

ARTICLE

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, so that state and local governments can appropriately respond to the digital activities that impact physical realities.

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I. 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 square just to list them on a short-term rental site. 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 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: § 230 of the Communications Decency Act ("CDA"), which states in relevant part: "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."¹

Section 230 is a 1996 law originally designed to protect online websites (such as message boards and AOL chatrooms) from defamation lawsuits for

¹ 47 U.S.C. § 230(c)(1) (2012).

user-generated speech.² It has been credited as the law that gave us the modern Internet and launched the digital revolution.³ More recently, however, online marketplaces have tried to use § 230 to protect themselves from everything from product liability⁴ to obligations under a myriad of state and local rules.⁵ As a result, § 230 is now the first line of defense for online marketplaces seeking 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 accountable for the activities it facilitates. In line with this theory, it offers 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 this Article does not intend to discount the contributions the law has made to the modern Internet. However, as Congress and courts revisit the language of the CDA, it is more important than ever to critically examine its purpose, its benefits, and its harms. Changes are needed to § 230's interpretation, if not its text, to assure that online marketplaces are accountable for the negative consequences of their actions—and to assure that state and local governments have the tools needed to appropriately govern.

II. THE MARKETPLACES AT ISSUE

Historically, most businesses followed a linear business model,⁶ focused primarily on creating goods and services to sell to distributors or customers.⁷ However, in the past decade, sophisticated electronic communications platforms have brought a massive shift. Today, many of the

² See *infra* notes 163–72.

³ Derek Khanna, *The Law that Gave Us the Modern Internet—and the Campaign to Kill It*, 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/> [<https://perma.cc/HUR5-GQ9Q>].

⁴ See, e.g., *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 allegedly defective products sold by third party users on its site).

⁵ See, e.g., *Hill v. StubHub, Inc.*, 727 S.E.2d 550 (N.C. Ct. App. 2012) (relying on § 230 to avoid state-level 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-ODW-AFM (C.D. Cal. Dec. 13, 2017); Complaint at 2, *Airbnb, Inc. v. Schneiderman*, No. 1:16-cv-08239-NRB (S.D.N.Y. Oct. 21, 2016).

⁶ ALEX MOAZED & NICHOLAS L. JOHNSON, MODERN MONOPOLIES: WHAT IT TAKES TO DOMINATE THE 21ST CENTURY ECONOMY 22 (2016).

⁷ *Id.* The world's largest companies in 2007 were arguably all based on a linear business model. *Global 500 June 2007*, FIN. TIMES (June 29, 2007), <http://im.ft-static.com/content/images/6aec81f8-2bd9-11dc-b498-000b5df10621.pdf> [<https://perma.cc/X5BR-KCV6>].

world's largest companies incorporate or are built on platforms⁸ that act as intermediaries between producers and customers or otherwise standardize and shape consumer activity.⁹

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.¹⁰ Marketplaces create the digital space for commerce, reducing transaction costs and allowing people to easily interact and transact.¹¹ 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.¹²

The following subsections briefly describe four online marketplaces—Craigslist, Uber, Airbnb, and Stubhub—which are widely used and well-known, and which motivate the regulatory questions discussed in the remainder of this Article.

A. Craigslist and General-purpose Listings

Online communications can facilitate all manner of transactions. Among the most longstanding and most flexible platforms 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.¹³ The emails eventually evolved into an online classified ad service and enjoyed exceptional success. By 2017 it offered comprehensive online listing services in more than 700 cities in seventy-eight

⁸ 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 [<https://perma.cc/FQH4-9HT2>]. These companies are also among the top ten most powerful brands. *The World's Most Valuable Brands*, FORBES, <https://www.forbes.com/powerful-brands/list> [<https://perma.cc/4PGQ-J4DN>] (last visited Oct. 14, 2018); see also Tim Wu, *In the Grip of the New Monopolists*, WALL ST. J. (Nov. 13, 2010, 12:01 AM), <https://www.wsj.com/articles/SB10001424052748704635704575604993311538482> [<https://perma.cc/LN7D-MVAV>].

⁹ See Julie E. Cohen, *The Regulatory State in the Information Age*, 17 THEORETICAL INQUIRIES L. 369, 376–77 (2016).

¹⁰ See MOAZED & JOHNSON, *supra* note 6, at 29.

¹¹ Transaction costs include costs of searching, standardizing terms of trade, and distilling vast amounts of information.

¹² MOAZED & JOHNSON, *supra* note 6, at 6.

¹³ 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> [<https://perma.cc/8SNG-XBXS>]; 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/> [<https://perma.cc/9VFU-EDZN>].

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countries.¹⁴ Craigslist's categories range 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 barebones design—just simple single-colored text on a white background, without graphics or even a logo.¹⁵ The site's architecture remains similarly simplistic—blank screens where users can describe the products they are selling, apartments they are 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 these criteria, if desired.

Most Craigslist users do business in person, which provides an opportunity for in-person inspection of goods, reducing many kinds of disputes.¹⁶ With in-person transactions, Craigslist saw no need for tracking or reporting reputations of buyers or sellers, offering any kind of insurance or guarantees, or facilitating payment on the platform.¹⁷ Foregoing these features, Craigslist ends up less intertwined in transactions that its site facilitates, arguably reducing Craigslist's responsibilities under the frameworks developed in the following sections.

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.¹⁸ In 2004, Craigslist began charging for certain listings in Los Angeles and New York, ultimately expanding to fees for brokered apartment rentals in New York City and job listings, car sales, and select "gigs" and "services" in particular areas.¹⁹ All other categories are provided without charge to buyer, seller, or anyone else.²⁰ Craigslist also does not seek additional revenue through advertising. Rather, Craigslist

¹⁴ CRAIGSLIST, <https://www.craigslist.org/about/sites> [<https://perma.cc/73KW-KRJP>] (last visited Oct. 14, 2018).

¹⁵ See Peter High, *The Craig Behind Craigslist and Craigconnects on His Influences and His Passions*, FORBES (Sept. 6, 2016, 9:28 AM), <https://www.forbes.com/sites/peterhigh/2016/09/06/the-craig-behind-craigslist-and-craigconnects-on-his-influences-and-his-passions/> [<https://perma.cc/T5EH-FQWP>] (noting that the founder of Craigslist wanted the site to be simple and effective without any of the "fancy stuff").

¹⁶ *Avoiding Scams*, CRAIGSLIST, <https://www.craigslist.org/about/scams> (last visited Nov. 1, 2018).

¹⁷ *Id.*

¹⁸ Peter Zollman, *Craigslist adding job-listing fees throughout U.S. and in Canada*, AIM GROUP (Oct. 26, 2016), <https://aimgroup.com/2016/10/26/craigslist-adding-job-listing-fees-throughout-u-s-and-in-canada/> [<https://perma.cc/AL4L-972H>].

¹⁹ *Posting Fees*, CRAIGSLIST, https://www.craigslist.org/about/help/posting_fees [<https://perma.cc/F5CF-QBYJ>] (last visited Dec. 22, 2017).

²⁰ *Id.*; Elizabeth Mott, *Does Craigslist Charge to Post Jobs?*, HOUSTON CHRON., <http://smallbusiness.chron.com/craigslist-charge-post-jobs-75712.html> [<https://perma.cc/35T8-KBDU>] (last visited Oct. 14, 2018).

keeps its costs low by employing few people (less than fifty as of 2017)²¹ and adding only the simplest new features, which yields ample profits²² 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 violating the Craigslist Terms of Use.²³ When a post receives several such reports, Craigslist software removes it automatically. Craigslist’s internal software also identifies some posts for automatic removal, and Craigslist staff have the ultimate authority to remove posts as they see fit.²⁴

Despite its flagging system, Craigslist faced a variety of complaints about certain categories of listings. Most controversial were the “Adult” listings where critics said the company was facilitating prostitution, sex trafficking, and abuse. Under pressure, including a congressional inquiry, criticism from attorneys general, and campaigns from advocacy groups, Craigslist shut down this category in 2010.²⁵ Craigslist also faced periodic complaints about the content of listings. For example, housing listings expressing a preference for tenants of a particular race were the subject of 2006 litigation discussed in Section V.B.

B. Uber and Ride-hailing

While Craigslist can be used to buy or sell almost anything, Uber and other ride-hailing services specialize in a single type of transaction: transportation.²⁶ Similar services include Lyft and Fasten in the United States, Grab in Southeast Asia, and Didi Chuxing in China. Uber historically presented

²¹ *Factsheet*, CRAIGSLIST, <https://www.craigslist.org/about/factsheet> [<https://perma.cc/5AP9-AFPP>] (last visited Dec. 22, 2017) (“40-some craigslist staff work at offices located in San Francisco, CA.”).

²² *Craigslist Revenue Soars Again*, AIM GROUP (Nov. 29, 2016), <https://aimgroup.com/2016/11/29/craigslist-revenue-soars-again/> [<https://perma.cc/22GA-QRVC>].

²³ *Flags and Community Moderation*, CRAIGSLIST, https://www.craigslist.org/about/help/flags_and_community_moderation [<https://perma.cc/AD4G-SDQD>] (last visited Oct. 14, 2018).

²⁴ *Terms of Use*, CRAIGSLIST, <https://www.craigslist.org/about/terms.of.use?lang=en&cc=us#conduct> [<https://perma.cc/NM4U-S8XD>] (last updated Dec. 29, 2017); *FAQ*, CRAIGSLIST, <https://www.craigslist.org/about/help/faq> [<https://perma.cc/2QPH-NGD7>] (last visited Oct. 23, 2018).

²⁵ 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> [<https://perma.cc/PKA7-R4DZ>]; William Saletan, *Pimp Mobile*, SLATE (Sept. 7, 2010), http://www.slate.com/articles/news_and_politics/frame_game/2010/09/pimp_mobile.html [<https://perma.cc/V5MG-DQ3G>].

²⁶ Uber has also begun other logistics services which we do not discuss.

itself to users with the motto “everyone’s private driver,”²⁷ and most passengers think of the company as a substitute for taxis.²⁸ But in legal documents and proceedings, Uber structures its role and responsibility more narrowly, arguing that it is a technology company that creates a marketplace connecting passengers and drivers.²⁹ 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 complaints against drivers, from poor choice of route³⁰ to vehicle condition³¹ to assault,³² but Uber says that passengers must bring legal claims arising from these complaints against drivers and not the company.³³ 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,”³⁴ including driver background checks,³⁵ driver ratings,³⁶ insurance,³⁷ and around-the-clock support.³⁸

²⁷ 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/> [https://perma.cc/2HPT-FPAF] (showing screenshot of Uber’s historic motto and marketing materials).

²⁸ *See Taxis v. Uber: Substitutes or Complements?*, ECONOMIST (Aug. 10, 2015), <https://www.economist.com/blogs/graphicdetail/2015/08/taxis-v-uber> [https://perma.cc/2WKW-Z6U2] (“[T]he majority of Uber’s growth has come from substituting for taxis rather than from complementing them.”).

²⁹ *U.S. Terms of Use*, UBER, <https://www.uber.com/legal/terms/us/> [https://perma.cc/4ABV-DEMP] (last visited Oct. 14, 2018) (“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).

³⁰ *My Driver Took a Poor Route*, UBER, <https://help.uber.com/h/0487f360-dc56-4904-b5c9-9d3f04810fa9> [https://perma.cc/4WXZ-E7ZP] (providing a potential fare adjustment for a user whose driver took a poor route) (last visited Oct. 14, 2018).

³¹ *My Driver’s Vehicle Was in Poor Condition*, UBER, <https://help.uber.com/h/ce11768c-c469-4a75-bb02-abc55ad15fa2> [https://perma.cc/ML66-2R6Z] (last visited Oct. 14, 2018) (providing a potential fare adjustment for a user whose driver’s vehicle was in poor condition).

³² *Trip Issues and Refunds*, UBER, <https://help.uber.com/h/595d429d-21e4-4c75-b422-72affa33c5c8> [https://perma.cc/SJ6L-V282] (last visited Oct. 14, 2018) (providing resources for various issues with an unprofessional driver, including if the driver’s behavior made the rider feel unsafe).

³³ *U.S. Terms of Use*, *supra* note 29.

³⁴ *Ride*, UBER, <https://www.uber.com/ride/> (as it stood through at least August 30, 2018, as preserved by Archive.org, <http://web.archive.org/web/20180830030517/https://www.uber.com/ride/> [https://perma.cc/V47F-548C]).

³⁵ *Uber Community Guidelines*, UBER, <https://www.uber.com/legal/community-guidelines/us-en/> [https://perma.cc/8NEJ-2E7E] (under the heading “Background Checks”) (last visited Oct. 14, 2018).

³⁶ *A Guide to Uber: Rating a Driver*, UBER, <https://help.uber.com/h/7b64dda6-78f5-4575-b7da-3c9e40d2c816> (as it stood through at least August 30, 2018, as preserved by Archive.org <http://web.archive.org/web/20170707215004/https://help.uber.com/h/7b64dda6-78f5-4575-b7da-3c9e40d2c816> [https://perma.cc/33KD-FNNX]).

³⁷ *Insurance*, UBER, <https://www.uber.com/drive/insurance/> [https://perma.cc/K7ZH-PVA T] (last visited Oct. 14, 2018).

Compared to other online marketplaces, Uber exercises more control over transactions. 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.³⁹ In contrast, Uber both specifies the base price (per minute and per mile rate) in each city,⁴⁰ and sets minute-by-minute “surge” price increases based on local supply and demand.⁴¹ 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 scores.⁴² By contrast, Uber assigns drivers to passengers and vice versa.⁴³ 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 tracks cancellations by both drivers and passengers and views cancellations unfavorably.⁴⁴ Taken collectively, these factors put Uber in a distinct position of control over transactions between passengers and drivers, notably more so than other marketplaces, which could impact the application of § 230 as discussed in Section V.C.

C. Airbnb and Short-term Rentals

Similar to Uber’s narrow scope, short-term rental platforms focus on informal accommodations. They provide an online environment where hosts and guests can find each other, communicate, and transact.

³⁸ *Ride with Confidence*, UBER, <https://www.uber.com/ride/safety/> [<https://perma.cc/C7A7-H4F2>] (last visited Oct. 14, 2018).

³⁹ *Selling Using a Fixed Price*, EBAY, <https://pages.ebay.com/help/sell/fixed-price.html> [<https://perma.cc/7M6Z-YPEV>] (last visited Dec. 22, 2017).

⁴⁰ *Uber Fare Estimator*, UBER, <https://www.uber.com/fare-estimate/> [<https://perma.cc/PR34-3W3S>] (last visited Oct. 14, 2018).

⁴¹ *What Is Surge?*, UBER, <https://help.uber.com/h/e9375d5e-917b-4bc5-8142-23b89a440e> [<https://perma.cc/72SJ-CN2R>] (last visited Oct. 14, 2018).

⁴² *Setting Buyer Requirements*, EBAY, <http://pages.ebay.com/help/sell/buyer-requirements.html> [<https://perma.cc/B4TJ-KCMB>] (last visited Oct. 14, 2018).

⁴³ Before accepting a ride, a driver has limited information about a passenger and may be unable to identify an unwanted passenger. See *Ride with Confidence*, *supra* note 38.

⁴⁴ Uber charges a cancellation fee if a user cancels more than five minutes after requesting a ride (or, in some cities, if a user cancels more than two minutes after requesting a ride). *Cancelling an Uber Ride*, UBER, <https://help.uber.com/h/56270015-1d1d-4c08-a460-3b94a090> de23 [<https://perma.cc/3KWH-JHMN>] (last visited Oct. 14, 2018). A driver who cancels too frequently may be penalized or even removed from Uber’s service. See *Uber Community Guidelines*, *supra* note 35. See *Problem with Cancellation Fee*, UBER, <https://help.uber.com/h/6bec690f-ee35-40ba-96ee-c38a8ae796e0> [<https://perma.cc/47G4-2X37>] (last visited Oct. 14, 2018).

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Short-term rental platforms have proven popular. Best known and largest by market share is Airbnb.⁴⁵ As of October 2018, Airbnb offered over 5 million listings in 191 countries, ranging from a room shared with others to entire apartments, homes, mansions, and palaces.⁴⁶ Competitors include Flipkey, HomeAway, and VRBO. Airbnb has grown sharply; in the summer of 2010, roughly 47,000 guests stayed with Airbnb hosts, but by the summer of 2015 the number had grown more than 300-fold to 17 million.⁴⁷

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.⁴⁸ They provide mechanisms to receive, process, and report reviews and reputations, including adjudicating which reviews are trustworthy and removing those that fail standards.⁴⁹ They assist with communication between guests and hosts, culminating in dispute resolution when requested by either side.⁵⁰ They provide structured communication systems to help guests search for properties and to help hosts describe and market their properties, sometimes even sending professional photographers to present a property at its best.⁵¹ Additionally, they provide certain insurance and guarantees, protecting guests against certain malfeasance by hosts and vice versa.⁵²

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 jurisdictions, zoning offers no exception even for *de minimis* commercial use.⁵³ In any event, many Airbnb hosts offer properties

⁴⁵ CJ Arlotta, *Airbnb Continues to Dominate Short-Term Rental Market*, HOTEL BUS. (Feb. 3, 2017), <http://hotelbusiness.com/Other/Airbnb-Continues-to-Dominate-Short-Term-Rental-Market/56245> [https://perma.cc/5TBU-HJBD].

⁴⁶ *About Us*, AIRBNB, <https://www.airbnb.com/about/about-us> [https://perma.cc/52VD-F7BG] (last visited Oct. 14, 2018).

⁴⁷ *Airbnb Summer Travel Report: 2015*, AIRBNB 3 (Sept. 9, 2015), <http://blog.atairbnb.com/wp-content/uploads/2015/09/Airbnb-Summer-Travel-Report-1.pdf> [https://perma.cc/5AF4-RJLU].

⁴⁸ *Payment*, AIRBNB, <https://www.airbnb.com/help/article/92/when-am-i-charged-for-a-reservation> (last visited Nov. 2, 2018).

⁴⁹ *Reviews*, AIRBNB, <https://www.airbnb.com/help/topic/1137/reviews> (last visited Nov. 2, 2018).

⁵⁰ *Help*, AIRBNB, <https://www.airbnb.com/help/> (last visited Nov. 2, 2018).

⁵¹ *See Does Airbnb Provide Professional Photography Services?*, AIRBNB, https://www.airbnb.com/professional_photography [https://perma.cc/DKP6-ADTV] (last visited Nov. 8, 2017).

⁵² 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> [https://perma.cc/XDC7-YJR3] (last visited Nov. 8, 2017).

⁵³ *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> [https://perma.cc/7PAU-JTTV] (noting that nothing in the Zoning Ordinance

continuously, exceeding any notion of *de minimis* exceptions.⁵⁴ Second, many jurisdictions impose substantial taxes on short-term rentals⁵⁵ 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.⁵⁶ Yet short-term rentals largely have not paid these taxes.⁵⁷ Third, most jurisdictions have higher safety requirements for commercial properties. For example, hotels are often required to install automatic fire suppression systems such as sprinklers⁵⁸ as well as provide nonflammable bedding.⁵⁹ These protections respond to a series of incidents in which hotels suffered disasters of exceptional severity,⁶⁰ 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.⁶¹

D. StubHub and 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

nance 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).

⁵⁴ See 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> [https://perma.cc/7KVQ-VZR7].

⁵⁵ See, e.g., 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> [https://perma.cc/CWK2-66AV]; *Chicago's New Airbnb Ordinance Greet 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/> [https://perma.cc/9LJE-Q9X8].

⁵⁶ Cf. 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/> [https://perma.cc/FJG6-234P].

⁵⁷ 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/> [https://perma.cc/QZ78-86RC].

⁵⁸ See, e.g., CAL. CODE REGS. tit. 19, § 902 (2016).

⁵⁹ See, e.g., *id.* § 1292.1.

⁶⁰ FEMA, *Hotel and Motel Fires*, TOPICAL FIRE REP. SERIES, July 2018, at 1, <https://www.usfa.fema.gov/downloads/pdf/statistics/v19i4.pdf> [https://perma.cc/6ZMU-W9JW] (tracing increased hotel fire precautions to a 1946 incident with substantial casualties and enumerating the safety precautions implemented in response).

⁶¹ See, e.g., 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> [https://perma.cc/7KE6-A8RH] (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 [https://perma.cc/Q59Z-TNXH].

in 2000 and acquired by eBay in 2007.⁶² Competitors include Razorgator, SeatGeek, Ticket Liquidator, and Vivid Seats.⁶³ 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.⁶⁴ 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 as well as the terms and conditions of the original ticket sale contract.⁶⁵

Critics suggest that ticket marketplaces normalize this unlawful activity and profit from it (since marketplace fees are largely proportional to purchase price).⁶⁶ However, marketplaces defend themselves as neutral actors, 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.”⁶⁷ Nonetheless, disputes arise, particularly when consumers feel they paid too much.

III. 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. The application of existing regulations may be unclear under the law. For example, regulations may anticipate only direct relationships between individuals rather than those facilitated by online marketplaces or formal

⁶² 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/> [<https://perma.cc/9ZGY-YCYR>].

⁶³ Lawrence Pines, *StubHub’s Top 4 Competitors*, INVESTOPEDIA (Sept. 8, 2016), <https://www.investopedia.com/articles/company-insights/090816/stubhubs-top-4-competitors.asp> [<https://perma.cc/BP9N-N349>].

⁶⁴ Eric Schroeder et al., *A Brief Overview on Ticket Scalping Laws, Secondary Ticket Markets, and the StubHub Effect*, 30 ENT. & SPORTS L. 1, 26–30 (2012) (surveying state antiscalping laws).

⁶⁵ See, e.g., OR. REV. STAT. § 646A.115 (2017); 4 PA. STAT. AND CONS. STAT. ANN. §§ 201-15 (West 2010); TENN. CODE ANN. § 39-17-1104 (2014).

⁶⁶ 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> [<https://perma.cc/N6T6-THC9>] (noting that in 2013 an unlicensed ticket vendor sold almost \$31 million worth of tickets on StubHub).

⁶⁷ *StubHub Marketplace Global User Agreement*, STUBHUB (Sept. 2, 2017), <https://www.stubhub.com/content/legal> [<https://perma.cc/JD94-KGKY>].

business entities. 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, casual service providers may avoid paying a variety of taxes and fees, including income and payroll taxes.⁶⁸ Indeed, some of the cost advantages of ride-hailing services come from avoiding the fees that taxis pay for the wear on roads and for use of other public spaces. Furthermore, lower prices for ride-hailing services can induce passengers to forego public transportation,⁶⁹ with resulting externalities including pollution and congestion.⁷⁰ Meanwhile, casual service providers may find it tempting to discriminate against customers of disfavored races,⁷¹ genders,⁷² sexual orientations,⁷³ or other classifications.

In addition, 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.⁷⁴ Even if existing regulations are an imperfect fit for new marketplaces, a complete absence of regulation could cause even larger distortions that push activity to new unregulated platforms and away from existing firms, which are conditioned to better internalize the costs associated with consumer protection.

Typically, these market failures do not directly affect marketplace users, who often enjoy and benefit from marketplace transactions. Rather, the transactions at issue create externalities: aggrieved parties tend to be outsiders and not parties to the transactions. The main factor pushing marketplaces to follow applicable law is the prospect of enforcement action⁷⁵—raising the

⁶⁸ See generally Shu-Yi Oei & Diane M. Ring, *Can Sharing Be Taxed?*, 93 WASH. U. L. REV. 989 (2016).

⁶⁹ 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> [<https://perma.cc/HL4N-BLDG>] (citing a U.C. Davis Institute of Transportation Studies survey finding that ride-hailing services draw people away from public transit).

⁷⁰ 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).

⁷¹ 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).

⁷² *Id.* at tbl.4.

⁷³ Rishi Ahuja & Ronan Lyons, *The Silent Treatment: LGBT Discrimination in the Sharing Economy* 2–3 (Trinity Econ. Papers, Working Paper No. 1917, 2017), <https://www.tcd.ie/Economics/TEP/2017/tep1917.pdf> [<https://perma.cc/S28Z-SJGD>].

⁷⁴ Edith Ramirez, Chairwoman, Fed. Trade Comm'n, Keynote Remarks at the 42nd Annual Conference on Int'l Antitrust Law & Policy at 10 (Oct. 2, 2015), https://www.ftc.gov/system/files/documents/public_statements/810851/151002fordhamremarks.pdf [<https://perma.cc/VF63-N3CF>] (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”).

⁷⁵ For example, California instituted fines of up to \$5,000 for each active and contracted driver who was not subjected to a background check or who failed one. CAL. PUB. UTIL. CODE

question of how state and local governments can regulate these marketplaces. The following subsections survey approaches taken and challenges faced by select state and local governments: asking marketplaces to verify compliance, shaping marketplace design, imposing taxes, and gathering certain user information.

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.⁷⁶ However, compliance is not guaranteed. During nine months of 2015, the City of San Francisco required short-term rental hosts to register, pay a fee, and comply with additional requirements; but only 1082 of approximately 5378 properties registered as required.⁷⁷

Since short-term rental marketplaces conceal information about hosts (such as names, contact information, and street addresses), it is particularly difficult for regulators to find offending hosts and enforce applicable requirements. And, as described more fully in the next section, short-term rental marketplaces often argue that § 230 shields them from any verification requirements—even in cases where the marketplace’s only obligation is not to accept a fee for illegal transactions.⁷⁸

B. Design

Online marketplaces are built environments, arguably with no “natural” or “necessary” design. Therefore, regulators find it natural to seek specific changes to a marketplace’s composition. The simplest addition to a marketplace is to require the inclusion of certain disclosures. In principle,

§ 5445.2 (West 2017); *see also* 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 [<https://perma.cc/LT6J-XY53>].

⁷⁶ *See Uber and Lyft Will Soon Face Strict New Background Check Rules in This State*, FORTUNE (Nov. 29, 2016), <http://fortune.com/2016/11/29/uber-lyft-driver-background-checks-massachusetts/> [<https://perma.cc/9JWG-RQAK>] (reporting that Massachusetts now requires ride service companies to perform strict background checks on all their drivers); *see also* Press Release, Cal. Pub. Utils. Comm’n, CPUC Strengthens TNC Driver Background Checks, Press Release Docket #: R.12-12-011 (Nov. 9, 2017) (increasing background checks required in California).

⁷⁷ 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> [<https://perma.cc/EBK5-5TQS>].

⁷⁸ *See, e.g.*, First Amended Complaint of Airbnb at ¶ 52, *Airbnb, Inc. v. City of Santa Monica*, No. 2:16-cv-6645-ODW-AFM, 2017 WL 9565588 (C.D. Cal. Dec. 13, 2017); First Amended Complaint of Airbnb at ¶ 54–56, *Airbnb, Inc. v. City & Cty. of San Francisco*, No. 3:16-cv-03615-JD, 2016 WL 8808846 (N.D. Cal. Sept. 6, 2016).

the information could be as simple as a static disclosure on a log-in or other type of screen. For example, the State of New York requires each Transportation Network Company (“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.⁷⁹

In other circumstances, a regulator or enforcement agency might ask a marketplace to add more complex information. Massachusetts, for instance, requires TNCs to display fare estimates to riders.⁸⁰ 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.⁸¹

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.⁸² For example, in 2014, Portland, Oregon began to require that short-term rental hosts obtain permits, and that hosting marketplaces display hosts’ permit numbers.⁸³ Homeaway refused to display the numbers and Portland sued. Once again § 230 was central to the litigation, leading the city to abandon the effort.⁸⁴

Other regulations might reasonably ask marketplaces to withhold certain information.

⁷⁹ N.Y. VEH. & TRAF. LAW §§ 1691, 1696 (McKinney 2017).

⁸⁰ MASS. GEN. LAWS ANN. CH. 159A½, § 2(d) (2016).

⁸¹ CAL. PUB. UTILS. COMM’N, R. 12-12-011, BASIC INFORMATION FOR TRANSPORTATION NETWORK COMPANIES AND APPLICANTS (Rev. July 6, 2015), http://www.cpuc.ca.gov/uploadedFiles/CPUC_Public_Website/Content/Licensing/Transportation_Network_Companies/BasicInformationforTNCs_7615.pdf (“TNCs must allow passengers to indicate whether they require a wheelchair-accessible vehicle”).

⁸² See, e.g., Andrew Hawkins, *Airbnb Threatens to Sue New York if Governor Signs New Law Curtailing its Service*, THE VERGE (Sept. 7, 2016), <https://www.theverge.com/2016/9/7/12834606/airbnb-threatens-lawsuit-new-york-governor-cuomo-law> [<https://perma.cc/AV7Y-72UU>]; Email from Kevin Henegan, Senior Counsel, Airbnb, to Zach Cowan, Berkeley City Att’y (Feb. 14, 2017, 15:09 PST), <http://berkeleytenants.org/wp-content/uploads/2017/04/2017-04-04-Item-11-Amending-BMC-Section-23C-22-050-Short-Term-Rental-1.pdf> [<https://perma.cc/2WPX-PACP>] (threatening to sue Berkeley, California over its short-term rental ordinance).

⁸³ Jessica Plautz, *Portland Could Soon Be the Most Airbnb-Friendly City in the U.S.*, MASHABLE (July 23, 2014), <http://mashable.com/2014/07/23/portland-airbnb/#nyIJBdSa2GqN> [<https://perma.cc/88HX-NSC7>].

⁸⁴ See *City of Portland v. HomeAway, Inc.*, 240 F. Supp. 3d 1099, 1114 (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. See Steve Law, *Airbnb Lobbying Portland to End City Inspection of Short-Term Rentals*, PORTLAND TRIB. (Aug. 10, 2017), <http://portlandtribune.com/pt/9-news/368939-251546-airbnb-lobbying-portland-to-end-city-inspections-of-short-term-rentals> [<https://perma.cc/C87F-WZC3>].

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.⁸⁵ Marketplaces similarly collect and distribute a wide range of information, which can facilitate discrimination.⁸⁶

C. Tax

Cities and states seek to tax marketplace transactions for several reasons. 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. Taxing marketplace transactions is necessary for equity with taxed competitors. Consider a potential guest's choice between a hotel room versus a short-term rental. If a guest thinks a \$100 hotel room is comparable in quality to a \$110 Airbnb rental but the hotel room is subject to a 20% tax, the guest will choose the latter. Yet, 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 instance, there are a large number of hosts, requiring correspondingly large enforcement efforts. 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 transient occupancy taxes from Airbnb hosts, without cooperation from Airbnb, illustrates the difficulty and predictably low compliance.⁸⁷

Despite these challenges, states and municipalities have nonetheless had some success seeking assistance from marketplaces. Airbnb now concedes that taxes are due and assists in collecting them on the behalf of local governments.⁸⁸ That said, Airbnb only offers this benefit if a jurisdiction

⁸⁵ 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).

⁸⁶ Finding discrimination by Airbnb guests against hosts, and by Airbnb hosts against guests, recent academic articles suggest that Airbnb withhold the names and photos of guests during pre-booking correspondence, so that booking decisions would be race-blind. See Benjamin Edelman & Michael Luca, *Digital Discrimination: The Case of Airbnb.com* (Harv. Bus. Sch., Working Paper, No. 14-054, 2014); Edelman, et al., *supra* note 71. Airbnb notably declined to respond directly to these research findings and offered band-aids such as requiring users to promise not to discriminate. See LAURA MURPHY, AIRBNB, AIRBNB'S WORK TO FIGHT DISCRIMINATION AND BUILD INCLUSION 11 (2016), https://blog.airbnb.com/wp-content/uploads/2016/09/REPORT_Airbnbs-Work-to-Fight-Discrimination-and-Build-Inclusion.pdf [<https://perma.cc/BU9M-5CYQ>].

⁸⁷ POLICY ANALYSIS REPORT, *supra* note 77.

⁸⁸ AIRBNB, AIRBNB POLICY TOOL CHEST 2–4 (2016), https://www.airnbccitizen.com/wp-content/uploads/2016/12/National_PublicPolicyTool-ChestReport-v3.pdf [<https://perma.cc/R5QE-V359>]. But see Brad Tuttle, *The Other Complication for Airbnb and the Sharing Econ-*

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otherwise accedes to Airbnb's favored regulatory scheme, such as Airbnb's approach to short-term rentals generally, zoning, enforcement, and more.⁸⁹ So while a jurisdiction may be able to tax short-term rentals, it then foregoes other policies contrary to the online marketplace's preferences.

Similar tax disputes arise in the context of ride hailing. During the period in which Uber and other TNCs operated without regulatory authorization, the company generally failed to collect or remit the various taxes and fees that apply by law, such as airport fees and commercial tolls.⁹⁰ In due course, TNCs typically agreed to pay certain airport fees—but only as jurisdictions approved of their overall approach.⁹¹

Amazon Marketplace also demonstrates the challenges that result from ignoring taxes on marketplace transactions. As of 2017, approximately half of Amazon's sales came from "Marketplace" sellers.⁹² 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 responsible for collecting their own taxes.⁹³ While Amazon in 2017 promised to collect and remit state sales taxes in all applicable states,⁹⁴ Marketplace sellers are beyond the scope of that promise, prompting renewed battles between Amazon and tax authorities.⁹⁵

omy: Taxes, TIME (June 15, 2013), <http://business.time.com/2013/06/15/the-other-complication-for-airbnb-and-the-sharing-economy-taxes> [<https://perma.cc/5RQJ-G9KF>] (arguing that "very few people" in the sharing economy pay taxes).

⁸⁹ AIRBNB POLICY TOOL CHEST, supra note 88, at 4 (describing "Voluntary Collection Agreements" in which Airbnb collects taxes a jurisdiction requires, a benefit Airbnb offers only if a jurisdiction broadly allows Airbnb hosting).

⁹⁰ 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. Ct. Mar. 2, 2016) (alleging that Uber charged passengers an "Airport Fee Toll" for rides to San Francisco International Airport but did not pay any portion of this fee to the airport).

⁹¹ 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> [<https://perma.cc/QZ8N-3Z7M>].

⁹² Statista, *Percentage of Paid Units Sold by Third-Party Sellers on Amazon Platform as of 3rd Quarter 2017*, STATISTA, <https://www.statista.com/statistics/259782/third-party-seller-share-of-amazon-platform> [<https://perma.cc/8Y2X-DD4H>] (last visited Jan. 15, 2018).

⁹³ The notable exception is the five states that, as of November 2018, imposed tax obligations on what Amazon called "Marketplace Facilitators." In those states, Amazon collected tax from Marketplace sellers. *Marketplace Tax Collection*, AMAZON, <https://www.amazon.com/gp/help/customer/display.html?nodeId=202211260> [<https://perma.cc/TZQ9-2G55>] (last visited Nov. 2, 2018).

⁹⁴ 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> [<https://perma.cc/8N2J-7G9U>].

⁹⁵ Enforcement of tax payments is ineffective because Amazon has approximately two million Marketplace sellers and sellers may not know which warehouses hold their inventory.

In an effort to avoid the mammoth task of contacting and pursuing Marketplace sellers, several states force or have attempted to force Amazon to collect and remit taxes by defining the platform as a “marketplace facilitator.”⁹⁶ Amazon has resisted these efforts. For example, South Carolina argued that Amazon is responsible for collecting taxes on behalf of businesses that used Amazon Marketplace to sell products to South Carolina residents.⁹⁷ 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; and Amazon controls the transaction, such as customer service and returns.⁹⁸ Amazon responded with a protest letter, and litigation is ongoing.⁹⁹

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.¹⁰⁰ 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.

Constrained by the same standard search tools available to the public, 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, documented its violations, and demanded 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 ad-

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> [https://perma.cc/E59B-U5CJ].

⁹⁶ *Marketplace Tax Collection*, AMAZON, <https://www.amazon.com/gp/help/customer/display.html?nodeId=20221126> [https://perma.cc/BZ8Y-8XN4] (last visited Oct. 14, 2018).

⁹⁷ *Amazon Servs., LLC v. S.C. Dep’t of Revenue*, No. 17-ALJ-17-0238-CC (S.C. Admin. Law Ct. June 21, 2017) (department determination), <https://www.brannlaw.com/wp-content/uploads/2017/09/AIS-170238.pdf> [https://perma.cc/9DPH-2MUY].

⁹⁸ *Id.*

⁹⁹ 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> [https://perma.cc/VP2Y-E7AB] (last visited Oct. 14, 2018).

¹⁰⁰ *Fast Facts Q2*, EBAY (2017), <https://static.ebayinc.com/assets/Uploads/PressRoom/eBay-FastFacts-Q22017-IR.pdf> [https://perma.cc/BZ2B-KV6X].

vance review by regulators, including cross-checking with criminal records.¹⁰¹

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 photographs¹⁰²—but cannot provide a full legal name, email address, mailing address, or property address.¹⁰³ 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, which would likely require Airbnb to find a new business model.¹⁰⁴ But once Airbnb conceals this information, enforcement agencies cannot find potentially unlawful listings within their jurisdictions. With no other option available, it is natural for regulators to pursue information, if not assistance, from Airbnb in their enforcement efforts.

In response, regulators sometimes seek superior access to marketplace data. For example, in 2013, the New York Attorney General Eric Schneiderman sought data on 15,000 hosts who appeared to be violating applicable zoning and tax requirements.¹⁰⁵ Airbnb resisted, moving to quash the subpoena as an overbroad "fishing expedition."¹⁰⁶ 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.¹⁰⁷ The court rejected each of these contentions, save for concern about overbreadth, finding that the subpoena must confine itself to listings for jurisdictions and lengths that violate applicable zoning laws.¹⁰⁸ In response, Airbnb and Schneiderman reached an agreement, and Airbnb shared some of the requested user information.¹⁰⁹

¹⁰¹ 2016 Mass. Legis. Serv. Ch. 187 (West).

¹⁰² *Listing photos & photography*, AIRBNB, <https://www.airbnb.com/help/topic/1040/listing-photos---photography?audience=host> [<https://perma.cc/RSL3-5BX3>] (last visited Nov. 2, 2018).

¹⁰³ *Is my listing's address visible on Airbnb?*, AIRBNB, <https://www.airbnb.com/help/article/1502/is-my-listing-s-address-visible-on-airbnb> [<https://perma.cc/A7DB-CJGA>] (last visited Nov. 2, 2018).

¹⁰⁴ *Cf.* AIRBNB, *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> [<https://perma.cc/FFF9-2FW6>] (last visited Oct. 14, 2018).

¹⁰⁵ 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> [<https://perma.cc/87NR-2FU2>].

¹⁰⁶ David Streitfeld, *Airbnb Will Hand Over Host Data to New York*, N.Y. TIMES (May 21, 2014), <https://www.nytimes.com/2014/05/22/technology/airbnb-will-hand-over-host-data-to-new-york.html> [<https://perma.cc/P7KM-RP9J>].

¹⁰⁷ Complaint at 2, *Airbnb, Inc. v. Schneiderman*, No. 1:16-cv-08239 (S.D.N.Y. Oct. 21, 2016).

¹⁰⁸ *See generally* *Airbnb, Inc. v. Schneiderman*, No. 5393-13, slip op. (N.Y. Sup. Ct. May 13, 2014).

¹⁰⁹ Letter Confirming Agreement Regarding Compliance with Subpoena from Clark Russell, Deputy Bureau Chief of the Internet Bureau, Office of the Att'y Gen. of the State of N.Y.,

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 regulations, some hosts will break those laws to increase their profits. But with their names and details available to the attorney general, hosts have reason to pause. Indeed, subsequent to the attorney general's successful demand for host information, Airbnb dropped hundreds of hosts in Manhattan,¹¹⁰ suggesting that compelled disclosure sharply affected the marketplace's prospects there.

IV. ARGUING AGAINST STATE AND LOCAL REGULATION

Whatever the benefits of state and local regulation of online marketplaces, marketplaces primarily argue that regulators simply cannot regulate them. Arguments against state and local regulation build on the federal immunity provided by § 230.¹¹¹

Section 230 was originally enacted, in part, to encourage providers of interactive computer services ("ICS") to moderate user-provided content without fear of publisher liability,¹¹² but on the whole, courts have offered a notably broader interpretation of this provision. For one, courts have held that § 230 immunizes not only efforts to moderate user content but also decisions not to moderate.¹¹³

to Belinda Johnson, Gen. Counsel, Airbnb, Inc. (May 20, 2014), https://ag.ny.gov/pdfs/OAG_Airbnb_Letter_of_Agreement.pdf [<https://perma.cc/39U4-L7M5>].

¹¹⁰ See, e.g., Murray Cox & Tom Slee, *How Airbnb's Data Hid the Facts in New York City*, INSIDE AIRBNB (Feb. 10, 2016), <http://insideairbnb.com/reports/how-airbnbs-data-hid-the-facts-in-new-york-city.pdf> [<https://perma.cc/4CV2-QGMP>]; see also Alison Griswold, *More than 600 New York City Hosts Got Kicked Off Airbnb Last Fall for Not Meeting Standards*, QUARTZ (Feb. 24, 2016), <https://qz.com/624145/more-than-600-new-york-city-hosts-got-kicked-off-airbnb-last-fall-for-not-meeting-standards> [<https://perma.cc/F5RB-J2LA>].

¹¹¹ See 47 U.S.C. § 230(c)(1) (2012).

¹¹² See Anthony Ciolli, *Chilling Effects: The Communications Decency Act and the Online Marketplace of Ideas*, 63 U. MIAMI L. REV. 137, 148 (2008).

¹¹³ *Batzel v. Smith*, 333 F.3d 1018, 1031 (9th Cir. 2003) (stating that developing content, which would take away § 230 immunity, "means something more substantial than merely editing portions of an e-mail and selecting material for publication"); *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997) (holding that the "exercise of a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content" does not preclude § 230's immunity); *Blumenthal v. Drudge*, 992 F. Supp. 44, 49 (D.D.C. 1998) ("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."); see also *Doe v. Backpage.com, LLC*, 817 F.3d 12, 16 (1st Cir. 2016) (finding website not liable when it failed to remove advertisements facilitating the sex trafficking of minors); *Doe v. MySpace, Inc.*, 528 F.3d 413, 415 (5th Cir. 2008) (finding a social networking site immune from negligence liability for failing to implement safety measures to protect children from exploitation).

Moreover, courts have found that the “robust”¹¹⁴ immunity of § 230 applies even if providers knew of allegedly unlawful material,¹¹⁵ encouraged it,¹¹⁶ altered the design of their services to facilitate it,¹¹⁷ and charged for the assistance they provided.¹¹⁸ Courts retain the immunity despite these circumstances because a narrower immunity “would have an obvious chilling effect”¹¹⁹ in discouraging providers from monitoring their services.

Proponents of these broad interpretations also assert that “the entire Web 2.0 revolution through which thousands of smaller innovative platforms have come to offer a range of socially useful services” would not be possible without § 230.¹²⁰ On this view, § 230 is a “masterpiece” and “a remarkable success.”¹²¹ And, “[n]o other sentence in the U.S. Code . . . has been responsible for the creation of more value.”¹²² Numerous scholars agree.¹²³ Tech companies are 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,

¹¹⁴ Carafano v. Metrosplash, 339 F.3d 1119, 1123 (9th Cir. 2003).

¹¹⁵ Glob. Royalties, Ltd. v. Xcentric Ventures, LLC, 544 F. Supp. 2d 929, 931–32 (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, 1015 (N.Y. 2011) (finding immunity website operator immune when it reposted user-generated defamatory statements).

¹¹⁶ Jones v. Dirty World Entm’t Holding, 755 F.3d 398, 402 (6th Cir. 2014) (finding immunity when defendant solicited gossip); Goddard v. Google, 640 F. Supp. 2d 1193, 1196 (N.D. Cal. 2009) (finding immunity when defendant’s software suggested that advertisers use unlawful keywords to falsely describe their products).

¹¹⁷ Doe, 817 F.3d at 22 (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).

¹¹⁸ Goddard v. Google, Inc., C 08-2738JF(PVT), 2008 WL 5245490, at *1 (N.D. Cal. Dec. 17, 2008) (finding immunity despite defendant charging advertisers to promote unlawful services).

¹¹⁹ Zeran v. Am. Online, Inc., 129 F.3d 327, 331 (4th Cir. 1997).

¹²⁰ Brief for Chris Cox and Netchoice as Amici Curiae Supporting Plaintiffs and Reversal Motion, HomeAway.com, Inc. and Airbnb, Inc. v. City of Santa Monica at 7, No. 18-55367 (9th Cir. Apr. 25, 2018).

¹²¹ Eric Goldman, *Congress is About to Eviscerate its Greatest Online Free Speech Achievement*, TECH. & MARKETING L. BLOG (Sept. 11, 2017), <https://blog.ericgoldman.org/archives/2017/09/congress-is-about-to-ruin-its-online-free-speech-masterpiece-cross-post.htm> [<https://perma.cc/Z7F8-KRJU>].

¹²² David Post, Opinion, *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), <https://www.washingtonpost.com/news/voxxh-conspiracy/wp/2015/08/27/a-bit-of-internet-history-or-how-two-members-of-congress-helped-create-a-trillion-or-so-dollars-of-value> [<https://perma.cc/L7GS-5G9M>]; 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. REV. 1, 1–3 (2016).

¹²³ See, e.g., Kosseff, *supra* note 122; Matthew Scruers, Note, *The History and Economics of ISP Liability for Third Party Content*, 88 VA. L. REV. 205 (2002); 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).

innovative, and collaborative.”¹²⁴ The Electronic Frontier Foundation, arguably the best-known digital rights group, called § 230 “[t]he most important law protecting Internet speech,”¹²⁵ and *Wired* said § 230 was “the most important law in tech.”¹²⁶

Online marketplaces have embraced § 230 when seeking to invalidate legislation and regulation they dislike.¹²⁷ Best known is Airbnb’s June 2016 litigation against the City of San Francisco, where Airbnb argued that the city’s amended short-term rental ordinance violates § 230 because it “treats online platforms such as Airbnb as the publisher or speaker of third-party content” and thus is completely preempted.¹²⁸ In seeking a preliminary injunction against enforcement of the ordinance, Airbnb emphasized that the ordinance “punish[es] platforms for failing to verify and screen third-party listings” which “directly conflicts with the CDA and is barred under settled law.”¹²⁹ Distinguished amici (including the Internet Association and the Electronic Frontier Foundation) sought to file briefs with the court in support of Airbnb’s position.¹³⁰ Airbnb also made similar arguments in its subsequent

¹²⁴ Press Release, Internet Association, Internet Association Files Brief in Support of Home Sharing, Section 230 (Sept. 9, 2016), <https://internetassociation.org/090916homesharing> [<https://perma.cc/C7W9-XBCQ>]; see also Brief for eBay, Inc. et al. as Amici Curiae Supporting Plaintiffs-Appellants, HomeAway.com, Inc. and Airbnb, Inc. v. City of Santa Monica, No. 18-55367 (9th Cir. Apr. 25, 2018).

¹²⁵ CDA 230: The Most Important Law Protecting Internet Speech, ELEC. FRONTIER FOUND., <http://www.eff.org/issues/cda230/legal> [<https://perma.cc/269J-JX7N>] (last visited Oct. 14, 2018).

¹²⁶ Christopher Zara, *The Most Important Law in Tech Has a Problem*, WIRED (Jan. 3, 2017), <https://www.wired.com/2017/01/the-most-important-law-in-tech-has-a-problem/> [<https://perma.cc/ZXX6-XS2Z>].

¹²⁷ See *City of Portland v. HomeAway, Inc.*, 240 F. Supp. 3d 1099 (D. Or. 2015); *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); Complaint at 2, *Airbnb, Inc. v. Schneiderman*, No. 1:16-cv-08239 (S.D.N.Y. Oct. 21, 2016); Complaint at 1, *Airbnb, Inc. v. City of Santa Monica*, No. 2:16-cv-6645 (C.D. Cal. Sept. 2, 2016); Lily Leung, *Anaheim Won’t Fine Websites Like Airbnb for Illegal Short-Term Rental Listings*, ORANGE CTY. REG. (Aug. 23, 2016), <http://www.ocregister.com/articles/city-726671-term-short.html> [<https://perma.cc/677Y-3PG2>] (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”); Memorandum on Appeal of Uber Technologies, Inc., Investigation to Consider the Nature and Extent of Regulation Over the Operations of Uber Technologies, LLC and Other Similar Companies, No. 9325 (Md. Pub. Serv. Comm’n June 6, 2014), <https://www.psc.state.md.us/search-results/?keyword=9325&x.x=16&x.y=19&search=all&search=case> (follow the link; search for No. 9325; click on the document dated 06/06/2014).

¹²⁸ Complaint at ¶ 56, *Airbnb, Inc. v. City and Cty. of San Francisco*, 217 F. Supp. 3d 1066 (N.D. Cal. 2016) (No. 3:16-cv-03615-JD).

¹²⁹ Motion for Preliminary Injunction at 2, *Airbnb, Inc. v. City and Cty. of San Francisco*, 217 F. Supp. 3d 1066 (N.D. Cal. 2016) (No. 3:16-cv-03615-JD).

¹³⁰ See generally 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> [<https://perma.cc/B6J7-JUXQ>]; Brief for Internet Association and CALinnovates 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> [<https://perma.cc/YYL4-PKYB>].

case against the City of Santa Monica, which substantially copied the San Francisco ordinance.¹³¹

A. *The Prima Facie Case Under § 230*

To invalidate a state or local law under § 230's immunity, a marketplace must establish three elements: first, that the marketplace 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 a publisher or speaker of that information.¹³² Quickly and with little reflection, marketplaces attempt to claim that they easily satisfy all three elements.

First, marketplaces call for a broad interpretation of "interactive computer service."¹³³ In describing eBay, Airbnb, or Uber, a lay person might refer to them as modern replacements for malls, hotels, or taxis. However, the marketplaces claim that their operations are grounded in the provision of interactive computer services whereby buyers and sellers find one another to transact.

Indeed, 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. People access these services via a "computer" broadly understood (notably including smartphones). Courts are similarly inclusive in their interpretation of "interactive computer service," so this element is usually straightforward.¹³⁴

Second, marketplaces allege that the disputed behavior at issue arises from third-party actions. When a seller uploads a 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), it provides all the information associated with the listing, including the title, description, and photos.

Third, marketplaces allege that when regulations hold them liable for illegal transactions, the regulations improperly treat the marketplaces as publishers or speakers of content provided by users.¹³⁵ Consider a state law disallowing the sale of recalled items or banning ticket sales above face value.

¹³¹ See generally *Airbnb, Inc. v. City of Santa Monica*, 2:16-cv-06645 (C.D. Cal. Sept. 2, 2016).

¹³² *Batzel v. Smith*, 333 F.3d 1018, 1037 (9th Cir. 2003).

¹³³ 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) (No. 09-3432).

¹³⁴ See *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1123 (9th Cir. 2003); *Schneider v. Amazon.com, Inc.*, 31 P.3d 37, 40 (Wash. App. 2001).

¹³⁵ Complaint at 13–14, *Airbnb, Inc. v. City of Anaheim*, No. 8:16-cv-1398 (C.D. Cal. July 28, 2016).

eBay and StubHub would argue that liability for including such listings in their respective marketplaces is exactly what § 230 prohibits.¹³⁶

Despite the apparent simplicity of *prima facie* § 230 claims, the additional actions taken by marketplaces to cause, assist, and facilitate the disputed information and activities give rise to many potential disputes. These disputes are the focus of Section V, below.

B. Fellow Travelers

While marketplaces frequently rely on § 230 to challenge state and local regulation, additional federal laws also grant Internet-based companies special privileges and immunities. Since these federal laws are less often used to avoid regulation, this Article explores them only briefly.

1. 1996 Federal Telecommunications Act

Some marketplaces seek shelter in the 1996 Federal Telecommunications Act¹³⁷ (“FTA”), the parent act of § 230. As the first significant overhaul of federal telecommunications law in more than sixty years, the FTA broadly sought to increase competition among telecommunications firms, in part by reducing regulation.¹³⁸

In an attempt to fight off regulation of its activities in both Maryland and California,¹³⁹ Uber argued that the purposes and objectives of the FTA give rise to conflict preemption.¹⁴⁰ Specifically, Uber claimed that in order to establish a “pro-competitive, deregulatory national policy framework,”¹⁴¹ the FTA distinguished between “telecommunications services,”¹⁴² which are subject to regulation by the Federal Communications Commission as com-

¹³⁶ *Id.*

¹³⁷ Pub. 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. REV. 123, 125 (1996).

¹³⁸ Telecommunications Act of 1996, S. 652, 104th Cong. § 2 (1996).

¹³⁹ See Comment of Uber Technologies, Inc., Order Instituting Rulemaking on Regulations Relating to Passenger Carriers, Ridesharing, and New Online-Enabled Transportation Services, R. 12-12-011 (Pub. Utils. Comm’n of the State of Cal. Dec. 20, 2012), <http://docs.cpuc.ca.gov/publisheddocs/efile/g000/m042/k157/42157058.pdf> [<https://perma.cc/EL35-X44B>]; Memorandum on Appeal of Uber Technologies, Inc., *supra* note 127.

¹⁴⁰ 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)).

¹⁴¹ H.R. REP. NO. 104-458, at 1 (1996) (Conf. Rep.).

¹⁴² “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) (2012). “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).

mon carriers, and “information services,” which are not.¹⁴³ 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.”¹⁴⁴

Under 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. The FTA identifies two requirements to qualify as an “information service”: 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 a telecommunications system or the management of a telecommunications service.”¹⁴⁵ The second requirement ensures the mutual exclusivity of telecommunications and information services.

Relying on its familiar claim that “Uber Technologies, Inc. is a technology company,” Uber asserted in a dispute with the Maryland Public Service Commission that it satisfied the first requirement because the core of its business makes information available about third-party providers of transportation services.¹⁴⁶ 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.¹⁴⁷ Uber’s argument went untested because the case settled.¹⁴⁸

2. Stored Communications Act

Marketplaces also invoke the Stored Communications Act (“SCA”) to avoid state and local regulations that require marketplaces to share user data with regulators.¹⁴⁹ The SCA limits when and how governments may access information about online marketplace users. The requirements vary based on

¹⁴³ Memorandum on Appeal of Uber Technologies, Inc., *supra* note 127, at 42.

¹⁴⁴ *Id.* at 45 (quoting *Vonage Holdings Corp. v. Minn. 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)).

¹⁴⁵ 47 U.S.C. § 153(24) (2012).

¹⁴⁶ Memorandum on Appeal of Uber Technologies, Inc., *supra* note 127, at 46.

¹⁴⁷ *Id.*

¹⁴⁸ 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). Airbnb continues to challenge data disclosure requirements under the SCA. *See* MD. PUB. SERV. COMM’N, ORDER NO. 86877, AN INVESTIGATION TO CONSIDER THE NATURE AND EXTENT OF REGULATION OVER THE OPERATIONS OF UBER TECHNOLOGIES, INC. AND OTHER SIMILAR COMPANIES (2015).

¹⁴⁹ *Airbnb, Inc. v. City of Santa Monica*, No. 2:16-cv-06645 (C.D. Cal. June 14, 2018); *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).

the type of service and the type of information sought.¹⁵⁰ For the actual contents of communications,¹⁵¹ the SCA requires a warrant, a subpoena with notice to the customer, or a court order based on “specific and articulable facts” with notice to the customer.¹⁵² State and local regulations often contemplate marketplaces sharing user information without such protections,¹⁵³ leading marketplaces to invoke the SCA in challenging those regulations.

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.¹⁵⁴ In challenging the ordinance, Airbnb invoked the SCA; however, rather than litigate this aspect of Airbnb’s defense, the city agreed to demand user data only with a subpoena.¹⁵⁵

3. Federal Tax Laws

Marketplaces have attempted to enjoin state and local governments from imposing tax obligations on them under a variety of federal principles and laws,¹⁵⁶ including the Due Process Clause,¹⁵⁷ Dormant Commerce Clause,¹⁵⁸ and the Internet Tax Freedom Act (“ITFA”).¹⁵⁹

Constitutional arguments are usually unsuccessful, particularly under the Due Process Clause. In *South Dakota v. Wayfair*,¹⁶⁰ the Supreme Court found that the Dormant Commerce Clause does not demand a physical nexus in order for a state to impose tax obligations on companies.¹⁶¹ Prior to 2018,

¹⁵⁰ 18 U.S.C. § 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 law enforcement must have a search warrant to obtain “content information” stored on its servers for 180 days or less. *Id.* § 2510. If the government wants content information stored for more than 180 days by an ECS or information retained by a remote computing service 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 to the customer. *Id.* § 2703(b)(1)(B).

¹⁵¹ 18 U.S.C. § 2510(8) (2012).

¹⁵² 18 U.S.C. § 2703(b)(1)(B).

¹⁵³ *See, e.g.*, SAN FRANCISCO ADMIN. CODE § 41A.5(g)(4)(C)(ii) (2018) (amended by S.F. Ordinance 104-16, File No. 160423 (June 7, 2016)) (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).

¹⁵⁴ *Id.*

¹⁵⁵ 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). Airbnb continues to challenge data disclosure requirements under the SCA. *See, e.g.*, Complaint at 25–26, *Airbnb, Inc. v. City of New York*, No. 1:18-cv-07712, 2018 WL 4048015 (S.D.N.Y. Aug. 24, 2018).

¹⁵⁶ *See, e.g.*, Complaint at 2, *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); *HomeAway Inc. v. City & Cty. of San Francisco*, No. 14-cv-04859-JCS, 2015 WL 367121 (N.D. Cal. Jan. 27, 2015).

¹⁵⁷ *See, e.g.*, Complaint, *supra* note 156, at 3.

¹⁵⁸ *Id.*

¹⁵⁹ 47 U.S.C. § 151 (2012); *City of Chicago v. StubHub Inc.*, 624 F.3d 363, 366–67 (7th Cir. 2010).

¹⁶⁰ 138 S. Ct. 2080 (2018).

¹⁶¹ *Id.* at 2099 (overturning *Quill v. North Dakota*, 504 U.S. 298 (1992)).

a jurisdiction could impose tax obligations on a company only if the company had an actual presence in that jurisdiction.¹⁶² The structure of online marketplaces made it particularly easy for marketplaces to argue that they had no such presence.¹⁶³ However, after *Wayfair*, states can tax a marketplace as long as it “avails itself of the substantial privilege of carrying on business in that jurisdiction.”¹⁶⁴ This can be established based on both “economic and virtual contacts”¹⁶⁵—a relatively easy standard for states to satisfy.

Marketplaces have also attempted to use the ITFA, which forbids “[m]ultiple or discriminatory taxes on electronic commerce,”¹⁶⁶ though, contrary to the suggestion in its title, the ITFA did not make transactions on the Internet tax-free.¹⁶⁷ “Multiple” taxes refer to transactions that are taxed by two states without an appropriate tax credit.¹⁶⁸ “Discriminatory” taxes treat Internet commerce differently than other types of commerce.¹⁶⁹ 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.¹⁷⁰ However, the court found that the ordinance did not turn on “the role of a computer server or the provision of electronic services” because the ordinance considered all resellers the same regardless of the form of their services.¹⁷¹ Thus, the tax was not discriminatory.¹⁷² Nonetheless, the ITFA may still help protect other marketplaces from specially tailored taxes, as suggested by the pending litigation related to Chicago’s tax of online streaming services.¹⁷³

V. ARGUING FOR STATE AND LOCAL REGULATION

Despite the appeal of alternative theories, § 230 remains by far the leading authority for marketplaces seeking to avoid state and local regulation. This Section turns to the core arguments about applying that statute to

¹⁶² See *Quill*, 504 U.S. at 311–12.

¹⁶³ Consider a host providing short-term rentals through Airbnb. Airbnb needs no physical presence in a state to offer this service. Therefore, Airbnb predictably argued that the host acts on his or her own—certainly not as Airbnb’s agent nor otherwise on Airbnb’s behalf—in its in-state activities.

¹⁶⁴ *Wayfair*, 138 S. Ct. at 2099.

¹⁶⁵ *Id.*

¹⁶⁶ Internet Tax Freedom Act, Pub. L. No. 114–125, § 1101(a) (2016).

¹⁶⁷ See JEFFREY M. STUPAK, CONG. RESEARCH SERV., THE INTERNET TAX FREEDOM ACT: IN BRIEF (2016), <https://fas.org/srg/crs/misc/R43772.pdf> [https://perma.cc/KP8X-4JVM] (noting that IFTA is unrelated to issues of taxation of electric commerce across state borders).

¹⁶⁸ Internet Tax Freedom Act § 1105(6).

¹⁶⁹ *Id.*

¹⁷⁰ *City of Chicago v. StubHub Inc.*, 624 F.3d 363, 366–67 (7th Cir. 2010).

¹⁷¹ *Id.* at 367.

¹⁷² *Id.*

¹⁷³ Complaint at 1, *Labell v. City of Chicago*, No. 2015-CH-13399, 2015 WL 5316414 (Ill. Cir. Ct. Sept. 9, 2015).

online marketplaces. In total, there are five mechanisms whereby a court could avert application of § 230.

A. Rely on the Legislative History of § 230

Section 230 was written when the Internet was still in its youth, and the interpretation and importance of the law were not yet apparent.¹⁷⁴ Moreover, the title of the statute, “Protection for Private Blocking and Screening of Offensive Material,” indicates that § 230 was not meant to provide unlimited immunity for marketplaces. Rather, it was designed to encourage website operators to remove “smut” from their systems without fear of liability.¹⁷⁵ Specifically, the text of § 230¹⁷⁶ responded to Senator James Exon’s (D-Neb.) campaign to use the CDA to *prohibit* “obscene or indecent” messages online.¹⁷⁷ This “Exon Amendment” was the most threatening attempt to truly censor the Internet, and, fearing that it went too far, Representatives Ron Wyden (D-Or.) and Christopher Cox (R-Cal.) strove to find a private sector solution to the problem of online pornography.¹⁷⁸ As Representative Cox stated “We want to encourage [companies] like Prodigy, like CompuServe, like America Online, like the new Microsoft network, to do everything possible for us, the customer, to help us control, at the portals of our computer, at the front door of our house, what comes in and what our children see.”¹⁷⁹ Thus misconstruing § 230 to create a “lawless no-

¹⁷⁴ When the CDA was enacted in 1996, less than eight percent of Americans had access to the Internet, and those who did went online for just thirty minutes a month. Farhad Manjoo, *Jurassic Web*, SLATE (Feb. 24, 2009, 5:33 PM), http://www.slate.com/articles/technology/technology/2009/02/jurassic_web.html [https://perma.cc/XJ8M-2CA2].

¹⁷⁵ 141 CONG. REC. H8471-2 (daily ed. Aug. 4, 1995) (statement of Rep. Goodlatte (R-Va.)). The CDA is “by no stretch of the imagination a libertarian enactment.” Danielle Keats Citron & Benjamin Wittes, *The Internet Will Not Break: Denying Bad Samaritans § 230 Immunity*, 86 FORDHAM L. REV. 401, 404 (2017).

¹⁷⁶ Also known as the Cox/Wyden Amendment. 141 CONG. REC. H8460, H8468–69 (daily ed. Aug. 4, 1995).

¹⁷⁷ 47 U.S.C. § 223(a)(1)(B)(ii), (d) (2012) (prohibiting the “knowin[g]” transmission to children under the age of 18 “that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs.”). These provisions were ultimately declared unconstitutional by the Supreme Court. *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 885 (1997). As stated by Senator Exon, “[t]he fundamental purpose of the Communications Decency Act is to provide much needed protection for children.” 141 CONG. REC. S8087–88 (daily ed. June 9, 1995) (statement of Sen. Exon); Robert Cannon, *The Legislative History of Senator Exon’s Communications Decency Act: Regulating Barbarians on the Information Superhighway*, 49 FED. COMM. L.J. 51, 57 (1996).

¹⁷⁸ Matthew Scruers, Note, *The History and Economics of ISP Liability for Third Party Content*, 88 VA. L. REV. 205 (2002).

¹⁷⁹ 141 CONG. REC. H8460, H8470 (daily ed. Aug. 4, 1995) (statement of Rep. Cox). In particular, the text of the Cox/Wyden Amendment was inspired by a recently decided case, *Stratton Oakmont v. Prodigy Services. Co.*, No. 31063/94, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995), which found an online message-board service liable for defamation for user-generated content because it exercised some “editorial control” over it. *Id.*; see also Scruers, *supra* note 123, at 208–14. Scruers continued:

man's-land on the Internet"¹⁸⁰ is a mistake and in direct contradiction with the statute's history and purpose.¹⁸¹

B. *Focus on Substance, Not Form, When Classifying Interactive Computer Service Providers*

In extending far beyond computer service to real-world transactions with real-world implications, marketplaces may exceed the boundaries of § 230's 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."¹⁸² 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."¹⁸³ 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.¹⁸⁴ As a result, courts rarely pause to fully consider the definition's outer limits.¹⁸⁵

There should be no serious dispute that online marketplaces *provide* interactive computer services. But when the provision of interactive computer services is incidental to a substantially different function ineligible for

To the extent that [§ 230] represented an understanding of the complex future economic implications of ISP liability regimes, it demonstrated commendable foresight by its sponsors. It appears more likely, however, that the sponsors of the Cox/Wyden Amendment saw *Stratton Oakmont* as a political vehicle by which they could undermine the CDA.

Id. at 213.

¹⁸⁰ *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1164 (9th Cir. 2008).

¹⁸¹ Brief for Internet, Business, and Local Government Law Professors as Amici Curiae Supporting Appellee and Affirmance of the District Court at 21, *HomeAway.com, Inc. and Airbnb, Inc. v. City of Santa Monica* 21, No. 18-55367 (9th Cir. Apr. 25, 2018).

¹⁸² 47 U.S.C. § 230(c)(1) (2012).

¹⁸³ *Id.* § 230(f)(2).

¹⁸⁴ Koseff, *supra* note 122, 6–8; *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, 1125 (9th Cir. 2003) (dating website); *Gentry v. eBay, Inc.*, 99 Cal. App. 4th 816, 836 (Cal. Ct. App. 2002) (auction website); *Milgram v. Orbitz Worldwide, Inc.*, 16 A.3d 1113, 1126–27 (N.J. Super. Ct. 2010) (travel website).

¹⁸⁵ *Milgram*, 16 A.3d at 1121 ("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*, 838 F.3d 158 (2d Cir. 2016), is a notable exception. 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.

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protection under § 230, a marketplace may struggle to claim to *be a provider* of an “interactive computer service” protected by § 230.¹⁸⁶ 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. 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 § 230 to avoid local health and safety regulations.¹⁸⁷

Marketplaces’ own statements may undermine their providers’ claims to be interactive computer services, to the exclusion of broader functions. Consider Uber’s assertions about its scope and role. Uber historically presented itself to users with the motto “everyone’s private driver,”¹⁸⁸ and then-CEO Travis Kalanick wrote on Uber’s official blog: “[W]e’re rolling out a *transportation system* in a city near you.”¹⁸⁹ Elsewhere, Uber claimed that the company “provides the best *transportation service* in San Francisco.”¹⁹⁰ 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. The tension between § 230’s limited scope of “computer service” and Uber’s operations continues to increase in light of the company’s growing ambitions—including new lines of business in driverless transportation, health care, and food delivery.¹⁹¹

When courts have considered marketplaces’ combination of computer service and other roles outside the context of § 230, they have been corre-

¹⁸⁶ *Zango* 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. 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 “computer 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. *Zango*, 568 F.3d at 1179–80.

¹⁸⁷ For companies that offer services primarily online, courts may take a different approach.

¹⁸⁸ Thomas, *supra* note 27.

¹⁸⁹ 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> [perma.cc/ZKJ3-S7R8] (emphasis added).

¹⁹⁰ Exhibit 29 at *2, *O’Connor v. Uber Technologies, Inc.*, No. C-13-3826 EMC, 2014 WL 1760314 (N.D. Cal. May 2, 2014) (Nos. 223–29) (emphasis added).

¹⁹¹ See Johana Bhuiyan, *Uber CEO Dara Khosrowshahi Says UberEats Has a \$6 Billion Bookings Run Rate*, RECODE (May 31, 2018, 12:08AM), <https://www.recode.net/2018/5/31/17390076/uber-ceo-dara-khosrowshahi-code-conference> [https://perma.cc/98T6-89K8]; Leif Johnson & Michelle Fitzsimmons, *Uber Self-Driving Cars: Everything You Need to Know*, TECHRADAR (May 25, 2018), <https://www.techradar.com/news/uber-self-driving-cars> [https://perma.cc/W3K7-EZTA]; Tom Krisher, *Uber Drives Deeper into Health Care Market*, PORTLAND PRESS HERALD (Mar. 1, 2018), <https://www.pressherald.com/2018/03/01/uber-drives-deeper-into-health-care-market> [https://perma.cc/4HLY-HTU4].

spondingly skeptical that computer service predominates. For example, in denying Uber's 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."¹⁹² 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.¹⁹³

Regulatory proceedings have taken a similarly dim view marketplace's 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 assertion that TNCs are nothing more than an application on smart phones, rather than part of the transportation industry."¹⁹⁴

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 through insurance, investigations, make-goods, and credits, bringing the marketplace that much closer to the substance of the transaction.

When a marketplace provides incentives to bring in service providers, the marketplace's role becomes that much larger and its involvement in the transaction that much deeper. When a marketplace sets detailed rules—what type of car an Uber driver may drive or what safety features an Airbnb host must provide—the marketplace similarly tests the boundaries of "computer service." 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 continued development of the Internet,"¹⁹⁵ and its intent to encourage the exchange of infor-

¹⁹² 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 11, 2015).

¹⁹³ *Id.*

¹⁹⁴ Order Instituting Rulemaking on Regulations Relating to Passenger Carriers, Ridesharing, and New Online-Enabled Transportation Services, Cal. Pub. Utils. Comm'n. Decision No. 13-09-045 (Sept. 19, 2013) <http://docs.cpuc.ca.gov/publisheddocs/published/g000/m077/k192/77192335.pdf> [https://perma.cc/HA55-P9U5].

¹⁹⁵ 47 U.S.C. § 230(b)(1) (2012).

mation and ideas.¹⁹⁶ 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.

C. Define Marketplaces as Information Content Providers

Some marketplaces may be considered information content providers (“ICP”), exempting them from § 230 protection. 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 ICP rather than a provider of an “interactive computer service,” and hence not protected by the § 230 immunity.¹⁹⁷ 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 applied different tests to it.¹⁹⁸ An initial test asked whether an intermediary develops or creates content in a way that exceeds “traditional editorial functions,”¹⁹⁹ such as withdrawing, postponing, altering, or organizing.²⁰⁰ 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 is an ICP outside the scope of § 230 protection.²⁰¹

The activities of some online marketplaces cross the line into editorial functions. Consider marketplaces that set prices and provide guarantees, insurance, credits, incentives, and dispute resolution mechanisms for users.²⁰²

Beginning in 2008, some courts shifted to a new test for ICP status. Looking beyond editorial functions, *Fair Housing Council of San Fernando*

¹⁹⁶ *Id.* § 230(a)(3) (“The Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity”); *id.* § 230(b)(3) (“[T]o encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services.”).

¹⁹⁷ 47 U.S.C. § 230(f)(3).

¹⁹⁸ 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).

¹⁹⁹ *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 a matchmaking website did not constitute a ICP because user profiles had no content until users actively created them, even if some content was generated from a user questionnaire); *Blumenthal v. Drudge*, 992 F. Supp. 44, 50 (D.D.C. 1998) (holding AOL was an ICP because there was “no evidence . . . that AOL had any role in creating or developing any of the information” in defamatory statements).

²⁰⁰ *See* *Langdon v. Google, Inc.*, 474 F. Supp. 2d 622 (D. Del. 2007); *Donato v. Moldow*, 865 A.2d 711, 720 (N.J. Super. Ct. App. Div. 2005).

²⁰¹ *Donato*, 865 A.2d at 727.

²⁰² *See supra* Section V.A.

Valley v. 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.”²⁰³ Under this test, a roommate search site 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 gender and family status).²⁰⁴

Subsequent cases have interpreted the *Roommates.com* test. 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.²⁰⁵ The leading case for the solicitation standard is *Federal Trade Commission v. Accusearch, Inc.*,²⁰⁶ 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.²⁰⁷ 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.”²⁰⁸ Because *Accusearch* specifically encouraged third-party providers to commit illegal acts, it was deemed an ICP without § 230 protection.²⁰⁹

Under *Accusearch*’s solicitation standard, marketplace actions can enter 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.²¹⁰

A closer question arises when most or substantially all user activity is unlawful, for example when a jurisdiction disallows short-term rentals.²¹¹ An intermediary might reasonably argue that continuing to operate its standard service does not “encourage” the misbehavior and certainly does not “specifically encourage” it.²¹² Yet some intermediary actions are reasonably un-

²⁰³ Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC, 521 F.3d 1157, 1168 (9th Cir. 2008) (emphasis added).

²⁰⁴ *Id.*

²⁰⁵ Jeffrey R. Doty, Note, *Inducement or Solicitation? Competing Interpretations of the “Underlying Illegality” Test in the Wake of Roommates.com*, 6 WASH. J.L. TECH. & ARTS 125, 132 (2010).

²⁰⁶ 570 F.3d 1187 (10th Cir. 2009).

²⁰⁷ *Id.* at 1191–92.

²⁰⁸ *Id.* at 1199 (emphasis added).

²⁰⁹ *Id.*; see also *MCW, Inc. v. Badbusinessbureau.com, L.L.C.*, No. Civ.A.3:02-CV-2727-G, 2004 WL 833595, at *10 (N.D. Tex. Apr. 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”).

²¹⁰ 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> [https://perma.cc/L8JY-BX3D] (publishing the content of an email sent by Uber Miami employees to drivers).

²¹¹ See, e.g., S. Res. S6340A, 2015–2016 Legis. Sess. (N.Y. 2016).

²¹² See *Accusearch Inc.*, 570 F.3d at 1199.

derstood as targeting specific hosts and transactions, arguably “specifically encoura[ing]” the corresponding transactions.²¹³ Consider sign-up bonuses to guests and/or hosts, as well as free photography for hosts—in each case, encouraging a specific transaction or set of transactions. One might be similarly skeptical of the marketplace’s provision of services in a jurisdiction that disallows short-term rentals.²¹⁴

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 is 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, including in the original bed-and-breakfasts, and passengers paid to ride in private cars, including in licensed taxis, in pirate taxis, and with friends and family. Yet Airbnb and Uber dramatically expanded the size of these markets by designing software to make these relationships easy and routine, and by promoting these transactions through advertising, incentives, and pricing. They further formalized these markets through screening, insurance, customer service, and dispute resolution to increase the number of customers and service providers inclined to participate. They also lobbied and litigated to advance and defend the practices they favor.²¹⁵ Where a marketplace takes such far-reaching actions to make a market, it arguably should be considered responsible in “whole or in part” for the resulting behavior of its users.²¹⁶

²¹³ See *id.*

²¹⁴ *Contra* NPS LLC v. Stubhub, Inc., No. 06-4874-BLS1, 2009 WL 995483 (Mass. Super. Ct. Jan. 26, 2009) (holding 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. This was a broader interpretation of *Room-mates.com*, the inducement standard, which captures general encouragement); cf. Hill v. Stubhub, Inc., 727 S.E.2d 550, 563 (N.C. Ct. App. 2012) (refusing to follow *NPS* because the court did not find the reasoning persuasive); Milgram v. Orbitz Worldwide, Inc., 16 A.3d 1113, 1127 (N.J. Super. Ct. 2010) (asserting that *NPS* contradicts the spirit of *Donato*).

²¹⁵ See Abbey Stemler, *Platform Advocacy and the Threat to Deliberative Democracy*, 78 MD. L. REV. (forthcoming 2018) (describing the lobbying and userbase mobilization techniques used by marketplaces to create favorable legal environments), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3024069 [<https://perma.cc/BRT5-UK32>].

²¹⁶ See Olivier Sylvain, *Intermediary Design Duties*, 50 CONN. L. REV. 203, 233 (2018).

D. Limit § 230 Immunity to Defamation-Related Claims

Section 230 incorporates the words “publisher” and “speaker,” both terms of art in defamation claims.²¹⁷ This language suggests that § 230 should be limited to defamation claims or at least to claims resulting from an intermediary’s publication. If a marketplace’s illegality comes from some action not fairly traced to conduct as publisher or speaker, § 230 is reasonably understood to offer no protection.²¹⁸ Moreover, even considering that many marketplaces could be said to “publish” listings, they often do substantially more, as discussed in Section V.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!, Inc.*²¹⁹ In *Barnes*, a Yahoo! employee promised the plaintiff that Yahoo! would remove sexually explicit posts made by her ex-boyfriend.²²⁰ When Yahoo! eventually refused to take down the post, the plaintiff sued for a variety of claims including promissory estoppel.²²¹ 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.”²²² 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.²²³

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.²²⁴ In those situations, the 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,²²⁵ support for terrorism,²²⁶ and dis-

²¹⁷ 47 U.S.C. § 230(c)(1) (2012).

²¹⁸ *See id.* at 211.

²¹⁹ 570 F.3d 1096 (9th Cir. 2009).

²²⁰ *Id.* at 1109.

²²¹ *Id.* at 1106.

²²² *Id.* at 1107.

²²³ *Airbnb, Inc. v. City and Cty. of San Francisco*, 217 F. Supp. 3d 1066, 1074 (N.D. Cal. 2016); *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”); *Lansing v. Sw. Airlines Co.*, 980 N.E.2d 630, 638 (Ill. App. 2012) (holding that “section 230 (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”).

²²⁴ *See Airbnb, Inc.*, 217 F. Supp. 3d at 1100–02; *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1163 (9th Cir. 2008).

²²⁵ *Doe v. Internet Brands, Inc.*, 824 F.3d 846, 847 (9th Cir. 2016).

²²⁶ *Fields v. Twitter*, 217 F. Supp. 3d 1116, 1129 (N.D. Cal. 2016).

crimination,²²⁷ the roles of the independent user and communication service do not neatly track what § 230 anticipates.²²⁸

In two cases, courts found a distinction between imputing liability for third-party activity on ICSs and holding them directly liable for their own bad acts.²²⁹ The courts 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 ordinance at issue regulated the plaintiffs' "own conduct as Booking Service providers and cares not a whit about what is or is not featured on their websites."²³⁰

The Ninth Circuit also distinguished a website's own acts from its users' acts in *Doe v. Internet Brands, Inc.*, 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.²³¹ The failure, the court found, was a wrong independent of third-party user behavior and was unrelated to any obligation to moderate or remove dangerous postings.²³²

Some might question whether CDA truly protects marketplaces whose actions include charging a fee. A marketplace's efforts to seek and accept payment are separate from "treat[ing it] as the publisher or speaker."²³³ When illegality targets payment, rather than publishing, the applicability of § 230 is less clear. Targeting payment has additional virtues: it tracks common law instincts about benefit as an indicator of liability; it exempts non-commercial and zero-fee services (most of Craigslist notably included); and it places liability on the large commercial marketplaces that seem particularly well-positioned to act.

²²⁷ *Sikhs for Justice "SFJ," Inc. v. Facebook, Inc.*, 144 F. Supp. 3d 1088, 1092 (N.D. Cal. 2015).

²²⁸ The awkwardness is apparent in the controversial California Court of Appeal decision, *Hassell v. Bird*, 247 Cal. App. 4th 1336 (Ct. App. 2016). There, a business had received a negative review on Yelp, and it complained of defamation by the anonymous reviewer. *Id.* at 1342. After a default judgment, the court ordered Yelp to remove the disputed review. *Id.* at 1345. 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. *Id.* at 1346–47. But the court found that Yelp was not treated as a publisher when a trial court ordered it to remove the post. *Id.* at 1358. In particular, the court found that since Yelp was not a party to the original case, the removal order did not impose liability on Yelp for its role as a publisher. *Id.* 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. *Id.* at 1365. 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. *Id.*

²²⁹ See generally *HomeAway.com, Inc. v. City of Santa Monica*, No. 2:16-cv-06641-ODW (AFM), 2018 WL 1281772 (C.D. Cal. Mar. 9, 2018).

²³⁰ *Airbnb, Inc. v. City of San Francisco*, 217 F. Supp. 3d 1066, 1074 (N.D. Cal. 2016). Similarly the district court in the Santa Monica case came to the same conclusion. *Airbnb, Inc. v. City of Santa Monica*, No. 2:16-cv-06645, 2018 WL 3013245 (C.D. Cal. Sept. 2, 2016).

²³¹ *Doe v. Internet Brands, Inc.*, 824 F.3d 846, 849 (9th Cir. 2016).

²³² *Id.* at 853 (finding that § 230 "does not provide a general immunity against all claims derived from third-party content").

²³³ 47 U.S.C. § 230(c)(1) (2012).

Proponents of broad § 230 protections question the wisdom of narrowing § 230 to defamation-related claims because they fear that any narrowing of § 230 will damage the vibrancy of the Internet.²³⁴ 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.

E. Use Canons of Construction to Support a Narrow Reading of CDA Immunities

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 narrowly to minimally preempt state law and to reduce any encroachment on traditional areas of state regulation. These canons call for a narrow interpretation of § 230 because a broad interpretation would conflict with state law, at least in certain fields; the canons thereby suggest that § 230's protection to marketplaces may be correspondingly narrower.

1. The Statutory Language

Section 230(e)(3) provides a preemption clause that declares, “[n]othing in this section shall be construed to prevent any State from enforcing any state law that is consistent with this section. No cause of action may be brought, and no liability may be imposed under any state or local law that is inconsistent with this section.”²³⁵

This preemption clause at first glance may seem unnecessary. The Constitution's Supremacy Clause instructs that federal law preempts inconsistent state law.²³⁶ Consequently, 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.”²³⁷ This princi-

²³⁴ See, e.g., Vankat Balasubramani, *9th Circuit Creates Problematic “Failure to Warn” Exception to Section 230 Immunity*-Doe v. Internet Brands, TECH. & MARKETING L. BLOG (Sept. 23, 2014), <https://blog.ericgoldman.org/archives/2014/09/9th-circuit-creates-problematic-failure-to-warn-exception-to-section-230-immunity-doe-v-internet-brands.htm> [https://perma.cc/U7NR-BP3A]; Eric Goldman, *Ninth Circuit Mucks Up 47 USC 230 Jurisprudence*. . . AGAIN!-Barnes v. Yahoo, TECH. & MARKETING L. BLOG (May 13, 2009), https://blog.ericgoldman.org/archives/2009/05/ninth_circuit_m.htm [https://perma.cc/WML3-PRTW]; Eric Goldman, *Section 230 Ruling against Airbnb Puts All Online Marketplaces at Risk*-Airbnb v. San Francisco, TECH. & MARKETING 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> [https://perma.cc/F7C9-HM7C].

²³⁵ 47 U.S.C. § 230(e)(3) (2012).

²³⁶ U.S. CONST. art. VI, cl. 2.

²³⁷ *Williams v. Taylor*, 529 U.S. 362, 404 (2000).

ple 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 one is that Congress sought to emphasize that there are indeed consistent state laws which will and should remain in effect despite § 230. Such emphasis favors a narrower reading of § 230 instead of an expansive one.

2. Avoidance Canons

Rules of statutory interpretation provide an additional basis to question the scope of § 230's immunity against state law. Absent a clear statement of legislative intent, *stare decisis* protects the values of federalism, which ensure that federal laws do not “intrude upon the usual balance of state and federal power.”²³⁸ Therefore, if there is doubt about the scope of preemption, principles of federalism would let state law stand. There is also a presumption that constructions of federal statutes that produce “federal encroachment upon a traditional state power” should be avoided.²³⁹ On subjects traditionally left to the states, these presumptions would be particularly deferential to state law.

Broad readings of § 230 run afoul of these values of federalism when applied to certain marketplaces. First, when there are ambiguities in a federal law, as there are with § 230,²⁴⁰ courts should construe the law so as to not limit states' rights to impose liability on marketplaces for the offline harms they produce. Second, the presumption against encroachment lends particular force in the context of marketplaces that facilitate transactions that are traditionally regulated under state police power (whether wielded by state or local governments). Areas traditionally regulated by the states and cities in-

²³⁸ John F. Manning, *Federalism and the Generality Problem in Constitutional Interpretation*, 122 HARV. L. REV. 2003, 2026 n.93 (2009) (stating that there is a “presumption against preemption of state law by a federal statute”).

²³⁹ See, e.g., *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 172–73 (2001) [hereinafter SWANCC] (emphasis added) (citing *United States v. Bass*, 404 U.S. 336, 349 (1971) (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*”); *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) (emphasis added) (invoking a clear statement rule where “the broad construction urged by the Government [would] render[] *traditionally local criminal conduct a matter for federal enforcement*”). Inasmuch as federal law generally treats local power as delegated state power, this Article elides here for simplicity the distinction between state and local law. 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”).

²⁴⁰ See *supra* Section V.A–C.

clude land use²⁴¹ as well as car services and taxicabs.²⁴² Federalism principles therefore suggest that § 230 should not block state and local regulation of the local activities of such marketplaces.

F. Turning Away from the CDA Caselaw

A final line of reasoning turns away from § 230 caselaw in light of broader principles informed by the statute's plain language and common law traditions. Indeed, many scholars suggest that § 230 is misguided or overbroad.²⁴³ Some courts have been equally skeptical, favoring common law notions of liability and questioning why Congress (supposedly) instructed a different result online.²⁴⁴ To date, the Supreme Court has not taken an opportunity to interpret § 230. It is not implausible that an appellate court would chart a new course, particularly as online information systems come to intermediate more transactions,²⁴⁵ as the divergence between § 230 versus common law standards becomes increasingly stark,²⁴⁶ as public sentiment shifts

²⁴¹ This can include zoning, real estate, and other aspects of short-term rentals. 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.").

²⁴² 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); *id.* at 78 ("Typically, taxis are regulated at the local level. . . .").

²⁴³ Brief for Legal Momentum et al. as Amici Curiae Supporting a Petition for a Writ of Certiorari at 6, *Jane Doe No. 1 v. Backpage.com, LLC*, 137 S. Ct. 622 (2017) (No. 16-276) (*petition for cert. denied*), <http://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=2319&context=historical> [<https://perma.cc/FCA2-KGMQ>]; Brief for Internet, Business, and Local Government Law Professors, *supra* note 181, at 21; Citron & Wittes, *supra* note 175, at 402; Doug Lichtman & Eric Posner, *Holding Internet Service Providers Accountable*, 14 *SUP. CT. ECON. REV.* 221, 260 (2006).

²⁴⁴ See, e.g., *Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12, 29 (1st Cir. 2016) ("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. Roommates.com, L.L.C.*, 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.").

²⁴⁵ 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, 835 (2017).

²⁴⁶ See, e.g., Leanne Ta & Aaron Rubin, *The Decline and Fall of Section 230?*, *LAW & BUS. SOC. MEDIA* (Dec. 15, 2016), <https://www.sociallyawareblog.com/2016/12/15/the-decline-and-fall-of-section-230> [<https://perma.cc/UZ29-H3XL>].

against tech platforms,²⁴⁷ and as scholars mount an increasingly vigorous assault against § 230 overbreadth.²⁴⁸

A first line of attack narrows 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 examine the origin and import of these words and their implications for interpreting the statute.²⁴⁹ 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.

A second line of attack would question the applicability of § 230 when an intermediary knows about a problem or set of problems. Courts have long found that § 230 protects intermediaries from liability for unlawful user content even if they knew of its unlawfulness.²⁵⁰ However, the stated purposes of § 230 nowhere suggest any intent to protect intermediaries who knowingly and willfully violate state or local law.²⁵¹ 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, such as a marketplace that knows that every transaction in a given jurisdiction is unlawful. It is particu-

²⁴⁷ See, e.g., *Internet firms’ legal immunity is under threat*, ECONOMIST (Feb. 11, 2017), <https://www.economist.com/news/business/21716661-platforms-have-benefited-greatly-special-legal-and-regulatory-treatment-internet-firms> [https://perma.cc/3HSN-S848]; Alan Rozenshtein, *It’s the Beginning of the End of the Internet’s Legal Immunity*, FOREIGN POLICY (Nov. 13, 2017), <http://foreignpolicy.com/2017/11/13/its-the-beginning-of-the-end-of-the-internets-legal-immunity> [https://perma.cc/C7WQ-BD2G].

²⁴⁸ See, e.g., Brief for Legal Momentum et al., *supra* note 243; Citron & Wittes, *supra* note 175; Doug Lichtman & Eric Posner, *Holding Internet Service Providers Accountable*, 14 SUP. CT. ECON. REV. 221 (2006).

²⁴⁹ Citron & Wittes, *supra* note 175, at 416–17.

²⁵⁰ See, e.g., *Zeran v. Am. Online*, 129 F.3d 327, 331 (4th Cir. 1997).

²⁵¹ The stated purposes of § 230(b) are:

- (1) to promote the continued development of the Internet and other interactive computer services and other interactive media;
- (2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation;
- (3) to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services;
- (4) to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children’s access to objectionable or inappropriate online material; and
- (5) to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.

47 U.S.C. § 230(b) (2012).

larly difficult to see a proper purpose resulting from allowing those intermediaries to continue with impunity.

The next sections 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.

VI. A FRAMEWORK FOR ASSESSING MARKETPLACE LIABILITY

Two normative systems predominate § 230 literature and caselaw: efficiency and fault. Generally, discussions of efficiency ask how assignments of liability maximize goods and minimize harms; discussions of fault ask whether an intermediary is culpable.²⁵² In other words, efficiency asks whether imposing liability is *reasonable*. 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.²⁵³

The next Section, below, considers efficiency and fault rationales that inform when it is reasonable and appropriate for liability to attach to online marketplaces.²⁵⁴ Be mindful of the limitations of this effort: for one, assigning liability requires fact-finding beyond the scope of this Article. Furthermore, the listing of factors is not exhaustive and these factors are not always the most important. Nevertheless, this Section offers these factors to provide a useful and intuitive framework for assessing marketplace liability.

²⁵² 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).

²⁵³ 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., 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> [https://perma.cc/SUE7-9LEE]. 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. 47 U.S.C. § 230(e)(1).

²⁵⁴ This approach borrows 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.

A. Efficiency

Typically, efficiency analyses ask how to maximize goods and minimize harms—a consequentialist focus grounded in outcomes.²⁵⁵ 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.

This is also true in § 230 efficiency literature. Looking at § 230, some see the protector of a thriving Internet economy and ecosystem, bringing benefits to innovators and platforms in their vast operations.²⁵⁶ 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.²⁵⁷ Many in the latter group focus on particular harms that intermediaries could work harder to combat and attempt to design regimes that would help limit those harms without unduly burdening intermediaries.²⁵⁸

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?²⁵⁹ When one player in the market is held liable, will other participants in the same marketplace self-

²⁵⁵ See, e.g., JEREMY BENTHAM, A FRAGMENT ON GOVERNMENT, at *i* (1776) (“[I]t is the greatest happiness of the greatest number that is the measure of right and wrong”); Posner, *supra* note 252, at 33 (defining “efficient” as “cost-justified”).

²⁵⁶ See *supra* notes 121–23.

²⁵⁷ See generally, e.g., Mann & Belzley, *The Promise of Internet Intermediary Liability*, 47 WM. & MARY L. REV. 239 (2005); Citron & Wittes, *supra* note 175, at 404.

²⁵⁸ 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> [<https://perma.cc/4KUZ-JH8B>]; Vanessa Brown-Barbour, *Losing Their License to Libel: Revisiting Sec. 230 Immunity*, 30 BERKELEY TECH. L.J. 1505, 1547–60 (2015); Scrivers, *supra* note 123, at 260–64.

²⁵⁹ 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> [<https://perma.cc/PKA7-R4DZ>]; William Saletan, *Pimp Mobile: Craigslist Shuts Its “Adult” Section. Where Will Sex Ads Go Now?*, SLATE (Sept. 7, 2010), http://www.slate.com/articles/news_and_politics/frame_game/2010/09/pimp_mobile.html [<https://perma.cc/J2FZ-GAMH>]. 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/45-9a8e751f713c

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. The importance, costs, and feasibility of having an intermediary regulate content can be hotly contested, and effects and responses of the market are challenging to predict. Additional challenges arise when harms are difficult to measure, as is often the case for defamation,²⁶⁰ psychological distress,²⁶¹ and invasions of privacy.²⁶² 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.²⁶³

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 as well as information from users' own submissions, customer feedback, and complaints. For example, California requires ride-hailing services, like Uber, to follow a "zero tolerance" policy for drunk driving.²⁶⁴ Upon receiving a drunk driving complaint, a service must suspend the driver until further investigation.²⁶⁵ 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 the most effective tools to remedy it and thus, should be required to act.²⁶⁶

799256f347c4aad2a49d/2017/04/Online-Erotic-Services-Advertising-and-Murder.pdf [https://perma.cc/R5QB-YFPH].

²⁶⁰ 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.").

²⁶¹ See, e.g., 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").

²⁶² See, e.g., 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).

²⁶³ 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> [https://perma.cc/E4XV-7Y9J] ("For years, YouTube has notoriously been the home of the worst comment section on the internet, 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.'").

²⁶⁴ Order Instituting Rulemaking on Regulations Relating to Passenger Carriers, Ridesharing, and New Online-Enabled Transportation Services, Cal. Pub. Utils. Comm'n. Decision No. 13-09-045, at 26 (Sept. 19, 2013), <http://docs.cpuc.ca.gov/publisheddocs/published/g000/m077/k192/77192335.pdf> [https://perma.cc/HA55-P9U5].

²⁶⁵ *Id.*; see also Florida's zero tolerance policy. FLA. STAT. § 627.748 (2017), <https://www.flsenate.gov/Session/Bill/2017/221/BillText/er/PDF> [https://perma.cc/2BH6-9EYV].

²⁶⁶ In April 2017, the CPUC recommended assessing Uber over \$1.3 million for 150-plus violations of the zero-tolerance rules. Order Instituting Investigation And Order To Show Cause Why The Commission Should Not Impose Appropriate Fines And Sanctions On Rasier-Ca LLC, Cal. Pub. Utils Comm'n, Order No. I.17-04-009 (Apr. 11, 2017), <http://docs.cpuc.ca>

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'.²⁶⁷ For example, if a blog-hosting platform were liable for libelous posts, it might block or 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. It would be enormously costly for eBay to proactively prevent the sale of counterfeit goods, since products ordinarily do not come into eBay's hands.²⁶⁸ 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.²⁶⁹ Meanwhile, the architecture of Amazon Marketplace, with many goods sent from Amazon's own warehouses, might make policing comparatively easy because many goods pass through Amazon's warehouses. Thus, Amazon is in a position to efficiently inspect for counterfeits, recalled serial numbers, and the like, unlike eBay, which does not routinely receive physical products brokered by its marketplace.

.gov/PublishedDocs/Published/G000/M182/K872/182872304.pdf [https://perma.cc/G49Q-LUF9].

²⁶⁷ See, e.g., 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"); 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."); 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 overdetter, 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, 296–97 (2011).

²⁶⁸ 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).

²⁶⁹ eBay has, in fact, implemented some such measures. See *Tiffany (NJ) Inc. v. eBay Inc.*, 600 F.3d 93, 98–99 (2d Cir. 2010).

B. Fault

Analyzing intermediary liability from the perspective of fault entails assessing blameworthiness—asking whether an intermediary *deserves* to have liability imposed on it, usually based on some disputed aspect of its design or conduct.²⁷⁰

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?²⁷¹ Did the marketplace fail to intervene where it could have?²⁷² Did the marketplace intervene clumsily, making matters worse?²⁷³

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 provided a tool that one user employed to harm another. There are two main ways to view such a scenario: the intermediary is liable on a root cause theory or not liable on the theory that an independent user’s bad acts are intervening causes. Meanwhile, fault is similarly muddled when a given type of harm has long occurred, with or without intermediaries, or via prior intermediaries.

Nonetheless, fault analysis is usually more tractable than efficiency analysis because it typically requires understanding only one company’s behavior,²⁷⁴ whereas thorough efficiency analysis often requires assessing responses by buyers, sellers, competitors, and beyond. Consider a regulation targeting a general-purpose tool that could be used to facilitate discrimination. For example, Craigslist allows sellers to list almost anything, and a landlord could post a listing for tenants that expresses racial preferences. 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 its listings. Blame is arguably further reduced by the ineffectiveness of plausible interventions. Landlords could probably evade most keyword filters via synonyms, euphemisms, misspellings, or the like.²⁷⁵ And landlords could move to an alterna-

²⁷⁰ See, e.g., *FTC 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?”).

²⁷¹ See, e.g., *id.* at 1198–1200.

²⁷² See, e.g., *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 331 (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”).

²⁷³ 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).

²⁷⁴ See, e.g., *Accusearch*, 570 F.3d at 1198–1200.

²⁷⁵ As seen on Backpage.com. See Timothy Williams, *Backpage’s Sex Ads Are Gone. Child Trafficking? Hardly.*, N.Y. Times (Mar. 12, 2017), <https://www.nytimes.com/2017/03/11/us/backpage-ads-sex-trafficking.html> [<https://perma.cc/52QL-FNBX>].

tive 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, there are five factors that can guide assessments of marketplace liability. These are specificity versus generality, scale, sales-enhancing activities, unlawful design, and location.

1. Specificity Versus 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.²⁷⁶

Constraints along a given dimension are *specificity*, and their 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 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 anticipate and police abuses related to that particular market.²⁷⁷

A potential twist in this analysis arises from abuses associated with a specific marketplace that are unanticipated or otherwise not blameworthy.

²⁷⁶ See, e.g., 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/> [https://perma.cc/386S-5KBN]; 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 [https://perma.cc/8ZKB-P25V]; 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> [https://perma.cc/Y63F-P55W].

²⁷⁷ A variation of this point is in the Localism portion of this Article. See *infra* Section VI.C.5; see also *Accusearch*, 570 F.3d at 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'être* and it affirmatively solicited them.").

Consider people using Airbnb for prostitution.²⁷⁸ If short-term rentals are generally attractive to sex workers,²⁷⁹ Airbnb's specificity as to the short-term rental market may mean the platform facilitates 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.

In principle, a marketplace might respond by creating potential generality—a technical capability for the marketplace to serve broader markets, even as the marketplace turns a blind eye to how its service is 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 Craigslist was used overwhelmingly for sale of counterfeit goods, recalled goods, illegal services, or other misdeeds, Craigslist's generality alone should not impede accountability.²⁸⁰

Finally, the specificity-generality spectrum reveals limits to the meaning of a marketplace. Some services might be so specific that they are best understood not as marketplaces but rather as sellers of goods or services. In that case, secondary liability doctrines fall away, and primary liability doctrines take center stage.²⁸¹ 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 Craigslist's generality.

Uber's specificity, by 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, 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,

²⁷⁸ See 'My Airbnb Flat Was Turned into a Pop-Up Brothel,' BBC MAG. (Apr. 8, 2017), <http://www.bbc.com/news/magazine-39528479> [<https://perma.cc/4BQZ-YND2>]; 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> [<https://perma.cc/TN8Z-95YT>]; Amanda Woods, *Prostitutes are Using Airbnb for 'Pop-up Brothels'*, N.Y. POST (July 3, 2017), <http://nypost.com/2017/07/03/prostitutes-are-using-airbnb-for-pop-up-brothels> [<https://perma.cc/PG8Z-ARKV>].

²⁷⁹ The authors express no opinion on this factual question.

²⁸⁰ 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 was distinctively and overwhelmingly used to copy copyrighted music and movies. See *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 920–21 (2005).

²⁸¹ A variation on this point is discussed more in depth in "Control of the Transaction." See *infra* Section VI.C.4.a.

a business selling services rather than a marketplace connecting drivers and riders.²⁸²

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).²⁸³ Building ContentID required not only 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 substantially cheaper than running it on one billion YouTube videos. In this way, YouTube benefits from its exceptional scale. A YouTube without ContentID might rightly be accused of cutting an important corner. Yet the same accusation would ring hollow if directed toward a tiny startup.

Similar concepts apply to other marketplaces. A short-term rental marketplace might consider 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 millions of transactions. 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. Compare the facilitation of racial discrimination of *Roommates.com* with racial discrimination on Airbnb, which results from preferences expressed by guests and hosts and is unprompted by Airbnb.²⁸⁴ While Airbnb

²⁸² Cf. Charlie Warzel, *Let's All Join the AP Stylebook in Killing the Term "Ride-Sharing,"* BUZZFEED (Jan. 8, 2015), <https://www.buzzfeed.com/charliwarzel/lets-all-join-the-ap-stylebook-in-killing-the-term-ride-shar> [https://perma.cc/BZ9G-45GD] (“[T]he vast majority of services that Uber and Lyft and others provide mimics a traditional taxi or driver service.”).

²⁸³ *How Content ID Works*, YOUTUBE HELP, <https://support.google.com/youtube/answer/2797370?hl=en> [https://perma.cc/46XU-YZA8].

²⁸⁴ For evidence on racial discrimination among guests directed at hosts, see generally Edelman & Luca, *supra* note 86. For evidence on hosts’ discrimination, see generally Edelman, et al., *supra* note 71.

could make design choices that discourage or prevent discrimination,²⁸⁵ its design choices do not appear to facilitate or encourage unlawful discrimination in the manner the court critiqued in *Roommates.com*.

4. Sales-Enhancing Activities

The Section below considers four sub-factors for assessing how a service's sales-enhancing activities might favor the imposition of liability: control, enhancement, representation, and market development. At the highest level of generality, the 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.

i. *Control of the transaction.* Intermediaries often seek to standardize the experience of market participants. Take Uber, which gives drivers "tips for 5-star trips" including how to drive, how to communicate with passengers, and even how to dress.²⁸⁶ Even more importantly, Uber sets prices,²⁸⁷ much like a taxi company or regulator would, eliminating the possibility of one-on-one negotiation. Uber also requires drivers to carry insurance²⁸⁸ and sets rules relating to car types.²⁸⁹ 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.²⁹⁰

These mechanisms of standardization and control may suggest that the putative online marketplace is not an intermediary between sellers and buyers at all, but the true seller.²⁹¹ For example, in setting prices and other key terms, Uber makes itself look more like a true service provider and less like

²⁸⁵ See Edelman & Luca, *supra* note 86, at 12–13; Edelman, et al., *supra* note 71, at 17–18.

²⁸⁶ *Tips for 5-Star Trips*, UBER, <https://www.uber.com/drive/resources/5-star-tips> [<https://perma.cc/MDT9-94QL>].

²⁸⁷ See *supra* notes 40–41. By contrast, Airbnb only 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 Airbnb's suggestion is optional, one can argue that Airbnb is only helping the seller, who may not have a refined sense of the market, instead of controlling the transaction.

²⁸⁸ *Insurance Requirements*, UBER, <https://help.uber.com/h/6e7ac56f-a12b-440a-9e6e-83acea284b55> [<https://perma.cc/794B-TG3E>].

²⁸⁹ 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> [<https://perma.cc/H2FV-M5SY>].

²⁹⁰ 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 [<https://perma.cc/MUF9-78HK>].

²⁹¹ 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) (citation omitted) ("[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.").

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an independent marketplace. As putative intermediaries exercise greater control over the transactions that they facilitate, they step toward being simple sellers and start being subject to primary, rather than secondary, liability. A seller is more blameworthy for problems that arise from its own service than an intermediary is blameworthy for transactions it merely facilitates.

ii. *Enhancement*. Online marketplaces often do more than facilitate transactions: they may undertake to *enhance* the offerings on their platform. For example, from the summer of 2010 through the summer of 2017, Airbnb offered hosts free professional photography services to better present their properties.²⁹² Improved photographs helped properties attract more guests and command higher rates, to the mutual benefit of the hosts 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,²⁹³ 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,”²⁹⁴ and the listings are therefore not “provided by *another* information content provider” so as to immunize the marketplace.²⁹⁵ (This is exactly the logic of *FTC v. Accusearch*.)²⁹⁶ 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

²⁹² Nidhi Subbaraman, *Airbnb’s Small Army of Photographers are Making You (and Them) Look Good*, FAST COMPANY (Oct. 17, 2011), <https://www.fastcompany.com/1786980/airbnbs-small-army-photographers-are-making-you-and-them-look-good> [https://perma.cc/E8QD-BGEU]; see also Zee & 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> [https://perma.cc/4BYU-JF87]. Airbnb continues to provide hosts with professional photographers, but the service is no longer free. *Does Airbnb Provide Professional Photography Services*, AIRBNB (June 26, 2017), <https://www.airbnb.com/help/article/297/does-airbnb-provide-professional-photography-services> [https://perma.cc/4BYU-JF87].

²⁹³ 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> [https://perma.cc/QQR6-QPSY].

²⁹⁴ 47 U.S.C. § 230(f)(3) (2012).

²⁹⁵ *Id.* § 230(c)(1) (emphasis added).

²⁹⁶ *FTC v. Accusearch, Inc.*, 570 F.3d 1187, 1187 (10th Cir. 2009); see also *supra* Section V.C.

also create complicity and enable liability. 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 is to monitor and oversee them.

iii. *Representations.* Online marketplaces sometimes make independent representations about the quality of a specific listing or about their general efforts across all listings.²⁹⁷ Such representations 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 on both efficiency and fault rationales.

iv. *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. In addition to litigating and lobbying for the 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.²⁹⁸ It offered signup bonuses to hosts²⁹⁹ and guests.³⁰⁰ 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.

On this line of reasoning, a marketplace is more liable for a market that it created—a market that plausibly would not 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. Compare Airbnb's efforts to bring about short-term rentals in private residences with Craigslist's provision of a new way for vacation listings to find customers. Certainly, vacation homeowners had found tenants before Craigslist and would do so

²⁹⁷ See, e.g., First Amended Complaint at 6–9, *People v. Uber Techs., Inc.*, No. CGC-14-543120 (Cal. Super. Ct. Aug. 18, 2015) (discussing Uber's "Safest Rides on the Road" claim, which describes specific methods of background checks, screening, and associated processes); see also *Keeping You Safe on eBay*, EBAY, <http://pages.ebay.com/help/account/safety.html> [<https://perma.cc/SH5D-ZUPP>] (describing specific methods to protect users and create a safe marketplace).

²⁹⁸ 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> [<https://perma.cc/B2LZ-4CKQ>].

²⁹⁹ *Earn a \$200 Cash Bonus by Hosting on Airbnb*, AIRBNB, <https://blog.atairbnb.com/withkendra> [<https://perma.cc/EF4P-48XF>].

³⁰⁰ *Airbnb Increased \$40 Sign-up Bonus!*, THRIFTY TRAVELER (Nov. 2, 2017), <https://thriftytraveler.com/Airbnb> [<https://perma.cc/BC8M-X49J>].

without Craigslist. Whatever goes wrong in that market, it is much less clear that Craigslist caused or materially increased the problem.

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. 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, it is predictable that the applicable regulators, enforcement agencies, and other legal institutions would ultimately become better-positioned to pursue subsequent similar offenders. This would blunt 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.³⁰¹ 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 unaware and stymie online activity, good or bad. These principles support broad regulatory scope at the national level, but not at the local level.³⁰² 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 discussions of the proper regulator for communications technologies including the Internet itself.

³⁰¹ See generally, e.g., Frank H. Easterbrook, *Antitrust and the Economics of Federalism*, 26 J.L. & ECON. 23 (1983); 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 (1988); Camilla A. Hrdy, *State Patents as a Solution to Underinvestment in Innovation*, 62 U. KAN. L. REV. 487 (2013); Zachary D. Liscow, *The Efficiency of Equity in Local Government Finance*, 92 N.Y.U. L. REV. 1828 (2017); 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). 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, 377–78 (2001).

³⁰² 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.* at 832 (George, C.J., dissenting) (discussing predatory lending as a “community development” issue). See generally John T. Scholz & Feng Heng Wei, *Regulatory Enforcement in a Federalist System*, 80 AM. POL. SCI. REV. 1249 (1986).

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.³⁰³ This physicality gives online marketplaces a certain concreteness compared to websites, which only distribute information.

Therefore, it 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,³⁰⁴ taxis,³⁰⁵ guns,³⁰⁶ alcohol,³⁰⁷ and cannabis³⁰⁸ are all regulated in dramatically different ways across jurisdictions.³⁰⁹ 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 VI.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

³⁰³ 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 242.

³⁰⁴ See, e.g., *Rapanos v. United States*, 547 U.S. 715, 738 (2006) (“Regulation of land use . . . is a quintessential state and local power.”); Ostrow, *supra* note 301, at 1404 (“[T]he dominant descriptive and normative account of land-use law is premised upon local control.”).

³⁰⁵ See Davidson & Infranca, *supra* note 242, at 217 (including “taxi medallion requirements” in a list of “distinctly local legal issues”).

³⁰⁶ See, e.g., *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> [<https://perma.cc/42PX-SCCA>]; *Guns on Campus: Overview*, NAT’L CONF. OF STATE LEGISLATURES (May 5, 2017), <http://www.ncsl.org/research/education/guns-on-campus-overview.aspx> [<https://perma.cc/7M3F-44PX>] (reviewing laws on access to guns on campus by state).

³⁰⁷ 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> [<https://perma.cc/26FK-7JJW>].

³⁰⁸ See, e.g., Bob Salsberg, *100 Massachusetts Towns Have Voted for Weed Bans, Moratoriums, or Zoning Restrictions*, ASSOCIATED PRESS (Sept. 19, 2017).

³⁰⁹ 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”). This point is not specific to regulations enacted by state or local government, and the authors express no preference between the two.

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often by default operate everywhere, and it is more plausible that an online marketplace could truly be unfamiliar with an idiosyncratic local law. When a jurisdiction has unusual laws or is geographically distant from the marketplace's core operations, online marketplaces should be granted more leeway in compliance, through generous opportunities to cure violations as well as light sanctions.

VII. A WAY FORWARD

This final Section turns to recommendations for courts, Congress, states, and localities on their approach to liability of online marketplaces.

A. *What Courts Should Do*

As a starting point, courts should be skeptical that § 230 provides complete immunity. 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 they should 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.³¹⁰ The analysis in Section V offers a roadmap of how courts can find their way to answers closer to both the text of the statute and sound policy.

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.

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

³¹⁰ See *Zango, Inc. v. Kaspersky Lab, Inc.*, 568 F.3d 1169 (9th Cir. 2009) (finding that a distributor of Internet security software qualified as a provider of an ICS because the distributor facilitated access to a computer server); *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).

a flexible standard could nonetheless prove useful. For example, a “reasonable care” requirement would ask intermediaries to calibrate their efforts to available resources, the nature of the material, and the popularity of a given submission. Fourth, Congress could limit § 230 protections to intermediaries that are truly and substantially facilitating free expression. 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. These limitations, individually or in some combination, would rein in judicial broadening contrary to congressional intent.

Any efforts to narrow § 230 will 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. In response to § 230 defenses to listings of prostitutes who are victims of sex trafficking, Congress in August 2017 introduced legislation that would allow claims under state and federal criminal and civil laws for certain forms of sex trafficking.³¹¹ Notably, the legislation would remove § 230 protections from certain intermediaries that knowingly facilitate such trafficking.³¹² As would be expected given § 230’s popularity among intermediaries and their defenders, even this small narrowing of § 230 immunity attracted widespread criticism. CDA proponent Eric Goldman said this legislation would “ruin” § 230.³¹³ Tech giants Google and Facebook lobbied against it, as did the Internet Association representing them, along with Amazon, Microsoft, Twitter, and others.³¹⁴ This legislation would alter only the far edges of § 230, a space in which the tech giants do not participate. Any effort closer to home—altering regulation of mainstream commercial marketplaces—would surely prompt even stronger objections from the companies directly affected.

C. What States and Localities Should Do

State and local regulators cannot directly change § 230 (though state attorneys general have sought to reduce § 230’s immunity),³¹⁵ yet they can nonetheless adjust their approach to policy goals in light of § 230.

³¹¹ Stop Enabling Sex Traffickers Act of 2017, S. 1693, 115th Cong.; Allow States and Victims to Fight Online Sex Trafficking Act of 2017, H.R. 1865, 115th Cong.

³¹² See *supra* note 311.

³¹³ Goldman, *supra* note 121.

³¹⁴ 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 [https://perma.cc/3YWU-ZLAC].

³¹⁵ Elizabeth Heichler, *U.S. states’ attorneys general to take aim at Internet ‘safe harbor’ law*, IDG NEWS SERV. (June 18, 2013), <https://www.pcworld.com/article/2042351/us-states->

A sensible first step is to be mindful of § 230 limitations from the outset of regulatory efforts. 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 those of its users (hosts).³¹⁶

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. Yet even there, San Francisco fell short in some respects. 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 services without registration.³¹⁷ Moreover, in litigation, San Francisco abandoned the ordinance's vision that rental marketplaces provide information without a subpoena.³¹⁸ With the benefit of San Francisco's experience, Santa Monica followed suit and enacted similar ordinances. These ordinances were once again upheld by the district court, but this time, Airbnb did not compromise with the City, and the case is now pending in the Ninth Circuit.³¹⁹ Seeing this dispute, other cities and towns should design their requirements with an eye to § 230 challenges, thereby narrowing the grounds for opposition.

A second approach attempts to overcome structural weaknesses of state and local regulators in disputes with large marketplaces. Marketplaces tend to be both well-funded and profitable, yielding ample resources that often exceed those available to a state or local government. Further, online marketplaces are well-versed on questions of intermediary liability and regulatory scope because they are fundamental to their operations, 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 that 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.³²⁰ Yet there is little sign of similar joint litigation, or even common drafting or information-sharing, in other state and local proceedings against Uber. The

attorneys-general-to-take-aim-at-internet-safe-harbor-law.html [https://perma.cc/3QG8-232X].

³¹⁶ See S.F. Ordinance No. 104–16, *supra* note 153.

³¹⁷ Compare *id.* with S.F. Ordinance 178-16, File No. 160790 (Aug. 2, 2016).

³¹⁸ Settlement Agreement, *supra* note 148, at 1.

³¹⁹ Airbnb, Inc. v. City of Santa Monica, No. 2:16-cv-06645, 2018 WL 3013245 (C.D. Cal. Sept. 2, 2016).

³²⁰ See First Amended Complaint, *supra* note 297, at 2; People v. Uber Techs., Inc., No. CGC-14-543120, 2016 WL 1532347 (Cal. Super. Ct. Mar. 2, 2016).

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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. 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 it could face criminal penalties for failing to use it. Finding these concerns to be legitimate, the court enjoined enforcement until the system was operational.³²¹ It is important to be mindful of the difficulties state and local governments face in designing software, all the more so 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 had to collaborate with Airbnb to create a registration system.³²² If a regulation requires a government to receive or process information, the government must either be able to do so on the timeline contemplated by the regulation or be aware of its limitations.³²³

Finally, state and local governments usually need to be realistic about popular support for online marketplaces, and popular opposition to restrictions on marketplaces. For example, when Cambridge, Massachusetts proposed to ban Uber in 2014, many residents spoke in opposition.³²⁴ Airbnb mobilizes support for "citizen petitions" in response to unfavorable regulation, and Uber uses its own app to alert customers to regulatory threats.³²⁵ A skeptic might reject users' responses as the fruits of corporate astroturf, not users' independent evaluation.³²⁶ Yet the popularity of Airbnb, Uber, and other online marketplaces is undeniable. A government seeking to regulate such marketplaces must convince the public that such regulation is prudent.

³²¹ 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. 3:16-cv-03615-JD).

³²² 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>. [<https://perma.cc/93BF-QKUU>]; 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> [<https://perma.cc/7P56-QZH9>].

³²³ See Abbey Stemler, *The Myth of the Sharing Economy and Its Implications for Regulating Innovation*, 67 EMORY L.J. 197, 234–35 (2017).

³²⁴ Cambridge License Comm. Hearing, In Re: License Comm. Gen. Hearing (June 17, 2014), <http://www.cambridgema.gov/~media/Files/licensecommission/meetingminutes/minutes2014/6172014licensing.pdf> [<https://perma.cc/6D6H-SLZB>].

³²⁵ See Stemler, *supra* note 215.

³²⁶ 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> [<https://perma.cc/MCP6-F45N>]; 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/> [<https://perma.cc/DKT5-RMT7>].

In this regard, Austin's experience regulating TNCs 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 protests by Uber and Lyft were overblown.³²⁷ 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, often favoring operations without substantial regulation. While there may be longstanding laws and regulations on the books, marketplace operators have found comfort in § 230 protection from those obligations. This is likely a mistake. Marketplaces may develop a culture of lawbreaking if they grow accustomed to exemption from regulation.³²⁸ Indeed, untouchable intermediaries not only facilitate bad behavior but also are likely to disproportionately hurt those most vulnerable.³²⁹ 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.

³²⁷ 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> [<https://perma.cc/XX6H-2TWX>].

³²⁸ Benjamin Edelman, *Uber Can't Be Fixed—It's Time for Regulators to Shut It Down*, HARV. BUS. REV. (June 21, 2017), <https://hbr.org/2017/06/uber-cant-be-fixed-its-time-for-regulators-to-shut-it-down> [<https://perma.cc/L6YN-2ERQ>].

³²⁹ See, e.g., *Jane Doe No. 1 v. Backpage.com*, 817 F.3d 12 (1st Cir. 2016) (distinctively hurting victims of sex trafficking); *Hinton v. Amazon.com.dedc, LLC*, 72 F. Supp. 3d 685, 687 (S.D. Miss. 2014) (hurting distinctively less sophisticated consumers who do not check for or recognize recalled merchandise).

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