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AIR BANNED AND BARRED: WHY NEW YORK CITY'S AFFORDABLE HOUSING CRISIS HAS NO ROOM FOR SHORT-TERM RENTALS

ABSTRACT

In August 2018, New York City passed a law that required short-term rental websites to disclose information about their users who host in the city. Airbnb, the largest short-term rental company, filed suit with hopes of having short-term rentals legalized. The law stems from the city's efforts to ameliorate its affordable housing crisis. With over 8.5 million residents living in a tight housing market, New York City should not allow home owners or rental tenants to commercialize their property into de facto hotels that will likely provide accommodations to tourists. This Note will examine the recent law's impact on New York City's housing market. This Note will also argue that the recommended approach to help deal with New York City's housing crisis is not to regulate Airbnb but to outright prohibit it.

INTRODUCTION

It is very expensive to live in New York City (“N.Y.C.”).¹ A high cost of living, together with stagnated wages and an increasing population, creates severe trouble for those looking to rent or purchase in the five boroughs.² Further, the lack of affordable housing, increased rents, and unscrupulous landlords are only three of the many factors that help keep tenants out of homes. In other words, N.Y.C. is experiencing a housing crisis.³ As a result, many New Yorkers must spend a disproportionate share of their income to simply put a roof over their heads.⁴ Add Airbnb and other platforms that allow users to provide short-term rentals at any price into the mix, and the housing crisis becomes an even bigger problem.

On August 6, 2018, in an effort to help solve its affordable housing crisis, N.Y.C. enacted N.Y.C. Admin. Code § 26-2101-4. This legislation required Airbnb and other short-term rental platforms to disclose information to N.Y.C. pertaining to hosts using their service.⁵ The law mandates that short-term rental services like Airbnb must submit, directly to the government, detailed monthly reports of all transactions for which the website charged or

1. Mariela Quintana, *Just How Crazy Is the Cost of Living in New York City?*, STREETEASY (Apr. 3, 2018), <https://streeteasy.com/blog/cost-of-living-new-york-city/>.

2. *Id.*

3. See generally Michael Greenberg, *Tenants Under Siege: Inside New York City's Housing Crisis*, 64 N.Y. REV. BOOKS 13, 75–81 (Aug. 17, 2017), <https://www.nybooks.com/articles/2017/08/17/tenants-under-siege-inside-new-york-city-housing-crisis/> [hereinafter *Tenants Under Siege*] (explaining the factors that drive New York City's housing crisis).

4. *Problem: Our Current Affordable Housing Crisis*, N.Y.C. HOUSING, <https://www1.nyc.gov/site/housing/problem/problem.page> (last visited Nov. 25, 2018) [hereinafter N.Y.C. Housing, *Current Affordable Housing Crisis*].

5. N.Y.C. Admin. Code § 26-2101-4 (2018).

collected a fee.⁶ In response to the new law, Airbnb filed a lawsuit against N.Y.C. in the Southern District of New York alleging, *inter alia*, that the ordinance violates the state and federal Constitution and the Federal Stored Communications Act.⁷ The New York and the U.S. Constitution grant its people the right to be secure in their own persons against unreasonable searches and seizures.⁸ Further, the Federal Stored Communications Act prohibits an electronic communication storage provider such as Airbnb from knowingly divulging information pertaining to its subscribers or users to the government.⁹

While the lawsuit has just begun, the battle between Airbnb and N.Y.C. has been ongoing for the past decade. During this time, N.Y.C. has passed several laws that target and limit Airbnb hosts' ability to provide short-term rentals.¹⁰ In response, Airbnb and its supporters argue that the law in question is simply a ploy to protect the lucrative hotel industry, a competitor in New York City's tourism market.¹¹ Airbnb and its supporters, also claim that their services benefit many local New Yorkers by providing a source of additional income.¹² New York City argues that short-term rental platforms such as Airbnb encourage landlords to turn their residential apartment buildings into illegal hotels which would violate safety, building codes, and zoning requirements.¹³ Furthermore, N.Y.C. argues that Airbnb has been a

6. *Id.*

7. Complaint for Declaratory and Injunctive Relief at 22 and 24, *Airbnb, Inc. v. The City of New York*, No. 18-07712 (S.D.N.Y. Aug. 24, 2018) (stating that "Airbnb has a reasonable expectation of privacy in its business records," and that "Airbnb hosts also have privacy interests in the non-public personal information they disclose to Airbnb." Airbnb argued that "Airbnb shares the interest of its hosts in maintaining their privacy[,] and allege that the ordinance will authorize the city to "execute an administrative search without any form of precompliance review." [hereinafter *Airbnb Complaint*].

8. N.Y. CONST. art. I, § 12; U.S. CONST. amend. IV.

9. 18 U.S.C. § 2702(a)(3); *Airbnb Complaint*, *supra* note 7, at 25, 26 (noting that Airbnb "provides its users with the ability to send or receive wire or electronic communications . . . and allow[s] its users to create listings and store photographs, documents, and correspondence." The ordinance would require Airbnb to "submit a monthly report that includes the full legal name, physical address, phone number and email address of the host . . . without a subpoena or other form of legal process").

10. Olivia Zaleski & Gerrit De Vynck, *Airbnb Sues New York City to Block User-Data Bill Over Privacy*, BLOOMBERG (Aug. 24, 2018), <https://www.bloomberg.com/news/articles/2018-08-24/airbnb-sues-new-york-city-to-block-user-data-bill-over-privacy>.

11. Glenn Fleishman, *Airbnb Sues New York Over Law That Demands Host Information*, FORTUNE MAG. (Aug. 24, 2018), <http://www.fortune.com/2018/08/24/airbnb-sues-new-york-over-law-that-demands-host-information/>.

12. *One Host, One Home: New York City (April 2018)*, AIRBNB (Apr. 2018), https://2sqy5r1jf93u30kwzc1smfqt-wpengine.netdna-ssl.com/wp-content/uploads/2018/04/One-Host-One-Home_-April-2018-Update.pdf ("Median annual earnings citywide is \$6,401, an economic life preserver for many hosts who are struggling to live an increasingly expensive city.").

13. James Dobbins, *How to Host on Airbnb Legally*, N.Y. TIMES (Apr. 7, 2017), <https://www.nytimes.com/2017/04/07/realestate/how-to-host-on-airbnb-legally.html>.

contributing cause to its affordable housing crisis and increasing rents.¹⁴ Accordingly, N.Y.C. Admin. Code § 26-2101-4 was passed to help identify where the illegal hotels are located and who is responsible for operating them.

This Note argues that N.Y.C.'s recent disclosure law is a positive step towards addressing and solving its affordable housing crisis and proposes an alternative solution that will help achieve the city's goal. By having the location and identity of all short-term hosts, N.Y.C. will be able to easily crack down on illegal hotel operators who are responsible for removing affordable apartments from the long-term housing supply. Part I of this Note details the history and establishment of online short-term rentals and explores the current housing issues surrounding metropolitan cities that have a shortage of affordable housing, specifically N.Y.C. and San Francisco. Part II addresses the current state of Airbnb laws and rules in these cities. Part III discusses the benefits and drawbacks of the new disclosure law, including similarities to San Francisco's current laws. This Part also analyzes how the new disclosure law would eventually lead to the legalization of short-term rentals. Part IV will discuss another option for dealing with the affordable housing crisis. Specifically, this section outlines the reasons and benefits for why legalizing short-term rentals may help address N.Y.C.'s housing issue. Part V of this Note will address the short-comings of legalizing short-term rentals, the poor state of N.Y.C.'s short-term rental laws and why this morass should morph into an outright ban. Since the disclosure law would inevitably lead to the legalization of short-term rentals, in order to effectively address its housing concern, N.Y.C. should impose an outright prohibition on short-term rentals.

I. BACKGROUND

New York City is the largest city in the United States in terms of population and density.¹⁵ It is also the country's largest public landlord with 400,000 tenants scattered across 325 developments.¹⁶ With rents increasing almost twice as fast as wages, New York City is also one of the country's most expensive places to live.¹⁷ Interestingly, however, not all rents increase

14. See generally Scott M. Stringer, *The Impact of Airbnb on NYC Rents*, CITY OF N.Y. OFF. OF THE COMPTROLLER (May 3, 2018), https://comptroller.nyc.gov/wp-content/uploads/documents/AirBnB_050318.pdf [hereinafter COMPTROLLER REPORT] (reporting the impact of short-term rentals on rent prices throughout New York City); David Wachsmuth et al., *The High Cost of Short-Term Rentals in New York City*, MCGILL UNIV. (Jan. 2018) <http://www.sharebetter.org/wp-content/uploads/2018/01/High-Cost-Short-Term-Rentals.pdf> [hereinafter MCGILL UNIV. REPORT] (analyzing Airbnb's activity in New York City and the negative impact on its neighborhoods).

15. *US City Populations 2019*, WORLD POPULATION REV., <http://worldpopulationreview.com/us-cities/> (last visited Feb. 23, 2019) [hereinafter 2019 U.S. Population].

16. Ronda Kaysen, *The Housing Crisis in New York*, ARCHITECTURAL REC. (Oct. 1, 2018), <https://www.architecturalrecord.com/articles/13651-the-housing-crisis-in-new-york>.

17. Grant Long, *The Widening Gap: Rents and Wages in New York City*, STREETEASY (Aug. 16, 2017), <https://streeteasy.com/blog/nyc-rent-affordability-2017/> (noting that between December

at the same pace.¹⁸ In fact, homes with the lowest rents grew at the fastest pace while higher rents increased at the slowest pace.¹⁹ This arises, partly, from “the increasing desirability of calling New York home.”²⁰

As N.Y.C. has become a popular home for large corporate headquarters, it has also attracted many tech companies and other startups who are looking to capitalize in a robust, economic environment.²¹ Since the value of land is increasing, landlords are pushing out current tenants in favor of those who can afford increased rents, such as the employees working in the aforementioned industries who wish to live closer to their offices.²² These tenants will have little trouble affording the expensive rents due to their sizable salaries.²³ As a result, this creates a rippling effect on the rental market as people are “priced out” and have no choice but to move to other neighborhoods with lower rents—a pattern that will eventually drive up rent prices there as well.²⁴ Rental prices in what were originally industrial-type neighborhoods increased due to the influx of large companies and development.²⁵ This prompts current renters living in these developing neighborhoods to use Airbnb to supplement their income and most importantly, stay in their homes.²⁶

New York City’s housing crisis is unprecedented.²⁷ The rising population, demand for affordable housing in both the rental and ownership market, increase of homeless shelters, and the recent wave of New Yorkers

2009 and June 2017, asking rents have increased 3.9 percent while wages have increased 1.8 percent).

18. *Id.*

19. *Id.* (noting that in terms of price, the bottom fifth of the market “have grown at an annual pace of 4.9 percent since 2010 whereas rents in the top fifth of the market have grown at an annual pace of 3 percent”).

20. N.Y.C. Housing, *Current Affordable Housing Crisis*, *supra* note 4.

21. Richard Florida, *What’s Manhattan’s Land Worth? Try ‘Canada’s Entire GDP’*, CITYLAB (Apr. 24, 2018), <https://www.citylab.com/life/2018/04/what-manhattans-land-is-worth/558776/>.

22. Kaysen, *supra* note 16.

23. See Amy Plitt, *With Amazon HQ2 Deal Dead, What’s Next For Long Island City Real Estate?*, CURBED N.Y. (Feb. 15, 2019), <https://ny.curbed.com/2019/2/15/18225366/amazon-hq2-new-york-real-estate-long-island-city> (noting that the average salary of an Amazon HQ2 employee moving into New York City would have been \$150,000/year).

24. Ameena Walker, *What Does Amazon’s HQ2 Mean for Long Island City Real Estate?*, CURBED N.Y. (Nov. 14, 2018), <https://ny.curbed.com/2018/11/14/18091872/amazon-hq2-long-island-city-home-rent-prices-nyc-predictions>. (“There will always be people who are priced out as a result . . . they will head to other neighborhoods, which will eventually push prices higher there as well.”).

25. *Id.* (“Long Island City has, for the past few years, experienced a development boom that shifted its once-industrial landscape into a largely residential one.”).

26. See *Shared Opportunities: How Airbnb Benefits Communities*, AIRBNB, https://www.ftc.gov/system/files/documents/public_comments/2015/05/01740-96152.pdf (last visited Nov. 24, 2018) (noting that “52 percent of Airbnb hosts live in low to moderate income households” and “53 percent of hosts report that income earned from hosting has helped them stay in their homes”).

27. N.Y.C. Housing, *Current Affordable Housing Crisis*, *supra* note 4 (last visited Nov. 25, 2018) (noting that “New York’s shortage of affordable housing has reached a crisis point”).

being pushed to live in the outer boroughs are just a few of many issues comprised within this crisis.²⁸ Despite N.Y.C.'s commitment to preserve and develop low-cost units, the "city's housing supply has not been able to keep up with the population growth."²⁹ As a result of the low supply of and high demand for affordable units, housing costs have drastically increased.³⁰ Rents are skyrocketing contemporaneously with Airbnb's increasing number of listings in N.Y.C.³¹ This particularly impacts neighborhoods where most short-term rentals are listed on Airbnb.³² In fact, Airbnb listings have attributed to approximately 9.2 percent of the overall increase in rents in New York City.³³ Airbnb hosts have many financial benefits³⁴ that incentivize homeowners or renters to use its home-sharing services rather than offer traditional long-term leases or subleases to New York City residents.³⁵ Consequently, units once available for long-term residents become short-term rentals for tourists, the housing supply decreases, and these available units' rents escalate.³⁶

The notion of home-sharing came up when two roommates, struggling to pay their rent, decided to rent out the unused space in their apartment, and provide their own bed and breakfast experience to outsiders.³⁷ They developed this concept by creating their own website to allow others to list their homes for rent by taking photos and including information about the space.³⁸ Soon, what started as a simple idea to rent out space for strangers evolved into a billion dollar company.³⁹

The secure and flexible short-term rental model is able to provide hosts with an additional revenue stream while at the same time provide travelers

28. Kaysen, *supra* note 16.

29. Aameena Walker, *NYC's Housing Crisis Accelerating as Low-Rent Apartment Stock Declines: Report*, CURBED N.Y. (Sept. 26, 2018), <https://ny.curbed.com/2018/9/26/17901946/nyc-housing-affordability-decline-report-scott-stringer>.

30. COMPTROLLER REPORT, *supra* note 14, at 1.

31. *Id.* ("Between 2009 and 2016, rents rose 25% on average citywide" and during the same period, Airbnb listings skyrocketed, from 1,000 in 2010 . . . "to slightly under 40,000 in 2016.").

32. *Id.* at 2 (noting that in eight neighborhoods where Airbnb listings are "particularly concentrated," rents have increased at a "substantially higher rates than the borough average between 2009 and 2016").

33. *Id.*

34. Jim Breese, *Benefits of Being an Airbnb Host*, LEARN AIRBNB, <https://learnairbnb.com/benefits-airbnb-host/> (last visited Oct. 27, 2018) (explaining that Airbnb provides an opportunity known as "rent arbitrage," where there is a potential to earn revenue of something significantly more than the cost to acquire it).

35. Nadia Abulatif, *Airbnb vs. Long Term Rental: Which One Is The Better Real Estate Investment Strategy for You?*, MASHVISOR (Jan. 12, 2018), <https://www.mashvisor.com/blog/airbnb-vs-long-term-rental/>.

36. See COMPTROLLER REPORT, *supra* note 14 at 1.

37. Biz Carson, *How 3 Guys Turned Renting an Air Mattress in their Apartment into a \$25 Billion Company*, BUS. INSIDER (Feb. 23, 2016), <https://www.businessinsider.com/how-airbnb-was-founded-a-visual-history-2016-2>.

38. *Id.*

39. *Id.*

with accommodations at a lower price than that of hotels.⁴⁰ Hosts on Airbnb are able to establish their own rates and provide unique experiences because their homes are located in distinct neighborhoods, whereas traditional accommodations are limited.⁴¹ Rates for short-term rental bookings, much like hotels, often vary depending on the size and location of the space, as well as available dates.⁴²

In addition to providing hosts with an opportunity to meet new people from all over the world, users are able to list their homes on Airbnb for free.⁴³ Compared to long-term rentals where landlords and lessors often spend time and money to perform background checks and market their property, short-term rental hosts now have a platform that simplifies all those obstacles under one convenient website.⁴⁴ Moreover, short-term rental platforms act as an intermediary by allowing hosts to collect payment instantly and hassle-free from guests through their website,⁴⁵ whereas traditional landlords often run into trouble collecting rent from their tenants.⁴⁶ An issue that often comes up in N.Y.C. where there is a high demand for permanent residence, is that by having available housing accommodations for transient occupants, units are effectively being taken out of the overall housing supply available for permanent residences.⁴⁷ In the basic economics of supply and demand, when there is a decrease in supply of available housing for New Yorkers looking to rent an apartment and an increase in demand for housing, the price of the available units will increase.⁴⁸

II. CURRENT STATE OF AIRBNB LAWS IN NEW YORK CITY AND SAN FRANCISCO

Airbnb's success does not come without encountering legal and practical issues across all cities where its services are used.⁴⁹ Generally, there are three options that cities can take when confronted with a breakthrough business: (1) no action, (2) regulation, or (3) prohibit the activity entirely.⁵⁰ The current

40. Jean Folger, *Airbnb: Advantages and Disadvantages*, INVESTOPEDIA (Oct. 22, 2018), <https://www.investopedia.com/articles/personal-finance/032814/pros-and-cons-using-airbnb.asp>.

41. *Id.*

42. *Id.*

43. Users can create an account and listing for free. Abulatif, *supra* note 35. Fees are only applied when a listing is booked. *Id.*

44. *See id.*

45. Guests enter their payment information and are charged as soon as their reservations are confirmed. Folger, *supra* note 40.

46. *See* Sarah Hume, *Problems Landlords Have Collecting Rent (And What to Do About It)*, AVAIL (Mar. 31, 2017), <https://www.avail.co/education/articles/problems-landlords-have-collecting-rent-and-what-to-do-about-it> (noting that one of the problems that arise in a landlord-tenant relationship is that the "tenant pays late or doesn't pay at all").

47. COMPTROLLER REPORT, *supra* note 14, at 1.

48. *Id.*

49. Appallonia Wilhelm, *Sharing is Caring: Regulating Rather than Prohibiting Home Sharing in Wisconsin*, 101 MARQ. L. REV. 821, 828 (2018).

50. *Id.*

landscape of regulatory schemes for short-term rentals differ, ranging from complete legalization and imposed tax reporting requirements,⁵¹ to allowing short-term occupancy in specific residential districts,⁵² or establishing limitations and onerous requirements that make short-term rentals impracticable.⁵³ San Francisco and N.Y.C. have adopted completely contrary approaches when it comes to short-term rentals.⁵⁴ Despite an affordable housing crisis in both cities, San Francisco allows short-term rentals, whereas N.Y.C. strictly limits short-term rentals that amount to a near outright ban.⁵⁵

The following sections will discuss, individually, N.Y.C.'s and San Francisco's approaches: Section A will examine N.Y.C.'s restrictive ordinance along with Airbnb's relationship with N.Y.C., and Section B will discuss San Francisco's comprehensive regulation of short-term rentals.

A. NEW YORK

New York City is one of the more restrictive cities when it comes to short-term rentals.⁵⁶ Currently, under New York State's Multiple Dwelling Law ("M.D.L."), it is illegal for residents living in buildings with three or more residential units, to rent out any portion of their space for less than thirty consecutive days unless that resident is present.⁵⁷ In other words, a host may be permitted to use Airbnb within their apartment unit in a building containing three or more units provided that the host is also present in the unit with the guests during the rental period.⁵⁸ Although the M.D.L. does not apply to single or two-family homes, it may still be illegal to rent out such properties if the homes are not in compliance with use and zoning restrictions.⁵⁹ It is also illegal to advertise short-term rentals that run against

51. See generally Andrew Moylan, *Roomscore 2016: Short-Term Rental Regulation in U.S. Cities*, R ST. POL'Y STUDY NO. 55 (Mar. 2016), <https://2o9ub0417chl2lg6m43em6psi2i-wpengine.netdna-ssl.com/wp-content/uploads/2018/04/RSTREET55-1.pdf> (analyzing 59 cities' regulatory climate pertaining to short-term rentals).

52. See *id.* at 6 (noting that Chicago allows short-term rentals but stays where the host is not present is prohibited in certain residential districts).

53. See *id.* at 9 (describing how the cost and efforts spent to obtain licenses in certain cities "effectively freeze[] out large numbers of potential participants in the short-term rental market").

54. Wilhelm, *supra* note 49, at 829.

55. *Id.*

56. See Moylan, *supra* note 51, at 7 tbl.2.

57. See N.Y. MULTI. DWELL. LAW § 4(8)(a) (2018). The law specifically defines permanent residence purposes as "occupancy of a dwelling unit by the same natural person or family for thirty consecutive days or more" and redefines the definition of a "Class A" multiple dwelling to be occupied for permanent residence purposes. *Id.* The law also sets forth uses that are inconsistent with permanent residence purposes which include occupancy by people other than "other natural person or family living within the household" (i.e., Airbnb guests). *Id.*

58. Michelle Itkowitz, Esq., *Airbnb and Your Building*, ITKOWITZ PLLC (Feb. 21, 2017), <http://www.itkowitz.com/booklets/SHORT-TERM-ILLEGAL-SUBLETS-IN-NYC-APARTMENTS-Prevention-Detection-and-Remedies-for-Landlords.pdf>.

59. See Ilya Maritz, *Think Private Homes Are Safe to List on Airbnb? Think Again*, WNYC NEWS (Sept. 13, 2016), <https://www.wnyc.org/story/think-private-homes-are-safe-list-airbnb-think-again/>.

state laws.⁶⁰ As expected, Airbnb challenged New York's regulations targeted at the \$30 billion business by filing a lawsuit against New York State in 2016, marking the beginning of a contentious relationship between Airbnb and New York.⁶¹

The lawsuit alleged that short-term rental statutes were ambiguous because they allow N.Y.C. to impose fines on entities like Airbnb, even though Airbnb does not control its hosts' advertisements.⁶² Therefore, short-term rental sites cannot be liable for their host's illegal listings. The parties eventually settled the lawsuit whereby N.Y.C. agreed that it would not enforce the law against Airbnb and instead pursue action against individual "bad actors" who are running illegal hotels.⁶³ In an effort to repair their relationship with N.Y.C. and in hopes of pushing towards the legalization of short-term rentals, Airbnb "voluntarily" implemented a "One Host, One Home" rule to help N.Y.C. crack down on operators of illegal hotels.⁶⁴ The rule limits a host to only one entire home listing and while multiple listings are allowed, they must be at the same address.⁶⁵ Violators of this "One Host, One Home" rule risk having their multiple listings removed or their account suspended.⁶⁶

B. SAN FRANCISCO

While New York's regulations lean towards prohibition of short-term rentals, San Francisco takes a friendlier approach.⁶⁷ Originally, San Francisco required short-term rental hosts to register with the city, however, it was unsuccessful because only a fraction of the actual number of hosts complied.⁶⁸ This led to San Francisco passing a law in 2016 that required Airbnb and other short-term rental platforms to display each of its short-term rental host's registration information and remove listings by any unregistered hosts.⁶⁹ If a host was not properly registered, then the website would be prohibited from accepting any bookings for that host.⁷⁰

60. N.Y. MULTI. DWELL. LAW § 121 (2018) (prohibiting advertisements of use of dwellings in buildings with three or more units for purposes other than permanent resident purposes).

61. See Nate Raymond, *Airbnb, New York City Settle Rental Law Lawsuit*, REUTERS, Dec. 2, 2016, <https://www.reuters.com/article/us-airbnb-new-york-idUSKBN13S03U>.

62. See *id.*

63. *Id.*

64. Katie Benner, *Airbnb Proposes Cracking Down on New York City Hosts*, N.Y. TIMES (Oct. 19, 2016), <https://www.nytimes.com/2016/10/20/technology/airbnb-proposes-cracking-down-on-new-york-city-hosts.html?module=inline>; see *Traveling Help [For] New York, NY*, AIRBNB (Mar. 27, 2018), <https://www.airbnb.com/help/article/868/new-york—ny?ibbe=0> [hereinafter *Airbnb, New York Traveling Help*].

65. See *Airbnb, New York Traveling Help*, *supra* note 64.

66. *Id.*

67. Wilhelm, *supra* note 49, at 829.

68. Alice Truong, *Airbnb is Suing San Francisco Over Its New Regulations*, QUARTZ (June 28, 2016), <https://qz.com/718402/airbnb-is-suing-san-francisco-over-its-new-regulations/>.

69. *Id.*

70. *Id.*

Shortly thereafter, Airbnb filed suit, alleging that the regulation violated free speech and privacy laws.⁷¹ After a year-long battle, the parties ultimately settled.⁷² San Francisco then enacted a short-term rental ordinance⁷³, which formally legalized short-term rentals and required every host or individual seeking to list their unit on short-term rental websites to become a certified host.⁷⁴ Due to San Francisco's shortage of affordable rental housing and increasing rents, the city created the ordinance to prevent people from obtaining properties for solely providing short-term rentals.⁷⁵

Becoming a certified host is a two-step process.⁷⁶ First, hosts must register as a business and obtain a "Business Registration Certificate" by submitting the address and other information about where they plan to host short-term rentals.⁷⁷ Once the applicant is officially registered as a business, to host, they then need to apply for a host certificate.⁷⁸

San Francisco created its own administrative office known as the Office of Short-Term Rental ("OSTR") to manage and process all short-term rental activities.⁷⁹ In their host certificate application to the OSTR, hosts are required to: (1) submit their names and addresses; (2) satisfy certain insurance requirements; (3) cure any violations pertaining to the listed property; and (4) pay a registration fee.⁸⁰ Along with other reporting, recordkeeping, and license renewal requirements, there is also a permanent resident requirement qualifying only those who have lived at the premises for at least 275 days in a calendar year.⁸¹ Moreover, hosts may not list a residential unit that is subject to the San Francisco's affordable housing program.⁸²

San Francisco uses the term "permanent resident" to describe a short-term rental host.⁸³ The permanent resident "may be an owner or a lessee,"

71. *Id.*

72. Dara Kerr, *Airbnb Settles Lawsuit with SF – Big Changes are Afoot*, CNET (May 1, 2017), <https://www.cnet.com/news/airbnb-settles-lawsuit-with-sf-big-changes-are-afoot/>.

73. S.F., CAL. ADMIN. CODE § 41A (2018).

74. Kerr, *supra* note 72.

75. Wilhelm, *supra* note 49, at 829.

76. *Become a Certified Host*, S.F. OFF. OF SHORT-TERM RENTALS, <https://shorttermrentals.sfgov.org/hosting/become-certified> (last visited Nov. 24, 2018) [hereinafter *Become a Certified Host in S.F.*] (explaining the procedure to become a certified host under the subtitle "[a]re you a tenant (renter), condominium owner, or TIC owner?").

77. *Id.*

78. *Id.*

79. S.F., CAL. ADMIN. CODE § 41A.7 (2018).

80. *See Become a Certified Host in S.F.*, *supra* note 76; Dara Kerr, *Airbnb Purges Thousands of San Francisco Listings Overnight*, CNET (Jan. 18, 2014, 4:54 PM), <https://www.cnet.com/news/airbnb-purges-thousands-of-its-san-francisco-listings-overnight/>.

81. *About Short-Term Rentals*, S.F. OFF. OF SHORT-TERM RENTALS, <https://shorttermrentals.sfgov.org/about> (last visited Nov. 24, 2018) [hereinafter *About S.F. Short-Term Rentals*].

82. S.F., CAL., ADMIN. CODE § 41A.4 (2018) (stating that a short-term residential unit cannot be "subject to the Inclusionary Affordable Housing Program set forth in Planning Code Section 415 *et seq.*").

83. Wilhelm, *supra* note 49, at 830.

meaning that a tenant may list their unit as a short-term rental.⁸⁴ However, the OSTR implements several schemes in an effort to protect the property owner's interest.⁸⁵ For example, the OSTR warns applicants that their leases may prohibit short-term renting and recommends that they review such agreements before submitting an application.⁸⁶ The OSTR also requires a tenant to submit a copy of their lease or rental agreement when applying to become a host.⁸⁷ Furthermore, the OSTR sends a notice of the tenant's application to the owner of the residential unit or building.⁸⁸ The extent of regulations and requirements that San Francisco imposes on hosts seeking to list their units is likely a response to San Francisco's housing shortage.⁸⁹

Lastly, Airbnb ensures that all of its hosts are following San Francisco's laws by working collaboratively with the city through the host registration process.⁹⁰ Airbnb also facilitates a host's compliance with tax reporting requirements by collecting the city's required transient occupancy tax on behalf of the host and remitting it directly to the city.⁹¹ In fact, Airbnb is one of only three short-term rental website companies in San Francisco allowed to collect the tax in this way.⁹² Airbnb's collective efforts to work with both the prospective host and the city assure that individuals are able to share their home while at the same time comply with San Francisco's laws.

III. DISCLOSURE LAW

A. BENEFITS OF DISCLOSURE LAW

The M.D.L.'s purpose was to eliminate illegal hotels in N.Y.C.'s scarce housing market.⁹³ Part of the problem is that Airbnb does not have a record of which types of homes are being listed on their site, making it difficult for

84. S.F., CAL. ADMIN. CODE § 41A.4.

85. Wilhelm, *supra* note 49, at 830.

86. *See Become a Certified Host in S.F.*, *supra* note 76.

87. *See id.*

88. *See id.*

89. Wilhelm, *supra* note 49, at 830.

90. *San Francisco's Registration Process: Frequently Asked Questions*, AIRBNB, <https://www.airbnb.com/help/article/1849/san-francisco-s-registration-process—frequently-asked-questions> (last visited Dec. 21, 2018) (explaining that once the OSTR approves or denies a registration, it will directly inform the host and Airbnb of its decision). Upon approval, the OSTR will provide the host and Airbnb with a registration number. *Id.* If the city denies the application, Airbnb will remove the listing from the website. *Id.*

91. *See Short-Term Residential Host/Qualified Website Company*, S.F. TREASURER & TAX COLLECTOR, <https://sftreasurer.org/short-term-host> (last visited Nov. 24, 2018).

92. *See id.* (noting that Airbnb is one of three San Francisco Qualified Website Companies along with Hostwell and misterB&B).

93. Emily M. Speier, *Embracing Airbnb: How Cities Can Champion Private Property Rights Without Compromising the Health and Welfare of the Community*, 44 PEPP. L. REV. 387, 416 (2017).

N.Y.C. to know exactly which listings violate the M.D.L.⁹⁴ One way to solve this problem would be to require disclosures of the exact address of each listing. If N.Y.C. has a listing's specific address, it will be able to ascertain the type of building the address is located in and confirm with the landlord of the building or apartment unit to determine if the host is in compliance with the M.D.L.⁹⁵

In addition to helping N.Y.C. crack down on illegal hotel operators, the disclosure law would also help enforcement officials track down ordinary individuals flouting the law and contributing to Airbnb's black market.⁹⁶ This "sharing economy", which has minimal regulation and accountability but great profitability, becomes a black market when hosts turn into opportunists trying to capitalize on this new business.⁹⁷ This is prevalent especially in popular, developing neighborhoods which attract a larger portion of Airbnb's listings.⁹⁸ Due to Airbnb's negative image in N.Y.C. and the strict laws surrounding short-term rentals, scofflaws tell their guests not to mention Airbnb to anyone in the building or to lie about their stays to avoid getting in trouble.⁹⁹ Hosts are also likely to remain anonymous by never meeting their guests in person and simply leaving keys and instructions in conspicuous locations which can be accessed by anyone.¹⁰⁰ Ultimately, hosts who insist on remaining anonymous or who tell their guests to lie about their stays are likely tenants or homeowners renting their homes in violation of the M.D.L.¹⁰¹ After all, 87% of entire-home/apartment listings are illegal under New York State Law which means that either hosts are listing multiple homes and, or, are not present with their guests during the rental period.¹⁰² In effect, these homes are removed from the supply of available units that might otherwise be rented to New York residents, thereby driving up rent prices.¹⁰³

94. Aameena Walker, *New York's Anti-Airbnb Law is Proving Tough to Quickly Enforce*, CURBED N.Y. (May 11, 2017, 5:15 PM), <https://ny.curbed.com/2017/5/11/15626876/new-york-anti-airbnb-law-enforcement-issues>.

95. See Luis Ferré-Sadurní, *To Curb Illegal Airbnbs, New York City Wants to Collect Data on Hosts*, N.Y. TIMES (June 26, 2018), <https://www.nytimes.com/2018/06/26/nyregion/illegal-airbnb-new-york-city-bill.html>.

96. Michael A. Pensabene, *Exposing the Airbnb Black Market*, COM. OBSERVER (Nov. 18, 2015, 11:40 AM), <https://commercialobserver.com/2015/11/exposing-the-airbnb-black-market/>.

97. *Id.*

98. Kirstan Conley, *Hipster Brooklyn's Airbnb Black Market is Booming*, N.Y. POST (Oct. 15, 2017, 9:14 PM), <https://nypost.com/2017/10/15/hipster-brooklyns-airbnb-black-market-is-booming/>.

99. *Id.*

100. *Id.*

101. *Id.*

102. MCGILL UNIV. Report, *supra* note 14.

103. COMPTROLLER REPORT, *supra* note 14, at 1.

The disclosure law would help pinpoint exactly who these hosts are, where they are advertising their units, and put a stop to their practices.¹⁰⁴

B. SHORTCOMINGS OF DISCLOSURE LAW

i. Adverse Effect on Landlords and Tenants

Although the disclosure law allows N.Y.C. to efficiently crack down on landlords running illegal hotels, it also accelerates the process in which tenants may be evicted for using Airbnb in contravention of the law. The law mandates disclosure of the physical address of short-term rentals along with the host's personal information.¹⁰⁵ This information would ostensibly help enforcement officers "identify commercial operators with multiple listings who run illegal hotels in residential buildings" who can be either tenants or landlords.¹⁰⁶ In the event a tenant illegally rents their unit, N.Y.C. will notify the building owner by issuing a violation and in turn, the property owner will likely seek to evict the tenant.¹⁰⁷ However, landlords also have to bear the cost as they are typically responsible for the fine even though they are not at fault.¹⁰⁸ Such fines come with a penalty of up to \$1,000 for first time offenders, \$5,000 for second time offenders, and up to \$7,500 for the third and any subsequent violations.¹⁰⁹ Some of these large fines may put individuals at a great risk of eviction, bankruptcy or even foreclosure.¹¹⁰

While proponents of this law argue that it is aimed at commercial operators running illegal hotels, the law also targets hosts with different purposes for utilizing short-term rentals.¹¹¹ For example, a tenant who travels often and wishes to temporarily rent out their apartment while they are away is adversely affected.¹¹² The disclosure law, collectively with the current laws affecting short-term tenancies, unfairly groups all short-term rental hosts with different purposes in the "same basket."¹¹³

104. Nick Tabor, *Is New York Cracking Down on Airbnb to Help Local Residents or Hotels?*, N.Y. MAG. (Aug. 13, 2018), <http://nymag.com/intelligencer/2018/08/airbnb-new-york-crack-down.html?gtm=bottom>.

105. N.Y.C. ADMIN. CODE §§ 26-2102(1)–(2) (2018).

106. Ferré-Sadurní, *supra* note 95.

107. *See generally* Ron Lieber, *A Warning for Hosts of Airbnb Travelers*, N.Y. TIMES (Nov. 30, 2012), https://www.nytimes.com/2012/12/01/your-money/a-warning-for-airbnb-hosts-who-may-be-breaking-the-law.html?_r=0 (reporting an instance where a tenant using Airbnb was evicted from his apartment after the landlord received a violation from the city).

108. Rich Bockmann, *Airbnb is Not Taking it Lying Down: Startup Ramps Up for Fight of Its Life in NYC*, REAL DEAL (Mar. 1, 2016, 11:59 AM), https://therealdeal.com/issues_articles/as-opponents-line-up-airbnb-fights-to-win-legitimacy-in-nyc/.

109. *See* N.Y. MULTI. DWELL. LAW § 121(2) (2018).

110. Wilhelm, *supra* note 49, at 839.

111. *Id.*

112. *Id.*

113. *Id.*

ii. Short-Term Rental Legalization is Inevitable

Despite N.Y.C.'s attempts to limit short-term rentals and to severely punish and deter illegal hotel operators, the current housing situation mirrors San Francisco's previous attempts to fight Airbnb prior to its 2016 lawsuit. That fight, however, eventually led to San Francisco's legalization and regulation of short-term rentals¹¹⁴—the very same business that N.Y.C. is trying to prevent in order to address its affordable housing crisis.

New York City's law requiring Airbnb to disclose information about its host and transactions is comparable to the current laws established in San Francisco.¹¹⁵ New York City requires disclosure of the names, addresses, and details about individual transactions such as the amount charged and collected by the host and Airbnb.¹¹⁶ Similarly, San Francisco requires hosts to disclose the very same information to the OSTR during registration with its own administrative agency.¹¹⁷ Also, New York City requires that any short-term rental host in buildings with three or more units be present with its guest at all times during the short-term rental period.¹¹⁸ Therefore, it is illegal for anyone else besides the permanent resident to reside in a unit by him or herself for less than thirty consecutive days.¹¹⁹ On the other hand, San Francisco provides flexible occupancy requirements for the host by requiring them to have lived at the premises for only 275 days out of the whole year in order to allow "unhosted rentals".¹²⁰ In other words, an Airbnb host in San Francisco can legally run his own hotel business for ninety days.¹²¹

The events leading up to Airbnb's current suit against N.Y.C. are identical to those leading up to Airbnb's complaint against San Francisco. First, the crux of the 2016 lawsuit against San Francisco is identical to the pending lawsuit against N.Y.C.¹²² At the time, San Francisco did not

114. Kerr, *supra* note 72.

115. Compare N.Y.C. ADMIN. CODE § 26-2101-4 (2018) (requiring a monthly report containing information pertaining to each transaction, including the physical address, name of host and amount of fees received), with S.F., CAL. ADMIN. CODE § 41A.5(g)(4)(E) (2018) (requiring hosting platforms to maintain, and be able, upon a lawful request, to provide the name of the owner, address of the unit, and rental period for each short-term rental transaction).

116. N.Y.C. ADMIN. CODE § 26-2101-4.

117. *About S.F. Short-Term Rentals*, *supra* note 81.

118. See generally N.Y. MULTI. DWELL. LAW § 4(8)(a) (2018) (stating that Class A Multiple Dwelling Units shall only be used for permanent residence purposes which consist of the permanent occupant occupying the unit for thirty consecutive days).

119. This applies to occupants other than the permanent resident's family and where there is monetary compensation paid to the permanent resident for such occupancy. See *id.* § 4(8)(a).

120. Unhosted rentals occur when the host is not present with the guest. *About S.F. Short-Term Rentals*, *supra* note 81.

121. *Id.* (noting that a host does not have to be present with the guest during the relevant time period, since "[r]egistered hosts may [] conduct unhosted short-term rentals for up to 90 nights per calendar year").

122. See also Fleishman, *supra* note 11 (stating that the New York lawsuit alleges privacy and constitutional violations of the laws); Truong, *supra* note 68 (noting that the San Francisco lawsuit alleged the rules "violate free speech and privacy laws").

explicitly prohibit the use of short-term rentals and instead, required Airbnb to only permit listings by registered hosts.¹²³ Likewise, N.Y.C. does not expressly forbid all short-term rentals, and its ordinance requires Airbnb to submit pertinent information about each host ostensibly to filter out hosts who are not occupying their units in accordance with the M.D.L.¹²⁴ By having a list of hosts who are illegally renting their units, N.Y.C. will be able to easily and effectively prosecute against bad actors.¹²⁵ Both cities' laws were implemented mitigate its own housing crisis by cracking down on individuals utilizing their own units or buildings as illegal hotels.¹²⁶ Moreover, both San Francisco and N.Y.C. created its own city agency primarily to investigate and enforce its rules regarding short-term rentals.¹²⁷ Due to San Francisco and N.Y.C.'s dense populations and Airbnb's privacy protection of its users, both cities have been struggling to enforce its regulation over short-term rentals.¹²⁸

Second, shortly after both ordinances were enacted, Airbnb sued each respective city with both lawsuits citing certain constitutional and privacy right violations.¹²⁹ In the case of San Francisco, Airbnb was able to settle and reached amicable terms in which San Francisco would legally recognize short-term rentals.¹³⁰ Therefore, it is unsurprising that Airbnb filed the pending lawsuit against N.Y.C. with hopes of achieving the same result as it did in San Francisco.

The company has already spent millions of dollars in advertising and campaigning for legalization of short-term rentals.¹³¹ There is currently a bill sitting in the New York State legislature that, if passed, would legalize short-term rentals resulting in a similar regulatory scheme as that of San

123. Truong, *supra* note 68 (noting that the law forced Airbnb to display on its website only listings by hosts who are registered with the city).

124. N.Y.C. ADMIN. CODE § 26-2101-4; Zoe Greenberg, *New York City Looks to Crack Down on Airbnb Amid Housing Crisis*, N.Y. TIMES (July 18, 2018), <https://www.nytimes.com/2018/07/18/nyregion/new-york-city-airbnb-crackdown.html>.

125. Tabor, *supra* note 104.

126. Greenberg, *supra* note 124 (“The bill aims to prevent landlords and tenants from illegally renting out apartments for a few days at a time to tourists.”); Truong, *supra* note 68.

127. See Carolyn Said, *S.F. to Create City Office to Enforce Airbnb Law*, SFGATE (July 2, 2015, 8:29 AM), <https://www.sfgate.com/business/article/S-F-to-create-city-office-to-enforce-Airbnb-law-6361832.php>; see also Rosa Goldensohn, *De Blasio Ramps up Airbnb Enforcement*, CRAIN'S N.Y. BUS. (Apr. 26, 2017, 12:00 AM), https://www.crainsnewyork.com/article/20170426/REAL_ESTATE/170429915/mayor-bill-de-blasio-budgets-1-6-million-to-crack-down-on-airbnb.

128. Zaleski & De Vynck, *supra* note 10 (“New York, which faces an affordable housing shortage, has struggled with how to enforce regulation to control Airbnb and other home-rental services.”); Said, *supra* note 127 (noting that San Francisco administrators “acknowledged that enforcement is difficult” because it requires “data on the number of nights a place is rented and the ability to go after hosting platforms that list illegal units”).

129. See Truong, *supra* note 68 (stating that the rule passed by San Francisco violates “free speech and privacy laws”); Zaleski and De Vynck, *supra* note 10.

130. Kerr, *supra* note 72.

131. Bockmann, *supra* note 108.

Francisco.¹³² The bill (“A-7520”) proposes an amendment to the M.D.L. to recognize short-term rentals, and to permit such short-term rentals with certain restrictions.¹³³ Along with imposing an occupancy tax similar to those imposed by hotels, the bill proposes that short-term rental hosts be required to register their short-term rental unit with the city agency and to maintain certain safety and insurance requirements.¹³⁴ In an effort to show its support for A-7520 and get the bill out of the housing committee, Airbnb pledged to donate \$10 million to New York non-profit organizations.¹³⁵ The company indicated that the large sum is merely a fraction of the potential tax revenue that the state could receive if lawmakers approved the bill.¹³⁶ Ultimately, if A-7520 is approved and passed, New York will have nearly identical rules and regulations as San Francisco pertaining to short-term rentals.¹³⁷ Airbnb even concedes that regulating short-term rentals is essentially recognizing short-term rentals.¹³⁸ While this disclosure law may seem like N.Y.C. is pressuring Airbnb to discontinue its operations in the city, it will inevitably provide Airbnb an opportunity to discuss and negotiate with N.Y.C. the legalization of short-term rentals.

IV. WHY CITY-WIDE LEGALIZATION OF SHORT-TERM RENTALS IS NECESSARY

Affordable housing is achieved in two ways: preservation and development.¹³⁹ New York City Mayor, Bill De Blasio acknowledged that there is a housing crisis and promised to build or preserve 300,000 affordable housing units by 2026.¹⁴⁰ His goal is to “help both tenants and small landlords preserve the quality and affordability of their homes.”¹⁴¹ Due to the disparity between the demand and supply of housing, however, in order to make this

132. *Compare* N.Y. Assemb. 7520, Legis. Sess. (N.Y. 2018) (defining short-term rental units and implementing a registration process with the Division of Housing and Community Renewal), *with* S.F., CAL. ADMIN. CODE § 41A (defining “short-term residential rental” and allowing certain residents to register with the city’s Short-Term Residential Rental Registry).

133. *See* N.Y. Assemb. 7520, Legis. Sess. (N.Y. 2018)

134. *See id.* (specifying that hosts are required to have liability insurance on their property of at least \$250,000, maintain transaction records with guests, and to register with the city).

135. Luis Ferré-Sadurní, *Airbnb Shows Them the Money. Is it Enough to Turn Albany Lawmakers’ Heads?*, N.Y. TIMES (Aug. 15, 2018), <https://www.nytimes.com/2018/08/15/ny-region/airbnb-legislation-albany.html>.

136. *Id.*

137. *Compare* N.Y. Assemb. 7520, Legis. Sess. (N.Y. 2018) (defining short-term rental units and implementing a registration process with the Division of Housing and Community Renewal), *with* S.F., CAL. ADMIN. CODE § 41A (defining “short-term residential rental” and allowing certain residents to register with the San Francisco’s Short-Term Residential Rental Registry).

138. Bockmann, *supra* note 108 (“To regulate Airbnb is to recognize Airbnb.”).

139. *See About HPD*, NYC HOUSING PRESERV. & DEV., <https://www1.nyc.gov/site/hpd/about/about-us.page> (last visited Feb. 2, 2019).

140. *Id.*

141. N.Y.C. Housing, *Current Affordable Housing Crisis*, *supra* note 4 (last visited Nov. 25, 2018).

happen, N.Y.C. needs a considerable amount of public investment and assistance.¹⁴² A big source of public investment may come in the form of an occupancy tax imposed on all short-term rentals.¹⁴³ To do so, N.Y.C. would need to legalize “unhosted” short-term rentals and provide a tax collection system for this activity.¹⁴⁴

Airbnb shares the same vision as N.Y.C. when it comes to protecting and promoting affordable housing.¹⁴⁵ The company has already removed listings that violate its “One Host, One Home” rule and has always welcomed working and collaborating with state legislature to fight the housing crisis.¹⁴⁶ Airbnb claims A-7520 will help achieve the humanitarian goals.¹⁴⁷

In fact, one of Airbnb’s main arguments in persuading N.Y.C. to legalize short-term rentals is the potential tax revenue that the state can collect.¹⁴⁸ While Airbnb directly collects taxes on behalf of the host and remits those taxes to San Francisco, it is not the same in N.Y.C.¹⁴⁹ Currently, Airbnb does not have a mechanism to ensure that the appropriate taxes are being remitted to N.Y.C. from short-term rental hosts in any of its five counties.¹⁵⁰ Instead, the company broadly advises hosts that multiple taxes and fees may apply to them.¹⁵¹ One of N.Y.C.’s taxes apply to transient occupation, known as the hotel room occupancy tax.¹⁵²

Many hosts are unfamiliar with occupancy taxes and are unlikely to collect them, even if Airbnb alerts them, because “many hosts do not see themselves as running hotels and thus believe they should not have to pay the tax.”¹⁵³ This creates confusion for those hosts who are legally providing short-term rentals and at the same time, provides an opportunity for bad actors to deceive the government from taxes as there is no mechanism in place to ensure Airbnb hosts are collecting, reporting, and remitting

142. *See id.*

143. Ferré-Sadurní, *supra* note 135.

144. *Sharing for a Stronger New York*, AIRBNB (Mar. 1, 2018), <https://www.airbnb.com/sharingforastrongerny/>.

145. *One Host, One Home: New York City (November 2018 Update)*, AIRBNB (Nov. 2018), <https://2sqy5r1jf93u30kwzc1smfqt-wpengine.netdna-ssl.com/wp-content/uploads/2018/11/One-Host-One-Home--November-2018-Update.pdf>.

146. *Id.* (“We look forward to working with leaders across the Empire State to pass A-7520/S-7182 and protect public safety and affordable housing, while fostering the economic opportunity of home sharing for New York families, businesses, and communities.”).

147. *See id.*

148. Ferré-Sadurní, *supra* note 135.

149. *See generally* Airbnb, *New York Traveling Help*, *supra* note 64 (advising that New York City and New York State impose many different taxes, and that Airbnb collects and remits taxes on behalf of hosts in some counties outside of New York City).

150. *See Occupancy Tax Collection and Remittance by Airbnb in New York*, AIRBNB, <https://www.airbnb.com/help/article/2319/occupancy-tax-collection-and-remittance-by-airbnb-in-new-york> (last visited Feb. 24, 2019) (list of counties where tax is collected by Airbnb).

151. *See* Airbnb, *New York Traveling Help*, *supra* note 64.

152. *See id.*

153. Speier, *supra* note 93, at 406.

occupancy taxes.¹⁵⁴ A-7520 would solve this problem because the bill defines: i) what is a short-term rental, ii) who is a short-term rental host, and iii) which transactions are subject to an occupancy tax.¹⁵⁵ The bill would also establish a procedure to ensure collection of any required taxes and “will authorize [Airbnb] to collect and remit occupancy taxes from guests on [] behalf of hosts.”¹⁵⁶ Additional N.Y.C. tax revenue would allow the city to fund more affordable housing projects.¹⁵⁷ Moreover, the bill would require hosts to carry insurance and establish a rule that would remove “bad actors after 3 rule violations”, thereby alleviating any concerns about safety and landlords creating their own illegal hotels.¹⁵⁸

In addition to being a strong source of tax revenue for the city, regulating short-term rentals can provide a stable revenue stream for hosts struggling to pay their rent and at the same time, effectively eliminate “bad actors”.¹⁵⁹ With many illegal N.Y.C. listings that are already posted on Airbnb, the number of bookings could be cut in half.¹⁶⁰ By requiring mandatory registration, hosts looking to offer short-term rentals will have to be vetted by the city to ensure that they are in good standing with the law before they are permitted to list their short-term rental unit.¹⁶¹ As it currently does in San Francisco, ideally, Airbnb would collaborate with N.Y.C. and deactivate listings that do not have the city’s approval.¹⁶² In order to prevent profiteering opportunities by certain tenants, A-7520 puts in place limitations on how much a short-term rental host of rent-stabilized apartments may charge so that the short-term rent generated does not exceed the annual legal rent.¹⁶³ Moreover, A-7520 adopts Airbnb’s “One Host, One Home” rule by prohibiting short-term rental hosts from operating more than one home as a short-term rental unit.¹⁶⁴

The legalization of short-term rentals would also produce competition in the rental market. In an area flushed with luxury rental apartments, the idea of new competition in the market may lower the prices of such apartments or

154. *See id.*

155. *See generally* N.Y. Assemb. 7520, Legis. Sess. (N.Y. 2018).

156. *Id.*

157. J.T. Minor, *Foregoing the Cleaver for the Scalpel: How New York Can Add Some Nuance to Its Short-Term Rental Laws*, 103 IOWA L. REV. 817, 834 (2018).

158. *See* Airbnb, *Sharing for a Stronger New York*, *supra* note 144.

159. *Id.*

160. Olivia Zaleski, *Airbnb’s Bookings Could Be Cut in Half by New Rule*, BLOOMBERG (July 24, 2018, 5:00 AM) <https://www.bloomberg.com/news/articles/2018-07-24/airbnb-s-nyc-bookings-could-be-cut-in-half-by-new-rule> (“The new legislation would dramatically cut Airbnb’s New York City bookings.”).

161. *See generally* N.Y. Assemb. 7520, Legis. Sess. (N.Y. 2018) (requiring that each short-term rental host register with the Division of Housing and Community Renewal which shall have the power to revoke the registration).

162. Kerr, *supra* note 72.

163. For the proposed language under Section 289(2), *see* N.Y. Assemb. 7520, Legis. Sess. (N.Y. 2018).

164. *Id.*

other comparable rentals.¹⁶⁵ In fact, although uncommon, hosts can also offer long-term rentals that can last from twenty-eight days and up to six months.¹⁶⁶

New York City's current affordable housing strategy is not effective, as middle income families still pay close to or above market rate for "affordable housing".¹⁶⁷ Despite N.Y.C. creating more affordable housing units, some units can hardly be classified as "affordable" insofar as more subsidized apartments are being set aside for higher income tenants than indigent tenants.¹⁶⁸ Moreover, Airbnb argues that short-term rentals do not have a significant impact on the housing supply, and blames the affordable housing crisis on "outdated zoning laws, longstanding political opposition to new development, and layers of bureaucracy accumulated over years."¹⁶⁹

Prohibiting Airbnb would also harm the tourist market because affordable and unique housing accommodations attract tourists that would have otherwise stayed for a smaller period of time due to expensive hotel prices.¹⁷⁰ With short-term rentals, guests are able to stay across different localities which generate business and economic growth for less concentrated neighborhoods.¹⁷¹ This would benefit the state's tourism industry and create additional growth for N.Y.C.¹⁷²

By legalizing short-term rentals and receiving an additional source of tax revenue from a popular business activity, N.Y.C. will have significant funding available to create more affordable houses. Ultimately, short-term rentals may provide a win-win situation—tenants have an extra source of income to help pay their rent, and N.Y.C. can use the tax revenue to provide housing for the homeless and lower income residents.¹⁷³

165. See Stefanos Chen, *The New Normal: It's a Buyer's Market*, N.Y. TIMES (Dec. 7, 2018), <https://www.nytimes.com/2018/12/07/realestate/the-new-normal-its-a-buyers-market.html>.

166. Julia Bunch, *Apartment Landlords Are Hopping Into Bed With Airbnb For Long-Term Rentals*, BISNOW (May 11, 2017) <https://www.bisnow.com/national/news/technology/as-long-term-rentals-gain-traction-with-airbnb-here-are-3-things-to-watch-74328>.

167. Cait Etherington, *Why Middle-Income New Yorkers are Turning Down Affordable Housing*, 6SQFT (Apr. 11, 2018), <https://www.6sqft.com/why-middle-income-new-yorkers-are-turning-down-affordable-housing/> (noting that New Yorkers have turned down opportunities to live in some affordable units because they cost more than their current market rent).

168. See *Tenants Under Siege*, *supra* note 3 (noting that in 2016, only 35 percent of new affordable units were for households making less than \$40,000 and that more units were set aside for tenants making between \$63,000 to \$143,000).

169. *Zillow Panel: Home Sharing Not Hurting Housing Supply, Affordability*, AIRBNB CITIZEN (Dec. 7, 2016), <https://www.airnbcitizen.com/zillow-panel-home-sharing-not-hurting-housing-supply-affordability/>.

170. See *Shared Opportunities: How Airbnb Benefits Communities*, *supra* note 26, at 2 (noting that generally, Airbnb rental prices are lower than hotel prices).

171. *Id.* at 2.

172. *Id.*

173. Minor, *supra* note 157.

V. WHY AN OUTRIGHT BAN ON SHORT-TERM RENTALS IS SUGGESTED

Legalizing short-term rentals would further exacerbate N.Y.C.'s affordable housing crisis given its large population and limited housing options.¹⁷⁴ First, there are many potential problems when someone decides to allow transient strangers into their home without being present, such as property damage or illegal activities.¹⁷⁵ While these are some of the inherent risks Airbnb hosts face when renting out their homes, these problems are often passed onto the property's neighbors and landlord by way of nuisance or receiving city code violations.¹⁷⁶ For neighbors, the constant stream of unvetted strangers can cause quality-of-life problems and safety concerns.¹⁷⁷ As for landlords, these problems exacerbate when they are unaware that their tenant is providing short-term rentals.¹⁷⁸

In addition to facing large fines from the city as a result of these violations, landlords have security concerns because guests are not vetted carefully and "liability for the use of short-term rentals usually falls to the owner of the property."¹⁷⁹ Therefore, short-term rentals unfairly present additional liability risks that the landlord did not foresee when they decided to rent to a particular tenant.¹⁸⁰ As a result, landlords may be more hesitant to rent out units to low or moderate-income individuals who may need to rely on short-term rental services to keep up with the bills.¹⁸¹

This becomes a bigger problem when landlords are unaware that their tenant is making a profit that far exceeds their current rent.¹⁸² Many leases already prohibit tenants from using short-term rental services because tenants

174. See Greenberg, *supra* note 124 (citing Scott M. Stringer, *The Impact of Airbnb on NYC Rents*, CITY OF N.Y. OFF. OF THE COMPTROLLER (May 3, 2018)).

175. See generally Harry Bradford, *Most Airbnb Rentals Go Perfectly. Then There Are These Horror Stories*, HUFFINGTON POST (July 29, 2014, 12:04 PM), https://www.huffingtonpost.com/2014/07/29/airbnb-horror-stories_n_5614452.html (reporting instances where guests damaged apartments and crimes occurred at the property).

176. See generally Lieber, *supra* note 107; Michael Capozzi, *Legal Issues Surrounding the Rise of Short-Term Rentals*, N.Y.L.J. (Sept. 29, 2017), https://www.ingramllp.com/media/1473/nylj_michael-capozzi.pdf ("Neighbors may also have legal claims . . . when property inhabitants engage in a continuous course of conduct which threatens the safety, health, welfare, or comfort of the neighborhood.").

177. Liz Krueger, *Answers for New Yorkers Concerned or Confused About the Illegal Hotel Law*, N.Y. ST. SENATE (May 27, 2014), <https://www.nysenate.gov/newsroom/articles/liz-krueger/answers-new-yorkers-concerned-or-confused-about-illegal-hotel-law>.

178. Capozzi, *supra* note 176.

179. The owner of the property indicates the owner of the building. See *id.*

180. See *id.*

181. See *How to Get Landlord Permission to Host on Airbnb*, LEARN AIRBNB, <https://learnairbnb.com/airbnb-landlord-permission-negotiation/> (last visited Dec. 26, 2018) ("Landlords see their long-term rental properties as a low risk, and moderate source of income," therefore, when a tenant "asks if they can let a large number of strangers come in and out of their space for their own profit . . . [the] property just went from low risk and modest income to high risk and modest income").

182. Capozzi, *supra* note 176.

must first obtain consent from their landlord before renting their apartment.¹⁸³ Therefore, when a tenant decides to use Airbnb without the landlord's consent, knowing that their landlord would likely deny their request anyway, they are putting themselves at risk of eviction.¹⁸⁴

When an apartment is rent-stabilized,¹⁸⁵ profits that are considered "substantial" can lead to a tenant being subject to an eviction without "any right to cure."¹⁸⁶ Generally, when a rent-stabilized tenant decides not to renew their lease or is evicted, thereby leaving the apartment vacant for new tenant, a landlord is entitled to a legal rent increase of up to 20% known as a "vacancy increase."¹⁸⁷ If the new amount exceeds a certain threshold, the apartment unit will no longer be subject to any rent increase restrictions and a landlord is free to charge at market rate.¹⁸⁸ This is known as "High-Rent Vacancy Deregulation."¹⁸⁹ High-Rent Vacancy Deregulation was found to be the biggest cause of apartment deregulation between 2005 and 2017.¹⁹⁰ Therefore, Airbnb presents a lucrative but risky opportunity to tenants which often result in a no-win situation: tenants engage in profiteering depriving the landlord of potential rent revenue while giving landlords an opportunity to evict the tenant and potentially remove an apartment from rent regulation.¹⁹¹ These eviction proceedings can be costly and can strip property owners of resources and incentives to invest in N.Y.C.'s affordable housing plans.¹⁹²

Additionally, Airbnb has a limited impact in terms of improving N.Y.C.'s affordable housing market.¹⁹³ While there are likely individuals who use Airbnb to supplement their income to help pay for rent, there are

183. Krueger, *supra* note 177.

184. *Id.*

185. *Frequently Asked Questions*, N.Y.C. RENT GUIDELINES BOARD, <https://www1.nyc.gov/site/rentguidelinesboard/resources/rent-stabilization.page#what> (last visited Nov. 24, 2018) (noting that the tenants of rent stabilized apartments are "protected from sharp increases in rent and have the right to renew their leases").

186. *See generally* Goldstein v. Lipetz, 150 A.D.3d 562, 570 (1st Dep't 2017) (holding that a rent stabilized tenant who earned \$33,592.00 over 338 nights while paying only \$19,536.40 in rent based on a per diem figure committed substantial profiteering).

187. *Fact Sheet #26: Guide to Rent Increases for Rent Stabilized Apartments in New York City*, N.Y. STATE DIV. OF HOUSING & CMTY. RENEWAL, at 2 (Aug. 2018), <http://www.nyshcr.org/Rent/FactSheets/orafac26.pdf> ("When a person rents a rent stabilized apartment for the first time, the owner and the tenant sign a [one or two year] vacancy lease."). The landlord may charge a 20 percent vacancy increase on the legal rent for two-year vacancy leases. *Id.*

188. *Id.* (noting that an apartment may be deregulated if the "rent has lawfully reached the Deregulation Rent Threshold").

189. Walker, *supra* note 29.

190. Scott M. Stringer, *The Gap is Still Growing: New York City's Continuing Housing Affordability Challenge*, CITY OF N.Y. OFF. OF THE COMPTROLLER (Sept. 26, 2018), <https://comptroller.nyc.gov/reports/the-gap-is-still-growing-new-york-citys-continuing-housing-affordability-challenge/>.

191. Pensabene, *supra* note 96.

192. *Id.*

193. COMPTROLLER REPORT, *supra* note 14.

also many others who see and use short-term rentals as a cash cow.¹⁹⁴ Sophisticated commercial landlords view Airbnb as a way of obtaining quick, timely, and secured “rental” payments in addition to having liability protection without the hassle of establishing a landlord-tenant relationship with the guest.¹⁹⁵ For this reason, landlords are further incentivized to use short-term rentals because they do not have to worry about going to court to seek rent from or evict a tenant, or recover damages to their property as Airbnb takes care of most of these issues.¹⁹⁶ Some landlords are even turning rent-stabilized apartments within their own building into individual illegal sublets while evading legal rent guidelines.¹⁹⁷ Despite Airbnb’s “One Host, One Home” rule, sophisticated landlords are able to circumvent this limitation by creating multiple accounts or having different affiliates operate listings for buildings that are actually owned by the same person.¹⁹⁸

Moreover, Airbnb mainly benefits commercial landlords and not local New Yorkers who wish to supplement their income because commercial landlords are able to impose more competitive rates in more desirable neighborhoods.¹⁹⁹ In turn, individuals have no choice but to cut their own rental rates in order to compete for short-term guests.²⁰⁰ As a result, commercial operators earn more than 28% of Airbnb revenue in N.Y.C. despite comprising only 12% of all hosts.²⁰¹ Legalizing short-term rentals would actually benefit those landlords who take advantage of N.Y.C.’s lax approach more so than it would individuals relying on home sharing to pay their bills.²⁰²

194. Ariel Stulberg, *The Airbnb Question: What’s A Broker to Do?*, THE REAL DEAL (Mar. 17, 2016), <https://therealdeal.com/2016/03/17/the-airbnb-question-whats-a-broker-to-do/> (noting that brokers have been coming across many clients who want to “cash cow their investment” and look to purchase units that they can market through short-term rental services).

195. Airbnb provides hosts with free liability insurance of up to \$1 million to protect against personal injury or property damage claims. *Host Protection Insurance*, AIRBNB, <https://www.airbnb.com/host-protection-insurance> (last visited Dec. 21, 2018).

196. See Matthew Rosendahl, *iTenant: How The Law Should Treat Rental Relationships In The Sharing Economy*, 59 WM. & MARY L. REV. 731, 742 (2017) (noting that Airbnb serves “landlords’ interests in receiving on-time payments and avoiding eviction proceedings”).

197. See generally Tanay Warekar, *City sues Hell’s Kitchen landlord running illegal Airbnb rentals*, CURBED N.Y. (June 7, 2018), <https://ny.curbed.com/2018/6/7/17437862/airbnb-illegal-nyc-lawsuit-hells-kitchen-rent-stabilized> (reporting that New York City sued a landlord who offered short-term rentals in seven different rent stabilized buildings).

198. Julia Marsh, *City Smacks Landlord with Lawsuit for Illegal Airbnb Rentals*, N.Y. POST (May 14, 2017), <https://nypost.com/2017/05/14/city-smacks-landlord-with-lawsuit-for-illegal-airbnb-rentals/> (reporting one incident where a landlord worked with several aliases and created different profiles to rent out apartments at multiple buildings on Airbnb).

199. Alastair Boone, *What Airbnb Did to New York City*, CITYLAB (Mar. 5, 2018), <https://www.citylab.com/equity/2018/03/what-airbnb-did-to-new-york-city/552749/>.

200. *Id.*

201. MCGILL UNIV. REPORT, *supra* note 14.

202. *Id.* at 7 (reporting that 10 percent of Airbnb hosts in New York generated 48 percent of all revenue in 2017).

Furthermore, Airbnb favorites hosts as evidenced by the website charging nominal host service fees compared to fees paid by the guest.²⁰³ Airbnb effectively subsidizes rentals for hosts because the company understands that in order to flourish, there needs to be a constant need for demand, and one method in creating the demand is to have a highly concentrated supply of available rentals where guests can pick and choose.²⁰⁴ This creates a greater incentive for people to utilize Airbnb and rent their homes despite the many risks associated with short-term rentals.²⁰⁵ Moreover, there are many nuanced zoning restrictions and safety standards on short-term rentals which are left exclusively for hotels.²⁰⁶ At the very same time, apartments are being removed from the housing supply as they are being rented to “high-paying tourists instead of full-time residents.”²⁰⁷

Current New York laws are ineffective and are proving tough to effectively enforce.²⁰⁸ Specifically, the law deters landlords from reporting tenants who are illegally listing their units on Airbnb because, ultimately, landlords are held “responsible for any illegal usage of their apartments, even when the usage is tenant-made.”²⁰⁹ Rather than legalizing short-term rentals, N.Y.C. should instead issue an outright ban of all short-term rentals within the five boroughs. As Airbnb’s popularity continue to grow, short-term rental listings are skyrocketing, driving up rental and sale prices of all housing.²¹⁰ More housing units are being purchased by overseas investors who see the surge of Airbnb as an economic opportunity.²¹¹ New York City is the densest city in the United States, so it is not surprising that Airbnb hosts view short-term rentals within the city as a lucrative investment.²¹² Real estate investors view Airbnb as an excellent revenue source thereby driving up sale prices of homes that they envision will be used for short-term rentals.²¹³ As a result,

203. Stephanie J. Knightly, *Regulating Innovation: The Positive Economic Impact of Taxing Airbnb Like the Hotel Industry*, 51 SUFFOLK U. L. REV. 457, 461 (2018).

204. *Id.*

205. See Bradford, *supra* note 175.

206. Speier, *supra* note 93, at 393.

207. Jennifer Peltz, *Airbnb Critics Argue Program Makes Housing More Expensive for People Who Live in New York City; Proponents Say it Helps Pay Bills*, NBC N.Y. (Jan. 20, 2015), <https://www.nbcnewyork.com/news/local/NYC-Airbnb-Housing-Short-Term-Rentals-Economy-289118361.html>.

208. Walker, *supra* note 94.

209. Matthew Rothstein, *New York City is Fining Landlords Who Report Airbnb-Using Tenants*, BISNOW (July 11, 2017), <https://www.bisnow.com/new-york/news/multifamily/new-york-city-suing-landlords-airbnb-76451> (reporting that some landlords have been fined \$3,400 by the city despite reporting its own tenant using Airbnb illegally).

210. Nathan Tempey, *Lights Out: New York City’s Ghost Apartments Multiply*, BRICK UNDERGROUND (Mar. 14, 2018), <https://www.brickunderground.com/rent/pied-a-terre-airbnb-affordable-housing-crisis-nyc>.

211. *Id.*

212. 2019 U.S. Population, *supra* note 15.

213. Tempey, *supra* note 210.

the constrained supply of available housing for rent drives up prices.²¹⁴ The artificial inflation of prices is due to the lucrative opportunities that investors see with Airbnb and the possibility of short-term rentals being legal.²¹⁵

In addition to creating a black market for converting residential buildings into makeshift hotels, short-term rentals threaten public safety and the quality of life in N.Y.C. neighborhoods.²¹⁶ For example, noise and safety concerns have a negative impact on neighboring tenants who may not want to deal with these issues on a nightly basis.²¹⁷ This could lead to tenants moving out of their current homes and having to find another residence in what is already a tight housing market.²¹⁸

The drawback of an outright prohibition on short-term rentals would be the loss of potential tax revenue that N.Y.C. could otherwise collect and use to address its affordable housing crisis.²¹⁹ Furthermore, prohibiting all short-term rentals in N.Y.C. may lead to more tenant evictions due to the lack of supporting income that would have otherwise come from utilizing these services.²²⁰ Although Airbnb argues that legalization of short-term rentals can generate additional tax revenue for the state, N.Y.C.'s vast population and housing crisis raise issues that cannot be solved simply with money.

So far, N.Y.C.'s plan to develop affordable housing has been ineffective.²²¹ Specifically, some of its development efforts comprise of promoting new construction by giving private developers tax breaks to build a certain number of "affordable" rental units within their buildings.²²² However, what N.Y.C. considers "affordable" is relative.²²³ Indeed, more units are constructed for higher-middle income tenants than low and moderate income residents.²²⁴ The problem is, the housing market in N.Y.C. is already glutted with luxury units aimed at higher income individuals.²²⁵ As

214. *Id.*

215. *Id.*

216. *Assembly Member Linda B. Rosenthal and Senator Andrew J. Lanza Unveil New Legislation to Crack Down on Airbnb & Illegal Hotel Operators*, SHAREBETTER, <http://www.sharebetter.org/story/assembly-member-linda-b-rosenthal-and-senator-andrew-j-lanza-unveil-new-legislation-to-crack-down-on-airbnb-illegal-hotel-operators/> (last visited Nov. 24, 2018).

217. *See Pensabene, supra* note 96.

218. *See id.*

219. Ferré-Sadurní, *supra* note 135.

220. *One Host, One Home: New York City (November 2018 Update)*, *supra* note 145.

221. *See Dana Schulz, Middle-Income Housing Lottery in Bed-Stuy Saves Renters Close to Nothing*, 6SQFT (Apr. 19, 2018), <https://www.6sqft.com/middle-income-housing-lottery-in-bed-stuy-saves-renters-close-to-nothing/>.

222. *See Tenants Under Siege, supra* note 3 ("The 'build' part of de Blasio's build-or-preserve housing plan gives private developers tax breaks.").

223. *Id.* ("The government deems housing affordable when a household spends no more than 30 percent of its income on rent.")

224. *See id.* (noting that in 2016, only thirty-five percent of 6,844 new affordable units "were for households making less than \$40,000").

225. *Id.*

a result, N.Y.C. is offering subsidies that are not being used to efficiently address its housing needs.

Instead, N.Y.C. should focus on preserving low-cost units and protecting its residents from increasing housing costs that will result if long-term residential buildings are converted into short-term use.²²⁶ Indeed, even if legalizing short-term rentals helps crack down on hosts operating multiple buildings and apartments, more issues arise. Juxtaposed with San Francisco's law, N.Y.C. will likely have difficulty verifying that a host has lived in the home long enough to qualify for short-term renting or which nights a host is residing with his guests to be considered an unhosted rental?²²⁷ Furthermore, short-term rentals will encourage landlords to charge higher rents when they are aware that tenants might host their homes on Airbnb.²²⁸ The greatest concern for N.Y.C. if short-term rentals are legalized, is the commercialization of short-term rentals in a very dense market.²²⁹ Homes and apartments rented on a short-term basis earned more than 50% than ones rented long-term (over thirty days).²³⁰ Short-term rentals are lucrative, prompting individuals to pursue hosting short-term rentals in the long run and making a substantial profit, distinct from individuals intermittently using these services to supplement their income to help pay for rent.²³¹ More people will seek to live in multi-bedroom apartments to rent out to other short-term guests instead of looking for roommates.²³² Consequently, these homes that would otherwise be available to N.Y.C. residents seeking a permanent home are instead rented to tourists looking for a temporary stay.²³³

CONCLUSION

Based on the foregoing reasons, while the new disclosure law is certainly helpful in addressing New York's affordable housing crisis, the end result will likely be a full legalization of short-term rentals. Despite some upsides of legalization, such benefits are negligible and, overall, detrimental to the affordable housing crisis. A one-size-fits-all solution to the short-term rental issue would be to simply prohibit short-term rentals within all five boroughs. Housing prices are already soaring; putting extra money into N.Y.C.'s budget

226. Speier, *supra* note 93, at 419.

227. See Jennifer Fieber & Charley Goss, *Fewer Airbnbs means good news for SF; now address other short-term-rental problems*, S.F. CHRONICLE (Feb. 6, 2018, 4:23pm), <https://www.sfchronicle.com/opinion/openforum/article/Fewer-Airbnbs-means-good-news-for-SF-now-address-12556374.php>.

228. *Id.*

229. Rosendahl, *supra* note 196.

230. MCGILL UNIV. REPORT, *supra* note 14, at 2-3 ("The median host of a frequently rented entire-home/apartment listing earned 55% more than the median long-term rent in its neighborhood last year.")

231. *Id.* at 2 (noting that 12,200 entire home listings were rented for 60 days or more and 5,600 entire-home listings were rented for 120 days or more).

232. Fieber & Goss, *supra* note 227.

233. *Id.* at 25.

and the pockets of only an insignificant number of residents do not outweigh the adverse impacts of short-term rentals on the housing market. Allowing short-term rentals would only create more problems and mainly benefit consumers who are contributing to the housing crisis, not alleviating it. Therefore, an absolute prohibition of short-term rentals would move New York City closer to solving its limited housing issue.

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