

Foregoing the Cleaver for the Scalpel: How New York Can Add Some Nuance to Its Short-Term Rental Laws

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ABSTRACT: In 2010, New York passed a law that made it illegal for residents living in areas zoned as class A multiple dwelling to rent their homes on a short-term basis using services like Airbnb. Just six years later, New York went even further and prohibited the advertisement of these short-term rentals. This Note will argue that New York's short-term rental laws go too far in banning short-term rentals outright. In addition, this Note will discuss solutions for how New York can provide greater nuance to these laws by simultaneously addressing the legislature's primary concerns with short-term rentals and allowing New York to reap the tax and tourism benefits that these rentals provide. These solutions include (1) imposing at least the standard hotel tax on short-term renters and allowing services like Airbnb to facilitate the collection of that tax; (2) distinguishing between commercial and non-commercial short-term renters (allowing the latter and outlawing the former); and (3) enabling individual neighborhoods to opt out of allowing non-commercial short-term rentals via a petition and subsequent hearing.

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I. INTRODUCTION

In 2010 and 2016, the New York State Legislature passed two short-term rental laws that make it illegal for New York residents living in areas zoned as class A multiple dwelling to rent out their homes using services like Airbnb.¹ These short-term rental laws are problematic in a number of ways. First, these laws prevent New York from reaping the benefits of a significant amount of tax revenue that could go not only to ensuring the proper use of short-term rentals but also to other important social programs like homeless services and low-income housing.² Second, these laws take away an income stream upon

1. S.B. 6873, 2009 Leg., 234th Sess. (N.Y. 2010) (deleting “as a rule” from New York State Multiple Dwelling Law § 4); Assemb. B. 8704, 2015 Leg., 238th Sess. (N.Y. 2016) (amending New York State Multiple Dwelling Law § 4 to make advertisement of short-term rentals illegal). New York Governor Andrew Cuomo signed the latter bill into law only very recently, and Airbnb has now filed a suit against the state of New York. Katie Benner, *Airbnb Sues over New Law Regulating New York Rentals*, N.Y. TIMES (Oct. 21, 2016), <http://www.nytimes.com/2016/10/22/technology/new-york-passes-law-airbnb.html>. There is evidence that New York has recognized a distinction between commercial and non-commercial hosts since at least 2014, but the legislature did not attempt to use any such distinction in the bill enacted in 2016. See Henry Grabar, *Everyone Is Wrong in the Battle Between New York City and Airbnb*, SLATE: MONEYBOX (Oct. 24, 2016, 6:31 PM), http://www.slate.com/blogs/moneybox/2016/10/24/some_new_york_airbnb_hosts_may_be_fined_under_a_new_law.html. This bill has further incited protests by many Airbnb hosts. Anisa Purbasari, *Airbnb Hosts Protest New Rental Law Outside New York Governor’s Office*, VERGE (Oct. 26, 2016, 4:32 PM), <http://www.theverge.com/2016/10/26/13421874/airbnb-rally-law-home-sharing-new-york-governor-cuomo>.

2. The estimation for this lost revenue ranges from \$20 to \$60 million. Compare *Airbnb to Start Charging Hotel Taxes in a Handful of Cities*, IOWA PUB. RADIO (Apr. 18, 2014, 6:13 PM) [hereinafter *Airbnb Charging Taxes*], <http://iowapublicradio.org/post/airbnb-start-charging-hotel-taxes-handful-cities#stream/0> (estimating a loss of \$20 million), with Reuters, *New York Bill Would Ban Airbnb Listings for Some Short-Term Rentals*, NBC NEWS (June 21, 2016, 7:00 AM), <http://www.nbcnews.com/tech/tech-news/new-york-bill-would-ban-airbnb-listings-some-short-term-n596111> (estimating that the company paid \$60 million in taxes before the short-term rental laws were passed). As this Note will address, these

which many families have come to depend.³ Third, these laws reduce the amount of money that comes into New York via tourism. This is especially true since some consumers—particularly international ones—see many other U.S. cities as vacation substitutes and prefer services like Airbnb due to their perceived price and quality advantage over hotels.⁴

This Note proposes legalizing short-term rentals in New York and seeks to address the primary concerns of the New York State Legislature by ensuring that certain safeguards are in place to prevent the more pernicious side effects of short-term rentals. First, in addressing the New York Legislature's concern that short-term rentals would lead to "unsafe conditions,"⁵ this Note proposes that New York apply the standard New York hotel tax rate to short-term rentals and to have Airbnb facilitate the collection of that tax to ease administrative costs. This tax revenue could then fund programs that ensure conditions remain safe. Second, in response to the New York Legislature's concern that allowing short-term rentals would lead to increased housing costs for lessees,⁶ this Note proposes a distinction between commercial and non-commercial short-term renters. This distinction would make it legal for non-commercial users to rent out their homes but not for commercial users who can drive up housing costs much more significantly.⁷ In doing so, this Note acknowledges that the legislature would need to create a department of short-term rentals for enforcement and registration similar to that which San Francisco has created.⁸ Last, this Note addresses the New York Legislature's concern that

estimates assume that New York would apply only its standard hotel tax rate. *See infra* Part III.A. If it decided to charge a higher rate, the losses would obviously be greater.

3. *See generally* GENE SPERLING, HOW AIRBNB COMBATS MIDDLE CLASS INCOME STAGNATION, https://1zxiwovqxoorypvz3jkczauf-wpengine.netdna-ssl.com/wp-content/uploads/2015/06/Middle-ClassReport-MT-061915_r1.pdf (last visited Oct. 25, 2017) (discussing how Airbnb income impacts middle-class earnings).

4. Christopher Mossa, *Airbnb Under Attack in New York*, UPTOWN RADIO (May 9, 2014), <http://uptownradio.org/2014/05/09/airbnb-under-attack-in-new-york> (detailing the price advantage that short-term rentals have over hotels); Nick Vivion, *Ranking of US Destination Underscores Intense Competition for Thriving Tourism*, TNOOZ (July 22, 2014), <https://www.tnooz.com/article/ranking-us-destination-underscores-intense-competition-thriving-tourism> (ranking U.S. tourism destinations by revenue and concluding that Los Angeles had the best overall year for tourism).

5. Will Rinehart, *New York Law Would Wipe out Half a Billion Dollars of Value for Airbnb Hosts*, AM. ACTION F. (July 21, 2016), <https://www.americanactionforum.org/research/new-york-law-wipe-half-billion-dollars-value-airbnb-hosts>. This article will be referenced throughout this Note as a means of demonstrating the New York State Legislature's primary concerns in passing these short-term rental laws.

6. *Id.*

7. Ariel Stulberg, *Airbnb Probably Isn't Driving Rents up Much, at Least Not Yet*, FIVETHIRTYEIGHT (Aug. 24, 2016, 7:00 AM), <http://fivethirtyeight.com/features/airbnb-probably-isnt-driving-rents-up-much-at-least-not-yet>. This article further noted these commercial uses of Airbnb "have drawn the most scrutiny from critics such as Sens. Elizabeth Warren, Diane Feinstein and Brian Schatz." *Id.*

8. *About Short-Term Rentals*, CITY & COUNTY OF S.F., <https://shorttermrentals.sfgov.org/about> (last visited Oct. 25, 2017).

short-term rentals would disrupt the quiet of residential neighborhoods⁹ by suggesting that the Legislature provide these neighborhoods with the ability to “opt out” of the legalization of short-term rentals. This “opt-out” would require a clearly worded petition followed by a hearing presided over by an independent adjudicator. The adjudicator would weigh the interests of the proponents and opponents of short-term rentals and then issue a determination on whether these short-terms would be allowed. In addressing the three primary concerns of the New York Legislature, this proposal allows New York to have its cake and eat it too. That is, this proposal ensures that the less desirable effects of short-term rentals are mitigated while also allowing New York to reap the tax and tourism benefits of short-term rentals.

II. BACKGROUND

In 2010, New York State Senate Bill S6873B (“S.B. 6873”) amended section 4(8)(a) of New York’s Multiple Dwelling Law and made it illegal for many New York City residents to rent out their homes using short-term rental services like Airbnb.¹⁰ The Bill banned rentals that are less than 30 days in homes zoned as class A multiple dwelling if the owners do not inhabit the residence with the sub-lessee for that period.¹¹ For example, if an owner of an apartment uses Airbnb to rent that apartment to someone for a weekend and the owner is not present during that weekend, the owner is violating New York law.¹² As one might imagine, this means that the vast majority of New York residents who rent their homes using Airbnb and other short-term rental services are violating the law.¹³ In fact, over half of New York City’s residents live in areas designated as class A multiple dwelling.¹⁴ Multiple dwelling buildings are dwellings “which [are] either rented, leased, let or hired out, to be occupied, or [are] occupied as the residence or home of three or more families living independently of each other.”¹⁵ Class A multiple dwellings are “multiple dwelling[s] which [are] occupied, as a rule, for permanent residence purposes.”¹⁶

Recently, Airbnb spearheaded an effort to mitigate this dilemma that renters faced by providing its users basic information on the zoning and

9. Rinehart, *supra* note 5.

10. S.B. 6873, 2009 Leg., 234th Sess. (N.Y. 2010).

11. *Id.*

12. This example, of course, assumes that the owner’s apartment building is zoned as a class A multiple dwelling.

13. *Proposed N.Y. State Law Would Crack Down on Illegal Airbnb Rentals*, CBS N.Y. (June 27, 2016, 10:13 PM), <http://newyork.cbslocal.com/2016/06/27/illegal-airbnb-rentals> (stating that “[a] new report issued Monday claims that 55 percent of unique Airbnb listings in New York City are for an entire apartment or home and likely violate state law”).

14. *See* N.Y. STATE OFFICE OF THE ATTORNEY GEN., AIRBNB IN THE CITY 12 (2014).

15. N.Y. MULT. DWELL. LAW § 4(7) (Consol. 2002).

16. N.Y. MULT. DWELL. LAW § 4(8)(a).

regulatory laws of different cities.¹⁷ The fact remains, however, that it has been illegal for New York residents of housing units zoned as class A multiple dwelling to rent their homes using Airbnb since the New York Senate passed S.B. 6873 in June of 2010.¹⁸ Further, to aid in enforcement of S.B. 6873, the New York Legislature passed Senate Bill A8704.¹⁹ This Bill made merely listing one's home for short-term rental punishable with fines of up to \$7,500.²⁰ These laws are different from San Francisco's and Chicago's short-term rental laws.²¹ These cities have opted to impose rules and regulations upon short-term renters but have essentially allowed the short-term rental market to exist and even thrive.²² These laws have provided the cities with additional tax revenue while simultaneously balancing the interests of consumers, renters, and the surrounding community.

A. THE LOOPHOLE THAT LED TO LAW

The New York Senate passed S.B. 6873 in response to *City of New York v. 330 Continental LLC*, which provided a loophole for those who wanted to rent their homes for short periods.²³ The court in that case held that class A multiple dwelling housing units could rent out a minority of their units for transient occupancy.²⁴ To come to this conclusion, the court interpreted section 4(8)(a) of New York's Multiple Dwelling Law²⁵ and reasoned that "the statute's use of the phrase 'as a rule' indicates that a secondary use of the building, different from the specified primary use, is permitted."²⁶ That secondary use, according to the court, could include renting the residence

17. *What Regulations Apply to My City?*, AIRBNB, <https://www.airbnb.com/help/article/961/what-regulations-apply-to-my-city> (last visited Oct. 25, 2017).

18. S.B. 6873, 2009 Leg., 234th Sess. (N.Y. 2010).

19. Assemb. B. 8704, 2015 Leg., 238th Sess. (N.Y. 2016).

20. *Id.*

21. See CHI., ILL., MUNICIPAL CODE OF CHICAGO ch. 3-24-030 (2015); S.F., Cal., Ordinance 218-14 (Oct. 7, 2014), <http://www.sfbos.org/ftp/uploadedfiles/bdsupvrs/ordinances14/00218-14.pdf>; Kim-Mai Cutler, *San Francisco Legalizes, Regulates Airbnb with 7-4 Vote, Lots of Amendments*, TECHCRUNCH (Oct. 7, 2014), <https://techcrunch.com/2014/10/07/san-francisco-airbnb/>; Chris Lentino, *Chicago's New Airbnb Ordinance Greets Visitors to the City with a 21 Percent Tax Bill*, ILL. POL'Y (June 22, 2016), <https://www.illinoispolicy.org/chicago-city-council-enacts-airbnb-regulations>; Carolyn Said, *Supes Back 'Airbnb Law' to Allow Short-Term Rentals, with Limits*, SFGATE (Oct. 8, 2014, 8:02 AM), <http://www.sfgate.com/news/article/Supervisors-approve-Airbnb-law-5807858.php>.

22. See CHI., ILL., MUNICIPAL CODE OF CHICAGO ch. 3-24-020; S.F., Cal., Ordinance 218-14; Cutler, *supra* note 21; Lentino, *supra* note 21.

23. *City of New York v. 330 Cont'l LLC*, 873 N.Y.S.2d 9, 13 (App. Div. 2009); Leonard Cohen, *Airbnb and Municipal Zoning Regulation*, HOST COMPLIANCE, <https://hostcompliance.com/resources-gallery/2016/6/5/airbnbregulation> (last visited Oct. 25, 2017).

24. *330 Continental LLC*, 873 N.Y.S.2d at 13.

25. This statute, as it existed at the time of this decision, defined a "class A" multiple dwelling as a multiple dwelling "occupied, as a rule, for permanent residence purposes." *330 Continental LLC*, 873 N.Y.S.2d at 13. The key language for this decision, as will be shown, dealt with the phrase "as a rule."

26. *Id.*

out on a short-term basis using services like Airbnb. In response to this holding, the New York Senate passed S. 6873-B, which was accompanied by a memorandum from the Bill's sponsor stating:

The only “secondary” transient use of class A dwelling units allowed would be use by the permanent occupants natural persons, not corporate entities—for house guests, boarders, roomers or lodgers living within the household of the permanent occupants or for circumstances such as the occasional pet or apartment “sitter” when the permanent occupants are absent for personal reasons, such as vacation or for medical treatment.²⁷

Moreover, the New York Senate expressly deleted the phrase “as a rule” from the Multiple Dwelling Laws, making it clear in the process that it was overturning the court’s decision in *330 Continental LLC*.²⁸ Thus, S.B. 6873 precluded New York residents from using this court-constructed loophole.

The New York Senate’s uneasiness with services such as Airbnb primarily stems from three concerns. The first concern deals with unsafe conditions brought about by the emergence of an illegal black market for hotels.²⁹ In regard to this first concern, New York City provided sworn affidavits from a fire chief and building inspector to support its claim that the use of Airbnb would lead to less safe conditions.³⁰ Some, however, have pointed out that the report making this claim lacked statistical evidence demonstrating how illegal hotels would lead to unsafe conditions.³¹ Nevertheless, supporters of the Bill contended that these unsafe conditions would arise due to this purported black market.³² Indeed, S.B. 6873 made this concern explicit from the outset by claiming that “[s]ome owners of class A multiple dwellings have been illegally using [c]lass A dwelling units as transient hotels.”³³

27. *Brookford, LLC v. Penraat*, 8 N.Y.S.3d 859, 870–71 (Sup. Ct. 2014) (quoting memo from bill sponsor, Liz Krueger).

28. S.B. 6873, 2009 Leg., 234th Legis. Sess. (N.Y. 2010).

29. Rinehart, *supra* note 5. San Francisco also explicitly stated that it passed its short-term rental laws in response to this concern over an illegal black market and the rise in prices that this illegal market invariably creates. Patrick Hoge, *San Francisco Supervisors Vote to Legalize Airbnb*, S.F. BUS. TIMES (Oct. 8, 2014, 9:10 AM), <http://www.bizjournals.com/sanfrancisco/blog/2014/10/san-francisco-supervisors-give-okay-to-airbnb.html>.

30. N.Y. STATE OFFICE OF THE ATTORNEY GEN., *supra* note 14, at 21–37. The New York Legislature used this report as a “guidepost” in its debates for the more recent Bill A8704 discussed later on. *See* Rinehart, *supra* note 5.

31. Rinehart, *supra* note 5.

32. *Id.*

33. S.B. 6873, 2009 Leg., 234th Sess. (N.Y. 2010). Claiming that these “transient hotels” were an illegal use was probably a bit disingenuous in light of the court’s holding in *330 Continental LLC* that short-term rentals were determined to be a valid secondary use of housing units zoned as class A multiple dwelling. *See* *City of New York v. 330 Cont’l LLC*, 873 N.Y.S.2d 9, 13 (App. Div. 2009).

The New York Senate's second concern is that allowing short-term leases would increase housing costs for lessees.³⁴ The source of this concern stems from the potential for commercial residents to buy up housing to take advantage of the greater rate of return on short-term leases; this, in turn, could lead to a drop in longer-term housing supply and a corresponding rise in rent.³⁵ Airbnb published its own study that determined its services were responsible for a \$19 per month increase in rent for one-bedroom apartments in San Francisco.³⁶

The last concern is likely one of the most common among many residents who oppose short-term rentals: that the influx of out-of-town, short-term lessees would disrupt the quiet of their neighborhoods.³⁷ Yet again, however, there are some who feel this concern is not borne out by the facts and that this kind of disruption would not take place in many neighborhoods.³⁸

What made these concerns worse, in the eyes of the legislature, was that many renters were not being properly deterred from using services like Airbnb under the original version of the short-term rental law. For instance, in spite of this law, a report by New York State Attorney General Eric T. Schneiderman indicated that short-term rentals increased tenfold between 2010 and 2014.³⁹ Another study found that the city issued only 465 fines between January 2014 and May 2016 and allowed more than half of the repeat offenders to pay half or none of that fine.⁴⁰ One reason for the ineffectiveness of enforcement was "the inability to know who is renting and when they are doing so."⁴¹ In other words, because the statute essentially required state officials to catch short-term renters red-handed, any attempts to punish these renters were substantially thwarted. These reports and other figures—including that the city issued only 465 fines between January 2014 and May 2016 and allowed more than half of the repeat offenders to pay half or none of that fine⁴²—led many to determine that S.B. 6873 needed a supplemental law that aided enforcement.⁴³ S.B. 6873 thus proved ineffective due to its inability to adequately enforce its own provisions.

34. See Rinehart, *supra* note 5.

35. See Reuters, *supra* note 2. San Francisco again noted that it shared this concern when passing its ordinance to legalize Airbnb. Hoge, *supra* note 29.

36. Rinehart, *supra* note 5.

37. *Id.*

38. *Id.*

39. N.Y. STATE OFFICE OF THE ATTORNEY GEN., *supra* note 14, at 2. In fact, the report labeled this increase "explosive growth" and pointed out that, in 2014 alone "revenue to Airbnb and its hosts from private short-term rentals in New York City is expected to exceed \$282 million." *Id.*

40. Michael Virtanen, *Governor Cuomo Reviewing Bill to Establish Fines for New York Airbnb Users*, INS. J. (Aug. 30, 2016), <http://www.insurancejournal.com/news/east/2016/08/30/424792.htm>.

41. Cohen, *supra* note 23.

42. Virtanen, *supra* note 40.

43. *Id.*

In response, the New York Senate passed Senate Bill A8704 (“A8704”), which makes it unlawful for renters even to list homes zoned as class A multiple dwelling for short-term leases.⁴⁴ The New York Senate passed this Bill on June 17, 2016, by a landslide 56–6 vote.⁴⁵ Under this law, owners who put their homes zoned as class A multiple dwelling up for short-term rental are subject to a minimum of \$1,000 and maximum of \$7,500 in fines.⁴⁶ Further, these fines are assessed to all residents and not merely to building owners and landlords.⁴⁷ This law solves the perceived problem of enforceability described above—i.e., that it is difficult to catch short-term renters red-handed—by making it immaterial whether renting in fact occurred since listing one’s apartment for short-term rental is *per se* sufficient to warrant a fine. Critics of this law, such as Airbnb’s head of New York Public Policy, Josh Meltzer, claim that the law “is an attack on the responsible users of the service” because “[i]t would have been very easy to draft the bill in a way that differentiated between middle-class people sharing their permanent home and the commercial operators who run illegal hotels.”⁴⁸ On October 21, 2016, New York Governor Andrew Cuomo indicated the New York Government’s distaste for short-term rentals by officially signing A8704 into law.⁴⁹

B. NEW YORK CITY’S APPROACH COMPARED TO SAN FRANCISCO AND CHICAGO

Although San Francisco and Chicago shared similar concerns with New York City, these cities took much more nuanced approaches that allowed the short-term rental market to remain and even thrive. In contrast to New York City’s approach, San Francisco passed legislation allowing non-commercial renters to use Airbnb to rent out their homes under short-term leases.⁵⁰ The stipulations for this allowance, however, include “adopt[ing] regulations that require permanent residents to secure a business license from the City, [and requiring residents] to show that they have occupied their homes for 275 days

44. Assemb. B. 8704, 2015 Leg., 238th Sess. (N.Y. 2016).

45. Amir Nasr, *New York Law Targeting Airbnb Could Provoke \$500 Million Loss, Study Says*, MORNING CONSULT (July 21, 2016, 4:29 PM), <https://morningconsult.com/2016/07/21/new-york-law-targeting-airbnb-provoke-500-million-losses-study-says>.

46. N.Y. Assemb. B. 8704. Under this law, the minimum fine for a first-time offender is \$1,000, and the penalties are tiered up to the maximum of \$7,500. *Id.*

47. N.Y. Assemb. B. 8704.

48. Nasr, *supra* note 45.

49. See Joshua Brustein & Christian Berthelsen, *N.Y. Governor Cuomo Signs Bill to Fine Illegal Airbnb Hosts*, BLOOMBERG: TECH. (Oct. 21, 2016, 5:44 PM), <https://www.bloomberg.com/news/articles/2016-10-21/n-y-governor-cuomo-signs-bill-to-fine-illegal-airbnb-hosts>.

50. S.F., Cal., Ordinance 218-14 (Oct. 7, 2014), <http://www.sfbos.org/ftp/uploadedfiles/bdsupvrs/ordinances14/00218-14.pdf>; Cutler, *supra* note 21; Said, *supra* note 21. It is also worth mentioning that San Francisco nearly reduced the amount of days per year that short-term renters could rent their homes from 90 down to 60. Greg Bensinger, *San Francisco Mayor Vetoes Airbnb Bill*, WALL ST. J. (Dec. 8, 2016, 11:36 PM), <https://www.wsj.com/articles/san-francisco-mayor-vetoes-airbnb-bill-1481254855>. However, San Francisco mayor Ed Lee vetoed the bill citing that the law would incentivize people to ignore the law just like New Yorkers did under New York’s original short-term rental laws. *Id.*

out of the last year, with a limit of 90 days of occupancy permitted by Airbnb customers.”⁵¹ The statute imposes a number of other regulations,⁵² but the end result is that, with some limited exceptions, consumers are allowed to use services like Airbnb and residents are allowed to rent their homes.⁵³ Moreover, to ensure compliance with these regulations, San Francisco has provided short-term renters with a “Short-Term Residential Rental Starter Kit” and “Guide” that are available to download online.⁵⁴ San Francisco has also created Short-Term Residential Rental Registry,⁵⁵ which is responsible for, among other things, overseeing enforcement of short-term rental regulations and providing information to the public on San Francisco’s short-term rental laws.⁵⁶

Chicago has taken a slightly different approach than San Francisco. Among other things, Chicago increased taxes for Airbnb renters and allowed certain neighborhoods to outlaw Airbnb listings via petition.⁵⁷ Unlike San Francisco, Chicago opted to increase the tax levied on hotels by 4% instead

51. Cohen, *supra* note 23.

52. See S.F., Cal., Ordinance 218-14 (requiring, among other things, the creation of a short-term rental department and an application fee); Cohen, *supra* note 23 (noting further that “[t]he City also developed a special department to assist with, regulate, and enforce short-term rentals. Additionally, there are new reporting, recordkeeping, and safety regulations that govern short-term listings. In an effort to address Airbnb opponents’ concern about a lack of affordable housing, the new law prevents landlords from evicting current tenants to create makeshift hotels.” (citations omitted)). Short-term renters must also register their homes for short-term rentals, obtain a permit, prove that they have short-term rental insurance with at least \$500,000 in coverage, follow rent control laws, pay hotel taxes, and, if they are tenants, inform their landlords of their intent to rent the residence out short-term (if they fail to do so, the landlord may evict the tenant). See S.F. ADMINISTRATIVE CODE § 41A.1–41A.8 (2012); Stephen Fishman, *Overview of Airbnb Law in San Francisco*, NOLO <http://www.nolo.com/legal-encyclopedia/overview-airbnb-law-san-francisco.html> (last visited Oct. 26, 2017).

53. See generally S.F., Cal., Ordinance 218-14 (making short-term rentals legal under some conditions). This is so despite the San Francisco Legislature’s recent attempts to reduce the number of days per year that short-term renters can rent out their homes. Emily Green, *SF Mayor Vetoes Bill that Would Have Slashed Short-Term Rentals*, S.F. CHRON. (Dec. 8, 2016, 5:55 PM), <http://www.sfchronicle.com/politics/article/SF-s-new-Airbnb-law-tightens-the-rules-will-10784313.php>. It thus remains to be seen whether San Francisco’s short-term rental laws will continue to come under attack in the future.

54. *Short-Term Residential Rental*, S.F. BUS. PORTAL, <http://businessportal.sfgov.org/start/starter-kits/short-term-rental> (last visited Oct. 26, 2017). The guide seems to be effective and helpful. It works as a sort of one-stop shop by providing short-term renters with information on how to determine their eligibility, fulfill their tax obligations, meet the other various application requirements, and ensure compliance even after listing. OFFICE OF SHORT-TERM RENTALS, SHORT-TERM RESIDENTIAL RENTAL GUIDE (2017), <http://businessportal.sfgov.org/start/starter-kits/short-term-rental> (follow “Download Guide” hyperlink).

55. S.F., Cal., Ordinance 218-14.

56. *About Short-Term Rentals*, *supra* note 8.

57. See CHI., ILL., MUNICIPAL CODE ch. 3-24-030 (2015); Chris Lentino, *Chicago’s New Airbnb Ordinance Greets Visitors to the City with a 21 Percent Tax Bill*, ILL. POL’Y (June 22, 2016), <https://www.illinoispolicy.org/chicago-city-council-enacts-airbnb-regulations>.

of simply charging Airbnb renters the same tax rate as hotels.⁵⁸ Overall, this Bill has a more nuanced approach than the San Franciscan alternative—not to mention, as detailed below, a stricter set of penalties—and is consequently a bit more complex.⁵⁹ Some of the additional provisions of the Chicago law include:

Buildings of fewer than five units will be allowed only one unit listed online at a time. Larger buildings will be capped at six units or 25 percent of the total number of units, whichever is less. But people who want to exceed the limit in the smaller buildings will be able to try to show the city Department of Business Affairs and Consumer Protection they are suffering “an extraordinary burden” because of it.⁶⁰

Penalties for not meeting some of these regulations are on the harsher side. For instance, City Alderman Joe Moore stated that “[t]he fines are \$1,500 to \$3,000 per offense and/or subject to up to six months of incarceration, with each day that a violation exists treated as a separate and distinct offense.”⁶¹ Essentially, this means that if short-term renters do not comply with the fairly complex set of regulations on which Chicago has conditioned their ability to rent their residences short-term, these renters could face tens of thousands of dollars in penalties.⁶² Much like in San Francisco, however, the end result is that these laws allow consumers and residents to use Airbnb while also providing tax and other revenue to the City of Chicago and its social programs.

III. WHY NEW YORK’S SHORT-TERM RENTAL LAWS ARE PROBLEMATIC

New York’s outright ban of short-term rental services for residents in homes zoned as class A multiple dwelling is problematic for a myriad of reasons. First, New York is missing out on a substantial amount of tax revenue

58. CHI., ILL., MUNICIPAL CODE OF CHICAGO ch. 3-24-030. Interestingly enough, this 4% tax will go to fund services to the homeless. John Byrne, *Airbnb Rules Easily Pass Chicago City Council Despite Vocal Opposition*, CHI. TRIB. (June 22, 2016, 1:48 PM), <http://www.chicagotribune.com/news/local/politics/ct-chicago-city-council-airbnb-rules-met-20160622-story.html>. Some have speculated that Chicago mayor, Rahm Emanuel, promoted using the tax in this way as a form of political pressure to ensure the Bill’s passage. *See id.* Regardless, as this Note will discuss in greater detail later on, homeless services are but one example of a program that the tax revenue from short-term rentals could help to fund. *See infra* Part IV.A.

59. Byrne, *supra* note 58.

60. *Id.*; *see* CHI., ILL., MUNICIPAL CODE OF CHICAGO ch. 3-24-030.

61. CHI., ILL., MUNICIPAL CODE OF CHICAGO ch. 4-6-300(4)(l); Eric Boehm, *Chicago Regulations Could Mean Jail for Some Airbnb Users*, WATCHDOG (Jan. 25, 2016), <http://watchdog.org/254875/chicago-regulations-jail-airbnb>. This article further noted that short-term renters could be facing a “one strike and you’re out” policy for violating these regulations. *Id.*

62. CHI., ILL., MUNICIPAL CODE OF CHICAGO ch. 4-6-300(i).

that cities such as Chicago and San Francisco have seized upon.⁶³ Second, the New York law ignores that services such as Airbnb, when used non-commercially, provide a new income stream for middle-class families. Instead of making a distinction between commercial and non-commercial users, S.B. 6873 and A8704 create blanket liability for all users. Third, these laws fly in the face of one of New York businesses' chief income streams: tourism. Services such as Airbnb make it easier for visitors to bring their expendable income to New York. Moreover, New York is especially vulnerable to losing this revenue since cities that many tourists consider potential vacation substitutes (e.g., Chicago, San Francisco, Los Angeles, and Orlando) have adopted Airbnb-friendly statutes.⁶⁴ Fourth, these laws hurt consumers who prefer services like Airbnb because of their superior price and perceived quality to that of hotels. Simply put, it is bad policy to enforce an outright prohibition of a service that consumers clearly hold in high regard. For all of these reasons, S.B. 6873 and A8704 go too far in outlawing consumers' and renters' ability to use short-term rental services like Airbnb.

A. LOSS OF TAX REVENUE

In outlawing short-term rental services like Airbnb, New York is losing a considerable amount of tax revenue that it could otherwise collect from short-term renters. Estimations for the yearly revenue these taxes would provide are a minimum of \$20 million a year.⁶⁵ At the higher end, other estimates indicate that this lost revenue could be as high as \$60 million a year.⁶⁶ What is more, these estimations assume that New York would charge the standard hotel tax rate.⁶⁷ If, as Chicago has done,⁶⁸ New York decided to add an additional tax to Airbnb users on top of the standard hotel tax, this loss of revenue would obviously be even greater. One need not list the vast multitude of social programs that this tax revenue could help fund.⁶⁹ Of course, this tax rate

63. See CHI., MUNICIPAL CODE OF CHICAGO ch. 3-24; S.F., Cal., Ordinance 218-14 (Oct. 7, 2014). Both of these ordinances apply a tax rate that is at least the equivalent of hotels to short-term rentals. Chicago, as previously noted, decided to apply a tax rate above and beyond that of hotels. CHI., MUNICIPAL CODE OF CHICAGO ch. 3-24; S.F., Cal., Ordinance 218-14.

64. See *supra* Part II.B.

65. *Airbnb Charging Taxes*, *supra* note 2.

66. Reuters, *supra* note 2.

67. See *id.* The current hotel tax rate in New York is 5.875%. *New Yorkers Need to Educate Themselves on Airbnb Issues*, REAL EST. WKLY. (May 13, 2015), <http://rew-online.com/2015/05/13/new-yorkers-need-to-educate-themselves-on-airbnb-issues>. This is more than three times less than the hotel tax rate in Chicago, and it is nearly three times less than San Francisco's. *FAQS About the City*, S.F. TRAVEL, <http://www.sftravel.com/faqs-about-city> (last visited Sept. 21, 2017) (stating that San Francisco's hotel tax rate is 14%); Amy Korte, *New Cook County Hotel Tax Will Make Visiting Chicago Even Pricier*, ILL. POL'Y (Dec. 31, 2015), <https://www.illinoispolicy.org/new-cook-county-hotel-tax-will-make-visiting-chicago-even-pricier> (stating that Chicago's hotel tax rate is 17.4%).

68. Lentino, *supra* note 21.

69. See Byrne, *supra* note 58 (noting that Chicago used the 4% over and above that of the standard hotel tax to fund homeless services). As this Note will argue *infra* Part IV.A, these taxes

would be discretionary and an exact estimation of what the additional charge should or could be is better suited for the democratic process and beyond the scope of this Note. The fact remains, however, that S.B. 6873 and A8704 completely shut out any additional tax revenue from renters of Airbnb with homes zoned in class A multiple dwelling.

Furthermore, the New York City government could collect this tax with very little administrative costs by allowing Airbnb and other short-term rental services to facilitate the collection from the New York renters.⁷⁰ Airbnb's head of Global Public Policy, David Hantman, recently stated that the company would like to start collecting and paying taxes in New York.⁷¹ In spite of this potential revenue—not to mention the low level of administrative costs associated with collecting it given Airbnb's willingness to do so itself—New York is preventing Airbnb from collecting these taxes.⁷² What is more, a great deal of the missing tax revenue resulted from Airbnb renters not filing the proper paperwork to remit the occupancy tax of 5.875%.⁷³ Airbnb could essentially solve this problem unilaterally by requiring its users to fill out some form of that paperwork as a condition for using the service as a New York resident. Yet as it stands, New York refuses to allow Airbnb to do so.

B. LOSS OF INCOME STREAM FOR RENTERS

In neglecting to distinguish between commercial and non-commercial users of Airbnb, S.B. 6873 and A8704 take away a valid income stream that many middle-class families in New York came to rely on. As Josh Meltzer, Airbnb's head of New York Public Policy, points out, “[i]t would have been very easy to draft the bill in a way that differentiated between middle-class people sharing their permanent home and the commercial operators who run illegal hotels.”⁷⁴ It is fairly clear that most of the opposition to the use of Airbnb is directed at these commercial users; many do not have a problem with Airbnb's use when non-commercial users rent out their homes.⁷⁵ In failing to distinguish between commercial and non-commercial users, these statutes blindly outlaw short-term rentals without consideration of non-commercial users' more beneficent interest in these kinds of rentals.

could be used to assuage one of the New York Legislature's chief concerns with short-term rentals: that they lead to unsafe conditions in neighborhoods.

70. These users would include New York residents who have homes that are not zoned as class A multiple dwelling.

71. *Airbnb Charging Taxes*, *supra* note 2. This representative stated that “[i]n Portland and San Francisco and New York, [Airbnb is already] looking at pilot projects to help collect and remit these taxes from guests, without the hosts having to worry about all the details.” *Id.*

72. *Id.*; Cohen, *supra* note 23.

73. *New Yorkers Need to Educate Themselves on Airbnb Issues*, *supra* note 67.

74. Nasr, *supra* note 45.

75. Hoge, *supra* note 29 (stating San Francisco was mostly concerned with the “hotelization” that Airbnb caused); Rinehart, *supra* note 5.

To be sure, the New York State Legislature claimed that the decision not to distinguish between commercial and non-commercial users was due to concerns over the plausibility of enforcing this distinction.⁷⁶ There are, however, ways to address this enforcement issue; this Note will address these strategies in greater detail later on.⁷⁷ It will suffice for now to note that other cities, Chicago in particular, have found ways to enforce this distinction and preserve the non-commercial use of short-term rental services like Airbnb.⁷⁸

What makes this lack of distinction even more troubling is that some middle-class families have come to depend on this income stream. This income stream has become especially important since the average middle class income has “fallen significantly over the last 15 years and ha[s] stagnated for much of the last three decades.”⁷⁹ Due to the many competing interests inherent in political issues of this nature, the percentage of hosts that use Airbnb to rent only their personal home depends on whom one asks.⁸⁰ It is safe to say, however, that at the very least, a majority of Airbnb users are only renting their personal homes and would thus be considered non-commercial users.⁸¹ In renting their homes in this manner, these hosts added an average of \$7,770 to their annual income.⁸² Thus, services such as Airbnb are, at a minimum, a viable option as an alternative income stream for middle class families that want to rent their personal home on a short-term basis. Refusing to distinguish between commercial and non-commercial users unfairly takes that option away.

In addition, a distinction between commercial and non-commercial users in S.B. 6873 and A8704 would assuage one of the New York Senate’s primary concerns regarding Airbnb: an increase in housing costs for lessees. The main reason for this concern was that commercial users could potentially buy or lease apartments, condos, and other residences solely for short-term rental use since they could charge the higher short-term rental prices and make

76. See Benner, *supra* note 1. *But see* Grabar, *supra* note 1 (pointing out that the distinction could be easily enforced by either New York City or Airbnb).

77. See *infra* Part IV.B.

78. See Lentino, *supra* note 21.

79. SPERLING, *supra* note 3, at 3. Sperling obtained this data from reports from the U.S. Census Bureau and the U.S. Bureau of Labor of Statistics. *Id.* at 4.

80. Compare *id.* with Sam Levin, *Airbnb’s Data Shows That Airbnb Helps the Middle Class. But Does It?*, GUARDIAN (July 27, 2016, 7:00 AM), <https://www.theguardian.com/technology/2016/jul/27/airbnb-panel-democratic-national-convention-survey>.

81. SPERLING, *supra* note 3, at 6. These hosts rented their homes for an average of 60 days per year. *Id.* If this number is truly the average, one can begin to see San Francisco mayor Ed Lee’s concern that people would simply ignore San Francisco’s law if it prohibited renters from renting their homes for more than 60 days. Suzanne Monyak, *San Francisco Mayor Vetoes Bill That Would Limit Airbnb Rentals*, SLATE: MONEYBOX (Dec. 9, 2016, 2:26 PM), http://www.slate.com/blogs/moneybox/2016/12/09/san_francisco_mayor_vetoes_legislation_that_would_limit_airbnb_rentals_to.html.

82. SPERLING, *supra* note 3, at 14. Sperling further noted that adding this amount of income would allow a middle-class family to keep up with and even outpace inflation. *Id.* at 7.

greater profits.⁸³ This activity would add buyers/renters to the market that were previously not present while simultaneously lowering the supply of available housing. As a result, New York would then face a corresponding rise in price for longer-term rent and housing costs in general.⁸⁴

If S.B. 6873 and A8704 had distinguished between commercial and non-commercial users, however, these commercial users could not have entered the market and housing costs would not have risen significantly. In other words, crafting the law so that it allowed those who simply used Airbnb as an alternate stream of income instead of as a commercial endeavor would not lead to a significant increase in housing costs. The non-commercial users' primary purpose in buying or renting their residences is for a roof over their heads rather than solely reaping the rewards of short-term rental markups.

C. LOSS OF REVENUE FROM TOURISM

New York City is one of the tourism capitals of the world and, as such, reaps great financial benefit from the influx of tourists and other visitors. Everyone from laymen to New York economic officials can agree that “[t]ourism is an incredibly important piece of [New York’s] economy.”⁸⁵ In 2015, New York played host to 58.3 million visitors and is expected to receive even more in 2017.⁸⁶ One can imagine, then, just how much money comes into New York because of these tourists. In fact, New York estimated that in 2014, tourist spending reached \$62.5 billion.⁸⁷ Further, these numbers are only increasing as New York receives more and more visitors from across the globe—particularly from China.⁸⁸

While it might be easy to think that New York will always have a stranglehold on the tourism market, recent research indicates that this may not be the case. As in any industry, tourist locations compete with one another for the revenue that these visitors provide to their cities. For instance, Los Angeles has been a far greater recipient of the rise in Chinese tourism than New York.⁸⁹ This difference could obviously have been the product of geography given that China is closer to Los Angeles than New York. However, Orlando has also taken some tourists from the New York market and has even

83. Rinehart, *supra* note 5.

84. See Reuters, *supra* note 2.

85. Patrick McGeehan, *Record Number of Tourists Visited New York City in 2015, and More Are Expected This Year*, N.Y. TIMES (Mar. 8, 2016), <http://www.nytimes.com/2016/03/09/nyregion/record-number-of-tourists-visited-new-york-city-in-2015-and-more-are-expected-this-year.html> (quoting Alicia Glen, deputy mayor for economic development in New York City).

86. *Id.*

87. TOURISM ECON., THE ECONOMIC IMPACT OF TOURISM IN NEW YORK: 2014 CALENDAR YEAR 3, http://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/NYS_Tourism_Impact_2014.pdf (last visited Oct. 26, 2017).

88. McGeehan, *supra* note 85.

89. Vivion, *supra* note 4.

recently surpassed New York for total number of annual visitors.⁹⁰ At a minimum, these figures indicate that New York cannot simply take for granted that it will forever be a center for tourism in the United States.

Consequently, New York should be supporting businesses that foster such an important part of its economy—businesses like Airbnb and other short-term rental services. As discussed above, some of New York's major competitors in tourism have already passed legislation that makes short-term rentals legal subject to minimal exceptions.⁹¹ In so doing, these cities have created a competitive advantage over New York by providing a service that facilitates access to these cities. One should further note that these cities have done so while simultaneously safeguarding against rampant abuse of Airbnb by commercial users.⁹² Given the New York economy's reliance upon this revenue stream, it should not be taking any chances at stifling tourism, especially if it can pass legislation that promotes the responsible use of Airbnb by hosts that rent out their personal homes as an additional income stream.

In making Airbnb essentially illegal in New York, S.B. 6873 and A8704 have taken away a service that many consumers (in this case, tourists) prefer to alternatives. One can see consumers' preference for this service most obviously in the price difference between the nightly rate for an Airbnb listing compared to the nightly rate for a hotel.⁹³

For instance, the average price per night for a hotel in New York City is \$245, whereas the average price per night using Airbnb is \$164.⁹⁴ Other consumer reports have indicated that many consumers prefer purchasing these short-term leases instead of staying the night in a hotel in terms of the overall quality these consumers feel that they receive.⁹⁵ In the eyes of many consumers, services like Airbnb therefore have both a quantitative and qualitative edge on similar services. By taking away a service that many

90. Mark Johanson, *Orlando Surpasses New York As Most-Visited US City*, INT'L BUS. TIMES (April 22, 2014, 9:53 AM), <http://www.ibtimes.com/orlando-surpasses-new-york-most-visited-us-city-1574621>.

91. See Cutler, *supra* note 21; Lentino, *supra* note 21.

92. See S.F., Cal., Ordinance 218-14 (Oct. 7, 2014); CHI., ILL., MUNICIPAL CODE OF CHICAGO ch. 3-24 (2015), <http://www.sfbos.org/ftp/uploadedfiles/bdsupvrs/ordinances14/00218-14.pdf>; Cutler, *supra* note 21; Lentino, *supra* note 21; see also Grabar, *supra* note 1 (pointing out that the distinction between commercial and non-commercial users could be enforced using mechanisms that are present in both the San Francisco and Chicago Airbnb laws).

93. *Comparing Airbnb and Hotel Rates Around the Globe*, BUSBUD, <https://www.busbud.com/blog/airbnb-vs-hotel-rates> (last visited Oct. 26, 2017); see also Mossa, *supra* note 4 (detailing a story about a couple from England who found the Airbnb service preferable to staying in a hotel that they claim would have cost three times as much per night in New York City).

94. *Comparing Airbnb and Hotel Rates Around the Globe*, *supra* note 93.

95. Ahmed Mahmoud, *The Impact of Airbnb on Hotel and Hospitality Industry*, HOSPITALITY NET (Mar. 7, 2016), <http://www.hospitalitynet.org/news/4074708.html>; *Airbnb vs. Hotels: New Study Reveals Key Consumer Purchase Drivers*, HOTELMARKETING.COM (June 23, 2016), http://hotelmarketing.com/index.php/content/article/airbnb_vs_hotels_new_study_reveals_key_consumer_purchase_drivers.

consumers clearly prefer, New York is putting itself in a position where it could lose a considerable amount of revenue from tourism.

Additionally, there has been some indication that New York's decision to outlaw short-term rentals in this way was the result of aggressive lobbying by the New York hotel industry.⁹⁶ Although lobbying may not be problematic in and of itself and, under the right circumstances, can serve useful purposes, the lobbying efforts in this instance did not serve its more useful ends. Rather, the lobbying led to the prohibition of a service (short-term rentals) that many consumers prefer in the name of protecting the service (hotels) that many consumers have now come to find inferior in both quality and price. Simply put, it is good policy to ensure competition, especially when that competition benefits consumers.⁹⁷ These New York laws have directly opposed this policy by favoring hotels over other short-term rental services. Therefore, a new solution must be considered that takes this policy into account and helps provide New York with tax revenue and middle-class families with an additional income stream.

IV. THE SOLUTION: REVENUE, NUANCE, AND OPT-OUTS

This Note's solution seeks to address the primary concerns of the New York Legislature while also balancing the interests of New York residents and consumers of short-term leases. To reiterate, the primary concerns of the New York Legislature in passing S.B. 6873 and A8704 were as follows: (1) unsafe conditions brought about by the emergence of an illegal black market for hotels; (2) a rise in rent due to an influx of commercial short-term renters; and (3) disruption in quiet neighborhoods caused by the short-term lessees.⁹⁸

This Part will argue that New York can resolve the first concern of unsafe conditions primarily through the increase in tax revenue it would receive by charging Airbnb users its hotel tax. In other words, New York could mitigate unsafe conditions that result from the use of Airbnb—a consequence that has not been proven⁹⁹—by funding new or existing departments to monitor and keep up a given neighborhood's condition as necessary. Next, this Part will address the New York Legislature's rising rent concern by arguing for a legal distinction between commercial and non-commercial users. The process for

96. Elie Mystal, *Airbnb Lawsuit Pits Poor New Yorkers Against Middle-Class New Yorkers as Hotels Laugh and Count Money*, ABOVE THE LAW (Oct. 26, 2016, 2:29 PM), <http://abovethelaw.com/2016/10/airbnb-lawsuit-pits-poor-new-yorkers-against-middle-class-new-yorkers-as-hotels-laugh-and-count-money>; Konrad Putzier, *Airbnb Rallies NY Users in Lobbying Effort to Fight Bill*, REAL DEAL (Sept. 23, 2016, 12:02 PM), <http://therealdeal.com/2016/09/23/airbnb-rallies-ny-users-in-lobbying-effort-to-fight-bill>.

97. This policy of favoring consumers has, for instance, been the primary concern for courts in antitrust law—at least since the mid-20th century to the present. See generally E. THOMAS SULLIVAN ET AL., *ANTITRUST LAW, POLICY, AND PROCEDURE: CASES, MATERIALS, PROBLEMS* (7th ed. 2014) (detailing the more modern antitrust policy that favors consumers).

98. N.Y. STATE OFFICE OF THE ATTORNEY GEN., *supra* note 14, at 21–37; Rinehart, *supra* note 5.

99. Rinehart, *supra* note 5.

this distinction would involve a sign-up process and a department that approves short-term rentals users. The hotel tax previously suggested could fund this department. Last, this Part will address the concern that these short-term rentals would disrupt the quiet of neighborhoods. The New York Legislature can alleviate this concern by providing neighborhoods the ability to outlaw short-term rental practices via a petition and subsequent hearing. Together, these solutions address all of the New York State Legislature's concerns and simultaneously allow New York to reap the benefits of short-term rentals such as tax revenue and increased tourism.

A. CHARGE SHORT-TERM RENTERS (AT LEAST) THE HOTEL TAX RATE

The New York Legislature should allow short-term rentals to occur in residences zoned class A multiple dwelling and should apply at least New York's hotel tax rate to such transactions. In so doing, New York could fund multiple programs aimed at preventing or mitigating the potential harms of short-term rentals and even more extraneous programs such as homeless services.¹⁰⁰ Applying this tax and using it to fund these programs would thus address the New York Legislature's concern that short-term rentals would lead to deteriorating or unsafe conditions.¹⁰¹ It would further even the playing field between short-term renters and the hotel industry by applying the same tax to both industries, thereby promoting competition and addressing some of the hotel industry's concerns.

At a minimum, New York should apply the standard hotel tax rate to short-term renters. The New York hotel tax rate is currently 5.875%.¹⁰² That rate is actually much lower than the hotel tax rate in both Chicago (17.4%)¹⁰³ and San Francisco (14%).¹⁰⁴ Various estimates have indicated that New York could receive revenue ranging from \$20 million to \$60 million per year if it merely legalized these short-term rentals and applied its standard hotel tax

100. In its short-term rental laws, Chicago decided to fund homeless services with the 4% tax it imposed upon short-term renters that was over and above its standard hotel tax. Lentino, *supra* note 21.

101. N.Y. STATE OFFICE OF THE ATTORNEY GEN., *supra* note 14, at 21–37. One concern with these assertions is that the Attorney General's Office did not provide any statistical evidence that short-term rentals would lead to unsafe conditions. Rinehart, *supra* note 5. All that the Attorney General's Report provided to defend that short-term rentals would lead to unsafe conditions were affidavits from one fire chief and one building inspector. N.Y. STATE OFFICE OF THE ATTORNEY GEN., *supra* note 14, 21–37.

102. *Hotel Room Occupancy Tax*, NYC: DEP'T FIN., <http://www1.nyc.gov/site/finance/taxes/business-hotel-room-occupancy-tax.page> (last visited Oct. 26, 2017) ("The Hotel Room Occupancy Tax Rate of 5.875% went into effect on December 20, 2013."); *New Yorkers Need to Educate Themselves on Airbnb Issues*, *supra* note 67.

103. Korte, *supra* note 67; *New and Modified Chicago Consumer Taxes in 2017*, CIVIC FED'N (Jan. 5, 2017), <https://www.civiced.org/civic-federation/blog/new-and-modified-chicago-consumer-taxes-2017> ("The total effective composite hotel tax in Chicago is 17.4%.").

104. *FAQS About the City*, *supra* note 67.

rate.¹⁰⁵ What is more, Airbnb has stated that it would be willing to act as a sort of administrative proxy in collecting this tax.¹⁰⁶ Consequently, if New York did apply this tax, the revenue that it would generate would be nearly all profit since the costs of collecting the tax would merely be getting a check from Airbnb instead of receiving the tax from each individual user. Given that many New Yorkers have been using services like Airbnb for quite some time—even as it has become more and more difficult to do so without facing stiff penalties¹⁰⁷—and these transactions have yet to be taxed, this revenue would essentially be found money.

Further, New York could take a page out of Chicago's ordinance and add a tax on top of this hotel tax. This additional tax was not figured into the tax revenue calculations previously referenced thus making the potential revenue even greater.¹⁰⁸ Moreover, given how easily short-term renters can undercut hotels, it seems fairly clear that an additional 5% tax will not significantly affect these renters' ability to offer a highly competitive price to the consumer.¹⁰⁹ Imposing a tax on short-term renters that is equal to or greater than the hotel tax would also have the tangential benefit of easing some of the hotel industry's anxiety about this new source of competition. Therefore, in the absence of other concerns, not taking advantage of this huge amount of revenue for the city of New York would be, at best, irresponsible.

In addition, this tax revenue could fund various programs that specifically address the concerns of the New York Legislature as well as other important social programs. The first program that these funds would need to support is some sort of department to enforce regulations and short-term renter registration.¹¹⁰ This revenue, however, can go far beyond that. The possibilities for funding are essentially limited only by the imagination of the legislature, but some ideas include: homeless services, low-income housing, public building and road maintenance and renovations, public education, public parks, and the list goes on and on.

Most importantly, this tax revenue could go to ensuring that housing conditions do not become less safe because of these short-term rentals. It should be noted, however, that this concern may be somewhat overblown since the Attorney General's Office did not provide any statistical evidence

105. *Airbnb Charging Taxes*, *supra* note 2; Reuters, *supra* note 2.

106. *Airbnb Charging Taxes*, *supra* note 2.

107. Assemb. B. 8704, 2015 Leg., 238th Sess. (N.Y. 2016). The New York Attorney General's report indicated that "[e]xplosive [g]rowth" occurred in short-term rentals even after the passage of these laws. N.Y. STATE OFFICE OF THE ATTORNEY GEN., *supra* note 14, at 2.

108. Reuters, *supra* note 2.

109. See *Comparing Airbnb and Hotel Rates Around the Globe*, *supra* note 93 (demonstrating that the average price per night for a hotel in New York City is \$245 whereas the average price per night using Airbnb is \$164).

110. See *infra* Part IV.B.

that short-term rentals would lead to unsafe conditions.¹¹¹ Nonetheless, if it is a legitimate concern of the legislature, the tax revenue can at least fund a program that will adequately monitor and remedy these unsafe conditions should they arise. These taxes could help provide, for instance, a better funded police force or fire department, fire hydrants, or even greater subsidies for building owners that provide extra safety features for tenants. Ultimately, charging short-term renters at least the hotel tax rate and allowing Airbnb to facilitate the collection of that tax will provide a significant amount of revenue to fund programs that will more than adequately address any concern over unsafe conditions that may arise from the short-term rental market. The New York Legislature should thus legalize these rentals and apply the hotel tax to them.

B. REGISTRATION AND THE ACQUISITION OF A SHORT-TERM RENTAL LICENSE AS
A MEANS OF DISTINGUISHING BETWEEN COMMERCIAL AND
NON-COMMERCIAL SHORT-TERM RENTERS

The New York Legislature should make a distinction between commercial and non-commercial users of Airbnb so that the law can root out the more pernicious side effects of short-term rentals. Allowing non-commercial users to rent out their residences on a short-term basis would not affect rent prices in the way in which the New York Legislature imagined when drafting S.B. 6873 and A8704.¹¹² In addition, New York could put the bulk of the burden of this registration on Airbnb by requiring short-term renters to fill out these forms as part of the registration process that they must go through to rent out their homes. Placing this burden on Airbnb would allow the law to be enforced much more easily and cost-effectively. More importantly, it would provide nuance and allow short-term renters to rent out their homes.

To carry out this registration properly, New York would need to form a short-term rental department similar to San Francisco's.¹¹³ This department could be adequately funded using the tax revenue described above. Ideally, this department would also work with Airbnb by allowing Airbnb (or similar short-term rental services) to put the registration forms on its website as part of the user sign-up process and subsequently processing these forms to approve or deny potential short-term renters. This symbiotic relationship is likely to work well for both parties because they are both incentivized to carry

111. Rinehart, *supra* note 5.

112. *See id.*

113. *See generally* S.F., Cal., Ordinance 218-14 (Oct. 7, 2014), <http://www.sfbos.org/ftp/uploadedfiles/bdsupvrs/ordinances14/00218-14.pdf> (describing San Francisco's short-term rental department); Cutler, *supra* note 21 (same). In addition to the responsibilities of issuing and enforcing regulation and registration, this department could also provide for the adjudication after a given neighborhood petitions to "opt-out." This adjudication process will be discussed in greater detail *infra* Part IV.C.

out this process together. For instance, Airbnb benefits by being granted access to the New York market where it receives its greatest share of revenue.¹¹⁴

Meanwhile, New York benefits from the tax revenue and increased money from tourism, while also saving on administrative costs since Airbnb, the short-term rental service with the greatest market share, would process the paperwork and facilitate the collection of the taxes.¹¹⁵

The department's decision to approve or deny the short-term rental application would rest on the classification of the would-be-short-term renter as a commercial or non-commercial user. Because the New York Legislature was concerned with an increase in rent due to these short-term leases, the real evil that it was concerned with was that of the commercial users.¹¹⁶ However, the same problem simply does not exist—at least to nearly the same degree—where users are merely renting out their residence for a couple of weeks a year while out of town because these users are using this service as an additional income stream and not as a business in and of itself.¹¹⁷ For instance, after San Francisco enacted its laws in a way that distinguished between commercial and non-commercial users, it saw its rents rise a mere \$19, which is well within acceptable levels.¹¹⁸ The short-term rental department could help support this distinction.

Additionally, allowing a short-term rental department to support this commercial versus non-commercial distinction does more than address the fear that housing costs will rise. It also allows many users and families the ability to have an additional stream of income by renting their residences to people while they are on vacation or otherwise out of town. As previously stated, this stream of income has helped many families with their bottom line.¹¹⁹ As a result, New York should revisit its laws on short-term rentals to make a distinction between commercial and non-commercial users of Airbnb and create a short-term rental department to enforce this distinction.

C. *HEARINGS AND PETITIONS FOR INDIVIDUAL NEIGHBORHOODS: THE CHANCE TO OPT OUT OF SHORT-TERM RENTALS*

In legalizing short-term rentals for non-commercial renters, New York should also include a means for individual neighborhoods to opt out. This

114. Maya Kosoff, *Airbnb Is Fighting for Its Life in Its Biggest Market*, VANITY FAIR (Oct. 24, 2016, 9:39 AM), <http://www.vanityfair.com/news/2016/10/airbnb-is-fighting-for-its-life-in-its-biggest-market>.

115. See Cohen, *supra* note 23 (discussing the structure of Airbnb).

116. Rinehart, *supra* note 5.

117. Stulberg, *supra* note 7. The article states that commercial users “take off the market units that would otherwise be available to local residents, thereby reducing the supply of housing and driving up rents.” *Id.*

118. Rinehart, *supra* note 5.

119. See SPERLING, *supra* note 3, at 7.

process is designed to address the third concern of the New York Legislature: that short-term rentals—and the influx of out-of-town visitors that they attract—“upset[] the quiet of longstanding residential neighborhoods.”¹²⁰ The New York Legislature could provide this means of opting out with a petition and a subsequent hearing within individual districts. Using these two devices in tandem would (1) ensure that there is enough opposition to short-term rentals to warrant a hearing (as opposed to merely a vocal minority) and (2) make certain that there is some process through which both sides can be heard by an independent adjudicator who can then determine if short-term rentals are adversely affecting the quiet of a given neighborhood.

Ideally, the petition process would work in a fashion that is similar to how Chicago’s short-term rental laws employ petitions.¹²¹ Most obviously, the petition would need a certain number of signatures and would also need to be worded in a manner that clearly conveys the matter for which the petitioners are signing their names. Admittedly, the number of signatures required for the petition to warrant a hearing will inevitably be somewhat arbitrary. However, New York does provide some guidance in other areas in which petitions tend to be used, specifically in local government consolidation or dissolution.¹²² In these matters, “[a] petition needs to be signed by at least ten percent of the number of electors or five thousand electors, whichever is less, in *each* town, village or special district to be consolidated or dissolved.”¹²³ This number is at least a good starting point. These numbers were used for much smaller cities than New York,¹²⁴ so the combination of proportion and a fixed number makes sense.

The concern that petitions need to be worded clearly so that people know what they are signing can be mitigated with a hearing as the second part of this opt-out process.¹²⁵ This hearing would consist of an independent adjudicator that could fairly balance the interests of the proponents and opponents of short-term rentals in a given neighborhood, as well as the benefits that the increased tax revenue provides all New York citizens. Since the law in this case would lay out that short-term rentals are legal, the burden of proof would be on the petitioners, and they would have to show some sort

120. Rinehart, *supra* note 5.

121. See CHI., ILL., MUNICIPAL CODE ch. 3-24-030 (2015); Lentino, *supra* note 21.

122. See e.g., ANDREW M. CUOMO, N.Y. DIV. OF LOCAL GOV’T SERVS., THE CITIZEN’S GUIDE TO PETITIONING FOR LOCAL GOVERNMENT CONSOLIDATION OR DISSOLUTION 1 (2009), <https://www.dos.ny.gov/lg/publications/CitizenGuidetoPetitions.pdf>.

123. *Id.* at 8. Electors are defined as “[a]nyone who is registered to vote in one of the local government units.” *Id.*

124. See *id.* at 1–2.

125. This hearing could be adjudicated by the short-term rental department that would also need to be created if New York were to legislate this Note’s solution. This way, the short-term rental department could be a veritable one-stop shop for all those wishing to rent out their homes on a short-term basis. The composition, funding, and additional responsibilities of this department were discussed *supra* Part IV.B.

of substantial injury caused by short-term rentals.¹²⁶ Putting this burden on the petitioners seeks to ensure that the injury resulting from these short-term rentals is more than a mere idiosyncrasy and that short-term rentals—and the benefits that these rentals provide—are not banned without a valid reason.

If a hearing ends with the determination that short-term rentals should be banned, short-term renters should also be given some sort of grace period to continue renting. This grace period would allow short-term renters the chance to decide if they ultimately want to move out of the neighborhood to one that does allow for short-term renting. Moreover, since many residents could be relying on the income from these short-term rentals as a way to stay afloat, the law should not pull the carpet out from underneath them immediately after the decision. This is another situation where providing an actual length of time to this grace period will resemble the arbitrary. However, given that most leases last for a year, one year is a good option.

This process would ultimately balance the interests of those who are opposed to short-term rentals in their neighborhood, those who rely on them as an additional stream of income, and those who benefit from the tax revenue these rentals provide. If the detractors of short-term rentals can point to a tangible injury that results from the influx of out-of-town visitors, and they receive enough support from their neighbors, that neighborhood should be able to opt out of the short-term rental laws. This process ensures that the short-term rental laws will not “upset[] the quiet of longstanding residential neighborhoods,” which was the third concern of the New York Legislature in passing S.B. 6873 and A8704.¹²⁷

V. CONCLUSION

The New York Legislature’s passage of S.B. 6873 and A8704 is problematic for a number of different reasons. New York is now missing out on a significant amount of tax revenue, taking away an income stream for many middle-class renters, and losing tourism revenue by refusing to offer a service that other tourist hotbeds do. This Note addresses the primary concerns of the legislature in passing these laws by ensuring that: (1) these short-term rentals provide additional revenue to compensate for any unsafe conditions that emerge; (2) these laws create a distinction between commercial and non-commercial users so that housing costs for lessees do not rise; and (3) detractors of short-term rentals have a mechanism for getting their neighborhoods to opt out if the lack of quiet in the neighborhood

126. The injury that a petitioner must show could resemble that of the injury-in-fact that is generally required for standing in courts. See KATHLEEN M. SULLIVAN & NOAH FELDMAN, CONSTITUTIONAL LAW 34–54 (Robert C. Clark et al. eds., 18th ed. 2013). This would allow a sort of minimum threshold for petitioners that proponents of short-term rentals could then try and rebut. The adjudicator would subsequently be given the opportunity to balance these competing interests and rule which one wins out.

127. Rinehart, *supra* note 5.

substantially injures them. This Note provides nuance instead of making a blanket law that reaches further than it should. If the New York State Legislature adopted a proposal similar to this one, it could address its primary concerns with short-term rentals while also benefitting from the revenue they provide. In so doing, the Legislature would be acting with a scalpel rather than a cleaver.