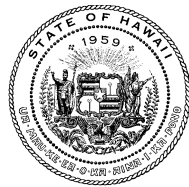


JOSH GREEN M.D.
GOVERNOR

SYLVIA LUKE
LT. GOVERNOR



STATE OF HAWAII
DEPARTMENT OF TAXATION

Ka 'Oihana 'Auhau
P.O. BOX 259
HONOLULU, HAWAII 96809
PHONE NO: (808) 587-1540
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GARY S. SUGANUMA
DIRECTOR OF TAXATION

KRISTEN M.R. SAKAMOTO
DEPUTY DIRECTOR

**TESTIMONY OF
GARY S. SUGANUMA, DIRECTOR OF TAXATION**

TESTIMONY ON THE FOLLOWING MEASURE:

H.B. No. 211, Relating to Transient Accommodations

BEFORE THE:

House Committee on Tourism

DATE: Thursday, February 2, 2023

TIME: 10:00 a.m.

LOCATION: State Capitol, Room 423

Chair Quinlan, Vice-Chair Hussey-Burdick, and Members of the Committee:

The Department of Taxation ("Department") offers the following comments regarding H.B. 211 for your consideration.

H.B. 211 seeks to establish requirements for transient accommodations brokers prior to publishing an advertisement on the availability of a property for lease or rent on behalf of an operator or manager and amends the definition of "transient accommodations broker" to include a person or entity who facilitates reservations or collects whole or partial payment for transient accommodations or resort time share vacation interests, units, or plans. The measure is effective upon approval.

The Department is able to administer this measure by the current effective date.

Thank you for the opportunity to provide comments on this measure.



Hawai'i Convention Center
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Governor

John De Fries
President and Chief Executive Officer

LATE *Testimony submitted late may not be considered by the Committee for decision making purposes.

Statement of
JOHN DE FRIES
Hawai'i Tourism Authority
before the
COMMITTEE ON

February 2, 2023
10:00 a.m.
State Capitol Conference Room 423 & Videoconference

In consideration of
HOUSE BILL NO. 211
RELATING TO TRANSIENT ACCOMMODATIONS

Aloha Chair Quinlan, Vice Chair Hussey-Burdick, and members of the Committee on Tourism,

The Hawai'i Tourism Authority (HTA) appreciates the opportunity to offer comments in support of the intent of HB211, which establishes requirements for transient accommodations brokers prior to publishing an advertisement on the availability of a property for lease or rent on behalf of an operator or plan manager, ensuring the compliance of those operators or plan managers with state laws and county ordinances.

While the number of visitors to Hawai'i has increased over the years, there have been no major increases to the number of traditional units which include hotel, condo hotel and timeshare units in the past decade. From 2009 to 2019, the state experienced an increase in visitor arrivals from 6 million to over 10 million, a 59.5% increase in arrivals without a corresponding increase in accommodations. We believe these additional visitors likely stayed in non-traditional units, including short-term vacation rentals.

Our community-driven Destination Management Action Plans across Hawai'i clearly articulate a desire to manage visitor accommodations – specifically, taking steps to limit and regulate short-term vacation rentals in neighborhoods and other sensitive areas in our communities. We are supportive of state and county efforts to advance that priority, and we support the intent of this measure to add another point to ensure the compliance of rentals with state laws and county ordinances.

We appreciate this opportunity to provide these comments in support of the intent of HB211. Mahalo.

TAX FOUNDATION OF HAWAII

126 Queen Street, Suite 305

Honolulu, Hawaii 96813 Tel. 536-4587

SUBJECT: TRANSIENT ACCOMMODATIONS, Advertising Requirements

BILL NUMBER: HB 211

INTRODUCED BY: QUINLAN, GATES, HASHIMOTO, HOLT, HUSSEY-BURDICK, KILA, KITAGAWA, LAMOSAO, POEPOE, Kobayashi

EXECUTIVE SUMMARY: Establishes requirements for transient accommodations brokers prior to publishing an advertisement on the availability of a property for lease or rent on behalf of an operator or plan manager. Prohibits transient accommodations brokers from engaging in business with an operator or plan manager who is not in compliance with state laws and county ordinances. Prohibits a hosting platform from providing booking services in connection with a transient vacation rental that is not lawfully certified, registered, or permitted as a transient vacation rental under applicable county ordinance.

SYNOPSIS: Adds a new section to chapter 237D, HRS, requiring transient accommodations brokers to do the following prior to publishing an advertisement for a unit: (1) Shall notify the operator or plan manager that the subject property is required to be in compliance with applicable state and county land use laws and ordinances prior to retaining the services of the transient accommodations broker; (2) Shall require the operator or plan manager to provide the transient accommodations broker with the operator or plan manager's registration identification number and local contact information and include this information in the advertisement, pursuant to section 237D-4; (3) Shall require the operator or plan manager to provide the transient accommodations broker with verification of compliance with state and county land use laws in the form of a written certification, verification, or permit, as applicable, issued by the appropriate county agency; and (4) Shall require the operator or plan manager to provide a statement to the transient accommodations broker confirming compliance with all applicable land use laws and ordinances.

Requires the operator or plan manager to remove an advertisement for any unit that does not comply with items (2) through (4) above, or for any unit that is the subject of a noncompliance notice issued by a state or county government.

Adds two new sections to chapter 481B, HRS, to further regulate transient accommodation brokers and booking services.

Amends section 237D-1, HRS, to amend the definition of “transient accommodations broker” to add the term “facilitates” to the definition, so that it reads “any person or entity, including but not limited to persons who operate online websites, online travel agencies, or online booking agencies, that offers, lists, advertises, facilitates, or accepts reservations or collects whole or partial payment for transient accommodations or resort time share vacation interests, units, or plans.”

EFFECTIVE DATE: Upon Approval.

STAFF COMMENTS: Transient vacation rental activity is a business and the dollars earned in that business are subject to Hawaii state taxes. Specifically, General Excise Tax (GET) and Transient Accommodations Tax (TAT) both apply, so those hosts that are in this business need to register appropriately and pay these taxes. But alas, not everyone does. So by Act 204, SLH 2015, the term “transient accommodations broker” was added to the law to cover marketing platforms such as Flipkey, AirBnB, and VRBO and imposed responsibility on them with regard to collecting these taxes.

The current bill, on the other hand, deals with state and county land use laws, and imposes duties on the transient accommodations brokers to yank advertisements for property units that are not demonstrably in compliance with those laws.

Digested: 1/31/2023



HAWAI'I LODGING & TOURISM
A S S O C I A T I O N

Testimony of
Mufi Hannemann
President & CEO
Hawai'i Lodging & Tourism Association

House Committee on Tourism
House Bill 211
February 2, 2023

Chair Quinlan, and members of the Committee, mahalo for the opportunity to provide testimony on behalf of the Hawai'i Lodging & Tourism Association, the state's oldest and largest private sector visitor industry organization.

The Hawai'i Lodging & Tourism Association—nearly 700 members strong, representing more than 50,000 hotel rooms and nearly 40,000 lodging workers—has long prioritized the regulation of short-term rentals across our state. STRs have had myriad negative impacts on our community ranging from limiting our housing inventory, stressing community utilities, and generally disrupting local neighborhoods.

With the various counties proposing and passing new legislation in order to achieve further regulation of these units, we appreciate the Legislature's renewed focus on the regulation of STRs and the hosting platforms where they are advertised. We also appreciate that this measure will further ensure that STR owners and operators will be in compliance with State and county laws while also paying the appropriate fees and taxes on their units.

For these reasons, HLTA supports House Bill 211.

Mahalo for the opportunity to offer these comments.



February 2, 2023

TO: Chair Sean Quinlan
Members of the House Committee on Tourism

FR: Alex April
Airbnb Public Policy, Hawaii

RE: **HB211 RELATING TO TRANSIENT ACCOMMODATIONS - COMMENTS**

Mahalo for the opportunity to comment on HB211, related to county zoning. We are grateful for the partnership developed between the State of Hawai'i and localities over the last several years on short-term rental policies that support the local tourism industry; and provide housing opportunities for transient workers, students, and other state guests.

In the event that counties rely on HB211, there could be a number of unintended consequences:

1. **Impact on County Revenue: If counties use the language of HB 211 to effectively prohibit rentals under 180 days, they could see a negative impact on tax revenue.** In Maui County, transient vacation rentals or "TVRs" are the largest source of property tax revenue for the County and provide for the largest contributions to affordable housing in Maui. It was reported that for fiscal year 2022-2023, TVRs in Maui County will raise \$160 million in real property tax revenue representing 37% (\$12.1 million) of total real property tax revenue. That \$12.1 million in real property tax revenue will be contributed to Maui's Affordable Housing Fund.
2. **Increased Prices for Existing Inventory: Reducing the availability of rentals under 180 days would also significantly increase the prices of any remaining accommodations, and will have other adverse effects on the State's economy.** Not only will this impact the ability of low and moderate-income families to visit Hawai'i, but it will also limit residents who need short-term housing during periods of transition, part-time students, traveling nurses, and other non-permanent island residents who participate in key sectors of Hawai'i's economy. Higher prices will also have ripple effects on the State's economy. Short-term rentals and their hosts, guests, and transitional residents support a number of local small businesses; everything from housekeeping and landscaping to restaurants and local markets benefit from a robust tourism and short-term rental market.

Mahalo for the consideration of our comments.



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February 1, 2023

HOUSE COMMITTEE ON TOURISM

Rep. Sean Quinlan, Chair, Rep. Natalia Hussey-Burdick, Vice Chair

HEARING DATE: Thursday, February 2, 2023

TIME: 10:00 a.m.

PLACE: Conference Room 423

Re: LETTER ON BEHALF OF AIRBNB OPPOSING HOUSE
BILL NO. 211.

Dear Chair Quinlan, Vice Chair Hussey-Burdick, and Members of the Committee:

We write on behalf of our client, Airbnb, in opposition to House Bill No. 211 (“*HB 211*”). *HB 211* contains problematic language that would render it invalid, unworkable, and unenforceable. The current language of *HB 211* also violates the federal Communications Decency Act, 47 U.S.C. § 230 (“*Section 230*”). *Section 230* provides vital protections that ensure a free and open internet. *HB 211* is therefore preempted by at least *Section 230* and would thus be unenforceable if passed.

Section 230 of the Communications Decency Act

Section 230 is considered the cornerstone of the legal framework that has allowed the internet to thrive, and it “protects websites from liability for material posted on the website by someone else.” *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1180 (9th Cir. 2008). It does so through two key provisions. First, “[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.” 47 U.S.C. § 230(c)(1). Second, “[n]o liability may be imposed under any State or local law that is inconsistent with this section.” *Id.* at § 230(e)(3). As the United States District Court for the District of Hawaii observed, “so long as a third party willingly provides the essential published content, the interactive service provider

receives full immunity regardless of the specific editing or selection process.” *Sulla v. Horowitz*, No. CIV. 12-00449 SOM, 2012 WL 4758163, at *2 (D. Haw. Oct. 4, 2012) (quoting *Carafano v. Metroplash.com, Inc.*, 339 F.3d 1119, 1124 (9th Cir. 2003)).

Although a state may regulate in various areas, it must do so in a manner that does not conflict with federal law. Courts across the country have regularly found that Section 230 preempts state laws that attempt to hold websites liable for third-party content. *See, e.g., Airbnb, Inc. v. City of Boston*, 386 F. Supp. 3d 113, 123 (D. Mass. 2019) (enjoining municipal law on Section 230 grounds that “facially compels [Airbnb] to monitor and remove third-party content or suffer complete banishment from Boston” under Section 230); *Backpage.com, LLC v. Cooper*, 939 F. Supp. 2d 805, 824 (M.D. Tenn. 2013) (enjoining state law on Section 230 grounds requiring that websites verify minor’s “driver license” or “other governmental” identification prior to publication of third-party advertisement as websites would need to “screen[] millions of advertisements”); *Backpage.com, LLC v. McKenna*, 881 F. Supp. 2d 1262, 1273 (W.D. Wash. 2012). Courts have also noted that state and local legislatures—whose laws are equally subject to Section 230 preemption—may not “creative[ly]” draft statutes or ordinances to “work around” Section 230 and accomplish prohibited ends in a law that would be preempted if enacted directly. *Kimzey v. Yelp! Inc.*, 836 F.3d 1263, 1266 (9th Cir. 2016) (noting that “[p]ermitting the evasion of Section 230 would undermine the “congressional recognition that the Internet . . . ‘ha[s] flourished . . . with a minimum of government regulation.’” (quoting 47 U.S.C. § 230(a)(4))). Further, two recent Supreme Court decisions have held that states may not “evade pre-emptive force of federal law by resorting to creative statutory interpretation or description at odds with the statute’s intended operation and effect.” *Wos v. E.M.A. ex rel. Johnson*, 568 U.S. 627, 636 (2013); *see National Meat Ass’n v. Harris*, 565 U.S. 452, 464 (2012).

HB 211 Impermissibly Violates Section 230

Section 1, § 237D-__ (a)(2) of HB 211 violates Section 230 in seeking to make hosting platforms responsible for the verifying the identity, licensing, and registration of content providers and screening the content posted to those hosting platforms based on that verification prior to publication. At the core of Section 230’s protections is the idea that hosting platforms cannot be held responsible for the content users provide and cannot be required to verify such information. HB 211 violates these federal protections by seeking to penalize hosting platforms for engaging in business with unregistered transient accommodation “Operators,” as defined in HRS § 237-1.

Section 230 protects websites from being forced to screen or otherwise verify third-party content. *See, e.g., Doe v. Friendfinder Network, Inc.*, 540 F. Supp. 2d 288, 295 (D.N.H. 2008) (Section 230 “bars the plaintiff’s claims that the defendants acted wrongfully by . . . failing to verify that the profile corresponded to the submitter’s true identity.”); *Doe v. MySpace, Inc.*, 474 F. Supp. 2d 843, 850 (W.D. Tex. 2007) (finding that Section 230 barred claims that MySpace was liable for policies relating to age verification); *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1180 (9th Cir. 2008) (“webhosts are immune from liability for . . . efforts to verify the truth of” third-party statements posted on the website); *Prickett v. InfoUSA, Inc.*, 561 F. Supp. 2d 646, 651 (E.D. Tex. 2006) (“The Plaintiffs are presumably alleging that . . . the Defendant is liable for failing to verify the accuracy of the content. Any such claim

by the Plaintiffs necessarily treats the Defendant as ‘publisher’ of the content and is therefore barred by § 230.”); *Mazur v. eBay Inc.*, No. CIV 07-3967 MHP, 2008 WL 618998, at *9 (N.D. Cal. Mar. 4, 2008).

By placing the onus of verifying and screening which posts may be allowed by content-generating “operators,” and requiring that platforms have responsibility to ensure that such content is included, HB 211 strikes at the very core of Section 230’s protection of hosting platforms by making them liable for the content posted to their online marketplaces. *Mazur v. eBay Inc.*, No. CIV 07-3967 MHP, 2008 WL 618998, at *9 (N.D. Cal. Mar. 4, 2008) (“Screening” a listing “is akin to deciding whether to publish” and thus a website “is immune under section 230 for its screening decisions”). “[P]ublication involves reviewing, editing, and deciding whether to publish or to withdraw from publication third-party content.” *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1102 (9th Cir. 2009), *as amended* (Sept. 28, 2009). Section 230 provides immunity to hosting platforms acting as publishers of third-party content, including the decision to publish or not the content generated by third parties. *Backpage.com, LLC v. Cooper*, 939 F. Supp. 2d 805 (M.D. Tenn. 2013) (enjoining state law on Section 230 grounds which required that websites verify minor’s “driver license” or “other governmental” identification prior to publication of third-party advertisement).

Section 1, § 237D-__ (a)(2) further implicates the protections and immunities for hosting platforms of Section 230 by requiring that “the transient accommodations broker” include the “operator or plan manager’s registration identification number and local contact information . . . in the advertisement.” § 237D-__ (a)(2) would force hosting platforms, serving as transient accommodations brokers, to verify and include certain content in every advertisement, in violation of Section 230. *See Fair Hous. Council of San Fernando Valley*, 521 F.3d at 1180 (“webhosts are immune from liability for . . . efforts to verify the truth of” third-party statements posted on the website); *Prickett*, 561 F. Supp. 2d at 651 (noting that claims treating hosting platforms “as ‘publisher’ of the content” is barred by § 230.”); *Horowitz*, No. CIV. 12-00449 SOM, 2012 WL 4758163, at *2 (“so long as a third party willingly provides the essential published content, the interactive service provider receives full immunity”).¹

HB 211 Creates Impossible Requirements for Hosting Platforms

Section 2, § 481B-__ (a) mandates that “It shall be unlawful for a transient accommodations broker to engage in business with an operator or plan manager . . . who is not in compliance with all state laws and county ordinances” This is a vastly over-broad, impossible requirement to place on a hosting platform. *See Smith v. California*, 361 U.S. 147 (1960) (striking down a Los Angeles ordinance making it a crime for booksellers to possess obscene books, noting the law would require booksellers to review every book or face strict criminal liability, which “would tend

¹ *See also HomeAway.com, Inc., v. City of Santa Monica*, 918 F.3d 676, 682 (9th Cir. 2019) (noting Section 230 is implicated where laws require content-based monitoring, not where “distinct, internal, and nonpublic” content is transmitted in the course of a booking transaction). While the *HomeAway* decision did allow the City of Santa Monica to require that hosting platforms verify that properties and property owners were properly registered and licensed, the Santa Monica Ordinance did not require (and the Ninth Circuit did not address) moderation and screening of the content of the advertisements in question, unlike HB 211. *Id.* at 683 (9th Cir. 2019) (noting that “the Ordinance does not proscribe, mandate, or even discuss the content of the listings that the Platforms display on their websites.”).

to restrict the public’s access to forms of the printed word which the State could not constitutionally suppress directly.”); *Braun v. Soldier of Fortune Magazine, Inc.*, 968 F.2d 1110, 1118-19 (11th Cir. 1992) (First Amendment permits liability for *publishing* third-party content “only if the [content] on its face, without the need to investigate” is unlawful); *Backpage.com, LLC v. McKenna*, 881 F. Supp. 2d 1262, 1281 (W.D. Wash. 2012) (“The third-party publication of offers to engage in illegal transactions does not fall within ‘well-defined and narrowly limited classes of speech’ that fall outside of First Amendment protection.”).

For example, in order to meet the proposed requirements of § 481B-__(a), a hosting platform would be required to verify at all times that operators or plan managers are current not only on property taxes, but any applicable personal income, estate, corporate or business, or countless other taxes. Further, they would be required to perform constant physical checks on prospective operators and at those operators’ homes to ensure that they were not violating any county ordinances such as prohibitions against having unpermitted additions to a home. Further, Hosting platforms would be required to ensure that prospective operators and plan managers are not engaged in operating other businesses or ventures, unrelated to any rental properties, without meeting all required licensing and registration requirements. The proposed additions set forth by Section 2, §§ 481B-__(a) and (b) essentially place the burden of policing the actions of all prospective operators and and/or plan managers on the hosting platforms. Hosting platforms have no means to verify an operator’s compliance with *all* state laws and/or county ordinances or even, in many cases, the *right* to perform such checks on those operators.

Conclusion

For the foregoing reasons, the problematic language of HB 211 renders it invalid and unworkable. We therefore urge that HB 211 be held. Thank you for your consideration.

Very truly yours,



DAVID M. LOUIE

for

KOBAYASHI SUGITA & GODA, LLP



February 1, 2023

Dear Chair Quinlan and Members of the House Committee on Tourism,

On behalf of Expedia Group, a family of brands that includes Expedia.com, Hotels.com, and short-term rental leader Vrbo, I am writing to share testimony on HB211, relating to transient accommodations.

We have several concerns about HB211 and urge you to oppose this legislation as currently drafted. Requiring public listings to include contact information (Section 1 amending HRS Chapter 237D) presents significant safety risks and challenges for legal short-term rental operators. The legislation also creates layers requiring counties to enforce county as well as state legislation (Section 2 amending HRS Chapter 481B). Finally, much of the language is overly broad and could be unenforceable.

Expedia Group supports reasonable regulations and oversight of the vacation rental industry and has worked with municipalities around the world to craft, enact, and support regulations and legislation to regulate vacation rentals. We have entered voluntary agreements with three counties in Hawai'i—Kaua'i, Maui, and Honolulu—to support compliance with county laws and regulations, share information, and foster collaboration between Expedia and county governments.

We have years of experience collaborating with governments and welcome the opportunity to work with you and the counties to craft balanced and enforceable legislation to further regulate short-term rentals in Hawai'i.

Thank you for the opportunity to share testimony on HB211 and for considering our comments.

Thank you,

Mackenzie Chase
Government Affairs Manager, Hawai'i



HB-211

Submitted on: 1/31/2023 3:54:19 PM

Testimony for TOU on 2/2/2023 10:00:00 AM

Submitted By	Organization	Testifier Position	Testify
Charles Prentiss	Keep It Kailua (KIK)	Support	Written Testimony Only

Comments:

The illegal short-term rental operators have been ignoring or using every loophole in the book to get around and frustrate county ordinances prohibiting short-term rentals. The provisions of this bill will significantly assist county enforcement.

HB-211

Submitted on: 2/1/2023 8:36:03 PM

Testimony for TOU on 2/2/2023 10:00:00 AM

Submitted By	Organization	Testifier Position	Testify
pahnelopi mckenzie	Individual	Support	Written Testimony Only

Comments:

I support HB211. The tourist industry and the brokers must be forced to be accountable for the unreasonable business at the expense of the residents and the ecosystem. The checks and balances have been way off and all measures to create safe zones to slow exploitation is needed.

HB-211

Submitted on: 2/1/2023 10:55:05 PM

Testimony for TOU on 2/2/2023 10:00:00 AM

Submitted By	Organization	Testifier Position	Testify
Scott Young MD	Individual	Support	Written Testimony Only

Comments:

We must do all we can to stop illegal STRS and cap any more as they invade our residential areas and they must decrease if we are to get sustainable tourism and stop overtourism which is destroying the environment and the quality of life for residents and the quality of the experience for tourists and destroying the tourism industry. Fodor determined that Maui is now an undesirable location because of over tourism and ranks in the worst 10 in its recent article and study. On Maui short term rentals are definitely the problem both the illegal ones which we are, I think, getting control of and the legal ones there are just too many in all neighborhoods and they must be decreased as one of the main methods to actually get quality over quantity tourism- that's an important aim to protect the industry and our quality of life and the environment. Mahalo for working on this issue.