

2019

Airbnb in New York City: Whose Privacy Rights are Threatened by a Government Data Grab?

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Recommended Citation

Tess Hofmann, *Airbnb in New York City: Whose Privacy Rights are Threatened by a Government Data Grab?*, 87 Fordham L. Rev. 2589 (2019).

Available at: <https://ir.lawnet.fordham.edu/flr/vol87/iss6/11>

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AIRBNB IN NEW YORK CITY: WHOSE PRIVACY RIGHTS ARE THREATENED BY A GOVERNMENT DATA GRAB?

*Tess Hofmann**

New York City regulators have vigorously resisted the rise of Airbnb as an alternative to traditional hotels, characterizing “home sharing” as a trend that is sucking up permanent housing in a city already facing an affordability crisis. However, laws banning short-term rentals have done little to discourage this practice, as Airbnb’s policy of keeping user information private makes it possible for illegal operators to evade law enforcement. Frustrated by this power imbalance, the New York City Council passed Local Law 146, which requires Airbnb to provide city officials with access to the names and information of its home sharing hosts on a monthly basis to assist with law enforcement efforts. Airbnb claims that the ordinance is a flagrant violation of its own privacy rights and the rights of its customers.

Local Law 146 is the culmination of the regulatory struggle over Airbnb in New York City, but it is also a flash point for government data-collection efforts generally. Because of the massive potential of using private companies’ data to aid in law enforcement efforts, the implementation of data-collection statutes could be an attractive policing tool. Using Local Law 146 as a lens, this Note examines the privacy issues implicated by data-collection laws and discusses which parties can assert these privacy rights, particularly given recent changes in third-party doctrine jurisprudence. Ultimately, this Note concludes that, while the outcome of Airbnb’s challenge to Local Law 146 will be an important indicator, the suit will not resolve the question of whether individual Airbnb hosts could successfully challenge this law without the support of the company. Individual challenges to sweeping data-collection statutes could be the next frontier in breaking down the third-party doctrine’s barrier to Fourth Amendment protections.

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INTRODUCTION

The Fourth Amendment,¹ originally enacted to protect against trespass in the home by police,² today also safeguards troves of online data from being commandeered by the government as a superpowered law enforcement tool. In New York City, classic home-based privacy concerns have dovetailed

1. U.S. CONST. amend. IV.

2. See Orin S. Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 MICH. L. REV. 801, 816 (2004).

with online data privacy concerns in a struggle over the regulation of Airbnb.³

The rise of Airbnb and fellow “home sharing” websites, which allow users to list spaces to rent for overnight stays,⁴ has been met with a cascade of regulation in New York City.⁵ Opponents of home sharing, including the New York City Council, claim the practice exacerbates the dearth of affordable housing for city residents by removing potential full-time rentals from the market,⁶ creates nuisances in peaceful residential buildings where full-time residents do not expect a constant stream of strangers,⁷ and potentially exposes short-term renters to dangerous conditions in regular apartments that are not outfitted to the same standards as legal hotel rooms.⁸

The city’s latest salvo is Local Law 146, an ordinance effectively requiring home sharing sites to hand over all user records on a monthly basis so that city agents automatically have the information needed to enforce local short-

3. Throughout this Note, Airbnb is sometimes used as a catchall term for home sharing service providers. Airbnb is the market leader in home sharing. Expedia, which owns HomeAway, ranks second. See Riley McDermid, *With HomeAway Growing Like Crazy, Expedia Closes in on Airbnb for Market Share*, AUSTIN BUS. J. (July 25, 2017, 1:45 PM), <https://www.bizjournals.com/austin/news/2017/07/25/with-homeaway-growing-like-crazy-expedia-closes-in.html> [<https://perma.cc/BP5U-C74Q>].

4. Airbnb is an online platform that allows users to advertise and rent out extra rooms or entire homes for short-term periods and provides a system for leaving ratings and reviews of those rentals. See *How Do Reviews Work?*, AIRBNB, <https://www.airbnb.com/help/article/13/how-do-reviews-work> [<https://perma.cc/C88M-PCFX>] (last visited Apr. 10, 2019); *How to Start Hosting*, AIRBNB, <https://www.airbnb.com/b/setup> [<https://perma.cc/X9YV-YPDX>] (last visited Apr. 10, 2019). The service boasts a global reach. Brian Solomon, *How Airbnb Expanded to 190 Countries by Thinking ‘Glocal,’* FORBES (May 3, 2016, 2:30 PM), <https://www.forbes.com/sites/briansolomon/2016/05/03/how-airbnb-expanded-to-190-countries-by-thinking-glocal/#5aca6fcf7e91> [<https://perma.cc/GM4H-758U>].

5. See, e.g., Katie Benner, *Airbnb Sues over New Law Regulating New York Rentals*, N.Y. TIMES (Oct. 21, 2016), <https://www.nytimes.com/2016/10/22/technology/new-york-passes-law-airbnb.html> [<https://perma.cc/3YU9-8YBU>]; Katie Honan, *New York City Council Passes Bill to Regulate Airbnb*, WALL ST. J. (July 18, 2018, 6:26 PM), <https://www.wsj.com/articles/new-york-city-council-passes-bill-to-regulate-airbnb-1531952763> [<https://perma.cc/2SGX-CTVR>]; S. Jhoanna Robledo, *Hey, Wanna Rent My Couch?*, N.Y. MAG. (Nov. 27, 2011), <http://nymag.com/realestate/realestatecolumn/short-term-rentals-2011-12/> [<https://perma.cc/H284-NZVJ>].

6. See BUREAU OF BUDGET, OFFICE OF THE N.Y.C. COMPTROLLER, *THE IMPACT OF AIRBNB ON NYC RENTS 1* (2018), https://comptroller.nyc.gov/wp-content/uploads/documents/AirBnB_050318.pdf [<https://perma.cc/84FK-SG3R>]; see also Luis Ferré-Sadurní, *To Curb Illegal Airbnbs, New York City Wants to Collect Data on Hosts*, N.Y. TIMES (June 26, 2018), <https://www.nytimes.com/2018/06/26/nyregion/illegal-airbnb-new-york-city-bill.html> [<https://perma.cc/TY2U-W5DM>]. But cf. Robert McClendon, *MIT Professor Skeptical of Airbnb’s Impact on New Orleans Housing Prices*, TIMES-PICAYUNE (Sept. 22, 2015), https://www.nola.com/politics/index.ssf/2015/09/mit_professor_skeptical_of_air.html [<https://perma.cc/6TPR-ZXJB>] (questioning the popular opinion that Airbnb rentals drive up housing costs).

7. See MEMORANDUM IN SUPPORT OF LEGISLATION, A10008, St. Assemb., 233d Legis. Sess. (N.Y. 2010), https://nyassembly.gov/leg/?default_fld=&leg_video=&bn=A10008&term=2009&Summary=Y&Actions=Y&Memo=Y [<https://perma.cc/BH7G-AGRY>].

8. *Id.*

term rental laws.⁹ Airbnb sued the city over the ordinance and won a preliminary injunction against its enactment.¹⁰ An interlocutory appeal is now pending before the Second Circuit.¹¹ In its lawsuit, Airbnb characterizes the law as a gross overreach and claims it is illegal under the Fourth Amendment administrative search doctrine and the Stored Communications Act.¹² In defense, the city argues that Airbnb is asserting rights that belong to its customers, whose privacy rights are nonexistent in this circumstance under the third-party doctrine.¹³

This Note explores whether Local Law 146 is a viable mechanism for stopping violations of New York City's short-term rental laws perpetuated by Airbnb hosts, or whether this law violates the privacy rights of Airbnb, the hosts who use home sharing sites to rent their homes, or both. Part I discusses the history of regulating home sharing in New York State and New York City. Part II discusses the privacy concerns potentially implicated by Local Law 146. Part III lays out the privacy arguments made by Airbnb in its recent lawsuit and explains how the Southern District of New York evaluated these arguments. Part IV suggests that courts should recognize the Fourth Amendment rights of individual Airbnb hosts who are affected by this law or similar laws in the future, despite the third-party doctrine.

I. NEW YORK CITY'S PROTECTIONIST POLICIES AND AIRBNB'S RESPONSE

There is a conflict brewing in New York City between Airbnb, regulators, and the hotel industry. This Part explores how ineffectual short-term rental laws prompted the New York City Council to pass Local Law 146 and examines several other cities' data-sharing laws.

A. *The Problem of Airbnb in New York City*

After hearing excessive barking, residents of a building decide to complain to their landlord that a neighbor is operating an illegal kennel from his apartment through dog-sitting gigs found on Rover.com. The landlord is busy and unconcerned, so the residents report it to the local buildings department, and the neighbor subsequently gets a notice from the code enforcer. The entrepreneurial neighbor would then have time to reconsider

9. N.Y.C., N.Y., ADMINISTRATIVE CODE §§ 26-2101 to -2105 (2019). The uncodified version of this municipal law was Local Law 146, and this Note uses that popular name to refer to this legislation.

10. *Airbnb, Inc. v. City of New York*, Nos. 18 Civ. 7712 (PAE), 18 Civ. 7742 (PAE), 2019 WL 91990, at *1 (S.D.N.Y. Jan. 3, 2019), *appeal docketed*, No. 19-288 (2d. Cir. Jan. 31, 2019).

11. *Id.*; Notice of Appeal at 1, *Airbnb, Inc. v. City of New York*, Nos. 18 Civ. 7712 (PAE), 18 Civ. 7742 (PAE), 2019 WL 91990 (S.D.N.Y. Jan. 3, 2019), ECF No. 93.

12. Complaint for Declaratory and Injunctive Relief at 1, *Airbnb, Inc. v. City of New York*, Nos. 18 Civ. 7712 (PAE), 18 Civ. 7742 (PAE), 2019 WL 91990 (S.D.N.Y. Jan. 3, 2019), ECF No. 1 [hereinafter *Airbnb Complaint*].

13. See Memorandum of Law in Opposition to Plaintiffs' Motions for a Preliminary Injunction at 7–9, *Airbnb, Inc. v. City of New York*, Nos. 18 Civ. 7712 (PAE), 18 Civ. 7742 (PAE), 2019 WL 91990 (S.D.N.Y. Jan. 3, 2019), ECF No. 27 [hereinafter *NYC Memo in Opposition*].

his position and take on fewer dogs the next week, hopefully never interfering with his neighbors' peaceful enjoyment of their apartments again.

This hypothetical presents the typical lifecycle of a residential code violation—housing maintenance codes are enforced on an ad hoc basis.¹⁴ But what if, rather than waiting for complaints, New York City made commercial dog-sitting in an apartment a fineable offense, and then required Rover.com to disclose all of its records to the government each month? This solution would likely be effective, but would it strike the proper balance between privacy and law enforcement?

This tactic is the one that New York City has tried to adopt in dealing with Airbnb and other home sharing services. The prospect of passively renting extra space to tourists has proven popular among New Yorkers. In its court filings, Airbnb admits that as of June 1, 2018, there were approximately 28,000 “entire home” Airbnb listings in New York City, which represents about 0.8 percent of New York City homes.¹⁵ As of March 2019, there were over 47,000 Airbnb listings in the city, including over 23,000 entire homes, according to Inside Airbnb, a website that analyzes publicly available information about Airbnb.¹⁶ Airbnb's immense popularity, combined with a historically passive approach to policing illegal building use, have created novel problems in New York City housing code enforcement.

B. The History of the Battle Between Airbnb and New York Regulators

While cities like San Francisco have opted to legitimize the business of Airbnb rentals by creating processes through which hosts register with the municipality,¹⁷ New York has outright banned short-term rentals of apartments.¹⁸ The one major exception is that New York hosts can rent space within their homes if they are present at the same time as the guest—offering just a room or rooms rather than an entire private home.¹⁹ In 2010, the New York State Legislature enacted a new law prohibiting the rental of units in

14. See N.Y.C. DEP'T OF HOUS. PRES. & DEV., THE ABCS OF HOUSING: HOUSING RULES AND REGULATIONS FOR OWNERS AND TENANTS 3 (2014), http://www1.nyc.gov/portal/apps/311_literatures/HPD/ABCs-housing-singlepg.pdf [<https://perma.cc/MJ92-WWKG>] (explaining the process for tenants to report housing code violations); *Illegal Building Conversion or Occupancy Complaint*, NYC.GOV, <https://www1.nyc.gov/nyc-resources/service/1891/illegal-building-conversion-or-occupancy-complaint> [<https://perma.cc/52Q8-E8E4>] (last visited Apr. 10, 2019) (providing a complaint form for residents to report illegal conversions).

15. See Airbnb Complaint, *supra* note 12, at 4.

16. *New York City*, INSIDE AIRBNB, <http://insideairbnb.com/new-york-city/> [<https://perma.cc/U8RK-YFXR>] (last visited Apr. 10, 2019).

17. See *San Francisco, CA*, AIRBNB, <https://www.airbnb.com/help/article/871/san-francisco--ca> [<https://perma.cc/NTA9-CTD2>] (last updated Aug. 28, 2017).

18. See *Illegal Short-Term Rentals*, N.Y.C. OFF. SPECIAL ENFORCEMENT, <https://www1.nyc.gov/site/specialeenforcement/enforcement/illegal-short-term-rentals.page> [<https://perma.cc/SWT4-KV2Z>] (last visited Apr. 10, 2019).

19. See N.Y. MULT. DWELL. LAW § 4(8)(a) (McKinney 2019); see also Abe Carrey, Appeal Nos. 1300602, 1300736 (N.Y.C. Envtl. Control Bd. 2013), <http://archive.citylaw.org/ecb/Long%20Form%20Orders/2013/1300602---1300736.pdf> [<https://perma.cc/N9HN-PNHQ>] (affirming the legality of hosting a paying guest while the permanent resident remains in the home).

Class A multiple dwellings for fewer than thirty days.²⁰ Class A multiple dwellings are residential buildings with three or more units, as opposed to Class B multiple dwellings, which encompass hotels, boarding houses, and dormitories.²¹ In 2016, the New York State Legislature passed another law that made it illegal to advertise apartments for short-term rental and created civil penalties escalating from \$1000 for a first violation to \$7500 for repeated violations.²² These two laws together have earned New York City a reputation as the American city most hostile to Airbnb.²³

The hotel industry has also inserted itself into the fight against Airbnb in New York City.²⁴ The American Hotel and Lodging Association, spurred by home sharing services cutting into its customer base,²⁵ has launched a “multipronged, national campaign approach at the local, state and federal level” aimed at minimizing Airbnb’s reach.²⁶ Airbnb and hotel industry groups have traded barbs—with the Hotel Association of New York City once suggesting that Airbnb rentals could expose residents to transient terrorists,²⁷ and Airbnb promoting the idea that it is good for the city²⁸ and suggesting that city council members are corrupted by hotel industry campaign donations.²⁹ This rhetoric aside, city regulators and the hotel lobby have found themselves on the same side of the fight against Airbnb.

20. MULT. DWELL. § 4(8)(a).

21. *See id.* § 4(8)–(9).

22. *See* N.Y. MULT. DWELL. LAW § 121 (McKinney 2019).

23. *See* Nestor M. Davidson & John J. Infranca, *The Sharing Economy as an Urban Phenomenon*, 34 YALE L. & POL’Y REV. 215, 249 (2016); J. T. Minor, Note, *Foregoing the Cleaver for the Scalpel: How New York Can Add Some Nuance to Its Short-Term Rental Laws*, 103 IOWA L. REV. 817, 831 (2018); Nick Tabor, *Is New York Cracking Down on Airbnb to Help Local Residents or Hotels?*, N.Y. MAG. (Aug. 13, 2018), <http://nymag.com/intelligencer/2018/08/airbnb-new-york-crack-down.html> [<https://perma.cc/B3TV-XMRK>].

24. *See* Will Bredderman, *Hotels Target Airbnb in Mail and Ad Blitz*, CRAIN’S N.Y. BUS. (Apr. 6, 2018, 12:00 AM), <http://www.crainsnewyork.com/article/20180406/REAL-ESTATE/180409933/hotels-target-airbnb-in-mail-and-ad-blitz> [<https://perma.cc/9A4A-Z8H6>]; Jake Offenhartz, *Hotel Industry Releases Attack Ad Accusing Airbnb of Enabling Terrorists*, GOTHAMIST (Aug. 1, 2017, 9:27 AM), http://gothamist.com/2017/08/01/airbnb-terrorism_ad.php [<https://perma.cc/GCD8-P82N>].

25. Dina Gerdeman, *The Airbnb Effect: Cheaper Rooms for Travelers, Less Revenue for Hotels*, FORBES (Feb. 27, 2018, 12:25 PM), <https://www.forbes.com/sites/hbsworkingknowledge/2018/02/27/the-airbnb-effect-cheaper-rooms-for-travelers-less-revenue-for-hotels/> [<https://perma.cc/MP9N-TF9D>].

26. Katie Benner, *Inside the Hotel Industry’s Plan to Combat Airbnb*, N.Y. TIMES (Apr. 16, 2017), <https://www.nytimes.com/2017/04/16/technology/inside-the-hotel-industrys-plan-to-combat-airbnb.html> [<https://perma.cc/9MCJ-VK8U>].

27. Kenneth Lovett, *New York City’s Hotel Industry Links Airbnb to Terror in Harsh Ad*, N.Y. DAILY NEWS (July 31, 2017, 5:00 AM), <https://www.nydailynews.com/new-york/new-york-city-hotel-industry-links-airbnb-terror-harsh-ad-article-1.3370202> [<https://perma.cc/Y9JF-GQVQ>].

28. Jack Smith IV, *Airbnb’s Latest Subway Propaganda Reminds You That You Love, Support Airbnb*, OBSERVER (Aug. 29, 2014, 12:18 PM), <https://observer.com/2014/08/airbnbs-latest-subway-propaganda-reminds-you-that-you-love-support-airbnb/> [<https://perma.cc/JUP4-3KPG>].

29. Joe Anuta, *Airbnb Questions Hotel Union’s Campaign Contributions to City Council Members*, CRAIN’S N.Y. BUS. (June 22, 2018, 12:00 AM), <https://www.crainsnewyork.com/>

In 2014, New York Attorney General Eric Schneiderman attempted to subpoena comprehensive host data from Airbnb for all New York State hosts as part of an investigation into potential violations of short-term rental laws.³⁰ Airbnb succeeded in getting the subpoena quashed as overbroad, since it asked for the information of all New York State hosts despite the fact that the short-term rental laws do not apply to cities with fewer than 325,000 citizens.³¹ Soon after, Airbnb agreed to release anonymized data on hosts, with names and addresses stripped, which Schneiderman would have one year to review.³² Under the agreement, if the investigation revealed suspicious illegal activity, Airbnb would have to turn over the hosts' identifying details,³³ which Airbnb ultimately did for 124 hosts.³⁴ From that point forward, Airbnb also agreed to require New York State hosts to view a warning about the short-term rental laws and applicable taxes prior to listing their space.³⁵

In 2015, Airbnb tried to increase transparency and collaboration with law enforcement by announcing a commitment to “provide cities with the information they need to make informed decisions about home sharing policies” in a mission statement titled the Airbnb Community Compact.³⁶ In conjunction with this statement, the company voluntarily released a trove of anonymized data on New York City hosts, including statistics like host earnings, types of listings, and how often hosts rent their spaces.³⁷

This cooperation did not last long. In 2016, Airbnb filed suit against Schneiderman and the City of New York over the amendments to the city and state laws making advertisement of short-term rentals a fineable offense.³⁸ Airbnb claimed that these amendments violated the Communications Decency Act of 1996 by making the company liable for third-party postings on its platform.³⁹ That suit was settled in just two months, with the City promising that only hosts would be held responsible

article/20180622/REAL_ESTATE/180629966/on-the-offensive-airbnb-questions-hotel-union-s-campaign-contributions-to-city-council-members [https://perma.cc/S369-AK5R].

30. See *Airbnb, Inc. v. Schneiderman*, 989 N.Y.S.2d 786, 790–91 (Sup. Ct. 2014).

31. *Id.* at 791–92.

32. David Streitfeld, *Airbnb Will Hand Over Host Data to New York*, N.Y. TIMES (May 21, 2014), <https://www.nytimes.com/2014/05/22/technology/airbnb-will-hand-over-host-data-to-new-york.html> [https://perma.cc/P6WJ-56CK].

33. *Id.*

34. Pui-Wing Tam & Christie Smythe, *Airbnb Turns Over Data on Top New York City Hosts to State Attorney General*, SKIFT (Aug. 23, 2014, 10:00 AM), <https://skift.com/2014/08/23/airbnb-turns-over-data-on-top-new-york-city-hosts-to-state-attorney-general/> [https://perma.cc/GFP8-3T2Q].

35. Streitfeld, *supra* note 32.

36. See *The Airbnb Community Compact*, AIRBNB CITIZEN, <https://www.airnbccitizen.com/community-compact/> [https://perma.cc/B4EK-N9KX] (last visited Apr. 10, 2019).

37. Mike Isaac, *Airbnb Releases Trove of New York City Home-Sharing Data*, N.Y. TIMES (Dec. 1, 2015), <https://www.nytimes.com/2015/12/02/technology/airbnb-releases-trove-of-new-york-city-home-sharing-data.html> [https://perma.cc/1QT7-R3CH].

38. Benner, *supra* note 5.

39. *Id.*

and fined, rather than Airbnb.⁴⁰ In its notice of dismissal, Airbnb vowed to continue to work cooperatively with the city on ways to address the permanent housing shortage, and the company committed to encourage its hosts' compliance with Airbnb's "One Host, One Home"⁴¹ policy.⁴² Despite this promise, the city has struggled to enforce hosts' compliance with its short-term rental regulations.

C. Enforcement Issues

Passing clear-cut legislation is one thing, but actually enforcing these provisions when the illegal activity takes place inside private homes has proven quite difficult.⁴³ Because Airbnb does not display the real names and addresses of its hosts on its website, New York City agents are stymied, as they cannot access a comprehensive list of Airbnb hosts in the city.⁴⁴ Like the code enforcer checking on the dog-sitter,⁴⁵ city officials are confined to traditional investigative tactics: following tips from complaining neighbors, knocking on doors and asking questions, and occasionally staking out suspicious buildings with video cameras.⁴⁶ The city has reportedly even used leads generated by private investigators paid by the hotel lobby.⁴⁷ These inspections have led Airbnb⁴⁸ and its hosts⁴⁹ to accuse city agents of harassment.

In addition to being irksome to hosts and guests, the process of investigating tens of thousands of potential illegal rentals using these tactics

40. Katie Benner, *Airbnb Ends Fight with New York City over Fines*, N.Y. TIMES (Dec. 3, 2016), <https://www.nytimes.com/2016/12/03/technology/airbnb-ends-fight-with-new-york-city-over-fines.html> [https://perma.cc/5RJ5-EC7H].

41. *See generally One Host, One Home: New York City (January 2019 Update)*, AIRBNB 1 (2019), https://2sqy5r1jf93u30kwzc1smfqt-wpengine.netdna-ssl.com/wp-content/uploads/2019/01/One-Host-One-Home_-_January-2019-Update.pdf [https://perma.cc/7B3W-JWF6] (providing information on the percentage of New York City Airbnb hosts with only one entire home listing available).

42. NY Stipulation of Settlement and Dismissal at 2, *Airbnb, Inc. v. Schneiderman*, No. 16-cv-8239 (KBF) (S.D.N.Y. Dec. 5, 2016), ECF No. 32.

43. *See* Jennifer Peltz, *The Team Tasked with Snooping Out Illegal Hotels and Airbnb Listings in NYC*, SKIFT (Mar. 30, 2015, 9:00 AM), <https://skift.com/2015/03/30/the-team-tasked-with-snooping-out-illegal-hotels-and-airbnb-hosts-in-nyc/> [https://perma.cc/S2AL-263Z].

44. *See* Declaration of Christian Klossner in Opposition to Plaintiffs' Motions for a Preliminary Injunction at 13, *Airbnb, Inc. v. City of New York*, Nos. 18 Civ. 7712 (PAE), 18 Civ. 7742 (PAE), 2019 WL 91990 (S.D.N.Y. Jan. 3, 2019) [hereinafter Klossner Declaration].

45. *See supra* Part I.A.

46. *See* Peltz, *supra* note 43.

47. Josh Eidelson, *Hotel Money Is Funding Anti-Airbnb Sting Operations*, BLOOMBERG BUSINESSWEEK (July 12, 2017, 6:25 AM), <https://www.bloomberg.com/news/articles/2017-07-12/hotel-money-is-funding-anti-airbnb-sting-operations> [https://perma.cc/9P5N-XXFL].

48. Sally Goldenberg, *New York City Poised to Join Airbnb Crackdown*, POLITICO (May 15, 2018, 5:05 AM), <https://www.politico.com/states/new-york/city-hall/story/2018/05/14/new-york-city-poised-to-join-others-in-cracking-down-on-airbnb-418835> [https://perma.cc/BM4X-3AXE].

49. Christopher Robbins, *Airbnb Host Sues City After Receiving \$32K in Fines*, GOTHAMIST (July 18, 2018, 2:08 PM), http://gothamist.com/2018/07/18/airbnb_nyc_lawsuit_fines.php [https://perma.cc/97TM-DKfy].

is resource intensive.⁵⁰ But rather than surrender, New York City has devoted increasing resources to enforcing the laws.⁵¹ In a 2016 executive order, Mayor Bill de Blasio recast the mission of the Office of Special Enforcement (OSE), a city agency once focused on issues including the sale of counterfeit goods and prostitution,⁵² to focus on enforcing the prohibition against advertising short-term rentals.⁵³ OSE conducted over 3500 inspections in 2017, up from 1695 inspections in 2016.⁵⁴ According to Christian Klossner, the executive director of OSE, the agency's enforcement capabilities have been outpaced by a massive increase in short-term rental listings.⁵⁵

Despite OSE's efforts, the presence of illegal inventory on Airbnb has persisted. A 2014 report by the state attorney general's office found that 72 percent of units booked as short-term rentals on Airbnb violated the ban on renting entire homes for fewer than thirty days.⁵⁶ A 2016 report from Housing Conservation Coordinators and MFY Legal Services found that 56 percent of Airbnb's New York City listings were likely illegal.⁵⁷ A McGill University report in 2018 found that illegal listings account for approximately 42 to 46 percent of all active New York City Airbnb listings, which comprises 66 percent of all host revenue,⁵⁸ and that Airbnb has removed between 7000 and 13,500 units of housing from New York City's long-term rental market.⁵⁹ Helpless to enforce the existing laws, the New York City Council adopted a creative solution.

50. See Rosa Goldensohn, *De Blasio Ramps Up Airbnb Enforcement*, CRAIN'S N.Y. BUS. (Apr. 26, 2017, 12:00 AM), https://www.crainsnewyork.com/article/20170426/REAL_ESTATE/170429915/mayor-bill-de-blasio-budgets-1-6-million-to-crack-down-on-airbnb [<https://perma.cc/F399-KVZN>] (discussing the city's expansion of the Office of Special Enforcement from thirty-two to forty-eight staffers).

51. See *id.*; see also Klossner Declaration, *supra* note 44, at 4.

52. See Stu Loeser & Virginia Lam, *Mayor Bloomberg Creates the Office of Special Enforcement to Expand Enforcement Initiatives Across the City and Improve Quality of Life in All Five Boroughs*, NYC.GOV (Dec. 14, 2006), <https://www1.nyc.gov/office-of-the-mayor/news/434-06/mayor-bloomberg-creates-office-special-enforcement-expand-enforcement-initiatives-across> [<https://perma.cc/M3ZL-F9D6>].

53. See CITY OF N.Y. OFFICE OF THE MAYOR, EXECUTIVE ORDER NO. 22, OFFICE OF SPECIAL ENFORCEMENT—UNLAWFUL ADVERTISEMENTS FOR CERTAIN OCCUPANCIES (2016), https://www1.nyc.gov/assets/home/downloads/pdf/executive-orders/2016/eo_22.pdf [<https://perma.cc/F625-LFYA>].

54. See Klossner Declaration, *supra* note 44, at 4.

55. See *id.* at 9.

56. RESEARCH DEP'T & INTERNET BUREAU, N.Y. STATE OFFICE OF THE ATT'Y GEN., AIRBNB IN THE CITY 8 (2014), <https://ag.ny.gov/pdfs/AIRBNB%20REPORT.pdf> [<https://perma.cc/N5FM-ZAXY>].

57. BJH ADVISORS LLC, SHORT CHANGING NEW YORK CITY: THE IMPACT OF AIRBNB ON NEW YORK CITY'S HOUSING MARKET 24 (2016), <http://mobilizationforjustice.org/wp-content/uploads/Shortchanging-NYC.pdf> [<https://perma.cc/6LAE-WFJV>].

58. DAVID WACHSMUTH ET AL., MCGILL UNIV., THE HIGH COST OF SHORT-TERM RENTALS IN NEW YORK CITY 15 (2018), <https://mcgill.ca/newsroom/files/newsroom/channels/attach/airbnb-report.pdf> [<https://perma.cc/5H25-NT4T>].

59. *Id.* at 25.

D. Local Law 146

Faced with the meteoric rise in popularity of short-term rentals with no slowdown in sight, the New York City Council passed Local Law 146.⁶⁰ The council unanimously approved the bill,⁶¹ and Mayor Bill de Blasio signed it into law on August 6, 2018.⁶² Before being preliminarily enjoined by the Southern District of New York, the law was set to take effect in February 2019.⁶³

Local Law 146 requires home sharing services such as Airbnb to submit a monthly report to OSE including the following details of each rental: the physical address of the premises; the legal name, phone number, email address, and physical address of the host; the URL of the listing; the number of the listing; whether the rental involved the entire dwelling or part of the dwelling; the total number of days it was rented; the amount of fees received by the booking service; the amount of rent received by the host; and the anonymized identifier for the account number used by the host to receive payments or, alternatively, the account name and account number.⁶⁴ The law also requires the home sharing service to obtain consent for this disclosure from its users as a condition of listing their property on the service.⁶⁵ If accurate reports are not submitted, the law provides for the home sharing service to be fined up to \$1500 per listing per month.⁶⁶ According to Klossner, “The additional information to be provided to the City pursuant to Local Law 146 will enhance OSE’s research and investigative capabilities and will provide OSE with the tools needed to effectively and efficiently combat increasing illegal and unsafe transient use in the City.”⁶⁷

Airbnb and its competitor HomeAway filed suit against the City of New York, claiming that the law creates an illegal administrative search.⁶⁸ As Airbnb framed the issue before the court: “In short, neither New York City, nor any other city, nor any state, nor the federal government, has ever tried

60. Honan, *supra* note 5.

61. *Id.*

62. Press Release, Mayor de Blasio Signs Legislation Regarding the Department of Correction, Bail Bonds, Senior Centers, and Short Term Rentals (Aug. 6, 2018), <https://www1.nyc.gov/office-of-the-mayor/news/398-18/mayor-de-blasio-signs-legislation-the-department-correction-bail-bonds-senior#0> [<https://perma.cc/CEN6-ZDQM>].

63. See N.Y.C., N.Y., ADMINISTRATIVE CODE §§ 26-2101 to -2105 (2019); Airbnb, Inc. v. City of New York, Nos. 18 Civ. 7712 (PAE), 18 Civ. 7742 (PAE), 2019 WL 91990, at *1 (S.D.N.Y. Jan. 3, 2019), *appeal docketed*, No. 19-288 (2d. Cir. Jan. 31, 2019).

64. N.Y.C., N.Y., ADMINISTRATIVE CODE § 26-2102 (2019).

65. *Id.*

66. N.Y.C., N.Y., ADMINISTRATIVE CODE § 26-2104 (2019).

67. Klossner Declaration, *supra* note 44, at 9.

68. Airbnb Complaint, *supra* note 12, at 23; Complaint to Declare Invalid and Enjoin Enforcement of New York City Administrative Code Sections 26-2101–26.2104 at 21, Airbnb, Inc. v. City of New York, Nos. 18 Civ. 7712 (PAE), 18 Civ. 7742 (PAE), 2019 WL 91990 (S.D.N.Y. Jan. 3, 2019) [hereinafter HomeAway Complaint]. These lawsuits were designated as related and assigned to the same judge in the Southern District of New York. See *Airbnb, Inc.*, 2019 WL 91990, at *1 n.1.

anything like this ever before.”⁶⁹ The home sharing sites claim that the law bypasses the usual requirement of a warrant by requiring the sites to turn over business records on a regular basis without probable cause; thus, the law violates both their privacy rights and the privacy rights of hosts under the Fourth Amendment and the Stored Communications Act.⁷⁰

In January 2019, the district court granted the home sharing sites’ request for a preliminary injunction of the ordinance and found that the collection of broad swaths of data absent reasonable suspicion would likely violate the Fourth Amendment.⁷¹ New York City is currently appealing that order before the Second Circuit.⁷² The result of the lawsuit could have implications not only for the city, but also for any municipality seeking data from private companies to help enforce administrative laws.

E. Data Sharing in Other Cities

This is not the first time that a city has elicited information from home sharing services to help with law enforcement; it is only the first time that a city has gone about it in this specific way.

In New Orleans, for example, hosts are required to obtain short-term rental licenses from the city.⁷³ Airbnb shares a log of its hosts’ anonymized activity with the city on a monthly basis in accordance with a local statute, and the city can subpoena personal host information when it has a reasonable belief that a specific short-term rental is operating illegally.⁷⁴ In contrast to New York City, there is no outright ban on short-term rentals in New Orleans.⁷⁵ Instead, there is a ninety-day annual cap for hosts to rent out entire homes in residential districts.⁷⁶

Several other cities have developed approaches to regulate this market. Chicago requires home sharing platforms to register each listed unit with the city.⁷⁷ Home sharing platforms must provide anonymized data on users and lengths of stay on a bimonthly basis, with the caveat that personalized information will be provided upon request by subpoena if illegal activity is suspected.⁷⁸ Chicago does not have laws banning short-term rentals, but it

69. Memorandum of Law in Support of Plaintiff’s Motion for a Preliminary Injunction at 13, *Airbnb, Inc. v. City of New York*, Nos. 18 Civ. 7712 (PAE), 18 Civ. 7742 (PAE), 2019 WL 91990 (S.D.N.Y. Jan. 3, 2019) [hereinafter *Airbnb Memo in Support*].

70. See *Airbnb Complaint*, *supra* note 12, at 5–6; *HomeAway Complaint*, *supra* note 68, at 5. The lawsuits also allege violations of the First Amendment and the New York State Constitution, but those claims are beyond the scope of this Note.

71. *Airbnb, Inc.*, 2019 WL 91990, at *20.

72. Joyce Hanson, *NYC Taking Short-Term Rental Rule’s Freeze to 2nd Circ.*, LAW360 (Feb. 1, 2019, 3:44 PM), <https://www.law360.com/appellate/articles/1124566/nyc-taking-short-term-rental-rule-s-freeze-to-2nd-circ-> [<https://perma.cc/SBL9-5BL9>].

73. NEW ORLEANS, LA., CODE OF ORDINANCES § 26-613(b) (2019).

74. NEW ORLEANS, LA., CODE OF ORDINANCES § 26-620(a)–(b) (2019).

75. *Short Term Rental Zoning Restrictions*, CITY NEW ORLEANS, <https://www.nola.gov/short-term-rentals/str-zoning-restrictions/> [<https://perma.cc/BP3Q-NLWZ>] (last updated May 24, 2018).

76. NEW ORLEANS, LA., COMPREHENSIVE ZONING ORDINANCE § 21.8.C.14.b (2019).

77. CHI., ILL., MUNICIPAL CODE § 4-14-020 (2018).

78. CHI., ILL., MUNICIPAL CODE § 4-13-240 (2018).

allows individual precincts with residentially zoned areas to adopt local ordinances prohibiting additional short-term rentals.⁷⁹ In Portland, short-term rentals are allowed, provided that hosts live in their homes for at least nine months a year⁸⁰ and obtain a permit from the city.⁸¹ San Francisco requires individuals to apply for an identifying number in the city's short-term rental registry⁸² and submit quarterly reports of activity.⁸³ San Francisco does not require Airbnb to regularly share data, but it does have laws specifying that home sharing platforms must maintain personalized host data for three years and provide it to the city in response to a lawful request.⁸⁴

These policies illustrate a willingness to accommodate the reality of Airbnb's popularity by refraining from banning short-term rentals of residential apartments while maintaining some limits on and oversight of the industry.

II. THE PRIVACY CONCERNS IMPLICATED BY LOCAL LAW 146

This Part discusses several distinct privacy questions that Local Law 146 raises, including whether the law constitutes an illegal Fourth Amendment administrative search, how the third-party doctrine affects a party's ability to successfully challenge the law, whether the law is preempted by the Stored Communications Act, and whether the law offends traditional notions of privacy in the home. These concerns provide the background for Airbnb and HomeAway's challenges to Local Law 146.

A. Fourth Amendment Administrative Search

The Fourth Amendment provides that “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause.”⁸⁵ Generally, a government search requires a court-issued warrant, and this warrant requirement guarantees a legal justification for the search.⁸⁶ Warrantless searches are “*per se* unreasonable” aside from “a few specifically established and well-delineated exceptions.”⁸⁷

Fourth Amendment protection extends to areas in which a person has a reasonable expectation of privacy, as Justice John Marshall Harlan discussed in his influential concurring opinion in *Katz v. United States*.⁸⁸ This expectation is twofold: “[F]irst that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one

79. CHI., ILL., MUNICIPAL CODE § 4-17-020 (2018).

80. PORTLAND, OR., CITY CODE & CHARTER § 33-207-040(A)(1) (2018).

81. PORTLAND, OR., CITY CODE & CHARTER § 33-207-040(C) (2018).

82. S.F., CAL., ADMINISTRATIVE CODE § 41A.5(g)(1)(E)–(F) (2019).

83. S.F., CAL., ADMINISTRATIVE CODE § 41A.5(g)(3)(C) (2019).

84. S.F., CAL., ADMINISTRATIVE CODE § 41A.5(g)(4)(E) (2019).

85. U.S. CONST. amend. IV.

86. See *Johnson v. United States*, 333 U.S. 10, 14–15 (1948).

87. *Katz v. United States*, 389 U.S. 347, 357 (1967).

88. 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

that society is prepared to recognize as ‘reasonable.’”⁸⁹ In *Katz*, the U.S. Supreme Court held that a criminal defendant’s Fourth Amendment rights were violated when law enforcement officers recorded his phone calls from a telephone booth⁹⁰ without a warrant.⁹¹ Despite the semi-public nature of the phone booth, the defendant could reasonably expect that his calls were private.⁹²

However, warrantless searches are sometimes allowed where “special needs . . . make the warrant and probable-cause requirement impracticable”⁹³ or the primary purpose of the search is “distinguishable from the general interest in crime control.”⁹⁴ Special needs searches directed toward a purpose other than crime control—usually compliance with health and safety regulations—are known as administrative searches.⁹⁵

The administrative search doctrine originated in the 1967 Supreme Court decision *Camara v. Municipal Court*.⁹⁶ In *Camara*, the Court found that a San Francisco ordinance authorizing building inspectors to determine compliance with the housing code would be permissible only if there was a reasonable government interest⁹⁷ that was balanced against the invasion of a citizen’s privacy.⁹⁸ In the case of the building-inspection regime, citizens could either consent to a search (the majority response), or, in the absence of consent, inspectors could obtain a warrant.⁹⁹ While a search warrant can generally only be obtained by showing probable cause that evidence is located in a particular place,¹⁰⁰ the Court determined that an administrative search warrant could properly be issued without reasonable suspicion if the criteria for inspection are set out in legislative standards.¹⁰¹ For a building inspection, these standards may include the passage of time, the nature of the building, or the condition of the entire area.¹⁰²

Since *Camara*, warrantless administrative searches have proliferated. Common forms of administrative searches include familiar processes such as checkpoint vehicle searches¹⁰³ and inspections of businesses in particular industries.¹⁰⁴

89. *Id.*

90. *Id.* at 353 (majority opinion).

91. *Id.* at 356–58.

92. *Id.* at 352–53.

93. *Skinner v. Ry. Labor Execs.’ Ass’n*, 489 U.S. 602, 619 (1989) (quoting *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987)).

94. *See City of Indianapolis v. Edmond*, 531 U.S. 32, 40 (2000) (quoting *Delaware v. Prouse*, 440 U.S. 648, 659 n.18 (1979)).

95. *See G. S. Hans, Curing Administrative Search Decay*, 24 B.U. J. SCI. & TECH. L. 1, 3 (2018).

96. 387 U.S. 523 (1967).

97. *Id.* at 539.

98. *Id.* at 537.

99. *Id.* at 539–40.

100. *Illinois v. Gates*, 462 U.S. 213, 230 (1983).

101. *See Camara*, 387 U.S. at 538.

102. *Id.*

103. *See United States v. Martinez-Fuerte*, 428 U.S. 543, 566 (1976).

104. *See United States v. Biswell*, 406 U.S. 311, 311–13 (1972).

In addition, certain “closely regulated industries”¹⁰⁵ are considered so hazardous to the public welfare that proprietors within these fields have no reasonable expectation of privacy.¹⁰⁶ There are, to date, only four industries that the Supreme Court has deemed closely regulated: liquor sales,¹⁰⁷ firearms dealing,¹⁰⁸ mining,¹⁰⁹ and running automobile junkyards.¹¹⁰

Outside of closely regulated industries, the Court has held that absent consent or exigent circumstances, the subject of an administrative search “must be afforded an opportunity to obtain precompliance review before a neutral decisionmaker.”¹¹¹ For example, if records are subpoenaed, the subject of the subpoena has the opportunity to “question the reasonableness of the subpoena” in court.¹¹²

In support of its position that Local Law 146 constitutes an illegal Fourth Amendment administrative search, Airbnb relies heavily on the 2015 Supreme Court decision *City of Los Angeles v. Patel*,¹¹³ in which the Court struck down a city ordinance requiring hotel operators to immediately turn over their records to the police on command and with no opportunity for precompliance review under the administrative search doctrine.¹¹⁴ In *Patel*, the Court held that it is unconstitutional to penalize a hotel owner who refuses to give police officers access to his or her registry on the spot and with no prior notice because the owner has not been given an opportunity to have a neutral decision maker review the demand.¹¹⁵ The Court also held that hotels are not a closely regulated industry under administrative search jurisprudence: “[C]lassify[ing] hotels as pervasively regulated would permit what has always been a narrow exception to swallow the rule.”¹¹⁶

Due to certain parallels with Airbnb’s lawsuit—the context of the hospitality industry, the search involving customer records, and the apparent lack of opportunity for precompliance review—*Patel* looms large in the dispute over Local Law 146.

B. Third-Party Issues

This section discusses whose rights courts will recognize when the government gains information about an individual through a search of a third-party entity. First, this section traces the evolution of the third-party doctrine and explains how the doctrine affects which parties can bring meritorious

105. *City of Los Angeles v. Patel*, 135 S. Ct. 2443, 2454 (2015).

106. *See* *Marshall v. Barlow’s, Inc.*, 436 U.S. 307, 313 (1978).

107. *See* *Colonnade Catering Corp. v. United States*, 397 U.S. 72, 74 (1970).

108. *See* *Biswell*, 406 U.S. at 316.

109. *See* *Donovan v. Dewey*, 452 U.S. 594, 603 (1981).

110. *See* *New York v. Burger*, 482 U.S. 691, 707 (1987).

111. *City of Los Angeles v. Patel*, 135 S. Ct. 2443, 2452 (2015).

112. *Donovan v. Lone Steer, Inc.*, 464 U.S. 408, 415 (1984).

113. 135 S. Ct. 2443 (2015).

114. *See id.* at 2456; Airbnb Complaint, *supra* note 12, at 23

115. *See Patel*, 135 S. Ct. at 2447, 2453. While it is not necessary that the demand actually be reviewed if the hotel owner gives consent, if the owner refuses consent, she must be afforded the opportunity to object. *See id.* at 2453.

116. *Id.* at 2455.

challenges to Local Law 146. Second, this section explains the distinct theory of third-party standing.

1. History of the Third-Party Doctrine

In an administrative search challenge, the complainant typically must be the business that was subject to the administrative search rather than an individual whose records were produced as a result of the search.¹¹⁷ This is due to the third-party doctrine, under which individual citizens do not have a protected privacy interest in records that are given to and controlled by a third party.¹¹⁸ This notion is rooted in *Katz*, which established that Fourth Amendment protection extends to areas where a person has a reasonable expectation of privacy but that “[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection.”¹¹⁹ Another key component of the third-party doctrine is that the Fourth Amendment does not prohibit the government from obtaining information that a person has revealed to a third party, “even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed.”¹²⁰ As a result, the government can usually obtain information provided by citizens to third parties without triggering Fourth Amendment protections by serving legal process on the third party.¹²¹

Following its rudimentary origins in *Katz*, the third-party doctrine was solidified in two 1970s cases: *United States v. Miller*,¹²² in which the Supreme Court found no reasonable expectation of privacy in bank records;¹²³ and *Smith v. Maryland*,¹²⁴ in which the Court held that there is no reasonable expectation of privacy in the numbers dialed on a phone.¹²⁵

More recently, the Court considered the limits of the third-party doctrine in *Carpenter v. United States*,¹²⁶ a case involving historical cell-site location information (CSLI) subpoenaed as a part of a robbery investigation.¹²⁷ The Court found that the defendant Timothy Carpenter had a reasonable expectation of privacy in his CSLI, despite the fact that the information was created, stored, and controlled by his cell phone company—a third party.¹²⁸ The Court found the third-party doctrine inapplicable in this case because Carpenter did not voluntarily share his location information with the cell

117. See Hans, *supra* note 95, at 10–11.

118. Lucas Issacharoff & Kyle Wirshba, *Restoring Reason to the Third Party Doctrine*, 100 MINN. L. REV. 985, 985 (2016).

119. *Katz v. United States*, 389 U.S. 347, 351 (1967).

120. *United States v. Miller*, 425 U.S. 435, 443 (1976).

121. See *Carpenter v. United States*, 138 S. Ct. 2206, 2216 (2018).

122. 425 U.S. 435 (1976).

123. See *id.* at 442–43.

124. 442 U.S. 735 (1979).

125. *Id.* at 743–44.

126. 138 S. Ct. 2206 (2018).

127. See *id.* at 2210.

128. See *id.* at 2217.

phone company and because of the comprehensive and especially revealing nature of CSLI.¹²⁹ Some scholars have predicted that this decision will have a ripple effect and will make it more difficult for the government to access various types of nonpublic databases.¹³⁰

The Court split 5-4 with the dissenting justices authoring four separate dissents.¹³¹ Justice Anthony Kennedy's dissent, joined by Justice Thomas and Justice Alito,¹³² emphasized that property concepts are still integral to Fourth Amendment rights.¹³³ Because the bank in *Miller* and the phone company in *Smith* were more than merely "bailees or custodians of the records, with a duty to hold the records for the defendants' use," individuals could not argue that their own personal property had been searched.¹³⁴ Justice Kennedy found nothing special to distinguish CSLI from other records that contain personal information but are nonetheless owned by businesses and can be obtained through serving a subpoena on the business.¹³⁵

In a separate dissent, Justice Alito emphasized that the majority decision "fractures two fundamental pillars of Fourth Amendment law" by treating an order to produce specified documents as equivalent to a search, and by allowing a defendant to object to the search of a third party's property.¹³⁶ Justice Alito warned that this would threaten legitimate investigative practices on which law enforcement officers rely.¹³⁷ By contrast, Justice Gorsuch was the only dissenting vote to argue for greater individual privacy protections than the majority and wholesale abandonment of the third-party doctrine.¹³⁸

While the implications of *Carpenter* are not yet fully understood, the decision shows that the Court is rethinking strict application of the third-party doctrine.¹³⁹ This rethinking is important in the Airbnb context because the classic application of the third-party doctrine would prevent individual hosts from claiming a violation of their privacy rights following a search of Airbnb's records.

2. Third-Party Standing

Third-party standing is an exception to the rule that a "plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to

129. *See id.* at 2223.

130. *See* Susan Freiwald & Stephen Wm. Smith, *The Carpenter Chronicle: A Near Perfect Surveillance*, 132 HARV. L. REV. 205, 206 (2018).

131. *See Carpenter*, 138 S. Ct. at 2211.

132. *Id.* at 2223.

133. *Id.* at 2227–28. (Kennedy, J., dissenting).

134. *Id.* at 2228.

135. *See id.* at 2229.

136. *Id.* at 2247 (Alito, J., dissenting).

137. *Id.*

138. *Id.* at 2262 (Gorsuch, J., dissenting).

139. *See* Jordan M. Blanke, *Carpenter v. United States Begs for Action*, 2018 U. ILL. L. REV. ONLINE 260, 260.

relief on the legal rights or interests of third parties.”¹⁴⁰ In certain situations, third-party plaintiffs can assert constitutional arguments on behalf of nonparties, provided that there is: (1) a close relationship between the plaintiff and the parties possessing the right; and (2) some hindrance to the nonparty bringing a claim of his own.¹⁴¹ This exception gives standing to businesses to bring constitutional claims on behalf of their clients and customers. For example, in *Craig v. Boren*,¹⁴² a licensed vendor of 3.2 percent beer was allowed to assert an equal protection claim on behalf of male customers who were adversely affected by a law allowing women to purchase 3.2 percent beer at age eighteen and men at age twenty-one.¹⁴³ In *Recording Industry Ass’n of America v. Verizon Internet Services*,¹⁴⁴ Verizon was allowed to challenge a subpoena that sought the identity of a user on the grounds that the subpoena violated the user’s First Amendment rights.¹⁴⁵ Accordingly, third-party standing is an alternate theory under which home sharing services could assert the privacy rights of their customers.

C. The Stored Communications Act

The Stored Communications Act (SCA)¹⁴⁶ is a federal statutory framework that adds an extra layer of responsibility to covered entities in safeguarding their users’ electronic information and communications from disclosure.¹⁴⁷ The law contains a sliding scale requiring greater protection for more sensitive types of information, such as the content of messages as opposed to a user’s basic registration information.¹⁴⁸ The provisions of the statute articulating which entities the SCA covers are considered to be outdated.¹⁴⁹ As written, the SCA covers electronic communications services (ECS), meaning “any service which provides to users thereof the ability to send or receive . . . electronic communications,”¹⁵⁰ and remote computing services (RCS), meaning any entity engaged in the “provision to the public of computer storage or processing services by means of an electronic communications system.”¹⁵¹

Regarding the disclosure of information to the government, the SCA provides that “a provider of remote computing service or electronic

140. *Warth v. Seldin*, 422 U.S. 490, 499 (1975).

141. *Kowalski v. Tesmer*, 543 U.S. 125, 130 (2004).

142. 429 U.S. 190 (1976).

143. *See id.* at 192–93.

144. 257 F. Supp. 2d 244 (D.D.C. 2003).

145. *See id.* at 258.

146. 18 U.S.C. §§ 2701–2711 (2012).

147. *See In re United States for an Order Pursuant to 18 U.S.C. § 2705(b)*, 289 F. Supp. 3d 201, 203 (D.D.C. 2018).

148. Orin S. Kerr, *A User’s Guide to the Stored Communications Act, and a Legislator’s Guide to Amending It*, 72 GEO. WASH. L. REV. 1208, 1222 (2004).

149. *Id.* at 1213; *cf. In re United States for an Order Pursuant to 18 U.S.C. § 2705(b)*, 289 F. Supp. 3d at 208 (“With technological advances since the enactment of . . . the SCA, the difference between ECS and RCS has eroded . . .”).

150. 18 U.S.C. § 2510(15) (2012).

151. *Id.* § 2711(2).

communication service to the public shall not knowingly divulge a record or other information pertaining to a subscriber to or customer of such service . . . to any governmental entity” without a subpoena or other legal process.¹⁵² The flip side is that the law requires an internet service provider to disclose electronic information protected by the Act to the government if the government obtains legal process in a form approved by the Act.¹⁵³

Section 2703 of the SCA discusses customer records.¹⁵⁴ The provision says that the government can use an administrative subpoena authorized by federal or state statute to compel disclosure of basic customer records including customer identity and the types of services used.¹⁵⁵ For all other customer records, the government must either obtain a warrant, a court order, or the consent of the customer.¹⁵⁶ Local Law 146 potentially implicates this provision.

D. *The Home and Privacy*

As the Supreme Court has recognized, “[W]hen it comes to the Fourth Amendment, the home is first among equals. At the Amendment’s ‘very core’ stands ‘the right of a man to retreat into his own home and there be free from unreasonable government intrusion.’”¹⁵⁷ Indeed, “the overriding respect for the sanctity of the home . . . has been embedded in our traditions since the origins of the Republic.”¹⁵⁸

The special consideration historically given to the home and overnight lodging are not directly asserted by Airbnb, likely because the privacy of the home is not directly implicated by Local Law 146, and Airbnb is not a private citizen with a home. But while this privacy concern is not currently being litigated, it is an undercurrent of the dispute. Local Law 146 does not directly authorize any home searches—rather, the law directs the disclosure of customer records.¹⁵⁹ However, these records contain information regarding the physical homes of New York City residents, in addition to the arguably commercial activity that periodically goes on within them. In November 2018, a team of twenty law enforcement officers descended on a condominium tower in Manhattan and issued violations to twenty different owners, which illustrates how the information contained in the reports mandated by Local Law 146 could lead to more physical searches of homes.¹⁶⁰

152. *Id.* § 2702(a)(3).

153. *See id.* § 2703(b).

154. *See id.* § 2703.

155. *Id.* § 2703(c)(2).

156. *Id.* § 2703(c)(1).

157. *Florida v. Jardines*, 569 U.S. 1, 6 (2013) (quoting *Silverman v. United States*, 365 U.S. 505, 511 (1961)).

158. *Payton v. New York*, 445 U.S. 573, 590 (1980).

159. *See supra* Part I.D.

160. *See* Josh Barbanel, *New York City Raids Condo Building in Crackdown on Airbnb Rentals*, WALL ST. J. (Nov. 11, 2018, 8:49 AM), <https://www.wsj.com/articles/new-york-city-raids-condo-building-in-crackdown-on-airbnb-rentals-1541944153> [<https://perma.cc/Q94C-TBFN>].

City council members have responded to blowback against regulation of Airbnb by claiming that the city has no interest in targeting individual middle- or low-income homeowners who rent out their homes occasionally for extra income and that, instead, the city is focused on eliminating operators of de facto illegal hotels with multiple listings.¹⁶¹ But the language imposing fines for violations of the short-term rental laws makes no distinction between the two,¹⁶² and anecdotal evidence shows the city is *not* only targeting large-scale operators.¹⁶³ Despite the promises of city officials, Local Law 146 and New York State's short-term rental laws apply to all New York City residents, regardless of the scale at which they operate on Airbnb.¹⁶⁴ The proximity of Local Law 146 to the home could further complicate privacy considerations.

III. THE SOUTHERN DISTRICT OF NEW YORK'S ASSESSMENT OF THE PRIVACY ARGUMENTS AGAINST LOCAL LAW 146

This Part lays out the privacy arguments that Airbnb and HomeAway assert in their lawsuits against New York City and explains the district court's reasons for its preliminary ruling against the city. First, this Part addresses the argument that the law creates an illegal Fourth Amendment administrative search; second, it explains the different approaches that Airbnb and HomeAway took in addressing the third-party issues; and third, it discusses the argument that the law violates the Stored Communications Act.

A. Fourth Amendment Administrative Search

In its lawsuit, Airbnb claims that Local Law 146 is facially invalid because it requires Airbnb to surrender information to the government with no opportunity for precompliance review.¹⁶⁵ Airbnb argues that "a company's common law possessory interest in its own records would have 'little practical value' if the government could commandeer them at will."¹⁶⁶ Airbnb argues that it does not fall into the limited category of closely regulated industries for which administrative searches are conducted in the regular course of business, as it is not involved in alcohol or firearm sales, mining, or automobile junkyards.¹⁶⁷ Furthermore, *City of Los Angeles v.*

161. See Emma Whitford, *Airbnb Accuses NYC Lawmakers of "an Attack on the Middle Class,"* GOTHAMIST (Oct. 30, 2015, 3:50 PM), http://gothamist.com/2015/10/30/sure_drag_tim_burton_into_this.php [<https://perma.cc/RX4X-63KT>].

162. See N.Y. MULT. DWELL. LAW § 121 (McKinney 2019).

163. See Olivia Zaleski, *Airbnb Is Financing a User's Lawsuit Against New York City,* BLOOMBERG (July 18, 2018, 8:22 AM), <https://www.bloomberg.com/news/articles/2018-07-18/airbnb-is-financing-a-user-s-lawsuit-against-new-york-city> [<https://perma.cc/Z3BX-WA2D>].

164. See MULT. DWELL. § 121.

165. Airbnb Memo in Support, *supra* note 69, at 15–16.

166. *Id.* (quoting *Florida v. Jardines*, 569 U.S. 1, 6 (2013)).

167. *Id.* at 17 n.6.

Patel explicitly clarified that the hotel industry is not closely regulated;¹⁶⁸ therefore, even though home sharing platforms are not exactly the same as hotels, Airbnb suggests that *Patel*'s holding weighs in favor of finding that home sharing is also not a closely regulated industry. As Airbnb argues, "there is no reason to believe that home sharing platforms pose a 'clear and significant risk to the public welfare' or are 'intrinsically dangerous.'"¹⁶⁹ Airbnb also claims that the provision requiring it to obtain its users' "consent" before giving over their information should not alter the analysis because "the government cannot condition the use of private property on a compelled waiver of Fourth Amendment rights."¹⁷⁰

In response, the City of New York claims that Airbnb is attempting to stand in the shoes of its hosts and does not have standing to assert claims on behalf of the hosts.¹⁷¹ The city does not argue that home sharing should be regarded as a "closely regulated industry," but instead suggests that Local Law 146 does not implicate Airbnb's Fourth Amendment rights because Airbnb lacks a reasonable expectation of privacy in records of rental transactions belonging to its hosts.¹⁷² It asserts that the opportunity for precompliance review deemed necessary in *Patel* is therefore unnecessary.¹⁷³ The city also argues that Local Law 146's consent provision—which requires Airbnb hosts to consent to this disclosure before using the service—is adequate legal consent.¹⁷⁴ If *Patel* does apply, the city argues that Airbnb's lawsuit itself could be deemed to constitute precompliance review as "the Court has never attempted to prescribe the exact form an opportunity for precompliance review must take."¹⁷⁵

In an opinion and order granting Airbnb and HomeAway's request for a preliminary injunction, Judge Paul A. Engelmayer found that Local Law 146 is likely unreasonable under the Fourth Amendment: "Existing Fourth Amendment law does not afford a charter for such a wholesale regulatory appropriation of a company's user database."¹⁷⁶ The opinion warned that "[a] ruling upholding the Ordinance as reasonable would invite municipalities to make similar demands on e-commerce companies . . . for the routinized production to investigative agencies of broad-ranging records."¹⁷⁷ Illustrating potentially troubling scenarios that endorsement of this law could lead to, the court explained that by similar logic, the city council could compel online auction services to produce records of all sales

168. *City of Los Angeles v. Patel*, 135 S. Ct. 2443, 2454 (2015).

169. Airbnb Memo in Support, *supra* note 69, at 17 n.6 (quoting *Patel*, 135 S. Ct. at 2454–55).

170. *Id.* at 18.

171. See NYC Memo in Opposition, *supra* note 13, at 7.

172. See *id.* at 14.

173. *Id.* at 16.

174. See *id.* at 12.

175. *Id.* at 17 (quoting *City of Los Angeles v. Patel*, 135 S. Ct. 2443, 2452 (2015)).

176. *Airbnb, Inc. v. City of New York*, Nos. 18 Civ. 7712 (PAE), 18 Civ. 7742 (PAE), 2019 WL 91990, at *20 (S.D.N.Y. Jan. 3, 2019), *appeal docketed*, No. 19-288 (2d. Cir. Jan. 31, 2019).

177. *Id.*

by New York City residents in order to root out evasions of capital gains taxes or compel medical providers to produce all patient records on a monthly basis to help identify “up-coding and other health-care fraud.”¹⁷⁸

According to the court, the city’s justification for its proposed collection of this data—facilitating OSE’s enforcement efforts—is not adequate.¹⁷⁹ The court opined that the history of OSE issuing subpoenas to Airbnb and HomeAway does not show that historical standards and investigative methods will necessarily be ineffectual.¹⁸⁰ Moreover, the Supreme Court has “disdained justifications like that offered by the City”¹⁸¹ and has held that “the test of reasonableness is not whether an investigative practice maximizes law enforcement efficacy.”¹⁸² While granting that Local Law 146 would aid OSE in its mission to identify violators of the short-term rental laws, the court ultimately found no precedent supporting the conclusion that governmental appropriation of private business records on this scale, unsupported by individualized suspicion or any tailoring, qualifies as reasonable.¹⁸³

As a threshold matter, the court found that the Fourth Amendment does apply to Local Law 146¹⁸⁴ and that Airbnb has a protectable privacy interest in the records that the law seeks as business records are covered under the “papers” category of the Fourth Amendment.¹⁸⁵ Additionally, the court found that *Patel* foreclosed the city’s argument that Airbnb does not have a privacy interest because the records at issue belong to customers.¹⁸⁶ In *Patel*, the data sought also originated with guests,¹⁸⁷ but the Supreme Court recognized that the hotel owners had a reasonable expectation of privacy in the guests’ information, which was stored in the hotel’s records.¹⁸⁸ The court noted that there are at least two reasons why businesses in the position of Airbnb or the hotel owners in *Patel* would seek to preserve the privacy of their customers’ information: first, to protect the information from business competitors and, second, to foster the trust of customers.¹⁸⁹ For these reasons, the court affirmed *Patel*’s assessment that customer-facing businesses are not expected to disclose commercially sensitive information such as customer lists and being compelled to do so is “more than sufficient to trigger Fourth Amendment protection.”¹⁹⁰ While the parties spilled considerable ink discussing whose rights are at issue under Local Law 146, the court found the premise that Airbnb’s rights are implicated relatively

178. *Id.*

179. *Id.* at *16–18.

180. *Id.* at *17.

181. *Id.*

182. *Id.*

183. *Id.* at *18.

184. *Id.* at *9.

185. *Id.* at *10.

186. *Id.*

187. For example, the municipal regulation sought names, addresses, and vehicle information. *City of Los Angeles v. Patel*, 135 S. Ct. 2443, 2447–48 (2015).

188. *Airbnb, Inc.*, 2019 WL 91990, at *10.

189. *Id.* at *11.

190. *Id.* (quoting *Patel v. City of Los Angeles*, 738 F.3d 1058, 1062 (9th Cir. 2013)).

straightforward.¹⁹¹ However, it did not foreclose the possibility that host rights are implicated as well.¹⁹²

Although the city did not argue that home sharing should be deemed a closely regulated industry, the court clarified that it is not.¹⁹³ The court found *Patel's* reasoning that the hotel industry does not involve inherently dangerous operations or have a history of pervasive regulation to be persuasive, and it ultimately concluded that this “equally applies to the peer-to-peer housing market.”¹⁹⁴ Thus, Airbnb does not have a diminished privacy interest in its records by virtue of the nature of the business.¹⁹⁵

The court then evaluated the reasonableness of the search under two related lines of authority: agency investigative subpoenas and administrative searches.¹⁹⁶ Though the parties’ arguments had focused on administrative searches, the court found that in some ways Local Law 146 acts more like an agency subpoena in that it requires booking services to produce records to an agency rather than requiring any physical inspection.¹⁹⁷ Ultimately, the two lines of authority led the court in a similar analytic direction as both require some form of tailored inspection or request to prevent fishing expeditions, as well as the opportunity of precompliance review before a neutral decision maker.¹⁹⁸ The court found Local Law 146 lacked both of these important restraints.¹⁹⁹

On the subject of tailoring, the court noted that the scale of the information to be collected by the city under the ordinance is “breathtaking.”²⁰⁰ As an example, the court pointed out that in 2016, data from more than 700,000 bookings would have been transmitted to the city under the ordinance.²⁰¹ “The universality of the Ordinance’s monthly production demand . . . , the sheer volume of guest records implicated, and the Ordinance’s infinite time horizon all disfavor the Ordinance when evaluated for reasonableness under the Fourth Amendment.”²⁰² While an agency subpoena must “be sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome,”²⁰³ the court found that Local Law 146 is “the antithesis of a targeted administrative subpoena”²⁰⁴ and “devoid of any tailoring.”²⁰⁵ The court found that the law amounts to “functional equivalent of a legislative edict mandating that OSE issue an

191. *Id.* at *9–10.

192. *See id.* at *10 n.7.

193. *Id.* at *12; *see supra* Part II.A.

194. *Airbnb, Inc.*, 2019 WL 91990, at *12.

195. *See id.*

196. *Id.* at *13.

197. *Id.* at *15–16.

198. *Id.* at *16, *18.

199. *Id.* at *17, *19.

200. *Id.* at *16.

201. *Id.*

202. *Id.*

203. *Id.* at *10 (quoting *See v. City of Seattle*, 387 U.S. 541, 544 (1967)).

204. *Id.* at *16.

205. *Id.* at *17.

identical subpoena to every covered booking service operating in New York City, every month . . . and extending into perpetuity.”²⁰⁶ Demanding this information without any factual basis to suspect any particular host, in the court’s view, fails to meet the standard of specificity.²⁰⁷ Administrative searches must usually satisfy “a relaxed standard of probable cause.”²⁰⁸ The court acknowledged that some “suspicionless searches”²⁰⁹ have been upheld as administrative searches, but only in exigent circumstances not present here.²¹⁰

On the issue of precompliance review, the court also found Local Law 146 deficient.²¹¹ The court relied on *Patel* and its recent affirmation that the subject of an administrative search must have an opportunity for precompliance review before a neutral decision maker prior to suffering penalties for refusing to comply.²¹² The court also found that the city failed to identify any mechanism for precompliance review under Local Law 146 where a home sharing service could challenge either a demand for data or a penalty for noncompliance.²¹³ Moreover, the court noted that the ordinance provides for penalties of up to \$1500 per listing for failure to comply, which “could prove punishing, if not an existential threat, to a booking service.”²¹⁴ The court rejected the city’s theory that the instant lawsuit could be deemed precompliance review as the lawsuit only constituted a facial challenge to Local Law 146 and could not substitute for a challenge to any particular application of the ordinance.²¹⁵ While Local Law 146 functions in a manner distinct from the ordinance at issue in *Patel*, and does not involve in-person inspections, the need for precompliance review is the same.

Ultimately, the court’s determination that Local Law 146 likely violates the Fourth Amendment was based “most notably, [on] the scale of the user data compelled to be produced, as measured against the precedents that require that the demands of subpoenas and regulatory searches and seizures be reasonably tailored and that reject governmental attempts to dispense with tailoring in the generalized interest of investigative efficacy.”²¹⁶ Further, the court emphasized that Fourth Amendment violation was aggravated “because (1) the user data in question is commercially sensitive and subject to potential

206. *Id.*

207. *Id.*

208. *Id.* at *13.

209. *Id.* at *14.

210. *Id.* at *18. The district court wrote, “OSE’s probe into violations by hosts of the Multiple Dwelling Laws does not implicate the exigencies (such as the risk that evidence will disappear if not promptly seized) on which these decisions have relied in upholding searches despite the lack of individualized suspicion.” *Id.* Examples of permissible suspicionless searches include a warrantless search of a student by a teacher and a warrantless search of an employee’s desk by a public employer. *Id.* at *14 (first citing *O’Connor v. Ortega*, 480 U.S. 709 (1987); then citing *New Jersey v. T.L.O.*, 469 U.S. 325 (1985)).

211. *Id.* at *19.

212. *Id.* at *18–19.

213. *Id.* at *19.

214. *Id.*

215. *Id.*

216. *Id.*

disclosure; and (2) the Ordinance's requirement for monthly productions of such data is perpetual."²¹⁷ Thus, while the lack of opportunity for precompliance review is important, amending that aspect of the ordinance would not necessarily salvage the constitutionality of the city's law.

B. *Third-Party Issues*

In their separate court filings, Airbnb and HomeAway take two different approaches to the issue of the third-party doctrine. Airbnb does not specifically allude to the third-party doctrine and frames its argument as an assertion of only its own Fourth Amendment rights, though it references its concern for its hosts' privacy.²¹⁸ Conversely, HomeAway directly argues that it should be able to sue on behalf of its hosts under the doctrine of third-party standing.²¹⁹

In its lawsuit, Airbnb sometimes conflates the concepts of its own privacy with its customers' privacy, for example, by asserting that Local Law 146 "requires Airbnb to report on a monthly basis volumes of otherwise private information about who New Yorkers choose to invite into their homes, where those homes are located, when and for how long the guests stay, and what the guests are doing there."²²⁰ While Airbnb embeds its arguments in themes of a personal privacy violation and ostensibly piggybacks on the more personal violation its customers would experience, it ultimately argues that the records at issue are its own regardless of "whether the information originally comes from users (as was true of the guest book in *Patel*)."²²¹ Airbnb argues that the relevant Fourth Amendment questions are "whether the requested information is in Airbnb's possession and whether Airbnb maintains it as private."²²²

HomeAway argues that Local Law 146 violates both its Fourth Amendment rights²²³ and the rights of its customers.²²⁴ In support of its right to assert claims on behalf of its customers, HomeAway argues that it has third-party standing because it has a close relationship to its customers and because there is a hindrance to the customers' ability to protect their own interests.²²⁵ Specifically, HomeAway claims that its customers would be overly burdened by the economic realities of litigation and would face the

217. *Id.*

218. See Airbnb Memo in Support, *supra* note 69, at 16 ("Airbnb's guests and hosts reasonably rely on Airbnb to protect their privacy and security.").

219. See Memorandum of Law in Support of Plaintiff Homeaway.com, Inc.'s Motion for a Preliminary Injunction to Preserve the Status Quo at 18, *Airbnb, Inc. v. City of New York*, Nos. 18 Civ. 7712 (PAE), 18 Civ. 7742 (PAE), 2019 WL 91990 (S.D.N.Y. Jan. 3, 2019) [hereinafter HomeAway Memo in Support].

220. Airbnb Complaint, *supra* note 12, at 3.

221. Reply Memorandum of Law in Support of Plaintiff's Motion for a Preliminary Injunction at 2, *Airbnb, Inc. v. City of New York*, Nos. 18 Civ. 7712 (PAE), 18 Civ. 7742 (PAE), 2019 WL 91990 (S.D.N.Y. Jan. 3, 2019).

222. *Id.*

223. See HomeAway Memo in Support, *supra* note 219, at 15.

224. See *id.* at 16.

225. See *id.* at 18.

possibility of retribution from the city.²²⁶ Moreover, it argues that the case for third-party standing is particularly compelling where personal privacy rights are involved.²²⁷

The city claims that the home sharing services lack standing to assert privacy claims on behalf of their hosts due to the general principle that Fourth Amendment rights are personal rights and cannot be vicariously asserted.²²⁸ It argues that third-party standing is inappropriate under the three-part test from *Powers v. Ohio*²²⁹: “(i) ‘[t]he litigant must have suffered an “injury in fact”’; (ii) ‘the litigant must have a close relation to the third party’; and (iii) ‘there must exist some hindrance to the third party’s ability to protect his or her own interests.’”²³⁰ While home sharing services might meet the second prong by having a close relationship with their users, the city argues that the plaintiffs have failed to show an injury to themselves or a legitimate reason that hosts are hindered from asserting their own privacy rights.²³¹ Furthermore, the city argues that HomeAway’s host-based claims would fail anyway because hosts lack a reasonable expectation of privacy in the information requested under the third-party doctrine,²³² as they have voluntarily turned the information over to the home sharing services²³³ and have already consented to the disclosure of information.²³⁴

Largely ignoring the lengthy discussion of standing in the parties’ briefs and the differing approaches taken by Airbnb and HomeAway, Judge Engelmayer chose only to address arguments regarding the rights of home sharing services rather than the rights of hosts.²³⁵ As discussed in Part III.A, the court determined that the Fourth Amendment rights of home sharing services are implicated by Local Law 146, as the statute seeks to compel production of their business records.²³⁶

Rather than responding to HomeAway’s theory of third-party standing, the court placed this comment in a footnote: “Airbnb and HomeAway base their challenges to the Ordinance solely on the claim that *their* Fourth Amendment rights . . . would be abridged. The Court’s Fourth Amendment analysis accordingly focuses solely on the claim that the Ordinance impairs the rights of the platforms.”²³⁷ It is unclear why the court took this relatively simplistic view of the standing arguments despite language in HomeAway’s complaint

226. *See id.*

227. *See id.* at 19.

228. *See* NYC Memo in Opposition, *supra* note 13, at 8 (citing *Alderman v. United States*, 394 U.S. 165, 174 (1969)).

229. 499 U.S. 400 (1991).

230. NYC Memo in Opposition, *supra* note 13, at 8 (alteration in original) (quoting *Powers*, 499 U.S. at 411).

231. *See id.*

232. *See id.* at 9.

233. *See id.* at 10.

234. *See id.* at 12.

235. *See* *Airbnb, Inc. v. City of New York*, Nos. 18 Civ. 7712 (PAE), 18 Civ. 7742 (PAE), 2019 WL 91990, at *10 n.7 (S.D.N.Y. Jan. 3, 2019), *appeal docketed*, No. 19-288 (2d. Cir. Jan. 31, 2019).

236. *Id.* at *10.

237. *Id.* at *10 n.7.

and memorandum in support of its motion for a preliminary injunction directly asking for relief on behalf of its customers.²³⁸ Perhaps the court intended to avoid the complex constitutional question of whether a third-party business can assert Fourth Amendment constitutional claims on behalf of customers, given that the lawsuit can be decided without this specific argument.

However, the court hinted that it remains open to a Fourth Amendment challenge by an individual, notwithstanding traditional third-party doctrine concerns. In the same footnote, the court wrote, “in theory a user could have brought a Fourth Amendment claim of his or her own, presumably attempting to extend the principles of *Carpenter* to this context.”²³⁹ While only mentioned briefly, this footnote shows the court acknowledging that Local Law 146 also implicates hosts’ rights. Moreover, following *Carpenter*, the court implies that there may be flexibility to argue that these individual privacy rights deserve Fourth Amendment protection despite the fact that the hosts shared their information with a third-party and thus can have no reasonable expectation of privacy under the classic application of *Smith* and *Miller*.²⁴⁰

C. The Stored Communications Act

Finally, Airbnb argues that the Stored Communications Act preempts Local Law 146²⁴¹ and that the company would violate federal law were it to comply with the ordinance because it requires the company to turn over user information without either a subpoena or valid user consent.²⁴² Airbnb claims that it could be liable to hosts if it turns over their information.²⁴³

While the SCA provides that the government can legally obtain information covered under the Act via the consent of the subscriber or customer,²⁴⁴ Airbnb argues that the provision of Local Law 146 requiring it to obtain disclosure consent from its users is insufficient for two reasons. First, it argues that the SCA requires the governmental entity itself to obtain user consent rather than the service provider.²⁴⁵ Second, it argues that the consent obtained by Airbnb would be invalid since the “consent” is forced and that allowing the government to mandate that covered entities obtain consent from users to disclose their information undermines the concept of consent set forth in the SCA.²⁴⁶ Illustrating its point, Airbnb claims that “if

238. HomeAway stated: “The City’s attempt to force HomeAway to disclose such private materials violates the Fourth Amendment rights of both HomeAway and its customers. . . . HomeAway also may vindicate the constitutional rights of its subscribers” HomeAway Complaint, *supra* note 68, at 21.

239. *Airbnb, Inc.*, 2019 WL 91990, at *10 n.7.

240. *See supra* notes 122, 124 and accompanying text.

241. Airbnb Memo in Support, *supra* note 69, at 22.

242. *See id.* at 24–25.

243. *See id.* at 25.

244. *See* 18 U.S.C. § 2703(c)(1) (2012).

245. *See* Airbnb Memo in Support, *supra* note 69, at 25–26.

246. *See id.* at 26.

the City's position were accepted, it is not clear why the City could not, for example, require Amazon or any other online platform to obtain blanket 'consent' from its customers and then turn over details of their purchases or other online activity."²⁴⁷

In response, the city claims that Local Law 146 does not conflict with the SCA because the SCA does not protect communications that are readily accessible to the public,²⁴⁸ not all booking services are covered by the SCA,²⁴⁹ the consent provision of Local Law 146 makes it legal under the SCA,²⁵⁰ consent is not forced,²⁵¹ and the SCA does not require governmental entities to obtain consent directly from the subscriber.²⁵²

In its preliminary injunction, the court found that the home sharing sites' argument that Local Law 146 is preempted by the SCA was "colorable" but declined to say whether the argument was likely to succeed.²⁵³ While portions of a similar home sharing data-collection law were found to be preempted by the SCA in a previous case, *Homeaway.com, Inc. v. City of Portland*,²⁵⁴ the court distinguished Local Law 146 on the basis of its consent provision, which requires the home sharing sites to obtain the consent of a user to the disclosure of their information before they can use the service.²⁵⁵ Despite the home sharing sites' argument that this consent would be invalid because it is forced, the court found that the plaintiffs had not proved that hosts would feel coerced to consent.²⁵⁶ Additionally, the court found relevant the fact that both Airbnb and HomeAway's current privacy policies already require hosts to consent to disclosure of their information to legal authorities when reasonably necessary.²⁵⁷ The court did not acknowledge that the implications of this consent would drastically change if Local Law 146 goes into effect. The court was also unpersuaded by Airbnb's stance that the SCA requires the government to obtain consent directly from users rather than through an intermediary.²⁵⁸ Ultimately, the court neither favored Airbnb's SCA preemption argument at the preliminary stage nor did it foreclose the possibility that it would be successful on a fully developed record.²⁵⁹

247. *Id.*

248. *See* NYC Memo in Opposition, *supra* note 13, at 18.

249. *See id.* at 20.

250. *See id.* at 21.

251. *See id.* at 24–25.

252. *See id.* at 22.

253. *Airbnb, Inc. v. City of New York*, Nos. 18 Civ. 7712 (PAE), 18 Civ. 7742 (PAE), 2019 WL 91990, at *20 (S.D.N.Y. Jan. 3, 2019), *appeal docketed*, No. 19-288 (2d. Cir. Jan. 31, 2019).

254. No. 3:17-cv-00091-MO, 2017 U.S. Dist. LEXIS 74880, at *11–12 (D. Or. May 11, 2017).

255. *Airbnb, Inc.*, 2019 WL 91990, at *21.

256. *Id.*

257. *Id.*

258. *Id.* at *22 n.14.

259. *Id.* at *20.

IV. THE UNANSWERED QUESTION OF INDIVIDUAL CHALLENGES TO LOCAL LAW 146

This Part explores the possibility of individual hosts bringing as-applied challenges to Local Law 146 or to similar statutes in the future.²⁶⁰ Could an individual plaintiff challenging this type of search provide a compelling justification for long-simmering change to the third-party doctrine?

A. Why Individuals Should Be Able to Challenge Data-Collection Laws

When the Second Circuit rules on the preliminary injunction in *Airbnb, Inc. v. City of New York*,²⁶¹ it will only resolve the question of Airbnb's Fourth Amendment right as a business to be free from this attempted administrative search. If the district court's decision is affirmed, Airbnb hosts will have been protected from these searches by a corporate proxy whose interests happen to be closely aligned with their own.²⁶² However, if the decision is reversed, every single Airbnb host in New York City could soon see their home sharing records turned over to the city and be subject to fines if they are found to be renting their home for fewer than thirty days.²⁶³ If Airbnb cannot successfully challenge the constitutionality of this search, would the third-party doctrine prevent hosts themselves from doing so? Given that hosts are the ultimate targets of the city's investigative efforts, this result seems unjust. The following sections discuss how hosts might attempt to bring a challenge.

B. Third-Party Doctrine Issues

The first hurdle that individuals must surmount is the third-party doctrine. Prior to *Carpenter*, the idea that individuals could be successful plaintiffs in a privacy challenge to Local Law 146 would have seemed misguided since Airbnb hosts voluntarily handed their information over to Airbnb and therefore could not be said to have a reasonable expectation of privacy in that information under *Smith* and *Miller*.²⁶⁴ This case would be a classic example of a challenge easily defeated by the third-party doctrine.²⁶⁵ Indeed, several months prior to the *Carpenter* decision, a California state court rejected a similar argument made by HomeAway on behalf of its customers.²⁶⁶

260. Airbnb is currently pursuing a separate lawsuit against the City of Boston, asking the court to enjoin several new short-term rental laws, including a data-collection law. *See* Complaint of Airbnb, Inc. for Declaratory and Injunctive Relief, *Airbnb, Inc. v. City of Boston*, No. 18-cv-12358 (D. Mass. Nov. 13, 2018).

261. Nos. 18 Civ. 7712 (PAE), 18 Civ. 7742 (PAE), 2019 WL 91990 (S.D.N.Y. Jan. 3, 2019), *appeal docketed*, No. 19-288 (2d. Cir. Jan. 31, 2019).

262. *See supra* Part III.B.

263. *See supra* Parts I.B, I.D.

264. *See supra* Part II.B.1.

265. Hans, *supra* note 95, at 10.

266. *See City & County of San Francisco v. HomeAway.com, Inc.*, 230 Cal. Rptr. 3d 901, 912 (Ct. App. 2018) (“The Fourth Amendment does not protect information voluntarily disclosed to a third party, which is why the SCA created a set of Fourth-Amendment-like protections for customer information stored on ISPs.”).

But *Carpenter* opened up the possibility that the Supreme Court may be willing to question the wisdom of the third-party doctrine in the digital age, as it is nearly impossible to function in today's society without sharing information digitally. The *Carpenter* Court found that the third-party doctrine did not apply to CSLI because the information was too comprehensive and was not voluntarily shared in the literal sense.²⁶⁷ Justice Gorsuch, in dissent, leaned even further toward protecting consumer privacy and argued that the Court should not sidestep the third-party doctrine but should instead rethink the doctrine completely²⁶⁸: “Just because you *have* to entrust a third party with your data doesn't necessarily mean you should lose all Fourth Amendment protections in it.”²⁶⁹

This skepticism of the third-party doctrine is not new. Professor Orin Kerr has explained that “the verdict among commentators has been frequent and apparently unanimous: The third-party doctrine is not only wrong, but horribly wrong.”²⁷⁰ In *United States v. Jones*,²⁷¹ Justice Sotomayor wrote a concurring opinion that questioned the third-party doctrine in its entirety:

[I]t may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties. . . . I would not assume that all information voluntarily disclosed to some member of the public for a limited purpose is, for that reason alone, disintegrated to Fourth Amendment protection.²⁷²

Despite this sentiment, Sotomayor joined *Carpenter* majority's opinion, which preserved the third-party doctrine and created a limited exception for CSLI.²⁷³ The *Carpenter* majority did not hint at what types of personal data held by third parties might also skirt the traditional third-party doctrine, and Justice Alito, in dissent, fretted that this uncertainty would guarantee a “blizzard of litigation.”²⁷⁴ Against this background, *Carpenter* could be regarded as the first major crack in the third-party doctrine, and likely not the last.

The third-party doctrine carveout created in *Carpenter* dictates that obtaining an individual's personal CSLI constitutes a search implicating the person's Fourth Amendment rights, even though the information was arguably “shared” with a third party.²⁷⁵ Investigators must obtain a warrant before accessing a wireless customer's CSLI²⁷⁶ rather than merely a court

267. *Carpenter v. United States*, 138 S. Ct. 2206, 2219–20 (2018).

268. *Id.* at 2270 (Gorsuch, J., dissenting).

269. *Id.*

270. Orin S. Kerr, *The Case for the Third-Party Doctrine*, 107 MICH. L. REV. 561, 564 (2009) (footnote omitted).

271. 565 U.S. 400 (2012). In *Jones*, the Court held that law enforcement officers violated the Fourth Amendment when they attached a GPS tracker to the bottom of a suspect's vehicle without a warrant. *Id.* at 404.

272. *Id.* at 417–18 (Sotomayor, J., concurring) (citations omitted).

273. *See Carpenter*, 138 S. Ct. at 2220.

274. *Id.* at 2247 (Alito, J., dissenting).

275. *Id.* at 2212 (majority opinion).

276. *Id.* at 2221.

order as the investigators did in the case.²⁷⁷ Careful not to seismically disrupt the Fourth Amendment landscape, the Court wrote that “[t]he Government will be able to use subpoenas to acquire records in the overwhelming majority of investigations [A] warrant is required in the rare case where the suspect has a legitimate privacy interest in records held by a third party.”²⁷⁸ The Court found that individuals have a legitimate privacy interest in their personal CSLI due to its “deeply revealing nature . . . , its depth, breadth, and comprehensive reach, and the inescapable and automatic nature of its collection.”²⁷⁹

As the majority of the Court does not appear ready for an all-out challenge to the third-party doctrine, individuals fighting Local Law 146 would do better to argue for an exception to the doctrine similar to that recognized in *Carpenter*. Home sharing records may not be as frighteningly invasive as CSLI, but the way in which the city plans to use these records presents its own undesirable consequences that the Supreme Court may not have intended when it created the third-party doctrine.

C. *The Dangerous Combination of the Third-Party Doctrine and Data-Collection Laws*

Though, with the exception of *Carpenter*, the Supreme Court has consistently upheld the third-party doctrine in the context of criminal investigations, it has never blessed the combination of the third-party doctrine and an administrative search regime.²⁸⁰ As Professor Adam Lamparello has explained, “Together, the third-party doctrine and administrative search exception can easily become a one-two punch that strikes a significant blow at the heart of basic privacy protections.”²⁸¹ This is especially true in the context of data-collection laws, which can amass a large volume of information about individuals who were not previously suspected of any legal violation, with little effort by the government.

Several differences in procedure distinguish the situation Timothy Carpenter faced from the situation individuals will face under Local Law 146. Carpenter’s CSLI records were obtained via subpoena as part of a criminal investigation in which he had been identified as a suspect.²⁸² At trial, he moved to suppress the records for having been obtained without a warrant.²⁸³ In contrast, Airbnb and its customers readily admit that host records can be subpoenaed through Airbnb as part of an investigation,²⁸⁴ but

277. *Id.* at 2212.

278. *Id.* at 2222.

279. *Id.* at 2223.

280. See Hans, *supra* note 95, at 38–39.

281. Adam Lamparello, City of Los Angeles v. Patel: *The Upcoming Supreme Court Case No One Is Talking About*, 20 TEX. J.C.L. & C.R. 135, 138 (2015).

282. See *Carpenter*, 138 S. Ct. at 2212.

283. See *id.*

284. See *Airbnb, Inc. v. City of New York*, Nos. 18 Civ. 7712 (PAE), 18 Civ. 7742 (PAE), 2019 WL 91990, at *7 (S.D.N.Y. Jan. 3, 2019) (stating that New York City has issued ten subpoenas to Airbnb and eventually obtained compliance with them following objections, and

they object to the fact that, under Local Law 146, the extra step of obtaining a court-ordered subpoena is skipped over. Individuals searched under Local Law 146 will be searched regardless of individualized suspicion since, in an administrative search regime, the criteria necessary for a search are provided by statute.²⁸⁵ Hosts could argue that, notwithstanding the government's ability to subpoena their records from Airbnb, a data-collection statute that takes the form of a monthly dragnet implicates the Fourth Amendment rights of individuals whose data is collected.²⁸⁶

The fact that Local Law 146 authorizes an automatic administrative search rather than an optional law enforcement tool is also significant. While the threat of a subpoena represents a possibility that records *may* be searched following approval by court order, pursuant to the needs of a specific investigation, data-collection statutes like Local Law 146 create a certainty that customer records *will* be searched *without* being relevant to a particular investigation. Even the administrative search regime at issue in *Patel* authorized searches of hotel records only when demanded by police, but it did not require all of the data to be turned over to the government on a set timetable.²⁸⁷ Hosts could argue that this more powerful and pervasive form of search necessitates greater protections for searched individuals.

Additionally, under Local Law 146, not only is the search automatized, but so is the penalty. If the reports provided by Airbnb reveal that a property has been rented for less than thirty days, this evidence could be enough to impose a fine automatically. Though it has not been stated by the OSE directly, Local Law 146 will not likely be used to procure individual search warrants based on the data—more logically, it will cut out the need for physical inspections entirely.

The city currently handles violations of the short-term rental and short-term advertising laws through the New York City Office of Administrative Trials & Hearings (OATH).²⁸⁸ An alleged violator receives a summons with the proposed penalty and an optional hearing date.²⁸⁹ As with a parking ticket, the recipient can pay the fine by mail or contest the charge in an

has issued five subpoenas to HomeAway and obtained full compliance), *appeal docketed*, No. 19-288 (2d Cir. Jan. 31, 2019); Airbnb Complaint, *supra* note 12, at 17; *see also* Sara O'Brien, *Airbnb Subpoenaed by New York City for Data on Listings*, CNN (Feb. 19, 2019, 7:00 PM), <https://www.cnn.com/2019/02/19/tech/airbnb-subpoena-new-york-city/index.html> [<https://perma.cc/L5UX-B6Z8>] (reporting Mayor Bill de Blasio's announcement that New York City subpoenaed approximately 20,000 host records from Airbnb following the district court's order.).

285. *See supra* note 102 and accompanying text.

286. *See supra* Part III.A.

287. *See supra* note 114 and accompanying text.

288. *See Hearings*, N.Y.C. OFF. ADMIN. TRIALS & HEARINGS, <https://www1.nyc.gov/site/oath/hearings/hearings.page> [<https://perma.cc/ASF8-44MF>] (last visited Apr. 10, 2019) (listing the city agencies whose summonses are handled by OATH, including the Mayor's Office of Special Enforcement).

289. *See Resolving a Violation*, N.Y.C. OFF. SPECIAL ENFORCEMENT, <http://www1.nyc.gov/site/specialeenforcement/enforcement/how-to-resolve-a-violation.page> [<http://perma.cc/CP5J-F7Z2>] (last visited Apr. 10, 2019).

informal hearing.²⁹⁰ Aside from the capacity of OATH to handle this volume of summonses, there is no apparent bar to the city transferring Airbnb user information directly to a summons if the report shows that user to have rented a property for fewer than thirty days or advertised a rental of fewer than thirty days. Granted, this less formal adjudication stems from the fact that the short-term rental laws only carry the possibility of civil rather than criminal penalties—but the lesser procedural protections for individuals are still striking. Automatic data collection combined with these swift and mechanized penalties could spur a reexamination of the rights at issue, as it seems particularly harsh to deny Fourth Amendment rights to individuals who lack other procedural protections.

D. *The Home and Privacy*

Another aggravating element of Local Law 146 that hosts are better positioned to highlight than Airbnb is that broad data-collection statutes are especially improper in the context of the home.²⁹¹ The specific data that New York City seeks to collect represents activity within private homes.²⁹² Some of these details are arguably quite personal, such as the decision to periodically open space in the home to paying guests and the number of days that a resident is away from home each month.²⁹³

Throughout Fourth Amendment jurisprudence, the privacy of the home has been zealously guarded. Private dwellings are “ordinarily afforded the most stringent Fourth Amendment protection.”²⁹⁴ For a search of a private home, “a warrant traditionally has been required.”²⁹⁵ The interior of a home is “the prototypical and hence most commonly litigated area of protected privacy.”²⁹⁶ The reasonableness of the minimal expectation of privacy that exists in the home has deep roots in the common law.²⁹⁷ The Court has acknowledged that the Fourth Amendment draws “a firm line at the entrance to the house.”²⁹⁸ The Court also has held that guests have protectable Fourth Amendment privacy rights in hotel rooms²⁹⁹ and that overnight guests share the same expectation of privacy in their hosts’ homes.³⁰⁰

While special protections for the home were once based on common-law trespass,³⁰¹ a physical intrusion into the home is no longer necessary in order for a Fourth Amendment search to occur following *Katz*.³⁰² In *Kyllo v.*

290. See *Hearings*, *supra* note 288.

291. See *supra* Part II.D.

292. See *supra* Part II.D.

293. See *supra* Part I.D.

294. *United States v. Martinez-Fuerte*, 428 U.S. 543, 561 (1976).

295. *Id.* at 565.

296. *Kyllo v. United States*, 533 U.S. 27, 34 (2001).

297. See *id.*

298. *Payton v. New York*, 445 U.S. 573, 590 (1980).

299. *Stoner v. California*, 376 U.S. 483, 490 (1964).

300. *Minnesota v. Olson*, 495 U.S. 91, 96–97 (1990).

301. See *Kyllo*, 533 U.S. at 31.

302. *Katz v. United States*, 389 U.S. 347, 353 (1967).

United States,³⁰³ investigators used thermal imaging technology to detect the presence of high-intensity lamps being used to grow marijuana in the defendant's home.³⁰⁴ The Supreme Court held that when "the Government uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a 'search' and is presumptively unreasonable without a warrant."³⁰⁵ While data disclosures from home sharing sites are distant in nature from thermal imaging technology, the analogy may not be so far-fetched. Both are law enforcement devices not in general public use that are being used to explore otherwise unknowable details of a home. Furthermore, *Kyllo* held that "[t]he Fourth Amendment's protection of the home has never been tied to measurement of the quality or quantity of information obtained."³⁰⁶

In *Smith*, the Supreme Court considered concerns about home privacy in the context of the third-party doctrine.³⁰⁷ The Court ruled that information voluntarily revealed to a third party, even within the context of the home, such as dialing numbers on a personal home phone, triggers the third-party doctrine, which means that a person has no reasonable expectation of privacy in this information.³⁰⁸ And without a reasonable expectation of privacy, no search occurs when law enforcement accesses this information.³⁰⁹ However, *Smith* involved the investigation of one specific crime and the installation of a pen register on one citizen's phone.³¹⁰ Thus, as discussed, it is distinguishable on the basis that it did not involve mass data collection without individualized suspicion.

As the district court determined, under Local Law 146, neither hosts nor Airbnb have the opportunity to obtain precompliance review of document requests.³¹¹ The absence of an opportunity to obtain precompliance review indicates that home sharing is being treated as a closely regulated industry.³¹² This absence further implies that home sharing is not just a business—but a business that is extremely hazardous to the public welfare.³¹³ While it is indisputable that home sharing is a business that generates profits for individuals, it is also indisputable that home sharing creates a hybrid between a home and a business.³¹⁴ Hosts could argue that their homes should still be regarded as homes, even if they are periodically rented out, and that the act of listing a private dwelling on Airbnb should not mean that a person automatically waives special protections usually afforded to the home. At

303. 533 U.S. 27 (2001).

304. *Id.* at 30–31.

305. *Id.* at 40.

306. *Id.* at 37.

307. *See Smith v. Maryland*, 442 U.S. 735, 742–46 (1979).

308. *See id.*

309. *Id.*

310. *Id.* at 737.

311. *See supra* Part III.A.

312. *See supra* Part II.A.

313. *See supra* Part II.A.

314. *See supra* Part II.D.

the very least, it should not automatically subject that home to a rare form of automatic search.

A challenge by hosts would depend on reconsideration of the third-party doctrine,³¹⁵ with special urgency generated by present circumstances. Local Law 146 involves (1) mandatory consent to disclosure as a prerequisite to using a commercial service,³¹⁶ (2) governmental access to comprehensive private business records on a monthly basis in perpetuity,³¹⁷ (3) the government learning information about private homes through these records,³¹⁸ and (4) the government's use of this information to impose automatic fines.³¹⁹ Accordingly, this law enables the government to conduct invasive searches that are certain to affect thousands of individuals. Further, the third-party doctrine denies these individuals Fourth Amendment rights that would provide grounds to challenge these searches, thereby allowing unreasonable searches to go unchecked. While Airbnb and HomeAway may be effective proxies for their customers given that their interests are closely aligned, in the future, customers should not have to rely on the will of corporate protectors to challenge data-collection laws.

CONCLUSION

New York City has had a contentious relationship with Airbnb from the start, and the local government is determined not to let the undeniable popularity of the home sharing model rule the day. The passage of Local Law 146 is a high-water mark for home sharing data-collection laws in the United States, spurred by flagrant noncompliance with the existing ban on short-term rentals. The collection of non-anonymized data of all Airbnb user transactions on a monthly basis takes the administrative search doctrine to a new level, and endorsing this approach would dramatically alter the online privacy landscape. However, regardless of the result of Airbnb's challenge to the law and the court's weighing of its privacy rights as a business, the important question of individual Airbnb customers' privacy rights will likely remain unanswered. Airbnb hosts in New York City or their counterparts who face future data-collection laws elsewhere should challenge traditional third-party doctrine assumptions by bringing as-applied challenges, and claim that indiscriminate data-collection statutes violate their Fourth Amendment rights. While the third-party doctrine could frustrate this type of challenge, *Carpenter* has shown that the doctrine itself is poised for change.

315. *See supra* Part II.B.1.

316. *See supra* Part III.A.

317. *See supra* Part III.A.

318. *See supra* Part II.D.

319. *See supra* Part IV.C.