NYC V. AIRBNB: NEW YORK CITY'S ATTEMPT TO REGULATE HOME-SHARING PLATFORMS AND AIRBNB'S ATTEMPT TO FIGHT BACK

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I. INTRODUCTION

Since the founding of Airbnb in 2008, the company has had to deal with various laws in many different cities and states, all trying to regulate the growth of Airbnb.[1] Cities (in general) have come up with various different ways to try to regulate these short-term rentals. These regulations vary from compliance of zoning regulations, requiring each host to register with various local government agencies, to obtaining certain licenses, to paying special taxes and complying with

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1 *Responsible Hosting in the United States*, AIRBNB, https://www.airbnb.com/help/article/1376/responsible-hosting-in-the-united-states (last visited Oct. 29, 2018).

various rent stabilized laws.[2] One of the leading regarding short-term rental regulation is New York City ("NYC").[3] However, despite the fact that there are strict regulations, and a potential for hosts to get heavily fined, NYC continues to be one of the most profitable locations for Airbnb.[4] In its latest attempt to crack down on NYC hosts, the NYC Council passed the Regulation of Short-Term Residential Rentals (the "Homesharing Surveillance Ordinance"), requiring that Airbnb and other home-sharing platforms, to provide the New York City Council (the "City Council") with some information regarding the hosts.[5] Some of the information required to be given up includes: the address, the name of the owner, the amount of days the home was rented out, and how much money the host collected.[6] In essence, this gives the City Council a list of people breaking the existing laws. On August 24, 2018, Airbnb filed a lawsuit in federal court arguing that the Homesharing Surveillance Ordinance violates both the First and Fourth Amendments of the U.S. Constitution, as well as the New York State Constitution, and the Federal Stored Communications Act.[7]

Due to the years-long battle against short-term rentals in NYC, particularly against Airbnb, the multiple laws prohibiting short-term rentals, the potential fines for violating those laws, the tax implications, and multiple other challenges that hosts must satisfy in order to legally rent out their home, the new Homesharing Surveillance Ordinance, requiring Airbnb to give NYC a detailed list of all hosts and their personal information, is an attempt by NYC to circumvent the usual constitutional safeguards in place, and therefore violates each host's constitutional rights and the company's constitutional rights, and should therefore be invalidated. New York City should instead embrace Airbnb's presence and use it is a tool to boost tourism and a way for citizens of the city to supplement their rental costs by providing them with a substantial income opportunity, without the fear of being fined.

2 *Id.*

3 Zaw Thiha Tun, *Top Cities Where Airbnb is Legal or Illegal*, INVESTOPEDIA (Oct. 23, 2018), https://www.investopedia.com/articles/investing/083115/top-cities-where-airbnb-legal-or-illegal.asp.

4 Yoana Yotova, *Here Are the Most Profitable Airbnb Cities at the Beginning of 2018*, MASHADVISOR (Mar. 11, 2018), https://www.mashvisor.com/blog/most-profitable-airbnb-cities-2018/.

5 N.Y. Regulation of Short Term Residential Rentals, Int. 098 (2018).

6 *Id.*

7 Complaint for Declaratory and Injunctive Relief, Airbnb Inc v. City of New York, 373 F. Supp. 3d 467 (S.D.N.Y. Jan. 3, 2019).

This Note argues that the Homesharing Surveillance Ordinance is in fact unconstitutional and will suggest other ways New York State ("NY") can accomplish their goals while also giving Airbnb and NY citizens the opportunity to generate additional income. To do this, I examine the extensive background between NYC and Airbnb to properly analyze the new law and Airbnb's attempt to invalidate it. Section II of this Note will give necessary background, by delving into the long history of New York's constant and continuing attempt to regulate short term rentals, and the various lawsuits that have been filed as a result of the regulations. Additionally, Section II will discuss all the laws that a person may be violating by becoming a host on Airbnb. Section III will introduce the Homesharing Surveillance Ordinance and the Lawsuit alleging its unconstitutionality. Section IV will discuss why the new law violates the Fourth Amendment. Section V will briefly discuss Article II Section 12 of the New York State Constitution. Section VI will discuss why Airbnb is precluded from releasing the information due to the Stored Communications Act, and because of this, the Homesharing Surveillance Ordinance is forcing Airbnb to violate federal law, and, therefore, should therefore be invalidated. Section VII will discuss how the Homesharing Surveillance Ordinance compels Airbnb to express messages which they don't want to make, which is a violation of the First Amendment. This Note will conclude with ways in which NYC and Airbnb can come up with a solution in which both parties are satisfied, and that all New Yorkers can benefit.

II. BACKGROUND

In order to fully comprehend the effect that this new ordinance will have on Airbnb and its hosts, a comprehensive understanding of the applicable laws in NY and NYC, as well as the history between the two parties is necessary.

A. Multiple Dwelling Law

The Multiple Dwelling Law, which has been around long before any short-term rental portals were created, had a provision that a "Class A" dwelling[8] cannot be rented out to anyone for less than 30

8 *See* N.Y.S. Multiple Dwellings Law at §4. 8. a. (defining a "Class A" dwelling as a "a multiple dwelling that is occupied for permanent residence purposes. This class shall include tenements, flat houses, maisonette apartments, apartment houses, apartment hotels, bachelor apartments, studio apartments, duplex apartments,

days, unless the primary resident is present in the dwelling.[9] However, these laws are only applicable to cities with a population of 325,000 or more.[10] Therefore, the only city in New York State that is actually subject to the Multiple Dwelling Law is NYC, since it is the only city that has a population of over 325,000.[11] About half of NYC is zoned as a Class A dwelling.[12] This law has been in place for decades before any home-sharing sites were ever founded.

City of New York v. 330 Continental LLC was a case brought by the City of New York in 2009 against three buildings on the Upper West Side of Manhattan that rented out some of its units for short term rentals (i.e., less than 30 days).[13] The City alleged that this was a violation of the Multiple Dwelling Law, and they sought to enjoin the buildings from further renting out those units for short term use.[14] The court, however, ruled that this short term rental did not violate the zoning laws.[15] The court interpreted the zoning law to mean that only if a *majority* of the building was used as short term rentals would it violate the zoning laws. Additionally, the court reasoned that since the bill used the term, "as a rule,"[16] it meant that if the short-term rentals were being used as a secondary use, whereas the primary use of the building was for regular long-term rentals, it only prohibits short-term rentals if the building is renting out a majority of its units as short term rentals. In this case however, since only a minority of the units in the building were used as short term rentals, it did not violate the zoning laws.[17] This created a loophole in the law that gave rise to another bill to attempt to help regulate short-term rentals, Bill 6873-B.[18]

kitchenette apartments, garden-type maisonette dwelling projects, and all other multiple dwellings except class B multiple dwellings.").

9 *Id.* at § 8.

10 *Id.* at § 3.1.

11 *See U.S. Census Bureau, New York: 2010, Population and Housing Unit Counts*, U.S. DEP'T OF COMMERCE (June 2012), https://www.census.gov/prod/cen2010/cph-2-34.pdf.

12 *Airbnb in the City,* NEW YORK STATE ATTORNEY GENERAL ERIC T. SCHNEIDERMAN (Oct. 2014), http://www.ag.ny.gov/pdfs/AIRBNB%20REPORT.pdf.

13 City of New York v. 330 Continental LLC, 873 N.Y.S.2d 9 (App. Div. 2009) [hereinafter "*330 Continental*"].

14 *Id.* at 11.

15 *Id.* at 12.

16 Multiple Dwelling Law § 4[8][a].

17 *Id.* § 4[8][a].

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

B. Bill 6873-B, to amend the Multiple Dwelling Law

Bill 6873-B, an amendment to the Multiple Dwelling Law, was passed in direct response to the *330 Continental* case. This amendment clarified that short-term rentals were illegal even if a minority of the units in that building were used for short term rentals. It also removed the words "as a rule," which was the basis of the *330 Continental* reasoning.[19]

The biggest issue for New York State was the enforcement of the Multiple Dwelling Law, since it was virtually impossible to catch a building owner in the act of actually renting out units for fewer than 30 days. Since the Multiple Dwelling Law only made it illegal for an owner to actually rent the unit to someone for less than 30 days, and that the owner was not present in the unit at the time of the rental. There was almost no way for New York state to know if this happened.

In fact, this law had such a little effect on Airbnb's presence in NYC. The growth of the company since the law was passed is staggering. In 2010, when the law was passed, Airbnb's revenue from NYC rentals was roughly 13.3 million dollars[20], and had roughly 1,100 total rentals.[21] In 2016, Airbnb's revenue from NYC rentals jumped to roughly 610.09 million dollars,[22] and had roughly 129,000 total rentals.[23] In 2014, then-New York State Attorney General Eric Schneiderman ("Schneiderman") released a detailed report with the applicable laws and statistics regarding the growth of Airbnb in NYC.[24] In that report, Schneiderman detailed the growth in NYC, noting, "between the start of 2010 and the end of 2013, revenue to Airbnb and its hosts from private short-term rentals in New York City doubled almost every year, with revenue in 2014 estimated to exceed $282 million."[25] It is clear from the data, that as of 2010, the law did little if nothing to slow down Airbnb's presence, and growth in NYC. The AG report stated that most Airbnb rentals in NYC are illegal. The report stated:

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19 *Id.*

20 *Revenue of Airbnb in New York City from 2010 to 2018 (in Million U.S. Dollars)*, STATISTA (Oct. 30, 2015), https://www.statista.com/statistics/483752/new-york-city-airbnb-revenue/.

21 *Market Overview, New York*, AIRDNA, https://www.airdna.co/market-data/app/us/new-york/new-york/overview (last visited Jan. 17, 2018).

22 *Revenue of Airbnb in New York City from 2010 to 2018 (in Million U.S. Dollars)*, *supra* note 21.

23 *Market Overview*, *supra* note 22.

24 *Airbnb in the City*, *supra* note 13.

25 *Id.* at 7.

> Comparing the addresses associated with the Reviewed Transactions to a database of New York City buildings suggests that 72% of unique units used as private short-term rentals on Airbnb during the Review Period involved the rental of an "entire/home apartment" for less than 30 days in either (1) a "Class A" multiple dwelling or (2) a non-residential building. 6 These rentals would respectively violate the MDL (which prohibits such rentals in "Class A" buildings) or the New York City Administrative Code (which prohibits the use of non-residential buildings for housing).[26]

Therefore, if NYC was serious about their fight to stop home-sharing platforms, they needed to further amend the Multiple Dwelling Law. This gave rise to Bill 8704-C to amend the Multiple Dwelling Law.[27]

In 2014, there was a legal battle between Airbnb and the State of New York (the "State").[28] Initially, Schneiderman issued a subpoena to Airbnb to produce the following:

> An Excel spreadsheet Identifying all Hosts that rent Accommodation(s) in New York State, including: (a) name, physical and email address, and other contact information; (b) Website user name; (c) address of the Accommodation(s) rented, including unit or apartment number; (d) the dates, duration of guest stay, and the rates charged for the rental of each associated Accommodation; (e) method of payment to Host including account information; and (f) total gross revenue per Host generated for the rental of the Accommodation(s) through Your Website. The Excel spreadsheet should be capable of being organized by gross revenue per Host and per Accommodation.[29]

The items that Schneiderman demanded in his subpoena were fundmanetally the same things that the Homesharing Surveillance Ordinance requires. In the lawsuit, Airbnb claimed; "(i) there is no reasonable, articulable basis to warrant such investigation and the subpoena constitutes an unfounded 'fishing expedition' . . . (iii) the subpoena is overbroad and burdensome; and (iv) the subpoena seeks confidential, private information from petitioner's users."[30]

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26 *Id.* at 8.

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

28 Airbnb, Inc. v. Schneiderman, 44 Misc. 3d 351 (Sup. Ct. Albany County 2014) [hereinafter *Airbnb, Inc.*].

29 *Id.* at 354.

30 *Id.* at 355.

The New York State Supreme Court, Albany County ruled that the Attorney General does have the authority to issue a subpoena when he can show that the records which he seeks bear a reasonable relation to the subject matter under investigation.[31] Therefore, since the Attorney General produced evidence that there were a number of people violating the law, there was a reasonable basis for the subpoena.[32] The court then ruled that the information requested is not considered confidential since in Airbnb's privacy policy,[33], it says that they will disclose any information at its sole discretion in order to respond to subpoenas.[34] The court also dismissed Airbnb's claim that compliance with the subpoena would be too burdensome.[35] Airbnb failed to show that the information requested wasn't easily and readily accessible.[36] However, the court ruled that the subpoena had to be quashed due to the fact that the subpoena was overly broad, since the subpoena requested information on hosts in the entire state of New York rather than just NYC which is the only place where the Multiple Dwelling Law is applicable to NYC,[37] and therefore, the only people that can possibly be violating the law, the subpoena is requesting a lot more information then they need for their investigation.[38]

In the end, the parties agreed on a settlement[39] which stated that Airbnb would provide the Attorney General's office with the demanded information and that all the identifying factors would be redacted and replaced with anonymous identifying factors.[40] The settlement also included an exhibit ("Exhibit A") with a list of potential legal issues that all potential Airbnb hosts should be made aware of prior to them listing their homes.[41] The information listed on the

31 *Id.* at 355.

32 *Id.* at 358.

33 *Airbnb Privacy Policy*, AIRBNB, https://www.airbnb.com/terms/privacy_policy (last updated Nov. 1, 2019).

34 *Airbnb, Inc.*, 989 N.Y.S.2d at 360.

35 *Id.* at 359.

36 *Id.* at 359.

37 S. 2010, 6873-B (N.Y. 2010), *supra* note 16.

38 *Airbnb, Inc.*, 989 N.Y.S.2d at 358.

39 Letter from Clark Russel, Deputy Bureau Chief, Internet Bureau, State of N.Y., Office of the Attorney General, to Belinda Johnson, General Counsel, Airbnb, Inc. (May 20, 2014), https://ag.ny.gov/pdfs/OAG_Airbnb_Letter_of_Agreement.pdf.

40 *Id.* at 2.

41 *Id.* at 4.

Exhibit A including hyperlinks to the various relevant laws,[42] is now on the help page of Airbnb.[43]

C. Bill 8704-C, to amend the Multiple Dwelling Law

In 2016, the State passed an amendment to try and find a way to be able to police the Multiple Dwelling Law.[44] The amendment makes it illegal to *advertise* any use that is prohibited, pursuant to the original Multiple Dwelling Law.[45] The amendment states that the amendment is, "AN ACT to amend the multiple dwelling law and the administrative code of the city of New York, in relation to prohibiting advertising that promotes the use of dwelling units in a class A multiple dwelling for other than permanent residence purposes."[46] The amendment also added a $1,000 fine for a first-time offender, $5,000 for a second-time offender, and $7,500 for a third-time offender.[47] The fines help to resolve the State's unenforceability issue, since the City can proactively regulate, prior to an actual rental taking place. With the amendment, anybody from the City Council's office can go online, do a simple Airbnb search in New York and find all the hosts that are violating the law. Additionally, the amendment added a provision that included tenants who sublease their apartments on Airbnb are also in violation of the law.[48] This gave the State the power to prosecute hosts who merely list their apartments thereby giving NYC a way to enforce the Multiple Dwelling Law.

After the amendment was passed, Airbnb filed another lawsuit against the State of New York and New York City;[49] however, this lawsuit was dropped by Airbnb soon thereafter, specifically, after the Attorney General's office and Airbnb reached a settlement wherein the Attorney General assured Airbnb that the company itself would not be held liable for the host's actions. Additionally, the Attorney General agreed that the State would not prosecute anyone within NYC, but that the Mayor's Office of Special Enforcement would be

42 *Id.* at Exhibit A.

43 *Help Center New York, NY*, AIRBNB, https://www.airbnb.com/help/article/868/new-york—ny (last updated Mar. 27, 2018).

44 *See* S. 2016, 8704-C (N.Y. 2016), *supra* note 28.

45 *Id.*

46 *Id.*

47 *Id.*

48 *Id.*

49 *Airbnb, Inc.*, 989 N.Y.S.2d at 351.

solely responsible for the prosecution of violators within NYC.[50] Since the only city in the State that was subject to the Multiple Dwelling Law was NYC, the terms of the settlement were satisfactory to Airbnb.

Despite the new amendment, and the threat of potential fines to hosts, there seemed to be nothing that would slow down Airbnb's growth in NYC. From 2016 to 2018, the revenue to Airbnb from rentals in NYC increased from $610 million dollars in 2016 to $805 million dollars in 2018.[51] The number of rentals in NYC went from roughly 129,000 rentals in 2016, to roughly 188,000 in 2018.[52] As of 2018, there were also roughly 28,000 hosts in NYC alone.[53] After the amendment was passed most of the listings are now subject to fines.

D. Other Applicable Laws to Short-Term Rentals

Aside from the Multiple Dwelling Law, there are a number of other laws that may apply to Airbnb rentals in NYC.[54] They range from zoning laws, rent control laws, and special taxes that the legal rentals have to pay.[55]

1. Zoning Laws: The NYC zoning laws define apartment hotels as:

   An "apartment hotel" is a #building# or part of a #building# that is a Class A multiple dwelling as defined in the Multiple Dwelling Law, which:

   a. has three or more #dwelling units# or #rooming units#;
   b. has one or more common entrances serving all such units; and
   c. provides one or more of the following services: housekeeping, telephone, desk, or bellhop service, or the furnishing or laundering of linens.[56]

50 *See* Greg Bensinger, *Airbnb Settles New York State Suit, Focusing on City*, WALL STREET JOURNAL (Nov. 22, 2016), https://www.wsj.com/articles/airbnb-drops-new-york-state-suit-focusing-on-city-1479849933.

51 *See Revenue of Airbnb in New York City,* note 21.

52 *See Market Overview*, *supra* note 22.

53 *Revenue of Airbnb in New York City, supra* note 21.

54 *See About Illegal Short-Term Rentals*, NYC OFFICE OF SPECIAL ENFORCEMENT, https://www1.nyc.gov/site/specialenforcement/enforcement/illegal-short-term-rentals.page (last visited Jan. 16, 2019).

55 *See* AIRBNB, *supra* note 44.

56 *Zoning Resolution*, THE CITY OF NEW YORK, https://www1.nyc.gov/assets/planning/download/pdf/zoning/zoning-text/allarticles.pdf?v=0912.

In NYC, where a majority of the residential properties are apartment buildings with many apartments that include the elements of an apartment hotel as defined in the zoning laws, and would therefore fall into the zoning definition of an "apartment hotel." That would mean that these listings, in addition to being subject to, and probably violating the Multiple Dwelling Law, these hosts are also operating a "hotel" in areas which are not zoned for that purpose and are therefore violating the applicable zoning law. This "hotel" classification, comes with many special laws that are unknow to most homeowners. One example of a law that isn't applicable to a regular residential property, but because of a hotel classification would now be applicable, is the requirement that there be commercial alarm systems.[57] The installation of these systems are never installed in small residential apartments. These systems can be extremely costly to install. Additionally, since many hosts are tenants, they can't install a commercial fire alarm system, themselves without the consent of the building owner. This is just one example of the many laws that are applicable to hotels that would also be applicable to these rental units.

2. Rent Control Law: Owners who are in rent controlled or rent stabilized apartments have additional issues. If they rent out their apartments for a profit, they could be in violation of the codes and be subject to an immediate eviction.[58]
3. Special Taxes: Short-term rentals are sometimes subjected to multiple additional taxes which vary by city and state. "Examples of taxes that could apply to your listing are State sales and use tax, City hotel room occupancy tax, and State and City nightly room fees."[59] On the FAQ portion of the NYC "Hotel Room Occupancy Tax" page, the first question asks whether renting out a single room requires you to pay the hotel Tax.[60] The answer given was that a one room rental is not

57 N.Y.C. Bldg. Code tit. 27 § 17, *available at* http://www.nyc.gov/html/dob/downloads/bldgs_code/bc27s17.pdf.

58 *See generally* Michelle Maratto Itkowitz, Esq., *Airbnb and Your Building, Short-Term Illegal Sublets in NYC Apartments, PREVENTION DETECTION, AND REMEDIES FOR LANDLORDS* (Feb. 21, 2017), http://www.itkowitz.com/booklets/SHORT-TERM-ILLEGAL-SUBLETS-IN-NYC-APARTMENTS-Prevention-Detection-and-Remedies-for-Landlords.pdf.

59 AIRBNB, *supra* note 44.

60 N.Y.C. Dep't of Fin., *Hotel Room Occupancy Tax, Frequently Asked Questions*, NYC.GOV, https://www1.nyc.gov/site/finance/taxes/business-hotel-room-occupancy-tax-faq.page (last visited Nov. 17, 2018).

considered a hotel and does not therefore have to pay the tax.[61] 44% of the listed homes in NYC are single rooms and are therefore not subject to the hotel tax.[62] However, the second question in the FAQ section asks whether a full apartment being rented out is subject to the hotel tax.[63] The answer states:

> Yes. The exception for rentals of a single room in your home (referred to in Question 1) does not apply to rentals of apartments or rooms in properties that are outside the owner's home. By definition, if the apartment or rooms is not in the owner's home, the owner has to collect Hotel Tax.[64]

This includes most of the NYC listings on Airbnb because 53% of the NYC listings on Airbnb are full apartments.[65] Therefore, every tenant who rents a full apartment must pay an additional 5.875% to the City.[66] Additionally, the NYC Department of Finance requires all owners to report and remit a special "Hotel Room Occupancy Tax return".[67] As a service, Airbnb has made agreements with many counties in New York[68] and throughout the country[69] to collect the taxes on behalf of the hosts and the tenants, and to remit same to the appropriate municipality.[70] NYC is noticeably missing from the list.[71]

4. Building Rules-Aside from the various governmental laws, passed by both the City and the State, there are also building rules that each host must comply with. Homeowners Associations and Co-Op boards may have specific rules regarding sub-leases. Therefore, in addition to abiding by the laws

61 *Id.*

62 *Market Overview, New* York, *supra* note 22.

63 N.Y.C. Dep't. of Fin., *supra* note 61.

64 *Id.*

65 *Market Overview*, *supra* note 22.

66 N.Y.C. Dep't. of Fin., *Hotel Room Occupancy Tax*, NYC.GOV, https://www1.nyc.gov/site/finance/taxes/business-hotel-room-occupancy-tax.page (last visited Nov. 17, 2018).

67 *Id.*

68 *Occupancy Tax Collection and Remittance by Airbnb in New York*, AIRBNB, https://www.airbnb.com/help/article/2319/occupancy-tax-collection-and-remittance-by-airbnb-in-new-york (last visited Nov. 17, 2018).

69 *In What Areas Is Occupancy Tax Collection and Remittance by Airbnb Available?*, AIRBNB, https://www.airbnb.com/help/article/653/in-what-areas-is-occupancy-tax-collection-and-remittance-by-airbnb-available#New_York (last visited Nov. 17, 2018).

70 *Id.*

71 *See Occupancy Tax Collection and Remittance by Airbnb in New York*, *supra* note 69.

imposed by NYC and the State, each homeowner must also follow the rules imposed by their own respective buildings.

As laid out above, violating the many laws in place prohibiting the short-term rental of an NYC apartment can subject hosts to fines. Despite the risks that hosts potentially face, Airbnb has seen growth in NYC and, there have not been many fines issued relative to the amount of apartments available for short-term rental. Although there haven't been many, there have been a few notable fines issued over the years that have garnished much attention. There have additionally been numerous cases where Airbnb has agreed to fully fund the hosts' defense.[72]

Most recently, on January 14, 2019, NYC filed a lawsuit against Metropolitan Property Group, alleging that between 2015 and 2018, the company made more than 21 million dollars by operating over 130 apartments in 13 different buildings in New York City.[73] The City alleges that the company created multiple different false accounts on Airbnb, all with the same contact information.[74] This is the largest lawsuit brought by NYC against an Airbnb operator.[75]

III. HOMESHARING SURVEILLANCE ORDINANCE[76]

The Homesharing Surveillance Ordinance, was brought to the City Council on June 7, 2018, and was signed into law by the Mayor of New York City, Bill de Blasio, on August 6, 2018 and was set to take effect on February 2, 2019.[77] The law was NYC's latest attempt

72 *See* Minda Zetlin, *Brooklyn Airbnb Host is Slapped with $32,000 Fine by New York City*, INC.COM (July 22, 2018), https://www.inc.com/minda-zetlin/airbnb-new-york-city-stanley-karol-fines-lawsuits-city-council-office-of-special-enforcement.html; *see also* Brad Tuttle, *A Women is Being Evicted and Fined $185,000 for Renting Her Apartment on Airbnb to Pay Medical Bills*, MONEY (May 11, 2018, 2:02 PM ET), http://time.com/money/5274116/airbnb-fine-eviction-illegal-hotel/.

73 *See* Summons at 9, *New York v. Metro. Prop. Grp., Inc.*, N.Y. Sup. Ct. (2019) (No. 450040).

74 *See* Summons, *supra* note 74, at 11.

75 *See Brokerage Hit with $21M Lawsuit Alleging Involvement in Illegal Airbnb Network*, THE REAL DEAL (Jan. 14, 2019), https://therealdeal.com/2019/01/14/brokerage-hit-with-21m-lawsuit-alleging-involvement-in-illegal-airbnb-network/; *see also* Joyce Hanson, *NYC Hits Property Brokerage With $21M Illegal Airbnb Suit*, LAW360 (Jan. 14, 2019), https://www.law360.com/realestate/articles/1118529/nyc-hits-property-brokerage-with-21m-illegal-airbnb-suit.

76 *See* Council of City of N.Y. Intro. No. 0981-A, amending Administrative Code § 26-2101-04 (Aug. 6, 2018). https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=3522047&GUID=BD0FAC13-E6DD-4C55-8376-CD82F1093402.

77 *Id.*

to try and put a plug in the growth of home-sharing sites like Airbnb, VRBO, and HomeAway, and try to regulate them. The law is the first time where NYC directly referenced home-sharing sites. The law defines "Booking Service" as:

> A person who, directly or indirectly:
>
> 1. Provides one or more online, computer or application-based platforms that individually or collectively can be used to (i) list or advertise offers for short-term rentals, and (ii) either accept such offers, or reserve or pay for such rentals; and
>
> 2. Charges, collects or receives a fee for the use of such a platform or for provision of any service in connection with a short-term rental.[78]

The law requires that all home-sharing sites must submit a monthly report to the relevant agency, containing; (1) the full physical address of the rental property; (2) the full legal name, phone number and email address of the host, the URL of the host on the booking platform; (3) the URL of the listing on the booking platform; (4) a statement as to whether the rental was for the whole unit or just part of the unit; (5) the total number of days that the unit was rented by that booking platform; (6) the total amount of fees that were collected by the booking platform for that rental; and, (7) the total amount of rents that were collected on behalf of the host, and the account number for the host that it uses to receive the rents.[79] Airbnb and other home-sharing platforms obtain this private information when one creates a host account, with the expectation that it will be kept private. With this new law, the home-sharing site is now required to give that information to the relevant government agency.

Airbnb has filed a lawsuit (the "Lawsuit") against NYC in the United States District Court for the Southern District of New York alleging that the new law is a violation of multiple federal laws and an infringement on the host's Constitutional rights.[80] The Lawsuit alleges that the law greatly infringes on the host's Fourth Amendment rights, the constitutional protection against unreasonable search and seizure without a valid warrant.[81] The Lawsuit quotes the U.S. Supreme

78 *Id.*

79 *Id.*

80 *See* Airbnb, Inc. v. City of New York, 373 F. Supp. 3d 467 (S.D.N.Y. Jan. 3, 2019) [hereinafter Airbnb, Inc. v. City of New York].

81 *See id.*

Court's opinion in *Florida v. Jardines*,[82] which says , "the Supreme Court has recognized, 'when 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 governmental intrusion.'"[83] For the same reasons, the new law violates Article I, Section 12 of the New York State Constitution.

The Lawsuit also alleges that the law violates the Stored Communications Act, a federal law enacted by the United States Congress that sets out regulations on the disclosure of personal data and records held by third party internet service providers.[84] Finally, the Lawsuit alleges that home-sharing websites would now be compelled to speak certain messages that they don't necessarily want to, hence violating the companies' first amendment right to free speech.[85]

Another home sharing site, HomeAway, also filed suit against New York City in federal court, which essentially mirrors the Airbnb lawsuit, alleging that the NYC laws violates the same four arguments made by Airbnb.[86] After a request by the City to consolidate both actions, the court granted the request on September 11, 2018.[87] Additionally, many other home-sharing platforms filed amicus briefs in support of Airbnb's challenge against NYC including: NetChoice; Tech: NYC; the Community Development Project at the Urban Justice Center; the Electronic Frontier Foundation; the Apartment Investment and Management Co.; and Linden Research Inc., OfferUp Inc., and Postmates Inc. This shows the importance all home sharing platforms are placing on this constitutional challenge, which would allow them to continue their businesses in New York City.

Given this historical background of the tumultuous relationship between NYC and Airbnb, and an understanding of the potential laws that one may be violating by renting out his home through a home-sharing platform, the full effects of the Homesharing Surveillance Ordinance on Airbnb can be fully comprehended.

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

83 Airbnb, Inc. v. City of New York, 373 F.Supp.3d 467 at 21.

84 *Id.*

85 *Id.*

86 *See* HomeAway Inc. v. City of New York, Case 1:18-cv-07742 (filed Aug. 24, 2018).

87 *See* Airbnb, Inc. v. City of New York, 373 F.Supp.3d 467 at 21.

IV. FOURTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA

The Lawsuit begins with a claim that the Ordinance is a violation of the protection against unreasonable search and seizure in the Fourth Amendment. The Fourth Amendment states:

> The right of the people to be secure in their persons, houses . . . against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[88]

The Lawsuit brings the recent U.S. Supreme Court case of *City of Los Angeles v. Patel*,[89] that had very similar facts to our case, as support for their claim. That case involved an ordinance passed in the City of Los Angeles (Los Angeles Municipal Code §41.49) that required that all hotels keep detailed records about all their guests, including the guest's name, address, number of people in their party, the make, model, and license plate number of their vehicle that is parked on the hotel premises, the date and time of their arrival, their scheduled time of departure, the room number, amount charged, method of payment, and credit card info.[90] Additionally, section 41.49(3)(a)[91] provided that the records had to made available to any police officer that requested it, and failure to hand over the records was misdemeanor, punishable by up to six months in jail, and a $1,000 fine.[92]

A number of motel owners sued the city, alleging that §41.49(3)(a) violated their Fourth Amendment rights and was therefore facially invalid. The Court first discussed whether facial challenges based on the Fourth Amendment are valid. The Court ruled that although facial challenges based on the Fourth Amendment are the most difficult to prove, they are still valid.[93] Once the Court ruled that Facial Challenges to the Fourth Amendment were not automatically barred, the Court then analyzed whether §41.49(3)(a) did in fact violate the Fourth Amendment. In analyzing, the Court stated:

88 U.S. CONST. amend. IV.

89 *See* City of Los Angeles v. Patel, 135 S. Ct. 2443, 2451-52 (2015).

90 *See id.* at 2451-52.

91 Los Angeles Mun. Code §§§ 41.49(2), (3)(a), (4) (2015).

92 *See id.*

93 *Patel,* 135 S. Ct. at 2447.

> The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." It further provides that "no Warrants shall issue, but upon probable cause." Based on this constitutional text, the Court has repeatedly held that "searches conducted outside the judicial process, without prior approval by [a] judge or [a] magistrate [judge], are *per se* unreasonable . . . subject only to a few specifically established and well-delineated exceptions."[94]

The Court then proceeded to explain that the search of the hotel records might be considered an administrative search, and search and would therefore not be required to obtain a warrant every time it sought to review the records.[95]

The Court cited to two cases where the Supreme Court discussed whether a search is considered an administrative search and would therefore be constitutional under the Fourth Amendment.[96] In *City of Indianapolis v. Edmond*, the concept of drug checkpoints came under attack as to whether they violated the Fourth Amendment.[97] The Court discussed how when there is an individualized suspicion of a particular criminal activity then traffic stops can be used and are not unconstitutional. However, the court ruled that the particular traffic stop program that was under review, violated the fourth amendment.[98] The Court included an example which can be directly applicable to our case. The Court stated:

> We have never approved a checkpoint program whose primary purpose was to detect evidence of ordinary criminal wrongdoing. Rather, our checkpoint cases have recognized only limited exceptions to the general rule that a seizure must be accompanied by some measure of individualized suspicion. We suggested in Prouse that we would not credit the "general interest in crime control" as justification for a regime of suspicion less stops . . . . Because the primary purpose of the Indianapolis narcotics checkpoint program is to uncover evidence of ordinary criminal wrongdoing, the program contravenes the Fourth Amendment.[99]

94 *Id.* at 2451–52.
95 *Id.* at 2452.
96 *See id.* at 2452.
97 *See* City of Indianapolis v. Edmond, 531 U.S. 32 (2000).
98 *Id.* at 48.
99 *Id.* at 41-42.

From the dicta of the Court, it seems that the Fourth Amendment prohibits setting up blanket searches for the sole purpose of "uncover[ing] evidence of ordinary criminal wrongdoing."[100] This seems to be very applicable to our case. Due to the many laws that NYC and the State has passed in an effort to limit Airbnb, it can now be considered a crime to rent out your home, without being subject to heavy fines. It would therefore seem that the Homesharing Surveillance Ordinance would fall into the category of a program whose primary purpose is to detect evidence of ordinary criminal wrongdoing, and should therefore be unconstitutional as a violation of the Fourth Amendment. The sole purpose of the Homesharing Surveillance Ordinance would be to get an exact list of all the hosts that are violating the law, and an easy way for the City to start handing out fines. It should therefore be a violation of the Fourth Amendment.

The other case that the Court cites to is *Camara v. Municipal Court of City and County of San Francisco*.[101] *Camara* discussed whether inspections of one's home by a housing code inspector violated one's fourth amendment rights. There, the Court ruled that when a homeowner refuses to allow home inspectors onto his property, they must obtain a warrant to come back and conduct the inspection. The Court stated:

> [T]he police may undertake to recover specific stolen or contraband goods. But that public interest would hardly justify a sweeping search of an entire city conducted in the hope that these goods might be found. Consequently, a search for these goods, even with a warrant, is 'reasonable' only when there is 'probable cause' to believe that they will be uncovered in a particular dwelling.[102]

The Homesharing Surveillance Ordinance, should be a violation of their fourth Amendment rights for the same reasons. It can be compared to the Court's example of a "sweep of entire city in the hope that stolen goods may be found."[103] The New York City Counsel is demanding the personal records of every single host in NYC. There are many hosts that are renting out their apartments legally. Yet, each hosts' information is included in the lists that Airbnb would be required to hand over to NYC on a monthly basis.

100 *Id.* at 42.
101 Camara v. Mun. Ct. of San Francisco, 387 U.S. 523 (1967).
102 *Id.* at 523.
103 *Id.* at 523.

Getting back to *Patel*, the Court said that they will assume that the law was an administrative search. However, the Court ruled that even administrative searches must give "the subject of the search . . . an opportunity to obtain pre-compliance review before a neutral decision-maker."[104] Therefore, since a hotel owner who refused to hand over the requested records was subject to an arrest on the spot, despite the fact that the law fell under the administrative review umbrella, it was held to be unconstitutional that the motel owners were subject to arrest and criminal prosecution, without the opportunity to obtain a pre-compliance review.[105] Finally, the Court responded to the dissent, written by then-Justice Scalia, in which he argued that hotels fall under the category of a "closely regulated business" and are therefore subject to a more relaxed standard of unreasonable search and seizure.[106] The Court discarded that argument saying that there have only been four industries in which the Supreme Court has recognized as being closely regulated business. These industries are; liquor sales,[107] firearms dealing,[108] mining,[109] and running automobile junkyards.[110] The Court saw no reason to include hotel operations as closely regulated business, and therefore, this case was not subject to the more relaxed standard of search and seizure.

The takeaways that we can apply from *Patel* to our case are: (1) facial challenges to laws under the Fourth Amendment are allowed; (2) the Court has ruled that in cases where there are blanket searches for the sole purpose of obtaining evidence of criminal information, it *is not* an administrative search; and (3) hotels do not fall into the category of a closely regulated business and are therefore subject to regular standards of search and seizure. Therefore, without an opportunity for pre-compliance review, the Homesharing Surveillance Ordinance should also be held unconstitutional.

V. NY STATE CONSTITUTION ARTICLE I §12[111]

Similar to the Fourth Amendment, Article I, Section 12 of the New York State Constitution states:

104 *See Patel,* 135 S. Ct. at 2443.
105 *Id.* at 2443.
106 *See id.* at 2457.
107 *See* Colonnade Catering Corp. v. United States, 397 U.S. 72, 90 (1970).
108 *See* United States v. Biswell, 406 U.S. 311 (1972).
109 *See* Donovan v. Dewey, 452 U.S. 594 (1981).
110 *See* New York v. Burger, 482 U.S. 691 (1987).
111 N.Y. CONST. art I, §12.

> "The 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, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."[112]

The Court of Appeals of New York has ruled that the New York State Constitution affords greater protections than the Fourth Amendment does.[113] Therefore, if it is indeed found that the Homesharing Surveillance Ordinance violates the Fourth Amendment, it will also be found to be in violation of the New York State Constitution.

VI. THE STORED COMMUNICATIONS ACT

The Stored Communications Act[114] was enacted in 1986, as Title II of the Electronic Communications Privacy Act, as a way to extend the Fourth Amendment protections that are binding upon physical records in one's home or business, to records that are filed electronically.[115] Since under the wording of the Fourth Amendment "The right of the people to be secure in their persons, houses, papers, and effects,"[116] lead to a concern that electronic records don't fall into any of those categories and can, therefore be searched freely by any government office for any reason.[117] Therefore, there was a need to provide protection to those forms of records.

The Stored Communications Act states that "a provider of remote computing service or electronic communication service to the public shall not knowingly divulge a record or other information about a subscriber to or customer of such service to any governmental entity."[118] The next section, §2703, deals with the ways that a government agency can require that the stored records be disclosed.[119] "A governmental entity may require the disclosure by a provider of electronic communication service of the contents of a wire or electronic communication

112 *Id.*

113 *See* People v. Scott, 79 N.Y.2d 474, 593 (1992).

114 18 U.S.C.A. § 2703; 18 U.S.C. § 2703.

115 *See generally* 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 (Aug. 2004).

116 *See* U.S. CONST. amend. IV.

117 *See supra* note 116.

118 18 U.S.C. § 2702(a)(3).

119 *See* 18 U.S.C.A. § 2703.

. . . only about a warrant issued using the procedures described in the Federal Rules of Criminal Procedure by a court of competent jurisdiction."[120] Section (d) of the Stored Communications Act sets out the requirements that are needed to obtain a warrant; "if the governmental entity offers specific and articulable facts showing that there are reasonable grounds to believe that the contents of a wire or electronic communication, or the records or other information sought, are relevant and material to an ongoing criminal investigation."[121] The Act, therefore, forbids all companies, including Airbnb, who is a provider of electronic communication service, from disclosing the stored material to a government agency without a valid warrant. It will be very difficult for NYC to obtain a warrant that is in accordance by the Stored Communications Act, for what they are attempting to receive by way of the Homesharing Surveillance Ordinance since what the Ordinance is requiring, is data regarding *all* hosts, most of whom are not under criminal investigation, which a court would presumably not grant since the city won't be able to show which homes specifically are the ones that are breaking the law until after they see the lists. Therefore, the Homesharing Surveillance Ordinance requires that Airbnb violate the Stored Communications Act.

The *Patel* Court ruled that the even after the assumption that the hotel records fell under the administrative search category since there was potential jail time involved, each owner had to be afforded an opportunity to obtain pre-compliance review, and since the review was not being offered, the law violated the owners' fourth amendment.[122] Before the discussion of The Stored Communications Act, that part of the *Patel* Case was not applicable to the Lawsuit The Homesharing Surveillance Ordinance doesn't call for any criminal prosecution, rather a civil penalty. However, the Federal Communications Act does have a potential criminal liability. Violations of the Stored Communications Act can carry a punishment of up to 10 years in prison.[123] Therefore, just like the court in *Patel* ruled, that since the hotel owners were subject to an arrest for their refusal to comply with the officer's request to look at the records, "business owners cannot reasonably be put to this kind of choice," the choice of compliance with the law or potentially going to jail.[124] Now that there is a potential for criminal

120 *Id.*

121 18 U.S.C. § 2702(d).

122 *See Patel,* 135 S. Ct. at 2457.

123 18 U.S.C. §2701(b).

124 *See* Metropolitan Property Group, Inc., 2019 N.Y.Misc. LEXIS at 599.

prosecution for Airbnb, that same constitutional protection should be afforded to them. Airbnb should not be able to be put to this sort of choice, to comply with the Stored Communications Act which would save them from criminal prosecution but would violate the Homesharing Surveillance Ordinance, or to comply with the Homesharing Surveillance Ordinance, but violate the Federal Communications act and be subject to criminal prosecution and possible jail time. By Airbnb complying with the Homesharing Surveillance Ordinance, and handing over its data, it is opening itself up to the possibility that it will be criminally prosecuted for violating the Stored Communications Act. Therefore, under the Fourth Amendment even if it can be proven that the Homesharing Surveillance Ordinance is an administrative search, it should still be ruled unconstitutional for its failure give an opportunity for pre-compliance review.

VII. FIRST AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA

The First Amendment states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech."[125] The claim by Airbnb is that the ordinance is a form of compelled speech which should be protected by the First Amendment.[126] Airbnb contends that by requiring them to submit a detailed list of all hosts, and all the hosts' information, is compelling Airbnb to speak, in a manner in which they do not want to. The Supreme Court recently stated in *Janus* v. *Am. Fed'n of State, Cty., & Mun. Employees, Council 31*,[127] that the Supreme Court has "held time and again that freedom of speech 'includes both the right to speak freely and the right to refrain from speaking at all.'"[128]

The Government can obviously compel speech in certain instances. This is apparent by looking to situations present in our everyday lives. For example, all manufactures of commodities are required

125 U.S. CONST. amend. I.

126 *See* Airbnb, Inc. v. City of New York, 373 F. Supp. 3d at 467.

127 Janus v. AFSCME, Council 31, 138 S. Ct. 2448, 2464 (2018).

128 *Id.* at 2464 (citing Wooley v. Maynard, 430 U.S. 705, 714 (1977)); *see* Riley v. National Federation of Blind of N. C., Inc., 487 U.S. 781, 796–797 (1988); Harper & Row, Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 559 (1985); Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 256–257 (1974); *accord,* Pacific Gas & Elec. Co. v. Public Util. Cmm'n of Cal., 475 U.S. 1, 9 (1986).

to print labels with a list of required disclosures.[129] This is because, as Congress declared in the beginning of Section 1451, that "Informed consumers are essential to the fair and efficient functioning of a free market economy."[130] Congress decided that the protections of the consumers and the importance of maintaining a free market economy are a substantial government interest which will override one's first amendment rights protecting them from compelled speech. This is just one of many examples in which the government has the right to force citizens to make some sort of disclosure, and it not be a violation of each citizen's First Amendment protection against compelled speech.

The standard for disclosure requirements is set out in the 1985 Supreme Court decision of *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*.[131] The *Zauderer* case involved an attorney who made a number of advertisements in the local newspaper. The Ohio Office of Disciplinary Counsel investigated multiple violations of the code of professional conduct by the ads. One of the violations was that the attorney failed to comply with the state law requirement that there be a disclaimer in all contingent-fee advertisements.[132] The attorney sued the Office of Disciplinary Counsel for violations of his First Amendment right to free speech. The court upheld the disclosure requirement saying that "[w]e recognize that unjustified or unduly burdensome disclosure requirements might offend the First Amendment by chilling protected commercial speech. But we hold that an advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers."[133]

Whether the *Zauderer* case applies beyond the government's interest in protecting consumers against advertising deception has not yet been considered by the Supreme Court. However, several circuit courts, including the Second Circuit,[134] have extended the *Zauderer* analytical framework to other government required disclosures.[135] The

129 *See* 15 U.S.C.A. § 1453; *see* 15 U.S.C.A. § 1453 (1992).

130 15 U.S.C.A. § 1451 (1966).

131 Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio, 471 U.S. 626, 651 (1985).

132 *Id.* at 633.

133 *Id.* at 652.

134 The Southern District for the District of New York, the court in which the Lawsuit was filed, is bound by precedents set in the Second Circuit.

135 *See* American Meat Institute v. U.S. Dept. of Agriculture, 760 F.3d 18, 37 (D.C. Cir. 2014); Am. Meat. Inst. v. United States Dep't of Agric., 760 F.3d 18, 37 (D.C. Circ. 2014) (extending the *Zauderer* rule to a required disclosure that meat products contain a label with the country of origin); *see also,* Am. Beverage Ass'n

Zauderer case sets out that a disclosure requirement that requires one to make: (1) a statement that is purely factual and uncontroversial;,[136] (2) is reasonably related to the state's interest;, and (3) is not unduly burdensome, is not a violation of one's First Amendment rights.[137] Additionally, the burden of proof is on the government to prove that the constitutional rights were not violated.[138]

For Airbnb, there is no question that the required disclosures consist of purely factual and uncontroversial statements. Therefore, the remaining questions are: (1) whether disclosure of the information that New York City is requiring Airbnb to disclose is reasonably related to the state's interest and (2) whether the disclosure requirement is overly burdensome to Airbnb.

The standard for the reasonable relationship requirement is that "the government must demonstrate that there is a 'rational relationship' between the disclosure requirement and the government interest. In the context of commercial speech, this means that the required disclosure "must relate to the good or service offered by the regulated party.'"[139] There has not been much discussion regarding the exact parameters of how close the state's relationship must be to the disclosure. In this case, the state would first need to demonstrate how the information that they are requiring Airbnb to disclose has a rational relationship to the state's interest. This showing of a rational relationship will consist of two parts: (1) that policing short term rentals is the best way to alleviate the issues that the City claims; and (2) that there aren't better solutions that wouldn't violate anyone's constitutional rights. The answer to both questions has been the subject of a great

v. City & Cty. of San Francisco, 871 F.3d 884, 894 (9th Cir. 2017) (extending the *Zauderer* rule to a local ordinance requiring a health warning to be posted to all sugar-sweetened beverages); *see also* Disc. Tobacco City & Lottery, Inc. v. United States, 674 F.3d 509, 520 (6th Cir. 2012) (extending the *Zauderer* rule to Congress's passing of the Federal Cigarette Labeling and Advertising Act requiring that cigarette manufacturers post warning labels on the box); *see also* New York State Rest. Ass'n v. New York City Bd. of Health, 556 F.3d 114, 117 (2d Cir. 2009) (extending the *Zauderer* rule to a New York health code requiring that restaurants, including McDonalds and Burger King, to post calorie content on menus); *see also* Pharm. Care Mgmt. Ass'n v. Rowe, 429 F.3d 294, 309 (1st Cir. 2005) (extending the *Zauderer* rule to a requirement that pharmacies make certain disclosures on prescription medication bottles).

136 Controversial compelled speech has generally referred to controversial political statements. *See* Evergreen Ass'n, Inc. v. City of New York, 740 F.3d 233, 249 (2d Cir. 2014) (holding that abortion is a controversial political topic.

137 *See Zauderer*, 471 U.S. at 651.

138 *Am. Beverage Ass'n*, 871 F.3d at 894.

139 *Id.*

debate. As Airbnb claims, there have been many studies suggesting that the new law is the result of influence by the hotel industry, rather than an actual help to the housing crisis.[140] Additionally, the State will need to show that Airbnb releasing the data is un-burdensome. In the case of *Airbnb Inc., v. Schneiderman*, the lawsuit brought in 2014 challenging a subpoena from the Attorney General, the Supreme Court, Albany County ruled that the excel spreadsheet that was being requested was not overly burdensome since it is presumably, readily available.[141] However, it can be argued that burdensome doesn't only mean that the information is physically burdensome to obtain, or to disclose. It can also mean that the effect of the required disclosure has an overly burdensome effect on the overall company. In this case, the effect of the regulation will surely have an extremely burdensome effect on the company. New York City is one of the most popular tourist destinations in the world.[142] If Airbnb lost most of its hosts in one of the most popular tourist destinations it would definitely be extremely burdensome.

New York City therefore, would have to prove that the disclosures that they are requesting is directly related to the state's interest, that even if it is related to the state's interest, that the disclosure would actually accomplish any of the NYC's objectives, and finally that the disclosure requirement is not overly burdensome on the company. If the State is unable to prove any of these things, then it would be a violation of Airbnb's First Amendment protections against compelling speech. Although it is not impossible for the state to prove, it seems like a high threshold.

VIII. PRELIMINARY INJUNCTION

In the original complaint, Airbnb asked for a preliminary injunction.[143] The law was set to take effect on 180 days after the law was passed, which was February 2, 2019.[144] On January 3, 2019, the United States District Court for the Southern District of New York

140 *See* Nick Tabor, *Is New York Cracking Down on Airbnb to Help Local Residents or Hotels?*, N.Y. MAG: INTELLIGENCER (Aug. 13, 2018), https://nymag.com/intelligencer/2018/08/airbnb-new-york-crack-down.html.

141 *Airbnb, Inc.*, 989 N.Y.S.2d at 786.

142 *See* Maureen O'Hare, *Most Visited: World's Top Cities for Tourism*, CNN (Dec. 4, 2018), https://www.cnn.com/travel/article/most-visited-cities-euromonitor-2018/index.html.

143 *See* Airbnb, Inc. v. City of New York, 373 F. Supp. 3d at 467.

144 *See* Council of City of N.Y. Intro. No. 0981, *supra* 78, at §2.

granted Airbnb's request for a preliminary injunction blocking the law from actually taking effect.[145]

One of the essential elements for the approval of a preliminary injunction is that the movant must show a likelihood of success on the merits.[146] Likelihood of success means that the probability of success is better than fifty percent.[147] In the decision, the court discusses the probability of success of Airbnb's Fourth Amendment claim. The court discusses both *Patel*[148] and *Camara*[149] establishing the need for pre-compliance review, and that the search be limited in scope. The court then uses strong language suggesting that these facts are more of a violation of the Fourth Amendment then the facts in *Patel*.[150] The court ruled that since the ordinance doesn't allow for any pre-compliance review, it seems more likely than not, that Airbnb would be successful in their ultimate case to permanently enjoin the law from going into effect. Additionally, the court denied the City's argument that the hearing on the preliminary injunction should serve as the pre-compliance review, since the sweeping demand for all constitutionally protected records, including hosts that are not in any violation of the Multiple Dwelling Law, is presumably a violation of Airbnb's Fourth Amendment right.[151] Additionally, the court briefly discussed the Stored Communication Act, but the court was not prepared to conclude on Airbnb's likelihood of success on that claim.[152] Additionally, the court did not address the First Amendment claim at all since they had already concluded that the preliminary injunction would be granted due to the Fourth Amendment claim.[153]

With this preliminary injunction granted, the law will not go into effect until the case is fully heard. Additionally, by the court ruling that it was more likely than not that Airbnb would be successful in their case, it shows that Airbnb has a promising case regarding the

145 *See Airbnb, Inc.*, 373 F. Supp. 3d at 488.

146 Airbnb, Inc. v. City of New York*,* 373 F. Supp. 3d at 488.

147 *Id.*

148 *See Patel,* 135 S. Ct. at 2443.

149 *See Camara*, 387 U.S., at 523.

150 *See* Airbnb, Inc v. City of New York*.,* 373 F. Supp. 3d at 488 (the scale of the production that the Ordinance compels each booking service to make is *breathtaking* . . . . In its sweep, the Ordinance *dwarfs* that of the Los Angeles ordinance at issue in *Patel* . . . 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) (emphasis added).

151 *See id. See also* Summons, *supra* note 75, at **9.**

152 *See Airbnb, Inc. v City of New York*, 373 F.Supp.3d 467 at 22.

153 *See id.*

Fourth Amendment claim. On top of that, Airbnb also has two other claims, that the law is a violation of the Stored Communication Act, and the First Amendment argument.[154] In sum, it seems very likely that Airbnb will be successful in permanently enjoining the City from implementing the Homesharing Surveillance Ordinance, allowing home sharing platforms to continue operating in New York City. The City has notified the Court that it intends to appeal the decision granting the preliminary injunction to the Second Circuit.[155]

IX. CONCLUSION

The Multiple Dwelling Law will presumably be invalidated as a violation of hosts' constitutional rights in addition to Airbnb's, HomeAway's and other home sharing platform companies' constitutional rights. However, it would seem, after looking at the long history between New York, more specifically New York City, and Airbnb representing all home-sharing platforms, that no matter what the outcome of this case is, the fight will continue. If the law is knocked down, the city will presumably pass another law addressing and circumventing the issues brought out in this case. If the law withstands constitutional scrutiny, Airbnb will presumably find a loophole and continue to operate in the City. It is time for the two parties to turn the page and work together to address the issues that the City is concerned about, while allowing New Yorkers to utilize Airbnb.

The primary issue that New York state legislators have with homesharing platforms is that they claim that it makes the housing crisis even worse. The reasoning being, that people are holding onto apartments that they would not otherwise keep, since they do not need it to live. The ability for these owners to rent out their apartment and collect enough rent to cover their costs, and sometimes even make a profit, allows them to hold the apartment.[156] However, the real issue that the city should have is with commercial hosts; hosts that rent apartments for the sole purpose of listing the apartment on Airbnb, and not with the regular citizen who rents out his apartment for a weekend that he is away. Therefore, Airbnb and NYC should work together, to allow regular residents of the City to rent out their apartment in instances where they will not be using it, while stopping the commercial

154 *See* Airbnb, Inc. v. City of New York, 373 F. Supp. 3d 467.

155 *See* Joyce Hanson, *NYC Taking Short-Term Rental Rule's Freeze to 2nd Circ.*, LAW360 (Feb. 1, 2019), https://0-www-law360-com.ben.bc.yu.edu/articles/1124566/nyc-taking-short-term-rental-rule-s-freeze-to-2nd-circ-.

156 *See supra* FN 13, at 12.

use or home sharing platforms. A potential future agreement which would accomplish everyone's goals, could look like one where NYC allowed apartments to be rented out as long as each unit was not rented out for more than 100 nights. This would make it financially impractical for commercial hosts to rent apartments for the sole purpose of short-term subleasing, while allowing regular people to rent out their apartment for some extra, much needed cash, and would accomplish the goals that each side has. Airbnb should agree to give a list to NYC with information regarding hosts that rent out any unit for more than the agreed upon nights.

The benefits of allowing Airbnb are great. First, it would allow residents to supplement the rising cost of living in NYC by renting out their homes when they aren't using them.[157] For example, this would allow students who relocate to NYC for the semester to rent out their apartment during school breaks. Second, by making it legal to rent out one's apartment, it would provide much needed tax income to the City by charging hotel-like taxes on Airbnb rentals.[158] Finally, it will lower the cost for tourists who will choose to stay in New York City, rather than finding a cheaper alternative in places such as Jersey City, New Jersey.

By coming together, Airbnb and NYC can create a lasting agreement in which everyone wins. This agreement can help alleviate the housing crisis by eradicating commercial Airbnb hosts, while also giving to every day, struggling, citizens of NYC, to keep up with the rising cost of living.

157 *See* Will Rinehart, *New York Law Would Wipe Out Half a Billion Dollars of Value for Airbnb Hosts*, AMERICAN ACTION FORUM (July 21, 2016), https://www.americanactionforum.org/research/new-york-law-wipe-half-billion-dollars-value-airbnb-hosts/.

158 *Airbnb to Start Charging Hotel Taxes in a Handful of Cities*, IOWA PUBLIC RADIO (Apr. 18, 2014), http://iowapublicradio.org/post/airbnb-start-charging-hotel-taxes-handful-cities#stream/0.