

## Airbnb: A Case Study in Occupancy Regulation and Taxation

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### INTRODUCTION

Six years after its founding, Airbnb stands as one of the most prominent participants in the sharing economy, a group that includes compatriots such as Uber and Lyft. These companies offer a variety of Internet-based platforms and applications that create new ways for people to share goods and services with one another on a previously unimaginable scale.<sup>1</sup> They also act like virtual matchmakers by lowering transaction costs and facilitating arrangements that might otherwise have been too burdensome. Doing so has vast potential to benefit consumers by encouraging collaborative consumption of assets like cars and homes that are expensive to purchase but often remain idle because their owners cannot make full use of them.<sup>2</sup> Although these companies are still in their nascent stages, they are growing rapidly, and their collective revenue was estimated to be in excess of \$3.5 billion last year.<sup>3</sup>

Sharing-economy companies offer a wide variety of services but are united by three common traits. First, they rely on recent technological advances to satisfy age-old consumer demands in ways not previously possible.<sup>4</sup> Second, they exist in and parallel to a wide variety of well-established industries that are fundamentally disrupted by the sharing economy's emergent ability to

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Although the authors have represented Airbnb in litigation matters, the views expressed here are their own and do not represent those of Airbnb.

<sup>1</sup> See Roberta A. Kaplan, *Regulation and the Sharing Economy* (NY L J July 18, 2014), online at <http://www.newyorklawjournal.com/id=1202663656633/Regulation-and-the-Sharing-Economy> (visited Feb 23, 2015).

<sup>2</sup> See *Peer-to-Peer Rental: The Rise of the Sharing Economy*, *Economist* 9 (Mar 9, 2013); Matthew Mitchell, *Uber, Airbnb, and Letting the Sharing Economy Thrive* (US News & World Rep Apr 15, 2014), online at <http://www.usnews.com/opinion/economic-intelligence/2014/04/15/uber-airbnb-and-letting-the-sharing-economy-thrive> (visited Feb 23, 2015).

<sup>3</sup> Tomio Geron, *The Share Economy*, 191 *Forbes* 58, 60 (Feb 11, 2013).

<sup>4</sup> See Mitchell, *Uber, Airbnb* (cited in note 2).

provide innovative alternatives.<sup>5</sup> Third, they operate in interstitial areas of the law because they present new and fundamentally different issues that were not foreseen when the governing statutes and regulations were enacted.<sup>6</sup>

This Essay discusses some of the specific issues that have confronted Airbnb, with a particular focus on New York, one of its largest markets. Part I discusses the impact that Airbnb has had on local communities. Part II focuses on the legal regime within which Airbnb operates—one that is marked by poorly drafted laws that fail to account for challenges presented by the sharing economy. Lastly, Part III addresses Airbnb’s collaborative response to the New York attorney general, who sought access to the company’s user data in order to investigate possible illegal hotels operating in New York.

### I. THE IMPACT OF AIRBNB

Over the course of its brief existence, Airbnb has experienced exponential growth. Today, it hosts more than one million listings in over 190 countries and territories around the world.<sup>7</sup> In addition to offering guests individual accommodations that range from tree houses to castles and everything in between,<sup>8</sup> Airbnb makes efforts to partner with localities and organizers hosting large-scale events ranging from shareholder conferences to the Olympics and the World Cup.<sup>9</sup>

Airbnb also contributes to local communities in myriad ways. Perhaps the most obvious and easiest to measure is its economic impact. One study found that 400,000 Airbnb guests who visited New York City between 2012 and 2013 spent \$632

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<sup>5</sup> For a discussion of the sharing-economy phenomenon in the hotel industry, see Sangeet Choudary, *How the Hotel Industry Got Blindsided . . . and Why Yours Could Be Next* (Forbes July 7, 2014), online at <http://www.forbes.com/sites/groupthink/2014/07/07/how-the-hotel-industry-got-blindsided-and-why-yours-could-be-next> (visited Feb 23, 2015).

<sup>6</sup> See Kaplan, *Regulation and the Sharing Economy* (cited in note 1).

<sup>7</sup> *About Us* (Airbnb), online at <http://www.airbnb.com/about/about-us> (visited Feb 23, 2015).

<sup>8</sup> See Anika Anand, *Airbnb’s Got Some Impressive Numbers, but What about Its Legal Woes?*, Upstart Bus J (Bus Journals Feb 7, 2013), online at <http://upstart.bizjournals.com/companies/startups/2013/02/07/airbnb-releases-impressive-2012-numbers.html> (visited Feb 23, 2015).

<sup>9</sup> See generally, for example, *Hosting Big Events: How Airbnb Helps Cities Open Their Doors*, Airbnb Pub Pol Blog (Airbnb), online at <http://publicpolicy.airbnb.com/wp-content/uploads/2014/08/Airbnb-big-events.pdf> (visited Dec 21, 2014); Poppy Harlow and David Goldman, *Warren Buffett Endorses Airbnb*, CNN Money (CNN Apr 9, 2014), online at <http://money.cnn.com/2014/04/09/technology/social/buffett-airbnb> (visited Feb 23, 2015).

million, supporting 4,580 jobs.<sup>10</sup> As compared to tourists staying in hotels, Airbnb guests in New York City tend to stay two days longer and spend nearly \$200 more at local businesses during their visit.<sup>11</sup> Part of what allows for this, of course, is that Airbnb helps guests find a variety of accommodations at a lower price point than what is available at expensive hotels.<sup>12</sup> Moreover, the rise in economic activity has been widely dispersed: while the vast majority of New York City hotels are clustered in midtown Manhattan, as of 2013, 82 percent of Airbnb accommodations were spread across the rest of the city.<sup>13</sup> Though New York remains Airbnb's largest market, similar results have been found elsewhere.<sup>14</sup>

Of course, Airbnb's impact is not merely financial. One of the primary benefits that it provides is that it allows guests to "live like a local" and explore neighborhoods that do not typically cater to tourists, both by providing accommodations in a wide variety of locales and by connecting visitors with local residents.<sup>15</sup> It has also exhibited a strong philanthropic streak,

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<sup>10</sup> *Airbnb Economic Impact* (Airbnb), online at <http://blog.airbnb.com/airbnb-economic-impact> (visited Feb 23, 2015); *New Study: Airbnb Generated \$632 Million in Economic Activity in New York* (Airbnb Oct 22, 2013), online at <http://www.airbnb.com/press/news/new-study-airbnb-generated-632-million-in-economic-activity-in-new-york> (visited Feb 23, 2015).

<sup>11</sup> *New Study: Airbnb Generated \$632 Million* (cited in note 10).

<sup>12</sup> See Courtney Banks, *Budget Rentals under Fire*, Travel Watch (Wall St J July 22, 2010), online at <http://www.wsj.com/articles/SB10001424052748704684604575381390324767922> (visited Feb 23, 2015) (observing that "[b]udget-minded travelers often turn to websites [like Airbnb's] to find short-term apartment and room rentals in cities where hotels are out of their price range"); Craig Karmin, *Airbnb Finds Little Hospitality in New York Market* (Wall St J Oct 20, 2013), online at <http://www.wsj.com/articles/SB10001424052702304384104579141790931429948> (visited Feb 23, 2015) (noting that Airbnb rentals present consumers with "a cheaper, more flexible alternative to many hotels").

<sup>13</sup> *The Airbnb Community's Economic Impact on New York City* \*4-6 (Airbnb), online at <http://blog.airbnb.com/wp-content/uploads/Airbnb-economic-impact-study-New-York-City.pdf> (visited Feb 23, 2015) (noting that 34 percent of guests stayed outside Manhattan, generating \$105 million in economic activity and supporting 950 local jobs).

<sup>14</sup> See, for example, Tomio Geron, *Airbnb Had \$56 Million Impact on San Francisco: Study* (Forbes Nov 9, 2012), online at <http://www.forbes.com/sites/tomiogeron/2012/11/09/study-airbnb-had-56-million-impact-on-san-francisco> (visited Feb 23, 2015); *New Study: Airbnb Community Generates £502 Million in Economic Activity in the UK* (Airbnb), online at <http://www.airbnb.com/press/news/new-study-airbnb-community-generates-502-million-in-economic-activity-in-the-uk> (visited Feb 23, 2015).

<sup>15</sup> See *Economic Impact* (cited in note 10); *Peer-to-Peer Rental*, Economist at 9 (cited in note 2); Julie Vallone, *Airbnb Valued above Hyatt, Wyndham*, Investor's Business Daily A5 (June 30, 2014); Carolyn Said, *How an Airbnb Dabbler Became a Superhost* (San Francisco Chronicle June 14, 2014), online at <http://www.sfchronicle.com/realestate/article/How-an-Airbnb-dabbler-became-a-superhost-5553257.php> (visited Feb 23, 2015); Jason Tanz, *How Airbnb and Lyft Finally Got Americans to Trust Each Other* (Wired

which includes participating in community-service projects<sup>16</sup> and aiding in relief efforts around the world by providing free housing to victims of natural disasters.<sup>17</sup>

Airbnb's growth does not necessarily come at the expense of the hotel industry. Rather, Airbnb can grow the overall pie and allow a wide variety of businesses to obtain a larger slice. As recognized by *SF Travel*, some cities may be prohibitively expensive for certain visitors and during some events.<sup>18</sup> By providing affordable accommodations, Airbnb ensures that such tourists and attendees are not priced out.<sup>19</sup> That lack of actual competition between Airbnb hosts and the hotel industry may explain why one study, focusing on the Texas market, projected that a 1 percent increase in Airbnb listings results in only a 0.05 percent decrease in hotel revenues.<sup>20</sup>

Similarly unavailing are complaints that Airbnb's growth has increased housing costs for local residents. According to one study, Airbnb has "little effect on urban apartment markets," for which prices are driven by fundamental economic and demographic factors, as well as constraints such as land-use policy that curtail residential development.<sup>21</sup> Rather, Airbnb serves to make housing *more* affordable: half of current Airbnb hosts, many of whom are moderate- to low-income individuals, have explained that hosting helps them afford to stay in their

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Apr 23, 2014), online at <http://www.wired.com/2014/04/trust-in-the-share-economy> (visited Feb 23, 2015).

<sup>16</sup> See generally Jacob Weisberg, *Tech Support*, *Vogue* 98 (May 2014).

<sup>17</sup> See, for example, Press Release, *Mayor Bloomberg and Airbnb Announce New Platform to Help Victims of Hurricane Sandy with Free Housing* (NYC Office of the Mayor Nov 7, 2012), online at [http://www.nyc.gov/portal/site/nycgov/menuitem.c0935b9a57bb4ef3daf2f1c701c789a0/index.jsp?pageID=mayor\\_press\\_release&catID=1194&doc\\_name=http://www.nyc.gov/html/om/html/2012b/pr401-12.html](http://www.nyc.gov/portal/site/nycgov/menuitem.c0935b9a57bb4ef3daf2f1c701c789a0/index.jsp?pageID=mayor_press_release&catID=1194&doc_name=http://www.nyc.gov/html/om/html/2012b/pr401-12.html) (visited Feb 23, 2015); Patrick Hoge, *Airbnb to Aid Disaster Response in San Francisco and Portland*, *San Francisco Bus Times* (Bus Journals July 29, 2014), online at <http://www.bizjournals.com/sanfrancisco/blog/techflash/2014/07/airbnb-to-aid-disaster-response-in-san-francisco.html> (visited Feb 23, 2015).

<sup>18</sup> See Annie Sciacca, *Airbnb's Chip Conley Talks Hospitality, Travel and His Latest Startup Venture*, *San Francisco Bus Times* (Bus Journals Aug 14, 2014), online at <http://www.bizjournals.com/sanfrancisco/blog/2014/08/airbnb-chip-conley-hospitality-travel-hotels.html> (visited Feb 23, 2015).

<sup>19</sup> See *id.*

<sup>20</sup> See Georgios Zervas, Davide Proserpio, and John W. Byers, *The Rise of the Sharing Economy: Estimating the Impact of Airbnb on the Hotel Industry* \*3–4 (Boston University School of Management Research Paper No 2013-16, Feb 12, 2014), online at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2366898](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2366898) (visited Feb 23, 2015).

<sup>21</sup> *Id.* at \*1.

homes.<sup>22</sup> Indeed, an independent study by the *San Francisco Chronicle* confirmed that 86 percent of Airbnb users in San Francisco had only one residence listed, and 98 percent had three or fewer, suggesting that only a miniscule proportion of users seek to operate on a commercial scale.<sup>23</sup> Back in New York City, the typical host earns only \$6,160 per year via Airbnb, an amount sufficient to bolster her budget but far too low to decrease the availability of housing in a city where the average monthly rent is nearly \$3,300.<sup>24</sup>

## II. THE POLITICAL AND REGULATORY ENVIRONMENT

Airbnb's rapid growth makes clear that its Internet platform benefits its guests, its hosts, and their local communities alike. Indeed, in a recent poll of New York City residents, a majority of voters expressed that they support Airbnb, responding that residents should be permitted to rent rooms in their homes for a few days at a time, with only 36 percent opposed.<sup>25</sup> Yet Airbnb hosts face strong headwinds from a well-funded coalition of landlords and hotel-industry insiders, which plans to spend millions of dollars on a public campaign criticizing Airbnb.<sup>26</sup> One large landlord went so far as to consider offering \$500 bounties to employees who identify Airbnb hosts in the landlord's buildings.<sup>27</sup> Amply demonstrating the coalition's deep political connections, it is spearheaded in New York City by a prominent

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<sup>22</sup> See *Economic Impact* (cited in note 10).

<sup>23</sup> See Carolyn Said, *Window into Airbnb's Hidden Impact on SF* (San Francisco Chronicle June 15, 2014), online at <http://www.sfchronicle.com/business/item/window-into-airbnb-s-hidden-impact-on-s-f-30110.php> (visited Feb 23, 2015).

<sup>24</sup> Kenneth T. Rosen, Randall Sakamoto, and David Bank, *Short-Term Rentals and Impact on the Apartment Market* \*3-4 (Airbnb Pub Pol Blog Oct 2013), online at <http://publicpolicy.airbnb.com/wp-content/uploads/2014/04/Short-TermRentalsandImpactonApartmentMarketNY1.pdf> (visited Feb 23, 2015).

<sup>25</sup> *New Yorkers Welcome Dem Convention 3-1, Quinnipiac University Poll Finds; Voters Want Right to Rent Rooms Like a Hotel*, Quinnipiac U Poll (Quinnipiac U Sept 2, 2014), online at <http://www.quinnipiac.edu/news-and-events/quinnipiac-university-poll/new-york-city/release-detail?ReleaseID=2076> (visited Feb 23, 2015).

<sup>26</sup> See Dana Rubinstein, *At City Hall, Officials Kick Off Airbnb Counteroffensive* (Capital NY Sept 12, 2014), online at <http://www.capitalnewyork.com/article/city-hall/2014/09/8552457/city-hall-officials-kick-airbnb-counteroffensive> (visited Feb 23, 2015); Craig Karmin, *Airbnb Faces New Threat in New York from Housing Coalition*, Digits Blog (Wall St J Sept 12, 2014), online at <http://blogs.wsj.com/digits/2014/09/12/airbnb-faces-new-threat-in-new-york-from-housing-coalition> (visited Feb 23, 2015).

<sup>27</sup> See Andrew J. Hawkins, *Landlord Related Cos. Cracks Down on Airbnb*, Insider Blog (Crain's NY Bus Oct 2, 2014), online at <http://www.craigslist.com/article/20141002/BLOGS04/141009955/landlord-related-cos-cracks-down-on-airbnb> (visited Feb 23, 2015).

political consultant who previously served as chief of staff to the New York attorney general, political strategist for the Hotel and Motel Trades Council, and chief strategist for the successful reelection campaign of New York's governor.<sup>28</sup>

As is typical, incumbent interests have sought to portray Airbnb and its ilk as “‘evading’ established systems of regulation,” though “this is true only in the sense that the automobile ‘evaded’ the horse tax and saddle regulations.”<sup>29</sup> As explained by Airbnb cofounder Brian Chesky, “There were laws created for businesses, and there were laws for people. What the sharing economy did was create a third category: people as businesses,” to which the application of existing laws is often unclear.<sup>30</sup> These new business models raise complex questions that have not yet been addressed by either legislatures or courts.<sup>31</sup>

Airbnb has, however, begun to address these regulatory challenges. As a first step, Airbnb takes efforts to ensure that its users are aware of the regulatory and legal regimes in which they operate. Because Airbnb operates in hundreds of countries, territories, and cities, it may not be practical for Airbnb to inform users of the potentially applicable laws in each jurisdiction where its hosts offer accommodations. Rather, upon reading Airbnb's Terms of Service, users are immediately informed, in all capitalized lettering:

IN PARTICULAR, HOSTS SHOULD UNDERSTAND HOW THE LAWS WORK IN THEIR RESPECTIVE CITIES. SOME CITIES HAVE LAWS THAT RESTRICT THEIR ABILITY TO HOST PAYING GUESTS FOR SHORT PERIODS. THESE LAWS ARE OFTEN PART OF A CITY'S ZONING OR ADMINISTRATIVE CODES. IN MANY CITIES, HOSTS MUST REGISTER, GET A PERMIT, OR

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<sup>28</sup> See Rubinstein, *Officials Kick Off Airbnb Counteroffensive* (cited in note 26) (noting that consultant Neal Kwatra “is spearheading the anti-AirBnB effort”); Kenneth Lovett, *Gov. Cuomo Builds Reelection Campaign Team That Includes Ad Whiz behind Dante de Blasio Video* (NY Daily News Apr 21, 2014), online at <http://www.nydailynews.com/news/politics/cuomo-hires-ad-whiz-behind-dante-de-blasio-video-article-1.1763099> (visited Feb 23, 2015); Laura Nahmias, *As Schneiderman Probes Airbnb, Hotel Industry Donates* (Capital NY Oct 23, 2014), online at <http://www.capitalnewyork.com/article/albany/2014/10/8555054/schneiderman-probes-airbnb-hotel-industry-donates> (visited Dec 22, 2014).

<sup>29</sup> Kaplan, *Regulation and the Sharing Economy* (cited in note 1).

<sup>30</sup> Andy Kessler, *The Weekend Interview with Brian Chesky: The ‘Sharing Economy’ and Its Enemies* (Wall St J Jan 17, 2014), online at <http://www.wsj.com/articles/SB10001424052702304049704579321001856708992> (visited Feb 23, 2015).

<sup>31</sup> See generally Molly Cohen and Corey Zehngbot, *What's Old Becomes New: Regulating the Sharing Economy*, 58 Boston Bar J 34 (2014).

OBTAIN A LICENSE BEFORE LISTING A PROPERTY OR ACCEPTING GUESTS. CERTAIN TYPES OF SHORT-TERM BOOKINGS MAY BE PROHIBITED ALTOGETHER. LOCAL GOVERNMENTS VARY GREATLY IN HOW THEY ENFORCE THESE LAWS. PENALTIES MAY INCLUDE FINES OR OTHER ENFORCEMENT. HOSTS SHOULD REVIEW LOCAL LAWS BEFORE LISTING A SPACE ON AIRBNB.<sup>32</sup>

Hosts are further informed that there may be applicable taxes, which it is their duty to pay.<sup>33</sup> Airbnb also provides guidance regarding responsible hosting and, for certain key cities, directs hosts to relevant laws and regulations.<sup>34</sup>

Taxation and housing laws are at the forefront of the regulatory and legal issues that Airbnb faces, as aptly demonstrated by recent challenges to Airbnb's operations in New York City. First, like many municipalities, New York City charges a 5.875 percent hotel room occupancy tax,<sup>35</sup> which accounts for approximately 1 percent of its tax revenue.<sup>36</sup> New York City's Department of Finance has clarified that Airbnb is not required to collect or remit the city's hotel room occupancy tax because, by providing a platform for hosts and guests to privately contract for available accommodations, Airbnb "is neither a hotel operator nor a room remarketer."<sup>37</sup> It remains unclear, however, whether that tax might apply to some of Airbnb's New York City users.<sup>38</sup>

Airbnb has sought to clarify this open question, taking the position that although its hosts do not technically qualify as

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<sup>32</sup> *Terms of Service* (Airbnb June 30, 2014), online at <http://www.airbnb.com/terms> (visited Feb 23, 2015).

<sup>33</sup> *Id.*

<sup>34</sup> See *Responsible Hosting* (Airbnb), online at <http://www.airbnb.com/help/responsible-hosting> (visited Feb 23, 2015).

<sup>35</sup> NYC Admin Code § 11-2502. See also NY Tax Law § 1104 (imposing a \$1.50 fee per day for occupancies of hotel units in cities with more than one million residents).

<sup>36</sup> *Tax Revenue Forecasting Documentation: Financial Plan Fiscal Years 2012–2016* \*111 (City of New York Office of Management and Budget Apr 22, 2013), online at [http://www.nyc.gov/html/omb/downloads/pdf/methodology\\_2013\\_04.pdf](http://www.nyc.gov/html/omb/downloads/pdf/methodology_2013_04.pdf) (visited Feb 23, 2015).

<sup>37</sup> Beth Goldman, *Letter Responding to Request for Ruling Regarding New York City Hotel Room Occupancy Tax* \*5 (New York City Department of Finance Aug 21, 2013), online at [http://www.nyc.gov/html/dof/downloads/pdf/redacted%20letter%20rulings/hotel/lr13\\_4939.pdf](http://www.nyc.gov/html/dof/downloads/pdf/redacted%20letter%20rulings/hotel/lr13_4939.pdf) (visited Feb 23, 2015).

<sup>38</sup> See *Airbnb, Inc v Schneiderman*, 44 Misc 3d 351, 358, 360 (NY Sup 2014) (noting that the New York City hotel room occupancy tax may apply to Airbnb hosts but finding the issue not ripe for review).

hoteliers, the Airbnb community should nevertheless pay its fair share of taxes, with limited exemptions for those hosts who earn under a certain threshold.<sup>39</sup> Indeed, in an era when many large corporations take extreme measures to avoid taxation,<sup>40</sup> Airbnb instead petitioned New York City to allow it to help facilitate collection and remittance of more than \$20 million in estimated occupancy taxes from its hosts annually, as it already does in several other American cities<sup>41</sup> and which it cannot currently do under existing New York law.<sup>42</sup> The hotel industry has stiffly resisted Airbnb's voluntary efforts to facilitate tax collection on behalf of its hosts, despite having initially criticized the company for escaping the same taxes that Airbnb now seeks to pay.<sup>43</sup> This reversal suggests that the industry's opposition is rooted in protectionism rather than principle.

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<sup>39</sup> See Brian Chesky, *Who We Are, What We Stand For* (Airbnb Oct 3, 2013), online at <http://blog.airbnb.com/who-we-are> (visited Dec 22, 2014).

<sup>40</sup> See David Gelles, *Businesses Are Winning Cat-and-Mouse Tax Game* (NY Times Aug 28, 2014), online at <http://dealbook.nytimes.com/2014/08/28/businesses-find-ways-to-avoid-corporate-taxes-but-a-fix-seems-unlikely> (visited Feb 23, 2015); Paul Krugman, *Corporate Artful Dodgers* (NY Times July 27, 2014), online at <http://www.nytimes.com/2014/07/28/opinion/paul-krugman-tax-avoidance-du-jour-inversion.html> (visited Feb 23, 2015); Gretchen Morgenson, *When Taxes and Profits Are Oceans Apart* (NY Times July 5, 2014), online at <http://www.nytimes.com/2014/07/06/business/when-taxes-and-profits-are-oceans-apart.html> (visited Feb 23, 2015).

<sup>41</sup> See Elliot Njus, *Airbnb to Start Collecting Oregon Lodging Tax Statewide*, OregonLive (Oregonian Aug 19, 2014), online at [http://impact.oregonlive.com/front-porch/print.html?entry=/2014/08/airbnb\\_to\\_start\\_collecting\\_ore.html](http://impact.oregonlive.com/front-porch/print.html?entry=/2014/08/airbnb_to_start_collecting_ore.html) (visited Feb 23, 2015); Carolyn Said, *Airbnb to Collect Hotel Taxes for San Francisco Rentals* (San Francisco Chronicle Apr 1, 2014), online at <http://www.sfgate.com/news/article/Airbnb-to-collect-hotel-taxes-for-San-Francisco-5365352.php> (visited Feb 23, 2015).

<sup>42</sup> See Brian Chesky, *The \$21 Million Problem*, The Blog (Huffington Post Apr 15, 2014), online at [http://www.huffingtonpost.com/brian-chesky/the-21-million-problem\\_b\\_5149190.html](http://www.huffingtonpost.com/brian-chesky/the-21-million-problem_b_5149190.html) (visited Feb 23, 2015); David Hantman, *\$21 Million More for New York*, Airbnb Pub Pol Blog (Airbnb Apr 14, 2014), online at <http://publicpolicy.airbnb.com/21-million-new-york> (visited Feb 23, 2015); Craig Karmin, *Airbnb to Mayor: Tax Our Hosts, Fund Pet Programs* (Wall St J Mar 27, 2014), online at <http://online.wsj.com/articles/SB10001424052702303779504579465532885246114> (visited Feb 23, 2015).

<sup>43</sup> See Lisa Fickenscher, *Hotels Girding for a Fight against Airbnb* (Crain's NY Bus Aug 19, 2013), online at [http://www.crainsnewyork.com/article/20130819/hospitality\\_tourism/130819909/hotels-girding-for-a-fight-against-airbnb](http://www.crainsnewyork.com/article/20130819/hospitality_tourism/130819909/hotels-girding-for-a-fight-against-airbnb) (visited Feb 23, 2015); Jason Q. Freed, *Legal Issues Divide Hosts and Hoteliers* (Hotel News Now Feb 10, 2014), online at <http://www.hotelnewsnow.com/Article/13109/Legal-issues-divide-hosts-and-hoteliers> (visited Feb 23, 2015); Megan Sullivan, *Is Airbnb the Hotel Industry's Greatest Threat?* (Lodging Apr 1, 2014), online at <http://www.lodgingmagazine.com/is-airbnb-the-hotel-industrys-greatest-threat> (visited Feb 23, 2015); Kaja Whitehouse, *Airbnb Aims to Start Taxing Renters by July 1* (NY Post Apr 14, 2014), online at <http://nypost.com/2014/04/14/airbnb-aims-to-start-taxing-renters-by-july-1> (visited Feb 23, 2015).



Second, and similarly, under a law enacted in 2010, New York restricts certain types of housing to use “only . . . for permanent residence purposes.”<sup>44</sup> It provides an exception, however, for “house guests or lawful boarders, roomers or lodgers,” so long as such temporary occupants remain for fewer than thirty days.<sup>45</sup> Because of the law’s recent vintage, there is a paucity of case law providing guidance as to how this exception is to be interpreted. In the only case applying it thus far, however, the New York City Environmental Control Board applied the express wording of the statute in holding that an Airbnb user did not violate the occupancy law because it “expressly allows a paying, lawful boarder, roomer, or lodger . . . to live a few days within the household of . . . the permanent occupant” and does not require that “such individuals [ ] have a personal relationship with the permanent occupants of the residence.”<sup>46</sup>

This interpretation comports with the occupancy law’s legislative history and intent. The law was passed in 2010, only one year after Airbnb first entered the New York market, and was responsive to an issue that predated Airbnb’s existence. The issue involved “illegal hotels”: certain landlords sought to evict tenants from their apartments in order to remove that housing stock from the rental market and operate it as full-time transient housing.<sup>47</sup> Indeed, the legislation’s primary sponsor, New York State Senator Liz Krueger, has repeatedly explained that it was not intended to target Airbnb or its users. In her own words, “If you’re renting out your apartment for a couple of days, this was not designed to target you. . . . Somebody is going somewhere, and someone else needs a place to stay, so you make a deal—those patterns have happened forever. That’s not the problem.”<sup>48</sup>

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<sup>44</sup> NY Mult Dwell Law § 4(8)(a).

<sup>45</sup> NY Mult Dwell Law § 4(8)(a)(1)(A).

<sup>46</sup> *City of New York v Abe Carrey*, Appeal Nos 1300602 and 1300736, \*5–6 (NY Envir Control Bd Sept 26, 2013).

<sup>47</sup> See Jessica Pressler, *The Dumbest Person in Your Building Is Passing Out Keys to Your Front Door!* (New York Magazine Online Sept 23, 2014), online at <http://nymag.com/news/features/airbnb-in-new-york-debate-2014-9> (visited Feb 23, 2015); Banks, *Budget Rentals under Fire* (cited in note 12); Colin Moynihan, *A Bill to Stop Illegal Hotels, and a Protest* (NY Times July 18, 2010), online at <http://www.nytimes.com/2010/07/19/nyregion/19hotel.html> (visited Feb 23, 2015).

<sup>48</sup> Annie Karni, *Airbnb: Hugely Popular, Still Illegal*, Technology Report (Crain’s NY Bus May 12, 2013), online at <http://www.crainnewyork.com/article/20130512/technology/305129987/airbnb-hugely-popular-still-illegal> (visited Feb 23, 2015). See also Brian Caulfield, *Airbnb: The eBay for the Entire House* (Forbes Nov 18, 2010), online at

Recognizing the ambiguity that was introduced by the 2010 occupancy law and seeking to remedy it, two bills have recently been introduced in New York's legislature.<sup>49</sup> The first bill would clarify the legality of individuals renting out their apartments while away on vacation. The bill expressly recognizes that doing so "provid[es] tax revenue and tourism dollars to the state and city."<sup>50</sup> The second bill would provide an explicit exemption allowing New Yorkers to rent out their primary or secondary residences for periods of up to thirty days to "help [them] make ends meet and earn extra income" and to "bring exponential economic benefits to both New York City's residents and its visitors."<sup>51</sup> Airbnb has advocated for these measures despite vehement political opposition.<sup>52</sup> Airbnb has similarly supported analogous legislation elsewhere, such as in its hometown of San Francisco, which recently approved legislation that will explicitly legalize and regulate the city's short-term rental market.<sup>53</sup>

### III. COLLABORATION, NOT CONFRONTATION

Airbnb prides itself on having been "founded on the belief that housing should be more accessible, more affordable, and

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<http://www.forbes.com/forbes/2010/1206/technology-airbnb-sequoia-capital-ebay-startup-next-door.html> (visited Feb 23, 2015); Pressler, *The Dumbest Person in Your Building* (cited in note 47).

<sup>49</sup> Bill No A07848, New York State Assembly, 2013–14 Reg Sess (June 6, 2013); Bill No A07495, New York State Assembly, 2013–14 Reg Sess (May 22, 2013).

<sup>50</sup> Memo for Bill No A07848, New York State Assembly, 2013–14 Reg Sess (June 6, 2013), online at [http://assembly.state.ny.us/leg/?default\\_fld=&bn=A07848&term=2013&Memo=Y](http://assembly.state.ny.us/leg/?default_fld=&bn=A07848&term=2013&Memo=Y) (visited Feb 23, 2015).

<sup>51</sup> Memo for Bill No A07495, New York State Assembly, 2013–14 Reg Sess (May 22, 2013), online at [http://assembly.state.ny.us/leg/?default\\_fld=&bn=A07495&term=2013&Memo=Y](http://assembly.state.ny.us/leg/?default_fld=&bn=A07495&term=2013&Memo=Y) (visited Feb 23, 2015).

<sup>52</sup> See David Hantman, *New York, New York: Resources and Information*, Airbnb Pub Pol Blog (Airbnb Oct 15, 2013), online at <http://publicpolicy.airbnb.com/new-york-resources-information> (visited Feb 23, 2015). See also Annie Karni, *Housing Advocates Are Fighting Bills That Loosen Restrictions on Using Airbnb in New York* (NY Daily News May 6, 2014), online at <http://www.nydailynews.com/new-york/rent-reformers-oppose-state-bills-loosen-restrictions-airbnb-article-1.1780958> (visited Feb 23, 2015).

<sup>53</sup> See Carolyn Said, *Supes Back 'Airbnb Law' to Allow Short-Term Rentals, with Limits* (San Francisco Chronicle Oct 8, 2014), online at <http://www.sfgate.com/news/article/Supervisors-approve-Airbnb-law-5807858.php> (visited Feb 23, 2015); Kim-Mai Cutler, *San Francisco Legalizes, Regulates Airbnb with 7–4 Vote, Lots of Amendments* (Tech Crunch Oct 7, 2014), online at <http://techcrunch.com/2014/10/07/san-francisco-airbnb> (visited Feb 23, 2015). See also Elliot Njus, *Portland Legalizes Airbnb-Style Short-Term Rentals*, OregonLive (Oregonian July 30, 2014), online at [http://www.oregonlive.com/front-porch/index.ssf/2014/07/portland\\_legalizes\\_airbnb-styl.html](http://www.oregonlive.com/front-porch/index.ssf/2014/07/portland_legalizes_airbnb-styl.html) (visited Feb 23, 2015).

more available.”<sup>54</sup> Accordingly, Airbnb strongly opposes illegal hotel operators.<sup>55</sup> Rather than seeking to protect such bad actors, it has acted swiftly to ensure that these illegal hotel operators are not allowed to benefit from access to Airbnb’s platform and users. Indeed, Airbnb boasts of having voluntarily examined its own user base and unilaterally removed thousands of such hosts earlier this year because it felt that they were abusing the Airbnb platform, harming their neighborhoods, and failing to provide quality accommodations.<sup>56</sup>

Airbnb has similarly sought to comply with an investigation by New York Attorney General Eric Schneiderman into possible violations of state law. Though early clashes between Airbnb and Schneiderman made for sensationalized headlines,<sup>57</sup> the press overemphasized what was, in reality, a minor dispute. Just as the occupancy law’s sponsors intended, Schneiderman has repeatedly made clear that he is focused on illegal hoteliers rather than people who rent out their primary residence for a night or two while out of town.<sup>58</sup> When Schneiderman initially subpoenaed user data from Airbnb, Airbnb argued that the subpoena was overbroad, and Justice Gerald Connolly of the New York Supreme Court agreed, quashing it.<sup>59</sup> That very same day,

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<sup>54</sup> Nick Papas, *Hotels vs. Regular New Yorkers*, Airbnb Pub Pol Blog (Airbnb Sept 12, 2014), online at <http://publicpolicy.airbnb.com/hotels-vs-regular-new-yorkers> (visited Feb 23, 2015).

<sup>55</sup> See Chesky, *Who We Are* (cited in note 39); Hantman, *New York, New York* (cited in note 52).

<sup>56</sup> See Papas, *Hotels vs. Regular New Yorkers* (cited in note 54).

<sup>57</sup> See, for example, Annie Karni, *State Supreme Court Denies Attorney General’s Request for Airbnb User Information* (NY Daily News May 14, 2014), online at <http://www.nydailynews.com/news/politics/supreme-court-denies-ag-request-airbnb-user-information-article-1.1791391> (visited Feb 23, 2015); Bruce Golding and Kaja Whitehouse, *Airbnb Execs Won’t Say If They’d Use Their Own Service* (NY Post May 5, 2014), online at <http://nypost.com/2014/05/05/airbnb-exec-wont-say-if-theyd-use-their-own-service> (visited Feb 23, 2015); Ben Fischer, *New York AG Attacks Tech’s ‘Cyberlibertarians’*, NY Bus J (Bus Journals Apr 23, 2014), online at <http://www.bizjournals.com/newyork/news/2014/04/23/new-york-ag-attacks-techs-cyberlibertarians.html> (visited Feb 23, 2015); David Streitfeld, *Companies Built on Sharing Balk When It Comes to Regulators* (NY Times Apr 21, 2014), online at <http://www.nytimes.com/2014/04/22/business/companies-built-on-sharing-balk-when-it-comes-to-regulators.html> (visited Feb 23, 2015); Kaja Whitehouse, *Attorney General’s NYC Battle with Airbnb Targets Widowed Grandma* (NY Post Nov 13, 2013), online at <http://nypost.com/2013/11/13/ny-attorney-general-targets-widow-in-airbnb-battle> (visited Feb 23, 2015).

<sup>58</sup> See Pressler, *The Dumbest Person in Your Building* (cited in note 47); David Streitfeld, *Airbnb Will Hand Over Host Data to New York* (NY Times May 21, 2014), online at <http://www.nytimes.com/2014/05/22/technology/airbnb-will-hand-over-host-data-to-new-york.html> (visited Feb 23, 2015).

<sup>59</sup> *Airbnb, Inc v Schneiderman*, 44 Misc 3d 351, 358–59, 361 (NY Sup 2014).

however, Airbnb made clear that it hoped to “continue working with the Attorney General’s office to try to address his legitimate concerns.”<sup>60</sup>

When a more narrowly tailored subpoena was subsequently issued, Airbnb entered into negotiations with Schneiderman to further limit the subpoena’s scope. An agreement was eventually reached that allowed Airbnb to protect the vast majority of its users’ privacy while also complying with the subpoena: Airbnb would provide Schneiderman with an anonymized version of the data that he had requested and, upon review of the anonymized data, Schneiderman could then request the identity of specific users.<sup>61</sup> Schneiderman subsequently requested information for approximately 125 of Airbnb’s New York hosts—the vast majority of whom were no longer active Airbnb hosts—representing far less than 1 percent of Airbnb’s New York hosting community.<sup>62</sup> By entering a constructive dialogue and seeking to cooperate with Schneiderman, both parties were able to protect and advance their interests.<sup>63</sup>

Moreover, this agreement offers a positive model for other innovative sharing-economy companies because it demonstrates that confrontation often is not the best approach to take with regulators. It proves that tech start-ups can continue to grow and expand while effectively collaborating with government officials and other stakeholders rather than seeking to ignore or confront them. The sharing economy’s interests are not antithetical to the public weal.

## CONCLUSION

Because the threat of enforcement actions can have a chilling effect on start-ups and their users, state and local government officials should consider how their actions may affect burgeoning businesses. Officials should encourage the sharing economy’s

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<sup>60</sup> David Hantman, *Good News in New York*, Airbnb Pub Pol Blog (Airbnb May 13, 2014), online at <http://publicpolicy.airbnb.com/good-news-new-york> (visited Feb 23, 2015).

<sup>61</sup> See Streitfeld, *Airbnb Will Hand Over Host Data* (cited in note 58); David Hantman, *Agreement in New York*, Airbnb Pub Pol Blog (Airbnb May 21, 2014), online at <http://publicpolicy.airbnb.com/agreement-new-york> (visited Feb 23, 2015).

<sup>62</sup> See David Hantman, *New York Update*, Airbnb Pub Pol Blog (Airbnb Aug 22, 2014), online at <http://publicpolicy.airbnb.com/new-york-community-update> (visited Feb 23, 2015).

<sup>63</sup> See *Joint Statement by the Office of the Attorney General and Airbnb* (New York State Office of the Attorney General May 21, 2014), online at <http://www.ag.ny.gov/press-release/joint-statement-office-attorney-general-and-airbnb> (visited Feb 23, 2015).

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growth through collaborative efforts rather than seek to protect incumbent businesses. As Ned Ludd's followers learned long ago, technological innovation is not easily halted.