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Testimony of the New York Civil Liberties Union

Before

The New York City Council Committee on Housing and Buildings

regarding

A Local Law to Amend the Administrative Code of the City of
New York in Relation to the Regulation of Short-Term
Residential Rentals

NYC Council Bill - Int. No. 981-2018

June 26, 2018

The NYCLU, the New York State affiliate of the American Civil Liberties Union, is a not-for-profit, nonpartisan organization with eight offices across the state and over 190,000 members and supporters. The NYCLU defends and promotes the fundamental principles and values embodied in the Bill of Rights, the U.S. Constitution, and the New York Constitution through an integrated program of litigation, legislative advocacy, public education and community organizing. In the forefront of those efforts has been our work to protect free speech and privacy rights in the online world. The NYCLU represents the interests of technology users in both court cases and in broader policy debates surrounding the application of law in the digital age. The NYCLU actively encourages and challenges industry and government to support free expression, privacy, and openness in the information society.

The New York Civil Liberties Union has a number of concerns about Int. 981, a bill that would provide for the regulation of booking services for short-term residential rentals (“STR”) in New York City. The NYCLU has identified three areas of concern arising from the proposed legislation. First, Int. 981 mandates reporting of personal information about New Yorkers into quasi-law enforcement databases without any apparent privacy protections. Second, the Council would better serve the needs of New Yorkers by collecting data relating to STR utilization to guard against tenant hardships and displacements and threats to affordable housing in New York City. Third, it would appear that Int. 981 violates section 230 of the Communications Decency Act.

Privacy Concerns: Int. 981 Mandates Reporting of Significant Personal Information about New Yorkers into NYC Quasi-Law Enforcement Databases without Any Apparent Privacy Protections

Int. 981 would mandate that Airbnb, VRBO and all other STR booking services, collect and provide significant amounts of information, on a monthly basis, regarding New Yorkers who use the Airbnb, VRBO or any other, STR platform to the New York City Office of Special Enforcement (“OSE”).¹ Significantly, OSE has been reported to utilize sophisticated data-crunching software from Palantir Technologies, Inc. (“Palantir”)² in connection with its enforcement efforts against Airbnb. Palantir’s other known past clients include the CIA, ICE, DHS, the FBI, major banks, and the New York City Police Department.³

As has been publicly reported, New York City has enlisted Palantir’s data analysis services in a variety of City agencies.⁴ The Palantir initiatives embraced by the Bloomberg administration continued under the de Blasio administration. The de Blasio administration was reported to have acquired 24 “Gotham” server cores and licenses for the Department of Finance

¹ OSE was established by then-Mayor Michael R. Bloomberg in 2006 by Executive Order No. 96. Prior to the establishment of OSE, the Office of Midtown Enforcement focused its investigative and enforcement efforts primarily in midtown Manhattan. OSE replaced that Office of Midtown Enforcement and expanded its activities to all five boroughs. OSE is responsible for coordinating enforcement efforts across City agencies to address quality of life issues related to adult entertainment locations, lawless clubs, trademark counterfeiting bazaars and illegal conversions of apartment buildings into hotels. OSE ensures that these enforcement efforts are leveraged across all five boroughs to address conditions at properties that require a coordinated, multi-agency response. OSE is located within the Mayor’s Office of the Criminal Justice Coordinator and commands significant investigatory and enforcement mechanisms. OSE acts as the umbrella agency overseeing joint investigations, joint inspections and supervising measures to bring identified properties into compliance with the law. OSE coordinates the inspection and investigation resources of a number of City agencies, including the Police Department, Fire Department, Buildings Department, Department of Consumer Affairs, Department of Environmental Protection, Housing Preservation and Development, Finance Department and Department of Health and Mental Hygiene, among others. <https://www1.nyc.gov/office-of-the-mayor/news/434-06/mayor-bloomberg-creates-office-special-enforcement-expand-enforcement-initiatives-across>.

² Palantir, incorporated in Delaware as Palantir Technologies, Inc., is a private technology corporation based in Palo Alto, California that develops software designed to analyze information. See Company Overview of Palantir Technologies, Inc., BLOOMBERG, <http://www.bloomberg.com/research/stocks/private/snapshot.asp?privcapId=43580005> (last accessed June 23, 2018).

³ See, e.g., Ilya Martinez, *Inspectors’ Gadgets Find Illegal Airbnbs*, WNYC NEWS (Jan. 20, 2015), <https://www.wnyc.org/story/inspectors-gadgets-find-illegal-airbnbs/>. NYPD appears to have terminated its relationship with Palantir last summer in favor of an IBM platform. See William Alden, *There’s A Fight Brewing Between the NYPD And Silicon Valley’s Palantir*, BuzzFeed June 28, 2017 3:23p.m., available at https://www.buzzfeed.com/williamalden/theres-a-fight-brewing-between-the-nypd-and-silicon-valley?utm_term=.kjVdIajB6g#.yjD9Kx1dZE.

Regardless of vendor, however, the privacy concerns the NYCLU has remain the same.

⁴ In December, 2011, the Bloomberg administration granted Palantir the first of at least five contracts, establishing Palantir’s “Gotham” software as a centerpiece of New York’s mission, utilized by NYPD and OES alike, to improve safety and security and to enhance “community livability and property values”—that is to say, quality of life – in New York City. See Brendan O’Connor, *How Palantir Is Taking Over New York City*, GIZMODO (9/22/2016 9:30am), <https://gizmodo.com/how-palantir-is-taking-over-new-york-city-1786738085>.

in 2014.⁵ The City also reportedly acquired licenses to provide OSE inspectors with Palantir's mobile technology, connecting them to everything the city knows about every place within it. This technology has reportedly already been used to crack down on illegal Airbnb rentals.⁶

With respect to the specific provisions of Int. 981 which mandates the collection and uploading of all STR hosts' data to OSE, there is simply no consideration afforded to the potential for customer privacy violations. There is also no consideration given to the need for

⁵ Palantir "Gotham" is an analysis platform that takes information from various sources and in various formats, processes that information into a common format, categorizes that data into various "objects," automatically identifies potential connections between different objects, and then allows analysts to perform actions on that data to make it usable, from conducting searches to making visualizations. Sam Biddle, *How Peter Thiel's Palantir Helped The NSA Spy On The Whole World*, THE INTERCEPT (Feb. 22, 2017), <https://theintercept.com/2017/02/22/how-peter-thiels-palantir-helped-the-nsa-spy-on-the-whole-world/>

Gotham is not strictly a single "database," in that it is not solely designed as a repository for information. Instead, it indexes a variety of data sources, processes and conforms that information, and stores it in another database that can then be used for searches and analysis, while tracking any changes to the underlying source material and the index through additional database sources. Thus, Gotham includes, maintains, or links to multiple databases containing personal information, some of which may be directly held on Palantir servers.

Palantir claims that it does not directly hold or store data provided to it by clients, but that assertion inherently conflicts with the design of the software. Palantir Gotham includes what the company calls a "revisioning database" that tracks access to data points and all changes that are made to a given piece of data. *See Palantir Gotham Technologies*, PALANTIR, available at <https://www.palantir.com/palantir-gotham/technologies/> (last accessed June 23, 2018). Such a feature can be a positive for privacy and security purposes, as it produces an "audit trail" that can be used to ensure that data is not accessed or edited by unauthorized actors. However, this tracking feature goes beyond a standard "audit trail" because it retains any information that has been deleted from underlying data sources. *See* Testimony of Dr. Alexander Karp, Co-Founder and CEO, to Senate Committee on Homeland Security and Governmental Affairs Subcommittee on Federal Financial Management, Government Information, Federal Services and International Security (Aug. 3, 2010), available at <http://www.hsgac.senate.gov/download/8310-karp> (last accessed June 23, 2018) ("The Revisioning Database...tracks and attributes all manipulations of objects and their underlying data sources, providing a tamper-free audit trail of analyst activity.").

Thus, no records can be completely deleted once input into the system; for example, if a record in a database feeding into Gotham is deleted, Gotham would recognize the deletion, but the deleted record would still technically be available to Gotham users depending on the security and access control settings in place. *See, e.g., The Palantir Platform: The Platform for Information Analysis*, PALANTIR available at <https://wikileaks.org/hbgary-emails//fileid/4771/1679> (last accessed Mar. 13, 2017); see also Email from Matthew Steckman to Aaron Barr (Dec. 22, 2009), available at <https://www.wikileaks.org/hbgary-emails/emailid/4771#searchresult>.

Palantir's "Gotham Mobile" technology also allows Android and iOS smartphones to access much of Gotham's functionality remotely, including the ability to both review data already in the system and input new material into the database. Gotham Mobile also permits what Palantir terms "blue force tracking," allowing users of Gotham Mobile to be physically tracked at all times. The ability to provide mobile access to almost any smartphone also means that, if ICE or NYC so chose, virtually any law enforcement officer could be provided with access to Gotham anywhere and at any time. *See, e.g., The Palantir Platform: Applications*, PALANTIR available at <https://www.palantir.com/palantir-gotham/applications/> (last accessed June 23, 2018) and., *The Palantir Platform: Solutions/Defense*, available at <https://www.palantir.com/solutions/defense/> (last accessed June 23, 2018). In this regard, it is important to note there has been reporting that Palantir technologies may be powering the Trump administration aggressive ICE and DHS enforcement actions. *See* Spencer Woodman, Documents suggest Palantir could help power Trump's 'extreme vetting' of immigrants, THE VERGE (Dec. 21, 2016), <http://www.theverge.com/2016/12/21/14012534/palantir-peter-thiel-trump-immigrant-extreme-vetting>.

⁶ *See* O'Connor, *How Palantir Is Taking Over New York City*, *supra* at fn 4.

accountability and oversight regarding data collection and retention by either OSE or Palantir. This legislation fails to provide adequate oversight and privacy protections for STR “hosts.”⁷ For example, there is no data retention policy. This creates a likelihood of security breaches regarding information about STR “hosts.” The best practice, which we urge you to incorporate into this proposed legislation, would be to minimize the collection and retention of this private information by STR platforms, and OSE, to what is operationally necessary and to set a fixed retention period that is tied to operational needs.

The bill also fails to address the potential use, or abuse, of both STR booking services’ and OSE’s technologies to engage in unwarranted surveillance of individuals who participate on any STR platform. This proposed legislation fails to provide any assurance to STR “hosts” that they will be notified of any government requests for information. Notice is crucial for providing users with the opportunity to argue against the reasonableness of such requests and for ensuring that courts are ultimately deciding the validity of government information requests, especially overbroad requests that infringe on Fourth Amendment rights. The proposed legislation should at minimum assure STR “hosts” that if there is a government request for information they will be provided notice through the email address that they provided during registration or through any other personally identifiable information in an STR’s or OSE’s possession, unless there is a lawful judicial order barring the STR booking service or OSE from doing so and, if there is such an order, the notice should be given as soon as the order is lifted.

Other than what can be gleaned through publicly available documents, the various data crunching technologies offered by Palantir, IBM and other vendors as fully utilized in New York City by City agencies is entirely shrouded in secrecy. Before the Council takes any action to mandate the turnover of personally identifying information of any New York City resident who participates on the STR services platform offered by Airbnb, VRBO or any other “booking service” to OSE’s data crunching platform, the Council might better engage in intensive fact-finding and oversight to better understand the City’s complex relationships with Palantir and other data crunching technology vendors operating under contract with New York City agencies so as to best ensure the privacy rights of all New Yorkers.

⁷ Section 26-2102(2) mandates that the STR booking service “[o]btain lawful consent from the person offering such unit for short-term rental to provide the information described in paragraph 1 to [OSE].” This mandate does nothing to protect the informational privacy of the STR “host.” Living in a highly digitized society entails a tradeoff between informational privacy and the benefits of information processing. Even assuming a person reads the typical “notice and choice” consent provisions utilized by internet providers, a person who wants to avail themselves of the STR booking service’s platform is forced into a Hobson’s choice – they can either consent to the waiver of their privacy rights worked by the STR booking service uploading their information to OSE or they can “choose” to waive consent and not be able to avail themselves of the STR booking service’s platform. As Tess Wilkinson-Ryan postulates, “[c]onsent to standard terms occupies an uneasy place in the existing research on the moral psychology of contracts. The relevant moral and social norms that bear on contracts of adhesion evince a deep cultural ambivalence. Contracts are understood to be serious moral obligations, and yet everyday commercial activity requires that consumers sign agreements that contain terms they have not read. Most people see consent to boilerplate as less meaningful than consent to negotiated terms, but nonetheless would hold consumers strictly liable for both.” Tess Wilkinson-Ryan, *A Psychological Account of Consent to Fine Print*, 99 Iowa L. Rev. 1725 (2014).

Data Collection relating to STR Utilization to Guard against Tenant Hardships and Displacements

As an alternative to the data collection proposed by Intro. 981, the NYCLU suggests that certain targeted, and anonymized, data sharing from Airbnb, VRBO and other STR booking services' platforms, could be useful to the Council, as well as to other City policymakers and economic justice advocates, including tenants' rights groups and fair and affordable housing advocates.

The NYCLU would support the mandated collection, and analysis, of anonymized data, with STR platform utilization stripped of personally identifying information and address resolution decreased to census tracts or street blocks. This data collection and analysis would ensure the accurate assessment of, and informed response by the City to, research indicating that STRs are disrupting communities, threatening affordable housing and facilitating rapid gentrification and displacement of long-time residents from many neighborhoods.⁸

For example, a recently issued report from McGill University Urban Planning professor David Wachsmuth provides a thought-provoking analysis of Airbnb activity in New York City and the surrounding region in the past three years. Wachsmuth and his team performed a spatial analysis on three years of Airbnb activity in New York City in order to measure how new capital flows into the short-term rental market, to identify neighborhoods whose housing markets have already been significantly impacted by short-term rentals, to identify neighborhoods which are increasingly under threat of Airbnb-induced gentrification and, finally, to measure the amount of rental housing lost to Airbnb. The authors present both a useful framework for analyzing the relationship between short-term rentals and gentrification by way of an exploratory case study of New York City as well as an agenda for future research on gentrification and the sharing economy.⁹ As a matter of economic justice, the Council should formulate responses to the affordable housing disruptions documented in the McGill study and in other recent studies, including the 2016 study commissioned by MFY Legal Services Inc.¹⁰

⁸ See BJH Advisors LLP For Housing Conservation Coordinators Inc. and MFY Legal Services Inc., *Short Changing New York City: The impact of Airbnb on New York City's housing market*, June 2016, available at http://www.sharebetter.org/wp-content/uploads/2016/06/NYCHousingReport_Final.pdf (last accessed June 23, 2018).

⁹ David Wachsmuth and Alexander Weisler, *Airbnb and the Rent Gap: Gentrification through the Sharing Economy*, available at https://www.researchgate.net/publication/318281320_Airbnb_and_the_Rent_Gap_Gentrification_Through_the_Sharing_Economy [last accessed June 23 2018]. David Wachsmuth, whose Ph.D. is from New York University, is the Canada Research Chair in Urban Governance at McGill University, an Assistant Professor in the School of Urban Planning and an Associate Member in the Department of Geography. He is an urban political economist whose research interests include city and regional governance, urban sustainability, housing policy, social theory, and the politics of urban public space. See <https://www.mcgill.ca/urbanplanning/people-0/wachsmuth>.

¹⁰ This same committee is considering Int. 601-2018, 607-2018 and 722-2018, all of which relate to various affordable housing reporting initiatives. There is no reason not to collect and analyze STR utilization data in connection with these other affordable housing data initiatives pursued by the Council.

First Amendment Considerations: Violation of Section 230 of the Communications Decency Act

We note that Int. 981 sweeps quite broadly in obligating any “booking service” to upload transaction reports to OSE on a monthly basis relating to, among other things, listings or advertisements relating to STRs offered by individuals utilizing the STR platform.¹¹ Int. 981 defines “booking service” in such a way as to capture within its purview not only STR services offered by Airbnb and VRBO, but also any entity that “provides to another person an online, computer or application-based, platform through which such other person may offer the rental of a dwelling unit or part thereof or of housing accommodations within a dwelling unit for occupancy of fewer than 30 consecutive days.” It is difficult to discern whether this is a drafting error or is intended intentionally to bring all on-line classified ad purveyors such as the newspapers that serve the very diverse populations of New York City¹² into the monthly OSE reporting regimen set forth in Int. 981.

However broad its scope, Int. 981 imposes civil penalties on the “booking service” for any violations that may be committed by the STR platform users in connection with their “listings or advertisements.”¹³ This provision of Int. 981 appears to violate section 230 of the Communications Decency Act of 1996 (the “CDA”), 47 U.S.C. § 230. Section 230(c)(1) provides what has been referred to as “intermediary immunity” from liability for providers and users of any “interactive computer service” who publish information provided by third-party users.¹⁴ Section 230 immunity empowers intermediaries to resist being enlisted as extensions of

¹¹ See proposed § 26-2102(1)(d). “Such report shall include the following information for each dwelling unit where a fee was accepted to facilitate a short-term rental ...

(c) The individualized name or number of each such advertisement or listing connected to such unit and the uniform resource locator (URL) for each such listing or advertisement, where applicable;

(d) A statement as to whether such booking services will be provided in connection with (i) short-term rental of the entirety of such unit, (ii) short-term rental of part of such unit, but not the entirety of such unit, and/or (iii) short-term rental of the entirety of such unit, or part thereof, in which a non-short-term occupant will continue to occupy such unit for the duration of such short-term rental...”

¹² Int. 981’s definition of “booking service” captures a broad swath of New York City newspaper services that run relatively robust online classified rental ad platforms where the platform accepts fees for ad placements. Those entities would appear to include the New York Times, the Amsterdam News, El Diario, the Jewish Press, Caribbean Life, the Russian Bazaar, the Staten Island Advance and the New York Daily News. Moreover, a “booking service” could also include paid content on platforms such as Facebook.

¹³ See proposed § 26-2104. “Penalties. A booking service that violates section 26-2102 with respect to a dwelling unit shall be liable for a civil penalty of no less than \$5,000 and no greater than \$25,000 for each such unit. The civil penalties established by this section may be recovered in a proceeding before the environmental control board or a court of competent jurisdiction.”

¹⁴ Section 230(c)(1) provides as follows: “No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content.” 47 U.S.C. § 230(f)(2) defines “interactive computer service” as “any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.” “Congress did not sound an uncertain trumpet when it enacted the CDA, and it chose to grant broad protections to internet publishers. Showing that a website operates through a meretricious business model is not enough to strip away those protections. If the evils that the appellants have identified are deemed to outweigh the First Amendment values that drive the CDA, the remedy is through legislation, not through litigation.” *Doe v. Backpage.com*, 817 F.3d 12, 29 (1st Cir. 2016).

local law enforcement as Int. 981 would do. The Council ought to conduct additional inquiry into the apparent conflict between Int. 981 and section 230 of the CDA.

Conclusion

Accordingly, the NYCLU urges the Council to reconsider Int. 981.