

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY**

AIRBNB, INC.,

Petitioner,

v.

ERIC T. SCHNEIDERMAN, ATTORNEY
GENERAL OF THE STATE OF NEW YORK,

Respondent.

Index No. 5593/13

**BRIEF OF *AMICUS CURIAE* THE INTERNET ASSOCIATION
IN SUPPORT OF PETITIONER**

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I. THE INTEREST OF *AMICUS CURIAE*

Amicus Curiae The Internet Association is a nonprofit trade organization that represents the interests of America's leading Internet companies and their global community of users. The Internet Association is dedicated to advancing public policy solutions to strengthen and protect Internet freedom, foster innovation and economic growth, and empower users. The Internet Association's membership includes Airbnb, Amazon.com, AOL, eBay, Expedia, Facebook, Gilt, Google, IAC, LinkedIn, Monster Worldwide, Netflix, Path, Practice Fusion, Rackspace, reddit, Salesforce.com, SurveyMonkey, TripAdvisor, Uber Technologies, Inc., Yahoo!, and Zynga.¹ Many of The Internet Association's members have received subpoenas or other legal process from governmental authorities seeking information about them and/or their users, and they have a strong interest in ensuring that governmental powers to compel the production of such information are exercised lawfully and responsibly.

II. INTRODUCTION

Law enforcement officials and regulators generally have broad powers to investigate alleged or suspected unlawful behavior and to root out bad actors. Here, however, the New York Attorney General ("NYAG") has exceeded the limits of those powers by choosing to use a meat cleaver rather than a scalpel. The NYAG has sought information concerning *all* of Airbnb's hosts in New York (except for a single category that Airbnb itself is unable to discern) without any explanation as to whether or how any of those hosts may have violated any law. Complying with this subpoena would impose an enormous cost and burden on Airbnb. And it would permit the government to intrude without justification on the privacy of Airbnb's users.

¹ While Airbnb, Inc. ("Airbnb") is a dues-paying member of The Internet Association, it took no part in the preparation of this brief and made no monetary contribution for the purpose of funding this brief's preparation.

If the NYAG's effort to engage in such a fishing expedition were upheld, it would have enormous implications for the Internet more generally. The Internet is replete with innovative and beneficial services, including many provided by members of The Internet Association, in which a provider operates an online platform or marketplace through which millions of users can communicate, engage in transactions, and otherwise interact. Should the Court require Airbnb to comply with the subpoena in its current form, it would set a dangerous and harmful precedent. Not only would providers be required to expend limited resources by dedicating time and absorbing costs of compliance—Airbnb estimates weeks of manual review time to comply with the NYAG subpoena, *see* Mem. of Law in Supp. of Verified Petition (“Airbnb Mem.”) at 16—but the prospect of law enforcement authorities, regulators, and other government personnel being able to obtain broad swaths of information about consumers under no articulated suspicion of wrongdoing would unduly discourage participation in these online services. That would deprive consumers of the benefits of those services and harm the economy more generally. Precisely because government authorities have broad law enforcement and regulatory powers, courts should be especially vigilant to ensure that those powers are used in an appropriately restrained and targeted manner. The NYAG subpoena fails that test.

III. BACKGROUND

As Airbnb exemplifies, the Internet has spawned the creation of many different kinds of virtual marketplaces and platforms that create new ways for consumers to communicate, interact, buy, rent, barter, and exchange. For example, eBay and similar sites allow for secondary sales of goods directly among users that would not otherwise be possible due to barriers such as geographic distance and lack of available information.² Stubhub and others provide secondary

² *See* <http://www.ebay.com/>.

ticket marketplaces in which consumers, for example, can find and buy tickets for sold-out events.³ Numerous websites, such as Vimeo, enable peer-to-peer sharing of movies and music.⁴ Companies, such as Kickstarter, support “crowdfunding” efforts by providing platforms on which to raise capital—from friends and strangers alike.⁵ DogVacay and Rover connect dog owners with dog sitters.⁶ Rent the Chicken allows people to try raising chickens from May to November (when chickens produce the most eggs).⁷

One particular type of model that has become more prominent recently is an online platform that facilitates the sharing of underutilized resources. Such platforms often employ a peer-to-peer model in which individuals transact in a two-sided marketplace maintained by a third party. For example, Airbnb—and counterparts, such as HomeAway—connect people looking for a place to stay with people who have a room, apartment, or house that would otherwise go unused.⁸ Similarly, Uber, Lyft, Sidecar, and RelayRides facilitate car sharing and transport services.⁹ Krrb and SnapGoods allow people to share, exchange, and rent goods (typically on a local level).¹⁰ Boatbound is a peer-to-peer, short-term boat rental site.¹¹ These virtual marketplaces allow the owners of particular resources to earn extra income and provide

³ See <http://www.stubhub.com/>.

⁴ See <https://vimeo.com/>.

⁵ See <http://www.kickstarter.com/>.

⁶ See <http://dogvacay.com/>; <http://www.rover.com/>.

⁷ See <http://www.rentthechicken.com/>.

⁸ See <http://www.homeaway.com/>.

⁹ See <https://www.uber.com/>; <http://www.lyft.me/>; <http://www.side.cr/>; <https://relayrides.com/>.

¹⁰ See <http://krrb.com/>; <http://snapgoods.com/>.

¹¹ See <https://boatbound.co/>.

access to a vast array of resources to users, who in turn save money by only paying to use the chosen goods or services for a limited time period.

IV. ARGUMENT

Internet-based marketplaces and platforms often make possible valuable interactions that were previously impractical and disrupt established business models, thereby providing great benefits to consumers and the economy more generally. A seller of a used good in California can connect with a buyer in New York. A person who wants tickets to a sold-out show now has a place to find available tickets from someone who may have purchased them months in advance but can no longer attend. In the case of the “sharing economy” in particular, one person can leverage idle capacity in a resource they own—such as a car or house—and make it available to someone with a need for that resource. That can benefit the owner by providing additional income and the buyer by providing an (often cheaper) alternative to traditional service providers such as hotels or taxi companies. As the United States Congress has found, “[t]he rapidly developing array of Internet and other interactive computer services available to individual Americans represent an extraordinary advance in the availability of educational and informational resources to our citizens,” and “[i]ncreasingly Americans are relying on interactive media for a variety of political, educational, cultural, and entertainment services.” 47 U.S.C. §§ 230(a)(1) & (a)(5). Moreover, “[t]he Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation,” and thus “[i]t is the policy of the United States to . . . *to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation.*” *Id.* §§ 230(a)(4) & (b)(2) (emphasis added).

To be sure, as in any endeavor, there may be bad actors and possibly unlawful transactions on online marketplaces. Law enforcement authorities need to be able to investigate and identify them. But government officials should not be able to exercise that power in a way that unduly suppresses or burdens these services by imposing unreasonable costs on service providers and discouraging participation by law-abiding citizens. A broad subpoena of the sort propounded by the NYAG here threatens to do just that, and *Amicus* accordingly urges the Court to quash or narrow it appropriately.

It is well-established that the government may not use subpoenas to engage in fishing expeditions where it has not articulated how the information being sought links to a particular alleged or suspected illegality. As the United States Supreme Court explained, “[i]t is contrary to the first principles of justice to allow a search through all [a corporation’s] records, relevant or irrelevant, in the hope that something will turn up.” *Fed. Trade Comm’n v. Am. Tobacco Co.*, 264 U.S. 298, 306 (1924). Courts in New York have long upheld these same principles. *See Brodsky v. New York Yankees*, 26 Misc. 3d 874, 883 (N.Y. Sup. Ct. Albany Cnty. 2009) (holding that government must show “relevancy of the items sought and some factual basis for inquisitorial action”); *see also Myerson v. Lentini Bros. Moving & Storage Co.*, 33 N.Y.2d 250 (N.Y. 1973) (motion to quash subpoena granted where Commissioner had done no more than claim that she had received “numerous complaints” about subject of inquisition). This principle is of particular relevance to Internet-based services where, as here, authorities often are left to apply to such services laws that were written before the Internet was even conceived. Thus, for example, courts and regulators have grappled with the application of sports memorabilia laws to

sales over eBay;¹² scalping and tax laws to secondary ticket marketplaces such as StubHub;¹³ fair use in copyright law to peer-to-peer sharing of movies and music;¹⁴ securities laws to crowdfunding services;¹⁵ and taxi and rental car regulations to new online-enabled ridesharing and transportation services.¹⁶

In an environment where it is unclear whether and how pre-existing laws apply to new and innovative services that benefit consumers but often disrupt incumbent business models, regulators may be tempted to propound broad subpoenas or rely on other compulsory legal process to collect as much information as possible, and to put off until later the development and articulation of a theory regarding whether and how any laws may have been broken. Indeed, that appears to be what has happened here. As Airbnb has explained, it is unclear whether and how various tax and occupancy laws apply to hosts who use its service. *See* Airbnb Mem. at 8-13. For that reason, Airbnb offered to work with the NYAG to develop a set of disclosures that would inform hosts if and when they were required to remit hotel taxes. *See* Airbnb Verified Petition ¶ 7. And yet, rather than take up that offer, articulate an explanation as to what would constitute a violation of the tax and occupancy laws, or propound a subpoena targeting

¹² *See, e.g., Gentry v. eBay, Inc.*, 99 Cal. App. 4th 816 (Cal. Ct. App. 2002) (addressing, among other things, whether eBay was a “dealer” under state sports memorabilia laws).

¹³ *See, e.g., City of Chicago v. Stubhub, Inc.*, 979 N.E.2d 844 (Ill. 2012) (certifying to the Illinois Supreme Court the question whether the City could require electronic intermediaries to collect and remit amusement taxes on resold admission tickets).

¹⁴ *See, e.g., BMG Music v. Gonzalez*, 430 F.3d 888 (7th Cir. 2005) (addressing whether downloading of recordings via KaZaA was “fair use” of copyrighted material).

¹⁵ *See, e.g., S.E.C. Release No. 9470*, 2013 WL 5770346, at *2 (Oct. 23, 2013) (seeking comment on application of statute to “startups and small businesses [that] raise capital through securities offerings using the Internet through crowdfunding”).

¹⁶ *See, e.g., Order Instituting Rulemaking on Regulations Relating to Passenger Carriers, Ridesharing, and New Online-Enabled Transportation Services*, 2013 WL 5488494 (Cal. P.U.C. Sept. 19, 2013) (considering application of regulations to car sharing and transport services like Uber, Lyft, Sidecar, and RelayRides).

information about particular hosts it has reason to believe have violated those laws, the NYAG has sought to compel Airbnb to disclose wide categories of information about virtually *all* hosts¹⁷ for a nearly three-year period. But such an overbroad subpoena is an inappropriate way for government officials to carry out their mission. *See Brodsky*, 26 Misc. 3d at 889 (“[r]equiring the Yankees to pack up every last document relating to the construction of the new stadium, amounting to hundreds of thousands of pages, load them literally into a tractor trailer and deliver them to the Legislature is neither reasonable nor productive of th[e] goal” of ensuring that projects that receive tax payer funding provide a true public benefit).

The danger of the NYAG’s approach is even more apparent when consumers’ privacy interests are factored into the balance. Internet companies’ ability to provide innovative services is based on user trust. The Internet Association’s member companies are deeply committed to protecting users’ online privacy and maintaining user trust. By sharing information with its member companies, users enjoy the benefits of personalized content and services relevant to them. For example, data held by video-sharing platforms point to users’ movie viewing habits. Auction sites, online ticket marketplaces, and crowdfunding platforms have financial details and information about people’s shopping habits and preferences. Online-enabled transportation services may maintain information about their users’ whereabouts and personal activities. Peer-to-peer rental sites store financial and tax-related information. Law enforcement should not be able to procure broad and unfettered access to such data without first articulating whether and how the data relate to an alleged or suspected violation of law.

¹⁷ The Subpoena has an exception for those hosts who are present during the rental period, *see* NYAG Subpoena *Duces Tecum*, attached as Ex. 3 to Airbnb Verified Petition, at 3 (Definition of “Accommodation”). As Airbnb has noted, however, this limitation is illusory because it is impossible for Airbnb to discern which hosts fall within the exception. *See* Airbnb Mem. at 14.

New York law has long supported and protected such privacy interests against undue government intrusion through subpoenas and other legal process: “It is ancient law that no agency of government may conduct an unlimited and general inquisition into the affairs of persons within its jurisdiction solely on the prospect of possible violations of law being discovered, especially with respect to subpoenas *duces tecum*.” *A’Hearn v. Comm. on Unlawful Practice of Law of New York Cnty. Lawyers’ Ass’n*, 23 N.Y.2d 916, 918 (N.Y. 1969); *see also Carlisle v. Bennett*, 243 A.D. 186, 192 (N.Y. App. Div. 3d Dep’t 1935) (Attorney General must not be allowed to “embark upon a roving course for the purpose of generally prying into the affairs of the plaintiff-respondent”).

“[S]ome factual basis” for the investigation is required before regulators are entitled to compelled disclosure of personal information. *Pavillion Agency, Inc. v. Spitzer*, 9 Misc. 3d 626, 632 (N.Y. Sup. Ct. N.Y. Cnty. 2005). Indeed, “conjecture and surmise” are “not sufficient legal reasons to issue a subpoena which clearly invades the privacy” of people using Airbnb and similar services. *Commission on Lobbying v. Simmons*, 4 Misc. 3d 749, 755 (N.Y. Sup. Ct. Albany Cnty. 2004) (denying Commission’s application to enforce subpoenas of person’s private financial records). Enforcing a blunderbuss subpoena like the one at issue here, especially where no legal theory or factual basis has been established, would set a dangerous precedent of “too easily subject[ing] innocent parties to administrative abuse.” *Myerson*, 33 N.Y.2d at 260.¹⁸

Moreover, absent appropriate limits and restraint, an official’s subpoena power could become a tool to discourage development of, and participation in, new and innovative Internet services. As one court explained in narrowing the scope of a governmental subpoena to Google

¹⁸ While providers of Internet-based services typically require users to agree to a privacy policy and such policies often recognize that the provider may disclose user information in response to legal process, as this case make clear there remains a significant *public* interest in protecting users’ privacy from unwarranted governmental intrusion.

seeking information about users' search queries, even if "[t]he expectation of privacy by some Google users may not be reasonable," allowing the government to obtain the information "may nonetheless have an appreciable impact on the way in which Google is perceived, and consequently the frequency with which users use Google," as well as impose a burden on Google through a loss of goodwill with its users. *Gonzales v. Google, Inc.*, 234 F.R.D. 674, 684 (N.D. Cal. 2006). Similarly, another court narrowed the scope of a grand jury subpoena served on Amazon that sought information about the identities of people who had bought books from a particular seller suspected of evading tax laws, in part because,

well-founded or not, rumors of an Orwellian federal criminal investigation into the reading habits of Amazon's customers could frighten countless potential customers into canceling planned online book purchases, now and perhaps forever. . . . Amazon . . . has a legitimate concern that honoring the instant subpoena would chill online purchases by Amazon customers.

In re Grand Jury Subpoena to Amazon.com Dated August 7, 2006, 246 F.R.D. 570, 573 (W.D. Wis. 2007). A similar concern arises here: if Airbnb were forced to turn over information about virtually all hosts, Airbnb users would be likely to use the service less frequently (or not at all) because of concerns that their privacy would not be protected from unwarranted government intrusions.

Finally, it is important for the Court also to serve as a check on law enforcement officials and regulators in this context because incumbent businesses, which may have the ear of elected government officials, often will seek to use their influence to prompt investigations as a means of intimidating or burdening providers of new and (beneficially) disruptive services. Here, hotel

owners clearly have been significant proponents of investigations such as this one.¹⁹ Taxi companies have similarly pressured state and local officials to ban or regulate innovative ride-sharing and similar transportation services.²⁰ Although government investigations are appropriate where there is a basis to believe that laws are being broken, courts play an important role in making sure the subpoena power is appropriately exercised and tailored to particular conduct that is alleged to be unlawful under an articulated legal theory.

¹⁹ See Craig Karmin, *Airbnb Finds Little Hospitality in New York Market*, Wall St. J. Online (Oct. 20, 2013), <http://online.wsj.com/news/articles/SB10001424052702304384104579141790931429948> (noting that The Hotel Association of New York City, a trade group, has been working with the city to step up enforcement of the 2010 occupancy law and is encouraging its members to alert the city where they believe violations are occurring).

²⁰ See Nick Bilton, *Disruptions: Ride-Sharing Upstarts Challenge Taxi Industry*, N.Y. Times Bits Blog (July 21, 2013), http://bits.blogs.nytimes.com/2013/07/21/disruptions-upstarts-challenge-the-taxi-industry/?_r=0; see also Brad Tuttle, *Rideshare Battle Shifts to L.A.: City Tells Uber, Lyft, SideCar to Stop Picking Up Riders*, Time Business & Money (June 27, 2013), <http://business.time.com/2013/06/27/rideshare-battle-shifts-to-l-a-city-tells-uber-lyft-sidecar-to-stop-picking-up-riders/> (noting that traditional taxi companies provide cities with a “steady flow of tax dollars and fees for licenses and permits”).

V. CONCLUSION

For these reasons and those set forth in Airbnb's papers, *Amicus Curiae* The Internet Association respectfully requests that the Court quash or substantially narrow the NYAG subpoena.

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