

NetChoice *Promoting Convenience, Choice, and Commerce on The Net*

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Palm Beach County Board of Commissioners
Palm Beach, FL

RE: **Opposition to Agenda Item 5D-1 - An Ordinance of the Board of County Commissioners of Palm Beach County, Florida, amending the Tourist Development Ordinance of Palm Beach County, Chapter 17, Article III, Sec. 17-117 of the Palm Beach County Code; (Ord. 95-30)**

Dear Palm Beach County Commissioners,

We ask that you not advance *Agenda Item 5D-1 - An Ordinance of the Board of County Commissioners of Palm Beach County, Florida, amending the Tourist Development Ordinance of Palm Beach County, Chapter 17, Article III, Sec. 17-117 of the Palm Beach County Code; (Ord. 95-30)* ("Ordinance") as it violates federal and constitutional privacy laws and exposes the personal information of Palm Beach residents to abuse by the government.

Government efforts to force Short-term Rental (STR) platforms to disclose data to the government and/or impose platform liability requirements on STR platforms efforts are unconstitutional on several privacy protecting fronts, including the 4th Amendment.

We outline the legal problems with such an approach below and welcome further conversation on the matter.

Benefits to your constituents of short-term rentals

STR services provide necessary income to many of your constituents. Over 52 percent of hosts nationwide live in low-to-moderate income households. More than 48 percent of the income hosts earn through certain short-term rental services is used to cover household expenses.

The presence of STR services also brings new money into parts of Palm Beach underserved by hotels. In these underserved areas, travelers are not likely to encounter businesses in areas under-served by hotels. Conversely, guests who stay in districts via STR services, bring income to your districts as they visit restaurants, grocery stores, and businesses in these areas.

Unconstitutionality of the Ordinance's imposition of liability on STR platforms

The internet is an open resource that enables people from all parts of Palm Beach to freely communicate with one another and pursue their goals. While some nations discourage user-generated content, the United States created a fertile ground for business models that have transformed the world.

Moreover, this openness is bolstered by Section 230 of the federal Communications Decency Act, which says platforms can't be held strictly liable for content posted *by others*.

The Ordinance ignores this federal law as it forces STR platforms to monitor listings.

Attempts to impose this type of liability on STR platforms fails. Consider the requirement that hosting intermediaries know if a host is licensed – this is a violation of Section 230. Santa Monica attempted to enact similar requirements and faced a swift injunction and ongoing legal fees.

Such requirements not only threaten a core tenet of the internet but is at odds with federal law – resulting in the likely injunction.

Here is what former US Congressman Chris Cox, author of Section 230 of the Communications Decency Act, said about the Santa Monica approach to impose liability on HomeAway and Airbnb:

“The Santa Monica ordinance effectively transfers each homeowner’s legal responsibility to the internet platform. *This clearly violates Section 230.*”

Sites such as Airbnb and HomeAway are matchmakers, bringing together homeowners and visitors. Their service is national in scope. When a family in Ohio plans a vacation in California or Florida or Maine, they expect Internet listings in these venues and more. And that is what the Internet delivers: it has allowed millions of homeowners across the country to list on these sites while millions of potential visitors have gained immediate, free access to those listings.

Requiring the websites to review each of these listings one at a time will eliminate the very benefits consumers expect from the Internet. It is the homeowners’ responsibility to ensure they comply with all local rules and ordinances. Making the Internet intermediary liable for the website users’ legal responsibilities is what Section 230 rightly prohibits.”

Further, in a joint NetChoice and Congressman Cox amicus brief in *HomeAway and Airbnb v. City of Santa Monica*,¹ Congressman Cox said:

“The [Santa Monica] Ordinance requires Airbnb and HomeAway to review each individual posting on its website and check it against ‘a Registry of licensed home-sharing operators in the City.’ Defendant’s Opp. to Preliminary Injunction at 14-15. This is exactly what Section 230 prohibits.”

Such an attempt by Palm Beach to impose monitoring liability on STR platforms, like the misguided efforts of Santa Monica, will likely see court actions, injunction, and invalidation of the law by the court.

The Ordinance’s forced disclosure of STR platform records illegally exposes the privacy of Palm Beach residents and short-term rental guests to city employees and potentially law enforcement

The 4th Amendment of the US Constitution protects Palm Beach citizens from unlawful search and seizure and is a core privacy protection.

But Ordinance’s forced disclosure of STR platform records ignores this privacy protection and instead requires platforms to disclose records and information about hosts to city employees and potentially law enforcement. And this disclosure does not require the state’s employees to first obtain a warrant.

¹ Available here: <http://netchoice.org/wp-content/uploads/Amicus-Brief-Filed-4-25-2018.pdf>

Required disclosure of STR platform's stored names and addresses of Palm Beach residents to City employees and potentially law enforcement.

This could not only expose the operating procedures and income of businesses but also expose the privacy of Palm Beach residents using the platform and people staying in Palm Beach homes.

New York City attempted this same effort and is currently facing a likely injunction as it has seen opposition from industry and privacy groups from across the country.

In NetChoice's amicus brief against the City of New York, we outlined the unconstitutionality of forced disclosure of STR platform records:

The home has long been afforded particular protection under the Fourth Amendment. *See, e.g., Kyllo v. United States*, 533 U.S. 27, 37–38 (2001). As the Supreme Court reiterated in *Kyllo v. United States*, the Fourth Amendment protects individuals from government intrusion inside the walls of the home. *See id.* (citing *Arizona v. Hicks*, 480 U.S. 321, 324–25 (1987); *Silverman v. United States*, 365 U.S. 505, 512 (1961)) (finding that heat lamps undetectable in plain view were “intimate details because they were details of the home” that should be protected under the Fourth Amendment). New York City's Local Law 146 forces short-term rental services to disclose how and when hosts choose to invite guests into their own homes, and this type of activity is among the “details of the home” that the Fourth Amendment maintains as private.

...

By forcing short-term rental services like Airbnb to disclose rental records, New York City violates privacy rights enshrined in federal law. The Federal Stored Communications Act (SCA) and Electronic Communications Privacy Act (ECPA) were passed specifically to prevent the type of warrantless search the City seeks to undertake with the ordinance in question.

The US Supreme Court and the Hotel industry say that mandated disclosure is unconstitutional

When the city of Los Angeles demanded a hotel's proprietary business records, the hotel industry fought back in court – ultimately winning at the US Supreme Court in a decision written by Justice Sotomayor in *Los Angeles v Patel*, 135 S. Ct. 2443 (2015).

In its opinion the US Supreme Court said:

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 out- side 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.”²

The Respondent hotel operator said in its brief:

The Fourth Amendment generally requires a warrant to address the Founders' fundamental “concern about giving police officers unbridled discretion to rummage at will among a person's private effects.” *Arizona v. Gant*, 556 U.S. 332, 345 (2009). The warrant requirement “interpose[s] a neutral magistrate

² *Los Angeles v Patel*, 135 S. Ct. 2443 (2015).

between the citizen and the law enforcement officer.” *Nat’l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 667 (1989). In addition, by requiring that the warrant “particularly describe[] the place to be searched, and the persons or things to be seized,” the Fourth Amendment seeks to safeguard against “exploratory rummaging in [that] person’s belongings,” including her papers. *Coolidge v. New Hampshire*, 403 U.S. 443, 467 (1971) (plurality). In combination, these requirements ensure that the decision whether, and how, to invade a person’s privacy is not made by officers in the field “engaged in the often competitive enterprise of ferreting out crime.” *Johnson v. United States*, 333 U.S. 10, 14 (1948); *see also United States v. U.S. Dist. Court*, 407 U.S. 297, 317 (1972).

In an amicus brief from the Asian American Hotel Operators Association, the hotel industry argued:

“The City should not be able to destroy the hoteliers’ property or interest in this information merely by requiring that some of it be collected.”

To protect this court ruling, we could see the hotel industry opposing such requirements on STR platforms to disclose business records. And if such a requirement is passed, Palm Beach would likely see a similar court outcome.

[The Ordinance’s forced disclosure of records by a STR platform violates federal privacy laws](#)

The Federal Stored Communications Act (SCA) was designed to prevent the voluntary or compelled disclosure of stored communications to the government. This precluded disclosures covered federal, state, city, and other municipal governments.

The SCA states:

(a) Prohibitions. — Except as provided in subsection (b) or (c)—

(2) a person or entity providing remote computing service to the public shall not knowingly divulge to any person or entity the contents of any communication which is carried or maintained on that service—³

[unless complying with the following provisions for disclosure to a governmental entity]

Contents of Wire or Electronic Communications in a Remote Computing Service.—

(1) A governmental entity may require a provider of remote computing service to disclose the contents of any wire or electronic communication to which this paragraph is made applicable by paragraph (2) of this subsection—

(A) without required notice to the subscriber or customer, if the governmental entity obtains a warrant issued using the procedures described in the Federal Rules of Criminal Procedure (or, in the case of a State court, issued using State warrant procedures) by a court of competent jurisdiction; or

(B) with prior notice from the governmental entity to the subscriber or customer if the governmental entity—

(i) uses an administrative subpoena authorized by a Federal or State statute or a Federal or State grand jury or trial subpoena; or

(ii) obtains a court order for such disclosure under subsection (d) of this section;

³ 18 U.S.C. § 2702(a)

except that delayed notice may be given pursuant to section 2705 of this title.⁴

As is clear from the SCA, either a warrant, administrative subpoena, or court order is required prior to compelled disclosure of stored communications by a “remote computing service.” Note also, that the 6th Cir in *United States v. Warshak*⁵ ruled that a warrant is required for government mandated disclosure of contents – not an administrative subpoena.

And for purposes of the SCA, names of hosts, lengths of stays, addresses, or any other information generated by users of the service and stored by HomeAway or Airbnb is covered by SCA.

The Congressional records for SCA state the purpose of the SCA is specifically to prevent governmentally forced disclosures such as mandating disclosure of host or visitor records kept by an STR platform. In particular, the SCA’s congressional record states:

“In the absence of market discipline, there is no presumption that the government will strike an appropriate balance between disclosure and confidentiality. And the enormous power of the government makes the potential consequences of its snooping far more ominous than those of . . . a private individual or firm.’ Posner, *Privacy in the Supreme Court*, 1979 Sup. Ct. Rev. 173, 176 (1979).

...

if Congress does not act to protect the privacy of our citizens, we may see the gradual erosion of a precious right. Privacy cannot be left to depend solely on physical protection, or it will gradually erode as technology advances. Additional legal protection is necessary to ensure the continued vitality of the Fourth Amendment.”⁶

Clearly the express language of the SCA and the legislative intent preclude any forced disclosure of records kept by an STR platform.

Privacy invasion of Palm Beach residents from the Ordinance’s forced disclosure of STR platform records

Legal arguments aside, mandating STR platforms disclose data to the city grants virtually any Palm Beach public employee access to private information of Palm Beach residents. As you can imagine, this provides an easily abused resource of information about your constituents and guests staying in the state.

We ask that you not advance the Ordinance which would impose unconstitutional and privacy invading requirements on STR platforms to disclose or moderate content.

We welcome the opportunity to work with you on reasonable regulations that allow all to prosper.

Sincerely,

Carl Szabo

Vice President and General Counsel, NetChoice

NetChoice is a trade association of e-Commerce and online businesses. www.netchoice.org

⁴ 18 U.S.C. § 2703(b).

⁵ *United States v. Warshak*, 631 F.3d 266 (6th Cir. 2010).

⁶ Congressional Record of Electronic Communications Act, Pub.L. 99–508 (1986).