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NetChoice
Defending Free Speech and Free Enterprise
Online

**Kansas City—Ordinances No. 230267
(Zoning) & No. 230268 (Registration)**

**REQUEST FOR FURTHER
CONSIDERATION**

May 31, 2023

Mayor Quinton Lucas
City Attorney Matthew Gigliotti
City Hall
414 E 12th St
Kansas City, MO 64106

Dear Mayor Quinton Lucas and City Attorney Matthew Gigliotti:

I am writing on behalf of NetChoice¹ to share our serious concerns with two ordinances regulating short-term rentals (STRs), which the City Council passed on May 4, 2023: Ordinance No. 230267 (the Zoning Ordinance) and Ordinance No. 230268 (the Registration Ordinance).

NetChoice represents the world's leading internet businesses and tech innovators to promote a free and open internet ecosystem that fosters economic growth and consumer choice. By fighting to protect internet innovation and commerce, our organization works to make the internet safe for free enterprise and free expression.

NetChoice supports our members, including short-term rental platforms, that have expressed their interest in working with the City on fair and reasonable rules that preserve the benefits of home sharing for residents and the local economy alike. For residents, home sharing provides another source of income at a time when the rising cost of living is stretching Americans' pocketbooks. Short-term rentals also help support the City's tourism industry, including small businesses that benefit from visitors to neighborhoods traditionally excluded from tourism.

NetChoice is especially troubled by the many procedural and substantive deficiencies violating basic precepts of local democratic governance.

¹ NetChoice is a trade association of leading internet businesses and tech innovators. Our mission is to keep the internet safe for free enterprise and free expression to flourish. Our views are just that—our views; they do not necessarily reflect those of individual members. Our membership roster is publicly available on our website: netchoice.org.

- *First*, we are concerned that the City disregarded key due process protections in its rapid enactment of these ordinances and seemingly enacted these ordinances without prior meaningful analysis.
- *Second*, the data reporting requirements fail to include valid legal process, under the Fourth Amendment of the U.S. Constitution and Section 2702 of the Stored Communications Act.
- And *third*, the requirement for platforms to check all listings against the City’s public registry violates Section 230 of the Communications Decency Act, a federal statute that prohibits enforcement entities from treating online platforms as publishers of information provided by third-party users.

Given these plain procedural and substantive deficiencies, we request that Kansas City immediately rescind, or at a minimum delay the enforcement of, both ordinances so that relevant stakeholders have an opportunity to provide feedback on the fair and reasonable regulation of STRs in Kansas City.

The City Disregarded Key Due Process Protections.

When the City rapidly passed both ordinances, it disregarded at least two important due process requirements designed to provide members of the public a voice in the legislative process.

First, the Neighborhood Planning and Development Committee failed to allow members of the public to provide testimony on the ordinances, violating both the Standing Rules of the City Council of Kansas City (Rule 10.06(c)) and the Zoning and Development Code (Section 88-505-06). The Committee refused to permit public testimony at its May 3, 2023 hearing on the two ordinances, despite multiple requests by citizens of Kansas.² Neither the Standing Rules nor the Zoning and Development Code grant the Committee discretion to waive this important due process protection.

Second, the City failed to provide accurate public copies of the Zoning Ordinance and Registration Ordinance. Rule 3.01(f) of the Standing Rules clearly notes that upon request, the public “shall be provided with a copy” of “any version of a proposed ordinance [that] amends, repeals or otherwise changes sections of the Code of Ordinances or City Charter.” Despite this requirement, the City did not publish accurate copies of either ordinance on the agenda for its May 3 hearing, or provide public copies in response to repeated requests by members of the public.

The rapid process by which the City enacted both ordinances also disregarded a key tenet of administrative law—that regulations must not be enacted in an arbitrary and capricious manner. The report issued by the City Planning Commission on March 21, 2023 did not consider, much less provide any meaningful analysis of, the zoning ban for non-resident STRs, or whether such a restriction would

² Although the Committee allowed public testimony during its previous hearing on April 19, 2023, the ordinances discussed at that hearing did not contain the platform requirements or the prohibition on non-resident short-term rentals operated in residential zones. Accordingly, members of the public were not afforded the opportunity to publicly speak on those provisions.

support the City’s purported policy goals of ensuring that STRs “operate in a manner consistent with public health and safety” or “promote[] accountability and preserve[] the established character of existing neighborhoods.” See Registration Ordinance, Sec. 56-801. As a matter of administrative law and basic good governance, Kansas City should have first conducted a meaningful analysis of how its ordinances aligned with the City’s objectives before enacting them into law.

These alarming and egregious procedural violations deprived Airbnb and residents of Kansas City of the ability to fairly take part in the legislative process. Due process protections play a crucial role in ensuring fairness, transparency, and public participation when local ordinances are passed, safeguarding the rights and interests of the community at large.

To remedy this deprivation, we request that the Council immediately rescind both the Zoning Ordinance and Registration Ordinance, or at a minimum delay enforcement while members of the community have the chance to weigh in on the ordinances.

The Data Reporting Requirements Violate the Fourth Amendment and Stored Communications Act.

The newly passed Registration Ordinance also contravenes core constitutional and federal legal authorities, including the Fourth Amendment and the Stored Communications Act (SCA). As courts have consistently found, municipal ordinances requiring the disclosure of nonpublic information—like hosts’ names, physical addresses of short-term rentals, and the specific dates of bookings—constitute an impermissible administrative search in violation of the Fourth Amendment.

Generally, “searches conducted outside the judicial process, without prior approval by [a] judge or [a] magistrate [judge], are per se unreasonable . . . subject only to a few specifically established and well-delineated exceptions.” *City of Los Angeles v. Patel*, 576 U.S. 409, 410 (2015).

Under this longstanding precedent, courts have consistently found that municipal ordinances requiring home-sharing platforms to disclose nonpublic information to regulators similarly violate the Fourth Amendment. For example, a federal court in New York enjoined a municipal ordinance requiring home-sharing platforms to disclose the physical address of home-sharing rentals, users’ contact information, and rental usage information. *Airbnb, Inc. v. City of New York*, 373 F. Supp. 3d 467, 484 (S.D.N.Y. 2019). Similarly, a federal court in Boston enjoined a municipal ordinance requiring home-sharing platforms to disclose the number of nights a short-term rental was occupied in a given time. *Airbnb, Inc. v. City of Boston*, 386 F. Supp. 3d 113, 125 (D. Mass. 2019).

Here, Section 56-808 of the Registration Ordinance raises significant Fourth Amendment concerns because, among other things, it seeks to compel home-sharing platforms to disclose nonpublic information. Federal courts in New York and Boston have found the disclosure of this exact type of information constitutes an impermissible administrative search, both due to the breadth of the competitive business information required to be disclosed, and because the ordinance did not provide

home-sharing platforms with the opportunity for individualized pre-compliance review before a neutral decision maker.

The disclosure requirements in Section 56-808 of the Registration Ordinance likewise violate the SCA, as they compel home-sharing platforms to disclose user information to a government entity without user consent, a warrant, court order, or formal request from law enforcement. The SCA prohibits Internet Service Providers (ISPs) from “divulg[ing] a record or other information pertaining to a subscriber to or customer of” its services.” 18 U.S.C. § 2702(a)-(c). “A governmental entity may mandate disclosure of such records or information only if it “has the consent of the subscriber or customer to such disclosure” or otherwise seeks disclosure pursuant to a warrant, court order, formal request relevant to a law enforcement investigation into telemarketing fraud, or subpoena (subject to limitations). *Id.* § 2702(c)(1)-(2).

Courts have found that ordinances compelling ISPs to disclose a customer’s physical address or other user records violate the SCA. For example, in *Homeaway.com, Inc. v. City of Portland*, 2017 U.S. Dist. LEXIS 70173, *1 (D. Or. Mar. 27, 2011), a federal court in Oregon enjoined a municipal ordinance on the ground that the ordinance, in contravention of the SCA, would have required Airbnb and Homeaway to provide monthly logs of host information, including hosts’ physical addresses. *See also Telecomms. Reg. Bd. of Puerto Rico v. CTIA-Wireless Assoc.*, 752 F.3d 60, 61 (1st Cir. 2014) (holding that a Puerto Rico act that required cellular service providers to disclose their customers’ names, addresses, and phone numbers to a governmental entity without a subpoena or other processes was preempted by the SCA).

Like users of an email provider or social media website, short-term rental hosts store their names, physical addresses, and other private user information with platforms, but they do not typically make this information publicly available. The SCA is designed to prevent governmental entities from having unfettered access to ISPs’ user records, and therefore requires the governmental entity seeking to compel disclosure to obtain the user’s consent or a formal court order. Unfortunately, Section 56-808 of the Registration Ordinance omits this legally required process by noting platforms must provide the required information “upon request.”

The Platform Requirement to Track Listings on the City’s Website Disregards the Communications Decency Act.

The Registration Ordinance’s platform requirement to check the City’s list of registered STRs also raises serious legal questions under another federal statute—the Communications Decency Act. Section 56-807(d) of the ordinance makes it a violation “for any booking service provider to receive payment, directly or indirectly, for a short-term rental located in the city that is not registered” and tasks platforms with verifying that all short-term rentals are included on the City’s yet-to-be-created public list of registered STRs.

By attempting to hold online platforms responsible for individual users’ compliance with the requirements, the City acts in stark contravention of the Communications Decency Act, which provides

that “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 provider.” 47 U.S.C. § 230. On top of its legal infirmity, the Registration Ordinance’s requirement is prone to human error, and may ultimately lead to more inefficiencies. The governmental department charged with managing Kansas City’s process will inevitably be forced to invest substantial time, resources, and personnel to maintain an accurate and current registry.

Other regulatory products that platforms such as Airbnb have deployed working in collaboration with other cities include a field for hosts to enter their registration number before publishing a listing and the removal of listings upon government notification. These types of products aim to accomplish the objectives envisioned by the ordinance’s platform requirement with significantly less resources and room for error.

* * *

We believe that the most productive path forward for all parties is to work cooperatively on these issues. To that end, we request that the City immediately rescind, or at a minimum delay the enforcement of, both the Zoning Ordinance and the Registration Ordinance to provide ample opportunity for feedback and revisions.

Additionally, we hope the City is able to work with the online platforms amicably on developing reasonable disclosure requirements that do not violate the Fourth Amendment and SCA, and to reach an agreement on regulatory products that they could put in place to accomplish the City’s goals relating to STRs.

Sincerely,

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