

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

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Mayor Bill de Blasio
New York City
New York, NY 10001

RE: Request to reconsider New York City Taxi and Limousine Commission Promulgates rules on HVFHS

Dear Mayor de Blasio,

We ask that your administration require the Taxi and Limousine Commission (TLC) to reconsider their December 4, 2018 promulgated rules on High-Volume For-Hire Services (HVFHS) (hereinafter "Rules).

NYC recently saw how its overreach to force Short-Term Rentals (STRs) to disclose records is a violation of 4th Amendment protections and is unconstitutional.¹ The TLC's Rules will follow a similar track towards being declared unconstitutional. Moreover, the proposed Rules are significantly more invasive to New Yorker privacy than the recently enjoined STR rules.

The Rules would force HVFHS to disclose to the TLC reams of highly sensitive data on movement of New Yorkers. And even if we ignore the potential misuse of this data, any loss of the data would create significant financial and reputational injuries for New Yorkers.

The Rules are also unconstitutional violation of the Stored Communications Act.

While we ask that you tell the TLC to reconsider the Rules, we do, however, agree with reasonable requirements for HVHFS and regularly advocate for such requirements.

The Rules exposes the privacy of New York residents to TLC employees and law enforcement

The 4th Amendment of the US Constitution's protection of New York citizens from unlawful search and seizure is a core privacy protection.

The Rules ignore this privacy protection and instead requires platforms to disclose records and information about rides to TLC employees. And this disclosure does not require the TLC's employees to first obtain a warrant.

The details about these rides is so specific it can identify whether a passenger traveled to a bank, church, club, women's health clinic, or therapist. While the passengers are anonymized, the city is provided with origin and

¹ See. *Airbnb, Inc. v. The City of New York*, Case Number: 1:18-cv-07712-PAE (S.D.N.Y Jan. 2019). "[The ordinance] would invite such productions so as to permit regulators to troll these records for potential violations of law, even as to customers as to which there had been no basis theretofore to suspect any violation of law." "Existing Fourth Amendment law does not afford a charter for such a wholesale regulatory appropriation of a company's user database." "A home-sharing platform has at least two very good reasons to keep host and guest information private, whether as to these users' identities, contact information, usage patterns, and payment practices. One is competitive: Keeping such data confidential keeps such information from rivals (whether competing platforms or hotels) who might exploit it. The other involves customer relations: Keeping such data private assuredly promotes better relations with, and retention of, a platform's users."

destination information. So, a TLC employee need only enter a known address for a political opponent or partner to uncover where and when they travel.

Even if we assume that this treasure trove of information won't be abused, merely holding it represents a honey-pot for hackers and other and of course the data could be accidentally compromised.

Moreover, rules empower the TLC to essentially track HVFHS drivers even when not engaged in a ride but also when they have their app is simply turned on.

The detailed travel information demanded by the Rules clearly goes against the Order in *Airbnb, Inc. v. The City of New York*:²

“[The ordinance] would invite such productions so as to permit regulators to troll these records for potential violations of law, even as to customers as to which there had been no basis theretofore to suspect any violation of law.”

“Existing Fourth Amendment law does not afford a charter for such a wholesale regulatory appropriation of a company's user database.”

Moreover, this type of data is protected by multiple US Supreme Court decisions.

When the city of Los Angeles demanded that a hotel's proprietary business records, the hotel industry fought back in court – ultimately winning at the US Supreme Court (*see In re Patel*, 576 U. S. ____ (2015)).

In *United States v. Jones*, 565 U.S. 400 (2012), a unanimous Supreme Court said unwarranted geolocation tracking of citizens violates the 4th Amendment. Justice Sotomayor wrote in the concurrence,

“[T]he Government installed a Global Positioning System (GPS) tracking device The Government usurped Jones' property for the purpose of conducting surveillance on him, thereby invading privacy interests long afforded, and undoubtedly entitled to, Fourth Amendment protection.” And that is what is happening here by the TLC's mandate to disclose route records.

Likewise, in *Carpenter v. United States*, No. 16-402, 585 U.S. ____ (2018), the four liberal justices and the Chief justice declared that warrantless government location surveillance via cellphone records constituted a 4th Amendment violation. As the Chief Justice said in the majority opinion,

“Here the progress of science has afforded law enforcement a powerful new tool to carry out its important responsibilities. At the same time, this tool risks Government encroachment of the sort the Framers, ‘after consulting the lessons of history,’ drafted the Fourth Amendment to prevent.”

Clearly, the TLC would lose a 4th Amendment challenge of these Rules. Rather than face another injunction, we ask the city preemptively reassess its approach, not only from a legal prospective, but a political one.

The Rules are discriminatory in application

The Rules apply only when a passenger books a ride on a “smartphone or other electronic device that allows communication.” (Rules §59D-03). This is clearly written exempt the Rules from bookings via traditional phone-calls.

² Case Number: 1:18-cv-07712-PAE (S.D.N.Y Jan. 2019)

The requirements placed on HVHFS by the Rules are not required of any other licensee in the city. Taxi-cab companies that only engage in street hails don't need to comply with the Rules. Legacy limo drivers and their passengers aren't tracked by the city.

This discrimination is likewise unconstitutional.

The Rules would undermine a key benefit of the internet and would likely be unconstitutional

The internet is an open resource that enables people from all parts of New York 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*.

However, the Rules fail to recognize Section 230 and instead attempt to hold HVFHS liable for the content and actions of others using the HVFHS platforms. This not only threatens a core tenet of the internet but is at odds with federal law – resulting in the likely injunction of the Rules.

Rather than advance the Rules, which is privacy invading, unconstitutional, and wrong for NYC and its citizens, we ask that TLC reconsider its approach.

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

Sincerely,

Carl Szabo

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