

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

Judge Assigned:  
Honorable Judge Gerald William Connolly

**BRIEF OF PROPOSED *AMICI CURIAE* THE ELECTRONIC FRONTIER  
FOUNDATION AND THE CENTER FOR DEMOCRACY AND TECHNOLOGY IN  
SUPPORT OF PETITIONER AIRBNB**

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**TABLE OF CONTENTS**

I. INTRODUCTION ..... 1

II. INTERESTS OF *AMICI*..... 2

III. FACTS ..... 3

IV. ARGUMENT..... 5

    A. The Attorney General’s Subpoena Is Invalid. .... 5

        1. The Attorney General Has Not Demonstrated Statutory Authority to Issue the Subpoena, Nor Has It Stated a Basis for Conducting an Investigation. .... 6

        2. The Attorney General Requests Irrelevant Information. .... 8

    B. Because Overbroad Subpoenas to Nonparties Have a Chilling Effect on Users, They Deserve Heightened Judicial Scrutiny..... 10

V. CONCLUSION..... 11

**TABLE OF AUTHORITIES**

**CASES**

*A'Hearn v. Comm. on Unlawful Practice of Law*, 23 N.Y.2d 916 (N.Y. 1969)..... 6, 8, 10

*Am. Dental Coop., Inc. v. Atty'y Gen. of New York*, 127 A.D.2d 274 (N.Y. App. Div. 1987)..... 7

*Anheuser-Busch, Inc. v. Abrams*, 71 N.Y.2d 327 (N.Y. 1988)..... 8

*Carlisle v. Bennett*, 268 N.Y. 212 (1935) ..... 6

*Cohen v. City of New York*, 255 F.R.D. 110 (S.D.N.Y. 2008)..... 10

*Concord Boat Corp. v. Brunswick Corp.*, 169 F.R.D. 44 (S.D.N.Y. 1996)..... 10

*Doe v. 2themart.com, Inc.*, 140 F. Supp. 2d 1088 (W.D. Wash. 2001)..... 3

*Echostar Satellite LLC v. Freetech Inc.*, No. C 07-6124 JW (RS), 2008 WL 4460236  
(N.D. Cal. Sept. 29, 2008) ..... 1, 3

*Feeley v. Midas Properties, Inc.*, 168 A.D.2d 416 (N.Y. App. Div. 1990) ..... 11

*Gonzales v. Google, Inc.*, 234 F.R.D. 674 (N.D. Cal. 2006) ..... 1, 3, 10

*Hill v. Cuomo*, 08/3209, 2009 N.Y. Misc. LEXIS 2370 (N.Y. Sup. Ct. 2009) ..... passim

*Hogan v. Cuomo*, 3626/08, 2008 N.Y. Misc. LEXIS 7428 (N.Y. Sup. Ct. 2008)..... 8

*Hyatt v. State of Cal. Franchise Tax Bd.*, 105 A.D.3d 186 (N.Y. App. Div. 2013) ..... 8

*In re Brasky*, 40 A.D.3d 531 (N.Y. App. Div. 2007)..... 6

*In re Brodsky*, 26 Misc. 3d 874 (N.Y. Sup. Ct. 2009) ..... 6

*In re Future Tech. Assoc. LLC*, 115054/2010, 2011 N.Y. Misc. LEXIS 1352  
(N.Y. Sup. Ct. 2011)..... 6

*In re Napatco, Inc. v. Lefkowitz*, 43 N.Y.2d 884 (1978)..... 7

*In re Nicholson*, 50 N.Y.2d 597 (1980) ..... 7

*In re Suffolk Cnty. Ethics Comm'n.*, 29 Misc. 3d 1136 (N.Y. Sup. Ct. 2010)..... 6, 7

*In re Sussman*, 39 N.Y.2d 227 (1976) ..... 7

*Myerson v. Lentini Bros. Moving & Storage Co.*, 33 N.Y.2d 250 (1973)..... 7, 8

*Nitz v. Prudential-Bache Securities, Inc.*, 102 A.D.2d 914 (N.Y. App. Div. 1984)..... 11

*Paramount Pictures Corp. v. ReplayTV, Inc.*, No. CV-01-09358-FMC (C.D. Cal. filed May 21,  
2002) ..... 3

*Pharm. Soc'y of New York v. Abrams*, 132 A.D.2d 129 (N.Y. App. Div. 1987)..... 6

<i>Theofel v. Farey-Jones</i> , 359 F.3d 1066, 1074-75 (9th Cir. 2004) .....	2
<i>Travelers Indemnity Co. v. Metropolitan Life Insurance Co.</i> , 228 F.R.D. 111, 113 (D. Conn. 2005) .....	10

**STATUTES**

New York City Admin. Code § 11-2501.5 .....	9
New York Civil Practice Law and Rules § 2302 .....	6, 7
New York Civil Practice Law and Rules § 2304 .....	5
New York Executive Law § 63(12) .....	6, 7, 8
New York Tax Law § 1101 .....	9

**OTHER AUTHORITIES**

A Guide to Sales Tax for Hotel and Motel Operators, N.Y. State Dep’t. of Tax. & Finance, Mar. 2008 .....	9, 10
Dara Kerr, <i>Airbnb Files Motion to Block New York AG’s Subpoena</i> , CNET, Oct. 9, 2013 .....	9
Gerry Shih, <i>Accommodation Renter Airbnb Fights NY State Subpoena on Sublets</i> , Reuters, Oct. 9, 2013 .....	9

## I. INTRODUCTION

Providers of online platforms serve as increasingly vital conduits connecting individuals with goods and services in ways that were previously infeasible or even impossible. Petitioner Airbnb, Inc. (“Airbnb”) is an example of such a platform. Like other successful online intermediaries such as Craigslist and eBay, Airbnb is designed to facilitate transactions between private individuals who would have had more difficulty doing so in a pre-Internet age. Not coincidentally, companies like Airbnb have become custodians of increasingly voluminous records of such user transactions. And not surprisingly, such providers have become increasingly tempting targets for those wishing to obtain information about those users’ activities through the use of subpoenas and other legal processes.

Whether they are prompted by governmental investigations or private litigation, legal processes targeting online intermediaries as a means to get to information about their users *en masse* raise pronounced privacy concerns. User information in the hands of such providers can be extraordinarily revealing, implicating private behavior, personal preferences, and movements over time, and the careless disclosure of such information about an individual can cause real harm. Attempts to collect data about wide swaths of users over time, even ostensibly for valid purposes, only multiplies these concerns. Recognizing the obvious risk to the privacy of such users—who are rarely themselves parties to proceedings (such as this one) evaluating the propriety of the use of subpoenas—courts correctly view the dragnet collection of user data with skepticism. *See, e.g., Gonzales v. Google, Inc.*, 234 F.R.D. 674, 687 (N.D. Cal. 2006) (discussing risk to Google users’ privacy from subpoena to Google that sought information about users’ search queries); *Echostar Satellite LLC v. Freetech Inc.*, No. C 07-6124 JW (RS), 2008 WL 4460236 at \*2 (N.D. Cal. Sept. 29, 2008) (where subpoena to technology vendor of customer lists includes individuals whose conduct is not alleged to be illegal, subpoena “could lead to the perceived harassment of legitimate users and a concomitant chilling effect on the purchase and lawful use of’ vendor’s product). This Court should do the same here.

In this matter, the New York Office of the Attorney General has issued a subpoena seeking to compel the production of information for a broad swath of Airbnb users, far beyond the bounds of its investigative power. The subpoena should be quashed for two reasons. First, while the results of the Attorney General's subpoena could potentially be used to determine whether Airbnb users have violated New York law, it has failed to articulate whether it is even conducting an investigation of any such violations. "It goes without saying that the courts will not hesitate to quash subpoenas that are an abuse of process for the purpose of coercing conduct that the agency has no legitimate basis requesting or for some other improper purpose." *Hill v. Cuomo*, 08/3209, 2009 N.Y. Misc. LEXIS 2370, at \*13 (N.Y. Sup. Ct. 2009). Second, even if the Attorney General were conducting an investigation, its subpoena is far broader than necessary and would inevitably sweep in data about users who are unrelated to the investigation.

This case highlights the significant dangers posed by overbroad subpoenas to the privacy interests of third parties. The Attorney General will, if unchecked, obtain in one fell swoop the personal records of New York Airbnb hosts regardless of whether they are even arguably violating the law. While Airbnb has opposed the subpoena, innocent third parties should not have to rely on a company to protect their privacy interests. *See, e.g., Theofel v. Farey-Jones*, 359 F.3d 1066, 1074-75 (9th Cir. 2004) (discussing hardships to individual users from subpoena directed at intermediary ISP). The Attorney General has not curtailed its request to what it is legitimately entitled to receive, and this type of unfettered dragnet collection of user records should be denied. *Amici* respectfully file this *amicus* brief to underscore these privacy interests and the risks posed by overbroad subpoenas, both generally and as applied here.

## II. INTERESTS OF AMICI

*Amicus* the Electronic Frontier Foundation ("EFF") is a member-supported, nonprofit public interest organization dedicated to protecting civil liberties and free expression in the digital world. EFF seeks to protect the rights of Internet users to communicate, learn, and engage in daily life online. With more than 22,000 active donors, including more than 1,200 in

New York State, EFF represents the interests of technology users in both court cases and in broader policy debates surrounding the application of law in the digital age. As part of its mission, EFF has intervened as *amicus curiae* or acted as counsel in a number of cases to protect the privacy rights of users from overbroad discovery requests. *See, e.g., Echostar Satellite LLC v. Freetech, Inc.*, No. 07-6124 (N.D. Cal. filed Aug. 15, 2008) (*amicus curiae* brief opposing subpoenas seeking contact information of every consumer who purchased a product from defendant, ECF No. 41); *Columbia Pictures Indus., Inc. v. Bunnell*, No. CV-06-01093-FMC (C.D. Cal. filed June 22, 2007) (*amicus curiae* brief addressing discovery request that would require search engine to track user searches, ECF No. 182); *Paramount Pictures Corp. v. ReplayTV, Inc.*, No. CV-01-09358-FMC (C.D. Cal. filed May 21, 2002) (*amicus curiae* brief addressing discovery request that sought television viewing habits of video recorder users, ECF No. 129); *Doe v. 2themart.com, Inc.*, 140 F. Supp.2d 1088 (W.D. Wash. 2001) (served as counsel to resist discovery request aimed at revealing the identity of an anonymous speaker).

*Amicus* the Center for Democracy & Technology (“CDT”) is a non-profit public interest organization focused on privacy and other civil liberties issues affecting the Internet, other communications networks, and associated technologies. With expertise in law, technology and policy, CDT represents the public’s interest in an open Internet and promotes the values of free expression, privacy, and individual liberty. CDT has filed *amicus* briefs in numerous cases, including *Gonzales v. Google*, No. CV 06-80006 MISC JW (N.D. Cal. filed Feb. 24, 2006) (*amicus curiae* brief opposing DOJ subpoena demanding that Google turn over millions of search terms).

### III. FACTS

Airbnb is an online service provider that connects with users with extra living space in their homes (“Hosts”) with users who desire to rent those accommodations. Airbnb is widely

“known as a place to rent out your apartment while you’re out of town for a few days.”<sup>1</sup> It permits, among other things, travelers on a budget to visit expensive places that might otherwise be outside of their reach, and lets tourists visit areas where they otherwise might not go for lack of accommodations.<sup>2</sup> Airbnb provides a platform for Hosts to post content and for Hosts and users to engage one other, reach an agreement about pricing and terms, and then complete the transaction with Airbnb acting as the intermediary. Airbnb is not a hotel; it does not operate, own, manage, sell or resell any properties. Nor is Airbnb a hotel aggregator.<sup>3</sup> Airbnb has a community of Hosts and users in 34,000 cities in 192 countries, including 15,000 Hosts in New York alone.<sup>4</sup>

On October 4, 2013, the Attorney General issued a subpoena duces tecum (“Subpoena”) to Airbnb seeking information concerning Hosts on Airbnb’s Internet platform. *See* Exhibit 3 to Airbnb’s Petition. The subpoena requested:

1. An Excel spreadsheet Identifying all Hosts that rent Accommodation(s) in New York State, including: (a) name, physical and email address, and other contact information; (b) Website user name; (c) address of the Accommodation(s) rented, including unit or apartment number; (d) the dates, duration of guest stay, and the rates charged for the rental of each associated Accommodation; (e) method of payment to Host including account information; and (f) total gross revenue per Host generated for the rental of the Accommodation(s) through Your Website. The Excel spreadsheet should be capable of being organized by gross revenue per Host and per Accommodation.
2. For each Host identified in response to Request No. 1, Documents sufficient to Identify all tax-related communications Your Website has had with the Host, including tax inquiries or tax document requests whether initiated by the Host or You.

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<sup>1</sup> Elizabeth A. Harris, *The Airbnb Economy in New York: Lucrative But Often Unlawful*, The New York Times, Nov. 4, 2013, available at <http://www.nytimes.com/2013/11/05/nyregion/the-airbnb-economy-in-new-york-lucrative-but-often-unlawful.html>.

<sup>2</sup> *Id.*

<sup>3</sup> Brian Chesky, *Who We Are, What We Stand For*, Airbnb Blog (Oct. 3, 2013), <http://blog.airbnb.com/who-we-are/>

<sup>4</sup> *Id.*



Subpoena at 8.<sup>5</sup>

No lawsuit has been filed in relation to the present matter. Verified Pet. 4, ¶ 16. The Attorney General has clarified that Airbnb is not the target of an investigation. Verified Pet. 2, ¶ 6. In a meeting on September 30, 2013, the Attorney General rejected Airbnb's request for clarification about which Airbnb users were subject to New York hotel taxes or how they should apply the various applicable exceptions. Verified Pet. 2, ¶ 7. The Attorney General subsequently declined Airbnb's request to withdraw or modify its subpoena. Verified Pet. 4, ¶ 15. Airbnb has moved to quash on the grounds that, among other things, the subpoena is overbroad in seeking information on Hosts who are not violating the law.<sup>6</sup> Mem. of Law in Supp. of the Verified Pet. ("Mem. of Law") 14.

#### **IV. ARGUMENT**

While generally broad in scope, law enforcement's investigatory subpoena power is constrained by clear procedural limitations that protect important substantive interests, such as the right of law-abiding users of online services to have the records of their activities shielded from unauthorized government snooping. The Office of Attorney General must do more than merely posit that a broad enough subpoena may gather evidence of illegality by one or more individuals; rather, it must exercise its authority within the specific bounds authorized by law. In this case, it has not come close to doing so.

##### **A. The Attorney General's Subpoena Is Invalid.**

It is well settled that governmental entities cannot "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." *In re Future Tech. Assoc.*, 115054/2010, 2011 N.Y. Misc. LEXIS 1352, at \*11-12 (N.Y. Sup. Ct.

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<sup>5</sup> Accommodation is defined as "the room or group of rooms which a Person or Entity offers to rent to a guest or guests in exchange for payment on Your Website, but not including where the Host stays at the Accommodation during the rental period." Subpoena at 3.

<sup>6</sup> An objecting party can move to quash or modify a subpoena under section 2304 of New York Civil Practice Law and Rules. N.Y. C.P.L.R. § 2304 (McKinney 2010).

2011) (citing *In re Brasky*, 40 A.D.3d 531, 533 (N.Y. App. Div. 2007)); *Hill*, 2009 N.Y. Misc. LEXIS 2370, at \*5; *A'Hearn v. Comm. on Unlawful Practice of Law*, 23 N.Y.2d 916, 918 (N.Y. 1969). Accordingly, courts hold that to issue a nonjudicial subpoena such as this one, the Attorney General must make a three-fold showing that: 1) the office has the statutory authority to issue the subpoena; 2) there is a factual basis for the inquisitional action; and 3) the items sought are relevant to the investigation. *In re Suffolk Cnty. Ethics Comm'n.*, 29 Misc. 3d 1136, 1139 (N.Y. Sup. Ct. 2010); *Hill*, 2009 N.Y. Misc. LEXIS 2370, at \*10-11; *In re Brodsky*, 26 Misc. 3d 874, 882 (N.Y. Sup. Ct. 2009) (citing *Pharm. Soc'y of New York v. Abrams*, 132 A.D.2d 129 (N.Y. App. Div. 1987)).

The subpoena issued by the Attorney General should be quashed because it fails to meet the above requirements. First, the Attorney General has failed to demonstrate that, even at the low threshold required by courts, the subpoena was issued pursuant to statutory authority instead of being used as part of an “arbitrary and unbridled” investigation. *A'Hearn*, 23 N.Y.2d at 918 (citing *Carlisle v. Bennett*, 268 N.Y. 212, 217 (1935)). Second, the Attorney General has not articulated any facts that might explain the basis for its hypothetical investigation or what ultimate information it seeks. Third—and most critically—even if the Attorney General was properly authorized to issue the subpoena, the subpoena request is so overbroad in compelling production of a significant amount of irrelevant information that it should be quashed—or at least substantially narrowed—on relevancy grounds.

**1. The Attorney General Has Not Demonstrated Statutory Authority to Issue the Subpoena, Nor Has It Stated a Basis for Conducting an Investigation.**

The Attorney General issued the subpoena in question pursuant to Executive Law § 63(12) and C.P.L.R. § 2302(a). Subpoena at 1. Section 63(12) gives the Attorney General authority to seek injunctive relief and damages for “repeated fraudulent or illegal acts . . . in the carrying on, conducting or transaction of business . . . .” Exec. Law § 63(12) (McKinney 2013). In doing so, the Attorney General is permitted to issue subpoenas pursuant to the C.P.L.R., such

as § 2302(a), upon which the Attorney General currently relies. Subpoena at 1. The Attorney General's invocation of this statutory authority, without more, is insufficient to support the issuance of the subpoena.

Though courts have recognized that § 63(12) confers broad investigatory powers to the Attorney General, nonetheless such "investigations [must be] into possible violations of the law." *Am. Dental Coop., Inc. v. Atty'y Gen. of New York*, 127 A.D.2d 274, 278-79 (N.Y. App. Div. 1987) (investigation into price conspiracies held sufficient); *see also In re Suffolk Cnt'y*, 29 Misc. 3d at 1139-40 (investigation into Code of Ethics violation was sufficient); *Hill*, 2009 N.Y. Misc. LEXIS 2370, at \*12 ("fishing expedition" into person's affairs "solely on the prospect of possible violations of the law" was insufficient and an abuse of authority). Thus while the authority bar is low, the Attorney General cannot simply engage in the proverbial fishing expedition without *some* showing that it is actually investigating violations of the law. Moreover, such investigations must also be legitimate and be "of sufficient substance to warrant investigation." *Hill*, 2009 N.Y. Misc. LEXIS 2370, at \*13; *see, e.g., id.* at \*13-14 (quashing Attorney General subpoena, though issued in the course of investigating employment and pension fraud, because the investigation originated merely from "insubstantial" government complaints); *In re Sussman*, 39 N.Y.2d 227 (1976) (quashing subpoena issued without basis); *In re Nicholson*, 50 N.Y.2d 597 (1980) (upholding subpoena issued on administrator's complaint and ex parte judicial hearing on basis for investigation); *In re Napatco, Inc. v. Lefkowitz*, 43 N.Y.2d 884 (1978) (quashing Attorney General subpoena issued on insufficient basis of advertisement and form solicitation letter); *Myerson v. Lentini Bros. Moving & Storage Co.*, 33 N.Y.2d 250, 259 (1973) (quashing subpoena issued on insufficient basis of unauthenticated "numerous complaints").

Here, the subpoena fails to specify any instances of fraudulent or illegal acts, much less the repeated patterns of such acts required by § 63(12). As Airbnb recounts in its Memorandum, the Attorney General has failed to articulate *any* allegations of wrongdoing, such as tax or housing violations. Mem. of Law 4-13. The Attorney General must make at least a minimal

showing before it is allowed to investigate into the private affairs of citizens in the hopes of discovering violations. See *A'Hearn*, 23 N.Y.2d at 918. Though the Attorney General is not required to demonstrate probable cause or disclose specific details of the investigation, it “must show . . . some basis for inquisitorial action.” *Hogan v. Cuomo*, 3626/08, 2008 N.Y. Misc. LEXIS 7428, at \*17 (N.Y. Sup. Ct. 2008) (emphasis added) (citing *A'Hearn*, 23 N.Y.2d at 918); *Hill*, 2009 N.Y. Misc. LEXIS 2370, at \*13.

## 2. The Attorney General Requests Irrelevant Information.

Assuming *arguendo* that the Attorney General was properly authorized to issue the subpoena under Executive Law § 63(12), the nonjudicial subpoena nonetheless must be limited to items that are “reasonably related to the subject matter under investigation.” *Hill*, 2009 N.Y. Misc. LEXIS 2370, at \*11-12 (citations omitted). Subpoenas that call for “irrelevant or immaterial documents or subject[] the witness to harassment” must be quashed. *Id.* at \*5 (citing *Myerson*, 33 N.Y.2d at 256; *Hyatt v. State of Cal. Franchise Tax Bd.*, 105 A.D.3d 186, 201-02 (N.Y. App. Div. 2013)). Subpoenaed information is only relevant when it has “a reasonable relation to the matter under investigation and the public purpose to be achieved.” *Id.* at 202 (quoting *Anheuser-Busch, Inc. v. Abrams*, 71 N.Y.2d 327, 332 (N.Y. 1988) (citation omitted)).

The Attorney General cannot do so here. First, the Attorney General’s office has not declared what it is investigating; no information can be reasonably related to a non-existent investigation. Second, if the Attorney General’s office is investigating non-payment of taxes by certain Airbnb Hosts,<sup>7</sup> its blanket request for information on “all Hosts that rent Accommodation(s)”, Subpoena at 8 (emphasis added), is a vast overreach. That some Airbnb

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<sup>7</sup> Airbnb theorizes that the Attorney General may be investigating violations of tax collection laws. Mem. of Law 7. This is supported by the Attorney General’s request for “tax-related communications”, Subpoena at 8, and news articles. See, e.g., Gerry Shih, *Accommodation Renter Airbnb Fights NY State Subpoena on Sublets*, Reuters, Oct. 9, 2013, available at <http://www.reuters.com/article/2013/10/09/us-airbnb-subpoena-idUSBRE9981AR20131009>; Dara Kerr, *Airbnb Files Motion to Block New York AG’s Subpoena*, CNET, Oct. 9, 2013, [http://news.cnet.com/8301-1023\\_3-57606814-93/airbnb-files-motion-to-block-new-york-ags-subpoena/](http://news.cnet.com/8301-1023_3-57606814-93/airbnb-files-motion-to-block-new-york-ags-subpoena/).

Hosts may be violating New York's hotel tax laws does not justify the investigation of an overbroad sweep of Airbnb Hosts, especially in light of the fact that the Attorney general has not even alleged any wrongdoing.

Even if the Attorney General was investigating a violation of hotel tax laws as Airbnb posits, Airbnb identified at least six categories of Hosts who are exempt from hotel taxes. Mem. of Law 8-11. These Hosts should have been excluded from the Attorney General's subpoena request because they are irrelevant to a hotel tax investigation. For example, New York statutes uniformly define a "hotel" as "[a] building or portion of it which is *regularly used and kept open* as such for the lodging of guests." NY Tax Law § 1101(c)(1); NYC Admin. Code § 11-2501.5 (emphasis added). The State Tax Department utilizes a number of factors to determine whether a particular rented space constitutes a "hotel" for these purposes, including whether "the operator provides maid and linen service or other customary hotel services for its occupants." *See A Guide to Sales Tax for Hotel and Motel Operators*, N.Y. State Dep't. of Tax. & Finance, Mar. 2008 ("Publication 848" or "Publ'n 848"). This factor would exempt the vast majority of Airbnb's listings since most Airbnb Hosts rent space in their own homes or apartments and do not employ maids or provide room or laundry services. Thus, the subpoena should not have requested information about the Hosts that fall within this exception.

Additionally, Publication 848 exempts the following from taxation:

- "[i]f a person rents a room in his or her residence to a transient occupant on a *less-than-regular basis*." Publ'n 848 at 8 (emphasis added).
- summer homes, described as the "[r]ental of individual, privately owned, *summer homes, camps, beach houses and similar properties*." *Id.* at 24 (emphasis added).
- complete living units that are rented furnished for single-family occupancy where "house cleaning, maid service, room service, mail service, entertainment, planned activities and other services that are commonly provided by hotels are not provided." *Id.* at 25.

Because many Airbnb Hosts certainly fall within these exceptions, and could readily have been excluded from the request, their information should not have been requested in the

subpoena. “Notwithstanding the broad statutes that empower the Attorney General to conduct investigations, even the Attorney general does not have an arbitrary and unbridled discretion as to the scope of what is investigated.” *Hill*, 2009 N.Y. Misc. LEXIS 2370, at \*7 (citing *A’Hearn*, 23 N.Y.2d at 918).

**B. Because Overbroad Subpoenas to Nonparties Have a Chilling Effect on Users, They Deserve Heightened Judicial Scrutiny.**

In assessing whether a subpoena should be quashed or modified, “special weight [should be given] to the burden on non-parties of producing documents to parties involved in litigation.” *Cohen v. City of New York*, 255 F.R.D. 110, 117 (S.D.N.Y. 2008) (citing *Travelers Indemnity Co. v. Metropolitan Life Insurance Co.*, 228 F.R.D. 111, 113 (D. Conn. 2005)); *Concord Boat Corp. v. Brunswick Corp.*, 169 F.R.D. 44, 49 (S.D.N.Y. 1996) (“[T]he status of a witness as a nonparty to the underlying litigation entitles [the witness] to consideration regarding expense and inconvenience.”) (quotations omitted)). Where the nonparty is the custodian of records for user information, subpoenas directed to the nonparty require even greater scrutiny because the interests of the nonparty are often not perfectly aligned with those of the user. While a user’s personal privacy is at stake, this interest is not necessarily shared by the nonparty because its own interests are not directly implicated. *See Gonzales v. Google*, 234 F.R.D. at 687 (court considered risk to users’ privacy *sua sponte* because Google raised an objection based only on a loss of business goodwill). If courts readily allow such overbroad subpoenas, a chilling effect would be cast over users who know that their privacy interests can be compromised at the whim of an overambitious attorney general and that the ability or willingness of the subpoena recipient to push back is uncertain at best. *See, e.g., supra* note 1 (“[E]ven those whose rental side business might surmount legal hurdles were skittish about being identified . . . . [T]hey were also worried that the state might choose to make an example of them.”).

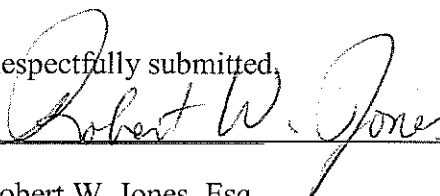
Once user information is improperly disclosed, it can be difficult—if not impossible—to effectively remedy such violations. Users of online services know this, and the compelled disclosure of their private information due to a failure of courts to strictly enforce subpoena

limitations would understandably undermine user trust and drive users away from even the lawful use of online services like Airbnb. *Amici* ask that the Court reject the Attorney General's unfocused and overbroad investigative effort before harm to both Petitioner and its users occurs.

## V. CONCLUSION

This Court has wide discretion to determine how to appropriately quash or limit a subpoena that is overly broad, invasive of privacy or directed at irrelevant information. *Feeley v. Midas Properties, Inc.*, 168 A.D.2d 416, 417 (N.Y. App. Div. 1990) (trial courts possess wide discretion to decide whether information sought is "material and necessary"); *Nitz v. Prudential-Bache Securities, Inc.*, 102 A.D.2d 914 (N.Y. App. Div. 1984) (lower court denial of overbroad discovery request was within lower court discretion). Because the Attorney General's subpoena was not issued under proper statutory authority, requests irrelevant information, and harms individuals' privacy interests, this Court should grant Airbnb's petition to quash the subpoena and/or award any other relief as the Court deems appropriate.

Dated: November 8, 2013

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SUPREME COURT OF THE STATE OF NEW YORK  
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**AIRBNB, INC.,**

**AFFIDAVIT OF SERVICE**

Plaintiff,

Index No.: 5593/13

- against -

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

Hon. Judge Gerald Connolly

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Defendants.

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STATE OF NEW YORK            )  
  ) ss.:  
COUNTY OF RENSSELAER    )

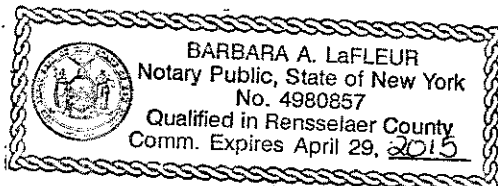
ROBERT W. JONES, being duly sworn, deposes and says:

1. That I am over 18 years of age and am not a party to this action.
2. That on November 8, 2013, I served a copy of the Notice of Motion for Leave to File Brief of proposed Amici Curiae on the Respondent, Eric T. Schneiderman, Attorney General of the State of New York, by personally delivering it to the New York State Attorney General's office at the New York State Capitol in Albany, New York.

*Robert W Jones*

Sworn to before me this  
8<sup>th</sup> day of November, 2013.

*Barbara A. LaFleur*  
Notary Public, State of New York



Albany County Clerk  
Document Number 11507814  
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