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

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| AIRBNB, INC.,<br><br>Petitioner,<br><br>v.<br><br>NEW YORK CITY MAYOR'S OFFICE OF SPECIAL ENFORCEMENT; CHRISTIAN J. KLOSSNER, in his official capacity as the Executive Director of the Mayor's Office of Special Enforcement; and THE CITY OF NEW YORK,<br><br>Respondents. | Index No. _____<br><br>**VERIFIED ARTICLE 78 PETITION, COMPLAINT & MOTION FOR PRELIMINARY INJUNCTION** |

Petitioner Airbnb, Inc. ("Airbnb"), by and through its undersigned counsel, for its Verified Petition and Complaint ("Petition"), alleges this hybrid Article 78 and plenary action as follows:

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## INTRODUCTION

1. For years, the City of New York (the "City") has enforced increasingly onerous restrictions on New Yorkers who wish to share their homes with guests and booking services like Airbnb. In January 2022, the City Council through Local Law 18 of 2022 ("Local Law 18") tasked the New York City Mayor's Office of Special Enforcement ("OSE") with implementing its most extreme and oppressive regulatory scheme yet, which operates as a **de facto ban** against short-term rentals in New York City, leaving Airbnb with no choice but to bring this challenge.

2. Pursuant to Local Law 18 and OSE's implementing rules (the "Challenged Rules"), attached as Exhibit 1,[1] prospective hosts seeking to share their homes must first register with OSE by filing an application that includes a bevy of personal information and documentation, including, most outrageously, private information regarding the number of individuals living in the unit who are not related to the host applicant. Host applicants must notify OSE if the number of unrelated residents in their home changes, which means they must tell the government if, for example, a partner in a romantic relationship moves in or out of the house.

3. In addition to the wealth of personal information the host applicant must provide to OSE as part of the application process, the host applicant must also certify that they understand and agree to comply with unspecified "applicable provisions" of the zoning resolution, multiple dwelling law, housing maintenance code, New York City construction code, and other laws and rules having anything to do with the short term rental of homes in the City. It is a near impossibility for lay New Yorkers to certify

[1] "Exhibit" or "Ex." citations refer to exhibits accompanying the Affirmation of Karen L. Dunn.

compliance with and understanding of the maze of complex regulations in different legal codes governing short-term rentals. The Challenged Rules do not even identify what OSE deems to be the "applicable provisions" of the various laws and codes with which the prospective host must certify understanding and compliance.

4. If, somehow, prospective hosts are willing and able to submit an application making the seemingly impossible certifications that OSE has demanded, OSE's rules go on to impose further restrictions before a registration will be granted, some of which appear completely unjustified. For example, OSE insists that hosts may not have locks on bedroom doors and may not host while on vacation. OSE will review the applications behind closed doors following a "process" that ensures that only a miniscule number of hosts will ever be granted a registration.

5. If OSE approves an application, then booking services like Airbnb must go through a verification process and ensure an exact match across four points of data, including name, address, URL of the listing, and registration number. If there is any discrepancy between the four points of data given to Airbnb by the host and the same information given to the City by the host—*e.g.*, an extra space or the inconsistent abbreviation of "Avenue" to "Ave."—the listing will not be verified. When a verification fails, Airbnb must remove the listing in order to avoid the civil penalties provided for in the Challenged Rules. The Challenged Rules do not provide for a mechanism by which OSE will provide to either Airbnb or the host a reason for the verification failure so that the host can remedy the issue—if there even is an issue—and get their listing verified.

6. On May 3, 2023, OSE Executive Director Christian Klossner informed Airbnb that OSE had only approved **nine** (9) total Airbnb registrations for short-term

rentals in all of New York City.[2] Those nine successfully registered hosts would comprise less than **0.04%** of the active non-hotel listings in New York City on Airbnb's platform that had each been booked at least once as of the beginning of the year.[3] In 2022, the listings for those nine hosts drove 0.05% of Airbnb's annual net revenue of $85 million associated with short-term rental listings in New York City.[4]

7. The registration scheme chills short-term rentals by requiring extensive and intrusive disclosures of personal information and forcing open-ended agreement to labyrinthine regulations scattered across a complex web of laws, codes, and regulations. Once registered, hosts remain subject to onerous ongoing data retention, disclosure, and other obligations, and they must abide by a litany of restrictions on short-term rentals, many of which originate not with the City Council or existing laws, but with OSE's undisclosed policy preferences.

8. The registration scheme also imposes massive burdens on booking services like Airbnb. Both the City Council and OSE have outsourced to booking services, under threat of large civil penalties, the responsibility to verify that hosts are duly registered and to provide detailed transaction reports to facilitate OSE oversight of short-term rentals.

9. Taken together, these features of the registration scheme appear intended to drive the short-term rental trade out of New York City once and for all. Consistent with that objective, OSE failed to consider reasonable alternatives that would not have the effect of ending short-term rentals.

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2 *See* Ex. 2, Email from Christian Klossner, OSE Exec. Dir., to Nathan Rotman, Airbnb Regional Lead (May 3, 2023, 12:27 PM) (identifying Airbnb listings associated with approved registrants).

3 Affidavit of John Merten [hereinafter Merten Aff.] ¶ 4 n.1.

4 *Id.* ¶ 4 n.1.

10. Adding to the pile of legal problems with the Challenged Rules, the City is now in breach of **two** earlier settlement agreements with Airbnb. In 2016, Airbnb challenged a New York state law, which tasked OSE with enforcing a state law prohibiting the advertisement of certain short-term rentals. In exchange for Airbnb's dismissal of the lawsuit, the City promised in 2016 to permanently refrain from taking any action to enforce the advertising restriction against Airbnb. With Local Law 18 and the Challenged Rules, the City has now done exactly what it promised not to do: it has prohibited Airbnb from advertising certain short-term rentals, imposing a penalty for violations. Similarly, the Challenged Rules breach a 2020 settlement in which the City promised to make best efforts to amend a local ordinance that required booking services like Airbnb to submit monthly reports to OSE detailing information about their transactions. Following the amendment, such reports were only required on a quarterly basis and required the reporting of information for only a subset of short-term rentals. Because Local Law 18 and the Challenged Rules revert to a monthly reporting requirement and require reporting on all short-term rentals with no exceptions, the City has breached its implied promise not to change the law in a way that conflicts with the more favorable reporting provisions that Airbnb specifically negotiated.

11. Moreover, separation-of-powers problems abound. In enacting Local Law 18, the City Council has impermissibly delegated unfettered discretion to OSE to implement the registration system in the absence of legislative guidance. OSE, in turn, has purported to fill the gaps in the City Council's standardless delegation by enacting a set of rules that exceed the scope of OSE's authority by impermissibly incorporating OSE's unreasonable interpretations of local laws, codes, and ordinances; imposing

burdens on booking services and hosts that Local Law 18 did not authorize; and implementing OSE's policy preference that short-term rentals should be effectively banned from New York City.

12. The Challenged Rules were promulgated after a defective notice-and-comment process that violated Airbnb's and the public's procedural rights, and since then, OSE has piled additional legal defects and arbitrary and capricious implementation choices on the legally vulnerable scaffold of the underlying Local Law 18.

13. If allowed to stand, the Challenged Rules implementing Local Law 18 will irreparably harm Airbnb's business by chilling host participation in the short-term rental market, thereby decimating Airbnb's short-term rental customer base and business in the City, and by impairing Airbnb's goodwill and reputation with hosts and guests, as well as potential hosts and guests. Additionally, the Challenged Rules will require Airbnb to incur substantial compliance expenditures that it will not be able to recoup even if the Challenged Rules are ultimately set aside, as they must be.

14. The damage of the Challenged Rules will not be limited to Airbnb's business. By preventing participation in the short-term rental market and causing a massive reduction in Airbnb's operations in the City, the Challenged Rules will also adversely affect the livelihood of many New Yorkers who host for much needed supplemental income; leave unaddressed the needs of New Yorkers who require temporary accommodation, particularly in residential areas and/or in Boroughs where there are fewer hotels; deprive visitors to New York of affordable accommodation options, particularly during periods of peak demand that hotels cannot service alone; and

hinder the ongoing recovery of the City's tourism sector in the wake of the COVID-19 pandemic.

15. The Challenged Rules should be declared invalid and unenforceable because they are arbitrary and capricious and violate federal and New York law. Furthermore, because the Challenged Rules will cause irreparable harm to Airbnb's business and the interests of the public at large, Airbnb respectfully requests that this Court issue a preliminary injunction preventing implementation of the Challenged Rules pending a final ruling on Airbnb's Petition.

## PARTIES

16. Petitioner Airbnb is a corporation organized and existing under the laws of the state of Delaware, with its principal place of business in San Francisco, California. Airbnb is an online homesharing platform that enables users to publish, offer, search for, and book short-term and long-term housing accommodations.

17. Respondent the New York City Mayor's Office of Special Enforcement ("OSE") is an agency of the City of New York, created in 2006 by Executive Order No. 96. OSE is charged with overseeing the City's response to quality of life issues, including the operation of illegal hotels. Its enforcement teams comprise staff from multiple City agencies, including the Department of Buildings, the Fire Department, and others.

18. Respondent Christian J. Klossner is the Executive Director of OSE. Upon information and belief, in his official capacity as Executive Director of OSE, Mr. Klossner is responsible for the actions of that agency that are being challenged in this lawsuit.

19. Respondent the City of New York is a municipal corporation organized and existing under the laws of the State of New York.

## JURISDICTION AND VENUE

20. This Court has subject-matter jurisdiction to decide this Petition pursuant to sections 3001 and 7803 of the New York Civil Procedure Law and Rules. The Challenged Rules were a final determination of OSE. This Petition challenges that determination as made in violation of lawful procedure, affected by an error of law, and arbitrary and capricious.

21. This Court also has subject-matter jurisdiction to decide Petitioner's claims seeking damages and declaratory relief pursuant to its general original jurisdiction in law and equity as provided in Article VI, section 7(a) of the New York State Constitution.

22. Venue is proper in New York County Supreme Court pursuant to sections 504(c), 506(b), and 7804(b) of the New York Civil Procedure Law and Rules because Petitioners' claims are asserted against a City agency and officer for actions taken in New York County and because the agency's and officer's principal offices are in New York County.

## FACTUAL ALLEGATIONS

***Homesharing and Airbnb***

23. Airbnb is an online marketplace that connects individuals who wish to offer accommodations and experiences, known as "hosts," with those seeking to book accommodations and experiences, known as "guests." A host can sign-up and use Airbnb's marketplace to list an accommodation, and a guest who wants to book an accommodation can sign up to book or communicate directly with a property's host to

request a booking. Airbnb does not own or control the properties that hosts list on the Airbnb platform, but instead allows hosts and guests to connect with each other to transact, make payments, and communicate.

24. As of January 1, 2023, there were approximately 38,500 active non-hotel listings in New York City on Airbnb's platform that had each been booked at least once.[5]

25. Many Airbnb hosts likewise list their spaces for rental only a minority of the year.

***Airbnb Provides Substantial Benefits to New Yorkers and New York City***

26. Offering short-term rentals through Airbnb is beneficial to the New Yorkers who welcome short-term visitors in their homes. By offering short-term rentals, those hosts can earn supplemental income while using their home more efficiently by renting out unused or under-used space. That makes housing more, rather than less, affordable, and in many cases helps hosts remain in their homes by providing them with the supplemental income necessary to pay mortgages or rent. The median supplemental income of an Airbnb host in New York City was approximately $5,000 in 2021.[6] Without that short-term rental income, the share of the total income that those hosts would pay on rent would increase from 46% to 55%.[7] Consistent with that observation, in a 2021 annual survey, 41% of Airbnb hosts in the United States reported that they use the money they earn sharing their homes to cover the rising costs of living, while 37% of hosts said that Airbnb helps them make ends meet.[8]

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5 Merten Aff. ¶ 4.

6 Ex. 4, Professor Michael Salinger et al., *Short-Term Rentals in New York City: An Economic Analysis of Proposed Rules* (Dec. 3, 2022) [hereinafter Salinger] ¶ 76 & tbl.6.

7 *Id.* ¶¶ 78–79.

8 *Id.* ¶ 80.

27. Short-term rentals also benefit the guests who choose them for their temporary stay in a new city or new neighborhood. In New York City, Airbnb listings bring tourists to areas they might not otherwise visit, fill a need for those who want to stay in a particular neighborhood that does not have hotels, and also provide back-up housing options for New Yorkers who are in need of a temporary place to stay. Economic analysis shows that, while the majority of the City's hotels are in Manhattan, Airbnb listings are more geographically dispersed across the five boroughs.[9] Indeed, fewer than half of total Airbnb listings are in Manhattan, with Brooklyn and Queens home to 37% and 13% of Airbnb listings, respectively.[10] And for city residents who rely on Airbnb for temporary accommodation, Airbnb stays can provide a more affordable and convenient alternative to hotels as they are located in more residential areas.[11]

28. Short-term rentals are also beneficial to the City of New York itself. Airbnb guests make meaningful contributions to the City's economy through their tourism expenditures. Having more accommodation choices and staying at an Airbnb that is on average less expensive than staying at a hotel leaves more money in visitors' pockets[12] for them to spend in the local economy. Additionally, Airbnb listings provide "surge capacity" during periods of peak demand, such as the summer and the winter holiday season, when hotel rooms are nearly booked out.[13] Without Airbnb's listings, fewer tourists could visit New York City during peak dates, depriving the City of significant revenue. That loss would hinder the City's recovery from the COVID-19

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9 Salinger ¶¶ 96–97 & 29 fig.10.

10 *Id.* ¶ 97 & 29 fig.10.

11 *Id.* ¶ 82.

12 Ex. 5, Chiara Farronato & Andrey Fradkin, *The Welfare Effects of Peer Entry: The Case of Airbnb and the Accommodation Industry*, 112 Am. Econ. Rev. 1782, 1783 (2022).

13 Salinger ¶ 92 & 27 fig.9.

pandemic at a critical time, considering that the tourism sector has only rebounded to 85% of pre-pandemic levels.[14]

***Short-Term Rentals in New York City Are Already Subject to Extensive Regulation.***

29. Short-term rentals in New York City are subject to a complex set of requirements and restrictions imposed by vague and, at times, conflicting New York State and New York City laws, regulations, and codes.

**New York State's Multiple Dwelling Law**

30. One of those laws, enacted by New York State in 2010, requires that certain dwellings be occupied for "permanent residence purposes." N.Y. Mult. Dwell. Law ("MDL") § 4-8(a). The City interprets that requirement as prohibiting "inconsistent" uses of such dwellings, including certain rentals for less than 30 days.

31. State law defines a "multiple dwelling" as "a dwelling which is either rented, leased, let or hired out, to be occupied, or is occupied as the residence or home of three or more families living independently of each other." MDL § 4-7.

32. The law categorizes multiple dwellings into two classes. A "class A" multiple dwelling is "a multiple dwelling that is occupied for permanent residence purposes." MDL § 4-8(a). For example, apartment buildings that serve as residence for three or more families that live independently of each other are Class A multiple dwellings. *Id.*; *see also* MDL § 4-7. By contrast, a "class B" multiple dwelling "is a multiple dwelling which is occupied, as a rule transiently, as the more or less temporary

[14] Ex. 6, Rossilynne Skena Culgan, *NYC Tourism Has Rebounded to 85% of Pre-Pandemic Levels*, Time Out (Nov. 16, 2022), https://www.timeout.com/newyork/news/nyc-tourism-has-rebounded-to-85-of-prepandemic-levels-111622.

abode of individuals or families who are lodged with or without meals." MDL § 4-9. Hotels are classic examples of Class B multiple dwellings. *Id.*

33. The MDL contains two exemptions from the general rule that class A multiple dwellings must be used for permanent residence purposes. First, rental of a class A multiple dwelling unit for less than 30 days is permissible for "other natural persons living within the household of the permanent occupant such as house guests or lawful boarders, roomers or lodgers." MDL § 4-8(a)(1)(A). Second, rental of a class A multiple dwelling unit for less than 30 days is permissible for "incidental and occasional occupancy . . . by other natural persons when the permanent occupants are temporarily absent for personal reasons such as vacation or medical treatment, provided that there is no monetary compensation paid to the permanent occupants for such occupancy." *Id.* § 4-8(a)(l)(B).

**New York City's Housing Maintenance and Building Codes**

34. The MDL does not apply to private dwellings, such as single- and two-family homes, but those buildings are nevertheless subject to requirements outlined in various City codes, including the Housing Maintenance Code and New York City Building Code.

35. The City's Housing Maintenance Code applies to "all dwellings," including "private dwellings" defined as "any building or structure designed and occupied for residential purposes by not more than two families." N.Y.C. Admin. Code tit. 27, ch. 2 [hereinafter HMC] §§ 27-2003, 27-2004(6).

36. The Building Code sets forth "the classification of all buildings and structures, and spaces therein, as to use and occupancy." N.Y.C. Admin. Code, tit. 28, ch. 7, Building Code [hereinafter B.C.] § 301.1.

37. All buildings constructed in New York City after 1961 are issued certificates of occupancy, which in relevant part identify the building's occupancy group classification pursuant to section BC 302.1 of the Building Code. A building's occupancy group classification limits its permissible uses; under the New York City Administrative Code, buildings may not be used in a manner "inconsistent with the last issued certificate of occupancy." N.Y.C. Admin. Code tit. 18, ch. 1, § 28-118.3.2.

38. Residential buildings are classified as belonging to one of three occupancy groups: Group R-1, Group R-2, and Group R-3.

39. A Group R-1 occupancy covers "[r]esidential buildings or spaces occupied, *as a rule*, transiently, for a period less than one month, as the more or less temporary abode of individuals or families who are lodged with or without meals." B.C. § 310.5 (emphasis added). An example of a Group R-1 occupancy is a Class B multiple dwelling unit. *Id.*

40. A Group R-2 occupancy covers "buildings or portions" of buildings that "contain[] sleeping units or more than two dwelling units that are occupied for permanent resident purposes." B.C. § 310.4. An example of a Group R-2 occupancy is a Class A multiple dwelling unit. *Id.*

41. A Group R-3 occupancy covers "buildings or portions" of buildings that "contain[] no more than 2 dwelling units, occupied, *as a rule*, for shelter and sleeping accommodation on a long-term basis for a month or more at a time." B.C. § 310.5 (emphasis added). A dwelling that meets the requirements of Group R-1 or R-2 occupancy does not qualify as a Group R-3 occupancy. *Id.* Examples of Group R-3 occupancies include "one- and two-family dwellings." *Id.*

42. One- and two-family dwellings are defined by the Building Code as "[a]ny building or structure designed and occupied exclusively for residency purposes on a long-term basis for more than a month at a time" by the applicable number of families. B.C. § 310.2.

43. Both the Building Code and the Housing Maintenance Code, as well as the MDL, contain definitions of "family" that describe the permanent occupants of a dwelling. In general, those provisions contemplate that members of the family may "occup[y] a dwelling unit and maintain[] a common household" with "boarders, roomers or lodgers." B.C. § 310.2; *see also* HMC § 27-2004(a)(4); MDL § 4(5). Boarders, roomers, and lodgers are those who pay consideration "for living within the household" and do not reside there "as an incident of employment." B.C. § 310.2; MDL § 4(5). Airbnb guests qualify as boarders, roomers, or lodgers under that definition. The Housing Maintenance Code uses the terms "boarders, roomers or lodgers" but does not define the terms.

44. Although the MDL and the New York City Codes incorporate, in their definitions of "family," an expectation that guests will maintain a "common household" with the permanent occupants, that key term does not have a definition of its own. For its part, the MDL does not purport to specify the characteristics of a "common household." By contrast, both the Building Code and the Housing Maintenance Code specify that "[l]ack of access to all parts of the dwelling unit establishes a rebuttable presumption that no common household exists." B.C. § 310.2; HMC § 27-2004(a)(4). But that is the extent to which the two New York City Codes agree on the "common household" requirement. While the Housing Maintenance Code provides that "a common household

is deemed to exist if every *member of the family* has access to all parts of the dwelling unit," the Building Code states that "all *household members*" must have such access for a common household to be deemed to exist. *Compare* HMC § 27-2004(a)(4), *with* B.C. § 310.2, Definition of Family; *see also* B.C. § 202.

***The City Previously Attempted to Enforce a Ban on Advertising of Listings That Would Violate the MDL.***

45. In October 2016, an amendment to the MDL made it "unlawful to advertise occupancy or use of dwelling units in a class A multiple dwelling for occupancy that would violate [MDL § 4-8] defining a 'class A' multiple dwelling as a multiple dwelling that is occupied for permanent residence purposes." MDL § 121(1). This amendment was incorporated into the City's Administrative Code, which provides for enforcement by OSE. *See* N.Y.C. Admin. Code § 27-287.1(1) (collectively with MDL § 121, the "2016 Amendments").

46. On their face, the 2016 Amendments prohibit the advertisement of short-term rentals in class A multiple dwellings unless the permanent resident is present during the rental period (the "Banned Advertisements").

47. Airbnb therefore faced a risk that the City would enforce the 2016 Amendments against Airbnb on the theory that, as a publisher of third-party short-term rental listings, Airbnb purportedly "advertised" unlawful short-term rentals within the meaning of the 2016 Amendments.

48. Accordingly, on October 21, 2016, Airbnb filed a complaint in the U.S. District Court for the Southern District of New York against New York Attorney General

Eric Schneiderman, the City of New York, and New York City Mayor Bill de Blasio (the "2016 Action").[15]

49. In the 2016 Action, Airbnb asserted that the 2016 Amendments violated (i) the Communications Decency Act, 47 U.S.C. § 230; (ii) the First and Fourteenth Amendments of the U.S. Constitution; and (iii) the Home Rule Clause of the New York State Constitution, N.Y. Const. Art. IX, § 2(B)(2). Airbnb sought a temporary restraining order ("TRO") and preliminary injunction against enforcement of the 2016 Amendments.

50. On December 2, 2016—before briefing and argument on the TRO was completed—Airbnb and the City executed a Stipulation of Settlement and Dismissal (the "2016 Settlement Agreement"). The 2016 Settlement Agreement is a valid, enforceable, and binding contract. On December 5, 2016, the Court "so ordered" the 2016 Settlement Agreement. The 2016 Settlement Agreement is made a part hereof and incorporated herein by reference. A copy of the 2016 Settlement Agreement is annexed hereto as Exhibit 7.

51. In the 2016 Settlement Agreement, the City promised to "permanently refrain from taking any action to enforce the [2016 Amendments], including retroactively and/or under any theories of direct or secondary liability, as against Airbnb." Ex. 7 at 2 ¶ 1. In full consideration for the City's promise, Airbnb dismissed without prejudice the 2016 Action as against the City and Mayor de Blasio. *Id.* at 2 ¶ 3.

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[15] *See* Complaint, *Airbnb, Inc.* v. *Schneiderman*, No. 16-cv-8239 (S.D.N.Y. Oct. 21, 2016), ECF No. 1. Because OSE was responsible for enforcing the 2016 Amendments in New York City, the complaint was later dismissed by stipulation as against defendant Attorney General Schneiderman. Stipulation of Settlement and Dismissal as against Eric Schneiderman, No. 16-cv-8239, ECF No. 28 (S.D.N.Y. Nov. 22, 2016).

52. Airbnb fully performed its obligation under the 2016 Settlement Agreement.

***Only Two Years Later, Airbnb Secured a Preliminary Injunction Against a City Ordinance Seeking Data on Homesharing Transactions.***

53. Two years later, New York City enacted another ordinance intended to secure data about homesharing transactions. Local Law 146/2018 ("Local Law 146"), also known as the "Homesharing Surveillance Ordinance," required that booking services like Airbnb submit monthly reports to OSE detailing each transaction for which the booking service charged or collected a fee.

54. In 2018, Airbnb sued the City in the U.S. District Court for the Southern District of New York (the "2018 Action").[16] The lawsuit alleged that Local Law 146 (i) violated (i) the Fourth and First Amendments of the U.S. Constitution; (ii) Article I, § 12 of the New York State Constitution; and (iii) the Stored Communications Act, 18 U.S.C. §§ 2701 *et seq*. Airbnb sought, among other forms of relief, a declaratory judgment under 28 U.S.C. § 2201 as well as a preliminary injunction.

55. In 2019, the court determined that Airbnb was likely to succeed on the merits of its claim under the Fourth Amendment of the United States Constitution and granted Airbnb's motion for a preliminary injunction.[17]

56. On June 12, 2020, Airbnb and the City executed a "Settlement and Release Agreement" (the "2020 Settlement Agreement")—a valid, enforceable, and binding contract. The 2020 Settlement Agreement is made a part hereof and incorporated

[16] *See* Complaint, *Airbnb, Inc.* v. *City of New York*, No. 18-cv-7712 (S.D.N.Y. Aug. 24, 2018), ECF No. 1.

[17] *See Airbnb, Inc.* v. *City of New York*, 373 F. Supp. 3d 467, 495, 501 (S.D.N.Y. 2019).

herein by reference. A copy of the 2020 Settlement Agreement is annexed hereto as Exhibit 8.

57. In the 2020 Settlement Agreement, the City agreed that the Office of the Speaker of the City Council and the Office of the Mayor "shall make best efforts" to make certain amendments to Local Law 146. Ex. 8 at 2 § 1.01.1. Those amendments included (i) limiting Airbnb's reporting obligations to short-term rentals that were rented for more than four days and that either (a) included an entire dwelling unit or (b) were rented to three or more individuals at the same time, *id.* at 10 § 1; and (ii) requiring reports on a quarterly—as opposed to monthly—basis, *id.* at 10 § 2.

58. The amended reporting requirements were specifically calibrated by the parties to prevent "unscrupulous hosts from temporarily renting out dozens of apartments in one building, thus taking apartments off the rental market for tenants," while establishing a regulatory framework that would allow Airbnb to continue doing business in the City.[18]

59. The City also released and discharged Airbnb with respect to the enforcement of Local Law 146. *Id.* at 5 § 2.02.

60. In consideration of the City's promises, Airbnb released and discharged the City with respect to the 2018 Action. *Id.* at § 2.01. Airbnb also agreed not to bring a legal challenge seeking to block implementation or enforcement of the amended Local Law 146. *Id.* at 4 § 1.04.1. The 2020 Settlement Agreement provides that Airbnb would *not* be prevented from bringing legal challenges to any future legislation. *Id.* at 5 § 2.03.

[18] Ex. 9, Carl Campanile, *Airbnb agrees to release information on short-term rentals in NYC*, N.Y. Post (June 12, 2020), https://nypost.com/2020/06/12/airbnb-agrees-to-release-information-on-short-term-rentals-in-nyc.

61. Airbnb has fully performed its obligations under the 2020 Settlement Agreement.

62. The amendments to Local Law 146 set forth above in paragraph 57, which were enacted by Local Law 64/2020 ("Local Law 64"), took effect on January 3, 2021. *See* N.Y.C. Admin. Code §§ 26-2101, 26-2102 (effective Jan. 3, 2021).

63. Airbnb has abided by all of the reporting obligations in Local Law 64.

64. In order to comply with Local Law 64, Airbnb alerted hosts that, if they offered certain types of short-term rentals, Airbnb would be required under the law to share their personal information and certain listing data with the City. If a host did not wish to consent to the disclosure as a condition of continuing to offer short-term rentals, Airbnb had to block them from offering such rentals on the platform.[19]

65. Faced with the choice of having their information disclosed to the City or forfeiting their ability to offer short-term rentals, more than 29,000 hosts elected to leave the short-term rental market in New York City rather than agree to have their information disclosed to the City.[20] And economic analysis shows that the volume of Airbnb listings (excluding Class B listings like rooms in hotels) in New York City fell by 21% in the six months following Local Law 64's implementation when compared to comparator cities including Boston, Chicago, Los Angeles, and Seattle.[21]

***The City Council Enacted Local Law 18.***

66. In 2021, New York City Council Member Ben Kallos and other legislators introduced a proposed bill that would amend the City's administrative code. Among

[19] Merten Aff. ¶ 6.
[20] *Id.* ¶ 6.
[21] Salinger ¶ 41.

other things, the bill required hosts to register with the City in order to operate rentals out of their homes for fewer than 30 consecutive days and created new reporting and verification obligations for booking services such as Airbnb.

67. Although the proposed bill did not contain any legislative findings of fact or statements of legislative purpose, its sponsors' official remarks suggested possible motivations. For example, at a legislative hearing, Councilmember Kallos indicated that the bill proposal was intended to divert tourists to hotels, stating: "Housing should be for New Yorkers. Hotels should be . . . for tourists. It's as simple as that."[22]

68. Councilmember Kallos's bill became Local Law 18 when Mayor Eric Adams returned it unsigned in January 2022.

69. Most of the provisions of Local Law 18 became effective on January 9, 2023, except that the penalty provisions contained in the legislation were set to go into effect on May 9, 2023. OSE has nevertheless represented on its website that it "will not begin enforcement of the registration law requirements until July 2023."[23]

***The City Council Improperly Delegated Overbroad Authority to OSE.***

70. As enacted, Local Law 18 violated the separation of powers because, in certain respects, it conferred upon OSE unfettered discretion to enforce an overbroad and vague mandate to crack down on short-term rentals.

71. For example, instead of establishing preconditions that would require OSE to grant a registration, Local Law 18 simply provides that "[n]o short-term rental registration shall be issued unless" the applicant satisfies the enumerated requirements,

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[22] Ex. 10, Dec. 9, 2021 City Council Stated Meeting on Int. No. 2309, Hearing Transcript at 35:25–36:2.

[23] *See* Ex. 11, *Registration Law: Short-Term Rental Registration and Verification by Booking Services*, NYC Office of Special Enf't, https://www.nyc.gov/site/specialenforcement/registration-law/registration.page (last visited May 31, 2023).

leaving entirely to OSE the decision to issue the registration to a qualified host. N.Y.C. Admin. Code tit. 26, ch.31, § 26-3101 et seq. [hereinafter Local Law 18], § 26-3102(c).

72. Similarly, Local Law 18 affords OSE unfettered discretion to revoke registrations whenever the agency "discovers information that would have precluded [it] from granting the registration had [the information] been known at the time." *Id.* § 26-3104(d)(5).

73. Furthermore, Local Law 18 also empowers OSE to establish registration and renewal fees without imposing any cap or guideline. *Id.* § 26-3102(c)(8).

***In Other Respects, the City Council Constrained OSE's Authority, Which OSE Then Exceeded.***

74. At the same time, Local Law 18 included certain provisions that granted OSE narrow authority to design very specific features of the short-term rental registration scheme. For example, Local Law 18 vested OSE with the limited authority to:

- Prescribe the "form" and/or "manner" in which booking services would report transactions, *see id.* § 26-3202(b), and hosts would apply for short-term rental registration and renewal, post information and certificates in their homes, and keep and submit records, *see id.* §§ 26-3103(a), 26-3103(c);
- Establish a minimum reverification period for booking services, *see* § 26-3202(a);
- Establish procedures for the creation of a prohibited buildings list that would include those buildings where, by agreement or by law, residents could not offer short-term rentals, *see* § 26-3102(l); and

– Set fees for hosts' applications and for booking services' use of the electronic verification system, *see id.* §§ 26-3202(c), 26-3102(c)(8).

75. Yet, as discussed below, over the course of the rulemaking, OSE took it upon itself to impose obligations outside these narrow areas. In so doing, OSE exceeded the limited scope of authority that the City Council delegated to it by engaging in impermissible policymaking that was not—and could not have been—authorized by City Council.

***The Rulemaking Process Highlighted the Public's Concerns with OSE's Extreme Implementation Proposals.***

76. On November 4, 2022, OSE promulgated a set of proposed rules implementing Local Law 18 (the "Proposed Rules") and issued a notice of hearing and opportunity to comment, inviting the public to weigh in by submitting a comment or speaking at a public hearing scheduled for December 5, 2022.[24]

77. The Proposed Rules imposed significant restrictions and obligations on booking services such as Airbnb.

78. The Proposed Rules operationalized Local Law 18's prohibition on booking services "charg[ing], collect[ing], or receiv[ing] a fee in connection with a short-term rental" associated with an unverified listing of a Class A multiple dwelling or private home. *See* Proposed Rules § 22-02(1). In the event the booking service collected such fees, the Proposed Rules imposed substantial per-transaction fines as penalties. *See id.* § 22-05(2).

[24] *See generally* Ex. 12, *Notice of Hearing and Opportunity to Comment on Proposed Rules*, N.Y.C. Off. of Special Enf't, https://rules.cityofnewyork.us/wp-content/uploads/2022/12/Proposed-Rules-Registration-and-Requirements-for-Short-Term-Rentals-Second-Notice-with-certifications.pdf (last visited May 31, 2023).

79. The Proposed Rules further required that booking services verify each short-term rental that is not within a Class B multiple dwelling (i.e., not a hotel or dorm) by submitting four items of information to be collected from the host: the street address of the offered dwelling unit; the host's name; the uniform resource locator or listing identifier being used to offer the short-term rental; and the host's registration number. Each of those four items of information would be matched exactly against corresponding information in OSE's host database to ascertain whether the host and listing have a valid registration. *See id.* § 22-02(1)–(2). As a result, verification may fail even due to typographical issues (e.g., extraneous spaces or accent marks) or abbreviation mismatches (e.g., due to the use of "Ave." instead of "Avenue"). And for each verification attempt conducted by the booking service as required by the Proposed Rules, the booking service would be obligated to incur a non-refundable charge of $2.40. *See id.* § 22-04(3). The rules did not specify that the City would provide booking services any information as to the reason for the failure to verify.

80. Finally, among other things, the Proposed Rules also required that booking services (i) retain certain unique confirmation numbers generated by the City's verification system for each and every verification, and (ii) compile such confirmation numbers alongside other transaction-specific information for submission to OSE on a monthly basis. *See id.* §§ 22-02(4), 22-03.

81. Additionally, the Proposed Rules imposed substantial burdens, obligations, and restrictions on New York City hosts, who are indispensable partners in the local short-term rental market.

82. For example, in connection with initial registration, the Proposed Rules required, among other things, that hosts (i) provide identification and two forms of proof of occupancy, including information about the host's period of tenancy in the home if the host is a tenant, *id.* § 21-03(4)–(6); (ii) disclose the full legal names of all permanent occupants of the home as well as "the nature of their relationship to" the host, *id.* § 21-03(3)(f); (iii) certify that hosts understand and "agree to comply" with the Zoning Resolution, the Multiple Dwelling Law, the Housing Maintenance Code, New York City Construction Codes, and other laws "including but not limited to" various local codes, *id.* § 21-03(7); (iv) disclose the "month and year the [host] began residing in" their home, *id.* § 21-03(3)(i); (v) agree to report all listings to OSE "prior to such listing being used to make an agreement for short-term rental," *id.* § 21-03(8); and (vi) pay a non-refundable $145 fee, *id.* § 21-03(11).

83. The Proposed Rules also imposed ongoing obligations on hosts once they registered with OSE, including an obligation to comply with OSE's interpretations of relevant laws and codes governing short-term rentals, which were incorporated into the Proposed Rules. Notably, the Proposed Rules required registered hosts to refrain from offering the short-term rental "of an entire registered dwelling unit"—even if that unit was in a private dwelling—and from allowing guests "exclusive access to a separate room" by, for example, providing them with means to lock their room when absent. *See id.* § 21-10(12)–(13).

84. Additionally, the Proposed Rules required that registered hosts (i) maintain records of all short-term rental transactions for seven years, § 21-10(5); (ii) report any changes to the information submitted as part of their registration application,

except changes to their phone number or email address, to OSE within five days, *id.* § 21-06(1)–(2); (iii) report all listings to OSE, even if the host previously submitted a materially identical listing for the same home that OSE approved, *id.* § 21-06(3); and (iv) post and maintain an exit and floor plan diagram as well as the registration certificate in the home, *id.* § 21-10(2)–(3).

85. Because registrations expired after two years at most, hosts seeking to renew their registrations would be subject to additional obligations under the Proposed Rules, including an obligation to certify that those hosts retroactively complied with the relevant local laws and codes and with the Proposed Rules, *id.* § 21-07(2), and to pay again a $145 fee for the renewal, *id.* § 21-07(3); *see also id.* § 21-03(11).

86. In issuing the Proposed Rules, OSE represented that "[t]he purpose of this proposed rule is to implement Chapters 31 and 32 of Title 26 of the Administrative Code of the City of New York in accordance with Local Law 18 for the year 2022."[25] The Proposed Rules did not otherwise state any rationale justifying the promulgation.

87. In advance of the December 5, 2022, hearing, Airbnb submitted a public comment[26] and accompanying economic analysis[27] that outlined its concerns about the Proposed Rules and suggested reasonable alternatives for OSE's consideration. Other commenters likewise made submissions through the online NYC Rules Portal and potentially other means.

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25 Ex. 12.

26 Ex. 3, Comments of Airbnb, Inc., on Short-Term Rental Rules [hereinafter Comment] (Dec. 3, 2022).

27 *See generally* Salinger.

88. OSE held a public hearing on December 5, 2022, at which more than 50 members of the public offered comment.[28]

89. In light of the substantial level of public interest in the Proposed Rules, on December 12, 2022, OSE extended the public comment period. It also held a second hearing on January 11, 2023, at which additional members of the public comment.[29]

90. In total, during the extended public comment period, OSE received at least 476 submissions via the online NYC Rules Portal[30] and an unknown number of submissions through other means.

***The Final Rules That Are the Subject of This Challenge Did Not Address the Problems in OSE's Original Proposals.***

91. On February 3, 2023, OSE adopted the final version of the Challenged Rules.[31] In the final Statement of Basis and Purpose, OSE did not further elaborate on the rationale for the Challenged Rules and simply echoed its earlier representation that their purpose was to implement Local Law 18. Nor did OSE explain why it believed its changes to the Proposed Rules adequately addressed the comments it received.

92. OSE revised the Proposed Rules in some minor respects in response to comments received from the public in writing and at the public hearings. But OSE did not identify with particularity any comments received during the rulemaking period,

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28 *See* Ex 13, *Registration and Requirements for Short-Term Rentals: Public Hearing Transcript and Chats*, N.Y.C. Rules, https://rules.cityofnewyork.us/wp-content/uploads/2022/12/SHORT-TERM-RENTAL-PUBLIC-HEARINGS-TRANSCRIPTS-AND-CHATS.pdf (last visited May 31, 2023).

29 *See id.*

30 *See* Ex. 14, *Registration and Requirements for Short-Term Rental*, N.Y.C. Rules, https://rules.cityofnewyork.us/rule/registration-and-requirements-for-short-term-rentals/ (last visited May 31, 2023); Ex. 15, *Registration of Short-Term Rentals*, N.Y.C. Rules, https://rules.cityofnewyork.us/rule/registration-of-short-term-rentals/ (last visited May 31, 2023).

31 *See* Ex. 1, *Registration and Requirements for Short-Term Rentals: Adopted Rule Full Text*, NYC Rules, https://rules.cityofnewyork.us/wp-content/uploads/2022/12/FINAL-RULES-GOVERNING-REGISTRATION-AND-REQUIREMENTS-FOR-SHORT-TERM-RENTALS-1.pdf (last visited May 31, 2023); N.Y.C. ADMIN CODE tit. 43, chs. 21–22, § 21-01 *et seq.* [hereinafter Challenged Rules].

failed to address concerns raised by Airbnb in its public comment, and offered no indication that it considered additional reasonable alternatives proposed by Airbnb that would have reduced the most onerous burdens imposed by the Challenged Rules.

93. Instead, in their final version, the Challenged Rules still require Airbnb to engage in a costly and likely error-prone verification process to match exactly four items of host and listing information against OSE's databases, or face a fine if Airbnb inadvertently collects a fee from an unregistered or otherwise unverified host. *See* Challenged Rules § 22-02. And indeed, the full scope of the cost and likelihood of technical errors that OSE's verification process will entail is unknown because OSE has not yet launched its verification system.

94. Furthermore, Airbnb is still required to monitor OSE's revocations of licenses and reverify listings periodically, including when Airbnb "knows or should have known" that host data underlying the registration has changed. *See id.* § 22-02(5), (7).

95. Finally, among other things, Airbnb is also still subject to the reporting requirements, including an obligation to retain certain verification confirmation codes that OSE's database will generate for each verified listing. *See id.* § 22-03.

96. Along the same lines, the Challenged Rules, as revised, still require that host applicants disclose detailed information about themselves and the basic composition of their household and that they certify that they understand and agree to comply with a long list of enumerated and, even more troublingly, unenumerated provisions of New York law, codes, and regulations. *See id.* § 21-03(3), (7), (9).

97. Although hosts now have a slightly longer period of 15 days to update OSE if any of the information underlying their registration changes, it still requires

amendment of the registration records within a very short period of time. *See id.* § 21-06(2).

98. Finally, registered hosts are still subject to onerous recordkeeping and other requirements, including abiding by OSE's unreasonable interpretations of City Codes as (i) requiring that all occupants of a dwelling unit, including the guests, have access to all parts of the dwelling, including bedrooms, home offices, and other areas where particular individuals may have an expectation of privacy and (ii) categorically barring unhosted rentals of entire dwellings while the host is absent, even for private dwellings. *See id.* § 21-10.

99. It is difficult to imagine any justification for the foregoing web of impenetrable, incomprehensible, and un-administrable rules—and their concomitant burdens on hosts, booking services, and the economy—other than decimation of the short-term rental market and booking services in New York City.

100. The Challenged Rules became effective, and OSE began accepting applications from prospective hosts, on March 5, 2023.

101. As of the filing of this Petition, OSE's website indicated that OSE "will not begin enforcement of the registration requirements until July 2023."[32]

## STANDARD OF REVIEW

102. An Article 78 proceeding raises for review "whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion." N.Y. C.P.L.R. § 7803(3).

[32] *See* Ex. 11.

103. "Administrative rules are not judicially reviewed pro forma in a vacuum, but are scrutinized for genuine reasonableness and rationality in the specific context." *N.Y. State Ass'n of Counties* v. *Axelrod*, 78 N.Y.2d 158, 166 (1991). An agency's action is arbitrary and capricious where it lacks a "sound basis in reason" or a "rational basis" in the record. *Pell* v. *Bd. of Educ.*, 34 N.Y.2d 222, 231 (1974) (citation omitted).

104. An administrative agency's action may be set aside where, among other things, it is "not based on a rational, documented, empirical determination," where it fails to consider an important aspect of the problem, or where "the calculations from which [it is] derived [are] unreasonable." *N.Y. State Ass'n of Counties*, 78 N.Y.2d at 166, 168 (alterations in original) (citations omitted); *see Motor Vehicle Mfrs. Ass'n of U.S., Inc.* v. *State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43, 52 (1983); *NRDC* v. *EPA*, 808 F.3d 556, 569, 574 (2d Cir. 2015).

105. In addition, agency actions that exceed the authority granted by a lawmaker cannot stand. *N.Y. State Superfund Coal., Inc.* v. *N.Y. State Dep't of Envtl. Conservation*, 18 N.Y.3d 289, 294–95 (2011); *see also Tze Chun Liao* v. *N.Y. State Banking Dep't*, 74 N.Y.2d 505, 510 (1989) ("An agency cannot create rules, through its own interstitial declaration, that were not contemplated or authorized by the Legislature and thus, in effect, empower themselves to rewrite or add substantially to the administrative charter itself.").

106. Courts also may annul agency actions that fail to meet the procedural specifications set out under the City Administrative Procedure Act ("CAPA"), which requires all local rules to go through a notice-and-comment process to be valid. *See Council of N.Y.C.* v. *Dep't of Homeless Servs. of N.Y.C.*, 22 N.Y.3d 150, 157–58 (2013).

107. It is "the settled rule that judicial review of an administrative determination is limited to the grounds invoked by the agency." *Scherbyn* v. *Wayne-Finger Lakes Bd. of Coop. Educ. Servs.*, 77 N.Y.2d 753, 758 (1991). Likewise, "[i]f the reasons an agency relies on do not reasonably support its determination, the administrative order must be overturned and it cannot be affirmed on an alternative ground that would have been adequate if cited by the agency." *Nat'l Fuel Gas Distrib. Corp.* v. *Pub. Serv. Comm'n of N.Y.*, 16 N.Y.3d 360, 368 (2011).

108. Additionally, because all necessary parties are before the court and the issues presented by the petition relate to non-constitutional as well as constitutional matters, this Court may treat this proceeding as seeking both Article 78 review and declaratory relief on the plenary claims. See *Kovarsky* v. *Hous. & Dev. Admin. of N.Y.C.*, 31 N.Y.2d 184, 192 (1972); *Heimbach* v. *Mills*, 54 A.D.2d 982, 982 (2d Dep't 1976).

## ARGUMENT

### I. The Challenged Rules Are Arbitrary and Capricious.

109. In promulgating a rule, an agency must "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *State Farm*, 463 U.S. at 43, 52 (quotation marks and citation omitted) (discussing this standard under the federal Administrative Procedure Act); *Brunswick Hosp. Ctr., Inc.* v. *Daines*, 26 Misc. 3d 1225(A), at *4 (N.Y. Sup. Ct. Feb. 22, 2010) (applying the same standard for arbitrary and capricious review of State agency action). Accordingly, an agency is not permitted to "disregard the facts," *Trump on the Ocean, LLC* v. *Cortes-Vasquez*, 76 A.D.3d 1080, 1085, 1087 (2d Dep't 2010), or "ignore the evidence and merely rely upon the [agency's] general authority to administer" rules, *Application of Gorham* v. *Blum*, 86 A.D.2d 505, 506 (1st Dep't 1982) (Fein, J.,

concurring). Nor may it disregard its "duty to consider responsible alternatives to its chosen policy and to give a reasoned explanation for its rejection of such alternatives." *City of Brookings Mun. Tel. Co.* v. *Fed. Commc'ns Comm'n*, 822 F.2d 1153, 1169 (D.C. Cir. 1987) (quotation marks and citation omitted).

110. The Challenged Rules violate those core tenets of reasoned decision-making and are therefore arbitrary and capricious. *First*, the Challenged Rules impose impossibly burdensome, inefficient, and costly requirements on booking services like Airbnb, and OSE did not consider reasonable alternatives. *Second*, OSE failed to account for unintended consequences.

### A. The Challenged Rules Impose Impossibly Burdensome, Inefficient, and Costly Requirements on Booking Services, and Fail to Account for Reasonable Alternatives.

111. "Administrative rules are not judicially reviewed pro forma in a vacuum, but are scrutinized for genuine reasonableness and rationality in the specific context." *N.Y. State Ass'n of Counties* v. *Axelrod*, 78 N.Y.2d 158, 166 (1991). And City agencies have a "duty to consider responsible alternatives to [their] chosen policy and to give a reasoned explanation for [their] rejection of such alternatives." *See City of Brookings*, 822 F.2d at 1169; *Motor Vehicle Mfrs. Ass'n of U.S., Inc.* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 48 (1983) ("At the very least this alternative way of achieving the objectives of the Act should have been addressed and adequate reasons given for its abandonment."); *see, e.g.*, *2 N.Y. Jur. 2d Admin. Law Summ.* (2023)("Decisions of federal authorities are often followed, or at least given considerable weight, by the courts of New York in dealing with problems of administrative law. . . ."); *Adler ex rel. Adler* v. *Educ. Dep't of State of N.Y.*, 760 F.2d 454, 458 (2d Cir. 1985) ("Article 78 review closely

resembles review under the federal Administrative Procedure Act, 5 U.S.C. § 706 (1982). . . .").

112. Here, the Challenged Rules fail that test for at least two reasons. First, the Challenged Rules impose unreasonable burdens on Airbnb that, taken together, appear intended to effectively shut down, rather than regulate, the short-term rental market in New York City. Second, the Challenged Rules do not reflect OSE's consideration of reasonable alternatives, including alternatives that Airbnb proposed during the public comment period of the rulemaking. It appears that at least one reason OSE failed to consider those alternatives is that they would not be as effective in decimating the short-term rental market.

**1. The Challenged Rules Impose Hugely Burdensome Obligations on Booking Services That Are Not Necessary for OSE to Enforce the Verification Scheme Contemplated by the Law.**

113. The Challenged Rules contemplate a verification process that is unreasonably onerous for Airbnb and other booking services. This process consists of an unwieldy four-point verification system and the additional requirement that booking services retain unique confirmation codes for no apparent reason.

a. Four-Point Verification

114. The Challenged Rules require Airbnb and other booking services to verify, before they may collect any fees, four distinct data points for all short-term rentals that are not within a class B multiple dwelling: (i) the street address of the short-term rental, (ii) the host's full legal name, (iii) the associated City registration number, and (iv) the uniform resource locator or listing identifier for the relevant short-term rental offering. *See* Challenged Rules § 22-02(1)–(2). By structuring verification in this way, OSE is effectively charging booking services with ensuring that registrations are validly issued.

But it is OSE's responsibility to confirm that registrations are not duplicative or improper, and OSE cannot outsource its own duty for booking services to discharge in its place at considerable cost.

115. In addition to paying fees to use OSE's electronic verification system once it is operational, Airbnb will have to build an application programming interface ("API") to submit information provided by New York City hosts to OSE for verification. Because OSE has not yet launched its verification system, Airbnb cannot know with certainty what the necessary features of the API will be or how much it will cost to develop all of them. At a minimum, however, the API will not only have to be able to submit host information to OSE's system and receive confirmation numbers in return, but it will also need to track registration expiration dates, annual listing reverification deadlines, and changes to host information that would trigger the reverification requirement in section 22-02(5) of the Challenged Rules.

116. Airbnb will also need to divert resources from other initiatives to expend money and employee time—that it will not be able to recover—on efforts to comply with the verification requirements in the Challenged Rules.[33] Those efforts will necessarily include reworking the technology through which it currently accepts New York City listings for publication on its website. Such modifications would be necessary to delay publication of new listings until each can be verified as required by section 22-02(1) and to provide a field on the public listing in which a host can input their registration number obtained from OSE.

[33] Merten Aff. ¶¶ 13, 14, 16.

117. Even with these technological updates, Airbnb anticipates that it may incur additional costs and potential penalties resulting from OSE's implementation choices with respect to the verification system.

118. The Challenged Rules require an exact match between the four data points provided by a host to the booking service and the corresponding information stored in OSE's registration database. Thus, OSE's electronic verification system may fail to confirm a valid registration if there is even a single typo—including typos introduced by OSE—in any of those four data points. And verification may even fail due to abbreviation mismatches (e.g., due to the use of "Ave." instead of "Avenue," or the use of a middle initial instead of a full middle name, or the use of a two-letter abbreviation of a state instead of the full name) and typographical issues (e.g., extraneous spaces or accent marks).[34] It is fair to say that no school, hospital, business, non-profit, or government entity could function with a verification system designed like this.

119. As Airbnb pointed out in its public comment and related submission, the four-point verification requirement in the Challenged Rules is overly burdensome because it does not contemplate any mechanism for identifying near matches, allowing confirmation based on any fewer than the four data points, or identifying and correcting errors in hosts' information.[35] The four-point verification criteria are also overly burdensome as Airbnb and other booking services may expend resources—including the booking service fee of $2.40 per verification, *see* Challenged Rules § 22-04(3)—attempting to use OSE's electronic verification system, only to have confirmation of a

[34] Salinger ¶ 53 & 14 tbl.2.

[35] Comment at 15; *see also* Salinger ¶ 53 & 14 tbl.2.

lawful short-term rental rejected for a minor clerical error.[36] Simply put, there is no reason to require an exact match across four separate data points unless OSE intends to make these requirements onerous and drive booking services out of the market.[37]

120. This verification system effectively subjects Airbnb and other booking services to a strict liability framework. Unless Airbnb preemptively cancels any transaction that fails verification—even if there is a reasonable probability that a legitimate transaction resulted in a mismatch due to an inadvertent typographical error—Airbnb will face up to $1,500 in civil penalties for each transaction. *See* Challenged Rules § 22-05. As Airbnb informed OSE during the rulemaking process, these harsh penalties pressure booking services to de-list any host whose information does not exactly match the information in OSE's electronic verification database, lest they inadvertently collect a fee from an unregistered host and incur a fine.[38] This places booking services in the untenable position of losing the goodwill of their users by removing their listings from the booking services' platforms for minor discrepancies in the presentation of personal information, even if the discrepancies could originate in OSE's own database.[39] And Airbnb may be unable to pinpoint the source of the problem because the Challenged Rules do not require OSE to inform Airbnb of the grounds upon which an attempted verification failed.

121. Airbnb noted in its public comment several less burdensome alternatives OSE could consider, such as implementing a notice and takedown regime or requiring

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36 Comment at 15.
37 *Id.* at 32.
38 *Id.* at 15–16.
39 *See* Merten Aff. ¶ 11.

booking services to include registration numbers in the quarterly reports they are already required to submit to OSE.[40] Consistent with an attempt to drive Airbnb out of the market, OSE ignored these less burdensome alternatives, rejecting them without explanation, in favor of an obviously draconian regime.

b. Unique Confirmation Codes

122. The Challenged Rules also require that booking services use and retain unique confirmation codes, instead of indexing verification status for listings based on existing listing identifiers. *See* Challenged Rules § 22-02(4). Without a stated justification for the heavy burden it imposes, the confirmation-code requirement appears designed to make compliance as difficult as possible in an effort to decimate, if not shut down, the short-term rental market.

123. After submitting host and listing information to the City's electronic verification system, booking services receive a unique confirmation number. Local Law 18 provides that this unique confirmation number be used in booking services' monthly reporting requirements. But section 22-02(3)–(5) of the Challenged Rules additionally requires that booking services "retain" these unique confirmation numbers and use these confirmation numbers to assess what type of dwelling the listing is and when a registration will expire.

124. The requirement to retain the unique confirmation number and interpret its meaning imposes another unnecessary burden on booking services, which already track (i) registration numbers, as required by the Challenged Rules, and (ii) listings, using existing, platform-specific identifiers.[41] Without explanation, OSE not only chose to

[40] Comment at 31–32.
[41] Comment at 32.

make booking services track yet another code—it chose one that is particularly burdensome to track because the confirmation number is subject to change as registrations expire.

125. There is no indication that OSE evaluated these concerns or considered less burdensome alternatives, including those that Airbnb presented in its public comment. For example, OSE could have required that booking services report confirmation numbers to certify verification as contemplated by Local Law 18, while permitting them to otherwise track listings using existing platform-based listing identifiers.[42] OSE could also have provided for unique confirmation numbers that would not change with each verification. Instead, OSE made arbitrary and capricious implementation choices that do not appear to serve any purpose other than driving booking services out of the rental market.

**2. The Challenged Rules Establish an Unreasonable and Internally Inconsistent Verification Fee Scheme.**

126. The verification and reverification fees imposed by the Challenged Rules on booking services, including Airbnb, are unreasonable and unduly burdensome.

127. Section 22-04(1)–(2) of the Challenged Rules requires that booking services register with OSE to use its electronic verification system and pay an initial registration fee of $2.40 per listing, based on the number of listings each service "reasonably believes" it will verify during the calendar year. Booking services must also pay $2.40 for each listing submitted for verification during a calendar year, with the exception of listings on the Class B multiple dwellings list (such as hotels), which will

[42] *Id.* at 32–33.

not be subject to any fee, and subject to a credit for the initial registration fee. Challenged Rules. § 22-04(3).[43]

128. As Airbnb explained in its public comment, requiring booking services to pay for the verification of tens of thousands of listings that could potentially be used during a calendar year, but for which the booking service may never collect any fee, is unreasonable.[44] For example, booking services would have to pay fees each year to verify a host that keeps an active listing but rents less than once per year, to attempt to verify an ineligible host who makes a listing without valid registration, or to attempt to verify a registered host who submitted personal information containing a typo that will preclude verification.

129. Following the rulemaking process, OSE amended section 22-04(3) to provide that "[r]everification of a listing in compliance with section 22-02(5) . . . shall not result in an additional charge." On its face, the revised provision did not include a reference to frequency and, by its plain terms, exempted booking services from ever paying any additional charges for verification beyond the payment made in connection with a listing's initial verification. However, in the Statement of Basis and Purpose for the Challenged Rules, OSE described this change as a "[c]larifi[cation]" that "the fee for

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[43] Under the short-term rental regulations that went into effect in 2020, OSE has an obligation to maintain a list of Class B multiple dwellings and update the list at least every six months. Rules of City of N.Y. Mayor tit. 43, § 17-05(3). OSE has not lived up to this obligation. The list available as of May 30, 2023 was last updated in April 2022, is missing dozens of iconic New York City hotels (for example, the Plaza Hotel), and is maintained using abbreviations and address ranges that will make it difficult or impossible to verify Class B listings using the required four-point verification method under section 22-02(1)–(2) of the Challenged Rules. *See* Ex. 18, Class B Multiple Dwellings List, NYC Office of Special Enforcement, https://www.nyc.gov/site/specialenforcement/reporting-law/class-b-mdl.page#:~:text=This%20class%20includes%20hotels%2C%20lodging,and%20college%20and%20school%20dormitories.%E2%80%9D (last accessed May 30, 2023).

[44] Comment at 35–36.

a booking service to use the verification system shall be assessed once per listing per calendar year, not once per listing per verification." Faced with these inconsistent articulations of what the Challenged Rules require, booking services cannot know with reasonable certainty whether they are in fact required to pay for reverification on an annual basis, and will be exposed to either overpayment or potential liability if they guess wrong. In any event, to the extent that booking services are still required to pay for reverification, that requirement is burdensome for the reasons stated above.

130. These provisions are also irrational in that they do not impose fees equally across all short-term rental listings. If the rationale for the verification fees is to recoup costs incurred by OSE, there is no reason it should exempt Class B multiple dwellings (e.g., hotels and dorms) from an associated verification payment. Moreover, OSE has provided no explanation for this differential treatment. OSE is therefore either acting irrationally or imposing the fee as a deterrent to short-term rentals in residential apartments and one- and two-family homes.

131. Airbnb raised these concerns in its public comment and proposed that OSE impose a less burdensome and more consistent fee structure. OSE has ignored those suggestions, articulated no rationale for the arbitrary fee scheme it imposed, and provided no indication that these fee requirements were rationally imposed or related to the cost of maintaining the electronic verification system.

132. For these reasons, OSE has acted arbitrarily and capriciously. And as with other requirements, OSE's implementation choices with respect to fees do not appear to serve any purpose other than making compliance as onerous as possible, even if that may foreseeably result in the shutdown of the short-term rental market in New York City.

### 3. The Challenged Rules Require Burdensome and Expansive Monthly Reporting and Ignore Reasonable Alternatives Identified During the Rulemaking.

133. OSE has imposed overly expansive and unduly burdensome monthly reporting requirements without articulating any rationale or basis for them.

134. The Challenged Rules require Airbnb and other booking services to compile transaction-specific information, on a monthly basis, for disclosure to OSE. *See* Challenged Rules §§ 22-02(4), 22-03. Specifically, Airbnb must produce, "in the format published on [OSE's] website," and through a "secure portal" accessed from that website, a monthly report listing each uniform resource locator or listing identifier associated with transactions processed by Airbnb, as well as the unique confirmation number obtained from the electronic verification system. Challenged Rules § 22-03(1). Additionally, in the monthly report, Airbnb must either provide the required data "once per transaction" or list the number of transactions associated with each unique confirmation number. *Id.*

135. These requirements impose considerable burdens on Airbnb. As Airbnb stated in its public comment, to comply with this monthly reporting requirement, Airbnb must divert employee time—not to mention other company resources—to collecting, maintaining, and producing the substantial amount of data that the provision demands.[45] And each month, Airbnb would have to collect all of the data subject to this reporting requirement, store it, determine in which month's report to OSE it must be included, organize it consistent with OSE's chosen format, and then electronically submit it to OSE.[46] Airbnb expects that this process will require 160 hours of employee time each

[45] Comment at 17; Merten Aff. ¶ 15.
[46] Merten Aff. ¶ 15.

month that could otherwise be spent advancing company initiatives, costing it $27,200 just to compensate those employees for their time.[47]

136. And, as Airbnb made plain in its comment, reasonable alternatives to this unreasonably burdensome requirement abound. For example, OSE could have reduced the frequency of the required reports to quarterly or annually, instead of monthly, or permitted booking services to use a reporting period aligned with their existing business practices, rather than mandating an arbitrary monthly reporting period.[48] In fact, Airbnb's current practice (consistent with Local Law 64 and Airbnb's settlement agreement with the City) is to provide quarterly reports containing the extensive information that Local Law 64 requires,[49] and OSE has provided no indication that Airbnb's disclosures are insufficient or defective in any way.

137. By imposing unreasonably burdensome reporting requirements, failing to both address concerns raised by Airbnb, and ignoring may reasonable alternatives that were available, OSE has acted in an arbitrary and capricious manner. Those actions appear deliberately calculated to pile on burdens to try to shut down Airbnb's business.

**4. The Challenged Rules Establish Disproportionate, Punitive Fines.**

138. The Challenged Rules, without justification, unreasonably impose steep penalties that amount to punitive fines on Airbnb and other booking services.

139. Section 22-05(2) of the Challenged Rules imposes penalties of up to $1,500 or three times the fee collected by the booking service for the improper collection of fees in connection with unverified short-term rentals. Section 22-05(2) allows OSE to

47 *Id.* ¶ 15.
48 Comment at 36.
49 Merten Aff. ¶ 6.

collect this penalty for "each" transaction that violates section 22-02, which, in turn, imposes a long list of onerous requirements on booking services. Similarly, for reporting violations—including, based on the face of the Challenged Rules, even a one-time violation of the monthly reporting requirement—section 22-05(3)–(4) imposes penalties of not more than the greater of $1,500 or the total amount of fees that the booking service collected for transactions related to the registration number or uniform resource locator during the preceding calendar year. These high penalties are grossly disproportionate to the gravity of the violations they purport to penalize, and are therefore punitive rather than solely remedial.

140. While OSE made minor amendments following the public comment period to provide a limited safe harbor, it could have—as Airbnb suggested—provided for a more reasonable penalty scheme for noncompliance by booking services. For example, OSE could have provided for more reasonable fees aimed at remediation rather than punishment.

141. Despite Airbnb's attempts to bring these concerns to OSE's attention and to propose reasonable alternatives, OSE has maintained an unreasonably punitive fine scheme. OSE did not and cannot articulate any justification for this fine scheme or for not pursuing more reasonable, proportionate, and substantially lower fine amounts. It therefore acted in an arbitrary and capricious manner.

### B. The Challenged Rules Arbitrarily and Capriciously Incorporate OSE's Unreasonable Interpretations of New York City Laws and Codes.

142. The Challenged Rules incorporate and give the effect of law to OSE's unreasonable interpretations of local laws, codes, and ordinances, including by (i) requiring that all registered hosts maintain a common household with guests by refraining

from restricting guest access to private areas of the home, like bedrooms or home offices, and (ii) by categorically prohibiting all hosts, including those who live in private dwellings, from offering unhosted short-term rentals of their entire homes while temporarily absent. *See, e.g.*, Challenged Rules §§ 21-08(8); 21-10(12)-(13).

143. Local Law 18 itself does not contain such restrictions or interpretations, providing only that host applicants shall comply with the law and that the issuance of a registration shall not be construed as permission for or approval of a use of a dwelling unit that would violate the law. *See* Local Law 18 § 26-3102(c)(3), (g). And other New York City laws and codes do not impose the restrictions on short-term rentals that OSE has imported into the Challenged Rules.

144. The Challenged Rules mischaracterize the Housing Maintenance Code as requiring that "every member of the household including the rentee has access to all parts of the dwelling unit." § 21-10(12). But that is not what the Housing Maintenance Code says. Rather, it states that "every member of the family," and not the boarders, roomers, or lodgers maintaining a common household *with the family*, must have access to all parts of the dwelling unit. *See* HMC § 27-2004(a)(4). Ignoring the plain language of the Housing Maintenance Code, the Challenged Rules instead track a conflicting definition in the Building Code that provides that a common household will be deemed to exist if "all household members have access to all parts of the dwelling unit." B.C. § 310.2. OSE has not explained the bases, if any, for its choice to privilege the Building Code in resolving this conflict in a manner that defies common sense.

145. Similarly, OSE has categorically barred all hosts offering "the unhosted rental of an entire unit," albeit without defining the term "unhosted." Challenged Rules

§ 21-08(8). But that prohibition is inconsistent with the Housing Maintenance Code, which contains no restrictions on short-term rentals in private dwellings and makes no reference to the occupant's "presence." And it is also inconsistent with the Building Code, which contemplates that one- and two-family homes shall be classified as Group R-3 occupancies—and thus subject to the ordinary building and fire safety requirements applicable to one- and two-family homes—so long as they are "occupied, *as a rule*, for shelter and sleeping accommodation on a long-term basis for a month or more at a time." B.C. § 310.5 (emphasis added). "As a rule" is a term of art that means that "a secondary use of the building, different from the specified primary use, is permitted." *City of New York* v. *330 Cont'l LLC*, 60 A.D.3d 226, 231 (1st Dep't 2009).

146. Thus, under a plain reading of the Building Code, the primary use of the unit is consistent with its R-3 occupancy classification so long as its primary occupant is usually present on the premises and using the dwelling for permanent residential purposes. And that remains the case even if the rest of the time the dwelling is offered as a short-term rental without the host present. That means that any heightened building and fire safety requirements that may apply to other buildings—including hotels that qualify as R-1 occupancies—do not apply to private dwellings just because they are rented out on a short-term basis as a secondary use. And while there are different time periods one could use to measure "usually" when determining primary use—e.g., weekly, monthly, yearly—the most natural metric is an annual one. Contrary to OSE's categorical bar on unhosted rentals in all dwellings, the Building Code permits hosts to offer unhosted rentals of their private dwellings for 182 days out of the year or fewer.

147. By construing ambiguities in the City's Codes, without explanation, in favor of restricting short-term rentals, and then giving those unreasonable interpretations the force of law by incorporating them into the Challenged Rules, OSE has acted arbitrarily and capriciously. Enshrining OSE's ad hoc and unreasonable interpretation of the Building Code as categorically barring unhosted STRs even in private dwellings would render the words "as a rule" in BC section 310.5 totally meaningless. And it would be *ultra vires* insofar as it would disregard the very text of the Building Code OSE purports to enforce.

### C. The Challenged Rules Are Arbitrary and Capricious Because OSE Failed to Account for Unintended Consequences.

148. The Challenged Rules are also arbitrary and capricious because OSE failed to consider, or account for, the many unintended consequences of the registration scheme and accompanying requirements and penalties.

149. An agency's promulgation must be set aside if the agency fails to consider an important aspect of the problem it seeks to address. *State Farm*, 463 U.S. at 43, 52. In promulgating the Challenged Rules, OSE did not consider the full foreseeable impact of the Challenged Rules.

#### 1. The Challenged Rules Will Chill Hosts from Offering Short-Term Rentals.

150. The overbroad, hugely burdensome, and virtually impossible to navigate requirements set forth in the Challenged Rules will substantially chill hosts from engaging in the lawful short-term rental trade. There will be hosts who simply cannot meet these requirements, and hosts who (reasonably) are unwilling to try. This chilling effect will not only decimate the short-term rental market and harm Airbnb's business and that of other booking platforms—it will also affect the livelihood of many New

Yorkers who host for supplemental income; leave unaddressed the needs of New Yorkers who need back-up temporary accommodation, particularly in residential areas and/or in boroughs where there are fewer hotels; deprive visitors of affordable accommodation options, particularly during periods of peak demand that hotels cannot service alone; and hinder the ongoing recovery of the City's tourism sector in the wake of the COVID-19 pandemic.

151. As part of the initial eligibility and registration requirements, the Challenged Rules require hosts to disclose a substantial amount of personal and potentially sensitive information, as well as information to which hosts may not even have access, and to make onerous and sweeping certifications about compliance with New York City laws and codes. *See* Challenged Rules § 21-03(3)–(11).

152. Though OSE made minor amendments following the rulemaking process, in their final form, the Challenged Rules still operate to deter hosts who are themselves part of marginalized groups—including but not limited to LGBTQ people and undocumented people—and who may have cause to be concerned about disclosing their full names.

153. As part of applying for and then maintaining their registration, hosts are required to (i) comply with OSE's interpretations of relevant laws and codes as incorporated into the Challenged Rules, regardless of their reasonableness; (ii) maintain records of short-term rentals for at least seven years; (iii) report updated registration information within business 15 days of a change; and (iv) post and maintain an exit diagram as well as the registration certificate in the dwelling. *See id.* §§ 21-06(1)–(2); 21-10(1)–(3), (5), (12).

154. Further, hosts pay a non-refundable $145 fee when initially applying for registration and for each subsequent renewal. *See* §§ 21-03(11); 21-07(3). This registration fee will deter hosts—especially those who host only occasionally throughout the year or who seek registration preemptively in the event that they might wish to host in the future, as the registration fee will make up a more significant share of their expected earnings.

155. Confirming Airbnb's concerns, as of May 3, 2023, OSE had only approved nine (9) registrations since it began receiving applications on March 6, 2023.[50] These newly registered hosts would comprise less than 0.04% of the non-hotel listings in New York City that had each been booked at least once as of the beginning of the year.[51]

156. Additionally, past experience indicates that onerous requirements like those in the Challenged Rules will deter hosts from applying for registration. As explained above, the City had previously enacted Local Law 64, which required booking services to disclose to OSE, on a quarterly basis, hosts' names, listing addresses, email addresses, and phone numbers associated with certain types of short-term rental listings.

157. In order to comply with Local Law 64, Airbnb alerted hosts that, if they offered certain types of short-term rentals, Airbnb would be required to share their personal and listing data with the City. If a particular host did not wish to consent to the disclosure as a condition of continuing to offer short-term rentals, Airbnb had to block them from offering short-term rentals on the platform. Faced with that choice, more than

[50] *See* Ex. 2 (identifying Airbnb listings associated with approved registrants).
[51] Merten Aff. ¶ 4 n.1.

29,000 hosts elected to leave the short-term rental market rather than agree to have their information disclosed to the City.[52]

158. Economic analysis shows that the volume of non-Class B Airbnb listings in New York City fell by 21% following Local Law 64's implementation compared to comparator cities.[53] Some of the impacted hosts may have exited the short-term rental market out of fear that OSE would use the data to engage in overbroad enforcement of the local laws restricting short-term rentals.

159. In addition to facing burdensome and invasive disclosure requirements, otherwise eligible hosts will be deterred from participating in the lawful short-term rental market by the vague and difficult-to-parse attestations and ongoing reporting and recordkeeping obligations.[54]

160. Despite Airbnb raising these concerns in its public comment, OSE has ignored these consequences for hosts and the chilling effect on the short-term rental market in New York City.

**2. The Hugely Burdensome Requirements Imposed on Booking Services Will Drive Them Out of the Market.**

161. The Challenged Rules impose burdensome, inefficient, and costly obligations on Airbnb that will limit Airbnb's ability to do business and will all but eliminate the short-term rental market in New York City.

162. Airbnb's business in New York City will be interrupted—and virtually ground to a halt—by the implementation of the Challenged Rules because Airbnb would be forced to remove current listings until it can verify them. Section 22-02(1) provides

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52 *Id.* ¶ 6.
53 Salinger ¶ 41.
54 *See* Merten Aff. ¶ 7.

that "[a] booking service shall not charge, collect, or receive a fee from a person in connection with a short-term rental of a dwelling unit or housing accommodation unless such booking service has used the electronic verification system maintained by [OSE]" to verify the listing. Given that guests may book listings with hosts in New York City without Airbnb's prior approval (and that Airbnb would ordinarily automatically receive a fee in connection with those transactions), Airbnb cannot allow existing, unverified listings to remain active on its website without exposing itself to penalties from OSE. As of January 1, 2023, there were approximately 38,500 non-hotel listings for New York City on Airbnb's platform that had each been booked at least once.[55] Airbnb estimates that it would lose approximately 95% of its net revenue associated with short-term rental listings in the New York City market if it removed all New York City listings subject to the Challenged Rules' verification requirements in advance of verification.[56] That would be approximately $6.7 million lost if the disruption is limited to a month.[57] This impact would be exacerbated by uncertainty about OSE's expected processing time for registrations because the Challenged Rules do not require that OSE issue registrations by a date certain following an application.

163. Implementation of the Challenged Rules would also damage Airbnb's reputation and impair the company's goodwill. Airbnb will be forced to cancel guests' booked stays in New York City as it works through the newly required verification process for all currently active listings, and these cancellations would severely harm guest trust in Airbnb. As of May 29, 2023, guests have booked more than 56,500 short-

55 Merten Aff. ¶ 4.
56 *Id.* ¶ 4.
57 *Id.* ¶ 4.

term rentals in New York City through Airbnb that are scheduled to begin after July 1, 2023.[58] More than 5,500 of these short-term rentals, booked for more than 10,000 guests, are scheduled to begin in the first week of July 2023.[59] Many of these more than 10,000 guests would be forced to spend time finding alternate accommodations or to alter their plans in other ways because the short-term rentals they have booked would not be able to be verified before their stays begin. Even if Airbnb were to subsidize new bookings for guests displaced due to the Challenged Rules, it would likely not be able to facilitate a new booking for each guest with a host who can provide a near-identical location and stay experience to that which each guest had chosen to book originally. For example, a guest who had booked a stay in the Bronx near a sick grandparent would certainly not be able to have the same trip experience if rebooked to a stay in Brooklyn. Nor could that guest necessarily find a hotel to accommodate them in the neighborhood in which they need to stay. All of these disruptions to guests' trips would irreparably harm Airbnb's goodwill—even if it expended all of the resources it could to minimize the adverse impacts of the Challenged Rules on guests.[60]

164. As discussed above, *supra* ¶¶ 116, 135, the short-term rental market in New York City will also be harmed because the Challenged Rules will force Airbnb to divert resources from other initiatives to expend employee time—that it will not be able to recover—and money on efforts to comply with the verification and reporting obligations in the Challenged Rules.[61] This lost time would cause harm to Airbnb's

[58] *Id.* ¶ 8.
[59] *Id.* ¶ 8.
[60] *Id.* ¶¶ 9–10.
[61] *Id.* ¶ 17.

business as damages cannot turn back time and allow Airbnb to advance strategic initiatives designed to improve guest and host experiences that its personnel would have focused on but for the Challenged Rules.[62]

165. Despite Airbnb raising these concerns in its public comment, OSE has ignored these consequences for booking services platforms and their detrimental effect on the short-term rental market in New York City.

**3. The Challenged Rules Endanger Hosts' Safety and Privacy.**

166. The Challenged Rules introduce serious safety and privacy concerns for hosts and their households.

167. Though OSE made minor amendments following the rulemaking process, the Challenged Rules still require hosts to disclose an invasive amount of personally identifying information to obtain and maintain a short-term rental registration, including their full legal name and basic household composition. *See* Challenged Rules § 21-03(3). Once registered, hosts have a duty to update the City with respect to changes in their information (including changes to the composition of their household) other than their phone number or email address, within 15 business days of the change. *See id.* § 21-06(1)–(2). A short-term rental host who had not rented their home in months would have to remember to report a death, birth, marriage, break-up, or other life event to OSE, within three weeks.

168. Additionally, the disclosure of address information and the requirement that hosts disclose their legal names to OSE, with only limited exceptions, expose hosts in vulnerable domestic or immigration situations and others at risk of stalking,

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62 *Id.* ¶ 17.

harassment, or violence, and the requirement to disclose household composition uniquely burdens LGBTQ individuals, who are more likely to have privacy and safety concerns regarding their associational relationships.

169. In addition to the invasive disclosure requirements, as discussed above, the Challenged Rules incorporate unreasonable interpretations of relevant New York City Codes that ignore serious safety concerns of hosts and guests alike. As it has made clear to the public,[63] OSE will presume that hosts are not maintaining a common household with their short-term rental guests if those hosts reasonably seek to prevent their guests from accessing, for example, their children's rooms, or sensitive material in home offices, storage rooms, or host bedrooms, even when hosts and their household members are sleeping. Likewise, vulnerable guests must allow unimpeded host access to their rented room, even if they wish to maintain privacy and safety while staying in someone else's home, or face a presumption that their short-term rental is noncompliant with the Challenged Rules.

170. OSE's interpretation is unreasonable because the Housing Maintenance Code requires only that "every member of the family," and not the boarders, roomers, or lodgers maintaining a common household with the family, must have access to all parts of the dwelling unit. *See* HMC § 27-2004(a)(4). In the Challenged Rules, OSE miscites the Housing Maintenance Code in requiring that "every member of the household including the rentee has access to all parts of the dwelling unit." Challenged Rules § 21-

[63] *See* Ex. 16, *Information for Hosts*, N.Y.C. Off. of Special Enf't, https://www.nyc.gov/site/specialenforcement/stay-in-the-know/information-for-hosts.page (last visited May 31, 2023) ("Internal doors cannot have key locks that allow guests to leave and lock their room behind them. All occupants need to maintain a common household, which means, among other things, that every member of the family and all guests have access to all parts of the dwelling unit.").

10(12). OSE's preferred interpretation arbitrarily gives the force of law to the language contained in the Building Code, but without acknowledging, much less addressing, the conflicting requirement contained in the N.Y.C. Administrative Code via the Housing Maintenance Code. OSE has provided no justification for its construction of the ambiguity in the City codes, which seemingly serves no purpose other than to deter hosts from offering short-term rentals and guests from safely availing themselves of such accommodations.

171. Despite Airbnb raising these concerns in its public comment, OSE has ignored these serious safety concerns for hosts and their household members.

**4. The Challenged Rules Will Harm New York City's Tourism Industry, Which Will Disproportionately Impact Historically Disadvantaged Groups.**

172. The Challenged Rules will significantly harm tourism and the New York City economy, and this harm will disproportionately impact historically disadvantaged groups.

173. New York City tourism will suffer because fewer short-term rentals will be available to visitors, and OSE has not produced any analysis to demonstrate that the hotel industry will be able to meet the demand for short-term accommodations.

174. Economic analysis shows that Airbnb properties provide surge capacity during such periods—including in the summer months and the winter holiday season—when hotel rooms are nearly booked out.[64] Airbnb's ability to provide surge capacity is inherent in its business model, as Airbnb allows hosts the flexibility to list their properties

[64] Salinger ¶¶ 88–90 & 26 fig.7. During the summer months and winter holiday season, hotel occupancy rates are over 90%. *Id.* ¶¶ 88, 90 & 26 fig.7. For instance, in 2019, during periods of peak demand when hotel occupancy rates exceeded 90%, Airbnb occupancy rates only fluctuated between 78% and 86%. *Id.* ¶ 90, & 26 fig.7.

during peak periods (such as New Year's Eve) and de-list them at other times.[65] The hotel supply, by contrast, is more rigid, as hotels cannot be built during peak times and taken off the market when tourism is slower. It follows that with fewer short-term rentals on the market, the City's surge capacity would decline, enabling fewer tourists to visit on peak dates.

175. The Challenged Rules also create disproportionate negative impacts for the tourism industry and residents in boroughs outside Manhattan, where more than half of Airbnb's listings in New York City are located.

176. Economic analysis shows that the presence of short-term rentals in a neighborhood leads to an increase in retail investments and tourism infrastructure.[66] The economies of these neighborhoods, in which local business owners have made investments, will thus tend to be those most disproportionately harmed by the reduction in short-term rental supply that will result from the Challenged Rules.

177. Relatedly, economic analysis shows that, because the Challenged Rules will harm tourism in New York City, they will disproportionately harm historically disadvantaged groups, including low-income individuals, members of communities of color, immigrants, and low-skilled workers,[67] as members of communities of color work 66% of tourism jobs in the City, with immigrants working 46%—both higher shares than the City's average in the total work force.[68]

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65 *Id.* ¶ 92 & 27fig.9. Airbnb's ability to provide surge capacity is also shown by the fact that short-term rentals, even more so than hotels, are subject to seasonality. *See id.* ¶¶ 89–9 & 26 figs.7, 8.

66 *Id.* ¶ 95; *see also id.* ¶¶ 94, 98 & 28 tbl.8.

67 *Id.* ¶¶ 100–01 & 31 tbl.9.

68 *Id.* ¶ 101.

178. Despite Airbnb raising these concerns in its public comment, OSE has ignored these serious consequences for the tourism industry in New York, at a time when the sector is still recovering from the downturn caused by the COVID-19 pandemic.

#### 5. The Challenged Rules Further Harm Historically Marginalized Hosts and Travelers in Other Ways, Too.

179. The Challenged Rules disproportionately harm historically marginalized hosts and travelers.

180. The Challenged Rules create heightened barriers to short-term rental registration for (among others) undocumented people, LGBTQ people, and survivors of violence. Members of each of these historically marginalized groups face heightened safety concerns from disclosing personal identifying information, as would be required by the Challenged Rules.

181. The Challenged Rules also disproportionately impact low-income travelers. Many visitors to New York City—such as interns, students in medical training, visitors seeking treatment at New York City hospitals, and travelers visiting family in outer boroughs—have unique needs that cannot adequately be addressed by hotels, and rely on Airbnb and short-term rental hosts for accommodation.

182. Despite Airbnb raising these concerns in its public comment, OSE has ignored these serious consequences for hosts and travelers who are members of marginalized groups.

## II. The Challenged Rules Breach the Terms of the City's 2016 and 2020 Settlements with Airbnb.

### A. 2016 Settlement

183. In the 2016 Settlement Agreement, the City promised to "permanently refrain from taking any action to enforce the [2016 Act], including retroactively and/or

under any theories of direct or secondary liability, as against Airbnb." Ex. 7 at 2 ¶ 1. That promise was material to Airbnb's agreement to settle and dismiss the 2016 litigation.

184. Airbnb has fully performed its obligations under the 2016 Settlement Agreement. Airbnb dismissed the 2016 action against the City and Mayor de Blasio without prejudice. *Id.* at 2 ¶ 3.

185. On November 13, 2021, the City materially and substantially breached the 2016 Settlement Agreement by enacting Local Law 18. On February 3, 2023, the City materially and substantially breached the 2016 Settlement Agreement when OSE published the Challenged Rules.

186. The City's enactment of Local Law 18 and OSE's issuance of the Challenged Rules are "action[s] to enforce" the advertising restriction contained in the 2016 Amendments because they prohibit Airbnb from—and establish a penalty for—advertising certain short-term rentals. *See id.* at 2 ¶ 1. The City's enactment of Local Law 18 and OSE's issuance of the Challenged Rules are also "actions to enforce' the advertising restriction contained in the 2016 Amendments for the additional reason that they are actions in furtherance of the City's ability to enforce against Airbnb restrictions on advertising short-term rentals in the imminent future.

187. The City's breach was material because the promise to "permanently refrain from taking any action to enforce" the 2016 Amendments went to the root of the agreement between Airbnb and the City. The City's breach was also so substantial as to defeat the purpose of the entire settlement and dismissal.

188. As a result of the City's breach, Airbnb has suffered harm. The harm Airbnb has suffered to date from the City's breach include, but are not limited to: (i) costs expended to implement systems to block from Airbnb's platform any unregistered listings that could be deemed Banned Advertisements; (ii) the loss of New York City hosts and users who otherwise would have listed or booked short-term rentals in New York City using Airbnb's platform (collectively "NYC Customers"); (iii) lost profits, which are capable of proof with reasonable certainty; and (iv) expenditures made in reliance on the City's promise to permanently refrain from enforcing the 2016 Amendments against Airbnb.

189. As a result of the City's breach, Airbnb will continue to suffer harm in the future. Those harms include, but are not limited to: (i) additional expenditures to operate systems that, on an ongoing basis, block from Airbnb's platform any unregistered listings that could be deemed Banned Advertisements; (ii) additional lost NYC Customers; and (iii) additional lost profits, which are capable of proof with reasonable certainty.

190. Airbnb's harms stated in paragraphs 188-89 flow directly from and are the natural, logical, and probable consequences of the City's breach, and are thus general damages. In the alternative, Airbnb's harms stated in paragraphs 188-89 were reasonably foreseeable and contemplated by the parties when the contract was made, and are thus consequential damages.

191. Airbnb will continue to be harmed by the City's breach because it will be required to pay a civil penalty if it accepts a fee for advertising an unregistered Banned Advertisement. *See* Local Law 18 § 26-3202; Challenged Rule § 22-05 ("Penalties Provision"). Such harm is imminent, as OSE intends to begin enforcing the Penalties

Provision against Airbnb on an unspecified date in July 2023. Airbnb anticipates that nearly all of its active listings in the City will be unable to secure registration by that time, and Airbnb will thus be required to remove those unregistered listings or risk fines for failure to verify and/or for processing fees if any of those listings results in a rental transaction. As a result, Airbnb estimates that it will either incur penalties if it continues to advertise those listings, or it will incur the costs of removing such listings from its platform, ensuring they are not added to its platform on an ongoing basis, losing customers, and losing profits that are capable of proof with reasonable certainty.

192. Airbnb will continue to be harmed by Local Law 18 and the Challenged Rules because it will incur fees to use the electronic verification system to verify prospective hosts are registered, and thus not advertising unlawful short-term rentals. *See* Challenged Rules § 22-04.

193. Unless enforcement of Local Law 18 and the Challenged Rules is enjoined, Airbnb will suffer imminent, irreparable harm with no other adequate remedy at law. Money damages are insufficient to fully compensate Airbnb for the harms it has incurred and will continue to incur as a result of the City's breach. The City's breach will force Airbnb to pass on increased compliance costs to its users, damaging Airbnb's reputation and eroding its position in the market and user goodwill.

**B. 2020 Settlement**

194. The 2020 Settlement Agreement provides that, except in the limited circumstances set forth in the margin,[69] "upon a breach by any Party, the aggrieved Party

[69] If the amendment to Local Law 146 were to have failed to become law, or if OSE were to have failed to promulgate implementing rules, then the 2020 Settlement Agreement would have become null and void. Ex. 8, 2020 Settlement Agreement at 2–3, 7 §§ 1.01.3, 1.02.2, 3.13.

may institute proceedings to obtain injunctive relief against the Party in breach of its obligations." Ex. 8 at 7 § 3.13. The City thus surrendered in unmistakable terms its authority to enforce future legislation that is contrary to the 2020 Settlement Agreement.

195. The 2020 Settlement Agreement provides that New York law governs. *Id.* § 3.14.

196. Like every contract, the 2020 Settlement Agreement contains an implied covenant of good faith and fair dealing, which "embraces a pledge that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract." *Moran* v. *Erk*, 11 N.Y.3d 452, 456 (2008) (internal quotation marks and citation omitted).

197. Airbnb has fully performed its obligations under the 2020 Settlement Agreement. As promised, Airbnb has not brought a legal challenge to Local Law 64. And as promised, Airbnb has released and discharged the City with respect to Local Law 146 and the 2018 Action by stipulating to the voluntary dismissal of the 2018 Action.[70]

198. On November 13, 2021, the City materially and substantially breached the 2020 Settlement Agreement's implied covenant of good faith and fair dealing by enacting Local Law 18. On February 3, 2023, the City materially and substantially breached the 2020 Settlement Agreement's implied covenant of good faith and fair dealing when OSE published the Challenged Rules.

199. The City has broken an implied promise that is so interwoven with its express promise to use best efforts to amend Local Law 146 that the City has destroyed Airbnb's ability to receive the benefit of the express promise. Specifically, the City has

[70] *See Airbnb, Inc.* v. *City of New York*, No. 18-cv-7712, ECF No. 161 (S.D.N.Y. July 14, 2020).

breached an implied promise not to change the law in a way that conflicts with the more favorable reporting provisions that Airbnb specifically negotiated.

200. Airbnb specifically negotiated for the amendment to Local Law 146 that decreased the frequency of Airbnb's reporting requirement from monthly to quarterly. Local Law 18 section 26-3202 and Challenged Rule section 22-03 purport to require Airbnb to make monthly reports.

201. Airbnb specifically negotiated for the amendment to Local Law 146 that limited Airbnb's reporting obligations to short-term rentals that were rented for more than four days and that either (a) included an entire dwelling unit or (b) were rented to three or more individuals at the same time. Local Law 18 section 26-3202 and Challenged Rule section 22-03 purport to require Airbnb to report each short-term rental transaction.

202. As a result of the City's breach, Airbnb has suffered harms. The harms Airbnb has suffered to date from the City's breach include, but are not limited to: (i) costs expended to enable compliance with the reporting requirements in Local Law 18 section 26-3202 and Challenged Rule section 22-03, which are more onerous than those Airbnb specifically negotiated; (ii) lost customers; (iii) lost profits, which are capable of proof with reasonable certainty; and (iv) expenditures made in reliance on the City's implied promise not to change the law in a way that undermines the terms Airbnb specifically negotiated.

203. As a result of the City's breach, Airbnb will continue to suffer harm in the future. Those harms include, but are not limited to: (i) additional costs expended to enable, on an ongoing basis, compliance with the reporting requirements in Local Law 18 section 26-3202 and Challenged Rule section 22-03, which are more onerous than those

Airbnb specifically negotiated; (ii) additional lost NYC Customers; and (iii) additional lost profits, which are capable of proof with reasonable certainty.

204. Airbnb's damages stated in paragraphs 202-03 flow directly from and are the natural, logical, and probable consequences of the City's breach, and are thus general damages. In the alternative, Airbnb's damages stated in paragraphs 202-03 were reasonably foreseeable and contemplated by the parties when the contract was made, and are thus consequential damages.

205. Airbnb will continue to be harmed by Local Law 18 and the Challenged Rules because it will be required to pay a civil penalty if it does not comply with the reporting requirement that is more onerous than the requirement Airbnb specifically negotiated. *See* Local Law 18 § 26-3202; Challenged Rule § 22-05. Such harm is imminent, as OSE intends to begin enforcing the Penalties Provision against Airbnb on an unspecified date in July 2023.

206. Unless enforcement of Local Law 18 section 26-3202 and Challenged Rule section 22-03 is enjoined—as expressly agreed upon in the 2020 Settlement Agreement—Airbnb will suffer imminent, irreparable harm with no other adequate remedy at law. Money damages are insufficient to fully compensate Airbnb for the harms it has incurred and will continue to incur as a result of the City's breach. The City's breach will force Airbnb to pass on increased compliance costs to its users, damaging Airbnb's reputation and eroding its position in the market and user goodwill.

## III. The Challenged Rules Violate the Separation of Powers Because They Were Promulgated Pursuant to an Invalid Legislative Delegation.

207. A legislature's delegation of authority to an administrative agency violates the separation of powers where it purports to confer on the agency not just the power to

implement legislative policy, but the authority to engage in policymaking of the agency's own—a prerogative expressly reserved for the legislature. *See Saratoga Cnty. Chamber of Com., Inc.* v. *Pataki*, 100 N.Y.2d 801, 821–22 (2003); *Boreali* v. *Axelrod*, 71 N.Y.2d 1, 9, 11 (1987). One of the factors that a court considers in deciding whether a delegation is invalid is whether "the regulatory agency balanced costs and benefits according to preexisting guidelines, or instead made value judgments entailing difficult and complex choices between broad policy goals to resolve social problems." *Nat'l Energy Marketers Ass'n* v. *N.Y.S. Pub. Serv. Comm'n*, 167 A.D.3d 88, 94 (3rd Dep't 2018).

208. With Local Law 18, the City Council improperly delegated to OSE the authority to make legislative policy judgments, and provided inadequate guidance as to the contours of the registration scheme.

209. The City Council's standardless delegation is apparent in the unbounded discretion it granted OSE to issue and revoke registrations. Because Local Law 18 does not affirmatively require that OSE issue registrations to eligible applicants and confers upon the agency unfettered discretion to revoke registrations whenever OSE, in its own judgment, decides that information has come to light that would have caused it to deny registration, the City Council improperly entrusted OSE with authority to make legislative policy judgments. *See* Local Law 18 §§ 26-3102(c), 26-3104(d)(5). New York courts time and again have struck down legislation that grants excessive discretion to agencies in implementing licensing schemes and benefit programs just as Local Law 18 purports to do here.

210. For example, in *Packer Collegiate Institute* v. *University of State of New York*, the New York Court of Appeals held unconstitutional a provision of the Education

Law requiring that private schools be "registered under regulations prescribed by the board of regents" because it permitted an administrative officer to grant or refuse registrations "under regulations to be adopted by him, with no standards or limitations of any sort." 298 N.Y. 184, 188–89 (1948).

211. Similarly, in *City of Tonawanda* v. *Tonawanda Theater Corp.*, the New York Appellate Division held unconstitutional a licensing ordinance "under which licenses shall be issued an[d] may be revoked in the sole discretion of the Mayor." 29 A.D.2d 217, 218 (4th Dep't 1968). The court explained that "[t]he Legislature cannot grant to an administrative officer plenary power to discriminate between applicants, requiring some to prove their fitness and granting a license to others without such proof." *Id.* at 220; *see also Sharp* v. *DeBuono*, 278 A.D.2d 794, 796–97 (4th Dep't 2000) (invalidating a local agency's policy governing the determination of whether a Medicaid recipient suffered undue financial hardship because the agency had unbounded discretion to determine what expenditures were "essential"); *Novak* v. *Town of Poughkeepsie*, 57 Misc. 2d 927, 927–28 (N.Y. Sup. Ct. 1968) (holding unconstitutional a provision of a town code providing that plumbers must "have such qualifications as may be deemed necessary by the board of plumbing examiners"). Local Law 18 similarly permits OSE to discriminate between applicants because it leaves the decision to issue a registration in any given case to OSE's discretion.

212. To the extent there is any purported limitation on OSE's discretion, it is only because OSE has tied its own hands. The Challenged Rules have been revised to provide that "the administering agency shall review the reasons for potential denial in accordance with the grounds for denial set forth in" section 21-08. *See* Challenged Rules

§ 21-08(12). Similarly, upon denial of an application, OSE is required to "notify the applicant and include all reasons for rejecting the application in accordance with the grounds for denial." *See id.* § 21-08(13). The language in these rules is so ambiguous as to be meaningless. But even if it can be interpreted to mean OSE has limited itself to denying registrations only to those applicants who run afoul of specific grounds for denial, that still would not cure the invalid delegation. It remains the case that the City Council enacted Local Law 18 without "limit[ing] the field in which [OSE's] discretion is to operate" or "provid[ing] standards to govern its exercise." *Levine* v. *Whalen*, 39 N.Y.2d 510, 515 (1976).

## IV. In Other Respects, the Challenged Rules Exceed Any Legal Authority That the City Council Delegated to OSE Through Local Law 18.

213. As an administrative agency of the City of New York, OSE may only promulgate rules in accordance with authority delegated to it by the City Council.

214. In some respects, the City Council invalidly delegated unfettered policymaking authority to OSE. *See supra* ¶ 208.

215. In other respects, the City Council granted OSE specific powers that are plainly limited, and OSE exceeded those powers.

216. Local Law 18 granted OSE the authority to do the following limited actions through the Challenged Rules:

(a) Prescribe the "form and manner of applying for a short-term rental registration or renewal thereof," Local Law 18 § 26-3102(b), (j);

(b) Set an "application or renewal fee," *id.* § 26-3102(c)(8);

(c) Establish a period for which a registration is valid, *id.* § 26-3102(h);

(d) Establish procedures for the creation of a prohibited buildings list, *id.* § 26-3102(l);

(e) Prescribe a "form and manner" in which hosts must post emergency egress information and registration certificates, *id.* § 26-3103(a);

(f) Prescribe a "manner" in which hosts must keep records and provide them to the agency, *id.* § 26-3103(c);

(g) Establish a minimum reverification period for booking services, *id.* § 26-3202(a) (providing OSE "may" establish a minimum period);

(h) Establish a "manner and form" in which booking services must report transactions to the agency, *id.* § 26-3202(b); and

(i) Set a fee for booking services' use of the electronic verification system, *id.* § 26-3202(c).

217. The Challenged Rules exceed the authority that the City Council granted OSE in four ways.

218. *First*, the Challenged Rules incorporate and give the effect of law to OSE's unreasonable interpretations of local laws, codes, and ordinances, including by (i) requiring that all registered hosts maintain a common household with guests by refraining from restricting guest access to even private areas like bedrooms or home offices and (ii) by categorically prohibiting all hosts, including those who live in private dwellings, from offering unhosted short-term rentals of their entire homes while temporarily absent. *See, e.g.*, Challenged Rules §§ 21-08(8); 21-10(12)–(13).

219. *Second*, the Challenged Rules impose requirements on booking services that were not authorized by Local Law 18. Local Law 18 provides that OSE shall "notify" booking services of registration revocations. Local Law 18 § 26-3102(m). The Challenged Rules go further by charging booking services with the responsibility of knowing each registration's expiration date and with knowing that a registration has been revoked 15 days after OSE emails the booking service regarding the revocation.

Challenged Rules § 22-02(3), (7). Local Law 18 does not authorize OSE to impose this further requirement.

220. *Third*, the City Council purported to delegate to OSE the authority to provide for the "form and manner" of the registration application. Local Law 18 § 26-3102(b). The Challenged Rules impose the further requirement that hosts who apply for registration disclose "[t]he number of individuals not related by blood, adoption, legal guardianship, marriage or domestic partnership that reside with the registrant in the unit," Challenged Rules § 21-03(3)(f), when the City Council did not mandate that disclosure as a condition of eligibility for short-term rental registration.

221. Local Law 18 itself does not contain such restrictions or interpretations, providing only that host applicants shall comply with the law and that the issuance of a registration shall not be construed as permission for or approval of a use of a dwelling unit that would violate the law. *See* Local Law 18 § 26-3102(c)(3), (g). And other New York City laws and codes do not impose the restrictions on short-term rentals that OSE has imported into the Challenged Rules.

222. As discussed supra ¶¶ 144-70, the Challenged Rules mischaracterize the Housing Maintenance Code as requiring that "every member of the household including the rentee has access to all parts of the dwelling unit." Challenged Rules § 21-10(12). But that is not what the Housing Maintenance Code says. Rather, it states that "every member of the family," and not the boarders, roomers, or lodgers maintaining a common household *with the family*, must have access to all parts of the dwelling unit. *See* HMC § 27-2004(a)(4). Ignoring the plain language of the Housing Maintenance Code, the Challenged Rules instead track the Building Code's conflicting definition. OSE has not

explained the bases for its choice to privilege the Building Code in resolving this conflict, and has arbitrarily incorporated its unreasonable interpretation of the relevant Codes—which carries safety risks, as discussed above—with the force of law by incorporating it into the Challenged Rules.

223. Similarly, OSE has categorically barred all hosts offering "the unhosted rental of an entire unit." Challenged Rules § 21-08(8). But that prohibition is inconsistent with the Housing Maintenance Code, which contains no restrictions on short-term rentals in private dwellings, and with the Building Code, which contemplates that one- and two-family homes shall be classified as Group R-3 occupancies so long as they are "occupied, *as a rule*, for shelter and sleeping accommodation on a long-term basis for a month or more at a time." B.C. § 310.5 (emphasis added). "As a rule" is a term of art that means that "a secondary use of the building, different from the specified primary use, is permitted." *City of New York* v. *330 Cont'l LLC*, 60 A.D.3d 226, 231 (1st Dep't 2009).

224. Thus, under the Building Code, so long as the host is usually present and using the dwelling for permanent "shelter and sleeping" purposes, the primary use of the unit remains consistent with its R-3 classification even if it is offered as a short-term rental without the host present the rest of the time. And while there are different time periods one could use to measure "usually" when determining primary use—e.g., weekly, monthly, yearly—the most natural metric is an annual one. Contrary to OSE's categorical bar on unhosted rentals in all dwellings, the Building Code permits hosts to offer unhosted rentals of their private dwellings for 182 days out of the year or fewer.

225. *Fourth*, the Challenged Rules improperly implement OSE's policy preferences in disregard of OSE's legal obligation to limit its administrative rulemaking

to implementing the City Council's legislation. By imposing onerous requirements on hosts and booking services that the City Council did not include in Local Law 18, *see supra* ¶¶ 111–82, OSE's Challenged Rules reflect its unauthorized policy preference that short-term rental hosts and booking services should be deterred from operating in New York City. This decision to dissuade a lawful industry is not OSE's to make, and OSE has exceeded the authority that the City Council delegated to it by promulgating the Challenged Rules to discourage short-term rental hosts and booking services.

## V. The Challenged Rules Are Contrary to Law.

### A. The Challenged Rules Are Contrary to Law Because OSE Did Not Disclose or Adequately Identify the Data and Considerations upon Which the Challenged Rules Are Purportedly Based.

226. The Challenged Rules violate the City Administrative Procedure Act ("CAPA") because they are the product of deficient notice and comment rulemaking. Specifically, meaningful comment was undermined, and judicial review on a full record prevented, because: (i) OSE has articulated no justification or goal for the Challenged Rules, leaving stakeholders and members of the public with no way to determine whether the Challenged Rules will meet the ends OSE may have sought to achieve; (ii) OSE has not identified any market failures or provided any data or analysis supporting its rationales; (iii) to the extent OSE was motivated by affordable housing or tourism concerns, those unstated concerns cannot possibly justify the Challenged Rules; and (iv) to the extent OSE was motivated by influencing or currying favor with the hotel industry, those unstated concerns could not justify the Challenged Rules because the Challenged Rules will *harm* tourism in New York.

227. Nor could OSE have articulated any plausible motivation for the Challenged Rules, as they were apparently designed to shut down the short-term rental business in the City.

228. Under CAPA, City agencies are required to "provide the public an opportunity to comment on . . . proposed rules" through, among other things, "submission of written data, views, or arguments." N.Y.C. Charter § 1043(e). Notice and comment serves important policy goals, including providing maximum public participation to affected parties, and ensuring that agencies have full information before making decisions. *See City of Idaho Falls* v. *Fed. Energy Reg. Comm'n*, 629 F.3d 222, 228–29 (D.C. Cir. 2011). It is also the primary means for establishing a record for judicial review of agency decision-making. *Am. Clinical Lab. Ass'n* v. *Azar*, 931 F.3d 1195, 1206 (D.C. Cir. 2019).

229. Courts vacate rules that are the product of deficient notice and comment, such as where an agency refuses to disclose information necessary to enable meaningful comment. *See ZEHN-NY LLC* v. *N.Y.C. Taxi & Limousine Comm'n*, No. 159195/2019, 2019 WL 7067072, at *2–3 (N.Y. Sup. Ct. Dec. 23, 2019) (Frank, J.).

230. OSE has articulated no justification or goal for the Challenged Rules, leaving stakeholders and members of the public with no way to determine whether the Challenged Rules will meet the ends OSE may have sought to achieve.

231. OSE did not identify market failures or reasons why current market outcomes are sub-optimal and must be addressed by regulation. That is because there is no extant market failure that would justify the Challenged Rules.

232. *First*, as articulated in Airbnb's comment, the Challenged Rules will have a negative effect on tourism in New York City. And to the extent that this reallocation of demand for tourist accommodations was an intended objective of the Challenged Rules—and there is no statement in the record of any valid objectives at all—it would be an inappropriate and biased regulatory objective that privileges special interests at the expense of the welfare of all other stakeholders.

233. *Second*, as articulated in Airbnb's comment, to whatever extent proponents of the Challenged Rules may claim OSE was motivated by affordable housing or tourism concerns, those unstated concerns cannot possibly justify the Challenged Rules.

234. Legislative history indicates that the City may be motivated by a desire to divert tourists to the traditional hotel industry. For example, in a legislative hearing, Councilmember Kallos indicated that the legislation underlying the Challenged Rules was intended to divert tourists to hotels, stating: "Housing should be for New Yorkers. Hotels should be . . . for tourists. It's as simple as that."[71]

235. But, as described above, the Challenged Rules' actual effect is likely to cause harm to the City's tourism industry and the New Yorkers who depend on it. There is no indication that OSE has considered the likelihood that the Challenged Rules will decrease the City's capacity to accommodate tourists and thereby hamstring the City's tourism sector.

236. The economic analysis Airbnb submitted with its public comment shows that short-term rentals are critical in providing accommodation capacity when there is a

[71] Ex. 10 at 35:25–36:2.

surge in demand; without an ample and reliable supply of short-term rentals, existing hotels will not suffice to accommodate these peaks in tourist demand for accommodation.[72] As a result of this decreased supply of tourist accommodations, either tourism revenue and jobs in the sector will be lost as tourists forgo visits to the City, or additional hotels will be built. This would exacerbate the very problem of housing availability and affordability by driving commercial development in locations that could have been developed for long-term rentals instead.[73]

237. Economic analysis also shows the Challenged Rules may restrict the tourism sector, as price-sensitive tourists who would have chosen to stay in a lower-cost short-term rental would have less funds to spend at other businesses.[74]

238. Furthermore, economic analysis shows that the curtailment of the tourism industry that could result from the Challenged Rules will have negative ramifications for the New York City residents who work in the sector. Tourism is a key industry in New York City that supports over 283,000 jobs.[75] By reducing the City's tourist capacity, the Challenged Rules will negatively impact the rest of the tourism sector, hurting not only former or potential short-term rental hosts, but also the great number of New York City residents who hold and depend on jobs in the tourism industry unrelated to hotels. Critically, the tourism jobs that the Challenged Rules would jeopardize are disproportionately held by historically disadvantaged groups, including members of communities of color, immigrants, and low-income individuals.[76] And the tourism jobs

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72 Salinger ¶¶ 88–90.
73 *Id.* ¶¶ 94–95, 102–03.
74 *See id.* ¶¶ 93–95.
75 *Id.* ¶ 85.
76 *Id.* ¶¶ 100–01.

that would be eliminated would also disproportionately affect neighborhoods outside of Manhattan.[77]

239. *Second*, legislative history suggests that Local Law 18 may arguably have been driven by a concern about housing affordability in New York City. Councilmember Ben Kallos—the sponsor of Local Law 18—stated at a December 8, 2021 legislative hearing that Local Law 18 was an effort to "respond[] to New York City's affordable housing crisis by hopefully bringing as many as 19,000 apartments back on the market—many of which might even be affordable."[78] Though unsupported by the legislative record, it was his belief that "soon to be vacant air B&B [sic] units" would all be used to house homeless New Yorkers.[79] Yet neither the legislative history nor OSE has shown (nor could they show) that the Challenged Rules will increase the availability of affordable housing in New York City or alleviate homelessness.

240. OSE has not made public any economic analysis underlying the Challenged Rules, despite Airbnb's requests. Airbnb submitted a FOIL request on November 4, 2022, seeking information related to Local Law 18 and any information OSE relied upon in the rulemaking process. Airbnb followed up on its FOIL request on November 17, 2022 and December 1, 2022. On January 13, 2023—in keeping with OSE's tendency to operate behind closed doors—Airbnb was informed that OSE had not identified any records responsive to Airbnb's request for a copy of any studies or economic analyses relating to Local Law 18.

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77 *Id.* ¶¶ 97–99.

78 Ex. 17, Dec. 8. 2021 Hearing on Int. No. 2309 Before the Comm. on Housing and Buildings, Hearing Transcript at 6:17–21.

79 *Id.* at 7:2–4.

241. The economic analysis that Airbnb submitted with its public comments is clear that the elimination of short-term rentals will not lead to the accomplishment of the City's affordable housing goal.

242. For one, short-term rentals allow housing to be used more efficiently while providing economic benefit to the homeowner or tenant. In other words, when New Yorkers are able to earn supplemental income by offering unused or under-used space in their homes as short-term rentals, housing becomes more affordable, not less. In 2019, the last full calendar year before the onset of the COVID-19 pandemic, the median income for Airbnb hosts in New York City from home sharing was approximately $3,400.[80] Without this supplemental income, homeowners and tenants would see the share of their income that must be spent on rent or a mortgage go up by nearly 10 percentage points.[81]

243. And critically, while some proponents of the Challenged Rules may believe that restricting short-term rentals would bring more long-term housing supply onto the market, that belief rests on a flawed assumption that an effective ban on short-term rentals would cause all housing units previously rented as short-term rentals to be converted to long-term rentals. In reality, many hosts use their homes as short-term rentals on a limited and temporary basis, such as renting an unused guest room that is often used by family, or renting their entire primary residence while the host is on vacation, traveling for work, or caring for a relative out of town.

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80 Salinger ¶ 76 &21 tbl.6.

81 *Id.* ¶ 79.

244. Indeed, economic analysis shows the majority of hosts would make *more* income from using a space as a long-term rental: approximately 85% of short-term rental listings of residential apartments and one- and two-family homes in the City are not rented enough to earn more revenue from short-term rentals than they could from being rented out on a long-term basis.[82] The fact that most hosts rent out space in their homes below this "break-even" level is a strong indication that they largely retain their spaces for personal use, rather than renting out their spaces full-time, and further shows that these spaces would not become available on the long-term rental market if it became effectively impossible to host short-term rentals. If hosts cannot use these spaces as short-term rentals, many of those housing units would likely be withdrawn from the housing market altogether, rather than be converted to long-term rentals.

245. Thus, without providing any benefit to the housing market, leaving these units empty would deprive the City of the social benefits of short-term rentals—renting to a neighbor's in-laws who want to stay close to their family, providing "surge capacity" during the busy holiday season, or renting to a community member undergoing home renovations who needs to stay near work and school for a couple of weeks.

246. Due to its failure to provide any goal or justification for the Challenged Rules, OSE has stifled meaningful comment and undermined judicial review, warranting vacatur of the Challenged Rules. *See ZEHN-NY LLC*, 2019 WL 7067072, at *2–3; *Am. Clinical Lab.*, 931 F.3d at 1206; *City of Idaho Falls*, 629 F.3d at 229.

[82] *Id.* ¶ 69 & 18 tbl.4.

247. And, to the extent OSE was motivated by concerns about affordable housing or the tourism industry, it has not made available any data or analysis supporting its position.

### B. The Challenged Rules Are Contrary to Law Because OSE Did Not Respond to Material Comments.

248. OSE did not merely undermine meaningful notice and comment by refusing to timely disclose important information about its decision making. It also refused to respond to the Comments it did receive—yet another violation of CAPA.

249. Another "central purpose of notice-and-comment rulemaking" is "to obligate the agency to respond to the material comments and concerns that are voiced." *Make the Road N.Y.* v. *Wolf*, 962 F.3d 612, 634 (D.C. Cir. 2020). Thus, an agency must "respond to significant comments received during the period for public comment," *Perez* v. *Mort. Bankers Ass'n*, 575 U.S. 92, 96 (2015), and its failure to do so "generally demonstrates that the agency's decision was not based on a consideration of the relevant factors," *Liliputian Sys., Inc.* v. *Pipeline & Hazardous Materials Safety Admin*, 741 F.3d 1309, 1312 (D.C. Cir. 2014) (quotation marks and citation omitted).

250. Although OSE extended the original public comment period, held a second hearing, and ultimately made a limited number of changes to its original rule proposals, the agency still failed to address or respond to many significant public comments from Airbnb, short-term rental hosts, and other members of the public,[83] including:

(a) OSE failed to consider amendments to the booking services' verification system, including adopting a notice and takedown regime or requiring booking services to include registration

[83] *See* Ex. 14.

numbers in the quarterly reports they are already required to submit to OSE;

(b) OSE failed to consider amendments to the booking services' monthly reporting requirements, including reducing the frequency of the required reports from monthly to quarterly or annually;

(c) OSE failed to consider amendments to the imposition of fees on booking services, including by making the fees less burdensome and creating a more consistent fee structure;

(d) OSE failed to consider amendments to the imposition of penalties on booking services, including the establishment of a fine scheme that is remedial rather than punitive;

(e) OSE failed to sufficiently consider unintended consequences of its registration scheme, including (i) imposing onerous registration, renewal, and ongoing requirements for hosts that will substantially chill hosts from engaging in the lawful short-term rental trade and thereby hinder the short-term rental market; (ii) imposing verification and reporting requirements on Airbnb that will limit the ability of Airbnb to do business and significantly damage the short-term rental market in New York City; (iii) introducing serious safety and privacy concerns for hosts and their households; (iv) creating significant harm to tourism and the New York City economy, and in such a way as to disproportionately impact historically disadvantaged groups; and (v) disproportionately harming historically marginalized hosts and travelers.

## VI. The Challenged Rules Are Invalid Because They Were Promulgated Pursuant to a Local Law That Exceeds the City's Police Powers and Home Rule Authority.

251. New York City has the power to "adopt and amend local laws" that relate to "[t]he government, protection, order, conduct, safety, health, and well-being of persons of property" in the City, so long as they are "not inconsistent with the New York Constitution or a New York general law. *See* N.Y. Const. art. IX, § 2(c)(ii)(10); *see also* N.Y. Mun. Home Rule § 10(1). That power authorizes the City, among other things, "to adopt local laws providing for the regulation or licensing of occupations or businesses." N.Y. Mun. Home Rule § 10(1)(ii)(a)(12).

252. However, any valid exercise of that authority is subject to limitations. *First*, the City cannot "prohibit" a lawful business, occupation or trade "by onerous and exasperating restrictions, under the guise of regulation." *Bon-Air Ests., Inc.* v. *Bldg. Inspector of Town of Ramapo*, 31 A.D.2d 502, 506 (2d Dep't 1969) (quotation marks and citation omitted. *Second*, the legislation must offer "some fair, just, and reasonable connection between it and the promotion of the health, comfort, safety and welfare of society." *People* v. *Bunis*, 9 N.Y.2d 1, 4 (1961) (quotation marks and citation omitted).

253. Local Law 18 and the Challenged Rules that implement it exceed the police powers and home rule authority vested in the City of New York in two ways.

254. *First*, "[w]hatever may be the power of a municipality to regulate a particular business, occupation or trade, it does not include the power to abolish a lawful trade." *Bon-Air*, 31 A.D.2d at 506. "Where the business is lawful, its lawful operation may not be curtailed on the part of all of its practitioners because some few transact business in a manner which creates conditions which the public should not be compelled to tolerate." *Id.* (quoting *Good Humor Corp.* v. *City of New York*, 290 N.Y. 312, 319 (1943)). Rather, "[t]he regulatory municipality must devise legislation which will heighten enforcement of lawful requirements and restrict the activities of the wrongdoer alone, unless it be impractical to draw a line separating the malefactor from the honest merchant." *Id.* (citing *Good Humor Corp.*, 290 N.Y. at 321).

255. Here, the City is improperly attempting to regulate the lawful short-term rental trade out of business by imposing onerous requirements and restrictions that will foreseeably chill the participants in this market from transaction. As discussed above, Local Law 18 and the Challenged Rules impose such burdensome and costly

requirements on booking services and hosts alike without proper consideration of reasonable regulatory alternatives, including those proposed by Airbnb and others during the rulemaking process. As designed, OSE's registration scheme is likely to dissuade law-abiding hosts from applying for registration or participating in the short-term rental market altogether, which will in turn decrease the stock of units available for listing on Airbnb. *See supra* ¶¶ 150-60. Coupled with booking services' own costs of compliance with verification and monitoring obligations—exacerbated by burdensome implementation choices made by OSE, without explanation—the foreseeable result will be the chilling of short-term rental activity in New York City. *See supra* ¶¶ 161-65. In practice, Local Law 18 and the Challenged Rules abolish the lawful trade in short-term rentals under the guise of regulation.

256. New York City cannot justify the effective ban on the lawful short-term rental trade in New York City by claiming that the registration scheme is designed to root out misconduct, including illegal hotels operating in the jurisdiction. That indiscriminate approach is "patently unreasonable, at least where it does not appear that discrimination between the harmful and the harmless is impractical and that the public interest may be served better by complete prohibition than by further attempts at regulation." *Good Humor Corp.*, 290 N.Y. at 319.

257. Neither Local Law 18 nor the Challenged Rules contain any legislative or administrative findings, or even articulated rationales, that support the conclusion that further incremental regulation that better discriminates between law-abiding hosts and wrongdoers is impractical. In the absence of such findings, the police power cannot be invoked to abolish the lawful trade in short-term rentals. *Bon-Air*, 31 A.D.2d at 507–08.

And indeed, the reasonable alternatives that Airbnb and others submitted for OSE's review during the rulemaking process confirm that better-tailored approaches to regulate the short-term rental trade are available. OSE's failure to consider such alternatives cannot be explained

258. *Second*, Local Law 18 and the Challenged Rules exceed the City's police powers and home rule authority because they do not have any reasonable relationship to the promotion of health, comfort, safety, and welfare of society. *Bunis*, 9 N.Y.2d at 4.

259. As discussed above, neither the City Council nor OSE has ever articulated any justification or goal for the legislating and implementing regulations, and OSE has not identified any market failures or provided any data or analysis supporting its rationales. *See supra* ¶¶ 231–38.

260. And if the proponents of the Challenged Rules claim that the legislation and regulations are motivated by affordable housing or tourism concerns, those unstated concerns cannot possibly justify the Challenged Rules for reasons discussed above. *See supra* ¶¶ 239–47.

261. Because they exceed the police power and home rule authority vested in the City of New York, Local Law 18 and the Challenged Rules are both invalid.

## VII. The Challenged Rules Are Legally Infirm Because They Are Preempted by the Communications Decency Act ("CDA").

262. The Challenged Rules are preempted by section 230 of the Communications Decency Act ("CDA") because they require Airbnb and other booking services to monitor and remove user information posted to the booking services platforms, and therefore impose liability on booking services in their role as publishers.

263. Section 230 of the CDA aims to support "the vibrant and competitive free market that presently exists for the Internet and other interactive computer services." 47 U.S.C. § 230(b)(2). In support of this goal, it immunizes computer service providers from liability for their role as "publisher[s]" of posts by third parties and expressly preempts laws that are inconsistent with the CDA. § 230(c), (e). Section 230 "was enacted "to maintain the robust nature of Internet communication and, accordingly, to keep government interference in the medium to a minimum." *See Force* v. *Facebook, Inc.*, 934 F.3d 53, 63 (2d Cir. 2019) (quotation marks and citation omitted), *cert. denied*, 140 S. Ct. 2761 (2020) (quotation omitted). Courts have read this prohibition broadly to prohibit any effort to hold an interactive computer service, including a website, liable based on the content of third-party postings on the site.

264. Section 22-02(2) of the Challenged Rules provides that booking services are responsible for providing, through an application program that feeds into the electronic verification system, (i) the street address of an STR, (ii) the host name, (iii) the associated registration number, and (iv) the uniform resource locator or listing identifier.

265. Section 22-02(2)–(5) of the Challenged Rules provide that booking services will be supplied with a unique confirmation number, and are required to use this number to continuously ensure that no host rents a property through its platform without registration.

266. Section 22-05 of the Challenged Rules in turn provides that "[f]or each transaction in which a booking service charges, collects, or receives a fee, directly or indirectly, for activity described in the definition of booking service in relation to a short-

term rental in violation of section 22-02 of this chapter, such booking service shall be liable for a civil penalty."

267. In other words, if Airbnb does not monitor the user content that hosts post on its platform, assess whether each host's user content is permissible under the Challenged Rules, and remove user content that may not comply with the Challenged Rules, it will risk steep and punishing fines.

268. Airbnb's platform is currently not designed to perform these monitoring and control functions.[84] It is currently designed in such a way that, when a guest submits a reservation for a stay with an Airbnb host, the reservation is under some circumstances instantaneously passed on to the host; and Airbnb plays no active role in the communication between host and guests on an ongoing basis.

269. The Challenged Rules effectively require Airbnb to rework its platform so that all user interactions can only be carried out if a host is verified through OSE's system before the time of booking. And Airbnb will be required to monitor that reservation, the host's registration status, and any listing information bearing on the validity of the host's registration, all from the date a reservation is made through the end date of each and every booking.

270. The Challenged Rules compel Airbnb to make changes to its API, business model, and other systems that will be costly and onerous. Airbnb expects to have to divert personnel time from work on business priorities essential to its U.S. and global operations to establish the technology and programs needed just to comply with the Challenged Rules. It also expects to lose personnel time to compliance efforts each

[84] *See* Merten Aff. ¶ 13.

month that the Challenged Rules are allowed to be in effect. These demands on personnel time will have an incalculable adverse impact on Airbnb's business.[85]

271. The Challenged Rules are thus preempted by section 230 of the CDA because they compel Airbnb to exercise a monitoring function and seek to hold Airbnb liable in its role as a "publisher" of posts by third parties.

## VIII. The Court Should Enjoin Enforcement of the Challenged Rules Pending Adjudication of the Petition.

272. The Court should issue a preliminary injunction enjoining enforcement of the Challenged Rules. A preliminary injunction is warranted if an agency is about to "act in violation of" the petitioner's rights in a way that will "render the [Court's] judgment ineffectual" by imposing losses that are not recoverable at law and enforcement of which during the pendency of this action will "produce injury." N.Y. C.P.L.R. § 6301; *see Credit Agricole Indosuez* v. *Rossiyskiy Kredit Bank*, 94 N.Y.2d 541, 544–45 (2000). A preliminary injunction is appropriate where, as here, the moving party shows by clear and convincing evidence "(1) a likelihood of ultimate success on the merits; (2) the prospect of irreparable injury if the provisional relief is withheld; and (3) a balance of equities tipping in [its] favor." *Doe* v. *Axelrod*, 73 N.Y.2d 748, 750 (1988); N.Y. C.P.L.R. §§ 6301, 6311 (authorizing such relief).

273. Airbnb satisfies each of these requirements and is entitled to a preliminary injunction of the Challenged Rules pending adjudication of the Petition.

### A. Airbnb Is Likely to Succeed on the Merits.

274. The threshold inquiry with respect to likelihood of success on the merits is "whether the proponent has tendered sufficient evidence demonstrating ultimate success

[85] *Id.* ¶¶ 13–17.

in the underlying action." *1234 Broadway LLC* v. *W. Side SRO Law Project*, 86 A.D.3d 18, 23 (1st Dep't 2011). Although the movant must "establish a clear right to that relief under the law and the undisputed facts upon the moving papers," it need not "tender conclusive proof beyond any factual dispute establishing ultimate success." *Id.* at 39–40 (cleaned up); *see Ma* v. *Lien*, 198 A.D.2d 186, 187 (1st Dep't 1993) ("[E]ven when facts are in dispute, the nisi prius court can find that a plaintiff has a likelihood of success on the merits, from the evidence presented, though such evidence may not be 'conclusive.'"); *McLaughlin, Piven, Vogel, Inc.* v. *W.J. Nolan & Co.*, 114 A.D.2d 165, 172–73 (2nd Dep't 1986) ("As to the likelihood of success on the merits, a prima facie showing of a right to relief is sufficient; actual proof of the case should be left to further court proceedings . . . .").

275. Airbnb's Petition is likely to succeed on the merits for the reasons set forth above.

**B. Airbnb Will Suffer Irreparable Harm Without an Injunction.**

276. A party seeking either a temporary restraining order or a preliminary injunction must demonstrate the prospect of irreparable injury if the injunction is not granted. *Gilliland* v. *Acquafredda Enters., LLC*, 92 A.D.3d 19, 24 (1st Dep't 2011). Here, the Challenged Rules are in effect, notwithstanding OSE's vague announcement that enforcement will not begin until some unspecified date in "July 2023."[86] If the Challenged Rules are permitted to be enforced, Airbnb will lose almost all its current listings, experience temporary but sustained disruption of its operations as verification obligations go into effect, and suffer reputational harm that will erode its position in the market and user goodwill.[87] Additionally, Airbnb will be forced to either absorb

[86] Ex. 11.
[87] *See generally* Merten Aff.

unrecoverable compliance expenditures, or pass those costs on to hosts and guests which will further damage customer goodwill.[88] Finally, if the Challenged Rules stand, Airbnb and the public will have no remedy for OSE's procedural violations of CAPA that impaired stakeholders' ability to weigh in on the information and policy considerations upon which the Challenged Rules were purportedly based.

1. *Airbnb Faces a Substantial Threat to Its User Base and User Goodwill.*

277. Prior experience with Local Law 64 demonstrates that the disclosure requirements contained in the Challenged Rules will continue to deter hosts from applying to register.[89] After Airbnb alerted hosts who offered certain kinds of short-term rentals that it would be required to share their personal information and certain listing data with the City, it offered them a choice: If a host did not wish to consent to the disclosure as a condition of continuing to offer short-term rentals, Airbnb would block them from offering such rentals on the platform.[90] More than 29,000 hosts elected to leave the short-term rental market rather than agree to have their information disclosed to the City.[91] The economic analysis that Airbnb submitted during the rulemaking process shows that the volume of Airbnb listings (excluding Class B listings) in New York City fell by 21% in the six months following Local Law 64's implementation when compared to comparator cities.[92]

278. In light of the more extensive disclosures that will be required under Local Law 18, Airbnb expects that many hosts will simply refrain from submitting even more

88 *Id.* ¶¶ 15–16.
89 Merten Aff. ¶ 6.
90 *Id.* ¶ 6.
91 *Id.* ¶ 6.
92 Salinger ¶ 41.

invasive information about their living situations to the City than Local Law 64 requires to apply to register their short-term rental under the Challenged Rules.[93] Because the Challenged Rules contain a host of other requirements beyond the burdensome disclosures of personal information, indeed, it is likely that even more hosts will choose to opt out from applying to register.[94]

279. And indeed, information disclosed by OSE that the Challenged Rules are very likely having a greater deterrent effect on hosts than Local Law 64. As discussed above, as of May 3, 2023, OSE had only granted nine registrations.[95] These registered hosts would comprise less than 0.04% of the active non-hotel listings in New York City that had each been booked at least once.[96] Such a reduction in the number of hosts on Airbnb's platform amounts to an absolute decimation of its business in New York City.

280. The expected reduction in listings will mean not only that hosts who list their homes with Airbnb in New York City would drop out of the short-term rental market, but also that guests who do not even have upcoming reservations in New York City yet will have fewer options to meet their budgets and amenity needs.[97] Guests who can no longer find listings on Airbnb that meet their needs for travel to New York City may then decide to bypass Airbnb's platform when searching for accommodations in other cities.

281. The type of loss of a business's customer base that Airbnb faces here is squarely recognized as irreparable harm. *See, e.g.*, *Nassau Soda Fountain Equip. Corp.*

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93 Merten Aff. ¶ 7.
94 *See id.* ¶ 7.
95 *See* Ex. 2 (identifying Airbnb listings associated with registrants).
96 Merten Aff. ¶ 4 n.1.
97 *Id.* ¶ 12.

v. *Mason*, 118 A.D.2d 764, 765 (2d Dep't 1986) ("[Petitioner] satisfactorily established irreparable injury, since it appears that the defendants might significantly diminish the amount of business conducted by [Petitioner]."); *Sylmark Holdings Ltd.* v. *Silicone Zone Int'l Ltd.*, 783 N.Y.S.2d 758, 772 (N.Y. Sup. Ct. 2004) ("The loss of an industry leader's market, and the loss of the advantages of being a pioneer and a market leader, may constitute irreparable harm."); *Willis of N.Y., Inc.* v. *DeFelice*, 299 A.D.2d 2d 240, 242 (1st Dep't 2002) (loss of business is irreparable harm).

282. These foreseeable harms are compounded by the fact that the City is placing Airbnb in the position of enforcer, through the verification system, of its registration scheme. Just as Airbnb lost users when it notified them of its approach to complying with the disclosures required by Local Law 64, *see supra* ¶¶ 65, 157, Airbnb is likely to lose host goodwill and suffer reputational harm when it has no choice but to remove listings it cannot verify to avoid fines—even if those listings cannot be verified due to flaws in the City's verification system or errors introduced by OSE in its own verification database.[98]

283. And indeed, because Airbnb would be forced to suspend New York City listings in advance of verification once the Challenged Rules go into effect, that is likely to result in loss of goodwill from guests as well. Some guests would have their booked stays in New York City cancelled as Airbnb worked through the newly required verification process, and these cancellations would severely harm guest trust in Airbnb.[99] As of May 29, 2023, guests have booked more than 56,500 short-term rentals in New

[98] *See* Merten Aff. ¶ 11.
[99] *Id.* ¶ 8–10.

York City through Airbnb that are scheduled to begin after July 1, 2023.[100] More than 5,500 of these short-term rentals, hosting more than 10,000 guests, are scheduled to begin in the first week of July 2023.[101] Some number of the more than 10,000 guests scheduled to check in to New York City short-term rentals in the first week of July 2023 would be forced to spend time finding alternate accommodations or to alter their plans in other ways because the short-term rentals they have booked would not be able to be verified before their stays begin.[102]

284. "[I]t is well settled that the loss of goodwill of a viable, ongoing business may constitute irreparable harm warranting the grant of preliminary injunctive relief." *Asprea* v. *Whitehall Interiors NYC, LLC*, 206 A.D.3d 402, 403 (1st Dep't 2022) (quoting *Advent Software, Inc*. v. *SEI Global Servs., Inc*., 195 A.D.3d 498, 499 (1st Dep't 2021)); *Klein, Wagner & Morris* v. *Lawrence A. Klein, P.C.*, 186 A.D.2d 631, 633 (2d Dep't 1992) (damage to "reputation with clients [and] potential clients . . . would constitute irreparable harm"). For this reason, too, Airbnb faces irreparable harm.

### 2. Compliance Costs Are Substantial and Not Recoverable at Law

285. A key determinant of whether harm is irreparable is "whether or not that harm may be compensated by money damages if the motion is not granted." *H.D. Smith Wholesale Drug Co.* v. *Mittelmark*, 33 Misc.3d 1227(A), 2011 WL 5964555, at *4 (N.Y. Sup. Ct. Nov. 18, 2011); *see also Chi. Research & Trading* v. *N.Y. Futures Exch., Inc.*, 84 A.D.2d 413, 416 (1st Dep't 1982) (injunctive relief warranted "where the plaintiff has no adequate remedy at law").

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100 *Id.* ¶ 8.
101 *Id.* ¶ 8.
102 *Id.* ¶ 9.

286. Here, Airbnb estimates that reworking the technology through which it currently accepts New York City listings for publication on its website would require more than 220 hours of employee time to build, and approximately an additional 5 hours per month to maintain.[103] This effort will require Airbnb to expend more than $47,000 through the end of 2024 just to compensate these employees for their time.[104]

287. Similarly, Airbnb will have to divert approximately 680 hours of employee time from other company priorities to build the API needed to submit information provided by New York City hosts to OSE's electronic verification system. Maintaining this technology will also cost approximately 5 additional hours per month.[105] This diversion of nearly 700 hours of employee time will hinder Airbnb's progress toward its business objectives and will require Airbnb to expend more than $125,000 through the end of 2024 in employee compensation costs alone.[106]

288. Further, Airbnb will have to devote personnel time to provide support to New York City hosts who are trying to navigate compliance with the Challenged Rules and to separately monitor communications from OSE. Pursuant to the Challenged Rules, OSE will presume that a booking service knows of a registration revocation 15 business days after it has been notified via email. § 22-02(7). As a result, Airbnb will need to assign staff to review communications from OSE and manually take any necessary action. Airbnb expects that it will need to devote 25 hours of employee time each month

[103] *Id.* ¶ 13.
[104] *Id.* ¶ 13.
[105] *Id.* ¶ 14.
[106] *Id.* ¶ 14.

to these communications, costing it $4,250 per month in ongoing employee compensation costs.[107]

289. In sum, as discussed in detail in the accompanying Merten Affidavit and above, Airbnb expects to divert some 1060 hours of personnel time from work on other business priorities to establish technology and programs just to comply with OSE's Rules.[108] And it expects to lose an additional 35 hours of personnel time each month to tasks relating to maintaining the website reworking and API that will be used for verification, complying with OSE's reporting requirements, and communicating with OSE and New York City hosts.[109]

290. In addition to Airbnb's upfront and ongoing costs of compliance with verification and reporting obligations, the company expects a loss of approximately $6.7 million per month as a result of removing all listings subject to the registration requirement in advance of verification once the Challenged Rules are enforced.[110] If Airbnb makes those expenditures, it is unlikely to recover them even if it succeeds in this proceeding because those funds are not recoverable under Article 78 or in an ancillary proceeding for reasons discussed in further detail below. And Airbnb also anticipates that it will incur other substantial losses, including the diversion of employee time from other company priorities and loss of goodwill.

291. Most of these compliance costs are not recoverable under New York Civil Practice Law and Rules section 7806, which permits in an Article 78 proceeding only

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107 *Id.* ¶ 16.
108 *Id.* ¶ 17.
109 *Id.* ¶ 17.
110 *See id.* ¶¶ 4, 13, 14.

restitution or damages that are "incidental to the primary relief sought." N.Y. C.P.L.R. § 7806. Damages are incidental to the primary relief sought where the "primary aim of the Article 78 proceeding would make it a 'statutory duty' of the respondent to pay the petitioner the sum sought." *Metro. Taxicab Bd. of Trade* v. *N.Y.C. Taxi & Limousine Comm'n*, 38 Misc. 3d 936, 941 (N.Y. Sup. Ct. 2013) (quotation marks and citation omitted). As one court put it, that is the case when a "[m]onetary [a]ward" is an "[a]utomatic [c]onsequence of [e]quitable [r]elief." *Safety Grp. No. 194* v. *State*, 2001 N.Y. Slip Op. 40099(U),, 2001 WL 939747, at *1 (N.Y. Ct. Cl. Apr. 11, 2001), *aff'd sub nom. Safety Grp. No. 194-New York State Sheet Metal Roofing & Air Conditioning Contractors Ass'n, Inc.* v. *State*, 298 A.D.2d 785 (N.Y. App. 3d Dep't 2002). By contrast, monetary injuries are not incidental to the relief when they are caused by compliance with an arbitrary and capricious agency action. *See Metro. Taxicab Bd. of Trade* v. *N.Y.C. Taxi & Limousine Comm'n*, 115 A.D.3d 521, 522 (1st Dep't 2014) (no recovery of funds that taxicab owners could not have been collected from drivers while an arbitrary and capricious rule was in effect).

292. Here, the only funds that Airbnb might be entitled to recover in an Article 78 proceeding are the direct payments of verification fees, which might be subject to recoupment if the Challenged Rules authorizing their collection are invalidated. *See, e.g.*, *N.Y. State Assn. of Homes & Servs. for the Aging, Inc.* v. *Perales*, 179 A.D.2d 296, 297–98 (N.Y. App. 3d Dep't 1992) (agency had to provide, as incidental damages, portion of Medicare rate "withheld or recouped" from nursing homes as a result of invalidated regulation). The City is unlikely to be obligated to repay Airbnb for other expenditures

"incurred . . . by reason of" Airbnb's "compliance with the regulation." *Metro. Taxicab*, 38 Misc. 3d at 942.

293. Furthermore, except to the extent that any of Airbnb's compliance costs may be recoverable as damages in connection with its contracts claims asserted in this petition, there is no separate action that would enable it to redress its harms because the City is immune from payment of damages resulting from invalidated rules that, as here, were implemented as "discretionary actions taken during the performance of government functions." *Metro. Taxicab*, 115 A.D.3d at 524(citation omitted); *Regeneron Pharms., Inc.* v. *U.S. Dep't of Health & Hum Servs.*, 510 F. Supp. 3d 29, 39 (S.D.N.Y. 2020) (holding Regeneron would likely suffer "irreparable financial loss absent a preliminary injunction" where monetary damages cannot later be recovered due to sovereign immunity).

294. In sum, the nonrecoverable compliance costs Airbnb will incur in connection with the Challenged Rules produce the harm that can warrant a preliminary injunction.

### 3. Airbnb's Participatory Rights in Rulemaking Have Been Irreparably Injured

295. OSE's violations of CAPA have separately caused irreparable harm to Airbnb which cannot be rectified if the Challenged Rules are allowed to go into effect.

296. "A procedural violation can give rise to irreparable harm justifying injunctive relief because lack of process cannot be remedied with monetary damages or post-hoc relief by a court." *Invenergy Renewables LLC* v. *United States*, 422 F. Supp. 3d 1255, 1290 (Ct. Int'l Trade 2019), *as modified*, 476 F. Supp. 3d 1323 (Ct. Int'l Trade 2020). Federal courts routinely hold that violations of the APA, whose application

informs this Court's interpretation of CAPA, cause irreparable injuries to regulated parties. *See id.* ("A failure to comply with APA procedural requirements therefore itself causes irreparable harm."); *see also ITServe All. Inc.* v. *Scalia*, No. 20-14604, 2020 WL 7074391, at *10 (D.N.J. 2020) ("[M]any courts have found that a preliminary injunction may be issued solely on the grounds that a regulation was promulgated in a procedurally defective manner."); *Eli Lilly & Co.* v. *Cochran*, 526 F. Supp. 3d 393, 408 (S.D. Ind. 2021) (finding irreparable harm based on violation of APA's notice and comment requirement alone); *N. Mariana Islands* v. *United States*, 686 F. Supp. 2d 7, 17–19 (D.D.C. 2009) (same).

297. OSE has violated CAPA's procedural requirements by failing to (i) identify with specificity the considerations on which the Challenged Rules are purportedly "based"; (ii) disclose the documents and information on which it purportedly relied in designing the Challenged Rules; or (iii) responding to material comments it received, including some of Airbnb's, in the Challenged Rules' Statement of Basis and Purpose.

298. Notice and comment is designed to ensure fairness in the rulemaking process, elicit meaningful participation by the affected public, and give affected parties an opportunity to develop an adequate factual record that will ultimately assist judicial review. *City of Idaho Falls*, 629 F.3d at 229; *Am. Clinical Lab. Ass'n*, 931 F.3d at 1206. OSE's procedural violations deprived Airbnb and New Yorkers of the right to respond substantively and meaningfully to the information on which the Challenged Rules are based. If the Challenged Rules are not enjoined, the harm from these procedural violations will be irreparable.

**C. The Balance of the Equities Favors Airbnb.**

299. The balance of equities also favors an injunction. Balancing the equities "requires the court to look to the relative prejudice to each party accruing from a grant or a denial of the requested relief." *Ma*, 198 A.D.2d at 187. The balance of equities favors petitioner or plaintiff where the injury to be sustained "is more burdensome to the [petitioner] than the harm caused to the [respondent] through the imposition of the injunction." *Klein, Wagner & Morris*, 186 A.D.2d at 633. Harm to a respondent from imposition of the injunction is particularly low where the injunctive relief would merely preserve the status quo pending final adjudication. *See, e.g.*, *Gramercy Co.* v. *Benenson*, 223 A.D.2d 497, 498 (N.Y. App. 1st Dep't 1996) ("[T]he balance of the equities tilts in favor of plaintiffs, who merely seek to maintain the status quo, and against the trustees, who may remove the trees" once the underlying claim is adjudicated). Finally, in balancing the equities, courts must "consider the enormous public interests involved." *Seitzman* v. *Hudson River Assocs.*, 126 A.D.2d 211, 214 (1st Dep't 1987) (quotation marks and citation omitted).

300. As explained above, Airbnb will suffer severe and irreparable injury without injunctive relief. By contrast, OSE will experience no harm if the Challenged Rules are temporarily enjoined pending adjudication on the merits of this Petition. At most, OSE would face some delay in beginning to enforce Challenged Rules that have been in the making for many months. Granting Airbnb injunctive relief here would only maintain the status quo pending final adjudication, consistent with the underlying purpose of preliminary injunctions. *See Bass* v. *WV Pres. Partners, LLC*, 209 A.D.3d 480, 480 (1st Dep't 2022) ("The purpose of a provisional injunction . . . [is to] maintain the status

quo until there can be a full hearing on the merits." (quotation marks and citation omitted)).

301. Finally, the public interest weighs in favor of granting Airbnb's requested injunctive relief. As discussed above, Airbnb serves an important function in New York City by helping hosts earn supplemental income while more efficiently occupying under-used or unused space in their homes. *See supra* ¶¶ 26, 242–43. For many New Yorkers who are hosts, this helps them face growing rent burdens, remain in their homes, and make ends meet. *Id.*

302. Likewise, Airbnb stays benefit guests by bringing tourists to areas in the outer boroughs they might not otherwise visit, filling needs for people—including local New Yorkers—who need to stay temporarily in a particular neighborhood that does not have hotels, and also providing back-up housing options for New Yorkers who need a temporary place to stay. *See supra* ¶ 181. For New Yorkers who use Airbnb locally, short-term rentals in those properties can also provide a more affordable and convenient alternative to hotels, as they are located in more residential areas. *Id.*

303. Finally, despite the City's opposition, short-term rentals are beneficial to the City of New York itself. Airbnb guests contribute to the City's economy through their tourism expenditures, and because short-term rental stays with Airbnb are on average less expensive than hotel stays, they end up with more money in their pocket to spend on the local economy. *See supra* ¶ 23. Airbnb also provides "surge capacity" to accommodate guests during periods of peak demand, such as the summer and the winter holiday season, when hotel rooms are nearly booked out. *Id.* Fewer Airbnb listings will translate into fewer tourists visiting New York City during peak dates when surge

capacity is needed, depriving the City of significant revenue at a time when the tourism industry is still recovering from the COVID-19 pandemic. *Id.*

## CAUSES OF ACTION

### FIRST CAUSE OF ACTION
### Arbitrary and Capricious

### (For Judgment Pursuant to N.Y. C.P.L.R. § 7803(3) and § 7806)

304. Petitioner re-alleges and incorporates by reference the allegations of all paragraphs above as if fully set forth herein.

305. The Challenged Rules are arbitrary and capricious for multiple reasons, including:

306. The Challenged Rules impose overly burdensome, inefficient, and costly requirements on booking services by establishing a verification process, fees, reporting requirements, and penalties that are unreasonably onerous and seemingly designed to drive booking services out of the market, in apparent disregard for more reasonable alternatives;

307. The Challenged Rules incorporate OSE's unreasonable interpretations of New York City laws and codes, by (i) requiring that all registered hosts maintain a common household with guests by refraining from restricting guest access to private areas of the home, like bedrooms or home offices, and (ii) by categorically prohibiting all hosts, including those who live in private dwellings, from offering unhosted short-term rentals of their entire homes while temporarily absent; and

308. The Challenged Rules fail to account for unintended consequences, such as substantially chilling hosts from engaging in the lawful short-term rental trade, imposing burdensome, inefficient, and costly obligations on Airbnb that will limit

Airbnb's ability to do business and will all but eliminate the short-term rental market in New York City, introducing serious safety and privacy concerns for hosts and their households, significantly harming tourism and the New York City economy, and disproportionately harming historically marginalized hosts and travelers.

309. The Challenged Rules must therefore be set aside as arbitrary and capricious under New York Civil Procedure Law and Rules section 7803(3). Petitioner is therefore entitled to a judgment under New York Civil Procedure Law and Rules section 7806 vacating and annulling the Challenged Rule.

**SECOND CAUSE OF ACTION**
**Breach of Contract – 2016 Settlement Agreement**

310. Airbnb re-alleges and incorporates by reference the allegations of all paragraphs above as if fully set forth herein.

311. The 2016 Settlement Agreement is a binding, valid, and enforceable contract between Airbnb and the City.

312. Airbnb agreed to dismiss the 2016 Action as against the City and Mayor de Blasio in full consideration for this contract.

313. In exchange for Airbnb's agreement to dismiss the 2016 Action as against the City and Mayor de Blasio, the City promised to "permanently refrain from taking any action to enforce the [2016 Amendments], including retroactively and/or under any theories of direct or secondary liability, as against Airbnb."

314. Airbnb has fully performed all of its obligations under the 2016 Settlement Agreement.

315. By enacting Local Law 18, and by OSE's issuance of the Challenged Rules, the City has breached the 2016 Settlement Agreement.

316. Specifically, the City breached its promise in the 2016 Settlement Agreement to "permanently refrain from taking any action to enforce the [2016 Amendments], including retroactively and/or under any theories of direct or secondary liability, as against Airbnb." Ex. 7 at 2 ¶ 1.

317. The City's breach is material because its promise to "permanently refrain from taking any action to enforce the [2016 Amendments], including retroactively and/or under any theories of direct or secondary liability, as against Airbnb," Ex. 7 at 2 ¶ 1, was central to Airbnb's agreement to settle and dismiss the 2016 Action, went to the root of the agreement between Airbnb and the City, and is so substantial as to defeat the purpose of the entire settlement and dismissal.

318. As a result of the City's breach, Airbnb will suffer imminent, irreparable harm with no other adequate remedy at law.

319. In the alternative, as a result of the City's breach, Airbnb has suffered damages that flow directly from and are the natural and probable consequences of the City's breach and/or that were foreseeable and within the contemplation of the parties before or at the time the contract was made.

## THIRD CAUSE OF ACTION
## Breach of the Implied Covenant of Good Faith and Fair Dealing – 2020 Settlement Agreement

320. Airbnb re-alleges and incorporates by reference the allegations of all paragraphs above as if fully set forth herein.

321. The 2020 Settlement Agreement is a valid, enforceable, and binding contract between Airbnb and the City.

322. Airbnb agreed to release and discharge the City with respect to the 2018 Action in full consideration for this contract.

323. In exchange for Airbnb's agreement to release and discharge the City with respect to the 2018 Action, the City promised that the Office of the Speaker of the City Council and the Office of the Mayor "shall make best efforts" to make certain amendments to Local Law 146, including (i) limiting Airbnb's reporting obligations to short-term rentals that were rented for more than four days and that either (a) included an entire dwelling unit or (b) were rented to three or more individuals at the same time; and (ii) requiring reports on a quarterly—as opposed to monthly—basis.

324. In exchange for Airbnb's agreement to release and discharge the City with respect to the 2018 Action, the City also released and discharged Airbnb with respect to the enforcement of Local Law 146.

325. The 2020 Settlement Agreement contains an implied covenant of good faith and fair dealing.

326. Airbnb has fully performed all of its obligations under the 2020 Settlement Agreement.

327. By enacting Local Law 18/2022, and by OSE's issuance of the Challenged Rules, the City has broken an implied promise that is so interwoven with its express promise to use best efforts to amend Local Law 146 that the City has destroyed Airbnb's ability to receive the benefit of the express promise. Specifically, the City has breached an implied promise not to change the law in a way that conflicts with the more favorable reporting provisions that were specifically negotiated.

328. As a result of the City's breach, Airbnb will suffer imminent, irreparable harm with no other adequate remedy at law.

329. In the alternative, as a result of the City's breach, Airbnb has suffered damages that flow directly from and are the natural and probable consequences of the City's breach and/or that were foreseeable and within the contemplation of the parties before or at the time the contract was made.

330. In addition, Airbnb will be imminently harmed by the City's breach because, as of an unspecified date in July 2023, Local Law 18/2022 and the Challenged Rules will require it to pay a civil penalty if it does not comply with the reporting requirement that is more onerous than the requirement Airbnb specifically negotiated.

**FOURTH CAUSE OF ACTION**
**The Challenged Rules Were Promulgated Pursuant to an Invalid Legislative Delegation**

**(For Judgment Pursuant to N.Y. C.P.L.R. § 7803(2), (3) and § 7806)**

331. Petitioner re-alleges and incorporates by reference the allegations of all paragraphs above as if fully set forth herein.

332. Article IX, § 1(a) of the New York State Constitution provides for a separation of powers between the legislative and executive branches of local government. The New York City Charter provides that the New York City Council will be the "legislative body of the city" and that it "shall be vested with the legislative power of the city." N.Y.C. Charter § 21.

333. A delegation to a local administrative agency runs afoul of the separation of powers when the legislature confers discretion without "limit[ing] the field in which that discretion is to operate and provid[ing] standards to govern its exercise." *Levine* v. *Whalen*, 39 N.Y.2d 510, 515 (1976).

334. Local Law 18 does not affirmatively require that OSE issue registrations to eligible applicants and confers upon the agency unfettered discretion to revoke

registrations whenever OSE, in its own judgment, decides that information has come to light that would have caused it to deny registration. These acts authorized by Local Law 18 reflect the exercise of legislative policymaking authority in violation of the separation-of-powers doctrine.

335. The Challenged Rules were promulgated pursuant to an invalid delegation of legislative power. Petitioner is entitled to judgment under New York Civil Procedure Law and Rules section 7806 vacating and annulling the Challenged Rules.

**FIFTH CAUSE OF ACTION**
**The Challenged Rules Were Promulgated in Excess of OSE's Legal Authority**

**(For Judgment Pursuant to N.Y. C.P.L.R. § 7803(2), (3) and § 7806)**

336. Petitioner re-alleges and incorporates by reference the allegations of all paragraphs above as if fully set forth herein.

337. OSE exceeded its legal authority by promulgating Challenged Rules that impose requirements on hosts and booking services and restrictions on how properties may be offered as short-term rentals that are not provided for in Local Law 18/2022 or otherwise authorized by law.

338. OSE further exceeded its legal authority by using the Challenged Rules to impose its policy judgment that short-term rental hosts and booking services should be dissuaded from operating in New York City, despite the fact that OSE's proper role is limited to the implementation of the legislature's policy.

339. The Challenged Rules are therefore *ultra vires*, in excess of statutory authority, and effected by an error of law. They must be set aside under New York Civil Procedure Law and Rules section 7803(2) and (3), and Petitioner is entitled to judgment

under New York Civil Procedure Law and Rules section 7806 vacating and annulling the Challenged Rules.

**SIXTH CAUSE OF ACTION**
**Local Law 18/2022 and the Challenged Rules**
**Exceed the City's Police Powers and Home Rule Authority**

340. Petitioner re-alleges and incorporates by reference the allegations of all paragraphs above as if fully set forth herein.

341. Local Law 18/2022 constitutes a legislative action that relates to the affairs or government of New York City because it amends the New York City Administrative Code and touches on local concerns specific to New York City's housing market and economy.

342. The Challenged Rules were promulgated pursuant to the authority vested in the City of New York and purportedly delegated to OSE.

343. Local Law 18/2022, which concerns matters local to New York City, should have been enacted in compliance with the procedures for such laws set forth in the home rule clause of the New York Constitution and the Municipal Home Rule Law. Instead, it exceeds the police powers and home rule authority vested in the City in two ways.

344. First, under the guise of regulation, Local Law 18/2022 operates as an impermissible de facto ban on participation in the legitimate business of short-term rentals in New York City. By imposing onerous registration requirements that will have a chilling effect on aspiring hosts, the City will foreseeably drive Airbnb's business counterparties out of the marketplace. And by shifting the responsibility and cost of registration verification to Airbnb rather than enforcing existing short-term rental laws directly against hosts who may violate them, the City will foreseeably make it

prohibitively risky and costly for Airbnb to continue to engage in the short-term rental business in this jurisdiction.

345. *Second*, Local Law 18/2022 and the Challenged Rules that implement it do not have any reasonable relationship to the promotion of health, comfort, safety, and welfare of society.

346. Local Law 18/2022 and the Challenged Rules should therefore be declared invalid because they exceed the police power and home rule authority vested in the City of New York pursuant to the home rule clause of the New York Constitution and the corresponding provision in the New York Municipal Home Rule Law.

**SEVENTH CAUSE OF ACTION**
**Preemption Under the Communications Decency Act, 47 U.S.C. § 230, Pursuant to 42 U.S.C. § 1983**

347. Petitioner re-alleges and incorporates by reference the allegations of all paragraphs above as if fully set forth herein.

348. Airbnb is an "interactive computer service" within the meaning of 47 U.S.C. § 230 because it operates an interactive website.

349. Local Law 18/2022 and the Challenged Rules violate Airbnb's rights under 47 U.S.C. § 230(c)(1) because enforcement of Local Law 18/2022 and the Challenged Rules would treat it as the publisher or speaker of information provided by third-party information content providers—hosts listing their properties for rental on Airbnb's platform.

350. Local Law 18 and the Challenged Rules are "State . . . law[s] that [are] inconsistent with" section 230, in direct violation of 47 U.S.C. § 230(e)(3).

351. Local Law 18 and the Challenged Rules violate and are preempted by section 230.

## PRIOR APPLICATION

352. No prior application has been made for the relief requested herein.

## TRIAL DEMAND

353. Petitioner demands an evidentiary hearing on all causes of action so triable.

## RELIEF REQUESTED

WHEREFORE, Petitioner respectfully requests that this Court enter an Order:

(a) Declare that the Challenged Rules are arbitrary and capricious and in violation of law, were promulgated pursuant to an invalid delegation of legislative power, in excess of OSE's legal authority, in excess of the City's police powers and home rule authority, and in breach of the implied covenant of good faith and fair dealing, and as it pertains to booking services, are preempted and invalidated by 47 U.S.C. § 230, 18 U.S.C. § 2701 *et seq.*, and are therefore invalid and unenforceable;

(b) Preliminarily and permanently enjoining the City and its respective officers, agents, servants, employees, and attorneys, and those persons in concert or participation with them, from taking any actions to implement and/or enforce any provisions of the Challenged Rules against Airbnb.

(c) On the Second Cause of Action for breach of contract (2016 Settlement Agreement), a permanent injunction against the enforcement of Local Law 18 and the Challenged Rules; and such other and further relief as the Court deems just and proper.

(d) In the alternative, on the Second Cause of Action for breach of contract (2016 Settlement Agreement), general and/or consequential damages in an amount to be determined at trial, but in no event less than the amounts set forth in Paragraphs 135, 162, and 287–89 of this Petition; an award of reasonable attorneys' fees, litigation expenses, costs, and interest; termination of the 2016 Settlement Agreement; and such other and further relief as the Court deems just and proper.

(e) On the Third Cause of Action for breach of the implied covenant of good faith and fair dealing (2020 Settlement Agreement), a permanent injunction against the enforcement of Local Law 18 section 26-

3202 and Challenged Rule section 22-03; and such other and further relief as the Court deems just and proper.

(f) In the alternative, on the Third Cause of Action for breach of the implied covenant of good faith and fair dealing (2020 Settlement Agreement), general and/or consequential damages in an amount to be determined at trial, but in no event less than the amounts set forth in Paragraphs 135, 162, and 287–89 of this Petition; an award of reasonable attorneys' fees, litigation expenses, costs, and interest; termination of the 2020 Settlement Agreement; and such other and further relief as the Court deems just and proper.

(g) Granting such other and further relief as this Court deems just and proper.

Dated: May 31, 2023
Washington, D.C.

*/s/ Karen L. Dunn*

Karen L. Dunn
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# VERIFICATION

STATE OF NEW YORK )
) ss.
COUNTY OF KINGS )

Jonathan Merten, being duly sworn, deposes and says:

1. I am the Director of Business Operations, North America at Airbnb, Inc.

2. I have read the foregoing Petition and its factual contents are true to my personal knowledge, except as to those matters alleged therein to be upon information and belief, and as to those matters, I believe them to be true.

3. The grounds for my belief as to all matters not stated upon my personal knowledge are my review of books and records of Airbnb, Inc. and upon my interviews with other officers and employees of Airbnb, Inc.

Dated: Brooklyn, New York
May 31, 2023

Jonathan Merten

Sworn to before me on this 31st day of May, 2023.

Notary Public

NICHOLAS J. LaFORGE
Notary Public, State of New York
No. 01LA6249453
Qualified in Kings County
Certificate Filed in New York County
Commission Expires October 11, 2023