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Vianca B. Canet

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I. INTRODUCTION

As technology advances with the rise of the Internet,² there has been a “shift towards networks and platform-based social and economic models.”³ The sharing economy allows people to offer their products or services to others “through online marketplaces that facilitate the transaction”⁴ during the strain of a global financial crisis. The sharing economy has decreased the “fixation on ownership and capital, and offers easier access to anything from accommodation to entertainment.”⁵ Founded in August 2008,⁶ “Airbnb is a[n] . . . online marketplace for short-term rentals.”⁷ Listings may be obtainable on a nightly or monthly basis.⁸

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² 47 U.S.C. § 230 (1996) (stating that the term “Internet” means the international computer network of both Federal and non-Federal interoperable packet switched data networks).

³ WORLD ECON. FORUM, GLOB. AGENDA COUNCIL ON THE FUTURE OF SOFTWARE & SOC’Y, *Deep Shift: Technology Tipping Points and Societal Impact*, Survey Report (Sept. 2015), http://www3.weforum.org/docs/WEF_GAC15_Technological_Tipping_Points_report_2015.pdf.

⁴ See Carmen Nobel, *Uncovering Racial Discrimination in the ‘Sharing Economy’*, HARVARD BUS. SCH. WORKING KNOWLEDGE (last visited Apr. 23, 2017) <http://hbswk.hbs.edu/item/uncovering-racial-discrimination-in-the-sharing-economy>; see also Carmen Nobel, *Racial Discrimination In The Sharing Economy*, FORBES (Feb. 24, 2014 10:24 AM), <http://www.forbes.com/sites/hbsworkingknowledge/2014/02/24/racial-discrimination-in-the-sharing-economy/>.

⁵ WORLD ECON. FORUM, *supra* note 3, at 34.

⁶ *About Us*, AIRBNB, <https://www.airbnb.com/about/about-us> (last visited Apr. 23, 2017).

⁷ Benjamin Edelman & Michael Luca, *Digital Discrimination: The Case of Airbnb.com*, HARVARD BUS. SCH. (Working Paper No. 14-054, 2014), http://www.hbs.edu/faculty/Publication%20Files/Airbnb_92dd6086-6e46-4eaf-9cea-60fe5ba3c596.pdf.

⁸ *Sublets*, AIRBNB, <https://www.airbnb.com/about/about-us> (last visited Apr. 23, 2017).

Airbnb has made it more accessible for people, who are more concerned with necessities rather than luxury amenities, to travel for a lower price,⁹ whether it be a loft in New York City overlooking bustling Time Square or a spare bedroom in Des Moines, Iowa. Airbnb provides a place to stay when hotels do not have rooms available.¹⁰ Furthermore, Airbnb offers users the ability to make a supplemental income.¹¹ Proponents of the sharing economy argue that Airbnb quickly generates income for residents.¹² A Nashville couple happily stated, “renting their three-bedroom home to more than fifty visitors during the past two years has helped them with their mortgage.”¹³

Despite the praise and rise in business for Airbnb, there is one problem that is affecting its reputation: virtually unregulated discrimination. However, the sharing economy is the future of our society, and websites like Airbnb, HomeAway,¹⁴ and VRBO,¹⁵ will likely become permanent fixtures.¹⁶ Currently, Airbnb provides more lodging than Hilton Worldwide and Marriot.¹⁷ Airbnb is projected to continue expanding over the coming years.

This article focuses on discrimination in the sharing economy. Part II addresses Airbnb’s efforts to combat discrimination, public response to Airbnb’s discrimination policy. Part III

⁹ Julie Weed, *Airbnb Grows to a Million Rooms, and Hotel Rivals Are Quiet, for Now*, N.Y. TIMES (May 11, 2015), http://www.nytimes.com/2015/05/12/business/airbnb-grows-to-a-million-rooms-and-hotel-rivals-are-quiet-for-now.html?partner=rss&emc=rss&_r=0.

¹⁰ Julie Weed, *supra* note 9. The author would like to note that Airbnb operates domestically as well as internationally. While this paper applies a domestic analysis, at a minimum, parties will need to determine how to complete international service of process.

¹¹ Verena Dobnik, *New York City, Airbnb Battles Over Data, Short-Term Rentals*, NBC 4 NEW YORK (Oct. 15, 2013 4:17 AM), <http://www.nbcnewyork.com/news/local/Airbnb-NYC-Data-Battle-227773671.html>.

¹² See generally Chris Butler, *Lawsuit Challenges Nashville’s Rules on Airbnb.com*, TN. WATCHDOG (Aug. 26, 2015), <http://watchdog.org/235580/nashville/>.

¹³ *Id.*

¹⁴ *Main Page*, HOMEAWAY, https://www.homeaway.com/?k_clickid=ae5712b4-dc98-4b04-96ad-61cc0f09ec4f&gclid=CJWFw6DEgckCFdgWgQodnTAApA (last visited Apr. 23, 2017).

¹⁵ *Main Page*, VRBO, https://www.vrbo.com/?k_clickid=ae5712b4-dc98-4b04-96ad (last visited Apr. 23, 2017).

¹⁶ Lyndsey Gilpin, *We-Commerce: The Sharing Economy’s Uncertain Path to Changing the World*, TECH REPUBLIC, <http://www.techrepublic.com/article/we-commerce-the-sharing-economys-uncertain-path-to-changing-the-world/> (last visited Apr. 23, 2017).

¹⁷ Julie Weed, *supra* note 9.

focuses on the extent that sharing economy businesses perform the same functions as traditional public accommodations, yet escape existing laws and suggestions for how the regulatory structure should be amended. Part IV addresses the legal realities that practitioners may face.

II. BACKGROUND

A. Airbnb's Business Model

Airbnb's website provides an anti-discrimination policy stating:

Airbnb is an open marketplace. Through their experiences on Airbnb, we hope that our guests and hosts build meaningful connections with people from all over the globe. To that end, we prohibit content that promotes discrimination, bigotry, racism, hatred, harassment or harm against any individual or group, and we require all users to comply with local laws and regulations.¹⁸

However, discrimination is inevitable under Airbnb's current user procedure.¹⁹ Airbnb users create online profiles as hosts or guests.²⁰ Subsequently, Airbnb requires users to have verified ID's and public reviews.²¹ Further, "[h]aving a [v]erified ID indicates that users have completed a specific set of verifications—offline ID, online ID, profile photo, email address, and phone number."²² Airbnb intends for "hosts and guests to build trust and cultivate their reputations by writing reviews about their experiences after each trip."²³ Thereafter, a guest seeking to rent on

¹⁸ Alice & Jeff, *Declining an Inquiry Based on Gender?*, COMMUNITY, <https://community.airbnb.com/t5/Hosts/Declining-an-Inquiry-based-on-gender/td-p/100049> (last visited Apr. 23, 2017) (quoting *Anti-Discrimination Policy*, AIRBNB, <https://www.airbnb.com/help/article/483/anti-discrimination-policy> (last visited Apr. 23, 2017)). Citation provided is to a cached version of website, exact phrasing has been altered without a change to meaning. The original posting is no longer accessible. The modified text reads as follows: "This commitment rests on two foundational principles that apply both to Airbnb's hosts and guests: **inclusion and respect**. Our shared commitment to these principles enables every member of our community to feel welcome on the Airbnb platform no matter who they are, where they come from, how they worship, or whom they love. Airbnb recognizes that some jurisdictions permit, or require, distinctions among individuals based on factors such as national origin, gender, marital status or sexual orientation, and it does not require hosts to violate local laws or take actions that may subject them to legal liability. Airbnb will provide additional guidance and adjust this nondiscrimination policy to reflect such permissions and requirements in the jurisdictions where they exist."

¹⁹ *How It Works: Airbnb Help Center*, AIRBNB, <https://www.airbnb.com/help/getting-started/how-it-works> (last visited Apr. 23, 2017).

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

Airbnb can select their destination, travel dates, and number of guests,²⁴ then narrow their search by adding filters such as room type, price, size, instant book, social connections, neighborhoods, amenities and property type.²⁵ Further, Airbnb charges guests when the reservation is confirmed and then releases payouts to hosts twenty-four hours after the guest checks in.²⁶

B. Impacts of Implicit Bias

Although pictures have the ability to “facilitate trust”²⁷ within the online rental community, they also have the ability to enable discrimination by implicit bias, “the unconscious, automatic assumption that people make about others based on their perceived racial identity.”²⁸ A host’s photo can easily convey race, color, religion, sex, national origin, ethnicity, disability,²⁹ age, and disability creating substantial bias against minorities. A host’s name provides an opportunity for the user to infer sex,³⁰ religion,³¹ national origin,³² race and ethnicity.³³

²⁴ *How do I search for listings?*, AIRBNB, <https://www.airbnb.com/help/article/252/how-do-i-search-for-listings> (last visited Apr. 23, 2017).

²⁵ *How do I use search filters?*, AIRBNB, <https://www.airbnb.com/help/article/479/how-do-i-use-search-filters> (last visited Apr. 23, 2017).

²⁶ *When am I charged for a reservation?*, AIRBNB, <https://www.airbnb.com/help/article/92/when-am-i-charged-for-a-reservation> (last visited Apr. 23, 2017).

²⁷ Edelman & Luca, *supra* note 7, at 2.

²⁸ Jamilah King, *Airbnb Challenges Harvard Racial Discrimination Study*, RACE FORWARD (Jan. 24, 2014, 11:13 AM), <https://www.colorlines.com/articles/airbnb-challenges-harvard-racial-discrimination-study>.

²⁹ The Americans with Disabilities Act of 1990 (ADA) defines the term “disability” as having “a physical or mental impairment that substantially limits a major life activity; a record of such an impairment; or being regarded as having an impairment.” 42 U.S.C. § 12102(1) (2000); *see also* 29 C.F.R. § 1630.2(g) (1996).

³⁰ *See* Angela Onwuachi-Willig and Mario L. Barnes, *By Any Other Name?: On Being “Regarded As” Black, And Why Title VII Should Apply Even If Lakisha And Jamal Are White*, 2005 WIS. L. REV. 1283, 1301 (2005) (stating that “...decisions based upon the sound of a name alone are not acting solely on the basis of race, but instead may also be drawing inferences about a number of the applicant's traits”). For example, making a decision based on name can result in making a decision based on gender.

³¹ *See generally* K.M. Sharma, *What’s In a Name: Law, Religion, and Islamic Names*, 26 DENV. J. INT’L L. & POL’Y 151, 153 (1998) (determining that “the vast majority of Muslim given names carry signifiers of Islamic heritage and are traditionally culled from that religion's holiest book, the Qur’an”); Andrew M. Milz, *But Names Will Never Hurt Me?: El-Hakem v. Bjy, Inc. and Title VII Liability for Race Discrimination Based on an Employee’s Name*, 16 TEMP. POL. & CIV. RTS. L. REV. 283, 293 (2006).

³² 29 C.F.R. § 1606(1) (2006) (determining that “the denial of equal employment opportunity because of an individual’s, or his or her ancestor’s place of origin; or because an individual has the physical, cultural or linguistic characteristics of a national origin group” and extends to discrimination founded on the view that “an individual’s name or spouse’s name is associated with a national origin group”).

³³ “Names are often a proxy for race and ethnicity.” *See* El-Hakem v. BJY Inc., 415 F.3d 1068, 1073 (9th Cir. 2005) (citing *Orhorhaghe v. I.N.S.*, 38 F.3d 503 (9th Cir. 1994)) (noting that “[l]ike one’s appearance, one’s name is

1. Case Studies on Discrimination

Scholars Marianne Bertrand and Sendhil Mullainathan, conducted a study titled “Are Emily and Greg More Employable Than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination,” which revealed that having an African-American-sounding name, as opposed to a white-sounding name, minimized one's chances of receiving a job interview considerably, irrespective of profession.³⁴ This field experiment involved sending fictitious, identical résumés with common African American-sounding name, such as “Lakisha Washington” or “Jamal Jones,” and common white-sounding name, such as “Emily Walsh” or “Greg Baker,” to the same employers in Boston and Chicago.³⁵ The study revealed that résumés with white-sounding names received “[fifty] percent more callbacks for interviews”³⁶ and higher quality résumés receive “[thirty] percent more callbacks” in comparison to those with African American-sounding names.³⁷

Table 1 shown below illustrates the mean callback rate by racial association of names:

frequently correlated with one’s racial or ethnic background, and in both instances the racial or ethnic background which results in adverse action by immigration officers almost always is that of people of color).

³⁴Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable Than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 THE AMERICAN ECONOMIC REVIEW 4, 991–1013 (Sep. 2004), https://www.fsb.miamioh.edu/lij14/420_paper_experiment_Bertrand04.pdf.

³⁵*Id.*

³⁶*Id.* at 1, 3, 10.

³⁷*Id.* at 1, 12.

TABLE 1—MEAN CALLBACK RATES BY RACIAL SOUNDINGNESS OF NAMES

	Percent callback for White names	Percent callback for African-American names	Ratio	Percent difference (<i>p</i> -value)
Sample:				
All sent resumes	9.65 [2,435]	6.45 [2,435]	1.50	3.20 (0.0000)
Chicago	8.06 [1,352]	5.40 [1,352]	1.49	2.66 (0.0057)
Boston	11.63 [1,083]	7.76 [1,083]	1.50	4.05 (0.0023)
Females	9.89 [1,860]	6.63 [1,886]	1.49	3.26 (0.0003)
Females in administrative jobs	10.46 [1,358]	6.55 [1,359]	1.60	3.91 (0.0003)
Females in sales jobs	8.37 [502]	6.83 [527]	1.22	1.54 (0.3523)
Males	8.87 [575]	5.83 [549]	1.52	3.04 (0.0513)

Notes: The table reports, for the entire sample and different subsamples of sent resumes, the callback rates for applicants with a White-sounding name (column 1) an African-American-sounding name (column 2), as well as the ratio (column 3) and difference (column 4) of these callback rates. In brackets in each cell is the number of resumes sent in that cell. Column 4 also reports the *p*-value for a test of proportion testing the null hypothesis that the callback rates are equal across racial groups.

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Moreover, a recent Harvard Business School (“HBS”) study pooled data on Airbnb rentals from July 2012 in New York City and found a substantial bias against minority Airbnb hosts, which could ultimately present a bias against minority guests.³⁹ The HBS researchers, together with workers from Amazon Mechanical Turk (“AMT”), rated photos of each listing on a seven-point scale ranging from “[t]his is a terrible apartment. I would not stay here at any price” to “[t]his is an extremely nice apartment. I would stay here even if it were a lot more expensive than a nice hotel room.”⁴⁰ HBS compiled all the publicly available profile pictures of New York City hosts in order to determine race, and other AMT employees coded the races into

³⁸ See Bertrand & Mullainathan, *supra* note 34.

³⁹ See Edelman & Luca, *supra* note 7.

⁴⁰ *Id.*

“White, Black, Hispanic, Asian, Unclear but Non-white, Multiple Races, Not Applicable (no people in picture), or Unclear/Uncertain.”⁴¹

The HBS study discovered that black hosts receive twelve percent less per similar listing than non-black hosts.⁴² The study also states, “[B]lack hosts receive a larger price penalty for having a poor location score relative to non-black hosts.”⁴³ These differences highlight the risk of discrimination in online marketplaces, suggesting an important unintended consequence of a seemingly-routine mechanism for building trust.”⁴⁴ Airbnb released a statement declaring, “We are committed to making Airbnb the most open, trusted, diverse, transparent community in the world” and “[o]ur Terms of Service prohibit content that discriminates.”⁴⁵ However, Airbnb refutes the HBS studies claims arguing that the data is “two-years old” and is simply one of thousands of cities Airbnb serves.⁴⁶

2. Public Response

Despite Airbnb’s refutations, individuals are publicly attacking Airbnb’s lack of compliance with housing regulations. YouTube personality, Tommy Sotomayor, claims he was rejected from a rental unit because of his skin color through a video uploaded to YouTube on October 2013, which has since been removed.⁴⁷ Sotomayor states, “I got declined twice by the same person trying to rent a place and if you look at their history they only rent to white people”⁴⁸ He claims he paid for his rental and was subsequently rejected after the host found out he is black.⁴⁹

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ See Edelman & Luca, *supra* note 7.

⁴⁵ Alexandra Sifferlin, *Harvard Study Suggests Racial Bias Among Some Airbnb Renters*, TIME (Jan. 27, 2014), <http://time.com/2345/harvard-study-suggests-racial-bias-among-some-airbnb-renters/>.

⁴⁶ *Id.*

⁴⁷ Jorge Rivas, *Airbnb Racism: Neither Unique nor Surprising*, FUSION (Jan. 23, 2014), <http://fusion.net/story/4689/airbnb-racism-neither-unique-nor-surprising>.

⁴⁸ Rivas, *supra* note 46.

⁴⁹ *Id.*

Furthermore, Sotomayor stated that the host was still listing the apartment space as vacant on the dates he requested.⁵⁰

In response to discrimination case studies, user complaints, and class action lawsuits, two rival room-sharing services, Innclusive⁵¹ and Noirbnb⁵², are marketing themselves as short-term rental services that are non-discriminatory and safe. Ironically, Noirbnb began as a result of Airbnb's discrimination practices.⁵³ On June 3rd, 2016, Noirbnb was created to serve the community and be "The Future of Black Travel."⁵⁴ Airbnb's continued success will be dependent on whether minorities feel welcomed to utilize the website in the same nondiscriminatory way that they are welcomed at hotels.⁵⁵

C. Airbnb's Latest Response to Discrimination

On September 8, 2016, Laura W. Murphy, President of Laura Murphy and Associates released "Airbnb's Work to Fight Discrimination and Build Inclusion A Report Submitted to Airbnb."⁵⁶ This report demonstrates the overall need for Airbnb to change its policy to reflect discrimination. Instead of removing mandatory profile photos that led to guests being instantly refused service because of their appearance, Airbnb intends on experimenting "with reducing the prominence of guest photos in the booking process and enhancing other parts of host and guest profiles with objective information."⁵⁷ In addition, November 1, 2016, marked the first day that

Airbnb users must agree to uphold a Community Commitment, which states:

⁵⁰ *Id.*

⁵¹ *Home Page*, INNCLUSIVE, <https://www.innclusive.com/> (last visited Apr. 23, 2017).

⁵² *Welcome Home*, NOIRBNB, <http://noirbnb.com/> (last visited Apr. 23, 2017).

⁵³ *Story*, NOIRBNB, <http://noirbnb.com/story> (last visited Apr. 23, 2017).

⁵⁴ *Id.*

⁵⁵ See Katie Benner, *Airbnb Vows to Fight Racism, but Its Users Can't Sue to Prompt Fairness*, THE N.Y. TIMES (June 19, 2016), <https://www.nytimes.com/2016/06/20/technology/airbnb-vows-to-fight-racism-but-its-users-cant-sue-to-prompt-fairness.html>.

⁵⁶ Laura W. Murphy, *Airbnb's Work to Fight Discrimination and Building Inclusion A Report Submitted to Airbnb*, AIRBNB (Sept. 8, 2016), http://blog.airbnb.com/wp-content/uploads/2016/09/REPORT_Airbnbs-Work-to-Fight-Discrimination-and-Build-Inclusion.pdf?3c10be.

⁵⁷ *Id.* at 11.

We believe that no matter who you are, where you are from, or where you travel, you should be able to belong in the Airbnb community. By joining this community, you commit to treat all fellow members of this community, regardless of race, religion, national origin, disability, sex, gender identity, sexual orientation or age, with respect, and without judgment or bias.⁵⁸

Airbnb has “trained specialist” to target and combat discrimination and route concerns.⁵⁹

Furthermore, Airbnb will offer new training to help people learn how to fight bias and will eventually highlight hosts who have completed this training.⁶⁰ Airbnb will implement the Diversity Rule, “a new Airbnb policy that will mandate that all candidate pools for senior-level positions include women and candidates from underrepresented backgrounds.”⁶¹ Airbnb will also expand efforts to bring economic opportunities to minority-owned business.⁶²

Airbnb’s updated non-discrimination policy states, in relevant part, what a guest can do if they have been turned down by a host:

If a particular listing contains language contrary to this nondiscrimination policy, the host will be asked to remove the language and affirm his or her understanding and intent to comply with this policy and its underlying principles. Airbnb may also, in its discretion, take steps up to and including suspending the host from the Airbnb platform. If the host improperly rejects guests on the basis of protected class, or uses language demonstrating that his or her actions were motivated by factors prohibited by this policy, Airbnb will take steps to enforce this policy, up to and including suspending the host from the platform. As the Airbnb community grows, we will continue to ensure that Airbnb’s policies and practices align with our most important goal: To ensure that guests and hosts feel welcome and respected in all of their interactions using the Airbnb platform. The public, our community, and we ourselves, expect no less than this.⁶³

⁵⁸*Id.* at 10.

⁵⁹*Id.*, at 11, 20.

⁶⁰*Id.* at 12.

⁶¹*Murphy, supra* note 55, at 12.

⁶²*Id.*

⁶³*Airbnb’s Nondiscrimination Policy: Our Commitment to Inclusion and Respect*, AIRBNB, <https://www.airbnb.com/help/article/1405/airbnb-s-nondiscrimination-policy--our-commitment-to-inclusion-and-respect?topic=533> (last visited Apr. 23, 2017).

Airbnb acknowledges that despite making these changes, discrimination is still likely to occur on its platform.⁶⁴ In order to accommodate those guests who have been discriminated against, Airbnb will begin instituting Open Doors.⁶⁵ The Open Doors policy ensures an Airbnb user a place to stay if the user is discriminated against and is unable to stay at a particular listing.⁶⁶ Already in effect and a favorite among users, Airbnb’s Instant Book is a feature, which does not require prior-approval from a user.⁶⁷ Airbnb’s goal is to make one million listings bookable via Instant Book by January 2017.⁶⁸ Ultimately, Airbnb has made minimal changes in the arena of discrimination and is simply designing its platform to absolve itself of liability.

III. LEGAL UNCERTAINTY

Of the many categories of complaint data for housing discrimination, “four million acts of discrimination are estimated to occur in the rental market,”⁶⁹ “but Americans only report a fraction of these acts in the form of complaints to private, nonprofit fair housing groups, and federal and local government agencies.”⁷⁰ The environment of legal uncertainty has created exponential development for Airbnb, yet has also opened it to attacks by its many critics. State and local government have attempted to make changes in order to regulate Airbnb and ensure compliance with housing regulations.

⁶⁴ Murphy, *supra* note 55, at 21.

⁶⁵ *Id.* at 11, 21.

⁶⁶ Murphy, *supra* note 55, at 11, 21.

⁶⁷ See Elaine Glusac, *As Airbnb Grows, So Do Claims of Discrimination*, THE N.Y. TIMES (June 21, 2016), <http://www.nytimes.com/2016/06/26/travel/airbnb-discrimination-lawsuit.html>; see also *What is Instant Book?*, AIRBNB, <https://www.airbnb.com/help/article/523/what-is-instant-book> (last visited Apr. 22, 2017) (defining Instant Book as listings [that] don’t require approval from the host before they can be booked. Instead, guests can just choose their travel dates, book, and discuss check-in plans with the host).

⁶⁸ Murphy, *supra* note 55, at 11.

⁶⁹ NAT’L FAIR HOUSING ALLIANCE, *Where You Live Matters 2015 Fair Housing Trends Report* (2015) <http://www.nationalfairhousing.org/Portals/33/2015-04-30%20NFHA%20Trends%20Report%202015.pdf> (citing the U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, *The State of Fair Housing: FY2006 Annual Report on Fair Housing* (2006), <http://www.hud.gov/offices/fheo/fy2006rpt.pdf>).

⁷⁰ *Id.*

Airbnb’s website now has an overview of local housing laws and regulations throughout the forty-seven cities in the United States.⁷¹ Hosts may, but are not required, to view these regulations before making a listing.⁷² Airbnb also urges users to check their “HOA or Co-Op Board regulations to make sure there is no prohibition against subletting--or any other restriction against hosting.”⁷³ Furthermore, many critics have attacked federal laws that undermine the legal framework and grant Internet platforms, such as Airbnb, immunity.

A. The Communications Decency Act of 1996

Airbnb is not liable for discrimination occurring on their platform because they are immune under Section 230 (c) of the Communications Decency Act of 1996 (“CDA”).⁷⁴ The CDA was enacted into law as a section of the Telecommunications Act of 1996, P.L. 104-104.⁷⁵ Subsection (c) of the CDA, known as the “Good Samaritan” provision states:

No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider. No provider or user of an interactive computer service shall be held liable on account of—any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).⁷⁶

⁷¹ See generally *Responsible Hosting in the United States*, AIRBNB, <https://www.airbnb.com/help/article/1376/responsible-hosting-in-the-united-states> (last visited Apr. 22, 2017).

⁷² *Id.*

⁷³ *Id.*

⁷⁴ 47 U.S.C. § 230(c) (1996).

⁷⁵ 47 U.S.C. § 230 (attempting to modernize the outdated Telecommunications Act of 1934).

⁷⁶ 47 U.S.C. § 230(b).

Courts have interpreted Section 230 of the CDA **broadly**⁷⁷ to grant immunity to websites that normally would be liable under “vicarious liability”⁷⁸ from liability for user-generated content.⁷⁹ However, subsection (e) of the CDA outlines exceptions.⁸⁰ The CDA has no effect on criminal law or on intellectual property law.⁸¹ Subsection (e) of the CDA also states, “Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section.”⁸² Further, “no cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.”⁸³ Section 230 has been construed to preempt inconsistent state law claims.⁸⁴ Moreover, this section does not limit the Electronic Communications Privacy Act of 1986, or any amendments to the Act including comparable State law.⁸⁵

In 1997, the United States Supreme Court determined in *Reno v. Am. Civ. Liberties Union* that sections of the CDA focusing on liability for indecent materials were unconstitutional under the First Amendment.⁸⁶ *Reno* emphasized that the Internet has experienced “extraordinary growth”

⁷⁷ See Matthew G. Jeweler, *The Communications Decency Act of 1996: Why § 230 is Outdated and Publisher Liability for Defamation Should be Reinstated Against Internet Service Providers*, 8 U. PITT. J. TECH. L. & POL'Y 3 (2007).

⁷⁸ *Vicarious Liability*, BLACK'S LAW DICTIONARY (9th ed. 2009) (defining “vicarious liability” as an “[o]bligation rising from a parties relationship with each other”).

⁷⁹ See Gregory M. Dickinson, *An Interpretive Framework for Narrower Immunity Under Section 230 of the Communications Decency Act*, 33 HARV. J.L. & PUB. POL'Y 863, 880 (2010).

⁸⁰ 47 U.S.C. § 230(e) (2012).

⁸¹ *Id.*

⁸² 47 U.S.C. §§ 230(e)(1)–(2).

⁸³ 47 U.S.C. § 230(e)(3).

⁸⁴ See Samuel J. Morley, *How Broad Is Web Publisher Immunity Under S230 of the Communications Decency Act of 1996?*, 84 FLA. B.J. 8 (2010).

⁸⁵ 47 U.S.C. § 230(e)(4).

⁸⁶ *Reno v. Am. Civil Liberties Union*, 521 U.S. 844 (1997) (holding that § 223(a)(1)(B), § 223(a)(2), § 223(d) of the CDA are unconstitutional because they limit freedom of speech guaranteed by the First Amendment and are substantially overbroad, except for cases of obscenity or child pornography); see also *Roth v. United States*, 354 U.S. 476 (1957) (determining that “[o]bscene material is not within the area of constitutionally protected speech or press”).

and “the content is as diverse as human thought.”⁸⁷ Furthermore, *Reno* stressed the importance of retaining first amendment rights in the light of new legislation governing the rise of the Internet.⁸⁸

The original purpose of Section 230 of the CDA was to restrict free speech on the Internet, yet the CDA’s effects have been counterintuitive resulting in free speech and expression on the Internet.⁸⁹ Section 230 states:

[I]t is the policy of the United States—(1) to promote the continued development of the Internet and other interactive computer services and other interactive media; (2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation; (3) to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services; (4) to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children’s access to objectionable or inappropriate online material; and (5) to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.⁹⁰

The CDA distinguishes between interactive computer services and internet content providers, for whom the statute does not provide immunity.⁹¹ Interactive computer services are “any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.”⁹² Internet content providers are defined in the statute as “any person or entity that is

⁸⁷*Zeran v. Am. Online, Inc.*, 129 F.3d 327, 328 (4th Cir. 1997) (stating that “the Internet is an international network of interconnected computers,” currently used by approximately 40 million people worldwide”) (quoting *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 849 (1997)).

⁸⁸*Reno*, 521 U.S. at 882.

⁸⁹*CDA 230 The Most Important Law Protecting Internet Speech*, ELECTRONIC FRONTIER FOUNDATION DEFENDING YOUR RIGHTS IN THE DIGITAL WORLD, <https://www.eff.org/issues/cda230> (last visited Apr. 22, 2017).

⁹⁰47 U.S.C. §§ 230 (b)(1)–(b)(5).

⁹¹*See* 47 U.S.C. §§ 230(f)(2), (f)(3); *see also* *Kuersteiner v. Schrader*, 2008 NY Slip Op 33614(U), ¶¶ 6–7 (Sup. Ct.). ⁹²47 U.S.C. § 230(f)(2).

responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.”⁹³

Three elements are required for Section 230 immunity to apply.⁹⁴ First, “the defendant must be a provider or user of an interactive computer service.”⁹⁵ Internet service providers, such as America Online⁹⁶ and Amazon,⁹⁷ are recognized as Section 230 providers of interactive computer services. Second, “the asserted claims must treat the defendant as a publisher or speaker of information.”⁹⁸ Lastly, “the information must be provided by another interactive computer service and not the interactive computer service itself.”⁹⁹

1. Judicial Interpretation of Section 230 of the CDA

Many scholars believe that, “Airbnb is a company that evolved in a relatively sparse and outdated regulatory environment.”¹⁰⁰ No amendments have occurred to the act since 1997,

⁹³ See 47 U.S.C. §§ 230(f)(2), (f)(3); see also Chicago Lawyers’ Committee for Civil Rights Under the Law, Inc. v. Craigslist, Inc., 461 F. Supp. 2d 681,688 (ND Illinois 2006) (citing, Zeran v. Am. Online, Inc., 129 F.3d 327).

⁹⁴ Schneider v. Amazon.com, Inc., 31 P.3d 37, 39 (Wash. Ct. App. 2001) (holding that Amazon had immunity under statute as the publisher of content provided by others).

⁹⁵ See 47 U.S.C. § 230(f)(2); see also Schneider, 31 P.3d at 39.

⁹⁶ Zeran, 129 F.3d at 327.

⁹⁷ Schneider, 31 P.3d at 40.

⁹⁸ *Id.* at 39.

⁹⁹ *Id.* (determining that an ISP will not be liable if the defamatory material is provided solely by a third party, but if the ISP takes any part in the creation of the material it could be liable).

¹⁰⁰ See Brittany McNamara, *Airbnb: A Not-So-Safe Resting Place*, 13 COLO. TECH. L.J. 160 (2015) (stating that “Airbnb is a company that evolved in a relatively sparse and outdated regulatory environment”); see generally Jeweler, *supra* note 73, at 1 (explaining that the CDA is outdated and unfair); see David Lukmire, *Can the Courts Tame the Communications Decency Act?: The Reverberations of Zeran v. America Online*, 66 N.Y.U. ANN. SURV. AM. L. 371, 410 (2010) (stating that the internet has flourished with a minimum amount of government regulation); see also Lisa Marie Ross, *Cyberspace: The New Frontier for Housing Discrimination-an Analysis of the Conflict Between the Communications Decency Act and the Fair Housing Act*, 44 VAL. U. L. REV. 329, 330 (2009) (arguing for modernization of the CDA); see also Stephen Collins, *Saving Fair Housing on the Internet: The Case for Amending the Communications Decency Act*, 102 N.W. U. L. REV. 1471, 1491 (2008) (explaining that Congress passed the CDA to promote decency on the internet); see also Amanda L. Cecil, *Taking Back the Internet: Imposing Civil Liability on Interactive Computer Services in an Attempt to Provide an Adequate Remedy to Victims of Nonconsensual Pornography*, 71 WASH. & LEE L. REV. 2513, 2540 (2014) (explaining that the CDA provides broad immunity to internet providers and needs to be reformed for the modern day internet).

although the Internet is substantially different than it was at its creation.¹⁰¹ Further, Airbnb should not fall under the blanket of Section 230 (c) of the CDA.¹⁰²

Decided a year after the CDA was passed, the leading decision is *Zeran v. Am. Online, Inc.*¹⁰³ In this case, Kenneth Zeran brought suit against America Online, Inc. (“AOL”), “arguing that AOL unreasonably delayed in removing defamatory messages posted by an unidentified third party, refused to post retractions of those messages, and failed to screen for similar postings thereafter.”¹⁰⁴ The district court determined that AOL had the affirmative defense of immunity under Section 230 of CDA.¹⁰⁵ The United States Court of Appeals affirmed the district courts determination holding that Section 230 inoculates computer service providers like AOL from liability for information that originates with third parties.¹⁰⁶ Therefore, lawsuits that hold a interactive computer service liable for publishing typical editor functions “such as deciding whether to publish, postpone or alter content are barred.”¹⁰⁷ Conversely, some courts have chosen to stray from the broad, *Zeran* interpretation.¹⁰⁸ For example, the court in *Barrett v. Rosenthal* stated, “We share the concerns of those who have expressed reservations about the *Zeran* court's broad interpretation of section 230 immunity.”¹⁰⁹

¹⁰¹ *Reno*, 521 U.S. at 886 (holding that § 223(a)(1)(B), § 223(a)(2), and § 223(d) of the CDA are unconstitutional because they limit freedom of speech guaranteed by the First Amendment and are substantially overbroad, except for cases of obscenity or child pornography).

¹⁰² 47 U.S.C. § 230(c).

¹⁰³ *See generally* *Zeran*, 129 F.3d 327.

¹⁰⁴ *Id.* at 328.

¹⁰⁵ *Id.* (affirming district court’s ruling that computer service providers like AOL are not liable for information that originates with third parties under §230 of the CDA).

¹⁰⁶ *Id.* at 330–31 (defining a “computer service provider” as “[o]ne of the many means by which individuals access the Internet is through an interactive computer service. These services offer not only a connection to the Internet as a whole, but also allow their subscribers to access information communicated and stored only on each computer service's individual proprietary network.”) (quoting *Reno v. ACLU*, 521 U.S. 874 (1997)).

¹⁰⁷ *See id.* at 330 (barring lawsuits against service providers for performing traditional editorial functions such as deciding whether to publish, withdraw, or postpone content); *see also* *Kuersteiner v. Schrader*, No. 33614, slip op. at 4–5 (N.Y.S. Ct. Oct. 14, 2008) (stating that “section 230 of the CDA precludes courts from entertaining claims that would put a computer service provider in a publisher’s role”).

¹⁰⁸ *See* *Barrett v. Rosenthal*, 146 P.3d 510, 529 (Cal. 2006) (concluding that “the prospect of blanket immunity for those who intentionally redistribute defamatory statements on the Internet has disturbing implications”).

¹⁰⁹ *Barrett*, 146 P.3d at 529.

In the case of *Chi. Lawyers' Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, the court held that the CDA barred causes of action that would require treating interactive computer services as publisher of third-party content.¹¹⁰

The issue becomes more convoluted when a website offers a mix of content created by a user and interactive computer service. At what point does an interactive computer service cross the line between being a facilitator of third-party content to being a co-creator of that content? In *Carafano v. Metrosplash.com, Inc.*, an unknown prankster impersonating actress Christianne Carafano, created a profile for her on an online dating site.¹¹¹ The profile included Carafano's home address.¹¹² Carafano received threatening phone calls and subsequently sued the dating site for publishing the unauthorized profile.¹¹³ In *Carafano*, the Court held that an interactive computer service who provided questions for users to answer when making a personal profile on its website is not considered an information content provider and is immune under Section 230.¹¹⁴ However, the court added on to the decision in *Carafano* the following:

[E]ven if the data are supplied by third parties, a website operator may still contribute to the content's illegality and thus be liable as a developer. Providing immunity every time a website uses data initially obtained from third parties would eviscerate the exception to section 230 for “develop[ing]” unlawful content “in whole or in part.”¹¹⁵

The Ninth Circuit Court in *Fair Housing Council of San Fernando v. Roommates.com* addressed the conflict between the CDA and the FHA and recognized that “reviewing courts have

¹¹⁰ *Chi. Lawyers' Comm. for Civ. Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666, 669 (7th Cir. 2008).

¹¹¹ *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1121 (9th Cir. 2003).

¹¹² *Carafano*, 339 F.3d at 1121.

¹¹³ *Carafano*, 339 F.3d at 1122.

¹¹⁴ *Carafano*, 339 F.3d at 1119.

¹¹⁵ *See Fair Hous. Council of San Fernando Valley v. Roommate.Com, LLC.*, No. CV 03-09386PA(RZX), 2004 WL 3799488 (C.D. Cal. Sept. 30, 2004), *aff'd in part, vacated in part, rev'd in part* by 521 F.3d 1157 (9th Cir. 2008) (holding an interactive computer service liable for the defamatory content it helped create, but finding immunity for the defamatory advertisements created entirely by third parties).

treated section 230(c) immunity as quite robust, adopting a relatively expansive definition of ‘interactive computer service’ and a relatively restrictive definition of ‘information content provider.’”¹¹⁶

provider.”¹¹⁷ The statute defines an “access software provider” as one that provides “enabling tools” to “filter,” “screen,” “pick,” “choose,” “analyze,” “digest,” “search,” “forward,” “organize,” and “reorganize” content.¹¹⁸ Roommates.com *required* subscribers to “divulge protected characteristics and discriminatory preferences and to match those who had rooms with those who were looking for rooms based on criteria that appeared to be prohibited by [the Fair Housing Act].”¹¹⁹ The CDA was not created to make “a lawless no-man's-land on the Internet.”¹²⁰ Nonetheless, a lawless no-man’s land was formed.

The Ninth Circuit determined that Roommates.com is considered an “information content provider because the company developed the questions and choices posed to users and then published the public profiles based on users’ answers.”¹²¹ Furthermore, the Court held that “requiring subscribers to answer the questions as a condition of using Roommate's services unlawfully ‘cause[s]’ subscribers to make a ‘statement ... with respect to the sale or rental of a dwelling that indicates [a] preference, limitation, or discrimination,’ in violation of 42 U.S.C. § 3604(c).”¹²² The Fair Housing Act and state housing discrimination laws were violated because

¹¹⁶ See *Fair Hous. Council of San Fernando Valley* at 1187.

¹¹⁷ 47 U.S.C. § 230(f)(2).

¹¹⁸ 47 U.S.C. §§ 230(f)(4)(A)–(C).

¹¹⁹ See *Fair Hous. Council of San Fernando Valley*, 521 F.3d at 1172.

¹²⁰ See *Fair Hous. Council of San Fernando Valley v. Roommate.Com, LLC*, No. CV 03-09386PA(RZX), 2004 WL 3799488 (C.D. Cal. Sept. 30, 2004), *aff'd in part, vacated in part, rev'd in part* by 521 F.3d 1157 (9th Cir. 2008).

¹²¹ *Id.*

¹²² See *id.* at 1165.

users were required to disclose their sex, family status and sexual orientation.¹²³ For these reasons, *Roommates.com* landed outside the scope of Section 230's immunity.¹²⁴

If the court applied the *Roommates.com* opinion, Airbnb would be considered an information content provider because the company *requires* users to have a verified ID consisting of an offline ID, online ID, profile photo, email address, and phone number and then publishes the public profiles. The CDA does not grant immunity for inducing third parties to express illegal preferences.¹²⁵ Requiring a profile photo and a user's name forces a user to divulge their disability, race, color, religion, sex, national origin, ethnicity, and age in violation of 42 U.S.C. § 3604(c).¹²⁶

2. Reforming the CDA

The most clear-cut way to prohibit discrimination in the sharing economy is federal legislation, which could remove all doubt, rather than a series of judicial decisions that criticize the current legislation and attempt to apply outdated laws. The CDA was enacted nearly twenty-eight years after the FHA and over thirty years after the Civil Rights Act of 1964,¹²⁷ but “congressional documents indicate that the legislators never contemplated a potential conflict...”¹²⁸

The Good Samaritan provision “immunizes interactive computer services from liability for third-party FHA violations posted on their websites and forums.”¹²⁹ This includes the ability to govern discriminatory online housing advertisements.¹³⁰ Further, the majority of courts’ interpret

¹²³ *Id.* at 1166.

¹²⁴ 47 U.S.C. § 230.

¹²⁵ *See Fair Hous. Council of San Fernando Valley* at 1165.

¹²⁶ 42 U.S.C. § 3604(c) (stating that it is prohibited “[t]o make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin, or an intention to make any such preference, limitation, or discrimination.”)

¹²⁷ *See* 42 U.S.C. § 2000(e).

¹²⁸ Ross, *supra* note 95; *see* Chi. Lawyers’ Comm. for Civ. Rights Under Law, Inc. v. Craigslist, Inc., 519 F. 3d 666, 671 (7th Cir. 2008).

¹²⁹ Ross, *supra* note 95 at 377.

¹³⁰ *See* 42 U.S.C. § 3604(c) (2008).

the CDA broadly,¹³¹ even when they do not agree with Congress's policy reasoning.¹³² Therefore, the FHA should be added to the list of exceptions in Section 230 (e)¹³³ or an exception should be added for the FHA under Section 230 (c),¹³⁴ which would solve the current conflict between the FHA and the CDA. In addition, Congress should limit the scope of Section 230 by amending Section 230(b) with a more current policy reasoning since nearly twenty years have passed since Section 230 was enacted.¹³⁵

B. The Civil Rights Act

As early as the 1920's, "property values became tied to race 'as a means to legitimize racial exclusion and protect racial boundaries.'"¹³⁶ With a history of racism, it is no surprise that the United States established Title II of the Civil Rights Act of 1964, which prohibits racial discrimination in "any inn, hotel, motel, or other establishment which provides lodging to transient guests."¹³⁷ The legislative intent of Title II is abundantly clear: "end discrimination in public accommodations affecting interstate commerce."¹³⁸ Title II is linked to the Commerce Clause, which refers to Article I Section 8 Clause 3 of the United States Constitution, because it empowers Congress to "regulate Commerce with foreign Nations, and among the several States, and with the

¹³¹ Jeweler, *supra* note 73 at 1.

¹³² Judge Easterbrook wrote in *Chicago Lawyers' Committee for Civil Rights Under Law, Inc. v. Craigslist, Inc.* that the broad interpretation of *Zeran* is not an accurate description of the Communication Decency Act because its "effect is to induce ISPs to do nothing about the distribution of indecent and offensive materials via their services. Why should a law designed to eliminate ISPs' liability to the creators of offensive material end up defeating claims by the victims of tortious or criminal conduct?" See *Chicago Lawyers' Comm. for Civil Rights Under Law, Inc.*, 519 F.3d at 670; see also William H. Freivogel, *Does the Communications Decency Act Foster Indecency?*, 16 COMM. L. & POL'Y 17, 18 (2011).

¹³³ 42 U.S.C. § 2000(e) (1991).

¹³⁴ 47 U.S.C § 230(c) (1998).

¹³⁵ See generally Jeweler, *supra* note 73; Lukmire, *supra* note 95; Ross, *supra* note 95; Collins, *supra* note 95; Cecil, *supra* note 95.

¹³⁶ THE LEADERSHIP CONFERENCE, *The Future of Fair Housing: Report on the National Commission on Fair Housing and Equal Opportunity* (2008), <http://www.civilrights.org/publications/reports/fairhousing/historical.html?referrer=https://www.google.com/>.

¹³⁷ 42 U.S.C. § 2000a(b)(1); see *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964).

¹³⁸ To Eliminate Discrimination in Public Accommodations Affecting Interstate Commerce, § Rep No. 88-872 at 17– 18, 88th Cong, 2d Sess 11 (1964), reprinted in 1964 USCCAN 2365.

Indian Tribes.”¹³⁹ Discrimination directly affects interstate travel.¹⁴⁰ Title II revolutionized a country where black and white Americans could not eat together in public restaurants under Jim Crow laws, let alone stay at the same hotel.¹⁴¹

1. Interpretations of the Civil Rights Act

Currently, the statute only specifies public accommodations consisting of traditional physical locations.¹⁴² However, the theme of brick and mortar accommodations has evolved. In *Noah v. AOL Time Warner*, the court held that an online chat room was not an “establishment” covered by Title II of the Civil Rights Act.¹⁴³ The court in *Noah* determined that “‘places of public accommodation’ must consist of, or have a clear connection to, actual physical facilities or structures.”¹⁴⁴

Courts have not yet addressed whether Title II applies specifically to Airbnb hosts, but there is an argument that Airbnb rentals should qualify as places of public accommodation since Airbnb serves the same function as hotel and is replacing hotels. Airbnb manages payments for rooms, and ensures that guests pay appropriate local hotel taxes; not the host. Therefore, there is a clear connection to an actual, physical facility or structure. However, Airbnb’s rentals are currently categorized under the ‘other establishment’ providing lodging.”¹⁴⁵

Section 2000a(b)(1) exempts from compliance any “establishment located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the

¹³⁹U.S. CONST. art. I, § 8, cl. 3.

¹⁴⁰*See Heart of Atlanta Motel*, 379 U.S. at 250.

¹⁴¹*See Heart of Atlanta Motel*, 379 U.S. at 250; *see also* Alicia W. Stewart and Tricia Escobedo, *What you might not know about the 1964 Civil Rights Act*, CNN POLITICS, <http://www.cnn.com/2014/04/10/politics/civil-rights-act-interesting-facts/> (last updated Apr. 10, 2014, 1:53 PM).

¹⁴²1 Federal Civil Rights Acts (3d ed.) § 7:1.

¹⁴³*Noah v. AOL Time Warner*, 261 F. Supp. 2d 532, 544 (2003).

¹⁴⁴*Id* at 543.

¹⁴⁵Michael Todisco, *Share and Share Alike? Considering Racial Discrimination in the Nascent Room-Sharing Economy*, 67 STAN. L. REV. ONLINE 121, 124 (2015).

proprietor of such establishment as his residence.”¹⁴⁶ This language can be interpreted to exempt Airbnb users who live in the properties they rent. Furthermore, Airbnb allows users to rent three of the following room types: “shared rooms, private rooms, or an entire homes/apartments.”¹⁴⁷ Therefore, Section 2000a(b)(1) would apply to Airbnb users who rent out homes with five or more rooms. This language could be interpreted to mean that Airbnb is in violation of Title II of the Civil Rights Act of 1964.

2. Reforming the Civil Rights Act

Updating the Title II of the Civil Rights Act of 1964 would provide a logical update to public accommodation laws that were drafted at a time when legislators could not have fathomed the existence or the impact the Internet would have on every day life. Title II should clearly define Airbnb rentals as places of public accommodation since Airbnb serves exactly the same function as hotel and is replacing hotels.

Furthermore, Title VII of the Civil Rights Act of 1964 states, “it shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.”¹⁴⁸ An “employment agency” is classified as “any person regularly undertaking with or without compensation to procure employees for an employer¹⁴⁹ or to procure for employees opportunities to work for an employer and includes an agent of such a person.”¹⁵⁰

¹⁴⁶42 U.S.C. § 2000a(b)(1).

¹⁴⁷*What does the room type of a listing mean?*, AIRBNB, <https://www.airbnb.com/about/about-us> (last visited Oct. 13, 2016).

¹⁴⁸42 U.S.C. § 2000(e) (1991).

¹⁴⁹“42 U.S.C. § 2000e(b) (defining “employer” as “a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person”).

¹⁵⁰42 U.S.C. § 2000(e)(c).

This does not apply to Airbnb, since hosts are not considered employees but are considered independent contractors.¹⁵¹ However, Congress or the state legislature can reclassify short-term rental services as employment agencies, discrimination would be deterred and subject to discipline.

C. The Fair Housing Act

In 1967, President Lyndon Johnson commissioned a study that surveyed racial violence in twenty-three cities, which found that segregated housing contributed substantially to the violent nature of large cities.¹⁵² Further, the two determined that two major factors contribute to the national housing issue: (1) many low-income residents cannot afford decent housing and (2) “[d]iscrimination prevents access to many non-slum areas, particularly the suburbs, where good housing exists.”¹⁵³

In response to racial violence affecting public housing, the Title VIII of the Civil Rights Act of 1968 or the Fair Housing Act of 1968 (“FHA”) was enacted.¹⁵⁴ The FHA is broader than Title II of the Civil Rights Act of 1964 and prohibits discrimination “against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin.”

¹⁵⁵ Public accommodation laws are necessary for society because they require nondiscriminatory treatment by the government and private parties, such as Airbnb. Four years after the enactment of the FHA, the Fourth Circuit court stated in the landmark case of *United States v. Hunter*, “While the owner of an exempted dwelling is free to indulge his discriminatory preferences in selling or renting that dwelling, neither the Act nor the Constitution gives him a right to publicize his intent

¹⁵¹ Jeffrey Pfeffer, *How to make a fortune without ‘doing’ anything: The Uber, Airbnb story*, FORTUNE (Nov. 24, 2014), <http://fortune.com/2014/11/24/uber-airbnb-sharing-economy-fallacy/>.

¹⁵² *Report of the National Advisory Commission on Civil Disorders* (1968), <http://www.eisenhowerfoundation.org/docs/kenner.pdf> (last visited Nov. 20, 2016).

¹⁵³ *Id.*

¹⁵⁴ 42 U.S.C. § 3604; see *Report of the National Advisory Commission on Civil Disorders*, *supra* note 143.

¹⁵⁵ 42 U.S.C. § 3604(a).

to so discriminate.”¹⁵⁶ It can be determined that the FHA exempts single-family homes rented by the owner, but does not exempt single-family homes that are sub-leased.

The FHA applies not just to landlords and housing providers, but also to real estate brokerage services.¹⁵⁷ Since Airbnb serves as an intermediary between renters and hosts, Airbnb could be viewed as brokering rental opportunities and thereby subject to the law.¹⁵⁸ In the case of *Singleton v. Gendason*, the court held that a “single-family dwelling owner can only [discriminate] if he goes his discriminatory way alone. If he seeks the help of others who furnish any rental service for compensation, he forfeits his exemption.”¹⁵⁹ Ultimately, this would extend the statute to include Airbnb.

Airbnb is currently in the midst of *Plazza v. Airbnb, Inc.*, 16-CV-01085 in in the United States District Court for the Southern District of New York, which alleges that Airbnb has engaged and continues to engage in illegal real estate broker transactions in violation of Section 440 of New York Real Property Law (NYRPL)¹⁶⁰ as well as Section 349¹⁶¹ of New York General Business Law.¹⁶² Airbnb current collects a commission of about six to twelve percent of reservation per

Law.¹⁶²

¹⁵⁶ See *United States v. Hunter*, 459 F.2d 205, 213 (4th Cir. 1972).

¹⁵⁷ See *JOINT STATEMENT OF THE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT AND THE DEPARTMENT OF JUSTICE REASONABLE ACCOMMODATIONS UNDER THE FAIR HOUSING ACT*, THE UNITED STATES DEPARTMENT OF JUSTICE (May 14, 2004), <https://www.justice.gov/crt/us-department-housing-and-urban-development>.

¹⁵⁸ See Matthew Pearlman, *New Suit Claims Airbnb Breaks NY Real Estate Broker Laws*, LAW 360 (Feb. 12, 2016), <http://www.law360.com/articles/758666/new-suit-claims-airbnb-breaks-ny-real-estate-broker-laws>.

¹⁵⁹ See *Singleton v. Gendason*, 545 F.2d 1227 (9th Cir. 1976).

¹⁶⁰ RRP § 440 (1) (defining a “real estate broker” as “any person, firm, limited liability company or corporation, who, for another and for a fee, commission or other valuable consideration, lists for sale, sells, at auction or otherwise, exchanges, buys or rents, or offers or attempts to negotiate a sale, at auction or otherwise, exchange, purchase or rental of an estate or interest in real estate, or collects or offers or attempts to collect rent for the use of real estate, or negotiates or offers or attempts to negotiate, a loan secured or to be secured by a mortgage, other than a residential mortgage loan, as defined in section five hundred ninety of the banking law, or other incumbrance upon or transfer of real estate, or is engaged in the business of a tenant relocater, or who, notwithstanding any other provision of law, performs any of the above stated functions with respect to the resale of condominium property originally sold pursuant to the provisions of the general business law governing real estate syndication offerings.”)

¹⁶¹ RRP § 349(a) (stating that “[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state are hereby declared unlawful.”)

¹⁶² *Plazza et Al. v. Airbnb, Inc.*, 16-CV-01085; see Pearlman, *supra* note 149.

rental listed on its website.¹⁶³ Despite the FHA being amended in the same session the CDA passed, Congress failed to take the possibility of online-housing discrimination into consideration.¹⁶⁴

In recent news, “[H]illary Clinton, raised a 1973 federal lawsuit brought against President-elect Donald Trump, and his company for alleged racial discrimination at Trump housing developments in New York.”¹⁶⁵ The Department of Justice filed the civil suit against the Trump management corporation for discriminating against black persons in the operation of their buildings, according to the Department of Justice’s news release on the date of the filing, Oct. 15, 1973.¹⁶⁶

The New York City Human Rights Division alleged that black people who went to Trump buildings were informed that no apartments were available.¹⁶⁷ Nonetheless, white people were offered units.¹⁶⁸ The settlement required the Trumps to place advertisements in newspapers saying that they “welcomed black applicants.”¹⁶⁹ A condition of the settlement is that the Trumps would familiarize themselves with the Fair Housing Act.¹⁷⁰

D. The Americans with Disabilities Act

¹⁶³ *What are Guest Services Fees?*, AIRBNB, <https://www.airbnb.com/help/article/104/what-are-guest-service-fees> (last visited Oct. 2, 2016) (stating that the fee is “[t]o help cover the costs of running Airbnb . . . charge[s] guests a service fee every time a reservation is confirmed.”)

¹⁶⁴ See Jennifer C. Chang, *Note, In Search of Fair Housing in Cyberspace: The Implications of the Communications Decency Act for Fair Housing on the Internet*, 55 STAN. L. REV. 969–70 (2002); see also *Chi. Lawyers’ Comm. for Civ. Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F. 3d 666, 671 (7th Cir. 2008).

¹⁶⁵ *Decades-Old Housing Discrimination Case Plagues Donald Pr*, NPR (Sept. 29, 2016, 10:22 PM), <http://www.npr.org/2016/09/29/495955920/donald-trump-plagued-by-decades-old-housing-discrimination-case>.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

Martin Luther King, Jr. wrote that the United States civil rights laws were a “sparse and insufficient collection of statutes . . . barely a naked framework.”¹⁷¹ Regulatory agencies and courts set the standards for the application of anti-discrimination principles. Because of the need for straightforward language, the Americans With Disabilities Act (“ADA”) was enacted in 1990 and is similar to Title II.¹⁷² The ADA was enacted in 1990 and extends protected status in employment, public transportation, and public accommodations to people with both mental and physical disabilities.¹⁷³ Adherence to the law could require for the creation of special access ramps for people in wheelchairs or allowing emotional support animals although it is against your housing policy.¹⁷⁴

In *National Federation of the Blind v. Scribd Inc.*, the court held that Scribd, an online website, was a public accommodation within the meaning of Title III of the ADA.¹⁷⁵ However, the ADA is not likely to apply to renting out space in a private home or apartment. The law has an exemption for owner-occupied lodgings with five rooms or fewer. In addition, the ADA only applies to employers with fifteen or more employees.¹⁷⁶ Given that Airbnb hosts are not considered employees, but independent contractors, the ADA would not apply.

IV. PRACTICAL REALITIES

A. Beware What You Click—Airbnb’s Binding Arbitration Clause

¹⁷¹Robert L. Burgdorf Jr., *The Americans with Disabilities Act: Analysis and Implications of A Second-Generation Civil Rights Statute*, 26 HARV. C.R.-C.L.L. REV. 413 (1991).

¹⁷²Americans with Disabilities Act Title III Regulations, 28 C.F.R. § 36 (March 15, 2011), https://www.ada.gov/regs2010/titleIII_2010/titleIII_2010_regulations.htm.pdf.

¹⁷³*See id.* at § 36.101.

¹⁷⁴*See id.* at § 36.104.

¹⁷⁵National association of blind persons and one of its members brought action against digital library, alleging that its reading subscription services website and mobile applications were inaccessible to the blind in violation of the Americans with Disabilities Act (ADA). *Nat'l Fed'n of the Blind v. Scribd Inc.*, 97 F. Supp. 3d 565 (D. Vt. 2015).

¹⁷⁶*What is the Americans with Disabilities Act*, ADA National Network, <https://adata.org/learn-about-ada> (last visited Apr. 7, 2017).

Typically, a person must examine whether there is personal jurisdiction to bring suit. Airbnb is a duly registered business incorporated in the State of California and with its principal offices located at 888 Brannan Street, 4th Floor, San Francisco, California 94197.¹⁷⁷ Since Airbnb operates throughout the United States, users outside of the state of California must examine California's long-arm statute in order to determine if the minimum contacts necessary to establish personal jurisdiction are met, which would dictate where a person would litigate their lawsuit. Pursuant to Cal. Code Civ. Proc. § 410.10 titled "Jurisdiction exercisable, "A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States."¹⁷⁸ California's long-arm statute is the most comprehensive long-arm statute of any state. However, as of March 2016, this is not the case.

In order to use their service, Airbnb requires all users to Airbnb requires that people agree to waive their right to sue, or to join in any class-action lawsuit or class-action arbitration, which is part of an eighty-six page contract.¹⁷⁹ In March 2016, Airbnb updated its terms of service for new users to include Clause 34 titled "Dispute Resolution" and states:

If you reside in the United States, you and Airbnb agree that *any dispute, claim or controversy arising out of or relating to these Terms* or the breach, termination, enforcement, interpretation or validity thereof, or to the use of the Services or use of the Site, Application or Collective Content (collectively, "Disputes") will be settled by binding arbitration, except that each party retains the right to seek injunctive or other equitable relief in a court of competent jurisdiction to prevent the actual or threatened infringement, misappropriation or violation of a party's copyrights, trademarks, trade secrets, patents, or other intellectual property rights. You acknowledge and agree that you and Airbnb are each waiving the right to a trial by jury or to participate as a plaintiff or class member in any purported class action lawsuit, class-wide arbitration, private attorney-general action, or any other representative proceeding. Further, unless both you and Airbnb otherwise agree in

¹⁷⁷ *Business Entities*, California Secretary of State, <http://kepler.sos.ca.gov/> (last visited November 16, 2016).

¹⁷⁸ *Abbott Power Corp. v. Overhead Elec. Co.*, 131 CAL. RPTR. 508 (Cal. Ct. App. 1976) (holding that Code Civ. Proc., § 410.10, which provides that a court may exercise jurisdiction on any basis not inconsistent with the state or federal constitutions, authorizes the broadest possible exercise of judicial jurisdiction).

¹⁷⁹ See Katie Benner, *Airbnb Vows to Fight Racism, but Users Can't Sue to Prompt Fairness*, THE N.Y. TIMES (June 19, 2016), <https://www.nytimes.com/2016/06/20/technology/airbnb-vows-to-fight-racism-but-its-users-cant-sue-to-prompt-fairness.html>.

writing, the arbitrator may not consolidate more than one person’s claims, and may not otherwise preside over any form of any class or representative proceeding. If this specific paragraph is held unenforceable, then the entirety of this “Dispute Resolution” section will be deemed void. Except as provided in the preceding sentence, this “Dispute Resolution” section will survive any termination of these Terms.¹⁸⁰

Airbnb users are not able to use their accounts until they agree to this clause, which requires that all disputes be settled by binding arbitration rather than having your day in court as of May 2016.¹⁸¹ However, Airbnb’s arbitration clause does not restrict the ability for guests to take action against hosts.

Unless otherwise agreed upon, the arbitration will be conducted in the *county where the user resides* and the arbitration will be conducted based on documents submitted to the arbitrator if the claim does not exceed \$10,000, unless a hearing is requested or the arbitrator determines that a hearing is necessary.¹⁸² However, a user has a right to a hearing if their claim exceeds \$10,000, which will be determined by the American Arbitration Association Rules.¹⁸³ Ultimately, Airbnb is facilitating racial discrimination and users are barred from bringing a civil lawsuit against the company.

On November 1, 2016, Judge Christopher Cooper of the U.S. District Court for the District of Columbia upheld the arbitration clause in Airbnb’s terms of service and put an end to a possible class-action lawsuit.¹⁸⁴ Judge Cooper found that Airbnb’s mobile sign-up screen places users on

¹⁸⁰ *Updates to the Terms of Service*, AIRBNB, <https://www.airbnb.com/terms> (last visited Apr. 7, 2017) (stating that “You acknowledge and agree that you and Airbnb are each waiving the right to a trial by jury or to participate as a plaintiff or class member in any purported class action lawsuit, class-wide arbitration, private attorney-general action, or any other representative proceeding”).

¹⁸¹ Katie Benner, *Federal Judge Blocks Racial Discrimination Suit Against Airbnb*, THE N.Y. TIMES (Nov. 1, 2016), http://www.nytimes.com/2016/11/02/technology/federal-judge-blocks-racial-discrimination-suit-against-airbnb.html?smprod=nytcore-iphone&smid=nytcore-iphone-share&_r=0.

¹⁸² *Updates to the Terms of Service*, AIRBNB, <https://www.airbnb.com/terms> (last visited Apr. 7, 2017).

¹⁸³ *Id.*

¹⁸⁴ Vauhini Vara, *HOW AIRBNB MAKES IT HARD TO SUE FOR DISCRIMINATION*, THE NEW YORKER (Nov. 3, 2016), <http://www.newyorker.com/business/currency/how-airbnb-makes-it-hard-to-sue-for-discrimination>.

sufficient notice of Airbnb’s terms of service, including their arbitration clause, and users agree to those terms by clicking the sign-up box and using the service.¹⁸⁵ The ruling came in the case of an Gregory Selden, an African-American man, who was suing Airbnb claiming a property owner refused to rent space to him because of his race.¹⁸⁶ Mr. Selden’s Airbnb profile includes “his face as well as other details such as his name, education, sex, age and residential location.”¹⁸⁷ Mr. Selden stumbled upon the same listing on the same day he was rejected, although the Airbnb agent informed Mr. Selden that listing was not available.¹⁸⁸

Mr. Selden had a hunch and decided to conduct an experiment. He created two fake Airbnb profiles with the stereotypical white names – “Todd” and “Jessie” – and put in requests for the same property on the same dates.¹⁸⁹ To his surprise, Todd and Jessie were contacted to stay at the residence unlike Mr. Selden.¹⁹⁰ This case is similar to many experiences from Airbnb users and many supporters of Selden’s claim took to social media, using #AirbnbWhileBlack to share their experiences with discrimination using the service. Selden claims he tried on multiple occasions to bring this incident to Airbnb’s attention, but ultimately filed a lawsuit, alleging violations of the Civil Rights Act of 1964 and the Fair Housing Act.¹⁹¹ He hoped to represent all Airbnb users who may have been similarly wronged. Selden stresses the following provisions of Title II of the Civil Rights Act of 1964 concerning jurisdiction and remedies:

(a) The district courts of the United States *shall have jurisdiction* of proceedings instituted pursuant to this subchapter and shall exercise the same without regard to whether the aggrieved party shall have exhausted any administrative or other remedies that may be provided by law.

¹⁸⁵ See Benner, *supra* note 169.

¹⁸⁶ *Selden v. Airbnb, Inc.*, No. 16-CV-00933 (CRC), 2016 WL 6476934 (D.D.C. Nov. 1, 2016).

¹⁸⁷ Second Amend. Compl. ¶¶ 6-7, *Selden v. Airbnb, Inc.*, No. 16-CV-00933 (CRC), 2016 WL 6476934 (D.D.C. Nov. 1, 2016).

¹⁸⁸ *Id.* at ¶¶ 7-8.

¹⁸⁹ Compl. ¶¶ 12-17, *Selden*, No. 16-CV-00933 (D.D.C. May 17, 2016).

¹⁹⁰ *Id.*

¹⁹¹ Second Amend. Compl. ¶¶ 54-72, *Selden v. Airbnb, Inc.*, No. 16-CV-00933 (CRC), 2016 WL 6476934 (D.D.C. Nov. 1, 2016).

(b) The remedies provided in this subchapter *shall be the exclusive means* of enforcing the rights based on this subchapter, but nothing in this subchapter shall preclude any individual or any State or local agency from asserting any right based on any other Federal or State law not inconsistent with this subchapter, including any statute or ordinance requiring nondiscrimination in public establishments or accommodations, or from pursuing any remedy, civil or criminal, which may be available for the vindication or enforcement of such right. (emphasis added).¹⁹²

Judge Cooper rejected claims that federal civil rights claims are not subject to arbitration, and stated:

No matter one’s opinion of the widespread and controversial practice of requiring consumers to relinquish their fundamental right to a jury trial—and to forego class actions—as a condition of simply participating in today’s digital economy, the applicable law is clear: Mutual arbitration provisions in electronic contracts—so long as their existence is made reasonably known to consumers—are enforceable, in commercial disputes and discrimination cases alike.¹⁹³

Nevertheless, the Federal Arbitration Act (“FAA”) provides that a provision in a contract requiring the arbitration of disputes related to the contract “shall be valid.”¹⁹⁴ Arbitration is a matter of contract law; therefore, the issue in dispute is whether a valid contract was formed. For all claims arising from a violation of a party’s copyrights, trademarks, trade secrets, patents, or other intellectual property rights, Section 33 of Airbnb’s Terms states:

These Terms and your use of the Services will be interpreted in accordance with the *laws of the State of California* and the United States of America, without regard to its conflict-of-law provisions. You and we agree to submit to the personal jurisdiction of a state court located in San Francisco County, San Francisco, California or a United States District Court, Northern District of California located in San Francisco, California for any actions for which the parties retain the right to seek injunctive or other equitable relief in a court of competent jurisdiction to prevent the actual or threatened infringement, misappropriation or violation of a party’s copyrights, trademarks, trade secrets, patents, or other intellectual property rights, as set forth in the Dispute Resolution provision below.¹⁹⁵

¹⁹² 42 U.S.C. §§ 2000a-6 (emphasis added).

¹⁹³ *Selden*, No. 16-CV-00933, at *2 (D.D.C. Nov. 1, 2016).

¹⁹⁴ 9 U.S.C. § 2.

¹⁹⁵ *Updates to the Terms of Service*, AIRBNB, <https://www.airbnb.com/terms> (last visited Apr. 8, 2017).

If am an Airbnb user who resides in Florida and wanted to sue Airbnb for trademark infringement, Airbnb's terms would dictate that we litigate the lawsuit in either a state court located in San Francisco County, San Francisco, California or the United States District Court of the Northern District of California located in San Francisco, California. Ultimately, only claims arising out of a violation listed above circumvent mandatory arbitration if brought on by private action.

B. Agency Enforcement

Although individuals are required to complete mandatory binding arbitration, federal enforcement through independent agencies can create compliance to the CDA, CRA, FHA, and ADA by investigation. This section will outline the various Federal agencies that can alter the fate of Airbnb and effectuate change and offer solutions geared towards Airbnb. In light of the current political climate, we will also address the impact that the Trump administration will have on the future of civil rights laws and enforcement.

1. Federal Enforcement of the CDA

The United States Federal Trade Commission was established by the Federal Trade Commission Act in 1914.¹⁹⁶ The agency has the responsibility of protecting consumers from regulating unfair business practices that undermine the competitive marketplace.¹⁹⁷ If the Commission has reason to believe that any such person, partnership, or corporation, has been or is using any unfair method of competition or unfair or deceptive act or practice in or affecting commerce, it can initiate a proceeding.

¹⁹⁶ *About the FTC*, Federal Trade Commission, <https://www.ftc.gov/about-ftc> (last visited Apr. 8, 2017).

¹⁹⁷ 42 U.S.C. § 202(a)(1) states, "Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful."

Furthermore, under 42 U.S.C. § 202 (a), “It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.”¹⁹⁸ Furthermore, these charges do not go without a stiff penalty. Under this section (c), “Any carrier who knowingly violates the provisions of this section shall forfeit to the United States the sum of \$6,000 for each such offense and \$300 for each and every day of the continuance of such offense.”¹⁹⁹ It is in Airbnb’s best interest to avoid a fee of \$6,000 for each offense in addition to a daily fee of \$300.

2. Federal Enforcement of the Civil Rights Act

The attorney general may bring a civil action under 42 U.S.C. § 2000a-6(a), which states:

Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights granted by this title, and that the pattern or practice is of such a nature and is intended to deny the full exercise of the rights herein described, *the Attorney General may bring a civil action* in the appropriate district court of the United States by filing with it a complaint (1) signed by him (or in his absence the Acting Attorney General), (2) setting forth facts pertaining to such pattern or practice, and (3) requesting such preventive relief, including an application for a permanent or temporary injunction, restraining order or other order against the person or persons responsible for such pattern or practice, as he deems necessary to insure the full enjoyment of the rights herein described. (emphasis added).²⁰⁰

The Housing and Civil Enforcement Section of the Department of Justice “works to protect some of the most fundamental rights of individuals, including the right to access housing free from discrimination, the right to access credit on an equal basis, the right to patronize places of business

¹⁹⁸ *Id.*

¹⁹⁹ 42 U.S.C. § 202 (c).

²⁰⁰ 42 U.S.C. §§ 2000a-6(a).

that provide public accommodations and the right to practice one's faith free from discrimination."²⁰¹ The Chief of the Housing and Civil Enforcement Section of the Department of Justice is Sameena Shina Majeed has the authority to enforce Title II of the Civil Rights Act of 1964 actions.²⁰²

3. Federal Enforcement of the FHA

In addition to regulating Title II of the Civil Rights Act of 1964, The Housing and Civil Enforcement Section of the Department's Civil Rights Division enforces the Fair Housing Act.²⁰³ Additionally, the Department of Justice has the authority to enforce the FHA. The Justice Department has specific authority to seek compensatory and punitive damages for persons aggrieved by discrimination in both individual and pattern-or-practice cases.²⁰⁴ The Department of Justice may seek civil penalties of up to \$50,000 for a first violation and up to \$100,000 for subsequent violations of the statute, which increases its enforcement abilities. Therefore, a lawsuit from the Department of Justice or administrative enforcement by the Department of Housing and Urban Development can be very costly and involve civil penalties. Additionally, the Civil Rights Division, through its Criminal Section, prosecutes cases under Section 901 of the Act, 42 U.S.C. § 3631, which makes it a federal crime for "[w]hoever, whether or not acting under color of law, by force or threat of force willfully injures, intimidates or interferes with, or attempts to injure, intimidate or interfere with [housing rights.]"²⁰⁵

4. Federal Enforcement of the ADA

²⁰¹ Home Page, THE U.S. DEPARTMENT OF JUSTICE, *Housing and Civil Enforcement Section*, <https://www.justice.gov/crt/housing-and-civil-enforcement-section> (last visited Apr. 8, 2017).

²⁰² *Id.*

²⁰³ Bill Lann Lee, U.S. DEPARTMENT OF JUSTICE, *An Issue of Public Importance: The Justice Department's Enforcement of the Fair Housing Act*, <https://www.huduser.gov/portal/Periodicals/CITYSCPE/VOL4NUM3/lee.pdf>.

²⁰⁴ 42 U.S.C. §§ 2000a-6(a).

²⁰⁵ 42 U.S.C. § 3631.

It is the Department of Justice’s responsibility to enforce the ADA under 42 U.S.C. § 12117, which prohibits discrimination and ensures equal opportunity for persons with disabilities in employment, State and local government services, public accommodations, commercial facilities, and transportation.²⁰⁶ The Department of Justice may file lawsuits in federal court to enforce the ADA, and courts may order compensatory damages and back pay to remedy discrimination if the Department prevails. Under title III, the Department of Justice may also obtain civil penalties of up to \$55,000 for the first violation and \$110,000 for any subsequent violation.²⁰⁷

C. Responsibility to Regulate Airbnb

The Department of Justice is the entity in the federal government that has the financial resources and the authority to litigate discrimination that occurs within Airbnb. The Department of Justice is the best agency to regulate Airbnb because of its underutilized testing program. In February 2006, the Department of Justice updated its testing program called Operation Home Sweet Home, initiated after Hurricane Katrina when many victims were displaced and searching for new housing, and targets subtle as well as blatant forms of discrimination.²⁰⁸

D. Political Climate and It’s Affect on Legislation

With Trump in the White House and the GOP controlling Congress —changes in legislation regarding discrimination are not going to be at the forefront. President Trump is considering reprising a program which requires people from “extremist” countries to provide fingerprints and

²⁰⁶42 U.S.C. § 12117 states, “The powers, remedies, and procedures set forth in sections 2000e–4, 2000e–5, 2000e– 6, 2000e–8, and 2000e–9 of this title shall be the powers, remedies, and procedures this subchapter provides to the Commission, to the Attorney General, or to any person alleging discrimination on the basis of disability in violation of any provision of this chapter, or regulations promulgated under section 12116 of this title, concerning employment.”

²⁰⁷See also Ass’n of Corp. Counsel, *The American Disabilities Act (2011)*, <http://www.acc.com/legalresources/quickcounsel/tawda.cfm> (last visited Apr. 8, 2017).

²⁰⁸The Leadership Conference, *The Future of Fair Housing: Report of National Commission on Fair Housing and Equal Opportunity Act December 2008*, http://www.civilrights.org/publications/reports/fairhousing/enforcement-doj.html#_edn134?referrer=http://www.civilrights.org/publications/reports/fairhousing/enforcement-doj.html?referrer=https://www.google.com/.

photos at the borders that would then be checked against a database of "known criminals and terrorists."²⁰⁹ It also allowed for "exit controls that will help the Immigration and Naturalization Service to remove those aliens who overstay their visas."²¹⁰ In one of the most-widely condemned decisions, the Supreme Court ruling in *Korematsu v. United States* allowed for Japanese internment still stands.²¹¹ This decision by President Trump will likely illicit similar backlash for creating a questionable discriminatory, immigration policy.

Jeff Sessions, Senator of Alabama, was selected as Attorney General on November 18, 2016.²¹² The nominee can change how laws are enforced under the Civil Rights Division at the Department of Justice. His nomination for a federal judgeship in 1986 was rejected because of racial comments and actions.²¹³ Furthermore, President Trump focus is on increased military spending, immigration reform, and healthcare reform; therefore, enforcement of discrimination actions will likely take a backseat given budget restrictions.

E. Proposed Solution to Airbnb

As it stands today, Airbnb has an incentive to self-regulate to avoid litigation by federal agencies. Airbnb can preserve host autonomy and privacy by removing host photo and names altogether from their website to eliminate the opportunity for discrimination because pictures and names enable discrimination by implicit bias.²¹⁴ The courts have made clear that immunity is lost

²⁰⁹Julie Hirschfeld Davis, *Trump Turns to His Right Flank to Fill National Security Posts*, N.Y. TIMES (Nov. 18, 2016), <http://www.nytimes.com/2016/11/19/us/politics/donald-trump-administration.html>

²¹⁰*Id.*

²¹¹An American citizen of Japanese ancestry petitioned for writ of coram nobis to vacate his 1942 conviction for being in a place from which all persons of Japanese ancestry were excluded pursuant to a civilian exclusion order. *Korematsu v. United States*, 584 F. Supp. 1406 (N.D. Cal. 1984).

²¹²Eric Lichtblau, *Jeff Sessions, as Attorney General, Could Overhaul Department He's Skewered*, N.Y. TIMES (Nov. 18, 2016), <https://www.nytimes.com/2016/11/19/us/politics/jeff-sessions-donald-trump-attorney-general.html>.

²¹³*See Fair Housing Council of San Fernando* at 1167; *see also Doe v. MySpace, Inc.*, 629 F. Supp. 2d 663, 665 (E.D. Tex. 2009).

²¹⁴*See Molly Mulshine, After a disappointing Airbnb stay, I realized there's a major flaw in the review system*, BUSINESS INSIDER (June 18, 2015), <http://www.businessinsider.com/why-airbnb-reviews-are-a-problem-for-the-site-2015-6> (providing an example of issues concerning profile photos and names displayed on Airbnb).

when an interactive computer service requires its users to provide discriminatory information as a condition of access.²¹⁵ These changes will not affect the operations of a business that is strongly based on user reviews.²¹⁶ Furthermore, Airbnb is incentivized to avoid the costly civil penalties resulting from an invasive investigation under any of the federal agencies. It is Airbnb's best interest to avoid Federal investigation and concede to the recommended changes.

V. CONCLUSION

The Internet is reinventing the way we think about old concepts. Just as so many of our record laws and paper-based laws need to be rethought, the concept of brick and mortar hotels needs to be revisited with the rise of the sharing economy. The sharing economy has the potential to exponentially increase access to once unattainable goods and services through peer-to-peer networks. Websites like Airbnb cannot conform to current regulations. In order to promote innovation and growth, Congress must make changes to Section 230 of the CDA in order to prevent and enforce housing discrimination from taking place over the Internet.

Currently, Section 230 of the CDA has imparted a blanket of immunity for interactive computer services against lawsuits for third-party content. However, mixed-use website and platforms have created a convoluted area for courts to examine. As the Internet continues to expand, some courts seem less likely to offer complete immunity in cases that involve allegations of illegal or discriminatory content.

The CDA was intended to encourage the removal of offensive or unlawful content,²¹⁷ yet the CDA's policy is contrary to current congressional intent and leaves victims

²¹⁵ See *Fair Housing Council of San Fernando* at 1167; see also *Doe v. MySpace, Inc.*, 629 F. Supp. 2d 663, 665 (E.D. Tex. 2009).

²¹⁶ *How Do Reviews Work?*, AIRBNB, <https://www.airbnb.com/help/article/13/how-do-reviews-work> (last visited Nov. 8, 2016).

²¹⁷ 47 U.S.C. § 230(b).

of housing discrimination with no source of relief under the FHA and the Civil Rights Act of 1964.²¹⁸ Congress or the state legislature should either amend or repeal Section 230 of the CDA.²¹⁹ As more aspects of every day life become digitalized, there will likely be stronger trend among the courts to examine the CDA Section 230 (c) closely, until Congress acts.

Housing violations should be added to the list of exceptions in Section 230 (e).²²⁰ Congress or the state legislature may opt to reclassify short-term rental services as employment agencies under Title VII.²²¹ Further, as a social solution, Airbnb’s verified ID policy should be limited to information about the listing and should remove photos and names, which act as a proxy for discrimination through implicit bias.

Airbnb is aware that its platform promotes racial discrimination and has created “solutions” that absolve itself from discrimination once it occurs. Instead of masking the problem, legislative, congressional, and internal corporate reform is necessary. As we explained in Part III, we think that existing laws—Title II, the FHA, and the ADA—can regulate discrimination, but these laws do not fully address all concerns that arise in the sharing economy. Ultimately, these solutions will provide both deterrence and culpability for those who should be liable under the CDA.

²¹⁸NAT’L FAIR HOUS. ALLIANCE, *supra* note 65.

²¹⁹42 U.S.C. § 230.

²²⁰42 U.S.C. § 2000(e).

²²¹42 U.S.C. § 2000(e).