

A NEW HOME FOR HATERS—ONLINE HOME SHARING PLATFORMS: A LOOK AT THE APPLICABILITY OF THE FAIR HOUSING ACT TO HOME SHARES

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ABSTRACT

*In 2018, we celebrated the fiftieth anniversary of the Fair Housing Act which outlawed discrimination in residential transactions. When the FHA was passed, the home search process was very different. Fifty years ago, most people searched for housing by viewing listings in newspapers and other printed publications or perhaps used a realtor. Today, most people use the internet to search for housing. Home sharing, where all or part of a home is rented on a short-term basis, has become very popular since 2008 when Airbnb entered the market. It has become a multimillion-dollar business and proponents see great potential in it to ease housing and income shortages. As home sharing has grown in popularity, racism has reared its ugly head and reports of discrimination against minority guests have become all too frequent. Complaints of housing providers refusing to rent based on the race, sexual orientation, religion, or other protected characteristics of prospective guests have gained widespread attention through social media and threaten to undermine the future of the concept.*

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## INTRODUCTION

Does the Fair Housing Act (“FHA”) apply to home sharing? If not, why not? If it does, is it working to stop discrimination against minority guests? This article explores discrimination in home sharing and issues with the applicability and enforcement of fair housing laws to these transactions. At the end, it will offer some suggestions for strategies for the future to allow the concept to grow freely and fairly.

The sharing economy has changed our lives. It has expanded opportunities for income, products, and services beyond what we imagined just a few years ago. Ride sharing companies, like Uber, Lyft, and Zipcar, have transformed transportation, and product platforms, like Etsy and eBay, have expanded product offerings. Home sharing entered the sharing economy in a big way in 2008 when Airbnb was formed. It has changed the way we obtain short-term housing and is impacting other housing decisions. Programs, like the National Shared Housing Resource Center and Let’s Share Housing, match people looking to offer housing in exchange for services like child care, elder care, and health care, to reduce housing costs, or to provide companionship. The concept has the potential to ease housing shortages, reduce housing costs, and expand housing choices.

As the concept has gained popularity, reports of discrimination, especially racial discrimination, have surfaced.<sup>1</sup> This article will discuss the applicability of the FHA to home sharing.<sup>2</sup> There are other federal discrimination laws that may also apply in some home sharing transactions, such as Title II of the Civil Rights Act of 1964, which prohibits discrimination in places of public accommodations;<sup>3</sup> Title III of the Americans with Disabilities Act of 1990, which requires certain accommodations for persons with

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1. Elaine Glusac, *As Airbnb Grows, So Do Claims of Discrimination*, N.Y. TIMES (June 21, 2016), <https://www.nytimes.com/2016/06/26/travel/airbnb-discrimination-lawsuit.html> [<https://perma.cc/59GP-MUBS>].

2. 42 U.S.C §§ 3601–3619 (2012).

3. Civil Rights Act of 1964, 42 U.S.C. § 2000a; Nancy Leong & Aaron Belzer, *The New Public Accommodations: Race Discrimination in the Platform Economy*, 105 GEO. L.J. 1271, 1274 (2017); Jamila Jefferson-Jones, *Shut Out of Airbnb: A Proposal for Remedying Housing Discrimination in the Modern Sharing Economy*, FORDHAM URB. L.J. (May 26, 2016), <https://news.law.fordham.edu/fulj/2016/05/26/shut-out-of-airbnb-a-proposal-for-remedying-housing-discrimination-in-the-modern-sharing-economy/> [<https://perma.cc/2A8F-P6K4>].

disabilities in public places;<sup>4</sup> and the Civil Rights Act of 1866, which prohibits race discrimination in certain housing transactions.<sup>5</sup> Additionally, most states and local governing authorities have anti-discrimination ordinances and discrimination prohibitions in their condominium regulations, landlord-tenant ordinances, and other local laws.<sup>6</sup> There are unanswered questions about the applicability of other related laws to home sharing, such as local rental ordinances, and health and safety laws. It is good to consider these issues now as the law is evolving so that we can ensure the concept grows in ways that promote fair and full participation.

### I. OVERVIEW OF HOME SHARING TODAY

Home sharing is not new. It dates back to the nineteenth century when boarding houses were common. Boarders rented rooms in private homes and shared common areas with the owner and other lodgers.<sup>7</sup> Boarding houses were often a bridge for people relocating, entertainers, African Americans, and others who were unable to stay in hotels and motels.<sup>8</sup> The internet has given home sharing a new look by providing a way for hosts and guests to connect quickly. Couchsurfing was an early form of internet-based home sharing that launched in the early 2000s.<sup>9</sup> It linked people to others who were willing to offer accommodations—a couch—for free with no reciprocity requirement.<sup>10</sup> In 2008, Airbnb entered the market and evolved couchsurfing to a fee-for-service model.<sup>11</sup> Airbnb was started by two young San Francisco based professionals who were looking for ways to earn extra money. A conference was coming to town and hotels were full, so they came

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4. Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12181–12189.

5. Civil Rights Act of 1866, 42 U.S.C. §§ 1981–1982.

6. See, e.g., Illinois Human Rights Act, 775 ILL. COMP. STAT. 5/3-102 (2016); CHI., ILL., MUNICIPAL CODE ch. 5-8, § 5-8-020 (2018); COOK COUNTY, ILL., CODE OF ORDINANCES ch. 42, art. II, § 42-38(b) (2018).

7. Ruth Graham, *Boardinghouses: Where the City Was Born*, BOS. GLOBE (Jan. 13, 2013), <https://www.bostonglobe.com/ideas/2013/01/13/boardinghouses-where-city-was-born/Hpstvjt0kj52ZMpjUOM5Rj/story.html> [<https://perma.cc/WXN6-36V7>].

8. *Id.*

9. *About Us*, COUCHSURFING, <https://www.couchsurfing.com/about/about-us/> [<https://perma.cc/5825-4GX8>] (last visited Feb. 1, 2019).

10. See *id.*

11. Biz Carson, *How 3 Guys Turned Renting an Air Mattress in Their Apartment into a \$25 Billion Company*, BUS. INSIDER (Feb. 23, 2016, 11:22 AM), <https://www.businessinsider.com/how-airbnb-was-founded-a-visual-history-2016-2> [<https://perma.cc/BX8D-KVDU>].

up with the idea of renting out airbeds in their living room. The concept took off and Airbnb was born. It has since become a multi-billion-dollar business.<sup>12</sup>

On Airbnb, people interested in renting all or a part of their homes sign up to be hosts.<sup>13</sup> Hosts supply the basics and set prices, access rights, dates of availability, and other key terms.<sup>14</sup> It is free to become a host, but Airbnb receives a percentage of the reservation fee and charges guests a service fee.<sup>15</sup> Guests book through the Airbnb website and pay in advance of their stay.<sup>16</sup> Listings include photos of the properties and hosts, along with information about the hosts and the communities.<sup>17</sup> Controls allow hosts to limit the number of people, set house rules, and other restrictions.<sup>18</sup> Some hosts offer meals, Uber-like transportation, and other services.<sup>19</sup> Airbnb provides advice and counsel to hosts and some liability insurance.<sup>20</sup>

Prospective guests sign up to become members of the community.<sup>21</sup> When prospective guests find something they like, they request a reservation and wait for the host to respond.<sup>22</sup> An instant

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12. See *A Brief History of Airbnb*, SHARING MY HOME, <https://www.sharingmyhome.com/brief-history-airbnb/> [<https://perma.cc/3VWY-4CZT>] (last visited Feb. 1, 2019); Carson, *supra* note 11.

13. *What Do the Different Home Types Mean?*, AIRBNB, <https://www.airbnb.com/help/article/317/what-do-the-different-home-types-mean> [<https://perma.cc/9KNQ-SU84>] (last visited Feb. 1, 2019) (explaining that homeowners may rent out portions of their homes); *Who Can Host on Airbnb?*, AIRBNB, <https://www.airbnb.com/elp/article/18/who-can-host-on-airbnb> [<https://perma.cc/28D7-6VKH>] (last visited Feb. 1, 2019) (describing who can be a host on Airbnb). Airbnb also offers opportunities to be a neighborhood or experience host. These hosts act like personal guides and assist guests in designing an activity like scuba diving, wine tasting, or tours. *What Are Airbnb Experiences?*, AIRBNB, <https://www.airbnb.com/host/experiences> [<https://perma.cc/E2YS-8LBS>] (last visited Feb. 1, 2019). Legal issues concerning these offerings are not included here.

14. See AIRBNB, [https://www.airbnb.com/host/homes?page=faq\\_article](https://www.airbnb.com/host/homes?page=faq_article) [<https://perma.cc/S24B-WPPG>] (last visited Feb. 1, 2019).

15. *Id.*

16. *Terms of Service*, AIRBNB, <https://www.airbnb.com/terms> [<https://perma.cc/WC84-ZYZA>] (last visited Feb. 1, 2019).

17. AIRBNB, *supra* note 14.

18. *Id.*

19. See, e.g., *Thai Villa + Private Pool + Private Van w/ Driver*, AIRBNB, <https://www.airbnb.com/rooms/12714387> [<https://perma.cc/U59U-Q5F5>] (last visited Feb. 1, 2019).

20. *What Is Host Protection Insurance?*, AIRBNB, <https://www.airbnb.com/help/article/937/what-is-host-protection-insurance> [<https://perma.cc/22V5-62A2>] (last visited Feb. 1, 2019).

21. See *How Do I Book a Place on Airbnb?*, AIRBNB, <https://www.airbnb.com/help/article/380/how-do-i-book-a-place-on-airbnb> [<https://perma.cc/5BED-VA2C>] (last visited Feb. 1, 2019).

22. *Id.*

booking feature accepts a guest automatically if the guest meets the host's requirements.<sup>23</sup> If the guest is accepted, the guest's credit card is charged, and the guest coordinates check-in and other details with the host. If the prospective guest is declined or the host cancels after acceptance, the prospective guest is out of luck in most instances, though the host may have to pay a cancellation penalty.<sup>24</sup> After their stay, guests and hosts may offer reviews. The more positive reviews received, the more bookings for hosts and faster acceptances for guests.<sup>25</sup>

The terms of service contract governs disputes between hosts and guests, which guests must accept to use the site.<sup>26</sup> The contract includes a promise to abide by the FHA and local and state anti-discrimination laws in connection with transactions taking place in the United States.<sup>27</sup> Additionally, the terms of service contract provides that disputes between guests and hosts not resolved through Airbnb's internal dispute resolution center will be decided by arbitration.<sup>28</sup>

Airbnb's business practices came under sharp scrutiny following a 2015 Harvard Business School study on rejection rates for minority users<sup>29</sup> and a high-profile discrimination claim by an African American guest.<sup>30</sup> The study found that users with distinctly African American names were sixteen percent less likely to be accepted when compared to users with white sounding names.<sup>31</sup> Requiring users to post photos of themselves exacerbated the problem.<sup>32</sup> Additionally, in May of 2016, Gregory Selden, a

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23. *What Is Instant Book?*, AIRBNB, <https://www.airbnb.com/help/article/523/what-is-instant-book> [<http://perma.cc/58WT-54QV>] (last visited Feb. 1, 2019).

24. *Terms of Service*, *supra* note 16.

25. *See What Factors Determine How My Listing Appears in Search Results?*, AIRBNB, <https://www.airbnb.com/help/article/39/what-factors-determine-how-my-listing-appears-in-search-results> [<http://perma.cc/3CTF-6LVR>] (last visited Feb. 1, 2019).

26. *See Terms of Service*, *supra* note 16.

27. *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> [<https://perma.cc/RD4D-ADFR>] (last visited Feb. 1, 2019).

28. *See Terms of Service*, *supra* note 16.

29. *See generally* Benjamin Edelman et al., *Racial Discrimination in the Sharing Economy: Evidence from a Field Experiment*, 9 AM. ECON. J. 1 (2017) (finding widespread discrimination on Airbnb towards African Americans).

30. *See Selden v. Airbnb, Inc.*, No. 16-cv-00933, 2016 U.S. Dist. LEXIS 150863, at \*2 (D.D.C. Nov. 1, 2016).

31. Edelman et al., *supra* note 29, at 2.

32. Ray Fisman & Michael Luca, *Fixing Discrimination in Online Marketplaces*,

twenty-five-year-old African American man, filed suit in federal court alleging racial discrimination by an Airbnb host.<sup>33</sup> Mr. Selden wanted a place to stay for a weekend trip to Philadelphia, but his request was declined due to unavailability.<sup>34</sup> He later saw the same listing showing availability for his dates.<sup>35</sup> He created two fake profiles of white men, sent reservation requests with those profiles, and waited to see what happened.<sup>36</sup> The host accepted the requests.<sup>37</sup> Mr. Selden complained to both Airbnb and the host, but nothing came of it until he vented on Twitter.<sup>38</sup> The dispute went viral and others began sharing similar experiences using the hashtag, #AirbnbWhileBlack.<sup>39</sup>

Airbnb has since implemented several policy changes to minimize the risk of future discrimination incidents.<sup>40</sup> Actions reportedly taken include a “community commitment” to diversity and inclusion, training, technological enhancements to aid in preventing discrimination, an improved complaint procedure, incentives

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HARV. BUS. REV. (Dec. 2016), <https://hbr.org/2016/12/fixing-discrimination-in-online-marketplaces> [<http://perma.cc/H8WR-PP4V>].

33. *Selden*, 2016 U.S. Dist. LEXIS 150863, at \*2, \*8.

34. *Id.* at \*2.

35. *Id.* at \*6.

36. *Id.*

37. *Id.*

38. Brian Solomon & Shelby Carpenter, *Airbnb Plans to Fight Racism with Diversity. But Will It Be Enough?*, FORBES (Sept. 8, 2016, 10:00 AM), <https://www.forbes.com/sites/briansolomon/2016/09/08/airbnb-racism-discrimination-plan/> [<https://perma.cc/CU6L-9NBS>].

39. *Selden*, 2016 U.S. Dist. LEXIS 150863, at \*6. The court granted Airbnb’s Motion to Compel Arbitration and stay the case without a decision on the merits. *Id.* at \*26. The judge found the arbitration provision in the terms of service contract prevented Selden from bringing the case to court. *See id.* The Court of Appeals for the D.C. Circuit denied Selden’s appeal. *Selden v. Airbnb, Inc.*, No. 16-7139, 2017 U.S. App. LEXIS 1918, at \*1 (D.C. Feb. 2, 2017), *hearing en banc denied*, No. 16-7139, 2017 U.S. App. LEXIS 6298, at \*1 (D.C. Cir. Apr. 12, 2017). In the aftermath of #AirbnbWhileBlack, home sharing companies targeting minority guests—Noirbnb, Rainbow BnB—have developed. *See Solomon & Carpenter, supra* note 38 (discussing Noirbnb, a small alternative to Airbnb); *Orion Travel Tech Builds Rainbow BNB, the World’s First Online BNB for the LGBT Community*, BUS. WIRE (June 22, 2016, 9:30 AM), <https://www.businesswire.com/news/home/20160622005526/en/Orion-Travel-Tech-Builds-Rainbow-BNB-Worlds> [<https://perma.cc/EN3P-S4SA>] (describing Rainbow BNB, an Airbnb alternative for LGBT travelers). This is very troubling from a fair housing perspective and begs the question of whether we are moving further away from the FHA integration goals and principles.

40. *See e.g., 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> [<https://perma.cc/5ZAQ-YFLY>] (last visited Feb. 1, 2019) (implementing policy changes prohibiting Airbnb hosts from declining, imposing different terms upon, or discouraging a preference for a guest based on color, ethnicity, national origin, or race).

for hosts to use instant booking (where reservations are accepted automatically), and various diversity employment initiatives, including changes to its majority white staff.<sup>41</sup> While these changes may impact the process, they cannot change the hearts. Would-be discriminators will continue to look for ways to shut the door to protected classes and prevent them from sharing the benefits of home sharing.

## II. APPLYING THE FAIR HOUSING ACT TO HOME SHARING

Does the FHA apply to home sharing transactions? If so, what effect does it have? Can it make discriminating hosts change their ways? What can hosts and guests do about it? What advice should their lawyers provide? The answers to these and related questions are in the making. One thing is clear though—given the widespread appeal of home sharing, it will be on the forefront of fair housing enforcement in the future. Indeed, the National Fair Housing Alliance (“NFHA”) identified home sharing and online housing discrimination as one of the key issues of fair housing enforcement for the future.<sup>42</sup>

### A. *What Properties Does the FHA Cover?*

While the FHA is typically understood to cover traditional home and apartment rentals and sales, it has been applied to vacation homes, timeshares, migrant housing, dormitories, shelters, and other types of temporary lodging.<sup>43</sup> The FHA defines covered

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41. Solomon & Carpenter, *supra* note 38.

42. NAT'L FAIR HOUS. ALL., THE CASE FOR FAIR HOUSING: 2017 FAIR HOUSING TRENDS REPORT 94–95 (2017), <https://nationalfairhousing.org/wp-content/uploads/2017/07/TREND-REPORT-2017-FINAL.pdf> [<https://perma.cc/9X45-LR28>].

43. 24 C.F.R. § 100.201 (1989) (expanding the definition of “dwelling unit” to include “dormitory rooms,” “sleeping accommodations in shelters intended for occupancy as a residence for homeless persons,” and “rooms in which people sleep” where “toileting or cooking facilities are shared by occupants of more than one room or portion of the dwelling”); *see also* United States v. Columbus Country Club, 915 F.2d 877, 878–81 (3d Cir. 1990), *cert. denied*, 501 U.S. 1205 (1991) (finding that the country club’s summer homes, or “bungalows,” qualified as dwellings under the FHA); United States v. Univ. of Neb. at Kearney, 940 F. Supp. 2d 974, 983 (D. Neb. 2013) (holding that university student housing qualified as a dwelling under the FHA); Lauer Farms, Inc. v. Waushara Cty. Bd. of Adjustment, 986 F. Supp. 544, 559 (E.D. Wis. 1997) (finding that migrant worker camps qualified as dwellings under the FHA); Louisiana Acorn Fair Hous. v. Quarter House, 952 F. Supp. 352, 360 (E.D. La. 1997) (finding that timeshare units qualified as dwellings under the FHA); Hernandez v. Ever Fresh Co., 923 F. Supp. 1305, 1308 (D. Or. 1996) (holding that a “temporary farm labor camp” qualified as a dwelling under the FHA); Woods v. Foster, 884 F.

properties broadly as “dwellings” occupied, designed, or intended to be occupied as a residence.<sup>44</sup> The main case interpreting this requirement, *United States v. Hughes Memorial Home*, involved an orphanage for white children.<sup>45</sup> Finding that the FHA covered such a residence, the court interpreted “residence” to mean “a temporary or permanent dwelling place, abode or habitation to which one intends to return as distinguished from the place of temporary sojourn or transient visit.”<sup>46</sup> Thus, while the length of the children’s stay varied, it was not a transient occupancy and the children viewed the orphanage as a place to which they could return.<sup>47</sup>

Whether a short-term stay is covered by the FHA depends on the specific circumstances. Factors to consider include whether the occupant treats the property like a home, use of common areas for socializing, the length of the stay, and whether the occupant intends to return to the place.<sup>48</sup> Additionally, the Department of Housing and Urban Development (“HUD”), the federal agency responsible for enforcing the FHA,<sup>49</sup> has indicated that it supports a flexible definition of covered properties, stating “on balance, the need to leave open the extent and scope of the terms defined in the [FHA] outweighs the need to provide comprehensive examples in connection with this rulemaking.”<sup>50</sup>

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Supp. 1169, 1173 (N.D. Ill. 1995) (finding that a homeless residential facility qualified as a dwelling under the FHA); *United States v. Hughes Mem’l Home*, 396 F. Supp. 544, 549 (W.D. Va. 1975) (holding that a home for dependent children qualified as a dwelling under the FHA).

44. 42 U.S.C. § 3602(b) (2012).

45. 396 F. Supp. at 547.

46. *Id.* at 549.

47. *See id.* at 547, 549.

48. *See Telesca v. Vill. of Kings Creek Condo. Ass’n*, 390 Fed. App’x 877, 881 (11th Cir. 2010) (when determining whether a building constitutes a “dwelling,” the court examined the length of the stay of a typical occupant and whether people treated the building like their home in terms of maintenance, meal preparation, and socializing (citing *Schwarz v. City of Treasure Island*, 544 F.3d 1201, 1214–15 (11th Cir. 2008))); *Lakeside Resort Enters., LP v. Bd. of Supervisors of Palmyra Twp.*, 455 F.3d 154, 158, 160 (3d Cir. 2006) (in considering whether the facility was intended or designed for occupants who intended to remain for a significant amount of time and whether they viewed the place as somewhere they would return, the court held that a proposed drug- and alcohol-treatment facility with an average stay of 14.8 days qualified as a dwelling); *Germain v. M&T Bank Corp.*, 111 F. Supp. 3d 506, 523 (S.D.N.Y. 2015) (“[T]he determination of whether a particular building is a dwelling or residence within the meaning of the FHA does not turn on fixed classifications of the building . . . but instead courts analyze the function of a specific building for a particular plaintiff alleging discrimination under the Act.”).

49. 42 U.S.C. § 3608(a).

50. Implementation of the Fair Housing Amendments Act of 1988, 54 Fed. Reg. 3232,

Home sharing sites offer a variety of lodging opportunities. Some are overnight stays, where the host remains in residence, while other stays are longer, with the owner absent.<sup>51</sup> Some stays involve typical housing, while others may involve nontraditional properties, such as yurts and houseboats.<sup>52</sup> Some users express an intent to return to the property in the reviews.<sup>53</sup> For the most part, the courts have found the FHA to cover cases dealing with temporary stays, and have found coverage usually relying on the broad construction principles of the prior decisions and the HUD regulations.<sup>54</sup> Therefore, while the length of the stay and other circumstances of the stay will impact the analysis, certainly the FHA will cover at least some home sharing properties.

### B. *What Properties Are Exempted from the FHA?*

There are some exemptions to the FHA which may apply to certain home sharing transactions.<sup>55</sup> Generally, these exemptions are narrowly interpreted and may be lost under certain circumstances.<sup>56</sup> Also, the exemptions do not apply to discriminatory advertising or racial discrimination.<sup>57</sup> Additionally, state and local discrimination laws may apply, and they often do not contain any exemptions or may contain a less restrictive version of the ex-

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3238 (Jan. 23, 1989).

51. See MJ Franklin, *The Difference Between Airbnb vs. VRBO, Explained*, MASHABLE (Feb. 16, 2018), <https://mashable.com/article/airbnb-vs-vrbo-trip-booking> [https://perma.cc/LPH8-KE6K]; Aaron Smith, *Shared, Collaborative and on Demand: The New Digital Economy*, PEW RES. CTR. (May 19, 2016), <https://www.pewinternet.org/2016/05/19/shared-home-sharing-services/> [perma.cc/EEN3-S8MW].

52. See *Yurt in the Woods Retreat—Winter Glamping*, AIRBNB, <https://www.airbnb.com/rooms/23419312> [https://perma.cc/9VV3-QVK5] (last visited Feb. 1, 2019); *Warm, Cozy and Comfortable Houseboat Gated Marina*, AIRBNB, <https://www.airbnb.com/rooms/7601591> [https://perma.cc/WR94-XZBR] (last visited Feb. 1, 2019); Smith, *supra* note 51.

53. See *Yurt in the Woods Retreat—Winter Glamping*, *supra* note 52.

54. See *supra* note 43. *But see* *Schneider v. Cty. of Will*, 190 F. Supp. 2d 1082, 1087 (N.D. Ill. 2002) (holding that a bed-and-breakfast is not a “dwelling”); *Patel v. Holley House Motels*, 483 F. Supp. 374, 381 (S.D. Ala. 1979) (holding that a motel is not a “dwelling”).

55. 42 U.S.C. § 3603(b) (2012).

56. See, e.g., *Balvage v. Ryderwood Improvement & Serv. Ass’n*, 642 F.3d 765, 776 (9th Cir. 2011); *Fair Hous. Advocates Ass’n v. City of Richmond Heights*, 209 F.3d 626, 634 (6th Cir. 2000); *Hogar Agua y Vida en el Desierto, Inc. v. Suarez-Medina*, 36 F.3d 177, 181–82 (1st Cir. 1994); *Massaro v. Mainlands Section 1 & 2 Civic Ass’n*, 3 F.3d 1472, 1475, 1477 (11th Cir. 1993); *United States v. Hughes Mem’l Home*, 396 F. Supp. 544, 550 (W.D. Va. 1975).

57. 42 U.S.C. § 3603(b) (noting that the exceptions do not apply to discriminatory advertising); *id.* §§ 1981–1982 (banning racially discriminatory practices in making and enforcing contracts, and in property transactions).

emptions in the federal law. Therefore, if you are home sharing in a place with more liberal local laws, a host may be liable for discrimination under those laws even though he or she may be exempt from the federal law.

### 1. Sale or Rental of a Single-Family Home Exemption

Under the single-family homeowner exemption (“SFH”), a single-family homeowner owner may discriminate in the sale or rental of his home, provided the owner does not own or have an interest in “more than three such single-family houses at any one time.”<sup>58</sup> Additionally, the owner may not use the services or facilities of a real estate agent, broker, salesperson, or anyone in the business of selling or renting properties to qualify for the exemption.<sup>59</sup> A person is considered “in the business” if she has been a principal in three or more transactions, not including transactions involving her primary residence, within the preceding twelve months, or has been an agent in two or more transactions within the preceding twelve months.<sup>60</sup> Further, discriminatory advertisements and statements may not be used in marketing the property.<sup>61</sup>

It is not clear whether using a home sharing site will be considered on par with using a real estate agent, broker, sales professional, or someone “in the business.” A strong argument for that could certainly be made since the sites perform many of the same functions of a real estate professional. Examples include assisting with securing renters, preparing the property for occupancy, and providing advice and counsel concerning the transaction.<sup>62</sup> Significantly, the host site collects and distributes fees pertaining to the transaction.<sup>63</sup> Indeed, in many ways, the site acts as a virtual office where the host and traveler meet, negotiate terms, and consummate the transaction.

However, internet service providers have enjoyed special protections from anti-discrimination laws that are not afforded to

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58. *Id.* § 3603(b)(1).

59. *Id.*

60. *Id.* § 3603(b)–(c).

61. *Id.* § 3604.

62. *Terms of Service*, *supra* note 16.

63. *Payments Terms of Service*, AIRBNB, [https://www.airbnb.com/terms/payments\\_terms](https://www.airbnb.com/terms/payments_terms) [<https://perma.cc/PAH9-D3VV>] (last visited Feb. 1, 2019).

traditional real estate sales professionals or companies. If the law applied these protections to home sharing sites, discriminating hosts would operate openly. One of the first cases to examine discrimination and the liability of an online provider was *Chicago Lawyers' Committee for Civil Rights Under the Law v. Craigslist, Inc.*<sup>64</sup> In this case, the plaintiffs accused Craigslist of violating the FHA by publishing discriminatory housing advertisements.<sup>65</sup> The court found that Craigslist came within the scope of an immunity provision within the Communications Decency Act ("CDA"), a federal law enacted in 1996 to regulate pornography on the internet, which insulated the site from liability for discriminatory user posts.<sup>66</sup> The court found Craigslist to be an internet service provider ("ISP") that published listings, but did not develop its content and was therefore exempt from the FHA.<sup>67</sup> The decision essentially created a double standard for online publishers versus traditional publishers.

Another case that extended special immunity to an online provider was *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC* ("Roommate").<sup>68</sup> *Roommate* involved a roommate matching service, where people looking for roommates could create a listing containing criteria for a prospective roommate.<sup>69</sup> The site allowed users to specify various characteristics for their prospective roommates, including some protected characteristics.<sup>70</sup> The court found that Roommate did not qualify for the CDA exemption because it was not just an ISP, but also a content developer.<sup>71</sup> The website played an active role in developing discriminatory criteria for the roommate search that ultimately led to discriminatory roommate postings and communications.<sup>72</sup> The court therefore found that Roommate was not entitled to CDA immunity.<sup>73</sup> In reaching this determination, the

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64. 519 F.3d 666, 668 (7th Cir. 2008).

65. *Id.*

66. *Id.* at 669–72.

67. *Id.*

68. 521 F.3d 1157, 1161, 1174–75 (9th Cir. 2008).

69. *Id.* at 1161.

70. *Id.* at 1161, 1167.

71. *Id.* at 1165–70.

72. *Id.*

73. *Id.* at 1162, 1170.

court considered Roommate's involvement in the development of the discriminatory questions and the fact that it required users to provide information on protected characteristics to use the site.<sup>74</sup>

It is unclear whether home sharing sites will be deemed an ISP, a content developer, or perhaps a hybrid. Arguably, home sharing sites are more akin to a content developer since they play an active role in developing criteria and many of the key terms of the transaction. However, the inquiry does not end there because the court, in subsequent proceedings, found Roommate was exempt from the FHA for other reasons.<sup>75</sup> The court applied a "shared living exception" to the roommate transactions and held that, since roommates share common areas and have a close relationship with one another, protected characteristics may be used in the selection process.<sup>76</sup> This shared living exemption is not specifically stated in the FHA, but it arises out of the constitutional right to freedom of association.<sup>77</sup> There are some local fair housing laws that recognize gender-based limitations in shared living situations,<sup>78</sup> but *Roommate* may be read as extending these limitations beyond gender to other protected characteristics (race, religion, national origin, etc.) since gender was not the only protected characteristic involved in the selection process. If it is expanding the shared living exception, does the expansion only apply to online services?

It is unclear how the exemptions in these cases will operate in home sharing transactions. Home sharing guests and hosts are not roommates in the traditional sense. They usually do not have the same level of intimacy, exclusivity, or selectivity as roommates and the length of their cohabitation is usually shorter. A host may have more than one guest at time and, with instant booking, may not even reject a guest if the accommodation is available.<sup>79</sup> However, some home shares may be analogous to the *Roommate* situation. If you are looking to home share in exchange for services (elder, child, health care) or are looking to reduce housing costs, expand housing choice, etc., the relationship

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74. *Id.* at 1164–66.

75. Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC, 666 F.3d 1216, 1222–23 (9th Cir. 2012).

76. *Id.* at 1221–22.

77. *Id.* at 1220–22.

78. *E.g.*, COOK COUNTY, ILL., CODE OF ORDINANCES ch. 42, art. II, § 42-38(c) (2006).

79. *What Is Instant Book?*, *supra* note 23.

between the guest and host may be very different. Thus, to some extent, the applicability of the *Roommate* exemption will vary based on the nature of the transaction.

Finally, another issue concerning the SFH exemption is whether home share listings on the internet qualify as advertisements, notices, or statements within the meaning of § 3604(c) of the FHA.<sup>80</sup> Properties or transactions that otherwise qualify for an exemption lose the protection if discriminatory advertising is used.<sup>81</sup> The FHA advertising section is broadly interpreted and examines advertisements using an ordinary reader standard.<sup>82</sup> Listings containing subtle discouraging statements (“perfect for single or couple,” “great bachelor pad,” or “solo travelers”) are prohibited, as well as those that blatantly exclude protected classes.<sup>83</sup> If notices on home share sites are found to come within the scope of this provision and are discriminatory, the SFH exemption would be lost. This would make the owner of the property and publisher of the advertisement liable, but the home sharing site would presumably still be exempt. This, of course, creates less incentive for private persons to pursue violations since the deep pockets would be off the hook.

## 2. The Mrs. Murphy Exemption

Another exemption that may arise in home sharing transactions is the exemption for owner occupied properties with four units or less.<sup>84</sup> This exemption is commonly referred to as the

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80. 42 U.S.C. § 3604(c) (2012). There are additional conditions relating to sales of personal residences, but this is not usually involved in home sharing.

81. See *United States v. Hunter*, 324 F. Supp. 529, 534 (D. Md. 1971).

82. 24 C.F.R. § 100.75(b) (2017) (“The prohibitions in this section shall apply to *all* written or oral notices or statements by a person engaged in the sale or rental of a dwelling.” (emphasis added)); see *White v. HUD*, 475 F.3d 898, 905 (7th Cir. 2007); *Hous. Rights Ctr. v. Sterling*, 404 F. Supp. 2d 1179, 1193 (C.D. Cal. 2004) (“An oral or written statement violates § 3604(c) if it suggests a preference, limitation or discrimination to the ‘ordinary listener’ or reader.”); *Fair Hous. Cong. v. Weber*, 993 F. Supp. 1286, 1290 (C.D. Cal. 1997) (“The standard . . . is whether the statement suggests a preference to the ordinary reader or listener. No discriminatory intent is required.” (citations omitted)).

83. See 42 U.S.C. § 3604(c); *Miami Valley Fair Hous. Ctr., Inc. v. Connor Grp.*, No. 3:10-cv-83, 2015 WL 853193, at \*1, \*9–10 (S.D. Ohio Feb. 26, 2015) (noting that the jury found the Craigslist advertisement containing “great bachelor pad” violated state and federal laws by discriminating on the basis of familial status and sex); *Guider v. Bauer*, 865 F. Supp. 492, 494, 497 (N.D. Ill. 1994) (dismissing defendant’s motion for summary judgment because newspaper ad stating “Perfect for . . . couple” was found “not facially nondiscriminatory as a matter of law.”).

84. 42 U.S.C. § 3603(b)(2).

“Mrs. Murphy exemption.”<sup>85</sup> This exemption was named after a fictitious widow who Congress hypothesized took in boarders to supplement her income.<sup>86</sup> The exemption was modeled after a similar provision in Title II of the Civil Rights Act of 1964 dealing with places of public accommodation.<sup>87</sup> Like the SFH exemptions, it does not apply if discriminatory advertising is used.<sup>88</sup> Also, the owner must live in the building.<sup>89</sup> Note that race-based discrimination by a Mrs. Murphy covered property would still be illegal under the Civil Rights Act of 1866<sup>90</sup> and, if the home share is in a state or city that does not recognize Mrs. Murphy, the host would still be liable and possibly the home share site.<sup>91</sup>

This exemption was ostensibly intended to protect Mrs. Murphy’s right to freedom of association, which includes the right *not* to associate with someone.<sup>92</sup> To a certain extent, the exemption is rooted in what might be deemed as a permissible level of prejudice. The FHA was designed to address discrimination in the housing market—not regulate private housing arrangements.<sup>93</sup> At the time, many people rented rooms and/or apartments in the building or home where they lived.<sup>94</sup> Personal relationships were often formed among the tenants and with the proprietor.<sup>95</sup> The FHA was meant to stop commercial property owners from discriminating—not require people to live with or be friends with African Americans.<sup>96</sup>

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85. James D. Walsh, *Reaching Mrs. Murphy: A Call for the Repeal of the Mrs. Murphy Exemption to the Fair Housing Act*, 34 HARV. C.R.-C.L. L. REV. 605, 605 (1999).

86. 114 CONG. REC. 2495 (1968); Walsh, *supra* note 85, at 607–08.

87. Civil Rights Act of 1964, 42 U.S.C. § 2000a (2012); Walsh, *supra* note 85, at 607–09.

88. 42 U.S.C. § 3603(b)(2) (Supp. IV 2017).

89. *Id.*

90. Civil Rights Act of 1866, 42 U.S.C. § 1982 (2012); Walsh, *supra* note 85, at 623 n.136.

91. *See supra* notes 71–75 and accompanying text.

92. Walsh, *supra* note 85, at 607.

93. Brenna R. McLaughlin, Comment, *#AirbnbWhileBlack: Repealing the Fair Housing Act’s Mrs. Murphy Exemption to Combat Racism on Airbnb*, 2018 WIS. L. REV. 149, 156–58.

94. Alan Durning, *Rooming Houses: History’s Affordable Quarters*, SIGHTLINE INST., (Nov. 14, 2012, 11:30 AM), <https://www.sightline.org/2012/11/14/rooming-houses-historys-affordable-quarters/> [<https://perma.cc/6KMM-Y8RG>].

95. David M. Forman, *A Room for “Adam and Steve” at Mrs. Murphy’s Bed and Breakfast: Avoiding the Sin of Inhospitality in Places of Public Accommodation*, 23 COLUM. J. GENDER & L. 326, 331 (2012).

96. McLaughlin, *supra* note 93, at 156.

Since the enactment of the FHA, times and attitudes have changed. Home sharing platforms have enabled Mrs. Murphy to compete on a level with hotels, motels, and established private housing providers. While there is a more personal relationship with the proprietor in home sharing, it is not like the relationships between roommates or in boarding houses. The relationships today are shorter and more distant. It may be time to reexamine the exemption and consider whether and to what extent we should allow Mrs. Murphy to use the internet, and specifically home sharing sites, to further her personal biases.

### III. ENFORCEMENT ISSUES AND STRATEGIES

In view of this legal context, are home sharing sites subject to the FHA? Maybe. It depends on the type of transaction and to some extent, where it occurs. If home share platforms are determined to be ISPs and eligible for the CDA immunity per *Craigslist*, discriminators will be free to post blatantly discriminatory listings and shut protected classes out of home sharing. Airbnb has raised this argument to insulate itself from its hosts' alleged illegal activity.<sup>97</sup> If, however, home sharing platforms are characterized as content developers, there may be some accountability in certain transactions. While the site might be liable for its own discriminatory actions in this circumstance, whether it would be held liable for actions of its hosts is not entirely clear. Traditional principles of vicarious liability apply in FHA cases to make a principal or employer responsible for the acts of his agents or employees, but it is unclear whether a home sharing site would be deemed to be in an agency relationship with a host.<sup>98</sup>

A leading case on vicarious liability under the FHA, *Meyer v. Holley*, involved a broker who was sued for his salesperson's dis-

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97. See Kia Kokalitcheva, *Airbnb Changes Its Tune in New York*, FORTUNE (Dec. 6, 2016), <https://fortune.com/2016/12/06/airbnb-drops-ny-lawsuit/> [<https://perma.cc/T9P3-33KL>]; see also Joe Anuta, *Airbnb's History of Lawsuits Provides Clues to Legal Strategy*, CRAIN'S (July 20, 2018), [https://www.crainsnewyork.com/article/20180720/REAL\\_ESTATE/180729987/airbnb-s-lawsuits-provide-clues-to-legal-strategy-against-new-york-city](https://www.crainsnewyork.com/article/20180720/REAL_ESTATE/180729987/airbnb-s-lawsuits-provide-clues-to-legal-strategy-against-new-york-city) [<https://perma.cc/AF76-6QKM>].

98. See *Meyer v. Holley*, 537 U.S. 280, 285 (2003); Quid Pro Quo and Hostile Environment Harassment and Liability for Discriminatory Housing Practices Under the Fair Housing Act, 81 Fed. Reg. 63,054, 63,064–65 (Sept. 14, 2016) (codified at 24 C.F.R. pt. 100.7 (2016)); ROBERT G. SCHWEMM, HOUSING DISCRIMINATION LAW AND LITIGATION 12B-2 to -3 (7th ed. 1997).

criminatory acts.<sup>99</sup> The Holleys, an interracial couple, alleged that they were prevented from buying a house by the salesperson's discriminatory tactics.<sup>100</sup> They sued the salesperson, the company that employed him, and the company's sole shareholder and president individually.<sup>101</sup> While the FHA is silent on the issue of vicarious liability, the court stated that Congress is presumed to have incorporated "ordinary tort-related vicarious liability rules . . . [which] make principals or employers vicariously liable for acts of their agents or employees in the scope of their authority or employment."<sup>102</sup> Once an agency relationship is established, the principal is liable for the agent's actions "committed within the scope of the agent's authority."<sup>103</sup>

The relationship between the home share company and its hosts has some attributes of an agency relationship. The site controls key aspects of the relationship, such as payment, policy development, and implementation.<sup>104</sup> It also supervises or has the ability to supervise key aspects of the relationship, such as rejections, cancellations, membership status, and search placement.<sup>105</sup> If there is an agency relationship, the home share company could be liable for its hosts' discriminatory actions, absent CDA immunity or exemption.

Even if home share sites are deemed to be content developers in an agency relationship with the host, home shares where the owner is in the residence will still be able to exclude protected classes by claiming one of the exemptions. They will be able to discriminate directly or indirectly by: crafting listings discouraging descriptions about the property and community; lying about availability as in the *Selden* case; or setting discriminatory policies. In states and cities where the Mrs. Murphy exemption does not exist or is more relaxed, victims may try to proceed under those laws, but remedies may be limited to arbitration.<sup>106</sup> While

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99. 537 U.S. at 283.

100. *Id.* at 282–83.

101. *Id.* at 283.

102. *Id.* at 285.

103. See Jessica Reingold Katz, Note, *Finding Fault: Implications of Importing the Title VII Standard for Vicarious Punitive Liability to the Fair Housing Act*, 29 CARDOZO L. REV. 2749, 2759 (2008).

104. See *Terms & Policies*, AIRBNB, <https://www.airbnb.com/help/topic/250/terms---policies> [<https://perma.cc/M4V3-J4L3>] (last visited Feb. 1, 2019).

105. *Terms of Service*, *supra* note 16.

106. McLaughlin, *supra* note 93, at 164, 173.

arbitration can be an effective dispute resolution process, it does not provide the type of broad injunctive relief needed to remedy discrimination. Discriminators often act based on deep seated biases that are not easily abandoned.<sup>107</sup>

All of this leaves a small window where the FHA could fully apply (assuming sites are not afforded CDA immunity)—home shares where the owner is not in residence. One strategy that may be considered in these circumstances to avoid arbitration would be to use the broad standing provided under the FHA and have a government agency, private fair housing agency, or perhaps a tester (persons posing as home seekers) bring the action using the broad standing provided under the FHA.<sup>108</sup> The United States Supreme Court has held that Congress intended to confer standing in FHA cases to the fullest extent permitted by Article III of the Constitution.<sup>109</sup> The Court recently reaffirmed these broad standing provisions.<sup>110</sup> The case involved a claim by the City of Miami that predatory loans targeting minority communities caused widespread foreclosures and vacancies, and thereby impacted property values and tax revenues for the City.<sup>111</sup> The banks argued that the City did not have standing to sue because the FHA “is primarily about obtaining redress for individual injury, not vindicating public rights.”<sup>112</sup> In rejecting this argument, the Court noted that the “FHA’s definition of person ‘aggrieved’ reflects a congressional intent to confer standing broadly.”<sup>113</sup>

This strategy was used recently by the State of California in resolving a discrimination claim by an Asian guest. The case arose in California when a Trump-supporting host canceled the reservation of an Asian guest on Airbnb at the last minute with a blatantly racist message.<sup>114</sup> The California Department of Fair Employment and Housing initiated an investigation and the vic-

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107. *See id.* at 172.

108. *See id.* at 173–74.

109. *See Meyer v. Holley*, 537 U.S. 280, 285–86 (2003); *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 211–12 (1972).

110. *Bank of Am. Corp. v. City of Miami*, 581 U.S. \_\_\_, \_\_\_, 137 S. Ct. 1296, 1301, 1303 (2017).

111. *Id.* at \_\_\_, 137 S. Ct. at 1300–01.

112. Brief for Petitioner at 17, *Bank of Am. Corp.*, 581 U.S. \_\_\_, 137 S. Ct. 1296 (No. 15-1111).

113. *Bank of Am. Corp.*, 581 U.S. at \_\_\_, 137 S. Ct. at 1303.

114. Hugo Martin, *Airbnb Host Must Pay \$5,000 for Canceling Reservation Based on Race*, L.A. TIMES (July 13, 2017, 2:50 PM), <https://www.latimes.com/business/la-fi-airbnb-discrimination-20170713-story.html> [https://perma.cc/6A6D-M6KA].

tim, Dyne Suh, a UCLA law student, cooperated.<sup>115</sup> The case was settled last year with an agreement requiring the host to pay \$5000 in damages, an apology, and fair housing training.<sup>116</sup> The settlement is significant in that it shows how creative and aggressive action by states can effectively address discrimination in home sharing.<sup>117</sup> California also recently entered in a Consent Decree with Airbnb to resolve issues raised in a broader investigation California initiated regarding discrimination on the platform.<sup>118</sup> This agreement includes, among other things, a provision allowing the Department to conduct fair housing testing on hosts.<sup>119</sup> State and local government action could thus play a crucial role in future enforcement of the FHA in home sharing. Many state and local fair housing laws authorize self-initiated actions by human rights commissions and, in some instances, the State Attorney General.<sup>120</sup>

## CONCLUSION

The resurgence of home sharing created by technology has the potential to provide new housing and income opportunities for users. The concept, however, really challenges us to consider how to best balance the values contained in the law with the right to

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115. *Id.*

116. See Amy B. Wang, *Airbnb Host Who Stranded Guest Because of Race Ordered to Take Class in Asian American Studies*, WASH. POST (July 14, 2017), <https://www.washingtonpost.com/news/business/wp/2017/07/14/airbnb-host-who-stranded-guest-because-of-race-ordered-to-take-class-in-asian-american-studies/> [https://perma.cc/3A7N-84NL].

117. Martin, *supra* note 114.

118. Dep't of Fair Emp't & Hous. v. AIRBNB Inc., Case Nos. 574743-231989, 574743-231624, at 1, 8, 20 (Voluntary Agreement Apr. 19, 2017) [hereinafter Dep't of Fair Emp't & Hous.], <https://www.dfeh.ca.gov/wp-content/uploads/sites/32/2017/06/04-19-17-Airbnb-DFEH-Agreement-Signed-DFEH-1-1.pdf> [https://perma.cc/4UTB-82MJ]; see Ben Lane, *Airbnb Agrees to Let California Conduct Fair Housing Tests on Hosts*, HOUSING WIRE (Apr. 28, 2017), <https://www.housingwire.com/articles/40001-airbnb-agrees-to-let-california-conduct-fair-housing-tests-on-hosts> [https://perma.cc/CL37-6EC9].

119. Dep't of Fair Emp't & Hous., *supra* note 118, at 16–17.

120. See *After a Complaint Has Been Filed with the Maine Human Rights Commission*, ME. HUM. RTS. COMM'N, [https://www.maine.gov/mhrc/guidance/after\\_complaint\\_filed.htm](https://www.maine.gov/mhrc/guidance/after_complaint_filed.htm) [https://perma.cc/WJG3-7CSG] (last updated Apr. 2012, 10:47 A.M.); Comm'n of Human Rights & Opportunities, *What Happens After I File a Complaint?*, ST. CONN., <https://www.ct.gov/chro/cwp/view.asp?a=2524&Q=316258> [https://perma.cc/94HT-JAXC] (last updated June, 22, 2011); Evan Noorani, *AG Investigation Uncovers Veteran Housing Discrimination Across Washington State*, KREM2 (Mar. 1, 2018, 5:28 P.M.), <https://www.krem.com/article/news/ag-investigation-uncovers-veteran-housing-discrimination-across-washington-state/293-524628409> [https://perma.cc/Q83J-3FR4]; State of Vt. Human Rights Comm'n, *Frequently Asked Questions*, ST. VT., <https://hrc.vermont.gov/resources/faq> [https://perma.cc/EW8D-BJLW] (last visited Feb. 1, 2019).

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indulge in your prejudices in your home. The challenge is exacerbated by the current state of the law relating to the responsibilities of online companies. Perhaps it is time to reexamine the principles established a decade ago in *Craigslist* and consider whether they are still relevant today. Technology has evolved rapidly and there may well now be ways to better control for discriminatory posts than were available in 2008. The legal loopholes that have been created for online providers could provide an opportunity for strong state and local government action in the future.