The First Amendment and Fair Housing in the Platform Economy

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The platform economy—a marketplace made up of businesses that profit by connecting providers of goods and services with users of those goods and services—challenges us to reevaluate our antidiscrimination laws. This Article considers one such challenge: how should public accommodation laws such as Title II of the Civil Rights Act of 1964 and the Fair Housing Act apply to the housing sector of the platform economy? Such laws, this Article explains, should apply in full to the housing sector. Moreover, legislators should act to remove the current statutory exemption for landlords who rent a small number of housing units and live on the premises from which they rent. While some might raise concerns that closing the exception will infringe upon these small-scale landlords' First Amendment right to free association, such concerns have no doctrinal basis. Moreover, closing the exception will in fact have the effect of advancing interests related to both freedom of speech and of association, particularly with respect to the people of color whom public accommodation laws were originally designed to protect.

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I. INTRODUCTION

Some hoped that the platform economy would usher in the end of race discrimination in the marketplace. Platform economy businesses profit by connecting providers of goods and services with users of those goods and services. Crucially, the connection takes place via an online platform, theoretically eliminating face-to-face interactions that trigger discrimination. The paradigmatic example is that of a black man attempting to get a ride

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somewhere. In the old economy, he had to navigate the difficulty of flagging down a cab. But in the new platform economy, he merely has to push a few buttons, and moments later an Uber will arrive at his location.

Unfortunately, however, research demonstrates that the platform economy has not succeeded in eliminating race discrimination. Platform design features, such as racially-identifiable profile pictures and names, often reveal race and lead to discrimination, while the rating systems used by most platform economy businesses can incorporate, perpetuate, and amplify both conscious and unconscious bias.

This Article focuses on race discrimination in the housing sector of the platform economy, although the core insights are applicable to other areas as well.[1] I have argued elsewhere that existing public accommodation laws such as Title II of the Civil Rights Act of 1964 and the Fair Housing Act should be interpreted to apply to the housing sector.[2] Here, I extend that argument, explaining how the structure of platform economy businesses makes urgent the need to eliminate the so-called "Mrs. Murphy exception" from public accommodation laws. That exception currently makes federal bans on discrimination inapplicable to small-scale landlords.[3] For example, Title II's prohibition on discrimination in public accommodations does not include properties where a landlord actually lives and rents out five or fewer units, and the Fair Housing Act likewise exempts landlords who actually live on their properties and rent four or fewer units from its prohibition on discrimination on the basis of race.[4] Yet the housing sector of the platform economy offers unprecedented access for many such small-scale landlords, with many rental properties advertised on major platform economy sites such as Airbnb, Homeaway, and VRBO consisting of a spare bedroom in someone's home or a basement apartment in a townhouse.

Would abolishing the Mrs. Murphy exception infringe upon the First Amendment right to freedom of association? As a doctrinal matter, I explain that it would not. Less obviously, I argue that eliminating the exception would, if anything, enhance the values that the First Amendment protects by encouraging a robust and open exchange of ideas and by protecting the associational interests of historically disadvantaged market participants.

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[1] For example, available evidence suggests that ride-share businesses such as Uber and Lyft, service providers such as TaskRabbit, and financial facilitators such as Prosper all suffer from some of the same issues as the housing sector and would benefit from some of the same solutions. I have previously addressed some of these commonalities in other works. *See* Nancy Leong, *New Economy, Old Biases*, 100 MINN. L. REV. 2153, 2154 (2016); Nancy Leong & Aaron Belzer, *The New Public Accommodations: Race Discrimination in the Platform Economy*, 105 GEO. L.J. 1271, 1275 (2017).

[2] *See generally* Leong & Belzer, *supra* note 1.

[3] *See* Nathaniel Decker, *Housing Discrimination and Craigslist*, 14 CURRENT 43, 52 (2010).

[4] 2 STATUTORY HISTORY OF THE UNITED STATES: CIVIL RIGHTS 1154 (Bernard Schwartz ed., 1970) [hereinafter 2 STATUTORY HISTORY]; Decker, *supra* note 3, at 52.

This Article proceeds in three parts. In Part II, I briefly describe the history of public accommodation laws, recount the considerable evidence of race discrimination in the housing sector of the platform economy, and explain why existing public accommodation laws should be interpreted to prohibit many instances of such discrimination. In Part III, I focus on the exception in the existing public accommodation statutory regime for small-scale landlords. I explain why, given the structure of housing-sector platform economy businesses, existing laws should be reinterpreted or amended to eliminate these gaps. Finally, in Part IV, I examine the concern that such laws will infringe upon the First Amendment right to freedom of expression, concluding not only that such concerns are legally unsupported but also that removing the small-scale landlord exception will in fact enhance values associated with both the freedom of speech and of association.

II. RACE DISCRIMINATION AND THE PLATFORM ECONOMY

Public accommodation laws arose as a response to Jim Crow. During the Jim Crow era—lasting roughly from the end of the Civil War until the early 1960s—black people were subject to legal segregation throughout much of the South. As historian C. Vann Woodward puts it, Jim Crow laws "lent the sanction of law to a racial ostracism that extended to churches and schools, to housing and jobs, to eating and drinking[,] . . . to virtually all forms of public transportation, to sports and recreations, to hospitals, orphanages, prisons, and asylums, and ultimately to funeral homes, morgues, and cemeteries."[5] Travel was particularly difficult. As one researcher explained, "Discrimination was so real that not only did [black travelers] pack their own food; but also their own gas."[6] Black people had such difficulty finding room, board, and other services while traveling that guides such as the Negro Motorist Green Book were created, which relied on word of mouth from black travelers to create a listing of hotels, restaurants, and other establishments willing to serve black customers.[7]

Such segregation, along with other civil rights abuses, ultimately prompted protests across the South and culminated in the Civil Rights Act of 1964. Title II of that Act prohibits discrimination in "public accommodations"—places such as hotels, restaurants, movie theaters, sports arenas, and other venues held

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[5] C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW 7 (commemorative ed. 2002). Woodward also emphasizes that this racial ostracism was not limited to the south. *Id.* at 18–19. *See generally* LEON F. LITWACK, NORTH OF SLAVERY (1961) (analyzing the treatment of black people in the antebellum North).

[6] Danielle Moodie-Mills, *The 'Green Book' Was a Travel Guide Just for Black Motorists*, NBC NEWS (July 11, 2017) (quoting Calvin Ramsey), http://www.nbcnews.com/news/nbcblk/green-book-was-travel-guide-just-black-motorists-n649081 [https://perma.cc/YVU4-P8CH].

[7] THE NEGRO MOTORIST GREEN BOOK (Victor H. Green & Co. ed., 1936–1967), http://digitalcollections.nypl.org/collections/the-green-book#/?tab=about [https://perma.cc/JNH8-C82X] (available through the New York Public Library Digital Collections); *see also* Moodie-Mills, *supra* note 6.

out as open to the public.[8] The legislative intent behind Title II is clear. The law was meant to "eliminate discrimination in public accommodations affecting interstate commerce."[9] The Senate Commerce Committee stated that the fundamental objective of Title II was "to vindicate 'the deprivation of personal dignity that surely accompanies denials of equal access to public establishments.'"[10] People who suffered discrimination on the basis of their racial identity, the Committee understood, were denied full participation in an equal society.

Four years later, the Fair Housing Act was passed as Title VIII of the Civil Rights Act of 1968.[11] The Act prohibits racial discrimination in selling or renting a dwelling, thus extending public accommodation norms to a broader array of housing options.[12] Similar to Title II, the Fair Housing Act was intended to spare nonwhite people the indignity of being denied housing as well as to serve integrationist goals by—at least in theory—making housing equally available to everyone.[13]

Public accommodation laws such as Title II and the Fair Housing Act accomplished a great deal by changing norms about racial discrimination in housing. The problem did not disappear overnight, but in the decades since the passage of the two laws, overt racial discrimination diminished considerably.[14]

Some hoped that the emergence of the platform economy would serve as the final nail in the coffin of race discrimination in housing. While there is no single authoritative definition of the platform economy,[15] one well-known source describes it as a "socio-economic ecosystem built around . . . shared creation, production, distribution, trade and consumption of goods and services."[16] Others have characterized the platform economy as "[a]n economic

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[8] 42 U.S.C. § 2000a(a)–(b) (2012).

[9] TO ELIMINATE DISCRIMINATION IN PUBLIC ACCOMMODATIONS AFFECTING INTERSTATE COMMERCE, S. REP. NO. 88-872, at 1 (1964), *as reprinted in* 1964 U.S.C.C.A.N. at 2355.

[10] Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 250 (1964) (quoting S. REP. NO. 88-872, at 16).

[11] Civil Rights Act of 1968, Title VIII, 42 U.S.C. §§ 3601–3631 (2012) (commonly referred to as the Fair Housing Act).

[12] 42 U.S.C. § 3604 (2012).

[13] *See* Tx. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2515–16 (2015).

[14] *See id.* at 2515–16 (acknowledging history of racial discrimination in housing and the shift from overt to disparate-impact discrimination).

[15] *See* DARCY ALLEN & CHRIS BERG, INST. OF PUB. AFFAIRS, THE SHARING ECONOMY 4 (2014), http://collaborativeeconomy.com/wp/wp-content/uploads/2015/04/Allen-D.-and-Berg-C.2014.The-Sharing-Economy.-Institute-of-Public-Affairs.-.pdf [https://perma.cc/4T28-8B3B]; Rachel Botsman, *The Sharing Economy Lacks a Shared Definition*, FAST COMPANY (Nov. 21, 2013), https://www.fastcompany.com/3022028/the-sharing-economy-lacks-a-shared-definition [https://perma.cc/UHJ7-AWNJ].

[16] Benita Matofska, *What Is the Sharing Economy?*, PEOPLE WHO SHARE (Sept. 1, 2016), http://www.thepeoplewhoshare.com/blog/what-is-the-sharing-economy/ [https://perma.cc/E3H5-VQM3].

system based on sharing underused assets or services, for free or for a fee, directly from individuals,"[17] or as "[t]he peer-to-peer-based activity of obtaining, giving, or sharing the access to goods and services, coordinated through community-based online services."[18] By removing the necessity of preexisting community relationships, the Internet dramatically amplifies the scale on which platform economy activity occurs.[19] The platform economy has grown dramatically in recent years and is projected to continue to do so: one estimate predicts that the platform economy will grow from $15 billion annual global revenue in 2013 to $335 billion in 2025.[20]

The concept of the platform economy is nothing new. People have been sharing unused or underused assets, often for monetary gain, since time immemorial.[21] What is new, however, is the way the Internet facilitates economic activity online without the need for the face-to-face interaction that often triggers racial bias. It is this innovation that has given people hope for an end to race discrimination in the platform economy.

Unfortunately, available evidence suggests that hopes that the platform economy would eliminate race discrimination in housing are misplaced.[22] The problem is rooted in the design of platform economy businesses' online platforms. As an example, consider Airbnb, which connects property owners with people looking for a short-term vacation or other rental; it offers an alternative to traditional hotels and bed-and-breakfast establishments.[23] The

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[17] Rachel Botsman, *Defining the Sharing Economy: What Is Collaborative Consumption—And What Isn't?*, FAST COMPANY (May 27, 2015), https://www.fastcompany.com/3046119/defining-the-sharing-economy-what-is-collaborative-consumption-and-what-isnt [https://perma.cc/MGU9-3ZD8].

[18] Juho Hamari et al., *The Sharing Economy: Why People Participate in Collaborative Consumption*, 10 J. ASS'N. FOR INFO. SCI. & TECH. 1002, at 1, 3, 4 (2015).

[19] *See* PATRICK MARSHALL, SHARING ECONOMY (2015), https://businessresearcher.sagepub.com/sbr-1645-96738-2690068/20150803/the-sharing-economy [https://perma.cc/6VUF-68LM].

[20] Ashley Kindergan, *Credit Suisse: By 2025, Companies Could Rake in $335 Billion a Year from People 'Sharing,'* BUS. INSIDER (Nov. 16, 2015), http://www.businessinsider.com/credit-suisse-sharing-economy-revenue-335-billion-by-2025-2015-11 [https://perma.cc/NR5Z-DXMY]. Indeed, according to the Federal Trade Commission, sharing-economy transactions totaled about $26 billion globally in 2013. Workshop Announcement, Fed. Trade Comm'n, The "Sharing" Economy: Issues Facing Platforms, Participants, and Regulators (2015), https://www.ftc.gov/system/files/documents/public_events/636241/sharing_economy_workshop_announcmenet.pdf [https://perma.cc/BK68-NYEG]. Variation among estimates of the sharing economy's value is likely a result of the lack of authoritative definition of the "sharing economy."

[21] *The Power of Connection: Peer-to-Peer Businesses: Hearing Before the H. Comm. on Small Business*, 113th Cong. 35–36 (2014) (statement of Philip Auerswald, Associate Professor, School of Public Policy, George Mason University), https://www.gpo.gov/fdsys/pkg/CHRG-113hhrg86266/pdf/CHRG-113hhrg86266.pdf [https://perma.cc/T396-QUDX].

[22] *See infra* notes 35–43 and accompanying text.

[23] *About Us*, AIRBNB, https://www.airbnb.com/about/about-us [https://perma.cc/Z66N-PNWK].

company's platform offers an opportunity to post attractive pictures of a property available for rent and detailed descriptions of its amenities. A transaction typically begins when an Airbnb user who wants to rent a home or an apartment logs in to the Airbnb app or website and finds a place to rent by searching through providers' listings of their properties. The provider is notified of rental requests and, at his or her discretion, rents the unit to the user for a specified period of time.[24] Airbnb then takes a percentage of the nightly rate in exchange for facilitating the transaction.[25]

Airbnb's platform includes a few key features shared by other housing share platforms.[26] Such platforms require parties to have profiles, which typically include names, photos, and other biographical information.[27] Sometimes the purpose of the profile is practical. According to Airbnb, the purpose of the profile is to build trust by giving parties more information about the person on the other side of the transaction.[28] The company implies that the profile is something of a curriculum vitae for others in the Airbnb community. It explains: Airbnb is a community marketplace built on trust and safety, so "[w]e require all hosts to have a profile photo, and we require all guests to upload a profile photo before making their first reservation."[29] Like other platform economy businesses, Airbnb strongly encourages both providers and users to create detailed profiles to maximize the benefits from using the site.[30] It says: "When your profile is robust, it helps others feel that you're reliable, authentic, and committed to the spirit of Airbnb. Whether you're a host or a guest, the more complete your profile is, the more reservations you're likely to book, too."[31] The flip side of the message, of course, is that providers and users who do not create such profiles will be at a substantial disadvantage.

The emphasis on profiles in the platform economy is understandable. After all, if a platform economy provider is hosting a person he has never met in his home, it is natural to want to know something about that person so that the provider can establish that the person is trustworthy. But as currently implemented, such emphasis also raises concerns about bias and discriminatory behavior. As a means of providing information about parties to a transaction and establishing trust, platforms generally require or strongly encourage users to

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[24] *Host a Home*, AIRBNB, https://www.airbnb.com/host/homes [https://perma.cc/ZWC6-M85B].

[25] *Id.* (noting the 3% service fee charged to hosts).

[26] Other platform economy businesses' platforms also share similar features, leading to similar conclusions, which I have examined in some detail elsewhere. Leong & Belzer, *supra* note 1, at 1287.

[27] *Id.*

[28] *See Why Do I Need To Have an Airbnb Profile or Profile Photo?*, AIRBNB, https://www.airbnb.com/help/article/67/why-do-i-need-to-have-an-airbnb-profile-or-profile-photo [https://perma.cc/2GR5-XVVN].

[29] *Id.*

[30] *Id.*

[31] *Id.*

create profiles using photos and real names, both of which can and often do reveal racial identity.[32]

With profile photos and real names as a basis, existing quantitative research provides support for the intuitive notion that the discrimination prevalent in the old economy also infects the new.[33] In a recent study, researchers found that Airbnb properties listed by black people received 12% less than otherwise comparable properties owned by white people.[34] Likewise, Airbnb users with "distinctively African-American" names had 16% more difficulty renting property.[35] Moreover, qualitative evidence regarding instances of discrimination abounds. In 2016 the hashtag #AirbnbWhileBlack trended on Twitter, allowing users to share stories.[36] Some incidents involved the use of racial slurs or statements like that a homeowner "did not rent to [your] kind."[37] Many more stories followed a more subtle but equally troubling pattern: a black person attempted to book a room, was told that the room was unavailable, noticed that the room was still listed as available on the website's calendar, tried again using a white profile, and was immediately offered the opportunity to book.[38] Other users, particularly, although not exclusively, black, Latino, and Arab-American people, described relying on white friends or significant others to book rooms for them.[39] Some of these incidents have resulted in civil rights lawsuits, some of which are currently pending.[40]

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[32] *See* Leong & Belzer, *supra* note 1, at 1287.

[33] *See* Nancy Leong, *The Sharing Economy Has a Race Problem*, SALON (Nov. 2, 2014), http://www.salon.com/2014/11/02/the_sharing_economy_has_a_race_problem/ [https://perma.cc/X7AQ-K4TK]; *cf.* Benjamin Sachs, *Uber: A Platform for Discrimination?*, ON LABOR (Oct. 22, 2015), http://onlabor.org/2015/10/22/uber-a-platform-for-discrimination/ [https://perma.cc/5V5A-369Q] (noting the potential for discrimination that arises when Uber riders rate Uber drivers).

[34] Benjamin Edelman & Michael Luca, *Digital Discrimination: The Case of Airbnb.com* 2, 4, 10 (Harvard Bus. Sch., Working Paper No. 14-054, 2014), https://ssrn.com/abstract=2377353 [https://perma.cc/HBN7-HTWH] (finding that nonblack hosts charge approximately 12% more than black hosts for equivalent rental properties).

[35] Benjamin Edelman et al., *Racial Discrimination in the Sharing Economy: Evidence from a Field Experiment*, AM. ECON. J. (forthcoming) (manuscript at 1–2), https://ssrn.com/abstract=2701902 [https://perma.cc/NK4T-PNUC] (finding that it is 16% more difficult for black people to find a rental online through Airbnb than for white people).

[36] Norrinda Brown Hayat, *Trying To Appear "Not Too Black" on Airbnb Is Exhausting*, CNN (Nov. 4, 2016), http://www.cnn.com/2016/09/12/opinions/too-black-rent-airbnb-hayat/ [https://perma.cc/KW3X-LNZZ].

[37] Class Action Complaint at ¶ 25, Hobzek v. Homeaway.com, Inc., 1:16-cv-1058 (W.D. Tex. Sept. 12, 2016).

[38] *See, e.g.*, Selden v. Airbnb, Inc., No. 16-cv-00933 (CRC), 2016 WL 6476934, at *1 (D.D.C. Nov. 1, 2016).

[39] *See, e.g.*, Victoria Yore, *As an Interracial Couple, We Know What Can Happen When You #AirbnbWhileBlack*, HUFFPOST (May 9, 2016), http://www.huffingtonpost.com/victoria-yore/an-interracial-couple-airbnbwhileblack_b_9858468.html [https://perma.cc/D5HR-SVWC].

[40] *See, e.g.*, *Selden*, 2016 WL 6476934, at *1 (stayed on other grounds); Class Action Complaint, *supra* note 37, at ¶¶ 13–35.

Such evidence supports Jerry Kang's observation, made more than a decade ago, that the Internet does not filter out racism.[41] It also supports the need for legal mechanisms to address race discrimination in the platform economy in general, and the housing sector of that economy in particular.

In other work, Aaron Belzer and I have argued that Title II and the Fair Housing Act should apply to platform economy housing sector businesses such as Airbnb, HomeAway, and VRBO.[42] The explicit language of the statutes appears to encompass housing sector platform economy businesses in the model of Airbnb and its kind.[43] More importantly, any analysis of housing sector platform economy businesses properly views such businesses as functionally equivalent to hotels: people seek them out for the same reason they seek out traditional hotels; they fulfill the same need as traditional hotels; they occupy the same market space as traditional hotels; and they compete with traditional hotels.[44] We argue, then, that both Title II and the Fair Housing Act should apply to Airbnb and similar businesses the same way they would apply to traditional hotels.[45]

Title II and the Fair Housing Act hold considerable promise for addressing race discrimination in the platform economy. Although it has not yet been tested in the courts, there is a strong argument that these legal mechanisms do, and should, apply to businesses such as Airbnb. Problematically, however, these statutes also have exceptions for small-scale landlords, who rent out only a few rooms on premises where they themselves live, which would exempt some landlords in a manner unique to the platform economy. In the next Part, I argue that these exceptions should be eliminated.

III. CLOSING THE SMALL-SCALE LANDLORD EXCEPTION

In order to pass Title II, proponents of the legislation had to compromise with their more hesitant colleagues by including the so-called "Mrs. Murphy exception"—a provision exempting landlords who lived on the premises and rented out five or fewer rooms.[46] The phrase was coined by Senator George D. Aiken of Vermont, who suggested that Congress "integrate the Waldorf and other large hotels, but permit the 'Mrs. Murphys,' who run small rooming

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[41] Jerry Kang, *Cyber-Race*, 113 HARV. L. REV. 1130, 1153–54 (2000).

[42] Leong & Belzer, *supra* note 1, at 1298, 1303.

[43] *See id.* at 1298–99, 1302–04.

[44] *See id.*

[45] In our previous work, Aaron Belzer and I have also explained why some concerns that people have raised regarding litigation of sharing economy race discrimination—the Communications Decency Act, intent requirements, etc.—should not apply. *See* Leong & Belzer, *supra* note 1, at 1307, 1310. While these issues are largely beyond the scope of the present Article, readers may refer to my previous work for a detailed discussion.

[46] 2 STATUTORY HISTORY, *supra* note 4, at 1154, 1742.

houses all over the country, to rent their rooms *to those they choose*."[47] As then-Senator Hubert Humphrey explained:

> The so-called Mrs. Murphy provision results from a recognition of the fact that a number of people open their homes to transient guests, often not as a regular business, but as a supplement to their income. The relationships involved in such situations are clearly and unmistakably of a much closer and more personal nature than in the case of major commercial establishments.[48]

The idea is that the relationship between the owner of a large hotel and its guests is a more impersonal and less intimate one than that of a landlord who rents to just a few guests, and that the distinction warrants an exemption from the provisions of Title II and, shortly thereafter, the Fair Housing Act.

Whatever merit this position may have had in the 1960s—and my own view is that it was questionable even then—the structure of the platform economy renders it untenable today. Many individuals who offer accommodations for rent on Airbnb technically fall within the small-scale landlord exception on Airbnb: for example, someone who rents out their spare bedroom, a mother-in-law cottage, or a converted basement apartment would seem to qualify under the bare language of the statute. Indeed, even someone who lives in a large house and rents out several spaces within that house—some of which might be entirely self-contained and have separate entrances, such that the landlord and tenant virtually never interact—would nominally qualify for the exception.

Yet it makes little sense to view these small-scale landlords as the functional equivalents of the archetypal Mrs. Murphy. By actively and voluntarily participating in the platform economy via Airbnb, the function of small-scale landlords is transformed in both degree and kind.

Consider, first, the degree of Airbnb's impact. The company has evolved into a major player in the short-term housing market. One estimate predicts that Airbnb will earn $1.6 billion in revenue in 2016 and $7.1 billion in annual revenue by 2020.[49] Moreover, Airbnb is steadily cutting into the market share of traditional hotels: its global bookings are projected to reach $38 billion by 2019; by comparison, Marriott's 2015 bookings were $37 billion and Hilton's were about $30 billion.[50] The same report projects that Airbnb will cut U.S. hotels' room-night growth to 1.2% per year over the next decade, as opposed to the 2% it would have been without Airbnb.[51] And perhaps most startling,

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[47] James D. Walsh, Note, *Reaching Mrs. Murphy: A Call for Repeal of the Mrs. Murphy Exception to the Fair Housing Act*, 34 HARV. C.R.-C.L.L. REV. 605, 605 n.3 (1999) (emphasis added).

[48] 2 STATUTORY HISTORY, *supra* note 4, at 1194.

[49] Danny King, *Report: Airbnb's Revenue Will Close in on Hilton, Marriott*, TRAVEL WKLY. (Apr. 18, 2016), http://www.travelweekly.com/Travel-News/Hotel-News/Report-Airbnb-revenue-will-close-Hilton-Marriott [https://perma.cc/V58T-MR8G].

[50] *Id.*

[51] *Id.*

Airbnb's roster of accommodations now includes more than one million rooms—more than either Marriott or Hilton.[52] The aggregation of hundreds of thousands of Mrs. Murphys into a streamlined online platform has a very different effect on society than scattered one-off small-scale landlords.

Moreover, the small-scale landlords who enter the housing sector of the platform economy via Airbnb or another platform are engaged in a qualitatively different activity than the Mrs. Murphys of years past—that is, small-scale Airbnb landlords also differ in kind. An individual who makes a conscious decision to rent out part of her property on Airbnb is choosing to enter the market in a very different manner. Such a landlord wishes to avail herself of a sophisticated online platform, a substantial preexisting user base, a built-in online screening process for prospective tenants, and a wealth of information about competitive rates and standard amenities in the market she is entering. She wants, in effect, to use Airbnb, or a similar platform, to enable her to compete with the giants of the hotel industry. And, indeed, available evidence suggests that Airbnb provides the Mrs. Murphys of the world with the opportunity to do precisely that: a recent study analyzed 220,000 Airbnb listings, compared them to comparable listings on discount website Hotels.com, and found that in sixteen out of twenty-two cities analyzed, Airbnb accommodations were cheaper than hotels.[53]

The Mrs. Murphys of decades past offer a stark contrast to the small-scale landlord who chooses to take advantage of Airbnb's streamlined platform and massive user base today. And in light of this contrast, the small-scale landlord exception is no longer warranted. By opting to participate in a platform economy business model, such as that of Airbnb, small-scale landlords are availing themselves of the ability to compete with hotels and should, therefore, abide by the same public accommodation laws as their competitors. And by aggregating the listings and preferences of hundreds of thousands of small-scale landlords, Airbnb creates a market force that is the functional equivalent of a hotel and should be governed by the same antidiscrimination provisions.

Legislators should, therefore, work to close the small-scale landlord exception in Title II and the Fair Housing Act. As the next Part will describe, they may do so without fear of infringing upon the First Amendment rights of small-scale landlords.

IV. SMALL-SCALE LANDLORDS AND THE FIRST AMENDMENT

This Part explains that there are no First Amendment barriers to closing the small-scale landlord exception, and that, moreover, closing the exception would further some First Amendment values. Part IV.A reviews the relevant doctrine

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[52] *See* 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 [https://perma.cc/UZY9-TERJ].

[53] *Comparing Airbnb and Hotel Rates Around the Globe*, BUSBUD, https://www.busbud.com/blog/airbnb-vs-hotel-rates/ [https://perma.cc/4H6J-VNPS].

relating to free association, concluding that nothing precludes closing the small-scale landlord exception. Part IV.B explains that eliminating the exception would promote more robust and honest communication; protect the associational interests of renters, particularly those who are members of historically marginalized groups; and further the government's ability to communicate its own views.

A. *Free Association Doctrine*

Congress included the Mrs. Murphy exception in both Title II and the Fair Housing Act at least in part to protect the First Amendment right to freedom of association.[54] The idea was that small-scale landlords—such as the paradigmatic widow who rents out a few rooms in her own home to earn a modest income—should not have to associate with those with whom they do not wish to interact. Yet even scratching the surface of this exception reveals unsavory reasons for it. Implicit in the idea that Mrs. Murphy should not have to associate with people against her wishes is the idea that Mrs. Murphy should not have to associate with *racial groups* against her wishes.[55] The Mrs. Murphy exception is, thus, in tension at least at a conceptual level with the values expressed elsewhere in the Constitution—in, for example, the Equal Protection Clause of the Fourteenth Amendment.

The Supreme Court held in *Roberts v. United States Jaycees* that the First Amendment freedom of association protects two different types of associations.[56] The first, so-called "expressive associations," are those that involve people coming together to communicate a message.[57] In *Boy Scouts of America v. Dale*, for example, the Court held that requiring the Boy Scouts to include a gay Scoutmaster impermissibly infringed on the organization's right to communicate certain ideas.[58] Yet, the expressive association doctrine is not without limits: the Court's later decision in *Christian Legal Society Chapter of the University of California Hastings, College of the Law v. Martinez* held that a religious student organization could be required to comply with a law school's reasonable, viewpoint-neutral antidiscrimination policy as a condition of access to the school's funds and facilities.[59] In any event, the Court has made clear that

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[54] Commentators have also widely recognized the purported First Amendment basis for the Mrs. Murphy exception. *See, e.g.*, Elizabeth F. Emens, *Intimate Discrimination: The State's Role in the Accidents of Sex and Love*, 122 HARV. L. REV. 1307, 1379 & n.332 (2009); Walsh, *supra* note 47, at 607; Kevin M. Wilemon, Note, *The Fair Housing Act, the Communications Decency Act, and the Right of Roommate Seekers To Discriminate Online*, 29 WASH. U. J.L. & POL'Y 375, 378 (2009).

[55] Emens, *supra* note 54, at 1379 & n.332.

[56] Roberts v. U.S. Jaycees, 468 U.S. 609, 617 (1984).

[57] *Id.* at 618–19, 622.

[58] Boy Scouts of Am. v. Dale, 530 U.S. 640, 655–56 (2000).

[59] Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez, 561 U.S. 661, 669 (2010).

to qualify for First Amendment protection, a group must actually engage in "expressive association"—that is, whether it engages in communicative activity that could be impaired by the inclusion of undesired members.[60] It is difficult to envision how a standard platform economy host would be engaging in expressive activity by renting out her property. The typical host is renting out accommodations for the same reason as a Hilton or Marriott hotel: to make money. There is no expressive purpose to the transaction, and this prong of *Jaycees* simply does not apply.

The other prong of *Jaycees* requires more discussion. There, the Court recognized a First Amendment right of intimate association, premised on the notion that certain intimate relationships deserve protection.[61] Justice Brennan wrote for the majority in *Jaycees*:

> The Court has long recognized that, because the Bill of Rights is designed to secure individual liberty, it must afford the formation and preservation of certain kinds of highly personal relationships a substantial measure of sanctuary from unjustified interference by the State. . . . Protecting these relationships from unwarranted state interference therefore safeguards the ability independently to define one's identity that is central to any concept of liberty.[62]

Jaycees articulated a nonexhaustive list of factors that determine whether a particular situation qualifies for the protection of intimate association: size, purpose, selectivity, and seclusion from others.[63] The Court also suggested that relationships important to the "culture and traditions of the Nation" would more likely qualify.[64] Both *Jaycees* and contemporaneous commentary suggest that the right of intimate association is not an absolute guarantee, but rather one that should receive varying degrees of protection depending on the circumstances of a particular case.[65] Kenneth Karst, for example, explains:

> The freedom of intimate association, like other constitutional freedoms, is presumptive rather than absolute. In particular cases, it may give way to overriding governmental interests. . . . The freedom of intimate association is thus a principle that bears on constitutional interest balancing by helping to establish the weight to be assigned to one side of the balance.[66]

Subsequent cases have been read to narrow the protection for intimate association afforded by the *Jaycees* decision. In *FW/PBS v. City of Dallas*, for

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[60] *See id.* at 704 (Kennedy, J., concurring).
[61] *Jaycees*, 468 U.S. at 617–18.
[62] *Id.* at 618–19.
[63] *Id.* at 618–20.
[64] *Id.* at 618–19.
[65] *Id.* at 620.
[66] Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624, 627 (1980).

example, the Court held that an ordinance regulating hotels that rent out rooms for less than ten hours did not violate the associational rights of the patrons of those hotels.[67] The Court concluded that the relationships in question were not within the realm of highly personal relationships, rooted in the history and culture of the nation, that intimate association doctrine protects.[68] *FW/PBS*, therefore, limits the *Jaycees* holding to relationships traditionally accorded protection.

In subsequent years, a multifaceted split has emerged in the circuit courts—one unnecessary to articulate in detail for present purposes.[69] Suffice it to say that no cases have held that a room rental qualifies as an intimate association, and that several cases have implied otherwise. For example, the Sixth Circuit declined to extend the protection of intimate association to an exclusive live-in sexual relationship when that relationship was adulterous.[70] Likewise, in *Chi Iota Colony of Alpha Epsilon Pi Fraternity v. City University of New York*, the Second Circuit held that a fraternity that refused membership to women did not meet the criteria for an intimate association.[71] In general, existing cases within this category have more frequently dealt with the situation in which people wish to *form* associations, rather than to exclude others from those associations.[72] This has been particularly true with respect to extending the intimate association doctrine to LGBT relationships.[73]

For present purposes, however, the question is whether the relationship between a small-scale landlord and a person to whom she rents a room should qualify as an "intimate association." No court has held that this is so. The closest any federal appellate court has come to suggesting that the First Amendment protects such an association is the Eleventh Circuit, in *Seniors Civil Liberties Ass'n v. Kemp*, which held that elderly plaintiffs who lived in a senior citizen complex could not restrain children from moving in next door to them given the Fair Housing Act's 1988 Amendments, which prohibited discrimination on the

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[67] FW/PBS, Inc. v. City of Dall., 493 U.S. 215, 237 (1990).

[68] *Id.*

[69] Commentators have examined the circuit split in detail. *See, e.g.*, Nancy Catherine Marcus, *The Freedom of Intimate Association in the Twenty First Century*, 16 GEO. MASON U. C.R.L.J. 269, 287 (2006); Collin O'Connor Udell, *Intimate Association: Resurrecting a Hybrid Right*, 7 TEX. J. WOMEN & L. 231, 239–63 (1998).

[70] *See* Marcum v. McWhorter, 308 F.3d 635, 640 (6th Cir. 2002).

[71] Chi Iota Colony of Alpha Epsilon Pi Fraternity v. City Univ. of N.Y., 502 F.3d 136, 147 (2d Cir. 2007).

[72] *See, e.g.*, Shahar v. Bowers, 114 F.3d 1097, 1115 (11th Cir.) (same-sex marriage), *reh'g denied*, 120 F.3d 211, 214 (11th Cir. 1997), *cert. denied*, 522 U.S. 1049 (1998); Doe v. City of Butler, 892 F.2d 315, 323 (3d Cir. 1989) (transitional shelter); Rigel C. Oliveri, *Single-Family Zoning, Intimate Association, and the Right To Choose Household Companions*, 67 FLA. L. REV. 1401, 1418–25 (2015) (tracing the Supreme Court's associational rights jurisprudence).

[73] *See, e.g.*, Gwynne L. Skinner, *Intimate Association and the First Amendment*, 3 LAW & SEXUALITY 1, 2 (1993).

basis of family status.[74] The Eleventh Circuit noted in dicta that "[i]f the Act were trying to force plaintiffs to take children into their home, this argument might have some merit"—but otherwise stated that "[o]f the five meritless arguments advanced by plaintiffs, their privacy and association argument is the most meritless."[75] In short, there is scant doctrinal support for the claim that the First Amendment entitles small-scale landlords to an exception to Title II and the Fair Housing Act.

B. *First Amendment Values*

First Amendment doctrine, then, does not appear to mandate the small-scale landlord exception to Title II and the Fair Housing Act. While any number of compelling policy justifications warrant the elimination of the exception[76]—treating racial minorities rationally in the marketplace and ensuring that the law embodies norms of racial fairness and equality—I will focus here on the free speech values that, I will argue, militate in favor of eliminating the exception.

As an initial matter, eliminating the small-scale landlord exception would be unlikely, as a practical matter, to force anyone to live with a person of a race (or gender, or religion) that they do not like. Title II and the Fair Housing Act require nondiscrimination on the basis of race and would require this of small-scale landlords as well if the existing exception were closed. Those statutes do not—and could not—require that a prospective landlord refrain from speech on the subject of race. So, for example, an individual who is adamantly opposed to renting a room to a black person might decorate the room with Ku Klux Klan paraphernalia that is clearly visible in the photos posted on Airbnb. Or, in her Airbnb profile, the host might list moderating threads on Stormfront.org as a favorite pastime.[77] The point is simply that someone who does not want a black person living in his house has ample opportunities to communicate that desire. Such efforts would all but guarantee that a black person seeking lodging would look elsewhere as a result. So, a host cannot legally refuse to rent to black people, but nothing prevents the host from making himself so unattractive to black people that no black person would want to rent from him.

With this reality in mind, closing the current small-scale landlord exception is unlikely to lead to the infringement on individual liberty that some critics predict. Moreover, closing the exception has a number of advantages relating to

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[74] Seniors Civil Liberties Ass'n v. Kemp, 965 F.2d 1030, 1036 (1992).

[75] *Id.*

[76] *See* Walsh, *supra* note 47, at 607 (stating that the existence of the exception shows that our nation still tolerates discrimination).

[77] Stormfront.org bears the dubious distinction of being one of the Internet's premier white supremacist websites. *See* Keith Schneider, *Hate Groups Use Tools of the Electronic Trade*, N.Y. TIMES (Mar. 13, 1995), http://www.nytimes.com/1995/03/13/us/hate-groups-use-tools-of-the-electronic-trade.html [https://perma.cc/2VS3-WNTG].

the values that the First Amendment is generally thought to protect. First, small-scale landlords who cannot stomach the idea of renting to particular racial groups would have to communicate that sentiment explicitly in order to deter members of those groups from seeking to rent from them. Such communication would encourage small-scale landlords to examine their views and, overall, would foster a more honest social discourse.

Second, closing the exception would allow markets to operate under conditions of better information. Given the priority assigned to the "marketplace of ideas," surely First Amendment values are also served by encouraging fuller information within the housing sector of the platform economy.[78] Under the current legal regime, small-scale landlords, such as Airbnb hosts offering up a spare bedroom or a mother-in-law cottage, need not declare or discuss their racial preferences. They can simply accept requests from people of all races and then quietly weed out members of racial groups that they dislike. Closing the small-scale landlord exception would require landlords either to rent to everyone on an equal basis or, to avoid renting to disfavored racial groups, to declare their racial biases explicitly.[79] The end result would be a better-functioning shared-housing market—one in which both users who are members of disfavored racial groups and people who do not wish to associate with racists could eschew landlords who discriminate.[80] Individuals could adjust their behavior in the marketplace based on better information.

Third, closing the Mrs. Murphy exception would better protect the free association interests of nonwhite people by providing them with better information about the people with whom *they* interact and form voluntary associations. A black person who wishes to rent a room on Airbnb might change her mind if she knew the host held virulent racist beliefs. Nonwhite renters probably would not waste their time sending requests to landlords who simply

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[78] *See* Citizens United v. FEC, 558 U.S. 310, 354 (2010) (noting the "'open marketplace' of ideas protected by the First Amendment"); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964) (explaining the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open").

[79] I acknowledge the tension between two First Amendment objectives: promoting full information in the marketplace of ideas and avoiding compelled speech and association. For present purposes, the point is simply that there are First Amendment interests on both sides of the equation.

[80] One obvious if less desirable corollary is that people who affirmatively wish to associate with racist landlords could do so more easily. White supremacists, in other words, would have an easier time finding one another, a concern made more salient by the recent violent protests in Charlottesville and Airbnb's decision to remove white supremacists from its platform. Jonah Engel Bromwich, *Airbnb Cancels Accounts Linked to White Nationalist Rally in Charlottesville*, N.Y. TIMES (Aug. 9, 2017), https://www.nytimes.com/2017/08/09/us/airbnb-white-nationalists-supremacists.html?_r=0 [https://perma.cc/P8TY-J7CJ]. While I acknowledge this concern, I think it still is outweighed by the other First Amendment values I describe in this Part as well as the other policy considerations I mentioned briefly at the beginning of this Part. *See supra* note 76 and accompanying text.

prefer not to rent to them—a task that consumes a great deal of time in the market as it currently exists. As one black Airbnb user put it, "I . . . know what it is like to spend too much of the work day trying to get an Airbnb host to accept you."[81] If discriminatory landlords were explicit about their views regarding race, people of color would not need to make such an investment of time and energy, to say nothing of the emotional investment of attempting to rent and being rejected over and over. The process of rejection is not unlike that documented in online dating. Indeed, OK Cupid's finding that black women are rated as 16% less attractive than the mean[82] eerily echoes the recent study authored by professors at the Harvard Business School finding that it is 16% more difficult for black people to find accommodations on Airbnb.[83] Closing the small-landlord exception would minimize this wasted effort, and would instead allow people of color to focus on those with whom they prefer to speak and associate.

Finally, the government's own speech interests deserve consideration. While the First Amendment specifically protects against infringement of rights *by* the government, the courts have made clear that the government also has the right to distance itself from at least some speech with which it disagrees.[84] Moreover, in the broader realm of social policy, much has been written about the expressive function of the law. As James Walsh has said: "The existence of an exemption for owner-occupied dwellings announces that our nation still tolerates discrimination."[85] In a society that values free speech, it is valuable for the government to be able to disavow this view, and statutorily closing the small-scale landlord exception would accomplish just that goal.

V. CONCLUSION

Race discrimination is as much a part of the platform economy as the traditional economy, and the structure of the platform economy renders current laws inadequate to deal with certain categories of discrimination. I have argued that the small-scale landlord exception is particularly problematic in the platform economy and should be eliminated. Such a modification would not, as some have argued, abridge the First Amendment freedom of association, and would, in fact, better promote the robust and honest discourse contemplated by

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[81] Hayat, *supra* note 36.

[82] Christian Rudder, *Race and Attraction, 2009–2014*, OKCUPID (Sept. 9, 2014), https://theblog.okcup*id*.com/race-and-attraction-2009-2014-107dcbb4f060 [https://perma.cc/UZY9-TERJ] (finding that in 2009, Asian men found black women 16% less attractive than the average, Latino men found black women 22% less attractive than the average, and white men found black women 18% less attractive than the average).

[83] Edelman et al., *supra* note 35 (manuscript at 1–2).

[84] *See, e.g.*, Rust v. Sullivan, 500 U.S. 173, 203 (1991) (holding government restrictions on counseling for abortions to be constitutionally permissible).

[85] Walsh, note 47, at 607.

the constitutional provisions that protect our freedoms of speech and association.