

## COMMENT

### **#AIRBNBWHILEBLACK: REPEALING THE FAIR HOUSING ACT'S MRS. MURPHY EXEMPTION TO COMBAT RACISM ON AIRBNB**

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The advent of Airbnb has created a chasm of liability between America's newest lodging category and our nation's fair housing laws. Developed in 2008, Airbnb offers travelers a way to bypass expensive hotels by renting space from home owners and lease holders through advertisements on Airbnb's website. Users book their accommodations directly from hosts, who have virtually complete discretion in deciding who to rent to. Airbnb faces growing criticism, highlighted by the personal stories told using the hashtag *AirbnbWhileBlack* on social media, that it has failed to stop the proliferation of racism on its platform. This Comment analyzes how Airbnb's hybrid category of publicized accommodation facilitated through private, peer-to-peer transactions likely makes both the company and its hosts immune from the Fair Housing Act (FHA) due to an old exemption within the law that protects discrimination by renters in small, owner-occupied buildings. This issue is particularly timely as Airbnb has currently surpassed all worldwide hotel chains in value, making it the world's largest accommodation provider.

This Comment argues the FHA's Mrs. Murphy exemption legalizes unfettered discrimination, that Airbnb creates a commercial relationship more akin to a hotel than a roommate, and that users' civil rights and inadequate legal remedies outweigh any association interests held by hosts. This Comment first examines the Civil Rights Movement's role in shaping the FHA and the lingering racial animus that led to the introduction of the Mrs. Murphy amendment. It then explores the rise of Airbnb and the regulatory gaps in current federal housing regulations and statutes. After arguing recent Supreme Court precedent interpreting the Mrs. Murphy exemption both applies to Airbnb and protects racial discrimination in shared housing, this Comment defends the FHA's robust remedies as a potential means to combat racial discrimination in the growing short-term rental economy. Finally, the Comment calls for the repeal of the Mrs. Murphy exemption in regards to race and advocates for the prohibition of class-action waivers in fair housing litigation. By encompassing FHA liability for companies that facilitate rental transactions, discriminated Airbnb users will gain enhanced legal remedies that will combat the proliferation of racism on America's fastest growing accommodation provider.

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INTRODUCTION

In many ways, Quirtina Crittenden is Airbnb’s ideal consumer. She is a millennial, travels, has a steady income, and embraces the opportunity to skip expensive hotels by renting out cheaper rooms from homeowners on Airbnb’s website.<sup>1</sup> Despite her willingness to take

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1. See Maggie Penman, Shankar Vendatam & Max Nesterak, *#AirbnbWhileBlack: How Hidden Bias Shapes the Sharing Economy*, NPR (Apr. 26, 2016, 12:10 AM), [<https://web.archive.org/web/20180308051232/https://www.npr.org/2016/04/26/475623339/-airbnbwhileblack-how-hidden-bias-shapes-the-sharing-economy>].

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advantage of America's fastest-growing lodging category,<sup>2</sup> she had difficulty booking a place to stay:

The hosts would always come up with excuses like, “oh, someone actually just booked it” or “oh, some of my regulars are coming in town, and they’re going to stay there,” Crittenden said. “But I got suspicious when I would check back like days later and see that those dates were still available.”<sup>3</sup>

Time and time again, Crittenden would send a request to a host for her desired dates, wait, and be steadfastly rejected.<sup>4</sup> Crittenden is African American, and she began to wonder if her bad luck on Airbnb had something to do with her race.<sup>5</sup> She shared her negative Airbnb experience with her Twitter followers using the hashtag AirbnbWhileBlack and began hearing back from many friends who had similar experiences.<sup>6</sup> “The most common response I got was, “oh yeah, that’s why I don’t use my photo.” Like duh. Like I was the late one,” Crittenden said.”<sup>7</sup> Airbnb currently requires hosts and guests to display their name and photos prominently on their profiles.<sup>8</sup> So Crittenden ran an experiment by shortening her name to only “Tina” and changing her photo to a landscape picture.<sup>9</sup> Crittenden reported that ever since she changed her name and photo on Airbnb, she has never had any problems booking a listing.<sup>10</sup>

Rohan Gilkes, an African American tech entrepreneur from Washington, D.C., had a similar experience when he tried to book a house on Airbnb for an Idaho vacation.<sup>11</sup> While the listing said his desired dates were available, they became suddenly unavailable after he

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2. See Matthew Morrow, *How Airbnb Became More Valuable than Marriott & Hilton*, FOX BUS. (Jan. 10, 2016), [https://perma.cc/PZZ7-R45B].

3. Penman et al., *supra* note 1.

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*; see also AIRBNB, *Why do I Need to Have an Airbnb Profile or Profile Photo?*, [https://perma.cc/3VTX-DJ5V].

9. Penman et al., *supra* note 1.

10. *Id.*

11. Elizabeth Weise, *Airbnb Bans N. Carolina Host as Accounts of Racism Rise*, USA TODAY (June 2, 2016, 9:31 AM), [https://perma.cc/39LB-ET5L].

sent the host his booking request.<sup>12</sup> When Gilkes responded that his dates were flexible, his message went ignored and he never heard from the host again.<sup>13</sup> However, rather than change his profile photo, Gilkes tried a different tactic. “So I had a white friend book for my same dates and all of a sudden [the host’s] plans changed back . . . [a]pproved immediately!”<sup>14</sup> Frustrated by his experience and the many others shared by the hashtag AirbnbWhileBlack, Gilkes founded an inclusive alternative called Noirebnb geared towards providing accommodation for persons of all colors and gender identities.<sup>15</sup> “When I started getting all these emails from people — black people, trans people, gay people — who were all going through the same thing, I felt like I had an obligation to do something.”<sup>16</sup>

Both Crittenden and Gilkes articulate a growing problem of systemic racism in America’s newest lodging category. Founded in 2008,<sup>17</sup> Airbnb is one of the world’s largest sharing economy companies<sup>18</sup> that seeks to solve the frustration of expensive hotels by replacing them with a cheaper, more personal alternative.<sup>19</sup> Travelers can go to Airbnb’s website and browse for anything from an entire house to a room in an apartment for rent in their desired city.<sup>20</sup> Lodgings are posted directly by home owners or lease holders (called “hosts”) looking to capitalize off extra space and the host has virtually complete discretion over who and when to rent to.<sup>21</sup> While it has

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12. *Id.*; see also Rohan Gilkes, *I’m a Black Man. Here’s What Happened When I Booked an Airbnb*, MEDIUM: STAY WOKE (May 25, 2016), [https://perma.cc/S3ZQ-HZCQ].

13. Weise, *supra* note 11.

14. Gilkes, *supra* note 12.

15. Madison Malone Kircher, *Competing Start-ups with the Same Name Want to Fix Airbnb’s Race Problem*, NY MAG: SELECT ALL (June 7, 2016, 9:41 AM), [https://perma.cc/925H-FXMN].

16. *Id.*

17. *About Us*, AIRBNB, [https://perma.cc/5SDA-LVF2].

18. Jasmine Enberg, *Uber, Airbnb Lead the Way as Sharing Economy Expands*, EMARKETER (June 30, 2017), [https://perma.cc/DM3P-TPSG].

19. See Brittany McNamara, Note, *Airbnb: A Not-So-Safe Resting Place*, 13 COLO. TECH. L.J. 149, 151–52 (2015).

20. *Id.* at 151.

21. *Id.* Although Airbnb has adopted an anti-discrimination policy that limits hosts’ ability to decline a guest based on race, hosts may nevertheless decline a guest for any allegedly “non-discriminatory” reason to avoid renting to guests of a certain race. “Although [Airbnb] has a policy against discrimination and has adopted rules aimed at curbing the problem, Airbnb has continued to argue that it is not legally liable when hosts on its platform discriminate against guests.” Sam Levin, *Airbnb Gives in to Regulators’ Demand to Test for Racial Discrimination by Hosts*, GUARDIAN (Apr. 27, 2017, 8:02 PM), [https://perma.cc/UZD8-GRP3]. See also *infra* Part II.B.1.

become a quick success, Airbnb faces harsh criticism that many white hosts refuse to rent to users of color and that the company has failed to stop the proliferation of racism on its platform.<sup>22</sup> A January 2016 study by the Harvard Business School found that Airbnb users with “distinctly African-American names were roughly [sixteen] percent less likely to be accepted as guests than those with distinctly white names.”<sup>23</sup> This difference persisted no matter the host’s race or gender, or whether the accommodation was shared with the host or not.<sup>24</sup>

Racial discrimination on Airbnb is exacerbated by the fact that Airbnb is now America’s largest hotel. Airbnb recently surpassed all worldwide hotel chains in value, making it the largest housing accommodation service in the world.<sup>25</sup> Like many sharing economy<sup>26</sup> scholars, fair housing advocates worry that our nation’s housing laws are not keeping up with the explosion of peer-to-peer based transactions.<sup>27</sup> While the 1968 Fair Housing Act (“FHA”)<sup>28</sup> brought new remedies for twentieth-century housing applicants facing racial

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22. Elaine Glusac, *As Airbnb Grows, So Do Claims of Discrimination*, N.Y. TIMES (June 21, 2016), [[https://web.archive.org/web/20180226160436/https://www.nytimes.com/2016/06/26/travel/airbnb-discrimination-lawsuit.html?\\_r=0&mtrref=undefined&mtrref=web.archive.org&mtrref=web.archive.org&mtrref=web.archive.org](https://web.archive.org/web/20180226160436/https://www.nytimes.com/2016/06/26/travel/airbnb-discrimination-lawsuit.html?_r=0&mtrref=undefined&mtrref=web.archive.org&mtrref=web.archive.org&mtrref=web.archive.org)].

23. *Id.*

24. *Id.*

25. Christopher Versace, *Airbnb – Not Quite the Simple Sharing Economy Company*, FORBES (Oct. 24, 2016, 5:38 PM), [<https://perma.cc/DHF7-3NK8>]. Airbnb is now larger than both Hilton and Marriot hotel chains and currently boasts a valuation of over \$31 billion. Avery Hartmans, *The Fabulous Life of Airbnb’s Brian Chesky, One of the Youngest and Richest Tech Founders in America*, BUS. INSIDER (July 22, 2017, 9:00 AM), [<https://web.archive.org/web/20180226000549/http://www.businessinsider.com/brian-chesky-airbnb-ceo-life-story-photos-2017-7/>].

26. The term “sharing economy” generally encompasses the idea that the twenty-first century economy is a “socio-economic ecosystem” built around private, peer-to-peer transactions that share creation, distribution, and consumption of goods and services. See Nancy Leong, *New Economy, Old Biases*, 100 MINN. L. REV. 2153, 2160 (2016).

27. Norrinda Brown Hayat, *Accommodating Bias in the Shared Economy*, 83 BROOK. L. REV. (forthcoming 2018); Johanna Interian, Note, *Up in the Air: Harmonizing the Sharing Economy Through Airbnb Regulations*, 39 B.C. INT’L & COMP. L. REV. 129, 134–35 (2016).

28. The FHA was first passed as part of the larger Civil Rights Act of 1968 and was codified under Title VIII of the Act. 42 U.S.C. §§ 3601–3619 (1969). Civil Rights Act of 1968, Pub. L. No. 90-284 §§ 801–19, 82 Stat. 73, 81–89 (1968) (codified as amended at 42 U.S.C. §§ 3601–3619 (2012)). This Comment will refer to Congress’s 1968 fair housing legislation and subsequent fair housing laws as the “Fair Housing Act” (FHA).

discrimination, hidden within the FHA is the so-called “Mrs. Murphy exemption,” which shields small owner-occupied apartments and homes from liability under the FHA.<sup>29</sup> So long as a homeowner lives in the home or apartment unit she rents out and the building contains four or fewer rental units, she is free to racially discriminate against potential renters.<sup>30</sup> Courts have held the Mrs. Murphy exemption also applies to shared-living situations where apartment lease holders rent out spare bedrooms within their units.<sup>31</sup> As claims of racial discrimination on Airbnb grow, so do fears the Mrs. Murphy exemption shields both Airbnb and its hosts from liability under the FHA and allows hosts to legally discriminate against potential guests on the basis of race.

Airbnb currently finds itself in a regulatory gap and a legal remedy must be crafted to combat racism in the growing short-term rental market. While many sharing economy articles focus on fashioning new regulatory solutions,<sup>32</sup> this Comment argues the FHA should be amended to adapt to the twenty-first century short-term rental economy. Amending the FHA to eliminate the infamous Mrs. Murphy exemption as applied to race<sup>33</sup> and providing new collective causes of actions for litigants under the law will make the FHA an effective tool to combat racial discrimination by America’s fastest-growing hotel.<sup>34</sup> The FHA, developed before the boom of short-term, peer-to-peer housing rentals, does not currently protect Airbnb users from racial discrimination by hosts due to the Mrs. Murphy exemption. Although amendments are needed to effectively address the problems created by Airbnb’s new

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29. 42 U.S.C. § 3603(b)(2); 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, 330 (2012).

30. Shelly Kreiczer-Levy, *Consumption Property in the Sharing Economy*, 43 PEPP. L. REV. 61, 113–14 (2015).

31. *See id.* at 114.

32. *Id.* at 65–66.

33. This Comment’s discussion is limited to racial discrimination and will not address the Mrs. Murphy exemption’s intersection with other protected classes, such as sex, sexual orientation, and gender identity. Other authors have voiced concerns, however, that the Mrs. Murphy exemption permits discrimination against these groups as well. *See Kreiczer-Levy, supra* note 30, at 113–14, 116–17.

34. This Comment’s argument is limited to repealing the Mrs. Murphy exemption for short-term rentals facilitated by Airbnb. Users typically lease short-term stays from home owners or lease holders similar to that of a hotel. This Comment does not address the Mrs. Murphy exemption in relationship to traditional long-term, shared living scenarios like roommates. Despite the difference between short-term Airbnb users and long-term roommates, this Comment argues that current appellate court precedent examining racial discrimination in the roommate context likely applies to Airbnb and thus currently shields the company from FHA liability. *See infra* Part II.A.

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housing category, the FHA nevertheless has potential to offer robust and consistent federal remedies to combat racial discrimination.

Part I of this Comment provides background on the FHA and the Mrs. Murphy exemption, and explains the Civil Rights Movement's role in shaping these regulations and their relationship to Airbnb. Part II argues the Mrs. Murphy exemption shields Airbnb and its hosts from FHA liability and protects racial discrimination on its platform due to Supreme Court precedent on discrimination in shared housing and the Court's willingness to apply freedom of association interests to shared living scenarios. The Comment then discusses alternative Airbnb regulatory proposals and defends the FHA's ability to best police discrimination in the rapidly evolving short-term rental economy. Finally, Part III of this Comment contends that Airbnb creates a commercial relationship more akin to a hotel than a roommate, and that Airbnb's short-term nature (where hosts may or may not share space with their guests) diminishes hosts' association interests; advocates for the repeal of the Mrs. Murphy exemption regarding race; and finally calls for the FHA to include liability for companies that facilitate rental transactions and eliminate the use of class-action waivers and arbitration clauses in fair housing litigation.

#### I. A BRIEF HISTORY OF THE FHA AND THE RACIAL DISCRIMINATION THAT SHAPED IT

The foundation of America's fair housing law is preeminently tied to our nation's enduring history of racial segregation. "[J]ust as the assassination of President John F. Kennedy gave impetus to the passage of the Civil Rights Act of 1964 and the violence at Selma gave impetus to the Voting Rights Act of 1966," the story of America's 1968 Fair Housing Act is shaped by the violence of the Civil Rights era and the continuing legacy of racism.<sup>35</sup> Any policy discussion regarding America's twenty-first century housing law is incomplete without a contextual understanding of the twentieth-century Civil Rights Movement that shaped it and the racial biases that make housing discrimination prevalent today. This part examines the legislative history of the FHA and its subsequent amendments that continue to make it the most robust federal deterrent against housing discrimination. This part also analyzes the racial biases that led to the introduction of the FHA's infamous Mrs. Murphy exemption and its

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35. Michael P. Seng & F. Willis Caruso, *Forty Years of Fair Housing: Where Do We Go From Here?*, 18 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 235, 235 (2009).

continuing role in modern segregation. Finally, the ascent of America's newest housing category, Airbnb, raises concerns that the Mrs. Murphy exemption, as currently written, may proliferate racial discrimination in the short-term rental economy due to the FHA's dubious ability to regulate private, peer-to-peer transactions in the twenty-first century.

*A. Two Societies, Separate and Unequal: A Regulatory Response*

The FHA boldly declares that “[i]t is the policy of the United States to provide . . . fair housing throughout the United States.”<sup>36</sup> To achieve this goal, section 3604 of the FHA prohibits discrimination based on race in the advertisement, sale, rental, or negotiation of housing.<sup>37</sup> In 1968, Congress passed the FHA “against a background of systematic and widespread racial discrimination in both the sale and rental of housing.”<sup>38</sup> While the Supreme Court declared state enforcement of racially restrictive covenants a violation of the Equal Protection Clause in the landmark case *Shelley v. Kraemer*<sup>39</sup> in 1948, residential racial segregation and systematic discriminatory lending practices against home seekers of color remained prevalent (and still do).<sup>40</sup> The practice of “redlining”—where mortgage lenders refused to offer loans in communities of color—proliferated, as did loan application procedures and marketing policies that discouraged minority applicants.<sup>41</sup> Pressure from political leaders in the flourishing Civil Rights Movement ultimately led to a congressional investigation into America's housing disparities. “From the early 1960s, organizations such as the National Association for the Advancement of Colored People (“NAACP”) and the National Committee Against

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36. 42 U.S.C. § 3601 (2012).

37. 42 U.S.C. §§ 3604(a)–(c); James D. Walsh, *Reaching Mrs. Murphy: A Call for Repeal of the Mrs. Murphy Exemption to the Fair Housing Act*, 34 HARV. C.R.-C.L. L. REV. 605, 605 (1999). Section 3604 specifically makes it unlawful to “refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.” 42 U.S.C. § 3604(a).

38. Diane J. Klein & Charles Duskow, *Housingdiscrimination.com?: The Ninth Circuit (Mostly) Puts Out the Welcome Mat for Fair Housing Act Suits Against Roommate-Matching Websites*, 38 GOLDEN GATE U. L. REV. 329, 339 (2008).

39. 334 U.S. 1, 20 (1948).

40. Robert G. Schwemm, *Why Do Landlords Still Discriminate (and What Can Be Done About It)?*, 40 J. MARSHALL L. REV. 455, 456–60 (2007); Equal Justice Soc’y & Wilson Sonsini Goodrich & Rosati, *Lessons From Mt. Holly: Leading Scholars Demonstrate Need for Disparate Impact Standard to Combat Implicit Bias*, 11 HASTINGS RACE & POVERTY L.J. 241 (2014).

41. Klein & Duskow, *supra* note 38, at 339–40.



Discrimination initiated efforts to push a housing-related civil rights bill through Congress with no success.”<sup>42</sup> When African American soldiers returned home from the Vietnam War, they “were forced into segregated veterans’ homes or were unable to find housing due to discrimination.”<sup>43</sup> The “combination of economic deprivation, social isolation, and psychological alienation fueled by the discriminatory conditions sparked riots in urban areas throughout the 1960s.”<sup>44</sup>

In an attempt to understand this phenomenon, President Johnson commissioned the National Advisory Commission on Civil Disorders<sup>45</sup> (known as the “Kerner Commission” after its chair, Governor Otto Kerner).<sup>46</sup> The Kerner Commission ultimately concluded segregation and discrimination in housing contributed to “frustrations of powerlessness” and advised Congress to take action to promote anti-discrimination and racial integration in national housing laws.<sup>47</sup> Relying on the Kerner Commission’s findings, the Senate passed the FHA on March 11, 1968.<sup>48</sup> While the FHA made its way through the House of Representatives, the assassination of Dr. Martin Luther King Jr. rocked the country on April 4, 1968, spurring further protests nationwide and adding new urgency to the Commission’s recommendations.<sup>49</sup> Racial tensions had reached a boiling point and the House responded by

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42. Valerie Schneider, *In Defense of Disparate Impact: Urban Redevelopment and the Supreme Court’s Recent Interest in the Fair Housing Act*, 79 MO. L. REV. 539, 552 (2014).

43. *Id.* at 552.

44. Brian Patrick Larkin, *The Forty-Year “First Step”: The Fair Housing Act as an Incomplete Tool for Suburban Integration*, 107 COLUM. L. REV. 1617, 1622 (2007) (quoting Douglas S. Massey & Nancy A. Denton, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* 58 (1993)) (internal quotation marks omitted).

45. *Id.*

46. *Id.* See also John Charles Boger, *Race and the American City: The Kerner Commission in Retrospect—An Introduction*, 71 N.C. L. REV. 1289, 1295 (1993). President Johnson charged the Kerner Commission with investigating the basic causes and factors leading to the public disorders witnessed at home during the Civil Rights era and the appropriate role of the federal government in controlling such disorders. *Id.* In March of 1968, the Kerner Commission opened its report with the “memorable warning: This is our basic conclusion: Our nation is moving toward two societies, one black, one white—separate and unequal.” *Id.*

47. Brooke Wright, *Fair Housing and Roommates: Contesting a Presumption of Constitutionality*, 2009 BYU L. REV. 1341, 1343–44.

48. Larkin, *supra* note 44, at 1623–24.

49. *Id.* at 1624.

passing the FHA on April 10, 1968.<sup>50</sup> “President Johnson signed the FHA into law the [very] next day.”<sup>51</sup>

While merited criticisms of the FHA claim it provides inadequate enforcement mechanisms,<sup>52</sup> it is the strongest federal deterrent currently available to combat discriminatory housing practices.<sup>53</sup> While the original 1968 Act provided limited relief for plaintiffs, the 1988 Fair Housing Act Amendment (FHAA) strengthened the FHA’s remedies to better reflect the coercive spirit of the law.<sup>54</sup> Aggrieved home seekers who bring individual causes of action are now armed with remedies including actual damages, uncapped punitive damages, attorney’s fees, injunctive relief, and civil penalties ranging from \$10,000 to \$50,000 in cases enforced by the Secretary of Housing or Attorney General.<sup>55</sup> To prevail on a claim under the FHA, a plaintiff must show that (1) she is a member of a protected class under the FHA; (2) that she applied for and was qualified to rent housing; (3) that she was rejected; and (4) that the housing remained available thereafter.<sup>56</sup>

### *B. Mrs. Murphy’s Freedom of Disassociation*

While the passage of the 1968 FHA and 1988 FHAA brought overdue remedies for African American home seekers, the law did not come without compromise. In order to pass the FHA, proponents conceded to the so-called “Mrs. Murphy” exemption within the law, which allows building owners who own dwellings intended for occupation by four or fewer families to discriminate against prospective tenants so long as the owner occupies one of the units.<sup>57</sup> In other words, so long as Mrs. Murphy owns her home, lives in it, and her house contains four units or fewer (i.e., a single family home or a house containing four or less rental units), she may freely discriminate against whomever she pleases without being exposed to liability under the FHA. The Supreme Court has consistently held that “[this] exemption

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50. Wright, *supra* note 47, at 1344.

51. *Id.*

52. Margalynne Armstrong, *Desegregation Through Private Litigation: Using Equitable Remedies to Achieve the Purposes of the Fair Housing Act*, 64 TEMP. L. REV. 909, 913 (1991).

53. Jonathan Zasloff, *The Secret History of the Fair Housing Act*, 53 HARV. J. LEGIS. 247, 249 (2016). *See also infra* Part II.B.2.

54. Armstrong, *supra* note 52, at 924–25.

55. 42 U.S.C. § 3613(c)–(d) (2012).

56. Brian S. Prestes, *Application of the Equal Credit Opportunity Act to Housing Leases*, 67 U. CHI. L. REV. 865, 870 (2000).

57. 42 U.S.C. § 3603(b)(2); Forman, *supra* note 29, at 330.

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applies to most shared living arrangements and allows [home] owners [and lease holders] to discriminate between potential roommates.”<sup>58</sup> Therefore, Mrs. Murphy is also free to reject potential roommates for her apartment solely on the basis of race under the FHA.

The original purpose of the Mrs. Murphy exemption was implicitly aimed at the idea that it was “Mrs. Murphy’s right not to associate with African Americans.”<sup>59</sup> Senator Mondale, a co-sponsor of the 1968 FHA, stated that “[t]he sole intent of [the Mrs. Murphy exemption] is to exempt those who, by the direct personal nature of their activities, have a close personal relationship with their tenants.”<sup>60</sup> Proponents, thus, framed the exemption as protecting freedom of association, with Senator Hubert Humphrey arguing that the Mrs. Murphy provision:

[R]esults 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.<sup>61</sup>

However, the historical backdrop of the exemption points to racial animus as the true reasons behind its inception. The exemption itself was modeled after a boardinghouse exclusion to Title II of the Civil Rights Act of 1964, during which “Mrs. Murphy” became a symbol by which opponents of Title II appealed to the public.<sup>62</sup> The sympathetic image of the fictitious elderly widow Mrs. Murphy being forced to rent rooms in her small boardinghouse without regard to race gained enough sympathy by whites to force Title II proponents to support the exemption.<sup>63</sup> Thus, the modern Mrs. Murphy exception, while commonly analyzed under a freedom of association analysis, has roots in the very discrimination that the FHA was created to combat.

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58. Kreiczer-Levy, *supra* note 30, at 114. See generally John T. Messerly, *Roommate Wanted: The Right to Choice in Shared Living*, 93 IOWA L. REV. 1949 (2008); see also *infra* Part II.A.

59. Walsh, *supra* note 37, at 607.

60. *Id.*

61. STATUTORY HISTORY OF THE UNITED STATES: CIVIL RIGHTS PART II 1194 (Bernard Schwartz ed., 1970).

62. Harry T. Quick, *Public Accommodations: A Justification of Title II of the Civil Rights Act of 1964*, 16 W. RES. L. REV. 660, 672 (1965).

63. *Id.*

*C. #AirbnbWhileBlack: Old Biases in the New Sharing Economy*

How the Mrs. Murphy exemption will interact with the modern sharing economy will have an important impact on the endurance of the FHA's civil rights protections. In addition to freedom of association claims, Mrs. Murphy proponents argued in 1968 that the exemption would have little practical significance as it would only affect three percent of America's housing supply.<sup>64</sup> However, Mrs. Murphy's proponents likely never envisioned the rise of a new housing category in the twenty-first century sharing economy: Airbnb. This past decade saw a reinvention of the global economy through internet-based companies that facilitate peer-to-peer transactions.<sup>65</sup> Shared housing has transformed the way Americans find short-term rentals by creating a "number of online platforms designed to link property owners with potential short-term lessees . . . ."<sup>66</sup>

Airbnb has quickly become the global leader in the shared housing economy since its birth in 2008.<sup>67</sup> Airbnb's founders, Brian Chesky and Joe Gebbia, were two unemployed friends living in San Francisco and in desperate need of extra income to help pay their rent.<sup>68</sup> When a popular design conference came to town and all the area hotels quickly sold out, Chesky and Gebbia decided to rent out air mattresses in their apartment for eighty dollars a night for conference goers who needed a place to stay.<sup>69</sup> From there, the idea for an inexpensive hotel alternative was born and the duo's idea quickly took hold.<sup>70</sup> As of July 2017, the company is worth \$31 billion.<sup>71</sup> For users, Airbnb allows travelers to

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64. Walsh, *supra* note 37, at 606 n.6.

65. Jamila Jefferson-Jones, *Airbnb and the Housing Segment of the Modern "Sharing Economy": Are Short-Term Rental Restrictions an Unconstitutional Taking?*, 42 HASTINGS CONST. L.Q. 557, 557–58 (2015).

66. *Id.* at 558.

67. Airbnb currently contains rentals in more than 65,000 cities, covers over 191 countries, boasts over 200,000,000 users, and has 4,000,000 listings worldwide. *About Us*, AIRBNB, *supra* note 17; *Airbnb Fast Facts*, AIRBNB, [https://perma.cc/2LBY-2M69]. Airbnb has disrupted the hotel industry by quickly becoming the most valuable short-term rental company in the world, surpassing all worldwide hotel chains in profit. Versace, *supra* note 25. As of July 2017, the company is worth more than \$31 billion. Hartmans, *supra* note 25.

68. 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://web.archive.org/web/20180226000757/http://www.businessinsider.com/how-airbnb-was-founded-a-visual-history-2016-2] (as of 2017, Airbnb's value is now estimated to be \$31 billion); Hartmans, *supra* note 25.

69. Carson, *supra* note 68; see also Hartmans, *supra* note 25.

70. Hartmans, *supra* note 25.

71. *Id.*

“bypass expensive hotels” by using Airbnb’s website or mobile application to browse for private apartments or rooms to book in their desired city.<sup>72</sup> All accommodations are placed on Airbnb by local “hosts,” who are either home owners or lease-holders who desire to “rent out anything from a spare living room couch to entire apartment units”<sup>73</sup> to supplement their income. Airbnb then collects a service fee from each transaction.<sup>74</sup>

While Airbnb has grown dramatically since inception, so have claims of racial discrimination and concerns that the Mrs. Murphy exemption shields both Airbnb and its hosts from liability under the FHA.<sup>75</sup> Before hosts accept or deny a user’s booking request for their listing, they are furnished with the user’s name, picture, and personal information.<sup>76</sup> Airbnb facilitates the publication of such information because it “is a great way for others to learn more about you before they book your space or host you. When your profile is robust, it helps others feel that you’re reliable, authentic, and committed to the spirit of Airbnb.”<sup>77</sup> According to a study by the Harvard Business School, it is also a way for users to discriminate against black hosts.<sup>78</sup> The same researchers later conducted an extensive and highly publicized study of 6,400 different listings in five cities around the United States that found users with “distinctively African-American names are roughly 16% less likely to be accepted than identical guests with distinctively White names.”<sup>79</sup> The study noted that this difference is particularly noteworthy when compared to the discrimination-free setting of competing short-term accommodation websites like Expedia who use traditional hotels.<sup>80</sup> The study noted that hosts paid an economic price

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72. Dayne Lee, Note, *How Airbnb Short-Term Rentals Exacerbate Los Angeles’s Affordable Housing Crisis: Analysis and Policy Recommendations*, 10 HARV. L. & POL’Y REV. 229, 232 (2016).

73. *Id.*

74. *Id.* at n.19 (citing *What are Host Service Fees?*, AIRBNB, [https://perma.cc/89GK-FJ82]).

75. See Michael Todisco, Essay, *Share and Share Alike? Considering Racial Discrimination in the Nascent Room-Sharing Economy*, 67 STAN. L. REV. ONLINE 121, 125 (2015), [https://perma.cc/WY2J-Y7GE].

76. See AIRBNB, *supra* note 8.

77. *Id.*

78. Benjamin Edelman & Michael Luca, *Digital Discrimination: The Case of Airbnb.com* 3 (Harvard Bus. Sch., Working Paper No. 14-054, 2014), [https://perma.cc/98CA-J7VT] (finding black hosts were paid twelve percent less than non-black hosts for equivalent rentals).

79. Benjamin Edelman, Michael Luca & Dan Svirsky, *Racial Discrimination in the Sharing Economy: Evidence from a Field Experiment* 1-2 (Harvard Bus. Sch. Working Paper 16-069), [https://perma.cc/4SE7-RCDC].

80. *Id.* at 3.

for such discrimination. Although hosts typically use Airbnb to monetize off extra space, the study found that only thirty-five percent of hosts who rejected African Americans' requests subsequently filled their listing with another guest.<sup>81</sup> The study calculated hosts lost an average of \$65 to \$100 each time they rejected black guests.<sup>82</sup>

Criticisms of Airbnb continued to snowball in 2016 when African American users began to share personal experiences of discrimination on Airbnb by using the hashtag *AirbnbWhileBlack* on social media.<sup>83</sup> The controversy largely erupted in May 2016, when Gregory Selden filed a lawsuit<sup>84</sup> against Airbnb saying he was discriminated against because he was black.<sup>85</sup> Selden tried to book an Airbnb listing for a vacation and his profile included his name and picture.<sup>86</sup> After the listing he wanted was rejected twice by the host, Selden saw the host had re-listed the space as available for the same dates he requested.<sup>87</sup> Selden then created two fake Airbnb accounts with nearly identical information to his own, but with profile pictures of white individuals.<sup>88</sup> When the host accepted requests from both fake accounts, Selden contacted Airbnb but received no assistance from the company.<sup>89</sup> The hashtag quickly went viral,<sup>90</sup> and the ensuing controversy was loud

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81. *Id.* at 1, 17–18.

82. *Id.* at 4, 20.

83. Kristen Clarke, *Does Airbnb Enable Racism?*, N.Y. TIMES (Aug. 23, 2016), [<https://web.archive.org/web/20160828033345/http://www.nytimes.com/2016/08/23/opinion/how-airbnb-can-fight-racial-discrimination.html>].

84. Selden sought to make his case a class-action against Airbnb in the U.S. District Court for the District of Columbia, but was barred from doing so due to an arbitration clause and class-action waiver in Airbnb's terms of service. Vauhini Vara, *How Airbnb Makes It Hard to Sue for Discrimination*, NEW YORKER (Nov. 3, 2016), [<https://web.archive.org/web/20180226152052/https://www.newyorker.com/business/currency/how-airbnb-makes-it-hard-to-sue-for-discrimination>]. Ultimately, the court agreed Selden was compelled to privately arbitrate his dispute with Airbnb and barred Selden's civil suit. *Id.* Arbitration clauses typically force individuals to relinquish their rights to a jury trial or class-action and they instead must go through a private arbitration process outside of the legal system, which is overseen by a paid arbitrator instead of a judge. *Id.* Due to the private nature of arbitration, the outcome of Selden's individual legal claim is unknown. *See id.*

85. Brian Solomon & Shelby Carpenter, *Airbnb Plans to Fight Racism with Diversity. But Will It Be Enough?*, FORBES (Sept. 8, 2016, 10:00 AM), [<https://perma.cc/P3ZB-4QCX>].

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. Brentin Mock, *#AirbnbWhileBlack and the Legacy of Brown vs. Board*, CITYLAB (May 20, 2016), [<https://perma.cc/A3TH-SULL>].

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enough to catch the attention of Eric Holder. “I wasn’t necessarily surprised [about claims of racism on Airbnb] because implicit bias is something that this country has been grappling with for hundreds of years,” Holder told Forbes in an interview.<sup>91</sup> “It will take an entity or individual to come up with something that is paradigm challenging and gutsy to help solve it.”<sup>92</sup>

The advent of Airbnb creates both a new housing category and a growing liability gap for short-term housing seekers under the FHA. Currently, it is unclear how the mixed personal and commercial nature of Airbnb’s rental units apply to America’s current federal housing laws or if Airbnb’s hybrid category of publicized accommodation through private transactions make the company and its hosts immune from regulation. However, the rapid evolution of the sharing economy and Airbnb’s swift ascension as the world’s leading short-term rental company raise concerns regarding users’ legal remedies to combat the growing problem of racial discrimination in short-term rentals. Public accommodations like hotels are quickly being replaced by private peer-to-peer transactions within individual homes. Airbnb and its hosts currently stand on tenuous legal ground against a growing chorus for reform in our nation’s fair housing laws. It begs the question: is it time to regulate Mrs. Murphy’s (air)bnb?

## II. TEACHING AN OLD DOG NEW TRICKS: THE FHA’S CONTINUED RELEVANCY

The Mrs. Murphy exemption creates a chasm of liability between modern rental seekers and America’s largest accommodation provider.<sup>93</sup> While Airbnb has created a valuable service for individuals looking to avoid costly hotels, the discrimination faced by many users

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91. Solomon & Carpenter, *supra* note 85.

92. *Id.*

93. Here, “accommodation providers” is defined in relationship to the FHA and federal fair housing law in the sale and rental of housing. There is a separate doctrine, public accommodation law, that “generally prohibits discrimination against protected classes in places that are open to the public and accept or solicit the patronage of the general public” (such as traditional hotels). Kreitzer-Levy, *supra* note 30, at 118. Although public accommodation laws may complement federal fair housing law and some public accommodation provisions affect housing, it does not regulate private places such as homes. *Id.* Because Airbnb transactions are facilitated through private, peer-to-peer agreements unlike traditional public hotels, Airbnb likely does not fit the definition of a public accommodation under federal public accommodation law. Several state laws include rental markets within the definition of public accommodations, but it remains ambiguous if Airbnb constitutes a rental establishment under various state laws. *Id.* at 118–19.

of color on its platform necessitates an improved legal scheme in federal fair housing laws. Since the rise of the sharing economy, courts across the country have been tasked with finding a regulatory home for companies like Airbnb. “Because transactions in the sharing economy do not fit squarely into the realm of public regulation, many sharing-economy activities continue unregulated or are self-regulated by the very companies participating in the activity.”<sup>94</sup> Critics have scorned the FHA as “the poor stepchild of federal civil rights legislation” and labeled it a “failure” due to its inability to meet high expectations in dismantling America’s racial segregation.<sup>95</sup> Rather than cast aside the FHA, this Comment explores its potential to serve as a robust federal deterrent to racial discrimination in the twenty-first century short-term rental economy.

This part argues that recent case law applying the Mrs. Murphy exemption to shared-living scenarios likely makes both Airbnb and its hosts immune from FHA liability. Although this Comment ultimately argues the Airbnb relationship is more akin to a hotel than a roommate,<sup>96</sup> freedom of association Supreme Court precedent casts doubt over the FHA’s current ability to regulate racism on platforms like Airbnb or its hosts. However, if amended to include companies like Airbnb, the FHA has the best potential to combat racial discrimination on such nationwide platforms due to its robust remedies and the Supreme Court’s recent willingness to use the FHA to combat implicit bias in housing through disparate impact theories of liability. Common non-FHA attempts to regulate racism on Airbnb (market-based approaches, the Federal Communications and Decency Act, and state and local regulations) fail to directly address the issue of racism that the FHA was created to combat and provide inadequate remedies to users.

*A. The Mrs. Murphy Exemption Likely Shields Airbnb and its Hosts from FHA Racial Discrimination Claims*

Under the current version of the FHA, Airbnb the company and its individual hosts are likely not liable for racial discrimination. While the FHA prohibits discrimination in the sale or rental of housing on the basis of race, the Mrs. Murphy exemption buffers internet-based shared

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94. Interian, *supra* note 27, at 131.

95. Zasloff, *supra* note 53, at 247–48.

96. *See infra* Part III.B.



housing companies and hosts from liability.<sup>97</sup> The exemption stipulates that dwellings intended for occupation by four or fewer rental units are protected from FHA liability so long as the owner occupies one of the units.<sup>98</sup> Airbnb hosts with large-scale living arrangements involving more than four unrelated housemates could, therefore, find themselves liable for racial discrimination under the current FHA.<sup>99</sup> However, any Airbnb listing renting out a single-family home, a house with four or fewer rental units, or an apartment unit with four or fewer unrelated roommates would fit within the statutory language of the Mrs. Murphy exemption.<sup>100</sup> In New York City alone, there are over 40,000 current Airbnb listings.<sup>101</sup> Of those, forty-nine percent of listings are for entire houses/apartment units—suggesting the home likely contains less than four rental units.<sup>102</sup> Forty-eight percent of the remaining lists are for private rooms within homes.<sup>103</sup> While it is unclear how many of those listing contain four or fewer roommates, it appears the Mrs. Murphy exemption likely shields a significant percentage of hosts on Airbnb from legal liability for racially discriminating against potential renters.

The case law unfolding in shared housing discrimination further indicates that Airbnb and its hosts are not liable under the current FHA. While it remains uncertain how courts and regulators will respond to the new housing category created by Airbnb, the Mrs. Murphy exemption has consistently been upheld in a variety of shared-living arrangements. In *Fair Housing Council v. Roommate.com*,<sup>104</sup> the Ninth Circuit clarified that while the FHA prohibits discriminatory advertising, the Mrs. Murphy exemption allows persons renting out a bedroom or space in an apartment unit to discriminate against potential roommates.<sup>105</sup> The Second Circuit affirmed that the Mrs. Murphy exemption operates as an affirmative defense to a FHA violation lawsuit in the shared housing context.<sup>106</sup> While the FHA bans

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97. See Kreiczer-Levy, *supra* note 30, at 113–14; see also Todisco, *supra* note 75.

98. 42 U.S.C. § 3603(b)(2) (2012).

99. See Messerly, *supra* note 58, at 1959.

100. See Kreiczer-Levy, *supra* note 30, at 113–14.

101. *New York City*, INSIDE AIRBNB, [https://web.archive.org/web/20180226001241/http://insideairbnb.com/new-york-city/] (providing statistics on current Airbnb listings in cities worldwide).

102. *Id.*

103. *Id.*

104. 521 F.3d 1157 (9th Cir. 2008).

105. *Id.* at 1161–62, 1165, 1169; Klein & Doskow, *supra* note 38, at 332–34.

106. *United States v. Space Hunters, Inc.*, 429 F.3d 416, 425–26 (2d Cir. 2005).

discriminatory advertising,<sup>107</sup> the Second Circuit interpreted the Mrs. Murphy exemption to protect racial discrimination by those who rent shared residential space to others.<sup>108</sup> In many ways, Airbnb's peer-to-peer home sharing transactions are analogous to websites that facilitate roommate connections. So long as Airbnb and its hosts do not publish discriminatory listings, hosts are likely protected in accepting or rejecting users at whim.

Examination of jurisdictions' analyses of discrimination in shared housing further indicates the Mrs. Murphy exemption shields discriminatory practices on Airbnb. In a later decision, the Ninth Circuit focused on the constitutional right to freedom of association to justify the application of Mrs. Murphy to shared living scenarios. It reasoned that:

There's no indication that Congress intended to interfere with personal relationships *inside* the home . . . [h]olding that the FHA applies inside a home or apartment would allow the government to restrict our ability to choose roommates compatible with our lifestyles. This would be a serious invasion of privacy, autonomy and security.<sup>109</sup>

The constitutional right to freedom of association protects against government interference with certain intimate relationships, and traditionally includes both the "affirmative right to associate with desired persons and a negative right to be free to not associate with undesired persons."<sup>110</sup> While legal scholars have grappled with how broadly freedom of association should apply in the new sharing economy, courts have been slow to recognize the same concerns and consistently uphold Mrs. Murphy in the shared-living context.<sup>111</sup>

*B. In Defense of the FHA's Regulatory Potential to Combat Housing Discrimination*

While the FHA's regulations do not currently apply to Airbnb and its hosts, if amended, the FHA may be the most effective regulatory

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107. 42 U.S.C. § 3604(c) (2012).

108. *Space Hunters*, 429 F.3d at 425–26.

109. *Fair Hous. Council of San Fernando Valley v. Roommate.com, L.L.C.*, 666 F.3d 1216, 1220–21 (9th Cir. 2012).

110. Tim Iglesias, *Does Fair Housing Law Apply to "Shared Living Situations"? Or the Trouble with Roommates*, 22 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 111, 114–15 (2014).

111. *See id.* at 115–16.

framework to cure the liability gap created by the Mrs. Murphy exemption. Airbnb, like many sharing companies, eludes traditional legal frameworks.<sup>112</sup> “Prosumers who use the services of sharing-economy companies often are able to evade liability because of the difficulty in applying laws—which were written for the offline world—to virtual spaces.”<sup>113</sup> To address the growing issue of racial discrimination in the short-term rental economy, changes will need to be made to America’s fair housing laws to encompass the new housing category formed by Airbnb. In discourse surrounding how to regulate the sharing economy, a variety of regulatory frameworks have been proposed to address this novel issue. Unfortunately, many popular regulatory proposals evolving in this ongoing dialogue fail to squarely address the problem of preventing racial discrimination by Airbnb hosts. The FHA’s legislative spirit of combating systemic racism, coupled with recent Supreme Court precedent broadening the FHA’s reach,<sup>114</sup> creates new potential for the FHA to be adapted to address racial discrimination in the twenty-first century sharing economy.

#### 1. ALTERNATIVE REGULATIONS FAIL TO DIRECTLY CONFRONT RACISM

While the variety of regulatory and policy proposals evolving in sharing economy discourse offer solutions to police host conduct, they ultimately fail to offer a direct tool to address racial discrimination. One common argument against adapting the FHA is that the Mrs. Murphy exemption itself is legally irrelevant due to the 1866 Civil Rights Act.<sup>115</sup> Section 1982 of the Act proclaims all United States citizens have the right to “purchase, lease, sell, hold, and convey real and personal property.”<sup>116</sup> While the Supreme Court once interpreted § 1982 to prohibit private forms of racial discrimination,<sup>117</sup> the Court did not address whether § 1982 would apply to accommodation providers exempt from FHA liability under the Mrs. Murphy exemption.<sup>118</sup> This question remains unanswered, and the modern Supreme Court’s willingness to broadly interpret § 1982 has come under doubt in light of

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112. Interian, *supra* note 27, at 151–52.

113. *Id.* at 151.

114. *See infra* notes 166–72 and accompanying text.

115. Schwemm, *supra* note 40, at 461.

116. 42 U.S.C. § 1982 (2012).

117. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 413 (1968).

118. The Court instead stressed that the FHA and § 1982 were independent and concurrent. *Id.* at 416–17.

its conservative make-up and concern for freedom of association.<sup>119</sup> The lingering uncertainty surrounding judicial interpretation, combined with recent case law affirming the Mrs. Murphy exemption's application to shared-living contexts, presents skepticism about § 1982's ability to combat racial discrimination in the new short-term rental economy.<sup>120</sup>

Other sharing economy scholarship focuses on regulating internet-based companies' liability for user-generated content. A modification to section 230 of the Federal Communications and Decency Act of 1996 ("CDA") is a suggested remedy to combat racial discrimination facilitated by Airbnb.<sup>121</sup> The current CDA shields internet-based companies from civil actions for users' conduct that would otherwise expose them to liability.<sup>122</sup> Proponents argue that amending the CDA to expose internet-based companies to liability for its users' misconduct (such as posting discriminatory listings) would create strong incentives for Airbnb to police its users' illegal activity.<sup>123</sup> While increased liability for internet-based companies may certainly play a role in regulating the new sharing economy, the CDA would only address the issue of discriminatory advertising by users. Much discrimination faced by users is implicit, with offending hosts creating excuses or simply ignoring booking requests from black users.<sup>124</sup> Therefore, amending the CDA by itself does not combat unadvertised discrimination by Airbnb hosts or address their FHA immunity under the Mrs. Murphy exemption.

In addition to proposed federal regulations, individual states and cities have also attempted to regulate Airbnb. San Francisco and Nashville implemented restrictions for Airbnb hosts that require them to have liability insurance, permits, business licenses, and adhere to city building code and occupancy restrictions.<sup>125</sup> Cities like Portland, Chicago, and Washington, D.C. have imposed hotel and occupancy taxes.<sup>126</sup> New York enacted state taxes and attempted to limit the

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119. Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 Nw. U. L. REV. 1283, 1426 (1996).

120. Walsh, *supra* note 37, at 630.

121. McNamara, *supra* note 19, at 162–64.

122. *Id.* at 163.

123. *Id.* at 165.

124. See generally Maggie Penman & Max Nesterak, *When Personalization Leads to Discrimination on Airbnb*, NPR (Apr. 26, 2016, 4:28 PM), [<https://web.archive.org/web/20180308051435/https://www.npr.org/2016/04/26/475773261/when-personalization-leads-to-discrimination-on-airbnb>] (describing implicit methods hosts use to discriminate against black users).

125. Interian, *supra* note 27, at 146–48.

126. *Id.* at 147–48.

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number of lease-holders allowed to rent out their units on Airbnb.<sup>127</sup> Cities and states, however, currently stand on tenuous legal ground in regulating Airbnb under traditional hotel and tax frameworks.<sup>128</sup> Lawsuits in New York and San Francisco are currently pending and it remains unclear how courts will respond to regulations aimed at companies that facilitate private peer-to-peer transactions.<sup>129</sup> Furthermore, current state and local Airbnb regulations primarily focus on the loss of tax revenue and housing shortages cities have experienced as a result of Airbnb's growth.<sup>130</sup> The regulations themselves do not address racial discrimination by Airbnb hosts or attempt to impose new liability on hosts for discrimination.<sup>131</sup>

California is the only exception. In April 2017, California's Department of Fair Employment and Airbnb came to an agreement where state officials will be permitted to conduct "fair housing tests" on hosts with three or more listings who have received discrimination complaints.<sup>132</sup> State officials will create "testers" that will be able to create fake accounts posing as potential renters "in order to gather information about whether a host is complying with fair housing

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127. *Id.* at 148–49.

128. While state and local laws may create additional protected classes not included in the FHA and create laws that may limit the applicability of the Mrs. Murphy exemption, state and local solutions to the Mrs. Murphy exemption fail to combat the national crisis created by Airbnb. Kinara Flagg, *Mending the Safety Net Through Source of Income Protections: The Nexus Between Antidiscrimination and Social Welfare Law*, 20 COLUM. J. GENDER & L. 201, 211 (2011). Use of the FHA instead of state and local housing law will ensure that users receive consistent remedies and that those remedies are far reaching in order to adequately address the large-scale discrimination created on Airbnb's fast growing national platform.

129. Dana Palombo, *A Tale of Two Cities: The Regulatory Battle to Incorporate Short-Term Residential Rentals into Modern Law*, 4 AM. U. BUS. L. REV. 287, 290, 302–03, 310–12 (2015).

130. Tristan P. Espinosa, Comment, *The Cost of Sharing and the Common Law: How to Address the Negative Externalities of Home-Sharing*, 19 CHAP. L. REV. 597, 606–07 (2016).

131. Several cities have passed ordinances that place restrictions on home owners and lease holders' ability to rent on their properties on Airbnb. *What Legal and Regulatory Issues Should I Consider Before Hosting on Airbnb?*, AIRBNB, [https://perma.cc/4V2W-TYQT]. Some cities require hosts to register their homes or apartments or obtain a license with the city before allowing hosts to rent to guests on Airbnb. *Id.* While local laws and penalties vary greatly, most are concerned with collecting tax revenue or enforcing occupancy ordinances. *Id.* The local regulations do not specifically combat racism or provide additional civil rights protections for Airbnb users.

132. Chris Welch, *Some Airbnb Hosts Will Face Racial Discrimination Tests in California*, VERGE (Apr. 28, 2017, 3:16 PM), [https://perma.cc/3DTS-CJ3F].

laws.”<sup>133</sup> While this practice could expose discriminatory hosts’ liability under California’s fair housing laws, most Airbnb hosts will not be tested.<sup>134</sup> Only approximately 6,000 of Airbnb’s 76,000 California hosts meet the “three or more listings requirement” that triggers liability under fair housing tests.<sup>135</sup> However, even if the scope of such regulations is initially limited, this practice may make it easier for users to file discrimination complaints with both Airbnb and state officials and lead to better state remedies for racial discrimination. Nevertheless, despite this positive emerging state solution, California is the only state to adopt such a measure so far and leaves the rest of Airbnb users across the country without such legal recourses.

Finally, some legal commentators argue Airbnb should be left to regulate itself.<sup>136</sup> By leaving Airbnb to self-regulate instead of adapting existing regulatory approaches to digital peer-to-peer exchanges, “grassroots innovation” will not be impeded.<sup>137</sup> Self-regulation advocates argue government intervention may slow business growth and ultimately burden the burgeoning sharing economy.<sup>138</sup> Airbnb itself claims it has already adopted rules to fight racial discrimination.<sup>139</sup> In September of 2016, Airbnb released a report outlining steps it planned to take to combat racial discrimination.<sup>140</sup> These steps include requiring hosts to agree to a nondiscrimination policy, reduce the prominence of user photographs, accelerate the use of instant bookings (a feature that allows users to book listings without host approval), finding accommodation for displaced users,<sup>141</sup> and the company employing

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133. *Id.*

134. *Id.*

135. *Id.*

136. See generally Molly Cohen & Arun Sundararajan, *Self-Regulation and Innovation in the Peer-to-Peer Sharing Economy*, 82 U. CHI. L. REV. DIALOGUE 116 (2015).

137. *Id.* at 116, 129.

138. *Id.* at 116.

139. Katie Benner, *Airbnb Adopts Rules to Fight Discrimination by Its Hosts*, N.Y. TIMES (Sept. 8, 2016), [https://web.archive.org/web/20180226161525/https://www.nytimes.com/2016/09/09/technology/airbnb-anti-discrimination-rules.html?mtrref=undefined].

140. *Id.*

141. Monica Nickelsburg, *Airbnb’s Answer to #AirbnbWhileBlack: New Anti-Discrimination Rules and ‘Open Door’ Policy*, GEEK WIRE (Sept. 8, 2016, 10:40 AM), [https://perma.cc/3JRV-9S2E]. The company will implement a new “open door” policy where users who feel they were denied a stay based on prejudice will be given assistance to find a “comparable listing” or “alternative accommodation[] nearby.” *Id.*

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specialists and consultants to handle discrimination complaints, including Eric Holder.<sup>142</sup>

To its credit, Airbnb has consistently acknowledged the problem of racism on its platform and the company's delayed response to the issue, with CEO Brian Chesky reflecting that:

We were so focused on an issue of trust and keeping people safe, responding to other people's issues on trust and safety, that we took our eye off the ball . . . [w]hen we designed the platform, three white guys, there were a lot of things we didn't think about . . . [t]here are racists in the world and we need to have zero tolerance.<sup>143</sup>

Airbnb recently went so far as to cancel several Airbnb accounts linked to a white nationalist rally in Charlottesville.<sup>144</sup> Under its new anti-discrimination policy, hosts are required to agree to the company's "Community Commitment" agreement before renting out their apartment or home on Airbnb.<sup>145</sup> If users do not sign the agreement, they will be unable to host or book an accommodation.<sup>146</sup> The policy states hosts will not be able to "decline a guest based on race, color, ethnicity, national origin, religion, sexual orientation, gender identity, or marital status."<sup>147</sup> If a host violates the Community Commitment, by posting a listing with discriminatory language or refusing to rent to someone based on a protected category, it is grounds for the post to be edited and the host to be suspended.<sup>148</sup>

Nevertheless, allowing Airbnb to self-regulate presents two primary concerns: that its regulations will fail to address racial discrimination and that aggrieved users will be left without adequate

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142. Benner, *supra* note 139.

143. Julie Bort, *Airbnb CEO Brian Chesky's Biggest Concern Is 'Discrimination We Are Having on Our Platform,'* BUS. INSIDER (July 12, 2016, 6:15 PM), [<https://web.archive.org/web/20180226001635/http://www.businessinsider.com/airbnb-ceo-on-discrimination-and-racism-2016-7>].

144. Jonah Engel Bromwich, *Airbnb Cancels Accounts Linked to White Nationalist Rally in Charlottesville*, N.Y. TIMES (Aug. 9, 2017), [<https://web.archive.org/web/20180226161723/https://www.nytimes.com/2017/08/09/us/airbnb-white-nationalists-supremacists.html?mtrref=undefined>].

145. Madison Malone Kircher, *Airbnb Will Now Require Hosts to Agree to Anti-Discrimination Policy*, NY MAG. (Nov. 1, 2016, 11:49 AM), [<https://perma.cc/VSF2-HG7F>].

146. *Id.*

147. *Id.* "Hosts can decline to rent to someone of a gender other than their own if the host and guest will be sharing living spaces." *Id.*

148. *Id.*

legal remedies. Airbnb’s researcher who compiled the report (ironically identified as one Ms. Murphy) acknowledged that “[t]here is no one product change, policy or modification that can eliminate bias and discrimination. . . . Tackling these challenges requires a sustained and multifaceted approach.”<sup>149</sup> While Airbnb is moving in the right direction and should be applauded for its increased efforts to deter discrimination on its platform, further regulation is needed to protect users from racial bias.<sup>150</sup> The company did not go so far to eliminate the use of users’ photos or names on its platform. Nor did Airbnb’s proposal address how racial discrimination claims would be investigated and proven, making it unclear how hosts would be deterred for violating the nondiscrimination policy. Furthermore, diversity advocates fear that hosts’ biases (both explicit and implicit) can be cloaked, giving the example of a Washington, D.C. Airbnb listing that refused to accept guests who arrived in D.C. by bus or motor coach.<sup>151</sup> While Airbnb has a policy for listings that contain discriminatory language, the company does not offer guidance on how it will remedy unadvertised, implicit biases.<sup>152</sup>

While it is likely impossible to completely eradicate the prevalence of racial discrimination in shared housing, the concerns regarding users’ legal remedies under Airbnb’s existing policies remain. Like many companies, Airbnb’s website contains a “clickwrap contract” that binds its users to verbose contractual terms that often go unread by users.<sup>153</sup> Part of Airbnb’s current user agreement contains both a forced arbitration clause and a class-action lawsuit waiver.<sup>154</sup> When consumers are banned both from suing in court and suing collectively, their legal remedies become dubious at best. “Class-action cases have been the

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149. Benner, *supra* note 139.

150. *Id.*

151. *Id.*

152. *Airbnb’s Nondiscrimination Policy: Our Commitment to Inclusion and Respect*, AIRBNB, [https://perma.cc/4VBP-SZCC]. Airbnb made efforts to incorporate implicit bias training for hosts in its business model in response to complaints of racial bias from Airbnb users, but such training was never formally incorporated in official Airbnb policy. Emily Badger, *How Airbnb Plans to Fix Its Racial-Bias Problem*, WASH. POST: WONKBLOG (Sept. 8, 2016), [https://perma.cc/C3BP-P2H4] (discussing plans to offer implicit bias training to Airbnb hosts); *Every Host Should Have Access to Tools for Success*, AIRBNB, [https://perma.cc/3F93-FALE] (discussing an Airbnb-created “toolkit” designed “[t]o help [] members understand discrimination and the biases that cause it . . . exploring bias and other factors that influence people’s decisions, even without their knowledge.”).

153. Palombo, *supra* note 129, at 300–01.

154. Katie Benner, *Airbnb Vows to Fight Racism, but Its Users Can’t Sue to Prompt Fairness*, N.Y. TIMES (June 19, 2016), [https://perma.cc/888W-WBB2].



only effective way to prove and remedy systemic discrimination because you can't prove a pattern of behavior with individually filed cases."<sup>155</sup> This concern is exemplified by Gregory Selden, who was barred from bringing a class-action claim against Airbnb for racial discrimination due to the company's class-action waiver in its terms of service.<sup>156</sup> Ultimately, Selden was forced to individually litigate his claim in private arbitration due to Airbnb's forced arbitration clause.<sup>157</sup> Not only are Selden's legal remedies limited and unpublished in arbitration, Airbnb's class-action waivers and arbitration clauses "make[] it unlikely that Airbnb will be embroiled in a drawn-out legal battle over whether the company is responsible when hosts discriminate against guests based on their race . . . ."<sup>158</sup> Selden's attorney issued a statement that "[b]y placing Mr. Selden's claims into arbitration, a consumer's constitutional right to a jury trial and access to the courts of law continues to be whittled down gradually but surely."<sup>159</sup>

If left to self-regulate, it is uncertain how Airbnb would police racial bias and what consequences would be imposed on offending hosts. Furthermore, Airbnb's arbitration and class-action waiver clauses curtail users' legal remedies by forcing users to bring expensive and time-consuming individual causes of action in arbitration.<sup>160</sup> So long as Airbnb's arbitration and class-action waivers remain in its terms of service, it is doubtful that courts will be able to resolve whether users who face racial discrimination have any legal remedies. And while these alternative approaches have failed to directly confront racism, the FHA is an existing regulatory remedy that is adaptable to the shared housing economy developed by Airbnb.

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155. *Id.*

156. *See supra* notes 84–85 and accompanying text.

157. *See supra* note 84.

158. Katie Benner, *Federal Judge Blocks Racial Discrimination Suit Against Airbnb*, N.Y. TIMES (Nov. 1, 2016), [[https://web.archive.org/web/20180226162602/https://www.nytimes.com/2016/11/02/technology/federal-judge-blocks-racial-discrimination-suit-against-airbnb.html?\\_r=0](https://web.archive.org/web/20180226162602/https://www.nytimes.com/2016/11/02/technology/federal-judge-blocks-racial-discrimination-suit-against-airbnb.html?_r=0)].

159. Vara, *supra* note 84.

160. Arbitration is a private proceeding whose results are shielded from public knowledge. Critics of arbitration argue the processes' lack of transparency favors defendant businesses over individual plaintiffs and liken the process to "kangaroo court," a sham legal proceeding weighed against consumers. Jeffery W. Stempel, *Keeping Arbitrations from Becoming Kangaroo Courts*, 8 NEV. L.J. 251, 254–57 (2007).

## 2. THE FHA'S RECENT EXPANSIONS IMPROVE LITIGANTS' REMEDIES

While imperfect, the FHA is currently the best regulatory weapon in the federal arsenal to provide adequate legal remedies for racial discrimination in the emerging short-term rental market. The 1968 FHA is the principal federal law aimed at policing explicit and implicit racial bias in the sale and renting of housing.<sup>161</sup> When a 1977 HUD study showed the FHA woefully failed to reduce housing discrimination, Congress' response was to beef up the FHA's enforcement remedies with the passage of the 1988 Fair Housing Amendments Act (FHAA).<sup>162</sup> The FHAA:

[S]trengthened all three of the FHA's enforcement techniques by: (1) eliminating the punitive damage cap, lengthening the statute of limitations, and making attorney's fees awards easier to obtain in private litigation; (2) establishing an expedited administrative complaint procedure that could result in injunctive relief, damages, and civil penalties; and (3) authorizing the Department of Justice to collect monetary damages for aggrieved persons in its "pattern or practice" and "general public importance" cases.<sup>163</sup>

Consequently, the FHA currently has the strongest federal remedies for equal housing violations.<sup>164</sup> While impossible to completely eradicate implicit bias in housing, the FHA offers aggrieved renters some of the most robust remedies available as a deterrence. Courts have been willing to read the FHA's damages broadly, with the Third, Eighth, and Sixth Circuits holding that hefty punitive damages could be awarded under the FHA even when a defendant's behavior was not demonstrated to be egregious or malicious.<sup>165</sup>

Aside from attractive remedies, the Supreme Court recently enhanced aggrieved renters' ability to bring an FHA claim. While the difficulty of proving discrimination is a warranted criticism of the

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161. Schwemm, *supra* note 40, at 460–61.

162. *Id.* at 462.

163. *Id.*

164. *Id.* Title II of the 1964 Civil Rights Act only provides equitable relief in public accommodation cases. 42 U.S.C. § 2000a(a), 2000a-3 (2012). The law also caps monetary damages in employment discrimination cases. 42 U.S.C. § 1981a(b).

165. Laurie R. Kaufman, *A Matter of Enforcement: The Fifth Circuit Considers the Issuance of Punitive Damages Under the Fair Housing Act in Lincoln v. Case*, 78 TUL. L. REV. 1377, 1382–83 (2004).

FHA,<sup>166</sup> the Court recently construed the FHA to allow for increasingly broader claims.<sup>167</sup> In *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*,<sup>168</sup> the Supreme Court held the FHA could be analyzed under a disparate-impact standard of liability.<sup>169</sup> This would allow plaintiffs to succeed on a FHA claim without demonstrating the defendant's illegal intent to racially discriminate.<sup>170</sup> Instead, liability would turn on if the landlord's rental practices had a disproportionate adverse effect on applicants of a certain race.<sup>171</sup> Writing for the majority, Justice Kennedy aptly reasoned disparate-impact “. . . plays a role in uncovering discriminatory intent: [i]t permits plaintiffs to counteract unconscious prejudices and disguised animus that escape easy classification as disparate treatment. In this way[,] disparate-impact liability may prevent segregated housing patterns that might otherwise result from covert and illicit stereotyping.”<sup>172</sup> The court has taken a significant step toward lowering legal barriers faced by FHA litigants and signaled its willingness to expand the law's scope to respond to new forms of discriminatory bias in housing.

Finally, the FHA's equitable tradition and comprehensive scope make it the best candidate to combat discrimination in the fast-developing sharing economy. Airbnb has grown exponentially in both size and popularity since its inception in 2008, making racial bias on its platform a national concern.<sup>173</sup> Utilizing the FHA to combat this issue allows for far-reaching, consistent remedies for all Airbnb users nationwide. Attempted state and local regulations have been inconsistent and primarily focus on local concerns of taxation and ordinance-compliance.<sup>174</sup> Adapting an existing federal fair housing law to Airbnb listings provides a standard, robust approach to the important government interest of combating racial segregation in the new short-term rental economy. And while contract law and the CDA offer

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166. Equal Justice Soc'y & Wilson Sonsini Goodrich & Rosati, *supra* note 40, at 261–62.

167. Robert G. Schwemm, *Fair Housing Litigation After Inclusive Communities: What's New and What's Not*, 115 COLUM. L. REV. SIDEBAR 106, 106 (2015).

168. 135 S. Ct. 2507 (2015).

169. *Id.* at 2518, 2525.

170. Schwemm, *supra* note 167, at 106.

171. *Inclusive Cmities.*, 135 S. Ct. at 2513.

172. *Id.* at 2522.

173. Todisco, *supra* note 75, at 122, 128–29.

174. Jennifer S. Fan, *Regulating Unicorns: Disclosure and the New Private Economy*, 57 B.C. L. REV. 583, 601–02 n.127 (2016); Interian, *supra* note 27, at 147–51.

roundabout solutions to police Airbnb, the FHA squarely tackles the issue of racism and offers robust equitable remedies. The FHA was born out of a desire to address racial disparities in housing nationwide and fight the prevalence of racial segregation in America.<sup>175</sup> The Supreme Court echoed this sentiment, reflecting that:

Much progress remains to be made in our Nation's continuing struggle against racial isolation. . . . The FHA must play an important part in avoiding the Kerner Commission's grim prophecy that "[o]ur Nation is moving toward two societies, one black, one white—separate and unequal." The Court acknowledges the Fair Housing Act's continuing role in moving the Nation toward a more integrated society.<sup>176</sup>

### III. THE 21<sup>ST</sup> CENTURY FHA: PROPOSED AMENDMENTS TO COMBAT RACIAL BIAS ON AIRBNB

Despite its virtues, the FHA contains imperfections that must be amended for it to serve as an effective regulatory deterrent against racism in the modern sharing economy. In order to address racial discrimination, the Mrs. Murphy exemption must be repealed in regards to race in the short-term rental economy.<sup>177</sup> While frequently shrouded in freedom of association arguments, the exemption's legislative history and modern legal applications demonstrate Mrs. Murphy protects racism. If America's new short-term rental economy will be based in private peer-to-peer transactions rather than traditional public hotels, the FHA must be amended to embody the state's interest in racial integration in the short-term accommodation market. Not only must the Mrs. Murphy exemption be repealed in regards to race, but the FHA should provide a mechanism for collective causes of action for aggrieved users that encompasses liability for both offending hosts and Airbnb.

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175. Schneider, *supra* note 42, at 543.

176. *Inclusive Cmities.*, 135 S. Ct. at 2525–26. See *supra* Part II.A (further elaborating on the notion that “[m]uch progress remains to be made”).

177. This comment does not address the Mrs. Murphy exemption as it relates to long-term, shared living scenarios like roommates. Although racial discrimination is a concern in the roommate context, the long-term, more personal nature of the relationship presents different freedom of association arguments outside the short-term rental context that Airbnb presents.

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*A. Mrs. Murphy Violates FHA Public Policy And Preserves Segregation*

The Mrs. Murphy exemption contradicts the FHA’s policy goal of reducing discrimination by providing a legal mechanism for the furtherance of housing segregation. When enacted in 1968, the FHA “reflected a sweeping prohibition on allowing private property owners in the residential housing market to use the selection of tenants to further racial discrimination and residential segregation in the United States.”<sup>178</sup> In examining the legislative history of the Mrs. Murphy exemption, racial politics of the 1960s played a flagrant role in the amendment’s introduction.<sup>179</sup> In addition to the discriminatory history behind the fictitious Mrs. Murphy imagery,<sup>180</sup> Senator Mondale speculated at the time that racial politics drove the amendment’s passage and questioned the motives of its adherents—implicitly suggesting the amendment was necessary to “make the FHA more palatable to white Americans opposed to open housing.”<sup>181</sup> The unspoken argument Mrs. Murphy proponents advocated was that white Americans had the right to not associate with black Americans.<sup>182</sup> Furthermore, it is impossible to separate the amendment from FHA’s grounding in the Civil Rights Movement and racial politics surrounding 1960s fair housing dialogue. The exemption itself runs counter to the FHA’s goal of racially integrating housing and remedying racial discrimination by providing a mechanism to legalize segregation in cases of intimate association.

Modern legal applications of Mrs. Murphy demonstrate the exemption has consistently been used to defend racial discrimination in shared housing. The Second,<sup>183</sup> Third,<sup>184</sup> Sixth,<sup>185</sup> and Eleventh<sup>186</sup> Circuits have all recognized the Mrs. Murphy exemption may be used as an affirmative defense for FHA claims of discrimination. In 2012, the Ninth Circuit held the FHA did not impose liability on a roommate matching website because the shared living situation fell within the

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178. Klein & Doskow, *supra* note 38, at 340.

179. Walsh, *supra* note 37, at 608–09.

180. *See supra* Part I.B.

181. Walsh, *supra* note 37, at 609–10.

182. *Id.* at 607.

183. *United States v. Space Hunters, Inc.*, 429 F.3d 416, 426 (2d Cir. 2005).

184. *United States v. Columbus Country Club*, 915 F.2d 877, 882–85 (3d Cir. 1990).

185. *Hooker v. Weathers*, 990 F.2d 913, 915–16 (6th Cir. 1993)

186. *Massaro v. Mainlands Section 1 & 2 Civic Ass’n*, 3 F.3d 1472, 1474 (11th Cir. 1993).

Mrs. Murphy exemption.<sup>187</sup> Thus, the federal safeguard afforded to the FHA’s protected classes (including race) ceased to apply in scenarios of intimate association.<sup>188</sup> “Because we find that the FHA doesn’t apply to the sharing of living units, it follows that it’s not unlawful to discriminate in selecting a roommate.”<sup>189</sup> In the modern short-term rental market landscape, the Mrs. Murphy exemption effectively serves as a legal apparatus to legitimize racial segregation. And while Mrs. Murphy’s advocates may argue the exemption operates on a small scale peer-to-peer level, systemic use of the exemption on national platforms like Airbnb may “have a cumulative impact on other members of the minority group. Because housing discrimination victims are denied equal opportunity to participate in the housing market their housing alternatives are necessarily diminished. The minority homeseeker is forced into a housing market that contains fewer choices.”<sup>190</sup>

### *B. Airbnb’s Commercial Nature Diminishes Hosts’ Association Interests*

The sharing economy has created a new hybrid category of accommodation that does not easily lend itself to traditional freedom of association frameworks. Freedom of intimate association has a long history in American housing and traditionally embodies the notion individuals may choose who they want to live with.<sup>191</sup> The Supreme Court unambiguously declared “the freedom to enter into and carry on certain intimate or private relationships is a fundamental element of liberty protected by the Bill of Rights.”<sup>192</sup> Both legal commenters and courts have grappled with how to apply this important doctrine in the roommate context, but typically err towards holding such relationships have association interests that the Mrs. Murphy exemption protects.<sup>193</sup> The rapid growth of the sharing economy presents a critical question in the application of intimate association doctrine—should freedom of association apply to hybrid property used personally but also held open to the public for monetary benefits?

Airbnb’s creation of a new accommodation category must fundamentally change the way freedom of association arguments in the

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187. *Fair Hous. Council of San Fernando Valley v. Rommate.com, L.L.C.*, 666 F.3d 1216, 1220–22 (9th Cir. 2012).

188. *Id.* at 1220.

189. *Id.* at 1222.

190. Armstrong, *supra* note 52, at 917.

191. Messerly, *supra* note 58, at 1966.

192. *Bd. of Dirs. of Rotary Int’l v. Rotary Club of Duarte*, 481 U.S. 537, 545 (1987).

193. Messerly, *supra* note 58, at 1967.

rental market are analyzed. Airbnb has already surpassed all worldwide hotel chains in value<sup>194</sup> and holds itself out as a platform dedicated to providing cheaper travel accommodations for users and a way for hosts to monetize on their space.<sup>195</sup> The commercial nature of the transaction—that the listing is widely marketed to the public online, its short-term basis, hosts’ monetary incentives, and its advertisement as a cheaper hotel alternative—all cut against traditional intimacy arguments associated with the Mrs. Murphy exemption. Unlike roommates, Airbnb transactions are more analogous to hotels in that hosts open their space to the world in order to monetize off short-term commercial transactions and may limit their interaction with guests by only renting out their home when they are absent. Furthermore, Airbnb is becoming a platform that may permanently replace the way travelers find accommodation.<sup>196</sup> Placing hosts’ association interests above travelers’ civil rights runs the risk of legalizing unfettered discrimination in a large sector of America’s future short-term rental market.

The commercial nature of Airbnb transactions further diminishes the association interests of its hosts. The novel issue presented by Airbnb is that unlike a traditional hotel, the transactions are facilitated in hosts’ private homes. Some scholars argue that although the Mrs. Murphy exemption may need to be narrowed, Airbnb transactions can never be purely commercial because private homes have an inherent intimate nature.<sup>197</sup> While Airbnb transactions have commercial elements:

[T]he possibility of connectivity should not distract us from the personal dimension of the property and the importance of intimacy, security, and safety in the home. Therefore, when a woman living alone does not feel comfortable renting a room to a man because she fears for her personal safety, the personal dimension of the property becomes prominent.<sup>198</sup>

While traditional association arguments of safety and privacy may be sympathetic, they do not outweigh users’ inalienable civil rights. When a host voluntarily opens her home to the world for quick monetary benefits, her association interests are greatly diminished—if not eliminated.<sup>199</sup> And “[w]hile society may understand the stereotypical

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194. Lee, *supra* note 72, at 232; Versace, *supra* note 25.

195. *About Us*, AIRBNB, *supra* note 17.

196. *See supra* Part I.C.

197. Krecizer-Levy, *supra* note 30, at 116.

198. *Id.* at 117.

199. Walsh, *supra* note 37, at 631.

Mrs. Murphy’s aversion to renting to those whose group affiliation makes her uncomfortable, society should not support the perpetuation of ignorance.”<sup>200</sup> While the intersection of gender and safety present valid security concerns in shared living scenarios,<sup>201</sup> it is difficult to see how association arguments grounded in safety may be legitimately applied to race in the short-term rental context. Allowing Airbnb hosts to racially discriminate against their guests propagates only one interest—the “right” of white Americans to not associate with black Americans. “The exemption does not shield an intimate relationship or protection-worthy expression. It shields only Mrs. Murphy’s ‘right’ to discriminate, a right substantially outweighed by a prospective tenant’s right not to be discriminated against.”<sup>202</sup> As the short-term rental market grows, our nation must decide how our fair housing laws will be applied in the sharing economy and whose rights will be valued. Racial equality is a fundamental human right—renting out a spare bedroom on Airbnb is not.

Finally, eliminating the Mrs. Murphy exemption as applied to race will not unconstitutionally violate hosts’ freedom of association. Airbnb is a voluntary opportunity for homeowners and lease-holders to monetize off extra space. If individuals are uncomfortable associating with guests of a different race, they may preserve their association rights by simply not renting out their home on Airbnb. If hosts view Airbnb participation as a personal economic necessity, they have the choice to limit their Airbnb rentals to times when the host is not present to avoid directly interacting or sharing space with guests. Many available Airbnb rentals are for entire apartments or houses completely unoccupied by the host.<sup>203</sup> A host may leave town for the weekend, rent out her vacant apartment on Airbnb, and profit off a guest without any direct or in-person interaction. This further likens Airbnb to a hotel under a freedom of association analysis rather than the roommate scenario presented to the Ninth Circuit.<sup>204</sup>

Unlike roommates, Airbnb hosts can easily avoid interacting and sharing space with their guests by limiting their availability to times when the host is not present. This solution, limiting availability or simply not opening up your home on Airbnb, sufficiently protects freedom of association rights while providing fair housing protections in the short-term rental economy. And while freedom of association has

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200. *Id.* at 632.

201. Kreiczer-Levy, *supra* note 30, at 117.

202. Walsh, *supra* note 37, at 634.

203. Lee, *supra* note 72, at 232.

204. *See supra* Part II.A.



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been consistently protected in shared-living scenarios, our nation's public accommodation laws do not apply such association rights to public hotels.<sup>205</sup> While Airbnb's private-public hybridity complicate the freedom of association analysis, its short-term, commercial nature ultimately make it more akin to a hotel than a roommate relationship.

*C. Incorporating Liability for Airbnb and Eliminating the Use of Class Action Waivers and Arbitration Clauses in Fair Housing Litigation.*

In addition to repealing the Mrs. Murphy exemption from the FHA in regards to race, the FHA could be better adapted to the sharing economy by providing for expanded remedies aimed at Airbnb as a whole and not simply the individual hosts. This can be achieved by encompassing liability not only for Airbnb's hosts, but for the company itself. Congress and the Supreme Court have bolstered the FHA by passing the FHAA and allowing for disparate impact liability.<sup>206</sup> These suggestions by no means exhaust possible enhancements to the FHA but will be an important tool with the increased use of forced arbitration clauses and class-action waivers hidden in many online transactions. However, more needs to be done to transform the off-line twentieth-century FHA into a modern law capable of combating discrimination in the twenty-first century online sharing economy.

Although the Supreme Court recently upheld the use of disparate impact liability under the FHA,<sup>207</sup> litigants still face significant practical limitations in proving racial discrimination.<sup>208</sup> In *Inclusive Communities*, the Court held mere racial imbalance is insufficient to support an FHA discrimination claim and reasoned plaintiffs must identify a landlord's specific practice or policy that supports the alleged discriminatory outcome.<sup>209</sup> Critics are concerned that this "robust causality" shields lenders and housing institutions from liability for racial disparities.<sup>210</sup> Currently, FHA claims "invoke[] the court's authority over only the individuals or companies named as parties . . . [and] the courts too often extend relief only to the specific parties to the

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205. See Krecizer-Levy, *supra* note 30, at 118.

206. See *supra* Part I.A.

207. *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmities. Project, Inc.*, 135 S. Ct. 2507, 2518, 2525 (2015).

208. Bethany A. Corbin, *Should I Stay or Should I Go?: The Future of Disparate Impact Liability Under the Fair Housing Act and Implications for the Financial Services Industry*, 120 PENN ST. L. REV 421, 460 (2015).

209. 135 S. Ct. at 2523.

210. Corbin, *supra* note 208, at 460.

individual litigation.”<sup>211</sup> If an individual plaintiff is unable to produce sufficient evidence to demonstrate a causal connection between her disparate treatment and the host’s specific policies and procedures, her FHA claim will be summarily dismissed.<sup>212</sup> If an Airbnb host has no ascertainable, documented policies or practices when selecting renters, it could be impossible for a user to individually prove a discrimination claim. Even if an individual is successful in her claim against an individual Airbnb host, that may not be sufficient to prove Airbnb the company has policies or practices that lead to racial discrimination (such as the requirement users provide their picture and name). As Airbnb merely facilitates the rental transactions and is not the actual host, it could be impossible for litigants to succeed on an FHA claim against Airbnb under a robust causality standard. Furthermore, even after the 1988 FHAA bolstered the FHA’s enforcement mechanisms, the FHAA “failed to address the fact that individual causes of action have had little impact on residential segregation during [the FHA’s] . . . history.”<sup>213</sup>

The continuing use of individual causes of action in FHA litigation presents concerns that individual plaintiffs will be unable to prove the so-called robust causality standard articulated in *Inclusive Communities*.<sup>214</sup> Individual causes of action were likely chosen by Congress to enforce the FHA because housing often involves individual transactions concerning highly personal and financial decisions for both the homeseeker and landlord.<sup>215</sup> However, relying on individual causes of action creates a number of barriers for plaintiffs to recover under the FHA. The time consuming and costly process of individually litigating a discrimination claim discourages plaintiffs from bringing a suit.<sup>216</sup> Furthermore, many discrimination victims are inexperienced in detecting implicit bias, decreasing the likelihood an individual will bring an FHA claim.<sup>217</sup> Critics argue this causes discrimination to proliferate, as:

[R]elying on individual action allows persons who oppose the law to disobey or disregard it until another individual acts to stop them. The lack of concerted governmental enforcement

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211. Armstrong, *supra* note 52, at 915.

212. Corbin, *supra* note 208, at 460.

213. Armstrong, *supra* note 52, at 911.

214. *Inclusive Cmities.*, 135 S. Ct. at 2523.

215. Armstrong, *supra* note 52, at 916.

216. *Id.* at 919.

217. Robert G. Schwemm, *Private Enforcement and the Fair Housing Act*, 6 YALE L. & POL’Y REV. 375, 380 (1988).

efforts encourages noncompliance with the law. When enforcement is relatively uncertain, violators are more likely to risk that their violations will not be prosecuted or that such prosecutions will be unsuccessful.<sup>218</sup>

Amending the FHA to incorporate liability for companies like Airbnb and prohibiting the use of class-action waivers and arbitration clauses will subsequently better achieve the FHA's policy goal of eliminating systemic racial discrimination and segregation in American housing. Individual causes of action limit the federal government's role in FHA enforcement and "victims too often lack the will and resources to carry out the fight, and individual litigation victories rarely can address large-scale patterns and practices of discrimination."<sup>219</sup> Prohibiting the use of class-action waivers and allowing liability to reach Airbnb in addition to individual hosts will: 1) allow users to have their day in court; 2) make it easier for groups to sue and reduce the cost of litigation; 3) provide Airbnb the company with incentives to eliminate current aspects of its platform that perpetuate racial discrimination and create new mechanisms to combat racial discrimination;<sup>220</sup> and 4) adequately compensate victims of racial discrimination and impose penalties on all parties responsible—biased hosts and Airbnb's platform structure that increases the likelihood of discrimination.<sup>221</sup> Encompassing liability for Airbnb and the elimination of class-action waivers and arbitration will make more likely that users who face racial discrimination will be able to prove a pattern of discriminatory practice by both Airbnb and its hosts.<sup>222</sup>

Both the FHA and Supreme Court recognize that racial discrimination does not exist in a vacuum and subsequently provided for broader liability through the FHAA and disparate impact liability. Although Congress chose to remedy FHA violations through individual causes of action, the injury caused by racial discrimination "tends to have a cumulative impact on the other members of the minority group"

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218. Armstrong, *supra* note 52, at 919.

219. Schwemm, *supra* note 217, at 384.

220. Such as removing the requirement of profile pictures or names.

221. For further discussion of how Airbnb's current practices increase instances of racial discrimination, see Edelman & Luca, *supra* note 78, at 3, 9 (finding black hosts were paid twelve percent less than non-black hosts for equivalent rentals).

222. Because most litigation against Airbnb for racial discrimination has been barred by the company's class-action waivers and arbitration clauses, it is currently unclear if Airbnb users have the ability to sue the company itself for racial discrimination. However, given current appellate court precedent applying Mrs. Murphy to shared-living scenarios, it remains doubtful that either hosts or Airbnb is currently liable under the FHA. See *supra* Part II.A.

due to diminished housing options and neighborhood segregation.<sup>223</sup> Because the communities of color suffer the effects of discrimination as a group, the FHA should respond by encompassing liability for companies that facilitate short-term rental agreements and prohibit the use of litigation-chilling class-action waivers and forced arbitration clauses.

Finally, the FHA's legislative history supports a modern evolution of its enforcement mechanisms. Through the 1988 FHAA amendments, Congress recognized the 1968 FHA's failure in combating racial discrimination and responded by strengthening the FHA's remedies to make individual causes of action more effective in the future.<sup>224</sup> Because the increased popularity of short-term rental platforms like Airbnb threaten to proliferate racial discrimination in accommodation and erode the FHA's legislative reach, Congress needs to once again adapt the FHA by providing discriminated renters the ability to sue both offending hosts and the organizations that facilitate the transactions. The FHA will also need to respond to the explosion of class-action waivers currently used by a large segment of American corporations.<sup>225</sup> By exposing Airbnb to liability under the FHA, users will be adequately compensated for discrimination and the company will have genuine incentives to police hosts' discriminatory conduct.

#### CONCLUSION

Advances must be made to address how our twentieth-century housing laws will intersect with the twenty-first century short-term rental economy. The biases and racial animus surrounding Mrs. Murphy's boarding house imagery still thrive in America today. While Congress and the Supreme Court have taken strides to improve our fair housing laws, "[m]uch progress remains to be made in our Nation's continuing struggle against racial isolation."<sup>226</sup> Airbnb has taken steps toward addressing systemic racism on its platform, but more must be done on a national level to ensure communities of color are afforded comprehensive remedies in America's fastest growing accommodation category.

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223. Armstrong, *supra* note 52, at 917–18.

224. *Id.* at 922.

225. See Jessica Silver-Greenberg & Michael Corkery, *In Arbitration, a 'Privatization of the Justice System,'* N.Y. TIMES (Nov. 1, 2015), [<https://web.archive.org/web/20180218232451/https://www.nytimes.com/2015/11/02/business/dealbook/in-arbitration-a-privatization-of-the-justice-system.html>].

226. *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmities.*, 135 S. Ct. 2507, 2525 (2015).

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The evolution of private peer-to-peer transactions from traditional public accommodation has created a chasm of liability in our housing economy that must be addressed by Congress. Amending the FHA to repeal the Mrs. Murphy exemption in regards to race, providing for liability against companies like Airbnb, and prohibiting the use of class-action waivers and arbitration clauses in fair housing litigation will provide discriminated groups with powerful and comprehensive federal remedies. As the sharing economy thrives and Airbnb continues to change how travelers find a place to stay, these changes will be especially important to ensure America's fastest growing accommodation provider is not immune from our nation's fair housing laws. Shielding Mrs. Murphy's Airbnb from FHA liability merely propagates the Kerner Commission's grim prophecy that our nation is a separate and unequal society. "The exemption does not shield an intimate relationship or protection-worthy expression. It shields only Mrs. Murphy's 'right' to discriminate, a right substantially outweighed by a prospective tenant's right not to be discriminated against."<sup>227</sup>

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227. Walsh, *supra* note 37, at 634.