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# Discriminatorybnb: A Discussion of Airbnb's Race Problem, Its New Anti-Discrimination Policies, and the Need for External Regulation

Jason McCloskey\*

## INTRODUCTION

Early in 2017, Airbnb capitalized on President Trump's much contested<sup>1</sup> executive order instituting a travel ban from specific Muslim nations<sup>2</sup> with an advertisement during Super Bowl LI entitled "#WeAccept."<sup>3</sup> Though some<sup>4</sup> noticed the advertisement's implicit irony, given Airbnb's struggles with discrimination,<sup>5</sup> it is important that the millions of other viewers<sup>6</sup> seeing the message understand its hollow nature and respond accordingly. This is especially true as Airbnb will likely continue to publicly promote an external message of inclusion, irrespective of the situation that persists in its internal market.

The rise of peer-to-peer companies and development of the sharing

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1. See generally Andy Newman, *Highlights: Reaction to Trump's Travel Ban*, N.Y. TIMES (Jan. 29, 2017), [https://www.nytimes.com/2017/01/29/nyregion/trump-travel-ban-protests-briefing.html?\\_r=0](https://www.nytimes.com/2017/01/29/nyregion/trump-travel-ban-protests-briefing.html?_r=0); Azadeh Ansari, Nic Robertson & Angela Dewan, *World Leaders React to Trump's Travel Ban*, CNN POLITICS (Jan. 30, 2017, 8:51 PM), <http://www.cnn.com/2017/01/30/politics/trump-travel-ban-world-reaction/>. The Justice Department is still fighting opposition to the plan. See Brooke Seipel, *Justice Department to Take Latest Travel Ban Ruling to Supreme Court*, THE HILL (Sept. 7, 2017, 8:42 PM), <http://thehill.com/homenews/administration/349754-justice-department-to-take-latest-travel-ban-ruling-to-supreme-court>.

2. Exec. Order No. 13780, 82 Fed. Reg. 13209 (Mar. 6, 2017).

3. AIRBNB, #WEACCEPT, (Feb. 05, 2017), <https://www.airbnb.com/weaccept>.

4. Kristyn Wong-Tam (@kristynwongtam), TWITTER (Feb. 05, 2017, 6:43 PM), <https://twitter.com/kristynwongtam/status/828433801885933568> (stipulating that the Airbnb advertisement was an "Expensive ad to distract from #AirbnbWhileBlack controversy"); Jeff Bercovici (@jeffbervovici), TWITTER (Feb. 06, 2017), [https://twitter.com/jeffbervovici/status/828683106643173377?ref\\_src=twsrc%5Etfw](https://twitter.com/jeffbervovici/status/828683106643173377?ref_src=twsrc%5Etfw) (threading multiple tweets together and showing that Airbnb's #WeAccept advertisement is nearly identical to its original video, entitled "Airbnb Community Commitment," addressing the alleged discrimination of its own hosts).

5. See *infra* notes 54-75 and accompanying text.

6. The Super Bowl game had an average audience of 111.3 million viewers. Joe Flint, *First-Ever Overtime Super Bowl Attracts 111.3 Million TV Viewers*, WALL ST. J. (Feb. 6, 2017, 2:02 PM), <https://www.wsj.com/articles/patriots-comeback-ranks-as-one-of-most-watched-super-bowls-1486396041>.

economy have fostered a new phenomenon<sup>7</sup> allowing companies to thrive within a marketplace without the need of tangible assets.<sup>8</sup> These businesses, though only in their infancy, are now household names; perhaps no company better exemplifies this trend than Airbnb.

Founded in 2008, Airbnb now advertises that it has accommodated over 300 million guests and offers connections to over 80,000 cities across the globe.<sup>9</sup> Further cementing its place within the sharing marketplace, Airbnb recently approached a round of funding at a valuation of \$31 billion<sup>10</sup> and secured financing with multiple banks for a \$1 billion debt facility.<sup>11</sup> As Airbnb grows, the impact of its practices will continue to have a direct correlative relationship with the company's size. Thus, regulators or other businesses need to take action to both monitor and remedy any blight within Airbnb<sup>12</sup> at the earliest opportunity.

In the following sections, this Note will address the legal climate of the peer-to-peer short-term rental market as it pertains to Airbnb. The company faces local regulation,<sup>13</sup> the potential for future federal regulation,<sup>14</sup> and a growing dialogue concerning discrimination by Airbnb hosts aimed at the marketplace's renters.<sup>15</sup> In response to the regulation of

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7. Tomio Geron, *Airbnb and the Unstoppable Rise of the Share*

*Economy*, FORBES (Feb. 11, 2013), <http://www.forbes.com/sites/tomiogeron/2013/01/23/airbnb-and-the-unstoppable-rise-of-the-share-economy/#12402546790b> (quoting Joe Kraus, a general partner at Google, "The sharing economy is a real trend. I don't think this is some small blip.").

8. Hamish McRae, *Facebook, Airbnb, Uber, and the Unstoppable Rise of the Content Non-Generators*, THE INDEPENDENT (May 5, 2015), <http://www.independent.co.uk/news/business/comment/hamish-mcrae/facebook-airbnb-uber-and-the-unstoppable-rise-of-the-content-non-generators-10227207.html> ("the world's largest accommodation provider, Airbnb, owns no property.").

9. AIRBNB NEWSROOM, *Fast Facts*, <https://press.airbnb.com/fast-facts/> (last visited Mar. 20, 2018). The site further claims to have 4.5 million available listings globally. *Id.*

10. Lauren Thomas, *Airbnb Just Closed a \$1 Billion Round and Became Profitable in 2016*, CNBC (March 9, 2017, 2:42 PM), <https://www.cnbc.com/2017/03/09/airbnb-closes-1-billion-round-31-billion-valuation-profitable.html>. This evaluation is indicative of a 10,000% increase in the company's value since its seed rounds in 2009. EQUIDATE, *Airbnb*, <https://equidateinc.com/company/airbnb>.

11. Eric Newcomer & Alex Barinka, *Airbnb Adds \$1 Billion to War Chest for Expansion*, BLOOMBERG TECHNOLOGY (June 15, 2016), <https://www.bloomberg.com/news/articles/2016-06-16/airbnb-said-to-get-1-billion-debt-facility-from-big-u-s-banks>.

12. See *infra* notes 54-75 and accompanying text.

13. San Francisco Ordinance, *infra* note 36.

14. Newcomer, *infra* note 47.

15. See *infra* notes 54-75 and accompanying text.

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its business by cities, Airbnb filed lawsuits,<sup>16</sup> and more importantly, to silence the claims of discrimination on its platform, the company adopted new anti-discrimination policies in late 2016.<sup>17</sup>

This Note looks to Airbnb's newly introduced anti-discrimination policies and posits that more must be done to ensure the company actively counters any discrimination within its short-term renting ecosystem. To confirm that the short-term renting company's new anti-discrimination policy exists as more than hollow verbiage, Airbnb needs to face liability for the actions of its hosts. As the Note puts forth, this liability should originate from a clarification of Title II of the Civil Rights Act of 1964.<sup>18</sup> If federal action is not taken, state and local governments can emulate cities like San Francisco<sup>19</sup> and place liability on the rent-sharing platform for the violations of the hosts. Though legislative action, either at the federal or state level, would serve as the best solution to deter implicit discrimination in the peer-to-peer short-term renting marketplace, the market may likely be able to regulate itself. The viability of this alternative rests in a consumer's understanding of the discrimination problem and willingness to divert business to other renting companies, like Innclusive, founded to combat discrimination by Airbnb hosts.<sup>20</sup>

## I. HISTORY

### A. *Airbnb's Legal Issues*

Analogous to any company that seeks to disrupt<sup>21</sup> a market accustomed to the status quo, Airbnb is not without its legal challenges. The state of New York represents one such legal effort against the short-term rental

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16. See *infra* notes 39-40 and accompanying text.

17. Airbnb, *infra* note 89. See also Murphy, *infra* note 83.

18. 42 U.S.C. § 2000a(b)(1) (1964).

19. San Francisco Ordinance, *infra* note 36.

20. See *infra* notes 100-106 and accompanying text.

21. Daniel Guttentag, *Airbnb: Disruptive Innovation and the Rise of an Informal Tourism Accommodation Sector*, 18 CURRENT ISSUES IN TOURISM 1192 (2013). See Nancy Trejos, *Study: Airbnb Poses Threat to Hotel Industry*, USA TODAY (Feb. 2, 2016, 9:10 AM), <http://www.usatoday.com/story/travel/hotels/2016/02/02/airbnb-hotel-industry-threat-index/79651502/>.

marketplace.<sup>22</sup> The state's Multiple Dwelling Law<sup>23</sup> stipulates that residents of cities with a population of 350,000 or more are prohibited from renting a "Class A" multiple dwelling<sup>24</sup> for a period of less than thirty days without the host present.<sup>25</sup> In his study of Airbnb rentals, Eric T. Schneiderman, New York State Attorney General, found that seventy-two percent of the units rented as private short-term rentals on Airbnb likely violated both the state's law and the New York City Administrative Code.<sup>26</sup>

New York has not discontinued its legal pursuits against the market dominated by Airbnb, evidenced by the actions of the state legislature seeking to amend the Multiple Dwelling Law.<sup>27</sup> The bill, signed into law by Governor Andrew Cuomo on October 21, 2016, prohibits the advertisement of "Class A" dwellings for any purpose other than permanent residence.<sup>28</sup>

The state of New York is not alone in erecting legal barriers for the

22. See generally N.Y. MULT. DWELL. LAW §§ 1-367 (2018), <http://www1.nyc.gov/assets/buildings/pdf/MultipleDwellingLaw.pdf>.

23. *Id.*

24. *Id.* § 4.

A "class A" multiple dwelling that is occupied for permanent residence purposes. This class shall include tenements, flat houses, maisonette apartments, apartment houses, apartment hotels, bachelor apartments, studio apartments, duplex apartments, kitchenette apartments, garden-type maisonette dwelling projects, and all other multiple dwellings except class B multiple dwellings.

*Id.*

25. *Id.* at §§ 3-4.

26. Eric T. Schneiderman, *Airbnb in the City*, NEW YORK STATE OFFICE OF THE ATTORNEY GENERAL (Oct. 2014), <https://ag.ny.gov/pdfs/AIRBNB%20REPORT.pdf>. In New York City alone, there are 40,000 Airbnb listings. *New York City*, INSIDE AIRBNB (Dec. 3, 2016), <http://insideairbnb.com/new-york-city/>.

27. S.B. S6340A, 2015-16 Leg., 201st Gen. Assemb., Reg. Sess. (N.Y. 2016), <https://www.nysenate.gov/legislation/bills/2015/s6340/amendment/a>. See also Malathi Nayak, *New York Bill Would Ban Airbnb Listings for Some Short-Term Rentals*, REUTERS (June 20, 2016, 6:09 PM), <http://www.reuters.com/article/us-new-york-airbnb-idUSKCN0Z62M2> (under this proposed bill, "New York would be the first jurisdiction in the world to ban ads for short-term rentals on home-sharing sites.").

28. S.B. S6340A, 2015-2016 Leg., 201st Gen. Assemb., Reg. Sess. (N.Y. 2016). See also Avery Hartmans, *Governor Cuomo Just Signed a Bill That Could Deal a Huge Blow to Airbnb in New York*, BUSINESS INSIDER (Oct. 21, 2016, 3:12 PM), <http://www.businessinsider.com/gov-cuomo-signed-new-york-airbnb-bill-2016-10>.

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short-term rental marketplace. Internationally, Berlin restricted Airbnb's prevalence with its Act on the Prohibition of Illegal Repurposing of Housing.<sup>29</sup> The law, effective May 2016, purports to address the housing shortage in the city by prohibiting individuals from renting out their entire home without a permit.<sup>30</sup> Permits are not readily available, as an applicant must demonstrate a countervailing private interest, outweighing public policy, to be granted a permit.<sup>31</sup> As a means to ensure compliance, the violation of the legislation carries a fine of €100,000.<sup>32</sup> Airbnb sought an exemption from the legislation, but Berlin's Parliamentary State Secretary for Construction and Housing in Berlin refused.<sup>33</sup> As a result of the legislation, Airbnb's listings of available rental spaces in Berlin dropped by forty percent.<sup>34</sup> Domestically, San Francisco, Airbnb's principal place of business,<sup>35</sup> amended its Administrative and Planning Codes to allow for a regulated short-term rental market for permanent addresses.<sup>36</sup> In accordance with the ordinance, San Francisco Mayor Edwin M. Lee articulated "San Franciscans may legally rent their primary residential unit for periods of less than 30 nights with a valid Short-Term Residential Rental Registration."<sup>37</sup> Unlike the political measure in Berlin, the San Francisco ordinance places the burden of violating the legislation on the

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29. Jenny Gesley, *Global Legal Monitor*, LIBRARY OF CONGRESS (May 24, 2016), <http://www.loc.gov/law/foreign-news/article/germany-law-restricting-airbnb-and-other-vacation-rentals-takes-effect-in-berlin/>.

30. *Id.*

31. *Id.*

32. Matt Payton, *Berlin Stops Airbnb Renting Apartments to Tourists to Protect Affordable Housing*, INDEPENDENT (May 1, 2016), <http://www.independent.co.uk/news/world/europe/airbnb-rentals-berlin-germany-tourist-ban-fines-restricting-to-protect-affordable-housing-a7008891.html>.

33. Gesley, *supra* note 29.

34. Gesley, *supra* note 29.

35. Airbnb, Inc., Notice of Exempt Offering of Securities (Form D) (Oct. 23, 2012), [https://www.sec.gov/Archives/edgar/data/1559720/000155972012000002/xslFormDX01/primary\\_doc.xml](https://www.sec.gov/Archives/edgar/data/1559720/000155972012000002/xslFormDX01/primary_doc.xml).

36. San Francisco Ordinance No. 218-14 (Oct. 7, 2014), <http://www.sfbos.org/ftp/uploadedfiles/bdsupvrs/ordinances14/o0218-14.pdf>. San Francisco has opened the Office of Short-Term Rentals to enforce and inform citizens concerning the ordinance. See San Francisco Office of Short-Term Rentals, *About Short-Term Rentals* (last visited Jan. 1, 2018), <https://shorttermrentals.sfgov.org/about>.

37. City and County of S.F.: Off. of the Mayor, *Mayor Lee Announces New 'One-Stop Shop' Office of Short-Term Rental Administration & Enforcement* (July 2, 2015), <http://sfmayor.org/article/mayor-lee-announces-new-“one-stop-shop”-office-short-term-rental-administration-enforcement>.

short-term rent-sharing platform.<sup>38</sup> To counter this action taken by San Francisco, Airbnb filed a federal lawsuit claiming the city ordinance violates its First Amendment rights.<sup>39</sup> The company filed another suit against the city of Anaheim regarding its rental regulations paralleling San Francisco's ordinance.<sup>40</sup> Legal scholars stipulated that Airbnb statistically stood a good chance of winning on the federal level, but likewise articulated a state or local government's ability to regulate for the health and safety of its populace.<sup>41</sup> Ultimately, while the city of Anaheim opted not to enforce its ordinance when challenged by Airbnb,<sup>42</sup> San Francisco remained steadfast against the short-term rent-sharing company and found favor with the court.<sup>43</sup> The parties settled the dispute, but the result is nonetheless significant.<sup>44</sup> Under the settlement agreement, Airbnb, along with a co-plaintiff HomeAway,<sup>45</sup> will give city officials access to

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38. San Francisco Ordinance, *supra* note 36, at §41.A6. Significantly, this would ensure that Airbnb and similar companies bear the consequences for host violations.

"If the City is the prevailing party in any civil action under this subsection (d): an Owner, *Hosting Platform*, or Business Entity in violation of this Chapter 41A may be liable for civil penalties of not more than \$1,000 per day for the period of the unlawful activity." *Id.* (emphasis added).

39. *Airbnb, Inc. v. City & Cty. of San Francisco*, 217 F. Supp. 3d 1066 (N.D. Cal. 2016); See Eric Newcomer, *Airbnb Sues Hometown San Francisco to Block Rental Rules*, BLOOMBERG TECHNOLOGY (June 27, 2016), <https://www.bloomberg.com/news/articles/2016-06-27/airbnb-is-suing-hometown-san-francisco-to-block-rental-rules>.

40. Hugo Martin, *Airbnb Sues Anaheim over Law that makes the Rental Site Liable for Hosts Who Violate City Law*, L.A. TIMES (Jul. 28, 2016, 3:40 PM), <http://www.latimes.com/business/la-fi-airbnb-anaheim-20160728-snap-story.html>. See City of Anaheim Ordinance No. 6384 (May 13, 2014), [http://local.anaheim.net/docs\\_agend/questys\\_pub/8070/8100/8101/10436/10516/1.%20Ordinance%20\(Regulations%20and%20Ban%20on%20New%20STR\)%20-%20redlined10516.pdf](http://local.anaheim.net/docs_agend/questys_pub/8070/8100/8101/10436/10516/1.%20Ordinance%20(Regulations%20and%20Ban%20on%20New%20STR)%20-%20redlined10516.pdf). See also San Francisco Ordinance, *supra* note 36, at § 41.A6.

41. *Airbnb, Inc.*, 217 F. Supp. 3d at 1066.

42. Lily Leung, *Anaheim Won't Fine Websites like Airbnb for Illegal Short-Term Rental Listings*, THE ORANGE COUNTY REGISTER (Aug. 23, 2016, 9:43 AM), <http://www.ocregister.com/articles/city-726671-term-short.html>.

43. The presiding U.S. District Judge James Donato stipulated that Airbnb's First Amendment violation argument was moot because San Francisco's act "was not motivated by a desire to suppress speech." Dan Levine & Heather Somerville, *Judge Rejects Airbnb's Bid to Halt San Francisco's Ordinance*, REUTERS (Nov. 8, 2016, 7:26 PM), <http://www.reuters.com/article/us-airbnb-sanfrancisco-ruling-idUSKBN1332OE>.

44. Dennis J. Herrera, *Herrera Repels Legal Challenge to Short-Term Rental Law, Secures Settlement with Airbnb and HomeAway*, S. F. CITY ATTORNEY'S OFFICE (May 1, 2017), <https://www.sfcityattorney.org/2017/05/01/herrera-repels-legal-challenge-short-term-rental-law-secures-settlement-airbnb-homeaway/>.

45. HomeAway is another short-term rent sharing platform. HOMEAWAY, <https://www.homeaway.com> (last visited May 14, 2018).

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sufficient information about hosts listing their individual properties on the particular rent-sharing platform to allow the city to determine compliance with its ordinance.<sup>46</sup>

Though only state and local governments have, at this point, initiated legal action, federal intervention may be on the horizon as three United States Senators, including Elizabeth Warren, recently wrote to the Federal Trade Commission (“FTC”) encouraging investigation of Airbnb and other similar websites.<sup>47</sup> Furthermore, the senators made sure to bring Airbnb’s issues with racism to the attention of the FTC.<sup>48</sup> Building upon the efforts of Senator Warren and her counterparts, in October 2016, local representatives from cities like San Francisco and New York addressed a letter to then FTC Chairwoman, Edith Ramirez, urging the collection of data on operators within the short-term renting marketplace.<sup>49</sup> Requests for federal investigation are not likely to diminish.<sup>50</sup>

### B. Discrimination within Airbnb

Internally, Airbnb also faces challenges with user testimonials that reflect flaws within its market framework. In one instance, a renter refused to vacate the host’s home for some time, and only left after the host offered to pay the renting couple \$1700.<sup>51</sup> Another unfortunate scenario took place when an Australian host rented her home for a holiday and

46. Herrera, *supra* note 44. Hugo Martin, *Airbnb, HomeAway Settle Rental-Registration Lawsuit Against San Francisco*, L.A. TIMES (May 01, 2017), <http://beta.latimes.com/business/la-fi-airbnb-san-francisco-20170501-story.html>.

47. Eric Newcomer, *U.S. Senators Ask FTC to Probe Airbnb’s Impact on Housing*, BLOOMBERG TECHNOLOGY (July 13, 2016), <https://www.bloomberg.com/news/articles/2016-07-13/u-s-senators-ask-ftc-to-probe-airbnb-s-impact-on-housing>.

48. *Id.* The company’s issues with discrimination are detailed further in the note, but largely deal with discriminatory interactions between a host and potential renter on the basis of race, sex, etc. See *infra* notes 54-75 and accompanying text.

49. David McCabe, *Airbnb Foes Mobilize in Washington*, THE HILL (Oct. 16, 2016, 8:00 AM), <http://thehill.com/policy/technology/301136-airbnb-foes-mobilize-in-washington>.

50. Neal Kwatra, the chief strategist for the Share Better coalition against Airbnb articulated that “increasingly I think you’re going to see the requests for federal intervention.” Herrera, *supra* note 44.

51. Jelisa Castrodale, *Woman Forced to Pay \$1,700 to Get Rid of Nightmare Airbnb Renters*, USA TODAY (May 19, 2015, 9:00 AM), <https://www.usatoday.com/story/travel/roadwarriorvoices/2015/05/19/woman-forced-to-pay-1700-to-get-rid-of-nightmare-airbnb-renters/83207226/>.



discovered that it had been transformed into a brothel.<sup>52</sup>

However, the prevailing critique of Airbnb is not on stories of poor host experiences, but rather on the issue of discrimination. Primarily, discrimination for the company presents itself in the context of the interactive exchanges between host and guest.<sup>53</sup>

After a trend of consistent denial by Airbnb hosts, persistent renter Quirtina Crittenden, a twenty-three year old African American woman, publicly voiced her frustrating experience online using the hashtag “#AirbnbWhileBlack.”<sup>54</sup> After feedback articulating that Crittenden’s experience was not an isolated occurrence, Crittenden tested her theory.<sup>55</sup> Given that responses often cited the racial bias as linked to Airbnb’s policy requiring both hosts and guests to have profile pictures, Crittenden shortened her listed first name to ‘Tina’ and used a landscape photograph as her profile picture.<sup>56</sup> As a result of her minor changes, Crittenden states that she has since “never had any issues on Airbnb.”<sup>57</sup>

Despite the fact Crittenden found satisfaction in the simple solution of altering her name and photograph,<sup>58</sup> Gregory Selden, a twenty-five year old African American male, filed a federal lawsuit against Airbnb based

52. Raymond Walsh, *Woman Shocked to Discover Prostitute Turned her Airbnb Rental into a Brothel*, USA TODAY (July 2, 2015, 10:15 AM), <https://www.usatoday.com/story/travel/roadwarriorvoices/2015/07/02/woman-shocked-to-discover-prostitute-turned-her-airbnb-rental-into-a-brothel/83207390/>.

53. See *infra* notes 54-75 and accompanying text.

54. Shankar Vedantam, *#AirbnbWhileBlack: How Hidden Bias Shapes The Sharing Economy*, NAT’L PUB. RADIO (Apr. 26, 2016, 12:10 AM), <http://www.npr.org/2016/04/26/475623339/-airbnbwhileblack-how-hidden-bias-shapes-the-sharing-economy>. Crittenden is the originator of this hashtag. Hannah Jane Parkinson, *#AirBnBWhileBlack Hashtag Highlights Potential Racial Bias on Rental App*, THE GUARDIAN (May 5, 2016), <https://www.theguardian.com/technology/2016/may/05/airbnbwhileblack-hashtag-highlights-potential-racial-bias-rental-app>. The hashtag remains a popular device for individuals to collectively voice their experiences. See Sasha Cotterell (@SashaCotterell), TWITTER (Nov. 15, 2016, 7:41 PM), <https://twitter.com/SashaCotterell/status/798732706376916992> (showing picture of house listing reading “[n]o members of the exclusionary and group Black Lives Matter”).

55. Vedantam, *supra* note 54.

56. Vedantam, *supra* note 54.

57. Vedantam, *supra* note 54. See @lesedik, TWITTER (Nov. 10, 2016, 12:36 PM), <https://twitter.com/lesedik/status/796813872120242176> (a young African American male was rejected over twenty times when using a photo of himself, but able to rent when using a photo of a city).

58. Author’s assertion stems from the fact that Crittenden still chooses to use Airbnb after changing her name and profile picture on the platform. See *supra* notes 56-57 and accompanying text.

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on violations of the Civil Rights Act of 1964 following his own investigation into the discriminatory practices of hosts against him.<sup>59</sup> Such prejudiced actions by a host are said to run counter to Airbnb's policies as a company,<sup>60</sup> yet company policies restrict its user base from striving for a mending of the broken system.<sup>61</sup> With Airbnb able to contractually avoid going to court, it is debatable whether the company possesses any incentive to create a policy that both has broad appeal, such as professing increased efforts to fight against discrimination, but more importantly also has an actual positive effect on the discriminatory practices of hosts.<sup>62</sup>

Though Crittenden and Seldon's stories are anecdotal, they are representative of the issue of discrimination in short-term renting at the macro level, that is, system-wide discrimination. Juxtaposed to the approach taken by Crittenden and Seldon as guests, researchers at Harvard Business School sought to analyze the existence of discrimination within Airbnb by observing the discrimination faced by landlords, or hosts, in the short-term renting marketplace.<sup>63</sup> With a focus on hosts in New York City, the researchers analyzed the host's profile picture along with the location's

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59. Erik Larson & Andrew Harris, *Airbnb Sued, Accused of Ignoring Host's Race Discrimination*, SYDNEY MORNING HERALD (May 19, 2016), <http://www.smh.com.au/technology/apps/airbnb-sued-accused-of-ignoring-hosts-racial-discrimination-20160518-goyjcg.html>. See *Selden v. Airbnb Inc.*, 2016 WL 6476934 (D.D.C. 2016).

60. Larson & Harris, *supra* note 59. Nick Papas, an Airbnb spokesman stated "We strongly believe that racial discrimination is unacceptable and it flies in the face of our mission to bring people together. . . . We are taking aggressive action to fight discrimination and eliminate unconscious bias in our community." *Id.*

61. *Airbnb Terms of Service*, § 34 *Dispute Resolution*, AIRBNB (Oct. 27, 2016), [https://www.airbnb.com/terms?hide\\_nav=true](https://www.airbnb.com/terms?hide_nav=true) (requires the waiving of right to form a class action in order to participate in the service). See also Katie Benner, *Airbnb Vows to Fight Racism, But Its Users Can't Sue to Prompt Fairness*, N.Y. TIMES (June 19, 2016), <http://www.nytimes.com/2016/06/20/technology/airbnb-vows-to-fight-racism-but-its-users-cant-sue-to-prompt-fairness.html> ("Airbnb requires that people agree to waive their right to sue, or to join in any class-action lawsuit or class-action arbitration, to use the service.").

62. Katie Benner, *Federal Judge Blocks Racial Discrimination Suit Against Airbnb*, N.Y. TIMES (Nov. 1, 2016), <http://www.nytimes.com/2016/11/02/technology/federal-judge-blocks-racial-discrimination-suit-against-airbnb.html> (the judge held that the company's arbitration policy agreed to by company users prohibits lawsuits). See also Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. TIMES (Oct. 31, 2015), <http://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html> (quoting Boston federal judge William G. Young: "[o]minously, business has a good chance of opting out of the legal system altogether and misbehaving without reproach.").

63. BENJAMIN EDELMAN & MICHAEL LUCA, *DIGITAL DISCRIMINATION: THE CASE OF AIRBNB.COM* (2014), <http://dx.doi.org/10.2139/ssrn.2377353>.

price and quality of the rental as a whole.<sup>64</sup> Results reflected that non-black landlords tend to charge twelve percent more than black hosts for an equivalent rental space.<sup>65</sup> The researchers suggest that these results reflect an innate discriminatory nature present in the business model of Airbnb because they ask users to post photographs of himself/herself to facilitate the exchange;<sup>66</sup> an experience that closely mimics Crittenden's and Seldon's.

Continuing the analysis of the prevalence of discrimination in the short-term rental market, the Harvard researchers conducted an additional study into Airbnb by observing hosts' response to 6,400 renting requests sent to real world hosts in cities: Baltimore, Dallas, Los Angeles, St. Louis, and Washington.<sup>67</sup> The requests sent were identical, but the names of the profiles alternated between traditionally African American and Caucasian names.<sup>68</sup> The field experiment yielded results showing that potential renters with readily identifiable African American names were sixteen percent less likely to be chosen for a room relative to the same renters with seemingly Caucasian sounding names.<sup>69</sup>

Prejudice within the Airbnb platform, however, is not merely limited to race. In fact, Shadi Petosky experienced discrimination via Airbnb when a host denied renting to Petosky because of her status as a transgender woman.<sup>70</sup> Though Petosky internally complained to the company about her experience, Airbnb later promoted the host to 'super host' status, a title given to hosts that typically attain five star reviews.<sup>71</sup> Airbnb later banned

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64. *Id.*

65. *Id.*

66. *Id.*

67. Benjamin Edelman, Michael Luca & Dan Svirsky, *Racial Discrimination in the Sharing Economy: Evidence from a Field Experiment*, 9 AM. ECON. JOURNAL: APPLIED ECON. 1, 5 (2017), <https://www.aeaweb.org/articles?id=10.1257/app.20160213>.

68. *Id.* at 2.

69. *Id.* at 1.

70. Jessica Guynn, *Airbnb Under Fire for Host Who Denied Lodging to Trans Woman*, USA TODAY (June 6, 2016, 4:35 PM), <http://www.usatoday.com/story/tech/news/2016/06/06/airbnb-under-fire-for-host-who-rejected-trans-woman/85521750/>. Of note is the host was in Minnesota. *Id.* Minnesota is one of twenty-three states that has non-discrimination laws. See American Civil Liberties Union, *Non-Discrimination Laws: State by State Information-Map*, AM. CIVIL LIBERTIES UNION, <https://action.aclu.org/maps/non-discrimination-laws-state-state-information-map> (last visited February 7, 2018) (listing all states with some form of non-discrimination law).

71. Guynn, *supra* note 70.

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the host based on Petosky's issue, but such action only took place after Petosky publicized her encounter over social media, nearly a year after the event took place.<sup>72</sup>

Despite the trend of researching discrimination on the site by creating multiple accounts, this method actually violates Airbnb's policy of allowing guests to only utilize one account,<sup>73</sup> and in fact the company suspended a researchers' access on the basis of this policy.<sup>74</sup> Though there is no evidence Airbnb intended to thwart researchers' effort to monitor the platform with the policy regarding multiple user accounts since it is purely a function to eliminate bots and fraudulent users, its effect of stymying research is noteworthy.<sup>75</sup>

### C. Civil Rights Act of 1964

As exhibited by Seldon's argument against Airbnb,<sup>76</sup> a federal initiative against discrimination currently exists, the Civil Rights Act of 1964.

Specifically, Title II of this legislation expressly prohibits discrimination on the basis of "race, color, religion, or national origin" by any place of public accommodation defined as "any inn, hotel, motel, or other establishment which provides lodging to transient guests."<sup>77</sup> Airbnb exists as company striving to provide lodging to individuals as they travel to destinations around the world. Certainly, this act should regulate such a business.

### D. New Anti-Discriminatory Policies of Airbnb

In response to widespread criticism following multiple claims of discrimination, Airbnb decided to reactively<sup>78</sup> address the growing

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72. Guynn, *supra* note 70.

73. *Terms of Service*, AIRBNB, <https://www.airbnb.co.uk/terms> (last visited Jan. 20, 2017).

74. Sam Levin, *Airbnb Blocked Discrimination Researcher over Multiple Accounts*, THE GUARDIAN (Nov. 17, 2016, 7:00 AM), <https://www.theguardian.com/technology/2016/nov/17/airbnb-while-black-discrimination-harvard-researcher-banned>.

75. *See id.* ("Academics and regular users were only able to expose discrimination on the site by creating fake accounts to test how hosts responded to users of different races.")

76. *See supra* note 59 and accompanying text.

77. 42 U.S.C. § 2000a(b)(1) (2012).

78. *See* James Gwartney & Charles Haworth, *Employer Costs and Discrimination: The Case of*

complaints by modifying its policies.<sup>79</sup> To begin this transformation of its policies, Airbnb hired former United States Attorney General Eric Holder to help the company draft new anti-discrimination policies.<sup>80</sup> Additionally, the company brought in Laura Murphy, former head of the American Civil Liberties Union's Washington office, to conduct an internal review of the company's current policies and make suggestions for change.<sup>81</sup> In the words of Airbnb's CEO, Brian Chesky, the goal of the company is to make the discrimination policy held by Airbnb "stronger."<sup>82</sup>

Murphy's report highlighted areas of weakness for Airbnb, and articulated policy changes the company should make moving forward in order to live up to its theme of allowing its guests to belong anywhere.<sup>83</sup> Though Airbnb had committed to President Obama's Tech Inclusion Pledge,<sup>84</sup> Murphy found that the company lacks diversity.<sup>85</sup> In response, Airbnb internally has committed to raising its number of employees from underrepresented populations to a minimum of eleven percent by end of year 2017.<sup>86</sup> The company also will assemble a workforce directly tasked with full-time monitoring of the marketplace and working to eliminate any

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*Baseball*, 82 J. POL. ECON. 873, 873 (1974) ("Economic theory implies that employers who discriminate are at a competitive disadvantage relative to firms that follow a less discriminatory policy.") See Ray Warren Symposium (@rwsymp), TWITTER (Nov. 10, 2016, 12:34 PM), <https://twitter.com/rwsymp/status/796813405025759232> ("Airbnb only acts against racism when they started getting lawsuits and when #airbnbwhileblack started trending.").

79. Brian Chesky, *An Update on the Airbnb Anti-Discrimination Review*, AIRBNB BLOG (July 20, 2016), <https://blog.airbnb.com/an-update-on-the-airbnb-anti-discrimination-review/> ("I sincerely believe that this [discrimination] is the greatest challenge we face as a company").

80. Abha Bhattarai, *Airbnb Hires Eric Holder to Help Company Fight Discrimination*, WASH. POST (July 20, 2016), <https://www.washingtonpost.com/news/business/wp/2016/07/20/eric-holder-joins-airbnb-to-help-company-fight-discrimination/>.

81. *Id.*

82. Chesky, *supra* note 79 ("While we have a policy that prohibits discrimination, we want this policy to be stronger.").

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

84. *Tech Inclusion Pledge*, WHITE HOUSE (June 22, 2016), available at <https://www.whitehouse.gov/sites/whitehouse.gov/files/images/Blog/Tech-Inclusion-Pledge-Letter-6-22-16.pdf>. See also Samantha Rhodes, *Airbnb, Lyft Among Tech Companies Pledging to White House Diversity Initiative*, CNET (June 22, 2016, 8:30 PM), <https://www.cnet.com/news/airbnb-lyft-among-tech-companies-pledging-to-white-house-diversity-initiative/>.

85. Murphy, *supra* note 83, at 17.

86. Murphy, *supra* note 83, at 24.

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bias that may exist.<sup>87</sup>

As part of the company's newfound "Airbnb Community Commitment"<sup>88</sup> initiative, Airbnb has enacted a new nondiscrimination policy.<sup>89</sup> The policy stresses Airbnb's core principles of "inclusion and respect" which are necessary to the success of its marketplace.<sup>90</sup> Implicit within this inclusive culture is the prohibition of discrimination by a host against a potential renter on the basis of "race, color, ethnicity, national origin, religion, sexual orientation, gender identity, or marital status."<sup>91</sup> Additionally, hosts cannot discriminate against those with a disability.<sup>92</sup> To enforce its policy, Airbnb asserts that it has the authority to suspend users that violate its rules.<sup>93</sup> As of November 1, 2016 the company instituted the second phase of its community commitment program, requiring users of the platform to affirmatively agree to a provided statement as a means to continue access to the short-term rental marketplace.<sup>94</sup> Further, under Airbnb's new nondiscrimination policies, the company will work to increase the use of Instant Book, a service where renters can book a place without host specific approval,<sup>95</sup> and strive to decrease the prominence of profile photographs during the booking process.<sup>96</sup>

Despite these implemented policies, scholars and skeptics alike believe

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87. Murphy, *supra* note 83, at 24.

88. Murphy, *supra* note 83, at 19.

89. *Nondiscrimination Policy*, AIRBNB, [https://www.airbnb.com/terms/nondiscrimination\\_policy](https://www.airbnb.com/terms/nondiscrimination_policy) (last visited Jan. 04, 2018).

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. Murphy, *supra* note 83, at 10. Statement reads:

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

Murphy, *supra* note 83, at 10

95. *What Is Instant Book?*, AIRBNB, <https://www.airbnb.com/help/article/523/what-is-instant-book> (last visited Jan. 20, 2017).

96. Murphy, *supra* note 83, at 11. Airbnb still upholds the belief that profile photographs for guests and hosts are "an important feature that help build relationships." Murphy, *supra* note 83, at 17.

more can be done in order to truly fight against the established discrimination present in the short-term rent-sharing marketplace.<sup>97</sup>

### *E. Rise of Other Rent-Sharing Competitors*

In the spirit of capitalism, where there is hole in a particular market that is unaddressed or a weakness in a company than can be corrected, new businesses will arise; the short-term rent-sharing marketplace is no exception. Given the notoriety of the discrimination problems faced by Airbnb with the prevalence of the #AirbnbWhileBlack movement<sup>98</sup> and the Harvard publications,<sup>99</sup> two such companies formed in order to address the issue.<sup>100</sup>

Innclusive arose from a discriminatory encounter experienced first-hand by the company's founder, Rohan Gilkes.<sup>101</sup> Like other individuals of color,<sup>102</sup> Gilkes was denied a room by a host who later agreed to rent the same space to a white female, who unbeknownst to the host, was Gilkes' friend.<sup>103</sup> Gilkes published his account online and upon hearing his experience was not an isolated occurrence, he developed Innclusive.<sup>104</sup>

97. Ruomeng Cui, Jun Li and Dennis J. Zhang, *Discrimination with Incomplete Information in the Sharing Economy: Field Evidence from Airbnb*, (Dec. 8 2016) (unpublished, under review), <https://poseidon01.ssrn.com/delivery.php?ID=561029122115112118025097081014070085025024069039034031127023090068083116095081067102017000125011012022037010122123079070117066111037074093092107111068065010125003107039087066024085070065009125007071064105109115086007068110007123065093113092009093099114&EXT=pdf> (finding that reviews of the individual users limit discrimination as does increased shared information between parties). See Julia Airey, *How Airbnb's New Policies Could Actually Hurt Hosts of Color*, TECHNICAL D.C. (Nov. 16, 2016, 11:31 AM), <http://technical.ly/dc/2016/11/16/airbnb-new-policies-discrimination-synta-keeling/> (quoting Synta Keeling, a half-Filipino and half African-American host on Airbnb, as saying "I think the new [Airbnb] policy is a great step forward . . . but [Airbnb needs] to go back and do more for hosts, who are minority and/or live in majority minority neighborhoods").

98. Vedantam, *supra* note 54.

99. Edelman, Luca & Svirsky, *supra* note 67.

100. See NOIRBNB, <http://noirbnb.com/> (last visited Feb. 8, 2017); INNCLUSIVE, <https://innclusive.com/> (last visited Feb. 8, 2017). Given that the Noirbnb platform is currently upgrading, this Note will solely focus its discussion on Innclusive.

101. Rohan Gilkes, *Our Story*, INNCLUSIVE, <https://www.innclusive.com/our-story> (last visited Jan. 1, 2018).

102. See Vedantam, *supra* note 54 and accompanying text.

103. Gilkes, *supra* note 101.

104. Gilkes, *supra* note 101. See also Rohan Gilkes, *I Read About This Phenomenon of Black People Being Rejected on Airbnb. Here's My Story of What Happened the Next Day!*, IMGUR, <http://imgur.com/gallery/4NP4n> (last visited on Jan. 1, 2018).

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In order to protect against discrimination, Innclusive stipulates that it will only approve hosts to list their individual properties after the platform has manually tracked the host's listing(s) on other networks and checked all reviews.<sup>105</sup> Furthermore, the site will not display the photograph of the guest until after confirmation of the booking and will additionally restrict hosts from denying one guest lodging for specific dates but allowing another guest to book the space for those same dates.<sup>106</sup>

## II. ANALYSIS

### *A. Effectiveness of Airbnb's New Nondiscrimination Policy*

Though the policies implemented by Airbnb are indeed a step in the right direction,<sup>107</sup> a change in policy does not guarantee dissolution of the discrimination issue. Striving for a greater use of the Instant Book<sup>108</sup> function helps to minimize the likelihood of discrimination during the booking process, but this success is only a function of its percentage of use. For guests that still utilize the normal booking system, and hosts that have not allowed instant booking, a reliance on names and photographs by users is still a factor.<sup>109</sup> Even if photographs were entirely removed from the site, hosts still have the ability to discriminate based upon a guest's name.<sup>110</sup> Ultimately the effectiveness of Airbnb's new policies rest in its enforcement against discriminatory parties, which in the past has been *laissez faire*,<sup>111</sup> but will likely improve under the company's new monitoring committee.<sup>112</sup> Again, Airbnb's progress is inspiring, but to ensure that Airbnb continues to strive to foster an inclusive environment

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105. *How Innclusive Addresses Issues of Discrimination*, INNCLUSIVE, <https://www.innclusive.com/why-innclusive> (last visited on March 24, 2018).

106. *Id.*

107. *Nondiscrimination Policy*, *supra* note 89. See also Murphy, *supra* note 83; Airey, *supra* note 97.

108. *What Is Instant Book?*, *supra* note 95.

109. See generally Murphy, *supra* note 83. Airbnb is working to reduce the prominence of profile pictures on the site, however the company likewise continues to believe in the importance of the profile photograph. Murphy, *supra* note 83.

110. Edelman, Luca & Svirsky, *supra* note 67.

111. Guynn, *supra* note 70.

112. Murphy, *supra* note 83.



for all users, external regulation, apart from the company's self-regulation, is imperative.

*B. Title II of the Civil Rights Act of 1964*

Title II of the Civil Rights Act of 1964 provides the necessary tool by which to regulate discrimination within the sharing economy because its primary focus is to stop discrimination in the public accommodation network.<sup>113</sup> This goal cannot be achieved by allowing businesses in the rent-sharing economy to escape liability for the discriminatory acts of hosts on its platform. It is a fallacy to analogize Airbnb with anything less than its primary competitor, the hotel industry.<sup>114</sup> Like a hotel, guests of Airbnb book their stays online, show up to the indicated address, and receive temporary lodging. The hosts of Airbnb, like that of hotel employees, are but the agents of the principal. As such, Airbnb needs to be liable for the actions of its host-employees.

The fact that Title II was enacted before the advent of the internet, and thus could not have foreseen the formation of businesses like Airbnb, emphasizes the need to clarify the legislation. If Congress does not clarify Title II's regulatory impact on short-term renting platforms, it will effectively be allowing the issues with Airbnb to persist, if not grow, as the company expands. Allowing discrimination in the hotel and short-term rental sphere is at odds with Title II's purpose—eradicating discrimination in businesses that accommodate the public.<sup>115</sup> Thus Congress cannot hesitate to investigate Airbnb and similar rent-sharing companies, as encouraged by a group of senators,<sup>116</sup> and develop a plan for federal regulation that seeks to hold the company liable for the actions of its hosting populace.

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113. 42 U.S.C. § 2000a(b)(1) (2012).

114. Trejos, *supra* note 21. Indeed, Seldon made such an analogy in his case against Airbnb. *Selden v. Airbnb Inc.*, 2016 WL 6476934 (D.D.C. 2016).

115. 42 U.S.C. § 2000a(b)(1) (2012).

116. Newcomer, *supra* note 47.

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### C. State Regulation

Redress for violations of civil rights at the state and local government level represents an approach to addressing the issues of discrimination for Airbnb that, though fragmented, can still be effective. As more and more constituents voice outrage for their discriminatory experiences on Airbnb,<sup>117</sup> state and local governing structures are more likely to both listen and be able to quickly enact legislation benefitting the oppressed. Furthermore, if local or state regulation takes effect, the efforts of representatives urging federal intervention in the short-term rent-sharing marketplace may increase and in fact spur federal action.<sup>118</sup> As proven by San Francisco, a city has the legal authority to effectively enact legislation that limits the business impact of a particular online business platform.<sup>119</sup> The states that currently have non-discrimination laws<sup>120</sup> need to remain vigilant and be sure to enforce such laws when violated by the agents of Airbnb, its hosts.

### D. Power of the Free Market

The influence and impact of the free market cannot be underestimated. Given market incentive, Airbnb may be forced to further self-regulate, as it did when creating its 2016 nondiscrimination policies.<sup>121</sup> However, the consumer's lack of ability to challenge marketplace injustice through the court system drastically narrows the avenues for change.<sup>122</sup> Despite the limiting factor of Airbnb's arbitration clause, granted by courts to have binding effect,<sup>123</sup> bringing a lawsuit, especially if done in mass amounts, could force internal oversight as means to avoid high cost of legal matters.<sup>124</sup> Given the rise of companies like Innclusive, founded in the

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117. See generally Newcomer, *supra* note 47; McCabe, *supra* note 49.

118. Newcomer, *supra* note 47; McCabe, *supra* note 49.

119. San Francisco Ordinance, Cal., 218-13 (Oct. 7, 2014). See also Levine & Somerville, *supra* note 43; Herrera, *supra* note 44.

120. See generally American Civil Liberties Union, *supra* note 70.

121. See generally Murphy, *supra* note 83.

122. See *Airbnb Terms of Service*, *supra* note 61; Benner, *supra* note 61; Benner, *supra* note 62; Silver-Greenberg & Gebeloff, *supra* note 62.

123. Benner, *supra* note 62.

124. See Jared Bilski, *Last Year's Top Discrimination Suits Cost Employers \$364M*, CFO DAILY

wake of Airbnb's discrimination issues,<sup>125</sup> competition can likely ensure that Airbnb remains vigilant in its renewed emphasis on fighting discrimination within its market.

### III. PROPOSAL

#### *A. A Small Clarification Regarding the Language of Title II of the Civil Rights Act of 1964 Would Effectively Serve to Regulate the Burgeoning Short-Term Rent-Sharing Economy*

In understanding Airbnb's impact on the tourism accommodation marketplace,<sup>126</sup> and thereby factoring in the detriment discrimination can have on its platform, federal legislators have a legislative path with two alternative rationales that can be pursued in order to externally regulate Airbnb and the short-term rent-sharing market as a whole. To monitor Airbnb, Congress should clarify that Title II in its current form encompasses short-term rent-sharing platforms like Airbnb. This clarification could either analogize the short-term renting provider with the other entities within the accommodation market, primarily hotels,<sup>127</sup> or alternatively could refuse to label Airbnb as a hotel and clarify that it falls within Title II's catchall provision of "other establishment[s] which provides lodging to transient guests."<sup>128</sup> Though interpretation of legislation is traditionally the role of the judiciary, because guests are not able to take their matters to court,<sup>129</sup> Congress should clarify its intent regarding Title II and how this applies to the modern lodging economy in order to make the issue moot. This simple congressional action aligns with Title II's purpose in that it would stop discrimination in the newfound public accommodation ecosystem.<sup>130</sup>

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NEWS (Jan. 11, 2001), <http://www.cfodailynews.com/last-years-top-discrimination-suits-cost-employers-346m/>.

125. See *supra* notes 100-105 and accompanying text.

126. Guttentag, *supra* note 21.

127. See *Selden v. Airbnb Inc.*, 2016 WL 6476934 (D.D.C. 2016).

128. 42 U.S.C. § 2000a(b)(1).

129. See Benner, *supra* note 61; Benner, *supra* note 62.

130. 42 U.S.C. § 2000a(b)(1).

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*B. Without Federal Regulation, State and Local Governments Could  
Impose Liability on Airbnb for the Actions of Hosts Operating on Their  
Platform*

In their individual capacities to act as legal laboratories,<sup>131</sup> state and local governments share a unique capability of political experimentation unachievable at the federal level. For this reason, if federal regulation proves too problematic or too delayed to implement, state or local agencies can address the issue of discrimination through legislation of their own. The quickness of the local route is made all the simpler by the ability to emulate the regulatory framework for Airbnb and similar short-term rent-sharing platforms already in place in cities like San Francisco<sup>132</sup> and Anaheim.<sup>133</sup>

For discrimination levied against classes of individuals identified by sexual orientation such as members of the LGBTQ community,<sup>134</sup> the existing law is present in a slight minority of states in the form of anti-discrimination laws.<sup>135</sup> Via the theory of respondeat superior, if states that currently have this type of legislation may hold Airbnb liable as employer of its hosting agents, and thus a desire to avoid liability would create an incentive for the company to monitor its marketplace more closely. Though the fines may be small in isolation, in the aggregate,<sup>136</sup> they will represent a significant deterrent for Airbnb to become apathetic towards the behavior of its hosts.

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131. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (J. Brandeis dissenting) (“It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”).

132. San Francisco Ordinance, *supra* note 36 and accompanying text.

133. City of Anaheim Ordinance, *supra* note 40.

134. *Guynn*, *supra* note 70.

135. American Civil Liberties Union, *supra* note 70.

136. Relying on the New York Attorney General’s analysis, under this proposal Airbnb would be liable for the violation of seventy-two percent of the nearly 40,000 listings in New York City thought to be in violation of the state’s current law. *See Schneiderman*, *supra* note 26; *INSIDE AIRBNB*, *supra* note 26.

*C. Market Driven Competition, Where No Other Action Can Be Taken, Can Still Effectively Impact Airbnb's Policies and Actions for the Better*

Though not representative of a full regulation of the short-term rent-sharing market, where legislation is not forthcoming, the status quo can still work to pressure Airbnb into compliance with its non-discriminatory policies.<sup>137</sup> Capitalism fosters a competitive marketplace driven by consumer tendencies. To remain successful, a rational enterprise will track the market and be sure to comply with the sentiments of its consumers or user base. Here, it is vital for users within this market to recognize the continued discrimination of Airbnb hosts<sup>138</sup> and divert spending to other services in the short-term renting economy. Though the mobilization of a significant number of users could prove difficult, it is not impossible and may not even be necessary. As the issues with discrimination in the marketplace persist and become more well known, a loss in market share, or in the least, the perception thereof, certainly will drive company behavior.<sup>139</sup> Coverage of the #AirbnbWhileBlack movement<sup>140</sup> has inspired a change in Airbnb policies before, suggesting that if discrimination continues, the market can dictate change again. Though short-term rent sharing companies primarily focused on remedying discrimination issues, like Innclusive, remain in their infancy,<sup>141</sup> their presence in the marketplace and exposure in the media<sup>142</sup> provides a business alternative for consumers, and applies consistent pressure on Airbnb to constantly monitor itself.

#### CONCLUSION

Airbnb is a significant and financially secure player within the growing short-term rent-sharing economy.<sup>143</sup> Any issues the company currently

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137. Gwartney & Haworth, *supra* note 78.

138. Cotterell, *supra* note 54; @lesedik, *supra* note 57. Hosts continue to discriminate despite Airbnb's new anti-discrimination policies. @lesedik, *supra* note 57.

139. Ray Warren Symposium, *supra* note 78. *See also* Guynn, *supra* note 70.

140. *See supra* notes 54-62 and accompanying text.

141. *See supra* notes 100-106 and accompanying text.

142. *See supra* notes 100-106 and accompanying text.

143. Thomas, *supra* note 10.

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faces, largely that of discrimination, will only grow in number as the company continues its rise, and will not disappear without action. Though Airbnb has taken the initial step to curb discrimination on its platform,<sup>144</sup> to ensure its policies are effective and that Airbnb does not become complacent in its efforts, liability for failure must lay with the company. This liability is best placed on the company by federal action. Small clarifications in Title II of the Civil Rights Act of 1964<sup>145</sup> could readily impart liability on Airbnb for the discriminatory actions of its hosts. Alternatively, state and local governments can follow the model that San Francisco has put forth and make Airbnb liable when hosts violate a particular state's ordinance against discrimination.<sup>146</sup> As a last measure, the free market status quo, without any implementation of liability for Airbnb, could supply sufficient pressure on the company from a market share vantage point. It is well understood that discrimination of any sort is not a reasonable business model,<sup>147</sup> and thus if Airbnb begins to lose its foothold on the market, or believes it might lose its standing, the company will have an incentive to consistently work to actively resolve its discrimination issues.

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144. Murphy, *supra* note 83.

145. 42 U.S.C. § 2000a(b)(1) (2012).

146. San Francisco Ordinance, *supra* note 36 and accompanying text.

147. Gwartney & Haworth, *supra* note 78.