NOTES

"Free Speech for Me but Not for Airbnb": Restricting Hate-Group Activity in Public Accommodations

As digital services grow increasingly indispensable to modern life, courts grow inundated with novel claims of entitlement against these platforms. As narrow, formalistic interpretations of Title II permit industry leaders to sidestep equal access obligations, misinformed interpretations of First Amendment protections allow violent speech and conduct to parade uninhibited. Within the mistreatment of these two established doctrines lies a critical distinction: the former is in desperate need of modernization to fulfill its original intent, and the latter is in desperate need of restoration for the same ends. This climate creates conditions ripe for doctrinal upheaval.

This Note considers how the rising digital accommodation challenges traditional legal frameworks, particularly as hate groups exploit these new public squares. Analyzed through the lens of Airbnb—its role as a modern public accommodation, its prior experiences with invidious discrimination on its platform, and its confrontations with allegations of discrimination issued by patrons excluded for hate-group affiliation—this Note parses the tension between ensuring equal access and upholding free speech. In so doing, this Note offers a legal framework for analyzing when digital entities qualify as public accommodations under Title II, when accommodations may exclude patrons while upholding Title II values, and what defenses an accommodation may employ if a patron establishes a speech interest. Ultimately, this Note argues that the digital accommodation may legally exclude unprotected traits to meaningfully include those who are protected.

INTRODUCTION

After the 2017 "Unite the Right" rally was declared an unlawful assembly by Charlottesville officials, its chief organizer, Jason Kessler, claimed First Amendment violations by the city.[1] Kessler alleged that the Defendants "knew [of] and desired" for public hostility to generate

1. Kessler v. City of Charlottesville, 441 F. Supp. 3d 277, 280–81, 284 (W.D. Va. 2020).

counter-protestor violence; thus, they cited risk of violence as a proxy to silence controversial speech.[2] The judge dismissed the lawsuit upon determining that the state's actions were a reasonable response to public safety concerns at the deadly protest.[3] Indeed, despite framing his motives as merely an exercise in free speech, Kessler's subsequent civil-conspiracy trial revealed it was really the organizers who "knew [of] and desired" for violence to occur.[4]

As society scrambles to address a reinvigorated alt-right,[5] the alt-right strategically counterattacks by claiming personal-right violations.[6] In tandem with these classic free speech claims against government entities, these groups are also claiming that they are targets of outright discrimination by private entities that have opted to withhold services from hate groups. Kessler himself denounced the "racial targeting of white people for their ethnic advocacy" after Airbnb canceled multiple bookings linked to Unite the Right attendees, stating "[t]his is outrageous and should be grounds for a lawsuit."[7] Thus goes the argument: "*Free speech for me but not for thee*."[8]

For nearly sixty years, Title II of the Civil Rights Act of 1964 has prohibited discrimination in public accommodations based on race, color, religion, and national origin.[9] Originally designed to eliminate discriminatory practices by hotels and restaurants in interstate travel, courts have since expanded the scope of Title II's application to include

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2. *Id.* at 289 n.5.

3. *Id.* at 291, *dismissal aff'd*, No. 20-1704, 2022 U.S. App. LEXIS 35873 (4th Cir. Dec. 29, 2022).

4. *Id.* at 289 n.5; *see infra* notes 251–259 and accompanying text for civil conspiracy trial discussion.

5. This Note uses "alt-right" to refer to the ideology claimed by defendants and coconspirators in Kessler's civil conspiracy trial. Sines v. Kessler, No. 18-mc-80080, 2018 U.S. Dist. LEXIS 132054, at *3 (N.D. Cal. Aug. 6, 2018). Described by Plaintiffs as "white supremacist[s], white nationalist[s], and neo-Nazi[s]," groups and individuals generally intersect under the "alt-right" umbrella for the core belief that white identity is under attack. *Id.* at *3, *5 (quoting from online coconspirator statements: "[T]his is an attack on your racial existence. FIGHT BACK OR DIE.").

6. *See Kessler*, 441 F. Supp. 3d at 280 (alleging defendants committed a First Amendment violation by "restricting Plaintiffs' speech based on the hostile public reaction to the message of the event").

7. Kyle Swenson, *Airbnb Boots White Nationalists Headed to 'Unite the Right' Rally in Charlottesville*, WASH. POST (Aug. 8, 2017, 2:33 AM), https://www.washingtonpost.com/news/morning-mix/wp/2017/08/08/airbnb-boots-white-nationalists-headed-to-unite-the-right-rally-in-charlottesville/ [https://perma.cc/XPJ9-42HE].

8. *See* David French, *Free Speech for Me but Not for Thee*, ATLANTIC (Apr. 11, 2022), https://newsletters.theatlantic.com/the-third-rail/email/1eff62d6-d95e-49f2-8e85-5a8ac4333206/ [https://perma.cc/5CG8-PXRV] (examining a conservative shift toward "embracing the tactics that it once opposed," contradicting "decades of litigation and legislation" in the process).

9. 42 U.S.C. § 2000a(a).

a wide range of entities.[10] Forty-five states have adopted additional statutes, often expanding on protected classes and legal requirements.[11] As state laws evolve to protect traits like sexual orientation, fervent debate contemplates whether public accommodation laws infringe on First Amendment rights.[12]

Though the bulk of this debate is occupied by questions of constitutionality, a more fundamental question persists: *What constitutes a public accommodation?* While some self-assume qualifying status to infiltrate the Title II landscape for political impact litigation,[13] modern giants fade into the background. The lodging and transportation industries have found new form in the sharing economy, exemplified by players like Airbnb and Uber. But because these entities outsource homes and cars from the public, they remain "somewhere between the commercial sphere, where discrimination is strictly prohibited, and the intimate-relationship sphere, where discrimination . . . is beyond governmental reach."[14]

Evaluating Airbnb as a case study informs the legal treatment of modern public accommodations writ large. While Airbnb promotes intimacy in patron experience, it is far from intimate in form. Enjoying an annual revenue of $8.4 billion in 2022—a forty percent increase from 2021—the platform continues to expand.[15] Despite more recent clarity in the parallel landscape of Title III public accommodations under the Americans with Disabilities Act ("ADA"), the jurisprudence contemplating the intersection of virtual platforms and Title II remains convoluted.[16] The Supreme Court has recognized the need for broad

10. *See, e.g.*, Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 257 (1964) (describing Congress's intent in passing Title II as "dealing with . . . a moral problem [and] the disruptive effect that racial discrimination . . . had on commercial intercourse"); 303 Creative LLC v. Elenis, 6 F.4th 1160, 1172–73 (10th Cir. 2021) (deeming small website designer a public accommodation under state law), *rev'd on other grounds*, 600 U.S. 570 (2023).

11. *State Public Accommodation Laws*, NAT'L CONF. OF STATE LEGISLATURES, https://www.ncsl.org/civil-and-criminal-justice/state-public-accommodation-laws (last updated June 25, 2021) [https://perma.cc/8N88-DS8E].

12. James M. Gottry, Note, *Just Shoot Me: Public Accommodation Anti-discrimination Laws Take Aim at First Amendment Freedom of Speech*, 64 VAND. L. REV. 961, 967–68 (2011).

13. *See, e.g.*, *303 Creative LLC*, 6 F.4th at 1172–73 (examining a small website designer's preemptive challenge to Colorado's public accommodation law, asserting a right to discriminate against "LGBT" consumers rather than contesting the law's applicability to her business). While the district court found Plaintiff lacked standing, the Tenth Circuit reasoned that although "it might appear that Appellants have no exposure to liability," the statute would be "arguably" offended by "at least *some* of Appellants' intended course of conduct." *Id.*

14. Norrinda Brown Hayat, *Accommodating Bias in the Sharing Economy*, 83 BROOK. L. REV. 613, 616 (2018).

15. *Airbnb Revenue 2018-2023 | ABNB*, MACROTRENDS, https://www.macrotrends.net/stocks/charts/ABNB/airbnb/revenue (last visited Apr. 1, 2024) [https://perma.cc/Y6CX-2UW7].

16. *See infra* note 42.

public accommodation definitions that reach "various forms of public, quasi-commercial conduct," particularly in light of "the changing nature of the American economy."[17] In ensuring equal access that transcends "purely tangible goods and services," the line between physical and digital marketplaces blurs beyond relevance.[18] With public accommodation status comes great responsibility, and if compelled to provide indiscriminate patron service, entities may fear repercussions flowing from diminished autonomy. Indeed, Title II limits a public accommodation's right to exclude patrons; but prohibiting exclusion *because of* a protected trait does not equate to forced inclusion of all.[19]

Part I outlines public accommodation law and First Amendment speech protections. Against this backdrop, hate groups and their present-day implications are introduced. The focus then shifts to Airbnb, surveying its prior discriminatory practices and policy responses. Part II analyzes Airbnb's public accommodation status, posing a case study for comparable actors in the sharing economy. This Part argues that denying service to hate groups offends neither the First Amendment nor Title II nondiscrimination requirements. Part III presents a roadmap for public accommodations to follow when navigating lawsuits. Using Airbnb as a case study, this Note offers an approach for the legal treatment of modern public accommodations—ensuring accountability while maintaining the right to exclude harmful expressive activity.

I. FOUNDATIONS AND EVOLVING CHALLENGES OF PUBLIC ACCOMMODATIONS

A. The History of Public Accommodation Law in the United States

Public accommodation law in the United States finds its roots in sixteenth-century England, as common law prohibited race-based exclusions by innkeepers.[20] Although early state supreme courts upheld this duty, interpretations began to shift leading up to the Civil War.[21] Attempting to balance obligations of indiscriminate service with white passengers' preferences, common carriers turned to segregation.[22]

17. Roberts v. U.S. Jaycees, 468 U.S. 609, 625–26 (1984).
18. *See id.* at 625.
19. *See* 42 U.S.C. § 2000a(a) (prohibiting exclusions based on protected traits).
20. Hayat, *supra* note 14, at 618.
21. *Id.* at 618–19.
22. *Id.* at 619–20; *see infra* note 71 for discussion of common carriers.

This trend reversed during Reconstruction when southern states began to adopt antidiscrimination laws to counter racial biases in common facilities like inns, trains, and theaters.[23] Propelled by these state initiatives, Congress exercised the authority granted in the Thirteenth and Fourteenth Amendments to enact the Civil Rights Act of 1875 (the "1875 Act").[24] The 1875 Act provided that all persons, regardless of race and color, "shall be entitled to the full and equal enjoyment" of open accommodations.[25] Fugitive in legal effect, the Supreme Court struck down the 1875 Act merely eight years after its passage.[26] In dissent, Justice Harlan rejected the majority's characterization of private nondiscrimination laws as unconstitutional social aspirations, arguing that "the work of certain accommodations, though privately held, [is] so public that it [is] as if those accommodations [are] operated by the state."[27]

Empowered by the Court's decision, states enacted Jim Crow laws en masse, which severely restricted Black travelers for decades.[28] Advocacy for Black-traveler safeguards from the Kennedy and Johnson Administrations, combined with significant pressure from leaders of the Civil Rights Movement, created enough momentum for congressional action.[29] Under its authority to regulate interstate commerce, Congress enacted the Civil Rights Act of 1964 (the "Act").[30] Title II of the Act targeted discrimination in public accommodations, declaring: "All persons shall be entitled to the full and equal enjoyment" of services and privileges "without discrimination or segregation on the ground of race, color, religion, or national origin."[31]

The Act defines a public accommodation as any establishment serving the public and affecting interstate commerce.[32] This includes "any inn, hotel, motel, or other establishment which provides lodging to

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23. *Id.* at 620.

24. *Id.* at 624.

25. Civil Rights Act of 1875, ch. 114, 18 Stat. 335.

26. *See* Hayat, *supra* note 14, at 621 (citing The Civil Rights Cases, 109 U.S. 3 (1883) (consolidating a series of cases)).

27. *Id.* at 621–22 (paraphrasing *The Civil Rights Cases*, 109 U.S. at 38 (Harlan, J., dissenting)).

28. Gottry, *supra* note 12, at 965–66.

29. The restrictions and safety threats placed on Black travelers following *The Civil Rights Cases* were pervasive, triggering publication of the *Negro Motorist Green Book* in 1936 as a practical guide. The administration sought to remedy this reality. *See* Hayat, *supra* note 14, at 623–24.

30. Learning from the 1875 Act's failure, Congress invoked its authority to regulate interstate commerce rather than utilizing the Thirteenth and Fourteenth Amendments. *Id.* at 624.

31. 42 U.S.C. § 2000a(a).

32. *Id.* § 2000a(b). "[C]ommerce means travel, trade, traffic, commerce, transportation, or communication among the several States." *Id.* § 2000a(c).

transient guests," as well as restaurants and entertainment venues.[33] Lodging entities are expressly narrowed, however, to exclude those "located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor."[34] Known as the "Mrs. Murphy" exception, this provision was instrumental in overcoming Republican senators' property-rights concerns.[35] Thus, the Act pursues a balanced approach—subjecting "large hotels" to enforcement, "but permit[ing] the 'Mrs. Murphys,' who run small rooming houses all over the country, to rent their rooms to those they choose."[36]

Title II functions as a floor for legal obligations.[37] Many states adopt higher burdens, varying greatly in how they define public accommodations and protected classes.[38] New Jersey's public accommodation definition, for instance, essentially encompasses a "business of any type, carrying on any activity."[39] Likewise, the District of Columbia adopted a broad definition of protected classes, prohibiting discrimination based on

> race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, gender identity or expression, familial status, family responsibilities, genetic information, disability, matriculation, political affiliation, source of income, place of residence or business of any individual, or homeless status of any individual . . . .[40]

Thus, interstate entities must navigate a broad legal landscape when pursuing compliance.[41]

The question of whether websites qualify as public accommodations remains unanswered, although deeper analysis exists within the analogous context of Title III under the ADA.[42] In light of persistent circuit splits, the Department of Justice ("DOJ") issued

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33. *Id.* § 2000a(b).

34. *Id.*

35. Leonard S. Rubinowitz & Ismail Alsheik, *A Missing Piece: Fair Housing and the 1964 Civil Rights Act*, 48 HOW. L.J. 841, 898 (2005) (discussing Republican legislature demands to protect the metaphorical "Mrs. Murphy").

36. Vermont Senator George Aiken is credited with first coining the "Mrs. Murphy" term while stressing an exemption's necessity. Hayat, *supra* note 14, at 625.

37. *See* 42 U.S.C. § 2000a (refraining from framing directives as a ceiling).

38. Gottry, *supra* note 12, at 967.

39. *Id.*

40. D.C. CODE § 2-1402.31(a) (2022).

41. *See* Gottry, *supra* note 12, at 968 ("This significant increase in coverage comes at a price.").

42. Greater analysis of this question exists within Title III of the ADA's context, but courts remain split. The DOJ recently issued guidance establishing "that the ADA's requirements apply to all the goods, services, privileges, or activities offered by public accommodations, including those offered on the web." *Guidance on Web Accessibility and the ADA*, U.S. DEP'T OF JUST. (Mar. 18, 2022), https://ada.gov/resources/web-guidance/ [https://perma.cc/92GA-DCZA].

guidance explaining that ADA obligations apply to all public accommodations, "including those offered on the web."[43] On the Title II front, the Tenth Circuit considered a website designer's preemptive challenge in *303 Creative LLC v. Elenis*, where Plaintiff—asserting a First Amendment right to refuse services for same-sex weddings—self-identified as an accommodation under Colorado law.[44] Rather than undertaking the question of a website's fundamental eligibility for public accommodation status, the Tenth Circuit heeded the Supreme Court-recognized interest in combating barriers to equal access amidst "the changing nature of the American economy."[45] Despite finding that Plaintiff had standing due to a credible fear of prosecution, the Tenth Circuit held that the public accommodation statute was narrowly tailored to Colorado's compelling interest in equal access.[46]

On appeal, the Supreme Court accepted Petitioner's susceptibility to the contested law; however, oral arguments revealed confusion—even among Supreme Court Justices.[47] Chief Justice Roberts questioned whether public accommodation precedent applies to website designers exercising subjective project discretion, contrasting their services to "a room in the hotel."[48] Justice Alito further questioned the level of selectivity needed to avoid public accommodation status and thus Title II obligations.[49] U.S. counsel explained that greater selectivity and individualized assessment is inversely proportional to Title II status.[50] Yet, "an entity that generally holds itself out as open to the public can't escape . . . by imposing a discriminatory limitation or some pretense of selectivity."[51]

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43. *Id.*

44. Sexual orientation is protected under Colorado's public accommodation statute. 6 F.4th 1160, 1171–74 (10th Cir. 2021).

45. *Id.* at 1179 (quoting Roberts v. U.S. Jaycees, 468 U.S. 609, 626 (1984)); *see also Roberts*, 468 U.S. at 625 ("[T]he state interest in assuring equal access [is not] limited to the provision of purely tangible goods and services.").

46. *303 Creative LLC*, 6 F.4th at 1172–73, 1179 (quoting Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 257 (1964) (upholding Title II under Congress's Commerce Clause Powers due to "overwhelming evidence of the disruptive effect that racial discrimination has had on commercial intercourse")).

47. 303 Creative LLC v. Elenis, 600 U.S. 570, 590–92 (2023); Transcript of Oral Argument at 62–63, 129–31, *303 Creative LLC*, 600 U.S. 570 (No. 21-476).

48. Transcript of Oral Argument, *supra* note 47, at 62–63.

49. *Id.* at 129–31.

50. *Id.* at 132 (discussing precedent established in Fulton v. City of Philadelphia, 593 U.S. 522 (2021)).

51. *Id.* While a foster care agency or charity escape due to their exclusive services, platforms like Airbnb may not rely on registration requirements or policy agreements to avoid Title II status. *See Fulton*, 593 U.S. at 538 (holding foster care agency was not a public accommodation); Coral Ridge Ministries Media, Inc. v. Amazon.com, Inc., 406 F. Supp. 3d 1258, 1298 (M.D. Ala. 2019) (holding charity was not a public accommodation).

B. The Reach of Free Speech Protections

Where laws subject qualifying accommodations to inclusion requirements, a clash of rights ensues: the statutory right to equal and indiscriminate enjoyment of public spaces and the constitutional right to free speech.[52] The First Amendment right attaches to individuals and organizations alike,[53] stating that "Congress shall make no law . . . abridging the freedom of speech."[54] In order to assert this right's protections, plaintiffs must demonstrate that government action—not private action—is responsible for the speech infringement.[55] Nevertheless, claims against private actors may arise where actors perform traditional state functions or where the state intertwines itself with private action through extensive control.[56]

Content-based speech restrictions are presumptively unconstitutional and may be justified only if narrowly tailored to serve a compelling state interest.[57] The First Amendment also protects the right to *not* speak.[58] In *Hurley v. Irish-American*, the Court found a violation of parade organizers' First Amendment rights when a Massachusetts state court, under its public accommodation law, sought to compel an advocacy group's inclusion.[59] Reasoning that the state "may not compel affirmance of a belief with which the speaker disagrees," the Court explained that the First Amendment may be used to "shield . . . those choices of content that in someone's eyes are misguided, or even hurtful."[60] *Hurley* made clear that

52. *See, e.g.*, Boy Scouts of Am. v. Dale, 530 U.S. 640, 657 (2000) (observing that as public accommodation definitions broaden beyond "clearly commercial entities" like hotels and restaurants to encompass organizations like the Boy Scouts, greater opportunity for conflict arises).

53. *See* Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal., 475 U.S. 1, 16 (1986) ("[S]peech does not lose its protection because of the corporate identity of the speaker."); Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 342 (2010) ("First Amendment protection extends to corporations.").

54. U.S. CONST. amend. I.

55. *See* Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 295 (2001) (explaining that the State must be "*responsible* for the specific conduct of which the plaintiff complains" (quoting Blum v. Yaretsky, 457 U.S. 991, 1004 (1982))).

56. *See id.* (recognizing claim as cognizable where there is a "close nexus" between the State and the challenged action). *But see* Manhattan Cmty. Access Corp. v. Halleck, 587 U.S. 802, 818–19 (2019) (holding that a private entity operating public television channels was not a state actor because it was not performing a traditional state function).

57. Richard F. Duncan, *Viewpoint Compulsions*, 61 WASHBURN L.J. 251, 251 (2022).

58. *See* Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 573 (1995) (stressing the right of speakers to choose what *not* to say).

59. *Id.* at 559. Respondent organization, GLIB, was formed "to march in the parade as a way to express pride in their Irish heritage as openly gay, lesbian, and bisexual individuals . . . ." *Id.* at 561.

60. *Id.* at 573–74.

antidiscrimination laws may not compel one private speaker to propagate another's ideologies.[61] While the state may regulate a speech-hosting entity's conduct, it must refrain from regulating its message.[62]

Nevertheless, the Court has consistently held that free speech protections are not absolute.[63] *Chaplinsky v. New Hampshire* recognized the government's right to restrict "threatening, profane or obscene revilings," as well as "fighting words"—that is, words causing injury or immediate public unrest.[64] Here, the Court upheld a state statute prohibiting offensive language towards others in public settings.[65] Because the Appellant's public statements could provoke a reasonable recipient to violence and bore "no essential part of any exposition of ideas, . . . any benefit . . . is clearly outweighed by the social interest in order and morality."[66] Likewise, *R.A.V. v. City of St. Paul* explained that content-based restrictions may withstand scrutiny if regulated speech is "swept up incidentally within the reach of a statute directed at conduct rather than speech."[67] Sexually derogatory remarks in the workplace are "fighting words," for instance, because they violate Title VII.[68] Most recently, the Court reaffirmed that "[t]rue threats [or] 'serious expression[s]' conveying that a speaker means to 'commit an act of unlawful violence' " lack protection.[69]

While private entities have long restricted illicit conduct and threatening speech from their businesses, recent debates have emerged over perceived patron censorship, evaluating the permissibility of state-imposed speech-hosting requirements as a potential remedy.[70] After Texas and Florida adopted parallel bills defining social media platforms

61. Duncan, *supra* note 57, at 262–63.

62. *See* NetChoice, L.L.C. v. Paxton, 49 F.4th 439, 455 (5th Cir. 2022) (upholding Texas law preventing media platforms from regulating user speech).

63. *See, e.g.*, Chaplinsky v. New Hampshire, 315 U.S. 568, 572–73 (1942) (discussing "fighting words" exception); Counterman v. Colorado, 600 U.S. 66, 74–75 (2023) (discussing "true threats" exception).

64. 315 U.S. at 572–73.

65. *Id.* at 571–74.

66. *Id.* at 569, 572–74 (calling someone a "damned racketeer" and "damned Fascist").

67. 505 U.S. 377, 389 (1992).

68. Title VII prohibits sex discrimination in employment. *Id.*

69. Counterman v. Colorado, 600 U.S. 66, 74 (2023) (quoting Virginia v. Black, 538 U.S. 343, 359 (2003)).

70. *See, e.g.*, Brief for Donald J. Trump as Amicus Curiae in Support of Petitioners at 9–10, Moody v. NetChoice, LLC, No. 22-277 (filed Oct. 21, 2022) (expressing interest in the matter as the lead plaintiff in class action lawsuits against Twitter, Meta, and YouTube); Biden v. Knight First Amend. Inst., 141 S. Ct. 1220, 1223–24 (2021) (Thomas, J., concurring) ("Internet platforms of course have their own First Amendment interests, but regulations that might affect speech are valid if they would have been permissible at the time of the founding.").

as common carriers,[71] thus restricting their ability to moderate user content, lower courts found both regulations likely unconstitutional and granted preliminary injunctions.[72] On appeal, the Eleventh Circuit agreed that Florida's restrictions offended a platform's right "to speak through content moderation."[73] The Fifth Circuit disagreed, however, reasoning that by merely preventing user censorship, Texas's restrictions did not threaten speech attribution.[74]

Notably, the Supreme Court vacated the Fifth Circuit's stay of the initial preliminary injunction pending appeal.[75] Justice Alito dissented, explaining that while the Court has recognized a private entity's right to refuse third-party speech, it has also rejected similar claims.[76] Due to a lack of clarity on "how our existing precedents, which predate the age of the internet, should apply," Alito opposed premature intervention.[77] The Court has agreed to resolve this split in authority on appeal.[78] While media platforms differ from public accommodations by presenting themselves as "neutral forums for the speech of others," the parallel legal landscapes involve overlapping precedent and likely bear significant consequences for one another—particularly when considering the legality of hate-group exclusions.[79]

C. Hate-Group Activity in the United States

Given the Court's uneven case law, uncertainty remains regarding when speech must be safeguarded for public enrichment and

71. "Historically, common carriers were companies such as railroads or telecommunications services who held themselves out to the public as carrying passengers, goods, or communications for a fee." VALERIE C. BRANNON, CONG. RSCH. SERV., LSB10748, FREE SPEECH CHALLENGES TO FLORIDA AND TEXAS SOCIAL MEDIA LAWS 1–2 (2022), https://crsreports.congress.gov/product/pdf/LSB/LSB10748 [https://perma.cc/YQ25-UGV9]. Today, common carriers "can be held to equal access obligations." *Id.* at 3.

72. *Id.* at 2–4.

73. *Id.* at 3.

74. *Id.* at 3–5; NetChoice, L.L.C. v. Paxton, 49 F.4th 439, 451 (5th Cir. 2022).

75. BRANNON, *supra* note 71, at 4.

76. NetChoice, LLC v. Paxton, 142 S. Ct. 1715, 1717 (2022) (Alito, J., dissenting).

77. *Id.*; *see also* Biden v. Knight First Amend. Inst., 141 S. Ct. 1220, 1221 (2021) (Thomas, J., concurring) ("[T]he principal legal difficulty that surrounds digital platforms . . . [is] that applying old doctrines to new digital platforms is rarely straightforward.").

78. Moody v. NetChoice, LLC, 144 S. Ct. 478 (2023) (agreeing to consider whether the Texas and Florida speech-hosting regulations comply with the First Amendment). At the time of this Note's writing, the Supreme Court has yet to issue its decision.

79. *See NetChoice*, 142 S. Ct. at 1717 (Alito, J., dissenting) (citing public accommodation case law and noting that Texas's regulation reaches only neutral forums).

when public interest instead justifies curtailing speech.[80] Such debate arises when considering organized hate-group rhetoric.[81]

1. The Legal Definition of Hate Groups

While common sense may guide colloquial understandings of the term "hate group," its legal definition remains imprecise.[82] This imprecision was at the center of *Coral Ridge Ministries Media, Inc. v. Amazon.com, Inc.*, a case originating in the Middle District of Alabama.[83] Coral Ridge, a Christian media organization vocally opposed to homosexuality, filed suit alleging that it was improperly designated as a hate group by the Southern Poverty Law Center ("SPLC"), which resulted in the group being deemed ineligible for AmazonSmile's charitable program.[84] The organization alleged that the SPLC's designation amounted to defamation. [85]

The court scrutinized Coral Ridge's position that "[a] hate group is legally and commonly understood" as engaged in or advocating for "crime or violence against others based on their characteristics."[86] By contrast, the FBI categorizes hate groups by ideology rather than activity, defining them as organizations "primar[ily]" fueled by intent "to promote animosity, hostility, and malice against" a protected trait.[87] Comparably, the Anti-Defamation League ("ADL") designates groups that are "substantially based on a shared antipathy" towards a protected class.[88] Acknowledging the term's lack of dictionary definition, the court concluded that its own "common sense" understanding did not require crime or violent engagement.[89] Thus, SPLC's designation enjoyed First Amendment protection, leading the court to dismiss Coral Ridge's claims.[90] *Coral Ridge* illustrates the

80. *See, e.g.*, Michael J. Cole, *A Perfect Storm: Race, Ethnicity, Hate Speech, Libel and First Amendment Jurisprudence*, 73 S.C. L. REV. 437, 439–40 (2021) (finding that minority communities suffer adverse health outcomes from posttraumatic stress and vicarious trauma in response to hate speech and activity).

81. *Id.* at 438–39.

82. *See, e.g.*, Coral Ridge Ministries Media, Inc. v. Amazon.com, Inc., 406 F. Supp. 3d 1258, 1272–74 (M.D. Ala. 2019) ("[T]he term 'hate group' has no single, commonly understood meaning . . . .").

83. *Id.* at 1271–74.

84. *Id.* at 1268–69.

85. *Id.* at 1271–74.

86. *Id.* at 1271.

87. *Id.* at 1273.

88. *Id.*

89. *Id.* at 1273–74.

90. *Id.* at 1277–78, 1280. On appeal, the Eleventh Circuit conceded fair debate on whether the term "hate group" is sufficiently factual to be proven false. The court affirmed without

complexities associated with defining organizations as hate groups; even absent explicit advocacy for criminal violence, designation may be legally justified when organizations promote antipathy for protected traits.[91]

2. Hate Activity as a Growing Threat

Hate groups are often fueled by white nationalist ideologies—targeting racial minorities as well as nonracial traits, such as religion, gender, or sexual orientation.[92] Although white nationalism has persisted throughout U.S. history, periods of pronounced societal change have spurred upticks in reactionary, white supremacist activity.[93] For instance, while Ku Klux Klan visibility faded in the 1930s and 1940s, organized activity exploded in opposition to the 1954 decision in *Brown v. Board of Education*.[94] Conversely, Donald Trump's presidency emboldened once-covert ideologies, leading to historically high rates of hate activity.[95] Under the President's marching orders to "fight like hell" or else "you're not going to have a country anymore," prominent hate groups—including the Proud Boys and the Oath Keepers—stormed the U.S. Capitol on January 6, 2021.[96] Provoked by Trump's 2020 election defeat, this effort to sustain power left five dead.[97] As Trump returns to conspicuous view for the 2024 election, rates of hate activity will likely remain high for the foreseeable future.

The FBI, Department of Homeland Security ("DHS"), and Congress have recognized white supremacists as the most lethal U.S.

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reconsidering this question because the complaint failed to adequately plead "actual malice." Coral Ridge Ministries Media, Inc. v. Amazon.com, Inc., 6 F.4th 1247, 1252 n.7 (11th Cir. 2021). The Supreme Court declined to consider the issue on appeal. Coral Ridge Ministries Media, Inc. v. S. Poverty L. Ctr., 142 S. Ct. 2453 (2022).

91. *Coral Ridge*, 406 F. Supp. 3d at 1277–78.

92. S. POVERTY L. CTR., THE YEAR IN HATE AND EXTREMISM 2020, at 2 (2021), https://www.splcenter.org/sites/default/files/yih_2020-21_final.pdf [https://perma.cc/B9CP-PG3Z].

93. *Id.* at 3.

94. *Id.* (discussing Brown v. Bd. of Educ., 347 U.S. 483 (1954)).

95. *Id.* at 2.

96. *Id.* The SPLC defines the Proud Boys as a general hate group fueled by white nationalist ideologies. *Proud Boys*, S. POVERTY L. CTR., https://www.splcenter.org/fighting-hate/extremist-files/group/proud-boys (last visited Apr. 1, 2024) [https://perma.cc/8E3K-78WD]. While denying affiliation with the racist alt-right, they are self-proclaimed "Western chauvinists" furthering an "anti-white guilt agenda." *Id.* The SPLC defines the Oath Keepers as a far-right antigovernment group claiming to defend the Constitution. *Oath Keepers*, S. POVERTY L. CTR., https://www.splcenter.org/fighting-hate/extremist-files/group/oath-keepers (last visited Apr. 1, 2024) [https://perma.cc/8Y8T-PHG8]. Typically recruiting from military and law enforcement, they often engage in armed standoffs against the government. *Id.*

97. S. POVERTY L. CTR., *supra* note 92, at 2.

domestic threat.[98] Nevertheless, the DHS clarifies that the First Amendment may shield mere advocacy of extremist ideologies, philosophical support for violence, and the "use of strong rhetoric."[99]

Where white supremacist activity artfully cloaks itself as free speech, it undermines platforms' ability to engage in meaningful threat recognition.[100] For instance, social media platforms are hate groups' primary recruitment tools, meaning these platforms are well positioned to undermine hate groups' organizing efforts; at the same time, hate groups often argue that platforms' efforts to regulate online misinformation and threatening content are forms of unlawful censorship.[101] Yet, these speech discrimination claims are often rooted in misinformation, as constitutional protections only exist—historically—against government action, and private technology companies maintain their own First Amendment right to regulate user speech.[102]

D. Airbnb's History of Discrimination

In 2007, two roommates were inspired to capitalize on the market for alternative travel accommodations after hosting strangers

98. *See* Domestic Terrorism Prevention Act of 2019, S. 894, 116th Cong. § 2(1), (3) (citing U.S. GOV'T ACCOUNTABILITY OFF., GAO-17-300, COUNTERING VIOLENT EXTREMISM: ACTIONS NEEDED TO DEFINE STRATEGY AND ASSESS PROGRESS OF FEDERAL EFFORTS 4 (2017), https://www.gao.gov/assets/gao-17-300.pdf [https://perma.cc/4ELK-Z38P] (finding that far right wing violent extremist groups were responsible for seventy-three percent of extremist incidents that resulted in death since September 12, 2001, while radical Islamist violent extremists were responsible for twenty-seven percent)); *see also Reference Aid: US Violent White Supremacist Extremists*, DEP'T OF HOMELAND SEC. 1 (Sept. 2017), https://www.dhs.gov/sites/default/files/publications/US%20White%20Supremacist%20Extremists_CVE%20Task%20Force_Final.pdf [https://perma.cc/LEF9-2Z7Q] (finding that 28 attacks in the United States were committed by white supremacists between 2000 and August 2016, resulting in 51 fatalities).

99. DEP'T OF HOMELAND SEC., *supra* note 98, at 1.

100. *See infra* text accompanying notes 253–259. FBI investigations into hate groups are only conducted "when a threat or advocacy of force is made; when the group has the apparent ability to carry out the proclaimed act; and when the act would constitute a potential violation of federal law." *Does the FBI Investigate Hate Groups in the United States?*, FBI, https://www.fbi.gov/about/faqs/does-the-fbi-investigate-hate-groups-in-the-united-states (last visited Apr. 1, 2024) [https://perma.cc/ZRK2-RHVR]. Investigations have doubled since Spring 2020, assisting in arresting and charging 850 individuals that took part in January 6. *Oversight of the Federal Bureau of Investigation: Hearing Before the S. Comm. on the Judiciary*, 117th Cong. 2 (2022) (statement of Christopher Wray, Director, FBI).

101. *See* S. POVERTY L. CTR., *supra* note 92, at 22, 31 (describing extremist internet use and censorship complaints).

102. *See id.* at 22 (discussing "the myth of conservative censorship online" in the wake of Trump's Twitter ban following the U.S. Capitol siege); Manhattan Cmty. Access Corp. v. Halleck, 587 U.S. 802, 812 (2019) ("[H]osting speech . . . does not alone transform private entities into state actors . . . .").

on air mattresses for a quick buck.[103] This experience led to the founding of Airbnb, an online platform for travel accommodations.[104] Evolving from its humble Air Bed and Breakfast concept, the seventy-five billion dollar platform has revolutionized and disrupted the travel market.[105] Airbnb differs from traditional accommodations because it does not own its rental properties, instead gaining commission from each facilitated transaction between guest and third-party host.[106] But Airbnb's revolutionary form affords no exemption from deeply familiar challenges—namely, allegations of patron discrimination.[107]

Airbnb has faced accusations of discriminatory practices by way of both informal testimonies and legal complaints.[108] A 2016 Harvard Business study substantiated such claims, revealing that online rental markets, unlike their regulated offline counterparts, were witnessing a persistent rise in discriminatory incidents.[109] Analyzing roughly 6,400 Airbnb listings across five cities, the study found that guests with distinctly "Black names" faced a sixteen percent lower host acceptance rate than guests with "white names."[110] Following the study's publication, online communities began exchanging corroborating testimonies using #AirbnbWhileBlack.[111]

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103. Rebecca Aydin, *How 3 Guys Turned Renting Air Mattresses in Their Apartment into a $31 Billion Company, Airbnb*, BUS. INSIDER, https://www.businessinsider.com/how-airbnb-was-founded-a-visual-history-2016-2 (last updated Sept. 20, 2019, 9:27 AM) [https://perma.cc/4C2U-SZRC].

104. *Id.*

105. *Id.*; *Airbnb Net Worth 2018-2023 | ABNB*, MACROTRENDS, https://www.macrotrends.net/stocks/charts/ABNB/airbnb/net-worth (last visited Apr. 1, 2024) [https://perma.cc/HK5T-D97P].

106. *See* Hayat, *supra* note 14, at 616 (noting Airbnb's "soft spot" between commercial and intimate spheres).

107. *See infra* Subsection II.A.1 for overview of legal complaints.

108. *See infra* Subsection II.A.1 for overview of legal complaints; Anne-Marie Hakstian, Jerome D. Williams & Sam Taddeo, *The More Things Change, the More They Stay the Same: Online Platforms and Consumer Equality*, 48 PEPP. L. REV. 59, 62–64 (2021) (discussing a user's experience with discrimination on the platform that imposed a "feeling of hopelessness as a [B]lack American" (quoting Timothy Bella, *'Which Monkey Is Gonna Stay on the Couch?': Airbnb Host Kicks Out Black Guests in Racist Exchange*, WASH. POST (June 3, 2019, 6:45 AM), https://www.washingtonpost.com/nation/2019/06/03/airbnb-racism-host-monkey-black-men-new-york/ [https://perma.cc/FQ3X-TY7Y])).

109. Benjamin Edelman, Michael Luca & Dan Svirsky, *Racial Discrimination in the Sharing Economy: Evidence from a Field Experiment*, 9 AM. ECON. J. 1, 2–3 (2017).

110. *Id.* at 2, 4, 7 n.9. Airbnb's profile picture and name requirements removed the veil of anonymity that often protects online consumers, thereby providing opportunities for widespread discrimination. *Id.* at 3; *see also* Hannah Jane Parkinson, *#AirBnBWhileBlack Hashtag Highlights Potential Racial Bias on Rental App*, GUARDIAN (May 5, 2016, 10:28 AM), https://www.theguardian.com/technology/2016/may/05/airbnbwhileblack-hashtag-highlights-potential-racial-bias-rental-app [https://perma.cc/5EN9-6DAJ] (noting Airbnb's defense of the photo requirement as a "tool" for user connection).

111. Hashtag founder, Quirtina Crittenden, conducted her own experiment: "Ever since I changed my name and my photo, I've never had any issues." Parkinson, *supra* note 110.

In response, Airbnb required all platform users to endorse a policy prohibiting discrimination "based on race, color, ethnicity, national origin, religion, sexual orientation, gender identity, or marital status."[112] The policy recognizes "all applicable federal, state, and local laws that apply to housing and places of public accommodation," requiring users to heed local regulations "that expand or limit the civil right protections of the user community."[113]

Airbnb's efforts to exclude discriminatory activity persist.[114] Today, guest photos are provided only upon booking confirmation and all hosts are encouraged to adopt "Instant Book" to bypass manual reservation approvals.[115] Because hosts retain the right to cancel bookings, however, these initiatives primarily combat unconscious biases rather than overt intolerances.[116] Further, Airbnb employs a dedicated antidiscrimination team to address policy violations and collaborate with civil rights organizations; their Project Lighthouse initiative seeks to "uncover, measure and overcome discrimination."[117]

In attempting to decrease discrimination against renters on the basis of race, nationality, and sexuality, Airbnb also acted to *increase* discrimination against another group of renters: those affiliated with hate groups.[118] Airbnb's community standards disallow "[m]embers of dangerous organizations," including "violent racist groups," from using the platform.[119] To enforce this policy, the platform utilizes both online monitoring and externally sourced data.[120] And as of December 2022, the policy has resulted in over 2.5 million users being denied access or removed from the platform altogether.[121] This explicit stance against hate groups emerged upon discovering neo-Nazi bookings for the Unite

112. *Nondiscrimination Policy*, AIRBNB, https://www.airbnb.com/help/article/2867/nondiscrimination-policy (last updated Jan. 25, 2023) [https://perma.cc/A9MC-ZVQD].

113. *Id.*

114. AIRBNB, A SIX-YEAR UPDATE ON AIRBNB'S WORK TO FIGHT DISCRIMINATION AND BUILD INCLUSION 7 (2022), https://news.airbnb.com/wp-content/uploads/sites/4/2022/12/A-Six-Year-Update-on-Airbnbs-Work-to-Fight-Discrimination-and-Build-Inclusion-12122022.pdf [https://perma.cc/7WXB-CL4W].

115. *Id.* at 11–13.

116. *But see id.* at 13–14 (finding photo policy change did not increase booking cancellations by Hosts).

117. *Id.* at 4–5, 19. After three years of data collection, Project Lighthouse's first report in December 2022 recognized it was "neither the end nor the beginning, but rather a reaffirmation of an ongoing commitment to combat discrimination." *Id.* at 22.

118. *An Update on Our Work to Uphold Our Community Standards*, AIRBNB (Mar. 18, 2021), https://news.airbnb.com/an-update-on-our-work-to-uphold-our-community-standards/ [https://perma.cc/8D8Z-BBZD].

119. *Id.*

120. *Id.*

121. AIRBNB, *supra* note 114.

the Right rally.[122] Jason Kessler expressed outrage that Airbnb would scrutinize user media and revoke platform access "if they disagree with something you said."[123]

II. BALANCING ACCESS AND EXPRESSION IN THE DIGITAL SQUARE

Most cases evaluating the tension between public accommodation laws and the First Amendment have considered statutes mandating the inclusion of protected traits (such as sexual orientation), thereby compelling speech from providers of accommodations who find such speech undesirable (often due to religious convictions).[124] But what happens when individuals, whose traits have been deemed undesirable and excluded, assert that this exclusion infringes upon their free speech rights? Does an accommodation possess a First Amendment defense to this claim? Is this the invidious harm Title II sought to vindicate? This Part evaluates the increasingly juxtaposed landscapes of statutory public accommodation law and constitutional First Amendment jurisprudence, advocating for a clear legal framework to address emerging challenges.

Section II.A examines Title II eligibility, beginning with review of case law specific to Airbnb's status as a public accommodation. The discussion then broadens to consider how courts have approached this classification more generally. This Section concludes by drawing lessons from Supreme Court precedent in analogous contexts, including the parallel Title III landscape under the ADA and the physical presence rule in tax law. To fulfill the original intent of Title II, modern platforms like Airbnb must fall within its scope.

Section II.B evaluates First Amendment implications of classifying such platforms as public accommodations. It first addresses the conditions under which Airbnb could be found liable for speech

122. Madison Park & Chris Boyette, *Airbnb Removes Users Affiliated with White Nationalists' Rally*, CNN (Aug. 9, 2017, 3:41 AM), https://www.cnn.com/2017/08/09/us/airbnb-cancels-bookings-white-nationalists-rally/index.html [https://perma.cc/64C4-325H].

123. In addition to political discrimination, Kessler suggested racially biased enforcement of the standard. *Id.*

124. *See, e.g.*, Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557 (1995) (holding that the Massachusetts state court's mandate requiring the inclusion of GLIB members violated the parade organizers' First Amendment speech rights); Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000) (holding that New Jersey's public accommodation law violated the Boy Scouts' First Amendment right of expressive association to exclude homosexual troop leaders); 303 Creative LLC v. Elenis, 600 U.S. 570 (2023) (holding that Colorado's public accommodation law would violate a Christian website designer's First Amendment speech rights if it were applied to compel services for same-sex weddings).

infringement. It then highlights Airbnb's right to speech and expressive conduct, particularly in its policy of excluding hate groups.

Section II.C examines the legal defenses available to public accommodations if patrons successfully establish a speech right. It then argues that speech and actions associated with hate groups often qualify as true threats or conspiratorial behavior, thus falling beyond First Amendment protections.

Lastly, Section II.D evaluates how policies restricting hate-group activities align with the obligation under Title II to serve all protected classes without discrimination. This section demonstrates that public accommodations cannot be deemed liable—under theories of intentional discrimination, disparate impact, or political discrimination— for policies excluding individuals based on hate-group affiliation.

A. Airbnb as a Public Accommodation

1. Existing Case Law on Airbnb

Airbnb's website affirms its compliance with state and federal public accommodation laws and imposes additional requirements for users.[125] Despite professing compliance, however, the company disputes its public accommodation classification in the face of legal complaints.[126]

In *Harrington v. Airbnb, Inc.*, three Black women from Oregon alleged that by disclosing the names and photos of prospective guests to hosts prior to reservation approval, Airbnb violated the state's public accommodation law ("OPAA")[127] by allowing hosts to discriminate.[128] Seeking dismissal, Airbnb claimed to be a distinctly private entity, citing the fact that it requires user registration and merely advertises privately owned accommodations.[129] The district court disagreed, reasoning that the statute must be read broadly to affect its purpose, and as a "service offering to the public . . . [certain] services," Airbnb's online platform falls within OPAA's reach.[130] Therefore, whether

125. AIRBNB, *supra* note 112.

126. *See* Harrington v. Airbnb, Inc., 348 F. Supp. 3d 1085, 1092 (D. Or. 2018) (discussing Airbnb's argument that it was "not a place of public accommodation" under the relevant state law).

127. OPAA closely mirrors Title II, defining public accommodations as "[a]ny place *or service* offering to the public accommodations, advantages, facilities or privileges . . . ." *Id.* at 1092 (alteration in original) (quoting OR. REV. STAT. § 659A.400(1)(a) (2013)).

128. *Id.* at 1086–88.

129. *Id.* at 1092.

130. *Id.* (quoting OR. REV. STAT. § 659A.400(1)(a) (2013)).

Airbnb's individual rental properties qualify as public was immaterial because the platform, as a whole, provides public services.[131] The court further deemed Airbnb "de facto" open to the public because its membership criteria is "so unselective."[132] Thus, Plaintiffs sufficiently alleged Airbnb's status as an OPAA public accommodation.[133]

In *Selden v. Airbnb, Inc.*, the D.C. Circuit upheld the district court's refusal to vacate an arbitration award, despite Plaintiff alleging discrimination by an Airbnb host, because the award itself was not prejudiced.[134] Plaintiff demonstrated he was initially denied a booking, but when he used a pseudonym and a photo of a white person two days later, the same host approved his request.[135] Because Plaintiff accepted Airbnb's terms and conditions, however, he was bound by its mandatory arbitration clause.[136] The arbitrator concluded that the host's property, being a single room in a residence occupied by the host, was beyond Title II's reach.[137] Further, the arbitrator did not view Airbnb's online platform as a public accommodation.[138] Because Plaintiff failed to contest these legal conclusions, Airbnb was not evaluated under Title II.[139]

Though *Selden* seemingly undermines Airbnb's public accommodation status, the procedural review standard is informative.[140] Arbitration awards may be vacated only if there is proof of arbitrator misconduct, like neglecting material evidence, and this misconduct "prejudice[d] the rights of the parties."[141] Failing to dispute the arbitrator's conclusions, the Plaintiff did not show that presenting further evidence would have impacted the award determination.[142] Moreover, the property—concurrently occupied by the owner—fell cleanly within the "Mrs. Murphy" exception.[143] Because courts remain

131. *Id.* at 1092–93.

132. *Id.* at 1092 (quoting Lahmann v. Grand Aerie of Fraternal Ord. of Eagles, 43 P.3d 1130, 1135 (Or. Ct. App. 2002)).

133. *Id.* at 1093.

134. 4 F.4th 148, 153, 160–62 (D.C. Cir. 2021). Selden shared his experience in a viral media post using the #AirbnbWhileBlack hashtag. Parkinson, *supra* note 110.

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

136. *Id.* at *3–4.

137. *Selden*, 4 F.4th at 160–61.

138. *Id.*

139. *Id.* at 161.

140. *See id.* at 160–61 ("A party seeking the vacatur of an arbitration award must establish that (1) the arbitrator committed some error, and (2) the error made a difference.").

141. *Id.* at 160 (quoting Lessin v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 481 F.3d 813, 818 (D.C. Cir. 2007)).

142. *Id.* at 160–61.

143. *Id.*; *see supra* notes 35–36 and accompanying text (discussing "Mrs. Murphy" exemption).

split regarding whether internet sources are subject to Title II, as subsequently discussed, the court unsurprisingly refrained from issuing sweeping determinations on Title II's scope where resolution emerged on alternative grounds.[144] Accordingly, *Selden* does not provide a definitive conclusion on Airbnb's status as a public accommodation.[145] Rather, *Harrington*'s determination that Airbnb's platform is a public accommodation aligns with the platform's own avowal of Title II compliance and offers persuasive guidance.[146]

2. Websites as Public Accommodations

The debate over whether websites are Title II public accommodations remains unsettled.[147] In *Coral Ridge*, the district court considered whether Amazon's virtual marketplace could qualify as such, but did not reach a definitive conclusion.[148] The court stated that Title II's scope must be liberally construed to achieve its overarching purpose of eradicating the "daily affront and humiliation involved in discriminatory denials of access."[149] Thus, as Amazon dominates physical markets traditionally governed by Title II, virtual access denials may warrant the Act's intervention.[150] Nevertheless, the court also recognized that Title II's language and history could require a connection to physical structures.[151]

Likewise, a West Virginia district court expressed skepticism in *Wilson v. Twitter* when Twitter argued it was not subject to Title II amidst allegations of discrimination.[152] The court noted that, although several courts have deemed an absence of physical presence as dispositive, there is "growing recognition" in the "analogous context of ADA discrimination claims" of need for modernized perspectives.[153] As similarly expressed in *Coral Ridge*, strict adherence to "rigid

144. *See Selden*, 4 F.4th at 160–62.

145. *Id.*

146. *See* Harrington v. Airbnb, Inc., 348 F. Supp. 3d 1085, 1093 (D. Or. 2018) (concluding its service is "using its online platform to browse, locate, book, and pay for accommodations in private homes"); AIRBNB, *supra* note 112.

147. *See supra* note 42 and accompanying text.

148. Coral Ridge Ministries Media, Inc. v. Amazon.com, Inc., 406 F. Supp. 3d 1258, 1297–98 (M.D. Ala. 2019).

149. *Id.* at 1296 (quoting Daniel v. Paul, 395 U.S. 298, 307–08 (1969)).

150. *Id.* at 1296–97.

151. *Id.*

152. No. 3:20-cv-00054, 2020 U.S. Dist. LEXIS 110800, at *19–20 (S.D. W. Va. May 1, 2020) (citing Noah v. AOL Time Warner, Inc., 261 F. Supp. 2d 532, 541 (E.D. Va. 2003), *aff'd*, No. 03-1770, 2004 U.S. App. LEXIS 5495 (4th Cir. Mar. 24, 2004) (finding that virtual chat rooms could not qualify as public accommodations)).

153. *Id.* at *25–26.

distinction[s] between virtual and physical commerce" could jeopardize core objectives of civil rights laws in a rapidly digitizing age.[154] Yet, both *Coral Ridge* and *Wilson* ultimately refrained from deciding the contentious issue because the claims failed on alternative grounds.[155]

Even without definitive legal rulings, the emphasis placed on Title II objectives in these cases informs Airbnb's treatment.[156] The enacting Senate Commerce Committee sought to vindicate "the deprivation of personal dignity," citing Black traveler exclusions as the chief offender.[157] Given Airbnb's significant intrusion in the market, a comprehensive Title II understanding necessitates extension.[158] Under the statute's explicit text, Airbnb evidently qualifies as an "establishment which provides lodging to transient guests" and affects interstate commerce.[159] Moreover, by facilitating physical lodging, concerns regarding physical presence are diminished.[160]

Several courts have considered the legal classification of digital entities that facilitate individual access to tangible travel services. The District Court for the District of Columbia suggested "Uber's app *itself*" may be considered a "place" under a public accommodation statute, "to the extent that it serves the public with respect to the coordination of rides."[161] Similarly, the District Court for the District of New Jersey refused to dismiss discrimination claims against Saber, a software provider for 225 airlines.[162] Plaintiffs argued that Saber acted as JetBlue's agent when providing software that determined boarding eligibility.[163] Because Saber's software triggered Plaintiffs' discriminatory removal from JetBlue's aircraft, and because airports

154. *Id.*; *Coral Ridge*, 406 F. Supp. 3d at 1296–97.

155. *Wilson*, 2020 U.S. Dist. LEXIS 110800, at *25–26; *Coral Ridge*, 406 F. Supp. 3d at 1298.

156. *Wilson*, 2020 U.S. Dist. LEXIS 110800, at *27–28; *Coral Ridge,* 406 F. Supp. 3d at 1296–97.

157. Nancy Leong & Aaron Belzer, *The New Public Accommodations: Race Discrimination in the Platform Economy*, 105 GEO. L.J. 1271, 1282–83 (2017) (quoting Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 250 (1964)).

158. *See* MACROTRENDS, *supra* note 15 and accompanying text (discussing revenue and staggering expansion rate).

159. *See* 42 U.S.C. § 2000a(b) (defining places of public accommodation).

160. *See Coral Ridge*, 406 F. Supp. 3d at 1297–98 (discussing physical presence concerns).

161. Equal Rts. Ctr. v. Uber Techs., Inc., 525 F. Supp. 3d 62, 86 (D.D.C. 2021) (quoting D.C. CODE § 2-1402.31(a)(1) (2023)); *see also, e.g.*, O'Hanlon v. Uber Techs., Inc., No. 2:19-cv-00675, 2021 U.S. Dist. LEXIS 110539, at *15 (W.D. Pa. June 14, 2021) (holding plaintiffs sufficiently stated ADA claim because "[t]he majority of courts to consider the issue have concluded that, at least for pleading purposes, Uber's vehicles are places of public accommodation" (citation omitted)); Lowell v. Lyft, Inc., No. 17-CV-06251, 2023 U.S. Dist. LEXIS 50722, at *5–6 (S.D.N.Y. Mar. 24, 2023) (treating defendant as a public accommodation under Title III of the ADA).

162. Abdallah v. JetBlue Airways Corp., No. 14-1050, 2015 U.S. Dist. LEXIS 74256, at *2–3, *14–16 (D.N.J. June 8, 2015).

163. *Id.* at *2.

are public accommodations, plaintiffs plausibly alleged joint responsibility.[164] Just as a software provider can virtually deprive equal access and enjoyment of a physical space without direct ownership or oversight, Airbnb's facilitative platform can similarly impact lodging access.[165]

3. Lessons from the Supreme Court

The Supreme Court has declined opportunities to provide clarity and resolve circuit splits concerning virtual accommodations.[166] Though the Court has remained silent on this precise question, it has provided guiding principles for applying old laws to new realities: "[T]he fact that a statute can be applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth."[167]

In *PGA Tour v. Martin*, the Court recognized the flexibility of public accommodations, suggesting that a public accommodation need not be physically fixed so long as it affects interstate commerce and is sufficiently open to the public.[168] Thus, the PGA, despite being untethered to a permanent physical location, was a public accommodation during its tours and qualifying rounds at various golf courses.[169] And although *Martin* considered an ADA claim, the Court explicitly cited "case law in the analogous context of Title II" as compelling.[170] The Court noted that it had previously refused to restrict Title II's scope "to the primary objects of Congress' concern when a natural reading of its language would call for broader coverage."[171] Here, plaintiff alleged discriminatory obstacles to participation, and while tournament participation was not per se open—as registration required expert skills—the Court determined the tournament *itself* provides public privileges.[172]

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164. *Id.* at *22.

165. *See id.*

166. Wilson v. Twitter, No. 3:20-cv-00054, 2020 U.S. Dist. LEXIS 110800, at *22 (S.D. W. Va. May 1, 2020).

167. PGA Tour, Inc. v. Martin, 532 U.S. 661, 689 (2001) (quoting Pa. Dep't of Corr. v. Yeskey, 524 U.S. 206, 212 (1998)).

168. *Id.* at 680–81.

169. *Id.*

170. *Id.* at 681 (citing Daniel v. Paul, 395 U.S. 298, 306 (1969) (holding that Title II protections may cover participation "in some sport or activity" as well as "spectators or listeners")).

171. *Daniel*, 395 U.S. at 307. *Daniel* also deemed minor connections to interstate commerce, such as purchasing club decor from out-of-state vendors, as sufficient for the commercial effect requirement. *Id.* at 308.

172. *PGA Tour*, 532 U.S. at 680.

Justice Thomas likewise suggested expanding longstanding doctrine to reach nontraditional entities "when 'a business, by circumstances and its nature, . . . rise[s] from private to be of public concern.' "[173] In a concurring judgment regarding First Amendment claims against President Trump by users blocked from his Twitter, Justice Thomas proposed an alternative defendant for excluded users to consider: the digital platform.[174] He suggested that, given their similarities to common carriers and public accommodations, digital platforms may be subject to comparable regulations that would thereby limit their ability to exclude users.[175] Further, Justice Thomas seemed to conflate Title II and Title III of the ADA, using Title II text to define public accommodations and Title III cases to cite debate surrounding physical location requirements—without distinguishing between the two.[176] Justice Thomas's analysis, like the Court's in *PGA Tour*, suggests that Title II and Title III doctrines naturally inform one another.[177]

Finally, the Court recently revisited Commerce Clause jurisprudence to address the internet's pervasive economic impact.[178] *South Dakota v. Wayfair* overturned the "physical presence rule" as an "arbitrary, formalistic distinction."[179] The rule, as understood by the Court, inadvertently favored "large internet behemoth[s] with pervasive digital sales," allowing them to sidestep tax burdens endured by small local retailers.[180] The myriad of complex state regulations attempting to define physical presence further fostered widespread confusion among sellers and courts, who struggled to reconcile dueling standards.[181] Thus, the physical presence requirement offended the

173. Biden v. Knight First Amend. Inst., 141 S. Ct. 1220, 1223 (2021) (Thomas, J., concurring) (quoting German All. Ins. Co. v. Lewis, 233 U.S. 389, 411 (1914)).

174. *Id.* at 1224–25. The Court remanded with instructions to dismiss the case as moot. *Id.* at 1220 (majority opinion).

175. *Id.* at 1224 (Thomas, J., concurring) ("There is a fair argument that some digital platforms are sufficiently akin to common carriers or places of accommodation to be regulated in this manner.").

176. *Id.* at 1225 ("[A] company ordinarily is a place of public accommodation if it provides 'lodging, food, entertainment, or other services to the public' . . . . Courts are split, however, about whether federal accommodations laws apply to anything other than 'physical' locations." (citations omitted)).

177. *See id.*; *PGA Tour*, 532 U.S. at 681 (using "the analogous context of Title II" to inform the ADA claim at hand).

178. *See* South Dakota v. Wayfair, Inc., 585 U.S. 162 (2018).

179. *Id.* at 176 (discussing the physical presence rule as a misguided "interpretation of the requirement that a state tax must be 'applied to an activity with a substantial nexus with the taxing State.' " (citation omitted)).

180. Wilson v. Twitter, No. 3:20-cv-00054, 2020 U.S. Dist. LEXIS 110800, at *23 (S.D. W. Va. May 1, 2020); *see Wayfair*, 585 U.S. at 179–81.

181. *Wayfair*, 585 U.S. at 184–86.

Commerce Clause's chief objective: preventing economic discrimination among the states.[182]

Wayfair heavily informs the Title II landscape, as arbitrary boundaries are drawn between physical and virtual services, as well as between Title II and Title III jurisprudence. Given the wide array of state public accommodation laws and interpretations, both commercial entities and courts must resort to guesswork when determining statutory obligations. Moreover, such narrow interpretations offend the overriding aims of the civil rights statutes: to address and redress personal indignities flowing from marketplace discrimination. If Congress intended to bring large hotel chains under the purview of Title II, why should a commercial accommodation platform serving 45.6 million global users enjoy exemption?[183] As communities and commerce increasingly migrate to digital platforms, legal frameworks must keep pace to ensure personal dignities are protected in all spaces—physical and virtual.

B. First Amendment Obligations and Protections of Public Accommodations

1. Restricting Hate-Group Activity Does Not Amount to State Action

Private organizations are increasingly facing speech-infringement lawsuits. Though many private entities already incorporate Title II–esque obligations through internal policies, these entities nevertheless oppose being formally classified as public accommodations, fearing increased legal vulnerability.[184] While public accommodations are prohibited from discriminating based on protected characteristics, they generally retain a right to regulate patron speech under any criteria—so long as the criteria do not implicate protected traits.[185]

Individuals who complain of speech infringement by private enterprises often overlook the First Amendment's state-action

182. *Id.* at 178, 187.

183. *See* Rubinowitz & Alsheik, *supra* note 35, at 898; *Number of Airbnb Users in the United States from 2016 to 2022*, STATISTA, https://www.statista.com/statistics/346589/number-of-us-airbnb-users/ (last visited Apr. 1, 2024) [https://perma.cc/AG37-ADUY] (estimating that the number of adults using Airbnb will reach 45.6 million by 2022).

184. *See supra* Subsections II.A.1–2 for discussion.

185. *See* Manhattan Cmty. Access Corp. v. Halleck, 587 U.S. 802, 811–12 (2019) (hosting speech does not convert private action into state action).

requirement—private enterprises *can* limit free speech.[186] And while some private institutions can become sufficiently intertwined with governments so as to effectively engage in state action, qualifying as a Title II public accommodation does not equate to qualifying as a government actor under this high bar.[187] The Supreme Court has rejected arguments that private entities that simply offer public services, such as public access television channels, have somehow been converted into state actors.[188] Offering television channels to the public at large is not a traditional state function.[189] Similarly, by offering travel accommodations to the public, Airbnb does not perform a traditional state function, nor does it become operationally dependent or intertwined with any government body.[190] Thus, as a private entity with public accommodation status, Airbnb may lawfully mandate conformity with antidiscrimination policies as an access requirement.[191]

Still, some theorize that digital platforms can become state actors if adverse actions flow from government coercion; but "[w]hat threats would cause a private choice by a digital platform to 'be deemed . . . that of the State' remains unclear."[192] A recent Supreme Court petition, seeking review of a First Amendment claim against Twitter, illustrates emerging claims under this theory.[193] The petition claims that California's Office of Elections Cybersecurity's monitoring and flagging programs compelled Twitter's suspension decisions; it alleges that this amounts to entwinement between the platform and state government such that Twitter itself became a state actor.[194] Because Airbnb engages in similarly extensive collaboration with

186. *See id.* ("In short, merely hosting speech by others is not a traditional, exclusive public function and does not alone transform private entities into state actors subject to First Amendment constraints.").

187. *See id.* at 808–12 (demonstrating difficulty of converting private action to state action).

188. *See id.* (rejecting claim where action was not a traditional government function).

189. *Id.*

190. *See id.* at 808–09 ("[I]t is not enough that the function serves the public good or the public interest . . . .").

191. *See id.* (explaining that the First Amendment does not prohibit "private abridgment of speech"); Transcript of Oral Argument, *supra* note 47, at 76 (discussing argument that "you can say anything you want as long as you say it to everybody").

192. Biden v. Knight First Amend. Inst., 141 S. Ct. 1220, 1226 (2021) (Thomas, J., concurring).

193. Rogan O'Handley is an attorney and political commentator, suspended from Twitter after violating its policy against election misinformation. Kalvis Golde, *Once-Suspended Twitter User Argues California Violated His First Amendment Rights*, SCOTUSBLOG (Aug. 25, 2023, 12:17 PM), https://www.scotusblog.com/2023/08/once-suspended-twitter-user-argues-california-violated-his-first-amendment-rights/ [https://perma.cc/276R-RLJ8].

194. O'Handley v. Weber, 62 F.4th 1145, 1163 (9th Cir. 2023).

government officials through its own risk-mitigation efforts, it is vulnerable to similar claims.[195]

Airbnb's pervasive government ties began in 2017 in the wake of discovering bookings associated with the Unite the Right rally.[196] Rather than solely utilizing internal intelligence gathering to identify hate-group members, Airbnb actively collaborates with key government entities like the DHS and FBI; these agencies provide Airbnb with names of hate-group affiliates.[197] Further, according to Airbnb CEO Brian Chesky, the platform is "in touch with Congress a lot, all the time."[198] In fact, in the days leading up to the January 6th Capitol attack, Chesky disclosed, "I had members of Congress and senators asking what we were doing, and could we stop reservations" due to the tense political climate.[199]

This Note emphasizes the heavily symbiotic relationship between Airbnb and the government to articulate a crucial premise: even in the intimate trenches of government association, Airbnb remains shielded from the First Amendment battleground. An organization remains protected so long as it acts on its own volition.[200] While the state may not compel censorship, the Ninth Circuit explained there is a critical "line between coercion and persuasion."[201] Thus, the simple fact that Twitter solicited outside input and acted in accordance with its own content-moderation policy is not dispositive.[202] In Airbnb's case, each suggestion of government submission is accompanied by phrases suggesting proactive solicitation or assent.[203] This self-driven

195. *See* Kara Swisher & Brian Chesky, *Airbnb Has a Hate Group Problem, Too*, N.Y. TIMES (Mar. 18, 2021), https://www.nytimes.com/2021/03/18/opinion/sway-kara-swisher-brian-chesky.html [https://perma.cc/DG5P-72K5] (explaining various forms of government collaboration in Airbnb's operations, including the government giving Airbnb names of hate-group members and placing government officials on Airbnb's Knowledge Operations Team).

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.*

200. *See* Wilson v. Twitter, No. 3:20-cv-00054, 2020 U.S. Dist. LEXIS 110800, at *13 (S.D. W. Va. May 1, 2020) (explaining that core speech principles "do not vary when a new and different [technology] appears" (quoting Brown v. Ent. Merch. Ass'n, 564 U.S. 786, 790 (2011))); s*ee also* Prager Univ. v. Google LLC, 951 F.3d 991, 995 (9th Cir. 2020) ("The Internet does not alter th[e] state action requirement of the First Amendment.").

201. O'Handley v. Weber, 62 F.4th 1145, 1163 (9th Cir. 2023) (citing Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 68–72 (1963) ("The former is unconstitutional intimidation while the latter is permissible government speech.")).

202. *Id.* at 1156.

203. Upon learning of the Unite the Right bookings, "[w]e went to law enforcement." Swisher & Chesky, *supra* note 195, at 3:31. Beyond receiving Congress's calls, "we called the mayor of D.C." and "we retained the former police chief of D.C. as an advisor." *Id.* at 6:30. In response to January 6 booking inquiries, "we did not want to be involved in anything that was going to destabilize our

commitment to excluding hateful speech and conduct is not a coerced reaction to state pressures, but a massive source of organizational identity and bragging rights—no government compulsion required. As Chesky declared, "I'm prepared to get shit from neo-Nazis. And I have been since Charlottesville."[204]

While potential First Amendment claims against public accommodations should seemingly end here, the case law recognizes certain exceptions.[205] In upholding the Texas censorship bill, the Fifth Circuit relied on *PruneYard Shopping Center v. Robins* to conclude that the First Amendment permits regulating speech-hosting entity conduct, so long as the host's message remains intact.[206] *PruneYard* considered the constitutionality of a state statute authorizing patron speech rights at private shopping centers open to the public.[207] Clarifying that the statute's existence was critical to the case's outcome, the Supreme Court differentiated its holding from *Lloyd Corporation v. Tanner*, which held that opening one's property to the public "does not thereby create individual rights in expression beyond those already existing under applicable law."[208] Thus, for plaintiffs to claim speech oppression on platforms like Airbnb, a statutory speech-hosting requirement must exist.[209] While Airbnb is not presently subject to a mandate compelling inclusion of hate groups, recent legislation and judicial decisions warrant this Note's analysis.[210]

Although the federal government has generally supported Airbnb's monitoring practices, resentment is bubbling on the far right, leading conservative candidates to issue campaign promises threatening a change in course.[211] Indeed, some state officials have

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democracy." *Id.* at 7:10. "[W]e were the first tech company to get Eric Holder involved." *Id.* at 31:30. "[W]e are now taking this framework . . . to 220 countries." *Id.* at 8:11. "We're stepping up, and we're going to take more responsibility for what happens on our platform . . . [otherwise there will be] government intervention." *Id.* at 12:15.

204. *Id.* at 11:30.

205. NetChoice, L.L.C. v. Paxton, 49 F.4th 439, 455 (5th Cir. 2022) (citing PruneYard Shopping Ctr. v. Robins, 447 U.S. 74 (1980)).

206. *Id.* (citing *PruneYard*, 447 U.S. at 88).

207. *PruneYard*, 447 U.S. at 80–81.

208. *Id.* (citing Lloyd Corp. v. Tanner, 407 U.S. 551 (1972)).

209. *See id.* (requiring additional statutory obligation).

210. *See, e.g.*, Moody v. NetChoice, LLC, 144 S. Ct. 478 (2023) (agreeing to consider whether the Texas and Florida speech-hosting regulations comply with the First Amendment).

211. *See, e.g.*, Michelle Malkin, *Opinion: Why Airbnb Banned Me (and My Hubby, Too!) - Michelle Malkin*, PRESCOTT ENEWS (Feb. 6, 2022, 12:07 AM), https://prescottenews.com/index.php/2022/02/06/opinion-why-airbnb-banned-me-and-my-hubby-too-michelle-malkin/ [https://perma.cc/9WCL-Q5AA] (citing state public accommodation laws to "fight these speech-stifling bigots who think they can get away with retaliating against me and my family for my journalism and activism"); Emily Birnbaum, *Donald Trump Targets Social-Media 'Censorship' for 2024 Campaign*, BLOOMBERG (Dec. 15, 2022, 1:48 PM), https://www.bloomberg.com/news/articles/2022-

previously pursued punitive measures in response to Airbnb's controversial stances.[212] At the same time, the Supreme Court sits on a pile of requests to modify precedent.[213] If legislatures pursue speech-hosting mandates for private online platforms, or if courts attempt to denounce exclusion policies like Airbnb's, such actions unquestionably qualify as state action and Airbnb may find refuge in its own First Amendment claim.[214]

2. Right to Speech and Expressive Conduct

As the Supreme Court recently recognized, "When a state public accommodations law and the Constitution collide, there can be no question which must prevail."[215] This principle supports the Eleventh Circuit's conclusion in *Coral Ridge* that compelling Amazon to financially support certain charities would amount to unlawful speech

12-15/trump-targets-social-media-censorship-in-2024-themed-unveiling [https://perma.cc/C2YD-C7Y8] ("Trump pledged to take on what he called 'Silicon Valley censorship' as he makes a third White House run . . . .").

212. After Human Rights Watch issued a 2018 report highlighting inconsistencies in Airbnb's enforcement of its antidiscrimination policy, Airbnb announced a policy to withdraw two hundred listings from Israeli settlements in the occupied West Bank. HUM. RTS. WATCH, BED AND BREAKFAST ON STOLEN LAND: TOURIST RENTAL LISTINGS IN WEST BANK SETTLEMENTS 3 (2018) [hereinafter HUM. RTS. WATCH, BED AND BREAKFAST], https://www.hrw.org/sites/default/files/report_pdf/israel1118_web_0.pdf [https://perma.cc/EN6V-XD46] (Israeli settlements in the West Bank were "the only example in the world . . . in which Airbnb hosts would be mandated by law to discriminate against guests based on national or ethnic origin."); *Listings in Disputed Regions*, AIRBNB (Nov. 19, 2018), https://news.airbnb.com/listings-in-disputed-regions/ [https://perma.cc/V8F2-CNSU] (expressing "deep respect for" the "many strong views" regarding the "controversial issue"). Several states swiftly moved to restrict business interactions with Airbnb due to alleged violations of state anti-boycott laws. *US: States Use Anti-boycott Laws to Punish Responsible Businesses*, HUM. RTS. WATCH (Apr. 23, 2019, 12:00 AM), https://www.hrw.org/news/2019/04/23/us-states-use-anti-boycott-laws-punish-responsible-businesses [https://perma.cc/RTY8-D7Z8] [hereinafter HUM. RTS. WATCH, *U.S.*]. Former Illinois governor Bruce Rauner stated he intended "to exert pressure on Airbnb to end its prejudicial policy against the Jewish state," while Florida governor Ron DeSantis stated he would "make Airbnb 'feel the heat.' " *Id.* Airbnb agreed to maintain listings in April 2019, instead opting to donate any profits from the region to humanitarian aid organizations; state restrictions were withdrawn, and outstanding claims were settled. *Update on Listings in Disputed Regions*, AIRBNB (Apr. 9, 2019), https://news.airbnb.com/update-listings-disputed-regions/ [https://perma.cc/E3PH-ZNGE]. Greater analysis is warranted regarding whether such government responses are impermissible speech restrictions. *See, e.g.*, Shilpa Jindia, *The Crackdown on Palestinian Protest Started Long Before Oct. 7*, SLATE (Nov. 20, 2023, 5:50 AM), https://slate.com/news-and-politics/2023/11/israel-palestinian-protest-boycott-divest-sanctions-movement.html [https://perma.cc/CK2G-PTJ8] ("Despite the clear threat these actions pose to First Amendment rights, challenges to these laws have had mixed results.").

213. *See, e.g.*, Moody v. NetChoice, LLC, 144 S. Ct. 478 (2023), *cert. granted*, 217 L. Ed. 2d 435 (2024); Golde, *supra* note 193 (discussing O'Handley's Twitter lawsuit).

214. *See* Shelley v. Kraemer, 334 U.S. 1, 13 (1948) (finding state action where racially restrictive covenants were granted judicial enforcement).

215. 303 Creative LLC v. Elenis, 600 U.S. 570, 592 (2023).

compulsion, "modify[ing] the content of [ ] expression" as to "modify Amazon's 'speech itself.' "[216] Likewise, Airbnb has a right to avoid supporting and mobilizing organizations or individuals it does not wish to support.[217]

Critics of this argument find refuge in *PruneYard*, explaining that speech-hosting requirements regulate a host's conduct, not message.[218] There, the shopping center was not required to proclaim support for certain ideologies; instead, it was required to provide speech access for all.[219] Further, because it was fully open to the public and could expressly disavow support for ideologies by posting notice, risk of speech attribution was diminished.[220] Similarly, in *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, the Court stated private entities may not assert a constitutional right to exclude if the hosting decision is not "inherently expressive."[221] There, law schools alleged First Amendment violations where a federal statute required access for military recruiting, despite the military's "Don't Ask, Don't Tell" policy violating their own antidiscrimination policies.[222] The Court clarified that in order to find compelled speech in violation of the First Amendment, "the complaining speaker's own message" must be "affected by the speech it was forced to accommodate."[223] Because law schools exist to provide legal education and facilitate job recruiting, accommodating military recruiters did not interfere with their message.[224]

Despite critics' attempts to draw parallels between technology platforms and *Pruneyard*'s shopping mall or *Rumsfeld*'s job fair, this argument ignores distinguishing characteristics of Airbnb and other platforms.[225] As demonstrated by the #AirbnbWhileBlack campaign, user actions are attributed to enabling organizations.[226] Today,

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216. Coral Ridge Ministries Media, Inc. v. Amazon.com, Inc., 6 F.4th 1247, 1254–56 (11th Cir. 2021) (quoting Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 573, 578 (1995)).

217. *See id.* (quoting *Hurley*, 515 U.S. at 573, 578).

218. NetChoice, L.L.C. v. Paxton, 49 F.4th 439, 455 (5th Cir. 2022) (citing PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 80 (1980)).

219. *PruneYard*, 447 U.S. at 86–87.

220. *Id.* at 88; *see infra* Section III.B for discussion of contrasts to Airbnb's model.

221. 547 U.S. 47, 65–66 (2006).

222. *Id.* at 60–61.

223. *Id.* at 63.

224. *Id.* at 64–65.

225. *See supra* Section I.D for discussion of Airbnb's history.

226. *See* Parkinson, *supra* note 110 (discussing campaign); Swisher & Chesky, *supra* note 195, at 2:28 (recognizing Airbnb's community commitment policy as being "in the wake of" the "hashtag #AirbnbWhileBlack [ ] trending").

organizations are held responsible for their action or inaction; in this setting, the only proper disclaimer of ideology is exclusion.[227] Although exclusion may not be "pure speech," associational decisions to not "propound a point of view contrary to its beliefs" remain wholly protected.[228] Thus, upon detecting use of its platform in furtherance of hate-group activity, Airbnb exercised its First Amendment right to prevent undesirable speech attribution.[229]

The platform regularly "put[s] their money where their mouth is" by refusing business and issuing public pledges.[230] Of course, commercially promoting diversity is not unique to Airbnb, as many corporations issue similar messages for popular approval. Moreover, Airbnb's business model requires communal values and tolerant interactions for economic success[231]—and Airbnb is ultimately a business driven by financial gain. Using its best business judgment, Airbnb determined that earning the non-hate-group majority's respect outweighed tolerating "shit from neo-Nazis."[232] But as recently reaffirmed by the Supreme Court, "a speaker's motivation is entirely irrelevant."[233] When hateful notions surface, Airbnb acts swiftly to exclude such speakers, thereby safeguarding its platform from messaging that infringes on its proclaimed commitments.[234]

Finally, Airbnb's interest in excluding activities that undermine the message of its mission, policies, and business model is not

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227. *See PruneYard*, 447 U.S. at 88 (discussing the ability to disclaim speech); *see* Parkinson, *supra* note 110 (discussing repercussions of user speech attribution to Airbnb).

228. 303 Creative LLC v. Elenis, 600 U.S. 570, 586 (2023) (quoting Boy Scouts of Am. v. Dale, 530 U.S. 640, 654 (2000)). Chesky reflected upon learning that "there are some who don't believe in *what you believe in*." *Should Airbnb Ban Customers It Disagrees With?*, BBC (Aug. 8, 2017, 4:50 AM), https://www.bbc.com/news/world-us-canada-40867272 [https://perma.cc/99HW-FQMC] (emphasis added).

229. *See* Park & Boyette, *supra* note 122 (discussing hate-group policy); Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal., 475 U.S. 1, 16 (1986) ("[S]peech does not lose its protection because of the [speaker's] corporate identity . . . .").

230. *See* Sara Clemence, *Black Travelers Say Home-Share Hosts Discriminate, and a New Airbnb Report Agrees*, N.Y. TIMES, https://www.nytimes.com/2022/12/13/travel/vacation-rentals-racism.html (last updated Dec. 18, 2022) [https://perma.cc/BT9W-CN25] (quoting civil rights expert, Laura Murphy); Hayat, *supra* note 14, at 613 (discussing Airbnb's five million dollar #WeAccept Super Bowl commercial championing identity acceptance); Leon Kaye, *Airbnb Users Must Agree to Non-discrimination Pledge This Week*, TRIPLE PUNDIT (Oct. 31, 2016), https://www.triplepundit.com/story/2016/airbnb-users-must-agree-non-discrimination-pledge-week/21721 [https://perma.cc/RER9-4SHW].

231. *See* AIRBNB, *supra* note 114, at 4 (explaining that Airbnb "was founded to foster positive social connections").

232. Swisher & Chesky, *supra* note 195, at 11:31.

233. *303 Creative LLC*, 600 U.S. at 595 (quoting Fed. Elections Comm'n v. Wis. Right to Life, Inc., 551 U.S. 449, 468 (2007)).

234. *See id.* at 585–86 (explaining that the First Amendment's protections apply to expressions and exclusions of speech).

outweighed by any compelling government interest.[235] While the state's compelling interest in furthering military recruitment outweighed a school's secondary interest in identity support, hate groups exist for the primary purpose of promoting antipathy and combatting antidiscrimination efforts.[236] Protecting such groups is not a compelling government interest. Ultimately, Airbnb's exclusionary conduct is expressive, and forcing the organization to knowingly serve and support the efforts of hate groups would far exceed state authority.[237]

C. First Amendment Defense of Unprotected Speech

Beyond its right to expressive conduct, Airbnb's hate-group intolerance avoids speech infringement because it targets impermissible conduct.[238] Speech protections are not absolute, particularly where speech amounts to "fighting words" or "true threats."[239] Further, where policies serve purposes beyond limiting expressive content, "acts are not shielded from regulation merely because they express a discriminatory idea or philosophy."[240] In this way, speech promoting or planning hate-group activity may be regulated for furthering discriminatory objectives. Therefore, Airbnb and other platforms subject to government compulsion should assert traditional defenses to First Amendment challenges.

The Court has held that speech loses protections when speakers intend to intimidate recipients, even where speakers do not intend to follow through on their threats.[241] Expanding on this rule while evaluating harmful online speech, *Counterman v. Colorado* clarified that the "true threats" exception only requires reckless disregard—that is, a speaker's awareness "that others could regard his statements as threatening violence and delivers them anyway."[242] This approach

235. *See id.* at 595 (explaining that First Amendment protections do not only apply to motives the government finds worthy).

236. *See* Rumsfeld v. F. for Acad. & Institutional Rts., Inc., 547 U.S. 47, 62 (2006) (holding that requiring a law school to host military recruitment efforts did not compel speech); AIRBNB, *supra* note 114, at 16 (explaining firm stance on hate groups).

237. *See* Coral Ridge Ministries Media, Inc. v. Amazon.com, Inc., 6 F.4th 1247, 1254–56 (11th Cir. 2021) (holding that expressive conduct is protected); Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 573, 578 (1995) (holding that a state statute cannot supersede the First Amendment).

238. *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 390 (1992) (explaining that certain content discrimination is allowed by the First Amendment).

239. *Id.* at 389; Counterman v. Colorado, 600 U.S. 66, 69 (2023).

240. *R.A.V.*, 505 U.S. at 390.

241. Virginia v. Black, 538 U.S. 343, 359–60 (2003) (citing *R.A.V.*, 505 U.S. at 388).

242. 600 U.S. at 79 (internal quotation marks omitted) (quoting Elonis v. United States, 575 U.S. 723, 746 (2015) (Alito, J., concurring in part and dissenting in part)).

strikes an appropriate balance between protecting casual speech and regulating speech likely to cause harm.[243] Under this standard, hate-group communications are key for determining when seemingly protected speech reasonably inflicts harm through intimidation.[244] As Kessler himself concedes, the alt-right is a "dangerous movement" that "feeds on the chaos energy" of threatening speech to maintain enthusiasm for, what they consider, a war effort.[245]

Beyond losing its protections, truly threatening speech may also establish civil conspiracy liability.[246] Cofounder of the SPLC, Morris Dees, initiated a movement towards punishing hate-group activity as civil conspiracy through group tort litigation, thus establishing that the First Amendment poses no significant barrier to holding hate groups liable for independent members' actions.[247] Civil conspiracy involves two or more individuals agreeing to achieve an unlawful objective or a lawful objective by unlawful means.[248] Accordingly, the act of one becomes the act of all—even where members lack knowledge of coconspirator identities or injurious plan details.[249] Under this framework, "one can prove civil conspiracy by showing that the defendants contemplated hate violence from the outset and that [violence] was a foreseeable result . . . ."[250]

For planning and participating in Unite the Right, a jury found all twenty-three defendants—including Kessler and several organizations[251]—liable for civil conspiracy.[252] Although Kessler's attorneys argued that prosecutors were merely punishing "First Amendment protected expressive activity," overwhelming evidence proved otherwise.[253] "[B]eliev[ing] Antifa wouldn't initiate the fight," the defendants undertook calculated efforts to lure and provoke counterprotesters with the aim of enabling and justifying the

243. *See id.* at 69.

244. *See id*. at 79 (discussing reckless disregard standard).

245. *See* Sines v. Kessler, No. 3:17-cv-00072, 2022 U.S. Dist. LEXIS 233715, at *28 (W.D. Va. Dec. 30, 2022).

246. *See* Morris Dees & Ellen Bowden, *Courtroom Victories: Taking Hate Groups to Court*, TRIAL (1995), http://hornacek.coa.edu/dave/Teaching/Core_Course.03/courtroom_victories.pdf [https://perma.cc/G4BA-5AER].

247. *Id*. at 5–6.

248. *Id*. at 5.

249. *Id*.

250. *Id*.

251. *See* Sines v. Kessler, No. 3:17-cv-00072, 2022 U.S. Dist. LEXIS 233715, at *21–22 (W.D. Va. Dec. 30, 2022) (explaining individual conduct of members "may result in liability to the organization for their torts, including intentional torts").

252. *Id*. at *7–10 (affirming jury verdict before the court on various post-trial motions).

253. *See id*. at *2, *9, *12, *35 (admitting 917 trial exhibits and calling thirty-five witnesses to testify).

defendants' violent objectives.[254] Kessler encouraged attendees to bring signposts and other items "which can be turned from a free speech tool into a self-defense weapon . . . ."[255] Yet, to maintain illusions of peaceful protest and facilitate greater opportunity for violent confrontations, he discouraged *openly* carrying firearms.[256] Internal exchanges, characterized as "funny bantz,"[257] included members fantasizing about driving vehicles into crowds of counterprotesters; such speech ultimately manifested in violence at the rally, resulting in dozens of counterprotester injuries and one death.[258] From this evidence, a compelling justification emerges for excluding threatening speech and conduct in public accommodations. Hate groups exhibit repeated, predictable patterns: claiming viewpoint discrimination while eagerly anticipating opportunities to transform "free speech tool[s]" into weapons for violence.[259]

D. Restricting Hate-Group Activity Does Not Violate Title II

When Airbnb banned hate-group members from the platform ahead of the Unite the Right rally, Jason Kessler exclaimed that the platform's actions reflected "racial targeting of white people for their ethnic advocacy" and "should be grounds for a lawsuit[.]"[260] But as right-wing extremists wage war against the "divisive" left,[261] society must consider when an accommodation's actions amount to plausible claims of discrimination based on race, color, religion, or national origin under Title II—or whether such complaints are merely fake news.[262] Discrimination claims under civil rights statutes are established through intentional discrimination or disparate impact evidence.[263] Ultimately, Kessler's claims fail under both theories.

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254. *Id*. at *34.

255. *Id*. at *32.

256. "If you want the chance to crack some Antifa skulls in self-defense don't open carry." *Id*. (emphasis omitted).

257. Kessler testified that "bantz" refers to "banter or joking." *Id*. at *29 n.9.

258. *Id*. at *62.

259. *See id*. at *30–32.

260. Swenson, *supra* note 7.

261. *See* Loren Campbell, *How They Scored: Airbnb*, VIEWPOINT DIVERSITY SCORE (Mar. 30, 2023), https://www.viewpointdiversityscore.org/news/how-they-scored-airbnb [https://perma.cc/2S2C-X34R] (giving Airbnb a poor score for "divisive workplace teachings").

262. *See* 42 U.S.C. § 2000a(a).

263. *See, e.g.*, Coral Ridge Ministries Media, Inc. v. Amazon.com, Inc., 406 F. Supp. 3d 1258, 1303–07 (M.D. Ala. 2019) (providing an example of intentional discrimination and disparate impact analyses).

1. Intentional Discrimination

Intentional discrimination claims may be alleged through direct or circumstantial evidence.[264] Direct evidence typically highlights overt statements made by decisionmakers or policies that expressly distribute benefits and burdens differently among classes.[265] Despite Kessler's claim of overt targeting, Airbnb's exclusion criteria lacks express intent, as accounts are banned when they engage in conduct antithetical to the platform's nondiscrimination policy.[266] Thus, direct evidence is unavailable and these claims must rely on a circumstantial-evidence framework.[267] A prima facie case of discrimination under Title II requires that a plaintiff establish: (1) membership in a protected class, (2) denial of accommodation benefits, and (3) less favorable treatment than similarly situated individuals outside the protected class.[268] Where plaintiffs establish a prima facie case, defendants must provide a legitimate, nondiscriminatory justification for exclusion, and plaintiffs bear the ultimate burden of proving such justifications are merely pretext.[269] In the present context, plaintiffs likely fail at the prima facie phase.

Assuming a policy's enforcement is the alleged source of discrimination, the first two elements are easily satisfied; indeed, all individuals possess protected traits like race, nationality, and religion.[270] But to satisfy the third element, plaintiffs must show service denials were *because of*, not in spite of, protected characteristics. [271] This distinction was emphasized in *Coral Ridge*, where the Plaintiff argued that the SPLC and Amazon engaged in religious discrimination when selecting its "hate group" definition for eligibility criteria.[272] But because the SPLC defined a hate group as one holding "beliefs or practices that attack or malign an entire class of people, typically for

264. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 804–05 (1973) (describing relevant circumstantial evidence to make out a prima facie case of racial discrimination).

265. *Cf. Coral Ridge*, 406 F. Supp. 3d at 1306–07 (discussing allegation of a policy being facially discriminatory).

266. *See* Park & Boyette, *supra* note 122 (discussing banning procedures).

267. *See McDonnell Douglas*, 411 U.S. at 801–06 (discussing circumstantial evidence framework).

268. *See* Bryan Casey, *Title 2.0: Discrimination Law in a Data-Driven Society*, 2019 J.L. & MOBILITY 36, 43 (explaining how to establish a prima facie case for Title II discrimination claims).

269. *Id.*

270. *See id.* (stating elements that establish a prima facie case); 42 U.S.C. § 2000a(a) (listing protected traits).

271. *See* Coral Ridge Ministries Media, Inc. v. Amazon.com, Inc., 406 F. Supp. 3d 1258, 1306 (M.D. Ala. 2019). For simplicity's sake, this Note analyzes an excluded white supremacist's racial discrimination claim.

272. *Id.* at 1303–07.

their immutable characteristics," the court found a dearth of support for any inference of religious targeting.[273] Similarly, the *Wilson* court dismissed the Plaintiff's religious-discrimination claim after Twitter banned his account for making derogatory remarks about homosexuality.[274] Because the offending speech did not mention or promote Christianity, the court could not infer enforcement action was taken *because of* his religion.[275] Without a clear connection between one's exclusionary treatment and religious beliefs, an intentional discrimination claim fails.[276] Ultimately, Twitter adhered to its content-neutral policy against promoting hate.[277]

Likewise, by requiring all users to "accept people regardless of their race, religion, national origin, ethnicity, disability, sex, gender identity, sexual orientation, or age," Airbnb's antidiscrimination policy lacks any suggestion of discriminatory intent.[278] Attempts to demonstrate superior treatment of similarly situated nonwhite individuals will also prove fatal, as policy-abiding individuals are not similarly situated.[279] Plaintiffs could plausibly allege discriminatory policy enforcement by identifying individuals known to similarly engage in hate violence but—because they are not white—retained platform use.[280] Kessler suggested such claims of biased enforcement, arguing Airbnb's policy would not similarly scrutinize Black Lives Matter activists.[281] But comparing their exclusion to the ongoing inclusion of activists in race-affiliated organizations that are not designated hate groups could only be logical if hate-group status was protected.[282] This bare allegation misunderstands Airbnb's exclusion process.

Ahead of the Capitol Insurrection, Brian Chesky explained that Airbnb shut down all D.C. rentals to curb the evidentiary burden of

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273. *Id.* at 1306.

274. Wilson v. Twitter, No. 3:20-cv-00054, 2020 U.S. Dist. LEXIS 110800, at *43–44 (S.D. W. Va. May 1, 2020).

275. *Id.*

276. *Id.* at *40 (citing Chalmers v. Tulon Co. of Richmond, 101 F.3d 1012, 1021 (4th Cir. 1996)) (relying on decision in the Title VII employment context, refusing to find religious discrimination where plaintiff was fired for criticizing the "immoral" lifestyles of colleagues via letter).

277. *Id.* at *43–44.

278. *See* Park & Boyette, *supra* note 122 (discussing policy).

279. *See* Coral Ridge Ministries Media, Inc. v. Amazon.com, Inc., 406 F. Supp. 3d 1258, 1306 (M.D. Ala. 2019) (discussing the lack of a similarly situated comparator).

280. *See id.* (emphasizing the need to allege that a policy is disproportionately applied because of a protected trait).

281. Swenson, *supra* note 7.

282. *See Coral Ridge,* 406 F. Supp. 3d at 1306 ("Of course, being deemed a 'hate group' by SPLC is not one of the traits protected by Title II.").

investigating thousands, as "you can't ban somebody . . . until you have evidence they're in a hate group."[283] Airbnb cross-references lists from the ADL, SPLC, DHS, and FBI to identify "active" hate-group affiliates; these data sources all recognize extremist organizations practicing nonwhite racial advocacy where such groups exhibit qualifying criteria.[284] The policy's evidentiary requirement of illicit conduct prevents intentional class targeting, and the use of external designation lists further combats intentionally discriminatory decisionmaking. Forced to rely on an attenuated category of comparators and unable to demonstrate discriminatory intent, allegations like Kessler's will be quickly dismissed for lack of inferential support.[285]

2. Disparate Impact

The Supreme Court has yet to determine whether disparate impact claims are cognizable under Title II, but assuming the theory is cognizable, Kessler's hypothetical claims would still fail.[286] Disparate impact claims allege that a facially neutral policy has disproportionately adverse effects for a protected class, demonstrated through a prima facie case of significant statistical disparity in exclusion.[287] At the motion-to-dismiss phase, plaintiffs need only demonstrate *some* level of statistical disparity in a policy's impact on their *protected* class.[288] As applied, plaintiffs must provide facts permitting a reasonable inference that Airbnb's neutral policy disproportionately excludes white individuals over other similarly situated nonwhite individuals.[289] In other words, they must demonstrate that their race is more likely than others to exhibit animosity or partake in prohibited hate-group activity.[290] Admittedly, this approach may find support in existing evidence; after all, white supremacists are recognized as the most lethal threat of domestic

283. Such evidence often includes posting activity on public forums. Swisher & Chesky, *supra* note 195, at 7:30.

284. *Id.* at 4:15; *see, e.g.*, Emerson Hodges, *Equity Through Accuracy: Changes to Our Hate Map*, S. POVERTY L. CTR. (Oct. 8, 2020), https://www.splcenter.org/hatewatch/2020/10/08/equity-through-accuracy-changes-our-hate-map [https://perma.cc/82ND-VWUF]; *Hate Crime Statistics*, FBI, https://www.fbi.gov/how-we-can-help-you/more-fbi-services-and-information/ucr/hate-crime (last visited Apr. 1, 2024) [https://perma.cc/VZP8-RKWT] (defining "Anti-White" groups as hate groups).

285. *See Coral Ridge,* 406 F. Supp. 3d. at 1303–07 (dismissing claims for lack of support).

286. *See id.* at 1304 (noting the lack of clarity on which disparate impact claims are cognizable).

287. *Id.* at 1303–04 (citing Ricci v. DeStefano, 557 U.S. 557, 587 (2009)).

288. *Id.* at 1304.

289. *See id.*

290. *See id.*

terrorism.[291] Inherent to this argument, however, lies a clear explanation for any racial disparities among excluded patrons—discrediting both plaintiffs' claims and entire ideological structures, revealing bad-faith attempts to appropriate statutory shields to discrimination.[292]

3. Political Discrimination

The most plausible discrimination claim for hate group–affiliated individuals excluded by Airbnb exists in local public accommodation ordinances recognizing political affiliation as protected.[293] The second and third elements of a traditional prima facie case for intentional discrimination may be easily satisfied in this setting, as both explicit policy language and decisionmaker statements show plaintiffs would have retained platform access but for their hate-group membership: "It's just a very low bar to not allow neo-Nazis on our platform. That is not a political decision."[294] Thus, the question then becomes whether plaintiffs would satisfy the first element of protected status.

D.C. code, for example, protects and defines political affiliation as "belonging to or endorsing any political party."[295] But arguably, hate-group affiliation lacks qualities generally attributed to politics. The D.C. Circuit suggested as much in *Blodgett v. University Club*, rejecting an activist's claim when club membership was revoked after dining with a known member of the white supremacist group, National Alliance.[296] Although "affiliation with National Alliance" was the explicit justification for his expulsion, the court found lacking "evidence that the National Alliance is a political party under 'any ordinary sense and with the meaning commonly attributed to' that term."[297] While today's extremists may boast imagery and apparel often attributed to

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291. *See* DEP'T OF HOMELAND SEC., *supra* note 98 (recognizing lethal threat posed by white supremacist extremists).

292. If relying on the Title VI setting to inform potential disparate impact claims under Title II, this argument also inherently satisfies defendant's burden of providing a legitimate business justification for disparate treatment. *See Ricci*, 557 U.S. at 587–89.

293. *See* Eugene Volokh, *Can Places of Public Accommodation Exclude People Based on Their Politics?*, REASON (Apr. 8, 2021, 5:46 PM), https://reason.com/volokh/2021/04/08/can-places-of-public-accommodation-exclude-people-based-on-their-politics/ [https://perma.cc/Q7HS-CG5B] (considering political discrimination in accommodation claims); Park & Boyette, *supra* note 122 (quoting Kessler's argument of "political discrimination" by Airbnb).

294. Swisher & Chesky, *supra* note 195, at 3:27.

295. D.C. CODE § 2-1401.02(25) (2023).

296. Blodgett v. Univ. Club, 930 A.2d 210, 221 (D.C. 2007).

297. *Id.* (quoting Peoples Drug Stores, Inc. v. District of Columbia, 470 A.2d 751, 753 (D.C. 1983)).

political candidates like Donald Trump, the Republican party has never explicitly endorsed hate-group activity.[298] An alternative interpretation could authorize any trait as politically protected, thus eliminating a business's right to regulate its services for permissible, nondiscriminatory reasons.[299] In response to Justice Alito's question of whether "a [B]lack Santa" in a shopping mall lacks agency to refuse having "his picture taken with a child who's dressed up in a Ku Klux Klan outfit," counsel communicated this distinction, responding: "No, because Ku Klux Klan outfits are not protected characteristics under public accommodation laws."[300]

Similarly, Seattle protects "political ideology" and speech achieved through "conduct[ ] reasonably related to political ideology," but its Civil Rights Division has narrowed this text's scope.[301] For example, wearing a political symbol while engaging in prohibitable conduct does not support a claim,[302] private companies may remove white nationalists to shield clients from discrimination or their business reputation from public scrutiny,[303] and an accommodation may exclude ideological-group members where the group has previously partaken in violent conduct.[304]

298. *See, e.g.*, Alexander Burns, Jonathan Martin & Maggie Haberman, *G.O.P. Alarmed by Trump's Comments on Extremist Group, Fearing a Drag on the Party*, N.Y. TIMES, https://www.nytimes.com/2020/09/30/us/politics/trump-debate-white-supremacy.html (last updated Jan. 20, 2021) [https://perma.cc/89L4-2S45] (describing Republicans' response concerning Trump's failure to disavow violent hate-group).

299. *See* Transcript of Oral Argument, *supra* note 47, at 76 (debating businesses' right to control services that are available to the public).

300. *Id.* at 75.

301. SEATTLE, WASH., MUN. CODE §§ 14.06.020-.030, 14.08.020-.030 (2023).

302. *See* Eugene Volokh, *Bans on Political Discrimination in Places of Public Accommodation and Housing*, 15 N.Y.U. J.L. & LIBERTY 490, 499 & n.26 (2022) (citing Hu v. Coury Rests., Inc., No. 2018-01046, at *5–6 (Seattle Off. for Civ. Rts. Mar. 29, 2019) (holding plaintiff was not excluded because of his political hat, but for becoming hostile when an employee expressed distaste for the hat)).

303. *See id.* at 500 & n.28 (citing Quinn v. Gibbens Ins. LLC, No. 2020-01277, at *8–9 (Seattle Off. for Civ. Rts. Feb. 24, 2021) (finding that employer permissibly fired employee because, among other reasons, the employee might discriminate against customers and the employer "received continued harassing phone calls and in-person visits from members of the public who were upset" by the employer's "continued . . . employ[ment] [of] a known white nationalist")).

304. *See id.* at 501 & n.30 (citing Gibson v. Mex. Seattle, LLC, No. 2019-01194, at *14, *18 (Seattle Off. for Civ. Rts. Dec. 18, 2020) (permitting the denial of services to a member of the violent group Patriot Prayer)).

III. PROPOSED LEGAL FRAMEWORKS FOR REGULATING HATE SPEECH IN PUBLIC ACCOMMODATIONS

A. Federal Recognition of Airbnb as a Public Accommodation

As the lines between physical and digital markets blur, the definition of public accommodations must evolve. The historic intent underlying public accommodation laws and the nature of Airbnb's expansive commercial services require Airbnb's platform, as a whole, to qualify as a public accommodation under Title II.[305] As explained in *Harrington*, the platform de facto opens itself to the public because it is "so unselective in [its] membership criteria" and its virtual services fall within the meaning of the statute.[306] A public accommodation may not escape liability simply by imposing registration and policy-agreement requirements.[307] Additionally, qualifying Airbnb's platform as a public accommodation promotes judicial efficiency and administrability as courts need not analyze individual properties to determine whether the "Mrs. Murphy" exemption applies.[308] As an entity disrupting the accommodation market, public policy requires subjecting Airbnb to regulations imposed on hotels to ensure commercial fairness and promote the right to nondiscriminatory travel accommodations.[309]

Because the scope of Title II enforcement certainly warrants clarification in the modern context, the DOJ should issue guidance on public accommodations, recognizing that actors in the sharing economy writ large qualify as public accommodations.[310] This solution is particularly feasible considering the DOJ's recent guidance on ADA liability, emphasizing that the agency "has consistently taken the position that the ADA's requirements apply to all the goods, services, privileges, or activities offered by public accommodations, including those offered on the web."[311] As analogies are often drawn between ADA

305. *See* PGA Tour, Inc. v. Martin, 532 U.S. 661, 689 (2001) (discussing the need for broad interpretation); Harrington v. Airbnb, Inc., 348 F. Supp. 3d 1085, 1092–93 (D. Or. 2018) (deeming the platform a public accommodation).

306. *Harrington*, 348 F. Supp. 3d at 1092–93.

307. *See* Fulton v. City of Philadelphia, 593 U.S. 522, 538–39 (2021) (finding that "foster care agencies do not act as public accommodations in performing certifications" because certification was not "made available to the public").

308. *See* Selden v. Airbnb, Inc., 4 F.4th 148, 160–61 (D.C. Cir. 2021) (reviewing the arbitrator's conclusion that a listed home did not constitute a public accommodation); *see also supra* notes 35–36 for a discussion of the "Mrs. Murphy" exemption.

309. *See supra* note 183 and accompanying text (highlighting the similarity between large hotel chains and a commercial accommodation platform serving millions of users).

310. *See* U.S. DEP'T OF JUST., *supra* note 42 (issuing guidance on the ADA).

311. *Id.*

and Title II public accommodations, the DOJ's firm stance on virtual liability extends smoothly to the context of Title II.[312] Guidance offers a relatively painless route; while it may not possess the "force and effect of law," it provides meaningful clarification for private entities seeking to comply with Title II in the face of uncertainty and may encourage sharing economy actors to revamp their approaches to supporting equal access and enjoyment.[313] Lower courts should take notice of this guidance moving forward.[314] And if prompted to assess virtual accommodations, the Supreme Court would benefit from extending its *Wayfair* reasoning against physical presence requirements to bolster the Court's Commerce Clause jurisprudence and maintain framework consistency.[315]

Private entities may reasonably seek to avoid public accommodation status to prevent greater potential for lawsuits. While public accommodation status naturally occasions greater opportunity for Title II claims,[316] many actors in the sharing economy maintain policies that expand beyond Title II obligations.[317] Chief among the concerns for Airbnb, however, is whether public accommodation status interferes with its right to exclude patrons that harm its reputation and community. As this Note argues, however, such fears may rest.

312. *See supra* note 42 and accompanying text for discussion; PGA Tour, Inc. v. Martin, 532 U.S. 661, 689 (2001) (relying on Title II discrimination case law to inform Title III ADA claim).

313. Memorandum from Off. of the Att'y Gen. on Issuance and Use of Guidance Documents by the Dep't of Just. to Heads of All Dep'ts 1 (July 1, 2021), https://www.justice.gov/d9/2022-12/attorney_general_memorandum_-_issuance_and_use_of_guidance_documents_by_the_doj712021.pdf [https://perma.cc/RJJ3-AL5S]

314. DOJ guidance would not require the D.C. Circuit to overturn *Selden*, given the case's mere affirmance of an award based on an arbitrator's findings. Selden v. Airbnb, Inc., 4 F.4th 148, 160 (D.C. Cir. 2021).

315. *See* South Dakota v. Wayfair, Inc., 585 U.S. 162, 177–78 (2018) (stating that physical presence is not necessary for one to have a substantial nexus to a state).

316. 42 U.S.C. § 2000a(a).

317. *See, e.g.*, *Uber Non-discrimination Policy*, UBER, https://www.uber.com/legal/en/document/?country=united-states&lang=en&name=non-discrimination-policy (last updated Jan. 12, 2020) [https://perma.cc/AB9B-6C9G] ("Uber and its affiliates therefore prohibit discrimination against users based on race, religion, national origin, disability, sexual orientation, sex, marital status, gender identity, age or any other characteristic protected under applicable law."); *Anti-discrimination Policies*, LYFT, https://help.lyft.com/hc/e/all/articles/115012923767-Anti-Discrimination-Policies (last visited Apr. 1, 2024) [https://perma.cc/R2E2-UVQ3] ("Discrimination against riders or drivers isn't tolerated on the Lyft platform.").

B. Lack of Speech Infringement and an Accommodation's First Amendment Right

Patrons excluded for hate-group affiliation profess that they are experiencing constitutional violations.[318] Under traditional understandings of First Amendment claims and state-action requirements, these claims are meritless and private entities may quickly move to dismiss due to lack of state action.[319] Collaborating with and responding to requests by government actors does not convert private action into state action.[320]

Legislatures may seek to impose speech-hosting requirements for certain accommodations, like that in *PruneYard* and *Rumsfeld,* but policy interests limit this possibility.[321] In *Rumsfeld*, a substantial congressional interest in promoting military recruitment justified legislation, whereas sexual orientation was largely unprotected.[322] In contrast, legislating to protect hate groups would suffer extreme public backlash. True, the circuit split on media platforms suggest viewpoint censorship regulations are increasingly feasible.[323] Such regulations are uniquely justified as protecting speech forums, however, and prudent legislators will generally tread lightly upon the rights of private commercial entities at large.[324]

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318. *See, e.g.*, *supra* note 70 and accompanying text for examples of growing interest in challenging viewpoint exclusions by private entities.

319. *See* Manhattan Cmty. Access Corp. v. Halleck, 587 U.S. 802, 818–19 (2019) (holding private entity operating public television channels was not a state actor because not performing a traditional state function).

320. O'Handley v. Weber, 62 F.4th 1145, 1163 (9th Cir. 2023) (citing Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 68–71 (1963) (distinguishing between encouragement and compulsion by the government)).

321. *See* PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 81 (1980) ("It is, of course, well established that a State in the exercise of its police power may adopt reasonable restrictions on private property so long as the restrictions do not amount to a taking without just compensation or contravene any other federal constitutional provision."); Rumsfeld v. F. for Acad. & Institutional Rts., Inc., 547 U.S. 47, 60–61 (2006) (discussing how "the First Amendment would not prevent Congress from directly imposing the Solomon Amendment's access requirement").

322. *Rumsfeld*, 547 U.S. at 60–61. Since *Rumsfeld*, many states have added sexual orientation and gender identity as protected categories under public accommodation law. *See* NAT'L CONF. OF STATE LEGISLATURES, *supra* note 11.

323. *See* BRANNON, *supra* note 71, at 1 ("Two U.S. Courts of Appeals have recently taken different positions on the validity of state laws restricting internet services' ability to moderate user content.").

324. Lawmakers must consider backlash from corporate donors when legislating. During the 2020 election, the lodging and tourism industry contributed nearly $35 million to political candidates: fifty-eight percent to Democrats and forty-one percent to Republicans. *Summary*, OPEN SECRETS, https://www.opensecrets.org/industries/indus.php?ind=N08 (last visited Apr. 1, 2024) [https://perma.cc/VKG6-LPJ8].

If Airbnb's policies and practices are indeed threatened by state legislation or judicial rulings, it may assert its own First Amendment right.[325] By forcing a private entity to host messages with which it disagrees, the government exerts impermissible speech compulsion, "modify[ing] the content of [Airbnb's] expression" as to "modify [Airbnb's] 'speech itself.' "[326] Responding to contentions that speech-hosting requirements merely regulate nonexpressive entity conduct, an accommodation must argue that a significant risk of speech attribution exists; in Airbnb's case, its history of discriminatory speech attribution bolsters this position.[327] Beyond Airbnb's explicit recognition of its intentions, the actions it takes under its policy qualify as "inherently expressive" conduct because a neutral observer would understand the conduct's expressive message without needing an explanation: it is simply the company's response to a social issue through service withdrawals.[328] Serving hate groups would undoubtedly interfere with Airbnb's longstanding commitments and messaging.[329]

C. Evaluate Hate-Group Speech as True Threats

If speech-hosting requirements are imposed on public accommodations, defenses traditionally employed by the state in response to First Amendment claims must be equally available to these entities. And if an accommodation's regulation of patron speech is deemed nonexpressive, it may argue its policies regulate impermissible conduct rather than speech.[330] Speech conveying intent to inflict harm per se constitutes discriminatory conduct and loses protection.[331] While the fighting words doctrine enjoys deep historical roots, the notion of face-to-face combat is outdated, ineffective for present purposes, and futile in effect; indeed, the Supreme Court has not sustained a

325. *See* Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal., 475 U.S. 1, 16 (1986) (establishing organizational speech rights).

326. *See* Coral Ridge Ministries Media, Inc. v. Amazon.com, Inc., 6 F.4th 1247, 1255–56 (11th Cir. 2021) (discussing how Coral Ridge's proposed interpretation of Title II would violate the First Amendment (quoting Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 573, 578 (1995))).

327. *See* Park & Boyette, *supra* note 122 (exploring the history of discrimination).

328. *See* Rumsfeld v. F. for Acad. & Institutional Rts., Inc., 547 U.S. 47, 66 (2006) (explaining that law schools' decision to exclude military recruiters was non-expressive because a neutral observer would not understand this as condemning the military's "Don't Ask, Don't Tell" policy).

329. *See* AIRBNB, *supra* note 114 (discussing standing policies, practices, and initiatives).

330. *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 573 (1942) ("fighting words"); Counterman v. Colorado, 600 U.S. 66, 69 (2023) ("true threats").

331. *See Chaplinsky*, 315 U.S. at 573.

conviction under this doctrine since 1942.[332] The true threats doctrine, by seeking to "protect individuals from the fear of violence" regardless of realization, extends smoothly to the virtual context and may adequately protect targeted communities from hatemongers.[333] Further, precedent supports viewing hate-group speech regulation as an incidental implication of conduct regulation.[334]

D. Emulate Tort-Litigation Strategy to Preemptively Hold Hate Groups Accountable

The argument for regulating speech as impermissible conduct is further bolstered by the civil conspiracy trial of Unite the Right participants.[335] When hate groups execute violent displays, the aftermath is often plagued by the blame game.[336] Individuals facing repercussions predictably offer victim-oriented defenses: "In the USA, we are not guilty by association, but I feel like a butterfly being accused of starting a hurricane."[337] Under civil conspiracy, however, individuals may be guilty by association.[338] By advocating for and fueling dissemination of threatening ideologies, these individuals signal agreement and act in furtherance of illicit objectives.[339] Because violent groups are encouraged and emboldened by the support of their "army," endorsements of violent public or internal speech secure one's guilt.[340]

Thus, while Airbnb has not yet suffered harm warranting its own legal remedy, it may channel tort strategy when deeming hate-

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332. Rosalie Berger Levinson, *Targeted Hate Speech and the First Amendment: How the Supreme Court Should Have Decided* Snyder, 46 SUFFOLK U. L. REV. 45, 55 (2013); *see Counterman*, 600 U.S. at 109 (Barrett, J., dissenting) (deeming fighting words "a category of unprotected speech that the Court skips past").

333. *See* Levinson, *supra* note 332, at 56–57 (describing the lack of constitutional protection for true threats).

334. *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 390 (1992) (indicating that hate speech can be incidentally affected by conduct regulation).

335. *See* Sines v. Kessler, No. 3:17-cv-00072, 2022 U.S. Dist. LEXIS 233715, at *30–32 (W.D. Va. Dec. 30, 2022) (affirming a civil conspiracy verdict against participants of the Unite the Right rally).

336. *See, e.g.*, Stephanie Moore, *Furman Professor Talks About Attending 'Unite the Right' Rally; Says He Was Exercising His Rights*, WYFF NEWS 4, https://www.wyff4.com/article/furman-professor-unite-the-right-rally/41545284 (last updated Oct. 6, 2022, 12:38 PM) [https://perma.cc/7HAK-NGJ7].

337. *Id.* (Chris Healy's statement upon being terminated by Furman University for participating in Unite the Right).

338. Dees & Bowden, *supra* note 246, at 5.

339. *See id.* ("[C]ivil conspiracy envisions an agreement between two or more persons . . . [in which] [a] meeting of the minds occurs, transforming the acts of one defendant into the acts of the other(s).").

340. *See id.*; *Sines*, 2022 U.S. Dist. LEXIS 233715, at *30–32.

groups affiliates to be in violation of its policies: group members are guilty by association.[341] Entities cannot wait for patrons to publicly commit violent crimes before restricting access to services and resources. Rather, targeting certain speech as predictive of future violence is necessary where it has the direct and foreseeable effect of violence.[342] Otherwise, Airbnb itself may be deemed guilty by association.[343]

E. Discrimination Claims Under Title II

Although hate-group members threaten lawsuits of status-based discrimination, such threats are largely meritless.[344] Excluded members cannot demonstrate a prima facie case of intentional discrimination because Airbnb's policy and enforcement practices lack any indication of animus for a *protected* class.[345] Further, a disparate-impact theory similarly fails for the very fact that hate-group affiliation is not protected.[346] In jurisdictions recognizing political identity as protected, existing case law informs and limits the feasibility of this claim.[347] Although most laws are narrowly prescribed and political affiliation is less likely to withstand constitutional scrutiny compared to widely recognized classes,[348] public accommodations must prepare to withstand these increasingly invoked claims. As one of the few jurisdictions presently protecting political ideology, recent decisions from Seattle's Civil Rights Division provide necessary and compelling

341. *See* Dees & Bowden, *supra* note 246, at 5 ("When the relationship between two or more persons is close enough, one can infer that a conspiracy exists.").

342. *See* Counterman v. Colorado, 600 U.S. 66 (2023) (affirming that preventative action against speech with a clear nexus to potential violence is permissible under the law); R.A.V. v. City of St. Paul, 505 U.S. 377, 390 (1992) (holding that "acts are not shielded from regulation merely because they express a discriminatory idea").

343. *See* HUM. RTS. WATCH, BED AND BREAKFAST, *supra* note 212, at 2–3 (criticizing Airbnb for profiting from and economically supporting unlawful settlements, as well as inconsistently applying their antidiscrimination policy). Greater analysis is warranted to evaluate whether Airbnb's failure to withdraw listings in turn generates separate liability.

344. *See* Coral Ridge Ministries Media, Inc. v. Amazon.com, Inc., 406 F. Supp. 3d 1258, 1303–07 (M.D. Ala. 2019) (holding that Defendants' refusal to acquiesce to Plaintiff's litigation demands fails to convert plaintiff's exclusion from the AmazonSmile program into intentional discrimination, nor does it inflict disparate-impact discrimination).

345. 42 U.S.C. § 2000a(a) (defining protected classes).

346. *See Coral Ridge*, 406 F. Supp. 3d at 1303–06 (providing that "a plaintiff must show that the defendant's challenged policy or practice has a 'significantly disparate impact' on members of a protected group" to make out a prima facie case under a disparate-impact theory).

347. *See* Transcript of Oral Argument, *supra* note 47, at 80 (arguing that "in most circumstances, political ideology did not satisfy the constitutional requirements" for discrimination).

348. *Id.* at 80.

guidance: illicit activity is not shielded from regulation due to its political nature,[349] private actors may expel ideologies that threaten to be conflated with their own,[350] and public accommodations may exclude patrons as guilty by ideological association.[351]

CONCLUSION

In an era where virtual meets reality, the digital public accommodation emerges as a pivotal battleground. Unfortunately, modern platforms have not triumphed beyond traditional evils; rather, these spaces have mobilized hate-group activity and the spread of violent ideologies. To properly reflect its history, precedent, and original intent, Title II must evolve to reach online actors, ensuring that protected classes enjoy full and equal access to publicly available services. This necessity is complicated by nuanced interpretations of free speech protections, operating as both a sword against and shield for digital platforms. On one hand, convoluted understandings of this right foster a misplaced sense of entitlement among patrons, empowering hate groups to camouflage violent speech and conduct against the First Amendment's backdrop. On the other, threats of legal repercussions deter entities from meaningful intervention against illicit discrimination on their platforms.

Now more than ever, the legal landscape must enforce legal realities: By electing to withhold services from hate groups, a public accommodation does not infringe on the First Amendment nor violate Title II antidiscrimination provisions. Rather, the law requires that public accommodations provide full and equal enjoyment of their services *to recognized protected classes*, permitting the exclusion of unprotected traits to meaningfully include those who are protected. If courts consistently uphold these priorities, much of this Note's analysis

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349. Volokh, *supra* note 302, at 499, 499 n.26 (citing Hu v. Coury Rests., Inc., No. 2018-01046, at *5–6 (Seattle Off. for Civ. Rts. Mar. 29, 2019) (holding plaintiff was not excluded because of his political hat, but because he became hostile when an employee expressed distaste for the hat)); *see also* R.A.V. v. City of St. Paul, 505 U.S. 377, 390 (1992) ("[A]cts are not shielded from regulation merely because they express" an idea).

350. Volokh, *supra* note 302, at 500, 500 n.28 (citing Quinn v. Gibbens Ins. LLC, No. 2020-01277, at *8–9 (Seattle Off. for Civ. Rts. Feb. 24, 2021) (finding that employer permissibly fired employee because, among other reasons, the employee might discriminate against customers and "members of the public . . . were upset")); *see also* Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 573 (1995) (stressing right of speakers to choose what not to say).

351. Volokh, *supra* note 302, at 501, 501 n.30 (citing Gibson v. Mex. Seattle, LLC, No. 2019-01194, at *14, *18 (Seattle Off. for Civ. Rts. Dec. 18, 2020) (permitting a restaurant to deny services to a member of the violent group Patriot Prayer)); *see also* Dees & Bowden, *supra* note 246 (contemplating civil conspiracy as means to hold all members of hate organization liable for single member actions).

will become historically informative rather than legally instructive—a welcome result. But until the legal system restores these black and white doctrines from their fifty shades of decay, this Note's analysis remains critical. With this legal action plan, accommodations may place their money where their mouth is and act against hate without fear of unjust consequences. By recognizing the misuse of First Amendment protections as a blanket shield for discriminatory conduct, the recent conviction of Jason Kessler and his coconspirators represents a hopeful step towards increased accountability. Theories of civil conspiracy liability warrant continued exploration to combat hate-group activity at large—beyond the four walls of a public accommodation, or even the four corners of your screen.

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* J.D. Candidate, Vanderbilt Law School 2024; B.A., 2021, Vanderbilt University. Thank you to the entire *Vanderbilt Law Review* staff for their thoughtful edits, particularly Ari Goldfine, Christian Dunn, Stefan Pruessmann, Andrea Steiner, and Hala Bazzaz. Special thanks to Samantha Hunt, for serving as my sounding board throughout the writing process; Natalia Andrade, Surya Garg, and Rafaela Valderrama, for always indulging my legal ramblings; and finally, to Robert, Carlisa, Catherine, and Michael Apple, for their endless love and support.