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Does Fair Housing Law Apply to "Shared Living Situations"? Or, the Trouble with Roommates

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I. INTRODUCTION

In its 2012 *Roommate.com* opinion,[2] the Ninth Circuit held that neither the federal Fair Housing Act ("FHA")[3] nor California's equivalent (the Fair Employment and Housing Act or "FEHA")[4] apply to "shared living situations" because of a conflict with the Constitutional right to freedom of intimate association. The *Roommate.com* case raises a real and important problem that must be resolved. This case presents a classic line-drawing problem between "public" and "private" realms: At what point (defined by housing types) does the statutory obligation to avoid discrimination impermissibly interfere with the constitutional right to freedom of intimate association? Unfortunately, *Roommate.com*'s solution is too broad because it extends this constitutional protection to *any* roommate relationship, indeed to any "shared living situation." In addition, the opinion is not well-grounded in precedent. A more nuanced solution that better balances the competing interests and rights is needed.

The constitutional right to freedom of intimate association is based in the concept of liberty in the due process clauses and is implied in the Bill of Rights.[5] This right protects certain important and intimate relationships from governmental intrusion without sufficient justification.[6] "[C]hoices to enter into and maintain certain intimate human relationships must be secured against intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme."[7] The right of intimate association includes both an affirmative right to associate with desired persons, and an implied negative right to be free from associating with undesired persons.[8] It is closely related to the unstated "right of privacy."[9] Prior to *Roommate.com*, courts had recognized only a narrow set of relationships as meriting protection under right to freedom of intimate association; primarily, marriage and family relationships.[10]

FHA and FEHA prohibit many forms of housing discrimination, including housing providers' selection of prospective tenants and discriminatory advertising. Fair housing laws aim to rid the housing market of discrimination and segregation because housing provides a foundation for individual and family life.[11] In the *Roommate.com* case, a private fair housing group alleged that Roommate.com, LLC (an internet roommate matching service) violated FHA and FEHA because its website elicited discriminatory preferences from its users and used this information to match prospective roommates. The broad ruling absolved from liability under these statutes, not only Roommate.com, LLC, but anyone offering shared housing.

Instead of merely resolving the issue presented, this case raises a thicket of complex and difficult issues for constitutional law[12] and for the fair housing movement—even among fair housing advocates.[13] The obvious effect of the opinion is to withhold antidiscrimination protection for roommates and others seeking to live in shared housing situations. This outcome affects a large number of people.[14] Equally important, the opinion promotes *discriminatory* social norms in housing. Social norms are the informal rules that guide our conduct, such as tipping at a restaurant.[15] The *Roommate.com* opinion validates such discriminatory preferences and the expression of these preferences in any kind of shared housing situation.

The FHA aims to eliminate discrimination in housing "within constitutional limits." It makes certain actions, such as a landlord's refusal to negotiate or lies about the availability of vacant units, illegally discriminatory if those actions are based upon the prospective tenant's membership in a protected class.[16] And this statute includes an absolute ban on discriminatory advertising.[17] Many online advertisements for roommates clearly appear to violate FHA's text.[18] Professor Rigel Oliveri, an expert on fair housing law, conducted a study of discriminatory online advertisements in which she found that,

> [t]he vast majority of potentially discriminatory ads are those for shared housing. Virtually all of the ads that mention the protected categories of race, religion, and national origin are roommate ads. Thus, to the extent that there is a problem of discriminatory advertising on the Internet, roommate ads are the primary culprit.[19]

Roommate.com is a website that helps people seeking roommates find them. The Fair Housing Council of San Fernando alleged that Roommate.com, LLC had violated FHA and FEHA because the website structure required users to disclose their sex, sexual orientation, and familial status preferences, then used this information to sort, steer and match users based upon these characteristics. Roommate.com's primary defense was that as an internet service provider ("ISP"), it is exempt from FHA liability under the federal Communications Decency Act ("CDA"), as had been found in Chicago *Lawyers' Committee for Civil Rights Under Law, Inc. v. Craigslist, Inc.*[20]

The *Roommate.com* case has a complex procedural history. Relying on the CDA exemption, the district court granted the defendant's motion for summary judgment as to the FHA claim, and dismissed the FEHA claims with prejudice. On appeal, the Ninth Circuit remanded the case, holding in part that because the structure of Roommate.com's website elicited discriminatory information from users, Roommate.com did not qualify for the CDA exemption. "On remand, the district court held that Roommate's prompting of discriminatory preferences from users, matching users based on that information and publishing

these preferences violated FHA and FEHA, and enjoined Roommate from those activities."[21] The district court granted summary judgment, a preliminary injunction and attorneys' fees to the plaintiff, and defendant appealed. On its last appeal, Roommate.com asserted that the FHA and FEHA do not apply in the selection of roommates because the constitutional right of free association protects roommate relationships, and application of these anti-discriminatory laws would impermissibly infringe upon this right. The decision in the case turned on statutory interpretation and judicial aversion to constitutional conflict in statutory interpretation. The court absolved Roommate.com of liability by holding that FHA and FEHA do not apply to roommates or to other "shared living situations" *independently* of any statutory or judicial immunity granted to internet service providers for what would otherwise be discriminatory postings.

The *Roommate.com* opinion adopts a simple solution to the conflict presented: FHA simply does not apply to shared living situations, including roommate situations. As the court stated that "[i]t makes sense to . . . stop the FHA at the front door."[22] Application of fair housing law to someone seeking a roommate is problematic, according to the court, because "roommates" are situated differently than "landlords" in the rental market due to their "shared living situation."[23]

Simplicity is not always a virtue in law, especially in the presence of diverse factual situations, complex, pre-existing legal frameworks, and competing rights. Unfortunately, the court's application of the FHA and FEHA to shared living situations in the context of the right of free association is poorly reasoned, weakly supported, and badly drafted.[24] Consequently, the case's overbroad solution unjustifiably expands the scope of the right of free association.[25] As a result, the opinion distorts fair housing law and will have uncertain application and effect in this area of the law.

Fair housing law can conflict with the right of intimate association in real and important ways, but this conflict only arises in conjunction with a subset of roommate relationships; those intending an intimate companionship or specifically seeking to avoid intimate companionship with a member of a protected class. These relationships can be protected, and the *Roommate.com* result avoided, by narrowly tailoring certain provisions of the FHA and FEHA, to avoid this constitutional conflict.

This article proposes amending the FHA and FEHA to create an affirmative defense for a person who seeks a roommate relationship meriting constitutional protection, and who is subsequently charged with a fair housing violation. This individual would have the burden of proving that she qualifies for the defense, but advertising in the "personal ads" section of a publication or its equivalent (rather than the "housing ads" section) will raise a rebuttable presumption that she meets the requirements of the defense. In contrast, someone who expresses discriminatory preferences in an ad placed in the "housing ads" section will be subject to liability unless she can affirmatively demonstrate her constitutionally-protected interest to claim the defense.

This solution appropriately respects the constitutional rights of roommates who merit the protection, while promoting fair housing goals and the social norms that support them. The Constitution protects *choice in personal relationships*, while the FHA prohibits *discrimination in the housing market*. Under the proposed solution, a person must choose the kind of roommate relationship she wants, and then either advertise in the personal ads section of a publication, or relinquish this preference and publish a non-discriminatory ad in the general housing advertisements section of a publication.

II. THE POTENTIAL CONFLICT BETWEEN THE FHA'S ANTIDISCRIMINATION REQUIREMENTS AND THE RIGHT OF FREEDOM OF INTIMATE ASSOCIATION IN ROOMMATE SITUATIONS[26]

The application of antidiscrimination principles in housing has been, and continues to be, a controversial policy. Fair housing advocates claim that a person's skin color, sex or religion, in and of themselves, have no bearing on their capacity to be a responsible tenant or worthy homeowner, but some property owners, realtors, financial institutions, and others consider these characteristics in making housing decisions. HUD provides an administrative enforcement scheme, and affected persons can bring private lawsuits to enforce the fair housing laws.[27] More than forty years after the FHA's enactment, there are still high rates of non-compliance with fair housing laws, including regular instances of blatant violations. For example, in a recent case, two men interfered with the housing rights of African-American residents including by spray painting a swastika and racial slurs on their driveway and hanging a noose from a tree outside of their residence.[28] HUD's most recent report found that although housing discrimination is reducing, it still persists.[29]

By definition, anti-discrimination laws conflict with the preferences and habits of people who take protected characteristics into account in their housing decisions. The adoption of anti-discrimination laws constitutes a legislative (and value) judgment that these preferences and habits are unacceptable in the public realm. In our democratic system, however, the Constitution limits the government's reach. Legislation cannot ban discriminatory thought or certain conduct in the "private realm." The dividing line between the public realm appropriate for regulation, and the off-limits private realm, is constantly debated; but when there are conflicts, we must do our best to draw the appropriate line.

The right of freedom of intimate association protects certain important and intimate relationships from governmental intrusion without sufficient justification. The U.S. Supreme Court applies a four element test to determine what relationships merit constitutional protection under the right of intimate association.[30] The Court first articulated this test in *Roberts v. U.S. Jaycees*, a case in which the Court upheld a Minnesota statute that required the Jaycees to admit women as full voting members against a First Amendment challenge.[31] The Court affirmed this test in *Board of Directors of Rotary International v. Rotary Club of Duarte* ("*Rotary*").[32] In *Rotary*, the Court upheld the constitutionality of a California law that required California Rotary Clubs to admit women members against a claim that the statute violated the organization's right of intimate association.[33] The *Rotary* test requires a court to consider "size, purpose, selectivity [of the relationship], and whether others are excluded from critical aspects of the relationship."[34] In addition, the analysis "unavoidably entails a careful assessment of where that

relationship's objective characteristics locate it on a spectrum from the most intimate to the most attenuated of personal attachments."[35] To date, the U.S. Supreme Court has applied this right to familial relationships,[36] but in principle, it has not limited the right to these relationships.[37]

Arguably, the *Roommate.com* case concerns a situation in which the FHA and FEHA collide with the constitutional right to freedom of intimate association. When a person decides to take on a roommate, usually she is making a decision to enter the housing market. But when two or more persons share an apartment or a house as roommates, the structural situation of sharing certain spaces may limit privacy and create the potential for the kind of intimate relationship that merits protection by the constitutional right to freedom of intimate association. The government does not apply anti-discrimination norms to who you invite to dinner at your home, or who you befriend.

One could argue that people *should* be able to use the characteristics of protected classes to select roommates and there is no significant harm to society because this is part of the "private realm." Under this view, characteristics protected by the FHA and FEHA *could* possibly matter. In its *Roommate.com* opinion, the Ninth Circuit offers the examples of sex (a woman seeking a woman roommate) and religion (an orthodox Jew who wants a roommate "with similar beliefs and dietary restrictions") as evidence of situations deserving of constitutional protection.[38] The issue is: In what living situations does an individual's statutory obligation to not discriminate impermissibly interfere with her constitutional right to freely associate with others? This problem demands a solution that respects and furthers each conflicting value to the greatest extent possible.

III. CRITIQUE OF THE *ROOMMATE.COM* DECISION

A. Summary of the Court's Reasoning

1. *The Federal Fair Housing Act*

The FHA was enacted to provide for fair housing "within constitutional limits."[39] The statute only applies to a "dwelling."[40] According to the Ninth Circuit, although this term is ambiguous, if "dwelling" is interpreted to apply to portions of a building in "shared living situations," such as those involving "roommates," then under the *Rotary*[41] test, people would be deprived of their constitutional right to associate.[42] This right includes the right not to associate as well. Ambiguity should be resolved in a way that prevents a constitutional clash when a reasonable interpretation of the statutory language would avoid such a conflict.[43] A "dwelling" under the FHA may be reasonably interpreted as an "independent living unit."[44] Therefore, the Ninth Circuit adopts this interpretation to avoid a constitutional conflict.[45] Under this interpretation, the FHA does not apply to "shared living situations," including those involving roommates. The court thereby exonerated Roommate.com from liability.[46]

2. *California's Fair Employment and Housing Act*

The *Roommate.com* court's reasoning and conclusion about FEHA parallels its reasoning and conclusion that the FHA does not apply to shared living situations. FEHA defines "housing accommodation,"[47] as "any building, structure, or portion thereof that is occupied as, or intended for occupancy as, a residence by one or more families."[48] The court declares this term ambiguous and to avoid a constitutional conflict, finds that "housing accommodation" is reasonably interpreted as excluding shared living situations. However, the majority and the dissent[49] disagree on FEHA's application to shared living situations due to their conflicting interpretations of a 1995 FEHA amendment.

This 1995 amendment removed from FEHA's definition of discrimination, "the use of words stating or tending to imply that the housing being advertised is available only to persons of one sex,"[50] "[w]here the sharing of living areas in a single dwelling unit is involved."[51] The majority reasons that despite the 1995 amendment, the definition of "housing accommodation" remains ambiguous. The dissent reasons instead that the statute's explicit reference to "sharing of living areas in a single dwelling unit" means that the FEHA is unambiguous on the issue of its application to shared living. In further support of its view, the dissent cites a decision by the Fair Employment and Housing Commission,[52] which held that two roommates violated FEHA's plain language when they refused to rent to another roommate because she was African American. Therefore, the dissent argues, there is a direct conflict with the Constitution, the constitutional conflict avoidance principle does not apply, and the statutory conflict must be resolved. The dissent suggests resolution might be achieved by striking language in the statute. For this reason, the dissent would have remanded the case to the district court for briefing and argument on this issue.

B. The Majority's Troubling Analysis

The court's holding rests on its application of the four-element *Rotary* test. The manner in which the court employs the *Rotary* test, and especially the purpose element of that test, fails to withstand critical scrutiny.

1. *Applying the Correct Legal Test*

The *Roommate.com* court looks to the *Rotary* case to supply the authoritative test for resolving the issue presented. The court correctly recognizes that the U.S. Supreme Court has been unclear about the scope of this right, and has not, in principle, limited it to familial relationships.[53] However, the court's application of the *Rotary* test is largely conclusory and is inadequately supported by other authority.

For each of the test's size, selectivity and exclusivity elements, the Ninth Circuit offers one conclusory clause without providing any supporting evidence or authority. The court reasons that "[t]he roommate relationship easily qualifies [as an intimate association relationship, deserving of Constitutional protection]: People generally have very few roommates; they are selective in choosing roommates; and non-roommates are excluded from the critical aspects of the relationship, such as using the living spaces."[54] While these findings merit criticism—for example, on the size element, would fraternity houses with ten members fall within the scope of this decision—the court's analysis and conclusions on these elements fall outside the scope of this article.

The most glaring error in this decision is the court's flawed reasoning on the "purpose" element.[55] Relationships that precedent has identified as protected by the constitutional right of free association include family relationships, long-term enduring

relationships and "deep attachments and commitments" that play a critical role in society by "cultivating and transmitting shared ideals and beliefs."[56] The *Roommate.com* court explicitly recognizes that courts issuing previous decisions have carefully limited the scope of these relationships to "only 'highly personal' relationships."[57]

To establish the purpose element, the court constructs the roommate situation in a one-sided and unrealistic manner using four different strategies.[58] First, the court frames the roommate selection situation solely from the viewpoint of a person deciding to invite a roommate to share her "home," thereby invoking the broadly accepted notion that one's home is the place of maximum protected privacy. Second, the court determines that the nature of the roommate relationship is defined and determined by the physical proximity of their shared living space. Specifically, the court contends that these characteristics inevitably and necessarily lead to a lack of privacy and a certain form of involuntary intimacy. Third, the court never considers physical structural elements or voluntary acts that roommates can, and usually do, employ to protect privacy in the roommate situation. Fourth, the court fails to consider that different people seek and prefer various kinds of relationships with their roommates, most of which do not rise to the level of intimate relationships deserving constitutional protection. Without any evidence or citations to authority, the court presumes that the intimate companionship roommate situation is at least the norm, and possibly the only form of roommate situation. Because this construction of the roommate relationship is fundamental to the court's holding that antidiscrimination law does not apply, it requires critical analysis.

2. *Exclusively Employing the "Housing as Home" Frame*

The court frames the roommate situation exclusively from the perspective of a person seeking a roommate with whom to share her "home." By framing the issue in this manner, the court attempts to ground its claim that all roommate relationships meet *Rotary*'s purpose element. Beginning with the opinion's first sentence ("[t]here's no place like home"), and eleven times thereafter, the *Roommate.com* court labels the applicable dwelling as the "home" of the housing provider.[59] This definition understandably evokes strong expectations of privacy and potential intimacy.[60]

Fair housing law, the legal basis for the plaintiff's claims, addresses "housing as an economic good"[61] or "housing as a human right."[62] These two common approaches to housing could have been applied in this case. This author presumes that the vast majority of people who advertise for roommates seek economic benefits from this arrangement, meaning someone to share their rent payments. Thus, approaching the *Roommate.com* issue from the perspective of housing as an economic good would have made sense here. However, the court disregards the fact that the parties to the type of roommate situation at issue usually approach it as a commercial transaction.[63]

Viewing housing as an economic good would have made a difference because recognizing a roommate relationship as a commercial transaction draws attention to the fact that in a commercial exchange, we expect each party to give something up in exchange for receiving something in the transaction. When one regards housing as an economic good, the person seeking a roommate sacrifices some of her privacy in exchange for assistance with rent payments.[64] Conceiving of the roommate relationship in this manner casts the roommate's potential loss of privacy in a different light than the exclusive "housing as home" framing. From this economic standpoint, any related loss of privacy becomes predictable and acceptable as subject to the free choice of the person seeking the financial benefit of a roommate.

The "housing as a human right" approach focuses primarily on individual legal rights concerning access to housing and its quality, including the rights of poorly housed or homeless persons. The *Roommate.com* plaintiffs sued to protect potential roommates from discrimination and the harm caused by rejection on the basis of a characteristic inapplicable to a roommate's ability to be a good tenant or roommate. The damaging effects of discriminatory rejection in housing are regularly documented and litigated. Because the *Roommate.com* court considers the roommate selection decision solely from the point of view of the person seeking a roommate (the leaseholder or homeowner), it avoids any mention—much less consideration—of the potential effects of rejection on persons seeking to become a roommate.

Potential roommates and their interests simply do not appear anywhere in this opinion. The court's failure to consider this perspective undercuts the essence of the plaintiff's fair housing claim. If the court had viewed the conflict from this angle, it would have necessarily acknowledged that a homeowner's or leaseholder's rejection of a potential roommate based upon a protected characteristic inflicts significant individual and social harm. Without this perspective, no legal, emotional, ethical, or other element counterbalances the privacy interests of a roommate who seeks another person to share his apartment.

3. *Imagining Inevitable Intimacy*

The court's decision that shared living situations, including those involving roommates, meet the purpose element of the *Rotary* test is founded on the court's belief that the social construction of the roommate relationship is *inherently* "intimate." Intimacy, in the court's view, is based *not* upon the intent of either person to be intimate, but upon the roommate situation in general, and a crude form of environmental determinism.

The court expresses concerns about impinging upon the constitutional right to freedom of association in "shared living situations."[65] According to the court, each roommate has "unfettered access to the home" and "physical belongings" of other roommates,[66] access "to our person" (presumably physical),[67] and intimate views of our body ("see us in various stages of undress").[68] The roommate situation also provides private knowledge of other roommates' "comings and goings,"[69] truly intimate associations ("whom we bring back at night"),[70] and personal habits, tastes, so forth ("hear what songs we sing in the shower" and "learn intimate details most of us prefer to keep private").[71] Finally, the court states: "Equally important, we are fully exposed to a roommate's belongings, activities, habits, proclivities and way of life."[72]

The court determines that these assumed facts about the roommate setting raise issues of privacy and intimate association of constitutional dimension. This reasoning leads to the court's conclusions that any type of shared physical space in a

roommate situation *necessarily* implicates intimate association.[73] The court reasons as if mere entry into any roommate situation *necessarily* entails all of the risks associated with violating the right of intimate association.[74]

4. Ignoring Structural Elements, Agreements Governing Use of Such Structures, and Voluntary Acts

While the *Roommate.com* court implicitly embraces a crude form of environmental determinism that it treats as inevitably creating intimacy, it never considers the physical, structural elements of typical apartments or houses that make intimacy *less* likely. Nor does the court consider voluntary actions that roommates can, and often do, take to avoid or limit the circumstances that can reduce their privacy and prevent an intimate relationship with other roommate(s).

First, consider the physical structure of a dwelling. The *Roommate.com* court never clearly defines the "roommate" situation it considers. Instead, the court constructs the concept broadly to include *any* roommate situation, including one with a shared bedroom and any shared apartment or house. Scholarly literature on roommate relationships recognizes that two elements of the physical structure of an apartment or house—sharing a bedroom or sharing a bathroom—can significantly influence the roommates' relationship, but are not determinative of the degree of intimacy of that relationship.[75] This distinction is relevant for purposes of the *Roommate.com* holding. A dormitory in which students share a bedroom and bathrooms is the physical situation that presents the highest risk of privacy loss. Importantly, the U.S. Department of Housing and Urban Development ("HUD") and courts have applied the FHA to these very roommate situations, interpreting the shared space as a "dwelling" for purposes of the FHA.[76] Yet, the *Roommate.com* court does not even mention, much less reconcile its decision with these cases. This disregard suggests that the court's unilateral focus on structural elements that *reduce* privacy results in an incomplete assessment of the roommate situation generally, and that its failure to distinguish among the broad variations of roommates' physical living situations contributes to the overbreadth of the court's holding.

A typical apartment contains a shared kitchen, living room, and some shared storage space, but separate bedrooms, sometimes with locks, and either a shared bathroom with a lock or separate bathrooms. Many houses are configured similarly. Due to these distinct, physical configurations, many of the court's concerns about involuntary intimacy either are not present or are mitigated by the physical structure of an apartment with separate bedrooms and bathrooms. For example, door locks on the bathroom and a separate bedroom provide enough privacy that a roommate need never be seen in any stage of undress unless she wants to be. In contrast, if roommates *want* to have a close relationship, their mutual intention will trump any obstructions posed by their home's physical structure.

Just as importantly, the court assumes a person cannot exercise discretion about whether to reveal intimate secrets or private information while living with a roommate. It is factually inaccurate to portray all roommate situations as necessarily revealing such information. Certainly, taking on a roommate predictably risks the loss of some privacy, but also immediately offers potential ways to mitigate that loss. If she desires, a roommate can keep to herself and take measured steps to prevent sharing personal information with her roommate. For example, she can text rather than speaking on a phone when she might be overheard, or she can keep confidential documents or objects in her room rather than in common areas.

Finally, the court completely overlooks the role of a contract in roommate leasing situations. The court treats the selection of a roommate as a once off, all-or-nothing decision without any pre-lease or post-lease negotiation. But in fact, roommates can make agreements to deal with many, if not all, of the concerns the court raises. Commentators generally recognize that contracts play an important role in managing any successful roommate relationship.[77] In fact, roommate groups, including the defendant Roommate.com itself, recommend these kinds of agreements.[78] Roommates formalize some aspects of these arrangements in legally enforceable lease provisions, making violation the basis for eviction. One such provision might be the house rules. Other agreements are informal, for example, whether a roommate's crucifix and her Sex Pistols poster belong in public areas of the shared living space versus in her individual bedroom. The Ninth Circuit's complete omission of the substantial role of contracts in residential leasing is particularly odd given the forty-year history of courts treating residential leases as a combination of a transfer of a property interest and a contract.[79]

5. Ignoring Different Kinds of Roommate Situations

To meet the *Rotary* purpose element, the *Roommate.com* court describes the roommate situation in an extreme manner that conflates all roommate relationships with one of inherent intimacy. It is common knowledge that many kinds of roommates do not form intimate relationships deserving of constitutional protection. The court fails to consider this fact.

Four common types of roommate relationships are described briefly below.[80]

a. Independent Living/Pure Convenience, Commercial Relationship: One common roommate arrangement is formed purely for convenience; the roommates live independent, separate lives, and in essence, merely have entered into a commercial transaction.[81] Advertisements for these types of roommates do not mention compatibility or, indeed, any relationship other than exchanging the use of a room for money. These publications simply present the salient characteristics of the housing unit; for example, when homeowners rent rooms to college students.[82] People in these kinds of roommate relationships can live together for an extended period of time without gaining any intimate knowledge of each other. For roommates who post these types of advertisements, the need for another person's financial contribution to rent is both the reason for seeking a roommate and the sole or primary selection criterion.

b. Compatibility: In the second type of roommate relationship, roommates seek minimum commitments to ensure compatibility with each other's lifestyles.[83] These ads describe the characteristics of the housing unit and state the compatibility criteria. The goal of this type of roommate search is to maintain a stable, non-intimate relationship for the term of the tenancy. Advertisements for these roommates focus on functionality: having a roommate situation that will work, but not necessarily

any substantive personal relationship.[84] "Compatibility" is defined by various characteristics, preferences and habits of the potential roommates, such as cleanliness, dietary preferences, political views, music preferences, sleeping times, and so forth. With the exception of gender or sex, neither the FHA nor FEHA protect the preferences and characteristics typically cited in these advertisements.[85] Colleges and universities regularly make "compatibility" of roommates their goal in matching new students.[86]

c. An Activity Companion: In this third type of roommate relationship, the advertiser seeks a casual friend, but not a close friend.[87] Therefore, compatibility is necessary, but insufficient alone. These ads seem to express the following preferences: "I want to hang out and have fun in commonly desired activities, but I don't want to be involved in your feelings and relationships." "No drama" appears to be a code phrase to make this distinction. This type of roommate relationship falls between mere compatibility (above), and intimate companionship (below).

d. Intimate Companionship:[88] In the fourth type of roommate relationship, the roommates expect and desire a close companion relationship, making compatibility a necessary element.[89] The advertising roommate expects that he and the other roommate(s) will spend a certain amount of time together and will actively share their lives in significant ways.[90] This kind of roommate relationship unquestionably deserves constitutional protection.[91]

Some definitions of "intimacy" describe it as a "state" of emotional closeness and connection;[92] others provide a more functional definition of how that state is achieved.[93] These definitions focus on the parties' intent and the volitional conduct toward intimacy, particularly mutual and reciprocal self-disclosure and willed transparency.[94]

Intimacy is not merely a passive loss of privacy as the *Roommate.com* court suggests. Rather, intimacy requires intentional activities by both persons, usually involving conversations in which each deliberately reveals confidences about their inner lives. In contrast, if a person showers with others in the common shower at a gym, s/he is naked and in close proximity to others. However, this radical loss of privacy does not regularly create intimate relationships because people adopt mental and physical means to avoid intimacy, such as by averting their gaze from each other's private parts. Similarly, a stalker may know many intimate details about his or her victim, but due to the lack of mutuality in their interest for each other, we would not consider the victim to be "intimate" with the stalker. And there are innumerable stories of married couples "living alone" together in a house, even while sharing a bed. Intimacy always requires mutual intent; the physical layout of housing never determines intimacy.

The *Roommate.com* court did not take evidence concerning the types of roommate relationships sought by Roommate.com website users. While a Roommate.com user could state her interest in finding a roommate who will be an intimate companion in her "Additional Comments" section, the Roommate.com website does not indicate that most or, indeed, any Roommate.com users seek this type of roommate.[95] In fact, the Roommate.com website aims to match compatible roommates in a commercial relationship,[96] thereby corresponding to the second type of roommate relationship described above.

Roommates clearly have an interest in choosing to share living space with someone who will be compatible with their lifestyle. Some people may be open to a close friendship if one happens to develop, but this differs from the relationship protected by the constitutional right of free association.

While *Roommate.com*'s explicit holding is grounded in a construction of the roommate relationship as inherently intimate, the court tellingly reveals its conflation of compatibility with intimacy when it states that "compatibility with lifestyle" would be enough to meet the constitutional test: "Holding that the FHA applies inside a home or apartment would allow the government to restrict our ability to choose roommates *compatible with our lifestyles*. This would be a serious invasion of privacy, autonomy and security."[97] This concentration of all roommate situations into an inherently intimate one magnifies the potential privacy and intimate association problem presented by a roommate situation. Consequently, the court constructs an exceedingly broad definition of shared living situations to avoid the constitutional conflict.

Moreover, the court's overly expansive construction largely *creates* the constitutional conflict it claims it must resolve. If the court had recognized the variety of roommate situations, it could have applied its conclusion to only the "intimate companion" ones because of the constraint imposed by the "purpose" element of the *Rotary* test. However, by construing all roommate situations as being of the "intimate companion" kind, the court expanded and, indeed maximized, the potential conflict between the FHA and the right to freely associate.

The court gives lip service to the fact that the FHA is a "remedial statute."[98] If the court had taken the remedial purpose seriously, the court would have construed the FHA's exceptions and limitations narrowly. In this case, that would mean focusing solely on roommate situations that truly involve intimate companions. Instead, the court ignores the statute's remedial purpose and construes shared living situations very broadly. Again, this move *maximizes* the potential conflict between the FHA and the Constitution, and substantially expands the types of relationships covered under the Constitution.

6. *Lacking Adequate Authority*

Existing authority does not support the *Roommate.com* court's extension of the right of intimate association to any roommate. Substantial case law has applied the intimate association test. Beyond citing *Rotary* for the test and the *Roberts v. U.S. Jaycees*[99] case for the traditional limitations on recognizing constitutionally protected relationships, however, the court only briefly cites three supporting cases: *Minnesota v. Olson*,[100] *Minnesota v. Carter*,[101] and *Lawrence v. Texas*.[102] The court selects quotes from each of these cases to reemphasize the traditional constitutional protection of the "home." However, none of these cases applied the *Rotary* test to determine whether a roommate relationship constitutes an intimate relationship protected by the Constitution's right of free association. In fact, the selected quotations are not part of the holdings of any of these cases.

In *Minnesota v. Olson*, the Supreme Court ruled that the police violated a murder suspect's Fourth Amendment right.[103] This case involved a murder suspect's expectation of privacy (not

the right of intimate association) when he was overnight guest (an "invitee" not a roommate). In *Minnesota v. Carter*, another Fourth Amendment case, the Court held that defendants, who were invitees in another person's apartment for a brief time solely for the purpose of packaging cocaine, had no legitimate expectation of privacy in the apartment.[104] *Lawrence v. Texas* concerned a Fourteenth Amendment Due Process Clause challenge to the application of a Texas statute that made it a crime for two persons of the same sex to engage in certain intimate sexual conduct in relation to adult males who had engaged in a consensual act of sodomy at their home.[105] While this case addressed the traditional privacy rights associated with one's home, the issue concerned same sex couples engaged in an intimate sexual relationship, not mere roommates. Thus, the Ninth Circuit's conclusion that *cohabitation alone is an adequate basis for extending the constitutional right to intimate association* finds no support in the actual holdings of these cases. Therefore, none of these cases support the *Roommate.com* court's application of *Rotary*'s purpose test to all roommate situations.

Roommate.com's overbreadth upsets the jurisprudence guiding the law of intimate association. This impact is especially disconcerting as the Ninth Circuit based its conclusion upon a factually weak record and failed to engage the appropriate case law. Other courts have recognized that this right protects only a narrow set of important relationships, and have limited its scope accordingly. Although the Supreme Court has not closed the door on other types of relationships that might merit protection, traditionally courts have deemed only marriage and other close familial relationships to be protected. In particular, courts have denied this protection to relationships that most people would agree are far more intimate than most roommate relationships, including early-stage dating relationships,[106] engaged couples who were not cohabitating,[107] gay couples,[108] and attorney-client relationships.[109]

Shared living or cohabitating alone has *never* been a sufficient basis for determining that a relationship merits constitutional protection. The closest previous cases have come to recognizing the right is when cohabitation is combined with evidence of a gay couple's intentional intimate relationship.[110] *Roommate.com*'s extension of this right to all "shared living situations," including *any* roommate situation, is an unwarranted expansion of the scope of this right.[111] The Supreme Court has been very reluctant to extend this constitutional protection broadly because, among other reasons, it restricts the scope of the legislature's authority to regulate.[112]

The court's description of the roommate relationship is not only objectively defective in failing to account for many important dimensions and facts about roommate relationships, but also fails to engage the legal analyses prior courts have used in applying the *Rotary* test to relationships being considered for constitutional protection. To the degree that the court's argument is persuasive, its power derives primarily from its rhetorical framing of the roommate situation and its implicit appeals to our powerful sense of privacy associated with "home," not from any legal argument or authority.

Allowing roommates to discriminate in situations in which they only seek an economic relationship, a compatible roommate, or an activity companion severely undercuts the purpose and scope of the FHA and FEHA in a way that the Constitution does not require, and that does not serve any important Constitutional purpose. The court's decision only invites more discrimination.

C. An Overbroad and Unclear Holding with Uncertain Application

Because of its overbreadth, the *Roommate.com* opinion unnecessarily circumscribes the scope of the FHA and FEHA. It draws too large of a margin to avoid a possible—but likely infrequent—constitutional conflict. The opinion holds that the FHA and FEHA do not apply to "roommates," but fails to define that relationship. Importantly, "roommates" may not all be legal equals. A person who owns a home and seeks "roommates" to raise money from spare rooms, perhaps previously occupied by her children, is more properly characterized as a landlord. A tenant with a lease who seeks roommates may structure the relationship so that she is the "master tenant," and the roommates are her subtenants. Thereby, she will occupy the position of landlord with the power to evict her subtenants.[113] The court's failure to define the term "roommate" will allow many people who are essentially landlords to claim that the FHA and FEHA do not apply to them.

This opinion also holds that the FHA and FEHA are inapplicable to "shared living situations," but again fails to define "shared living situations."[114] Therefore, lower courts are left with the following questions: (1) Do all situations characterized as "roommate" situations by one or more the parties fall under this decision's rule?; (2) Do roommate situations exhaust the category of shared living situations covered by this opinion, or are there *other* shared living situations to which this holding would also apply? For example, does the holding apply to congregate living housing for disabled persons,[115] to fraternity and sorority houses, to boarding houses in which the owner selects the boarders, to transitional housing, or to apartments in which the landlord selects the co-tenants?[116]

The opinion's ambiguity renders the scope of its application uncertain, but potentially broad. Far from resolving a tough issue by selecting a bright line, as initially appears, the *Roommate.com* opinion opens up a wide array of new issues and problems regarding the constitutionality of applying the FHA and FEHA to shared living situations. With the exception of a brief mention of one HUD administrative decision and one FEHA decision, the opinion fails to engage existing HUD regulations and guidelines,[117] and other relevant case law, despite extensive briefing.[118] This failure will make the work of the lower courts all the more difficult and the likelihood of conflicting decisions quite high.

D. Alternatives the Court Could Have Taken

The *Roommate.com* court did not need to decide the freedom of association claim in the case before it. It could have denied Roommate.com, LLC's standing to raise this defense. Allowing the defendant Roommate.com, LLC to raise this defense may have contributed to the court's inability to recognize the different types of roommate relationships. As a company, Roommate.com, LLC had an economic interest in raising this defense, but it lacked any personal interest of the kind protected by the Constitution that would have led the court to distinguish among roommate situations. A better result

would have been achieved had the court denied Roommate.com, LLC standing to raise the right of association defense and allowed actual, individual roommates who felt aggrieved on this basis bring their own claims or raise their freedom of intimate association right as a defense. In such a case, the Ninth Circuit could have set forth a roommate intimacy test using the requisite elements of the *Rotary* test, but based upon the facts of an actual roommate situation.

Alternatively, if as it seems, the court was committed to deciding this issue with the parties before it, then it could have defined "roommate" and "shared living situations" narrowly to limit them to those housing situations that certainly, or are very likely to, conflict with the right of association, as this article has done. Or, the court could have remanded the case so that the trial court could do this work, including taking evidence if necessary.[119]

E. Consequences for Fair Housing of *Roommate.com*'s Overbroad Rule

The consequences of this opinion and their scope are uncertain, but assuming that the holding is applied to future cases,[120] its primary effects on fair housing will be to deny roommate housing opportunities to members of protected classes[121] and degrade the social norms supporting fair housing.

Even assuming a narrow application of the opinion to roommates only (both shared bedroom and shared apartment), the direct effect of this case could be significant. There is a substantial market for roommate housing opportunities. Roommate.com—only one of many internet roommate listings websites—claims one million new listings per year.[122] This verdict may impact a broader section of the population than merely those persons traditionally regarded as "roommates" because the opinion does not specify what qualifies as a "shared living situation," and many websites do not clearly distinguish roommate rentals from traditional landlord-tenant relationships.[123] Given the ambiguity of the decision's scope, the *Roommate.com* case may enable clever housing providers to set up or claim a right to discriminate.

Equally important, the *Roommate.com* opinion undercuts and degrades the already fragile anti-discriminatory social norms in housing by allowing discriminatory statements to be widely publicized through websites that serve as a primary means of marketing and finding rental housing. Sociologists have demonstrated that compliance with most laws occurs not through actual enforcement or even general deterrence due to enforcement, but rather from people following social norms.[124] Because resources will never be sufficient to support traditional enforcement of fair housing's anti-discrimination laws, increasing compliance in fair housing depends upon deepening and expanding anti-discriminatory social norms.[125] The importance of social norms is probably part of the reason there are no exceptions in the FHA's ban on discriminatory advertising. As fair housing expert Professor Robert Schwemm wrote that the FHA's ban on discriminatory statements

> also helps break down the notion that illegal discrimination continues to permeate America's housing markets by banning every ad, notice, and statement suggesting the FHA's promise of nondiscrimination is not a reality. . . . The underlying theory is that the continuing presence of discriminatory ads, notices, and statements encourage a variety of groups—particularly minority home seekers and housing providers—to believe housing discrimination is an accepted norm despite the FHA's pronouncements to the contrary.[126]

Any such proliferation of discriminatory advertisements would have the likely effect of leading users who regularly read discriminatory ads in both roommate websites and landlord-tenant websites to believe that discrimination in rental housing is acceptable. Even if the "law" is clear to lawyers and courts, this regular experience blurs the line of acceptability in the public's mind. This degradation of anti-discriminatory social norms in housing could also foster continued discrimination in other housing advertisement forums and housing types. At a minimum, the *Roommate.com* opinion complicates fair housing education and advocacy, which already presents an uphill battle. Fair housing educators will need to communicate a complex message: "It is illegal to discriminate in rental housing, except in shared living situations. These situations include, but may not be limited to, roommate situations."

IV. THE PROPOSED SOLUTION

The *Roommate.com* case raises an important problem that must be resolved. But *Roommate.com*'s solution is too broad and not well grounded. A more nuanced solution that better balances the competing interests and rights is needed.

The proposed solution is premised on the following considerations. Roommate situations vary. Only roommates seeking intimate companionship,[127] or seeking to avoid them, deserve constitutional protection. The FHA and FEHA are primarily concerned with eliminating discrimination in the general economic marketplace for housing,[128] and widespread compliance requires promotion of anti-discriminatory social norms in housing. The purpose element of *Rotary*'s test to determine eligibility for constitutional protection under the intimate association right requires intent. Therefore, it is fair to require a party to engage in an explicit act or signaling in order to benefit from this Constitutional protection. Given the complications and competing rights, interests, and values in this controversy, however, there is no perfect solution.[129]

A. Differentiate Intimate Association Warranting Constitutional Protection

Different people want different relationships with roommates,[130] but only intimate roommate relationships warrant constitutional protection. If a roommate relationship qualifies for constitutional protection, then the FHA and FEHA should not prohibit the relationship, nor impose substantial burdens on persons seeking such a roommate relationship.[131]

Under current law, certain provisions of the FHA, including 42 U.S.C. subsections 3604(a), (d), and (f), and certain provisions of FEHA, including California Government Code sections 12955(a)–(b), (d), and 12927(c), which define "discrimination," to prohibit a wide range of practices in renting or selling housing units if the actions are taken because of a person's membership in a protected class. These practices include refusing to negotiate, refusing to rent or sell, and making false

representations about a unit's availability. This article will refer to these provisions collectively as "roommate selection liability" provisions. In addition, 42 U.S.C. section 3604(c) of the FHA and California Government Code section 12955(c) of FEHA prohibit discriminatory oral or written statements with respect to the sale or rental of a dwelling. This article will refer to these provisions collectively as the "advertising liability" provisions.

Under the proposed solution, if a roommate[132] demonstrates interest in a relationship warranting protection as an intimate association, this action constitutes an affirmative defense to roommate selection liability claims. Like other affirmative defenses under the FHA and FEHA, the person claiming the defense would bear the burden of proof. This solution seeks to balance the free association rights of roommates whose intended relationship warrants constitutional protection, with the goal of prohibiting housing discrimination within constitutional limits in a manner that protects anti-discrimination social norms. Creating discrimination-free housing market advertising both directly and indirectly advances the FHA's anti-discriminatory goals. These goals would be achieved by eliminating discriminatory housing ads and by supporting the development and maintenance of anti-discriminatory social norms in the housing market. This solution offers roommates whose desired relationships are likely to deserve constitutional protection an easy way to signal their intent and avoid application of the roommate selection liability under the FHA and FEHA to them. These types of roommates must advertise their roommate preference only by word-of-mouth or in the "personal ads" section (or equivalent) of any publication and not in the regular housing section.

To qualify for the proposed defense against roommate selection liability, an advertiser must show intent to establish a roommate tenancy and to seek an intimate companionship type of roommate. Advertising by word of mouth only or in the "personal ads" section of print and electronic media, or their equivalent,[133] rather than in the "housing market ads" section (e.g. Roommate.com or Craigslist housing ads) and expressing a preference for an intimate roommate relationship in the advertisement would raise a rebuttable presumption that the advertiser meets the requirement for intimate association protection.

Under the proposed solution, if a person qualifies for the defense against these roommate selection claims, it does not automatically exempt a person from liability under the FHA and FEHA advertising liability provisions because, as discussed above, the policy reasons behind this provision do not generally admit exceptions. However, the proposed solution would require an amendment to these statutes that would allow persons who qualify for the defense from liability under the roommate selection liability to also qualify for a defense from the advertising liability provisions when such individuals advertise by word of mouth or solely in the "personal ads" section of a publication.

Under the proposed solution, if a person who qualifies for the roommate selection liability defense advertises in the "housing" advertisement section of a publication, and states discriminatory preferences, she would be liable for violating the advertising liability provisions, but would not lose the exemption from the roommate selection liability.[134]

Under the proposed solution, if a person places an ad containing language that would violate the advertising liability provisions in *both* kinds of venues (personal ads and housing market ads), she would be liable for the discriminatory advertising violation, and she would *not* qualify for the presumption that she seeks an intimate roommate relationship. In other words, she would bear the burden of showing that she seeks an intimate relationship to which the FHA does not apply in order to escape the roommate selection liability.[135]

In conclusion, if a person desires an intimate roommate situation, then she needs to advertise by either word of mouth or placing an advertisement in the personals section of a publication or its equivalent. Furthermore, she may, and should, express those interests in her advertisement. A person who does not seek an intimate roommate situation may advertise in any channel or by any means, but she may not express discriminatory preferences or limitations in those publications, and may not discriminate in her actual roommate selection process.

B. Applications of the Proposed Solution

Women who only want other women as roommates could do so by advertising through word-of-mouth or in the "personal ad" section of a publication. Women who are open to having roommates of both sexes may advertise in the housing advertisements section. Sex *can* be a legitimate basis for not applying the FHA and FEHA to a roommate selection, but not on the basis of compatibility alone. First, women do not universally seek other women as roommates. Some women do have this preference, but not all.[136] For those that do, the reason may be fear of vulnerability, including sexual harassment or even rape.[137] Or, maybe a woman wants to establish a strong community with other women in her household. Advertisements that contain these types of roommate preferences deserve constitutional protection.[138] In contrast, other women might base their desire to room with women purely on gender or sexual stereotypes of men, such as "guys are so sloppy." These preferences do not deserve constitutional protection. Allowing discrimination on the basis of stereotypes alone for the sake of "compatibility" sacrifices too much for the FHA and FEHA. The social goal of the FHA and FEHA is to prevent such stereotypes from limiting housing opportunities for members of protected classes.

The orthodox Jew example posed in the *Roommate.com* opinion wants "a roommate *with similar beliefs and dietary restrictions*."[139] This advertiser would clearly qualify for protection under this proposed solution because he wants a roommate who shares his religious beliefs and practices. In this example, religion provides the basis for roommate selection with a clear intention that the roommate relationship be intimately focused on religious beliefs and practices. Fair housing law should not apply to this private, intimate roommate relationship. The harder case would be if this advertiser wants a roommate who will not interfere with his commitment to practice his faith and live Kosher, but is uncertain whether he wants to live with another orthodox Jew. Under the proposed solution, if he really wants to live with a co-religionist, he should advertise in the "personal ads" section and clarify his preference. If, on the other hand, his concern about kosher living is more of a practical nature, for example wanting to ensure that his roommate does

not use his pots, pans, bowls, and utensils in violation of kosher rules,[140] he may advertise in the general housing section of a publication, and he may select roommates on the basis of this preference. He may not, however, articulate that compatibility interest in his advertisement.[141]

The proposed solution is consistent with the "Determination of No Reasonable Cause" in *Fair Housing Center of West Michigan v. Tricia*, a case cited by *Roommate.com* opinion with approval.[142] In this case, an administrative law judge at HUD dismissed a complaint against a young woman for advertising, "I am looking for a female Christian roommate," on her church bulletin board. The administrative law judge explained that "in light of the facts provided and after assessing the unique context of the advertisement and the roommate relationship involved . . . the Department defers to Constitutional considerations in reaching its conclusions."[143] This case turned on both the type of roommate relationship sought—one that the proposed solution would consider clearly deserving of constitutional protection—and the context of the advertisement, a church bulletin board. The proposed solution would treat the church bulletin board as a publication equivalent to an advertisement in a paper or electronic publication's "personal ads" section. Thus, the proposed solution would come to the same conclusion as the *Roommate.com* court.

C. Justification for the Proposed Solution

The proposed solution allows roommates who seek an intimate relationship that warrants constitutional protection to advertise explicitly for such a relationship if they do so in the personal ads section or its equivalent, and to select a roommate based upon their criteria. Otherwise, roommates must abide by fair housing law's anti-discrimination prohibitions, both in their advertising and in their actual selection decisions. This solution draws the best possible line between public and private realms in this conflict because it respects truly intimate relationships without placing an unreasonable burden on those meriting constitutional protection. It enables those roommates seeking intimate relationships to advertise in venues appropriate for such personal advertisements, using means that clearly signal their primary interest in an intimate relationship. It is reasonable to exclude these advertisers from the general housing marketplace because obtaining an ancillary source of rent from a roommate is a secondary purpose for these advertisers. Websites and other venues for such advertisements are widely available and as easily accessible as housing market advertising venues. Arguably, people who want an intimate companionship with a prospective roommate tend to conduct these searches orally so they may not be burdened at all by the proposed solution's advertising restriction.[144]

The proposal provides a practical solution targeted at the primary problem—advertising for roommate relationships—making it likely to be effective in actual practice.[145] In addition, the proposal relies on an already clear, widely understood cultural expectation of personal ads. In the context of personal ads, an advertiser may express preferences about race, sex, and religion that in other contexts would be offensive and even illegal, but which is socially understood as appropriate when involving personal and intimate relationships.[146] This article's proposal relies on the traditional behavioral assumption in law that adults know what they want. After some initial education,[147] people who want to be a roommate in such a special relationship would know where to find ads for roommates with similar desires. And they would know that if they were to look in the roommate ads in the regular housing advertisement section of a publication, persons advertising in that section would not be seeking that kind of a relationship.

To the degree possible given the complications of roommate situations, the proposed solution promotes fair housing by serving the FHA's anti-discriminatory purposes and respecting its remedial intent. This statutory revision is consistent with the policy reasons behind the current the FHA exemptions and 42 U.S.C. section 3604(c), in that it would limit access to the general housing market for those allowed to discriminate under the FHA.[148] This solution also limits the damage to social norms that would come from allowing roommates seeking intimate companionship to advertise their discriminatory preferences in the general housing market by channeling what would be "discriminatory" ads into the personal ads section, where expression of such preferences is broadly accepted and expected. Only people who base their roommate search upon personal criteria, including potentially discriminatory criteria, will look there. By selecting publication in this manner, members of protected classes and others will not be subjected unnecessarily to individual harms by having to read through discriminatory ads while browsing the general housing market ads.[149] And, relying on the widely shared cultural understanding that anti-discrimination law does not apply to personal relationships, this solution avoids the broader harm of supporting and deepening stereotypes in the housing market.[150]

The proposal is not ideal because, on the one hand, it compromises the full interest of the FHA and FEHA by allowing some "discrimination" and some expression of discriminatory preferences in what might be called a "personal housing market,"[151] and, on the other hand, it imposes what might be considered a burden on an individual's exercise of her constitutional right to intimate association. How large this "personal housing market" might become is, of course, an empirical question about which one could only speculate.[152] Similarly, the actual burden this solution places on persons seeking an intimate roommate, if any, is also unknowable. Given the wide availability of personal ads and their equivalents both online and in print publications, this burden would likely be minor or even negligible after the public became aware of the author's proposed legislative change. For many potential roommates, the adjustment would amount to placing the same ad they would otherwise have written, in a different location on a website. Arguably, the proposal may make roommate searches by people seeking intimate companionship more effective and efficient compared to the present situation, in which these advertisers are forced to consider replies from many potential roommates who are not similarly interested.[153]

D. Responses to Potential Objections

Substantive challenges may be levied against this solution. Detractors might ask, why isn't it enough for a roommate seeking an intimate companionship to advertise in the "roommate subsection" of housing ads, or in a new "intimate roommate subsection" behind a disclaimer? The response is that these

advertisements would still be part of the general housing market, which continues to be sullied with discriminatory ads undermining anti-discriminatory social norms. Channeling these ads to a publication's personal advertising section clearly distinguishes them as focused primarily on the acquisition of an intimate relationship, instead of on the financial convenience of living with other, unrelated people.

Applying the FHA and FEHA to roommate selection also might have the unintended effect of undermining the social norms supporting fair housing law, because someone who is generally sympathetic to them might feel (as the *Roommate.com* opinion expresses) that the inability to search for or select a roommate using these criteria is taking fair housing law "too far."[154] This concern arises from the prospect of the FHA and FEHA being applied to a situation in which a person seeks an intimate roommate relationship. The proposed solution addresses this concern by creating unlimited opportunities for persons seeking intimate roommate relationships to do so essentially unhindered by the FHA and FEHA because of the unlikelihood of litigation. Generally, one would expect few cases to be brought by one roommate against others, both because of the relatively low financial stakes and because this population has less resources to bring lawsuits. In the forty-five years since the FHA was enacted, there have been only three published FHA cases in which a roommate has accused another roommate of fair housing violations.[155] If an advertiser places her ad in the personal ads section, thereby qualifying for an affirmative defense, such litigation is even less likely. This concern also highlights the importance of careful education in a transitional time.

Inevitably, there would be a transition period during implementation of the proposed legislation. At this time, some ad posters would be unaware of the new law. The author believes that if this solution was enacted, websites would quickly adapt by creating a roommate subsection of the personal ads section, and that this section of websites would quickly become known as the place to seek or place such an ad.[156] Once website users understood this requirement, some proportion of roommate seekers would choose to place non-discriminatory ads in the housing market section to take advantage of a potentially larger market.

Another concern about the author's proposal might be that ads in the personals section would be interpreted as seeking a sexual relationship. To prevent this result if unwanted, the person writing the ad can clearly express his or her preferences, just like other personal ads. In addition, websites that post personal ads already accommodate non-sexual personal ads.[157]

Enforcement issues may also cause concern. Initially, courts might struggle with applying the proposal's "formalist" requirement of distinguishing between personal ads and general housing advertisements; but if the statutory definitions are reasonably well-drafted, this will not be a serious problem. A few litigated decisions should clarify the parameters of this new legislation sufficiently for the vast majority of cases.

A final concern might be that even if courts could make the necessary distinctions, their review in such cases would be too intrusive into the parties' privacy. However, because the *Roommate.com* case and this solution focus on the roommate selection decision, courts will not need to conduct intrusive discovery into the details of any actual roommate relationship. Litigation will only arise when someone has been rejected as a roommate, and so no roommate relationship would have been established.[158]

V. CONCLUSION

The *Roommate.com* court offers an overbroad, poorly reasoned, and legally unsupported solution to a real, but limited, problem. In contrast, the solution proposed in this article appropriately respects the constitutional rights of roommates who merit constitutional protection for their proposed intimate associations, while promoting fair housing and its social norms. The Constitution protects *choice in personal relationships*, while the FHA prohibits *discrimination in the housing market*. The proposal merely elevates common sense into law. Discrimination has no place in the public realm of "housing market ads," but is completely acceptable in the private realm of "personal ads."

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ENDNOTES

1 This article is derived from a presentation made at the California Bar Real Property 5th Annual Fair Housing and Public Accommodations Symposium at Golden Gate University School of Law on April 19, 2013. It is an abbreviated version of Tim Iglesias, *Does Fair Housing Law Apply to "Shared Living Situations"? Or, the Trouble with Roommates*, 22 J. AFFORDABLE HOUSING & COMMUNITY DEV. L., issues 3 & 4 (forthcoming spring/summer 2014). The author is very grateful to Bob Schwemm and Rigel Oliveri for comments on a previous draft and to USF School of Law student Christina Crosetti for research assistance and manuscript preparation. Special thanks to Allison Harris for helpful editing suggestions.

2 *Fair Hous. Council of San Fernando Valley v. Roommate.com, LLC*, 666 F.3d 1216 (9th Cir. 2012).

3 42 U.S.C. §§ 3601–19 (West 2013).

4 Cal. Gov't Code §§ 12900–96. For an overview of FEHA, see Tim Iglesias & Susan Saylor, *Fair Housing at 30: Where We Are, Where We Are Going*, 30 CAL. REAL PROP. J. 16 (2012).

5 *Roberts v. U.S. Jaycees*, 468 U.S. 609, 618–19 (1984) ("The Court has long recognized that, because the Bill of Rights is designed to secure individual liberty, it must afford the formation and preservation of certain kinds of highly personal relationships a substantial measure of sanctuary from unjustified interference by the State . . . . Moreover, the constitutional shelter afforded such relationships reflects the realization that individuals draw much of their emotional enrichment from close ties with others. Protecting these relationships from unwarranted state interference therefore safeguards the ability independently to define

one's identity that is central to any concept of liberty.").

6 The Court has also recognized a second type of freedom of association termed "freedom of expressive association." "In another set of decisions, the Court has recognized a right to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion." *Id.* The *Roommate.com* court did not consider a freedom of expressive association claim.

7 *Roommate.com*, 666 F.3d at 1220 (citing *Roberts*, 468 U.S. at 617–18). The *Roberts* Court cited numerous decisions in which it has defined and applied this right. *Roberts*, 468 U.S. at 618–19.

8 *Roommate.com*, 666 F.3d at 1220 (citing *Roberts*, 468 U.S. at 623). Most of the decisions applying the right to not associate concern whether individuals who are required by the State to join an organization, e.g. state bar or a union, may be required to pay dues to the organization when it advances causes that some members disagree with. *See, e.g.*, *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977) (holding the state may require a public worker to pay dues or the equivalent if the money is used for collective bargaining, contract administration and grievance adjustment).

9 The right of freedom of association "is connected to the fundamental right to privacy." TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 20.41(b) (Ronald D. Rotunda & John E. Nowak eds., 4th ed. 2008).

10 *See, e.g.*, *Moore v. City of E. Cleveland*, 431 U.S. 494 (1977) (right of extended family to live together); *Loving v. Virginia*, 388 U.S. 1 (1967) (freedom to choose one's spouse).

11 *See* Robert G. Schwemm, *Discriminatory Housing Statements and § 3604(c): A New Look at the Fair Housing Act's Most Intriguing Provision*, 29 FORDHAM URB. L.J. 187, 212 (2001) ("While eliminating discrimination was a fundamental goal shared by [several civil rights] statutes, the FHA was also intended to promote integrated housing patterns."). For some sources regarding the importance of housing, see Megan J. Ballard, *Legal Protection for Home Dwellers*, 56 SYRACUSE L. REV. 277, 284–89 (2006) (discussing how a home can be "constitutive of the dweller" and how "home embodies psychological and social benefits"); D. Benjamin Barros, *Home as a Legal Concept*, 46 SANTA CLARA L. REV. 255, 259–75 (2006) (discussing home as a source of security, liberty, and privacy).

12 The problem raised for constitutional law is the broad extension of the right of free association to anyone sharing a living space without adequate recognition of and engagement with precedent. This article focuses on the problems raised for the fair housing movement.

13 Over the course of the extensive *Roommate.com* litigation, the case attracted significant scholarly attention. *See, e.g.*, Rigel C. Oliveri, *Discriminatory Housing Advertisements On-Line: Lessons from Craigslist*, 43 IND. L. REV. 1125 (2010).

14 "Roommate's website receives over 40,000 visits a day and roughly a million new postings for roommates are created each year." *Fair Hous. Council of San Fernando Valley v. Roommate.com, LLC*, 666 F.3d 1216, 1218 (9th Cir. 2012).

15 A "social norm" is a rule or standard of behavior shared by members of a social group. Norms may be internalized, for example, incorporated within the individual so that there is conformity without external rewards or punishment, or they may be enforced by positive and negative sanctions from without. The social unit sharing particular norms may be small (such as a clique of friends) or may include all adult members of a society. Norms are more specific than values or ideals: honesty is a general value, but the rules defining honest behavior in a particular situation are norms. *Social Norm Definition*, DICTIONARY.COM, http://dictionary.reference.com/browse/social norm (last visited Nov. 14, 2013).

16 42 U.S.C. § 3604(a)–(f) (West 2013).

17 On the FHA's ban on discriminatory statements, see Schwemm, *supra* note 11.

18 *See, e.g.*, ads cited in Oliveri, *supra* note 13.

19 *Id.* at 1151–52.

20 461 F. Supp. 2d 681, 685 (N.D. Ill. 2006).

21 *Fair Hous. Council of San Fernando Valley v. Roommate.com, LLC*, 666 F.3d 1216, 1219 (9th Cir. 2012).

22 *Id.* at 1220.

23 *Id.* ("But a *business transaction* between a tenant and landlord is quite different from an *arrangement* between two people sharing the same living space." (emphasis added)).

24 The application of section 2 of the Civil Rights Act of 1866 (42 U.S.C. § 1982) and any other civil rights statutes is beyond scope of this article.

25 *See infra* Part III.B.6.

26 In this article, I only address the freedom of intimate association constitutional claim. Several law review articles not discussed in this article explore additional alleged constitutional violations that occur if the FHA is applied to shared living. They are: the right to privacy, freedom of expressive association, free exercise of religion, and free speech.

27 *See* ROBERT G. SCHWEMM, HOUSING DISCRIMINATION LAW AND LITIGATION pt. D (2013) (Fair Housing Act Enforcement).

28 Press Release, U.S. Dep't of Justice Civil Rights Div., Two Tennessee Men Plead Guilty to Conspiring to Violate Civil Rights of African-American Residents (May 14, 2013), *available at* http://www.justice.gov/usao/tnm/pressReleases/2013/5-14-13.html.

29 *See* U.S. Dep't of Hous. & Urban Dev., Office of Policy Dev. & Research, Housing Discrimination Against Racial and Ethnic Minorities 2012: Executive Summary (2013), *available at* http://www.huduser.org/portal/Publications/pdf/HUD-514_HDS2012_execsumm.pdf.

30 *Fair Hous. Council of San Fernando Valley v. Roommate.com, LLC*, 666 F.3d 1216, 1220 (9th Cir. 2012).

31 *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984).

32 481 U.S. 537 (1987).

33 *Id.*

34 *Id.* at 546.

35 *Roberts*, 468 U.S. at 620.

36 "The intimate relationships to which we have accorded constitutional protection include marriage, *Zablocki v. Redhail*, 434 U.S. 374, 383–86 (1978); the begetting and bearing of children, *Carey v. Population [Servs. Int'l]*, 431

U.S. 678, 684–86 (1977); child rearing and education, *Pierce v. [Soc'y] of Sisters*, 268 U.S. 510, 534–35 (1925); and cohabitation with relatives, *Moore v. [E.] Cleveland*, [431 U.S. 494, 503–04 (1977)]." *Rotary Club*, 481 U.S. at 545; *see also* notes 106–10 *infra* for additional cases.

37 *Rotary Club*, 481 U.S. at 545 ("Of course, we have not held that constitutional protection is restricted to relationships among family members.").

38 *Fair Hous. Council of San Fernando Valley v. Roommate.com, LLC*, 666 F.3d 1216, 1221 (9th Cir. 2012).

39 42 U.S.C.A. § 3601 (West 2013).

40 *Roommate.com*, 666 F.3d at 1219–20. Previous interpretations of "dwelling" in published cases haven't focused on the shared living aspect (even when they were clearly "shared living"), but instead on whether they are "temporary" or not. *See* SCHWEMM, *supra* note 27, § 9.2 (Dwellings: Types of Property Covered by the Fair Housing Act).

41 481 U.S. at 546.

42 *Roommate.com*, 666 F.3d at 1221–22.

43 *Id.* at 1222 (citing *Frisby v. Schultz*, 487 U.S. 474 (1988)).

44 *Id.*

45 *Id.*

46 *Id.*

47 Cal. Gov't Code § 12955(c).

48 *Id.* § 12927(d).

49 Judge Ikuta concurred in part and dissented in part from the majority's opinion. Although the majority refers to the dispute regarding FEHA as part of the "concurring opinion," *Roommate.com*, 666 F.3d at 1223, in fact it was a dissent, *id.* at 1227.

50 Cal. Gov't Code § 12927(c)(2)(B).

51 *Id.*

52 *Dep't of Fair Emp't & Hous. v. Larrick*, FEHC Dec. No. 98-12, 1998 WL 750901 (FEHC July 22, 1998).

53 *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 545 (1987) ("Of course, we have not held that constitutional protection is restricted to relationships among family members.").

54 *Roommate.com*, 666 F.3d at 1221.

55 While not all right of free association cases apply the four *Rotary* elements in a strict fashion, the majority of the reasoning in the *Roommate.com* case is clearly directed toward addressing the "purpose" prong after its quick disposition of the first three elements.

56 *Roberts v. U.S. Jaycees*, 468 U.S. 609, 618–19 (1984).

57 *Roommate.com*, 666 F.3d at 1220.

58 The *Roommate.com* court is not alone in oversimplifying and conflating distinct types of roommate relationships into one presumed "intimate" form. Other published accounts that do not adequately distinguish different kinds of roommate relationships include John T. Messerly, *Roommate Wanted: The Right to Choice in Shared Living*, 93 IOWA L. REV. 1949 (2008), and Oliveri, *supra* note 13.

59 The references to "home" occur in *Roommate.com* three times at page 1218, twice at page 1220, five times at page 1221, and once at page 1222.

60 In a previous article, the author identified five common frames employed in housing law and policy. Tim Iglesias, *Our Pluralist Housing Ethics and the Struggle for Affordability*, 42 WAKE FOREST L. REV. 511 (2007) [hereinafter *Pluralist Housing Ethics*]. For purposes of this article, a "housing frame" is the same as what was previously named a "housing ethic." In that article, a "housing ethic" was defined as "an organizing principle that affects American housing land and policy by directing attention to certain kinds of facts and issues as relevant and important for policy and decision-making. It may be pre-reflective or consciously employed. It enables a certain kind of discourse with its own concepts and vocabulary. Beyond just categorizing the world, each ethic incorporates a normative dimension; it is poised toward decision and action." *Id.* at 516 (footnote omitted).

61 The "housing as economic good" frame is discussed in detail in *Pluralist Housing Ethics*, *supra* note 60, at 519–23.

62 The "housing as human right" frame is discussed in detail in *Pluralist Housing Ethics*, *supra* note 60, at 540–49.

63 The court acknowledges the commercial dimension of a roommate relationship exactly *twice* in the entire opinion, in the third sentence of the introduction of the opinion: "While we usually share our homes only with friends and family, sometimes we need to take in a stranger to help pay the rent," *Fair Hous. Council of San Fernando Valley v. Roommate.com, LLC*, 666 F.3d 1216, 1221 (9th Cir. 2012); and "She might also worry about . . . becoming romantically involved with someone she must count on to pay the rent," *id.* at 1221. This example casts the woman as not being able to exercise free will in determining what kind of relationship she wants to pursue with a roommate because of the economic dimension of the roommate relationship. In the remainder of the opinion and in all of its legal analysis, the court avoids and even explicitly denies the commercial dimension: "But a *business transaction* between a tenant and landlord is quite different from an *arrangement* between two people sharing the same living space." *Id.* at 1220 (emphasis added). This sentence suggests that a roommate situation is not also a business transaction. But while the initial roommate may not be making a profit, there is indeed a "business transaction" occurring which is subject to all of the traditional rules of contract law as well as landlord-tenant law. Roommate leases differ from more informal arrangements, such as sharing gas expenses in a carpool, because they are subject to these legal frameworks. While roommates rarely sue other roommates, they can readily turn to contract and landlord-tenant law to learn their legal rights and duties in the relationship, including the right to evict. *See infra* note 113 and accompanying text.

64 *See, e.g., State ex rel. Sprague v. City of Madison*, 555 N.W.2d 409, 1996 WL 544099 (Wis. Ct. App. Sept. 26, 1996) (unpublished table decision) (rejecting a privacy and right to free association defense to a fair housing claim because the roommates "gave up their unqualified right to such constitutional protection when they rented housing for profit"). While this case's reference to a "profit" rather than a "financial benefit" may be misguided, this case exemplifies the consequence of applying the "housing as economic good" to the assertion of privacy in the roommate situation—the claim to the constitutional right must be quali-

fied by this choice.

65 As explained above at notes 75–94 and in the accompanying text, all of these assumed "facts" about roommate situations are neither necessary nor always true.

66 *Roommate.com*, 666 F.3d at 1221.

67 "As the Supreme Court recognized, '[w]e are at our most vulnerable when we are asleep because we cannot monitor our own safety or the security of our belongings.'" *Roommate.com*, 666 F.3d at 1221 (alteration in original) (citing *Minnesota v. Olson*, 495 U.S. 91, 99 (1990)). In *Minnesota v. Olson*, the Supreme Court ruled that the police violated a murder suspect's Fourth Amendment right. The *Roommate.com* court's citation to this case is dicta because neither the facts of the case nor its holding involved a roommate disturbing another roommate's person or her belongings.

68 *Id.*

69 *Id.*

70 *Id.*

71 *Id.*

72 *Id.* at 1221 ("This could include matter we find offensive (pornography, religious materials, political propaganda); dangerous (tobacco, drugs, firearms); annoying (jazz, perfume, frequent overnight visitors, furry pets); habits that are incompatible with our lifestyle (early risers, messy cooks, bathroom hogs, clothing borrowers). When you invite others to share your living quarters, you risk becoming a suspect in whatever illegal activities they engage in.").

73 "Aside from immediate family or a romantic partner, it's hard to imagine a relationship more intimate than that between roommates, who share living rooms, dining rooms, kitchens, bathrooms, even bedrooms." *Id.*

74 "Taking on a roommate means giving him *full* access to the space where we are most vulnerable." *Id.* (emphasis added).

75 *See, e.g.*, Ray Switzer & Ralph B. Taylor, *Sociability Versus Privacy of Residential Choice: Impacts of Personality and Local Social Ties*, 4 Basic & Applied Soc. Psychol. 123, 125–26 (1983) (distinguishing "single apartment; apartment with others but with own separate bedroom; apartment with others without separate bedroom; and living in a fraternity" and arguing that the structure element is not determinate, but may have an effect: "[T]he residential arrangement just makes it more or less likely that interaction or privacy will occur there. . . . Thus, the arrangement is a setting condition, and does not unequivocally determine social or privacy-related outcomes.").

76 The U.S. Department of Housing and Urban Development, the federal agency charged with administering the FHA included a dormitory room as an example of a "dwelling unit" in regulations implementing the FHA. Fair Housing Act, 42 U.S.C.A. § 3602(b) (West 2013); 24 C.F.R. §§ 100.20, 100.201 (2012). *See, e.g.*, *Hack v. President & Fellows of Yale Coll.*, 237 F.3d 81 (2d Cir. 2000) (assuming Fair Housing Act applies in college dormitory case); *United States v. Univ. of Neb. at Kearney*, 4:11-CV-3209, 2013 WL 1694603 (D. Neb. Apr. 19, 2013) ("UNK's student housing facilities are 'dwellings' within the meaning of the Fair Housing Act."); *Franchi v. New Hampton Sch.*, 656 F. Supp. 2d 252, 260 (D.N.H. 2009) (holding that boarding school's dormitory "fits the statutory definition of dwelling" under the Fair Housing Act).

77 *See, e.g.*, Sarah Katz, *Do You Need a Roommate Agreement? (Yes!)*, Apartments.com (Feb. 27, 2013), http://renters.apartments.com/landlords-leases/do-you-need-a-roommate-agreement-yes ("A roommate agreement seems like overkill to many renters. The idea of entering into a contract with your roommate—especially if that roommate is a friend—may bring to mind images of silly outcomes like litigation over someone not taking the garbage out. However, it is in your best interest to have a roommate agreement. And that's true even if your roommate is your best friend or your brother.").

78 Press Release, Apartments.com, Apartments.com Survey Reveals Majority of Renters Have Lived with a Roommate (Aug. 29, 2007), *available at* http://www.apartments.com/PressRoom/roommate.htm ("In order to ensure an enjoyable and stress-free experience when living with a roommate, Apartments.com and Roommate.com offer the following advice: . . . Create a roommate agreement that details items including who is responsible for paying rent and other utilities, who gets which bedroom, who will buy and prepare food and how will moving out be handled.").

79 *See, e.g.*, John Forrester Hicks, *The Contractual Nature of Real Property Leases*, 24 Baylor L. Rev. 443 (1972).

80 The article presumes that if a person is placing an ad seeking a roommate, the ad poster already has secured a housing unit and owns at least a leasehold interest of some kind if not a fee interest. So, functionally, in selecting tenants, she is acting in the capacity of a landlord. In cases in which the initial tenant becomes the "master tenant" and subsequent tenants are her subtenants, she has the legal right to evict them, just as a landlord could. Alternatively, when a group of people decide to find an apartment together, they typically select a place and all become cotenants at the same time. This selection of (initial) roommates in this scenario is often by word of mouth and no advertising is involved.

It was difficult to find any statistically reliable evidence on the incidence of different preferences for types of roommate relationships. However, the author gathered and analyzed surveys conducted by the website Apartment.com about roommates in 2007, 2009, 2010, and 2011. This data confirms two propositions: (1) There is a range of preferences for roommate relationships, i.e. not everyone is seeking an intimate companion; and, (2) Probably twenty-five percent or fewer roommates seek an intimate companion, as defined above. Survey results and analysis on file with author.

81 *See, e.g.*, http://sfbay.craigslist.org/sfc/roo/4051630733.html (last visited Sept. 8, 2013); http://sfbay.craigslist.org/sby/roo/4051629633.html (last visited Sept. 8, 2013); http://sfbay.craigslist.org/eby/roo/4045022846.html (last visited Sept. 8, 2013).

82 *See, e.g.*, ads posted on JumpOffCampus, http://occ.jumpoffcampus.com (last visited Sept. 8, 2013).

83 *See, e.g.*, http://sfbay.craigslist.org/nby/roo/4051221738.html ("Available to drama-free, non-smoker, non-drug user, non-drinker. No pets (Might consider a cat).") (last visited Sept. 8, 2013); http://sfbay.craigslist.org/nby/roo/4051209123.html ("There are two other housemates

who stay upstairs and share kitchen and main bathroom. We are clean, considerate, peaceful, independent . . . . Age, race creed (what is that?), sexual pref, gender i.d. doesn't matter. What does matter is that we are all completely free from the use of alcohol or other mood altering drugs and you will need to be also to live here.") (last visited Sept. 8, 2013); http://sfbay.craigslist.org/sby/roo/4051288712.html ("Looking for: (1) Responsible professional employed person; (2) Pay rent on time; (3) No-drugs; (4) Non-smoking; (5) Clean; (6) No pets; (7) No overnights [sic] visitors") (last visited Sept. 8, 2013).

84 Of course, it is always possible that a meaningful relationship *could* develop with a roommate who was selected only on the basis of compatibility. However, this potential does not detract from the primary goal at the time of roommate selection which is the focus of this article.

85 Some may argue that at least certain protected characteristics are legitimate elements of "compatibility," even if a person is not seeking intimate companionship. Such a person might say: "I just can't get along with people who are [fill in protected characteristic]." The *Roommate.com* opinion offers religion (an orthodox Jew seeking another orthodox Jew) and sex (a woman wanting another woman as a roommate) as examples. But these examples are underanalysed in the opinion. These issues are discussed, *infra*, at notes 136–141 and accompanying text.

86 *See, e.g., Stanford's Freshman Roommate Matching Secrets Revealed,* STANFORD REP. (Sept. 14, 2010), http://news.stanford.edu/news/2010/september/freshman-roommate-match-091410.html (explaining process using compatibility of "sleeping and cleanliness habits, how quiet or social they want to the room to be while studying, what types of music they prefer"); *see also* Karen Erlandson, *Similarity of Interpersonal Needs and Roommate Satisfaction,* 36 J. C. & U. STUDENT HOUSING 10 (2010) (discussing experiment results "in terms of best practices for roommate matching").

87 *See, e.g.,* http://sfbay.craigslist.org/eby/roo/4051265406.html ("A little about myself: I am a 23 year old female doctoral student looking for female room mate (student preferable) in a 2 bedroom apartment. I'm pretty laid back, like to meet new people, and friendly. In my free time I enjoy going out and exploring the city, being spontaneous (but not crazy), being outside in the sun, reading, kicking back and watching my favorite shows, things like that (I'm an introvert, so I'm very quiet most times). I'm clean, honest, and responsible. Looking for someone who has similar qualities/interests.") (last visited Sept. 8, 2013); http://sfbay.craigslist.org/sfc/roo/4051173328.html ("A little about me: I . . . am a 29-year-old male working professional, . . . am a consultant, so I travel Monday-Thursday meaning that you have the entire place to yourself during the week, . . . like to keep the common areas considerately clean, . . . am outgoing, friendly, and get along with most people, . . . enjoy the outdoors, going out with friends in the city, traveling, tv shows (breaking bad, homeland, how I met your mother . . . [sic]), all types of music, and exploring the city. Who Im looking for: 25–35 year-old male or female, Friendly, responsible, respectful, fun, and trustworthy, Non-smoker, no drugs, Financially stable with good credit history, Likes to have friends over for dinner and games, but keeps the big parties elsewhere . . . . Please email me back with the following:...Tell me a little bit about yourself (where you're from, what you do for a living, what you like to do for fun, etc. . . . .)") (last visited Sept. 8, 2013).

88 Admittedly, the phrase "intimate companionship" is problematic. Psychologists regularly distinguish between emotional intimacy and physical or sexual intimacy. *See, e.g.,* Elaine Hatfield, *Passionate and Companionate Love, in* THE PSYCHOLOGY OF LOVE 191–217 (Robert J. Sternberg & Michael L. Barnes eds., 1988) (contrasting "passionate love" characterized as "a state of high arousal, sexuality, idealization, ecstasy, and agony" with "companionate love" as like "intimacy" and described as "a capacity for secure, enduring, and trusting attachment"). However, the term "intimacy" is sometimes colloquially assumed to include a sexual relationship. This article use the term "intimate" because both the *Roommate.com* court uses it and because the constitutional right at issue is commonly referred to as "the right of intimate association." And, this article attempts to address this concern by making "intimate" modify "companionship" which generally has a non-romantic, non-sexual connotation.

89 *See, e.g.,* http://sfbay.craigslist.org/sfc/roo/4048924927.html ("i [sic] am looking for a gay male roommate to share my bedroom and this awesome apt. Let me know ur Budget [sic] and let's work something out") (last visited Sept. 8, 2013); http://sfbay.craigslist.org/sfc/roo/4048953674.html ("If you are a performer with an interest in surrealism, surreal cinema, industrial culture, robots, cabaret, avant-garde electronic music, and progressive social vision then contact us about the opportunity to live and work with us.") (last visited Sept. 8, 2013); http://sfbay.craigslist.org/sfc/roo/4051337084.html ("Free place to stay for few weeks if you can help me out. In the middle of SOMA close to Sightglass cafe is my apartment. I created a startup and started working 16 hours per day in front of a computer. Help me get out of rut with interesting, fun and creative activities. Some of the things you could help me with: 1: Research and sign me up for Dance, improv, spiritual classes, swimming, singing etc; 2: Help me change my day to day routine and plan my days; 3: Plan my diet and cooking help. Anything else that is fun and adventurous and helps me get over my rut!") (last visited Sept. 8, 2013).

90 This kind of intentional community is described in Carol Pimentel, *Shared Living—When Home Is a Community,* COMMUNITIES, Fall 2009, at 28–30.

91 Students or recent former students might have higher likelihood of wanting this kind of roommate relationship. Sue Heath, *Peer-Shared Households, Quasi-Communes and Neo-Tribes,* 52 CURRENT SOC. 161 (2004), *available at* http://csi.sagepub.com/content/52/2/161.

92 The American English version of the Oxford Dictionaries defines "intimacy" as "close familiarity or friendship." *Intimacy Definition,* OXFORD DICTIONARIES, http://oxforddictionaries.com/us/definition/american_english/intimacy (last visited Nov. 14, 2013). The Dictionary of Psychology defines "intimacy" as:

(1) In general, a feeling or attitude characterized by a complete emotional sharing with another; (2) (E. Erickson) According to Erik Erickson, one of the steps in normal personality development when one person's personality fuses with the personality of another who is not from the person's own family of origin (for example, sharing ideas, feelings and concerns with a best friend).
THE DICTIONARY OF PSYCHOLOGY 503 (Ray Corsini ed., 1999).

K.J. Prager defines "intimacy" as "positively cathected psychological relation between two or more people in which partners share that which is private and personal with one another." KAREN J. PRAGER, THE PSYCHOLOGY OF INTIMACY 67 (1995). Prager's multitiered structure of intimacy "requires intimate interactions to have positive affect, perceptions of understanding between the partners, a sharing of something personal. Intimate relationships are characterized by the presence of intimate interactions between the partners. She also hypothesizes affection, trust and cohesiveness as relationship characteristics that sustain relational intimacy." *Intimacy*, ENCYCLOPEDIA OF PSYCHOLOGY 361 (Alan E. Kazdin ed., 2000). Discussing the difficulty of defining the concept of intimacy, "one needs to make reference to concepts such as self-disclosure, attachment, closeness, love and sexuality." Beverley Fehr, *Prototype Analyses of the Concepts of Love and Commitment*, 55 J. PERSONALITY & SOC. PSYCHOL. 557 (1988).

PRAGER, *supra* note 93, at 67; Fehr, *supra* note 93.

See ROOMMATES.COM, www.roommate.com (last visited Nov. 15, 2013).

There is no "free" rent option available in the profile section of Roommate.com. If a user seeking a room tries to select zero in the dropdown menu for "Maximum Rent," she is brought to a page in which an error message states: "Maximum dollar amount is required." Roommate.com screen shots on file with author.

Fair Hous. Council of San Fernando Valley v. Roommate.com, LLC, 666 F.3d 1216, 1221 (9th Cir. 2012) (emphasis added).

"Nonetheless, this interpretation is not wholly implausible and we would normally consider adopting it, given that the FHA is a remedial statute that we construe broadly." *Id.*

468 U.S. 609 (1984).

495 U.S. 91 (1990).

525 U.S. 83 (1998).

539 U.S. 558 (2003).

495 U.S. 91.

525 U.S. 83.

539 U.S. 558.

United States v. Cote, No. 03CR271, 2005 U.S. Dist. LEXIS 11725 (N.D. Ill. May 26, 2005)

City of Bremerton v. Widell, 146 Wash. 2d 561, 51 P.3d 733 (Wash. 2002).

Shahar v. Bowers, 114 F.3d 1097 (11th Cir. 1997); *Goodridge v. Dep't of Pub. Health*, No. 2001-1647-A, 14 Mass. L. Rptr. 591, 2002 Mass. Super. LEXIS 153 (Mass. Super. Ct. 2002), *vacated and remanded*, 798 N.E.2d 941 (Mass. 2003). *But see Anderson v. City of LaVergne*, 371 F.3d 879 (6th Cir. 2004).

109 *Nathanson v. Commonwealth*, 16 Mass. L. Rptr. 761, 2003 Mass. Super. LEXIS 293 (Mass. Super. Ct. 2003).

110 *Marcum v. Catron*, 70 F. Supp. 2d 728, 736–37 (E.D. Ky. 1999) ("First, does the constitution protect cohabitation, a relationship short of marriage, as part of the right to intimate association? . . . The court finds that the relationship in which the plaintiff in this case was a member may be constitutionally protected . . . . While the Supreme Court's listing of factors to be considered in determining whether a relationship should be protected may have added some clarity to this legal issue, the divergent views held among the different circuits suggest that much remains to be defined before the question of whether cohabitation is a protected right can be said to be clearly established.").

111 The paucity of academic research on the content and meaning of roommate relationships (other than for colleges to help design compatibility selection programs) suggests that this is not a relationship that traditionally is a building block of society, such as marriage or family.

112 Relatedly, *Roommate.com*'s overbreadth also poses a potential problem for municipalities' land use regulation. Many municipalities have long distinguished between a "family" and "unrelated persons" living together in a dwelling in zones designated as "single family zones." *Roommate.com*'s overbroad extension of the right of association to any people who happen to be roommates in an apartment or a house directly conflicts with the Supreme Court's decision in *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974). Because most states continue to follow Belle Terre's rule, the *Roommate.com* opinion announces a holding that threatens to undermine the majority of the state's zoning laws without even addressing *Belle Terre's* long-standing rule. *See* Adam Lubow, . . . *Not Related by Blood, Marriage, or Adoption: A History of the Definition of "Family" in Zoning Law*, 16 ABA J. AFFORDABLE HOUSING & CMTY. DEV. L. 144, 158 (2007) (reviewing local jurisdictions' traditional definitions of "family" for "single family zones" in regards to excluding non-related persons and reporting that "[a]side from those in New Jersey, Michigan, New York and California, no other state high court has turned away from Belle Terre's constitutional blessing of traditional family zoning definitions").

113 See, for example, Cal. Civ. Proc. Code § 1161(3), part of California's unlawful detainer statute, which provides: "A tenant may take proceedings, similar to those prescribed in this chapter, to obtain possession of the premises let to a subtenant or held by a servant, employee, agent, or licensee, in case of his or her unlawful detention of the premises underlet to him or her or held by him or her." And see S.F. Admin. Code § 37.2(h), part of San Francisco's Rent Ordinance, in which the definition of "landlord" includes: "An owner, lessor, sublessor, who receives or is entitled to receive rent for the use and occupancy of any residential rental unit or portion thereof in the City and County of San Francisco, and the agent, representative or successor of any of the foregoing."

114 While initially appealing as a concept, making "shared living situations" an operational term to distinguish various housing situations is quite difficult and inevitably

involves a fair amount of subjectivity and assumptions. Is sharing a matter of conduct, intent or both? Or is merely a "legal right of access" sufficient? Does the required sharing include a physical dimension? If so, is it enough to share a living room and kitchen, or does it require sharing a bathroom and/or bedroom? Is mere sharing of rental payments sufficient? Is there a time dimension to what constitutes sufficient sharing? If so, what is enough time? Would a month-to-month lease or a summer sublet be enough? There is some discussion of this concept in single family zoning cases employing the intermediate concept of a "shared housekeeping unit." *See, e.g., Brady v. Town of Atherton*, 200 Cal. App. 2d 69 (1962) (defining "family" as "single housekeeping unit"). However, this jurisprudence is not unified and courts' inquiries in such cases are necessarily intrusive.

115 Note that the FHA and FEHA have consistently been applied to congregate living situations for persons with disability. *See* SCHWEMM, *supra* note 27, § 9.2 (Dwellings: Types of Property Covered by the Fair Housing Act); *see also Kaeo-Tomaselli v. Butts*, CIV 11-00670 LEK/BMK, 2013 WL 5295710 (D. Haw. Sept. 17, 2013) (granting defendant's motion for summary judgment on FHA claims against group home for discriminating in selection relying, in part, on *Roommate.com*'s "roommate exception"). This court reflexively applied *Roommate.com*'s holding in the group home context without any attempt to reconcile the prior cases. Both parties were representing themselves in this case.

116 Each of these housing situations could be described as "shared living situations" to which the *Roommate.com* holding might apply.

117 For example, HUD regulation 24 C.F.R. 109.20(b)(5) (2012) ("Use of words, phrases, symbols, and visual aids") and the Memorandum by Roberta Achtenberg, Assistant Sec'y for Fair Hous. & Equal Opportunity, Guidance Regarding Advertisements Under 804(c) of the Fair Housing Act (Jan. 9, 1995).

118 Cases discussed in the briefing but not mentioned in the opinion include: *United States v. Space Hunters*, 429 F.3d 416 (2d Cir. 2005) (holding defendant, a housing information vendor offering services in connection with the rental of rooms, failed to make a showing for the Mrs. Murphy exemption, so the FHA applied); *Senior Civil Liberties Ass'n v. Kemp*, 965 F.2d 1030 (11th Cir. 1992) (rejecting claim of persons living in a condo complex who claimed that the FHA violated their right to intimate association by disallowing their complex's rule forbidding children); *Wilson v. Glenwood Intermountain*, 876 F. Supp. 1231 (D. Utah 1995) (holding university dormitory could segregate by gender in the dormitory and that Title IX expressly allowed for it); *HUD v. Fung*, HUDALJ 07-053-FH (HUD 2008), *aff'd, Ho v. Donovan*, 569 F.3d 677 (7th Cir. 2009) (holding that the owner and tenant (tenants shared common areas, kitchen, bathroom) violated the FHA when the owner supported one of the tenant's refusal to allow an African-American woman to move into the shared condominium). The so-called "Mrs. Murphy" exemption, 42 U.S.C. § 3603(b)(2), was thoroughly briefed and argued, but not mentioned in the opinion. For a discussion of the inapplicability of the Mrs. Murphy exemption to the roommate context see Oliveri, *supra* note 13, at 1135–38.

119 The court considered but rejected the possibility of remanding the case. "We are as capable as the district court in resolving the issue, which we review de novo in any event. Therefore, we see no need to remand this question to the district court." *Fair Hous. Council of San Fernando Valley v. Roommate.com, LLC*, 666 F.3d 1216, 1223 (9th Cir. 2012). However, this decision overlooked the inadequate factual record before the court regarding the different kinds of roommate relationships among other things.

120 Given poor drafting and reasoning, another court could disagree with (avoid, distinguish, limit, etc.) *Roommate.com*'s holding creating a circuit split on the FHA.

121 The focus of this article and the *Roommate.com* litigation is on issues arising in the roommate selection process, not what happens in the relationship afterwards. It is not clear if people who would not apply the FHA to the selection process would nonetheless think that roommates (once selected) might still deserve protection under 42 U.S.C. § 3604(b) (terms and conditions) and 42 U.S.C. § 3617 (harassment).

122 *Roommate.com*, 666 F.3d at 1218.

123 Because of their broad immunity from FHA under section 230 of the Communications Decency Act ("CDA"), 47 U.S.C. § 230, internet service providers do not have any legal reason to distinguish them if there is not a business reason. And, websites like Airbnb.com which purport to offer short term roommate-type rentals, actually carry ads for longer term rentals and traditional landlord-tenant rentals. *See* Jason Clampet, *Airbnb's Growing Pains Mirrored in New York City, Where Half Its Listings Are Illegal Rentals*, SKIFT (Jan. 7, 2013, 11:11 AM), http://skift.com/2013/01/07/airbnbs-growing-pains-mirrored-in-new-york-city-where-half-its-listings-are-illegal-rentals.

124 As early as 2001, one scholar announced: "In recent years, the legal academy has experienced an 'explosion of scholarly interest in [social] norms.'" Ryan Goodman, *Beyond the Enforcement Principle: Sodomy Laws, Social Norms, and Social Panoptics*, 89 CALIF. L. REV. 643, 644 (2001) (citing numerous articles in footnotes).

125 Professor Schwemm considers social norms as critical for fair housing enforcement. Robert G. Schwemm, *Why Do Landlords Still Discriminate (and What Can Be Done About It)?*, 40 J. MARSHALL L. REV. 455, 508–09 (2007). Professor Oliveri agrees. *See* Oliveri, *supra* note 13, at 1160–63. Fair housing advocates promote anti-discriminatory social norms in housing through education, honoring fair housing heroes, when prominent respected people stand up for fair housing in public, etc.

126 Schwemm, *supra* note 11, at 250.

127 This article employs the term "intimate" because of its traditional use in right of association jurisprudence, including the *Rotary* opinion which employs the term seven times in a brief decision. The term "intimate" is unfortunate because in contemporary discourse it is often associated with sexual relationships. *See supra* note 88.

128 The FHA is sometimes applied to non-economic hous-

ing transactions and the statutory exceptions allow some discrimination in limited contexts, but never in the general housing market.

29 This article proposes a legislative solution based upon both institutional competence and legal rules. A legislative amendment would address the problem better than litigation or regulation, which are both limited by the existing statutory text.

30 This article assumes that adults considering having a roommate can know and do know what type of roommate relationship they want. This assumption seems reasonable and consistent with standard assumptions in law about an individual's awareness of his or her own preferences.

31 "[C]hoices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 617–18 (1984).

32 The defense would only apply to roommates who are either sharing the same bedroom or sharing an apartment or home and not to any other types of "shared living situations."

33 A church bulletin board, *see Fair Hous. Ctr. of W. Mich. v. Tricia*, No. 05-10-1738-8 (9th Cir. Oct. 28, 2010), the HUD ALJ case cited in *Fair Hous. Council of San Fernando Valley v. Roommate.com, LLC*, 666 F.3d 1216, 1222 (9th Cir. 2012), as well as a person's Facebook page would be considered equivalents to placing an ad in the "personal ads section."

34 The failure to advertise in "personal ads" section means that such a person does not benefit from the rebuttable presumption. This result is structurally similar to the relationship between the single-family homeowner exemption, 42. U.S.C. § 3603(b)(1) (providing that a homeowner who otherwise qualifies for the exemption loses it if she advertises in violation of section 3604(c), and the "Mrs. Murphy" exemption (providing that a person who otherwise qualifies for the exemption is liable for a violation of section 3604(c), but does not thereby lose her exemption from liability for other provisions).

35 The courts have demonstrated that they are capable of making these kinds of determinations both in freedom of association cases and in other contexts. *See, e.g., Braschi v. Stahl Assocs. Co.*, 74 N.Y.2d 201, 211–14, 543 N.E.2d 49 (1989) (finding that a permanent life partner may meet a state statute's definition of "family" and providing a totality of the circumstances factor test to make the determination).

36 To demonstrate this assertion, go to the "rooms and shares" section of the housing ads on www.Craigslist.com and enter "women" in the search box. If you browse the ads, you will encounter many in which self-identified women seek roommates without specifying a desired sex. For example, see http://sfbay.craigslist.org/eby/roo/4159844821.html, http://sfbay.craigslist.org/eby/roo/4159806244.html, and http://sfbay.craigslist.org/sby/roo/4159647682.html (last visited Oct. 29, 2013).

37 *See, e.g., Roommate.com*, 666 F.3d at 1221 ("For example, women will often look for female roommates because of modesty or security concerns. . . . She might also worry about unwanted sexual advances . . . .").

138 HUD's efforts to accommodate these concerns were well-intentioned but awkward. For a description of these efforts, see Oliveri, *supra* note 13, at 1132 n.27. The proposed solution, *infra*, provides a clear and direct way for these desires to be accommodated.

139 *Roommate.com*, 666 F.3d at 1221 (emphasis added). The court is consistent in characterizing this example as including *both* religious convictions and dietary needs.

140 People who are vegan face a similar practical need. See, for example, this shared housing ad in Craigslist: *$650 Looking for a vegan roommate*, http://sfbay.craigslist.org/eby/roo/4143702816.html ("We are relaxed and like to go out and enjoy life, but we are vegan and looking for a roommate that is a non-smoker and shares the vegan lifestyle (at least while in the house)") (last visited Oct. 29, 2013).

141 Stating his religion in the ad could be construed by a reasonable reader as indicating a limitation or a preference on the basis of religion, violating 42 USC § 3604(c). *See* 24 C.F.R. § 100.75 (2012) (HUD's regulations on discriminatory advertising).

142 No. 05-10-1738-8 (9th Cir. Oct. 28, 2010) (cited in *Roommate.com*, 666 F.3d at 1222).

143 *Id.*

144 Surveys by the American Apartment Owners Association revealed that the percentage of people who search for roommates by word of mouth is substantial: "45.1 percent [of survey respondents] relied on word of mouth [in 2013] versus 31.5 percent in 2012." *Survey Reveals What Renters Want in 2013*, APARTMENT.COM, http://www.american-apartment-owners-association.org/blog/2013/02/06/survey-reveals-what-renters-want-in-2013 (last visited Nov. 15, 2013). In response to the question "Where did you find your roommate" in a 2007 survey conducted by Apartment.com, 31.6% selected "Friend before lived together" and 12.7% selected "Referral by friend, etc." Survey on file with author. Research by apartment.com and Pew Research suggests about half of people use the internet, but many use word of mouth to seek housing, so the proposed solution maybe not very restrictive in practice. *See* Pew Internet Project Data Memo from Senior Research Fellow Deborah Fallows, Looking for Information About a Place to Live (Dec. 13, 2006), *available at* http://www.pewinternet.org/~/media/Files/Reports/2006/PIP_Place_to_Live_2006.pdf.pdf ; Pew Internet & American Life Project Data Memo from Research Assistant Angie Boyce & Dir. Lee Rainie, The Growth of Online House Hunting: 40 Million Wired Americans Have Used the Internet to Search for Houses or Apartments (Aug. 2002), *available at* http://www.pewinternet.org/Reports/2002/Hunting-for-a-home-online/Data-Memo.aspx.

145 *See* Oliveri, *supra* note 13.

146 Professor Rigel Oliveri's review of online advertisements for roommates led her to describe them as highly personal. *Id.* at 1157 ("[M]any roommate ads resemble personal dating ads, down to the familiar abbreviations for race, gender, and ethnicity.") "There is a qualitative difference between Roommate Ads and Ads for Traditional Rental Housing."

Id. at 1151.

147 Like all legal changes, there will need to be public education to make the transition. This is an opportunity for HUD and fair housing groups to educate about the FHA and FEHA and their purposes. For a time, websites could post notices and use disclaimer pages on housing market ads sections to steer users to the appropriate placement for ads. Or they could interpose a page informing the user of her choices and require a deliberate choice to move to either the personal ads section or the general housing ad section of the website.

148 For an authoritative discussion of 42 U.S.C. § 3604(c), including the source and evolution of its language as well as judicial interpretation of the provision, see Schwemm, *supra* note 11, at 206–52. Professor Schwemm identifies three interrelated purposes of 42 U.S.C. § 3604(c). First, the "market-limiting" effect avoids market narrowing by reducing barriers "that might deter minorities seeking homes in neighborhoods that must be open to them under the FHA but might appear restricted if discriminatory ads, notices, or statements are allowed." *Id.* at 249. Second, its "protection-against-psychic-injury" purpose protects "minority home seekers from suffering insult, emotional distress, and other intangible injuries resulting from discriminatory ads, notices, or statements." *Id.* And, third, its "re-education" purpose avoids "ongoing, costly efforts to re-educate relevant groups about their rights and responsibilities under the FHA" that would otherwise be required due to "the continuing presence of discriminatory ads, notices, and statements [that would] encourage a variety of groups—particularly minority home seekers and housing providers—to believe housing discrimination is an accepted norm despite the FHA's pronouncements to the contrary." *Id.* at 250.

149 This concerns section 3604(c)'s "protection-against-psychic-injury" purpose, discussed above in note 148.

150 This concerns section 3604(c)'s "re-education" purpose, discussed above in note 147.

151 It is also limited because it does not address the problem of CDA immunity for websites allowing discriminatory ads, including for regular landlord-tenant or for-sale housing ads. *See* Oliveri, *supra* note 13, at 1172–76 ("There is still a need for website publisher liability").

152 This solution has no interest in limiting the number of persons who opt for advertising on the personal ads section.

153 This solution is not so different from the actual current practice of some who want intimate roommates. For example, the following ad was found in the "Personal/Strictly Platonic" section of Craigslist.com:

> Want a chill roomie- need room! - m4m - 26 (north beach / telegraph hill) i know this is the wrong section, but this is for a specific kind of roomie. Want a chill roomie that i can either share a room with or have my own room and share an apartment. I like sports, drink socially, play video games, go out to bars/clubs concerts, 420 friendly, I'm pretty relaxed and chill with mostly everything. A nude friendly place would be nice, and if sharing a room, it would be nice if you didn't care about me watching porn (having to wait till the roomie is gone is no fun). be around my age, chill and sane. So if you have a room or are looking to move also, let me know. Thanks.

http://sfbay.craigslist.org/sfc/stp/3914007159.html (last visited July 15, 2013).

154 I am indebted to Professor Rigel Oliveri, at the University of Missouri School of Law, for raising this issue.

155 *Marya v. Slakey*, 190 F. Supp. 2d 95 (D. Mass. 2001); *State ex rel. Sprague v. City of Madison*, 555 N.W.2d 409, 1996 WL 544099 (Wis. Ct. App. Sept. 26, 1996) (unpublished table decision); *Dep't of Fair Emp't & Hous. v. DeSantis*, Nos. H 9900 Q-0328-00-h, C 00-01-180, 02-12, 2002 WL 1313078 (FEHC May 7, 2002). The author is indebted to Rigel Oliveri for identifying these cases. The *Roommate.com* court identified one FEHA case of this kind: *Dep't of Fair Emp't & Hous. v. Larrick*, FEHC Dec. No. 98-12, 1998 WL 750901 (FEHC July 22, 1998).

156 The fair housing community and roommate-matching websites could collaborate on this education. For an example of prior collaboration between fair housing advocates and for-profit apartment industry regarding discriminatory advertising, see Press Release, Hous. Rights Ctr., Tenn. Fair Hous. Council & Apartments.com, National Rental Website and Fair Housing Organizations Celebrate National Fair Housing Month with the Launch of Unique Internet Fair Housing Awareness Campaign (Mar. 31, 2003), *available at* http://www.apartments.com/PressRoom/hrc.htm.

157 See, for example, Craigslist's "strictly platonic" section of personal ads: *Strictly Platonic*, CRAIGSLIST.COM, http://sfbay.craigslist.org/stp (last visited Sept. 6, 2013).

158 At this point, there will be a reasonably objective record upon which the court can decide without delving into details of any actual roommate relationship. *What did the ad state? What questions were asked in the interview?* If there is a significant discrepancy between these two, then there will be a reasonable basis for finding pretext. When available, the results of testing will help generate a sufficiently clear factual record.