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Should Airbnb Use The First Amendment As A Shield In Regulatory Fights?

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Should Airbnb look to the First Amendment as a shield in the struggle to survive amid regulatory backlash? Although debates about the sharing economy are often couched in discussions on the extent of the regulatory state, it's worth keeping in mind that homeshare prohibitions like proposed legislation in New York ultimately rely on homeowners not being allowed to speak about their own property.

It's tempting to think of Airbnb as a hotel chain. Yet, while Airbnb hosts do compete with hotels, they shouldn't be labeled as such. After all, Airbnb hosts set their own prices, open and close at will, and are not subject to lodging demands from Airbnb's San Francisco headquarters. Airbnb is a platform where those with spare properties or bedrooms can advertise their space, making the availability of the space known to anyone with an Internet connection.

Some believe that this advertising of space is protected speech. When discussing legislation on New York Governor Andrew Cuomo's desk, which would ban the advertising of whole apartments for fewer than 30 days on platforms such as Airbnb, Christina Sandefur, an attorney and vice president of the Goldwater Institute, said "Prohibiting people from advertising their homes online would appear to be a violation of free speech rights."

This approach may sound initially appealing, although it's worth keeping in mind that the New York bill bans the advertising of an activity that is already illegal. In addition, not all speech is created equal, with commercial speech enjoying less protection than non-commercial speech.

That said, this "homesharing as protected speech" approach might be worth exploring, if only to help highlight the fact that restrictions on homesharing require the stifling of homeowners discussing details about their property.

Thanks to Airbnb and similar platforms homeowners willing to rent out spare bedrooms and travelers who prefer to stay in houses rather than hotels can very easily find one another. But this model only works if homeowners are free to advertise their properties, and as long as Airbnb

rentals for fewer than 30 days in New York are prohibited lawmakers may be able to hold off First Amendment concerns related to advertising:

From Watchdog.org:

Since New York has criminalized Airbnb rentals and turned anyone who uses the room-sharing services into law-breakers, the ban on public advertising might be able to skirt around otherwise robust protections for free speech, Sandefur said.

In other words, New York's state government could get away with infringing on free speech because it made the subject matter of that speech illegal.

"It's pretty scary stuff—if government can criminalize harmless behavior in order to avoid the First Amendment, our rights are doubly at risk," Sandefur said.

In discussions about homesharing it's important to remember that prohibitions necessarily restrict what homeowners can say about their properties while they seek to carry out peaceful and voluntary transactions. This is a disturbing legislative tactic and should be watched carefully by those concerned about free speech.

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