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PORTLANDIA, RIDESHARING, AND SEX DISCRIMINATION

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There are two new ridesharing apps entering the market: See Jane Go[1] and SafeHer.[2] No, they are not meant for Toni and Candace, the proprietors of the fictional feminist bookstore Women and Women First featured in the IFC show Portlandia.[3] Instead, these apps are poised to offer an important and previously unavailable service. They provide female drivers for female riders[4] who feel vulnerable riding in conventional taxicabs or using generic ridesharing apps. The apps work just like Uber or Lyft—download the app, sign up, enter your credit card information, request a driver, and go.

The problem is that these apps might not be legal. "Good motives do not suspend the rule of law," critics will say. True, See Jane Go and SafeHer are well-meaning startups, but they accomplish their goals by discriminating against male drivers. Title VII of the Civil Rights Act of 1964 forbids employers from hiring or refusing to hire someone "because of such individual's race, color, religion, sex, or national origin."[5] And it is unclear if

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1. Tracy Lien, *Uber . . . for Women? Start-ups Hope to Match Female Passengers With Female Drivers*, L.A. TIMES (July 16, 2016), http://www.latimes.com/business/technology/la-fi-tn-ride-hailing-women-snap-story.html [https://perma.cc/8L43-TJPE].

2. Kristen Hall-Geisler, *Chariot for Women is a New Ridesharing Service for Women Only*, TECHCRUNCH (April 8, 2016), http://techcrunch.com/2016/04/08/chariot-for-women-is-a-new-ride-sharing-service-for-women-only/ [https://perma.cc/H883-CATS]. Citing extremely high demand, Chariot for Women delayed its launch in the process was rebranded "SafeHer" in April 2016. *Chariot for Women is Now SafeHer, Delays Launch Citing High Demand*, SHERPASHARE BLOG (April 22, 2016), http://www.sherpashareblog.com/2016/04/chariot-for-women-is-now-safeher-delays-launch-citing-high-demand/ [https://perma.cc/C7K9-PGK5].

3. *See generally Portlandia: Feminist Bookstore's 10th Anniversary* (IFC television broadcast Feb. 24, 2012).

4. With SafeHer, male children are also allowed if age 13 or younger. Hall-Geisler, *supra* note 2. Using See Jane Go, male passengers who request a ride are redirected to a competing ridesharing app. *Ask Jane*, SEE JANE GO, http://seejanego.co/ask-jane/#faq [https://perma.cc/R99W-B9KD].

5. 42 U.S.C. § 2000e-2(a)(1) (2012).

the exception for Bona Fide Occupational Qualifications[6] (or BFOQ) will apply here. Someone will sue See Jane Go or SafeHer under Title VII—it is only a matter of time.

When that happens, the rideshare companies might first try to claim that they are not technically employers. "The term 'employer' means a person . . . who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year . . . ."[7] So the question would be whether or not ridesharing drivers are employees. But that is a larger war that Uber has been fighting for quite some time now.[8] Besides, there already is sufficient scholarship along these lines.[9] Thus, this Essay brackets that issue and proceeds under the assumption that See Jane Go and SafeHer cannot get out from under Title VII through that route.

In that case, See Jane Go and SafeHer will have to show that sex in this limited instance is a BFOQ. This will be difficult, but not impossible. This Essay discusses and assesses the legal hurdles that they may face. Part I of this Essay explains how the plain text of Title VII and the pertinent Equal Employment Opportunity Commission (EEOC) guideline can fairly be read either to allow or condemn See Jane Go and SafeHer's hiring practices. Part II then highlights precedent that supports See Jane Go's and SafeHer's discriminatory driver–passenger practices. Part III concludes by arguing that the legal system ought to make room for apps like See Jane Go and SafeHer in the current framework.

I. THE PLAIN TEXT OF TITLE VII AND THE EEOC GUIDELINE SUPPORT ARGUMENTS BOTH IN FAVOR OF AND IN OPPOSITION TO FEMALE-ONLY RIDESHARING APPS.

Opponents and proponents of the all-female business model might each find support in the text of Title VII's BFOQ provisions. On the one hand, Title VII stipulates that the BFOQ exception must be "*reasonably* necessary,"[10] not absolutely necessary. This suggests that sex discrimination doesn't need to be indispensable to meet the BFOQ exception, but just needs

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6. *Id.* § 2000e-2(e).

7. *Id.* § 2000e(b).

8. *See* Mike Isaac & Natasha Singer, *California Says Uber Driver is Employee, Not Contractor*, N.Y. TIMES (June 17, 2015), http://www.nytimes.com/2015/06/18/business/uber-contests-california-labor-ruling-that-says-drivers-should-be-employees.html?_r=0 (on file with the *Michigan Law Review*).

9. *E.g.*, Jennie Davis, Note, *Drive at Your Own Risk: Uber Violates Unfair Competition Laws By Misleading UberX Drivers About Their Insurance Coverage*, 56 B.C. L. REV. 1097, 1105 n.41 (2015).

10. § 2000e-2(e) (emphasis added).

to be closely tied to the business—as hiring female drivers unquestionably is for SafeHer. Thus, arguments that there are other conceivable ways of dealing with sexual assault and harassment may fall short. Plus, the legislature has extended eligibility for BFOQ exceptions to religion and national origin.[11] Were religion and national origin not included in the provision, it might fairly be read as reserved only to occupations like wet nursing, where being female is physically necessary. Yet it is difficult to imagine where religion or national origin might be as requisite as sex is to being a wet nurse.[12] Finally, the BFOQ must be reasonably necessary for the "*particular* business or enterprise."[13] In other words, the BFOQ is sensitive to the individual constraints of each business as opposed to each industry.[14] To that point, both See Jane Go and SafeHer have taken up the goal of serving a very particular clientele.

On the other hand, the BFOQ is also regarded as an "extremely narrow exception to the general prohibition of discrimination on the basis of sex."[15] For example, the Supreme Court has interpreted the word "occupational" to indicate "job-related skills and aptitudes."[16] If See Jane Go or SafeHer's purported BFOQ rests on the premise that no man is capable of safely, professionally, and courteously driving all women to their destination, then it is erroneous. Hence, the discriminatory policy would be unnecessary.

The EEOC guideline on sex-based discrimination forbids sex-based stereotypes or customer preferences.[17] Yet See Jane Go and SafeHer will argue that their businesses are not founded on stereotypes. In fact, one of SafeHer's founders is a man![18] Both app companies might also claim that their passengers need female drivers, that it is not merely a customer

11. *Id.*

12. Note that due to First Amendment concerns, Title VII didn't apply against a church-affiliated hospital that fired a priest. Scharon v. St. Luke's Episcopal Presbyterian Hosps., 929 F.2d 360, 363 (8th Cir. 1991). So, synagogues, for example, wouldn't need the BFOQ defense to hire only Jewish rabbis.

13. § 2000e-2(e) (emphasis added).

14. *See* Torres v. Wis. Dep't of Health & Soc. Servs., 859 F.2d 1523, 1528 (7th Cir. 1988) (en banc) ("Oftentimes, this task requires that a court recognize factors that make a particular operation of an employer unique or at least substantially different from other operations in the same general business or profession.").

15. Dothard v. Rawlinson, 433 U.S. 321, 334 (1977) (emphasis added).

16. UAW v. Johnson Controls, Inc., 499 U.S. 187, 201 (1991).

17. 29 C.F.R. §1604.2(a)(1) (2015).

18. *See* Shelagh Braley, *Safeher, Driven by Women, Speeds to Market*, FOUNDERSWIRE (March 27, 2016), http://www.founderswire.com/the-founders/safeher-driven-by-women-speeds-to-market/ [https://perma.cc/7832-PLQE].

preference.[19] They will say that "preference" indicates the ability to make a choice; it is simply a predilection for one option over another. See Jane Go and SafeHer will claim that their targeted customers suffer debilitating anxiety when locked in a male-driven car. "Some of these passengers are not choosing one option over an equally viable alternative. Instead, they are choosing their only option."

Still, not all of See Jane Go and SafeHer's clientele will be sexual assault victims. Many will be women who previously used Uber, Lyft, taxis, trains, or buses. So it will be argued that if they were able to use those options before, using SafeHer is clearly a preference and not a need.

II. COURTS MAY RECOGNIZE BFOQS WHEN THE DISCRIMINATORY PRACTICE SERVES THE ESSENCE OF THE BUSINESS, BUT RELYING ON PRECEDENT DOES NOT GUARANTEE VICTORY FOR SEE JANE GO AND SAFEHER.

In order to show that sex is a BFOQ, See Jane Go and SafeHer are likely to have to clear at least three doctrinal hurdles. First, they must show that the discriminatory hiring practice for which the exception is sought serves the "essence of the business." Second, they will likely have to prove that "all or substantially all" of the excluded applicants would be incapable of performing that essential function. Third, even after See Jane Go and SafeHer have made these showings, many courts will only find a BFOQ if the essential function in question serves at least one of a narrow set of important interests—most relevant here are privacy, safety, or rehabilitation.[20]

A. Critics might claim that the true essence of the business is safe transportation, not female drivers.

Even if the demand for female drivers is considered a customer preference, courts may recognize sex as a BFOQ for SafeHer and See Jane Go so long as their hiring practices serve the essence of the business.[21] While the

19. *Cf.* Fernandez v. Wynn Oil Co., 653 F.2d 1273, 1276 (9th Cir. 1981) (finding that gender-based preferences of customers cannot justify a discriminatory hiring policy); Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385, 388 (5th Cir. 1971) ("[M]any airlines including Pan Am have utilized both men and women flight cabin attendants in the past . . . .").

20. Katie Manley, Note, *The BFOQ Defense: Title VII's Concession to Gender Discrimination*, 16 Duke J. Gender L. & Pol'y 169, 175–76 (2009).

21. *E.g.*, *Diaz*, 442 F.2d at 389 ("[W]e feel that customer preference may be taken into account only when it is based on the company's inability to perform the primary function or service it offers."); *see also Johnson Controls, Inc.*, 499 U.S. at 203 (first citing W. Air Lines, Inc., v. Criswell, 472 U.S. 400, 413 (1985); then citing Dothard v. Rawlinson, 433 U.S. 321, 333 (1977)); EEOC v. Wyoming, 460 U.S. 226, 258 (1983) (endorsing as typical the essence-of-the-business analysis); Everson v. Mich. Dep't of Corr., 391 F.3d 737, 749 (6th Cir. 2004) (quoting *Johnson Controls, Inc.*, 499 U.S. at 203); EEOC v. Sedita, 816 F. Supp. 1291, 1295–96 (N.D. Ill.

essence of a business can be defined—at least in part—by its particular clientele,[22] it is unclear what that means for SafeHer and See Jane Go. The companies will say: "Of course this serves our business's essence. Our essence is providing women drivers for female rideshare users."

But disgruntled male applicants might challenge this interpretation. Critics may argue that SafeHer is, in fact, a service intended to provide safe ridesharing, not female drivers. Discriminating by gender would not serve that goal. And precedent supports this contention. In *Wilson v. Southwest Airlines Co.*, a district court held that a business's essence is determined by its primary function.[23] SafeHer's primary function is transportation—after all, it is a ridesharing app. Similarly, the Fifth Circuit has held that only the mechanical aspects of being a flight attendant serve the essence of that business because the non-mechanical aspects were tangential.[24] SafeHer is targeting ex-Uber and ex-Lyft passengers. These women were willing to ride with male drivers before, the argument would go. So SafeHer is just another competitor in the rideshare industry, and female-driver availability is only a secondary, tangential concern for passengers.

If SafeHer's essence can be limited to transportation, it might also fail the "all-or-substantially-all" test.[25] Under this test, sex-based discrimination is acceptable only when there is a factual basis for finding that substantially all employees of a given sex are incapable of completing the job.[26] And all or substantially all men can drive a taxicab without assaulting their passengers.

It is unclear which of these arguments a court would favor. But even if a court agrees with the companies' characterization of their essence, they would still need to tie their services to recognized privacy, rehabilitation, or safety concerns to raise a valid BFOQ—which they should be able to do.

1993) (citing EEOC v. Mercy Health Ctr., No. Civ. 80-1374-W, 1982 WL 3108 (W.D. Okla. Feb. 2, 1982)) (finding the BFOQ exception may be applicable when the preference is based on a desire for sexual privacy).

22. *See Sedita*, 816 F. Supp. at 1296 ("Although . . . the essence of WWW is providing exercise classes . . . [it] can be more broadly construed as providing personal and individual service to an exclusively female clientele.").

23. 517 F. Supp. 292, 301–02 (N.D. Tex. 1981) (citing *Diaz*, 442 F.2d at 388).

24. *Diaz*, 442 F.2d at 388.

25. *Dothard*, 433 U.S. at 333 (quoting Weeks v. S. Bell Tel. & Tel. Co., 408 F.2d 228, 235 (5th Cir. 1969)).

26. *Criswell*, 472 U.S. at 414 (quoting *Weeks*, 408 F.2d at 235).

B. SafeHer and See Jane Go could serve rehabilitative, safety, religious, or other recognized BFOQ interests.

BFOQs have also been found in the context of businesses where rehabilitation or safety was part of their central mission. In *Torres*, the court recognized that the BFOQ for female prison guards was "directly related to the 'essence' of the 'business'—the rehabilitation of females incarcerated in a maximum security institution."[27] In a sense, See Jane Go and SafeHer's goals are actually quite akin to the prisons. While not explicitly rehabilitative, See Jane Go and SafeHer will inevitably serve sexual assault victims, helping them regain a semblance of normal life.

Both apps might also serve a vital (albeit unorthodox) safety role for its customers, which has sufficed to establish a BFOQ in narrow instances.[28] Getting into a male driven car could reasonably exacerbate or create additional psychological injuries to those of See Jane Go and SafeHer's customers who have been victims of sexual assault. So using female drivers averts that safety risk and is tied to the essence of both See Jane Go and SafeHer's businesses.

Further, some women may turn to See Jane Go and SafeHer for religious reasons. For example, under the laws of *yichud* in Hasidic Judaism, unrelated men and women are not allowed to be alone together in seclusion.[29] Using SafeHer could give many observant Jewish women access to safe public transit. And Justice Alito noted that "Title VII . . . provides . . . that any employer can hire on the basis of religion if it is a bona fide occupational qualification."[30] In this hypothetical instance, it certainly is.

Finally, SafeHer and See Jane Go *might* be able to argue that their apps protect client privacy, which courts have sometimes relied on in finding a BFOQ.[31] Perhaps some passengers feel that they compromise their privacy

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27. Torres v. Wis. Dep't of Health & Soc. Servs., 859 F.2d 1523, 1530 (7th Cir. 1988) (en banc) (citing *Dothard*, 433 U.S. at 333).

28. UAW v. Johnson Controls, Inc., 499 U.S. 187, 203 (citing *Dothard*, 433 U.S. at 333) (noting that safety creates a BFOQ only when it is tied to the essence of the job).

29. *Yichud*, HALACHIPEDIA, http://halachipedia.com/index.php?title=Yichud [https://perma.cc/4JMK-B99J]; *see also*, *Curb Your Enthusiasm: The Ski Lift* (HBO television broadcast Nov. 20, 2005) (portraying Larry David and a Hasidic woman stuck on a chairlift together and the woman jumping off the chairlift when Larry refuses to, in order to comply with religious law).

30. Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez, 561 U.S. 661, 733 n. 8 (2010) (Alito, J., dissenting) (citing 42 U.S.C. §§ 2000e-1(a), 2000e-2(e) (2012)).

31. *E.g.*, Everson v. Mich. Dep't of Corr., 391 F.3d 737, 753 (6th Cir. 2004); *R*obino v. Iranon, 145 F.3d 1109, 1111 (9th Cir. 1998); *see also* EEOC Compl. Man. (BNA) § 625.7 ("[Same-sex] BFOQs are usually premised on the employer's need to protect the privacy interests or meet the psychological needs of its customers or clients.")

by revealing their home addresses to male drivers. But courts appear to limit the privacy BFOQ mostly to cases involving bodily privacy or prisoners. In *Healey v. Southwood Psychiatric Hospital*, gender was a privacy BFOQ where "adolescent patients [had] hygiene, menstrual, and sexuality concerns."[32] The Seventh Circuit held that in a female prison, undressing in front of the opposite sex raised a legitimate privacy issue in part because the women feared sexual abuse, which counteracted the prison's goal of rehabilitation.[33] So it appears unlikely that courts will recognize a privacy BFOQ without a significant expansion of the current doctrine.

III. CONCLUSION

Allowing See Jane Go and SafeHer—as well as companies like it—to exist is good policy. Courts should make room for it within the privacy-based BFOQ. The idea of federalism—whereby states act as laboratories of democracy—is mirrored in our market economy. We often turn to the private sector to produce the most efficient solutions to major societal needs, and that demands bottom-up experimentation. If See Jane Go and SafeHer are not allowed to attempt this tailored solution, it would signal to future innovators not to experiment. This blindly rigid enforcement of Title VII would remove something that might otherwise provide security and peace of mind.

That said, there is a reasonable slippery-slope argument to be made, too. Opening the door to discrimination here could, arguably, lead to less noble-minded iterations of analogous discrimination. And ridesharing apps center around the notion of empowering individuals to make their own supplemental income. The See Jane Go–SafeHer model makes that more difficult for half of the population. But that is why we have courts. They serve the critical function of sorting through these alleged BFOQs to determine which are truly reasonable and which are in fact not. So far, See Jane Go and SafeHer genuinely seem to be well-intentioned.

When See Jane Go or SafeHer is sued under Title VII, each company can mount a strong defense based on the BFOQ exception, but that defense is not guaranteed to win the day. If courts do decide to ban this business strategy, though, the EEOC should revise its guideline to make a clear exception for nuanced and limited-scope businesses like See Jane Go and SafeHer. Companies like these, which offer creative solutions to legitimate social problems, should be able to stake out a place in the market. We should

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32. 78 F.3d 128, 133 (3d Cir. 1996).

33. *See* Torres v. Wis. Dep't of Health & Soc. Servs., 859 F.2d 1523, 1530–32 (7th Cir. 1988) (en banc).

trust our legal system to be able to distinguish truly invidious discrimination and innovation.