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Sophia A. Studer

University of Richmond School of Law

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**HOW JUDICIAL APPLICATION OF CDA § 230 AND FHA § 3604
HAVE CREATED SAFE HavENS FOR ONLINE HOUSING
DISCRIMINATION**

Sophia A. Studer*

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* Juris Doctor Candidate at T.C. Williams School of Law, University of Richmond. I would like to thank Professor Carol Brown for her guidance and support. She sparked my interest in this field of law, and to her I am so grateful.

ABSTRACT

This article analyzes how the anti-discrimination language of Fair Housing Act section 3604 is currently out of reach for people being discriminated against online through the exclusionary language of Communications Decency Act section 230(c). The exclusionary language in CDA section 230(c) prevents liability from attaching to interactive computer service providers so long as the interactive computer service provider is not a creator or developer of information.¹ Through the decisions of *Zeran*, *Craigslist*, and *Roommate*, the federal appellate courts created broad shield of immunity for interactive computer service providers, leading to a safe haven for discrimination online.² Together the courts and Congress need to act to prevent further discrimination in housing advertisements online.

¹ See 47 U.S.C.S. § 230(c) (LEXIS through Pub. L. No. 117-47); 42 U.S.C.S. § 3604 (LEXIS through Pub. L. No. 117-44).

² See *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 334–35 (4th Cir. 1997); *Craigslist*, 519 F.3d at 670; *Roommate*, 521 F.3d at 1174.

I. INTRODUCTION

[1] As the cost of living increases and the use of the internet as a housing search tool soars, the absolute immunity protection afforded to interactive computer service providers by the Communications Decency Act (“CDA”) section 230(c) permits blatant discrimination in online housing advertisements. The key inquiry in this issue is whether Congress intended CDA section 230(c) to provide absolute immunity for interactive computer service providers from the Fair Housing Act (“FHA”) section 3604.

[2] Currently, renters who may experience discrimination while searching to buy a home online cannot rely on the anti-discrimination language provided in the FHA section 3604. The exclusionary language in CDA section 230(c) prevents liability for interactive computer service providers so long as the interactive computer service provider is not a creator or developer of the discriminatory information.³ This article will discuss the relevant statutes and case law. I will then provide an in-depth examination of the harm resulting from the application of the case law and statutory standards.

[3] First, this article establishes the standards from the FHA and CDA necessary to understand the deciding factors in *Chicago Lawyers’ Commission v. Craigslist*⁴ and *Fair Housing v. Roommates.com*.⁵ FHA section 3604 and CDA section 230(c) are the key statutory players in this issue. Next, this article will delve into the rationales and analyses undertaken by both the *Craigslist* court of the Seventh Circuit and the *Roommate* court of the Ninth Circuit. This exploration will flow into a discussion on the analyses of the standards adopted by the other circuits. Finally, this article considers the policy concerns of the resulting disjointed

³ Fair Hous. Council v. Roommates.com, LLC (*Roommate*), 521 F.3d 1157, 1166 (9th Cir. 2008).

⁴ Chi. Laws.’ Comm. for Civ. Rts. Under L., Inc. v. Craigslist, Inc. (*Craigslist*), 519 F.3d 666 (7th Cir. 2008).

⁵ *Roommate*, 521 F.3d 1157.

standard, and also considers the implications of the application of this standard going into the future.

II. DISCUSSION

A. Developing the Legal Standard for Online Housing Discrimination as Applied in *Craigslist* and *Roommate*

[4] Many federal circuit courts have adopted absolute immunity rules to protect interactive computer service providers from liability for discrimination happening on their online forums. The cases on point are *Chicago Lawyers' Commission v. Craigslist*—from the Seventh Circuit—and *Fair Housing v. Roommates.com*—from the Ninth Circuit.⁶ The focal issue in both *Craigslist* and *Roommate* is whether section 230(c) of the Communications Decency Act (“CDA”) was drafted to create absolute immunity for interactive computer services under the federal Fair Housing Act (“FHA”).⁷ This necessitates a close look at FHA section 3604 and CDA section 230 which impact the absolute immunity issue.

1. Statutory Background: FHA § 3604 and CDA § 230

[5] In order to understand the *Craigslist* and *Roommate* cases, and the resulting safe havens for online housing discrimination that these cases provide, the statutory scheme must first be set. Section 3604 of the FHA states:

[I]t shall be unlawful . . . (b) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin [and] (c) [t]o make, print, or publish, or cause to be made, printed, or published any

⁶ *Craigslist*, 519 F.3d 666; *Roommate*, 521 F.3d 1157.

⁷ *Craigslist*, 519 F.3d 666; *Roommate*, 521 F.3d 1157.

notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin, or an intention to make any such preference, limitation, or discrimination.⁸

[6] FHA section 3604(c)–(b) play a significant role in these cases. Complainants in online housing discrimination cases need FHA section 3604 to apply for any liability to be placed on the interactive computer service provider. Outside of the online realm, FHA section 3604 is a powerful tool.⁹ This section was intended to apply to a wide variety of housing issues; indeed, “the language of the [federal Fair Housing] Act covers a wide range of activities associated with housing advertising. Given the breadth of [section] 3604(c) it is almost certain that, absent the CDA, the ban on publishing discriminatory housing advertisements would apply to [interactive computer service providers].”¹⁰

[7] Prior to the adoption of section 230, also known as the “Good Samaritan” section of the CDA, courts held interactive computer service providers were “publishing” or “causing to be published” any content that is posted on their sites if the site was doing any screening to remove discriminatory posts.¹¹ This caused a chilling effect on interactive computer service providers’ will to do any screening for fear of liability, which in turn

⁸ 42 U.S.C.S. § 3604(b)–(c) (LEXIS through Pub. L. No. 117-44).

⁹ Andrew J. Crossett, *Unfair Housing on the Internet: The Effect of the Communications Decency Act on the Fair Housing Act*, 73 MO. L. REV. 195, 196–97 (2008).

¹⁰ Stephen Collins, *Saving Fair Housing on the Internet: The Case for Amending the Communications Decency Act*, 102 NW. UNIV. L. REV. 1471, 1473, 1476 (2008).

¹¹ *Roommate*, 521 F.3d at 1163.

caused Congress to take action and adopt the “Good Samaritan” language in the CDA.¹²

[8] Section 230(c) of the CDA states:

(c) Protection for “Good Samaritan” blocking and screening of offensive material. **(1) Treatment of publisher or speaker.** No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider. **(2) Civil Liability.** No provider or user of an interactive computer service shall be held liable on account of— **(A)** any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or **(B)** any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1) [subparagraph (A)].¹³

[9] The language of CDA section 230 protects interactive computer service providers from FHA liability if they have screening functions for discriminatory language.¹⁴ The statute was intended to encourage interactive computer service providers to continue to screen out any discriminatory content without penalty for missing some discriminatory content.¹⁵ A large argument from the supporters of CDA section 230(c) is that the wealth of information on an interactive website could be too much

¹² *See id.*

¹³ 47 U.S.C.S. § 230(c) (LEXIS through Pub. L. No. 117-47) (emphasis added).

¹⁴ *Roommate*, 521 F.3d at 1175.

¹⁵ *Id.*

for interactive computer service providers to ever be able to thoroughly screen, thus making them far more susceptible to FHA liability.¹⁶ While the intentions behind the “Good Samaritan” language are benevolent, the resulting doctrinal standards being adopted by the courts appears problematic. Prior to the adoption of CDA section 230, and still outside of the online housing realm, FHA section 3604 was very powerful.¹⁷ A commentator provides:

No person or entity is exempt from [section 3604(c)’s] reach, provided that the statement is made in connection with the sale or rental of a dwelling and indicates discrimination on a prohibited basis. Although discrimination may be permissible in the sale or rental of housing when that housing falls into one of the statutory exemptions, it is never permissible to advertise that discriminatory animus.¹⁸

After the adoption of CDA section 230, however, the far-ranging ability of FHA section 3604 to nix discriminatory housing ads was essentially nullified when the discriminatory ad was online instead of in print.¹⁹ Instead of confronting online housing discrimination, Congress’s passage of CDA section 230 significantly impaired consumers, providing immunity for the very entities with the power to control housing discrimination online.

2. Overview of Analysis: *Craigslist* and *Roommate*

[10] FHA section 3604 and CDA section 230 are the key statutes in federal appellate courts’ absolute immunity analysis. The courts in *Craigslist* and *Roommate* came to different conclusions on the issue of

¹⁶ *Id.*

¹⁷ Crossett, *supra* note 7, at 197.

¹⁸ *Id.* at 197–98.

¹⁹ *See, e.g.,* Chi. Laws.’ Comm. for Civ. Rts. Under L., Inc. v. Craigslist, Inc. (*Craigslist*), 519 F.3d 666 (7th Cir. 2008).

absolute immunity, but each followed a similar pattern of analysis.²⁰ The courts begin the analysis by first implicitly determining if there is discrimination occurring that would implicate FHA protection.²¹ This generally occurs at the district court level, and the appellate court adopts the district court's decision of whether the action implicates FHA liability.

[11] Finding that the complaint falls within the realm of the FHA, the court then moves on to section 230 of the CDA. CDA section 230(c) is titled "Protection for 'Good Samaritan' blocking and screening of offensive material."²² The scope of CDA section 230(c) is where the courts disagree.²³ Each of the circuits that have considered the issue construe CDA section 230(c) as granting some broad level of immunity from the FHA to interactive computer service providers.²⁴ In *Roommate*, the court adopted a broad reading of CDA section 230 granting total immunity to interactive computer service providers, so long as they are not creating or developing the offensive content.²⁵ In *Craigslist*, the court avoided adopting "broad immunity from liability for unlawful third-party content" as suggested by Craigslist's counsel, but also avoided limiting the scope of CDA section 230(c) to allow FHA liability.²⁶ The Seventh Circuit decided to read the statute "naturally" and stopped short of granting absolute immunity to

²⁰ *Craigslist*, 519 F.3d at 669–72; *Roommate*, 521 F.3d at 1162, 1164, 1175–76.

²¹ *Craigslist*, 519 F.3d at 671–72; *Roommate*, 521 F.3d at 1164, 1175–76.

²² 47 U.S.C.S. § 230(c) (LEXIS through Pub. L. No. 117-47).

²³ Compare *Roommate*, 521 F.3d at 1175 (holding that internet services providers are totally immune from liability for third-party content unless they participate in creating or developing it), with *Craigslist*, 519 F.3d at 669–71 (declining to apply "broad immunity from liability for unlawful third-party content").

²⁴ See *Roommate*, 521 F.3d at 1162; *Craigslist*, 519 F.3d at 669–71.

²⁵ *Roommate*, 521 F.3d at 1174–75.

²⁶ *Craigslist*, 519 F.3d at 669–71.

interactive computer service providers like Craigslist.²⁷ This decision is in contrast with a multitude of other federal appellate circuits which adopted the broad absolute immunity standard.²⁸

[12] The adoption of the absolute liability rule does, however, come with an exception for interactive computer service providers that are acting as creators or developers.²⁹ To the Ninth Circuit, “[CDA] section 230 provides immunity only if the interactive computer service does not create or develop the information in whole or in part.”³⁰ This means that the immunity will not apply to interactive computer service providers that are creating or developing discriminatory content. The Ninth Circuit held that Roommates.com was developing discriminatory content by requiring users to answer a pre-populated survey with questions about sex, sexual orientation, and familial status.³¹ Roommates.com was therefore no longer provided with immunity under the CDA, so the Ninth Circuit subjected it to the discrimination laws of the FHA.³² The Ninth Circuit found that Roommates.com was also free of FHA liability, meaning discriminatory content and prompting is free of any and all judicial condemnation.³³ While potential FHA liability is helpful in this case, it does not prevent interactive computer service providers from being a safe haven for online housing

²⁷ *Id.* at 671.

²⁸ *Id.* at 669.

²⁹ *Roommate*, 521 F.3d at 1166.

³⁰ *Id.* (internal quotation marks omitted) (citations omitted).

³¹ *Id.*

³² *Id.*

³³ *Id.* at 1167.

discrimination, as it seems that courts do not believe the CDA or the FHA apply.³⁴

B. Understanding the Courts' Rationales in *Craigslist* and *Roommate*

1. *Craigslist*

[13] The Seventh Circuit in *Craigslist* stated that “the question is not whether Congress gave any thought to the Fair Housing Act, but whether it excluded [section] 3604(c) from the reach of [section] 230(c)(1).”³⁵ The court found that Craigslist hosted discriminatory housing ads online.³⁶ The ads posted were “concern[ing] apartment buildings, condominiums, and single-family homes owned by someone who has a portfolio of four or more rental properties.”³⁷ Each of these types of dwelling are within the reach of FHA section 3604, as recognized by the court.³⁸ However, the court deflected these concerns by claiming that the Chicago Lawyers’ Committee—the appellant—could create a list of individuals that posted the discriminatory ads on Craigslist and go after them, holding that section 230 of the CDA protects Craigslist from liability for discriminatory messages posted on its website.³⁹ The court provided Craigslist with this protection,

³⁴ Matthew T. Wholey, Note, *The Internet is for Discrimination: Practical Difficulties and Theoretical Hurdles Facing the Fair Housing Act Online*, 60 CASE W. RESV. UNIV. L. REV. 491, 493–94 (2010).

³⁵ Chi. Laws.’ Comm. for Civ. Rts. Under L., Inc. v. Craigslist, Inc. (*Craigslist*), 519 F.3d 666, 671 (7th Cir. 2008).

³⁶ *Id.* at 668.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.* at 672.

stopping just short of explicitly calling it immunity.⁴⁰

[14] The *Craigslist* court came very close to establishing an absolute immunity standard for CDA section 230 for the application of the FHA to online housing discrimination complaints.⁴¹ The Seventh Circuit began its analysis by briefly discussing scenarios in which FHA section 3604(c) would apply.⁴² The court acknowledged FHA section 3604 as having a broad scope, applying to many forms of media such as written notices like newspaper ads or even posters and flyers.⁴³ The differentiation between treatment of discrimination in print media and discrimination online is worrisome. A discriminatory rental advertisement printed in a local daily newspaper would subject the newspaper itself to liability under FHA section 3604, whereas the same exact ad posted on a website like Craigslist would not implicate liability for that platform, leaving it free and clear of the FHA.⁴⁴

[15] The court compared interactive computer service providers like Craigslist to telephone service providers.⁴⁵ Since telephone service providers have no way of regulating what is said over their phone lines due to the large number of calls being made, they are not be held liable for discriminatory things that were said on those individual phone calls.⁴⁶ Because interactive computer service providers, such as Craigslist, operate

⁴⁰ *Craigslist*, 519 F.3d at 672.

⁴¹ *Id.*

⁴² *Id.* at 668.

⁴³ Crossett, *supra* note 7, at 197.

⁴⁴ James D. Shanahan, *Rethinking the Communications Decency Act: Eliminating Statutory Protections of Discriminatory Housing Advertisements on the Internet*, 60 FED. COMM'NS L.J. 135, 151–52 (2007).

⁴⁵ *Craigslist*, 519 F.3d at 668.

⁴⁶ *Id.* at 668, 672.

on a similar content volume and scale, that they should not be held as publishing or causing to be published the discriminatory content that is posted on their site.⁴⁷

[16] The Seventh Circuit stated that concerns about the real life application of a law against online discrimination is what led to the creation of CDA section 230(c).⁴⁸ CDA section 230(c) provides language that courts tend to construe as creating a broad sense of immunity for interactive computer service providers.⁴⁹ The court stopped just short of adopting an absolute immunity reading of CDA section 230(c), and instead read CDA section 230(c) “to do exactly what it says.”⁵⁰ What CDA section 230(c)(1) “says is that an online information system must not “be treated as the publisher or speaker of any information provided by” a third party.⁵¹ This reading of the statute creates immunity for interactive computer service providers, but the court is adamant that it is not absolute immunity.⁵² The Seventh Circuit also adopted a carveout, placing liability on developers and creators of discriminatory content that is standard for jurisdictions opting for the absolute immunity reading of CDA section 230(c).⁵³

[17] The *Craigslist* court, however, stands behind the natural reading as a means of following congressional intent.⁵⁴ Overall, the court said that the intent of Congress does not have to explicitly name the type of harm it is

⁴⁷ *Id.* at 669.

⁴⁸ *Id.* at 671.

⁴⁹ *Id.* at 669.

⁵⁰ *Craigslist*, 519 F.3d at 671.

⁵¹ *Id.*

⁵² *Id.* at 670.

⁵³ *See id.*

⁵⁴ *Id.* at 671.

trying to remedy in drafting a statute.⁵⁵ It is up to the courts to take the general law and construe it in a way that does not offend the general message of the law.⁵⁶ The appellants argued that “nothing in [CDA section] 230's text or history suggests that Congress meant to immunize an [internet service provider] from liability under the Fair Housing Act.”⁵⁷ It continued, “[i]n fact, Congress did not even remotely contemplate discriminatory housing advertisements when it passed [CDA section] 230.”⁵⁸

[18] The court employed the canons of textualism and constitutional avoidance to refrain from answering tougher constitutional questions about the implications of absolute immunity for online housing discrimination. As the Lawyers' Committee argued in *Craigslist*, there is no evidence that the legislature intended to completely immunize interactive computer service providers from liability for discriminatory housing advertisements online.⁵⁹ It seems premature for courts to jump to the conclusion that interactive computer service providers are free from liability when such large protections are at stake. Ultimately, the *Craigslist* court held that Craigslist was exempt from liability under section 3604 of the FHA and was not considered a creator or developer of discriminatory content under section 230(c) of the CDA.⁶⁰

⁵⁵ *Craigslist*, 519 F.3d at 671.

⁵⁶ *See id.* (“[T]he reason a legislature writes a general statute is to avoid any need to traipse through the United States Code . . .”).

⁵⁷ *Id.* at 671.

⁵⁸ *Id.*

⁵⁹ *Id.* at 671.

⁶⁰ *Craigslist*, 519 F.3d at 671–72.

2. *Roommate*

[19] The court in *Roommate* considered a different issue than that in *Craigslist*. Here, Roommates.com prompted users with a questionnaire that forced users to discriminate based on sex, sexual orientation, and familial status to be able to use the website.⁶¹ The court in *Roommate* split the decision in two, deciding the first and second issues separately.⁶² The first issue—the one critical to this article—involves the court’s determination of “the depth[] of the immunity provided by section 230 of the [CDA].”⁶³ The court held that the CDA provides immunity to interactive computer service providers for the discriminatory content posted on their sites.⁶⁴ The second issue, determined in a separate opinion that will be referred to as “*Roommate II*,” is whether “the anti-discrimination provisions of the [FHA] extend to the selection of roommates.”⁶⁵ The court here held that the FHA does not extend to protect against discrimination when it comes to the selection of roommates, or shared living units.⁶⁶

[20] In *Roommate*, the court takes a similar approach to the analysis in *Craigslist*, but instead adopts a reading of CDA section 230 that grants absolute immunity to interactive computer service providers.⁶⁷ The court, however, provides carveout language stating that “[t]his grant of immunity applies only if the interactive computer service provider is not also an

⁶¹ Fair Hous. Council v. Roommates.com, LLC (*Roommate*), 521 F.3d 1157, 1164–65 (9th Cir. 2008).

⁶² *Id.* at 1171 n.30.

⁶³ *Id.* at 1161.

⁶⁴ *Id.* at 1162.

⁶⁵ Fair Hous. Council v. Roommates.com, LLC (*Roommate II*), 666 F.3d 1216, 1218, 1222–23 (9th Cir. 2012).

⁶⁶ *Id.* at 1222–23.

⁶⁷ *Roommate*, 521 F.3d at 1162.

‘information content provider,’ which is defined as someone who is ‘responsible, in whole or in part, for the creation or development of’ the offending content.”⁶⁸ Based on the carveout, the court found that Roommates.com would have to undergo scrutiny for liability under FHA section 3604 because of the discriminatory prompt that the company forced users to complete.⁶⁹ The court held that Roommates.com’s creation and/or development of discriminatory content landed it outside of CDA immunity, moving next to decide whether Roommate.com had liability under FHA section 3604.⁷⁰

[21] The court in *Roommate II* held that the FHA extended to some instances of online housing discrimination, but not when it comes to the selection of roommates or shared living units, and that Roommates.com was not liable for the discriminatory content on its site under the FHA section 3604.⁷¹ The court held that Roommates.com was protected by CDA section 230(c) for publishing an “Additional Comments” section—which allows users to comment without Roommates.com’s interference—but not for posting discriminatory prompts and questionnaires.⁷² This decision by the Ninth Circuit, that FHA liability could attach to the actions of an interactive computer service provider, is a step in the direction toward preventing housing discrimination havens online.⁷³

[22] The Ninth Circuit also discussed the legislative intent behind the creation of the “Good Samaritan” language of CDA section 230, and it

⁶⁸ *Id.* (quoting CDA § 230(f)(3)).

⁶⁹ *Id.* at 1175.

⁷⁰ *Id.*

⁷¹ *Fair Hous. Council v. Roommates.com, LLC (Roommate II)*, 666 F.3d 1216, 1223 (9th Cir. 2012).

⁷² *Roommate*, 521 F.3d at 1174–75.

⁷³ *Roommate II*, 666 F.3d at 1223.

declared that “Congress sought to immunize the *removal* of user-generated content, not the *creation* of content: ‘[S]ection [230] provides ‘Good Samaritan’ protections from civil liability for providers . . . of an interactive computer service for actions to *restrict* . . . access to objectionable online material.’”⁷⁴ This statute was intended to protect interactive computer service providers that had adopted screening practices for the information posted on their websites.⁷⁵ While this may be a positive development, it does not do enough to remedy the blatant discrimination that is escaping the reach of FHA section 3604.

[23] While the court in *Craigslist* verbally rejected the concept of absolute immunity, the court in *Roommate* embraced it.⁷⁶ However, the two are strikingly similar in application, and it is difficult to see where a practical difference exists. The *Roommate* court even cites *Craigslist*, agreeing with the Seventh Circuit’s decision to interpret CDA section 230(c) consistent with its title: “Protection for ‘[G]ood [S]amaritan’ blocking and screening of offensive material.”⁷⁷ The *Roommate* decision essentially establishes that the *Craigslist* court adopted an absolute immunity standard without actually saying it.⁷⁸

3. Other Circuits Weighing In

[24] Other circuits have also weighed in on the issue and have all fallen into the absolute immunity category. The Fourth Circuit held in *Zeran* that

⁷⁴ *Roommate*, 521 F.3d at 1163 (original internal emphasis).

⁷⁵ *Id.* at 1175.

⁷⁶ Chi. Laws.’ Comm. for Civ. Rts. Under L., Inc. v. Craigslist, Inc. (*Craigslist*), 519 F.3d 666, 670–71 (7th Cir. 2008); *Roommate*, 521 F.3d at 1175.

⁷⁷ *Roommate*, 521 F.3d at 1163–64; *Craigslist*, 519 F.3d at 669.

⁷⁸ See *Roommate*, 521 F.3d at 1175 (holding that absent encouraging or requiring illegal content there is immunity, an absolute immunity standard is being adopted, even though it is not specifically addressed as such).

“[s]ection 230 [] plainly immunizes computer service providers like AOL from liability for information that originates with third parties.”⁷⁹ The Tenth Circuit adopted the same interpretation of CDA section 230 as the Fourth Circuit in *Zeran*, agreeing that the plain language of CDA section 230 was intended to create broad immunity for interactive computer service providers.⁸⁰ The Third Circuit follows suit, agreeing with the Tenth Circuit and the Fourth Circuit that the statutory language of CDA section 230 provides immunity.⁸¹ The First Circuit construes CDA section 230 as providing broad immunity stating that:

The other courts that have addressed these issues have generally interpreted Section 230 immunity broadly, so as to effectuate Congress's "policy choice . . . not to deter harmful online speech through the . . . route of imposing tort liability on companies that serve as intermediaries for other parties' potentially injurious messages."⁸²

The First Circuit, Third Circuit, Ninth Circuit, and Tenth Circuit each draw heavily from the standard that was adopted in the Fourth Circuit's *Zeran* decision.⁸³ In *Zeran*, the court adopted the broadest reading of absolute immunity possible, and the subsequent circuits—except for the Seventh Circuit—followed suit and adopted very broad readings of CDA section 230.⁸⁴

⁷⁹ *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 328 (4th Cir. 1997).

⁸⁰ *Ben Ezra, Weinstein, & Co. v. Am. Online, Inc.*, 206 F.3d 980, 986 (10th Cir. 2000).

⁸¹ *Green v. Am. Online (AOL)*, 318 F.3d 465, 471 (3d Cir. 2003).

⁸² *Universal Commc'n. Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 418 (1st Cir. 2007).

⁸³ *Zeran*, 129 F.3d at 331.

⁸⁴ *Id.* (explaining the court's broad interpretation of absolute immunity under 47 U.S.C. § 230); *Fair Hous. Council v. Roommates.com, LLC (Roommate)*, 521 F.3d 1157, 1179–80 (9th Cir. 2012) (explaining that other circuits adopted broad readings of 47 U.S.C. § 230 after *Zeran*).

[25] The Seventh Circuit is the only one to reject the “absolute immunity” language, but the standard adopted in *Craigslist* still provided a very strong statutory reading of CDA section 230.⁸⁵ Jurisdictions that have adopted the absolute immunity standard also recognize the same liability carveout for interactive computer service providers that act as creators or developers of discriminatory content,⁸⁶ so in practice *Craigslist*’s holding is not functionally dissimilar than that of *Zeran*⁸⁷ or of *Roommate*.⁸⁸

[26] In following the Fourth Circuit’s lead, each of the circuits that have heard the issue held that CDA section 230 should be broadly construed, in one way or another. These decisions create a body of case law that will likely lead to major policy concerns.⁸⁹ Congressional action is necessary to clarify whether Congress simply failed to consider the contradictions between FHA section 3604 and CDA section 230, or if Congress knew of the diminishing effect CDA section 230 would have on FHA section 3604, intending that result.

⁸⁵ *Chi. Lawyers’ Comm. for Civil Rights Under the Law, Inc. v. Craigslist, Inc. (Craigslist)*, 519 F.3d 666, 669 (7th Cir. 2008).

⁸⁶ *See generally Roommate*, 521 F.3d at 1157 (explaining the Ninth Circuit’s interpretation of the term “development” as it applies to 47 U.S.C. § 230).

⁸⁷ *See Zeran*, 129 F.3d at 330–31 (explaining that even with the broad immunity extended to interactive computer service providers, parties responsible for defamatory content will still be held accountable).

⁸⁸ *See generally Roommate*, 521 F.3d at 1172–75 (explaining that absolute immunity did not encompass computer service providers that created or developed discriminatory content).

⁸⁹ *See Universal Commc'n. Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 418–19 (1st Cir. 2007).

C. Making Sense of *Roommate* and *Craigslist* Doctrine Policy Implications

[27] As we head into an increasingly internet-dependent future, society will rely on interactive computer service providers more than ever.⁹⁰ Especially when it comes to the search for a roommate or a new housing opportunity, the old print or in-person methods are practically nonexistent.⁹¹ If one runs a simple Google search for “how to find a roommate,” a plethora of websites come up with options galore.⁹² This is an exciting thing for the housing market and for people looking to connect, but there are legitimate concerns when FHA discrimination laws might not apply to the administrators of that website.⁹³

[28] The *Zeran* court stated it best: “Congress made a policy choice [] not to deter harmful online speech through the separate route of imposing tort liability on companies that serve as intermediaries for other parties’ potentially injurious messages.”⁹⁴ Congress should reconsider the societal implications that come from absolute immunity for interactive computer service providers. There have been calls by commentators requesting that Congress amend the CDA, stating that “[i]n order to curb discriminatory housing advertisements, the FHA’s ban on discriminatory housing

⁹⁰ See Jennifer C. Chang, *In Search of Fair Housing in Cyberspace: The Implications of the Communications Decency Act for Fair Housing on the Internet*, 55 STAN. L. REV. 969, 970–71 (2002).

⁹¹ *Cf. id.* (noting that numerous housing consumers now rely primarily on online search providers for vacant housing, creating a decrease in traditional search methods).

⁹² See, e.g., Laura Mueller, *Find a Roommate, Fast: 10 Online Roommate Finders*, MOVING.COM (Sept. 13, 2018), <https://www.moving.com/tips/find-a-roommate-fast-10-online-roommate-finders/> [https://perma.cc/6KEB-JHGF].

⁹³ See, e.g., *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330–31 (4th Cir. 1997).

⁹⁴ *Id.*

advertisements should extend to online advertising.”⁹⁵

[29] This policy choice renders the FHA ineffective. As the housing search moves to the digital realm, FHA protections that apply to print sources are prevented from following the reader. As a commentator puts it, “[a]s housing advertising migrates from print media to the Internet, section 3604(c) gradually becomes less effective in preventing discriminatory advertisements.”⁹⁶ The CDA creates a digital no man’s land for protection against housing discrimination. The court in *Roommate* stated that “[t]he Communications Decency Act was not meant to create a lawless no-man’s-land on the Internet,”⁹⁷ but that is arguably the result. By diminishing FHA section 3604 protections as applied to interactive computer service providers, the court stripped FHA section 3604 of almost all power over online housing advertisements.⁹⁸ Forcing impacted individuals to seek an alternative route to avoid discrimination seems to cultivate the exact “lawless no-man’s-land” that the *Roommate* court strove to prevent.⁹⁹ Certainly, a complaining party could sue the individual who posted the discriminatory ad, but the likelihood of success depends upon identification of the poster, some reliability that they actually posted the material, and funds to redress the harm.¹⁰⁰ This is concerning because, as a commentator

⁹⁵ Collins, *supra* note 8, at 1490.

⁹⁶ *Id.* at 1491.

⁹⁷ Fair Hous. Council v. Roommates.com, LLC (*Roommate*), 521 F.3d 1157, 1164 (9th Cir. 2012).

⁹⁸ *See id.* at 1162 (arguing that by finding that CDA section 230 provides an absolute immunity to interactive computer service providers FHA section 3604 protections are diminished.).

⁹⁹ *Id.* at 1164.

¹⁰⁰ *See* 42 U.S.C.S. § 3604 (LEXIS through Pub. L. No. 117-44).

notes in his legislative history of FHA section 3604,

The FHA's broad prohibition on discriminatory advertising serves three principal goals. First, it is intended to stave off the exclusionary effect of discriminatory advertising . . . Second, it addresses the "discouraging psychological effect" of the expression of discriminatory preferences . . . Furthermore, the legislative history of section 3604(c) indicates Congress' concern with the harm a person could suffer from hearing a discriminatory statement . . . Finally, the broad prohibition on discriminatory advertising seeks to prevent the spread of misinformation among the public at-large.¹⁰¹

[30] Online housing discrimination is no different than “brick and mortar” housing discrimination.¹⁰² Just as it would be illegal for a newspaper to run an advertisement with discriminatory content, interactive computer service providers such as Craigslist or Roommates.com should face the same liability.¹⁰³ The court in *Roommate* found that the discriminatory prompting would lead to liability for the website under the CDA,¹⁰⁴ which is a step in the right direction, but it is not enough to fully combat the risk of rampant discrimination occurring online. The application of this rule also brings up inconsistencies in application. For example, most print newspapers have online counterparts; would a discriminatory “want ad” published in the online edition of the newspaper render the newspaper

¹⁰¹ Crossett, *supra* note 7 at 198–99.

¹⁰² See Diane J. Klein & Charles Doskow, *Housingdiscrimination.com?: The Ninth Circuit (Mostly) Puts Out the Welcome Mat for Fair Housing Act Suits Against Roommate-Matching Websites*, 38 GOLDEN GATE U. L. REV. 329, 357–58 (2008).

¹⁰³ See *id.*

¹⁰⁴ *Roommate*, 521 F.3d at 1170–71.

liable for discrimination under the FHA?¹⁰⁵ The print version would be subject to liability under the FHA, but the online version would be exempt through CDA section 230.¹⁰⁶

[31] The same type of conundrum is what happened in *Craigslist*.¹⁰⁷ Due to the nature of Craigslist as an interactive computer service provider, CDA section 230(c) would also blanket Craigslist in absolute immunity against the FHA, just as it did the discriminatory online newspaper ad.¹⁰⁸ The only way a person facing discrimination could recover would be to go after a stranger—through the infamously-anonymous internet—that posted the discriminatory ad. Also considering the likelihood of valid contact information, chances are low of determining the discriminator’s identity, let alone contacting or suing them.¹⁰⁹ In this situation, an individual or group of people being discriminated against is left, in essence, without a remedy. This is incredibly problematic in an increasingly digital society, especially with growing dependence on internet interactions to communicate throughout the COVID-19 pandemic. The decisions in the realm of CDA section 230(c) have effectively limited the scope of FHA section 3604 without the express consent of Congress.

Despite the fact that the *Craigslist* and *Roommate* courts came to the proper legal result, the result is undesirable; that is, a key component [of] the FHA should not be overruled based on the reading of another statute. If Congress did not

¹⁰⁵ See *Print Edition Website*, WALL ST. J. (2021), <https://www.wsj.com/digital-print-edition?mod=wsjheader> [<https://perma.cc/5K5T-PVMY>] (example of print newspapers with online counterparts).

¹⁰⁶ See Crossett, *supra* note 7, at 209–210.

¹⁰⁷ See, e.g., Chi. Laws.’ Comm. for Civ. Rts. Under L., Inc. v. Craigslist, Inc. (*Craigslist*), 519 F.3d 666, 668–69 (7th Cir. 2008).

¹⁰⁸ *Id.* at 669; Crossett, *supra* note 7, at 209–210.

¹⁰⁹ See Andra Gumbus & Patricia Meglich, *Abusive Online Conduct: Discrimination and Harassment in Cyberspace*, 14 J. MGMT. POL’Y & PRAC. 47, 47 (2013).

intend for section 3604(c) to apply where it otherwise would in a paper world—for example, with newspapers—Congress should expressly say so.¹¹⁰

[32] The FHA is a major player in the game of housing equity.¹¹¹ Limiting both the scope and strength of the FHA should not come from the results of appellate courts applying a generalized statute if Congress has not even considered the issue.¹¹² In *Craigslist*, the Lawyers' Committee presented the argument that CDA section 230's legislative history provides no evidence that Congress had considered the implications that CDA section 230's passage would have on FHA section 3604.¹¹³ To that argument, the Seventh Circuit flippantly responds: "That's true enough, but the reason a legislature writes a general statute is to avoid any need to traipse through the United States Code and consider all potential sources of liability, one at a time."¹¹⁴ This flagrant application of constitutional avoidance takes the canon a step too far. When the application of one statute effectively voids a section of another strong-rooted, well-respected statute, such as the FHA, courts should at a minimum consider the legislative history surrounding the issue.¹¹⁵

¹¹⁰ Crossett, *supra* note 7, at 211.

¹¹¹ See *Housing Discrimination Under the Fair Housing Act*, U.S. DEPT. HOUS. & URB. DEV., https://www.hud.gov/program_offices/fair_housing_equal_opp/fair_housing_act_overview [<https://perma.cc/M527-9RWA>].

¹¹² Crossett, *supra* note 7, at 211–12.

¹¹³ Chi. Laws.' Comm. for Civ. Rts. Under L., Inc. v. Craigslist, Inc. (*Craigslist*), 519 F.3d 666, 671 (7th Cir. 2008).

¹¹⁴ *Id.*

¹¹⁵ See Jennifer C. Chang, Note, *In Search of Fair Housing in Cyberspace: The Implications of the Communications Decency Act for Fair Housing on the Internet*, 55 STAN. L.R. 969, 982, 987, 1002 (2002) (discussing Congress' failure to consider the effects the CDA would have on the FHA and arguing that courts have mischaracterized the CDA's purpose, which can be determined through an examination of its legislative history).

[33] The courts are essentially in agreement that the difficulty of enforcing liability for online discrimination would be too high on interactive computer service providers.¹¹⁶ Administrability concerns occur often in the legal realm, but that does not make the issue insurmountable. Congress and the courts often run the cost benefit analysis of a new law or rule application, and this exact type of cost benefit analysis occurred when Congress enacted the FHA.¹¹⁷ Through the enactment of the FHA, and specifically section 3604, Congress decided that the administrability cost and burden placed on brick and mortar publishers would be outweighed by the benefit of restricting discrimination in housing advertisements.¹¹⁸ The concern of keeping discrimination out of the housing market is still as valid and as prevalent as it was when the FHA was enacted, but now the main source of housing advertisements—interactive computer service providers—is absolutely immune from the FHA’s reach.

[34] With respect to the fact that courts are ill-equipped to answer the problem of the conflicting nature of CDA section 230 and FHA section 3604, the courts could attempt to remedy the problem without the help of Congress. If the courts were to more willingly construe interactive computer service providers as creating or developing discriminatory housing advertisements or *causing* discriminatory advertisements to be created or

¹¹⁶ See, e.g., *Craigslist*, 519 F.3d at 668–69 (weighing the burden that would be placed on interactive computer service providers to vet their services for discrimination when determining their liability for statements made by third parties on their websites); *Fair Hous. Council v. Roommates.com, LLC (Roommate)*, 521 F.3d 1157, 1163 (9th Cir. 2008) (discussing Congress’ attempt to limit the amount of liability placed on online service providers for discriminatory content created by third parties by passing section 230 of the CDA); *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997) (discussing the issues that would result from holding online service providers liable for uncontrollable amounts of third-part content).

¹¹⁷ See *Collins*, *supra* note 7, at 1497.

¹¹⁸ See *id.* at 1496–97.

developed, FHA section 3604 would not lose as much power.¹¹⁹ If the court in *Craigslist* had viewed Craigslist as causing the discriminatory housing advertisement to be developed, it could help soften the absolute immunity standard.¹²⁰ The absolute immunity standard is by no means user-friendly; it seems to have been created by and for interactive computer service providers, not for the people who are trying to use a website free of discriminatory content.¹²¹ If the courts were to think of the CDA section 230 carveout in the context of a ‘but for’ causation test, it could help even the standard out. If the ‘but for’ causation concept were applied in *Craigslist*, the court could have found that but for the ability to post a comment on Craigslist, the discriminatory housing advertisement would not be on the internet.¹²² While this may not be the strongest practical argument, it seems counterintuitive in real world practice that the interactive computer service provider would be exempt from all liability of discrimination occurring on its website.

[35] Ultimately, the Supreme Court will likely end up ruling on the issue. Through the passage of time and a heavier dependence on the internet for housing-related advertising, more appellate courts will deal with these cases, and one is bound to end up at the Supreme Court. If the Supreme

¹¹⁹ See generally *Craigslist*, 519 F.3d at 669, 672; *Roommate*, 521 F.3d at 1162; *Zeran*, 129 F.3d at 328 (highlighting courts have used the CDA to grant immunity to interactive computer services, for content made by third parties, which otherwise would be liable under the FHA).

¹²⁰ See *Craigslist*, 519 F.3d at 671 (holding that Craigslist did not cause the discriminatory housing advertisement to be developed); Joseph J. Opron III, *License to Kill (The Dream of Fair Housing): How the Seventh Circuit in Craigslist Gave Websites a Free Pass to Publish Discriminatory Housing Advertisements*, 4 SEVENTH CIR. 152, 187 (2008).

¹²¹ Aaron M. Kelly, *Section 230 of the CDA and Website Immunity*, HG.ORG, <https://www.hg.org/legal-articles/section-230-of-the-cda-and-website-immunity-20450> [<https://perma.cc/KVE2-G5HR>].

¹²² See generally *Craigslist*, 519 F.3d at 671 (demonstrating how the Court did not apply a “but for” standard of causation); Opron, *supra* note 118, at 186.

Court were to affirm the standard created by *Craigslist* and *Roommate*, a large chunk of power would instantly be taken from FHA section 3604.¹²³ It would be preferable for Congress to deliberate on the contradiction between FHA section 3604 and CDA section 230, providing the context and congressional intent on which future Supreme Court decisions could properly rely. The intent of Congress would help the courts, especially the Supreme Court, make a more sound and thorough ruling on the issue.

III. CONCLUSION

[36] Section 3604 of the federal Fair Housing Act and section 230(c) of the Communications Decency Act are currently in direct conflict with one another.¹²⁴ Section 230(c) is working against the strength and scope of section 3604, directly tolerating discriminatory online results.¹²⁵ In-depth analysis of the holdings in *Craigslist* and *Roommate* indicate that the courts' reasonings are based primarily on each court's acceptance of a lack of Congressional intent to directly address the issue.¹²⁶ Considering the policy implications of following such a rule, either the courts or Congress need to take action in correcting this goliath of a safe haven for online housing discrimination.

[37] The question at issue is whether CDA section 230(c) was intended to provide absolute immunity for interactive computer service providers from FHA section 3604.¹²⁷ This will likely soon be a question for the

¹²³ See *Craigslist*, 519 F.3d at 671 (holding that the scope of CDA section 230 protects against FHA liability); *Roommate*, 521 F.3d at 1162 (holding that section 230 grants absolute immunity to interactive computer service providers).

¹²⁴ Crossett, *supra* note 7, at 210–11.

¹²⁵ See 47 U.S.C.S. § 230(c) (LEXIS through Pub. L. No. 117-47); 42 U.S.C.S. § 3604(b)–(c) (LEXIS through Pub. L. No. 117-44).

¹²⁶ See *Craigslist*, 519 F.3d at 671; *Roommate*, 521 F.3d at 1175.

¹²⁷ See 47 U.S.C.S. § 230(c) (LEXIS through Pub. L. No. 117-47); 42 U.S.C.S. § 3604 (LEXIS through Pub. L. No. 117-44); *e.g.*, Collins, *supra* note 8, at 1476.

Supreme Court to answer, but the result could cast a dark pall over the realm of housing equality. It would be ideal to have Congress deliberate the issue of the contradiction before any other courts adopt an uninformed standard.

[38] The anti-discrimination language of FHA section 3604 is currently out of reach for renters being discriminated against online through the exclusionary language of CDA section 230(c), preventing liability for interactive computer service providers so long as the interactive computer service provider is not a creator or developer of information.¹²⁸ After the development of the doctrines of *Zeran*, *Craigslist*, and *Roommate*, the federal appellate courts created a practically impenetrable shield of immunity for interactive computer service providers, leading to an immense safe haven for discrimination online.¹²⁹ Working hand in hand, the courts and Congress need to act to prevent further discrimination in housing advertisements online.

¹²⁸ See 47 U.S.C.S. § 230(c) (LEXIS through Pub. L. No. 117-47); 42 U.S.C.S. § 3604 (LEXIS through Pub. L. No. 117-44).

¹²⁹ See *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 334–35 (4th Cir. 1997); *Craigslist*, 519 F.3d at 670; *Roommate*, 521 F.3d at 1174.