

SAVING FAIR HOUSING ON THE INTERNET: THE CASE FOR AMENDING THE COMMUNICATIONS DECENCY ACT

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I. INTRODUCTION

A casual review of online housing advertisements uncovers a handful of advertisements that discriminate against *somebody*. The advertisements range from the somewhat laughable:

Free rent for hot blonde model! . . . I'm 45, in decent shape, white, have always dated cute girls.¹

To the subtle:

Two young professional Christian . . . men looking for third male aptmate.²

To the blatant:

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¹ Craigslist, <http://miami.craigslist.org/roo/226454428.html> (last visited Nov. 19, 2006) (on file with author).

² Craigslist, <http://newyork.craigslist.org/mnh/roo/604311951.html> (last visited Mar. 13, 2008) (on file with author).

I'm looking for a male roommate, non-smoker, no drugs, no pets, no children, able to pay rent on time.³

I am looking for a Female Christian to share an apartment with in the Cedar Hill/Duncanville/Grand Prairie area. . . . Must be living in the Dallas area, no one from overseas!⁴

If these advertisements were printed in the classified section of a newspaper, the newspaper could be liable for violating the Fair Housing Act (FHA). Because these ads appeared on the Internet, however, the question of liability is somewhat more complicated.

Section 3604(c) of the FHA makes it unlawful to publish housing advertisements that discriminate on the basis of traits such as race, religion, national origin, or familial status.⁵ Standing on its own, § 3604(c) would probably impose liability on Internet sites that display discriminatory advertisements. The language of § 3604(c) is broad; even though the Internet did not exist when the law was passed, the courts' interpretations of the statute's text show that the prohibition against discriminatory advertising applies to a wide range of media.⁶ However, before the courts could address the question whether § 3604(c) applies to Internet advertisements, Congress passed the Communications Decency Act of 1996 (CDA).⁷ As the Act's name suggests, Congress passed this law in an effort to reduce the amount of obscene, offensive, or otherwise indecent content on the Internet.⁸ Congress included in the CDA a provision stating that a provider of interactive computer services shall not be considered a "publisher" of content that originates from third parties.⁹ Under common law rules, an entity becomes a "publisher" when it exercises editorial control over content.¹⁰ Congress

³ Craigslist, <http://sfbay.craigslist.org/sby/roo/237132975.html> (last visited Nov. 19, 2006) (on file with author).

⁴ Craigslist, <http://dallas.craigslist.org/roo/234913273.html> (last visited Nov. 19, 2006) (on file with author). I was able to find these discriminatory advertisements, and others, after searching the Internet for about an hour. I have little doubt that a more extensive search would yield more similar advertisements.

⁵ 42 U.S.C. § 3604(c) (2000). The law also bars discrimination on the basis of color, sex, or handicap. *Id.*

⁶ *See, e.g.,* *Mayers v. Ridley*, 465 F.2d 630, 633 (D.C. Cir. 1972) (Wright, J., concurring) (noting that the text of § 3604(c) applies to all forms of discriminatory advertising, "whether or not they involve the printing process").

⁷ The Communications Decency Act consists of Title V of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

⁸ *See infra* Part II.B.1.

⁹ 47 U.S.C. § 230(c)(1) (2000).

¹⁰ *See, e.g.,* *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, No. 31063/94, 1995 WL 323710, at *3 (N.Y. Sup. Ct. May 24, 1995), *superseded by statute*, Communications Decency Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (noting that the critical issue for the court was determining whether Prodigy "exercised sufficient editorial control over its computer bulletin boards to render it a publisher").

wanted to empower online entities to identify and remove offensive content without being exposed to liability as a publisher.¹¹

Although this provision was intended to encourage the removal of offensive or unlawful content, most courts have interpreted the CDA in a way that extends immunity regardless of whether an online service provider (OSP)¹² attempts to remove offensive content from its pages.¹³ The minority view, articulated by the Seventh Circuit, envisions a narrower scope of immunity,¹⁴ but a suit in that circuit alleging that an OSP violated the FHA has already failed.¹⁵ Consequently, it seems unlikely that subsequent plaintiffs will be able to hold OSPs liable for publishing discriminatory housing advertisements under existing law.

This result is unfortunate. As an illustration, the aftermath of Hurricanes Katrina and Rita showed that discriminatory housing advertising remains a persistent problem. Federal and local housing authorities expressed concern over discriminatory advertisements that allegedly appeared on online housing resources that were meant to assist displaced residents. Such advertisements impeded residents' efforts to find housing, and they added to evacuees' already considerable emotional harm.¹⁶ However, under the courts' current interpretations of the CDA, OSPs are likely immune from liability for the discriminatory housing advertisements they make available to the world. Legislative action is necessary to prevent discriminatory advertisements similar to those that appeared in the wake of the hurricanes.

This Comment proposes that Congress amend the CDA so that immunity does not extend to OSPs when they publish discriminatory housing advertisements. Given the courts' broad interpretations of immunity under the CDA, such an amendment is the best way to ensure that the FHA continues to protect against discriminatory housing advertising in the modern age of digital media.

This Comment proceeds in four parts. Part II discusses § 3604(c) and its importance to fair housing, and then examines the history and text of the CDA. Part III discusses the CDA's interpretation in the courts, one court's decision to hold Craigslist immune from liability under § 3604(c), and the

¹¹ See 141 CONG. REC. H8469–70 (daily ed. Aug. 4, 1995) (statement of Rep. Cox) (noting that it is “backward” for an online service provider to face greater liability when it attempts to remove offensive content than when it does nothing at all).

¹² 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. REV. 969, 970 n.5 (2002), for a definition of “online service provider.” In the rest of this Comment, I follow Chang's approach and use OSP as a term that encompasses websites as well as entities that provide access to the Internet.

¹³ See, e.g., *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119 (9th Cir. 2003).

¹⁴ See *Doe v. GTE Corp.*, 347 F.3d 655, 660 (7th Cir. 2003) (proposing that § 230(c)(1) of the CDA be read as a “definitional clause”).

¹⁵ See *Chi. Lawyers' Comm. for Civil Rights Under the Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666 (7th Cir. 2008).

¹⁶ See *infra* notes 170–77 and accompanying text.

unfortunate reality that subsequent litigation is unlikely to hold OSPs responsible for the discriminatory advertisements they publish. Part IV argues that Congress should amend the CDA so that OSPs can be held liable for discriminatory advertisements. Part V briefly concludes.

II. THE FAIR HOUSING ACT AND THE COMMUNICATIONS DECENCY ACT

A. *The Fair Housing Act: § 3604(c)*

1. *The Purposes of § 3604(c).*—Section 3604(c) provides, in pertinent part, that:

[I]t shall be unlawful . . . [t]o make, print, or publish, or cause to be made, printed, or published any 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.¹⁷

The prohibition against discriminatory statements applies to everyone: individuals who make the statements,¹⁸ as well as entities that disseminate discriminatory statements, such as newspapers.¹⁹

As one commentator has noted, § 3604(c) serves three main functions.²⁰ First and foremost, § 3604(c) helps promote housing integration by ensuring that advertisements do not deter minority home seekers.²¹ Although the legislative history of the FHA is sparse, courts interpreting § 3604(c) have emphasized the importance of preventing discriminatory housing advertisements.²² In *United States v. Hunter*,²³ the Fourth Circuit found that Congress clearly intended § 3604(c) to prevent newspapers from printing discriminatory housing advertisements.²⁴ The court reasoned that allowing newspapers to print discriminatory housing advertisements would prevent groups of individuals (in this case racial minorities) from seeking

¹⁷ 42 U.S.C. § 3604(c) (2000).

¹⁸ See, e.g., *United States v. Space Hunters, Inc.*, 429 F.3d 416, 424 (2d Cir. 2005) (noting that the language of § 3604(c) “applies on its face to anyone” who makes discriminatory statements (citation omitted) (internal quotation marks omitted)).

¹⁹ See, e.g., *Hous. Opportunities Made Equal v. Cincinnati Enquirer, Inc.*, 943 F.2d 644 (6th Cir. 1991).

²⁰ Chang, *supra* note 12, at 974.

²¹ *Id.*; see also *Hous. Opportunities Made Equal*, 943 F.2d at 652 (“The purposes of the FHA are to eradicate housing discrimination and to promote integrated housing. . . . The prohibition against discriminatory housing advertising contributes to the eradication of discriminatory housing practices.”).

²² See, e.g., Hugh J. Cunningham, Comment, *The Fair Housing Act: Newspaper Liability for Discriminatory Advertisements*, 37 LOY. L. REV. 981 (1992) (tracing jurisprudential interpretation of § 3604(c) as preventing discriminatory housing advertisements).

²³ 459 F.2d 205 (4th Cir. 1972).

²⁴ *Id.* at 210.

housing opportunities.²⁵ Furthermore, minorities might decide not to pursue any housing opportunities in a community with a large number of discriminatory advertisements, even though some of the property owners in that community do not discriminate.²⁶ By preventing discriminatory housing advertising, § 3604(c) helps encourage members of protected classes to pursue housing opportunities freely, thereby promoting integrated communities.

Of course, § 3604(c) does not bar discrimination in the actual decision to rent or sell housing; another provision of the FHA accomplishes that end.²⁷ Without § 3604(c), however, property owners could discriminate without ever making discriminatory housing decisions.²⁸ As the Sixth Circuit has noted, discriminatory housing advertisements effectively prevent individuals from coming forward to pursue a housing opportunity, thereby allowing property owners to circumvent the objectives of the FHA.²⁹ Therefore, the FHA's prohibition against discriminatory housing advertisements helps ensure that the other provisions of the Act do not lose their effectiveness.

In addition to promoting integrated communities, § 3604(c) prevents the infliction of emotional distress on individuals who are the targets of discriminatory housing advertising.³⁰ The Second Circuit has emphasized that § 3604(c) “protect[s] against [the] psychic injury’ caused by discriminatory statements made in connection with the housing market.”³¹ Not surprisingly, then, courts have affirmed damages awards based on emotional distress arising from discriminatory housing advertisements.³²

²⁵ *Id.* at 214.

²⁶ *Id.*

²⁷ 42 U.S.C. § 3604(a) (2000) (providing that it is unlawful “[t]o refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin”).

²⁸ See Chang, *supra* note 12, at 975 (“If large numbers of exempted landlords were permitted to advertise their discriminatory intent and thus create a generalized environment of exclusion, covered landlords . . . would effectively be excused from FHA mandates since minority home seekers would be discouraged from contacting them in the first place.”).

²⁹ *Hous. Opportunities Made Equal v. Cincinnati Enquirer, Inc.*, 943 F.2d 644, 652 (6th Cir. 1991) (“Without the regulation of advertisements, realtors could deter certain classes of potential tenants from seeking housing at a particular location, effectively discriminating against these classes without running afoul of the FHA’s prohibition against discriminatory housing practices.”).

³⁰ Chang, *supra* note 12, at 975–76.

³¹ *United States v. Space Hunters*, 429 F.3d 416, 424 (2d Cir. 2005) (quoting 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, 250 (2001)).

³² See, e.g., *Ragin v. Harry Macklowe Real Estate Co.*, 6 F.3d 898, 907–09 (2d Cir. 1993) (affirming compensatory damages awarded to four plaintiffs for emotional distress).

Finally, prohibiting discriminatory housing advertising helps promote public awareness that discriminatory housing practices are unlawful.³³ The common occurrence of discriminatory advertising gives the impression that discrimination is legal, either as a general matter or as it relates to individually protected classes.³⁴ Fair housing advocates devote substantial resources to fighting public misperceptions about the legality of discriminatory housing advertisements.³⁵ In fact, such advocates often serve as plaintiffs in § 3604(c) actions, and courts have recognized that the resources that they devote to combating misinformation arising from discriminatory housing advertising can confer standing to sue.³⁶ In preventing discriminatory housing advertising, § 3604(c) helps inform the public and save resources that would otherwise go toward correcting public misperceptions about the law.

2. *The Breadth of § 3604(c).*—The FHA’s prohibition against discriminatory housing advertising applies to a broad array of actors and forms of communication. Furthermore, the language of the Act covers a wide range of activities associated with housing advertising. Given the breadth of § 3604(c) it is almost certain that, absent the CDA, the ban on publishing discriminatory housing advertisements would apply to OSPs.

First, § 3604(c) applies to all kinds of housing owners. Unlike other provisions of the FHA, which contain “Mrs. Murphy” exceptions for owner-occupants,³⁷ § 3604(c) admits no exceptions. Therefore, Mrs. Murphy may refuse to rent one of her spare rooms on the basis of race, sex, national origin, or any of the other factors proscribed in the FHA. However, she may not publish discriminatory advertisements for that room. Although this might lead to inefficient results,³⁸ the fact remains that Congress explic-

³³ Chang, *supra* note 12, at 976–77.

³⁴ *Id.* at 976. As Chang notes, the prevalence of housing advertising that discriminates on the basis of, for example, familial status promotes the notion that this kind of discrimination is legally permissible. *Id.*

³⁵ See, e.g., *Spann v. Colonial Vill., Inc.*, 899 F.2d 24, 28 (D.C. Cir. 1990) (noting fair housing organizations’ allegations that discriminatory housing advertising practices “required the organizations to expend additional resources to identify and dispel [the practices]”).

³⁶ See, e.g., *id.* at 29 (“Expenditures to reach out to potential home buyers or renters who are steered away from housing opportunities by discriminatory advertising, or to monitor and to counteract on an ongoing basis public impressions created by defendants’ use of print media, are sufficiently tangible to satisfy Article III’s injury-in-fact requirement.”).

³⁷ See, e.g., 42 U.S.C. § 3603(b) (2000) (“Nothing in section 3604 of this title (other than subsection (c)) shall apply to . . . rooms or units in dwellings . . . if the owner actually maintains and occupies one of such living quarters as his residence.”). The “Mrs. Murphy” exception in the FHA finds its roots in Title II of the Civil Rights Act of 1964, which concerns discrimination in places of public accommodation. See Hila Keren, “*We Insist! Freedom Now*”: *Does Contract Doctrine Have Anything Constitutional to Say?*, 11 MICH. J. RACE & L. 133, 149–50 (2005). Senator George Aiken is credited for the creation of the “Mrs. Murphy” exception in Title II. See 131 CONG. REC. S429–07 (1985).

³⁸ Because Mrs. Murphy may not publish advertisements that indicate a preference on the basis of any of the factors listed in § 3604(c), she might attract interested parties from many different walks of life. Once a prospective buyer or renter approaches her, however, Mrs. Murphy is free to discriminate in

itly chose not to allow any exceptions to § 3604(c). Discriminatory housing advertising is unlawful, regardless of the status of the advertiser.

Second, the prohibition against discriminatory advertising applies to various forms of communication. For example, an advertisement need not explicitly state a discriminatory preference to fall under § 3604. Courts have recognized that less overt language can unlawfully indicate such a preference. In one case, a newspaper published advertisements that read, “FOR RENT—Furnished basement apartment. In private white home,” and “FURNISHED APARTMENT, well located, clean quiet. In white home.”³⁹ The court held that these statements indicated a discriminatory preference.⁴⁰ In addition, a housing advertisement need not contain discriminatory written words in order to be discriminatory. Housing advertisements can violate § 3604(c) if they portray images that convey a discriminatory preference. In *Ragin v. New York Times Co.*,⁴¹ for example, the plaintiff alleged that the defendant newspaper printed an array of housing advertisements over a twenty-year span that depicted virtually no African-American models.⁴² The plaintiffs further alleged that the few African-American models that did appear in the advertisements were “building maintenance employees, doorm[e]n, entertainers, sports figures, small children or cartoon characters.”⁴³ The defendant moved to dismiss the suit for failure to state a claim, arguing that the U.S. Department of Housing and Urban Development (HUD) guidelines for housing advertisements⁴⁴ were not mandatory.⁴⁵ In denying the defendant’s motion to dismiss, the district court reasoned that the HUD guidelines did not foreclose the plaintiffs’ claims.⁴⁶ Affirming the district court’s judgment, the Second Circuit concluded that an “ordinary reader” could conclude that the *New York Times* published discriminatory advertisements.⁴⁷ As *Ragin* makes clear, a housing advertisement can unlawfully indicate a discriminatory preference in its use of images, not just words.

making her decision to sell or rent. If Mrs. Murphy were allowed to discriminate in her advertisements, she and her disfavored buyers and renters would save time and energy by not pursuing a transaction in the first place.

³⁹ *United States v. Hunter*, 459 F.2d 205, 209 n.1 (4th Cir. 1972).

⁴⁰ *Id.* at 215.

⁴¹ 726 F. Supp. 953 (S.D.N.Y. 1989), *aff’d*, 923 F.2d 995 (2d Cir. 1991).

⁴² *Id.* at 954.

⁴³ *Id.* (citing the complaint).

⁴⁴ 24 C.F.R. § 109.30(b) (1990) (withdrawn by directive no. FR-4029-F-01, eff. May 1, 1996) (“Human models in photographs, drawings, or other graphic techniques may not be used to indicate exclusiveness because of race, color, religion, sex, handicap, familial status, or national origin.”).

⁴⁵ *Ragin*, 726 F. Supp. at 958.

⁴⁶ *Id.*

⁴⁷ *Ragin*, 923 F.2d at 1001.

Third, and most importantly, the language of § 3604(c) applies to a wide range of advertising media.⁴⁸ The section's prohibition covers six different advertising activities. It is unlawful to "make, print, or publish," as well as "cause to be made, printed, or published" an advertisement that indicates a prohibited discriminatory preference.⁴⁹ Presumably, none of these six activities are redundant.⁵⁰ Therefore, one should conclude that the Act covers advertising outlets beyond the conventional print media of magazines and newspapers. Indeed, as Judge Wright of the D.C. Circuit recognized, Congress could have restricted the reach of § 3604(c) by only including printing.⁵¹ The inclusion of the verb "publish" should be understood as a prohibition on all vehicles for making discriminatory preferences, "whether or not they involve the printing process."⁵² Therefore, there is a strong argument that the broad language of § 3604(c) should apply to OSPs that display discriminatory housing advertisements.

As one commentator has noted, however, not all OSPs could be held liable for violations of the FHA.⁵³ Internet intermediaries that provide access to the Internet are not analogous to newspapers because they merely provide channels for communication.⁵⁴ Their role is similar to that of a telephone company that provides the channel for vocal communication.⁵⁵ Only Internet intermediaries that provide forums for online housing advertisements should fall within the scope of § 3604(c).

Although there once was a strong case for holding OSPs liable for § 3604(c) violations, the applicability of § 3604(c) to OSPs was not litigated until after the passage of the CDA.⁵⁶ As the following Sections show, the CDA effectively has shielded online entities from liability for violations of § 3604(c). Even though Congress did not seem to contemplate the CDA's effect on the FHA when it passed the Act, courts have interpreted CDA immunity broadly, and one court has already extended CDA immunity to protect OSPs from alleged violations of § 3604(c).⁵⁷

⁴⁸ See Chang, *supra* note 12, at 977; see also *Ragin*, 923 F.2d at 999 ("Congress used broad language in Section 3604(c), and there is no cogent reason to narrow the meaning of that language.").

⁴⁹ 42 U.S.C. § 3604(c) (2000).

⁵⁰ See Chang, *supra* note 12, at 978. For a general discussion of the presumption against redundancy, see WILLIAM N. ESKRIDGE, JR. ET AL., *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 833 (3d ed. 2001).

⁵¹ *Mayers v. Ridley*, 465 F.2d 630, 633 (D.C. Cir. 1972) (Wright, J., concurring).

⁵² *Id.*

⁵³ Chang, *supra* note 12, at 979.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ See *id.* at 972–73 (noting that no court had addressed the issue of the applicability of § 3604(c) to online entities at the time of the comment's publication in 2002).

⁵⁷ See *Chi. Lawyers' Comm. for Civil Rights Under the Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666 (7th Cir. 2008).

B. The Communications Decency Act

1. *The History of the Act.*—Senator James Exon of Nebraska first introduced the CDA in February 1995 as an amendment to 47 U.S.C. § 223, which is a part of the Federal Telecommunications Act of 1934.⁵⁸ Senator Exon proposed the legislation as a tool to protect families from online pornography and other forms of indecency.⁵⁹ The Senate ultimately passed a version of Senator Exon’s amendment on June 14, 1995 as a part of its telecommunications reform bill.⁶⁰ The Exon Amendment, as passed by the Senate, amended 47 U.S.C. § 223 by extending antiobscenity regulations that had previously applied to telephone calls to “interactive computer services.”⁶¹ The amendment provided, in relevant part, that it was unlawful knowingly to send to or display

to a person under 18 years of age, any comment, request, suggestion, proposal, image, or other communication that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs, regardless of whether the user of such service placed the call or initiated the communication.⁶²

The Exon Amendment was passed by the House and enacted into law, but it was later found unconstitutional on First Amendment grounds.⁶³

Section 230 of the CDA was introduced into the House by Representatives Christopher Cox of California and Ron Wyden of Oregon in summer 1995.⁶⁴ Like Senator Exon, Representatives Cox and Wyden were concerned about protecting children from online pornography and other offensive material.⁶⁵ Unlike the Exon Amendment, however, the Cox-Wyden Amendment disfavored governmental regulation of online content. Representative Cox expressed concerns that heavy-handed regulation would hamper the development of the Internet. He noted, “If we regulate the Internet at the [Federal Communications Commission (FCC)], that will freeze or at least slow down technology. It will threaten the future of the Inter-

⁵⁸ Vikas Arora, Note, *The Communications Decency Act: Congressional Repudiation of “The Right Stuff,”* 34 HARV. J. ON LEGIS. 473, 479 (1997).

⁵⁹ See 141 CONG. REC. S1953 (daily ed. Feb. 1, 1995) (“The information superhighway should not become a red light district. . . . Once [this legislation is] passed, our children and families will be better protected from those who would electronically cruise the digital world to engage children in inappropriate communications and introductions.”).

⁶⁰ Arora, *supra* note 58, at 483.

⁶¹ Robert Cannon, *The Legislative History of Senator Exon’s Communications Decency Act: Regulating Barbarians on the Information Superhighway*, 49 FED. COMM. L.J. 51, 57 (1996).

⁶² 47 U.S.C. § 223(d)(1)(B) (Supp. II 1997).

⁶³ See *Reno v. ACLU*, 521 U.S. 844, 882 (1997) (“[T]he CDA places an unacceptably heavy burden on protected speech, and . . . the defenses do not constitute the sort of ‘narrow tailoring’ that will save an otherwise patently invalid unconstitutional provision.”).

⁶⁴ Chang, *supra* note 12, at 988.

⁶⁵ *Id.*

net.”⁶⁶ Rather than task the FCC with the regulation of online content, the Cox-Wyden Amendment sought to empower private individuals to remove offensive content from the Internet.⁶⁷ Supporters of the Amendment thought that this approach struck the most effective balance between discouraging online obscenity and promoting the growth and development of the Internet. As Representative Wyden noted, “we believe that parents and families are better suited to guard the portals of cyberspace and protect our children than our Government bureaucrats.”⁶⁸

Proponents of the Cox-Wyden Amendment recognized, however, that the common law of defamation discouraged online entities from removing offensive content from the Internet. The New York Superior Court case of *Stratton Oakmont, Inc. v. Prodigy Services*⁶⁹ stood for the common law rule that the Cox-Wyden Amendment sought to overcome. In that case, the defendant, Prodigy, was an online service that provided subscribers access to a variety of online bulletin boards.⁷⁰ One such board was called “Money Talk,” a forum where users could “post statements regarding stocks, investments and other financial matters.”⁷¹ An anonymous user used “Money Talk” to post a variety of allegedly defamatory statements about Stratton Oakmont and its president, Daniel Porush.⁷²

The plaintiffs filed a suit claiming, inter alia, libel, and they sought partial summary judgment on whether Prodigy was a “publisher” of the statements that appeared on “Money Talk.”⁷³ According to libel law, one who republishes a libelous statement is subject to the same liability as the person who originally published the statement.⁷⁴ On the other hand, a “distributor,” such as a library, is only subject to liability if it knew or had reason to know of the libelous statement.⁷⁵ The rationale for this distinction is that a distributor is merely a “passive conduit” for information, while a publisher exercises editorial control over what it publishes.⁷⁶ Therefore, Prodigy’s status as a publisher was pivotal to the outcome of the case.

The court granted the plaintiffs’ motion for partial summary judgment and cited two main reasons for finding that Prodigy was a publisher. First, Prodigy’s director of market programs made public statements about the

⁶⁶ 141 CONG. REC. H8471 (daily ed. Aug. 4, 1995) (statement of Rep. Cox).

⁶⁷ See Chang, *supra* note 12, at 990.

⁶⁸ 141 CONG. REC. H8470 (daily ed. Aug. 4, 1995) (statement of Rep. Wyden).

⁶⁹ No. 31063/94, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995).

⁷⁰ *Id.* at *1.

⁷¹ *Id.*

⁷² *Id.* (describing the defamatory statements, including “Porush was ‘soon to be proven criminal’ . . . [and] Stratton was a ‘cult of brokers who either lie for a living or get fired’”).

⁷³ *Id.*

⁷⁴ *Id.* at *3.

⁷⁵ *Id.*

⁷⁶ *Id.*

company's editorial control over online content.⁷⁷ The court concluded that Prodigy "held itself out" as having control like that of a publisher.⁷⁸ Second, the court relied on the fact that Prodigy used an automated screening program that detected offensive language.⁷⁹ From this fact, the court concluded that "Prodigy is clearly making decisions as to content, and such decisions constitute editorial control."⁸⁰ In concluding that Prodigy was a publisher, the court emphasized that the company must "accept the concomitant legal consequences" that go along with making itself appear to be a family-friendly service.⁸¹

The outcome in *Stratton Oakmont* inspired the passage of the Cox-Wyden Amendment. Representative Cox believed that the holding in the case discouraged users and OSPs from trying to remove offensive content from the Internet. He described the *Stratton Oakmont* holding thusly: "The court said . . . 'You are going to face higher, stric[t]er liability because you tried to exercise some control over the offensive material.' Mr. Chairman, that is backward."⁸² Indeed, under *Stratton Oakmont*, it appeared that one could not exercise *any* editorial control over online content without being considered a publisher for the purposes of libel law.

Consequently, a provision of the Cox-Wyden Amendment eliminated the publisher liability that previously attached to the exercise of control over third-party content. In what became part (c)(1) of § 230 of the CDA, the provision stated that "[n]o 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."⁸³ This provision sought to protect "interactive computer services" from republication liability because, as *Stratton Oakmont* showed, one must be a publisher to be liable for defamation. In fact, a conference report specifically stated that § 230 overturned *Stratton Oakmont*.⁸⁴

The Cox-Wyden Amendment overwhelmingly passed in the House.⁸⁵ At no point in deliberations over the Amendment did Congress discuss fair

⁷⁷ *Id.* at *2 ("We make no apology for pursuing a value system that reflects the culture of the millions of American families we aspire to serve. Certainly no responsible newspaper does less when it chooses the type of advertising it publishes, the letters it prints, the degree of nudity and unsupported gossip its editors tolerate." (quoting an article by Geoffrey Moore, Prodigy's director of market programs) (internal quotation marks omitted)).

⁷⁸ *Id.* at *4.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.* at *5.

⁸² 141 CONG. REC. H8469–70 (daily ed. Aug. 4, 1995) (statement of Rep. Cox).

⁸³ 47 U.S.C. § 230(c)(1) (2000).

⁸⁴ H.R. REP. NO. 104-458, at 194 (1996) (Conf. Rep.) (commenting on section 509, § 230(c)(1)).

⁸⁵ See 141 CONG. REC. H8478–79 (daily ed. Aug. 4, 1995) (recorded vote on the amendment was 420 to 4).

housing or the FHA. It appears that the legislature's sole focus was to encourage the removal of obscene content.⁸⁶

2. *The Text of § 230.*—Subsection (c)(1) has come to govern the applicability of § 3604(c) to online entities. Pursuant to the Cox-Wyden Amendment, it provides that “[n]o 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.”⁸⁷

The other provisions of § 230 deserve some attention as well. The section is entitled, “Protection for private blocking and screening of offensive material.”⁸⁸ It begins in subsection (a) by listing five congressional findings.⁸⁹ Collectively, these findings recognize the usefulness of the Internet, the ability of users to exercise control over online content, and the Internet's success in an environment of minimal governmental regulation.⁹⁰ Subsection (b) of § 230 is a policy statement. It emphasizes that it is the United States's policy to encourage the development of the Internet by minimizing governmental regulation, and to encourage the development of filtering technologies that allow users to exercise control over online content.⁹¹

Subsection (c) is entitled “Protection for ‘Good Samaritan’ blocking and screening of offensive material.”⁹² In addition to (c)(1), described above, subsection (c) also contains provisions explicitly stating that providers and users of interactive computer services shall not be liable for taking steps to restrict access to offensive content. Subsection (c)(2)(A) provides that no provider or user shall be held liable for good-faith efforts to remove content considered to be offensive, “whether or not such material is constitutionally protected.”⁹³ Subsection (c)(2)(B) shields providers and users from liability for making available the technology for restricting access to offensive content.⁹⁴

Section 230 also explains the section's effect on other laws. Subsection (e) specifies that § 230 has no effect on any federal criminal statute or any intellectual property law.⁹⁵ Subsection (e) also explains that § 230 has

⁸⁶ See Chang, *supra* note 12, at 993.

⁸⁷ 47 U.S.C. § 230(c)(1).

⁸⁸ *Id.* § 230.

⁸⁹ *Id.* § 230(a).

⁹⁰ *Id.*

⁹¹ *Id.* § 230(b).

⁹² *Id.* § 230(c).

⁹³ *Id.* § 230(c)(2)(A).

⁹⁴ *Id.* § 230(c)(2)(B). The original text of the Act purports to create immunity for providing technologies designed to “restrict access to material described in paragraph (1)” of § 230(c), but this is probably an error. Paragraph (1) of § 230(c) does not describe any kinds of material. Instead of paragraph (1), it was probably intended that the text refer to subparagraph (A), which provides immunity for action taken to remove “obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable” material. See 47 U.S.C.A. § 230, n.1 (West 2001).

⁹⁵ 47 U.S.C. § 230(e).

no effect on the Electronic Communications Privacy Act of 1986 or any analogous state law.⁹⁶ Nowhere, however, does subsection (e) discuss the effect of § 230 on the FHA.

With the text and legislative history of § 230 properly understood, I now turn to the courts' interpretation of the CDA. The following Part shows that although there is some disagreement in the courts about the scope of § 230 immunity, neither of the two primary competing views is likely to result in OSP liability for violations of § 3604(c) of the Fair Housing Act.

III. THE DOMINANCE OF THE COMMUNICATIONS DECENCY ACT

A. Courts Interpret § 230

The text of § 230 did not exist in a vacuum for long. Shortly after the Act's passage, the Fourth Circuit issued an opinion that laid the groundwork for a broad grant of immunity to OSPs for content originating from third parties.⁹⁷ Although the legislative history of § 230 suggests that Congress intended the CDA to foster the removal of indecent online content, the Fourth Circuit's opinion extends broad immunity to providers of online services for claims arising from a wide array of online content, regardless of whether an OSP even attempts to remove such content.⁹⁸ With only a few exceptions, *Zeran v. America Online, Inc.* has been widely followed in courts across the country,⁹⁹ thereby offering almost complete immunity from liability for content that comes from third parties.¹⁰⁰

In *Zeran*, an anonymous user posted a message on an America Online (AOL) bulletin board that purported to advertise "Naughty Oklahoma T-Shirts."¹⁰¹ The t-shirts contained offensive messages relating to the bombing of the Oklahoma City federal building in April 1995.¹⁰² The user also provided *Zeran's* phone number with instructions to call "Ken."¹⁰³ After receiving several harassing and threatening phone calls, the plaintiff, *Zeran*,

⁹⁶ *Id.*

⁹⁷ *Zeran v. Am. Online, Inc.*, 129 F.3d 327 (4th Cir. 1997).

⁹⁸ *See id.* at 333 (declining to impose notice-based liability on OSPs). By refusing to make an OSP liable for its content even when it knows that the offending content exists, *Zeran* effectively extends immunity to OSPs whether or not they remove that content.

⁹⁹ *See, e.g.*, *Batzel v. Smith*, 333 F.3d 1018 (9th Cir. 2003); *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119 (9th Cir. 2003); *Doe v. MySpace, Inc.*, 474 F. Supp. 2d 843 (W.D. Tex. 2003). *But see Doe v. GTE Corp.*, 347 F.3d 655 (7th Cir. 2003).

¹⁰⁰ *See* Patrick J. Carome & C. Colin Rushing, *Anomaly or Trend? The Scope of § 230 Immunity Challenged by Two Courts*, COMM. LAW., Spring 2004, at 3, 3 (noting that defendants seeking immunity under § 230 "virtually always won").

¹⁰¹ *Zeran*, 129 F.3d at 329.

¹⁰² *Id.*

¹⁰³ *Id.*

called AOL, which eventually removed the offensive post.¹⁰⁴ Over the next several days, however, the anonymous user continued to post offensive “advertisements” that included Zeran’s home phone number, and the plaintiff continued to receive threatening phone calls.¹⁰⁵ Zeran then sued AOL in federal court for negligently failing to remove the offensive posts.¹⁰⁶ AOL asserted § 230 of the CDA as an affirmative defense and moved for judgment on the pleadings, and the district court granted the motion.¹⁰⁷

In affirming the judgment of the district court, the Fourth Circuit first emphasized that while Zeran was free to sue the person who created the inflammatory posts, Congress decided as a matter of policy that he could not sue AOL over the content that a third party created.¹⁰⁸ Relying on some of the findings and policies listed in § 230,¹⁰⁹ the court noted that Congress enacted § 230 to avoid “intrusive government regulation of speech” that necessarily accompanies the imposition of tort liability for third-party content.¹¹⁰ Furthermore, as a practical matter, entities such as AOL could not be held responsible for third-party content because “[i]t would be impossible for service providers to screen each of their millions of postings for possible problems.”¹¹¹

Zeran argued on appeal that AOL was not a “publisher” for the purposes of § 230, but rather a “distributor” that is subject to liability once it has notice of defamatory content.¹¹² The court rejected this attempt to distinguish distributor liability from publisher liability, stating that the former is “merely a subset, or a species,” of the latter, “and is therefore also foreclosed by § 230.”¹¹³

Zeran also argued that AOL should be liable because it had notice of the defamatory content.¹¹⁴ The court rejected this position for three reasons. First, notice-based liability would give providers of interactive computer

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Zeran v. Am. Online, Inc.*, 958 F. Supp. 1124, 1128 (E.D. Va. 1997).

¹⁰⁷ *Zeran*, 129 F.3d at 329–30.

¹⁰⁸ *Id.* at 330–31.

¹⁰⁹ 47 U.S.C. § 230(a)(3) (2000) (“The Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.”); *id.* § 230(a)(4) (“The Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation.”); *id.* § 230(b)(2) (“It is the policy of the United States to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation.”).

¹¹⁰ *Zeran*, 129 F.3d at 330.

¹¹¹ *Id.* at 331.

¹¹² *Id.*

¹¹³ *Id.* at 332. Several commentators have questioned this characterization of distributor liability. See, e.g., Annemarie Pantazis, Note, *Zeran v. America Online, Inc.: Insulating Internet Service Providers from Defamation Liability*, 34 WAKE FOREST L. REV. 531, 547–49 (1999).

¹¹⁴ *Zeran*, 129 F.3d at 333.

services an incentive to overreact to notices of offensive content by removing all content, no matter how inoffensive, upon notification.¹¹⁵ This, the court reasoned, would chill free speech on the Internet.¹¹⁶ Second, notice-based liability would give online service providers a disincentive to seek out and remove offensive content because such activity would lead to notice and “create a stronger basis for liability.”¹¹⁷ Finally, the court was concerned that notice-based liability would overwhelm online service providers with innumerable requests to remove material.¹¹⁸

The *Zeran* holding is significant for a number of reasons. For one, it advanced the notion that Congress passed the CDA to protect free speech on the Internet, not simply to promote the removal of obscene and otherwise offensive online content. Courts have overwhelmingly agreed with this position.¹¹⁹ However, as one commentator has noted, this proposition is dubious for two reasons.¹²⁰ First, Congress passed Senator Exon’s amendment—§ 223 of the CDA—at the same time it passed § 230.¹²¹ The former section imposed restrictions on free speech that the Supreme Court ultimately found unconstitutional.¹²² If protecting free speech had been Congress’s primary concern, it would not have simultaneously passed § 223.¹²³ Second, subsection (c)(2)(A) insulates providers and users of interactive computer services from liability for restricting access to material that the provider or user “considers” to be offensive, regardless of whether the material is constitutionally protected.¹²⁴ This provision of § 230 suggests that protecting free speech was secondary to Congress’s top priority of promoting the removal of offensive online content.¹²⁵

Nonetheless, courts across the country have picked up this ball and run with it.¹²⁶ With only a few exceptions, subsequent cases have steadfastly adhered to *Zeran*’s grant of immunity where the third-party content is alleg-

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ See Carome & Rushing, *supra* note 100, at 4 (“Since *Zeran*, many courts across the country have reached the same conclusions for the same reasons.”).

¹²⁰ See Chang, *supra* note 12, at 996.

¹²¹ See *supra* notes 60, 64 and accompanying text.

¹²² See Chang, *supra* note 12, at 996. The Supreme Court held that key provisions of § 223, including the prohibition in § 223(d)(1)(B) against transmitting “patently offensive” material to minors, violated the First Amendment because they were overbroad. *Reno v. ACLU*, 521 U.S. 844, 882 (1997).

¹²³ Chang, *supra* note 12, at 996.

¹²⁴ See *supra* note 93 and accompanying text.

¹²⁵ See Chang, *supra* note 12, at 996.

¹²⁶ See *Batzel v. Smith*, 333 F.3d 1018, 1028 (9th Cir. 2003) (“[E]ven though the CDA overall may have had the purpose of restricting content, there is little doubt that the Cox-Wyden Amendment, which added what ultimately became § 230 to the Act, sought to further First Amendment and e-commerce interests on the Internet while also promoting the protection of minors.”).

edly defamatory.¹²⁷ Courts have also extended *Zeran*'s broad grant of immunity to cases involving other forms of content. For instance, § 230 has provided immunity from claims arising from obscene content,¹²⁸ advertising for fraudulent sports memorabilia,¹²⁹ and unsolicited email messages.¹³⁰

Yet in the face of the overwhelming weight of courts granting providers of online services broad immunity under § 230(c),¹³¹ the Seventh Circuit recently issued an opinion that challenges this dominant view.¹³² In *Doe v. GTE Corp.*, the plaintiffs were varsity athletes from several different universities.¹³³ They alleged that someone put hidden video cameras in their locker rooms and sold the videos online.¹³⁴ In addition to naming as defendants those responsible for the production and sale of the tapes, plaintiffs also sued GTE and two other OSPs that provided the means for selling the videos online.¹³⁵ After the individual sellers were dropped from the suit because they could not be located, the district court dismissed the case against the OSPs because § 230(c) provided an affirmative defense.¹³⁶ On appeal, the Seventh Circuit affirmed the district court's dismissal because the plaintiffs failed to identify any state law that could make a web hosting service such as GTE liable for failing to investigate and discontinue service to parties selling harmful materials online.¹³⁷

Before the court reached this conclusion, however, it explored the text of § 230 in dicta and proposed a reading of the statute that departed from the *Zeran* grant of broad immunity. The court began by noting that the district court followed *Zeran* in holding that § 230(c)(1) provides immunity to online content providers who make no attempt to screen and remove offensive content.¹³⁸ The court then reasoned that this interpretation of the statute makes OSPs "indifferent" toward the content they make available on the Internet.¹³⁹ Given the costs of screening and removing content, OSPs will choose to do nothing because they know they will still enjoy immunity un-

¹²⁷ See, e.g., *Green v. Am. Online (AOL)*, 318 F.3d 465 (3d Cir. 2003) (affirming dismissal where defendant failed to remove allegedly defamatory material); *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119 (9th Cir. 2003) (affirming summary judgment in favor of the defendant in a suit for defamation and other torts arising from third-party content).

¹²⁸ *Doe v. Am. Online, Inc.*, 783 So. 2d 1010 (Fla. 2001).

¹²⁹ *Gentry v. eBay, Inc.*, 121 Cal. Rptr. 2d 703 (Cal. Ct. App. 2002).

¹³⁰ *Beyond Sys., Inc. v. Keynetics, Inc.*, 422 F. Supp. 2d 523 (D. Md. 2006).

¹³¹ See *Carome & Rushing*, *supra* note 100, at 3.

¹³² See *Doe v. GTE Corp.*, 347 F.3d 655 (7th Cir. 2003).

¹³³ *Id.* at 656.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.* at 656–57.

¹³⁷ *Id.* at 662.

¹³⁸ *Id.* at 659.

¹³⁹ *Id.* at 660.

der § 230(c)(1).¹⁴⁰ The court then noted that this outcome would be inconsistent with the title of § 230(c), which is “Protection for ‘Good Samaritan’ blocking and screening of offensive material,” because no OSP would have an incentive to block and screen offensive material.¹⁴¹ If the purpose of § 230 is really to promote decency on the Internet, then the interpretation advanced by *Zeran* impedes the fulfillment of that purpose by encouraging OSPs to sit on their hands and allow offensive content to remain on the Internet.

The Seventh Circuit then proposed two alternative readings of § 230(c)(1) that purported to be more consistent with the stated purpose of the Act. First, the court rhetorically asked, “Why not read § 230(c)(1) as a definitional clause rather than as an immunity from liability, and thus harmonize the text with the caption?”¹⁴² The court explained that under this interpretation, “an entity would remain a ‘provider or user’—and thus be eligible for the immunity under § 230(c)(2)—as long as the information came from someone else; but it would become a ‘publisher or speaker’ and lose the benefit of § 230(c)(2) if it created the objectionable information.”¹⁴³ Under this reading of the statute, a state law or a common law doctrine that requires an OSP “to protect the interests of third parties” would not be preempted by § 230(e)(3)¹⁴⁴ because such a law would not be inconsistent with this reading of § 230(c)(1).¹⁴⁵ Consequently, § 230(c)(1) would protect OSPs from liability for removing offensive content without foreclosing the possibility of liability under state law or common law.¹⁴⁶

The court’s second interpretation of § 230(c)(1) was more straightforward. It raised the possibility that the section “forecloses any liability that depends on deeming the [OSP] a ‘publisher’—defamation law would be a good example of such liability—while permitting the states to regulate [OSPs] in their capacity as intermediaries.”¹⁴⁷ Ultimately, however, the court did not need to embrace either one of these alternative readings of

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.* The caption reads, “Protection for ‘Good Samaritan’ blocking and screening of offensive material.” 47 U.S.C. § 230(c) (2000).

¹⁴³ *GTE*, 347 F.3d at 660.

¹⁴⁴ This section provides, in relevant part, that “[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.” 47 U.S.C. § 230(e)(3).

¹⁴⁵ *GTE*, 347 F.3d at 660.

¹⁴⁶ The court did not elaborate on this point, but the following example illustrates the argument. Suppose a state law requires OSPs to help protect children from Internet predators. This law would not be inconsistent with the court’s reading of § 230(c)(1) because the provision no longer provides blanket immunity to OSPs. Rather, it merely states that OSPs are *eligible for*—but not *guaranteed*—immunity, so long as they did not create the offending content. Therefore, such a state law would not be inconsistent with § 230, and so it would not run afoul of § 230(e)(3).

¹⁴⁷ *GTE*, 347 F.3d at 660. Under this reading, a cause of action that does not rely on the OSP’s status as a publisher might succeed.

§ 230(c)(1) to reach its conclusion. It affirmed the district court because the plaintiffs did not identify any state law that imposed liability on OSPs for failing to screen their content.¹⁴⁸

In the following Section, I discuss a case from the Seventh Circuit that explored the applicability of § 3604(c) to OSPs that publish discriminatory housing advertisements. This case illustrates that, even under the Seventh Circuit's narrow view of CDA immunity, plaintiffs alleging violations of § 3604(c) are unlikely to succeed in court.

B. Courts Apply § 230 to the Fair Housing Act

In 2006, the Northern District of Illinois addressed the question whether CDA immunity extends to OSPs that publish discriminatory housing advertisements in *Chicago Lawyers' Committee for Civil Rights Under the Law, Inc. v. Craigslist, Inc.*¹⁴⁹ *Craigslist* shows that, even under the Seventh Circuit's more restrictive reading of § 230(c) immunity, plaintiffs alleging violations of § 3604(c) are unlikely to succeed. Consequently, plaintiffs bringing suit in circuits with more expansive interpretations of CDA immunity are even less likely to succeed.

Relying on the dicta in *GTE* discussing § 230, a Chicago legal advocacy group filed suit against Craigslist, a major online forum that allows users to post housing advertisements, among others.¹⁵⁰ The plaintiff alleged that Craigslist published a variety of discriminatory advertisements in violation of § 3604(c).¹⁵¹ Pointing to the dicta in *GTE*, the plaintiff argued that the court should read § 230(c)(1) as a "definitional" clause providing no immunity on its own, thereby making OSPs subject to liability for discriminatory housing advertisements.¹⁵² In response, Craigslist argued that the *Zeran* line of cases provided robust immunity that completely immunized OSPs from liability for any third-party content.¹⁵³

The court rejected both arguments but ultimately granted the defendant's motion for judgment on the pleadings.¹⁵⁴ The court first criticized the *Zeran* line of cases, stating that those opinions interpret immunity under § 230(c)(1) too broadly given the plain language in the statute.¹⁵⁵ The court reasoned that a better interpretation of § 230(c)(1) would "prohibit treatment as a publisher, which, quite plainly, would bar any cause of action that requires, to establish liability, a finding that an [interactive computer ser-

¹⁴⁸ *Id.* at 662.

¹⁴⁹ 461 F. Supp. 2d 681 (N.D. Ill. 2006).

¹⁵⁰ *Id.* at 681.

¹⁵¹ *Id.* at 686.

¹⁵² *Id.* at 692.

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 692, 698.

¹⁵⁵ *Id.* at 695.

vice] published third-party content.”¹⁵⁶ Under this reading of the statute, § 230(c)(1) “bars any claim that requires ‘publishing’ as an element.”¹⁵⁷ Liability under § 3604(c) requires that the OSP be a publisher; therefore, Craigslist was immune from liability for discriminatory housing advertisements that originated from third-party users.¹⁵⁸

The Seventh Circuit affirmed the district court.¹⁵⁹ The Seventh Circuit noted that “§230(c)(1) says . . . that an online information system must not ‘be treated as the publisher or speaker of any information provided by’ someone else. Yet only in this capacity as publisher could [C]raigslist be liable under §3604(c).”¹⁶⁰ The court admitted that Congress did not contemplate § 230’s effect on the Fair Housing Act when it passed the CDA, but still found that § 230 applied to housing advertisements: “§230(c)(1) is general [It] covers ads for housing, auctions of paintings that might have been stolen by Nazis, biting comments about steroids in baseball, efforts to verify the truth of politicians’ promises, and everything else that third parties may post on a web site.”¹⁶¹

Under existing interpretations of § 230, then, it seems as though a plaintiff’s chances of successfully bringing suit against an OSP for a violation of § 3604(c) are slim to none.¹⁶² In addition, Congress has seemingly embraced the *Zeran* view of CDA immunity. When it passed the Dot Kids Implementation and Efficiency Act (Dot Kids Act) in 2002, it adopted some of the language of § 230 of the CDA.¹⁶³ A committee report that accompanied the 2002 statute stated that “[t]he courts have correctly interpreted section 230(c), which was aimed at protecting against liability for such claims as negligence and defamation. The Committee intends these interpretations of section 230(c) to be equally applicable to those entities covered by” the

¹⁵⁶ *Id.* at 696.

¹⁵⁷ *Id.* at 696–97.

¹⁵⁸ *Id.* at 698.

¹⁵⁹ *Chi. Lawyers’ Comm. for Civil Rights Under the Law v. Craigslist, Inc.*, 519 F.3d 666 (7th Cir. 2008).

¹⁶⁰ *Id.* at 671.

¹⁶¹ *Id.*

¹⁶² A recent opinion from the Ninth Circuit held that CDA immunity was not available to an OSP that exerted substantial influence over the content in housing advertisements that were posted to its site. *Fair Hous. Council v. Roommates.com, LLC*, 489 F.3d 921 (9th Cir. 2007). Among other things, Roommates.com required users to complete questionnaires indicating their roommate preferences. *Id.* at 926. The site also used the information from the questionnaires to publish profiles of its users. *Id.* at 927. A divided panel held that Roommates.com was not eligible for CDA immunity for the publication of this information because the site was an “information content provider” for the information. *Id.* at 925–27. However, the opinion should not pose a threat of liability to more passive OSPs, such as Craigslist. Roommates.com lost CDA immunity because its questionnaires shaped the content on its site. An OSP that merely accepts content that originates entirely from users should retain CDA immunity even after *Roommates.com*.

¹⁶³ *Carome & Rushing*, *supra* note 100, at 4.

new law.¹⁶⁴ Given Congress's apparent support for the *Zeran* line of cases, it seems unlikely that courts outside the Seventh Circuit will depart from their precedent. While the Seventh Circuit might interpret § 230 somewhat differently than do the other circuits, *Craigslist* has shown that this interpretation still protects OSPs from liability for discriminatory housing advertisements that originate with third parties.

IV. SAVING § 3604(C)

As the discussion above shows, the courts' interpretations of immunity under § 230 of the CDA likely foreclose the possibility of an OSP being held liable for violations of § 3604(c). This Part argues that discriminatory housing advertising on the Internet is a problem that persists. In order to curb discriminatory housing advertisements, the FHA's ban on discriminatory housing advertisements should extend to online advertising. The most sensible way to achieve this is to amend the CDA.¹⁶⁵

A. *The Problem of Discriminatory Housing Advertising Online*

OSP's are rapidly becoming the forum of choice for advertising that once found its place in print newspapers and magazines. Whereas readers formerly submitted housing advertisements to classified advertising sections in newspapers, they now post those advertisements directly online. Studies show that circulation among several major newspapers has declined, partly because of the growth in online alternatives to print news sources.¹⁶⁶ Some observers have also noted strong trends that as online advertisements become more popular, newspapers lose their advertising market share.¹⁶⁷ Furthermore, some analysts have predicted that the growth in online advertising poses a serious threat to print advertising and newspaper

¹⁶⁴ H.R. REP. NO. 107-449, at 13 (2002). Like § 230, the Dot Kids Implementation and Efficiency Act does not concern housing issues. It is merely intended to promote the facilitation of "the creation of a new, second-level Internet domain . . . that will be a haven for material that promotes positive experiences for children and families using the Internet . . ." Pub. L. No. 107-317, 116 Stat. 2766 (2002).

¹⁶⁵ Other commentators have expressed concern over the extension of CDA immunity to discriminatory online housing advertisements. See, e.g., Rachel Kurth, Note, *Striking a Fair Balance Between Protecting Civil Rights and Free Speech on the Internet: The Fair Housing Act vs. The Communications Decency Act*, 25 CARDOZO ARTS & ENT. L.J. 805 (2007). However, this Comment is the first to propose a legislative solution to the problem.

¹⁶⁶ See, e.g., Katharine Q. Seelye, *Newspaper Circulation Falls Sharply*, N.Y. TIMES, Oct. 31, 2006, at C1 (noting that newspaper circulation seems to be declining at a faster rate "as the industry tries to adjust to the steady migration of readers and advertisers to the Internet").

¹⁶⁷ See, e.g., Jorn Madslie, *Craigslist's Silent Emergence*, BBC NEWS, Aug. 4, 2005, <http://news.bbc.co.uk/2/hi/business/4724165.stm> ("Some analysts are already predicting that newspaper classified advertising could vanish entirely. Investment bank Goldman Sachs describes Craigslist as 'a real menace' to newspapers, and warns that 'all publishers face a significant threat to their profitability.'"); Robert Weisman, *Virtual Ads Pose Real Threat to Traditional Media*, BOSTON GLOBE, Feb. 12, 2006, at D1 ("The rapid growth of online advertising is threatening the historic dominance of print and broadcasting.").

profitability generally.¹⁶⁸ Housing advertising is following the same trends.¹⁶⁹ As housing advertising migrates from print media to the Internet, § 3604(c) gradually becomes less effective in preventing discriminatory advertisements. Under the courts' broad reading of § 230 immunity, it seems likely that liability for violations of § 3604(c) will not extend to OSPs that electronically publish users' housing advertisements.

One might argue that discriminatory housing advertising is not as significant a problem as it was forty years ago, when the FHA was passed. Although I have no evidence to prove or disprove this general proposition, the aftermath of the recent hurricanes in the Gulf Coast area provides anecdotal evidence that discriminatory housing advertising is a persistent problem. James Perry, the Executive Director of the Greater New Orleans Fair Housing Action Center, recently testified before Congress about the fair housing problems that hurricane evacuees have faced.¹⁷⁰ One such problem has been discriminatory housing advertisements on websites specifically designed for hurricane evacuees, such as *Katrinahousing.com*, *Katrinahome.com*, and *reliefwelcomewagon.com*.¹⁷¹ Perry read a sampling of discriminatory housing advertisements, such as “[p]rovider will provide room and board for \$400 but prefers two white females,” and “[n]ot to sound racist, but because we want to make things more understandable for our younger children, we would like to house white children.”¹⁷² The persistence of discriminatory online housing advertisements led Perry to state that such postings “are perhaps the most concerning issues we have confronted since the hurricanes.”¹⁷³

HUD also recognized that discriminatory online advertising has proven an obstacle in the search for fair housing in the wake of Hurricanes Rita and Katrina. In testimony before Congress, HUD administrator Kim Kendrick acknowledged that her office had received complaints of discriminatory advertisements on the Internet.¹⁷⁴ Kendrick testified that:

¹⁶⁸ See Madslie, *supra* note 167.

¹⁶⁹ See James R. Hagerty & Kevin J. Delaney, *Google, Craigslist Expand into Real Estate: With Listings from Owners as well as Agents, Sites May Weaken Realtors' Hold*, WALL ST. J., Apr. 6, 2006, at D1 (noting that “sites like Google and Craigslist have begun reshaping the advertising world as they offer a potent alternative to ad spending on traditional media such as newspapers and TV. . . . Google and Craigslist have the potential to draw large numbers of home-sale listings.”).

¹⁷⁰ See *Housing Options in the Aftermath of Hurricanes Katrina and Rita: Hearing Before the Subcomm. on Housing and Community Opportunity of the H. Comm. on Financial Servs.*, 109th Cong. 69–72 (2006) (statement of James Perry, Executive Director, Greater New Orleans Fair Housing Action Center).

¹⁷¹ *Id.* at 70.

¹⁷² *Id.*

¹⁷³ Adam Liptak, *The Ads Discriminate, but Does the Web?*, N.Y. TIMES, Mar. 5, 2006, § 4, at 16 (quoting James Perry).

¹⁷⁴ *Fair Housing Issues in the Gulf Coast in the Aftermath of Hurricanes Katrina and Rita: Hearing Before the Subcomm. on Housing and Community Opportunity of the H. Comm. on Financial Servs.*,

HUD has found that while the Internet is a valuable resource, helping hurricane evacuees finding housing, obtaining supplies, and locating loved ones, it can also cause harm. . . . HUD takes all allegations of discriminatory advertising seriously, particularly when the language inflicts harm on people who have already gone through so much.¹⁷⁵

In other words, there was concern that allegedly discriminatory advertising was causing psychic harm, which § 3604(c) is meant to avoid.¹⁷⁶ Kendrick also testified that HUD was “investigating” the allegations of discriminatory online advertising.¹⁷⁷

Anticipating the likelihood of CDA immunity for the websites that posted the discriminatory advertisements, Representative Frank of Massachusetts asked, “[w]hat if . . . we found that Congress inadvertently in my judgment but perhaps effectively anyway has said that the Internet is immune from the fair housing laws, is that a situation you would be satisfied with or should we try to change that?”¹⁷⁸ In response to this question, Kendrick testified that she did not believe that CDA immunity extended to online housing advertising.¹⁷⁹ Representative Frank then added:

[I]f it should be held by the courts that [immunizing Internet service providers for discriminatory housing advertisements] is the effect of what we did [in passing the CDA], then I hope we will be able to call on you for appropriate help in drafting legislation that would change that.

I notice some of the people from [C]raigslist said, well, we are not a newspaper and we shouldn't be treated exactly like a newspaper. I accept that. There may be some differences in how we apply the enforcement. But I want to definitely make sure it is enforced.¹⁸⁰

The remainder of this Comment explores a possible legislative solution to the problems of discriminatory online housing advertisements. As the *Craigslist* case indicates, courts interpreting the CDA are likely to disagree with Assistant Secretary Kendrick and hold that § 230(c) grants immunity for FHA violations on the Internet. As Representative Frank suggested, the most plausible solution to this problem is legislation. To ensure the effectiveness of § 3604(c), Congress must amend the CDA. In the following pages, I explore the ramifications of holding OSPs responsible for discrimi-

109th Cong. 7 (2006) [hereinafter *Fair Housing Hearing*] (statement of Kim Kendrick, Assistant Secretary for Fair Housing and Equal Opportunity, U.S. Department of Housing and Urban Development).

¹⁷⁵ *Id.*

¹⁷⁶ See *United States v. Space Hunters, Inc.*, 429 F.3d 416, 424 (2d Cir. 2005) (noting that § 3604(c) helps prevent emotional harm resulting from exposure to discriminatory statements); see also *supra* notes 30–32 and accompanying text.

¹⁷⁷ *Fair Housing Hearing, supra* note 174, at 7 (statement of Kim Kendrick).

¹⁷⁸ *Id.* at 13 (statement of Representative Frank).

¹⁷⁹ *Id.* (statement of Kim Kendrick).

¹⁸⁰ *Id.* (statement of Representative Frank).

natory housing advertisements, and ultimately conclude that amending § 230(c) to accommodate FHA liability would be a sound policy choice.

B. Online Service Providers as Gatekeepers

I am not the first to propose imposing some form of liability on OSPs for the conduct of third parties. Other authors have explored the ramifications of holding OSPs liable for a variety of “cyber-wrongs,” such as the proliferation of computer viruses and other malicious codes,¹⁸¹ the sale of counterfeit goods,¹⁸² Internet gambling,¹⁸³ and child pornography.¹⁸⁴ Indeed, at least one commentator has described future governmental regulation of the Internet as “inevitable.”¹⁸⁵ To date, however, no author has explored regulation that would impose liability on OSPs for violations of the FHA.

Much of the literature addressing OSP liability has approached the matter as an issue of gatekeeper liability.¹⁸⁶ This form of liability is essentially “liability imposed on private parties who are able to disrupt misconduct by withholding their cooperation from wrongdoers.”¹⁸⁷ Gatekeeper liability derives from the obligation not to lend support—in the form of goods or services—to wrongdoing.¹⁸⁸ When the theory of gatekeeper liability was first conceived, lawyers and accountants were seen as “natural” gatekeepers for fraud because their specialized knowledge is necessary for an array of fraudulent transactions.¹⁸⁹ Similarly, an OSP can be seen as a gatekeeper because it provides a service that is essential to many forms of online misconduct.

A recent article by Ronald Mann and Seth Belzley explores the suitability of gatekeeper liability for online intermediaries¹⁹⁰ by focusing on three key factors: the relative ease of identifying online intermediaries compared to end users, the infeasibility of regulating individual users who are directly responsible for misconduct, and the ability of intermediaries to

¹⁸¹ See Doug Lichtman & Eric Posner, *Holding Internet Service Providers Accountable*, 14 SUP. CT. ECON. REV. 221 (2006) (arguing that Internet service providers should be responsible for stopping the spread of malicious code and identifying those who create it).

¹⁸² See Ronald J. Mann & Seth R. Belzley, *The Promise of Internet Intermediary Liability*, 47 WM. & MARY L. REV. 239, 276–80 (2005).

¹⁸³ See *id.* at 281–91.

¹⁸⁴ See *id.* at 291–98.

¹⁸⁵ *Id.* at 239.

¹⁸⁶ *Id.* at 265.

¹⁸⁷ Reinier H. Kraakman, *Gatekeepers: The Anatomy of a Third-Party Enforcement Strategy*, 2 J.L. ECON. & ORG. 53, 53 (1986).

¹⁸⁸ *Id.* at 54.

¹⁸⁹ *Id.*

¹⁹⁰ Mann and Belzley identify three particular types of “online intermediaries”: Internet service providers that provide access to the Internet, payment intermediaries that facilitate the online transfer of funds, and auction intermediaries that provide a forum for auction sales. Mann & Belzley, *supra* note 182, at 254–59.

monitor end users.¹⁹¹ Based on these three factors, their article argues that gatekeeper liability is well suited to online intermediaries. First, much online misconduct takes place through online intermediaries that are easy to identify and essential to carrying out the misconduct.¹⁹² Second, in contrast to online intermediaries, the users who engage in misconduct are anonymous or hard to identify, thereby making direct governmental regulation of end users infeasible.¹⁹³ Third, advances in technology have given online intermediaries the ability to monitor online conduct relatively cheaply.¹⁹⁴ Mann and Belzley apply this framework to a variety of intermediaries that might play a role in various forms of misconduct, and conclude that gatekeeper liability is an appropriate policy in a variety of contexts.¹⁹⁵

Each of these three factors favors imposing gatekeeper liability on OSPs that host discriminatory housing advertisements. First, it goes without saying that OSPs such as Craigslist, Yahoo!, and Roommates.com are readily identifiable as online intermediaries. Second, the individuals who post online housing advertisements are often anonymous or difficult to identify. Although it is true that a housing advertisement must include contact information in order for prospective buyers and renters to express their interest, some OSPs protect their users' anonymity by hiding their email addresses. If an interested party wants to contact the person who posted an advertisement, he or she sends an email to a temporary, anonymous address that the OSP specially created for the advertisement. The email is automatically forwarded from the anonymous email address to the user's actual address. The person responding to the advertisement never sees the advertiser's actual contact information unless the advertiser responds via email. In this way, online housing advertisers remain much more anonymous than traditional print advertisers, who generally have no choice but to provide an accurate phone number or email address.

Finally, filtering technologies allow OSPs to screen advertisements for discriminatory content before they are posted online. Unlike screening for defamatory content, which generally involves interpretation of words in light of a broader context, screening for advertisements that indicate a discriminatory preference should be relatively simple. HUD has created guidelines that contain a list of "buzzwords" that could potentially indicate

¹⁹¹ *Id.* at 251.

¹⁹² *Id.* at 267–68.

¹⁹³ *Id.* at 268.

¹⁹⁴ *Id.*

¹⁹⁵ For instance, Mann and Belzley argue that liability for payment intermediaries would be an appropriate way to curtail online gambling. Individuals who gamble online are generally difficult to identify, and payment intermediaries can withhold their services from gambling websites relatively easily. *Id.* at 281, 288. Congress apparently agrees with this analysis. It recently passed the Unlawful Internet Gambling Enforcement Act of 2006. The law provides for the implementation of regulations that require payment intermediaries to identify and block unlawful Internet gambling transactions. *See* 31 U.S.C.A. § 5364 (Supp. 2007).

a discriminatory preference in housing advertisements.¹⁹⁶ While these guidelines are not binding,¹⁹⁷ HUD relies on the list in assessing a complaint that an advertisement conveys a discriminatory intent.¹⁹⁸ Technologies that screen content for obscene language already exist.¹⁹⁹ OSPs could easily use the same technology to screen housing advertisements for HUD's discriminatory buzzwords. In sum, OSPs are well suited for gatekeeper liability for FHA violations.

C. Proposed Amendment to § 230(c)

In order to hold OSPs responsible for publishing housing advertisements that violate § 3604(c), Congress should amend § 230(c) of the CDA so that it reads as follows: "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, *except for notices, statements, or advertisements with respect to the sale or rental of a dwelling.*" The first portion of the proposed amendment is identical to the current language in § 230(c); the second half borrows language from § 3604(c) of the FHA.

The effect of this proposed amendment is twofold. First, it effectively ends OSP immunity for discriminatory online housing advertisements. Under this amendment, OSPs would be considered publishers of all notices, statements, and advertisements relating to housing transactions, thereby making them liable for damages and injunctive relief for content that indicates a discriminatory preference. Second, the amendment does not affect an OSP's immunity from liability for other types of content, such as defamatory material, which can be harder to detect. The scope of the amendment is narrow; OSPs will not have to worry about being held responsible for a wide array of content that their users might make available online. Therefore, the amendment would remain faithful to the legislative purpose behind § 230.²⁰⁰ OSPs will still be free to identify and remove obscene content without being considered a publisher of that content.

D. Responses to Objections

This Section responds to anticipated criticisms of the amendment I propose. I argue that, although each of these critiques is well founded, none is persuasive enough to merit the conclusion that we should continue to protect OSPs from liability for discriminatory housing advertisements.

¹⁹⁶ See Implementation of the Fair Housing Amendments Act of 1988, 54 Fed. Reg. 3232, 3309 (Jan. 23, 1989). Such words include "Black," "White," "Catholic," and "Oriental."

¹⁹⁷ See Chang, *supra* note 12, at 1006 n.163 (noting the codification of the guidelines and their subsequent removal from the Code of Federal Regulations).

¹⁹⁸ Implementation of the Fair Housing Amendments Act of 1988, 54 Fed. Reg. at 3309–10.

¹⁹⁹ See Chang, *supra* note 12, at 1007 n.166 (citing sources describing such technology).

²⁰⁰ See *supra* note 84 and accompanying text.

1. *OSPs Will Overreact.*—One concern is that OSPs facing potential liability for discriminatory housing advertisements will overreact by blocking some housing advertisements that do not discriminate at all. For instance, an OSP might use a screening technology that searches advertisements for HUD’s buzzwords and blocks an ad that contains any one of those words. Consequently, an innocent advertisement that reads, “For sale: one-bedroom apartment, full kitchen with black granite countertops” would be blocked because it contains the word “black,” even though it does not discriminate against African Americans. Judge Easterbrook shared this concern in the *Craigslist* case and concluded that automated filtering software “can’t work.”²⁰¹

It is also possible that OSPs will overreact by adopting an ever-expanding list of prohibited words. For instance, if discriminating housing advertisers know that a phrase such as “no blacks” will get filtered, they might instead say “no people with ebony skin” in order to avoid detection. OSPs, in an effort to keep up, will add more words to their filters until an advertiser’s acceptable vocabulary is absurdly limited.

Although the potential for overzealous enforcement is real, it does not pose insurmountable challenges. If an advertisement is blocked because it contains a word that might be discriminatory, the advertiser should be notified that her ad is being blocked because it contains potentially discriminatory language. This notice will further the FHA’s goal of educating the public about discriminatory housing practices. A user should then have the chance to modify her advertisement so that it does not contain any potentially discriminatory words. Although this might constrain the vocabulary that an advertiser can use to describe a dwelling, online housing forums such as Craigslist allow users to post digital photographs along with their descriptions of the housing units; if an advertiser wants readers to know about her black countertops, she can simply post a photograph of them.²⁰²

To address the concern that OSPs will prohibit the use of too many words, the list of filtered words should be robust, but not to the point that nondiscriminating advertisers have difficulty communicating. OSPs should be able to rely on HUD guidelines in determining which words to filter. If a word does not appear on HUD’s list, then an OSP should not be liable for a housing advertisement that uses that word.

2. *The Amendment Imposes Too Great a Burden on OSPs.*—An additional objection to my proposal is that the cost of compliance and liability will impose a crushing burden on OSPs that host housing advertisements. Such costs could also deter new firms from entering the market for online

²⁰¹ Chi. Lawyers’ Comm. for Civil Rights Under the Law v. Craigslist, Inc., 519 F.3d 666, 668 (7th Cir. 2008).

²⁰² Judge Easterbrook predicted that parties would be worse off if filtering software blocked innocent descriptions such as “red brick house with white trim.” *Id.* But if a picture is worth a thousand words, then the use of an image instead of a description could enhance the overall transaction.

housing advertising, thereby reducing overall market competitiveness. However, the same argument applies to imposing liability on traditional print advertisers. By enacting the FHA, Congress has implicitly accepted these costs as a necessary byproduct of preventing discriminatory housing advertising. Furthermore, although some costs are inevitable, they should not be excessive. Firms will be able to rely on automated filtering technologies that are far less costly than reviewing individual advertisements manually. Finally, firms should not be strictly liable for any violation of the FHA. As long as a firm employs an appropriate filtering technology as determined by HUD, it should fall under a regulatory safe harbor from liability.

3. *The Amendment Is Not Necessary Because Private Regulation Is Effective.*—Another critique to my proposed amendment might be that it is more effective and less intrusive to allow private parties to identify and remove discriminatory advertisements. The argument would proceed that it is more consistent with the spirit, if not the letter, of § 230 of the CDA to let users and OSPs take responsibility for making sure that online housing advertisements do not discriminate. This model of private self-regulation has been effective for OSPs in other contexts.²⁰³ For their part, some housing websites do try to empower users to help minimize discriminatory housing advertising. For example, Craigslist has a separate webpage containing information about the FHA's ban on discriminatory housing advertising.²⁰⁴ Users who encounter discriminatory advertisements can “flag” them by clicking a link next to the advertisement; if an ad is flagged enough times, it is automatically removed.²⁰⁵

Although user-based screening might help remove some discriminatory advertisements, it is preferable to prevent such advertisements from being published in the first place. My limited search of online housing advertisements showed that many discriminatory advertisements remain online, despite OSPs' best efforts to promote private regulation.²⁰⁶ As noted above, courts interpreting § 3604(c) have recognized that the purpose of the law includes preventing emotional injury to individuals who face discriminatory advertising.²⁰⁷ Although giving users the power to identify and remove dis-

²⁰³ For instance, Legacy.com is a website for online obituaries. Users are allowed to go to the site and post comments about the deceased in a “guest book.” Legacy.com takes it upon itself to employ forty-five screeners that manually review over 18,000 posts a day for offensive content, removing posts that might be offensive to the memory of the deceased. See Ian Urbina, *Sites Invite Online Mourning, but Don't Speak Ill of the Dead*, N.Y. TIMES, Nov. 5, 2006, § 1, at 1.

²⁰⁴ See Fair Housing, Craigslist, <http://www.craigslist.org/about/FHA.html> (last visited Mar. 10, 2008).

²⁰⁵ See Flags and Community Moderation, Craigslist, http://www.craigslist.org/about/help/flags_and_community_moderation (last visited Mar. 10, 2008).

²⁰⁶ See *supra* notes 1–4 and accompanying text.

²⁰⁷ See *supra* notes 30–32 and accompanying text.

criminy advertisements helps reduce injurious content, such a policy provides inadequate safeguards against the emotional harm that results from an advertisement being available online before it is ultimately removed.

Furthermore, placing the burden of identifying discriminatory advertisements on users assumes that individuals know precisely which forms of discrimination are unlawful under the FHA. This is an unfounded assumption. Although some forms of discrimination might strike users as clearly unlawful, other kinds of discriminatory preferences might not set off any alarms, even though they are prohibited under § 3604(c). Indeed, the persistence of certain kinds of discriminatory advertisements, such as ads that discriminate on the basis of familial status,²⁰⁸ suggest that users are not aware that it is unlawful to indicate certain kinds of preferences in housing advertisements. As noted above, one of the purposes of § 3604(c) is to help educate the public about the types of preferences that are unlawful in housing advertisements.²⁰⁹ If OSPs had an obligation to screen housing advertisements before they appear online, users attempting to post unlawful ads would immediately learn that their advertisements indicate an unlawful preference. This would help inform advertisers of the contours of § 3604(c)'s ban on discriminatory advertising.

4. *Congress Has Embraced Broad CDA Immunity Under Zeran and Its Progeny.*—One might argue that Congress, in passing the Dot Kids Act, has already expressed the view that OSPs should have broad immunity under § 230.²¹⁰ Any limitation on § 230 immunity, therefore, would contradict recently expressed congressional intent. This argument is not persuasive. The Dot Kids Act did not address housing issues. Instead, much like the CDA itself, the Dot Kids Act sought to promote a family-friendly environment on the Internet. Amending § 230 so that OSPs could be liable for discriminatory housing advertisements would not contradict any congressional policy of promoting Internet content that is appropriate for children.

V. CONCLUSION

This Comment argues that an amendment to § 230 of the Communications Decency Act is necessary in order to foster fair housing advertising on the Internet. Section 3604(c) of the Fair Housing Act, which prohibits the publication of advertisements that indicate an unlawful discriminatory preference, serves three important purposes: it promotes integrated housing, it prevents the infliction of emotional distress upon the targets of discrimination, and it helps educate the public about unlawful housing practices. Were it not for the CDA, § 3604(c) of the FHA would likely apply to OSPs in the same way that it applies to newspapers and other print advertisers.

²⁰⁸ See *supra* note 3 and accompanying text.

²⁰⁹ See *supra* notes 33–36 and accompanying text.

²¹⁰ See *supra* notes 163–64 and accompanying text.

However, in 1995 Congress passed the CDA, a law whose legislative history (not to mention, name) suggests that its primary purpose was to promote decency on the Internet. In response to a case that imposed publication liability for defamation on an OSP for attempting to exert editorial control over its content, Congress enacted § 230 in order to encourage private entities—OSPs and end users alike—to remove offensive content from the Internet without exposing them to future liability. Although the law was meant to inspire proactive screening measures, courts have interpreted § 230 in a way that protects OSPs from liability for third-party content, regardless of whether the OSP tries to remove unlawful content or does nothing at all. The Seventh Circuit has put its own spin on § 230 immunity, but not in a way that helps plaintiffs who bring suit under the FHA. A suit alleging an OSP violation of § 3604(c) has already failed in the Seventh Circuit, and there is little indication that subsequent plaintiffs will be able to get around § 230 immunity.

This development would be less troublesome if there were no housing discrimination on the Internet, but there is strong evidence to the contrary. A cursory review of housing advertisements reveals that many online housing ads violate § 3604(c), and the recent natural disasters in the Gulf Coast area have engendered a particularly worrisome concentration of discriminatory ads. Given the persistence of discriminatory housing advertisements and the trend toward increased advertising on the Internet, the only way to avoid the evisceration of § 3604(c) is to amend § 230 of the CDA. In particular, § 230(c)(1) should be amended so that OSPs are not considered publishers of third-party content, *except* when that content is a housing advertisement. OSPs are ideal targets for liability given their capacity for controlling what appears online and the relative anonymity of individual users. In order to avoid liability, OSPs should employ simple screening programs that block advertisements containing any of HUD's discriminatory "buzzwords." This policy will impose only a slight burden on OSPs, and it will ensure that safeguards against discriminatory housing advertisements are not a thing of the past.

