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Cyberspace: The New Frontier for Housing Discrimination--An Analysis of the Conflict Between the Communications Decency Act and the Fair Housing Act

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I. INTRODUCTION

Despite Congress’s enactment of the Fair Housing Act of 1968 ("FHA"), which regulates housing discrimination, one need spend only a few minutes searching for housing via the Internet before finding blatant FHA violations, such as the listing above. The FHA’s efforts to end egregious housing practices aimed at persons of a particular race or socioeconomic status has certainly had some success. Nevertheless, those who wish to circumvent the FHA may now do so simply by using the Internet to disseminate discriminatory housing advertisements. Although more than forty years have passed since the civil rights movement, discrimination continues as was recently seen in advertisements stating racial preferences on websites designed to help Hurricane Katrina victims find housing.2

As the Internet has quickly become a staple of mainstream society, one might be inclined to question how such blatant discrimination is permissible under the FHA. In short, discrimination is not allowed under the FHA. The prevailing judicial interpretation of the FHA is that liability for discriminatory housing advertisements falls both on the creator of the discriminatory words and the intermediary, such as the publisher of a newspaper or a housing pamphlet.3 If the FHA was the

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1 These quotes were found on the Chicago Craigslist website and presented at trial in Chi. Lawyers’ Comm. For Civil Rights Under the Law v. Craigslist, Inc., 461 F. Supp. 2d 681, 685–86 (N.D. Ill. 2006), a’ffd, 519 F.3d 666 (7th Cir. 2008) (holding that an online listing service was not liable for discriminatory housing advertisements posted on its website by third-party users of the service).

2 Infra note 24 (noting that in a December 2005 hearing before the House of Representatives about housing discrimination after Hurricane Katrina, the executive director of the Fair Housing Action Center reported receiving more than two hundred discrimination complaints). A key provision of the FHA prohibits advertising that expresses preference for or limitations on a potential buyer or renter based on “race, color, religion, sex, handicap, familial status, or national origin.” 42 U.S.C. § 3604(c) (2006).

3 Infra note 24 and accompanying text (discussing several cases in which intermediaries were found liable for FHA violations).
sole operating law governing discriminatory online housing advertisements, the owner or operator of an online listing service could likely be held liable for discriminatory housing advertisements posted on his or her website, even if the posts were generated by a third party.4 The Communications Decency Act of 1995 ("CDA") has a "Good Samaritan" provision ("Good Samaritan provision") that operates contrary to the stated goals of the FHA.5

The Good Samaritan provision has been interpreted to insulate online intermediaries from liability for discriminatory comments made by third parties. Although congressional documentation indicates that this immunity provision was designed to protect interactive computer services that attempt to screen offensive content and to prevent an onslaught of online defamation litigation, the Seventh and Ninth Circuit Courts of Appeals have held the CDA may also be used to immunize interactive computer services from FHA violations perpetrated by users of their websites and forums.6 This Note proposes a textual revision to the CDA that would prevent interactive computer services from escaping liability for FHA violations contained in third-party user postings on their websites.

Part II of this Note provides a comprehensive review of the conflict between the CDA and the FHA.7 Next, Part III of this Note provides an in-depth analysis of the discourse between the CDA and the FHA, the

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4 Infra notes 21–24 and accompanying text (illustrating how the FHA extends liability to the intermediaries of discriminatory housing advertisements and citing cases where publishers of newspapers, listing services, and advertising brochures were held liable for discriminatory advertisements generated by third parties).
5 See 47 U.S.C. § 230(c) (2006). This provision of the CDA is entitled "Protection for "Good Samaritan" blocking and screening of offensive material" and prevents interactive computer services from being held liable for screening objectionable content on their websites and forums. Id.
Currently, however, there is a tremendous disincentive for online service providers to create family friendly services by detecting and removing objectionable content. These providers face the risk of increased liability where they take reasonable steps to police their systems. A New York judge recently sent the online services the message to stop policing by ruling that Prodigy was subject to a $200 million libel suit simply because it did exercise some control over profanity and indecent material.
Id. at H8471.
7 Infra Part II.A (explaining the history and interpretation of the FHA); infra Part II.B-C (describing the development and operation of the Internet and discussing the creation and interpretation of the CDA); infra Part II.D (examining how the Seventh and Ninth Circuits have dealt with the textual conflict between the CDA and the FHA).
questionable existence of a circuit split, the adverse effects of the CDA’s current application, and the proposed solutions to the conflict. Finally, Part IV of this Note proposes a resolution to the conflict that amends the CDA to eliminate all exceptions to the FHA and tailors the text of the CDA’s Good Samaritan provision to apply to only those instances in which Congress intended immunity to apply, such as when an interactive service provider is treated as a publisher of third-party generated defamation or when the service has made a good faith attempt to screen “offensive” content on its website or user forums.

II. BACKGROUND

Before analyzing the issues surrounding the tension between the CDA and the FHA, a working knowledge of the Internet and an understanding of the statutes at the heart of the conflict is needed. First, Section A highlights the development of the FHA, focusing on the advertising provision laid out in Section 3604(c) of the FHA. Then, Section B provides a brief history of the Internet’s development and operation, including an overview of federalism and jurisdictional issues that a court may face before it can decide an Internet-related action on the merits. Next, Section C introduces the CDA by discussing the New York case leading to its creation, its legislative history, and key statutory interpretations of the CDA by the federal circuit and district courts. Finally, Section D discusses two major cases where the FHA’s expansive imposition of liability for discriminatory advertisements directly
conflicted with the interactive computer service immunity provided by the CDA.14

A. Development of the Fair Housing Act

One commentator described residential segregation as taking effect “slowly and deliberately” after the turn of the Twentieth Century, with the urban ghetto developing after World Wars I and II when African Americans began moving into industrialized areas.15 Even prominent and successful African American figures, such as Nat King Cole, were victims of racially based housing discrimination.16 After race-restrictive covenants were declared unconstitutional, African Americans who bought or rented homes in white neighborhoods were given an icy reception, often accompanied by violence.17

14 Infra Part II.D (discussing in depth the Roommate and Craigslist holdings and rationales).
15 Mark Settles, Note, The Reputation of Residential Racial Segregation in America: Historical Discrimination, Modern Forms of Exclusion, and Inclusionary Remedies, 14 J. LAND USE & ENVTL. L. 89, 91 (1998) (briefly discussing race relations in America prior to the 1900s). Others have traced the roots of housing segregation in the United States as far back as the middle nineteenth century. Derrick Bell, Race, Racism and American Law 289 (2004). While a small number of African Americans owned homes in expensive neighborhoods during the nineteenth century, many lived in crowded ghettos with derogatory nicknames, such as “Nigger Hill” or “Little Africa.” Id. The living conditions in these ghettos affected mortality rates as the potential for disease exposure and malnutrition was significantly higher in these areas than in other communities. Id. at 289-90. Some African Americans lived in “cold and exposed rooms and garrets, board shanties, five and six feet high, and as many feet square . . . without any comforts, save the bare floor, with the cold penetrating between the boards.” Id. at 290 (internal citation omitted). “Ghetto” in this Note is used as it was by the National Advisory Commission on Disorders and is defined as “an area within a city characterized by poverty and acute social disorganization, and inhabited by members of a racial or ethnic group under conditions of involuntary segregation.” Report of the National Advisory Commission on Civil Disorders 25 (1968) available at http://www.eisenhowerfoundation.org/docs/kerner.pdf (last visited Oct. 24, 2009).

In August, 1948, popular music star Nat King Cole purchased an estate in a wealthy Los Angeles neighborhood with his wife and children. The Property Owners Association of the neighborhood expressed prejudice against the wealthy, cultured and sophisticated black singer’s presence in their community, and they tried to buy the home back from him at a profit. Cole declined the offer and asserted his rights to move into his home, only to be terrorized by his white neighbors, who planted signs that said “Nigger Heaven” on his property and burned the word “Nigger” into his front lawn.

Id. (internal citations omitted).
In 1967, a study on racial violence, which was commissioned by President Lyndon Johnson, found that segregated housing greatly contributed to the volatile nature of large cities and “[d]iscrimination prevents access to many non-slum areas, particularly the suburbs, where good housing exists.”\textsuperscript{18} Within a year, Congress enacted the Civil Rights Act of 1968, which included Section 3604(c) of the FHA.\textsuperscript{19} Section 3604(c)
was intended to eliminate the special dangers posed by discriminatory housing advertisements, such as psychological harm and stigmatic effects.20

A plain reading of Section 3604(c) suggests that publishers are liable to anyone who creates or transmits a discriminatory housing advertisement.21 In other words, it makes publishing a discriminatory advertisement a distinct and actionable wrong separate from the creation of the advertisement.22 The “Mrs. Murphy exemption” is the only

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20 Id. § 3604(c). The term “dwelling” as used in Section 3604(c) means: “any building, structure, or portion thereof which is occupied as, or designed or intended for occupancy as, a residence by one or more families, and any vacant land which is offered for sale or lease for the construction or location thereon of any such building, structure, or portion thereof.” Id. § 3602(b).

21 Id. One writer stated that Section 3604(c) “works to prevent the substantial stigma, humiliation, and other emotional injuries caused by encountering discriminatory preferences or exclusions.” 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, 975–76 (2002). Another commentator recounted a psychological study conducted in the 1940s where African American school children were asked to choose between a black doll and a white doll in response to a series of questions. Kurth, supra note 16, at 814–15. African American school children across the country chose the white doll when asked which one they liked better and which one was prettier, but they chose the black doll when asked which one “looks bad.” Id. at 814. Section 3604(c) also promotes community diversity and helps encourage the dissemination of accurate information about the law. Chang, supra, at 974–76. Chang presents the following hypothetical situation:

For example, a housing consumer faced with numerous notices specifying “no kids” might conclude that discrimination against families with children is permissible in all cases. Such miseducation of the public further frustrates fair housing efforts, which rely heavily on private complainants who identify illegal housing practices. Unless housing consumers are aware of their rights, they will not be alert to violations of those rights.

Id. at 976–77.


The law expands the class of those held legally responsible for non-discrimination in housing to include not just housing providers, but those who publish their advertisements…[u]nder the FHA, the “actual wrongdoers” are not limited to those who “originate the allegedly unlawful content”—by writing and placing the ads—but also those who publish them.

Id.

22 James D. Shanahan, Note, Rethinking the Communications Decency Act: Eliminating Statutory Protections of Discriminatory Housing Advertisements on the Internet, 60 FED. COMM. L.J. 135, 136 (2007) (arguing that the FHA holds publishers responsible for third-party content). Shanahan explains:

The 1968 [FHA] protects the supply of housing for those who may otherwise be discriminated against and functions to reduce overall
Federal district and circuit courts have liberally applied Section 3604(c) to many media outlets in order to impose liability for publishing discriminatory housing advertisements. That said, a loophole allowing for discrimination in housing under the FHA and explicitly bars the exemption from applying to the advertising provision in Section 3604(c). The "Mrs. Murphy exemption" is a nickname for Section 3603(b), which provides that: nothing in section 3604 of this title (other than subsection (c)) shall apply to . . . rooms or units in dwellings containing living quarters occupied or intended to be occupied by no more than four families living independently of each other, if the owner actually maintains and occupies one of such living quarters as his residence. 42 U.S.C. § 3603(b)(2). The nickname was derived because the original draft did not leave room for people such as Mrs. Murphy, a woman who did not want to rent her boardinghouse to African Americans. James D. Walsh, Note, Reaching Mrs. Murphy: A Call for Repeal of the Mrs. Murphy Exemption to the Fair Housing Act, 34 HARV.C.R.-C.L. L. REV. 605, 607-08 (1999). Some commentators have referred to the Mrs. Murphy exemption as "a loophole big enough to drive a Mack truck full of roommate-seekers through." Klein & Doskow, supra note 21, at 334. See Ragin v. N.Y. Times, 923 F.2d 995, 999-1000 (2d Cir. 1991) (holding a newspaper liable under the FHA for publishing housing advertisements that depicted only whites as homeowners); United States v. Hunter, 459 F.2d 205, 211 (4th Cir. 1972) (stating "the congressional prohibition of discriminatory advertisements was intended to apply to newspapers as well as any other publishing medium"); Wheatley Heights Neighborhood Coal. v. Jenna Resales Co., 447 F. Supp. 838, 842 n.3 (E.D.N.Y. 1978) (noting that a listing service falls clearly within the scope of the FHA’s expansive liability); Saunders v. Gen. Serv. Corp., 659 F. Supp 1042, 1057–59 (E.D. Va. 1987) (holding that an advertising brochure violated Section 3604(c) because it did not contain an Equal Housing Opportunity logo nor feature an adequate number of African American models in its pictures). One commentator argues that Section 3604(c)’s expansive language has not deterred housing discrimination, which is evident from the blatant housing discrimination in the wake of Hurricane Katrina. Stephen Collins, Comment, Saving Fair Housing on the Internet: The Case for Amending the Communications Decency Act, 102 NW. U. L. REV. 1471, 1491 (2008). In a hearing before the House of Representatives concerning housing options for Hurricane Katrina victims, the executive director of the Greater New Orleans Fair Housing Action Center reported that he had received more than two hundred complaints about housing discrimination since the hurricane hit. Housing Options in the Aftermath of Hurricanes Katrina and Rita: Hearing Before the Subcomm. on Housing and Cnty. Opportunity of the House Comm. on Fin. Servs., 109th Cong. 70 (2006) (statement of David E. Garratt) available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_house_hearings&docid=f:26753.pdf (last visited Aug. 1, 2009). The director brought twenty-eight pages worth of discriminatory statements from websites, such as Katrinahousing.org, Katrinahome.com, DHRonline, and reliefwelcomewagon.com. Id. A sample of the discriminatory statements included: “I would love to house a single mom with one child, not racist, but white only’’; “Not to sound racist, but because we want to make things more understandable for our
broad application of Section 3604(c) is at odds with the immunity provided by the CDA because the FHA extends liability to intermediaries.25 To shed additional light on the issue, Section B explains the CDA and highlights some of the jurisdictional issues that may arise regarding its application in an Internet-related housing discrimination case.26

B. The Internet and the Communications Decency Act

The World Wide Web was developed for a society whose demand for information and technology allowed Internet usage to spread quickly into homes, offices, and classrooms via the personal computer.27 People

younger children, we would like to house white children”; and “Provider will provide room and board for $400 but prefers two white females.” Id. at 69–70. See also Jeffrey M. Sussman, Student Article, Cyberspace: An Emerging Safe Haven for Housing Discrimination, 19 LOY. CONSUMER L. REV. 194, 215 (2007) (arguing that the application of the CDA to FHA violations has made the Internet a sanctuary for those who wish to discriminate).

25  *Infra* Part II.D (discussing the Seventh and Ninth Circuit decisions in depth).

26  *Infra* Part II.B (providing an overview of the Internet’s development and special issues inherent to Internet-related cases).

27  JAN SAMORISKI, ISSUES IN CYBERSPACE 25 (2002). The number of Internet hosts went from about five million in 1995 to over seventy million in 2000. Id. at 25 fig. 2.3. The number of websites increased from less than one million to more than eighteen million between 1996 and 2000. Id. at 26, fig. 2.4. A 2004 study released by the National Telecommunications and Information Administration reported that fifty-four percent of American households had Internet access in the home. A NATION ONLINE: ENTERING THE BROADBAND AGE, http://www.ntia.doc.gov/reports/anol/NationOnlineBroadband04.pdf (last visited Oct. 24, 2009). According to the United States Census Bureau, more than one hundred and two million Americans had Internet access in their homes as of 2006, and an additional thirty-four million had Internet access at work. U.S. CENSUS BUREAU, INTERNET ACCESS AND USAGE AND ONLINE SERVICE USAGE: 2006, http://www.census.gov/compendia/statab/tables/08s1127.xls (last visited Aug. 1, 2009). Although the terms “Internet” and “World Wide Web” are often interchanged, this practice is erroneous because the World Wide Web is simply one method of accessing information on the Internet. Webopedia, The Difference Between the Internet and the World Wide Web, http://www.webopedia.com/DidYouKnow/Internet/2002/Web_vs_Internet.asp (last visited Oct. 24, 2009). The Internet’s humble beginnings can be traced back to 1961 when a Massachusetts Institute of Technology scientist began researching methods to connect computers through digital bursts of data known as packet technology. SAMORESKI, supra at 22. The Defense Advanced Research Projects Agency (“DARPA”) became involved with packet technology research in the mid-1960s in order to place the United States at the forefront of military scientific advancement. Id. See also FRED FEDLER ET. AL., REPORTING FOR THE MEDIA 407 (7th ed. 2001) (discussing early developments in digital technology, such as the first time several university computer sites were connected via the Internet). The modern Internet is built on Transmission Control Protocol/Internet Protocol (“TCP/IP”), a system that allows data to be broken into smaller pieces, transmitted by routers and servers, and reassembled at its final destination. JANINE S. HILLER & RONNIE COHEN, INTERNET LAW & POLICY 6 (2002). The Internet was created in part out of concern for the transmission of intelligence during a disaster, and the military found TCP/IP
are increasingly turning to the Internet as a source for news and information, which has resulted in a massive decrease in traditional print source circulation. The latest technological advances have allowed

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users to access the Internet on cellular phones, personal digital assistants, in vehicles, and even on airplanes.29 Although the Internet allows for the exchange of ideas and information with increasing speed and efficiency, its use poses serious questions for American lawmakers as to who should exercise jurisdiction over the information superhighway.30

Jurisdiction gives a court the power to exercise legal authority over persons, property, and issues, and is typically based on geographic and political boundaries.31 The United States uses a dual system of government that often raises questions on whether a particular issue is


30 See infra notes 31–39 and accompanying text (discussing the problems faced by courts attempting to exercise jurisdiction over Internet cases).

31 HILLER & COHEN, supra note 27, at 11. The term “jurisdiction” is a general term with several definitions: “(1) [a] government’s general power to exercise authority over all persons and things within its territory, (2) [a] court’s power to decide a case or issue a decree, (3) [a] geographic area within which political or judicial authority maybe exercised; (4) [a] political or judicial subdivision within such an area.” BLACK’S LAW DICTIONARY 393 (3d pocket ed. 2006). A court’s jurisdiction consists of both personal and subject matter elements, and the exercise of jurisdiction is improper if either element is not present. JOSEPH W. GLANNON, CIVIL PROCEDURE EXAMPLES & EXPLANATIONS 59 (5th ed. 2006). Bases for personal jurisdiction include physical presence, domicile, consent, and “minimum contacts.” Id. at 4. See Pennoyer v. Neff, 95 U.S. 714 (1877) (discussing the traditional modes of obtaining personal jurisdiction); see also Int’l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (defining the “minimum contacts” test as a defendant’s minimum contacts with a territory “such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’”) (internal citation omitted). Subject matter jurisdiction is “[j]urisdiction over the nature of the case and the type of relief sought; the extent to which a court can rule on the conduct of persons or the status of things.” BLACK’S LAW DICTIONARY, supra at 396. Federal courts are courts of limited jurisdiction, meaning a federal court has subject matter jurisdiction only if its power to hear a particular type of case is authorized by the U.S. Constitution, federal statute, or judicial decision. JACK H. FRIEDENTHAL ET. AL., CIVIL PROCEDURE CASES AND MATERIALS 245 (9th ed. 2005).
properly regulated by state or federal law. In the past, states have enacted laws attempting to directly regulate aspects of the Internet, including online pornography and alcohol distribution; however, the dormant commerce clause invalidated most of those statutes.

32 Christopher N. May & Allan Ides, Constitutional Law: National Power and Federalism 268 (4th ed. 2007). Under the preemption doctrine, state law that is inconsistent with the goals or text of valid federal law cannot stand. Id. The federal law may include a textual provision explicitly preemption state law. Id. See Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1144(a) (2006) (“[T]he provisions of this subchapter . . . shall supersede any and all State laws insofar as they . . . relate to any employee benefit described in section 1003(a) of this title and not exempt under section 1003(b).”); Federal Debt Collection Procedure Act, 28 U.S.C. § 3003(d) (2006) (“This chapter shall preemt State law to the extent such law is inconsistent with a provision of this chapter.”). When it is impossible to comply with both a state and federal law, the conflicting provisions of the state law invalidated. May & Ides, supra at 268; see Fla. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142 (1963) (holding that the test of whether a particular state statute can co-exist with a federal statute regulating the same subject is “whether both regulations can be enforced without impairing the federal superintendence of the field”). Finally, a state law may be preempted when Congress intends to give the federal government exclusive regulatory power over a particular subject matter, such as interstate commerce. May & Ides, supra at 269. When regulation of the Internet is at issue, the Commerce Clause typically answers these questions. Hiller & Cohen, supra note 27, at 11. The Commerce Clause provides that “Congress shall have Power . . . to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.” U.S. Const. art. I, § 8, cl. 3. Generally, the Commerce Clause allows Congress to regulate three main categories of commerce: the channels of interstate commerce; the instrumentalities of interstate commerce; and any activity that has a substantial effect on interstate commerce. Erwin Chemerinsky, Constitutional Law: Principles and Policies 366–67 (2005). The Dormant or Negative Commerce Clause, a purely judicial interpretation, prohibits states from passing legislation regulating activity within their boundaries that substantially hampers interstate commerce. Hiller & Cohen, supra note 27, at 12; see C&A Carbone, Inc. v. Town of Clarkston, 511 U.S. 383, 393–94 (1994) (invalidating a flow-control ordinance that set up a mandatory processing facility for solid waste because it discriminated against interstate commerce); Raymond Kassel v. Consol. Freightways Corp. of Del., 450 U.S. 662, 678–79 (invalidating an Iowa statute prohibiting the use of sixty-five-foot double trailers within its borders because it placed a substantial burden on out-of-state trucking companies). Nevertheless, not all members of the Supreme Court believe in the existence of the Dormant Commerce Clause. See Gen. Motors Corp. v. Tracy, 519 U.S. 278, 312 (1997) (Scalia, J., dissenting) (“The so-called ‘negative’ Commerce Clause is an unjustified judicial invention, not to be expanded beyond its existing domain . . . .”); United Haulers Ass’n v. Oneida-Herkimer Solid Waste Mgt. Auth., 127 S. Ct. 1786, 1799 (2007) (Thomas, J., concurring in the judgment) (“The negative Commerce Clause has no basis in the Constitution and has proved unworkable in practice.”).

33 Hiller & Cohen, supra note 27, at 12. 16. Hiller and Cohen noted that “[t]he plaintiffs challenging these state laws argue that the Internet, by its borderless nature, is inherently a form of interstate commerce, and a state’s attempt to regulate conduct on the Internet poses an undue, and therefore, unconstitutional burden on it.” Id. at 12. See generally S.E. Booksellers Ass’n v. McMaster, 371 F. Supp. 2d 773 (2005) (granting pre-enforcement enjoinder of a state statute that would impose criminal sanctions on those who disseminate harmful materials to minors via the Internet because the statute violated the First Amendment and the Commerce Clause); Granholm v. Heald, 544 U.S. 460 (2005)
Nevertheless, the states’ concerns regarding the Internet did not go unnoticed by Congress, which has since passed legislation addressing some controversial Internet issues.34 Even though the Commerce Clause can make it difficult for states to enact new legislation directly regulating an Internet user’s behavior, a state may still enforce its laws already on record against an Internet-based defendant.35

The Internet’s broad coverage creates controversy in the realm of personal jurisdiction.36 States that have not amended their long-arm (invalidating Michigan and New York statutes regulating alcohol distribution because they discriminated against interstate commerce). Despite the states’ argument that concern for the ease with which minors could obtain alcohol via the Internet was a compelling state interest, the Court found that the states did not adequately demonstrate the need for discrimination such that the laws could be upheld under the Dormant Commerce Clause. Granholm, 544 U.S. at 489, 493.

34 For example, the Unlawful Internet Gambling Enforcement Act of 2006 provides in part:

No person engaged in the business of betting or wagering may knowingly accept, in connection with the participation of another person in unlawful Internet gambling—(1) credit, or the proceeds of credit, extended to or on behalf of such other person (including credit extended through the use of a credit card); (2) an electronic fund transfer, or funds transmitted by or through a money transmitting business, or the proceeds of an electronic fund transfer or money transmitting service, from or on behalf of such other person; (3) any check, draft, or similar instrument which is drawn by or on behalf of such other person and is drawn on or payable at or through any financial institution; or (4) the proceeds of any other form of financial transaction, as the Secretary and the Board of Governors of the Federal Reserve System may jointly prescribe by regulation, which involves a financial institution as a payor [sic] or financial intermediary on behalf of or for the benefit of such other person.

31 U.S.C. § 5363 (2006). See also the Communications Decency Act, 47 U.S.C. § 230(c) (2006) (immunizing interactive computer services from liability for third party user content). The Twenty First Amendment provides, however, that “[t]he transportation or importation into any State, Territory or possession on the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.” U.S. CONST. amend. XXI, § 2. In Granholm, the Court addressed the states’ arguments under Section 2, holding that states have broad power to regulate some Internet activity under the provision, but that they must do so evenhandedly, treating in-state and out-of-state entities alike. 544 U.S. at 493.

35 Supra note 33 and accompanying text (discussing the Commerce Clause’s invalidation of state laws attempting to regulate Internet behavior); infra note 36 and accompanying text (providing an example of how one state amended its long-arm statute to reach Internet defendants for purposes of personal jurisdiction).

36 Hiller & Cohen, supra note 27, at 16. In response to Int’l Shoe Co. v. Washington, a case that set forth the “minimum contacts” test, many states passed long-arm statutes enumerating certain types of contact with the state that would give courts within the state personal jurisdiction over a defendant. Glannon, supra note 31, at 24–25; see Int’l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945); see, e.g., Ohio Rev. Code Ann. § 2307.382(A) (2004). The statute states:
statutes to include Internet contacts rely on the Supreme Court’s evolving standard in this relatively new area of personal jurisdiction jurisprudence.\textsuperscript{37} Although the Internet exposes the antiquity of the
Court’s jurisdictional doctrines, history shows that the law will eventually adapt accordingly, even if it is in a Johnny-come-lately fashion. Thus, a court can hear an Internet-related case on the merits only when the parties clear the personal and subject-matter jurisdiction hurdles. Next, this Note steps away from the jurisdictional issues courts may face regarding Internet-related cases and focuses on the CDA’s regulation of the Internet.

C. Development of the Communications Decency Act

In 1995, a New York trial court rendered a decision that compelled Congress to amend the Telecommunications Act of 1934. In Stratton Oakmont, Inc. v. Prodigy Services Co., the New York Supreme Court considered whether an Internet service provider could be held liable for

plurality opinion); cf. Zippo Mfg. v. Zippo Dot Com., Inc., 952 F. Supp. 1119, 1124 (W.D. Pa. 1997) (holding that a California-based defendant was subject to personal jurisdiction in Pennsylvania by virtue of its doing online business with Pennsylvania residents). In Zippo, the court found that the validity of personal jurisdiction “is directly proportionate to the nature and quality of commercial activity that an entity conducts over the Internet.” Zippo, 952 F. Supp. at 1124.

Hiller & Cohen, supra note 27, at 21. Hiller and Cohen compare the Internet to the advent of the assembly line and mass production of the automobile, arguing that “[w]hile the world of physical transactions may be like the stagecoach, and thus many of the rules developed to govern it may not be applicable to the Internet, the underlying legal principles will be applied to the electronic environment as they were to the automobile.” Id. at 22.

See infra Part II.C (discussing the development and application of the CDA). This Note does not further address jurisdictional issues related to the Internet. Part II.B.2 provides a cursory understanding of some of the issues a court may address before an action involving the Internet may be heard on the merits. This Note’s primary focus is on the substance of the CDA, its controversial applications, and ways in which it may be improved.

Kurth, supra note 16, at 821 (arguing that the CDA was to effectively overrule the decision in Stratton Oakmont Inc. v. Prodigy Servs. Co.). See Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (modernizing the Telecommunications Act of 1934 to incorporate Internet transmissions). See also Stratton Oakmont, Inc. v. Prodigy Serv. Co., 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995). Stratton Oakmont, an investment-banking firm, commenced a libel action against Prodigy, an Internet service provider, resulting from several postings on a user message board. Id. at *1. Stratton Oakmont’s president claimed the firm was defamed on a message board owned and operated by Prodigy. Id. “Money Talk,” the online bulletin board on which the allegedly defamatory statements appeared, was “the leading and most widely read financial computer bulletin board in the United States [in 1994], where members [could] post statements regarding stocks, investments, and other financial matters.” Id. Among the statements were claims that Stratton Oakmont was a “cult of brokers who either lie for a living or get fired” and that Stratton Oakmont’s President had committed criminal and fraudulent acts in the public sale of stock. Id.
the content of its online message board. Ultimately, the \textit{Stratton Oakmont} court found that the Internet service provider had published the defamatory statements and reasoned that its “conscious choice, to gain the benefits of editorial control, had opened it up to a greater liability than . . . other computer networks that make no such choice.” Some commentators interpret \textit{Stratton Oakmont} as imposing publisher liability in defamation actions on any online service that exercises any degree of control over the content of its user forums. In response to the \textit{Stratton Oakmont} decision, Congress passed the Telecommunications Act of 1996, which was designed to “promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of

\footnotesize{\textsuperscript{42} \textit{Stratton Oakmont}, 1995 WL 323710, at *3. In order for Stratton Oakmont to prevail, it had to prove that Prodigy published the allegedly defamatory statements. \textit{Id.} Generally, a defendant who repeats or republishes libel is subject to the same liability as if he had published the original. \textit{Id.} (citing Cianci v. New Times Pub. Co., 639 F.2d 54, 61 (1980)). Distributors of communication, however, are considered passive conduits of defamatory information and will not be held liable for its content unless they know or have reason to know of the defamation. \textit{Id.} Libel is “the publication of defamatory matter by written or printed words, by its embodiment in physical form, or by any other form of communication that has the potentially harmful qualities characteristic of written or printed words.” \textit{Restatement (Second) of Torts} § 568 (1977). “Publication” is a legal term of art meaning that the harmful content is communicated by the defendant to a third party. \textit{Edward J. Ki enko, Torts in a Nutshell} 442 (4th ed. 2005). Four years after \textit{Stratton Oakmont} was decided, the company’s chairman and president both pleaded guilty to ten counts of money laundering and securities fraud. Edward Wyatt, \textit{Stratton Oakmont Executives Admit Stock Manipulation}, \textit{N.Y. Times}, Sept. 24, 1999, available at \url{http://query.nytimes.com/gst/fullpage.html?res=9C06E6DC123FF937A1575AC0A96F958260} (last visited Aug. 1, 2009). The two men had participated in a seven-year scheme manipulating the stocks of thirty-four companies and defrauding investors of millions of dollars. \textit{Id.} \textsuperscript{43} 1995 WL 323710, at *5. The New York Supreme Court found that Prodigy had held itself out as controlling the content of its message boards by utilizing an automated filtering system and by implementing guidelines for users and Board Leaders to follow. \textit{Id.} at *4. The court noted that Prodigy’s system “may have a chilling effect on freedom of communication in Cyberspace, and it appears that this chilling effect is exactly what Prodigy wants, but for the legal liability that attaches to such censorship.” \textit{Id.} at *5. \textsuperscript{44} See \textit{generally} Douglas B. Luftman, Note, \textit{Defamation Liability for On-line Services: The Sky is Not Falling}, 65 GEO. WASH. L. REV. 1071, 1071 (1997) (describing the post-\textit{Stratton Oakmont} sentiment as a “‘the sky is falling’ reaction” that would have amused Chicken Little). Luftman argues that if online services listen to “the sky is falling” advice and relinquish editorial control of their user forums, it will result in a self-fulfilling prophecy of stagnation from Internet users’ dissatisfaction with chaotic interactive environments. \textit{Id.} Also, Representative Cox stated that the New York court’s ruling had sent a message to interactive computer services that they would be held liable for defamatory postings if they exercised control over the content posted by third party users. See \textit{141 Cong. Rec. H8471} (daily ed. Aug. 4, 1995) (statement of Rep. Goodlatte).}
new telecommunications technologies.\textsuperscript{45} The CDA is a section within the Telecommunications Act of 1996 that supports development of the Internet, encourages a free market for the Internet, and promotes the control of offensive content by interactive computer services.\textsuperscript{46}

Prior to the enactment of the CDA, Congress considered two similar communications bills—the Exon-Coats bill in the Senate and the Cox-Wyden bill in the House of Representatives.\textsuperscript{47} The Exon-Coats bill won

\textsuperscript{45} Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996). In an attempt to modernize the outdated Telecommunications Act of 1934, the updated version: [F]undamentally restructures local telephone markets, ending the monopolies that states historically granted to local exchange carriers and subjecting incumbent local exchange carriers to a host of duties intended to facilitate market entry, including the obligation to share their networks with competitors . . . .

Specifically, telecommunications carriers have the duty to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers; in addition, such carriers are not to install network features, functions, or capabilities that do not comply with guidelines and standards established in various sections of the Act regarding access by persons with disabilities and coordination for interconnectivity.


\textsuperscript{46} See 47 U.S.C. § 230 (2006). Congress listed several policy reasons within the statute for the inclusion of the CDA:

(1) to promote the continued development of the Internet and other interactive computer services and other interactive media; (2) 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; (3) to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services; (4) to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material; and (5) to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.

\textsuperscript{47} Kurth, supra note 16, at 821; infra notes 47–51 and accompanying text (discussing the Exon-Coats and Cox-Wyden bills). Senator James Exon became a champion for children against the dangers of Internet predators and pornography in 1994 after watching a Dateline special about Internet pedophiles. Kurth, supra note 16, at 821. In addition to the Dateline special, the infamous Rimm Study of Internet pornography suggested that eighty-three percent of the images available on the Internet were pornographic. Robert Cannon, The Legislative History of Senator Exon’s Communications Decency Act: Regulating Barbarians on the Information Superhighway, 49 FED. COMM. L.J. 51, 53 (2006). The phenomenon piqued
the Senate’s approval in June 1995 despite strong opposition from those who wished to abstain from Internet regulation and those who believed the proposed amendment was riddled with escape hatches for pornographers.48

48 Cannon, supra note 47, at 66. On April 7, 1995, Senator Leahy proposed an alternative bill that called for a study to be conducted by the Department of Justice and the Department of Commerce: See S. 714, 104th Cong. (1995). Upon introduction, Senator Leahy noted: Many of us are, thus, justifiably concerned about the accessibility of obscene and indecent materials on-line and the ability of parents to monitor and control the materials to which their children are exposed. But government regulation of the content of all computer and telephone communications, even private communications, in violation of the First Amendment is not the answer—it is merely a knee-jerk response.
Protecting children from accessing sexually explicit material on the Internet was one of the motivating factors behind the Cox-Wyden bill in the House, but the bill was also proposed in opposition to the regulatory scheme created by the Senate’s Exon-Coats bill and the *Stratton Oakmont* decision.49 The Cox-Wyden bill would have overruled *Stratton Oakmont* and protected “interactive computer services” against liability resulting from third-party Internet content.50 Despite the rejection, the Cox-Wyden bill was included as Section 230 of the CDA; however, one

49 Chang, *supra* note 20, at 988–91 (listing the motivations behind the Cox-Wyden bill). Specifically, members of the House were aware of the public’s negative response to the recently passed Senate bill and believed it might place unconstitutional restrictions on speech. *Id.* at 989–90. Representative Cox argued that “[t]he Cox-Wyden amendment removes the liability of providers such as Prodigy who currently make a good faith effort to edit the smut.” 141 *CONG. REC. H8471* (daily ed. Aug. 4, 1995) (statement of Rep. Cox). See Michelle V. Rafter, *On-line Protestors Rally Against Decency Act*, St. Louis Post-Dispatch, Dec. 20, 1995, at 7C, available at 1995 WLNR 737201. “Close to 9,000 people had notified the lobby group that they had contacted their congressional representatives to protest Internet censorship, and new email messages were rolling in at the rate of a thousand every 10 minutes.” *Id.* See also *supra* note 43 (detailing the New York trial court’s approach in *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995)).

50 Kurth, *supra* note 16, at 825 (arguing that in overruling *Stratton Oakmont*, Congress intended to promote self-regulation on the Internet). “Interactive computer service” is defined within the text of the CDA as “any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.” 47 U.S.C. § 230(f)(2) (2006). At the heart of the provision was the notion that those interactive computer services that made good-faith efforts to screen their content should not be liable if a piece of offensive information evades the filters. Kurth, *supra* note 16, at 824. The House bill forwent assigning regulatory control to the FCC in favor of utilizing a system that would encourage interactive computer services and individuals to screen potentially harmful content. Chang, *supra* note 20, at 990 (discussing the House’s view that the inclusion of the FCC would be less effective and efficient than allowing self-regulation on the Internet). Representative Cox stated that “[i]f we regulate the Internet at the FCC, that will freeze or at least slow down technology. It will threaten the future of the Internet. That is why it is so important that we not have a Federal computer commission do that.” 141 *CONG. REC. H8471* (daily ed. Aug. 4, 1995) (statement of Rep. Cox). The House passed the Cox-Wyden bill by a majority vote of 402–04 in what appeared to be a landslide victory for those who expressed anti–regulatory sentiment regarding the Internet. CTR. FOR DEMOCRACY & TECH., *POLICY POST*, (Aug. 4, 1995), available at http://www.cdt.org/publications/pp250804.html (last visited Aug. 24, 2009). The “Policy Post” newsletter claimed that the Cox-Wyden bill:

[prohibited] the FCC from imposing content regulations on the Internet or other interactive media[,] [removed] disincentives for online service providers to exercise editorial control over their networks and to provide blocking and screening technologies to their users[,] [and sought] to create a uniform national policy prohibiting content regulations in interactive media.

*Id.*
commentator describes its inclusion as a hollow victory because it has no effect on the provisions in the CDA that came from the Exon-Coats bill.\footnote{Cannon, \textit{supra} note 47, at 68. Cannon called the Cox-Wyden Amendment “far from a victory,” noting that the amendment “specifically and curiously stated that ‘nothing in this section shall be construed to impair the enforcement of section 223 of Title 47, the very statute that [the Exon-Coats bill] sought to amend. As a result, the House and Senate amendments were described as fitting together ‘like a hand in a glove.’” \textit{Id}. (quoting 141 Cong. Rec. H8468–69 (daily ed. Aug. 4, 1995)).} Specifically, Section 230(c) contains a Good Samaritan provision that is particularly important for the purposes of this Note.\footnote{See 47 U.S.C. § 230(c) (2006). Section 230(c)’s grant of immunity directly conflicts with the expansive liability contained in Section 3604(c) of the FHA. \textit{See id}. The provision reads:}

\footnote{See \textit{supra} note 50 (defining “interactive computer service”). See generally infra Parts III–IV (discussing the CDA’s conflict with the FHA and proposing a revision to the text of Section 230(c)(1)).}

\textit{(c) Protection for “Good Samaritan” blocking and screening of offensive material}

\begin{enumerate}
\item \textbf{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.

\item \textbf{Civil liability:}

No provider or user of an interactive computer service shall be held liable on account of—

\begin{enumerate}
\item 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
\item 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).
\end{enumerate}
\end{enumerate}

\textit{Id}. The statute defines “information content provider” as “any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.” \textit{Id}. § 230(f)(3). \textit{See also supra} note 50 (defining “interactive computer service”). \textit{See generally infra} Parts III–IV (discussing the CDA’s conflict with the FHA and proposing a revision to the text of Section 230(c)(1)).

\footnote{Chang, \textit{supra} note 20, at 984 (stating that the Good Samaritan provision is unclear as to how “publisher” should be defined); 47 U.S.C. § 230(c). At common law, whether a person was a “publisher” for purposes of imposing defamation liability hinged on the “extent to which he participates with an author . . . of the defamatory statement in its publication.” \textit{Prosser and Keeton on Torts}, § 113 (5th ed. 1984). Actors who are more intimately involved in the process may be held liable “because they have the opportunity to know the content of the material being published.” \textit{Id}. §113. In contrast, “one who only delivers or transmits defamatory matter published by a third person is subject to liability if, but only if, he knows or had reason to know of its defamatory character.” \textit{Restatement (Second) of Torts} § 581 (1977). The ordinary meaning of publisher is “[o]ne who publishes or makes something public; one who declares, announces or proclaims publicly . . . [o]ne who puts
Congress intended the Good Samaritan provision to apply beyond defamation cases, and, if so, whether the list of exceptions is exhaustive. Generally, the courts have interpreted the Good Samaritan

anything into circulation.” OXFORD ENGLISH DICTIONARY 785–86 (2d ed. 1989); cf. Zeran v. Am. Online, Inc., 958 F. Supp. 1124 (E.D. Va. 1997). The court found that “a publisher is not merely one who intentionally communicates defamatory information. Instead, the law treats as a publisher or speaker one who fails to take reasonable steps to remove defamatory statements from property under her control.” Zeran, 958 F. Supp. at 1133. Section 230(e) provides several exceptions where the Good Samaritan provision does not apply:

(e) Effect on other laws
   (1) No effect on criminal law
      Nothing in this section shall be construed to impair the enforcement of section 223 or 231 of this title, chapter 71 (relating to obscenity) or 110 (relating to sexual exploitation of children) of title 18, or any other Federal criminal statute.
   (2) No effect on intellectual property law
      Nothing in this section shall be construed to limit or expand any law pertaining to intellectual property.
   (3) State law
      Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section. No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.
   (4) No effect on communications privacy law
      Nothing in this section shall be construed to limit the application of the Electronic Communications Privacy Act of 1986 or any of the amendments made by such Act, or any similar State law.

47 U.S.C. § 230(e). See Chang, supra note 20, at 991. “[T]he House also recognized that the application of traditional common law defamation principles in the context of the Internet might serve as an obstacle to harnessing the cooperation of the private sector.” Id. But see Fair Housing Council of San Fernando Valley v. Roommate.com, LLC, No. CV 03-09386PA(RZX), 2004 WL 3799488 (C.D. Cal. Sept. 30, 2004), rev’d, 521 F.3d 1157 (9th Cir. 2008). The court relied on the canon of statutory construction expressio unius est exclusio alterius, which means “[w]here Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent.” Id. at 5. According to Sutherland:

As the maxim is applied to statutory interpretation, where a form of conduct, the manner of its performance and operation, and the persons and things to which it refers are designated, there is an inference that all omissions should be understood as exclusions. The maxim does not apply to every statutory listing or grouping. It has force only when the items expressed are members of an associated group or series, justifying the inference that the items not mentioned were excluded by deliberate choice.

provision as providing near-absolute immunity for third-party FHA violations to interactive computer services.\textsuperscript{55}

Section 230’s first major challenge came in \textit{Zeran v. America Online, Inc.}\textsuperscript{56} In this seminal case, the Fourth Circuit Court of Appeals found that Section 230 provided immunity to an interactive computer service

\begin{itemize}
  \item \textsuperscript{55} Infra notes 56–71 and accompanying text (discussing several cases where courts have found interactive computer services to be immune from publisher liability through the CDA for third-party tort and statutory infractions). Section 223, a series of provisions originally proposed in the Exon-Coats bill, was the first portion of the CDA to be interpreted by the Supreme Court of the United States. See \textit{Reno v. ACLU, 521 U.S. 844} (1997). In \textit{Reno}, immediately after President Bill Clinton signed the CDA, twenty plaintiffs challenged the constitutionality of CDA provisions designed to protect children from “indecent communications.” \textit{Id.} at 861. In a facial challenge to the new statute’s constitutional validity, the Court unanimously held that two provisions of Section 223 were unconstitutionally vague and overbroad, finding that:

  \begin{quote}
  [G]iven the vague contours of the coverage of the statute, it unquestionably silences some speakers whose messages would be entitled to constitutional protection. That danger provides further reason for insisting that the statute not be overly broad. The CDA’s burden on protected speech cannot be justified if it could be avoided by a more carefully drafted statute.
  \end{quote}

\textit{Id.} at 874. Congress addressed the legislation’s flaws in its introduction of the Child Online Protection Act, but a similar constitutional challenge was brought within less than twenty-four hours of President Bill Clinton’s signing of the bill. Sheryl Rakestraw, \textit{Current Event}, 10 AM. U. J. GENDER SOC. POL’Y & L. 521, 521 n.3 (2002).

\textit{Id.} at 1135.

\textsuperscript{56} 958 F. Supp. 1124 (E.D. Va. 1997), a’ffd, 129 F.3d 327 (4th Cir. 1997). Shortly after the Oklahoma City bombing in 1995, an anonymous America Online (AOL) member defamed Zeran on an AOL message board. \textit{Id.} at 1127. The poster listed Ken Zeran’s name and telephone number on a phony advertisement for shirts that carried messages such as “Visit Oklahoma . . . It’s a BLAST!!!,” “Putting the kids to bed . . . Oklahoma 1995,” and “McVeigh for President 1996.” \textit{Id.} Zeran received a “flood of abusive telephone calls,” estimating about one every two minutes. \textit{Id.} at 1128. Similar false advertisements appeared on the message boards even after Zeran notified AOL, and the phone calls did not subside until more than three weeks later. \textit{Id.} Zeran brought a negligence action against AOL for its failure to remove the allegedly defamatory postings from its message boards, but AOL argued that Zeran’s action was preempted by the Good Samaritan provision. \textit{Id.} at 1129. Zeran’s theory was derived from \textit{Cubby, Inc. v. CompuServe, Inc.}, 776 F. Supp. 135 (S.D.N.Y. 1991). \textit{Id.} at 1128–29. See \textit{Cubby}, 776 F. Supp. at 141 (holding that information distributors cannot be held liable unless they knew or had reason to know that the information was defamatory). The District Court for the Eastern District of Virginia also considered the three instances under which preemption is proper: where Congress expresses an intent to displace state law, where Congress implies such an intent, or where state law conflicts with federal law. \textit{Zeran}, 958 F. Supp. at 1129 n.9 (citing \textit{English v. Gen. Elec. Co.}, 496 U.S. 72, 78 (1990)). The court reasoned that Zeran had miscategorized distributor liability as distinct and separate from publisher liability when it was in fact “a species or type of liability for publishing defamatory material.” \textit{Id.} at 1133. The court agreed with AOL, holding that “although the CDA does not preempt all state law causes of action concerning interactive computer services, it does preempt Zeran’s claim. This is so because his ‘negligence’ cause of action conflicts with both the express language and the purposes of the CDA.” \textit{Id.} at 1135.
from a state law claim that treated the interactive computer service as a publisher.57

In June 2003, the Ninth Circuit Court of Appeals considered the meaning of “provided” for the purposes of Section 230(c)(1).58 In Batzel v. Smith, the Ninth Circuit reasoned that “provided” referred only to “third-party information provided for use on the Internet or another interactive computer service” and remanded the case to determine if the information at issue had been “provided” under Section 230(c)(1).59

57 Zeran, 129 F.3d at 330-31. The Fourth Circuit found the congressional intent “not difficult to discern.” Id. The court specifically noted that “[t]he imposition of tort liability on service providers for the communications of others represented, for Congress, simply another form of intrusive government regulation of speech. Section 230 was enacted, in part, to maintain the robust nature of Internet communication and, accordingly, to keep government interference in the medium to a minimum.” Id. The plaintiff continued to rely on a theory of distributor liability, but the Fourth Circuit affirmed the decision of the trial court reasoning that computer-based companies may be liable each time they are notified that a potentially defamatory statement is posted on their message boards. Id. at 333. The court reasoned that:

Each notification would require a careful yet rapid investigation of the circumstances surrounding the posted information, a legal judgment concerning the information’s defamatory character, and an on-the-spot editorial decision whether to risk liability by allowing the continued publication of that information. Although this might be feasible for the traditional print publisher, the sheer number of postings on interactive computer services would create an impossible burden in the Internet context.

Id.

58 See Batzel v. Smith, 333 F.3d 1018, 1019 (9th Cir. 2003). In Batzel, a handyman who performed housework for an attorney sent an email to the Museum Security Network (“MSN”) alleging that the attorney said she was a descendant of a high ranking Nazi official and suggesting that the artwork in the attorney’s home may have been stolen from Jewish people during World War II. Id. at 1020-21. The sole operator of MSN sent the message to the MSN subscribers via listserv (an automated emailing list). Id. at 1021. The listserv mailings “[were] read by hundreds of museum security officials, insurance investigators, and law enforcement personnel around the world, who use the information in the [MSN] posting to track down stolen art.” Id. at 1022. The attorney filed a defamation action against several parties, including MSN, claiming that the handyman fabricated the allegations because she refused to show his screenplays to her Hollywood contacts and that she had lost several prominent clients because of the MSN listserv mailing. Id. The trial court denied MSN’s motion to strike under California’s anti-SLAPP (Strategic Lawsuits Against Public Participation) statute (CAL. CIV. PROC. CODE § 425.16) and his motion to dismiss for lack of personal jurisdiction. Id. at 1023.

59 333 F.3d at 1033. The handyman claimed that he never thought his e-mail would be posted on an international message board and that he never would have sent the e-mail had he known that it would be used in such a manner. Id. at 1032. The Ninth Circuit provided the following example to illustrate its rationale:

So, if, for example, an individual who happens to operate a website receives a defamatory “snail mail” letter from an old friend, the website operator cannot be said to have been “provided” the information in his capacity as a website service. Section 230(c)(1)
August 2003, the Ninth Circuit Court of Appeals found that Section 230 provided immunity for an online match-making service when a user posted a false profile depicting a celebrity.\(^{60}\) In *Carafano v. Metrosplash.com, Inc.*, the Ninth Circuit narrowed its interpretation of “information content provider” and concluded the interactive computer service in question did not play a pertinent part in “creating, developing, or ‘transforming’ the relevant information.”\(^{61}\)

In the same year, a U.S. District Court in Virginia expanded the scope of Section 230(c) to bar a claim brought under Title II of the Civil Rights Act of 1964.\(^{62}\) Although the plaintiff in *Noah v. AOL Time Warner*,

\[\text{supplies immunity for only individuals or entities acting as} \]
\[\text{“provider[s]” or “user[s]” of an “interactive computer service,” and} \]
\[\text{therefore does not apply when it is not “provided” to such persons in} \]
\[\text{their roles as providers or users.} \]

\(^{60}\) *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1125 (9th Cir. 2003). Christine Carafano was a popular actress, starring in television shows, such as “Star Trek: Deep Space Nine” and “General Hospital.” *Id.* at 1121. She began receiving threatening and sexually explicit phone calls in response to a Matchmaker.com (owned and operated by Metrosplash) personal profile designed by an unknown person in Berlin, Germany. *Id.* Carafano filed a suit against Metrosplash alleging defamation, negligence, invasion of privacy, and misappropriation of the right of publicity. *Id.* at 1122.

\(^{61}\) *Id.* at 1125. Carafano argued that Metrosplash should be considered an information content provider because it asked a series of questions and provided a drop down menu for “pre-prepared responses,” but the court found that even if Metrosplash could be considered an information content provider, Section 230(c) would still bar the claim “unless Matchmaker created or developed the particular information at issue.” *Id.* The court reasoned that Carafano’s contact information was “transmitted unaltered to profile viewers” and that the sexually provocative information in the essay section did not bare “more than a tenuous relationship to the actual questions asked.” *Id.* See also supra note 52 (providing the CDA’s definition of “interactive content provider”); *supra* note 50 (providing the CDA’s definition of “interactive computer service”).


(a) Equal access. All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin.

(b) Establishments affecting interstate commerce or supported in their activities by State action as places of public accommodation; lodgings; facilities principally engaged in selling food for consumption on the
Inc. argued that the statute treated the interactive computer service as “the owner of a place of public accommodation,” the court found that the plaintiff was attempting to treat the interactive computer service as a publisher in violation of Section 230(c).

Similarly, in 2006, a U.S. District Court in Pennsylvania broadened the Good Samaritan provision’s grant of immunity to include protection

Id. § 2000a(a)–(b). Noah, a Muslim, participated in faith-based chat rooms and on several occasions was barraged with vulgar, religiously discriminatory remarks written by other AOL members. *Noah*, 261 F. Supp. 2d at 535. At the time of the action, AOL had thirty million subscribers and provided a variety of online services, including real time chat rooms where subscribers could chat via instant text messages. *Id.* at 534. For example, Noah alleged that “[o]n July 18, 1999 ‘SARGON I’ wrote ‘Qura’n lies about everything—a Satan made verses of darkness and destruction’, ‘Mohammed was no shit, only a killer, thief, a liar and a adulterer’, and ‘BYE STUPID MUSLIMS . . . ALL GO TO HELL.” *Id.* at 535. Even though Noah reported every incident to AOL, he claimed that AOL did nothing to eliminate the harassment in the Muslim chat rooms. *Id.* Noah brought a class action lawsuits against AOL under the Civil Rights Act of 1964 resulting from AOL’s failure to enforce the community guidelines within its member agreement. *Id.* The member agreement was a “legal document that details [a member’s] rights and obligations as an AOL member.” *Id.* The pertinent community guidelines provided:

You will be considered in violation of the Terms of Service if you (or others using your account) do any of the following: . . . [h]arass, threaten, embarrass, or do anything else to another member that is unwanted. This means: . . . don’t attack their race, heritage, etc. . . . Transmit or facilitate distribution of content that is harmful, abusive, racially or ethnically offensive, vulgar, sexually explicit, or in a reasonable person’s view, objectionable . . . . Disrupt the flow of chat in chat rooms with vulgar language, abusiveness . . . .

*Id.* at 536. The member agreement stated that AOL could take action, including termination of accounts, against those who violated the terms of service. *Id.*

*Id.* 261 F. Supp. 2d at 538. The district court reasoned that “[a]n examination of the injury claimed by plaintiff and the remedy he seeks clearly indicates that his Title II claim seeks to ‘place’ AOL ‘in a publisher’s role.” *Id.* Noah also contended that Section 230(c) did not apply to actions brought under federal civil rights statutes, but the court found that Section 230(c)’s “expansive language grants a broad immunity limited only by specific statutory exclusions, none of which is applicable here.” *Id.* at 539. The court added:

Nor can it be plausibly argued that § 230 is limited to immunity from state law claims for negligence or defamation. Such a limitation is flatly contradicted by § 230’s exclusion of some specific federal claims. Those exclusions would be superfluous were § 230 immunity applicable only to certain state claims. Moreover, the exclusion of federal *criminal* claims, but not federal civil rights claims, clearly indicates, under the canon of *expressio unius est exclusio alterius*, that Congress did not intend to place federal civil rights claims outside the scope of § 230 immunity.

*Id.* (emphasis added).
from invasion of privacy and negligence claims. The *Parker* court found that Section 230 barred the plaintiff’s claims because the interactive computer service was not an information content provider as defined by the CDA. Nevertheless, nearly all courts that have addressed the application of the Good Samaritan provision have followed *Zeran*’s holding that the CDA provides immunity to interactive computer services from claims that treat the computer service as a publisher of third-party information.

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64 Parker v. Google, Inc., 422 F. Supp. 2d 492, 500 (E.D. Pa. 2006). Roy Parker was an author who claimed that Google should be held liable for defamation and invasion of privacy because it archived false statements about him posted by Google group users, provided a search function that returned a list of websites containing his name, and continued to cache such websites after being notified that they were defamatory. See Google, http://www.google.com (last visited Oct. 24, 2009). In its intricate search process, Google makes a copy of each website and stores it in a storage tool called a cache and provides a link to the cache when listing search results for its users. *Parker*, 422 F. Supp. 2d at 496. Google also operates a multitude of user bulletin boards. See Google Groups, http://groups.google.com (last visited Oct. 24, 2009). Specifically, Parker claimed that “the act of Google users putting in a search query of his name [led] Google to produce a list of websites in which his name [appeared], thus creating what he [called] ‘an unauthorized biography . . . that [was] an invasion of his right to privacy.’” *Parker*, 422 F. Supp. 2d at 500 (internal citation omitted).

65 422 F. Supp. 2d at 500. The court refrained from examining the elements of Parker’s claim and noted that “each claim revolves around the tortious acts of a third party for which Parker holds Google accountable by virtue of its archived USENET system, its website search tool, and its caching system.” *Id.* Relying on *Carafano*, the court examined the intent behind Section § 230, concluding that “Congress granted most Internet services immunity from liability for publishing false or defamatory material so long as the information was provided by another party. *Id.* As a result, Internet publishers are treated differently from corresponding publishers in print, television and radio.” *Id.* at 501 (citation omitted). The court reasoned that Google was not an information content provider because “[i]n each instance raised by Plaintiff’s tort claims, Google either archived, cached, or simply provided access to content that was created by a third party.” *Id.*

In contrast, a few courts have rejected the rationale used in Zeran. Specifically, the Seventh Circuit Court of Appeals questioned Zeran’s validity after a trial court held the Good Samaritan provision barred a plaintiff’s Electronic Communications Privacy Act claim. The Seventh Circuit Court of Appeals questioned Zeran’s validity after a trial court held the Good Samaritan provision barred a plaintiff’s Electronic Communications Privacy Act claim. The Seventh Circuit Court of Appeals questioned Zeran’s validity after a trial court held the Good Samaritan provision barred a plaintiff’s Electronic Communications Privacy Act claim. The Seventh Circuit Court of Appeals questioned Zeran’s validity after a trial court held the Good Samaritan provision barred a plaintiff’s Electronic Communications Privacy Act claim. The Seventh

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67 See MCW, Inc. v. Badbusinessbureau.com, LLC, No. Civ.A.3:02-CV-2727-G, 2004 WL 833595, *7–*8 (N.D. Tex. Apr. 19, 2004). MCW filed a complaint against Badbusinessbureau for trademark infringement and violations of the Lanham Act. Id. at *1. Badbusinessbureau sought a Rule 12(b)(6) dismissal, citing Section 230(c) of the CDA for support. Id. at *7. The Texas court held that “Section 230(c) immunity is not so broad as to extend to an interactive computer service that goes beyond the traditional publisher’s role and takes an active role in creating or developing the content at issue.” Id. at *8. See also Doe v. GTE Corp., 347 F.3d 655, 659–60 (7th Cir. 2003) (questioning the rationale in Zeran because the application of the Good Samaritan provision is inconsistent with its title); cf. Carafano v. Metrosplash.com, Inc., 339 F.3d 1119, 1124 (9th Cir. 2003) (holding that an interactive service provider receives full immunity under Section 230(c) so long as a third party provides the content).

68 GTE Corp., 347 F.3d at 659–70 (suggesting that the text of Section 230 is illogical when read in conjunction with its title). The Electronic Communications Privacy Act states in part that:

(1) Except as otherwise specifically provided in this chapter, any person who intentionally—

(a) sends through the mail, or sends or carries in interstate or foreign commerce, any electronic, mechanical, or other device, knowing or having reason to know that the design of such device renders it primarily useful for the purpose of the surreptitious interception of wire, oral, or electronic communications;

(b) manufactures, assembles, possesses, or sells any electronic, mechanical, or other device, knowing or having reason to know that the design of such device renders it primarily useful for the purpose of the surreptitious interception of wire, oral, or electronic communications, and that such device or any component thereof has been or will be sent through the mail or transported in interstate or foreign commerce; or

(c) places in any newspaper, magazine, handbill, or other publication or disseminates by electronic means any advertisement of—

(i) any electronic, mechanical, or other device knowing the content of the advertisement and knowing or having reason to know that the design of such device renders it primarily useful for the purpose of the surreptitious interception of wire, oral, or electronic communications; or

(ii) any other electronic, mechanical, or other device, where such advertisement promotes the use of such device, for the purpose of the surreptitious interception of wire, oral, or electronic communications, knowing the content of the advertisement and knowing or having reason to know that such advertisement will be sent through the mail or transported in interstate or foreign commerce, shall be fined under this title or imprisoned not more than five years, or both.

18 U.S.C. § 2512(1) (2006). In GTE Corp., a person installed secret cameras in college locker rooms, bathrooms, and showers, and several college athletes brought a claim against GTE
Circuit contested the policy implications of Section 230’s grant of immunity to interactive computer services regardless of whether they made an effort to screen offensive content.69 The Seventh Circuit noted that “a statute’s caption must yield to its text when the two conflict” and suggested readings that allowed for liability in some situations.70

While district and circuit courts had interpreted the Good Samaritan provision as it related to tort-based actions, the Civil Rights Act of 1964, and the Electronic Communications Privacy Act, the judiciary would soon be faced with yet another collision on the information superhighway—a conflict between the protection provided by the CDA’s Good Samaritan provision and the expansive liability imposed by the advertising provision of the FHA.71

when they discovered the footage on several websites hosted by GTE. 347 F.3d at 656–57. GTE claimed that Section 230(c) barred the students’ claim and sought a Rule 12(b)(6) dismissal. Id. at 657.

69 GTE Corp., 347 F.3d at 657 (holding that an interactive service provider was not liable to the college athletes for the display of voyeur photos taken and posted by a user on its website). The Seventh Circuit addressed Zeran’s validity in dicta, reasoning that “if [Zeran’s] reading is sound, then § 230(c) as a whole makes ISPs indifferent to the content of information they host or transmit: whether they do (subsection (c)(2)) or do not (subsection (c)(1)) take precautions, there is no liability under either state or federal law?” Id. The court further questioned Zeran, noting that:

As precautions are costly, not only in direct outlay but also in lost revenue from the filtered customers, ISPs may be expected to take the do–nothing option and enjoy immunity under § 230(c)(1). Yet § 230(c)—which is, recall, part of the “Communications Decency Act”—bears the title “Protection for ‘Good Samaritan’ blocking and screening of offensive material”, hardly an apt description if its principal effect is to induce ISPs to do nothing about the distribution of indecent and offensive materials via their services. Why should a law designed to eliminate ISPs’ liability to the creators of offensive material end up defeating claims by the victims of tortious or criminal conduct?

Id.

70 Id. (citing Bhd. of R.R. Trainmen v. Balt. & Ohio R.R., 331 U.S. 519, 528–29 (1947)). The Seventh Circuit suggested reading Section 230(c)(1) as a definitional clause as opposed to interpreting it as immunity from liability:

On this reading, 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. The difference between this reading and the district court’s is that § 230(c)(2) never requires ISPs to filter offensive content, and thus § 230(e)(3) would not preempt state laws or common-law doctrines that induce or require ISPs to protect the interests of third parties, such as the spied-on plaintiffs, for such laws would not be “inconsistent with” this understanding of § 230(c)(1).

Id.

71 See infra Part I.D (discussing the conflict between the FHA and the CDA).
D. At Odds: When the Good Samaritan Provision and the Fair Housing Act Collide

In Fair Housing Council of San Fernando v. Roommate.com, the Ninth Circuit was the first to address the conflict between the CDA and the FHA. In Roommate, the trial court found that the CDA did not provide immunity to the corporate operator of an online roommate-matching website, an interactive computer service, for the FHA advertising violations on its website and distinguished between content that was created solely by third parties and content facilitated by the interactive computer service. In affirming the trial court’s ruling, the Ninth Circuit

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72 See No. CV 03-09386PA(RZX), 2004 WL 3799488 (C.D. Cal. Sept. 30, 2004), aff’d in part, vacated in part, rev’d in part by 521 F.3d 1157 (9th Cir. 2008) (holding an interactive computer service liable for the defamatory content it helped create, but finding immunity for the defamatory advertisements created entirely by third parties).

73 521 F.3d at 1175. The defendant operated Roommates.com, a website designed to match people who were renting rooms with people who were searching for roommates. Id. at 1161. The website made a profit through advertising and premium subscriptions. Id. It was viewed about a million times each day and displayed approximately one hundred and fifty thousand postings. Id. In order to become a member of the website, potential Roommates.com subscribers were required to fill out questionnaires disclosing basic contact information as well as gender, sexual orientation, and family status and preferences related to those categories. Id. at 1173. This information then became the user’s profile, along with an “Additional Comments” section where users could post their own information as well as gender, sexual orientation, and family status and preferences related to those categories. Id. at 1173. The Ninth Circuit found that the Good Samaritan provision did not provide immunity for Roommate regarding its required questionnaire and the inclusion thereof in user profile web pages, but that the “Additional Comments” section was “precisely the kind of situation for which section 230 was designed to provide immunity.” Id. at 1165, 1168, 1174. The Ninth Circuit held that Roommate could be held liable for violations committed as a result of the answers on the questionnaire. The court noted that:

Roommate created the questions and choice of answers, and designed its website registration process around them. Therefore, Roommate is undoubtedly the ‘information content provider’ as to the questions and can claim no immunity for posting them on its website, or for forcing subscribers to answer them as a condition of using its services.

Id. at 1164. See also Batzel v. Smith, 333 F.3d 1018, 1053 (9th Cir. 2003) (noting that the party who displays content on a website may be liable even if the content was provided by a third party); cf. Carafano v. Metrosplash.com, Inc., 339 F.3d 1119, 1124 (9th Cir. 2003) (holding that a website operator was immune under the Good Samaritan provision even when it provided a questionnaire with pre-populated answers); see supra notes 60–61 and accompanying text (discussing the Carafano decision). In Roommate, the Ninth Circuit also considered the development and display of subscribers’ discriminatory questionnaire answers, noting that the information was meant to help users decide which housing opportunities were most compatible with their own preferences and to steer searchers in
extensively clarified its decisions in *Batzel* and *Carafano*, which appeared to be contradictory to its holding in *Roommate* that the interactive computer service was liable for FHA violations resulting from questionnaires created by the service, but not for violations contained in free-form entries created entirely by third parties.\(^\text{74}\)

In contrast, the Seventh Circuit concluded in a similar case that the Good Samaritan provision immunized an online listing service riddled with user-generated postings that violated the advertising provision of the FHA.\(^\text{75}\) In *Chicago Lawyers’ Committee for Civil Rights Under the Law, Inc. v. Craigslist*, the plaintiffs argued that an online listing service should be held accountable for FHA violations committed by those who posted

the direction of the best matches based on their criteria. 521 F.3d at 1165. The Ninth Circuit concluded, however, that Roommate crossed from mere transmitter to developer of the content by providing pre-populated answers to the questionnaire. *Id.* at 1166. Therefore, the court held that “a website helps to develop unlawful content, and thus falls within the exception to Section 230, if it contributes materially to the alleged illegality of the conduct.” *Id.* at 1168.

\(^{74}\) *Roommate*, 521 F.3d at 1170–72; see notes 58–63 and accompanying text (providing an in-depth discussion of the decisions in *Batzel* and *Carafano*). The Ninth Circuit noted that part of *Batzel’s* holding was that an editor does not forfeit Section 230 immunity when making spelling, grammar, and length-based corrections so long as the editor’s changes do not contribute to the defamatory content of the message. *Id.* at 1170. The court further explained that under *Batzel*, an editor can become a developer of content, and therefore precluded from Section 230 immunity, when he publishes material that he believes was not intended for him to post online. *Id.* at 1171. The Ninth Circuit stressed that its holding coincided with *Carafano’s* rationale that “classif[y] user characteristics . . . does not transform [it] into a ‘developer’ of the ‘underlying misinformation.’” *Id.* at 1172 (citing *Carafano*, 339 F.3d at 1124). In *Carafano*, the website provided neutral tools to help create romantic matches that did not violate any statute, whereas Roommates forced subscribers to disclose characteristics and used the disclosures to match roommates in violation of the FHA. *Id.*

\(^{75}\) Chi. Lawyers’ Comm. for Civil Rights Under the Law, Inc. v. Craigslist, Inc., 519 F.3d 666, 672 (7th Cir. 2008). Plaintiffs presented a laundry list of discriminatory postings on Craigslist’s Chicago’s housing classifieds sections, including postings such as “NO MINORITIES” or “Only Muslims” by users who clearly did not meet the “Mrs. Murphy exemption.” Chi. Lawyers’ Comm. for Civil Rights Under the Law, Inc. v. Craigslist, Inc., 641 F. Supp. 2d at 685–86 (N.D. Ill. 2006), aff’d, *Craigslist*, 519 F.3d 666. See supra note 23 (explaining the “Mrs. Murphy exemption”). Specifically, the civil rights committee alleged that Craigslist “publishes housing advertisements on its website that indicate a preference, limitation, or discrimination, or an intention to make a preference, limitation, or discrimination, on the basis of race, color, national origin, sex, religion, and familial status.” *Craigslist*, 641 F. Supp. 2d at 685. Craigslist.com lists classifieds for more than five hundred and fifty cities in over fifty countries and is a self-proclaimed repository of listings for “[j]obs, housing, goods, services, romance, local activities, advice—just about anything, really.” Craigslist FAQ, http://www.craigslist.org/about/factsheet (last visited Aug. 1, 2009). For Craigslist’s current Chicago housing classifieds, see http://Chicago.craigslist.org/hhh (last visited Aug. 1, 2009).
their housing listings on the listing service's website. At trial, the district court embarked on its own analysis of Section 230's statutory construction, rejecting Zeran in favor of its own notion that Section 230(c)(1) "bars those causes of action that would require treating an [interactive computer service] as a publisher of third party content." On appeal, the Seventh Circuit affirmed the district court's holding and asserted 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)" and reasoned that, under Section 230(c)(1), the plaintiff "cannot sue the messenger just because the message reveals a third party's plan to engage in unlawful discrimination."
Some commentators believe the magnitude of the conflict between the CDA and the FHA is so great that the Supreme Court should take an active interest in the topic.79 While those who have commented on the CDA and the FHA do not all agree on the proper resolution, most have recognized that the judiciary’s current application of the CDA has several unintended consequences.80 Next, this Note analyzes a potential

the statutory text of the CDA, the Seventh Circuit reasoned that Congress could have used narrowly restrictive language in Section 230(c)(1) instead of “information” that the court classified as “the stock in trade of online service providers.” Id. “The actual statute has the word ‘information.’ That covers ads for housing, auctions of paintings that may 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 website.” Id. The Seventh Circuit also addressed the plaintiff’s argument that Craigslist “caused” the postings to be made, finding that “[n]othing in the service [C]raigslist offers induces anyone to post any particular listing or express a preference for discrimination.” Id.

79 See Klein & Doskow, supra note 21, at 376–78. Klein & Doskow argue that certiorari for Roommate would likely be granted if sought. Id. at 376. Nevertheless, the commentators warn that other jurisdictions may be suspicious of the Ninth Circuit’s decision in Roommate because ninety percent of the Ninth Circuit cases heard by the Supreme Court in the 2006–2007 term were reversed. Id. (internal citation omitted). A circuit split is one factor the Court considers when deciding whether to grant certiorari, and the dissent in Roommate suggests that one may have been created. Id. at 377–79; see Roommate, 521 F.3d at 1177 (McKeown, J., dissenting); infra note 86 (providing the Supreme Court Rule governing grants of certiorari). One author compared Roommate and Craigslist, concluding that the Ninth Circuit’s approach was improper and that the Seventh Circuit’s approach better reflected the intent of Congress in drafting Section 230(c). J. Andrew Crossett, Note, Unfair Housing on the Internet: The Effect of the Communications Decency Act on the Fair Housing Act, 73 Mo. L. Rev. 195, 207–08 (2008).

80 See Shanahan, supra note 22, at 155 (suggesting that the FHA be added to the exceptions in Section 230(e) of the CDA); Collins, supra note 24, at 1495 (proposing a revision to Section 230(c) that would create an exception for FHA violations); Robert J. Aalberts, The Communications Decency Act Trumps Fair Housing: A Collision of Public Policy?, 36 Real Est. L. J. v (2007) (arguing that the conflict between the CDA and the FHA should be resolved by Congress). Other commentators believe the judiciary should be charged with harmonizing the CDA and the FHA. See Klein & Doskow, supra note 21, at 376–78 (suggesting the Supreme Court should resolve the conflict); Kurth, supra note 16, at 834–35 (arguing that the judiciary should read Section 230(c) to require a good faith effort by interactive computer services to screen offensive content before allowing immunity for FHA violations); see also Tenn. Valley Auth. v. Hill, 437 U.S. 153, 195 (1978) (Berger, C.J., dissenting) (noting that the judiciary concerns itself with following the letter of the law and not what seems morally appropriate). One concern with the current application of the CDA is that it will nullify the effect of Section 3604(c) as more people abandon traditional print sources of information in favor of online sources. See Collins, supra note 24, at 1491; infra Part III.B.1. A second problem with the current application of the CDA is that it creates special status and an incentive for interactive computer services not to screen offensive content. Crossett, supra note 79, at 209; infra Part III.B.2. A third concern is that the Seventh and Ninth Circuits ignored precedent that requires both statutes in conflict to be given effect in favor of substituting Congressional silence for intent, a judicial exercise that is frowned upon in many contexts. See Chang, supra note 20, at 1002; Morton v. Mancari, 417 U.S. 535 (1974) (establishing the analysis courts should take when faced with a
Part III of this Note provides a detailed analysis of the conflict between the Good Samaritan provision of the CDA and the advertising provision of the FHA. Section A addresses whether a circuit split exists and opines that: (1) the Supreme Court likely would not have granted certiorari to *Roommates* or *Craigslist* if it had been petitioned and (2) that judicial action should not be used to resolve the conflict between the FHA and the CDA. Section B explores several problems with the current application of the CDA, including assertions that it eviscerates the effect of Section 3604(c) of the FHA, encourages interactive service providers to take no action, is inconsistent with congressional intent, and leaves victims of housing discrimination with no source of relief. Finally, Section C analyzes the proposed solutions to the statutory conflict, ultimately calling for a specific revision to the Good Samaritan

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81 *Infra Part III* (analyzing the conflict between the FHA and the CDA).
82 *Infra Part III* (analyzing the conflict between the FHA and the CDA).
83 *Infra Part III.A* (arguing that no viable circuit split exists between the Seventh and Ninth Circuits).
84 *Infra Part III.B* (discussing the negative effects of the CDA’s current application on victims of FHA violations, on the goals of the FHA, and on public policy).
provision of the CDA that better reflects congressional intent by limiting the provision’s application.85

A. A Supreme Court Decision Would Not Resolve the Conflict

In determining whether to grant certiorari, the Supreme Court considers several factors, including whether “a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter.”86 Some commentators question whether Zeran, Roommate, and Craigslist can co-exist and conclude that the Supreme Court would likely have granted certiorari in Roommate and Craigslist if it had been sought.87

Nevertheless, the Ninth Circuit’s holding in Roommate can be reconciled with Zeran and its progeny because Roommate is the only case

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85 Infra Part III.C (weighing the proposed solutions to the conflict between the FHA and the CDA and calling for a textual revision to the Good Samaritan provision).
86 Klein & Doskow, supra note 21, at 376–78 (internal citation omitted). The Supreme Court Rule governing considerations for review on certiorari provides:

Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court’s discretion, indicate the character of the reasons the Court considers:

(a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court’s supervisory power;

(b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;

(c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

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87 Crossett, supra note 79, at 207–08 (arguing the existence of a circuit split by contrasting the rationales employed by the Seventh and Ninth circuits in Craigslist and Roommate, ultimately finding fault with the Ninth Circuit’s interpretation of the CDA); Klein & Doskow, supra note 21, at 376–78 (expanding on the dissent’s view in Roommate that “five Circuits (and many district courts) had interpreted Section 230 as imposing a flat ban on the imposition of liability on the basis of information provided by third parties” and speculating that certiorari would likely be granted if sought).
considering the conflict between the FHA and the CDA.\textsuperscript{88} The \textit{Craigslist} and \textit{Roommate} decisions are not inconsistent because key factual differences between the cases led the Ninth Circuit to deny immunity for some of the FHA violations at issue in \textit{Roommate}.\textsuperscript{89} While the Ninth Circuit, in \textit{Roommate}, found an interactive computer service liable for the display of discriminatory preferences resulting from the content of its questionnaires, the court also found the CDA provided the interactive computer service immunity with regard to free-form entries provided entirely by third parties, which was a nearly identical scenario resulting in the same legal outcome as \textit{Craigslist}.\textsuperscript{90}

Despite the lack of conflict between the Seventh and Ninth Circuits, some commentators argue that \textit{Roommate} presented the Supreme Court with the ideal opportunity to address the conflict between the CDA and civil rights legislation.\textsuperscript{91} Assume, \textit{arguendo}, the Supreme Court had been given the opportunity and granted certiorari to \textit{Roommates} or \textit{Craigslist}.\textsuperscript{92}

\textsuperscript{88} \textit{Roommate}, 521 F.2d at 1172, n.33. Judge Kozinski, writing for the \textit{Roommate} majority, stated:

\begin{quote}
The dissent coyly suggests that our opinion “sets us apart from” other circuits . . . carefully avoiding the phrase “intercircuit conflict.” And with good reason: No other circuit has considered a case like ours and none has a case that even arguably conflicts with our holding today. No case cited by the dissent involves active participation by the defendant in the creation or development of the allegedly unlawful content; in each, the interactive computer service provider passively relayed content generated by third parties, just as in \textit{Stratton Oakmont}, and did not design its system around the dissemination of unlawful content.
\end{quote}

\textit{Id.} (internal citation omitted). According to Klein & Doskow, “[t]he strong public policy which had been applied uniformly from \textit{Zeran} forward was subordinated to a policy overlooked by the drafters of § 230.” Klein & Doskow, \textit{supra} note 21, at 377–78.

\textsuperscript{89} \textit{Compare supra} note 73 (discussing the facts in \textit{Roommate}), \textit{with supra} note 75 (recounting \textit{Craigslist’s} facts). Klein and Doskow acknowledge the key difference between \textit{Roommate} and \textit{Craigslist} that “one service has, and the other lacks, the offending drop-down menus.” Klein & Doskow, \textit{supra} note 21, at 377. Klein and Doskow focused, however, on the larger issue of the interpretation of Section 230 and the competing policy interests of the CDA and FHA, claiming that “[i]n piercing the immunity, the policy against advertising expressing discriminatory preferences was elevated above the immunity policy expressed in § 230.” \textit{Id.}

\textsuperscript{90} \textit{Supra} notes 72–74 and accompanying text and notes 75–78 and accompanying text (discussing the reasoning of \textit{Roommate} and \textit{Craigslist}).

\textsuperscript{91} Klein & Doskow, \textit{supra} note 21, at 378 (arguing in part that the CDA’s current state of affairs may be reason enough for the Supreme Court to grant certiorari). According to Klein and Doskow, the possible circuit divide may cause those who have been harmed by housing discrimination online to shop their way into the Ninth Circuit, whereas interactive computer services want a forum that gives a broad reading to Section 230. \textit{Id.} “The consistent holdings prior to [\textit{Roommate}], and the strength of the immunity policy suggest the Supreme Court may take interest in this matter.” \textit{Id.}

\textsuperscript{92} \textit{Supra} note 86 (providing the criteria for granting certiorari).
The Court may have determined which circuit engaged in the proper analytical process, derived some combination of the two rationales, or created an entirely new method of analysis to resolve the issue.\footnote{\textit{Crossett}, \textit{supra} note 79, at 211 (arguing that it is ultimately Congress’s responsibility to reconcile the CDA and the FHA). \textit{Crossett} notes: the enforcement of the spirit of the law would come at the expense of the letter of the law, which is an unacceptable result. This demonstrates that the courts are not the appropriate mechanism of change to interpret the two competing statutes. The language of 230(c) is clear in the result that it demands, but it is a distasteful result and is inconsistent with the letter of section 3604(c) and with how the FHA has been interpreted by courts. \textit{Id. at 211.} See also Aalberts, \textit{supra} note 80, at v (noting that Congress is charged with resolving statutory conflict). “Yet, unless Congress amends the CDA to create another expressed exception . . . supporters of the FHA . . . will have to rely on the good graces of [interactive computer services] . . . to assume a moral duty to eliminate or at least temper the tone of the discriminatory ads.” \textit{Id.} While it is arguable that courts have on occasion shaped public policy at the expense of the letter of the law, Chief Justice Berger summarized the role of the judiciary with a quote from Robert Bolt’s \textit{A Man for All Seasons}: The law, Roper, the law. I know what’s legal, not what’s right. And I’ll stick to what’s legal. . . . I’m not God. The currents and eddies of right and wrong, which you find such plain-sailing, I can’t navigate, I’m no voyager. But in the thickets of the law, oh there I’m a forester . . . . What would you do? Cut a great road through the law to get after the Devil? . . . And when the last law was down, and the Devil turned round on you[—]where would you hide, Roper, the laws all being flat? . . . This country’s planted thick with laws from coast to coast[—]Man’s laws, not God’s[—]and if you cut them down . . . d’you really think you could stand upright in the winds that would blow then? . . . Yes, I’d give the Devil benefit of law, for my own safety’s sake. \textit{Tenn. Valley Auth. v. Hill}, 437 U.S. 153, 195 (1978) (Berger, C.J., dissenting) (internal citation omitted). \textit{But see} Kurth, \textit{supra} note 16, at 834 (arguing that the courts should read Section 230 as requiring as a prerequisite a good-faith effort to screen offensive content on the part of interactive computer services before receiving immunity).} Regardless of whether the Supreme Court may ever weigh in on the interaction between the FHA and the CDA, the conflict will likely continue to plague courtrooms with a tug-of-war between text and policy until Congress takes action, because the heart of the problem lies within the language of the CDA.\footnote{For a discussion of the \textit{Roommate} and \textit{Craigslist} analysis, see \textit{supra} notes 73–74 and accompanying text and notes 76–78 and accompanying text.}
B. Why the CDA Should Not Apply to FHA Advertising Violations

1. Evisceration of Section 3604(c)

Section 3604(c) was designed to reform the housing industry and eliminate the special dangers associated with housing discrimination. Some argue that society has changed its discriminatory practices in recent years, but the numerous FHA violations following the Hurricane Katrina disaster in 2005 show that America has not progressed in eliminating housing bias nearly as far as some would believe. While Section 3604(c) has been particularly strong in preventing discriminatory print advertisements by imposing publisher liability, the provision has been unsuccessful in its application to interactive service providers, and there are no signs of recovery without congressional intervention. Moreover, newspaper circulation has seen a steady decline as more readers and advertisers are taking advantage of the Internet’s popularity and real-time capabilities. Notwithstanding the purposes behind Section 3604(c), discriminatory housing advertisements will continue moving into the mainstream, as the Internet has been deemed a “safe haven” for FHA advertising violations.

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95 Crossett, supra note 79, at 210 (discussing the purpose of Section 3604(c)); supra note 19 (providing the text of Section 3604(c)); supra note 20 and accompanying text (highlighting the dangers posed by housing discriminations).

96 Collins, supra note 24, at 1491 (noting that HUD received complaints of housing discrimination on numerous housing websites designed especially for Hurricane Katrina victims). In a 2006 hearing before Congress, a HUD administrator said that she feared the discriminatory advertisements were causing psychological harm and that HUD was rigorously investigating the allegations. Id. at 1492. During the hearing, a representative from Massachusetts addressed the reality that Congress may have inadvertently designed the CDA to provide for the types of violations at issue and requested HUD's assistance in drafting corrective legislation if necessary. Id. See also supra note 24 and accompanying text (providing examples of the discrimination faced by Hurricane Katrina victims).

97 See supra note 24 (listing cases in which Section 3604(c) liability was imposed on media including newspapers, listing services, and advertising brochures); supra Part II.D (providing an in-depth discussion of the holdings in Roommate and Craigslist). Some authors have argued that the conflict between the CDA and FHA should be resolved by a revision to the CDA. See Shanahan, supra note 22, at 155; Collins, supra note 24, at 1495; Crossett; supra note 79, at 211. But see Klein & Doskow, supra note 21, at 376–78 (suggesting that the Supreme Court may resolve the conflict between the CDA and the FHA); Kurth, supra note 16, at 834–35 (arguing that the judiciary could reconcile the conflict by construing the CDA to require a good faith effort on the part of [interactive computer services] to implement screening and filtering mechanisms”).

98 Collins, supra note 24, at 1490–91; supra note 28 and accompanying text (discussing the circulation decreases that newspapers across America are experiencing because of competition from online news sources).

99 Sussman, supra note 24, at 215 (arguing that application of the CDA to Section 3604(c) claims requires immunity for interactive computer services and creates a “safe haven” for...
housing sales and advertising during the 1960s originally drove Congress to pass Section 3604(c). The CDA, however, has turned the Internet, a mainstream medium, into a hotbed for housing discrimination by allowing interactive computer services to circumvent Section 3604(c), thereby bringing the state of the law full circle and eviscerating the FHA advertising provision.

2. Special Status for Internet Companies and the Do-Nothing Mentality

Another criticism of allowing the CDA to provide immunity for an interactive computer service when its users have committed FHA violations is that Internet-based companies can escape liability in situations where traditional companies are held accountable. Although some interactive computer services receive a voluminous number of user posts each day and have a minimal number of employees, those services should not be held to a different standard from similar traditional companies who maintain a staff sufficient to ensure compliance with the FHA and other applicable laws. Even if an

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100 See generally Part II.A (discussing the development of the FHA).
101 Supra note 20 and accompanying text (discussing the purpose of the FHA); supra note 24 and accompanying text (illustrating the types of discrimination faced by the victims of Hurricane Katrina who were displaced from their homes); supra Part II.D (discussing the decisions in Roommate and Craigslist).
102 Crossett, supra note 79, at 209. “[E]nforcing the CDA against FHA claims creates an anomalous result, because immunizing websites results in newspapers being held liable for identical advertisements posted online, even if on that same newspaper’s website.” Id. See supra note 24 (providing a discussion of cases where the court extended liability to newspapers, listing services, and advertising brochures for publishing discriminatory housing advertisements in violation of the FHA). The Fourth Circuit allowed the most extensive liability for intermediaries, finding that the FHA advertising provision “was intended to apply to newspapers as well as “any other publishing medium.” United States v. Hunter, 459 F.2d 205, 211 (4th Cir. 1972). In Craigslist, the Seventh Circuit addressed an amicus brief submitted in support of the plaintiff that illustrated the judiciary’s willingness to apply the FHA to various media. 519 F.3d 666, 668 (7th Cir. 2008). Nevertheless, the Seventh Circuit was not persuaded by the brief, finding that “[o]nline services are in some respects like the classified pages of newspapers, but in others they operate like common carriers such as telephone services, which are unaffected by § 3604(c) because they neither make nor publish any discriminatory advertisement, text message, or conversation that may pass over their networks.” Id.
103 Klein & Doskow, supra note 21, at 343 (arguing that online services should be subjected to the same expenses as traditional companies). Klein and Doskow explained:

There is no reason to exempt Internet roommate-matching services from having to bear the same costs that are borne by newspapers and other publishers who decide to enter the real estate advertising market, who must then police the contents of their real estate advertisements for illegal content. The Internet permits the
Internet service does not have the human capital to manually edit postings, there are several alternative methods of monitoring third-party posts to ensure housing advertisements are valid under the FHA, such as automated screening software and user-based notification programs.104

Furthermore, the CDA’s current application actually provides interactive computer services an incentive not to screen discriminatory

website operator to disseminate much more information, at much lower cost, than a traditional publisher. . . . In this way, those who enjoy commercial benefits from bringing together housing providers and housing seekers can cooperate to ensure that the anti-discrimination laws are not violated.

Id. (internal citations omitted). In Roommate, the Ninth Circuit noted that Roommates.com had about one hundred and fifty thousand active listings and received more than a million page views every day, but did not consider staffing issues in its holding. 521 F.3d 1157, 1161 (9th Cir. 2008). In Craigslist, however, the Seventh Circuit specifically addressed Craigslist’s understaffing and posited that the costs of maintaining editorial control over posts would be too burdensome. 519 F.3d at 668–69.

An online service could hire a staff to vet the postings, but that would be expensive. . . . Every month more than 30 million notices are posted to the [C]raigslist system. Fewer than 30 people, all based in California, operate the system, which offers classifieds and forums for 450 cities. It would be necessary to increase that staff (and the expense that the users must bear) substantially to conduct the sort of editorial review that [plaintiff] demands.

Id.

104 Chang, supra note 20, at 1007 (arguing that the FHA does not overburden interactive computer services and advocating the use of filtering technology). Chang stated:

Because such clear guidelines exist as to words and combinations of words that would likely violate § 3604(c), [interactive computer services] could utilize available filtering technology to automatically prescreen discriminatory text-based housing listings while minimizing the need for manual review. The same filtering technology currently used to block obscene language could be configured to block discriminatory words and phrases from classified housing listings.

Id. Chang concedes that the technology “is not foolproof and may be under- or overinclusive,” but suggests that the problem could be cured by utilizing advanced word-search techniques or by implementing a program that allows users to report discriminatory postings to the website operators. Id. But see Craigslist, 519 F.3d at 668–69 (finding fault with automated filters). “[S]creening, though lawful, is hard. Simple filters along the lines of ‘postings may not contain the words ‘white’” can’t work. . . . [A]utomated filters and human reviewers may be equally poor at sifting good from bad postings unless the discrimination is blatant; both false positives and false negatives are inevitable.” Id. Other commentators have suggested placing a banner advertisement on the user forum that contains the pertinent provisions of the FHA or creating drop down menus that only allow information permissible under the FHA. Klein & Doskow, supra note 21, at 343. But see Collins, supra note 24, at 1497–98 (arguing that user-based notification programs may be ineffective because they do not eliminate the harm caused by a discriminatory advertisement during the time it is available to the public and the program assumes that users know what type of content constitutes discrimination under the FHA).
advertisements because they are less likely to face liability if they take a hands-off approach. A do-nothing mentality allows some interactive computer services to shirk their ethical duty of ensuring that housing listings are non-discriminatory without fear of repercussion and directly contradicts the congressional intent behind the Good Samaritan provision.

3. Silence and Intent Treated as the Same

Both the Seventh and Ninth Circuits erred by construing Congress’s silence as an indication that the FHA was not excluded from the CDA’s immunity provision. As it stands, the CDA effectively preempts Section 3604(c) of the FHA’s liability for intermediaries when interactive computer services are involved by providing near-absolute immunity for the intermediaries for clear FHA violations. In other contexts, the Supreme Court has attempted to adhere to the provisions of both statutes when resolving conflicts between two federal laws. Yet, even

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105 Crossett, supra note 79, at 210 (arguing that the Good Samaritan provision promotes inefficiency). Crossett asserts that “[b]ecause a website may avoid liability under the FHA by turning its website into a free-for-all (the less oversight, the greater chance of immunity), online housing consumers will be left to negotiate thousands of unfiltered advertisements, like on Craigslist.” Id. Crossett argues that this method is inefficient for both web-surfers and the companies who want to serve them and will ultimately lead to greater violations of the FHA. Id. See supra notes 67–70 and accompanying text (discussing the Seventh Circuit’s questioning of the logic behind the Ninth Circuit’s decision in Zeran and the application that appeared to create a disincentive for interactive computer services to use filtering technology).

106 Kurth, supra note 16, at 835. “Congress used the terms ‘protection for blocking and screening’ seven times in the rather brief § 230 of the CDA. This notion was at the heart of the legislation—that immunity was intended for those Web site hosts who made some good faith effort to curb malicious practices.” Id. (footnote omitted). See supra notes 47–51 and accompanying text (discussing the legislative history of the CDA); infra Part III.B.3 (expounding the shortcomings of the CDA’s application with regard to congressional intent).

107 Chang, supra note 20, at 1001. Chang argues that the congressional silence about the CDA’s implications on fair housing and the lack of an irreconcilable conflict between the laws means that the courts should adhere to the FHA’s broad imposition of liability. Id.; infra notes 110–11 and accompanying text (arguing that congressional silence within the context of two federal laws should be treated the same way as when the situation involves a federal law and a state law).

108 Supra note 24 and accompanying text (illustrating how the FHA’s expansive liability applies to both the principal discriminator and the intermediaries); supra Part II.D (discussing Roommate and Craigslist, two cases where the CDA’s immunity trumped FHA’s liability for intermediaries).

109 Chang, supra note 20, at 1001 (arguing that the judiciary should attempt to give both statutes effect). Also, in Morton v. Mancari, 417 U.S. 535, 550 (1974) the Court held:
when a dispute arises as to whether a federal law was meant to preempt a particular area of state law, which under the Supremacy Clause of the United States Constitution must give way to conflicting federal law, courts still may apply preemption only where there is a clear congressional intent to preempt state law.\textsuperscript{110}

Applying this framework supports the argument that the Seventh and Ninth Circuits erred in their analyses because Congress’s failure to contemplate the FHA while drafting the CDA is a far cry from clear congressional intent to preempt the FHA advertising provision in certain situations through application of the CDA.\textsuperscript{111} In \textit{Craigslist}, the Seventh Circuit reasoned that the purpose of drafting a general statute was so the legislature need not “traipse through the United States Code” to consider all possible sources of liability and improperly treated congressional silence as intent to include the FHA within the CDA’s immunity provision.\textsuperscript{112} While the Ninth Circuit chose to address the issue of congressional intent through \textit{expressio unius est exclusio alterius} in

\begin{quote}
In the absence of some affirmative showing of an intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable . . . . The courts are not at liberty to pick and choose among Congressional enactments, and when two statutes are capable of coexistence, it is the duty of the courts, absent a clearly expressed Congressional intention to the contrary, to regard each as effective. “When there are two acts upon the same subject, the rule is to give effect to both if possible” . . . . The intention of the legislature to repeal “must be clear and manifest.”
\end{quote}

\textit{Id.} at 550–51 (internal citations omitted). Chang’s commentary provides an in-depth analysis of the possibility of reconciling the CDA and the FHA, ultimately concluding that the application of the FHA’s advertising provision to interactive computer services does not frustrate the purpose of the CDA. See \textit{Chang}, \textit{supra} note 20, at 1003–08; see also Kurth, \textit{supra} note 16, at 835 (arguing that the judiciary should solve the conflict by reading a good faith screening requirement into the Good Samaritan provision).

\textsuperscript{110} \textit{Chemerinsky, supra} note 32, at 366–67 (providing an overview of the Supreme Court’s preemption jurisprudence). Chemerinsky explains:

\begin{quote}
The problem, of course, is that Congress’s intent, especially as to the scope of preemption, is rarely expressed or clear. Therefore, although the Court purports to be finding congressional intent, it often is left to make guesses about purpose based on fragments of statutory language, random statements in the legislative history, and the degree of detail of the federal regulation.
\end{quote}

\textit{Id.} at 367.

\textsuperscript{111} \textit{Supra} notes 47–51 and accompanying text (discussing the CDA’s legislative history).

\textsuperscript{112} Chi. Lawyers’ Comm. for Civil Rights Under the Law v. Craigslist, Inc., 519 F.3d 666, 671 (7th Cir. 2008). The Seventh Circuit perceived the question to be “not whether Congress gave any thought to the Fair Housing Act, but whether it excluded § 3604(c) from the reach of 230(c)(1).” \textit{Id. Cf. supra} note 54 (discussing the Central District of California’s application of the doctrine of \textit{expressio unius est exclusio alterius} to the CDA).
Roommate, its reasoning was equally unsound because the FHA was not even on the congressional radar when the CDA and its exceptions were drafted.113 That said, the FHA was a landmark piece of legislation designed to protect compelling interests in equal housing opportunities, and nothing in the legislative history of the CDA remotely suggests that Congress actually intended the CDA to erase such an important step in equality by providing immunity for advertising violations, no matter their form.114 The legislative history of the CDA reveals several purposes behind the inclusion of the Good Samaritan provision, and, if anything, the congressional silence on the topic of its application to the FHA illustrates that Congress did not intend for the CDA to provide immunity for interactive computer services in their role as intermediaries for discriminatory housing advertisements.115

113 Supra note 54 (discussing the canon of expressio unius est exclusio alterius and its application in Roommate); notes 47–51 and accompanying text (providing an overview of the CDA’s legislative history).

114 Supra notes 15–20 and accompanying text (discussing the history and purposes of the FHA); notes 47–51 and accompanying text (providing the legislative history of the CDA). Congress listed five policy reasons for enacting the CDA, one of which was “to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children’s access to objectionable or inappropriate online material.” 47 U.S.C. § 230(b)(4) (2006). The Good Samaritan provision fits squarely within that particular policy goal. Furthermore, in Craigslist, the district court for the Northern District of Illinois recounted some of the goals Congress discussed as the CDA passed through the legislature, specifically that the statute “was enacted, in part, to maintain the robust nature of Internet communication and, accordingly, to keep government interference in the medium to a minimum.” Chi. Lawyers’ Comm. For Civil Rights Under the Law v. Craigslist, Inc. 461 F. Supp. 2d 681, 689 (N.D. Ill. 2006) (quoting Zeran v. Am. Online, Inc., 129 F.3d 327, 330–31 (4th Cir. 1997)). The district court relied heavily on the Zeran court’s assessment that Congress was also concerned about the chilling effect that tort-based lawsuits have on free speech. Id.; supra note 57 and accompanying text (providing a discussion of the Zeran courts discernment of the nongressional intent behind the CDA). The district court also noted that Congress made the policy choice not to impose tort liability on intermediaries and reasoned that it would be impossible for interactive computer services to screen millions of messages. See Craigslist, 461 F. Supp. 2d at 689 (reasoning that “Congress considered the weight of the speech interests implicated and chose to immunize service providers to avoid any such restrictive effect.” (quoting Zeran, 129 F.3d at 331)).

115 Supra, notes 45–51 and accompanying text (explaining that in enacting the CDA, Congress was concerned with immunizing interactive computer services that utilized screening techniques to block offensive conduct and eliminating a flood of tort-based litigation in the wake of the decision in Stratton Oakmont, Inc. v. Prodigy Servs. Co., 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995)). The notion that silence should not be construed by courts as indicative of Congressional intent is not unique to the conflict between the FHA and the CDA, as commentators have made similar arguments regarding other areas of law. See Levinson, supra note 80, at 796 (arguing that congressional silence about administrative or judicial remedies in a statute does not warrant an automatic inference that Congress intended to eliminate Section 1983 relief in conjunction with certain statues); Sullivan, supra
4. Victims May Be Denied a Remedy

Those who support the CDA’s current dominance over the FHA argue that victims of housing discrimination are barred only from recovering from intermediary interactive computer services for third-party online housing violations and that the avenue of recovery against the third-party discriminators remains available. While this argument is plausible, the ability to post anonymous messages on the Internet may leave victims of housing discrimination without a readily available defendant. The burdensome task of identifying interactive computer service users may prove to be so costly and time-consuming that victims of housing discrimination will be discouraged from pursuing a remedy. If a victim cannot obtain a violator’s identity on his or her account, he or she may be denied a remedy.

note 80, at 299 (arguing that Congressional inaction should not preclude the Food and Drug Administration from regulating tobacco products); Bogen, supra note 80, at 1068 (asserting that “[c]ongressional silence indicates nothing” when determining whether a state’s boycott of foreign goods is consistent with federal law).

116 Supra notes 21–24 and accompanying text (discussing the broad application of the FHA advertising provision); supra note 52 (containing the text of the Good Samaritan provision, which mentions only “interactive computer services” and not the third party discriminators).

117 Kurth, supra note 16, at 828. See supra notes 56–57 and accompanying text (discussing Zeran v. Am. Online, Inc., a case in which an anonymous posting resulted in the plaintiff receiving a flood of angry phone calls); supra notes 60–61 and accompanying text (providing an explanation of Carafano v. Metrosplash.com, Inc., a case in which a woman received unsolicited phone calls from users of an online dating service because an anonymous user created a false advertisement using the woman’s name and likeness); supra notes 41–43 and accompanying text (discussing Stratton Oakmont, where an anonymous user posted allegedly defamatory statements about an investment banking company). Kurth argues that the same type of instance could arise in the context of fair housing. Kurth, supra note 16, at 828. “[I]ndividuals who find individual user violations of the Fair Housing Act on Websites such as Craigslist would have to go through the burdensome task of affirmatively identifying the individuals who posted the questionable ads, which may have been posted anonymously, and then filing suit against each individual.” Id.

118 Kurth, supra note 16, at 828. One commentator provided insight into how difficult it may be to identify a user of a website such as Craigslist or Roommates.com. Collins, supra note 24, at 1494. According to Collins:

Although it is true that a housing advertisement must include contact information in order for prospective buyers and renters to express their interest, some [interactive computer services] 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 [interactive computer service] 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
own, the victim must first establish a *prima facie* case of discrimination and then pursue additional litigation to compel the disclosure of the defendant’s identity. Commentators suggest that the difficulty of identifying individual online discriminators is a key reason why interactive computer services should be held liable for their users’ discriminatory housing advertisements. Next, Section C explores and evaluates solutions posed by various legal commentators, focusing on the strengths, weaknesses, and policy concerns of each.

Advertisers remain much more anonymous than traditional print advertisers, who generally have no choice but to provide an accurate phone number or email address.

*Id.* Kurth, *supra* note 16, at 828. Kurth argues that “potential plaintiffs might be deterred from filing lawsuits given the increased costs and the seeming impossibility of identifying the faceless Internet offender.” *Id.* The New Jersey Supreme Court is credited with positing the dominant analysis used when a plaintiff wishes to unmask an anonymous defendant. *Id.* The court produced the following analysis:

We offer the following guidelines to trial courts when faced with an application by a plaintiff for expedited discovery seeking an order compelling an ISP to honor a subpoena and disclose the identity of anonymous Internet posters who are sued for allegedly violating the rights of individuals, corporations or businesses . . .

[T]he trial court should first require the plaintiff to undertake efforts to notify the anonymous posters that they are the subject of a subpoena or application for an order of disclosure, and withhold action to afford the fictitiously-named defendants a reasonable opportunity to file and serve opposition to the application . . . .

The court shall also require the plaintiff to identify and set forth the exact statements purportedly made by each anonymous poster that plaintiff alleges constitutes actionable speech . . . .

The complaint and all information provided to the court should be carefully reviewed to determine whether plaintiff has set forth a *prima facie* cause of action against the fictitiously-named anonymous defendants . . . .

Finally, assuming the court concludes that the plaintiff has presented a *prima facie* cause of action, the court must balance the defendant’s First Amendment right of anonymous free speech against the strength of the *prima facie* case presented and the necessity for the disclosure of the anonymous defendant’s identity to allow the plaintiff to properly proceed.


*Kurth,* *supra* note 16, at 828. “[I]f Web sites such as Craigslist maintained a degree of control in preventing the publication of FHA-violative housing ads, offenders could be prevented from [disseminating] their discriminatory housing preferences on such major Internet databases.” *Id.* See Collins, *supra* note 24, at 1493–95 (arguing that interactive computer services are ideal candidates for gatekeeper liability because they are easier to identify than anonymous users and can utilize filtering systems to minimize violations).

*Infra* Part III.C (discussing the suggestions of allowing the judiciary to solve the conflict between the FHA and the CDA, adding the FHA to the already developed exceptions list, and amending the text of Section 230(c)).
C. Weighing the Alternatives

Although the application of the CDA to online FHA violations is a relatively new practice, three commentators present solutions to the conflict, which include allowing the courts to harmonize the FHA and the CDA by reading a good faith screening requirement into the text of the CDA, adding an FHA exception to Section 230(e), or revising Section 230(c) to exclude FHA violations.\(^\text{122}\) One commentator suggests the judiciary can resolve the conflict between the CDA and the FHA by granting immunity to interactive computer services for third-party FHA advertising violations only after a showing of a good-faith effort to block the discriminatory content.\(^\text{123}\) This approach poses a minimal threat to free speech on the Internet and allows for a case-by-case analysis that adheres to the Supreme Court’s practice of trying to equally enforce conflicting federal statutes.\(^\text{124}\) Yet, this solution may not be viable in jurisdictions that firmly adhere to \textit{Zeran} or shun the idea of judicial activism, as this approach overlooks the text of the law in favor of policy concerns.\(^\text{125}\)

In addition, two legal commentators who address the discourse between the CDA and the FHA concluded that Congress should resolve the conflict by amending the CDA, but posited revisions to different

\(^{122}\) \textit{Infra} Part III.C.

\(^{123}\) Kurth, \textit{supra} note 16, at 834–35 (arguing that the suggested application also embodies the legislative intent behind the CDA and that “[w]ith this interpretation enunciated, courts could take individual cases on their facts to determine whether the challenged Website has met this standard and qualified for immunity”).

\(^{124}\) Kurth, \textit{supra} note 16, at 835 (noting that the judiciary’s case-by-case determination would result in restriction only for discriminatory housing advertisements). Kurth asserts that “[t]he fact that a user who posts an ad seeking to rent an apartment to ‘Whites only’ . . . . might have that post removed by screening software, does not mean that the same user is not free to open his own Web site devoted to ‘White power.’” \textit{Id.} See \textit{Chang, supra} note 20, at 1001-08 (arguing that FHA liability should apply to interactive computer services because the FHA and CDA can be reconciled); \textit{supra} note 109 and accompanying text (discussing the analysis used by the Supreme Court when the Equal Employment Opportunity Act ran afoul of an older statute that allowed the Bureau of Indian Affairs to give a preference to Native Americans in its hiring decisions).

\(^{125}\) \textit{Supra} notes 56–57 and accompanying text (providing a detailed discussion of the Fourth Circuit’s decision and rationale in \textit{Zeran v. Am. Online, Inc.}). While the Seventh Circuit questioned the \textit{Zeran} court’s decision to construe the CDA in a way that conflicted with the statute’s subtitles, the contentions were posed in dicta, which has minimal persuasive power. See \textit{Doe v. GTE Corp.}, 347 F.3d 655, 660 (7th Cir. 2003) (noting that the Good Samaritan provision seems to provide immunity to interactive computer services regardless of whether they attempt to screen offensive content); \textit{supra} note 68 (providing a discussion of \textit{GTE Corp.}). Some justices, however, do not take a proactive stance and believe that their role is to follow the letter of the law, regardless of its illogical structure or impractical effects. \textit{Supra} note 94 (quoting then Chief Justice Burger’s famous dissent from \textit{Tenn. Valley Auth. v. Hill}).
sections of the statute. One author suggests in his 2007 Note that Congress should add the FHA to Section 230(e), an explicit list of exceptions to the CDA. While creating a special exception for the FHA has some of the same strengths as Kurth’s proposition (suggesting the Court could resolve the conflict through a new interpretation of the CDA) and would likely be the quickest resolution to the conflict, it is a reactive step that ignores the CDA’s textual shortcomings.

Another commentator advocates the creation of an exception for the FHA by combining elements of the CDA and FHA in a specific revision to the text of Section 230(c)(1). Although this suggestion is a viable solution to the conflict between the CDA and the FHA, it contains the same deficiencies as Shanahan’s proposal. Furthermore, Collins recognizes that his solution is subject to several criticisms, including overreaction by interactive computer services, overburdening interactive computer services, and Congress’s acceptance of Zeran’s broad grant of immunity. Finally, Part IV of this Note suggests a remedy to the conflict between the FHA and the CDA—revisions to Section 230(c)(1)

126 Shanahan, supra note 22, at 155 (recommending that Congress add the FHA to the list of exceptions in the CDA); Collins, supra note 24, at 1495 (proposing a revision to Section 230(c)(1) that would create an exception for the FHA).
127 Shanahan, supra note 22, at 155. For the text of Section 230(e) see supra note 54.
128 Kurth, supra note 16, at 834–35 (suggesting that the judiciary can solve the conflict through a new interpretation of the CDA); supra note 124 and accompanying text (providing a discussion of the strengths of Kurth’s solution). See supra notes 69–70 and accompanying text (discussing the inconsistencies between the subtitles of the CDA and its application in FHA cases); supra Part III.B.3 (analyzing how the judiciary’s application of the CDA mistakenly construes congressional silence and is contrary to the CDA’s legislative intent).
129 Collins, supra note 24, at 1495. Collins argues that Section 230(c)(1) should read “[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, except for notices, statements, or advertisements with respect to the sale or rental of a dwelling.” Id.
130 Collins note 128 and accompanying text (discussing the weaknesses in adding the FHA to the Section 230(e) exception list).
131 Collins, supra note 24, at 1495–98. Collins also presents counterarguments to the perceived weaknesses in his suggested statutory revision. Id. He acknowledges that interactive computer services may become overzealous in their blocking of potentially discriminatory content, but that the practice can be overcome by allowing users to revise their screened advertisements in a manner consistent with Section 3604(c). Id. at 1496. Collins negates the argument that interactive computer services might be overburdened by noting that they would be held to the same legal standard as traditional print media. Id. at 1497; see supra note 24 (providing several cases imposing FHA liability on newspapers, listing services, and advertising brochures). Lastly, Collins considers whether Congress had accepted Zeran by passing the Dot Kids Act, but concludes that the new legislation has no bearing on the CDA and does not constitute acceptance of Zeran. Id. at 1498.
that clarify the scope of its application, are proactive in nature, and avoid the pitfalls inherent in other proposed solutions.\textsuperscript{132}

IV. PROPOSED REVISION

Although some scholars suggest revising the CDA to create an exception for FHA violations, a more appropriate revision is needed, one that eliminates exceptions and refines the text of the Good Samaritan provision to state its intended use.\textsuperscript{133} First, the list of exceptions in Section 230(e) of the CDA should be stricken.\textsuperscript{134} A list of exceptions, such as the one currently included in the CDA, opens the door to \textit{expressio unius est exclusio alterius}, a canon of statutory construction that assumes any item not on the list was intentionally excluded by Congress.\textsuperscript{135} Yet, such an assumption is erroneous when exclusion results from mere oversight as opposed to intent.\textsuperscript{136} Rather than include a list of exceptions, Congress can accomplish the same end by adding a provision to Section 230(c) that limits its application to only those instances included within the CDA’s text.\textsuperscript{137}

The Author’s proposed resolution is centered on the following revisions to the Good Samaritan provision of the CDA:

\begin{itemize}
  \item (c) Protection for “Good Samaritan” blocking and screening of offensive material
  \item (1) Treatment of publisher or speaker:
    \begin{itemize}
      \item For the purposes of determining defamation liability, \textit{no} provider or user of an interactive computer service shall be treated as the publisher or
    \end{itemize}
\end{itemize}

\textsuperscript{132} \textit{Infra} Part IV (suggesting a revision to Section 230(c)(1) that is consistent with congressional intent and limits the application of the Good Samaritan provision).

\textsuperscript{133} \textit{Infra} Part IV (explaining this Author’s proposed revisions to the CDA); \textit{see supra} Part III.C (analyzing solutions posed by other legal scholars, including adding the FHA to the exceptions list under Section 230(e), revising the Good Samaritan provision to include an exception for the FHA, and allowing the judiciary to resolve the conflict through a new interpretation of the CDA).

\textsuperscript{134} \textit{Supra} note 54 (containing the text of 47 U.S.C. \textsection 230(e) (2006), which includes exceptions for specific criminal provisions, intellectual property laws, consistent state laws, and the Electronic Communications Privacy Act).

\textsuperscript{135} \textit{Supra} note 54 and accompanying text (providing Sutherland’s description of the canon of \textit{expressio unius est exclusio alterius} and illustrating how the Ninth Circuit applied it to the CDA).

\textsuperscript{136} \textit{Supra} Part III.B.3 (arguing that congressional silence should not be construed as intent).

\textsuperscript{137} \textit{Infra} note 138 and accompanying text (containing the Author’s proposed revisions to the Good Samaritan provisions).
(2) Other civil liability:
No provider or user of an interactive computer service shall be held liable on account of—
(A) any action 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 (A).
(C) “Any action taken in good faith” as used in paragraph (A) means filtering software, specialized search engines, a reporting scheme, or any other method reasonably calculated to restrict access to the material described in paragraph (A).
(3) This provision shall have no other applications aside from those provided in paragraphs (1) and (2).138

Commentary

This framework allows for clearer application of the Good Samaritan provision and is more compatible with the congressional intent behind the enactment of the CDA because it provides immunity for defamatory statements posted by third parties, immunizes interactive computer services that make a good-faith attempt to screen offensive content, and limits the application of the CDA to only the uses provided within the text.139 The revisions proposed to Section 230(c)(1) and 230(c)(2) draw a distinct line between the two subsections and eliminate the confusion associated with determining how the two subsections interact with each other.140

Under the Author’s suggested revisions, Section 230(c)(1) would unequivocally prevent interactive computer services from being treated

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138 The Author’s original revisions are italicized. The remainder of the statutory text is from 47 U.S.C. § 230(c) (2006).
139 Supra notes 45–51 and accompanying text (discussing Congresses intent behind the enactment of the CDA).
140 Supra note 77 (providing the district court for the Northern District of Illinois’s analysis of the interaction between Sections 230(c)(1) and 230(c)(2)).
as publishers of content provided by third parties only in defamation actions. The revisions to Section 230(c)(1) are designed to provide absolute immunity in defamation actions while striking an adequate balance between the unfair imposition of liability on interactive computer services and censorship on the Internet.

The proposed revisions of Section 230(c)(2) provide civil immunity, most likely from First Amendment claims, for interactive computer services that make a good-faith effort to restrict access to patently offensive or obscene materials on their websites or forums. Even though Rachel Kurth’s position that a good-faith effort to restrict offensive content should be an implied requirement for immunity, this Note concludes that making the requirement explicit in the statute is preferable to creative statutory interpretation by the ever-changing judiciary. The proposed revisions of Section 230(c)(2)(C) reinforce the “good faith” requirement by providing examples of means available to restrict content. Nevertheless, the phrase “reasonably calculated to restrict access” allows for flexibility to account for the financial capabilities of individual interactive computer services. Lastly, the proposed addition of Section 230(c)(3) to the CDA replaces the need for a list of exceptions by clearly stating the Good Samaritan provision shall have no use other than those listed in Section 230(c)(1) and 230(c)(2).

This Note’s suggested revisions serve two purposes: (1) eliminating near-absolute immunity provided to interactive computer services for third-party FHA violations and (2) providing a proactive solution to the current conflict that is workable for future lawmakers. While adding the FHA to the exceptions list in Section 230(e) or amending the text in Section 230(c) to create an exception for the FHA would solve the current

141 Supra text accompanying note 138 (containing the Author’s proposed revisions to the Good Samaritan provision); supra notes 41–43 and accompanying text (discussing Stratton Oakmont, Inc. v. Prodigy Servs. Co., 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995), a case in which an Internet service provider was held liable for defamatory messages posted by third parties on its “Money Talk” message board).

142 Supra text accompanying note 138 (providing the Author’s suggested revisions to the CDA); see 141 CONG. REC. H8471 (daily ed. Aug. 4, 1995) (noting Congressional concern for the protection of free speech on the Internet).

143 Supra text accompanying note 138 (containing the Author’s proposed statutory solution to the conflict between the CDA and the FHA).

144 Kurth, supra note 16, at 834–35 (arguing the judiciary should be allowed to read a good faith requirement into the current text of the CDA).

145 Supra text accompanying note 138 (listing the Author’s proposed changes to the CDA).

146 Supra text accompanying note 138 (listing this author’s proposed changes to the CDA).

147 Supra text accompanying note 138 (listing this author’s proposed changes to the CDA).
conflict between the FHA and the CDA, the Author’s proposed revisions of Section 230(c) also contemplate the potential for future misuses of the CDA. With such a vast array of bills and a limited amount of time during any given legislative session, it is unreasonable to assume that Congress could ever contemplate every possible misuse of a given statutory provision. Rather than wasting congressional time and resources amending the CDA each time a defendant attempts to utilize the CDA in an unforeseen manner, new applications are presumed invalid under the proposed amendment to the statute. While Congress may always amend any portion of the CDA that no longer serves its purpose or is inconsistent with contemporary attitudes and needs, the proposed revisions to the CDA encourage efficiency in drafting, which eliminates the need for the same provision to be repeatedly amended after its initial passage. Furthermore, the proposed revisions put the application of the CDA in the hands of Congress instead of the judiciary and allows for harmonious coexistence between the FHA and the CDA.

V. CONCLUSION

Housing discrimination is an egregious form of prejudice that perpetuates stereotypes and causes psychological harm. Despite congressional efforts to eliminate the expression of such prejudices through the enactment of the FHA, housing discrimination remains prevalent on the Internet. Although a provision of the FHA extends liability for discriminatory housing advertisements to intermediaries, defendants have successfully used the Good Samaritan provision of the CDA to immunize interactive computer services from liability for third-party FHA violations posted on their websites and forums.

The CDA was enacted more than twenty-five years after the FHA, but congressional documents indicate that the legislators never contemplated a potential conflict between the FHA and the CDA. The CDA, a law that was intended to prevent a flood of defamation litigation and protect interactive computer services that make a good-faith effort to

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148 Supra Part III.C (presenting and analyzing alternative solutions to the conflict between the CDA and the FHA proposed by various scholars).
149 Supra Part II.C (discussing the enactment of the CDA).
150 Supra notes 113–15 and accompanying text (arguing that Congress did not foresee the conflict between the CDA and the FHA when it enacted the CDA).
151 Supra text accompanying note 138 (containing the Author’s proposed revisions to the CDA).
152 Supra text accompanying note 138 (containing this author’s proposed revisions to the CDA).
screen sexually explicit or offensive materials, has effectively eviscerated the advertising provision of the FHA and left victims of housing discrimination without a form of recovery for online FHA violations.

The Good Samaritan provision has several textual flaws, allowing for immunity broader than that envisioned by Congress and creating confusion as to how its two subparts should interact. These flaws could be cured by revisions that clarify how and when the CDA should apply. Furthermore, the addition of a clause limiting the application of the Good Samaritan provision only to those instances listed in the statute closes the door on the use of the CDA to protect interactive computer services from third-party FHA violations, as well as protects against future misuses of the CDA.

The judiciary cannot avoid affording immunity to interactive computer services for third-party FHA violations because the current text of the CDA demands such immunity. Rather than encourage the judiciary to engage in extreme activism in the name of public policy, the Author argues that the resolution to the conflict between the CDA and FHA is a textual revision by Congress and encourages legislators to draft statutes that clarify the intent behind their enactment. While a policy section provides some insight to future interpreters, legislators should strive to ensure that the substantive text of the law also embodies the specific intent of the statute.

Although those who wish to engage in housing discrimination have taken advantage of the Internet as their new frontier, Congress has the power to force interactive computer services to take responsibility for the content on their websites and forums and to prevent the Internet from serving as a catalyst of reversion to the same deplorable attitudes and housing prejudices that plagued America more than half a century ago.

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