REVISITING *ROOMMATES.COM*

G.S. Hans†

ABSTRACT

Fair Housing Council of San Fernando Valley v. Roommates.com holds an important place in the history of cases interpreting § 230, the federal law which has facilitated the growth of the modern internet. But unlike many other § 230 cases, which concern defamation claims, *Roommates.com* focused on alleged violations of the Fair Housing Act. The Fair Housing Act, the final major 1960s federal civil rights law, holds an important place in our racial justice history—one that § 230 and the *Roommates.com* decision limit.

This Article examines the history and legacy of *Roommates.com*, situating it within the framework of the Fair Housing Act to focus debates over § 230 reform. As a case that, at the time, complicated the dominant interpretations of § 230 and yet ultimately stymied enforcement of the Fair Housing Act online, *Roommates.com* demonstrates how the promise of civil rights laws has fallen short in a digital economy. Even as § 230 has facilitated speech online for individuals, civil rights protections have lagged. By re-evaluating *Roommates.com* in a larger history beyond technology law, this Article aims to evaluate more fully what § 230 reforms might further the goals of civil rights protections and what costs might result.

TABLE OF CONTENTS

DOI: https://doi.org/10.15779/Z38DJ58H67

† Associate Clinical Professor of Law, Cornell Law School. I am grateful to Cloe Anderson for her invaluable research assistance. Kurt Opsahl and Nicky Ozer patiently answered my obscure questions about the *Roommates.com* litigation. My colleagues Chris Serkin and Dan Sharfstein helped me understand the history and structure of the Fair Housing Act, providing excellent guidance to a novice. I thank Adam Cowing, Emma Llanso, and Chris Morten for close readings and feedback, and Anupam Chander, Daphne Keller, Mason Kortz, Jef Pearlman, Jenn Prusak, and Blake Reid for their insights. I am grateful to the editors of the *Berkeley Technology Law Journal* for their thoughtful suggestions and assistance. All errors remain my own.

I. INTRODUCTION

Section 230[1] of the Communications Decency Act has transformed from a once-obscure federal statute to the *bête noire* of presidents past and present.[2] The law that facilitated the growth of the American digital economy has become the focus of critique from those of us—which is to say, basically everyone—dissatisfied with the current state of the internet.[3] In addition to a spike in public attention, legislators and regulators have also turned their attention to § 230 in recent years, resulting in the enactment of the controversial SESTA/FOSTA legislation and the possibility of future legislative reforms.[4]

---

1. 47 U.S.C. § 230 (2018).

2. *See* Bobby Allyn, *As Trump Targets Twitter's Legal Shield, Experts Have a Warning*, NPR (May 30, 2020, 11:36 AM ET), https://www.npr.org/2020/05/30/865813960/as-trump-targets-twitters-legal-shield-experts-have-a-warning ("President Trump has a new rallying cry in his escalating crusade against Twitter. As he put it in a tweet Friday: 'REVOKE 230!' "); The New York Times Editorial Board, *Joe Biden Says Age Is Just a Number*, N.Y. TIMES (Jan. 17, 2020), https://www.nytimes.com/interactive/2020/01/17/opinion/joe-biden-nytimes-interview.html?smid=nytcore-ios-share ("[The Times] can't write something you know to be false and be exempt from being sued. But [Mark Zuckerberg] can. The idea that it's a tech company is that Section 230 should be revoked, immediately should be revoked, number one. For Zuckerberg and other platforms.")

3. *See* Todd Shields & Ben Brody, *Washington's Knives Are Out for Big Tech's Social Media Shield*, BLOOMBERG (Aug. 11, 2020, 1:00 AM PDT), https://www.bloomberg.com/news/articles/2020-08-11/section-230-is-hated-by-both-democrats-and-republicans-for-different-reasons.

4. SESTA/FOSTA, the Stop Enabling Sex Traffickers Act and Allow States and Victims to Fight Online Sex Trafficking Act, have been codified at 47 U.S.C § 230(e)(5). *See* Aja Romano, *A new law intended to curb sex trafficking threatens the future of the internet as we know it*, VOX (July 2, 2018, 1:08 PM EDT), https://www.vox.com/culture/2018/4/13/17172762/fosta-sesta-backpage-230-internet-freedom (describing SESTA/FOSTA); *Wicker, Graham, Blackburn Introduce Bill to Modify Section 230 and Empower Consumers Online*, U.S. SENATE COMM. ON COM., SCI., & TRANSP. (Sept. 8, 2020), https://www.commerce.senate.gov/2020/9/wicker-graham-blackburn-introduce-bill-to-modify-section-230-and-empower-consumers-online (announcing legislation proposed by Republican Senators Roger Wicker, Lindsey Graham, and Marsha Blackburn to amend § 230); *Warner, Hirono, Klobuchar Announce the SAFE TECH Act to Reform Section 230*, MARK R. WARNER (Feb. 5, 2021), https://www.warner.senate.gov/public/index.cfm/2021/2/warner-hirono-klobuchar-announce-the-safe-tech-act-to-reform-section-230 (announcing legislation proposed by Democratic Senators Amy Klobuchar, Mark Warner, and Mazie Hirono to amend § 230); *The Telecommunications Act's "Good Samaritan" Protection: Section 230*, DISCO, https://www.project-disco.org/section-230/ (Oct. 21, 2021) (collecting proposals to amend § 230).

Enacted in 1996, § 230 provides immunity from liability for interactive computer services (often called platforms) that publish information from third parties.[5] Such information (commonly referred to as user-generated content) might be potentially defamatory or otherwise unlawful, creating a risk of liability for the platforms for their role in publishing or hosting the unlawful user-generated content. At the scale at which the platforms hope to operate, the potential for liability would be immense, as would the costs of prescreening content.

But § 230 means that platforms cannot be held liable as the publisher or speaker of the content or for their screening provisions if those provisions are undertaken in good faith. Although § 230 has some exceptions—most notably, for federal criminal law and intellectual property law—it largely immunizes the platforms for their users' content. Platforms can still be held liable for their own content.

Because of the relative brevity of § 230's provisions—as Jeff Kosseff notes in his landmark study of the law, the core protections amount to merely twenty-six words[6]—caselaw interpreting the statutory language has played a central role in determining the scope of § 230's protections. In an early case, *Zeran v. AOL*, the Fourth Circuit interpreted § 230 broadly, asserting that Congress had made a clear policy choice to limit platform liability.[7] *Zeran* concerned a defamation claim that Kenneth Zeran, an AOL user, brought against the company for failing to remove postings at Zeran's request. The postings falsely implied that he was selling tasteless t-shirts regarding the Oklahoma City bombing. AOL, though it had notice, did not promptly remove the postings. However, the Fourth Circuit found that § 230 still insulated the company from liability, as it was acting as a publisher.[8]

Soon after, other circuits followed the Fourth Circuit's interpretation of § 230.[9] However, the Supreme Court has never granted certiorari on a case

5. 47 U.S.C. § 230(c).

6. JEFF KOSSEFF, THE TWENTY-SIX WORDS THAT CREATED THE INTERNET 2 (2019).

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

8. *Id.* at 332 ("AOL falls squarely within this traditional definition of a publisher and, therefore, is clearly protected by § 230's immunity.").

9. *See, e.g.*, Ben Ezra, Weinstein, & Co. v. Am. Online Inc., 206 F.3d 980, 986 (10th Cir. 2000) ("[W]e agree with the Fourth Circuit's decision in *Zeran*."); Batzel v. Smith, 333 F.3d 1018, 1027–28 (9th Cir. 2003) ("Consistent with these provisions, courts construing § 230 have recognized as critical in applying the statute the concern that lawsuits could threaten the 'freedom of speech in the new and burgeoning Internet medium.' " (citations omitted)); Green v. Am. Online (AOL), 318 F.3d 465, 471 (3d Cir. 2003) ("By its terms, § 230 provides immunity to AOL as a publisher or speaker of information originating from another information content provider."); Universal Commc'n Sys., Inc. v. Lycos, Inc., 478 F.3d 413,

interpreting the law.[10] As a result, courts have frequently ruled in favor of defendants (often, internet platforms), asserting that § 230 bars tort claims or statutory violations, relying upon *Zeran*'s broad reading of § 230 immunity.[11]

Fair Housing Council of San Fernando Valley v. Roommates.com exists as a critical, partial exception to this trend.[12] *Roommates.com* is a rare appellate opinion to find that a website could potentially be held liable for developing and displaying unlawful user content despite § 230's broad immunization.[13] *Roommates.com* involved a federal Fair Housing Act (FHA) claim (and associated California state law claims) brought against Roommates.com, a website designed to match potential renters with potential tenants. Given that Roommates.com facilitated connections between third parties, one might think that § 230 and *Zeran* would make this an easy case, as Roommates.com merely published third-party content rather than creating its own. But because Roommates.com mandated users to answer questions that could facilitate discrimination in violation of the Fair Housing Act and California state law, the U.S. Court of Appeals for the Ninth Circuit held in an en banc opinion that § 230 did not *completely* bar the plaintiff's claims.

Since this case created a rupture in the wall § 230 created and *Zeran* fortified, some plaintiffs have relied upon *Roommates.com* and its progeny to demonstrate why, despite § 230's broad grant of immunity, *their* claims should proceed.[14] Few plaintiffs have been successful. Section 230 continues to stymie those hoping to find platforms liable for their choices or their users' content. For those who support the current regulatory regime governing platforms, *Roommates.com* is an outlier. If platforms do not get *too* involved in facilitating the users' content, § 230 remains effective. As a result, platforms generally avoid the pitfalls Roommates.com fell into.

418–19 (1st Cir. 2007) ("Although this court has not previously interpreted CDA Section 230, we do not write on a blank slate. The other courts that have addressed these issues have generally interpreted Section 230 immunity broadly. . . . In light of these policy concerns, we too find that Section 230 immunity should be broadly construed.").

10. *See* Biden v. Knight First Amendment Inst. at Columbia Univ, 141 S. Ct. 1220 (2021) (Thomas, J., concurring), https://www.supremecourt.gov/opinions/20pdf/20-197_5ie6.pdf (citing critiques of § 230 on First Amendment grounds).

11. *See, e.g.*, Nemet Chevrolet v. Consumeraffairs.com, 591 F.3d 250 (4th Cir. 2009) (finding that § 230 protected a website from defamation and statutory claims and upholding the trial court's dismissal of the plaintiff's complaint).

12. 521 F.3d 1157 (9th Cir. 2008).

13. *Id.* at 1175–76.

14. *See, e.g.*, Complaint at 17, Herrick v. Grindr, LLC, 306 F. Supp. 3d 579 (S.D.N.Y. 2018), *aff'd*, 765 F. App'x 586 (2d Cir. 2019) (No. 17-CV-932) (arguing that "[t]he plain language of CDA § 230 does not extend do Grindr's operation and design").

This Article complicates the common story of *Roommates.com* in technology law circles by discussing its relationship to the Fair Housing Act. Examinations of the case rarely describe how the underlying claim that Roommates.com sought to dismiss alleged violations of the Fair Housing Act—the last major civil rights law enacted in the 1960s and a cornerstone of Lyndon Johnson's Great Society initiative. The civil rights laws of the 1960s, with their goal of promoting racial equality and securing equal rights for Black communities, represent a rare moment of federal legislative achievement to vindicate the rights of racial minorities. Yet this nexus between civil rights and technology in *Roommates.com* remains largely unexamined in technology law scholarship analyzing the case and its effects.

What would a world that expanded § 230's carveouts for intellectual property and federal criminal laws to include specific civil rights laws (like the Fair Housing Act) look like?[15] In considering these questions, this Essay aims to expand our understanding of how technology can work to improve rather than impede racial justice. How does *Roommates.com* appear when placed alongside the history of housing discrimination, the decades-long efforts by advocates and organizers to protect tenants, the unrealized promise of the Fair Housing Act, and the socioeconomic dynamics that have thwarted justice for the unhoused and under-resourced?

Long before § 230 came into being, the Fair Housing Act already had a large exception—the Mrs. Murphy exception, which exempts the Act premises that are owner-occupied and relatively small. However, this exception does *not* apply to housing advertisements. Effectively, under the Fair Housing Act, it is permissible for a landlord to discriminate against a potential tenant for a room in his house, so long as the landlord does not explicitly advertise in a discriminatory manner.

The Mrs. Murphy exception attempts to balance associational First Amendment rights against the Fair Housing Act's purpose to promote housing equity and justice. But by prohibiting such small landlords from advertising in discriminatory ways, the Fair Housing Act also forestalls the *marketing* of a landlord's potentially discriminatory preferences. In essence, while there might be associational or privacy interests for small landlords, there are also policy interests in preventing the spread of such preferences through advertising.

15. As a result of the carveouts, entities otherwise immunized for liability as publishers can still be held liable under federal criminal or intellectual property laws. 47 U.S.C. § 230(e) (setting forth exemptions). Thus, for example, the Department of Justice could file a case against a website that hosts content unlawful under federal law, like child pornography. *See* 47 U.S.C. § 230(e)(1).

Whether one agrees or not with that policy choice, it at least reflects some consideration of competing values.[16] This lies in contrast with the blunt force application of § 230 and its near-total foreclosure of Fair Housing Act liability online, particularly for publishers. In essence, § 230 reflects an *unbalanced* approach to the tension between housing equity and speech online.

This Article proceeds in three parts. Part II discusses *Roommates.com* and how it complicated the trajectory of § 230's interpretation by courts. Part III situates *Roommates.com* among Fair Housing Act cases and larger debates regarding housing, technology, and race. Part IV concludes by considering avenues for changing the law to improve Fair Housing Act enforcement online and the strengths and weaknesses of each approach. Just as we should situate *Roommates.com* in a larger narrative of Fair Housing Act claims and civil rights litigation, reformers should also consider whether legislative reform of § 230 will address the massive problems the platforms present.

II. THE SHARP TURN OF *ROOMMATES.COM*

Section 230 was enacted in 1996 to avoid the repercussions of developing caselaw that might allow internet platforms to be held contributorily liable for the actions of their users.[17] Although one major case prior to its enactment, *Cubby v. Compuserve*, held that platforms were not liable for potentially defamatory content posted by users, another—*Stratton Oakmont, Inc. v. Prodigy Services Co.*—imputed liability to the platform for user content.[18]

Section 230 creates a rule granting "interactive computer services" (ranging from sites that host user content to DNS providers that provide technical services) broad immunity from liability for the content of their users. It does this by expressly disclaiming secondary liability for platforms or users for the content of another, creating a safe harbor for content moderation decisions, and preempting state laws that run contrary to its protections.[19] The first major test of § 230's protections, *Zeran v. America Online, Inc.* (*AOL*), interpreted the scope of its language quite broadly.[20] *Zeran* concerned America Online's

16. *See* Norrinda Brown Hayat, *Accommodating Bias in the Sharing Economy*, 83 BROOK. L. REV. 613, 625 (2018) (describing the policy goals of the Mrs. Murphy exception); James D. Walsh, *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, 605 (1999) (calling for abolition of the Mrs. Murphy exception).

17. KOSSEFF, *supra* note 6, at 2–3, 6.

18. Stratton Oakmont, Inc. v. Prodigy Services Co., No. 31063/94, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995).

19. 47 U.S.C. § 230 (c)–(e).

20. 129 F.3d 327 (4th Cir. 1997).

potential liability for allegedly defamatory content posted by an unknown third party on its service.[21] AOL had notice of the content issue, but the Fourth Circuit held that notice did not impede AOL's ability to rely upon § 230's protections. The court observed that notice-based liability would create immense practical burdens for platforms, which it reasoned Congress had sought to avoid by enacting broad language in § 230 in the first place.[22] Individual speakers would also suffer if notice-based liability were in effect, as a platform might, out of an abundance of caution, remove their content upon notice whether or not was defamatory, creating a chilling effect.[23]

The *Zeran* decision is notable for its scope, as Mary Anne Franks, Jeff Kosseff, and others have observed.[24] It is very difficult for plaintiffs to file claims against platforms without running into § 230 and the caselaw following *Zeran*'s broad interpretation. Of the cases that have not found § 230 to definitively preempt plaintiff claims, *Roommates.com* is among the most prominent.

Roommates.com began when two nonprofits opposed to housing discrimination filed suit against Roommates.com, a website that facilitated roommate matching. The nonprofits alleged that Roommates.com violated state and federal fair housing laws, among other statutes, by (1) allowing usernames that used words associated with race, religion, or sex; (2) allowing users to write essays describing what they were looking for in a roommate that could indicate discriminatory preferences; and (3) requiring a questionnaire that mandated disclosure of information regarding a user's age, gender, sexual orientation, occupation, and familial status.[25] The trial court focused primarily on the federal Fair Housing Act, which plaintiffs alleged Roommates.com had

21. *Id.* at 328.

22. *Id.* at 333.

23. *Id. See, e.g.*, Phila. Newspapers, Inc. v. Hepps, 475 U.S. 767, 777 (1986) (discussing chilling effects as antithetical to First Amendment protections).

24. KOSSEFF, *supra* note 6, at 94–96; Mary Anne Franks, *How the Internet Unmakes Law*, 16 OHIO ST. TECH. L.J. 10, 19–20 (2020).

25. Fair Hous. Council of San Fernando Valley v. Roommate.Com, LLC., 2004 WL 3799488, at *2 (C.D. Cal. Sept. 30, 2004), *rev'd and remanded sub nom.* Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC, 489 F.3d 921 (9th Cir. 2007), *on reh'g en banc*, 521 F.3d 1157 (9th Cir. 2008), *and aff'd in part, vacated in part, rev'd in part sub nom.* Fair Hous. Council of San Fernando Valley v. Roommates.Com, LLC, 521 F.3d 1157 (9th Cir. 2008). In the subsequent Ninth Circuit decision, the court noted that "[e]ach subscriber must also describe his preferences in roommates with respect to the same three criteria: sex, sexual orientation and whether they will bring children to the household." Fair Hous. Council of San Fernando Valley v. Roommates.Com, LLC, 521 F.3d 1157, 1161 (9th Cir. 2008). The site required its users to engage in selection based on these criteria. *Id.*

violated by allowing the publication of discriminatory statements, contravening section 804(c) of the FHA—a key section of the law applying to publishers. That provision makes it unlawful to:

> make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin, or an intention to make any such preference, limitation, or discrimination.[26]

Plaintiffs effectively alleged that Roommates.com facilitated the unlawful content posted by its users as a condition of use, even if the website did not actually create or draft the content.[27] But the trial court applied Ninth Circuit precedent, which generally followed *Zeran*, to hold that § 230 precluded the FHA claim.[28] The court observed that though the plaintiffs were concerned that finding § 230 to preclude their claim might "eviscerate" the FHA, such a concern was not unique to the Fair Housing Act, given how broadly § 230 was written.[29]

In other words, to the trial court, the case did not implicate the policy justifications underlying the FHA, given how broadly § 230 preempts liability (except for a few specific carveouts). Those carveouts, as the trial court noted, cover federal criminal law and intellectual property law and do not include any reference to civil rights or housing law.[30] Invoking one of the maxims of statutory construction, *expressio unius est exclusio alterius*, the court declined to read the FHA into that limited list.[31]

It is worth considering *why* federal civil rights laws are not part of the list of exceptions. Section 230 became part of a larger bill, the Communications Decency Act (CDA), which arose from concerns about explicit content online that minors might be able to access. Although § 230 was designed as an

26. 42 U.S.C. § 3604(c).

27. *Roommates.com*, 521 F.3d at 1166. ("By requiring subscribers to provide the information as a condition of accessing its service, and by providing a limited set of pre-populated answers, Roommate [sic] becomes much more than a passive transmitter of information provided by others; it becomes the developer, at least in part, of that information.").

28. 2004 WL 3799488 at *3–5. Because the federal court only had jurisdiction over the state law claims if the federal claim survived, the court dismissed without prejudice the state law claims. *Id* at *5.

29. *Id.* at *4.

30. *Id.* at *3.

31. *Id.*

alternative to the CDA—one that was supported by the American Civil Liberties Union (ACLU)—Congress ended up combining the two bills. Jeff Kosseff describes the drafters of § 230 as particularly focused on creating broad language that would attract minimal opposition from other constituencies, especially "law enforcement or industry groups," while not creating so many exceptions as to poke holes in the law.[32] Kosseff quotes one drafter:

> We had to cut out criminal law. We had to cut out intellectual property. We knew the copyright people would kill us on that. It was a developing area. We were flying by the seats of our pants trying to make sure we got all the language in that we needed.[33]

It is revealing that civil rights groups were not on the list of feared opponents. One view might be that because few people could really understand what § 230 would enable, fewer constituencies lobbied for changes to the proposed legislation. Kosseff describes the contemporaneous congressional milieu as relatively unaware of the dynamics or potential of the internet. Perhaps it is unsurprising that the content industries or the Justice Department *would* have understood what could happen if § 230 weakened their own legislative frameworks, given their awareness of the disruptive nature of new technologies.[34]

The plaintiffs appealed the district court decision, and the Ninth Circuit partially reversed in a splintered ruling.[35] Judge Kozinski's controlling opinion held that, because Roommates.com mandated a questionnaire that required the users to express impermissible preferences under the FHA, it could not wholly rely upon § 230 to immunize itself from liability.[36] In reconciling *Roommates.com* with earlier Ninth Circuit cases that had effectively applied *Zeran*, Kozinski noted that such cases did not necessarily grant § 230 immunity "to those who actively encourage, solicit and profit from the tortious and unlawful communications of others."[37] This ruling created, as Kosseff notes, a potentially destabilizing result for online service providers on their home turf, as the Ninth Circuit covers both California and Washington State.[38]

---

32. KOSSEFF, *supra* note 6, at 66.

33. *Id.*

34. *Id.* at 67–73. The lack of Congressional debate over § 230, as Kosseff reports, shows that few legislators really understood the ramifications of what they were voting on.

35. Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC, 489 F.3d 921 (9th Cir. 2007), *on reh'g en banc*, 521 F.3d 1157 (9th Cir. 2008).

36. *Id.* at 926–27.

37. *Id.* at 928 (discussing *Carafano v. MetroSplash.com*, an earlier Ninth Circuit § 230 case that relied upon the Ninth Circuit's version of the *Zeran* framework).

38. KOSSEFF, *supra* note 6, at 174.

Roommates.com petitioned for, and obtained, an en banc rehearing. The ACLU of Northern California filed an amicus brief in support of neither party, seeking to balance the organization's commitments to both racial justice and to free speech, suggesting a path forward that the court ultimately took.[39] The ACLU argued:

> Section 230 does not apply in this case to the extent that Roommate's liability is predicated upon the questions it asks in the questionnaire it designed, without respect to the responses provided by its members. Roommate is also not immune for its affirmative decision not to provide home seekers with email notifications of housing opportunities when the home seeker does not meet the allegedly discriminatory preferences of the provider. However, section 230 immunity does apply to members' statements in the comments sections of their profiles. That is content attributable solely to Roommate's members.[40]

The ACLU's amicus attempted to balance the need for enforcing civil rights statutes like the FHA against the free speech concerns that could limit online expression. It casts the relevant inquiry as the platform's conduct (making active, mandatory choices in design to facilitate FHA violations, and thus acting like a speaker) against its users' choices (something largely out of the control of the platform).

Like the original three judge Ninth Circuit panel, the en banc court found that § 230 immunized some, but not all, of the claims that the plaintiffs had brought.[41] In doing so, it did not wholly hew to the *Zeran* line of cases, but it also declined to drastically reform appellate interpretation of § 230: "The CDA does not grant immunity for inducing third parties to express illegal preferences. Roommate's own acts—posting the questionnaire and requiring answers to it—are entirely its doing and thus § 230 of the CDA does not apply to them. Roommate is entitled to no immunity."[42] A website that does not passively host content, but actively induces it, could be liable.[43]

---

39. *See* Brief of Amicus Curiae Am. C.L. Union of N. Cal. in Support of Neither Party, Fair Hous. Council of San Fernando Valley v. Roommates.Com, LLC, 521 F.3d 1157 (9th Cir. 2008) (Nos. 04-56916, 04-57173).

40. *Id.*

41. *Roommates.com*, 521 F.3d 1157 (9th Cir. 2008). As Judge Kozinski wrote both the controlling opinion in the initial panel and the en banc majority, it is unsurprising that the en banc opinion effectively ratified the earlier controlling opinion. The key language in the en banc opinion relies in large part on the initial panel's reasoning.

42. *Id.* at 1165.

43. Additionally, the site's search and email notification systems, which used the answers to its violative questions to filter and sort results, also fell outside of § 230's protections:

The en banc opinion opened the door to plaintiffs who earlier might have been absolutely foreclosed by *Zeran* and its progeny from overcoming § 230's grant of immunity. Now, if plaintiffs could allege that a platform had created content or induced third parties to violate the law, the platform could not rely upon § 230 as its Get Out of Litigation card. Though the en banc decision shifted the state of play for litigants, Judge Kozinski underplayed his holding: "The message to website operators is clear: If you don't encourage illegal content, or design your website to require users to input illegal content, you will be immune."[44]

The decision did, in fact, change how plaintiffs brought cases, though its practical consequences were not as extensive as § 230 proponents might have feared. *Roommates.com* itself bounced around the district and appeals courts for a few more years, ultimately ending in a finding that the website had no liability as a publisher under the FHA.[45] Additionally, the selection of roommates did not violate the FHA.[46] Thus, no party (individual or website operator) was liable. The sputtering end to a high-profile saga serves as a symbol of the en banc opinion's effect upon § 230 caselaw—potentially revolutionary but in practice somewhat limited.

Kosseff notes that plaintiffs seeking to avoid § 230 will allege that *Roommates.com* governs, to "varying degrees of success."[47] Orly Lobel observes that platforms like Airbnb and Uber might be more comparable to Roommates.com than Craigslist, potentially exposing those platforms and their users to liability risks § 230 does not immunize.[48] And although a few cases have relied upon *Roommates.com* to preclude defendants from enjoying full

> Similarly, Roommate is not entitled to CDA immunity for the operation of its search system, which filters listings, or of its email notification system, which directs emails to subscribers according to discriminatory criteria. Roommate designed its search system so it would steer users based on the preferences and personal characteristics that Roommate itself forces subscribers to disclose. If Roommate has no immunity for asking the discriminatory questions, as we concluded above, it can certainly have no immunity for using the answers to the unlawful questions to limit who has access to housing.

Id. at 1167 (citations omitted).

44. *Id.* at 1175.

45. 666 F.3d 1216 (9th Cir. 2012).

46. *Id.* at 1222 ("Because we find that the FHA doesn't apply to the sharing of living units, it follows that it's not unlawful to discriminate in selecting a roommate.")

47. KOSSEFF, *supra* note 6, at 180.

48. Orly Lobel, *The Law of the Platform*, 101 MINN. L. REV. 87, 145–46 (2016).

immunity under § 230, those cases are generally in the minority of § 230 cases.[49]

III. *ROOMMATES.COM* AND FAIR HOUSING ACT LITIGATION

Although *Roommates.com* reshaped § 230 caselaw, it also has an important place in FHA litigation. Perhaps because of § 230's origins in responding to judicial decisions involving defamation claims, law and technology scholarship analyzing § 230 has tended to focus more on speech issues and less on civil rights claims like those in *Roommates.com*.[50] This Part contextualizes *Roommates.com* amongst Fair Housing Act cases—specifically, the provisions creating liability for publishing or printing allegedly discriminatory advertisements. This Part also considers the larger questions involving race, housing, and technology, both before and after the *Roommates.com* decision.

When it was decided, *Roommates.com* was not the only Fair Housing Act case involving § 230 in the federal courts. Less than a month prior to the en banc opinion in *Roommates.com*, the Seventh Circuit ruled in *Chicago Lawyers' Committee for Civil Rights Under Law, Inc. v. Craigslist, Inc.*[51] The suit involved a similar challenge to *Roommates.com*—a nonprofit advocating for housing rights alleged that Craigslist was violating the FHA by allowing users to post notices that allegedly discriminated against potential renters.

Craigslist spends more time than *Roommates.com* discussing how, exactly, the Fair Housing Act might be violated if § 230 did not provide the website with immunity. Naturally, the most obvious FHA violation would occur if a landlord refused to rent to or treated inequitably a potential or actual tenant based on protected statuses like race, age, religion, or sex; the subsection of the FHA that prohibits such action is the first in a long list of prohibited

49. *See* Huon v. Denton, 841 F.3d 733 (7th Cir. 2016) (finding § 230 did not apply when website's employees allegedly created potentially defamatory content); Lemmon v. Snap, Inc., 995 F.3d 1085 (9th Cir. 2021) (holding that § 230 did not preclude a negligent design claim); Barnes v. Yahoo!, Inc., 570 F.3d 1096 (9th Cir. 2009) (finding that § 230 did not forestall plaintiff's breach of contract claim under a theory of promissory estoppel); FTC v. AccuSearch, Inc., 570 F.3d 1187 (10th Cir. 2009) (holding that a website that acted to generate user content could not rely upon § 230); Doe v. Internet Brands, Inc., 824 F.3d 846 (9th Cir. 2016) (finding that a failure-to-warn claim against a website operator was not precluded by § 230).

50. *See, e.g.*, Eric Goldman, *Why Section 230 is Better than the First Amendment*, 95 NOTRE DAME L. REV. REFLECTION 33 (2019) (discussing the interaction between § 230 and the First Amendment in protecting online speech).

51. 519 F.3d 666 (7th Cir. 2008).

conduct.[52] But liability also exists for *advertising* housing in a discriminatory manner under section 804(c) of the FHA.[53] Thus, a newspaper that allowed an advertisement for an apartment complex that only invited non-Black potential tenants to apply, could be subject to FHA liability independently of the apartment complex itself. It was under this theory that the nonprofits filed their claims against both Roommates.com and Craigslist.

Unlike Roommates.com, Craigslist won resoundingly at both the trial and appellate levels. The Seventh Circuit applied § 230's prohibition on publisher liability, determining that such language obviated any possibility for liability under section 804(c).[54] Although the Seventh Circuit was skeptical of *Zeran*'s broad interpretation of § 230, it fully insulated Craigslist and did not foreshadow the Ninth Circuit's mixed decision for Roommates.com.[55]

Historically, publisher liability cases under the FHA have involved advertisements or statements that a publisher made or that the landlord itself promulgated. In an early case, *U.S. v. Hunter*, the Fourth Circuit held that section 804(c)'s ban on discriminatory advertising applied to newspapers and survived First Amendment scrutiny.[56] A more recent case, *Iniestra v. Cliff Warren Investments, Inc.*, involved a landlord that printed notices and policies saying, in part, that children were required to stay in their apartments at certain times.[57] The plaintiffs successfully alleged that such a notice violated section 804(c)

52. 42 U.S.C. § 3604(a)–(b)

53. 42 U.S.C. § 3604(c).

54. 519 F.3d at 671 ("What § 230(c)(1) says is that an online information system must not 'be treated as the publisher or speaker of any information provided by' someone else. Yet only in a capacity as publisher could craigslist be liable under § 3604(c). It is not the author of the ads and could not be treated as the 'speaker' of the posters' words, given § 230(c)(1).").

55. *Id.* at 669 ("We have questioned whether § 230(c)(1) creates any form of 'immunity.' "). Interestingly, Judge Easterbrook noted that the visibility of alleged housing discrimination on such sites might make FHA enforcement *easier* because civil rights organizations could monitor listings to see if any listings trigger FHA liability. *Id.* at 672 ("Using the remarkably candid postings on craigslist, the Lawyers' Committee can identify many targets to investigate. It can dispatch testers and collect damages from any landlord or owner who engages in discrimination. It can assemble a list of names to send to the Attorney General for prosecution." (citations omitted)). Judge Easterbrook does not note that, just as it would be difficult for platforms to prescreen potentially non-compliant postings at scale, it would likely be even more challenging for under-resourced civil rights organizations to monitor postings for potential FHA cases.

56. 459 F.2d. 205, 211 (4th Cir. 1972) ("[T]he congressional prohibition of discriminatory advertisements was intended to apply to newspapers as well as any other publishing medium.").

57. 886 F.Supp. 2d. 1161, 1169–70 (C.D. Cal. 2012).

because it limited certain occupants' use of apartment facilities and thus discriminated based on familial status.[58]

Such cases demonstrate clear prohibitions on publishing or printing materials that could fall within the FHA's restrictions on discrimination. Although a landlord of a sufficiently small property can rely upon the Mrs. Murphy exception to engage in potentially unlawful conduct in selecting tenants, a newspaper cannot print an advertisement from that landlord advertising such selection preferences because the exception does not cover section 804(c), as discussed below.

It is against this backdrop that we can see decisions like *Roommates.com* (in its ultimate disposition, in which the website was not liable under the FHA) and *Craigslist* as creating massive exceptions to the protection of the law. When aspiring renters moved from analog spaces (like newspaper classified ads) to online venues (like Roommates.com) in their housing search, they moved from a space governed by the FHA to one largely *ungoverned* by it. Although plaintiffs could pursue individual claims against posters, the platforms' practices that facilitate or encourage the underlying conduct are insulated from secondary liability. Potential renters likely did not even realize that shift. Yet, rather than considering *Roommates.com* as a destabilizing force to a major civil rights law, many technology law scholars focus on its effects on § 230.[59]

Civil rights litigators, advocates, and scholars already grapple with exceptions to statutory protections. The Mrs. Murphy exception, which applies to both Title II (governing public accommodations) and the Fair Housing Act, effectively exempts from coverage premises that are owner-occupied and relatively small.[60] Such exceptions were designed to protect small establishments—those that run "small rooming houses all over the country," in the words of one senator—from civil rights enforcement.[61] They balance the associational rights of individuals in certain settings against the policy goals of civil rights protections. Crucially, the Mrs. Murphy exception does *not* apply

58. *Id.* at 1169.

59. *See, e.g.*, Eric Goldman, *Roommates.com Denied 230 Immunity by Ninth Circuit En Banc (With My Comments)*, TECH. & MKTG. BLOG (Apr. 3, 2008), https://blog.ericgoldman.org/archives/2008/04/roommatescom_de_1.htm; Olivier Sylvain, *Intermediary Design Duties*, 50 CONN. L. REV. 203, 253–55 (2018) (discussing how *Roommates.com* has opened the door to plaintiffs seeking to hold platforms liable for their non-publishing decisions).

60. 42 U.S.C. § 2000a(b)(1) ("[O]ther than an establishment located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his residence; . . ."); 42 U.S.C. § 3603(b)(1)).

61. *See* Norrinda Brown Hayat, *Accommodating Bias in the Sharing Economy*, 83 BROOK. L. REV. 613, 625 (2018); *see also* James D. Walsh, *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, 605 (1999) (discussing the legislative origins of the Mrs. Murphy exception).

to section 804(c)—the section that governs discriminatory printed notices and advertisements, which *Roommates.com* and *Craigslist* implicate.

Roommates.com's parsing of liability for different components of Roommates.com's site seems plausible given the different elements of § 230. The site had effectively no control over what users typed in its open field "Additional Comments," but it *did* influence user responses to its questions. Thus § 230 insulated Roommates.com from liability for the former but not the latter. For housing law experts, such parsing may seem ridiculous. Why should it matter to what degree the website enabled or induced potentially discriminatory content since it wouldn't matter for a traditional newspaper advertisement?

In the original Ninth Circuit panel opinion, Judge Reinhardt made a variation on this point in his concurrence:

> On the final page of the sign-up process in which prospective users create their profiles, Roommate's site states, "We strongly recommend taking a moment to personalize your profile by writing a paragraph or two describing yourself and what you are looking for in a roommate" directly above a blank box. This page immediately follows the "My Roommate Preferences" form, which explicitly asks members to provide their preferences based on gender, sexual orientation and familial status. Judge Kozinski concludes that the "open-ended" recommendation on the "Additional Comments" page "suggests no particular information that is to be provided by members." Op. at 929. However, when viewed in the context of the entire sign-up process that conveys the message to prospective users that they should express their preferences for tenants based on race, gender, sexual orientation, national origin and religion, ordinary users would understand the recommendation to constitute a suggestion to expand upon the discriminatory preferences that they have already listed and to list their additional discriminatory preferences in that portion of the profile.[62]

The opinions differ on how to characterize Roommates.com's design choices. Judge Reinhardt argued that the "Additional Comments" section was more likely to give rise to potentially discriminatory content given how the site set up the field. In contrast, Judge Kozinski characterizes it as more "open-

62. Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC, 489 F.3d 921, 932 (9th Cir. 2007), *on reh'g en banc*, 521 F.3d 1157 (9th Cir. 2008), *and aff'd in part, vacated in part, rev'd in part sub nom.* Fair Hous. Council of San Fernando Valley v. Roommates.Com, LLC, 521 F.3d 1157 (9th Cir. 2008).

ended."[63] This debate either seems completely vital to determining when and how § 230 applies or completely absurd—especially when contextualizing the debate against the FHA's very broad prohibitions against publishing discriminatory advertisements, regardless of whether the publisher facilitated the development of the advertisement.

But recall that § 230, in its equally broad language, insulates information content providers from publisher liability. This creates the bizarre result in which a newspaper that reproduces a potentially discriminatory advertisement may be liable under the FHA for a print version, but not if it allows users to post advertisements on a website. In one sense, § 230 can be read as a "super-statute"—one that trumps almost all others.[64] As discussed later in Part IV, although this reading has dominated caselaw, following *Roommates.com*'s lead judges have expressed reservations about the broad immunity that *Zeran* established. In essence, treating § 230 as a super-statute seems less appealing now than it was at the time *Zeran* was decided.

Section 230 is an exception large enough to potentially swallow all of section 804(c). Like critics who have characterized the Mrs. Murphy exception as unnecessary, outdated, or discriminatory,[65] critics of § 230's breadth highlight how it contributes to inequities.[66] It is also notable that the companies

63. Judge Reinhardt was on the en banc panel that reheard the case a year after writing this concurrence but joined Judge Kozinski's majority en banc opinion without writing separately.

64. I use this term advisedly, referencing Justice Gorsuch's description in his majority opinion in *Bostock v. Clayton County* of the Religious Freedom Restoration Act as a "super-statute." *See* Bostock v. Clayton Cty., GA, 140 S. Ct. 1731, 1754 (2020) ("Because RFRA operates as a kind of super statute, displacing the normal operation of other federal laws, it might supersede Title VII's commands in appropriate cases.").

65. *See* Hayat, *supra* note 61, at 644 ("There are good reasons to amend Title II to remove the Mrs. Murphy exception, of course, including the fact that its very existence continues to signal that discrimination in some (even limited number) public accommodations is acceptable. The exception was rooted in racism and its modern-day proponents use it to perpetuate racism today."); Walsh, *supra* note 61, at 607 ("The existence of an exemption for owner-occupied dwellings announces that our nation still tolerates discrimination. Implicit in the exemption is the belief that there is something so unsavory about Mrs. Murphy's likely targets—African Americans, Latinos, Jews, families with children—that she should not have to live amongst them, even if they reside in separate units that she chose to make available on the market.").

66. *See, e.g.*, Danielle Keats Citron & Mary Anne Franks, *The Internet as a Speech Machine and Other Myths Confounding Section 230 Reform*, 2020 U. CHI. LEGAL F. 45, 54 ("Section 230 has subsidized platforms whose business is online abuse and the platforms who benefit from ignoring abuse. It is a classic 'moral hazard,' ensuring that tech companies never have to absorb the costs of their behavior. It takes away the leverage that victims might have had to get harmful content taken down."); Danielle Keats Citron & Benjamin Wittes, *The Internet Will Not*

that § 230 protects are mostly based in California, a state with the highest housing inequities in the nation.

Technology companies are hardly the sole cause of housing discrimination. The Fair Housing Act, on its own, cannot solve the housing inequities we see in America today. But § 230 immunity impedes the *goals* of the Fair Housing Act by essentially creating a largely nonregulable sector of the housing market. If the 1960s civil rights laws demonstrated a national commitment to racial justice and equality, § 230 makes that commitment incomplete. As a policy choice, § 230 is justifiable, given the need to provide broad protections to platforms to facilitate their development, growth, and moderation. The limited list of exceptions means that platforms can remain relatively confident that they are not exposing themselves to extensive litigation risk, theoretically incentivizing the creation of new platforms. But congressional choices mean that the values the Fair Housing Act was designed to protect and promote will never be fully realized under the current system—if they ever could have been at all.

IV. PROMOTING THE FAIR HOUSING ACT IN A § 230 WORLD

What, then, is to be done to address the problem of fair housing and discrimination in a country governed by § 230's protections? I envision three options: (1) changing how internet platforms advertise housing; (2) reinterpreting § 230's grant of immunity to such platforms qua their advertising activity; or (3) amending § 230. This Part evaluates each option in turn. Because it seems that legislative reform would best address the issues that *Roommates.com* highlighted, the preferred option is a statutory amendment that would include section 804(c) of the FHA alongside other exempted laws like federal criminal law and intellectual property law.

Given that § 230 has protected technology companies from a vast number of legal claims, private pressure—largely from individual users and civil society—has served as the main method for trying to urge companies to change their practices. Because such pressure is definitionally ad hoc, likely uncoordinated, and often from individuals or civil society (who generally have

Break: Denying Bad Samaritans § 230 Immunity, 86 FORDHAM L. REV. 401, 403 (2017) ("The CDA's origins in the censorship of 'offensive' material and protections against abuse are inconsistent with outlandishly broad interpretations that have served to immunize platforms dedicated to abuse and others that deliberately host users' illegal activities.").

far less power than legislators or regulators) the likelihood of success varies widely.[67]

In the housing context, the years since *Roommates.com* have given rise to a range of platforms that facilitate short-term uses, long-term rentals, and other housing arrangements—most notably VRBO, Airbnb, and Zillow. Though Airbnb primarily advertises itself as a platform facilitating short-term rentals, usually for vacationers, critics have inveighed against its effects upon local housing markets for years.[68] Those effects potentially include accelerating gentrification, pushing out long-time residents (who are often from historically marginalized groups), and limiting housing stock.[69]

Airbnb has also received much criticism for the experiences of minority users, especially Black users, who have encountered racial discrimination while attempting to find accommodations. These experiences led to a prominent campaign, #AirbnbWhileBlack, which sought to force the company to improve its approach.[70] Because § 230 limits the possibilities for litigation activists and advocates must resort to advocacy efforts like #AirbnbWhileBlack to urge the company to change its practices that might, but for § 230, run afoul of the FHA. The company's policy responses have been voluntary, which—regardless of whether they are permanent, effective, or fully enacted—lack the financial pain and potential durability of a legal remedy.[71]

---

67. *See* Lee Rowland, *Naked Statute Reveals One Thing: Facebook Censorship Needs Better Appeals Process*, ACLU (Sept. 25, 2013, 10:07 AM), https://www.aclu.org/blog/national-security/naked-statue-reveals-one-thing-facebook-censorship-needs-better-appeals (discussing how the ACLU's influence and access facilitated its request to Facebook regarding a censorship decision).

68. *See, e.g.*, Kyle Barron, Edward Kung & Davide Proserpio, *Research: When Airbnb Listings in a City Increase, So Do Rent Prices*, HARVARD BUS. REV. (Apr. 17, 2019), https://hbr.org/2019/04/research-when-airbnb-listings-in-a-city-increase-so-do-rent-prices.

69. *See, e.g.*, Robert McCartney, *Airbnb Becomes Flash Point in the District's Hot Debate Over Gentrification*, WASH. POST. (Nov. 21, 2017), https://www.washingtonpost.com/local/airbnb-becomes-flash-point-in-the-districts-hot-debate-over-gentrification/2017/11/21/3c3bcdb2-bf19-11e7-8444-a0d4f04b89eb_story.html.

70. *See* Hannah Jane Parkinson, *#AirBnBWhileBlack hashtag highlights potential racial bias on rental app*, THE GUARDIAN (May 5, 2016, 10:28 EDT), https://www.theguardian.com/technology/2016/may/05/airbnbwhileblack-hashtag-highlights-potential-racial-bias-rental-app (discussing racial bias and disparate experiences for Black Airbnb users for both hosts and guests); *see also* Ray Fisman & Michael Luca, *Fixing Discrimination in Online Marketplaces*, HARVARD BUS. REV. (Dec. 2016), https://hbr.org/2016/12/fixing-discrimination-in-online-marketplaces (describing empirical research into race-based discrimination on Airbnb).

71. *See An Update on Airbnb's Work to Fight Discrimination*, AIRBNB (Sept. 10, 2019), https://news.airbnb.com/an-update-on-airbnbs-work-to-fight-discrimination/ (discussing

Litigation addressing § 230's scope has had some success in tacking back from the expansive *Zeran* line. However, it is questionable that litigation could address the preemption of section 804(c) liability because existing cases don't address allegedly discriminatory advertising. Nevertheless, because recent cases show some willingness from courts to reorient the trajectory of § 230 caselaw, they signal the possibility of more meaningful legislative reforms.

In 2016, in a reversal of the typical § 230 case in which an aggrieved plaintiff sues a technology platform, only to run headlong into § 230, Airbnb proactively contested San Francisco's attempts to regulate Airbnb's rental procedures within the city. Airbnb argued that the possibility of criminal penalties against short-term rental platforms that failed to police their listings for compliance with city registration mandates ran contrary to § 230.[72] Perhaps because platforms had been so successful in invalidating regulatory efforts under § 230, Airbnb initiated its case against the city in a pre-enforcement challenge.

Surprisingly, Airbnb lost its motion for a preliminary injunction. The district court held, relying upon *Roommates.com* and its Ninth Circuit progeny, that § 230 did not apply because the ordinance did not create speaker or publisher liability for platforms.[73] Specifically, because the ordinance required Airbnb to "monitor and police listings by third parties to verify registration" rather than create liability for Airbnb as the publisher or speaker for those listings, § 230 was not applicable.[74] In essence, the court asserted that the ordinance held "plaintiffs liable only for their own conduct—namely for providing and collecting a fee for Booking Services in connection with an unregistered unit."[75] Such decisions create the possibility that governments could regulate housing platforms without running afoul of § 230, although likely not to the extent that section 804(c) does, since that language explicitly

---

Airbnb's voluntary policy changes in response to public criticism). Because Airbnb's changes are self-regulatory, they lack the oversight and enforceability of a court order or consent decree.

72. Airbnb, Inc. v. City & Cty. of San Francisco, 217 F.Supp.3d 1066, 1071 (N.D. Cal, 2016). Although in practice and prior to beginning my academic work, I advocated publicly on behalf of Airbnb's position that § 230 immunized the company from liability under San Francisco's ordinance, that position was unsuccessful; Airbnb later settled with San Francisco. My advocacy was not funded by Airbnb, though we were in communication about the issue.

73. *See id.* at 1072–76.

74. *Id.* at 1072.

75. *Id.* at 1073. The court analogized the ordinance to a tax scheme that the City of Chicago levied on internet auction sites; that scheme was unsuccessfully challenged by StubHub! on § 230 grounds in the Seventh Circuit. *See* City of Chicago, Ill. v. StubHub!, Inc., 624 F.3d 363, 366 (7th Cir. 2010).

creates publisher liability. Another way to frame this puzzle: the sorting, filtering, and other design actions of a platform aren't covered by § 230, but the more obvious forms of housing discrimination may be.

A later Ninth Circuit case, *HomeAway v. City of Santa Monica*, similarly upheld a local ordinance that required housing platforms to monitor their sites for listings that did not comply with the city's short-term rental registry.[76] As in *Airbnb*, the court held that § 230 did not preempt Santa Monica's ordinance because the ordinance did not require the platforms to monitor content.[77] The court relied upon *Roommates.com* and other Ninth Circuit decisions that limited § 230's scope in order avoid *Roommates.com*'s fears that expansive immunity would "create a lawless no-man's-land on the Internet."[78]

Decisions like *Airbnb* and *HomeAway* demonstrate how courts have grown uneasy at the prospect of expansively reading § 230 to eliminate the ability of governments to regulate internet activities, particularly on critical issues like housing. This unease parallels judicial and scholarly concerns about rulings that use the First Amendment as a deregulatory tool.[79] Jeff Kosseff argues that judges have become skeptical of *Zeran* and how dominant the expansive view of § 230 became in the early years following § 230's enactment.[80] Judicial ambivalence—and extensive scholarly criticism—helps to explain why § 230 has received so much legislative attention in recent years.

Shortly after the *Airbnb* decision, Nancy Leong and Aaron Belzer argued that certain decisions by platforms (including encouraging users to post photos and creating rating systems) might implicate liability under civil rights laws,

---

76. 918 F.3d 676 (9th Cir. 2019).

77. *See id.* at 683 ("On its face, the Ordinance does not proscribe, mandate, or even discuss the content of the listings that the Platforms display on their websites."). Because the court construed the ordinance as not requiring the platforms to edit or monitor the content of listings but rather to check for licenses, it held that § 230 was not implicated.

78. 521 F.3d at 1164 (9th Cir. 2008).

79. *See, e.g.*, Amanda Shanor, *The New Lochner*, 2016 WISC. L. REV. 133, 135–38. Dissenting in a recent case, Justice Kagan observed the dangers of a deregulatory First Amendment:

> Speech is everywhere—a part of every human activity (employment, health care, securities trading, you name it). For that reason, almost all economic and regulatory policy affects or touches speech. So the majority's road runs long. And at every stop are black-robed rulers overriding citizens' choices. The First Amendment was meant for better things. It was meant not to undermine but to protect democratic governance—including over the role of public-sector unions.

Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2502 (2018) (Kagan, J., dissenting).

80. *See* KOSSEFF, *supra* note 6, at 203–05.

including the FHA, without triggering § 230's protections.[81] In effect, the ways in which platforms facilitate their users' content may remove their ability to rely upon § 230—at least if they are sufficiently active (such as with Roommates.com's dropdown menus). Leong and Belzer rely in part upon *Roommates.com*'s holding that when platforms materially develop content, § 230 immunity does not apply. Although this theory has not been tested in court, and Leong and Belzer do not address the final disposition of *Roommates.com* (in which the site was ultimately found not liable under the Fair Housing Act), it does provide an alternate method of promoting the goals of civil rights statutes by relying upon and extending § 230 and civil rights laws' existing interpretations without requiring statutory revisions.

Beyond the housing context, the Ninth Circuit analyzed more recently in *Lemmon v. Snap* a wrongful death claim against Snapchat, limiting the company's § 230 immunity.[82] The plaintiffs alleged that Snapchat negligently designed a "Speed Filter" app that some users incorrectly perceived would reward them if they drove over 100 miles per hour. Tragically, two teenagers died in an automobile accident; their parents filed suit, claiming that the company knew about the myth regarding the Speed Filter and did not effectively limit the risk.[83] Snap claimed that § 230 immunized the company from liability.[84]

The Ninth Circuit disagreed, applying *HomeAway* and an earlier case, *Barnes v. Yahoo*, to find that § 230 did not immunize Snap's design choices. In effect, the plaintiffs sought to hold Snap liable not for its actions as a publisher or speaker, but rather for the potentially negligent elements of its platform.[85] The Ninth Circuit ratified this approach, citing *Roommates.com* and noting that because the plaintiffs did not attempt to hold Snapchat liable for the content for another, but rather for its own choices, § 230 did not immunize the company.[86] In effect, the Speed Filter was analogous to the drop-down menus on Roommates.com.

---

81. Nancy Leong & Aaron Belzer, *The New Public Accommodations: Race Discrimination in the Platform Economy*, 105 GEO. L.J. 1271, 1306–99 (2017).

82. 995 F.3d 1085 (9th Cir. 2021).

83. *Id.* at 1087–90.

84. *Id.* at 1090.

85. *Id.* at 1092 ("It is thus apparent that the Parents' amended complaint does not seek to hold Snap liable for its conduct as a publisher or speaker. Their negligent design lawsuit treats Snap as a products manufacturer, accusing it of negligently designing a product (Snapchat) with a defect (the interplay between Snapchat's reward system and the Speed Filter). Thus, the duty that Snap allegedly violated 'springs from' its distinct capacity as a product designer." (quoting Barnes v. Yahoo!, Inc., 570 F.3d 1096, 1107 (9th Cir. 2009), as amended (Sept. 28, 2009))).

86. *See id.* at 1093–94.

Though *Airbnb* and *HomeAway* demonstrate that platforms that implicate housing laws may not use necessarily § 230 as an escape hatch, and *Lemmon* shows that design choices are not immune under § 230, we are still a long way from enforcing the Fair Housing Act online, particular under section 804(c). Because section 804(c) explicitly invokes publisher liability, § 230 will inevitably immunize platforms that might otherwise be liable under that section, as in *Craigslist*, unless they engage in design conduct to a degree that arguably contravenes the FHA's protections. But since Roommates.com was ultimately found not liable even for its non-§ 230 protected conduct, the FHA itself needs more strength to effectively promote housing justice.

The broad protections of section 804(c) are likely irreplicable in an online environment unless Congress can both (A) craft an amendment that does not treat platforms as publishers (while still preserving some core § 230 protections) and (B) enact it. And although *Airbnb*, *HomeAway*, and *Lemmon* arguably widen the crack that *Roommates.com* created, courts generally continue to rely upon *Zeran* when assessing cases implicating § 230. Thus, advocates for robust civil rights law enforcement online have increasingly considered § 230 reform as the best path forward.[87]

Many legislators have proposed various § 230 reforms. Because of the fast-moving nature of legislation, this Article considers more generally the *types* of reform proposals and how they might further effectuate the goals of the FHA (and perhaps other civil rights laws as well). I am sympathetic to the concerns that many have raised concerning § 230's role in creating an internet ecosystem rife with systemic injustice, horrifying conduct, and vast inequities. But my default has generally been to consider § 230 to be a bit like the old joke about democracy—the worst system, except for all the others. Although open to the possibility of reform, like others, I consider most of the recent proposals unworkable, counterproductive, or potentially unconstitutional.

For those, like me, who want robust civil rights laws and active enforcement of those laws, § 230 creates a vast realm where unenforceable conduct can run rampant. There are two potential modifications to § 230 that could further the goals of the FHA. Congress could change the statute in order to create a system in which design decisions—the ways in which an entity covered by § 230 sets up its system—are more explicitly unprotected (like

87. *See, e.g.*, Ian Weiner, *Civil Rights Laws Will Significantly Benefit From Hirono, Warner, Klobuchar Section 230 Communications Decency Act Reform Proposals*, LAWS.' COMM. FOR C.R. UNDER L. (Feb. 5, 2021), https://www.lawyerscommittee.org/civil-rights-laws-will-significantly-benefit-from-hirono-warner-section-230-communications-decency-act-reform-proposals/ (expressing support for legislative proposals that would allow for greater civil rights enforcement online).

Roommates.com's dropdown menus). Congress could also require prescreening for certain types of content (as in *Airbnb*, and akin to how newspapers must ensure print advertisements do not violate section 804(c)). Alternatively, the FHA, or perhaps only section 804(c), could be added to the list of statutes not covered by § 230, joining federal criminal and intellectual property law.

The design decisions approach has the benefit of hewing more closely to § 230's policy goals, effectively making more explicit the interpretative moves of *Roommates.com* and *Lemmon*.[88] However, the design decisions approach fails to further the goals of the FHA in two key respects. First, section 804(c) would remain unenforceable against platforms that carried discriminatory advertisements unless the platform was careless enough to actively assist in the creation of those advertisements. A platform would need to be as foolish as Roommates.com, or as intransigent as Airbnb and HomeAway, to run afoul of the Fair Housing Act and other laws and ordinances that regulate housing. Most sophisticated companies would likely avoid such liability.

Second, to the degree that civil rights laws create a regulatory environment in which individuals can be relatively confident that they will not be discriminated against in public accommodations or housing, a design-oriented approach reverses the expectations. Rather than knowing ex ante that a platform likely opposes discriminatory housing policies, a user would need to litigate a case following a potentially discriminatory incident, shifting the burden. If civil rights laws are to have any force, they should create a regime in which individuals can feel confident that their rights are being protected.

Alternatively, legislators could add the FHA to the list of laws to which § 230 does not apply. This would make section 804(c) enforceable against platforms.

There are potential downsides to this approach. Most obviously, the SESTA-FOSTA debacle demonstrates how amending § 230, even for purported socially beneficial efforts, may create disastrous results for communities needing protection. The SESTA-FOSTA legislation supposedly addressed the problem of child sex trafficking, though in fact that problem was already addressed by existing federal criminal law (to which § 230 does not

88. Olivier Sylvain argues for this approach in a recent essay, drawing upon recent cases like *Lemmon* and *HomeAway*. *See* Olivier Sylvain, *Platform Realism, Informational Inequality, and Section 230 Reform*, 131 YALE L.J. FORUM 475, 501 (2021) ("My reform proposal is simple: online intermediaries should not be immune from liability to the extent that their service designs produce outcomes that conflict with hard-won but settled legal protections for consumers—including consumer-protection and civil-rights laws and regulations.").

apply[89]). As legislators considered SESTA and FOSTA, advocates and activists repeatedly sounded the alarm on how the legislation was both unnecessary, given existing law, and likely to cause harm to those who relied upon the community aspect of technology platforms to protect themselves.[90] Sex workers, who have relied upon online spaces to support their community, warned that the SESTA-FOSTA language could remove the possibility of sharing information and expressing solidarity online, driving sex work to the margins in which sex workers themselves would be more imperiled.[91] Those concerns went unheeded, and the consequences, unfortunately, have come to pass.[92] Beyond undoing the damage of SESTA-FOSTA, any future legislation modifying § 230 must do a far better job of avoiding negative consequences for those groups who lack the social or economic power to protect themselves.

The best way forward is to add section 804(c) to the list of exempted statutes, in addition to more meaningful reforms to the FHA itself. I leave proposals on the latter to more experienced housing scholars and advocates. As to the former, without allowing for FHA enforcement against discriminatory online housing advertisements—given how common such

89. 47 U.S.C. § 230(e)(1).

90. *See* Melissa Gira Grant, *Proposed Federal Trafficking Legislation Has Surprising Opponents: Advocates Who Work With Trafficking Victims*, THE APPEAL (Jan. 26, 2018), https://theappeal.org/proposed-federal-trafficking-legislation-has-surprising-opponents-advocates-who-work-with-bf418c73d5b4/
("Laura LeMoon, an anti-trafficking and sex workers' rights advocate, wants to change that. She worries that legislation like SESTA and FOSTA, though ostensibly meant to help trafficking victims, is based on dangerous presumptions about the sex trade, which can actually harm both sex workers and people who are trafficked.")

91. *See id.* ("Yet neither bill will result in justice for victims of human trafficking, anti-trafficking advocates and service providers told The Appeal. If passed, they say, the legislation stands to do more harm than good by failing to distinguish between trafficking victims and sex workers, eliminating sex workers' source of income, and hampering anti-trafficking investigations.").

92. *See* Melissa Gira Grant, *The Real Story of the Bipartisan Anti-Sex Trafficking Bill That Failed Miserably on Its Own Terms*, THE NEW REPUBLIC (June 23, 2021), https://newrepublic.com/article/162823/sex-trafficking-sex-work-sesta-fosta ("The new GAO report on SESTA/FOSTA, issued Monday, helps validate many of these concerns shared by sex workers and survivors of trafficking. As the report notes, rather than helping identify and prosecute traffickers, what SESTA/FOSTA did was push online sex work ads to the margins.") Kendra Albert argues that for some lawmakers such consequences were the actual goal. *See* Kendra Albert, *Enough About FOSTA's 'Unintended Consequences'; They Were Always Intended*, TECHDIRT (July 29, 2021, 11:57 AM), https://www.techdirt.com/articles/20210728/13245147264/enough-about-fostas-unintended-consequences-they-were-always-intended.shtml (arguing that the legislation's effects upon sex workers were intentional). I agree with this perspective.

advertisements are today—other adjustments will only allow for minor improvements.

A world in which platforms face section 804(c) liability would likely require a great deal of investment, both in terms of individual workers to prescreen content and automated review. Platforms might automatically ban all housing advertisements rather than prescreen. The housing market itself could change drastically. But the current dynamic, in which the already imperfect FHA lacks force online, effectively makes a powerful tool like section 804(c) into a dead letter.

I share the concerns of advocates who fear that § 230 reform will imperil the internet. Frankly, I am unsure whether such a legislative reform could help achieve the unrealized goals of the FHA. But the internet is already not functioning in so many obvious ways. Although this Article only discusses the FHA and related housing regulation, many other areas of traditional regulatory oversight remain largely unregulated online. That might be a situation we are willing to live with, or even embrace. But troubling consequences result from the current regime.

V. CONCLUSION

For technology lawyers and scholars, *Roommates.com* serves as an early indicator of how § 230 might not provide as much coverage to platforms as the early cases interpreting its text indicated. In revisiting it, my goal has been to employ a different lens to view its place not only in the history of § 230 cases but in a larger civil rights history as well. Because of the broad scope of § 230's language, it is easy to overlook the laws it overrides. Many § 230 cases deal with defamation, but the Fair Housing Act serves an important role in our civil rights history, one that § 230 lessens. Many scholars, advocates, companies, and governmental bodies are now taking a belated look at how technology and race intersect, while others who have done this work for years are finally receiving overdue attention.

It is impossible to say what will come of the calls and proposals for § 230 reform. But exempting section 804(c) would make a meaningful and expressive difference and could be worth the costs. No matter the outcome, we need a more sophisticated and expansive understanding of the role § 230 plays in a larger civil rights and racial justice movement. Only by clearly understanding current dynamics can we achieve real equity.