IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CHICAGO LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, INC.,

Plaintiff,

v.

CRAIGSLIST, INC.,

Defendant.

Judge Amy J. St. Eve

Magistrate Judge Jeffrey Cole

Case No. 06 C 0657

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NOTICE OF FILING

PLEASE TAKE NOTICE that on Friday, May 19, 2006, we filed electronically with the Clerk of the United States District Court for the Northern District of Illinois, Eastern Division, Plaintiff Chicago Lawyers' Committee for Civil Rights Under Law, Inc.'s Memorandum in Opposition to Defendant's Motion for Judgment on the Pleadings, a copy of which is served upon you.

Dated: May 19, 2006

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CERTIFICATE OF SERVICE

I, Stephen D. Libowsky, certify that I caused a copy of Plaintiff's Memorandum in Opposition to Defendant's Motion for Judgment on the Pleadings to be served by e-mail to Eric Brandfonbrenner and Christopher Wilson via the ECF system of the U.S. District Court, Northern District of Illinois, Eastern Division, and by Federal Express delivery to David Burman, David W. Ogden and Patrick J. Carome on this 19th day of May, 2006.

/s/ Stephen D. Libowsky
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MEMORANDUM IN OPPOSITION TO DEFENDANT'S
MOTION FOR JUDGMENT ON THE PLEADINGS

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Introduction

In its motion for judgment on the pleadings, Defendant craigslist, Inc., asserts immunity from the present suit based on a single sentence, which craigslist has isolated and stripped away from the rest of a comprehensive and carefully worded, titled, structured, and designed 30 sentence statute. The Supreme Court has not yet interpreted or commented on Section 230 of the Communications Decency Act of 1996 (CDA), but some circuit courts, including the Seventh Circuit, have. Not only did the Seventh Circuit refuse to follow any of the opinions cited by craigslist, it harshly criticized those opinions and rejected their holdings. *Doe v. GTE Corp.*, 347 F.3d 655 (7th Cir. 2003). In charting its own course, this Circuit faulted the opinions relied upon by craigslist for (i) failing to interpret the statute as a whole, (ii) adopting a reading of the statute that rendered parts of the text superfluous or meaningless, and (iii) reaching a conclusion contradicted by unambiguous legislative intent. This Court should follow the Seventh Circuit's lead and hold that Section 230 provides legal protection to entities like craigslist from civil liability only when they undertake good faith, front-end efforts to block and screen the offensive material at issue. craigslist does not make any efforts to block and screen discriminatory housing advertisements and, indeed, insists that it has no responsibility to do so. craigslist's motion for judgment on the pleadings should be denied.

Legal Standards

"[C]ourts grant a Rule 12(c) motion for judgment on the pleadings only if it appears beyond doubt that the plaintiff cannot prove any facts that would support his claim for relief." *Northern Indiana Gun & Outdoor Shows, Inc. v. City of South Bend*, 163 F.3d 449, 452 (7th Cir. 1998) (internal quotations omitted). In evaluating such a motion, courts must "accept all well-pleaded allegations in the complaint as true." *Forseth v. Village of Sussex*, 199 F.3d 363, 364

(7th Cir. 2000). The facts in the complaint are to be viewed "in the light most favorable to the nonmoving party." *Northern Indiana Gun & Outdoor Shows, Inc.*, 163 F.3d at 452 (internal quotations omitted). When, as here, "a defendant raises an affirmative defense, the burden of proof rests squarely on the defendant, not the plaintiff." *Ryan v. Town of Schererville, Ind.*, 2005 WL 1172614, *16 (N.D. Ind. 2005) (attached as Ex. 1) (following *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 765 (1998)). Accordingly, the plaintiff is not required to "plead around" affirmative defenses. *Doe*, 347 F.3d at 657.

Statement of Facts

craigslist is a Delaware corporation (Compl. ¶ 6) operating a website accessible at "chicago.craigslist.org," containing website links that facilitate its publication of housing advertisements. (Compl. ¶¶ 7–13.) In the past year, craigslist published on its website over one hundred housing advertisements that indicate discriminatory preferences based on six protected classes: race (Compl. ¶¶ 17–19), color (Compl. ¶ 21), national origin (Compl. ¶¶ 23–28), sex (Compl. ¶¶ 30–34), religion (Compl. ¶¶ 36–58), and familial status (Compl. ¶¶ 60–141). To illustrate, discriminatory housing advertisements published on craigslist's website contained the following statements: "NO MINORITIES" (Compl. ¶ 19); "Non-Women of Color NEED NOT APPLY" (Compl. ¶ 21); "African Americans and Arabians tend to clash with me so that won't work out" (Compl. ¶ 23); "Requirements: Clean Godly Christian Male" (Compl. ¶ 30); "Only Muslims apply" (Compl. ¶ 40); and "No children" (Compl. ¶ 134). In addition, craigslist allows housing providers to conceal their identities by assuming an anonymous email address with the domain name "craigslist.org." (Compl. ¶¶ 10–11.) It is undisputed that craigslist did not make any effort to block or screen these, or any other, discriminatory housing advertisements.

Section 3604 of the Federal Fair Housing Act (FHA) prohibits discrimination in the sale or rental of housing. 42 U.S.C.A. § 3604 (2001). More specifically, Section 3604(c) makes it unlawful to print a discriminatory housing advertisement even if that advertisement was written by a third party. Its operative language forbids persons and entities

> 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. 42 U.S.C.A. § 3604(c) (2001).

There is no question that newspapers and other media outlets, and any other printer or publisher, are subject to liability for violations of Section 3604(c). *See U.S. v. Hunter*, 459 F.2d 205, 211 (4th Cir. 1972) (holding that the "congressional prohibition of discriminatory advertisements was intended to apply to newspapers as well as *any other publishing medium*") (emphasis added); *Mayers v. Ridley*, 465 F.2d 630, 633 (D.C. Cir. 1972) (Wright, J., concurring) (concluding that the "proscription against 'publication' should therefore be read more broadly to bar *all devices for making public* racial preferences in the sale [or rental] of real estate, whether or not they involve the printing process") (emphasis added).[1]

[1] The Department of Housing and Urban Development, the federal agency charged with enforcing the Fair Housing Act, and the Department of Justice have stated that Section 3604(c) applies to Internet publishers. *See* Mike Hughlett, *Craigslist suit faces speech hurdle*, CHI. TRIB., March 26, 2006, (Assistant Secretary Kim Kendrick, Fair Housing and Equal Opportunity, U.S. Dept. of Housing and Urban Development, said "that in her view the FHA applies as much to the Internet as it does to print media"); *see also Hearing on Fair Housing Issues in the Gulf Coast in the Aftermath of Hurricanes Katrina and Rita Before the House Subcommittee on Housing and Community Opportunity,* United States House of Representatives 4 (2006) (statement of Kim Kendrick; The Department of Housing and Urban Development "has received and is investigating complaints alleging that some Internet sites have carried advertisements offering housing to [Katrina] evacuees, but only if they were of the right race or religion, or have no children. The FHA makes it unlawful to publish discriminatory statements in connection with the sale or rental of housing. . . . We are currently investigating complaints that allege that advertisers and the Website publishers of these advertisements have violated the Fair Housing Act.") (attached as Group Ex. 2); *U.S. v. Spyder Web Enterprises, LLC*, No. 03-1509 (D.N.J. 2003) (consent decree applying FHA to online publisher) (attached as Ex. 3).

craigslist argues that Section 230 regards its discrimination differently because it publishes the discriminatory advertisements on a computer screen rather than on paper. Today's reality, however, is that the vast majority of housing advertisements are published on the Internet. Since many of the discriminatory advertisements at issue here are placed by landlords whom craigslist has made anonymous, victims of these discriminatory advertisements have no remedy other than against craigslist. It is, therefore, imperative that the FHA apply to craigslist's online posting of housing advertisements.[2]

Argument

Section 230 provides legal protection from civil liability as follows:

> § 230. Protection for private blocking and screening of offensive material
>
> * * *
>
> (c) *Protection for "Good Samaritan" blocking and screening of offensive material.*
> (1) Treatment of publisher or speaker
> No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.
> (2) *Civil liability*
> *No provider or user of an interactive computer service shall be held liable on account of—*
> (A) *any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected*; or
> (B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in [subparagraph (A)]. 47 U.S.C.A. § 230 (2001) (emphasis added).[3]

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[2] craigslist contends that if this Court interprets Section 230 to protect only efforts to block and screen, its business and that of other Internet entities will be seriously threatened. (Def. Mem. in Supp. of Mot. 18–19.) Not so. Newspapers have screened out discriminatory advertisements for years without any difficulty, because screening for discriminatory advertisements does not require nuanced judgments about truth or falsity or fact or opinion.

[3] Section 230 also provides in pertinent part the following:
(b) Policy

* * *

(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.*

* * *

craigslist asserts that, as a provider of an interactive computer service, it is immune under Section 230(c)(1) from suit or liability for publishing discriminatory advertisements posted on its website. Yet, as discussed below, a thorough and careful analysis of Section 230 in its entirety demonstrates that the crabbed reading advanced by craigslist cannot survive close scrutiny, and that the Seventh Circuit's more holistic reading of the statute, as articulated in *Doe,* correctly subjects craigslist to suit in the circumstances presented here.

I. Section 230's Text, Title, Headings, Structure, and Policies Demonstrate that Good Faith, Front-End Blocking and Screening of the Offensive Material at Issue is Required for Section 230 Protection.

craigslist's motion isolates a single sentence in Section 230(c)(1) from the statute and wholly ignores the statutory headings, structure and remaining text. "[S]tatutory interpretation is a holistic endeavor and, at a minimum, must account for a statute's full text, language as well as punctuation, structure, and subject matter." *Trs. of the Chicago Truck Drivers, Helpers & Warehouse Workers Union (Indep.) Pension Fund v. Leaseway Transp. Corp.*, 76 F.3d 824, 828 (7th Cir. 1996) (quoting *U.S. Nat'l Bank of Or. v. Indep. Ins. Agents*, 508 U.S. 439, 454–56 (1993)).[4] Though the "plain meaning" of the statutory text is "clearly important," the text "must still be construed in its proper context." *Dersch Energies, Inc. v. Shell Oil Co.*, 314 F.3d 846, 856 (7th Cir. 2002).[5] It is thus imperative that courts "view the statutory command as a whole and read it so that each part can play its congressionally appointed role in achieving the 'overall

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[4] In *United States National Bank of Oregon*, the Court ruled that statutory interpretation requires a thorough and holistic inquiry construing a statute's language, punctuation, structure, and subject matter together and held that "evidence that the 1916 Act amended only the Federal Reserve Act comes from the 1916 Act's title: *An Act To amend certain sections of the Act entitled 'Federal reserve Act,' approved December twenty-third, nineteen hundred and thirteen.*" 508 U.S. at 457 (emphasis in original). The Court stated that the "first thing to notice" with respect to the 1916 Act was its "structure," as it "[began] by stating *[t]hat the Act entitled 'Federal reserve Act,' approved [1913], be, and is hereby, amended as follows.*" *Id.* at 455–56 (emphasis in original).

[5] In *Dersch Energies*, the Seventh Circuit held that no implied right of action existed under Section 2805(f)(1) of the Petroleum Marketing Practices Act (PMPA). 314 F.3d at 855. The Seventh Circuit cited the title of Section 2805(a)—"maintenance of civil action by franchisee against franchisor; jurisdiction and venue; time for commencement of action"—and how Section 2805(a) "delineate[d] all of the statutory requirements for maintaining a cause of action under the PMPA." *Id.* at 856–57. Consequently, the Seventh Circuit held that "we believe that the existence of an explicit cause of action in § 2805(a) and (b) . . . makes it highly unlikely that Congress absentmindedly forgot to provide a cause of action for § 2805(f)(1)." *Id.* at 857.

statutory scheme.'" *U.S. v. Franz*, 886 F.2d 973, 978 (7th Cir. 1989) (quoting *Gomez v. U.S.*, 109 S.Ct. 2237, 2240–41 (1989)). *See Cole v. U.S. Capital, Inc.*, 389 F.3d 719, 725 (7th Cir. 2004) ("In interpreting the FCRA . . . we must keep in mind the language and design of the statute as a whole.") As pointed out in *Dersch Energies, Inc.*, 314 F.3d at 856, statutes are "passed as a whole and not in parts or sections" such that "each part or section must be construed in connection with every other part or section so as to produce a harmonious whole."

craigslist asks this Court to read Section 230(c)(1) in isolation and grant it outright immunity from liability which, would effectively rewrite 230 so as to render Section 230(c)(2) subordinate to (c)(1). Section 230(c)(1) does not trump Section 230(c)(2), or any other part of Section 230, all of which fall under the title "Protection for private blocking and screening of offensive material."

Here, Section 230's text, title, headings, structure, and policies construed as a whole demonstrate Congress' intent to immunize only efforts to block and screen offensive material. First, the text of Section 230(c)(2) explicitly provides in its two subparts how an interactive computer service provider or user receives protection from civil liability. These provisions respectively state that interactive computer service providers are not "liable" for displaying offensive material if they have taken good faith actions to restrict access (Section 230(c)(2)(A)) or have made blocking technology available to information content providers (Section 230(c)(2)(B)).

Second, the titles and subtitles of Section 230 set forth Congress' intent to protect only efforts to block and screen. Section 230 is titled "Protection for private blocking and screening of offensive material." 47 U.S.C.A. § 230 (2001). Moreover, the heading assigned to Section 230(c) is effectively the same: "Protection for 'Good Samaritan' blocking and screening of offensive material." 47 U.S.C.A. § 230(c) (2001). The title of Section 230(c)(2), the subsection setting forth the immunity for efforts to block and screen, is "Civil liability."

Third, the structure or design of Section 230 shows that Congress intended to protect only efforts to block and screen. The "publisher or speaker" language in Section 230(c)(1) relied on by craigslist as its sole support for its argument falls under and is subordinate to Sections 230 and 230(c), which both speak to "protection for blocking and screening of offensive material." Moreover, the "protection for blocking and screening" language in Sections 230(c)(2)(A) and (B) under the heading "Civil liability." In contrast, the text in Section 230(c)(1) (relied on by craigslist) does not fall under or appear in the operative "Civil liability" provision.

Finally, Congress codified the policies it sought to advance with the statute's enactment; Section 230(b) titled "Policy," states that the statute will "encourage the development of technologies" and "remove disincentives for the development and utilization of blocking and filtering technologies." 47 U.S.C.A. § 230(b)(3)–(4) (2001).

craigslist focuses exclusively on the single sentence in Section 230(c)(1) in urging the opposite result, citing to decisions in other circuit courts construing the statute as an unconditional grant of immunity. *See Zeran v. America Online, Inc.*, 129 F.3d 327 (4th Cir. 1997) (involving state law negligence claims); *Ben Ezra, Weinstein, and Co. v. America Online, Inc.*, 206 F.3d 980 (10th Cir. 2000) (involving state law defamation and negligence claims); *Green v. America Online*, 318 F.3d 465 (3d Cir. 2003) (involving First Amendment and state law contract and negligence claims); *Batzel v. Smith*, 333 F.3d 1018 (9th Cir. 2003) (involving state law defamation claims). None of these cases involved Section 3604(c) of the FHA,[6] and each one, as indicated, was sharply criticized by the Seventh Circuit in *Doe* for failing to properly analyze the statute. *See Doe*, 347 F.3d 655, 659-60.

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[6] The only opinion construing Section 230 of the Communications Decency Act and Section 3604(c) of the federal Fair Housing Act is *Fair Housing Council of San Fernando Valley v. Roommate.com, LLC*, 2004 WL 3799488 (C.D.Cal. 2004) (attached as Ex. 4). Like other opinions craigslist cites, this opinion contains a cursory analysis of Section 230. The case is currently on appeal to the Ninth Circuit. *See also* Chang, Jennifer C., Note, *In Search of Fair in Housing Cyberspace: The Implications of the Communications Decency Act for Fair Housing on the Internet*, 55 STAN. L. REV. 969 (2002) (arguing that Section 230 does not immunize electronic publishers from FHA liability).

As the Seventh Circuit observed, if the other courts' "reading of [(c)(1)] is sound, then § 230 *as a whole* makes [interactive computer service providers] indifferent to the content of information they host or transmit" because there would be no liability under state or federal law

> whether they do (subsection (c)(2)) or do not (subsection (c)(1)) take precautions. . . . As precautions are costly . . . ISPs may be expected to take the do nothing option and enjoy immunity under 230(c)(1). Yet 230(c) . . . bears the title 'Protection for 'Good Samaritan' blocking and screening of offensive material,' hardly an apt description if its principal effect [under (c)(1)] is to induce [interactive computer service providers] to do nothing about [blocking and screening] the distribution of indecent and offensive materials. 347 F.3d at 660 (emphasis added).

The Seventh Circuit then rhetorically asked, "[w]hy not read § 230(c)(1) as a definitional clause rather than as an immunity from liability, and thus harmonize the text with the caption? (citation omitted) On this reading, an entity would remain a 'provider or user'—and thus be eligible for [civil liability protection] 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." *Id.*

Under this straight-forward reading of Section 230(c)(1), an interactive computer service provider would, if it created the offensive material, be subject to treatment as a speaker or publisher and thus understandably would "lose the benefit" of civil liability protection under (c)(2)—because as the author of the content it could not credibly maintain that good faith efforts were made to prevent the offensive disclosure. *Id.* But where an interactive computer service does not create the offensive information, it is merely the provider or user, and will be entitled to civil liability protection only for its efforts to block and screen. *Id.*

The alternative reading of the statute, as urged by craigslist and adopted by the Third, Fourth, Ninth and Tenth Circuits, treats Section 230(c)(1) as an unrestricted grant of *complete* immunity, available to an interactive computer service provider for doing *absolutely nothing*. *See Zeran*, 129 F.3d at 330; *Ben Ezra*, 206 F.3d at 984–85 (following *Zeran*); *Green*, 318 F.3d at 470–71 (following *Zeran* and *Ben Ezra*); *Batzel*, 333 F.3d at 1026; *Carafano v.*

Metrosplash.com, Inc., 339 F.3d 1119, 1122–24 (2003) (following *Batzel* and *Zeran* and involving state law defamation, negligence, and other tort claims). To construe Section 230 in this manner, however, renders Section 230(c)(2) wholly superfluous and effectively meaningless. As the Seventh Circuit noted in *Doe,* entities like craigslist can, as a practical matter, "be expected to take the do-nothing option and enjoy immunity"—the exact opposite result from that which Congress intended. As discussed above, the Seventh Circuit in *Doe* also correctly noted that Section 230(c)'s title "Protection for 'Good Samaritan' blocking and screening of offensive material,'" as explicitly provided in (c)(2), is "hardly an apt description if its principal effect under [(c)(1)] is to induce [interactive computer service providers and users] to do nothing about [blocking and screening] the distribution of indecent and offensive materials via their services." 347 F.3d at 660.

Courts are "reluctant to treat statutory terms as surplusage." *Duncan v. Walker*, 533 U.S. 167, 174 (2001). Indeed, as a general proposition courts "should not construe a statute in a way that makes words or phrases meaningless, redundant, or superfluous." *Zimmerman v. North American Signal Co.*, 704 F.2d 347, 353 (7th Cir. 1983). *See Matter of Clark*, 738 F.2d 869, 872 (7th Cir. 1984).[7] Certainly, where Congress has used the same language many times over, this Court should not render that language superfluous. In Section 230, Congress used the phrase "protection for private blocking and screening" seven times: in the title to Section 230, the title to Section 230(c), in 230(b)(4), (c)(2)(A), (c)(2)(B), (d) and (f)(4)(A).

No "protection from liability" or "immunity" language appears in Section 230(c)(1), only language related to who is not a speaker or publisher if the information is provided by a third party. Section 230(c)(1) does not discuss, in any way, immunity or protection from civil liability. *See De Soto Securities Co. v. Commission of Internal Revenue*, 235 F.2d 409, 411 (7th

[7] In *Matter of Clark*, the Seventh Circuit interpreted the definitions of "modify" and "cure" under Section 1322(b) of the Bankruptcy Code ("Code"). 738 F.2d at 871. The Seventh Circuit concluded that "it is clear that Congress intended 'cure' to mean something different from 'modify'; otherwise, in light of (b)(2), (b)(3) would be superfluous." *Id.* at 872.

Cir. 1956) ("Courts have no right . . . [to] eliminate words from the language used by [C]ongress."). Specifically, "when the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 712 n. 9 (2004). Moreover, "that presumption is even stronger when the omission entails the replacement of standard legal terminology with a neologism," such as "private blocking and screening." *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 537 (1994).[8]

Here, craigslist tries to read out of Section 230 the good faith, front-end blocking and screening requirement (the explicit terms of Section 230(c)(2)) and to immunize an Internet provider who does no blocking or screening whatsoever. That is not the statutory scheme Congress devised or the construction it intended. Under Section 230(c)(1), an Internet service provider is a provider or user if it publishes content provided by someone else and is eligible for immunity for its efforts to block and screen. This reading gives effect to all parts of the statute, to its legislative context, and to its structure and underlying policies. *See Doe*, 347 F.3d at 659-60. This Court should thus follow the Seventh Circuit's lead in *Doe* and, because craigslist acknowledges that it has made no effort to block or screen, deny craigslist the protection sought in its motion for judgment on the pleadings.

II. Section 230's Legislative History and the Circumstances Surrounding the Statute's Enactment Demonstrate that Good Faith, Front-End Blocking and Screening of the Offensive Material at Issue is Required for Section 230 Protection.

craigslist's reading of Section 230(c)(1) disregards the statute's extensive legislative history and the specific circumstances surrounding the enactment of the Communications Decency Act. Even where statutory language is clear and unambiguous, courts will frequently "examine the legislative history" to discern "whether it reflects a clearly expressed legislative

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[8] In *BFP*, the Supreme Court held that "reasonably equivalent value" under Section 548 of the Bankruptcy Code was different than the concept of fair market value. 511 U.S. at 536–37. The Supreme Court held that because Congress expressly provided for the fair market value concept in Sections 346 and 522 of the Code, Congress intended a new benchmark for Section 548; otherwise, Congress would have provided the same express language specifying fair market value in Section 548. *Id.* at 537.

intention to the contrary." *Grzan v. Charter Hospital of Northwest Indiana*, 104 F.3d 116, 122 (7th Cir. 1997) (internal quotations omitted); *U.S. v. Doherty*, 969 F.2d 425, 429 (7th Cir. 1992) (following *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)).[9] Nowhere does the legislative history of Section 230 signal a congressional intent (let alone express a clear legislative purpose) to grant outright immunity to indifferent interactive computer service providers who facilitate the posting of discriminatory advertisements in violation of the FHA.

A. The House and Senate Conference Reports Emphasize the Importance of Blocking and Screening.

The House and Senate conference reports and statements by the original congressional sponsors and supporters underscore that Congress intended Section 230 to protect only good faith, front-end efforts to block and screen offensive material.[10] Highlighting the heading of Section 230(c), the reports state "[t]his section provides 'Good Samaritan' protections from civil liability" for interactive computer service providers and users "for actions to restrict or to enable restriction of access to objectionable online material." H.R. REP. NO. 104-458, at 194 (1996) (Conf. Rep.) (attached as Ex. 5); S. REP. NO. 104-230, at 194 (1996) (Conf. Rep.) (attached as Ex. 6). The reports further specify that said "providers and users" are, for civil liability purposes under (c)(2), to enjoy protection unavailable to "publishers or speakers of content that is not their own *because they have restricted access to objectionable material.*" H.R. REP. NO. 104-458, at

[9] In *Doherty*, after the Seventh Circuit found a federal bank fraud statute unambiguous and "lucid," the Court looked to the statute's legislative history and concluded that the "legislative materials surrounding the passage of § 1344(1) confirm, rather than refute, our conclusion regarding its scope, for they clearly evince Congress' desire." 969 F.2d at 429.

[10] Four of the federal appellate opinions cited by craigslist gave no consideration to Section 230's legislative history at all. *See Zeran*, 129 F.3d at 330–31; *Ben Ezra*, 206 F.3d at 985; *Green*, 318 F.3d at 471; *Carafano*, 339 F.3d at 1122–23. The *Batzel* court in a footnote dismissively mentioned Section 230(c)(2) as "not relevant" and read the provision narrowly by citing and relying on the text and legislative history of a different and subsequently-enacted statute altogether. *See Batzel,* 333 F.3d at 1030 n.14.

194 (1996) (Conf. Rep.); S. REP. NO. 104-230, at 194 (1996) (Conf. Rep.) (emphasis added). *See* 47 U.S.C.A. § 230(c)(1)–(2) (2001).

B. Statements by the Congressional Sponsors and Supporters Emphasize Congress' Wish to Encourage Blocking and Screening.

Statements by the original sponsors of Section 230 remove all doubt regarding Congress' purpose in enacting the statute. Representative Christopher Cox, one of the co-sponsors, stated that the statute "will protect computer Good Samaritans, online service providers, any one who provides a *front end* to the Internet . . . *who takes steps to screen indecency and offensive material.*" 141 CONG. REC. H8470 (1995) (statement of Rep. Cox) (emphasis added) (attached as Ex. 7). *See also* 141 CONG. REC. H8470 (1995) (statement of Rep. Cox) ("We want to encourage people like Prodigy, like CompuServe, like America Online, like the new Microsoft network, to do everything possible for us."). Rep. Cox also explains that Section 230 was specifically enacted in response to two decisions, *Cubby, Inc. v. CompuServe, Inc.*, 776 F.Supp. 135 (S.D.N.Y. 1991),[11] and *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, 1995 WL 323710 (N.Y.Sup.Ct. May 24, 1995).[12] Those two decisions, Rep. Cox admonished, together presented "a massive disincentive" for interactive computer service providers and users. 141 CONG. REC. H8469–70 (1995) (statement of Rep. Cox). Cox described *Cubby* as holding that CompuServe was not liable because "[i]t just let everything come onto your computer without, in any way, trying to screen or control it," whereas *Stratton Oakmont* held Prodigy liable because Prodigy had utilized "screening and blocking software" and "tried to exercise some control over offensive material." 141 CONG. REC. H8469–70 (1995) (statement of Rep. Cox). Rep. Cox

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[11] In *Cubby*, the court found that CompuServe exercised "no editorial control" over any given publication it carried and thus held that it could not be held liable for a libel claim. *Cubby, Inc.*, 776 F.Supp. at 140–41.

[12] In *Stratton Oakmont*, the court found that Prodigy utilized an "automatic software screening program" and required online bulletin board leaders to enforce content guidelines. *Stratton Oakmont, Inc.*, 1995 WL 323710 at *4 (attached as Ex. 8). Prodigy made decisions on content "[b]y actively utilizing technology and manpower to delete notes from its computer bulletin boards on the basis of offensiveness." *Id.* Accordingly, the court held that Prodigy's decision to screen content "has opened it up to a greater liability than CompuServe and other computer networks that make no such choice." *Id.* at *5.

described the outcomes in *Cubby* and *Stratton Oakmont* as "backward." 141 CONG. REC. H8470 (1995) (statement of Rep. Cox). Cox joined in sponsoring proposed Section 230 so as to correct this "massive disincentive and to encourage people . . . to do everything possible . . . to help us control, at the portals of our computer, at the front door of our house, what comes in." 141 CONG. REC. H8470 (1995) (statement of Rep. Cox). Similarly, Representative Ron Wyden, the other co-sponsor, championed the statute to advance good faith, front-end blocking and screening of offensive material by "employing the technologies and the creativity designed by the private sector." 141 CONG. REC. H8470 (1995) (statement of Rep. Wyden).

craigslist relies on statements in the policy portion of Section 230 which disfavors government regulation of the Internet. (Def. Mem. in Supp. of Mot. 16, 18.) But craigslist once again ignores the legislative context and as a result mischaracterizes these statements as reflecting a legislative intent to provide *carte blanche* immunity from civil liability for all Internet providers and users. Instead, as the legislative history explicitly states, the sponsors of Section 230 were reacting to and rejecting the regulatory approach taken by a Senate bill, the Exon amendment, which made the Federal Communications Commission (FCC) responsible for determining indecency and obscenity on the Internet. Section 230's sponsors were wary of the FCC setting indecency standards so those sponsors instead empowered families, individuals, and the private sector to monitor content by providing the incentive of civil liability protection for developing and utilizing good faith, front-end blocking and screening methods. As Rep. Cox declared, Section 230

> will establish as the policy of the United States that we do not wish to have content regulation by the Federal Government of what is on the Internet, that we do not wish to have a Federal Computer Commission with an army of bureaucrats regulating the Internet because frankly the Internet has grown up to be what it is without that kind of help from the Government. . . . . We want to help [the Internet] along this time by saying Government is going to get out of the way *and let parents and individuals control it rather than Government doing that job for us.* 141 CONG. REC. H8470 (1995) (statement of Rep. Cox) (emphasis added).

See also 141 CONG. REC. H8470 (1995) (statement of Rep. Wyden) ("Government censors must not be allowed to spoil [the Internet's] promise").[13]

Representative Thomas Barton, a supporter of Section 230, concluded that the statute was "a reasonable way to . . . help [interactive computer service providers and users] self-regulate themselves without penalty of law." 141 CONG. REC. H8470 (1995) (statement of Rep. Barton). Similarly, Representative Bob Goodlatte, another supporter of Section 230, wrote that "Congress has a responsibility to help encourage the private sector to protect our children from being exposed" to offensive online material. 141 CONG. REC. H8471 (1995) (statement of Rep. Goodlatte). He then observed, "there is a tremendous disincentive for online service providers to create family friendly services by detecting and removing objectionable content" because of "the risk of increased liability where they take reasonable steps to police their systems." 141 CONG. REC. H8471 (1995) (statement of Rep. Goodlatte). "[T]hat doesn't mean," he added, "that providers should not be given incentives to police the use of their systems" and use software "to help screen out this material." 141 CONG. REC. H8471 (1995) (statement of Rep. Goodlatte). Section 230 accomplishes that purpose, he concluded, by "remov[ing] the liability of providers . . . who currently make a *good faith effort to edit the smut from their systems*" and "encourag[ing] the online services industry *to develop new technology, such as blocking software.*" 141 CONG. REC. H8471–72 (1995) (statement of Rep. Goodlatte) (emphasis added).

Notably, nowhere in the legislative history is there any suggestion that Section 230 would protect from civil liability any and all electronic publishers, even those who do nothing to block

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[13] Section 230's sponsors and supporters criticized the Exon amendment at some length. *See* 141 CONG. REC. H8469 (1995) (statement of Rep. Cox) ("some have suggested . . . that we take the Federal Communications Commission and turn it into the Federal Computer Commission, that we hire even more bureaucrats and more regulators who will attempt, either civilly or criminally, to punish people by catching them in the act of putting something into cyberspace."); 141 CONG. REC. H8470 (1995) (statement of Rep. Wyden) (Section 230 "does stand in sharp contrast to the work of the other body. They seek there to try to put in place the Government rather than the private sector about this task of trying to define indecent communications and protecting our kids."). Despite this House criticism, Senator Exon's amendment was passed into law as Section 223 of the CDA, thus acquiescing in federal content regulation of the Internet. Section 223 was found unconstitutional in *Reno v. ACLU*, 521 U.S. 844 (1997).

and screen open and obvious violations of the FHA.[14] To the contrary, the House and Senate conference reports and congressional sponsors' and supporters' statements uniformly discuss Section 230 as intending to encourage and protect from civil liability efforts to block and screen offensive material.[15] craigslist does absolutely nothing in the way of blocking and screening, freely allowing discriminatory housing advertisements to be placed on its website. Congress expressed no intent to protect such indifference.

C. To the Extent Section 230 Conflicts with the FHA, the Statutes can be Reconciled so Each is Given Effect.

When confronted with an arguable conflict between two federal statutes, "courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Morton v. Moncari*, 417 U.S. 535, 551 (1974). "In the absence of some affirmative showing of intent to repeal, the only permissible justification for repeal by implication is when the earlier and later statutes are irreconcilable." *Id.* The FHA and Section 230 can be reconciled, as discussed above. Section 230's legislative history contains no expression of any intent to repeal the FHA. This Court should presume that Section 230 has no

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[14] *See Chisom v. Roemer*, 501 U.S. 380, 396 (1991) ("We are convinced that if Congress had such an intent . . . at least some of the Members would have identified or mentioned it at some point in the . . . legislative history.").

[15] craigslist cites the subsequent legislative history of the Dot Kids Implementation and Efficiency Act of 2002 as support for construing Section 230(c)(1) of the Communications Decency Act of 1996 as a complete immunity. (Def. Mem. in Supp. of Mot. 17–18.) *See* 47 U.S.C.A. § 941 (West Supp. 2005). The Supreme Court has concluded that "'the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.'" *Wright v. West*, 505 U.S. 277, 295 n.9 (1992) (quoting *Consumer Prod. Safety Comm'n*, 447 U.S. at 117); *U.S. v. Price*, 361 U.S. 304, 313 (1960). *See Haynes v. U.S.*, 390 U.S. 85, 87 n.4 (1968) ("The view of a subsequent Congress of course provide[s] no controlling basis from which to infer the purposes of an earlier Congress."). But even if the legislative history of the subsequently passed Dot Kids Implementation and Efficiency Act of 2002 were more than a "hazardous basis" to construe Section 230, the entire history would be necessary. craigslists's quotes only the first half of a sentence from the legislative history and leaves out the telling second half: "The courts have correctly interpreted section 230(c), *which was aimed at protecting against liability for such claims as negligence* (See, e.g., *Doe v. America Online*, 783 So.2d 1010 (Fla. 2001)) *and defamation* (*Ben Ezra, Weinstein, and Co. v. America Online*, 206 F.3d 980 (2000); *Zeran v. America Online*, 129 F.3d 327 (1997))." H.R. REP. NO. 107-449, at 13 (2002) (emphasis added) (attached as Ex. 9). (Def. Mem. in Supp. of Mot. 18.) Thus, when Congress passed the Dot Kids Act in 2002, it viewed Section 230 as protecting electronic publishers from state law defamation and negligence claims, not from federal civil rights claims.

effect on the FHA and that both statutes remain in full force and effect. This Court should interpret Section 230 in a manner to give effect to both Section 230 and the FHA.

III. The Fair Housing Act is Consistent with Section 230, as Properly Construed, and Section 230(e) Does Not Preclude a Federal Fair Housing Act Claim.

Section 230(e), titled "Effect on other laws," explicitly preempts claims brought under contrary state law. *Doe*, 347 F.3d at 658. As to federal law, Section 230(e) provides that "[n]othing in this section shall be construed" to limit enforcement of criminal laws, intellectual property laws or communications privacy laws. craigslist argues that "[b]y creating these particular and limited statutory carve-outs, Congress plainly demonstrated that Section 230 immunity reaches all other types of statutory (and nonstatutory) claims." (Def. Mem. in Supp. of Mot. 6.) But, "'[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*.'" *TRW, Inc. v. Andrews*, 534 U.S. 19, 29 (2001) (internal quotations omitted and emphasis added). By its terms, this canon only applies when courts construe a general, substantive provision accompanied by precise, enumerated exceptions thereto.[16]

Here, as Judge Easterbrook explained, Section 230(c) is not a general, substantive provision. Rather, as stated in *Doe*, 347 F.3d at 660, (c)(1) is a definitional clause as to the meaning of "provider or user" in (c)(2). Section 230(c)(2) is Section 230's operative "safety net" provision, not in terms of commanding or mandating that interactive computer service providers take specific action, but in affording them civil liability protection for their good faith, front-end blocking and screening efforts. *Id.* at 659. It follows that Section 230(e), titled "Effect on other laws," does not enumerate exceptions to a general mandate or prohibition. When Section 230(e) simply declares that the entire statute shall have no effect whatsoever on the applicability of

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[16] *See Leatherman v. Tarrant County Narcotics Intelligence Coordination Unit*, 507 U.S. 163 at 168–69 (1993) (interpreting Rule 8 of the Federal Rules of Civil Procedure, titled "General Rules of Pleading," as establishing the notice pleading standard whereas Rule 9, titled "Pleading Special Matters," imposes a particularity pleading exception).

criminal, intellectual property, "consistent" state,[17] and communications privacy law, it means that even good faith, front-end efforts to block and screen methods will not protect interactive computer service providers from civil liability for such violations.[18] 47 U.S.C.A. § 230(e) (2001).

As the Seventh Circuit explained in *Doe,* because Section 230(c)(1) may be read as a definitional clause and (c)(2) "never requires [interactive computer service providers and users] to filter offensive content," (e)(3) as a result "would not preempt state laws or common-law doctrines that induce or require [such entities] to protect the interests of third parties . . . for such laws would not be 'inconsistent with' this understanding" of Section 230. 347 F.3d at 660.[19] Here, because Section 3604(c) of the FHA explicitly requires publishers to shield third parties (homeseekers) from discriminatory housing advertisements, Section 3604(c) is thus not inconsistent with Section 230(c) and not precluded by Section 230(e).[20]

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[17] Indeed, in *George S. May Int'l. Co.,* the court granted a temporary restraining order in spite of the defendant's assertion of Section 230 immunity from a Lanham Act claim and various state law claims. *See George S. May Int'l. Co. v. Xcentric Ventures, LLC,* No. 04 C-6018 (N.D.Ill. Sept. 24, 2004) (Norgle, J.) (attached as Ex. 10).

[18] craigslist cites *Roommate.com,* which held that Section 230(c)(1) provided substantive immunity and that 230(e) did not exempt Section 3604(c) of the FHA therefrom. 2004 WL 3799488 (C.D.Cal. 2004) (attached as Ex. 4). As stated above, the *Roommate* court's cursory review of Section 230 (similar to other opinions craigslist cites) is wrong, and the case is currently on appeal to the Ninth Circuit.

[19] The Seventh Circuit in *Doe* hinted at an alternative reading of Section 230(c)(1) such that it "forecloses any liability that depends on deeming the [interactive computer service provider or user] a 'publisher.'" *Doe,* 347 F.3d at 660. Construing Section 230(c)(1) in this way does not preclude liability under the FHA because, under this view, Section 230(c)(1) was directed at protecting only claims that require an entity to be regarded as a publisher or speaker. *See also* Chang, Jennifer C., Note, *In Search of Fair Housing Cyberspace: The Implications of the Communications Decency Act for Fair Housing on the Internet,* 55 STAN. L. REV. 969 (2002) (arguing that Section 230 does not immunize electronic publishers from FHA Liability). Since Section 230's text and legislative history clearly express that Congress enacted Section 230 to overrule *Stratton Oakmont's* narrow holding that Prodigy was a publisher for the purposes of liability under state defamation law, as a result, distributor liability was preserved. Moreover, Section 3604(c) is a federal civil rights statute and goes well beyond publisher liability; it prohibits any printing or steps—"[t]o make, print or publish, or cause to be made, printed or published"—quite different than publisher as used in (c)(1). *See Mayers* 465 F.2d at 633 (Wright, J., concurring). Accordingly, craigslist can be liable as a distributor and printer of discriminatory advertisements.

[20] Section 230(e)(3) states "[n]o cause of action may be brought and no liability may be imposed under any state or local law that is inconsistent with this section." No similar language concerning federal law appears.

Construing Section 230 by reading its text, title, headings, structure, and policies as a whole—thereby avoiding any construction that makes certain language superfluous or meaningless—and analyzing the legislative history demonstrates Congress' intent to require good faith, front-end blocking and screening of the offensive material at issue in order for interactive computer service providers and users to receive Section 230 civil liability protection. This harmonizes and gives effect to all parts of Section 230: (c)(2) makes available "civil liability" protection; (c)(1) defines "provider or user" in (c)(2); and 230(e)'s limitations provide that even good faith, front-end efforts to block and screen offensive material will not immunize an interactive computer service provider from the specified criminal, intellectual property, communications privacy or consistent state and local laws.

Conclusion

craigslist asserts immunity based on one sentence that it seeks to isolate and divorce from the rest of a carefully worded, titled, structured, and designed 30 sentence statute. The Seventh Circuit has sharply criticized this reading of the subject statute, and taken to task the several circuit court opinions craigslist relies upon for failing to interpret Section 230 as a whole, advancing a construction that renders parts of the statute superfluous or meaningless, and reaching a result that contradicts Congress' unambiguous legislative intent. This Court should follow the Seventh Circuit's lead and hold that Section 230's legal protection from civil liability for posting offensive material applies only when interactive computer service providers undertake good faith, front-end efforts to block and screen the offensive material. craigslist makes no good faith effort to front-end block or screen discriminatory housing advertisements posted on its website. Accordingly, it is not entitled to protection from civil liability under Section 230, and its motion for judgment on the pleadings should be denied.

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Dated: May 19, 2006