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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

FAIR HOUSING COUNCIL OF SAN FERNANDO VALLEY; FAIR HOUSING COUNCIL OF SAN DIEGO, individually and on behalf of the GENERAL PUBLIC,

Plaintiffs,

v.

ROOMMATE.COM, LLC,

Defendant.

CASE NO. CV03-9386 PA (RZx)

DEFENDANT'S NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT; MEMORANDUM OF POINTS AND AUTHORITIES

[Filed concurrently with Declarations of Bryan Peters and Timothy L. Alger, Defendant's Statement of Uncontroverted Facts and Conclusions of Law, and [Proposed] Judgment.]

Date: September 13, 2004
Time: 1:30 p.m.
Place: Courtroom 15

Honorable Percy Anderson

Complaint filed: December 22, 2003
Pre-trial Conf.: October 15, 2004
Trial Date: November 9, 2004

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on September 13, 2004, in Courtroom 15 of the above-entitled court, located at 312 North Spring Street, Los Angeles, California 90012, before the Honorable Percy Anderson, defendant Roommate.com, LLC will, and hereby does, move the Court for summary judgment on plaintiffs' first claim for violation of the Fair Housing Act, second claim for violation of the California Fair Employment and Housing Act, third claim for violation of the Unruh Civil Rights Act, Fourth Claim for Unfair Business Practices, and Fifth Claim for Negligence.

This Motion is made on the ground that there are no triable issues of any material fact and defendant is entitled to judgment as a matter of law, for the following reasons:

(1) All of plaintiffs' claims for relief are absolutely barred by the Communications Decency Act of 1996, 47 U.S.C. § 230, which immunizes interactive computer services for statements made by third parties.

(2) All of plaintiffs' claims are absolutely barred because the United States Constitution prohibits the regulation of speech based on content, and, alternatively, because the speech at issue here relates to lawful matters and the regulation urged by plaintiffs is unjustified and excessive.

This Motion is brought pursuant to Fed. R. Civ. P. 56 and is based on this Notice, the attached Memorandum of Points and Authorities, the concurrently filed Declarations of Bryan Peters and Timothy L. Alger and their exhibits, the concurrently filed Statement of Uncontroverted Facts and Conclusions of Law, those matters of which the Court takes judicial notice, the Court's file in this matter, and any other evidence and argument as may be presented at the hearing on the Motion.

This Motion is made following the conference of counsel pursuant to Local Rule 7-3, which took place on July 16, 2004.

DATED: August 19, 2004

QUINN EMANUEL URQUHART OLIVER & HEDGES, LLP

By _____
Timothy L. Alger
Attorneys for Defendant
Roommate.com, LLC

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MEMORANDUM OF POINTS AND AUTHORITIES

I.

INTRODUCTION

This lawsuit is an attack on the freedom to choose and the freedom to speak. Individuals have the right to freely select those with whom they wish to live, without government interference. This lawsuit's goals are to muzzle individuals attempting to find and associate with others with similar lifestyles, and to punish those who help them with this endeavor.

Plaintiffs want to shut down a forum on the Internet for constitutionally protected speech. They do this in defiance of an unambiguous federal statute, the Communications Decency Act of 1996, 47 U.S.C. § 230 ("CDA"), which immunizes interactive computer services from publisher liability for statements made by third parties. This entire lawsuit rests on the notion that defendant is responsible for the postings of its *users,* not its *own* statements.

Plaintiffs' attack also rests on an unconstitutional interpretation of the federal Fair Housing Act, 42 U.S.C. § 3604(c) ("FHA"), and the state Fair Employment and Housing Act, Cal. Govt. Code § 12955(c) ("FEHA"). Plaintiffs seek to impose liability for speech because of disfavored content. They also seek to restrict speech about lawful activities, even though the government lacks any compelling or substantial interest that might justify such controls. Further, the speech restriction sought by plaintiffs goes far beyond that which is necessary to achieve any government interest.

Accordingly, plaintiffs' claims are all barred by the CDA and the First Amendment to the United States Constitution, and must be dismissed.

II.

BACKGROUND

Defendant Roommate.com, LLC ("Roommate") owns and operates Roommates.com, a roommate search service that is accessed through the Internet

at http://www.roommates.com. (Separate Statement ("SS") ¶ 1.) Individuals who are looking for residences to share, may post information about themselves and the housing on a searchable database. (SS ¶ 2.) Users can search the database based on certain criteria, including geographic location and roommate characteristics. (SS ¶ 3.)

Roommates.com receives over 50,000 visits and 1,000,000 page views per day. (SS ¶ 4.) It has approximately 150,000 active listings; approximately 40,000 users are offering rooms for rent at their personal residence, and about 110,000 users are looking for a residence to share. (SS ¶ 5.)

Basic membership is free of charge and allows a user to create a personal profile, conduct searches of the database, and send "roommail" to other users. (SS ¶ 6.) Basic members cannot view profile "comments" (free-form essays), full-size photos, or "roommail" sent by other members. (*Id.*) For payment of a fee, a user may upgrade his or her membership, and this allows the user full access to all features of the website, including the ability to read profile "comments" and the "roommail" sent to the upgraded user by other users. (SS ¶ 7.)

Approximately 24,000 users are upgraded, paying members. Members exchange approximately 30,000 "roommails" per day, and there are currently more than 1.3 million "roommail" messages on Roommate's servers. (SS ¶ 8.)

When a person reaches Roommates.com through the Internet, he or she is accessing Roommate's computer servers located in Mesa, Arizona. (SS ¶ 9.) These servers store the data that comprises member profiles (discussed below), as well as the "roommail" messages sent among the members. (SS ¶ 10.) The servers also contain the programming that presents users with a questionnaire to create a profile, presents the member profiles on the computer screen in a standardized format, and enables users to do searches. (SS ¶ 11.)

To become a member of Roommates.com, a person must author a personal profile. (SS ¶ 12.) When listing a room for rent, the user responds to prompts that

result in the posting of specific information about the area, rent and deposit information, date of availability, and features of the residence. (SS ¶ 13.) Information may be posted about the occupants of the household, as well as roommate preferences. For example, individuals may state whether they are willing to live with a smoker, with pets, and preferred cleanliness level, occupation, and location. (SS ¶14.)

Users who are posting residences to share must disclose their sex and sexual orientation, and they *may* specify a roommate preference on that basis. (SS ¶ 15.) This preference is optional; the default setting is *no* preference, and the user must alter this setting to indicate a preference. (SS ¶ 16.) Users must state whether they are willing to live with children. (SS ¶ 17.) The questionnaire makes no mention of racial or religious preferences. (SS ¶ 18.) Users may include additional information about themselves or their residence in the "Additional Comments" section of the questionaire, which may be viewed as part of the user's profile by paying members. (SS ¶ 19.) Users also may post up to six images to be displayed with their profile. (SS ¶ 20.)

Roommate does not review or edit the text of users' profiles. (SS ¶21.) As soon as a new user completes the questionnaire, the resulting profile is made available online to other users. (SS ¶ 22.) Members are permitted to change their profiles at any time. These revisions are not reviewed by Roommate. (SS ¶23.) Roommate reviews photographs after they are posted, to make sure they do not contain images that violate the terms of service, such as obscene images or contact information (typically telephone numbers and e-mail addresses) that is normally accessible only to paying members through "roommail" and profile "comments." (SS ¶ 24.)

In its Terms of Service ("Terms"), Roommate informs users that it does not screen the postings. (SS ¶ 25.) Roommate also informs users that Roommate is not the author of the information posted on the service, and the posted content is

"the sole responsibility of the person from which such Content originated." (*Id.*)

The user is "entirely responsible for all Content" he or she uploads, downloads, posts, emails, transmits or otherwise uses. (*Id.*) The Terms further explain that Roommate cannot and will not guarantee the accuracy, integrity or quality of such content. (*Id.*) Each user agrees that Roommate will not be liable for any content made available via the service. (*Id.*)

While Roommate (which has 10 employees) is able to efficiently review images after they are posted, the monitoring of text would be a crushing burden. (SS ¶ 26.) Comments posted by users may be up to 65,000 characters, and many profiles are quite lengthy. (SS ¶ 27.) Further, such review would necessarily involve subjective judgments and would place Roommate in the role of editor, censor, and arbiter of taste and morals. (SS ¶ 28.) Roommate relies on its members to report abuses in the profiles. It then investigates the complaint and removes the offending profile if appropriate. (SS ¶ 29.) Such complaints are rare. (*Id.*)

Similarly, if a member is found to be sending offensive "roommail" to other members, Roommate will eliminate his or her access to the service. (SS ¶ 30.) Roommate does not monitor "roommail" among members, so, like other types of abuse, this type of abuse is discovered only when the members report it. (SS ¶ 31.)

III.

SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate where the defendant establishes that there can be no liability because of an immunity or privilege. *See, e.g.,* U.S. v. City of Spokane, 918 F.2d 84, 86 (9th Cir. 1990) (affirming grant of summary judgment based in part on immunity). Summary judgment is also appropriate where there is no dispute as to material fact and the application of a statute would be unconstitutional, *see* Morrison v. Hall, 261 F.3d 896, 905 (9th Cir. 2001), or the

statute itself is unconstitutional, *see* Edwards v. Aguillard, 482 U.S. 578, 594-95 (1987) (affirming summary judgment based on violation of Establishment Clause by state creationism law). *See also* Desert Outdoor Advertising, Inc. v. City of Moreno Valley, 103 F.3d 814, 816 (9th Cir. 1996) (ordering trial court to grant summary judgment where sign ordinance violated First Amendment).

IV.

PLAINTIFFS' CLAIMS ARE BARRED BY THE COMMUNICATIONS DECENCY ACT OF 1996

Congress has immunized all interactive computer services from publisher liability arising from content supplied by third parties. Congress recognized that the expansion of the Internet would be stymied if interactive computer services were confronted with the dilemma of either (1) reviewing and editing *all* third-party content, or (2) acting as a pure conduit, exercising no editorial control whatsoever. Because plaintiffs' theory of liability rests completely on defendant's publication of user-supplied content, plaintiffs' claims are barred by the CDA.

A. Interactive Computer Services Are Not Subject To Liability For Content Provided By Third Parties

The CDA states: "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." 47 U.S.C. § 230(c)(1). An "interactive computer service" is "any information service [or] system . . . that provides or enables computer access by multiple users to a computer server." *Id.* § 230(f)(2).

Congress enacted section 230 in response to the decision in Stratton Oakmont, Inc. v. Prodigy Servs. Co., 1995 WL 323710 (N.Y. Sup. Ct. 1995), in which Prodigy was found liable as a "publisher" of false information posted by the user of a financial bulletin board. Under common law, one who repeats a libel is subject to liability as if he had originally published it. Barry v. Time, Inc., 584 F. Supp. 1110, 1122 (N.D. Cal. 1984); Restatement (Second) Torts § 578 (1977). In

contrast, conduits that do not exercise editorial control are "distributors" and are not liable unless they knew or had reason to know that a statement provided by another was false. Lewis v. Time, Inc., 83 F.R.D. 455, 463-64 (E.D. Cal. 1979), *aff'd*, 710 F.2d 549 (9th Cir. 1983); Restatement § 581.

Prodigy was liable because it chose to edit third-party content "on the basis of offensiveness and 'bad taste.'" Stratton Oakmont, 1995 WL 323710 at *4. The court said the outcome would have been different if Prodigy had made user content available without alteration (*i.e.*, acted merely as a distributor), and had not taken the publisher's role of "determining what is proper for its members to post and read on its bulletin boards." *Id.*

By withdrawing interactive services from republication liability, Congress sought to overrule Stratton Oakmont while encouraging open discourse on the Internet.[1] Congress recognized that the information revolution made possible by the Internet would be hampered if computer services that made third-party content available to others were held to the same liability standards as the original speakers. *See* 47 U.S.C. § 230(b)(1), (2) ("It is the policy of the United States . . . to promote the continued development of the Internet and other interactive computer services and other interactive media [and] to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation"). *See* Batzel v. Smith, 333 F.3d 1018, 1026-29 (9th Cir. 2003), *cert. denied*, 124 S. Ct. 2812 (2004) (discussing the origin and goals of section 230).

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[1] The purpose of section 230 was to "protect [interactive computer services] from taking on liability such as occurred in the Prodigy case . . . ." 141 Cong. Rec. H8460-01, *H8470 (daily ed. August 4, 1995 (comments of Rep. Cox); *see also* House Conf. Rpt. No. 104-458 (104th Cong., 2d Sess.), at 194 (purpose of immunity provision was to overrule Stratton Oakmont and protect all interactive computer services, including non-subscriber business systems); Senate Rpt. No. 104-230 (104th Cong., 2d Sess.), at 194 (same) (SS, Conclusions of law, ¶ 8).

B. The CDA's Immunity Is Broad And Absolute

Section 230 precludes liability wherever the complained-of content is posted by third parties and publication is an element of the plaintiff's claim. The provision "overrides the traditional treatment of publishers, distributors, and speakers under statutory and common law." Batzel, 333 F.3d at 1026; *accord* Carafano v. Metrosplash.com, Inc., 339 F.3d 1119, 1122-25 (9th Cir. 2003). "Under § 230(c), . . . so long as a third party willingly provides the essential published content, the interactive computer service receives full immunity regardless of the specific editing or selection process." Carafano, 339 F.3d at 1124; *see also* Blumenthal v. Drudge, 992 F. Supp. 44, 49 (D.D.C. 1998) ("In view of this statutory language, plaintiff's argument that the *Washington Post* would be liable if it had done what AOL did here . . . has been rendered irrelevant by Congress.").

The courts have consistently interpreted the CDA with Congress' express goals in mind, while recognizing the impossible burden that would be imposed if interactive services were required to screen and control users' postings. In Zeran v. America Online, Inc. 129 F.3d 327 (4th Cir. 1997), *cert. denied,* 524 U.S. 937 (1998), false postings on an America Online ("AOL") bulletin board caused the plaintiff to be deluged with abusive phone calls, including death threats. *Id.* at 329. The Fourth Circuit rejected the contention that AOL had tort liability for allowing the postings and then not removing them quickly enough:

> Congress made a policy choice . . . not to deter harmful online speech through the separate route of imposing tort liability on companies that serve as intermediaries for other parties' potentially injurious messages. Congress' purpose in providing the § 230 immunity was thus evident. Interactive computer services have millions of users. The amount of information communicated via interactive computer services is therefore staggering. The specter of tort liability in an area of such prolific speech would have an obvious chilling effect. It would be impossible for service providers to

screen each of their millions of postings for possible problems. Faced with potential liability for each message republished by their services, interactive computer service providers might choose to severely restrict the number and type of messages posted. Congress considered the weight of the speech interests implicated and chose to immunize service providers to avoid any such restrictive effect.

Id. at 330-31 (quoted by Ninth Circuit with approval in Carafano, 339 F.3d at 1123-24); *accord* Batzel, 333 F.3d at 1027-28 ("Making interactive computer services and their users liable for the speech of third parties would severely restrict the information available on the Internet. Section 230 therefore sought to prevent lawsuits from shutting down websites and other services on the Internet.").[2]

C. The CDA's Immunity Extends To Roommate

Plaintiffs' claims fall within the scope of, and are barred by, the CDA. The immunity of section 230(c)(1) applies to every type of information service "that provides or enables computer access by multiple users to a computer server . . ." 47

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[2] Zeran's broad view of the immunity provision has been consistently applied in a variety of contexts. *See, e.g.,* Carafano, 339 F.3d at 1121 (false dating profile on "Matchmaker" website); Ben Ezra, Weinstein and Co., Inc. v. America Online, Inc., 206 F.3d 980, 983 (10th Cir. 2000), *cert. denied*, 531 U.S. 824 (2000) (stock information made available on AOL's "Quotes & Portfolios" service); Blumenthal, 992 F. Supp. at 46 (allegation of wife-beating in on-line magazine); PatentWizard, Inc. v. Kinko's, Inc., 163 F. Supp. 2d 1069, 1071-72 (D.S.D. 2001) (statements about patent service made in chat room by user of defendant's computers); Morrison v. America Online, Inc., 153 F. Supp. 2d 930, 933-34 (N.D. Ind. 2001) (threats directed at physician, distributed by e-mail); Optinrealbig.com, LLC v. Ironport Systems, Inc., 323 F. Supp. 2d 1037 (N.D. Cal. 2004) (compiled complaints forwarded to Internet providers); Gentry v. eBay, Inc., 99 Cal. App. 4th 816, 832, 121 Cal. Rptr. 2d 703 (2002) (offers to sell counterfeit sports memorabilia on Internet auction site); Doe v. America Online, Inc., 783 So.2d 1010, 1017 (Fla. 2001) (use of chat rooms to market obscene photos); Schneider v. Amazon.com, Inc. 31 P.3d 37, 41-42 (Wash. Ct. App. 2001) (allegation in reader book review that author was a felon).

U.S.C. § 230(f)(2). This broad sweep includes interactive websites such as Roommates.com. Through the Internet, many thousands of users are able to access and use a searchable database on Roommate's computer servers. (SS ¶¶ 1, 4.) *See* Carafano v. Metrosplash.com, Inc., 207 F. Supp. 2d 1055, 1065-66 (C.D. Cal. 2002), *aff'd*, 339 F.3d 1119 (9th Cir. 2003); Gentry, 99 Cal. App. 4th at 831 n.7; Schneider, 31 P.3d at 40; *see also* Ben Ezra, 206 F.3d at 983, 985 (§ 230(c) applied to searchable database of third-party stock quotes); Batzel, 333 F.3d at 1030 & n.15 (rejecting argument that § 230(c) applied only to Internet service providers)).

Further, plaintiffs' claims treat Roommate as a publisher; indeed, it is the only theory under which plaintiffs attempt to hold Roommate liable. (FAC ¶¶ 16-32, 43, 52.) Section 230(c) "precludes courts from entertaining claims that would place a computer service provider in a publisher's role." Zeran, 129 F.3d at 330. The publisher's role includes the decisions "to publish, withdraw, postpone or alter content." *Id.* Claims of *all kinds* that seek to impose liability for failure to remove a posting are barred. Schneider, 31 P.3d at 464 (CDA extends to all civil claims involving publisher liability for third-party content); Carafano, 339 F.3d at 1123, 1125 (dismissing defamation, invasion of privacy, and negligence claims).

Finally, plaintiffs are seeking to recover from Roommate for the publication of third-party content. Plaintiffs complain about the preferences expressed by *users*; no claim is made as to any expression of preference by Roommate. *See* Gentry, 99 Cal. App. 4th at 834 (representations on auction website were made by users; categorization and compilation of postings did not abrogate immunity).

D. Plaintiff's Claims Do Not Involve Content Created by Roommate

Roommate is not an "information content provider" in respect to the statements that are the subject of this lawsuit. Plaintiffs seek to impose liability on the notion that Roommate creates content with its questionnaire (FAC ¶ 11-13), but the Ninth Circuit has already rejected this theory. The collection, formatting, and

manipulation of information does not transform statements made by a third party into content created by the service. Carafano, 339 F.3d at 1124-25.

> [T]he fact that Matchmaker classifies user characteristics into discrete categories and collects responses to specific essay questions does not transform Matchmaker into a "developer" of the "underlying misinformation." . . . Matchmaker's decision to structure the information provided by users allows the company to offer additional features, such as "matching" profiles with similar characteristics or highly structured searches based on combinations of multiple choice questions. Without standardized, easily encoded answers, Matchmaker might not be able to offer these services and certainly not to the same degree.

Id.

The Ninth Circuit also made clear in Carafano that the fact that an interactive computer service provides *some* content on its site does not abrogate the immunity.

> . . . [T]he statute precludes treatment as a publisher or speaker for "*any* information provided by *another* information content provider." 47 U.S.C. § 230(c)(1) (emphasis added). The statute would still bar [plaintiff's] claims unless Matchmaker created or developed the particular information at issue. . . . "The critical issue is whether [the interactive computer service] acted as an information content provider with respect to the information that appellants claim is false or misleading."

Id. at 1125 (quoting Gentry, 99 Cal. App. 4th at 833 n.11); *accord* Novak v. Overture Servs., Inc., 309 F. Supp. 2d 446, 452-53 (E.D.N.Y. 2004).

Here, plaintiffs allege that the preferential statements of *users* of Roommates.com are unlawful. It is the users who create the profiles and select the information in the profiles. Plaintiffs identify no statement *of Roommate* that indicates a preference. The site's questionnaire is simply a method of collecting standardized information for a convenient, searchable database. (SS, Conclusions

of Law, ¶ 18.) Roommate is not the "content provider" of the complained-of statements, and is therefore immune from any liability for those statements.

E. The CDA's Immunity Precludes Liability Under the FHA

Section 230(e) provides that "No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section." 47 U.S.C. § 230(e)(3). Exempted are federal criminal statutes, intellectual property law, state laws that are *consistent* with section 230, and the Electronic Communications Privacy Act of 1986. 47 U.S.C. § 230(e)(1)-(4).

Any contention by plaintiffs that their claims are consistent with or exempted from section 230 does not withstand scrutiny. In Noah v. AOL Time Warner Inc., 261 F. Supp. 2d 532 (E.D. Va. 2003), *aff'd*, 2004 WL 602711 (4th Cir. 2003), the plaintiff alleged that offensive comments about Muslims in an AOL chat room violated Title II of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000a *et seq.* He contended that the CDA did not bar his claim because AOL was being treated as the owner of a place of public accommodation, not a "publisher." *Id.* at 538-39.

The Noah court rejected this argument as "flatly contradicted by § 230's exclusion of some specific federal claims."

> [T]he exclusion of federal *criminal* claims, but not federal civil rights claims, clearly indicates, under the canon of *expressio unis est exclusio alterius*, that Congress did not intend to place federal civil rights claims outside the scope of § 230 immunity. In short, Congress' decision to exclude certain claims but not federal civil rights claims as a group, or Title II specifically, must be respected. *See* TRW, Inc. v. Andrews, 534 U.S. 19, 28, 122 S. Ct. 441, 151 L. Ed. 2d 339 (2001) (noting that "where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of a contrary legislative intent").

Id.; *see* U.S. v. Johnson, 529 U.S. 53, 58 (2000) ("When Congress provides exceptions in a statute, it does not follow that courts have authority to create others.").[3]

Moreover, punishing Roommate for the postings of its users runs contrary both to Congress' expressed intention in CDA of fostering a vibrant marketplace of information on the Internet *and* the First Amendment's protection of free speech. Plaintiffs seek to turn defendant into a censor and policeman. This is particularly abhorrent given that defendant's users have the right to select their roommates without government interference, as discussed below. *See* Reno v. ACLU, 521 U.S. 844, 885 (1997) ("As a matter of constitutional tradition, . . . we presume that governmental regulation of the content of speech is more likely to interfere with the free exchange of ideas than to encourage it.").

Roommate is immune from liability under the CDA, and summary judgment must be granted to defendant as to all of plaintiffs' claims.

V.

PLAINTIFFS' CLAIMS ARE BARRED BY THE FIRST AMENDMENT

Plaintiffs' claims are barred by the First Amendment to the United States Constitution because they seek to impose liability under statutes that regulate speech on the basis of content and viewpoint.

Moreover, *even if* the postings on Roommates.com are considered commercial speech (and they are not), plaintiffs' claims do not meet the requirements of Central Hudson Gas & Elec. Corp. v. Public Serv. Comm., 447 U.S. 557 (1980), and they are invalid for that reason as well.

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[3] It is also noteworthy that Congress had not forgotten the FHA by the time it enacted the CDA. The CDA was enacted on February 8, 1996 (Pub. L. 104-104, § 509). The FHA was amended on December 28, 1995 (Pub. L. 104-76, § 1).

A. **Plaintiffs' Interpretation of FHA and FEHA Is Unconstitutional**

The FHA makes it unlawful to publish "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. § 3604(c) (emphasis added). The FEHA has a nearly identical provision, with the additional categories of "sexual orientation," "marital status," "ancestry, and "disability." Cal. Govt. Code § 12955(c).[4]

During the 36 years since the FHA was enacted, the United States Supreme Court has developed exacting standards by which any regulation of speech must be judged. The Supreme Court's decisions leave no doubt that it would reject the application of the FHA and the FEHA urged by plaintiffs.[5] Plaintiffs seek to punish speech based on content, and this is not permitted.

"[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." Police Dept. of the City of Chicago v. Mosley, 408 U.S. 92, 95 (1972) (striking down ordinance prohibiting demonstrations near schools except peaceful

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[4] Plaintiffs' claims alleging violation of the Unruh Civil Rights Act, violation of Business & Professions Code § 17200, and for negligence fail for the same reasons as the FHA and FEHA, because they also seek to impose liability for speech based on content. Plaintiffs offer no factual basis for these claims that is different than their FHA and FEHA claims. The Unruh Act, section 17200, and negligence claims also fail because, if they are somehow interpreted to reach speech relating to housing, they are void for vagueness. It is impossible to know what statements are permitted or not permitted. *See* Reno, 521 U.S. at 874, 884-85; Board of Airport Comm'rs v. Jews for Jesus, Inc., 482 U.S. 569, 576 (1987).

[5] The Supreme Court's holdings control any interpretation of the Fair Housing Act, which was enacted "to provide, *within constitutional limitations*, for fair housing throughout the United States." 42 U.S.C. § 1301 (emphasis added).

labor picketing). "The First Amendment generally prevents government from proscribing speech, or even expressive conduct, because of disapproval of the ideas expressed." R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992) (citations omitted); *see also* Smolla & Nimmer on Freedom of Speech (2004) § 3:3 ("When the government's purpose is disagreement with the message, the regulation is obviously content-based.").

The Supreme Court applies "strict scrutiny" to content-based speech regulations, and this analysis inevitably leads to a finding of unconstitutionality. *See* Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board, 502 U.S. 105, 120-21 (1991); Consolidated Edison Co. v. Public Service Comm., 447 U.S. 530, 536 (1980).[6] That must be the result here, as well. The government does not have a compelling interest in controlling speech relating to the search for and selection of roommates. Individuals have the right to freely select those with whom they choose to live. (*See* Section V(B)(2), *infra.*) The interpretation urged by plaintiffs merely *interferes* with the exercise of that right. Moreover, even if the government had some interest (such as restricting public speech that some might consider offensive or perpetuating of stereotypes),[7] sections 3604(c) and 12955(c) are not narrowly tailored to achieve that interest; as

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[6] In his Simon & Schuster concurrence, Justice Kennedy attacked the state "Son of Sam" law as "raw censorship based on content, and "[t]hat ought to end the matter." 502 U.S. at 515. "Here, a law is directed to speech alone where the speech is not obscene, not defamatory, not words tantamount to an act otherwise criminal, not an impairment of some other constitutional right, not an incitement to lawless action, and not calculated or likely to bring about imminent harm the State has the substantive power to prevent. No further inquiry is necessary to reject the State's argument that the statute should be upheld." *Id.* at 512-13. All of this applies equally to section 3406(c) and section 12955(c).

[7] This is an insufficient interest, in any event. *See* Simon & Schuster, Inc., 502 U.S. at 118 ("'[T]he fact that society may find speech offensive is not a sufficient reason for suppressing it.'" (quoting Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 55 (1988)).

interpreted by plaintiffs, the provisions prohibit a broad sweep of protected speech, including the private, one-on-one communications of those considering rooming together. The evangelical Christian who seeks a roommate who will join in daily Bible study, and the orthodox Jew who keeps a kosher kitchen, are forbidden from speaking to others about matters that are of great concern to them as they decide whether to form an intimate association.[8]

The Constitution's rejection of content-based regulations extends even to categories of speech that can be forbidden altogether. In R.A.V., the Supreme Court struck down a city ordinance that outlawed expressive conduct "which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of *race, color, creed, religion or gender* . . . ." 505 U.S. at 380 (emphasis added). The ordinance was restricted to proscribable "fighting words," yet the Court held that the government could not regulate such speech based "on hostility -- or favoritism -- towards the underlying message expressed." *Id.* at 386.

> Displays containing abusive invective, no matter how vicious or severe, are permissible [under the ordinance] unless they are addressed to one of the specified disfavored topics. Those who wish to use "fighting words" in connection with other ideas -- to express hostility, for example, on the basis of political affiliation, union membership, or homosexuality -- are not covered. *The First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects.*

Id. at 391 (emphasis added).

The Supreme Court also found that the ordinance engaged in viewpoint discrimination, in that it permitted those who favor racial tolerance to use "fighting

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[8] Imposing liability for such communications, as plaintiffs seek to do here, violates the Free Exercise Clause of the First Amendment, as well as the right of intimate association. Employment Div. v. Smith, 494 U.S. 872, 881 (1990) (where there are hybrid rights, government regulation must survive strict scrutiny). (SS ¶ 32 (postings by kosher users.)

words" while punishing opponents who use the same speech. While the city's desire to restrict "messages of 'bias-motivated' hatred" was laudable, "[t]he point of the First Amendment is that majority preferences must be expressed in some fashion other than silencing speech on the basis of its content." *Id.* at 392.

Section 3604(c) and section 12955(c) undoubtedly evince a "special hostility towards the particular biases . . . singled out." *Id.* at 395. Neither forbids a statement indicating a preference to rent or sell to Democrats, senior citizens, pet owners, college students, cigarette smokers, or those who are gainfully employed. If plaintiffs' view that the statutes reach shared living arrangements is correct, the statutes violate the First Amendment by adopting the position that it is *wrong* to choose who you live with based on certain characteristics, and silence the speech of those who consider any of the disfavored characteristics to be important. Indeed, those people who seek to share their homes with members of groups that often have difficulty finding housing (such as racial minorities, the disabled, and homosexuals) cannot (in plaintiffs view) state these facts without running afoul of section 3604(c) and section 12955(c).[9]

Even if it is assumed for argument's sake that the governmental interest here is diversity in housing, that interest may be advanced by alternatives that do not run afoul of the First Amendment. The FHA and the FEHA already prohibit discrimination in the actual rental or sale of a dwelling; the goal of ending actual discrimination is better served by prosecuting those who unlawfully discriminate in such transactions, rather than publishers. *See* 42 U.S.C. § 3604(a), (b), (d), (f). Educating and sensitizing the public regarding offensive speech and stereotypes can be better advanced by educational advertisements than by interfering with the

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[9] The FHA and the FEHA therefore are overbroad, and are unconstitutional for that reason as well. *See* Jews for Jesus, 482 U.S. at 575-76; R.A.V., 505 U.S. at 414 (White, J., concurring) (ordinance violates First Amendment by punishing "expressive conduct that causes only hurt feelings, offense, or resentment").

efforts of individuals seeking compatible living partners and imposing a burden on an interactive computer service that will put it out of business.

Here, the FHA and the FEHA silence certain disfavored categories of speech, while leaving all other preferential speech about housing unrestricted. This violates the Constitution, even where the government has good intentions.[10] "The First Amendment does not guarantee that other concepts virtually sacred to our Nation as a whole -- such as the principle that discrimination on the basis of race is odious and destructive -- will go unquestioned in the marketplace of ideas." Texas v. Johnson, 491 U.S. 397, 414, 418 (1989).

B. The Roommate.com Postings Are Not Commercial Speech, but Even If They Are, the Restrictions Urged by Plaintiffs Are Unconstitutional

1. The Commercial Speech Doctrine Does Not Apply Here

The postings on Roommates.com do not merely "propose a commercial transaction," resulting in reduced protection under the First Amendment. City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 423 (1993); *see also* Riley v. National Fed. of the Blind, 487 U.S. 781, 795-96 (1988) (speech with commercial aspects is still fully protected where intertwined with informative speech). Although users indicate a desire to share the expenses of a residence, those costs

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[10] *See* Brown v. California Dept. of Transportation, 321 F.3d 1217, 1223-25 (9th Cir. 2003) (rejecting policy that allows display of flags along state highways and forbidding all other signs and banners); *see also* Boy Scouts of Am. v. Dale, 530 U.S. 640, 661 (2000) (approving Boy Scouts' exclusion of homosexuals under right of expressive association; the law "is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government"); Collin v. Smith, 578 F.2d 1197, 1205-06 (7th Cir. 1978) (striking down ordinance restricting march by Nationalist Socialist Party of America in heavily Jewish community; "That the effective exercise of First Amendment rights may undercut a given government's policy on some issue is, indeed, one of the purposes of those rights. *No distinction is constitutionally admissible that turns on the intrinsic justice of the particular policy in issue.*" (emphasis added)).

are a small fraction of the information in a Roommates.com posting. Users describe themselves, their interests, their characteristics (messy, clean), their schedules, and the homes they hope to share. (SS ¶ 14.) If economic motive was the sole reason for the postings, users would not be interested in disclosing all this personal information to others. Users are looking for people with whom they can comfortably and safely share living quarters.

Indeed, the preferences expressed in the profiles run *counter* to the users' economic interests, because they *limit* the potential matches. This simply is not a case of "I will sell you X at the Y price." Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 762 (1976); *see also* Bigelow v. Virginia, 421 U.S. 809, 818 (1975) ("The existence of 'commercial activity, in itself, is no justification for narrowing the protection of expression secured by the First Amendment.'"); *compare* Pittsburgh Press Co. v. Pittsburgh Comm. on Human Relations, 413 U.S. 376, 385 (1973) (gender-based advertisements were "no more than a proposal of possible employment").

2. The Restrictions Urged by Plaintiffs Are Unconstitutional Even Under the Commercial Speech Doctrine

In Central Hudson, the Supreme Court formulated a four-part analysis for determining whether a regulation of commercial speech passes constitutional muster. First, the court must determine as a threshold matter whether the commercial speech is protected by the First Amendment -- i.e., whether the commercial speech concerns lawful activity and is not misleading. Second, the court must determine whether the government has a substantial interest in regulating the expression. Third, the court must determine whether the regulation directly advances the governmental interest. Fourth, the court must determine whether the regulation is no more extensive than necessary to serve the governmental interest. 447 U.S. at 566.

The interpretation of the FHA and the FEHA urged by plaintiffs is unconstitutional, for it fails even the intermediate scrutiny of Central Hudson.

a. The Postings Do Not Involve Illegal Activity

i. Selection of roommates is protected by the right of intimate association

The United States Constitution recognizes a right of intimate association, which permits people to freely choose those with whom they live and socialize. The Supreme Court most recently acknowledged this substantive due process right in Lawrence v. Texas, 539 U.S. 558, 123 S. Ct. 2472 (2003), when it struck down a Texas statute making it a crime for two persons of the same sex to engage in certain sexual conduct: "Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home." *Id.*, 123 S. Ct. at 2475. The activities of consenting adults within their homes, even outside of marriage, is beyond the power of the government. *Id.* at 2483-84.

In Moore v. City of East Cleveland, 431 U.S. 494 (1977), the Supreme Court struck down a city ordinance that restricted which relatives qualified as "family" under the housing code. The Court made clear that substantive due process under the Fourteenth Amendment does not permit the government to control living situations; "[T]he Constitution prevents East Cleveland from standardizing its children and its adults by forcing them to live in certain narrowly defined family patterns." *Id.* at 505-06. In his concurrence, Justice Brennan explained that the constitutional principle behind the Moore holding went beyond the rights of relatives to households of many types:

> The Constitution cannot be interpreted . . . to tolerate the imposition by government upon the rest of us of white suburbia's preference in patterns of family living. The "extended family" . . . remains not merely still a pervasive living pattern, but under the goad of brutal economic necessity, . . . a means

of survival for large numbers of the poor and deprived minorities of our society. For them compelled pooling of scant resources requires compelled sharing of a household.

Id. at 508.

This right of intimate association includes the right to exclude. Although it rejected the Jaycees' claim that they were exempt from a state nondiscrimination statute, the Supreme Court in Roberts v. United States Jaycees, 468 U.S. 609 (1984), recognized that adults may select (or exclude) other adults in highly personal relationships without government interference. "[F]reedom of association receives protection as a fundamental element of personal liberty." *Id.* at 618-19. Such relationships involve the "distinctively personal aspects of one's life. . . . [T]hey are distinguished by such attributes as relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship." *Id.* at 620.[11]

It is beyond dispute that roommate relationships meet these criteria, and people are entitled to create a household without government interference. These are relationships of two, three, or four people who choose to share kitchen, bathroom, and living areas not just for economic reasons, but also because they have compatible lifestyles. In many situations (as shown by many of the Roommate.com postings complained of by plaintiffs), individuals seek roommates

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[11] The California Constitution also recognizes a right of privacy that includes the right to share living quarters with any other person without interference by the government. *See* California Const., Art. I, § 1; City of Santa Barbara v. Adamson, 27 Cal.3d 123, 164 Cal. Rptr. 539 (1980) (reversing preliminary injunction against residents who violated zoning statute on the grounds that the statute limiting the number of unrelated persons in a single-family house improperly abridged the right to privacy); *accord* Coalition Advocating Legal Housing Options v. City of Santa Monica, 88 Cal. App. 4th 451, 105 Cal. Rptr. 2d 802 (2001).

with the same religious beliefs.[12] Others seek roommates of the same sex or sexual preference; they understandably want to share a home with others with whom they are comfortable. The government cannot compel a woman to live with a man, a homosexual to live with heterosexual, a nonsmoker to live with a chain-smoker, or a cat lover to live with the owner of dogs. And, no more than it can force or forbid procreation, the government cannot compel people to live with children not their own. The postings on Roommates.com clearly involve lawful activity.

ii. The FHA and FEHA were never intended to control roommate selection

Although they have been on the books for decades, Roommate has not found any reported court decision applying section 3406(c) or section 12955(c) to speech relating to the selection of roommates. This makes sense because any common-sense analysis makes plaintiffs' claims untenable.

First, the plain language of the FHA indicates that Congress intended the prohibition against discrimination to apply to the typical landlord-tenant relationship and the sale of real property, and not to the selection of someone who will share one's intimate living space. Roommate selection is not equivalent to a commercial transaction involving housing stock, where the right to occupy an entire dwelling is transferred, usually between strangers, and the government has an interest in ensuring access for all, without preference.[13]

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[12] Imposing liability for these postings, as plaintiffs seek to do here, violates the Free Exercise Clause of the First Amendment, as well as the right of intimate association. Employment Div. v. Smith, 494 U.S. 872, 881 (1990) (where there are hybrid rights, government regulation must survive strict scrutiny).

[13] The Washington State Attorney General addressed an anti-discrimination law similar to the FHA and the FEHA, and concluded that it is lawful for "a person to discriminate on the basis of sex, age or religion in selecting a roommate with whom to share living quarters, or for a person to specify in an advertisement

(continued...)

Second, the goal of the FHA is to eliminate discrimination in housing and to promote diverse communities. Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 211 (1972); Housing Opportunities Made Equal v. Cincinnati Enquirer, 943 F. 2d 644, 652 (6th Cir. 1991). Suppressing the speech of those who wish to *share* their homes does not further this purpose. Many people become roommates so they can live in a residence or community that they could not afford if they lived alone. Making such cohabitation more difficult burdens the efforts of members of historically repressed groups to associate and perpetuates homogeneity in the more desirable locales.

Third, the "Mrs. Murphy exemption" suggests that Congress did not intend to include roommate selection within the FHA. The "Mrs. Murphy exemption" provides that if a dwelling has four or fewer units and the owner lives in one of the units, the owner is exempt from the FHA's non-discrimination provisions. 42 U.S.C. § 3603(b). The policy underlying the exemption is, if anything, *more* applicable to a roommate situation. The selection of a person to share one's own living quarters must be one of the most intimate, personal decisions one can make, and is more deserving of protection than the right to select your neighbors.[14]

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[13] (...continued)
for a roommate that the roommate must be of a particular sex, age or religion, or for a newspaper to publish an advertisement for a roommate when the advertisement contains such specification." 1976 Op. Wash. A.G. 17, at 1, 1976 WL 168501. "'One of the societal values which is deserving of recognition, in our view, is the basic freedom to control one's life by choosing the sex of persons with whom one lives.'" *Id.* at 4-5. The Attorney General went on to conclude that "since the conduct advertised is legal so also, logically, should the advertisement itself be." *Id.* at 9.

[14] The right of individuals to exclude when selecting roommates distinguishes this case from Ragin v. New York Times Co., 923 F.2d 995 (2d Cir. 1991). There, the court found that the preferential advertising was unprotected speech because it related to *illegal* activity in the sale and rental of homes. *Id.* at 1002-03.

b. Because preferential roommate selection is lawful, the government does not have a substantial interest in controlling speech about it

As discussed above, the selection of roommates is beyond the power of the government, so it lacks a substantial interest in regulating speech relating to that selection, as required under Central Hudson. Postings that might offend or stereotype do not justify content-based regulation. *See* Texas v. Johnson, 491 U.S. 397, 412, 418 (1989); R.A.V., 505 U.S. at 414 (White, J., concurring); *see also* Robert G. Schwemm, "Discriminatory Housing Statements and § 3604(c)," 29 Fordham Urb. L.J. 187, 287-289 (expressing concern that section 3604(c), as a regulation of speech, not conduct, does not survive R.A.V.).

c. Punishing publication of preferential roommate postings does not directly advance, and is not "directly linked" to any governmental interest

Even if it assumed that the government's interest in regulating speech about roommate selection is fostering diversity (rather than stopping offensive speech, which is inadequate), muzzling speech does not directly advance that interest. Those who wish to share their homes only with adults or people of their own sex, religion, or race will do so whether or not publication of those preferences is banned. Further, as discussed above, the restriction on speech urged by plaintiffs simply makes cohabitation more difficult, and this, in turn, interferes with the movement of the economically disadvantaged. The necessary "fit" under Central Hudson is lacking where the regulation impedes the flow of truthful, lawful information because government paternalistically fears the impact on recipients. Virginia State Board of Pharmacy, 425 U.S. at 773; Linmark Assocs. v. Township of Willingboro, 431 U.S. 85, 96-97 (1977); *see also* Schwemm, *supra*, 29 Fordham Urb. L.J. at 280-82 (acknowledging insufficient "fit" between the FHA's purpose

and section 3604(c) where the underlying activity is exempt from other FHA provisions).

d. The restriction urged by plaintiffs is more extensive than necessary to serve the governmental interest

Section 3604(c) and section 12955(c) go far beyond what is necessary to serve any substantial governmental interest. They impede a broad sweep of protected speech: The statutes are not limited to public advertisements; they reach any "notice" or "statement," and this necessarily includes the thousands of "roommail" communications among Roommate.com's users. Indeed, Roommate's servers now hold 1.3 million messages. (SS ¶ 8.) Those messages certainly include countless exchanges among potential roommates in which they describe themselves. If plaintiffs' interpretation of the FHA and the FEHA is correct, Roommate is liable for any preferential statement in these communications, as well as the public postings (approximately 150,000 currently). What plaintiffs want to do is turn Roommate and other interactive computer services into "the government's policemen in enforcing section 3604(c)." Housing Opportunities, 943 F.2d at 653.

Also, plaintiffs' interpretation would create a substantial societal burden, making the search for a compatible roommate more difficult and burdensome. If individuals were prohibited from advertising roommate preferences, serious inefficiencies would result. For example, people advertising for roommates -- and people responding to such advertisements -- would be forced to meet with and interview numerous individuals they would never choose to live with. *See* Greater New Orleans Broadcasting Assoc. v. U.S., 527 U.S. 173, 194 (1999) (striking down casino advertising ban because it sacrificed "an intolerable amount of truthful speech about lawful conduct when compared to the policies at stake and the social ills that one could reasonably hope such a ban to eliminate").

"If the First Amendment means anything, it means that regulating speech must be a last -- not first -- resort." Thompson v. Western States Medical Ctr., 535

U.S. 357, 372 (2002). Where the government can "achieve its interests in a manner that . . . restricts less speech, the Government must do so." *Id.* at 371. Here, the governmental interest in ensuring access to housing for protected classes is adequately achieved by enforcing the provisions of the FHA and the FEHA that prohibit discrimination. The government and fair housing organizations such as plaintiffs may place educational advertisements on the Internet and in print publications. They also can offer their own placement services for those whom they believe are disadvantaged in the housing market.

In sum, then, the interpretation of the FHA and FEHA urged by plaintiffs is unconstitutional as a content-based regulation of speech. Plaintiffs' claims also fail under even the more relaxed commercial speech doctrine, because they seek to impose an unjustified, excessive regulation of speech about lawful matters.

VI.

CONCLUSION

For the forgoing reasons, Roommate respectfully requests that the Court grant summary judgment in its favor, and dismiss the action in its entirety.

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