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

CHICAGO LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, INC.	)	
Plaintiff	)	Judge Amy J. St. Eve
v.	)	Magistrate Judge Jeffrey Cole
CRAIGSLIST, INC.	)	Case No. 06 C 0657
Defendant.	)	

CRAIGSLIST'S REPLY IN FURTHER SUPPORT OF ITS MOTION FOR JUDGMENT ON THE PLEADINGS

INTRODUCTION

Plaintiffs' response to craigslist's motion for judgment on the pleadings does not attempt to rebut craigslist's showing that it is immune from liability to Plaintiff under the construction of 47 U.S.C. § 230(c)(1) that has been uniformly adopted in *every* single reported case construing that provision.[1] Thus, Plaintiff has effectively conceded that if this provision is what *every* reported decision has said it is – namely, a broad immunity from liability for the display of other people's content – then Plaintiff's suit against craigslist must be dismissed.

Without any refuge in the case law, Plaintiff invites this Court to adopt a radically different and unprecedented construction of § 230(c)(1) that defies both the statute's plain language and its key policy objectives. As craigslist's opening memorandum anticipated, Plaintiff would have this Court rule that § 230(c)(1)'s clear prohibition against "treat[ing]" interactive computer service providers as "publishers or speakers" of other people's content is really not a prohibition at all, but instead is merely a "definitional clause" without independent operative force.

As we show below, however, Plaintiff's contrarian construction of § 230(c)(1) is meritless. First, it accords no weight to the legions of court rulings that have all read § 230(c)(1)'s "publisher or speaker" prohibition as one of Section 230's most significant operative provisions. Second, it places undue reliance on, and misinterprets, Judge Easterbrook's *dicta* in *Doe v. GTE*, 347 F.3d 665 (7th Cir. 2003). Third, it is completely at odds with the plain language and overall structure of Section 230. Fourth, it flies in the face of Section 230's overall purposes as enunciated in the statute's preamble and legislative history. And fifth, it erroneously assumes that Section 230 does not apply to claims under federal statutes, like the FHA, that do not fall within any of Section 230's express exceptions.

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[1] All abbreviations are as in craigslist's opening Memorandum.

ARGUMENT

1. Plaintiff Fails to Grapple with the Existing Precedents that Doom Its Claim.

Plaintiff's response barely even mentions, much less distinguishes, the numerous reported decisions from courts across the country that have uniformly held that § 230(c)(1) is the source of a broad and robust immunity. *See* craigslist's Mem. at 10-13 (citing approximately 30 appellate and trial court decisions adopting a broad construction of Section 230). While Plaintiff's discussion of these cases is scant, it is sufficient to confirm that Plaintiff concedes that its claim cannot survive under the construction of § 230(c)(1) that has carried the day in every reported case. *See, e.g.*, Pltf's Mem. at 8 (the "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 . . . to an interactive computer service provider") (emphasis added).

Plaintiff half-heartedly suggests that these rulings can be ignored because (with one exception[2]) they did not involve claims under the FHA. Pltf's Mem. at 7 & 15 n.15. But this is wrong. The application of Section 230 did not turn in any of those cases on the nature of the claim at issue, except to the limited extent that the claim fell within one of the narrow (and exclusive) exceptions explicitly carved by § 230(e). *See, e.g., Zeran v. America Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997) (§ 230(c)(1) "creates a federal immunity to *any cause of action* that would make

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[2] As for the one precedent that did involve an FHA claim, *Fair Housing Council v. Roommates.com. LLC,* No. CV 03-09386PA (RZX), 2005 WL 3299077 (C.D. Cal. Sept. 30, 2005) (copy attached in craigslist's Mem. at Ex. 1), Plaintiff says only that its analysis of Section 230 was "cursory" and that it is "currently on appeal." Pltf's Mem. at 7 n.6 & 17 n.18. In fact, the district court's opinion in *Roomates.com* was thorough, carefully reasoned, and respectful of precedent. Moreover, the mere fact that a decision is on appeal neither invalidates it as precedent nor weakens its reasoning.

service providers liable for information originating with a third-party user of the service"). Plaintiff does not (and cannot) argue that its FHA claim fits within any of those exceptions.[3]

The departure from prevailing precedent that Plaintiff now urges would be radical. Plaintiff contends that scores of respected federal and state judges – who have all consistently held that § 230(c)(1) is an independently operative source of broad immunity for online intermediaries – have all botched the interpretation of the statute. Rather than a substantive prohibition on how online service providers may be "treated," Plaintiff contends, § 230(c)(1) is merely a "definitional clause" that has no independent function. Pltf's Mem. at 8. The difference between a statutory *definition* and a statutory *prohibition* is no small matter, and it strains credulity for Plaintiff to suggest that every court that has applied Section 230 over the past decade has consistently gotten this wrong. Indeed, in the decade since the statute was enacted, not a single court that has decided what § 230(c)(1) means has ever expressed even the slightest doubt about its status as a free-standing source of immunity.

Plaintiff's disregard for the uniform body of precedents also cannot be reconciled with the statement in the House Report on the Dot Kids Implementation and Efficiency Act of 2002 that those precedents had "correctly interpreted Section 230(c)." *See* craigslist's Mem. at 17-18 (quoting H.R. Rep. No. 107-449, at 13 (2002)) (copy attached to Pltf's Mem. at Ex. 9). Each of the decisions that the House Report explicitly endorsed (*Zeran*, *Ben Ezra* and *Doe v. America*

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[3] Plaintiff submitted with its response a number of items that have no precedential value and should be accorded no weight. For example, the unsigned, undated Consent Decree in *U.S. v. Spyder Web Enter., LLC,* Civ. Action No. 03-1509 (D.N.J.) (Pltf's Mem. at Ex. 3), can have no weight here (even if it was ever entered), because it states on its face (at ¶ 6) that "[t]he Court takes no position on the merits of the allegations in this case, nor on the defenses raised. . . ." Likewise, the TRO in *George S. May Int'l v. Xcentric Ventures, LLC*, Case No. 04 C 6018 (N.D. Ill. Sept. 24, 2004) (Pltf's Mem. at Ex. 10) can carry no weight for a host of reasons, including that it was entered within days of filing of the case and on a limited record, and that there is no indication that Section 230 was even considered by the Court before its entry.

Online) squarely and unambiguously held that § 230(c)(1) is an independent source of immunity. Plaintiff erroneously asserts that this statement from a "subsequent Congress" should be accorded little weight. Pltf's Mem. at 15 n.15. While subsequent legislative history sometimes may not be a reliable indicator of a prior Congress's intent, the House Report here was not mere commentary about a prior statute; rather, it explicated the meaning of a new statute that extended Section 230 to a new class of entities. The Seventh Circuit has recognized that it is "permissible" and even "advisable" to consider legislative history associated with subsequent legislation that is related to the earlier statute. *Orrego v. 833 West Buena Joint Venture*, 943 F.2d 730, 736 (7th Cir. 1991); *see also Vance v. Whirlpool Corp.*, 716 F.2d 1010, 1012 (4th Cir. 1983).

2. *GTE's* Dicta Is Not a Basis for Ignoring the Overwhelming Precedent.

As anticipated (*see* craigslist's Mem. at 13-18), Plaintiff's opposition relies heavily on dicta in *Doe v. GTE* as its principal basis for urging this Court to jettison the large, uniform and growing body of precedent favoring craigslist's position. Plaintiff erroneously represents that the *GTE* opinion "harshly" and "sharply criticized" and "rejected" all of those holdings. Pltf's Mem. at 1, 7. It then argues that this Court should follow the "lead" of the *GTE* case to narrow Section 230's immunity solely to instances where a party undertakes "good faith, front-end efforts to block and screen . . . offensive material" from the Internet. *Id.* at 1.

Plaintiff treats *GTE*'s three-paragraph discussion of Section 230 as if it were on a par with the *holdings* of the numerous courts that have actually confronted and *decided* what Section 230 means. Plaintiff ignores, however, that that discussion was merely dicta, and therefore is entitled to little or no weight. Courts have long been cautious of the dangers of relying on dictum, and lower courts are always free to reject it, even where it has emanated from a directly superior court. As Chief Judge Posner has observed, dictum is

> "a statement in a judicial opinion that could have been deleted without seriously impairing the analytical foundations of the holding – that being peripheral, may not have received the full and careful consideration of the court that uttered it" . . . What is at stake in distinguishing holding from dictum is that a dictum is not authoritative. It is the part of an opinion that a later court, even if it is an inferior court, is free to reject.

U.S. v. Crawley, 837 F.2d 291, 292 (7th Cir. 1988) (Posner, C.J.) (*quoting Sarnoff v. American Home Products Corp.*, 798 F.2d 1075, 1084 (7th Cir. 1986)).

In any event, Plaintiff has completely misread the tenor of the *GTE* dicta, erroneously mistaking the opinion's open-ended questions about what Section 230 might mean as "sharp criticism" and outright "reject[ion]" of an entire body of uniformly consistent precedent. *See* Pltf's Mem. at 1, 7. In its brief discussion of Section 230, the *GTE* opinion first noted the uniformity of all other appellate courts regarding the scope of the immunity (consistent with Chief Judge Kocoras' ruling then on appeal). 347 F.3d 655, 660. Judge Easterbrook then postulated that "*if* this reading is sound" (which hardly can be called a harsh or sharp criticism or rejection of these decisions), then economically motivated Internet service providers might be expected to opt for the protections of the immunity of Section 230(c)(1) (providing an immunity for firms that do not "take precautions"), as opposed to the protections of the immunity offered in Section 230(c)(2) (providing an immunity for firms that "take precautions"). *Id.* "Why," Judge Easterbrook asks (without performing an analysis of the legislative history or other assumptions made) "should a law designed to eliminate ISP's liability to the creators of offensive material end up defeating claims by the victims of tortuous or criminal conduct?" *Id.*[4] Judge

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[4] In fact, the immunity provided to Internet service providers has not eliminated incentives to self-regulate. Interactive computer service providers who enjoy the broad immunities provided by Section 230 *do* engage in a wide range of self-regulatory practices for many different reasons, including the desire to compete for the attention and business of consumers who do not want to view (or have their children view) web sites populated with offensive or unlawful content.

Easterbrook then suggests "[w]hy not read § 230(c)(1) as a definitional clause rather than an immunity from liability . . .?" *Id.* Ultimately, Judge Easterbrook never even answers this question because "[w]e need not decide which understanding of § 230(c) is superior." *Id.* This open-ended, inconclusive pondering of different alternatives is not a basis on which this Court should cast aside the unanimous views of all the other courts that have ruled on Section 230.

3. Plaintiff's Construction of Section 230's "Publisher or Speaker" Provision Contravenes the Plain Language of the Statute.

The unprecedented construction of Section 230 that Plaintiff advocates, which Plaintiff tries to erect almost entirely on the shaky foundation of the *GTE* dicta, presumes that the statute's "publisher or speaker" provision is not a source of immunity at all, but rather is merely a "definitional clause" that modifies § 230(c)(2). It is simply impossible to square this construction with the plain language of the statute.

craigslist's opening memorandum spelled out several obvious and specific reasons why Plaintiff's "definitional" interpretation of the "publisher or speaker" provision is a nonstarter, including **(1)** § 230(c)(1) is cast in terms of a substantive prohibition on how online services may be "treated," **(2)** nothing in § 230(c)(1) reads as a definition of any term, **(3)** there are no words or terms with within § 230(c)(2) that are logically defined, limited, modified or explicated by § 230(c)(1), and **(4)** Section 230 has (in § 230(f)) its own separately designated set of "definitions," and § 230(c)(1) obviously is not one of them. craigslist's Mem. at 15. Nothing in either Plaintiff's opposition or the amicus brief of the National Fair Housing Alliance ("NFHA") confronts these fundamental problems with Plaintiff's proposed construction.

Plaintiff's discussion of the supposed interplay between § 230(c)(1) and § 230(c)(2) further underscores the incoherency of its position. Plaintiff argues that the sole function of § 230(c)(1) is to *negate* the availability of immunity under § 230(c)(2) whenever the service

provider itself "created the offensive material" that it screens or blocks. Pltf's Mem. at 8. But § 230(c)(1) cannot operate in this fashion. This is so because the function § 230(c)(2) is to immunize an online service provider who (in good faith) blocks or removes content from liability *to the persons whose content was blocked or removed. See GTE*, 347 F.3d at 659 (stating that § 230(c)(2) eliminates liability "to the censored customer" when "[a] web host *does* filter out offensive material") (emphasis in original)). Accordingly, the only situation in which § 230(c)(1) could play the "definitional" role that Plaintiff posits – namely, negating immunity that a service provider would otherwise enjoy under § 230(c)(2) – would be when a service provider blocks or removes offensive content that the service provider itself created *and then sues itself* for having engaged in such self-censorship. This, of course, is a preposterous situation that could never occur.

Plaintiff thus has it exactly backwards when it argues (Pltf's Mem. at 9) that the interpretation of § 230(c)(1) that courts have uniformly endorsed violates the time-honored canon that "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). In fact, it is Plaintiff's proposed construction of § 230(c)(1) that violates this canon – by ascribing to § 230(c)(1) a contorted and meaningless role that, as a practical matter, it could never play. *See United Savings Ass'n of Texas v. Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365, 375 (rejecting interpretation of statute that renders another section "a practical nullity and a theoretical absurdity"). In contrast, under the construction urged by craigslist, subsections (c)(1) and (c)(2) each has its own separate and independent meaning and function. The former provides broad immunity from liability for *displaying or disseminating* harmful content that originates with someone else. *E.g., Zeran*, 129 F.3d at 329.

The latter provides immunity from liability for good faith *censoring* (i.e., "restricting access to or availability") of content. *See Batzel v. Smith*, 333 F.3d 1018, 1030 n.14 (9th Cir. 2003); *Zeran v. America Online*, 958 F. Supp. 1124, 1134 n.22 (E.D. Va. 1997).[5]

Unable to find support for its position in Section 230's text, Plaintiff instead fixates on the statute's titles and subtitles. Pltf's Mem. at 6-8. But this tactic fails as well. The Supreme Court has repeatedly held that it is the actual text of a statute, not its titles or subtitles, that controls its meaning. *See, e.g., Intel Corp. v. Advanced Micro Devices*, 124 S.Ct. 2466, 2470 (2004) ("A statute's caption, however, cannot undo or limit its text's plain meaning"); *Brotherhood of Railroad Trainman v. Baltimore & Ohio R.R. Co.*, 331 U.S. 519, 528-29 (1947) ("the heading of a section cannot limit the plain meaning of the text . . . they are but tools available for the resolution of a doubt"); *see also GTE*, 347 F.3d at 660 ("a statute's caption must yield to its text when the two conflict").

In any event, even if Section 230's headings or sub-headings could properly be given significant weight, nothing about them would either undermine the widely accepted proposition that § 230(c)(1) creates a broad immunity from liability for the display of unlawful third party content or support Plaintiff's contrary claim that it has no independent function. In particular, once it is understood (as explained *infra* at 11-13) that broad immunity for the display of unlawful content actually removes disincentives for online intermediaries to engage in blocking or screening of tortious or unlawful content, any perceived tension between such broad immunity and the statute's headings and sub-headings disappears.

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[5] The incoherency of Plaintiff's argument is compounded by its own internal confusion over whether § 230(c)(2) is merely an immunity from liability for acts of censoring content, as the *GTE* dicta on which CLC relies assumes, or whether it more broadly immunizes from liability for the *display* of information by an entity that screens or blocks some content (but not the particular content at issue), as some statements in CLC's opposition inconsistently seem to imply. *See, e.,g.*, Pltf's Mem. at 6, 18.

4. Plaintiff's Unprecedented Construction Contravenes Section 230's Core Purposes.

Plaintiff argues at length (Pltf's Mem. at 11-16) that the policy considerations that lay behind Section 230's enactment, as reflected in the statute's legislative history, supports a reading of the statute that would strip § 230(c)(1) of any independent operation and make § 230(c)(2) the only source of immunity. This would mean, according to Plaintiff, that service providers would have protection only from liability that arises on account of "good faith, front-end efforts to block and screen offensive material." Pltf's Mem. at 18. Plaintiff's argument rests on two fundamental misconceptions. First, it erroneously assumes that Congress enacted Section 230 to serve *only* the one-dimensional goal of encouraging service providers to self-regulate offensive content appearing on their networks. Second, it fails to comprehend that, as the courts have recognized, broad immunity under § 230(c)(1) actually advances Congress's policy of removing disincentives to responsible self-regulation.

(a) Plaintiff Ignores Section 230's Objective of Promoting the Development of the Internet by Protecting Online Intermediaries from Potentially Crushing Liabilities.

Congress enacted Section 230 to serve not just one, but two, overarching goals. To be sure, one of these goals is the one on which Plaintiff (and the *GTE* dicta) single-mindedly focuses, namely the elimination of legal disincentives to self-regulation of third-party content by online intermediaries. But, as craigslist has already pointed out (craigslist's Mem. at 18-19), and as numerous courts have recognized, Congress had another goal that is no less important: to promote the robust development and continued vitality of new electronic media by removing the specter of service-provider liability for the vast quantities of third-party communications that flow through their networks. *Zeran*, 129 F.3d at 330-31; *Batzel,* 339 F.3d at 1027.

This key promotional goal is readily apparent on the face Section 230's enacted preamble, which Plaintiff barely discusses, and is prominent in the statute's legislative history, which Plaintiff fails to present in a complete and balanced manner. As craigslist's opening brief noted (craigslist's Mem. at 18), the preamble declares that it is federal policy "to preserve the vibrant and competitive free market that presently exists for the Internet," 47 U.S.C. § 230(b)(2), to keep the Internet "unfettered by Federal or State regulation," *id.*, and to allow the Internet to "flourish[] . . . with a minimum of government regulation." Interpreting § 230(c)(1) as a broad immunity from liability for the display of third-party content substantially advances these policy objectives. In contrast, these objectives would be severely undermined by Plaintiff's contrarian construction, under which service providers would have protection only from liability arising from the *censoring* of third-party content, but not from the far more threatening – and potentially devastating – liabilities that can arise from the *dissemination* of such content.[6]

Plaintiff's survey of the legislative record conveniently ignores other clear indications that Congress saw that the growth of the Internet would be stunted, and that many online media simply could not function, if online service providers were forced to shoulder the potentially crushing liabilities that could arise from the huge quantities of third-party information that

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[6] Plaintiff erroneously asserts that the preamble's references to freeing the Internet from government regulation reflect nothing more than a desire to keep the Federal Communications Commission out of the business of regulating indecent and obscene content on the Internet. *See* Pltf's Mem. at 13-14. While that is surely one thing Congress had in mind, the excerpts from the floor debate on which CLC relies evince a much broader and more general goal to avoid "content regulation by the Federal government," and to prevent "Government censors" from "spoil[ing the Internet's] promise." *Id.* at 13-14 (quoting floor remarks of Reps. Cox and Wyden, respectively). CLC's effort to have this Court enjoin craigslist to engage in some form of "front-end screening and blocking" of third-party content represents exactly the sort of "content regulation by the Federal government" that Congress sought generally to avoid. *See Zeran*, 129 F.3d at 330 (observing that lawsuits seeking to impose liability on service providers for the unlawful communications of others "represented, for Congress, simply another form of intrusive government regulation of speech").

relentlessly flows through their networks. For example, one of the key co-sponsors of the bill, Representative Goodlatte, spoke directly to this point on the House floor:

> There is no way that any of the entities, like Prodigy, can take the responsibility to edit out information that is going to be coming in to them from all manner of sources onto their bulletin board. We are talking about something that is far larger than our daily newspaper. We are talking about something that is going to be thousands of pages of information every day, and to have that imposition imposed on them is wrong. [Section 230] will cure that problem, and I urge the Members to support [it].

141 Cong. Rec. H8471 (statement of Rep. Goodlatte) (Pltf's Mem. at Ex. 7). Plaintiff's reading of § 230(c)(1) cannot be squared with this clearly articulated objective of freeing online service providers from liability for disseminating content in quantities and at speeds that surpass by many orders of magnitude the flow of information through older media such as newspapers.

(b) Plaintiff Fails to Comprehend that the Broad Reading of § 230(c)(1) Serves Congress's Goal of Eliminating Disincentives to Self-Regulation.

The basic premise of Plaintiff's policy-oriented discussion is its erroneous notion that providing online intermediaries with broad immunity from liability for unlawful third-party content conflicts with Congress's desire for increased levels of self-regulation of third-party content by online intermediaries. *See* Pltf's Mem. at 10-15; *see also GTE*, 347 F.3d at 660 (assuming, without in-depth analysis, that immunity for *display* of unlawful or offensive content, in contrast to immunity for *censoring* such content, would have a "principal effect" of "induc[ing] ISPs to do nothing about the distribution of indecent and offensive materials via their services").

However, a broad immunity for the dissemination of third-party content is not at odds with – but rather, directly furthers – Congress's goal of *eliminating disincentives* to self-regulation of third-party content by online intermediaries. Congress correctly perceived that a legal regime in which online service providers are held liable for disseminating other people's unlawful messages would strongly discourage them from engaging in self-regulation. *See Zeran*,

129 F.3d at 333; *Batzel*, 333 F.3d at 1028 (Section 230 was intended to "encourage interactive computer services and users of such services to self-police the Internet for obscenity and other offensive material"). This is so because, as a matter of law, such liability may be imposed on entities who act as clearing-houses for large quantities of third-party content only if they knew or were "on notice" about the particular content at issue. *See, e.g.*, *Smith v. California*, 361 U.S. 147, 152-53 (1959). Because acts of self-regulation – such as efforts to detect or screen for particular types of unwanted content that may be hidden among masses of innocuous content – have a tendency to put service providers "on notice" of content that may be unlawful, the safest course for service providers in the absence of broad immunity is to completely close their eyes and ears to what is flowing through their networks. *Zeran*, 129 F.3d at 333 (notice-based liability would "reinforce[] service providers' incentives to . . . abstain from self-regulation").

Indeed, while Plaintiff readily concedes (as it must) that one of the specific objectives of Section 230 was to overturn the trial court decision in *Stratton Oakmont v. Prodigy*, in which an online provider was held to be potentially liable for displaying false and defamatory third-party content, there is no way to reconcile that objective with the alternative construction of Section 230 that was discussed in the *GTE* dicta and is now espoused by Plaintiff. The plaintiff in *Stratton Oakmont* was a company that claimed it had been injured by the *display* of *someone else's* content, not a company whose content had been *censored* by Prodigy. It is difficult to imagine that the Seventh Circuit, once advised of Congress's disdain for *Stratton Oakmont*, would decide that Section 230 is merely "a law designed to eliminate ISP's liability *to the creators* of offensive material" that has been censored. 347 F.3d at 660 (emphasis added).

In sum, Plaintiff's argument regarding Section 230's legislative history and policy objectives is incomplete and oversimplified. It fails to grasp that Congress often enacts a statute

to serve multiple (and competing) policy objectives, and that Congress is free to select sophisticated means to meet those objectives that, at first, might not seem to be the most obvious way to advance each goal. But as the Ninth Circuit recently observed regarding Section 230,

> [L]aws often have more than one goal in mind, and . . . it is not uncommon for these purposes to look in opposite directions. The need to balance competing values is a primary impetus for enacting legislation. Tension within statutes is not a defect but an indication that the legislature is doing its job.

Batzel, 333 F.3d at 1028. The Seventh Circuit's abbreviated and open-ended dicta in *GTE* may not have fully grasped the multiple considerations that lay behind Section 230's enactment. But many other federal courts have had a full opportunity to study these issues, and they all have found that the broad reading of § 230(c)(1) advanced by craigslist is fully consistent not only with Section 230's plain language, but also with its multiple and competing policy objectives. It is those decisions that should guide this Court's decision here.

5. There Is No Basis for Holding that Claims Under the FHA Are Not Subject to the Immunity Provided in Section 230(c)(1).

Finally, both Plaintiff and its amicus, the NFHA, variously argue that to the extent there is a "conflict" between Section 230 and the Fair Housing Act, it must be resolved by holding craigslist liable under the FHA, even if that means denying craigslist the protection of a statutory immunity that Congress specifically created for online intermediaries. Pltf's Mem. at 15-16; NFHA Br. at 10-11. These arguments do not withstand even cursory scrutiny.

Plaintiff and NFHA both erroneously argue that application of Section 230 in this case will be tantamount to a "repeal" of the FHA, and that this is not permissible "absent a clearly expressed congressional intention to the contrary." Pltf's Mem. at 14-15; NFHA Br. at 10-11. Quite obviously, Section 230 is not a repeal of anything. Rather, like any statutory immunity, it simply operates to bar the imposition of any form of liability (subject to certain enumerated exceptions) against a defined class of defendants (*i.e.*, providers or users of interactive computer

services) in a defined type of circumstance (*i.e.*, when the liability would treat the defendant as the publisher or speaker of information created or developed by someone else). In all other respects, liability may be imposed to the full extent available under the FHA, including against anyone who originates and posts an unlawfully discriminatory housing ad on craigslist's service. In any event, it is readily apparent that Congress fully understood and affirmatively intended that Section 230 would have the effect of preventing suits against online intermediaries that might otherwise be brought pursuant to a federal statute such as the FHA. If that were not so, then surely Congress would not have included in Section 230(e) a series of explicit exceptions that eliminate or curb Section 230 immunity with respect to certain enumerated classes of federal statutes (namely all federal criminal statutes, all copyright, trademark and patent laws, and the federal Electronic Communications Privacy Act).

NFHA devotes the bulk of its brief to a discussion of the importance of the federal laws against discrimination in housing advertisements. NFHA Br. at 1-10. craigslist readily acknowledges that these laws and the policies they serve are important.[7] But the fact that FHA serves important objectives does not distinguish it from numerous other federal and state laws under which online intermediaries cannot be sued for having disseminated unlawful third-party

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[7] Plaintiff asserts, without any substantiation or citation, that craigslist "does absolutely nothing" to prevent discriminatory housing notices from appearing on its site and "freely allow[s]" such notices to appear. Pltf's Mem. at 15. This allegation, even if it were in the Complaint (which it is not) and therefore deemed true for purposes of this motion, would not affect craigslist's immunity under § 230(c)(1), for it is settled that this immunity is not dependent on whether the defendant in fact engages in voluntary self-regulation of content. *E.g.*, *Blumenthal v. Drudge*, 992 F. Supp. 44, 52 (D.D.C. 1998) ("Congress has conferred immunity from tort liability as an incentive to Internet service providers to self-police the Internet for obscenity and other offensive material, even where the self-policing is unsuccessful or not even attempted"). Nevertheless, for the public record, craigslist feels compelled to point out that, contrary to Plaintiff's allegation, it takes steps to discourage and curtail discriminatory housing postings on its cite, including expressly requiring users to agree not to provide content that violates the FHA, prominently displaying warnings and educational materials to further discourage users from doing so, and inviting users to flag for removal any postings that they believe are contrary to the law or craigslist's rules. *See* craigslist's Mem. at 4-5 n.4; *see also* "Terms And Conditions" at craigslist.org.

content. With respect to all such laws, Congress has determined as a matter of federal policy that liability should be imposed not on the intermediaries, but rather "the original culpable party who posts" the unlawful content. *Zeran*, 129 F.3d at 330.

CONCLUSION

While Plaintiff repeatedly criticizes craigslist for reading Section 230 in a manner that supposedly takes § 230(c)(1) out of context and is not "holistic" (Pltf's Mem. at 1, 5-7, 18), it actually is *Plaintiff's* own unprecedented interpretation that suffers from such defects. In particular, it is *Plaintiff's* interpretation that **(1)** fails to mesh with the language and structure of the *entire* statute (including its preamble, *both* parts of subsection (c), its exclusive set of exceptions as specified in subsection (e), and its gathering of all "definitional" provisions in subsection (f)), **(2)** erroneously fixates on the statute's headings and subheadings while ignoring its governing text, and **(3)** would run rough-shod over the statute's overarching policy objectives.

For the reasons set forth in craigslist's opening Memorandum, and above, craigslist respectfully requests that this Court enter judgment dismissing Plaintiff's complaint with prejudice.

Respectfully submitted,
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CERTIFICATE OF SERVICE

The undersigned, an attorney, certifies that on June 21, 2006, he caused a true and correct copy of **CRAIGSLIST'S REPLY IN FURTHER SUPPORT OF ITS MOTION FOR JUDGMENT ON THE PLEADINGS** to be served through the Court's electronic filing system on:

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