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 OPPOSITION TO CLC'S MOTION TO SUPPLEMENT

craigslist respectfully opposes the CLC's motion for leave to file "New Supplemental Authority." Contrary to CLC's assertion, under well-settled Supreme Court doctrine, agency memoranda like the one CLC now seeks to submit are not entitled to deference from the Court. Moreover, the position stated in the document is not new – but rather is cumulative of other (similarly non-authorative) materials already attached to the CLC's initial opposition to craigslist's motion for judgment on the pleadings. craigslist further states as follows:

1. The purported "new authority" that the CLC puts at issue is a one-page memorandum from Bryan Greene, Deputy Assistant Secretary for Enforcement and Programs, ED, of the U.S. Department of Housing and Urban Development ("HUD") addressed to HUD's FHEO [Fair Housing and Equal Opportunity] Regional Directors. In his memo, Mr. Greene concedes that "some believe that Section 230 [47 U.S.C. § 230] . . . gives Internet publishers immunity from lawsuits brought under federal and state civil rights statutes." CLC Mot., Ex. A.[1] Mr. Greene then asserts, without any explanation or

[1] As shown in craigslist's submissions, decisions of federal district and appellate courts have consistently construed Section 230 to provide such broad immunity, including specifically cases involving claims under the Fair Housing Act and federal civil rights statutes. *See, e.g.*, craigslist Mem. in Supp. of Mot. for Judgment on the Pleadings at 10-13.

citation, that HUD nonetheless "has concluded" that Section 230 does not provide immunity to Web sites under the Fair Housing Act ("FHA").

2. Although the Greene memo on its face appears intended for internal agency use only and does not have any indicators that it is the product of in-depth analysis or review, the CLC argues that the interpretation of Section 230 in Mr. Greene's memo is entitled to deference from the Court under principles set out in cases such as *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). But even the cases relied upon by the CLC plainly provide that such deference is appropriate only where the agency involved is interpreting a statute it is "charged with enforcing," where it has a special expertise, and where it has engaged in a formal administrative process, such as notice and comment rulemaking, pursuant to a delegation of authority from Congress. The Greene memo, however, has absolutely none of these qualities.

3. The Supreme Court has repeatedly made clear that agency interpretations of a statute that are not the result of a formal and thorough decision making process, such as a formal adjudication or notice-and-comment rulemaking, do not warrant deference from courts. *See, e.g., Christensen v. Harris County*, 529 U.S. 576, 587 (2000) ("Interpretations such as those in opinion letters – like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law – do not warrant *Chevron*-style deference"). The Green memo is exactly the sort of document that *Christensen* said is not entitled to deference. The authority on which CLC relies for its contrary view, *Rapanos v. United States*, 126 S.Ct. 2208 (2006), afforded deference to formal agency regulations (*id.* at 2240) and therefore is of no help to CLC.

4. Even if the statutory interpretation articulated in the Green memo were the product of a formal and binding administrative process engaged in by HUD, it still would

not be entitled to judicial deference, because the statute that the memo purports to construe is 47 U.S.C. § 230, a statute of general application that is not within the scope of HUD's expertise.[2] Courts do not defer to an agency interpretation under *Chevron* where the agency has construed a general statute that the agency itself is not charged with interpreting. *See Chevron,* 467 U.S. at 843-45 (giving deference to "an executive department's construction of a statutory scheme it is entrusted to administer;" recognizing agency role to formulate policy and make rules where "Congress has explicitly left a gap for the agency to fill"); *see also Bowen v. Am. Hosp. Ass'n*, 476 U.S. 610, 643 n.30 (1986) (where twenty-seven agencies had promulgated regulations under a particular statute, "[t]here is . . . not the same basis for deference predicated on expertise as we found . . . in [*Chevron*]"); *Ass'n of Am. Physicians & Surgeons v. Clinton*, 997 F.2d 898, 913 (D.C. Cir. 1993) ("As we have so often noted, we do not defer to an agency's construction of a statute interpreted by more than one agency, . . . let alone one applicable to all agencies") (citation omitted).

5. The CLC motion to supplement further should be rejected on the ground that the Greene memo is cumulative. The CLC argued in its initial opposition (at page 1) that HUD had taken the position, including in testimony before a Congressional committee, that the FHA applied to Internet housing advertising. The present Greene memo is cumulative of these previously cited sources.

WHEREFORE, craigslist respectfully requests the Court deny the CLC's motion to file the Greene memo. Alternatively, to the extent the Court grants the CLC's motion, craigslist respectfully submits that the Greene memo should be entitled to no weight in this proceeding.

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[2] Section 230 is part of the Federal Communications Act of 1934, as Amended by the Telecommunications Act of 1996. To the extent that any federal agency is charged by Congress with interpreting Section 230, it clearly is not HUD.

Respectfully submitted,

CRAIGSLIST, INC.

October 4, 2006 By: /s/ Eric D. Brandfonbrener

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CERTIFICATE OF SERVICE

The undersigned, an attorney, certifies that on October 4, 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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