ELECTRONIC FRONTIER FOUNDATION
Protecting Rights and Promoting Freedom on the Electronic Frontier

September 1, 2010

Via Overnight Mail

Court of Appeal for the State of California
First Appellate District
350 McAllister Street
San Francisco, CA 94102

RE: ***craigslist, Inc. v. The Superior Court of California, County of San Francisco (No. A129536); Amici Letter Supporting Writ Petition of craigslist, Inc.***

Dear Justices of the Court of Appeal:

Public interest non-profits the Electronic Frontier Foundation, Citizen Media Law Project, and the Center for Democracy & Technology, and law professors Eric Goldman, Jason Schultz, David Post and David Levine (collectively, "Amici") submit this letter in support of Defendant-Petitioner craigslist, Inc.'s petition for a writ to this Court. Amici urge the Court of Appeal to grant this writ and reverse the Superior Court's denial of craigslist's demurrer because craigslist is statutorily immune from liability pursuant to Section 230 of the Communications Act, as amended, 47 U.S.C. § 230 ("Section 230"). The Superior Court's interpretation of Section 230 is neither compelled by the language of the statute nor advisable as a matter of policy. If left intact, the decision below will generate perverse incentives on the part of providers of interactive computer services to be more circumspect and less helpful when approached by individuals who claim to have been injured by third party content.

The Interest of the Amici Curiae

The Electronic Frontier Foundation ("EFF") is a non-profit, member-supported civil liberties organization that works to protect rights in the digital world. EFF encourages and challenges industry, government and the courts to support free expression, privacy, and openness in the information society. It is particularly concerned that laws and regulations not be used to stifle free expression on the Internet by holding intermediaries liable where the content in question originates with a third party.

EFF has a substantial interest in this case because it concerns issues related to intermediary liability and free speech on the Internet. Specifically, EFF supports a broad interpretation of Section 230 because this statute has played a vital role in allowing millions of people to create and disseminate user-generated content through the Internet, enriching the diversity of offerings online. EFF has participated in a significant number of cases addressing the interpretation of this statute, including as amicus in *Barrett v. Rosenthal* (Cal. 2006) 40 Cal. 4th 33, the only California Supreme Court decision on Section 230.

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Citizen Media Law Project ("CMLP") provides legal assistance, education, and resources for individuals and organizations involved in online and citizen media. CMLP is jointly affiliated with Harvard University's Berkman Center for Internet & Society, a research center founded to explore cyberspace, share in its study, and help pioneer its development, and the Center for Citizen Media, an initiative to enhance and expand grassroots media. CMLP is an unincorporated association hosted at Harvard Law School, a non-profit educational institution. CMLP recognizes Section 230 as critical to maintaining a vibrant online media environment and supports sensible interpretations of the statute that safeguard this role.

The Center for Democracy & Technology ("CDT") is a non-profit public interest and Internet policy organization. CDT represents the public's interest in an open, decentralized Internet reflecting constitutional and democratic values of free expression, privacy, and individual liberty. CDT has litigated or otherwise participated in a broad range of Internet free speech cases and works to protect the ability of websites and other service providers to offer new opportunities for online speech unfettered by government regulation or censorship.

Eric Goldman is a professor at Santa Clara University School of Law, where is also Director of the High Tech Law Institute (affiliations are for identification purposes only). Before becoming a full-time professor, he was General Counsel at Epinions.com, a user-generated content company that relied heavily on 47 USC 230's immunity. He has taught Internet Law for 15 years and has blogged on 47 USC 230 cases for the past 5 1/2 years. His interest in this case is to help advance the development of appropriate legal doctrines for the Internet.

Jason Schultz is an Assistant Clinical Professor of Law at UC Berkeley School of Law. His research and writings focus on protecting consumer rights in the digital world and on the proper public policies that should govern new technologies.

David G. Post is the I. Herman Stern Professor of Law at the Beasley School of Law at Temple University. He is the author of numerous scholarly and popular articles, and two books, focused on the new regulatory challenges posed by the emergence of the Internet as a global communications forum, and in particular on means of protecting and preserving the freedoms of expression, association, and thought in the face of those challenges.

David S. Levine is an Assistant Professor of Law at Elon University School of Law, and a Fellow at the Center for Internet and Society at Stanford Law School (affiliations are for identification purposes only), who teaches about Section 230 and hosts a radio show that discusses intellectual property and technology issues.

This Court Should Grant Craigslist's Writ Petition

The Internet is one of the most diverse forums for individual communication ever invented. In its short life, the Internet has moved from the province of technical specialists and educational institutions into a powerful force in the everyday lives of most Californians, allowing them to share, discuss and develop ideas in their political, professional, and personal lives. As the U.S. Supreme Court observed over 13 years ago, "It is 'no exaggeration to conclude that the content on the Internet is as diverse as human thought.'" (*Reno v. American Civil Liberties Union,* 521 U.S. 844, 852 (1997)(citation omitted).) Section 230 immunizes interactive computer services from liability for hosting this diverse content, which in turn encourages the development and availability of innovative online services that foster free speech. Because it encourages both large and small intermediaries to open forums for discussion, it is no exaggeration to say that Section 230 has been critical to protecting and expanding the Internet as a forum for free speech.

The Superior Court ruling in *Scott P. v. craigslist, Inc., et al.* (S.F. Sup. No. CGC-10-496687), unless reconsidered, threatens to undermine this powerful protection for free speech by eliminating the broad immunity of Section 230 whenever a host has offered to help someone who claimed to be harmed by an online speaker. Defendant craigslist demurred to the First Amended Complaint filed by Plaintiff Scott P. on the grounds that the promissory estoppel cause of action fails due to the statutory immunity provided by Section 230. The Superior Court overruled the demurrer on the promissory estoppel count, holding that the complaint "sufficiently pleaded an agreement supported by promissory estoppel" because the complaint alleged that craigslist's customer service gave a vague promise that it would help plaintiff. (Hearing Transcript at p. 20.) This raises the prospect that the critical protections of Section 230, upon which the revolution in user-generated content online has been founded, can be swept away by a vague assurance of help.

As the Superior Court acknowledged, the attempt to use promissory estoppel to undermine Section 230 poses an issue of first impression in California. However, while promissory estoppel claims are new to California's Section 230 jurisprudence, Section 230 is not. In *Barrett v. Rosenthal*, the California Supreme Court recognized that Congress implemented its policy preferences by "by broadly shielding all providers from liability for 'publishing' information received from third parties." (*Barrett*, 40 Cal.4th at 53.)

As the California Supreme Court recognized, the text of Section 230 makes clear that Congress created this immunity in order to limit the impact on the Internet of federal or state regulation imposed either through statute or through the application of common law causes of action. This Congressional decision was a deliberate effort to encourage service providers to find innovative ways to self-regulate in order to better protect the public. Section 230 itself provides: "[i]t is the policy of the United States . . . to encourage the development of technologies which maximize user control over what information is

received by individuals, families, and schools who use the Internet and other interactive computer services" 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." (47 U.S.C. § 230(b)(2), (3).)

As Representative Christopher Cox noted in support of the bill, Section 230 would "protect [online service providers] from taking on liability . . . that they should not face . . . for helping us solve this problem" as well as establish a federal policy of nonregulation to "encourage what is right now the most energetic technological revolution that any of us has ever witnessed." (141 Cong. Rec. H8470 (daily ed. Aug. 4, 1995); *see also Barrett*, 40 Cal.4th at n.14 (quoting this statement by Cox); Statement of Rep. Barton, 141 Cong. Rec. H8460-01, H8470 (1995) (Congress enacted § 230 to give interactive service providers "a reasonable way to . . . help them self-regulate themselves without penalty of law"); *Zeran v. America Online, Inc.*, (4th Cir. 1997), 129 F.3d 327, 331, *cert. denied*, (1998) 524 U.S. 937 ("Congress enacted § 230 to remove the disincentives to selfregulation created by the *Stratton Oakmont* decision," referring to *Stratton Oakmont, Inc. v. Prodigy Services Co.*, (N.Y. Sup. Ct. 1995) 1995 WL 323710).)

Congress correctly recognized that "[m]aking interactive computer services and their users liable for the speech of third parties would severely restrict the information available on the Internet." (*Batzel v. Smith*, (9th Cir. 2003) 333 F.3d 1018, 1027-28, *cert. denied*, (2004) 541 U.S. 1085.) Section 230 encourages "freedom of speech in the new and burgeoning Internet medium" by eliminating the "threat [of] tort-based lawsuits" that would impose burdens on interactive computer services with respect to the communications of their millions of users. (*Zeran v. America Online,* 129 F.3d at 330; *see also Barrett,* 40 Cal.4th at 41-47 (extensive discussion of *Zeran*, citing with approval).)

If left intact, the decision to overrule craigslist's demurrer will lead to results that directly conflict with Congress' goal in enacting Section 230. First, the ruling will force those who provide interactive computer services to choose between ignoring complaints about harmful third party content on their services or potentially sacrificing their Section 230 immunity by making "promises" of assistance. Either way, their ability to provide a good hosting service to their customers will suffer; more importantly, so will the experience of their users. Indeed, if the only way to provide a hosting service is to turn a deaf ear to complaints, even socially useful speech may be lost in a sea of abusive behavior. Yet one of Congress' goals in enacting Section 230 was precisely to support service providers to provide services that make the user experience better and to actively solve customer problems.

Moreover, allowing promissory estoppel claims to route around Section 230's protections will encourage plaintiffs to creatively draft complaints to avoid early dismissal. Even if the complaint would fail at a later stage, this loophole threatens the efficacy Section 230's immunity. Widespread use of this tactic could discourage service providers from allowing comments or user generated content. This obviously undermines the ultimate

goal of Section 230: to encourage the development of a wide array of hosting services thus encouraging robust free speech online.

Indeed, the Superior Court's holding would open to question the very first Circuit Court decision resolved pursuant to Section 230, *Zeran v. America Online, Inc.* In a striking similarity to the facts of this case, AOL customer service representatives repeatedly told plaintiff Kenneth Zeran that the company would take action to protect him from defamatory postings, and yet failed to solve Zeran's problems. Nonetheless the Fourth Circuit found that AOL enjoyed immunity under Section 230.

California courts have followed *Zeran.* In *Barrett,* 40 Cal. 4th at 41, the Supreme Court recognized *Zeran* and its progeny as the leading cases on Section 230. Instead of following the lead of the California Supreme Court in *Barrett,* however, the Superior Court erroneously relied upon a Ninth Circuit case, *Barnes v. Yahoo!, Inc.*, (9th Cir. 2009) 570 F.3d 1096. This was error for two reasons. First, while California courts may treat federal precedent like *Barnes* as persuasive authority, they "must look to our own state's treatment of section 230 immunity to confirm" the analysis. *Doe II v. MySpace Inc.*, (Cal.App. 2 Dist. 2009) 175 Cal.App.4th 561. Notably, the *Barrett* court observed that Section 230's protection "applies even when self-regulation is unsuccessful, or completely unattempted." (*Barrett*, 40 Cal.4th at 53; *see also Blumenthal v. Drudge*, (D.D.C. 1998) 992 F. Supp. 44, 52 ("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.")). The *Barrett* Court recognized that "Congress contemplated self-regulation, rather than regulation compelled at the sword point of tort liability." (*Id.* at 53.)

Second, extending *Barnes* to the facts of this case is misguided. While Scott P. alleges that that craigslist made vague promises to help him, *Barnes* "rested on a promise that scarcely could have been clearer or more direct." (*Goddard v. Google, Inc.*, (N.D.Cal. 2009) 640 F.Supp.2d 1193, 1201 (declining to extend *Barnes* to a claim that plaintiff was an intended third-party beneficiary of Google's content policy with its advertisers).) The *Barnes* court itself noted that the precision of the promise is important: The promise in question "must be as clear and well defined as a promise that could serve as an offer, or that otherwise might be sufficient to give rise to a traditional contract supported by consideration." (570 F.3d at 1108.) Providers of interactive computer services can respond complaints and assist those injured by harmful speech without making this type of "clear and well defined" promise, but they cannot possibly do so without making some kind of express or implied assurance of assistance.

Moreover, allowing claims of promissory estoppel to arise from customer service conversations with a plaintiff also conflicts with Section 230(c)(2)(A), which protects a service provider from liability for actions voluntarily taken in good faith to restrict access to or the availability of alleged fraudulent content. Essential to Section 230's protections is the ability of a service provider to be promptly spared the burden of extensive discovery and trial (such as would be required by the Superior Court's decision). By

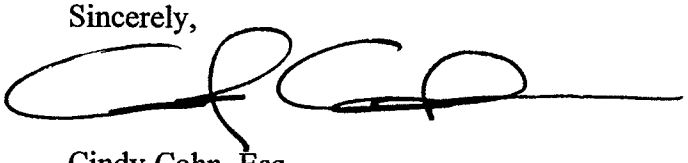
allowing a trial to proceed, the court below is violating the Congressional language and clear intent to promote voluntary actions to remove objectionable content.

It is beyond dispute that if craigslist had not provided any means for the plaintiff to object to content, craigslist would be absolutely protected from liability to the plaintiff by Section 230(c)(1). But, consistent with the Congressional goal to promote voluntary efforts by service providers, craigslist voluntarily chose to create a customer complaint process that allowed the Plaintiff to communicate with a customer support staff member. Any claimed liability to the Plaintiff that flows out of craigslist's "voluntary action" to create the customer complaint process is barred by Section 230(c)(2)(A). Even if the customer complaint process is flawed (as the plaintiff appears to be alleging), its creation is nevertheless an "action" that is protected from liability.

Critically, this protection is completely consistent with the goal of Congress to promote voluntary efforts by service providers to remove objectionable content. A finding holding craigslist potentially liable because of its customer complaint process would directly conflict with Congressional intent and statutory language found in Section 230.

In summary, the Superior Court's decision reanimates the disincentives to self-regulation that Congress sought to eradicate in enacting Section 230 and stretches the logic of *Barnes v. Yahoo* beyond acceptable bounds. Moreover, allowing a claim of promissory estoppel to undermine Section 230's broad protection for Internet hosts, especially for voluntary actions to remove alleged fraudulent content, would return online innovators to that environment of unnecessary risk and liability that was banished with the passage of Section 230. For these reasons, Amici respectfully request that the Court of Appeal grant the writ petition and reverse the Superior Court's decision.

Sincerely,



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DECLARATION OF SERVICE

I, the undersigned, declare:

1. That the declarant is and was, at all times herein mentioned, a citizen of the United States, employed in the city of San Francisco, California, over the age of 18 years, and not a party to or interested in the within action, and that the declarants's business address is 454 Shotwell Street, San Francisco, CA 94110.

2. That on September 1st, 2010, declarant served the foregoing documents by Overnight Delivery as noted on the attached service list by placing a true copy thereof in a sealed envelope addressed to the parties listed on the attached Service List.

3. That there is a regular communication by mail between the place of mailing and places so addressed.

I declare under penalty of perjury that the foregoing is true and correct. Executed on this 1st day of September, 2010, at San Francisco, California.

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