

**IN THE SUPREME COURT  
FOR THE STATE OF FLORIDA**

JANE DOE, mother and legal guardian of  
JOHN DOE, a minor,

Petitioner,

CASE NO. 94,335

v.

District Court of Appeal  
4th District - No. 97-2587

AMERICA ONLINE, INC.,  
a foreign corporation,

Respondent.

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**CERTIFIED QUESTIONS FROM THE DISTRICT COURT OF APPEAL  
FOURTH DISTRICT**

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**RESPONDENT AMERICA ONLINE, INC.'S ANSWER BRIEF**

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**CERTIFICATION OF SIZE AND STYLE OF TYPE USED**

In accordance with Fla. R. App. P. 9.210 and this Court's Administrative Order of July 13, 1998, this brief uses 14-point, proportionately-spaced Times Roman font, with less than 27 lines of text per page.

The issue raised in this appeal is whether the provider of an interactive computer service, such as Defendant-Respondent America Online, Inc. (“AOL”), may be held liable for the allegedly tortious and harmful speech of someone who merely subscribed to and used its service. The courts below, like every other court to consider this question, correctly held that AOL is immune from such liability under a federal statute, 47 U.S.C. § 230. The courts below also correctly followed clear federal precedent that this statute applies to all cases filed after its enactment, regardless of when the underlying events occurred. The final judgment in favor of AOL should therefore be affirmed.

### **STATEMENT OF THE CASE AND FACTS**

The parties do not appear to disagree about the facts that are material to this appeal.<sup>1/</sup> The following statement highlights certain points that were omitted from or mischaracterized in Petitioner’s Statement of the Case and Facts.

#### Nature of the Case

Plaintiff Jane Doe (“Doe”), mother and legal guardian of John Doe, a minor, brought this action against defendant Richard Lee Russell (“Russell”) seeking to recover for emotional injury that John Doe allegedly suffered as a result of Russell’s sale of a videotape made by Russell that depicted Russell having sex with John Doe. The Complaint named AOL as a defendant solely on the ground that Russell, as a subscriber to AOL’s interactive computer service, allegedly had used the AOL

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<sup>1/</sup> For purposes of a motion to dismiss pursuant to Florida Rule of Civil Procedure 1.140(b)(6), all material allegations in the complaint are taken as true. *See, e.g., Cyn-Co, Inc. v. Lancto*, 677 So.2d 78, 79 (Fla. 2d DCA 1996). By reciting Doe's allegations, AOL does not concede their truth.

service as a means to communicate with other people about possible sale of the videotape.

Statement of Facts

AOL “own[s] and operate[s] . . . a computer, on-line, interactive information, communication, and transaction service.” (Complaint ¶ 9, R. 2.<sup>2/</sup>) Subscribers to AOL’s service may communicate with each other over AOL’s service in a variety of ways, including electronic mail, message boards, and “chat rooms.” Chat rooms are modern-day analogs to telephone party-lines, in which multiple subscribers may conduct real-time, computer-to-computer conversations, with the statements of each speaker momentarily appearing on the computer screens of each participant in the conversation. (See Brief of Petitioner (“Doe Br.”) at 5.)

The Complaint alleged that in early 1994 Defendant Russell committed sexual battery on John Doe and two other minor males and also induced John Doe and the other minors to perform sexual activities with one another. (Complaint ¶ 23, R. 4.) Russell is alleged to have videotaped and photographed these activities. (*Id.* ¶ 24, R. 4-5.) The Complaint further alleges that Russell was an AOL subscriber in 1994 and that he communicated with other persons in AOL chat rooms “to advertise/and or solicit” and arrange for “the sale and distribution of” the videotape and photographs. (*Id.* ¶¶ 24-26, 28, R. 4-5.) These chat room conversations allegedly “included the exchange of addresses and telephone numbers for purposes of the sale

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<sup>2/</sup> “R.2” refers to page 2 of the Record on Appeal. A copy of the Complaint also may be found as item 3 in Petitioner’s Appendix.

of . . . pornographic materials.” (*Id.* ¶ 26, R. 5.) “As a result of these discussions,” Russell allegedly sent a single copy of the videotape by *U.S. mail* (not through the AOL service) to a man in Arizona. (*Id.* ¶ 27, R. 5.)

The Complaint does not allege that anyone at AOL ever had contemporaneous knowledge of any statement made by Russell through AOL’s service concerning child pornography in general or the John Doe videotape or photographs in particular.<sup>3/</sup> Doe seeks to hold AOL responsible for the harm flowing from Russell’s alleged distribution of the videotape depicting John Doe on the theory that AOL allegedly was “on notice” that persons other than Russell may have used AOL’s service to discuss and market child pornography materials among themselves. (*Id.* ¶¶ 20-21, R. 4.)

#### Course of Proceedings

The Complaint asserted four counts against AOL. Counts I and II purported to state claims under Florida Statutes §§ 847.011(1)(a) and 847.0135(2), respectively, which establish criminal penalties for certain conduct involving the

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<sup>3/</sup> Doe’s statement that AOL “ignored Russell’s blanket violations of law” and “encouraged the activities of Russell” (Doe Br. at 23) are entirely unsupported and go far beyond even the allegations in her complaint. While Doe alleged that “[c]omplaints were communicated to AOL” regarding Russell “transmitting obscene and unlawful photographs and/or images” (Complaint ¶ 22, R. 4), she did not allege that these “complaints” were made *before* the chat room communications that are at issue in this case or even that these complaints related to things Russell had said using AOL’s service, as opposed to things he had sent through the mail. In any event, as we show below, even if Doe had alleged that AOL had contemporaneous knowledge of Russell’s chat room communications, it would not affect the outcome of this appeal.

sale or distribution of certain obscene materials. Count III, captioned “negligence *per se*,” also sought to hold AOL liable for an alleged violation of § 847.0135. Count IV sounded in simple negligence. Each of these counts alleged that John Doe had suffered solely emotional distress, *i.e.*, “humiliation, embarrassment, mental anguish, loss of the capacity for the enjoyment of life, and expense of psychological care.” (*Id.* ¶¶ 30, 34, 39, 44, R. 6-9.) The Complaint also asserted two separate counts against Russell for alleged violations of Sections 847.011 and 847.0135(2).

AOL moved to dismiss all claims against it on three independent grounds: (1) all of Doe's claims against AOL are barred by 47 U.S.C.A. § 230 (West Pocket Part 1997) (“Section 230”), which prohibits lawsuits that seek to treat an interactive computer service provider as the “publisher or speaker” of messages transmitted over its service by a third party; (2) all of Doe’s claims against AOL fail because they seek recovery only for emotional injury yet fail to meet the strict Florida-law standards for recovery for such injury; and (3) Doe’s claims under Florida Statutes §§ 847.011(1)(a) and 847.0135(2) fail because these penal statutes do not create a private cause of action.

#### Disposition of the Lower Courts

The Circuit Court granted AOL’s motion to dismiss on the basis of 47 U.S.C. § 230, without reaching the other grounds raised in AOL’s motion. (Order of Dismissal at 4-8, R. 253-57.<sup>4/</sup>) The Court of Appeal affirmed. Relying on

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<sup>4/</sup> The Circuit Court’s Order of Dismissal also may be found as item 4 in  
(continued...)

*Zeran v. America Online, Inc.*, 129 F.3d 327 (4th Cir. 1997), *cert. denied*, 118 S. Ct. 2341 (1998), the court unanimously held both that Section 230 immunized AOL from tort liability for any harm caused by third-party content such as Russell's alleged statements and that Section 230 applied to Doe's suit because "Section 230 applies by its plain terms to complaints brought after [Section 230] became effective," including Doe's complaint. (DCA Opinion at 3 (internal quotations and citation omitted).<sup>5/</sup>) The Court of Appeal also rejected Doe's arguments that the Circuit Court had erred by deciding the Section 230 immunity issue in the context of a motion to dismiss and by declining to grant Doe leave to amend. (*Id.* at 3-5.)

Although the Court of Appeal reached its decision without any apparent difficulty or doubt, it *sua sponte* certified three questions to this Court pursuant to Fla. R. App. P. 9.030:

- (1) Whether section 230 of the Communications Decency Act applies to complaints filed after its effective date where the complaint alleges a cause of action based upon acts occurring prior to its effective date?
- (2) If the answer is in the affirmative, whether section 230 of the Communications Decency Act preempts Florida law?
- (3) And whether a computer service provider with notice of a defamatory third party posting is entitled to immunity under section 230 of the Communications Decency Act?

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<sup>4/</sup> (...continued)  
Petitioner's Appendix.

<sup>5/</sup> The Court of Appeal's opinion may be found as item 5 in Petitioner's Appendix.

This Court postponed its decision on jurisdiction and set a briefing schedule on November 19, 1998.

### **SUMMARY OF ARGUMENT**

Operation of Section 230: The Circuit Court and Court of Appeal properly held that Section 230 preempts state law to the extent such law is inconsistent with that section and that Section 230 immunizes interactive service providers such as AOL from liability for third-party content. Accordingly, the second and third certified questions must be answered in the affirmative.

Section 230 states that “[n]o provider of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider” and further that “[n]o cause of action may be brought and no liability may be imposed *under any State or local law that is inconsistent*” with Section 230. 47 U.S.C. §§ 230(c)(1), (d)(3) (emphasis added). As the United States Court of Appeals unanimously held in *Zeran v. America Online, Inc.*, “[b]y its plain language, § 230 creates a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service.” 129 F.3d at 330.

By its very terms, Section 230 preempts and bars any claims brought “*under any State or local law that is inconsistent*” with that section. 47 U.S.C. § 230(d)(3) (emphasis added). As the *Zeran* court held in ruling that Section 230 barred the plaintiff’s state law causes of action, “when Congress has ‘unmistakably ... ordained,’ that its enactments alone are to regulate a part of commerce, state laws

regulating that aspect of commerce must fall. . . . Here, Congress' command is explicitly stated." 129 F.3d at 334 (internal quotations and citation omitted).

The prerequisites for Section 230 immunity were fully evident on the face of Doe's Complaint. Her own allegations established both that AOL is the provider of an "interactive computer service" and that Russell's allegedly harmful chat room conversations were "information provided by another information content provider." Moreover, Doe's suit plainly sought to treat AOL as the "publisher or speaker" of these communications in at least three different ways: (1) by attempting to put AOL in the same legal position as the person (Russell) who posted and thereby published the messages; (2) by requiring AOL to satisfy a standard of care that would compel it to undertake the quintessential duties of a traditional publisher; and (3) by subjecting AOL to the same legal rules that apply to traditional publishers for harm arising from their dissemination of third-party advertisements. Section 230's preamble and legislative history fully support the lower courts' ruling.

Section 230's Temporal Reach: Section 230 applies to all cases that were commenced after its enactment, even if the events at issue allegedly occurred before its enactment. Accordingly, the first certified question should be answered "yes." This precise issue was decided by the Fourth Circuit Court of Appeals in *Zeran* when it held that Section 230 applies to all cases commenced after its enactment, regardless of when the underlying conduct occurred. *Zeran*, 129 F.3d at 334-35. Indeed, the present case does not even present an issue of retroactivity because Section 230 "is addressed only to the bringing of a cause of action" and Doe "did

not file [her] complaint until [almost one year] after § 230's immunity became effective.” *Id.*

Even if application of Section 230 did raise a retroactivity issue, Doe still would not be able to evade the statute's clear command. Under *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), a federal statute must be applied to cases involving pre-enactment events if Congress expressly prescribed that result. Congress did precisely that in Section 230 by providing that “[n]o cause of action may be brought and no liability may be imposed” under any inconsistent state law. 47 U.S.C. § 230(d)(3). Moreover, even if Congress's intent were not clear, Section 230 would nonetheless control this case because application of it to bar Doe's claims does not have a “retroactive effect” as defined in *Landgraf*. It is well settled that a statute that simply deprives a would-be plaintiff of an unfiled cause of action does not impair any “vested right” and therefore does not, under the basic *Landgraf* test, have a “retroactive effect.”

Adjudication of Section 230 Defense in Context of Motion to Dismiss:

Contrary to Doe's argument, the Circuit Court's decision was not based on any facts outside of her complaint. The only factual predicates for immunity under Section 230 -- that AOL is a provider of an “interactive computer service” and that the content at issue “was provided by another information content provider” -- were easily found within the four corners of Doe's Complaint. Moreover, Florida Rule of Civil Procedure 1.110(d) unequivocally permits a court to grant a motion to dismiss

on the basis of an affirmative defense when, as here, the factual predicates for that defense were pled in the complaint.

Dismissal with Prejudice: Doe is also incorrect in her contention that the Circuit Court erred by dismissing her claims against AOL with prejudice and without leave to amend. Florida law is clear that leave to amend should not be granted when amendment would be futile. Any amendment would be futile here because, no matter how Doe's claims might be cast, they inevitably would treat AOL as the "publisher or speaker" of Russell's alleged statements in contravention of Section 230.

## **ARGUMENT**

### **I. THE COURTS BELOW CORRECTLY HELD THAT SECTION 230 BARS DOE'S CLAIMS AGAINST AOL BECAUSE THE CLAIMS SOUGHT TO TREAT AOL AS THE "PUBLISHER OR SPEAKER" OF INFORMATION PROVIDED BY A THIRD PARTY.**

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The second and third certified questions present the issue whether 47 U.S.C. § 230, on which the courts below relied, confers immunity on AOL in this case. For the reasons set out below, the courts below correctly ruled that Section 230 provides AOL with complete immunity from Doe's claims. Both certified questions should therefore be answered in the affirmative.

Interactive computer services -- which enable persons to communicate with one another with unprecedented speed and efficiency through the Internet and related electronic networks -- are revolutionizing the way people and businesses share and receive information. "The Internet is a unique and wholly new medium of

worldwide human communication.” *Reno v. ACLU*, 521 U.S. 844, 117 S. Ct. 2329, 2334 (1997) (citation omitted). Unlike traditional media such as television, radio, newspapers, and books, where content typically flows from a single, centralized “publisher,” information and content on interactive computer services are created and disseminated by millions of individual subscribers. One of the great challenges of this revolution is to develop legal rules to govern this new medium that recognize this fundamental distinction between traditional media and interactive services. In February 1996, Congress enacted Section 230 as a response to this challenge.<sup>6/</sup>

The key operative provision of Section 230 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). The statute further provides that suits based on laws inconsistent with Section 230 are prohibited. *Id.* § 230(d)(3).

As every state and federal court to consider the issue has held, these provisions of Section 230 shield providers of interactive computer services, such as AOL, from liability for harms resulting from the dissemination of content created and transmitted by other persons. The broad immunity conferred by the statute was

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<sup>6/</sup> Section 230 was enacted as part of the Communications Decency Act of 1996 (“CDA”). In *Reno*, the U.S. Supreme Court struck down on First Amendment grounds two other provisions of the CDA that had criminalized certain online transmissions of “indecent” or “patently offensive” material. The invalidation of those CDA sections did not affect Section 230. *See* 47 U.S.C. § 608 (1994) (“If any provision of this [Act] . . . is held invalid, the remainder of [the Act] . . . shall not be affected thereby.”); *Reno*, 117 S. Ct. at 2350.

decisively confirmed in *Zeran v. America Online, Inc.*, 129 F.3d 327 (4th Cir. 1997), *cert. denied*, 118 S. Ct. 2341 (1998). Just like Doe, the plaintiff in *Zeran* sought recovery from AOL *under state law* for injuries allegedly sustained as a result of harmful messages that a user of the AOL service had posted on the AOL service. The federal court of appeals unanimously upheld the dismissal with prejudice of *Zeran*'s claims, holding that, “[b]y its plain language, § 230 creates a federal immunity to *any* cause of action that would make service providers liable for information originating with a third-party user of the service.” *Id.* at 330 (emphasis added).

Similarly, in *Blumenthal v. Drudge*, 992 F. Supp. 44 (D.D.C. 1998), the district court granted summary judgment in AOL's favor in a *state law* action for defamation and invasion of privacy based on content provided by a third party. The court held that, in Section 230, Congress “made the legislative judgment to effectively immunize providers of interactive computer services from civil liability in tort with respect to material disseminated by them but created by others.” *Id.* at 49. Other state and federal courts have unanimously reached the same conclusion.<sup>7/</sup> For

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<sup>7/</sup> See *Aquino v. Electriciti, Inc.*, 26 Media L. Rptr. (BNA) 1032, 1032 (Cal. Super. Ct. Sept. 23, 1997) (holding that Section 230 bars suit seeking to make interactive service provider liable *under state law* for information originating with a third party); *Ben Ezra, Weinstein & Co. v. America Online, Inc.*, 26 Media L. Rptr. (BNA) 2211, 2213 (D.N.M. July 16, 1998) (holding that Section 230 protected interactive service provider from burdens of discovery in suit alleging *state law* tort liability for third-party content). Copies of each of these decisions are included in the appendix at the back of this brief.

the same reasons as in all these cases, Section 230 likewise required dismissal of Doe’s claims against AOL.

Because the interpretation of Section 230 is a matter of *federal* law, the Florida Court of Appeal appropriately relied on *Zeran*, and this Court could affirm the lower court’s decision on the same basis. *See, e.g., Zorick v. Tynes*, 372 So.2d 133, 139 (Fla. 1st DCA 1979) (Florida court construing federal statute “receive[s] the federal creature hide and hair, . . . [including] the federal judicial decisions . . . construing it . . .”). In any event, as we show below, the federal courts’ interpretation of Section 230, and the lower courts’ application of the statute to this case, were clearly correct.

**A. Section 230 Preempts State Law to the Extent that State Law Provides the Basis for Suits Such as Doe’s that Treat an Interactive Service Provider as the Publisher or Speaker of Third-Party Content.**

The Court of Appeal correctly held that Section 230 preempts and bars any cause of action under state law that treats an interactive service provider as a publisher or speaker of third-party content. Accordingly, the second certified question -- whether Section 230 preempts Florida law -- should be answered “yes.”

Section 230(d)(3) explicitly provides that “[n]o cause of action may be brought and no liability may be imposed *under any State or local law that is inconsistent with this section.*” 47 U.S.C. § 230(d)(3) (emphasis added). Thus, by its very terms and as Doe concedes (Doe Br. at 19), Section 230 preempts inconsistent state law. Indeed, one of the specific purposes of Section 230 was to

overrule *Stratton Oakmont, Inc. v. Prodigy Services Co.*, No. 31063/94, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995), in which a state trial court had concluded that an interactive service provider could be liable *under state tort law* for an allegedly tortious message posted by an unidentified user. See H.R. Conf. Rep. No. 104-458, at 194 (1996).<sup>8/</sup>

In view of this plain language and legislative history, it is hardly surprising that *every* court to have considered the applicability of Section 230 to state law claims has found such claims preempted and barred by Section 230. As the *Zeran* court explained,

While Congress allowed for the enforcement of “any State law that is consistent with [§ 230],” 47 U.S.C. § 230(d)(3), *it is equally plain that Congress’ desire to promote unfettered speech on the Internet must supersede conflicting common law causes of action.* . . . With respect to federal-state preemption, the [U.S. Supreme] Court has advised: “[W]hen Congress has ‘unmistakably . . . ordained,’ that its enactments alone are to regulate a part of commerce, state laws regulating that aspect of commerce must fall. The result is compelled whether Congress’ command is explicitly stated in the statute’s language or implicitly contained in its structure and purpose.” . . . Here, Congress’ command is explicitly stated.

See *Zeran*, 129 F.3d at 334 (citation omitted and emphasis added).

Even Doe readily concedes the preemptive force of Section 230. (Doe Br. at 19.) She argues instead about only the *scope* of that preemption, claiming that

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<sup>8/</sup> The *Stratton Oakmont* case has since been overruled as a matter of state law by the Appellate Division of the New York Supreme Court. See *Lunney v. Prodigy Servs. Co.*, 1998 WL 909836 (N.Y. App. Div. Dec. 28, 1998).

Section 230 does not create “blanket immunity.” (Doe Br. at 20-21.) But AOL does not claim that Section 230 establishes “blanket immunity” for *all* content that flows through its online service. Rather, AOL consistently has maintained that the immunity extends only to cases involving *third-party* content. As discussed below in Part II, this case easily falls within that scope.

Doe’s discussion of the scope of Section 230 preemption erroneously fixates on a footnote from the superseded decision of the federal district court in the *Zeran* case. (Doe Br. at 20-21.) In that footnote, the district court (in *dicta*) questioned (but did not answer) whether Section 230 “might” be inapplicable if the “[d]efendant knew of the defamatory nature of the material and made a decision not to remove it from the network based on a malicious desire to cause harm to the party defamed.” (*Id.* at 21 (quoting *Zeran*, 958 F. Supp. at 1133 n.20).) Even assuming that such a situation would fall outside the reach of Section 230, that would be of no help to Doe. Doe did not allege -- and, indeed, could not have alleged -- that Russell’s allegedly harmful statements were available to anyone on the AOL service for more than a fleeting moment.<sup>2/</sup> Nor did she (or could she) allege that AOL “made a decision not to remove [those statements] from the network,” much less a decision “based on a malicious desire to cause harm to [John

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<sup>2/</sup> Because chat room conversation is “real-time dialogue,” *see Reno*, 117 S. Ct. at 2335, Russell’s alleged statements could not have been available on the AOL service for more than a few *seconds*. This contrasts starkly with the facts in *Zeran*, which involved “message board” postings that allegedly were available on the AOL service for several *days*.

Doe].” In any event, any qualification of immunity that might have been implied in this footnote was overtaken by the unanimous decision of the federal court of appeals, which held categorically that “§ 230 creates a federal immunity to *any* cause of action that would make service providers liable for information *originating with a third-party user* of the service.” *Zeran*, 129 F.3d at 330 (emphasis added).

**B. Section 230 Immunizes Interactive Service Providers Such as AOL from Liability for Content Provided by a Third Party.**

As all state and federal courts to have considered the issue have held, both the plain language and legislative history of the statute make clear that Section 230 immunizes interactive service providers such as AOL from liability for third-party content, regardless of whether the provider had notice of the allegedly offending content. Thus, the third certified question -- whether immunity applies to a provider who had notice of the allegedly tortious content -- must also be answered in the affirmative.

**1. The Court of Appeal Correctly Held that the Plain Language of Section 230 Operates to Immunize AOL from Doe’s Claims.**

Under Section 230(c)(1), “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.” This provision bars any cause of action brought under State law where three elements are present: (1) the defendant is the “provider . . . of an interactive computer service,” (2) the suit concerns “information provided by another information content provider,” and (3) the plaintiff’s claims

seek to treat the defendant as the “publisher or speaker” of such information. Each of these elements was evident from the face of Doe’s complaint.

a. AOL Is the Provider of an “Interactive Computer Service.”

Doe does not -- and cannot -- challenge the lower courts’ conclusion that AOL is a “provider . . . of an interactive computer service” within the meaning of Section 230(c)(1). (Order of Dismissal at 4.) Section 230(e)(2) defines an “interactive computer service” to include “any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet.” Doe’s Complaint explicitly alleged facts establishing that the AOL service meets this definition. Specifically, Doe alleged that the AOL service “is a computer on-line, interactive information, communication, and transaction service.” (Complaint ¶ 9, R. 2.) *See also Zeran*, 129 F.3d at 330 n.2; *Blumenthal*, 992 F. Supp. at 49-50.

b. The Content at Issue Was “Information Provided by Another Information Content Provider.”

Doe also does not and cannot question the conclusion of the courts below that Russell’s alleged statements during chat room communications were “information provided by another information content provider” within the meaning of Section 230(c)(1). Section 230(e)(3) defines “information content provider” as “any person or entity that is responsible, in whole or in part, for the creation or development of

information provided through the Internet or any other interactive computer service.” Here again, Doe’s own Complaint affirmatively pled that the statements allegedly made in AOL’s chat rooms concerning the sale or distribution of a videotape or photographs of John Doe were created and placed on AOL’s system not by AOL, but by Russell in his capacity as an AOL subscriber. (Complaint ¶¶ 25, 26, 31, 40, 45, R. 5-6, 8-10.) These allegations are dispositive. *See, e.g., Zeran*, 129 F.3d at 330.

c. All of Doe’s Claims Against AOL Sought to Treat AOL as the “Publisher or Speaker” of Russell’s Chat Room Statements.

As the lower courts’ opinions carefully set forth and as other decisions construing Section 230 confirm, holding AOL liable for allegedly harmful third-party content such as Russell’s alleged chat room communications would impermissibly treat AOL as the “publisher or speaker” of those communications. *See Zeran*, 129 F.3d at 332-33; *Blumenthal*, 992 F. Supp. at 52. This is evident from at least three distinct perspectives.

*First*, all of Doe’s claims sought to put AOL in precisely the same legal position as Russell, who obviously was the “publisher or speaker” of the statements that are the subject of Doe’s claims against AOL. In this most basic sense, Doe impermissibly attempted to “cast [AOL] in the same position as the party who originally posted the offensive messages,” thereby treating AOL as the “publisher or speaker” of the messages. *Zeran*, 129 F.3d at 332. This parallelism was underscored by the Complaint itself, which sought identical relief from both AOL

and Russell and alleged that both AOL and Russell simultaneously violated the same Florida statutes. The court in *Zeran* relied on this same reasoning in holding that Section 230 bars claims that aim to make AOL liable for online communications of a user of its service:

According to *Zeran*'s logic, AOL is legally at fault because it communicated to third parties an allegedly defamatory statement. This is precisely the theory under which the original poster of the offensive messages would be found liable. If the original party is considered a publisher of the offensive messages, *Zeran* certainly cannot attach liability to AOL under the same theory without conceding that AOL too must be treated as a publisher of the statements.

*Id.*

*Second*, Doe's claims against AOL explicitly sought to impose on AOL, as a matter of law, a standard of care that would, in Doe's own words, require AOL to "monitor" and "screen" all of the information transmitted over its system by third persons and to censor all "objectionable" material. (Complaint ¶¶ 15, 17, 42, R. 3-4, 8-9.) These are the quintessential duties in which traditional publishers, such as newspapers and magazines, engage. As the Fourth Circuit ruled in *Zeran* and the Court of Appeal recognized below, "lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions -- such as deciding whether to publish, withdraw, postpone or alter content -- are barred" under Section 230. *Zeran*, 129 F.3d at 330; DCA Opinion at 4. Adoption of a legal standard that would require AOL to perform these functions with respect to third-

party content would “impose liability on AOL for assuming the role for which § 230 specifically proscribes liability -- the publisher role.” *Zeran*, 129 F.3d at 332-33.

*Third*, Doe’s Complaint attempts to subject AOL to the same legal rules that apply to traditional publishers, such as newspapers and magazines, if they are sued for harm arising from their dissemination of allegedly harmful third-party advertisements. *See, e.g., Braun v. Soldier of Fortune Magazine, Inc.*, 968 F.2d 1110, 1118-19 (11th Cir. 1992), *cert. denied*, 506 U.S. 1071 (1993); *Manual Enters., Inc. v. Day*, 370 U.S. 478, 492-93 (1962). By seeking to make AOL shoulder the same responsibility that a traditional publisher bears with respect to advertisements originating with a third party, the Complaint impermissibly sought to “treat” AOL as the “publisher” of Russell’s alleged statements advertising pornographic materials.

**2. Doe’s Arguments that Her Suit Did Not Seek to Treat AOL as the “Publisher or Speaker” of Russell’s Statements Are Meritless.**

Doe’s brief does not even mention, much less rebut, *any* of the three grounds on which the lower courts rested their rulings on the “publisher or speaker” issue. Instead, Doe’s brief sets forth a series of disjointed and meritless arguments that fundamentally misconstrue the scope and meaning of Section 230(c)(1).

Doe erroneously contends that Section 230 immunity should apply only to cases, such as *Zeran*, that involve allegedly defamatory content, but not to cases involving allegedly “criminal conduct.” (Doe Br. at 21-23.) This argument fails on several levels. First, Doe’s attempt to draw a distinction between “content” and

“conduct” is untenable. Because AOL’s alleged involvement in this case was necessarily confined to being a conduit for Russell’s alleged communications, any liability that could possibly be imposed on AOL (absent Section 230) would have to hinge solely on the *content* of what Russell said online -- not on Russell’s off-line criminal *conduct*. Second, Doe’s suggestion that Section 230 is somehow limited to just cases involving content that is defamatory cannot be squared with the overall thrust of Section 230, which was enacted to establish federal ground rules for liability with respect to “objectionable or inappropriate online material” of all sorts. *See* 47 U.S.C. §§ 230(b)(4), 230(c)(2)(A). Indeed, Section 230 makes no express reference to “defamatory” content, yet does focus expressly and specifically on the very sort of content that is allegedly at issue in this case: material relating to “trafficking in obscenity.” *Id.* § 230(b)(5).

Third, Section 230 unquestionably applies with full force to civil claims (such as some of Doe’s claims) that purport to be based on state criminal statutes. Although Section 230 provides that it does not affect “enforcement” of “*Federal* criminal statute[s],” 47 U.S.C. § 230(d)(1) (emphasis added), it conspicuously omits any comparable exception for *state* criminal statutes. Thus, the provision that “no liability may be imposed under *any* State or local law that is inconsistent with this section,” *id.* § 230(d)(3) (emphasis added), is controlling, and Section 230 must be read as immunizing interactive service providers from liability under *state* criminal

statutes.<sup>10/</sup> In any event, as a private litigant, Doe of course brought only a *civil tort* claim against AOL, not a *criminal* prosecution. Accordingly, the only question here is whether AOL is subject to civil liability in tort for Russell’s third-party content, and the answer to that question is clearly no. “By its plain language, § 230 creates a federal immunity to *any* cause of action that would make service providers liable for information originating with a third-party user of the service.” *Zeran*, 129 F.3d at 330 (emphasis added); *Blumenthal*, 992 F. Supp. at 49 (in Section 230, Congress “made the legislative judgment to effectively immunize providers of interactive computer services *from civil liability in tort* with respect to material disseminated by them but created by others” (emphasis added)).

Doe fares no better in arguing that her suit is not barred by Section 230 because it sought to treat AOL not as a “publisher” of third-party content, but as a “distributor” of such content. (Doe Br. at 23-26.) Here again, Doe’s argument is rooted in confusion and contrary to settled law. It starts from the erroneous premise that her claims against AOL were “not prefaced [sic] on the *content* of Russell’s statements” and did “not require a showing that [Russell’s] message was *published*.” (*Id.* at 24, 27 (emphasis added).) This is nonsense: as already noted, any claim that Doe could possibly state against AOL would necessarily derive from

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<sup>10/</sup> See, e.g., *Andrus v. Glover Construction Co.*, 446 U.S. 608, 616-17 (1980) (“Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent.”).

the content of what Russell said and would necessarily require proof of its publication to third parties.

Doe’s “distributor liability” argument veers even further off track when she posits that courts have “traditionally” recognized “distributor liability” as a concept that is separate and distinct from “publisher liability.” (Doe Br. at 24.) In fact, both before and after Section 230’s enactment, courts have recognized just the opposite: that imposition of liability on a distributor for harmful third-party content treats the distributor as the “publisher” of that content. The cases that Doe cites (*Cubby, Inc. v. CompuServe, Inc.*, 776 F. Supp. 135 (S.D.N.Y. 1991) and *Smith v. California*, 361 U.S. 147 (1959)) do not establish any notion of “distributor liability” that is distinct from “publisher liability.” Instead, they merely recognize that “distributors” of third-party content (such as newstands and bookstores) enjoy special protections that make it more difficult to hold them liable *as publishers* of third-party content.<sup>11/</sup> It is absurd for Doe to equate these special *protections* with a new type of *liability*, much less one that is distinct from “publisher liability.”

At bottom, Doe’s “distributor liability” argument is merely a rehash of the very argument that the plaintiffs in *Zeran* and *Blumenthal* raised unsuccessfully.

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<sup>11/</sup> Specifically, under both the First Amendment and the common law of (at least) New York, a distributor may not be held liable as the publisher of harmful third-party information -- whether it be defamatory or obscene or otherwise -- absent proof that it knew or should have known of the information and its harmful nature. *Smith*, 361 U.S. at 149; *Cubby*, 776 F. Supp. at 139-40.

Those courts' rejection of this argument could not have been more direct or more forceful:

Zeran contends that the term “distributor” carries a legally distinct meaning from the term “publisher.” Accordingly, he asserts that Congress' use of only the term “publisher” in § 230 indicates a purpose to immunize service providers only from publisher liability. He argues that distributors are left unprotected by § 230 and, therefore, that his suit should be permitted to proceed against AOL. *We disagree.* Assuming arguendo that Zeran has satisfied the requirements for imposition of distributor liability, *this theory of liability is merely a subset, or a species, of publisher liability, and is therefore also foreclosed by § 230.*

*Zeran*, 129 F.3d at 331-32 (emphasis added).

Any attempt to distinguish between “publisher” liability and notice-based “distributor” liability and to argue that Section 230 was only intended to immunize the former would be unavailing. Congress made no distinction between publishers and distributors in providing immunity from liability.

*Blumenthal*, 992 F. Supp. at 52.

Doe finally suggests that immunity under Section 230(c)(1) applies only to “good faith” efforts taken by the defendant to block and screen offensive material from its service and does not apply when the service provider allegedly knew of the offensive material. (Doe Br. at 22, 26-27.) This argument erroneously conflates Section 230's “publisher or speaker” provision, 47 U.S.C. § 230(c)(1), with a *separate* part of Section 230 that shields interactive service providers from “liabil[ity] on account of . . . any action voluntarily taken in *good faith* to restrict access to or availability of” objectionable material, *id.* § 230(c)(2) (emphasis

added). Whereas Section 230(c)(2) expressly makes “good faith” a prerequisite for immunity under that provision, Section 230(c)(1) contains no such qualifier.

“[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.” *Russello v. United States*, 464 U.S. 16, 23 (1983) (citation omitted). Thus, the absence of any reference to a “good faith” element in Section 230(c)(1) requires that it be construed as lacking any such element. Doe’s attempt to inject a “good faith” element into Section 230’s “publisher or speaker” immunity was rejected in *Zeran*, which expressly held that Section 230 immunity operates even if the interactive service provider had actual knowledge of the tortious third-party content that is at issue. *Zeran*, 129 F.3d at 331-33.

### **3. The Overall Purposes of Section 230 Confirm that AOL May Not Be Held Liable for Russell’s Statements.**

The overall policy objectives of Section 230, as set forth in the statute’s preamble and as evidenced in its legislative history, also support the lower courts’ holding that AOL is immune from liability in this case. Imposing liability on AOL for the online statements of one of AOL’s millions of subscribers would be entirely inconsistent with these objectives.

The preamble and legislative history of Section 230 demonstrate that Congress enacted this statute to promote the continued development of vibrant discourse over the Internet and other interactive computer services by ensuring that

the conduits of such discourse -- service providers such as AOL -- would not be held liable for the tortious or otherwise harmful speech of the participants in this discourse. At the same time, the preamble and history also show Congress's awareness that this rapidly emerging electronic medium is susceptible to various harmful misuses, including trafficking in obscenity. Section 230 reflects Congress's fundamental judgment that making the conduits liable for harmful content originating from others would imperil the new medium and at the same time exacerbate -- *not* solve -- the underlying problem.

Section 230's preamble announces a congressional finding that "interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity" and that these services have "flourished, to the benefit of all Americans, *with a minimum of government regulation.*" 47 U.S.C. §§ 230(a)(3)-(4) (emphasis added). The preamble also declares that it is "the policy of the United States . . . 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.*" *Id.* § 230(b)(2) (emphasis added).

These declarations reflect Congress's judgment that a legal regime under which interactive computer service providers could face tort liability for dissemination of content produced by others inevitably would impair the development of an emerging medium that holds great promise for the Nation. As the federal court of appeals stated in *Zeran*:

The imposition of tort liability on service providers for the communications of others represented, for Congress, simply another form of intrusive government regulation of speech. Section 230 was enacted, in part, to maintain the robust nature of Internet communication and, accordingly, to keep government interference in the medium to a minimum.

129 F.3d at 330.

Congress understood, in particular, that imposing liability on interactive service providers for harmful third-party content would be especially damaging to the continued development and growth of this medium because the volume and speed of third-party communications over this medium are simply too great to permit service providers to engage in comprehensive monitoring, review, editing, or control. During debate on the floor of the House of Representatives, one supporter of Section 230 stated:

There is no way that any of those 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 . . . .

141 Cong. Rec. H8471 (Aug. 4, 1995) (statement of Rep. Goodlatte). Because “[i]t would be impossible for service providers to screen each of their millions of postings for possible problems,” providers faced with the threat of liability for each message on their systems “might choose to severely restrict the number and type of

messages posted.” *Zeran*, 129 F.3d at 331. Congress “chose to immunize service providers to avoid any such restrictive effect.” *Id.*

In enacting Section 230, Congress also was sensitive to the need to deter and restrict unlawful and harmful speech on the Internet and online services. *See* 47 U.S.C. § 230(b)(4). Congress decreed, however, that this need should be addressed through steps that would not involve “imposing tort liability on companies that serve as intermediaries for other parties’ potentially injurious messages.” *Zeran*, 129 F.3d at 330-31. For example, Congress declared in the preamble to Section 230 that the transmission of offensive material over computer networks, including specifically “trafficking in obscenity,” should be deterred and punished by “vigorous enforcement of Federal criminal laws” against the originator of such material. 47 U.S.C. § 230(b)(5). Congress also sought to “encourage the development of technologies [that will] maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services.” *Id.* § 230(b)(3).

Congress’s intention that problems of harmful online speech be addressed through means other than imposing liability on interactive service providers also infuses the legislation’s Conference Report, which states that one of the purposes of Section 230 was to overrule *Stratton Oakmont, Inc. v. Prodigy Services Co.*, No. 31063/94, 1995 WL 323710, at \*1, \*5 (N.Y. Sup. Ct. May 24, 1995), the *only* reported case in which an interactive service provider had ever been found

potentially liable for tortious third-party content. H.R. Conf. Rep. No. 104-458, at 194 (1996).

Ultimately, then, Section 230 represents a policy decision by Congress to immunize interactive service providers from liability for harmful third-party content not only to promote and preserve the development of the new electronic medium, but also out of a recognition that the threat of such liability actually represents a *disincentive* to responsible self-regulation. As one legislator put it, Section 230 was designed to give interactive service providers “a reasonable way to . . . help them *self-regulate themselves without penalty of law.*” 141 Cong. Rec. H8470 (Aug. 4, 1995) (statement of Rep. Barton) (emphasis added); *See also Zeran*, 129 F.3d at 331 (Section 230 was designed “to encourage service providers to self-regulate the dissemination of offensive material over their services.”).

A ruling that AOL is not immune from Doe’s claims would frustrate Section 230’s core policy objectives. In particular, as recognized in *Zeran*, subjecting AOL to liability on the basis of allegations that it knew or should have known of the harmful nature of one of its subscriber’s communications -- what Doe now terms “distributor liability” (Doe Br. at 24) -- would “reinforce[] service providers’ incentives to . . . abstain from self-regulation.” *Zeran*, 129 F.3d at 333. Under Doe’s proposed rule

[a]ny efforts by a service provider to investigate and screen material posted on its service would only lead to notice of potentially [harmful] material more frequently and thereby create a stronger basis for liability. Instead of subjecting themselves to further possible lawsuits, service providers would likely eschew any attempts at self-regulation.

*Id.*

Acceptance of Doe’s arguments also would frustrate Congress’ core objective of protecting and promoting the development of vibrant discourse over online services. Imposing liability on a service provider on the ground that it knew or should have known of the harmful nature of the content at issue would have “a chilling effect on the freedom of Internet speech.” *Id.* Under such a rule, service providers “would face potential liability each time they received notice” of allegedly harmful content. *Id.* Confronted with the “impossible burden” of investigating such notices and making the “ceaseless choices of suppressing controversial speech or sustaining prohibitive liability” and the reality that they would be “subject to liability only for the publication of information, and not for its removal,” service providers subject to notice-based liability “would have a natural incentive simply to remove messages upon notification, whether the contents were [tortious or otherwise unlawful] or not.” *Id.* Such results would clearly frustrate Congress’s intent.

Courts must, of course, construe a federal statute in a manner that both accords with its plain meaning and also advances its purposes as expressed in its enacted findings and statements of policy and legislative history. *See, e.g., Crandon v. United States*, 494 U.S. 152, 158 (1990) (“In determining the meaning of the statute, we look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy.”). Here, the only way to meet these twin objectives is to conclude that Section 230’s “publisher or speaker” provision

immunizes online service providers from liability for harmful content originating with third parties, even where it is alleged that the provider had notice of the harmful content.

**II. THE COURT OF APPEAL CORRECTLY RULED THAT SECTION 230 APPLIES IN ALL CASES FILED AFTER ITS ENACTMENT, EVEN IF THE EVENTS AT ISSUE PRECEDED ITS ENACTMENT.**

By its plain language, Section 230 applies to all cases that were commenced after its enactment. Accordingly, the first certified question should be answered “yes,” and the Court should reject Doe’s argument that Section 230 is inapplicable because Russell’s alleged communications occurred before the statute was enacted. (Doe Br. at 10-19).

Section 230 was enacted on February 8, 1996, yet Doe’s suit was not filed until almost a year later, on January 23, 1997. The issue presented by these facts was squarely decided in *Zeran*, where the communications at issue also predated enactment of Section 230, but suit was commenced after passage of the statute. The federal court of appeals unanimously held that Section 230 applies to all cases filed after the statute’s enactment, regardless of when the underlying conduct occurred. *Zeran*, 129 F.3d at 334-35. This holding, followed by the courts below, was indisputably correct.

**A. Application of Section 230 Here Is Entirely Prospective.**

Section 230 expressly provides that “[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with

this section.” 47 U.S.C. § 230(d)(3). Because Doe filed suit after Section 230 was enacted, application of this language to this case is really prospective in nature and no retroactivity issue is even presented. The Fourth Circuit’s analysis in *Zeran* is directly on point:

Retroactivity concerns arise when a statute applies to conduct predating its enactment. Section 230 does not directly regulate the activities of interactive computer service providers like AOL. Instead, § 230 is addressed only to the bringing of a cause of action. Here, [Doe] did not file [her] complaint until [almost one year] after § 230’s immunity became effective. *Thus, the statute’s application in this litigation is in fact prospective.*

*Zeran*, 129 F.3d at 334-35 (emphasis added); *see also St. Louis v. Texas Worker’s Compensation Comm’n*, 65 F.3d 43, 46 (5th Cir. 1995) (“[I]ssue is not technically one of retroactivity” because statute “applied to conduct that occurred after the statute’s enactment -- the plaintiff’s filing of the complaint -- not to the allegedly discriminatory acts of the defendant.”), *cert. denied*, 116 S. Ct. 2563 (1996); *Vernon v. Cassadaga Valley Cent. Sch. Dist.*, 49 F.3d 886, 889-90 (2d Cir. 1995) (same).

The Court of Appeal expressly relied on this same analysis (DCA Opinion at 3), and Doe does not even attempt to challenge the court’s reasoning on this point. Thus, the Court of Appeal’s decision should be affirmed on this ground alone.

**B. Even If Application of Section 230 Were Not Entirely Prospective,  
It Still Would Govern This Case.**

Even if application of Section 230 in this case did raise an issue about retroactivity, the statute still would apply here. Relying heavily on *Lynce v. Mathis*, 117 S. Ct. 891 (1997), Doe makes much of the supposed “presumption” against retroactive application of statutes. (Doe Br. at 10-11.) Yet, as the Supreme Court has explained, “[a]lthough we have long embraced a presumption against statutory retroactivity, for just as long we have recognized that, in many situations, a court should ‘apply the law in effect at the time it renders its decision,’ even though that law was enacted after the events that gave rise to the suit.” *Landgraf v. USI Film Prods.*, 511 U.S. 244, 273 (1994) (citation omitted). Faced with the need to balance these conflicting goals, the Supreme Court developed in *Landgraf* a two-part framework for analyzing the temporal reach of a federal statute, a framework that even Doe concedes is controlling.<sup>12/</sup> (Doe Br. at 10.)

Under the first part of the *Landgraf* test, if the statute “expressly prescribes” that it should apply to a suit involving events pre-dating its enactment, then courts must follow that prescription. 511 U.S. at 280. Second, even without such a prescription, the statute should still be applied to such a suit unless doing so would have an impermissible “retroactive effect.” *Landgraf*, 511 U.S. at 280. To win, AOL needs to prevail at only one of these two steps. In fact, as both the courts

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<sup>12/</sup> Doe’s heavy reliance on cases discussing the test under *Florida* law for determining whether *Florida* statutes apply to cases involving pre-enactment events (Doe Br. at 14, 16) is misplaced. The temporal reach of a *federal* statute clearly is a matter of *federal* law, a principle that even Doe concedes (*id.* at 15, 18) and that Florida courts recognize. See, e.g., *Levine v. FDIC*, 651 So.2d 134 (Fla. 4th DCA) (applying *Landgraf*), *review denied*, 660 So.2d 713 (Fla. 1995).

below correctly recognized, and as the authoritative decision in *Zeran* confirms on precisely the same points, AOL prevails at *both* stages.

1. Congress Expressly Prescribed that Section 230 Applies in Cases Involving Pre-Enactment Events.

Congress expressly provided that Section 230 govern any suit brought after its enactment, including those, such as the present case, in which the conduct at issue occurred before its enactment. By providing that “[n]o cause of action may be brought” under any inconsistent State law, 47 U.S.C. § 230(d)(3), “Congress clearly expressed its intent that the statute apply to any complaint instituted after its effective date, regardless of when the relevant conduct giving rise to the claims occurred.” *Zeran*, 129 F.3d at 335.

The *Zeran* court’s analysis of this statutory language is fully in line with other appellate courts’ interpretations of other statutes containing similar language. *See, e.g., Wright v. Morris*, 111 F.3d 414, 418 (6th Cir.) (statute providing that “[n]o action shall be brought with respect to prison conditions” until a prisoner has exhausted administrative remedies “expressly governs the bringing of new actions”), *cert. denied*, 118 S. Ct. 263 (1997); *Abdul-Wadood v. Nathan*, 91 F.3d 1023, 1025 (7th Cir. 1996) (statute providing that “[i]n no event shall a prisoner bring a civil action or appeal a judgment in a civil action” if he has brought three previous frivolous actions or appeals “governs bringing new actions”); *Madrid v. Gomez*,

150 F.3d 1030, 1035-36 (9th Cir. 1998) (statute restricting attorney fee awards in “any action” applies even to suits brought before statute’s enactment).<sup>13/</sup>

Finding “a directive as plain as § 230(d)(3) to be ambiguous as to Congress’ intent” would constitute a “jurisprudential shift [that] would be both unwise and contrary to the Court’s admonitions in *Landgraf*.” *Zeran*, 129 F.3d at 335. The plain language of Section 230 embodies Congress’ decision that “free speech on the Internet and self-regulation of offensive speech were so important that § 230 should be given immediate, comprehensive effect.” *Zeran*, 129 F.3d at 335.

Doe never even joins issue with the conclusion of the courts below and *Zeran* that the language of Section 230 expressly encompasses all cases brought after its enactment. Indeed, her only criticism of the *Zeran* holding on this point is her claim that the Fourth Circuit somehow misunderstood the *Landgraf* test to require only that Congress’s intent as to the temporal reach of Section 230 be “adequately clear.” (Doe Br. at 13.) In fact, the term “adequately” appears *nowhere* in the *Zeran* court’s discussion of the retroactivity issue. The Fourth Circuit correctly cited *Landgraf* for the proposition that Congress must “expressly prescribe[] the statute’s

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<sup>13/</sup> The two federal cases on which Doe relies in her discussion of Congress’ intent (Doe Br. at 14-15) in fact have nothing to do with interpreting federal statutes. *Harless v. Boyle-Midway Div. Am. Home Prods.*, 594 F.2d 1051, 1057 (5th Cir. 1979), concerned the retrospective application, not of a federal statute, but of a state *judicial decision*, a situation which is subject to entirely different retroactivity rules. *Arledge v. Holnam, Inc.*, 957 F. Supp. 822, 826 (M.D. La. 1996), dealt with Louisiana state law, under which the retroactivity of Louisiana statutes is governed by a specific state statute.

proper reach” and concluded that in Section 230 “Congress clearly expressed its intent . . . .” 129 F.3d at 335.

2. Application of Section 230 to This Case Does Not Have “Retroactive Effect.”

Even if (contrary to the foregoing) it were necessary to reach the second step of the *Landgraf* analysis, Section 230 still would control this case because its application to Doe’s claims does not have a “retroactive effect” within the meaning of *Landgraf*. Application of a new statute to a pending case has a disfavored “retroactive effect” when “it would impair rights a party possessed when he acted, increase a party’s liability for past conduct, or impose new duties with respect to transactions already completed.” *Landgraf*, 511 U.S. at 280. As Doe concedes (Doe Br. at 16), Section 230 does not meet either the second or third prongs of this test: it neither “*increase[s]* [any] party’s liability” nor “*impose[s]* new duties” on anyone. Thus, any issue of “retroactive effect” turns on whether application of the statute would “impair” Doe’s pre-existing “rights . . . when [s]he acted.”

Application of Section 230 to this case did not “impair” any “rights” Doe had when she acted because, contrary to her arguments, she never had a “vested right” in her unfiled tort claim against AOL. (Doe Br. at 16-19.) As the courts below, the federal court in *Zeran*, and numerous other courts have correctly held, “[n]o person has a vested right in a nonfinal tort judgment, much less an unfiled tort claim.” *Zeran*, 129 F.3d at 335. “Because rights in tort do not vest until there is a final, unreviewable judgment, Congress abridge[s] no vested rights of the plaintiff by . . .

retroactively abolishing [plaintiff's] cause of action in tort.” *Hammond v. United States*, 786 F.2d 8, 12 (1st Cir. 1986); *see also Clausell v. Hobart Corp.*, 515 So.2d 1275, 1276 (Fla. 1987) (plaintiff has “no vested right in his [accrued] cause of action”); *Symens v. Smithkline Beecham Corp.*, 152 F.3d 1050, 1056 n.3 (8th Cir. 1998) (“[P]laintiffs had no vested rights in [their] unasserted claims at the time [the statute] was modified.”); *In re TMI*, 89 F.3d 1106, 1113 (3d Cir. 1996) (even a statute that eliminates a *pending* tort claim does not impair a vested right), *cert. denied*, 117 S. Ct. 739 (1997); *Hyundai Merchant Marine Co. v. United States*, 888 F. Supp. 543, 551 (S.D.N.Y. 1995) (statute that eliminates tort claim applies to claim arising from pre-enactment events because such a claim is not a vested right until reduced to final judgment), *aff’d*, 75 F.3d 134 (2d Cir.), *cert. denied*, 117 S. Ct. 51 (1996).

Applying Section 230 in this case could not “impair rights [Doe] possessed *when [s]he acted*,” because, like the plaintiff in *Zeran*, Doe “cannot point to any action [s]he [or her son] took in reliance on the law prior to § 230’s enactment.” *Zeran*, 129 F.3d at 335. The only “reliance” interest Doe even attempts to claim is that she “chose to wait” to bring her suit, rather than “tak[ing] a more aggressive approach and fil[ing] her suit earlier.” (Doe Br. at 17.) But this is not the type of “reliance” the presumption against retroactivity protects. As courts have explained, retroactivity is implicated not by a statute’s effect on “the secondary conduct of the plaintiffs, the filing of their suit,” but only by an effect on the “primary conduct” of the parties that is at issue in the suit. *Vernon*, 49 F.3d at 890; *Alexander S. v. Boyd*,

113 F.3d 1373, 1387 (4th Cir. 1997). Thus, for example, courts routinely apply changes in statutes of limitations to cases filed after their enactment even when -- as Doe alleges here -- a claim that could have been brought under the old law is eliminated because the plaintiff delayed in filing suit until after a new statute was enacted. *See, e.g., Texas Worker's Compensation Comm'n*, 65 F.3d at 44, 46; *Vernon*, 49 F.3d at 887, 889-90.

Accordingly, Doe's "secondary conduct" concerning decisions about litigation strategy and timing does not reflect any cognizable reliance interest. Indeed, the *Zeran* court rejected the same claim of reliance. As it explained, "there . . . is a significant contrast between statutes that impose new liabilities for already-completed conduct and statutes that govern litigants' access to courts." 129 F.3d at 335.

Doe's reliance on *Maitland v. University of Minnesota*, 43 F.3d 357 (8th Cir. 1994), is entirely misplaced. She erroneously asserts that the court in that case was "persuaded by the Appellant's argument that had the appellant known that the law would change and that he might be barred by subsequent legislation from bringing a lawsuit, he would have brought the lawsuit sooner."<sup>14/</sup> (Doe Br. at 17.) In fact, *Maitland* involved no such issue. *Maitland*, a plaintiff with a prospective cause of action for employment discrimination, had participated in a limited way in consent

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<sup>14/</sup> The only other federal case Doe cites (Doe Br. at 18), *Strauss v. Springer*, 817 F. Supp. 1203 (E.D. Pa. 1992), is inapposite because it concerned application of a Pennsylvania statute rather than a federal statute.

decree hearings involving other discrimination claims against his employer. When he did so, “the law did not even hint that [such participation] would jeopardize his cause of action.” 43 F.3d at 362. Congress subsequently passed a statute providing that anyone with an opportunity to present objections to a consent order resolving a claim of employment discrimination could not challenge any action taken within the scope of that order -- a statute that, if applied to Maitland, would bar his cause of action. *Id.* at 361. The court found that the statute should not extinguish Maitland’s claim because, by his earlier participation in another legal proceeding, he had “reasonably relied” on the preexisting law. *Id.* at 363. Thus, contrary to Doe’s assertion, *Maitland* had nothing to do with the *timing* of the plaintiff’s lawsuit. Instead, it involved a situation in which the plaintiff took certain actions unrelated to litigation decisions in his own lawsuit (i.e., “primary conduct”) in reliance on the then-existing law.

Finally, Doe’s suggestion that “[t]o require that Plaintiff allege reliance in her Complaint would be tantamount to requiring her to possess a crystal ball” (Doe Br. at 19) illustrates Doe’s complete misunderstanding of the reliance interest the presumption against retroactivity is intended to protect. The law requires not that she allege how she may rely on the law *in the future*, but how her *past* primary conduct evidenced reliance on the then-existing law. If such reliance took place, it by definition would have occurred *before* suit was filed, and *a fortiori*, no powers of prediction would be needed in drafting a complaint. Here, of course, Doe has not and cannot identify any such reliance.

### **III. DOE’S REMAINING PROCEDURAL ARGUMENTS ARE MERITLESS.**

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Doe raises two additional procedural arguments, which she terms “pendent issues,” that were not certified to this Court. (Doe Br. at 27-33.) Both of these arguments are meritless.

#### **A. The Court of Appeal Correctly Held that AOL’s Section 230 Defense Was Appropriately Decided in the Context of a Motion to Dismiss.**

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Doe argues that the Circuit Court erred in granting AOL’s motion to dismiss because, in Doe’s view, (1) the court “considered defenses, facts, exhibits, and other evidence outside the four corners of the Complaint” and (2) an affirmative defense may not be raised in a motion to dismiss. (Doe Br. at 27-31.) While a court deciding a motion to dismiss must confine itself to the allegations in the complaint, Doe’s contention that the Circuit Court here did otherwise is erroneous. Moreover, as the Court of Appeal found, Florida’s rules of procedure expressly provide that a court may adjudicate a motion to dismiss based on an affirmative defense where, as here, the predicates for that defense appear on the face of the complaint.

The conclusion that AOL is statutorily immune from Doe’s claims is a *legal* conclusion that flows inexorably from facts that Doe herself affirmatively pled. As demonstrated above (*see supra* at 16-18), the sole *factual* predicates for immunity under Section 230 are (1) that the defendant is a provider of an “interactive

computer service” and (2) that the content at issue was “provided by another information content provider.”<sup>15/</sup> As the Court of Appeal correctly held, “the information alleged in the complaint furnished a sufficient basis” for both of these facts. (DCA Opinion at 4.) The first was set out in paragraph 9 of the Complaint, which describes the “AOL Service,” as a “a computer on-line, interactive information, communications and transactions service.” (Complaint ¶ 9, R. 2.) The second was alleged throughout the Complaint, including in paragraphs 25, 26, 31, 40, and 45, in which Doe repeatedly stated that all of the allegedly injurious material that was transmitted through AOL’s service has originated with Russell. *See supra* at 18.

These facts -- and no others -- supplied the factual foundation on which the Circuit Court relied in its analysis of the operation of Section 230, which is set out in its entirety in Part II of the Order of Dismissal. (Order of Dismissal at 4-7, R. 253-56.) The Circuit Court’s own framing of the issue at the outset of Part II of its Order confirms that these were the *only* facts on which its analysis was based:

AOL is an “interactive computer service” as defined in Section 230(e)(2), and the communications allegedly made by Russell in AOL chat rooms are “information provided by another information content provider” within the meaning of Section 230(c)(1). . . . Accordingly, the issue of whether Section 230 operates to bar Doe’s claims against AOL reduces to the question of whether imposing liability under state law on the provider of an interactive computer service for injury allegedly resulting from a third party’s online communications would

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<sup>15/</sup> The third prerequisite for Section 230 immunity -- that the claims seek to treat the defendant as a “publisher or speaker” -- is purely a legal question.

treat the provider as “the publisher or speaker” of those communications.

(Order of Dismissal at 4, R. 253.)

Doe’s assertion that the Circuit Court rendered its immunity decision on the basis of “numerous references to facts” *outside* the Complaint (Doe Br. at 30) is demonstrably false. The only “facts” to which Doe points are the statements, in the introductory section of the Order of Dismissal, that AOL has “millions of subscribers” who use AOL’s service to, among other things, communicate with others via electronic mail and that Russell was convicted and is serving prison sentences based on events relating to those alleged in the Complaint. (*See id.*) The Circuit Court obviously recited these facts (which Doe has not even suggested she disputes) merely to provide background and context for its decision. None of these facts played any role in, or was relevant to, the Circuit Court’s legal analysis.

The infirmity of Doe’s argument is further demonstrated by her assertion that it was impermissible for the Circuit Court’s Order to refer to the actual language of Section 230 itself, the statute’s legislative history, and the *Zeran* precedent. (Doe Br. at 30-31.) It is unquestionably appropriate -- indeed essential -- for any court considering a motion to dismiss that is based on a statute to determine what the statute means. It is absurd to suggest, as Doe does, that the most useful and authoritative sources for discerning the statute’s meaning -- namely its language, legislative history and pertinent judicial precedents -- are off limits on a motion to dismiss.

Ultimately, Doe retreats to arguing -- again erroneously -- that Florida law categorically prohibits raising affirmative defenses in a motion to dismiss. (*See* Doe Br. at 29.) Even the premise of this argument -- i.e., that Section 230 immunity constitutes a mere “affirmative defense” -- is subject to doubt.<sup>16/</sup> More importantly, Fla. R. Civ. P. 1.110(d) makes it crystal clear that where, as here, the factual predicates for an affirmative defense are evident from the complaint itself, the affirmative defense properly may be raised and decided on a motion to dismiss.

Rule 1.110(d) states:

Affirmative defenses appearing on the face of a prior pleading may be asserted as grounds for a *motion* or defense under rule 1.140(b) (emphasis added).<sup>17/</sup>

Doe inexplicably fails even to mention this dispositive rule. She compounds her error still further by relying on *Staples v. Battisti*, 191 So.2d 583, 585 (Fla. 3d DCA 1966), *cert. denied*, 196 So.2d 926 (Fla. 1967), a case decided under an *outdated*

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<sup>16/</sup> Because Section 230 expressly provides that “[n]o cause of action may be brought . . . under any State or local law that is inconsistent with this section,” 47 U.S.C. § 230(d)(3), its basic function is to deprive all courts (state and federal) of subject matter jurisdiction over claims such as Doe’s. Lack of subject matter jurisdiction, of course, may always be raised in a motion to dismiss. *See, e.g.*, Fla. R. Civ. P. 1.140(b); *Estate of Frappier v. Wishnov*, 678 So.2d 884, 885 (Fla. 4th DCA 1996); *Florida Dep’t of Transp. v. Bailey*, 603 So.2d 1384, 1387 (Fla. 1st DCA 1992) (defense of sovereign immunity).

<sup>17/</sup> *See also* *McWhirter, Reeves, McGothlin, Davidson, Rief & Bakas, P.A. v. Weiss*, 704 So.2d 214, 215 (Fla. 2d DCA 1998); *Waters v. Nu-Car Carriers, Inc.*, 500 So.2d 224, 227 (Fla. 1st DCA 1986); *Timmings v. Firestone*, 283 So.2d 63, 65 (Fla. 4th DCA 1973); Fla. R. Civ. P. 1.110, Historical Note to 1967 Amendments.

*predecessor* to Rule 1.110(d) which, unlike the current rule, required all affirmative defenses to be raised by answer rather than motion to dismiss.

The appropriateness of adjudicating AOL's Section 230 defense on a motion to dismiss is further strengthened -- not weakened, as Doe erroneously suggests (Doe Br. at 29) -- by the fact that Section 230 expressly preempts state law causes of action. Florida courts have routinely granted motions to dismiss based on a defense of federal preemption.<sup>18/</sup> In contrast, the preemption case on which Doe relies, *Martin v. Eastern Airlines, Inc.*, 630 So.2d 1206 (Fla. 4th DCA 1994), concerned whether a preemption defense had been waived because the defendant had failed to raise it in its answer before raising it in a motion to dismiss filed several years into the litigation. Thus, the issue in *Martin* was not whether the preemption defense had been raised too *early*, but rather whether it had been raised too *late*.

Doe's contention that the Circuit Court erred in adjudicating AOL's Section 230 defense at the threshold is wrong not just as a matter of Florida procedural law, but as a matter of federal law as well. Section 230(d)(3) expressly prohibits any court from entertaining a state law cause of action in the face of a well-grounded claim of immunity: It provides not only that "no liability may be imposed," but also

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<sup>18/</sup> See, e.g., *Eirman v. Olde Discount Corp.*, 697 So.2d 865, 865 (Fla. 4th DCA), *cert. denied*, 697 So.2d 865 (Fla. 1997); *Shearson Haydon Stone, Inc. v. Sather*, 365 So.2d 187 (Fla. 3d DCA 1978), *cert. dismissed*, 374 So.2d 100 (Fla. 1979); *Florida Dep't of Revenue ex rel. Jorda v. Fleet*, 679 So.2d 326 (Fla. 1st DCA 1996).

that “no cause of action may be brought.” 47 U.S.C. § 230(d)(3). As the federal court of appeals recently ruled in *Zeran*, Section 230 “precludes courts from *entertaining* claims that would place a computer service provider in a publisher’s role. Thus, [such] lawsuits . . . are barred.” *Zeran*, 129 F.3d. at 330 (emphasis added). *See also Weinberger v. Salfi*, 422 U.S. 749, 756-57 (1975) (statute providing that “[n]o action . . . shall be brought” is jurisdictional and bars claim *ab initio*). In light of this federal requirement, as well as the foregoing principles of Florida law, it was not only appropriate, but necessary, for the Circuit Court to hear and decide AOL’s Section 230 defense at the earliest possible juncture.

**B. The Complaint Was Appropriately Dismissed with Prejudice Because Amendment Would Have Been Futile.**

Doe is also wrong in her contention that the Circuit Court erred in dismissing her claims against AOL with prejudice and without leave to amend. (Doe Br. at 32-33.) The Circuit Court and Court of Appeal properly concluded that Section 230 would bar any claim that Doe might attempt to assert against AOL, and therefore properly dismissed Doe’s complaint with prejudice.

While Florida courts generally are liberal in permitting amendment, even the cases that Doe herself cites make clear that leave to amend should *not* be granted when “no viable cause of action can be stated.” *Brumer v. HCA Health Servs. of Fla., Inc.*, 662 So.2d 1385, 1386 (Fla. 4th DCA 1995). Where “amendment would be futile,” courts routinely refuse to permit amendment, and instead dismiss with

prejudice. *Lee v. Paxson*, 641 So.2d 145, 146 (Fla. 5th DCA 1994); *Hotchkiss v. FMC Corp.*, 561 So.2d 1261, 1263 (Fla. 2d DCA 1990).

Amendment is usually futile when, as in this case, the plaintiff's claims have foundered on grounds of federal preemption and immunity. Typically, dismissals on such grounds cannot be cured by recharacterizing the theory for relief, for they are premised on a federal statutory regime that requires dismissal no matter how the claim is styled. As the court noted in *Shearson Haydon Stone, Inc. v. Sather*, 365 So.2d 187, 188 (Fla. 3d DCA 1978), *cert. dismissed*, 374 So.2d 100 (Fla. 1979), "where the facts disclosed in the complaint show[] the action to be" preempted by federal law, the specific allegations in the complaint cannot be restyled so as to avoid preemption. Indeed, dismissal *with prejudice* appears to be the rule in Florida cases where state law claims are found to be preempted. *See Eirman*, 697 So.2d at 865; *Local Union #2135, Int'l Assn. of Firefighters v. City of Ocala*, 371 So. 2d 583, 585 (Fla. 1st DCA 1979).<sup>19/</sup>

The futility of amendment is especially clear here. Based on the allegations already in the Complaint, it is evident that no matter how Doe might recast her claims, they inevitably would continue to seek to hold AOL liable for harm allegedly suffered as a result of material that originated with Russell, a third party. Any such

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<sup>19/</sup> In federal courts, where amendment likewise is liberally permitted except where amendment would be futile (or the privilege has been abused), state law claims preempted by federal law are also routinely dismissed with prejudice, without leave to amend. *See, e.g., Reilly v. Blue Cross & Blue Shield United*, 846 F.2d 416, 426 (7th Cir.) *cert. denied*, 488 U.S. 856 (1988); *Fisher v. Bard*, Civ. A. No. 94-11324-MLW, 1996 WL 33818, at \* 3 (D. Mass. Jan. 3, 1996).

claim, no matter how it might be labeled or presented, would treat AOL as a “publisher or speaker” of third-party content in contravention of Section 230. As the court unanimously held in *Zeran*, Section 230 plainly “creates a federal immunity to *any* cause of action that would make service providers liable for information originating with a third-party user of the service.” 129 F.3d at 330 (emphasis added).

For the first time in the course of this litigation, Doe’s brief identifies a single amendment that she claims could have remedied the fatal defects that required dismissal of each of her four claims against AOL. She now suggests -- without any explanation or support -- that she could amend her Complaint to assert “a third party beneficiary breach of contract cause of action” and that such a cause of action “[c]ertainly . . . would not be preempted by Section 230.” (Doe Br. at 20.) The contract that Doe seems to have in mind is the standard subscription contract between AOL and Russell, and the breach she envisions is apparently Russell’s alleged violation of that contract’s prohibitions against certain abuses of AOL’s service. (See Complaint ¶¶ 10-14, 42, R. 2-3, 8-9.)

Even assuming that Florida law would permit Doe to state a cause of action against AOL for a breach of contract by *Russell*,<sup>20/</sup> such a claim clearly would

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<sup>20/</sup> In fact, the notion that state law would support such a claim against AOL is frivolous. Even in those limited circumstances where state law permits a third party to sue on a contract, the only proper defendant is the contracting party who breached the contract. See generally Restatement (Second) of Contracts § 304 (1979) (contract creates duty “in the *promisor*” (i.e., Russell) to any intended

(continued...)

“treat[.]” AOL as a “publisher or speaker” of “information provided by another information content provider” and therefore be preempted by Section 230. The action that allegedly breached the contract between AOL and Russell was Russell’s alleged publication of statements about child pornography in the AOL chat room. Holding AOL liable for that publication necessarily would treat it as the publisher or speaker of those statements -- imposition of liability would put AOL in the same legal position as the actual publisher (Russell) and would effectively impose on AOL the quintessential duties of a publisher, such as screening and monitoring content.<sup>21/</sup> *See generally supra* at 18-20; *Aquino*, 26 Media L. Rep. at 1032 (holding that Section 230 immunizes interactive service provider from breach of contract claim).

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<sup>20/</sup> (...continued)  
beneficiary); *see also Lunney v. Prodigy Svcs. Co.*, 1998 WL 909836, \*6 (N.Y. App. Div. Dec. 28, 1998) (rejecting third-party beneficiary claim against interactive service provider). Thus, if Doe had a right to sue anyone for breach of the AOL-Russell contract, her claim would have to be against Russell, not AOL. Moreover, a third party may sue on a contract only if he or she was an “intended” -- not merely “incidental” -- beneficiary of the contract. *See, e.g., Maryland Cas. Co. v. Department of Gen. Servs.*, 489 So.2d 57, 58 (Fla. 2d DCA 1986); Restatement § 315. Doe has never suggested how she (or her son), who apparently were not even known to AOL, could possibly qualify as “intended beneficiaries” of the standard AOL subscription agreement.

<sup>21/</sup> Doe’s third-party beneficiary theory is completely at odds with the fundamental objectives of Section 230. Accepting this theory would create an incentive for service providers *not* to contractually prohibit objectionable content on their systems (and thereby foreclose any third-party beneficiary breach of contract claim). That would defeat the purpose of Section 230 to eliminate disincentives to such self-regulation.

Doe also suggests that she should be given *carte blanche* to amend, essentially because she failed to know about or consider Section 230 when she filed suit. (Doe Br. at 33.) But ignorance of the impact of the preemptive and immunizing effects of Section 230 (which was enacted nearly a year *before* Doe brought this suit) cannot alter those effects or change the fundamental fact that any claim she might bring against AOL would impermissibly seek to make AOL liable for a third party's (Russell's) communications. Accordingly, any amendment would necessarily have been futile, and dismissal with prejudice was required.

**CONCLUSION**

For all of the foregoing reasons, the Circuit Court's order dismissing all of Doe's claims against AOL with prejudice must be affirmed.

Respectfully submitted,

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February 3, 1999

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## APPENDIX

The following decisions, which are not included in official reporters, are reproduced in this Appendix:

*Aquino v. Electriciti, Inc.*, 26 Media L. Rep. (BNA) 1032  
(Cal. Super. Ct. Sept. 23, 1997)

*Ben Ezra, Weinstein & Co. v. America Online, Inc.*,  
26 Media L. Rep. (BNA) 2211 (D.N.M. July 16, 1998)

CERTIFICATE OF SERVICE

I hereby certify that I have this 3rd day of February 1999 served a copy of  
Respondent America Online, Inc.'s Answer Brief on

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