IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

WESTERN DIVISION

NATIONAL ASSOCIATION OF THE DEAF, on behalf of its members, C. WAYNE DORE, CHRISTY SMITH, and LEE NETTLES, on behalf of themselves and a proposed class of similarly situated persons, Plaintiffs, v. MASSACHUSETTS INSTITUTE OF TECHNOLOGY, Defendants.	CIVIL ACTION NO. 3:15-CV-30024-MGM

PLAINTIFFS' OPPOSITION TO DEFENDANT'S
MOTION FOR JUDGMENT ON THE PLEADINGS

ORAL ARGUMENT ON MOTION
SET FOR OCTOBER 30, 2018

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I. INTRODUCTION

Contrary to the Defendant Massachusetts Institute of Technology's ("MIT's") assertions in its Motion for Judgment on the Pleadings ("Motion" or "MIT 12(c) Motion") that Plaintiffs' "claim rests on the mistaken notion that MIT's websites are, as a whole, a 'place of public accommodation,'" this case does not involve access to websites *qua* websites. While the Online Content[1] that is inaccessible due to lack of captioning or inaccurate captioning is delivered on MIT websites, the Complaint alleges that MIT, as a whole, discriminates by not providing access to that Online Content—programs and activities under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 ("Section 504") and goods and services under Title III of the Americans with Disabilities Act ("Title III" or "ADA") of MIT. Plaintiffs have consistently advanced this legal theory in the instant case, as evidenced in the briefing on MIT's motion to dismiss three years ago and reflected in this Court's decision.[2]

Notwithstanding the plain language of the Complaint and the procedural history of this matter, the Motion seeks to sidestep this Court's prior decision by rehashing arguments that were previously rejected or could have been presented at the time of MIT's 2015 Motion to Dismiss,[3]

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[1] "Online Content" refers to the speeches, talks, lectures, courses, and other informational material that MIT makes available to the public online.

[2] MIT Mem. in Supp. of Mot. to Stay or Dismiss ("Mot. to Dismiss"), Dkt. 25; *Nat'l Ass'n of the Deaf v. Harvard Univ.*, No. 3:15-cv-30023-MGM, 2016 U.S. Dist. LEXIS 120121, at *14, n.5 (D. Mass. Feb. 9, 2016) ("R&R") (*adopted by Nat'l Ass'n of the Deaf v. Mass. Inst. of Tech. ("MIT")*, No. 3:15-cv-30024-MGM, 2016 U.S. Dist. LEXIS 91080, at *4-5 (D. Mass. Feb. 9, 2016)).

[3] While Plaintiffs have elected not to clutter the Court's docket by filing a separate motion to make a procedural objection, it is worth noting that the instant Motion is nothing more than a second bite of the apple on the same claims. Although Federal Rule of Civil Procedure Rule 12(h)(2) allows a party to file a Rule 12(c) motion after a Rule 12(b)(6) motion for failure to state a claim on different grounds, courts have admonished counsel for attempting to use a Rule 12(c) motion to supplement earlier arguments made in an unsuccessful Rule 12(b)(6) motion with arguments that were available but neglected on the same claims. *See, e.g.*, *Lefkoe v. Jos. A.*

making unsupported and contested factual assertions,[4] and challenging well-established case law in the First Circuit. Accordingly, MIT's 12(c) Motion should be denied for the same reasons set forth in Plaintiffs' Opposition to Defendants' Motion for Judgment on the Pleadings, filed in *National Association of the Deaf v. Harvard University*, No. 3:15-cv-30023-KAR, Dkt. 147 (D. Mass. filed Aug. 29, 2018) ("Harvard 12(c) Opposition"), which is incorporated herein by reference,[5] and for the reasons set forth below.

II. LEGAL STANDARD

Plaintiffs incorporate by reference the legal standard set forth in the Harvard 12(c) Opposition. No. 3:15-cv-30023-KAR, Dkt. 147, at 2.

Bank Clothiers, No. WMN-06-1892, 2008 U.S. Dist. LEXIS 112007, at *23-24 (D. Md. May 1, 2008) ("[to] the extent that Defendants' [Fed. R. Civ. P. Rule 12(c) motion] simply assert the same arguments as were raised on the motion to dismiss, the Court declines to reconsider its determinations"); *Marrero-Gutierrez v. Molina*, 491 F.3d 1, 6-7 (1st Cir. 2007) (relying on Fed. R. Civ. P. Rule 12 (h)(2) to allow defendant's motion for judgment on the pleadings of plaintiff's First, Fourth, Fifth Amendment claims after defendant's first motion to dismiss monetary damages was on different grounds: the Eleventh Amendment).

[4]Throughout its Motion, MIT relies on disputed facts inappropriate for resolution on a Fed. R. Civ. P. Rule 12(c) motion. *Compare* Mot. at 1 (MIT has no control over the content of posts and that it "merely hosts") *with* Compl. ¶ 28 (MIT "also controls, maintains and/or administers webpages, websites and other Internet locations ('MIT Platforms') on which online content is made available to the general public"); *compare* Mot. at 15 (MIT's primary function does not include its prominent online presence) *with* Compl. ¶¶ 2, 28(making "open and available" Online courses, lectures videos of general interest).

[5] The instant action was filed simultaneously with a related action against Harvard University, *Nat'l Ass'n of the Deaf v. Harvard Univ.* ("*Harvard*"), No. 3:15-cv-30023-KAR. Earlier in the proceedings, MIT and Harvard ("the Universities") filed largely identical motions to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). *See MIT*, Dkt. 24-25; *Harvard*, Dkt. 24-25. This Court then issued a comprehensive Report and Recommendations denying both Universities' motions to dismiss, issuing an opinion in *Harvard*, *R&R*, 2016 U.S. Dist. LEXIS 120121, which it adopted by reference in the present case, *MIT*, 2016 U.S. Dist. LEXIS 91080, at *4-5. The Universities followed suit in the recent round of briefing, advancing nearly identical arguments in 12(c) motions filed in both matters. *See MIT*, Dkt. 148-149; *Harvard*, Dkt. 141. Because the MIT 12(c) Motion largely repeats the Harvard 12(c) Motion, where appropriate Plaintiffs incorporate the Harvard 12(c) Opposition by reference (No. 3:15-cv-30023-KAR, Dkt. 147 (D. Mass. filed Aug. 29, 2018)).

III. ARGUMENT

A. Plaintiffs' Allegations That MIT Has Denied Them a Full and Equal Opportunity to Enjoy Its Services State a Claim Under Title III.

This Court has already determined that Plaintiffs' legal "theory is cognizable under the ADA." *R&R*, 2016 U.S. Dist. LEXIS 120121, at *36. In the teeth of this earlier ruling, MIT now argues that Plaintiffs fail to state a Title III claim because "places of public accommodation" are limited to physical structures,[6] that Title III's protections apply only to the services of public accommodations that have a nexus to the physical structures, and that Plaintiffs have not alleged such a nexus. This argument seeks to discredit the law of this Circuit in *Carparts Distribution Ctr. v. Auto. Wholesaler's Ass'n*, 37 F.3d 12 (1st Cir. 1994), and in this Court by urging tests for liability under Title III that have been rejected. *R&R*, 2016 U.S. Dist. LEXIS 120121, at *13-16 n.5; Mot. at 3. As set forth in both the Harvard 12(c) Opposition, No. 3:15-cv-30023-KAR, Dkt. 147, at 2-10, and below, all of these arguments are based on a distortion of Plaintiffs' legal theory and the governing case law.

1. No Nexus is Required in the First Circuit.

Instead of following this Court's previous admonition—"whether [MIT] agrees with it or not, *Carparts* is binding precedent in this Circuit"—MIT relies on cases from other circuits to import a nexus requirement into First Circuit Title III analysis. *R&R*, 2016 U.S. Dist. LEXIS 120121, at *14 n.5; Mot. at 7. Ironically, these cases all expressly acknowledge the clear standard in this circuit that MIT ignores—there is no requirement to plead a nexus to a physical

[6]MIT waived the argument that Title III does not prohibit discrimination in Online Content. It cannot now legitimately make this claim when more than three years ago, it conceded that *Carparts* established that public accommodations under Title III are not limited to physical structures. Mot. to Dismiss, Dkt. 25, at 29; *R&R*, 2016 U.S. Dist. LEXIS 120121, at *14 n.5; *see also R&R*, 2016 U.S. Dist. LEXIS 120121, at *42 n.14; *see also* Section III.A.1 (analyzing *Carparts* and related authority).

facility under Title III. *See* Mot. at 8 (citing *Castillo v. Jo-Ann Stores*, LLC, 286 F. Supp. 3d 870, 878 (N.D. Ohio 2018) (the First Circuit has "held that the ADA applies to websites regardless whether there is a connection with a physical space"); *Carroll v. Fedfinancial Fed. Credit Union*, No. 1:17-cv-1361, 2018 U.S. Dist. LEXIS 108808, at *10 (E.D. Va. June 25, 2018) (same); *Del-Orden v. Bonobos, Inc*., 2017 U.S. Dist. LEXIS 209251, at *14 (S.D.N.Y. Dec. 20, 2017) ("The First and Seventh Circuits. . . have read the ADA to extend to service providers, including websites, *with or without a nexus to a physical place*."); *Haynes v. Interbond Corp. of Am*., No. 17-CIV-61074, 2017 U.S. Dist. LEXIS 171644, at *10 (S.D. Fla. Oct. 16, 2017) (same). Accordingly, MIT's argument that Plaintiffs must connect the discrimination in its Online Content to a physical facility must be rejected.

Without distinguishing this authority, MIT instead relies on the plaintiffs' *brief* in *Carparts* rather than the decision itself. *See* Mot. at 9 (citing Br. for Pls.-Appellants at 33, *Carparts Distribution Ctr., Inc. v. Auto. Wholesaler's Ass'n of New England, Inc.*, No. 93-1954, 1993 WL 13624093 (1st Cir. Oct. 25, 1993) ("*Carparts Brief*")). Plaintiffs-Appellants' view in that case, that "there must be some physical structure, somewhere, from which at least some of the entity's operations are conducted" is of no relevance. *Carparts Brief*, No. 93-1954, 1993 WL 13624093, at 39. The First Circuit's decision in *Carparts* focused on ensuring that people with disabilities have access to the goods and services a public accommodation offers, not whether or not the goods and services were attained *in* a public accommodation or were directly tied to the physical structure. *Carparts*, 37 F.3d at19. The First Circuit explained that reading Title III to limit public accommodations to physical places was at odds with the plain language of the statute and "would severely frustrate Congress's intent that individuals with disabilities fully enjoy the

goods, services, privileges and advantages [offered by private establishments and made] available indiscriminately to other members of the general public." *Id.* at 19-20.

This court has relied on *Carparts* to require covered public accommodations to make their websites accessible, even if they lack nexuses to physical locations. *See Nat'l Ass'n of the Deaf v. Netflix, Inc.*, 869 F.Supp.2d 196, 200 (D. Mass. 2012). Quoting *Carparts*, Judge Ponsor stated that "[i]n a society in which business is increasingly conducted online, excluding [entities] that sell services through the Internet from the ADA would 'run afoul of the purposes of the ADA and would severely frustrate Congress's intent'" with the statute. *Id.* (quoting 37 F.3d at 20). Moreover –as Defendant acknowledges—, although *Carparts* "did not have any occasion to consider the kind of service that is provided *only* in the virtual world without any connection to a physical facility," that issue was affirmatively addressed by *Netflix*. Mot. at 11 (emphasis in the original); *Netflix*, 869 F. Supp. 2d at 200. Judge Ponsor noted in *Netflix* that arguments rejecting the applicability of *Carparts*' holding to "services such as streaming video programming" must fail. *Netflix*, 869 F. Supp. 2d at 200. "[W]hile such web-based services did not exist when the ADA was passed in 1990 and, thus, could not have been explicitly included in the Act, the legislative history of the ADA makes clear that Congress intended the ADA to adapt to changes in technology." *Netflix*, 869 F.Supp. 2d at 200-201 (citing H.R. Rep. 101-485 (II), at 108 (1990)); *see also Nat'l Fed'n of the Blind v. Scribd Inc.*, 97 F. Supp. 3d 565, 575 (D. Vt. 2015) ("excluding disabled persons from access to covered entities that use [the Internet] as their principal means of reaching the public would defeat the purpose of this important civil rights

legislation.").[7] From the language of *Carparts* itself and its application by this Court and Judge Ponsor, among others, MIT's attempt to limit the holding must fail.

Finally, although MIT, like Harvard, looks to Title II of the Civil Right Act of 1964 ("CRA"), 42 U.S.C. § 2000a *et seq*., it further relies on *Nesmith v. Young Men's Christian Ass'n of Raleigh, N.C.* for the proposition that "public accommodation" refers to "all of the services rendered and operated within its physical confines." 397 F.2d 96, 98 (4th Cir. 1968), *cited in* Mot. at 5. This gets *Nesmith* exactly backward. The CRA's definition of "public accommodation" was far more limited than Title III's, reaching only lodging, gas station, dining, and entertainment establishments. 42 U.S.C. § 2000a(b); *compare* 42 U.S.C. § 12181(7) (including significantly more types of public accommodations including "place[s] of education"). *Nesmith* held that section 2000a(b)'s definition should be read *broadly* to include the YMCA's health and athletic facilities since they were in the same building as lodging rooms and a coffee shop. 397 F.2d at 97-98. Especially since, in 1968, there was no public internet, rather than limiting the scope of the term "public accommodation," *Nesmith*'s holding should be read to expand it.

2. Plaintiffs Allege a Nexus Between MIT's Online Content and a Physical Place of Public Accommodation.

Even assuming, *arguendo*, that the nexus test applied here, Plaintiffs' well-pled allegations meet that standard as well. First, Plaintiffs brought an action for declaratory injunctive relief to gain access to the benefits of MIT's video and audio online speeches, talks,

[7] Without citing any authority, MIT asserts that the decision in *Netflix* is "an extreme outlier." Mot. at 12. To the contrary, it has been followed in a number of cases in this Circuit and others. *See, e.g., Access Now, Inc. v. Blue Apron, LLC*, 2017 DNH 236 (D.N.H. Nov. 8, 2017); *Del-Orden*, 2017 U.S. Dist. LEXIS 209251; *Andrews v. Blick Art Materials, LLC*, 268 F. Supp. 3d 381 (E.D.N.Y. 2017); *Scribd*, 97 F. Supp. 3d at 571 (all citing *Netflix* and holding that a "place" is not necessarily a physical location).

lectures and courses by renowned speakers and guests that MIT claims it has made "open and available to the world." Compl. ¶ 28 nn.6-7. MIT makes the connection between its Online Content and the live instruction that happens on campus itself by explaining that, for example:

> [Open Course Ware ("OCW")] has significant impact *on campus* at MIT, where both faculty and students embrace it. Students use OCW resources such as problem sets and exams for study and practice. *New first-year students often report that they checked out MIT by looking at OCW before deciding to apply.* Instructors often refer students to OCW for part of their coursework. OCW staff work extensively with faculty to develop and refine course materials for publication, and faculty frequently use these updated materials in their classroom teaching.[8]

MIT's stated objective of offering digital learning technologies for the MIT community is to "strengthen MIT's on-campus education, while extending MIT's educational impact to the world. These technologies are already impacting and enhancing the learning experience for MIT students."[9] Therefore, MIT contemplates and expects that, much like the websites at issue in *Nat'l Fed'n of the Blind v. Target Corp*., 452 F. Supp. 2d 946, 949 (N.D. Cal. 2006), its Online Content will, in turn, impact the educational offerings occurring in its live classrooms. *See Target*, 452 F. Supp. 2d at 953, 955.

Second, the Complaint's descriptions of challenged Online Content allege that much of the content that MIT has failed to make accessible are lectures, meetings, or talks given by MIT personnel—many of them on campus. For example, Plaintiffs allege that "MIT Museum posts videos and audio tracks of lectures and talks, including videos of its lunchtime series Lunch with Laureates and Luminaries, which features MIT professors and students discussing their research, videos of its Soap Box series, a series of salon-style talks with MIT scientists, and videos of

[8] *Digital Learning: MIT Open Course Ware*, MIT COURSE CATALOG, http://catalog.mit.edu/mit/resources/digital-learning/ (last visited Sept. 21, 2018) (emphasis added).

[9] *About*, MIT OPEN LEARNING, https://openlearning.mit.edu/about (last visited Sept. 21, 2018).

other MIT Museum programs." Compl. ¶ 56. As another example, the Complaint challenges MIT's failure to caption a highlight video of a 2009 visit by President Barack Obama to campus. *Id.* ¶ 54 n.28. And to the extent individual professors or departments post inaccessible content to MIT platforms that relates to the research, teaching, or training they provide on MIT's physical campus, this presents yet another link to MIT's physical facilities. *See id.* ¶¶ 28, 50-57 (describing original work, such as performances, lectures, symposia, panel discussions, etc., by MIT faculty or students that may be featured on the Online Content). Accordingly, Plaintiffs have alleged a direct link between MIT's physical campus and the alleged discrimination.

3. MIT's "Places" Argument Misreads Plaintiffs' Complaint and Misunderstands the Internet.

MIT wrongly contends that Plaintiffs' "claim rests on the mistaken notion that MIT's websites are, as a whole, a 'place of public accommodation.'" Mot. at 2. Based on this false premise, MIT then argues that, under Title III, "places" are limited to "facilities," which must be physical. Mot. at 4-5. As demonstrated above, this is not Plaintiffs' claim. Even if MIT's characterizations of Plaintiffs' Complaint were accurate, such a claim is appropriate in the First Circuit. *See Carparts*, 37 F.3d at 19; *R&R*, 2016 U.S. Dist. LEXIS 120121, at *14 n.5; *Netflix*, 869 F. Supp. 2d at 200; *supra* Section III.A.1. *See also Del-Orden*, 2017 U.S. Dist. LEXIS 209251, at *19 ("A commercial website itself qualifies as a place of 'public accommodation' to which Title III of the ADA affords a right of equal access.").

Moreover, MIT's "places" argument attempts to create a distinction between "physical" and "virtual" places that exists in neither fact nor law. It recites the Title III definition of "facility"—including "all or any portion of buildings, structures, sites, . . . equipment, . . . or other real or personal property, including the site where the building, property, structure, or equipment is located," 28 C.F.R. § 36.104—and announces that it "makes plain that a 'place of

public accommodation' must be a physical place." Mot. at 4. In making this argument, MIT ignores the various physical places that MIT uses to house equipment, produce Online Content and provide streaming on websites. *Cf. South Dakota v. Wayfair, Inc*., 138 S. Ct. 2080, 2095 (2018) (recognizing "'physical' aspects of pervasive modern technology" such as data storage in a particular state). MIT Online Content does not suddenly appear out of nowhere on MIT Websites bearing the MIT logo. The vast majority of the videos that Plaintiffs seek to access are made by MIT personnel, ostensibly in MIT buildings, with MIT resources.[10]

B. MIT is Required by Section 504 of the Rehabilitation Act to Make its Online Content Accessible to Deaf and Hard of Hearing People.

This Court has already held that Plaintiffs' Complaint states a claim under Section 504. *R&R*, 2016 U.S. Dist. LEXIS 120121, at *34. None of MIT's arguments change that finding. Plaintiffs incorporate by reference their arguments in the Harvard 12(c) Opposition (No. 3:15-cv-30023-KAR, Dkt. 147, at 11-15), but write to provide citations relevant to the present case.

Since March 31, 2012,[11] MIT has received more than 2,213 grants totaling more than $1.4 billion from at least 20 federal agencies, including the Departments of Health and Human Services, Defense, Energy, Justice, State, Commerce, Interior, and Education; the National Science Foundation; and the National Aeronautics and Space Administration.[12] As required by

[10] *See Services*, MIT VIDEO PRODUCTIONS, https://mvp.mit.edu/services/ (last visited Sept. 21, 2018) (asking MIT faculty, "Want to share your class? Check out our course package pricing and get your class documented for posterity or online use."); *see also id*. (advertising to the MIT community, "Reach a worldwide audience with live interactive webcasting. We stream to most social media platforms and our services include web development and in-depth analytics.").

[11] This date is two years before the effective date of the tolling agreement signed by the parties. Decl. of Amy F. Robertson in Supp. of Pls.' Opp'n to Defs.' Mot. for J. on the Pleadings ("Robertson Decl.") ¶ 8.

[12] *See* Robertson Decl. ¶¶ 3-9; Ex. 1; *see also Santiago v. Bloise*, 741 F. Supp. 2d 357, 361 (D. Mass. 2010) (court may consider facts susceptible to judicial notice in evaluating a Rule 12(c) motion).

Section 504 and the U.S. Department of Justice's ("DOJ's") coordination regulations, 28 C.F.R. § 41.4(a), each of these agencies has issued regulations implementing Section 504 as to recipients of federal funding, each of which includes a general provision prohibiting recipients from excluding people with disabilities from participation in, denying them the benefits of, or "otherwise subjecting them to discrimination" under any program or activity receiving federal financial assistance.[13] As this Court recognized, the DOJ coordination regulations specifically require that MIT "take appropriate steps to ensure that communications with their applicants, employees, and beneficiaries are available to persons with impaired ... hearing," *R&R*, 2016 U.S. Dist. LEXIS 120121, at *31 (quoting 28 C.F.R. § 41.51(e)). A similar requirement is also included in the implementing regulations of a number of MIT's agency funders.[14]

With no statutory or regulatory support, MIT attempts to limit the scope of the general antidiscrimination regulation by defining "aids, benefits, and services" in terms of a recipient's "function," and then asserts that MIT's "function" does not include providing online content. Mot. at 15-16. First, this proposition defies logic. If an online presence is not a function of MIT, it is unclear why MIT has one. Moreover, this unsupported assertion conflicts with MIT's own statements about the importance of having an online presence:

> The Institute's role in education no longer stops at the borders of our campus, but extends to a global community of learners. MIT is in a unique position to contribute to this dialogue in a meaningful way. The Institute has historic opportunities to reach more people, to infuse the magic of MIT into online and blended learning environments, to reshape residential MIT education leveraging the opportunities of the digital education revolution, and to impact lives and society in ways not previously thought possible.[15]

[13] Robertson Decl. Ex. 1 (Column E).

[14] *Id.* Column G.

[15] INSTITUTE-WIDE TASK FORCE ON THE FUTURE OF MIT EDUCATION, Final Report (July 28, 2014), *available at* http://web.mit.edu/future-report/TaskForceFinal_July28.pdf.

MIT further cites *Schultz v. YMCA of the U.S.* for the general proposition that the application of Section 504 should not distort remedial relief. 139 F.3d 286, 291 (1st Cir. 1998) (affirming denial of $20 million in emotional distress damages to a Deaf lifeguard challenging revocation of his YMCA certification), *quoted in* Mot. at 14. In *Schultz*, the First Circuit explained that "an award of damages for emotional distress, in a debatable case on the merits with no animus or other concrete impact, strikes us as a distortion of remedial relief." 139 F.3d at 291. Here, Plaintiffs' Complaint seeks no damages, and the impact of the challenged practices—inability of Deaf and hard of hearing people to access MIT's benefits and services—is concrete. MIT and the Departments of Justice and of Education have already recognized the necessity of captioning for accessing online content, making the relief sought here straightforward and precisely targeted to remedy the violation. Compl. ¶¶ 2-3, 80-84.

C. Plaintiffs Have Stated a Claim Under Title III and Section 504 Alleging That MIT Makes Available Inaccessible Content on its Websites and Platforms.

As demonstrated above, *all* of MIT's programs, activities, goods, and services are subject to the antidiscrimination mandates of Section 504 and Title III. Nonetheless, MIT attempts to avoid the broad reach of these statutes by attempting to distinguish between the Online Content "MIT itself" creates and posts, and "content posted by third parties that is merely *made available* through a MIT-controlled website"—arguing that it has no obligation to provide access for Deaf and hard of hearing people to the latter. Mot. at 1, 3 (emphasis added). In addition to the arguments set forth below, Plaintiffs incorporate by reference the argument in the Harvard 12(c) Opposition. No. 3:15-cv-30023-KAR, Dkt. 147, at 17-24.

1. Section 230 of the Communications Decency Act Does Not Provide Absolute Immunity For Making Available Inaccessible Content.

In an attempt to avoid its obligations under Title III and Section 504, MIT argues that the Communications Decency Act of 1996, 47 U.S.C. § 230 *et seq*.("CDA" or "Section 230") pre-

empts Plaintiffs' rights under the antidiscrimination laws to full and equal access of the programs and benefits that MIT offers other members of the public. The crux of MIT's argument is that the CDA—a statute designed to protect against liability for the substance of *content* posted by others in, for example, a state law defamation suit,[16]—absolves MIT of its additional responsibilities under Section 504 and Title III to provide Deaf and hard of hearing people equal access to the Online Content that it hosts. Mot. at 19. However, Plaintiffs have no complaint with the *substance* of MIT's Online Content. Rather, they seek equal *access* to the Content regardless of its substance through auxiliary aids and services, such as captioning. Neither Section 230 nor any of the Section 230 cases that MIT cites address the accessibility of the content, rendering the CDA inapplicable here.

a. CDA immunity relates to the substance of the online material provided by a third party, not accessibility of content.

Section 230 provides in relevant part that: "No provider . . . 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). By its plain terms, Section 230 addresses whether internet service providers should be treated as the speakers with respect to the *content* of the information provided by others, not the content's accessibility. *See Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1118 (9th Cir. 2007) (relating immunity under the CDA to "*information* originating with a third party user of the service") (emphasis added, citation omitted); *Chi.*

[16] *See, e.g., Jane Doe No. 1 v. Backpage.com LLC*, 817 F.3d 12, 18 (1st Cir. 2016) ("Congress enacted this statute partially in response to court cases that held internet publishers liable for defamatory statements posted by third parties on message boards maintained by the publishers."); *see id.* (shielding "website operators from being 'treated as the publisher or speaker' of *material* posted by users of the site" and allowing website operators to block or screen third party content free from liability) (emphasis added).

Lawyers' Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc., 519 F.3d 666, 668 (7th Cir. 2008) (analyzing liability of housing ads that state a preference with respect to a protected class).

Accessibility, on the other hand, has no relationship to the substance of the underlying material. MIT's argument is based on the premise that making its Online Content accessible is equivalent to changing the underlying content. *See* Mot. at 17-19. This Court has previously recognized that closed captioning is an auxiliary aid or service, separate from the information being disseminated that simply makes the underlying content accessible. *R&R*, 2016 U.S. Dist. LEXIS 120121, at *43-44; *see also* 28 C.F.R. § 36.303(b).

For that reason, MIT's reliance on *Craigslist* to support broad immunity from nearly all federal liability is misplaced. Mot. at 19.[17] The plaintiffs in *Craigslist* claimed the defendant violated the Fair Housing Act through allowing *content* expressing a prohibited preference, rather than failing to provide accessibility to that content. 519 F.3d at 668. Here, Plaintiffs are not challenging the content posted on MIT websites. In fact, just the opposite, they want access to the content as is.[18] As this Court has previously noted, "[i]f [MIT] chooses to make videos available online as a service to the general public, then it cannot discriminate against deaf and hard of hearing individuals in the 'full and equal enjoyment' of that service." *R&R*, 2016 U.S. Dist. LEXIS 120121, at *44 n.15 (citing42 U.S.C. § 12182(a)).

Indeed, extending immunity to MIT from Title III and Section 504 in this case is contrary to the purposes of Section 230 and disability antidiscrimination mandates. *Morton v. Mancari*,

[17] In fact, the court in *Craigslist* also recognized that "Subsection (c)(1) [of the CDA] does not mention 'immunity' or any synonym." *Craigslist*, 519 F.3d at 669.

[18] Thus *Kimzey v. Yelp! Inc.*, 836 F.3d 1263, 1268 (9th Cir. 2016), and *Universal Commc'n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 419 (1st Cir. 2007), do not advance MIT's case, as both cases challenged content posted on the relevant websites. *See Kimzey*, 836 F.3d at 1265 (focusing on negative reviews of plaintiff's business posted on Yelp website); *Universal*, 478 F.3d at 415 (plaintiff challenging "a series of allegedly false and defamatory postings" on an Internet message board operated).

417 U.S. 535, 537-45 (1974) (wherever possible, federal laws should be construed to not conflict with the objectives of other federal laws); *compare* 47 U.S.C. 230 (a)(1) (the "rapidly developing array of Internet and other interactive computer services . . . represent an extraordinary advance in the availability of educational and informational resources to our citizens.") *with Scribd*, 97 F. Supp. 3d at 575 (Congress "could not have foreseen these advances in technology which are now an integral part of our daily lives. Yet Congress . . . believed that the nondiscrimination mandate contained in the ADA should be broad and flexible enough to keep pace.") (internal citations omitted). *See also* H.R. Rep. 101-485(II), at 108 (1990) (although there were "still substantial barriers" in the important area of information exchange, "great strides are being made"). No public policy is served by MIT's novel argument that Section 230 eviscerates laws which ensure that people with disabilities have equal access to the programs and services of federal financial recipients and public accommodations.

b. The CDA does not support ex ante absolute immunity which would have the effect of limiting the public's equal access to the internet.

Even if this Court determines that the CDA addresses liability for the accessibility rather than the substance of MIT's Online Content, MIT's requested blanket immunity from liability for *all* Online Content that MIT makes available on its websites is not supported under CDA case law. The Court in *Craigslist* recognized that Section "230(c) as a whole cannot be understood as a general prohibition of civil liability for web-site operators and other online content hosts . . . ." *Craigslist*, 519 F.3d at 669. Cases applying the CDA have generally assessed specific instances of alleged offensive content. *See, e.g., Barnes v. Yahoo!, Inc.*, 570 F.3d 1096 (9th Cir. 2009) (nude photographs of plaintiff posted in a public profile on defendant's website); *Blumenthal v. Drudge*, 992 F. Supp. 44 (D.D.C. 1998) (defamatory article appeared on website of defendant

AOL). MIT, in contrast, demands immunity from liability for a vast array of content that would be impossible to clearly define, even if the CDA applied.

The purpose behind Section 230's protection of "Interactive Computer Services" is not present here, where Plaintiffs allege that MIT, rather than a member of the general public, creates and makes available content to MIT Websites and Platforms. Compl. ¶ 28.[19] A member of the public cannot influence what content is made available on MIT Websites and Platforms. And, even if MIT were considered an "interactive computer service provider," it "remains liable for its own speech." *Universal Commc'n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 419 (1st Cir. 2007); *see also Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 115, 1162 (9th Cir. 2008) (interactive computer service provider is not protected from liability for content it creates itself, or is "responsible, in whole or in part" for creating or developing).[20] The limitations placed on who can post content make MIT "responsible, in whole or in part, for the creation or development of information" in much the same way that a corporate entity is

[19] "Interactive Computer Service" is defined as "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 and such systems operated or services offered by libraries or educational institutions." 47 U.S.C. § 230(f)(2); *see also FTC v. Accusearch Inc.*, 570 F.3d 1187, 1195 (10th Cir. 2009) ("The prototypical service qualifying for [CDA] immunity is an online messaging board (or bulletin board) on which Internet subscribers post comments and respond to comments posted by others."); MIT Policies Section 13.2, *Policy on the Use of Information Technology Resources*, https://policies.mit.edu/policies-procedures/130-information-policies/132-policy-use-information-technology-resources (last visited Sept. 21, 2018) ("The use of MIT's IT resources is restricted to Institute business and incidental personal use.").

[20] MIT is the content provider for all content that it—including but not limited to faculty and staff—creates or develops, in whole or in part, not simply the content on websites that "speak" for MIT. *See* Mot. at 1,16; Compl. ¶57. Plaintiffs do not now know the numerous ways in which MIT "makes available" on its websites and or platforms Online Content or MIT's role in the creation of that Content. All of these issues would require further facts to resolve and MIT's unsupported allegations in the Motion are insufficient to sustain its 12(c) Motion. *See R&R*, 2016 U.S. Dist. LEXIS 120121, at *57 (identifying as a factual question how content becomes publicly available).

responsible for the accessibility of content on its website regardless of its point of origin. *See* Compl. ¶¶ 33- 38; *see, e.g., Gil v. Winn-Dixie Stores, Inc.*, 257 F. Supp. 3d 1340, 1347 (S.D. Fl. 2017) ("Winn-Dixie has a legal obligation to require [third party vendors] to be accessible if they choose to operate within the Winn-Dixie website.").

2. All of the Video Content That MIT Chooses to Make Available on its Websites and Platforms Must Be Accessible.

MIT's argument that it is not responsible for assuring the accessibility of content created by third parties that it chooses to display on its websites is contrary to its obligation to ensure that all of its programs and services are available on an equal basis to deaf and hard of hearing individuals. To support this assertion, MIT refers to cases that concern the responsibilities of movie theaters to acquire equipment which displays closed captions that are embedded in a film by the studio that produces it. Mot. at 17-18.[21] This analogy misses the mark. A movie theater's involvement is much more circumscribed, because movie theaters are not in the business of creating content, let alone captioning content.[22] Here, MIT is both the creator of the Online Content as well as the arbiter in determining what Online Content is posted, and can implement a policy that would ensure that all aural content be captioned as a precondition for the use of the www.MIT.edu domain or other MIT Platforms. *See, e.g.,* Compl. ¶¶ 34-39.

[21] *Arizona ex rel. Goddard v. Harkins Amusement Enters., Inc.*, 603 F.3d 666 (9th Cir. 2010) and other movie cases cited by MI actually support this Court's previous recognition that "Plaintiffs have alleged that [MIT] provides a service — *making online video content available to the public for free* — which is inaccessible to the deaf and hard of hearing because of [MIT's] failure to provide captioning." *R&R*, 2016 U.S. Dist. LEXIS 120121, at *44. Accepting MIT's argument that it is only required to provide the equipment for auxiliary aids and services when Online Content already has captioning would negate the Title III requirement that public accommodations must provide auxiliary aids and services. *See id.*

[22] At the very least, whether a movie theater would have the ability to caption or even choose the films it shows is a question of fact that is not appropriately resolved on a Fed. R.Civ. P. 12(c) motion.

MIT's additional reliance on *Huzar v. Groupon, Inc.*, No. 17 C 05383, 2018 U.S. Dist. LEXIS 126653, at *10 (N.D. Ill. July 30, 2018), for the proposition that "serving as a conduit is not discrimination in violation of the ADA" Mot. at 17, ignores the allegations in the Complaint that MIT controls who posts content on its Websites and Platforms and what is posted. Compl. ¶ 28. The court in *Huzar* rejected the plaintiff's claim challenging Groupon.com, which offers discounts on the goods and services of other businesses that were not wheelchair accessible. While the court held that Groupon.com did not own or operate the public accommodations (hotels; arenas) in question, the court's rejection of liability based on Groupon.com's role as a "conduit" supports Plaintiffs' theory:

> [T]here is no free-standing theory of liability under the ADA that ensnares anyone who "serves as a nexus or conduit for individuals to obtain access to places of public accommodation and is directly linked to places of public accommodation." . . . The cases cited by *Huzar* only stand for the *uncontroversial proposition that the owner (or operator) of a public accommodation cannot evade the ADA by engaging in disability discrimination off-site, such as through its website* or in screening participants.

2018 U.S. Dist. LEXIS 126653, at *10 (emphasis added) (internal citations omitted).[23]

MIT's extensive role in designing websites, producing content and deciding who posts and what is posted distinguishes it from movie theaters. Posting inaccessible third-party content is not different from holding events in inaccessible buildings or providing inaccessible transportation. If the Online Content that MIT posts on MIT Websites are programs and benefits

[23] MIT admits that *Flava Works, Inc. v. Gunter*, 689 F.3d 754 (7th Cir. 2012) and *Ticketmaster Corp. v. Tickets.Com, Inc.*, No. 99-7654, 2000 U.S. Dist. LEXIS 4553 (C.D. Cal. Mar. 27, 2000) support the limited proposition that a party cannot be held liable for violations *of the Copyright Act* for content that it embeds or hosts. Mot. at 17. Yet, MIT asserts without any further analysis that Title III yields the same result. This Court should reject this argument.

and services of MIT, then they must be equally available to deaf and hard of hearing individuals as they are to other members of the public.[24]

IV. CONCLUSION

For the foregoing reasons, MIT's Motion for Judgment on the Pleadings should be denied.

REQUEST FOR ORAL ARGUMENT

This Court already granted the Parties' request for Oral Argument on September 10, 2018 (Dkt. 150), setting the hearing for October 30, 2018.

Respectfully submitted,

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[24] To the extent that MIT appears to argue that captioning third-party videos would be an undue hardship or constitute a fundamental alteration, it can raise those defenses at the appropriate time. *See R&R*, 2016 U.S. Dist. LEXIS 120121, at *44.

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* Application for admission *pro hac vice* granted
Dated: September 24, 2018

CERTIFICATE OF SERVICE

I hereby certify that, on September 24, 2018, the foregoing document and supporting Declaration of Amy F. Robertson were served upon all counsel of record through this Court's electronic filing system as identified in the Notice of Electronic Filing.

/s/ Arlene B. Mayerson
Arlene B. Mayerson
Pro Hac Vice