NO. 44920-0-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

J.S., S.L., and L.C.,

Respondents,

v.

VILLAGE VOICE MEDIA HOLDINGS, L.L.C., d/b/a Backpage.com; BACKPAGE.COM, L.L.C; and NEW TIMES MEDIA, L.L.C., d/b/a Backpage.com,

Petitioners.

MOTION FOR DISCRETIONARY REVIEW

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I. IDENTITY OF PETITIONERS

Petitioners are Defendants in the underlying Superior Court action: Village Voice Media Holdings, LLC, Backpage.com, LLC, and New Times Media, LLC (collectively, "Backpage.com").

II. SUPERIOR COURT DECISION

Plaintiffs in the Superior Court (Respondents here) are three minors who allege they were abused by adult pimps who prostituted them. They claim Backpage.com should be responsible for the harm they suffered because the pimps posted ads about them on the Backpage.com website. Plaintiffs admit that Backpage.com did not author the ads, that the website imposes express rules to prevent improper posts, and that the ads submitted by the pimps appeared to (but did not actually) abide by those rules.

Section 230 of the Communications Decency Act ("CDA"), 47 U.S.C. § 230, explicitly prohibits liability in these circumstances and provides websites broad immunity from lawsuits based on user-submitted content. In the seventeen years since the law was passed, hundreds of cases have found online service providers immune, respecting Congress's intent to preserve free speech on the Internet and encourage websites to self-police by imposing rules and screening or blocking content. No court has ever held that a plaintiff may avoid immunity and defeat a Rule 12(b)(6) motion on the grounds the Superior Court accepted here.

Plaintiffs urged the Superior Court to deny Backpage.com's motion because they alleged that Backpage.com knew or should have known that

content posted to the website by users could concern illegal activity. In fact, the law is well established that actual knowledge, constructive knowledge, and even direct notice of the unlawful nature of third-party content cannot make a service provider liable for the content. Equally clear, a plaintiff may not overcome Section 230 immunity by alleging a website implicitly "encourages" illegality by the nature of the site or the content it allows, as that would destroy Section 230's purpose and effect. Likewise, no court or case has held that a website loses Section 230's protections because it imposes rules to *prohibit* unlawful content, nor that a plaintiff can avoid dismissal under Rule 12(b)(6) merely by alleging the rules mean the opposite of what they expressly state.

On April 26, 2013, the Superior Court denied Backpage.com's motion because, it found, the website's rules and restrictions suggest it knows or should know that some third-party content is unlawful. The court admitted its decision conflicted with reported case law, and, in fact, federal cases expressly reject the claims and theories Plaintiffs advance here, including one case against Backpage.com, *M.A. v. Village Voice Media Holdings, LLC*, 809 F. Supp. 2d 1041 (E.D. Mo. 2011), and another against Craigslist, *Dart v. Craigslist, Inc.*, 665 F. Supp. 2d 961 (N.D. Ill. 2009). The Superior Court noted that Backpage.com's motion "really walks the line" and was "the closest [the Court had] ever come" to granting a 12(b)(6) dismissal. The court therefore certified its order for immediate review under RAP 2.3(b)(4), and stayed the case in the meantime.

Prompt appellate review is crucial here. If this Court does not correct the Superior Court's ruling and erroneous premise, websites that impose rules or measures to restrict or preclude improper user content put themselves at risk of liability that they could avoid by doing nothing. Moreover, if this is the result in Washington because of the state's liberal Rule 12(b)(6) standards, which do not apply in federal court, the Superior Court's ruling also cannot stand because it would impermissibly allow state procedural rules to undermine federal substantive rights.

Section 230 reflects a considered and overarching policy decision that courts must respect. As Congress recognized, some people will misuse the Internet to post unlawful content. Those harmed may sue the persons who posted the content, but *not* the messenger, *i.e.*, the website where the content appeared, as any other rule would destroy free speech on the Internet and websites' incentives to self-police.

III. ISSUE PRESENTED FOR REVIEW

Whether Section 230 of the Communications Decency Act, 47 U.S.C. § 230, provides immunity to a website and bars state claims based on content that was undisputedly created and posted by third-party users.

IV. STATEMENT OF THE CASE

A. Factual Background

According to their First Amended Complaint, Plaintiffs are three minors who ran away from home and were recruited into prostitution by "professional adult pimps," defendant Baruti Hopson and two other

"unnamed individuals" *See* App. A (First Am. Compl.) ¶ 1.2. The complaint says almost nothing about the pimps, except that they prostituted the three Plaintiffs, "engaged in [immoral] communications" with them, "took naked and illicit photographs" of them, and posted ads about them on Backpage.com. *See id.* ¶¶ 2.8, 5.1-5.2, 6.1-6.3. Everything else in Plaintiffs' 26-page complaint targets Backpage.com.

Backpage.com undisputedly did not author any of the ads, which Plaintiffs admit the pimps created, posted and uploaded. *See, e.g., id.* ¶¶ 1.2 ("adult pimps … posted advertisements for the girls"); 5.2 ("adult pimps … create[d] … and then uploaded [the] advertisements of S.L. onto … Backpage.com"); *id.* ¶¶ 2.8, 4,1, 6.2, 6.3. Plaintiffs also admit that all users who post ads on the website do so through an automated process and have no personal contact with Backpage.com. *Id.* ¶ 3.19.

Plaintiffs also allege (correctly) that Backpage.com takes measures to police its site and prohibit improper or illegal conduct, especially prostitution or underage sex trafficking. *See id.* ¶¶ 3.6-3.13. For example, they admit Backpage.com forbids "[s]exually explicit language," *id.* ¶ 3.6; ads with "naked images [or] images using transparent clothing," *id.* ¶ 3.9; and posting "content which advertises an illegal service" or "suggest[s] an exchange of sex acts for money." *id.* Plaintiffs also admit that, before posting any ad, the website requires users to certify they are at least 18 years old, *id.* ¶ 3.19, and agree *not* to post any "obscene or lewd … photographs," "any solicitation directly or in 'coded' fashion for any

illegal service," or "any material … that exploits minors in any way," *id.* ¶ 3.13. Finally, Plaintiffs admit that Backpage.com "removes ads that violate these requirements." *Id.* ¶ 3.9.

These are essentially all of the *factual* allegations in Plaintiffs' First Amended Complaint. The balance of the complaint consists of Plaintiffs' arguments (couched as allegations offered "upon information and belief") that all escort ads are ads for prostitution, *id.* ¶¶ 3.1, 3.2, 3.5; and Backpage.com's rules and restrictions prohibiting illicit content are "window dressing," *id.* ¶ 3.7, and "a fraud and a ruse" to "evade law enforcement," *id.* ¶¶ 3.9, 3.14, and allow Backpage.com to "fly under the radar," *id.* ¶ 3.6. At bottom, Plaintiffs challenge all of Backpage.com's efforts to monitor, police and restrict content on its site, asserting that "the entire purpose" of the website "is exactly what its content requirements … prohibit." *Id.* at ¶ 3.14. Based on this rationale—that Backpage.com's rules must mean the opposite of what they state—Plaintiffs contend the site should be liable for third-party ads and whatever may occur as a result, asserting claims for negligence, outrage, sexual exploitation of children in violation of RCW ch. 9.68A, vicarious liability, unjust enrichment, invasion of privacy, and civil conspiracy. *Id.* ¶¶ 7.1-7.21, 7.25-26.

B. Procedural History

On March 25, 2013, Backpage.com moved to dismiss Plaintiffs' First Amended Complaint on the basis that Section 230(c)(1) of the CDA provides express immunity to online service providers for state-law claims

based on content provided by third parties. App. B (Backpage.com Motion to Dismiss). In opposing the motion, Plaintiffs did not dispute that Backpage.com satisfied the three requirements of Section 230(c)(1) (as discussed below). Instead, they argued that their complaint should survive because they alleged that Backpage.com itself "develops" content in that the website (1) contains a category for escort ads; (2) makes information useable and available; and (3) imposes posting rules and restrictions that Plaintiffs contend mean the opposite of what they say. *See* App. C (Plaintiffs' Opposition to Motion to Dismiss).

The Superior Court (Hon. Susan K. Serko) heard argument on Backpage.com's motion on April 26, 2013. *See* App. E (Hearing Transcript). The Court rejected Plaintiffs' first two arguments, noting that a website cannot be a content developer for making information available and useable (all websites do this) nor for having a category for escort ads (a legal activity). *Id.* at 13:24-15:8, 23:8-23:19; *see also* App. D (Backpage.com Reply in Support of Motion to Dismiss) at 8-9 (citing state and local laws regulating escort services).

However, the court indicated it felt constrained to credit all allegations of Plaintiffs' complaint, App. E (Hearing Tr.) at 4:13-4:14 ("the decision of the Court turns on the allegations"), and by the "high standard" for a 12(b)(6) motion, *id.* at 18:7-18:8; *see also id.* at 29:6-29:9 (stating, in response to Plaintiffs' assertion that they should be entitled to every inference: "You're preaching to the choir."). The court therefore

refused to accept federal precedent dismissing identical claims, *id.* at 18:15-18:17, and declined to dismiss Plaintiffs' claims because the complaint alleged that Backpage.com should have known that ads on the site were for prostitution, *id.* at 50:8-50:10 ("And, frankly, my note to myself … was Backpage.com doesn't know this is for prostitution and isn't assisting in the development?"). Although the court said this case was the closest it had ever come to granting a 12(b)(6) motion, *id.* at 49:21-49:23, 49:23-50:1, it refused to do so "despite the case law," *id.* at 50:10-50:11. But she also stated "I think this needs appellate review," *id.* at 50:12-50:13, invited Backpage.com to request certification, *id.* at 50:12-50:21, and readily agreed to recommend certification under RAP 2.3(b)(4), while recognizing the case should not proceed in the trial court. *Id.* at 50:24-50:25; 52:16-52:19. *See also* App. F (April 26, 2013 Order).

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

Under RAP 2.3(b), this Court accepts discretionary review, in relevant part, when the Superior Court (1) commits "obvious error which would render further proceedings useless"; (2) commits "probable error" and its decision "substantially alters the status quo or substantially limits the freedom of a party to act"; or (4) has "certified … that the order involves a controlling question of law as to which there is substantial ground for difference of opinion and that immediate review of the order may materially advance the ultimate termination of the litigation." Discretionary review is proper here under each of these standards.

A. The Superior Court Committed Obvious and Probable Error Because Its Order Conflicts with Established Law and Would Severely Chill Speech.

1. All of the Elements of Section 230(c)(1) Immunity Are Established Here.

Section 230(c)(1) of the CDA provides immunity to online service providers and bars state-law claims for third-party content. It 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 CDA expressly preempts state laws: "[N]o liability may be imposed under any State or local law that is inconsistent with this section." 47 U.S.C. § 230(e)(3).[1]

Congress enacted Section 230 to achieve two goals. First, it "wanted to encourage the unfettered and unregulated development of free speech on the Internet, and to promote the development of e-commerce." *Batzel v. Smith*, 333 F.3d 1018, 1027 (9th Cir. 2003).[2] Second, it sought to encourage online service providers to "self-police" offensive material by providing immunity for such efforts. *Batzel*, 333 F.3d at 1028.

Recognizing these goals, courts across the country have interpreted the CDA to establish broad immunity. *See, e.g., Perfect 10, Inc. v. CCBill*

[1] In another subsection, Section 230 also makes clear that online service providers may not be liable for "any action voluntarily taken in good faith to restrict access to or availability" of material that is "obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable." 47 U.S.C. § 230(c)(2).

[2] Otherwise, "[f]aced with potential liability for every message republished by their services," online providers "might choose to severely restrict the number and type of messages posted." *See Zeran*, 129 F.3d at 331.

LLC, 488 F.3d 1102, 1118 (9th Cir. 2007); *Johnson v. Arden*, 614 F.3d 785, 791 (8th Cir. 2010); *Nemet Chevrolet v. ConsumerAffairs.com*, 591 F.3d 250 (4th Cir. 2009), 260; *Doe v. MySpace, Inc.*, 528 F.3d 413, 418 (5th Cir. 2008); *Universal Commc'n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 419 (1st Cir. 2007). This Court reached the same conclusion in *Schneider v. Amazon.com, Inc.*, 108 Wn. App. 454, 31 P.3d 37 (2001). There, Division 1 affirmed a CR 12(b)(6) dismissal of an author's claims against Amazon.com for allegedly false and defamatory user comments about him. The Court found Section 230 barred the claims even though the plaintiff alleged that he had provided notice of the posts, and Amazon admitted at least one violated its guidelines but failed to remove the content. *Id.* at 458. The plaintiff, the Court found, sought to hold Amazon liable for editorial functions—*i.e.*, "deciding whether to publish, withdraw, postpone or alter content" or "the failure to remove [content]"—exactly what "Congress sought to protect." *Id.* at 463, 466.

All three elements of Section 230 are present here; Plaintiffs did not dispute this, and the Superior Court did not find otherwise. First, Backpage.com, as a website, is a "provider ... of an interactive computer service." 47 U.S.C. § 230(c)(1); *see also Fair Hous. Council v. Roommates.com*, 521 F.3d 1157, 1162 n.6 (9th Cir. 2008) (websites are the "most common interactive computer services"). Second, Plaintiffs base their claims on "information provided by another information content provider," *i.e.*, the ads created and posted by the pimps. *See, e.g.*, App. A

(First Am. Compl.) ¶¶ 2.8, 4.1, 4.2, 5.2, 5.3, 6.2, 6.3, 6.5. Finally, Respondents' claims treat Backpage.com "as the publisher or speaker" of the ads, 47 U.S.C. § 230(c)(1), because they "seek[] to hold" it liable "for its exercise of a publisher's traditional editorial functions, such as deciding whether to publish, withdraw, postpone or alter content." *See Zeran v. Am. Online*, Inc., 129 F.3d 327, 330 (4th Cir. 1997).

2. A Website Does Not Lose Section 230 Immunity Even If It Knows of or Encourages Unlawful Content or Imposes Rules to Prohibit It.

The arguments Plaintiffs raised in opposition to the motion to dismiss—which the Superior Court accepted in part—have been uniformly rejected by numerous cases interpreting Section 230.

First, "[it]t is, by now, *well established* that notice of the unlawful nature of the information provided is *not* enough to make it the service provider's own speech" and cannot defeat Section 230 immunity. *Lycos*, 478 F.3d at 420 (emphasis added); *see also M.A. v. Village Voice*, 809 F. Supp. 2d at 1051 ("[E]ven if a service provider knows that third parties are posting illegal content, the service provider's failure to intervene is immunized.") (internal quotation omitted). A different rule would destroy "the vigor of Internet speech." *Zeran*, 129 F.3d at 333

Second, "the fact that a website acted in such a manner as to encourage the publication of unlawful material does not preclude a finding of immunity pursuant to [Section] 230." *Hill v. StubHub, Inc.*, 727 S.E.2d 550, 560 (N.C. App. 2012); *see also, e.g., Ascentive, LLC v. Opinion*

Corp., 2011 WL 6181452, at *20 (E.D.N.Y. Dec. 13, 2011) ("[T]here is simply no authority for the proposition that [encouraging allegedly improper content] makes the website operator responsible, in whole or in part, for the creation or development of every post on the site.") (internal quotation omitted); *S.C. v. Dirty World, LLC*, 2012 WL 3335284, at *4 (W.D. Mo. Mar. 12, 2012) ("As a matter of law, and even if true, encouraging defamatory posts is not sufficient to defeat CDA immunity.").

Finally, no court has ever held that a website may be subject to liability and outside the protections of Section 230 *because* it imposes rules to prohibit improper or unlawful content.[3] Plaintiffs admit Backpage.com imposes and enforces such rules, *see* App. A (First Am. Compl.) ¶¶ 3.6-3.13 (*e.g.* banning sexually explicit language or any suggestion of an exchange of sex for money), but claim the rules *encourage* illegal conduct by instructing pimps "how to develop an ad that will pass muster," App. E (Hearing Tr.) at 40:13-17. This argument turns Section 230 on its head and would destroy its fundamental purposes. If such allegations were enough, every plaintiff could defeat immunity by alleging that a website's rules and restrictions mean the opposite of what they say and are designed to encourage unlawful content. If that were the case, websites would be far

[3] In fact, many courts have held Section 230 immunity is *supported* by the fact that websites impose rules and restrictions. *E.g.*, *Dart v. Craigslist*, 665 F. Supp. 2d at 969 (rejecting argument that Craigslist causes or induces illegal content in part because Craigslist's rules prohibit such content); *Goddard v. Google*, 640 F. Supp. 2d 1193, 1198 (N.D. Cal. 2009) (rejecting plaintiff's attempt to hold Google liable for third-party ads that were "contrary to Google's express policy").

better off to impose no rules or restrictions on content and to do no monitoring—exactly the opposite of Section 230's intent. *See Backpage.com v. McKenna*, 881 F. Supp. 2d 1262, 1273 (W.D. Wash. 2012) (making websites liable for efforts to prohibit content would "create[] an incentive for online service providers *not* to monitor the content that passes through [their] channels[,] precisely the situation that the CDA was enacted to remedy.") (emphasis in original).

The Ninth Circuit has instructed courts to reject theories of "implicit encouragement" and "development by inference" like the ones advanced by Plaintiffs:

> [T]here will always be close cases where a clever lawyer could argue that something the website operator did encouraged the illegality. Such close cases, we believe, must be resolved in favor of immunity, lest we cut the heart out of section 230 by forcing websites to face death by ten thousand duck-bites, fighting off claims that they promoted or encouraged—or at least tacitly assented—to the illegality of third parties. Where it is very clear that the website directly participates in developing the alleged illegality ... immunity will be lost. But in cases of enhancement by implication or development by inference ... section 230 must be interpreted to protect websites not merely from ultimate liability, but from having to fight costly and protracted legal battles.

Roommates.com LLC, 521 F.3d at 1174-75. Plaintiffs' arguments in the Superior Court are precisely the type that the Ninth Circuit and many other courts have rejected.

3. The Superior Court's Decision Contradicts Established Precedent under Section 230.

The Superior Court denied Backpage.com's motion to dismiss, concluding that Plaintiffs sufficiently alleged that Backpage.com was a content developer because, they claimed, its posting rules suggest it "know[s]" that posts by users are ads for prostitution. App. E (Hearing Tr.) at 50:8-50:10. In doing so, the Superior Court erred and endorsed a rule that would destroy Section 230's protection.

The Court admitted that it reached its decision "despite the case law," *id.* at 50:10, and, in this sense, it was right: the ruling conflicts with established law under Section 230—not only with the cases discussed above, but also with two decisions rejecting identical theories: *M.A. v. Village Voice Media*, 809 F. Supp. 2d at 1041 and *Dart v. Craigslist, Inc.*, 665 F. Supp. 2d at 961. The court did not address *Dart* but admitted it "had a hard time" with *M.A.* App. E. (Hearing Tr.) at 44:8-44:10.

This is not surprising since *M.A.* rejected the same claims and the same allegations against the same defendant. There, a sex trafficking victim (also a minor) alleged Backpage.com "creat[ed] a highly viewed website" with "adult sex focused categories"; used "posting rules and limitations which … create the veil of legality"; "had knowledge" that "postings … were advertisements for prostitution," including for "numerous minors"; and "had a desire that these posters accomplish[] their nefarious illegal prostitution activities so that the posters would return to the website and pay for more posting." 809 F. Supp. 2d at 1044-45. The

court rejected these arguments, held that Backpage.com was immune under Section 230, and dismissed the case outright on a 12(b)(6) motion.

Similarly, in *Dart v. Craigslist, Inc.*, 665 F. Supp. 2d at 961, the court rejected a sheriff's claims that Craigslist created a public nuisance and aided and abetted prostitution by inducing users to post prostitution ads. The court dismissed the claims because they amounted to allegations of "negligent publishing," and even if "users routinely flout Craigslist's guidelines," Craigslist had not caused them to do so, except "in the sense that no one could post [unlawful content] if craigslist did not offer a forum." *Id.* at 967, 969 (quotation marks and citation omitted). The court disregarded the sheriff's "conclusory allegations ... that Craigslist induces users to post ads for illegal services," reasoning that Section 230 "would serve little purpose if companies like Craigslist were found liable under state laws for 'causing' or 'inducing' users to post unlawful content..." *Id.*[4]

The Superior Court provided no analysis or explanation to distinguish *M.A.* or *Dart* from Plaintiffs' claims. Instead, it concluded that Backpage.com, by virtue of its rules and restrictions, might "know[]" that ads posted by users are "for prostitution." App. E. (Hearing Tr.) at 50:8-50:12. In doing so, the court contravened the "well-established" rule "that notice of the unlawful nature of the information provided is *not enough* to

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[4] The *M.A.* and *Dart* decisions are not alone. In many other cases, plaintiffs have sued websites claiming they were sexually abused as a result of third-party content on the sites, and in each, courts have dismissed the claims. *See, e.g.*, *Doe v. MySpace*, 528 F.3d at 420; *Doe II v. MySpace Inc.*, 175 Cal. App. 4th 561, 96 Cal. Rptr. 3d 148, 156-57 (2009); *Doe v. SexSearch.com*, 502 F. Supp. 2d 719, 727-28 (N.D. Ohio 2007); *Doe v. Am. Online, Inc.*, 783 So.2d 1010 (Fla. 2001).

make it the service provider's own speech" and cannot defeat Section 230 immunity. *Lycos*, 478 F.3d at 420 (emphasis added); *see also Schneider*, 108 Wn. App. at 463-64 (Amazon.com immune even though plaintiff provided notice of unlawful content and Amazon failed to remove it); *Hill*, 727 S.E.2d at 559-60 (Stubhub immune from claims based on ticket scalping, despite allegations that it knew or should have known tickets were being sold at more than face value).

The trial court also apparently accepted Plaintiffs' argument that Backpage.com could be liable because it imposes posting rules and restrictions. But again, no court has accepted this theory, and for good reason. If Plaintiffs were right, anyone could defeat Section 230 immunity by mere alleging that a website's rules do *not* mean what they say, which, in turn, would cause websites to impose *no* rules and *not* self-police, precisely contrary to Section 230's purpose. *See Batzel*, 333 F.3d at 1028; *Langdon v. Google*, 474 F. Supp. 2d 622, 631 (D. Del. 2007).

In rejecting the established case law, the Superior Court apparently felt constrained by Washington's more liberal rules for 12(b)(6) motions (as compared to the federal standards). App. E (Hearing Tr.) at 4:13-4:14, 18:7-18:8, 29:6-29:9. But such a decision improperly gives Washington procedural rules precedence over federal substantive rights, and undermines Congress's intent that online service providers avoid "costly and protracted legal battles." *Nemet Chevrolet*, 591 F.3d at 259; *Roommates.com*, 521 F.3d at 1174. As the United States Supreme Court

has held, a "federal right cannot be defeated by the forms of local practice." *Brown v. Western Ry. of Ala.*, 338 U.S. 294, 295-96 (1949) (reversing dismissal of a claim under the federal Employers' Liability Act, where the lower court relied on a state pleading standard construing allegations "most strongly against the pleader" and holding that the state standard was preempted because it interfered with a federal substantive right) (quotation marks and citation omitted); *see also Felder v. Casey*, 487 U.S. 131, 138 (1988) (refusing to enforce state law requiring notice of claim under 42 U.S.C. § 1983, in part because it would "frequently and predictably produce different outcomes in § 1983 litigation based solely on whether the claim is asserted in state or federal court").[5]

The Superior Court did not address these principles in its decision and erred in this regard too.

B. Granting Discretionary Review Is Crucial to Correct the Result in this Case and Preserve Free Speech on the Internet.

This case is uniquely appropriate for discretionary review for several reasons. Not only did the Superior Court commit obvious or probable error, but it also expressly recognized that the decision "needs appellate review." App. E (Hearing Tr.) at 50:12-50:14. Under RAP 2.3(b)(4), the order involves a controlling question of law (whether this

[5] Washington courts have also recognized and applied this doctrine. *See Stanton v. Bayliner Marine Corp.*, 123 Wn.2d 64, 866 P.2d 15 (1993) (federal maritime law precluded application of state economic loss rule; "the extent to which state law may be used to remedy maritime injuries is constrained by a so-called 'reverse-*Erie*' doctrine which requires that the substantive remedies afforded by the States conform to governing federal maritime standards.").

case should be dismissed outright), as to which there is substantial ground for difference of opinion (given that the decision contravenes all cases on point), review of which will "materially advance" the "ultimate termination of the litigation" (here, end the case). More fundamentally, the opinion undermines the immunity from suit that Congress intended in Section 230 and threatens free speech on the Internet generally.

Section 230 creates "an *immunity from suit* rather than a mere defense to liability and it is effectively lost if a case is erroneously permitted to go to trial." *Nemet Chevrolet*, 591 F.3d at 254-55 (internal quotation omitted). The law thus dictates that courts resolve the question of immunity at the earliest possible stage of a case, *id.*, because it "must be interpreted to protect websites not merely from ultimate liability, but from having to fight costly and protracted legal battles." *Roommates.com*, 521 F.3d at 1175.

Washington cases echo these principles. *See, e.g.*, *Robinson v. City of Seattle*, 119 Wn.2d 34, 65, 830 P.2d 318, 336 (1992) (since the purpose of immunity is to provide "an immunity from suit rather than a mere defense to liability ..., it is critical that insubstantial claims be resolved as quickly as possible."). Thus, in the context of federal immunity under 42 U.S.C. § 1983, this Court has counseled liberal application of the discretionary review criteria in RAP 2.3. *Walden v. City of Seattle*, 77 Wn. App. 784, 789-90, 892 P.2d 745 (1995) (review should be granted if obvious or probable error is shown, regardless of whether the

error renders further proceedings useless or substantially alters the status quo or a party's freedom to act); *see also Bailey v. State*, 147 Wn. App. 251, 191 P.3d 1285 (2008) (granting review of trial court's refusal to dismiss case based on immunity under Anti-SLAPP law, RCW 4.24.510).

Discretionary review is necessary and appropriate here not only to preserve Backpage.com's rights to immunity under Section 230, but also because free speech rights are at stake. In cases involving First Amendment rights, the Washington Supreme Court has cautioned courts *not* to "too restrictively view[] their power," thereby allowing "long and expensive litigation." *Mark v. Seattle Times*, 96 Wn.2d 473, 484, 635 P.2d 1081 (1981). The Court has admonished that summary procedures are "essential" in cases involving free speech:

> In the First Amendment area, summary procedures are ... essential.... Unless persons ... desiring to exercise their First Amendment rights are assured freedom from the harassment of lawsuits, they will tend to become self-censors. .... [S]elf-censorship affecting the whole public is hardly less virulent for being privately administered.

Id. at 484-85 (internal quotation marks and citations omitted); *accord Mohr v. Grant*, 153 Wn.2d 812, 821, 108 P.3d 768, 773 (2005) ("Serious problems regarding the exercise of free speech and free press guaranteed by the First Amendment are raised if unwarranted lawsuits are allowed to proceed to trial. The chilling effect of the pendency of such litigation can itself be sufficient to curtain the exercise of these freedoms.") (internal quotation marks omitted).

As noted, Congress enacted Section 230 of the CDA to preserve and encourage free speech on the Internet. *Batzel*, 333 F.3d at 1027. If this Court does not review the trial court's decision immediately, online service providers will have reason to fear that they, too, could be the target of similar claims, and such claims may survive based on bare, unsupported allegations or rules that *prohibit* improper third-party content. The court's ruling thus raises the specter of other unwarranted lawsuits, chilling effects on Internet speech, and self-censorship—all of which the Supreme Court and Congress have cautioned should be avoided.

VI. CONCLUSION

The Superior Court obviously erred by denying Backpage.com's motion to dismiss, contravening more than seventeen years of established law and threatening the settled practice of websites in allowing third parties to post content without fear of liability. It recognized this by certifying its order under RAP 2.3(b)(4). This Court should accept review.

RESPECTFULLY SUBMITTED this 12th day of June, 2013.

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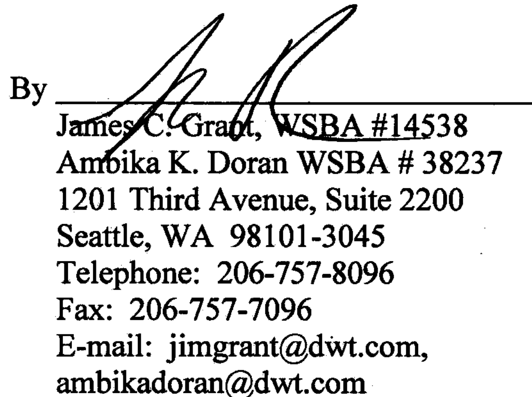

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CERTIFICATE OF SERVICE

I hereby certify that I caused the document to which this certificate is attached to be delivered to the following as indicated:

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Declared under penalty of perjury under the laws of the state of Washington this 12th day of June, 2013.

Ambika K. Doran