

No. \_\_\_\_\_

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**In the Supreme Court of the United States**

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JANE DOE, ET AL., PETITIONERS

*v.*

BACKPAGE.COM LLC, ET AL.

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*ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE FIRST CIRCUIT*

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**PETITION FOR WRIT OF CERTIORARI**

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## QUESTION PRESENTED

In the Trafficking Victims Protection Reauthorization Act (TVPRA), Congress provided a private right of action to victims of child sex trafficking against those who knowingly participate in the trafficking venture. Massachusetts provides a similar cause of action against those who “knowingly aid[]” such a venture. Petitioners are child sex trafficking victims who were trafficked through Backpage.com, which is owned and operated by respondents. Petitioners sued respondents under the TVPRA and its state analogue for their role in promoting, facilitating, and aiding the trafficking of petitioners. The First Circuit held that even if petitioners had plausibly alleged a cause of action under the TVPRA and state law, Section 230(c)(1) of the Communications Decency Act (CDA) made respondents “immune” from liability. Section 230(c)(1) provides that no internet service provider “shall be treated as the publisher or speaker” of internet content that was “provided by another.” The First Circuit held that petitioners’ claims “treated” respondents as a “publisher or speaker” of “information provided by another” for purposes of Section 230(c)(1) because online advertisements created by third-party traffickers were a “but-for” cause of petitioners’ injuries. The question presented is:

Whether Section 230 of the CDA precludes a civil lawsuit against a website owner and operator based on its own criminal conduct any time online content created by a third party was a part of the chain of causation leading to the plaintiff’s injuries.

## **PARTIES TO THE PROCEEDING**

Petitioners Jane Doe No. 1, Jane Doe No. 2, Jane Doe No. 3, Sam Loe, and Sara Loe were the plaintiffs in the District Court and the appellants in the Court of Appeals.

Respondents Backpage.com LLC, Camarillo Holdings, LLC, and New Times Media, LLC were the defendants in the District Court and the appellees in the Court of Appeals.

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PETITION FOR WRIT OF CERTIORARI

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Petitioners Jane Doe No. 1, Jane Doe No. 2, Jane Doe No. 3, Sam Loe, and Sara Loe respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

**OPINIONS BELOW**

The opinion of the Court of Appeals (App., *infra*, 1a-33a) is reported at 817 F.3d 12. The opinion of the District Court granting respondents' motion to dismiss (App., *infra*, 34a-67a) is reported at 104 F. Supp. 3d 149.

**JURISDICTION**

The Court of Appeals entered judgment on March 14, 2016. The court denied Doe's timely petition for rehearing en banc on May 3, 2016. See App., *infra*, 68a-

69a. This Court has jurisdiction under 28 U.S.C. 1254(1).

### RELEVANT STATUTORY PROVISIONS

The relevant statutes are the Communications Decency Act of 1996 (CDA), 47 U.S.C. 230; the Trafficking Victims Protection and Reauthorization Act of 2008 (TVPRA), 18 U.S.C. 1591 and 1595; and the Massachusetts Anti-Human Trafficking and Victim Protection Act of 2010 (MATA), Mass. Gen. Laws ch. 265, § 50(d).

The relevant provisions of the statutes are reproduced in full in the appendix (App., *infra*, 70a-80a).

### STATEMENT OF THE CASE

This petition involves a statutory provision—Section 230 of the Communications Decency Act (CDA)—that Congress enacted in 1996 to protect internet service providers (ISPs) serving as passive intermediaries of online content from liability for claims that treat them as a traditional publisher. 47 U.S.C. 230(c)(1). The First Circuit applied Section 230 to preclude petitioners’ claims alleging affirmative conduct by an ISP itself that violated federal and state anti-trafficking statutes, specifically the federal Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA), 18 U.S.C. 1591(a), and the Massachusetts Anti-Trafficking Act of 2010 (MATA), Mass. Gen. Laws ch. 265, § 50(d).

Petitioners brought suit in the United States District Court for the District of Massachusetts, under the TVPRA and MATA alleging that respondents had knowingly profited from aiding and participating with traffickers in the sexual exploitation of children by in-

tentionally creating an online marketplace to facilitate the trafficking. App., *infra*, 35a-40a. The district court granted respondents motion to dismiss, concluding that Section 230 of the CDA barred petitioners' claims under the TVPRA and MATA. The First Circuit affirmed, holding that, even assuming respondents directly violated the TVPRA and MATA, petitioners' claims under those statutes "treated" respondents "as a publisher" under Section 230(c)(1), because advertisements that third-party traffickers created were part of the chain of causation that led to petitioners' injuries.

The First Circuit's decision conflicts with several decisions of the Ninth Circuit rejecting the "chain of causation" principle adopted by the First Circuit. Additionally, the decision conflicts with a September 2015 decision of the Washington Supreme Court in a nearly identical case brought against these same respondents. Finally, the First Circuit disregards the guidance provided by this Court in *POM Wonderful LLC v. Coca-Cola Co.*, 134 S. Ct. 2228 (2014), and other cases about the need to harmonize intersecting statutes.

## **A. Statutory Provisions**

### **1. Section 230 of the CDA**

Section 230 of the CDA provides that no ISP defendant "shall be treated as the publisher or speaker" of Internet content that was "provided by another." 47 U.S.C. 230(c)(1). Passed in 1996, the CDA represents an effort by Congress to regulate access to indecent or obscene content on the Internet. Congress was additionally motivated by the then-recent New York state court decision in *Stratton Oakmont, Inc. v. Prodigy Services Co.*, 1995 WL 323710 (N.Y. Sup. Ct. May 24,

1995), superseded by statute, Communications Decency Act, Pub. L. No. 104-104, 110 Stat. 137, as recognized in *Shiamili v. Real Estate Group of N.Y., Inc.*, 952 N.E.2d 1011, 1016 (2011). In *Stratton Oakmont*, an Internet service provider was held liable for a third party's libelous statements posted on a neutral message board. *Id.* at \*6-7. The court determined that, because the interactive computer service Prodigy sometimes "deleted \* \* \* distasteful third-party postings" that appeared on Prodigy-owned bulletin boards, Prodigy was subject to strict, common law "publisher's liability" for defamatory content that any one of its millions of users might choose to post on any one of Prodigy's numerous online bulletin boards. *FTC v. Accusearch, Inc.*, 570 F.3d 1187, 1195 (10th Cir. 2009). Concerned that *Stratton Oakmont* would deter ISPs from exercising any editorial control over potentially offensive third-party content, Congress passed Section 230 to remove traditional publisher liability for ISPs who acted in good faith to remove or restrict such content. See H.R. Rep. No. 458, at 194 (1996), 104th Cong., 2d Sess. (stating that specific purpose of Section 230(c)(1) was to overrule *Stratton Oakmont*); 141 Cong. Rec. 22044-22045 (1995) (amendment offered by Rep. Cox). Senator Coats, one of the two main authors of the CDA, made clear while discussing Section 230 that its intention was to prevent ISPs that try to keep offensive material off the Internet "from being held liable as a publisher for defamatory statements for which they would not otherwise have been liable." 141 Cong. Rec. S8345 (daily ed. June 14, 1995) (statement of Sen. Coats).

Given its historical context, courts have accepted that the wording of Section 230(c)(1) has its roots in the

common law of defamation, which “treats as publishers” those who participate, either intentionally or negligently, in the communication of a defamatory matter to a person other than the person defamed. See Restatement (Second) of Torts §§ 577, 581 (1977). In fact, early decisions applying Section 230 generally arose out of facts similar to those that inspired its passage. See, e.g., *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997), cert. denied, 524 U.S. 937 (1998). Federal courts have generally agreed, however, that Section 230 is not limited to defamation claims and “does more than just overrule *Stratton Oakmont*.” *Accusearch*, 570 F.3d at 1195. In those instances where courts have specifically interpreted the phrase “treat[] as the publisher or speaker of any information provided by another,” they have concluded that it bars claims that seek to impose liability solely on the basis of a website operator’s “exercise of a publisher’s traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content.” *Zeran*, 129 F.3d at 330.

## 2. TVPRA

In 2000, Congress enacted the Trafficking Victims Protection Act. The statute represents a congressional effort to criminalize conduct related to human trafficking. Reauthorized five times—in 2003,<sup>1</sup> 2005, 2008, 2011 and 2013—the TVPRA imposes severe penalties on any person who, *inter alia*, knowingly engages in trafficking of children for the purposes of engaging in “a commercial sex act.” 18 U.S.C. 1591(a)(2). Significantly,

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<sup>1</sup> In 2003, Congress reauthorized the statute, which then became known as the Trafficking Victims Protection Reauthorization Act.

since 2003, the TVPRA has included a civil enforcement provision that allows victims to “bring a civil action against the perpetrator in an appropriate district court of the United States” and to “recover damages and reasonable attorneys fees.” 18 U.S.C. 1595 (2003). The TVPRA does not impose liability for “publishing” information.

In 2008, Congress amended the TVPRA to broaden its reach. The Wilberforce Amendments expanded criminal liability to anyone who “benefits, financially or by receiving anything of value, from participation in [the underlying sex trafficking] venture” that “provides [or] obtains” a child for a commercial sex act either knowingly or in “reckless disregard” of the fact that the victim is a minor. 18 U.S.C. 1591(a)(1) and (2). The statute’s private right of action was also expanded to give victims, like petitioners, the right to pursue a civil claim against any persons who “knowingly benefit[] financially \* \* \* from participation in [the underlying sex trafficking] venture.” See 18 U.S.C. 1595. This private right of action provision makes clear that, to be civilly liable for participating in a child sex trafficking venture, a defendant need not have been the “perpetrator” of the trafficking. *Ibid.* (no longer requiring defendant to be “perpetrator”).

The legislative history of the TVPRA confirms Congress’ intention to expand the reach of the statute. In explaining the need for its amendments, one senator stated, “[I]t is our job to once again be a beacon of progress and hope and no longer allow one man to profit from the suffering of another.” 153 Cong. Rec. H14098, H14120 (daily ed. Dec. 4, 2007). About these expansive amendments, then-Senator Biden stated that they “es-



tablish[ed] some powerful new legal tools, including increasing the jurisdiction of the courts, enhancing penalties for trafficking offenses, punishing those who profit from trafficked labor and ensuring restitution of forfeited assets to victims.” 154 Cong. Rec. S4798, S4799 (daily ed. May 22, 2008).

### **3. MATA**

Passed in 2011, the MATA is an example of the sustained national effort to comprehensively address the problem of human trafficking at the state level. See generally Melissa Dess, *Walking the Freedom Trail: An Analysis of the Massachusetts Human Trafficking Statute*, 33 B.C.J.L. & Soc. Just. 147, 151 (2013). Like its federal analogue, the MATA not only includes criminal penalties, but also provides victims with a private right of action. Under the MATA’s private right of action, a victim is entitled to sue not only the individuals who forced her to engage in commercial sex, but also “[a]ny business entity that knowingly aid[ed] \* \* \* [the] joint venture[.]” Mass. Gen. Laws ch. 265 § 50(d).

#### **B. Respondents’ Participation In Child Sex Trafficking**

Respondents own and operate Backpage.com, a website that hosts more than 80 percent of the online advertising for illegal commercial sex in the United States. Each day, several hundred thousand advertisements are posted on the “Escorts” section of Backpage.com. Respondents charge money for the “Escort” advertisements, reaping more than one million dollars in profits annually from them. A significant portion of

the advertisements on Backpage.com features children that sex traffickers hold out for sale.

As petitioners alleged in their complaint, respondents are not merely passively aware that illegal commercial sex ventures operate over Backpage.com. Rather, respondents have engaged in affirmative conduct designed to support such ventures (including those that exploit children). Petitioners' complaint alleged, among other things, that respondents (1) steer traffickers toward advertising language that will avoid law enforcement detection; (2) accept and indeed encourage non-traditional payment methods that render virtually untraceable the financial transactions between respondents and the traffickers that advertise their victims over Backpage.com; (3) strip metadata, including geolocation information, from photographs that traffickers upload to Backpage.com to entice potential customers, which hinders law enforcement's ability to locate victims and apprehend their traffickers; (4) intentionally delete from Backpage.com "sting ads" that law enforcement places on Backpage.com, which aids trafficking ventures' profitability by eliminating a potential customer deterrent; (5) host and facilitate private communications between traffickers and customers regarding illegal sex transactions; and (6) feign cooperation with law enforcement while refusing to use techniques that could identify and locate children being sold for sex.<sup>2</sup> App., *infra*, 4a-7a. Respondents take all of

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<sup>2</sup> The plausibility of Plaintiffs' allegations of criminal wrongdoing are supported by developments in the ongoing investigation of Backpage.com by the U.S. Senate, including the preliminary conclusions of subcommittee staff, the assertion by the Backpage.com CEO and two of its employees of their Fifth Amendment

these actions in pursuit of their own profit; if the underlying sex trafficking ventures flourish, the traffickers will post more advertisements on Backpage.com and be willing to pay more to post them, which directly translates into more advertising dollars for respondents.

### **C. The Present Litigation**

#### **1. Petitioners**

Beginnings at age 15, petitioners were illegally trafficked for sex through Backpage.com. Jane Doe No. 1 was trafficked across Massachusetts and Rhode Island on Backpage.com in 2012 and 2013. She was sold and raped 10-12 times per day by men responding to the advertisements. Jane Doe No. 2 was trafficked across Massachusetts on Backpage.com from 2010 through 2012. She was advertised an average of 6 times per day and was sold and raped by 5 to 15 customers a day. Jane Doe No. 3 was trafficked on Backpage.com in 2013. She was driven to a hotel in Massachusetts, where she was raped in exchange for payment that went to her trafficker. As a direct result of these sex trafficking ventures, petitioners have suffered severe physical and psychological injuries.

In order to hold respondents responsible for their conduct and the injuries that conduct caused, petition-

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privilege against self-incrimination, and the determination by the Senate to hold Backpage.com's CEO in contempt. See Staff of S. Permanent Subcomm. on Investigations, 114th Cong., Recommendation to Enforce a Subpoena Issued to the CEO of Backpage.com, LLC 1, 10, 30-33 (Nov. 19, 2015), <https://www.hsgac.senate.gov/subcommittees/investigations/reports>; see also Application to Enforce Subpoena, *Senate Permanent Subcomm. on Investigations v. Ferrer*, No. 1:16-mc-621 (D.D.C. Mar. 29, 2016).

ers filed a civil action against respondents in the United States District Court for the District of Massachusetts. Petitioners' complaint included causes of action under the TVPRA and the MATA. Petitioners' complaint included detailed factual allegations about respondents' own knowing, purposeful business conduct that is designed to and does solicit, encourage, promote, and protect the sex trafficking ventures that serve as an engine of Backpage.com's profitability.

## **2. The District Court and First Circuit Proceedings**

Respondents moved to dismiss petitioners' complaint, arguing that Section 230 of the CDA provided them immunity from civil liability. Respondents argued that, because third-party traffickers were the ones who authored and posted the advertisements that shopped petitioners to potential customers, petitioners' lawsuit "treated" respondents "as the publisher or speaker" of "information provided by another" and was therefore barred by Section 230. The district court agreed with respondents and dismissed petitioners' lawsuit. App., *infra*, 67a.

Petitioners timely appealed. On March 14, 2016, the United States Court of Appeals for the First Circuit affirmed the district court's dismissal. The panel acknowledged that the CDA and TVPRA "do not fit together seamlessly, and this case reflects the tension between them." App., *infra*, 3a. The court wrote that Congress enacted the CDA, in part, in response to court cases that had held internet publishers liable for defamatory content posted by third parties on the publishers' message boards. Still, it concluded that there had been "near-universal agreement" that the CDA

should not be construed “grudgingly” and to do otherwise could have a “chilling effect.” *Id.* at 10a.

The First Circuit found that petitioners’ complaint made a “persuasive case” that respondents purposefully tailored Backpage.com to “make sex trafficking easier.” App. *infra*, 32a-33a. The First Circuit concluded, however, that even if petitioners’ complaint plausibly alleged that respondents had violated the federal and state criminal anti-trafficking laws, petitioners’ causes of action “treated” respondents as the “publisher or speaker” of online advertisements that third-party traffickers created, and therefore those claims were barred by Section 230(c)(1). *Id.* at 11a-15a. The court explained that the advertisements that petitioners’ traffickers posted on Backpage.com were what provided a connection between respondents’ own violations of the federal and state anti-trafficking statutes on the one hand and petitioners’ injuries on the other. In other words, “information provided by another” linked the chain of causation that led to petitioners’ injuries. This, the First Circuit reasoned, was sufficient to trigger Section 230(c)(1)’s bar. *Id.* at 11a.

### REASONS FOR GRANTING THE PETITION

The First Circuit’s decision immunizes website owners and operators, such as respondents, from civil liability whenever online content created by a third party was a part of the chain of causation leading to the plaintiff’s injury—even if there are plausible allegations that the website owner and operator’s own criminal conduct contributed to her injury. The First Circuit’s broad construction of Section 230 conflicts with several decisions of the Ninth Circuit that expressly reject the reasoning of the First Circuit, as well as with decisions

of other circuits which align with the Ninth Circuit in carefully confining the CDA to “neutral intermediaries.” The First Circuit’s decision also directly conflicts with a September 2015 decision of the Washington Supreme Court in a case involving a nearly identical set of facts that a nearly identical set of plaintiffs brought against these same respondents.

The conflict between the First Circuit and these other courts follows from a failure to attempt to harmonize the CDA with the criminal statutes underling petitioners’ claims. The consequence is that the federal and state trafficking statutes have been effectively set aside without any effort to determine whether Congress intended that the CDA would undermine its own anti-trafficking efforts in that manner. More careful analysis of the language and context of each statute demonstrates that they can operate together in a manner that fulfills the important purposes of each.

This petition represents an ideal vehicle for this Court to address Section 230 of the CDA and to provide the lower courts guidance on how to construe and apply this provision. First, the court of appeals held below that Section 230 barred petitioners’ lawsuit against respondents, even assuming that petitioners’ complaint stated a plausible claim that respondents have engaged in purposeful and knowing conduct that violates federal and state criminal anti-trafficking laws that include private rights of action. The court of appeals’ construction and application of Section 230 was therefore outcome determinative of petitioners’ appeal. Second, the stakes here are high. The gravamen of petitioners’ complaint is that respondents violated federal and state criminal law—namely, the TVPRA and the MATA.

Congress and the Massachusetts legislature each determined that, in addition to criminal penalties, private rights of action are an essential part of the anti-trafficking enforcement scheme. The First Circuit's decision strips petitioners of their right to hold respondents civilly liable for the injuries that their criminal conduct caused, and thereby impairs the enforcement scheme that Congress and the Massachusetts legislature so carefully crafted.

**I. THE FIRST CIRCUIT'S BROAD CONSTRUCTION OF CDA IMMUNITY CONFLICTS WITH OTHER COURTS AND WITH GUIDANCE FROM THIS COURT ON THE INTERPRETATION OF INTERSECTING STATUTES**

**A. The First Circuit's Broad Reading Of The CDA Conflicts With The More Limited Construction Given It By Other Courts**

**1. The Ninth Circuit Rejects the First Circuit's "causation" construction of the CDA**

The Ninth Circuit, which has the most developed jurisprudence concerning Section 230, construes that provision far more narrowly than the First Circuit does. In particular, the Ninth Circuit has explicitly rejected the First Circuit's view that the mere presence of third-party content in the chain of causation leading to a plaintiff's injury necessarily triggers Section 230. In stark contrast to the First Circuit's approach, the Ninth Circuit has instead looked beyond the presence of third-party content to the particular nature of the claims at issue to determine whether Section 230 applies. Other courts of appeals have agreed with the

Ninth Circuit that liability can lie against an ISP that acts as more than a mere passive intermediary, even where third-party content played some role in the alleged injury.

In *Fair Housing Council v. Roommates.com*, the Ninth Circuit held that a website operator could be held liable for its own conduct that violated a “law[] of general applicability.” 521 F.3d 1157, 1164 n.15 (2008). The court explained that, “even if the [challenged] information originated with a user,” the party “responsible for putting [that] information online may be subject to liability” if, in the process of doing so, the ISP’s own conduct makes it “more than a passive transmitter of information provided by others.” *Id.* at 1165-1166. The court emphasized that the plaintiffs’ allegations sought to hold Roommates.com liable for its “own acts,” which were “entirely its doing.” *Id.* at 1165. In other words, the fact that third-party content appeared in the chain of causation did not decide the matter. If the result were otherwise, the Ninth Circuit noted, such an interpretation of Section 230 would stray far beyond congressional intent: “The Communications Decency Act was not meant to create a lawless no-man’s-land on the Internet.” *Id.* at 1164.

The next year, in *Barnes v. Yahoo!, Inc.*, the Ninth Circuit concluded that a defendant could not rely on Section 230 to defend against a promissory estoppel claim where the defendant had promised the plaintiff that it would remove certain third-party content from its website but then failed to do so. See 570 F.3d 1096, 1099, 1107-1109 (2009). The promissory estoppel claim, the court explained, did not “seek to hold Yahoo liable as a publisher or speaker of third-party content.” *Id.* at



1107. That is, the claim was not based on Yahoo acting as a passive intermediary, nor did it seek to impute the content of the third-party speech to Yahoo. Rather, the claim alleged that Yahoo had acted “as the counterparty to a contract, as a promisor who has breached.” *Ibid.* Even though the plaintiff would not have suffered injury but for the third party’s original act of posting the content, the court held that this fact did not bar the plaintiff’s claim. Instead, what mattered was that the claim sought to hold the ISP liable for its own conduct in violation of contract law.

Most recently, in *Jane Doe No. 14 v. Internet Brands, Inc.*, the Ninth Circuit reaffirmed the reasoning of *Roommates.com* and *Barnes* by explicitly holding that a claim was not barred by Section 230 simply because publication of third-party content on a website was part of the chain of causation leading to the injury. See 824 F.3d 846, 848, 853 (2016) (decision on rehearing). The plaintiff in *Internet Brands* alleged that the defendant website knew that two of the site’s users had been engaging in a scheme to lure, drug, and rape women by responding to postings on the site; the plaintiff claimed that the site’s operators had tortiously failed to warn the plaintiff and others like her about the risk of being victimized. *Id.* at 848-849. Unlike the First Circuit, the Ninth Circuit explained that, although the defendant “acted as the ‘publisher or speaker’ of user content \* \* \* and that action could be described as a ‘but-for’ cause of [plaintiff’s] injuries \* \* \* that does not mean the failure to warn claim seeks to hold [defendant] liable as the ‘publisher or speaker’ of user content.” *Id.* at 853. The court reaffirmed *Barnes*’s holding that “the CDA does not provide a

general immunity against all claims derived from third-party content.” *Ibid.* And it further recognized that any concern about a “chilling effect” on Internet speech—such as the First Circuit expressed here, (App., *infra*, 10a)—is inapplicable in a situation like this: “Congress has not provided an all purpose get-out-of-jail-free card for businesses that publish user content on the internet, though any claims might have a marginal chilling effect on internet publishing businesses.” *Internet Brands*, 824 F.3d at 853.

The lynchpin of these decisions is the understanding that Section 230, which was designed to protect ISPs in their capacity as “neutral intermediaries,” does not immunize a defendant from its own alleged violations of “laws of general applicability.” *Room-mates.com*, 521 F.3d at 1164 n.15. The court emphasized that the internet “is no longer a fragile new means of communication that could easily be smothered in the cradle,” but rather “a dominant—perhaps the preeminent—means through which commerce is conducted.” *Id.* at 1164 n.15. In that context, courts must not “exceed the scope of the immunity provided by Congress” by “giv[ing] online businesses an unfair advantage over their real-world counterparts,” who have to obey the same laws as everyone else, *ibid.*—including laws prohibiting participation in child sex trafficking ventures. If a business operator in the brick-and-mortar world had created a marketplace for illegal sex with children, assisted child sex traffickers in connecting with their “customers,” and shielded those traffickers from law enforcement scrutiny—in other words, if it had done exactly what petitioners allege that respondents have done—that business would be subject to civil liability in

the Ninth Circuit for its participation in child sex trafficking. But not so in the First Circuit.

**2. Other circuits agree that Section 230 is limited to protection of ISPs serving as “neutral intermediaries”**

Other courts of appeals have agreed with the Ninth Circuit that Section 230 must have limits, in order to avoid turning the internet into the “lawless no-man’s land” that the *Roommates.com* court warned against. 521 F.3d at 1164; *FTC v. Accusearch, Inc.*, 570 F.3d 1187, 1201 (10th Cir. 2009) (“Accusearch’s actions were not ‘neutral’ with respect to generating offensive content; on the contrary, its actions were intended to generate such content. Accusearch is not entitled to immunity under the CDA.”); *Doe v. SexSearch.com*, 551 F.3d 412, 415 (6th Cir. 2008) (refusing to adopt district court’s interpretation of Section 230, “which would read [that section] more broadly than any previous Court of Appeals decision has read it, potentially abrogating all state- or common-law causes of action brought against interactive Internet services”); *Chicago Lawyers’ Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666, 669 (7th Cir. 2008) (holding 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”).

Accordingly, the federal courts of appeal are broadly aligned on the principle that Section 230 protects neutral intermediaries, not ISPs that, through their own acts, have committed a wrong against a plaintiff.<sup>3</sup>

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<sup>3</sup> See, e.g., *Klayman v. Zuckerberg*, 753 F.3d 1354, 1358 (D.C. Cir. 2014) (a website is immune pursuant to Section 230 if it “mere-

This principle is particularly strong where the ISP's affirmative conduct is itself against the law. Both the Ninth and Tenth Circuits have explicitly held that Section 230 does not apply to non-neutral ISPs engaged in misconduct that violates federal statutes. See *Accusearch*, 570 F.3d at 1198-99 (Section 230 did not apply where the ISP contributed to the unlawful conduct of its users in violation of the Telecommunications Act of 1996); *Roommates.com*, 521 F.3d at 1166 (ISP was “much more than a passive transmitter of information provided by others,” and was therefore liable under Section 230, where it required users to disclose illicit preferences that violated the Fair Housing Act).

Unlike these other circuits, the First Circuit adopted a “but-for” causation test that does not limit its application to passive intermediaries. The First Circuit goes far beyond those other courts to deem a plaintiff's cause of action to “treat[]” the defendant “as the publisher or speaker” of third-party content, and to be barred by Section 230(c)(1), wherever “there would [have been] no harm” to the plaintiff “but for [the third-party] content.” App., *infra*, 12a.

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ly provides a neutral means by which third parties can post information of their own independent choosing online”); *Doe v. GTE Corp.*, 347 F.3d 655, 657 (7th Cir. 2003) (finding that an ISP was entitled to Section 230 immunity where its conduct was “passive”); *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1124 (9th Cir. 2003) (finding that an ISP was a neutral intermediary entitled to Section 230 protection because it did not contribute to the “underlying misinformation”); *Ben Ezra, Weinstein & Co. v. Am. Online, Inc.*, 206 F.3d 980, 985-986 (10th Cir. 2000) (finding that an ISP was a neutral intermediary entitled to Section 230 protection because it did nothing to encourage the offensive content), cert. denied, 531 U.S. 824 (2000).

Yet petitioners' claims under the TVPRA and the MATA do not "treat" respondents "as a publisher" at all. Petitioners do not assert any claim that sounds in defamation, or that resembles defamation despite being asserted as a different cause of action. These claims do not seek to impute another's speech to Backpage.com. See *Universal Commc'n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 422 (1st Cir. 2007) (claim treated defendant as a publisher because "any liability against [a defendant] must be premised on imputing to it the alleged misinformation" written by message board users). Nor do petitioners' TVPRA and MATA claims seek to hold Backpage.com liable for merely posting the advertisements, or for the act of communicating the advertisements. Compare, e.g., *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 333 (4th Cir. 1997) (under plaintiff's claims, an ISP defendant would be "cast \* \* \* in the same position as the party who originally posted the offensive messages"). In other words, plaintiffs do not seek to impose liability because of Backpage.com's role as an intermediary. Rather, petitioners seek to hold respondents liable for their own affirmative conduct—conduct that ranged far beyond the "standard elements of web sites 'with both lawful and unlawful potential.'" *Lycos*, 478 F.3d at 421 (quoting *MGM Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 937 (2005)); see also *J.S. v. Vill. Voice Media Holdings, L.L.C.*, 359 P.3d 714, 718 (Wash. 2015) (en banc) (explaining that Backpage's policies, designed to enable sex trafficking, are "not simply neutral policies prohibiting or limiting certain content").

The First Circuit's interpretation of Section 230 would provide any website operator with an absolute immunity from any civil claim for a limitless range of

illegal conduct, provided solely that third party content appears somewhere in the chain of causation leading to the plaintiff's injury. Any plaintiff bringing a claim against a website operator in the First Circuit will therefore face an insuperable barrier to overcoming a motion to dismiss, whereas if that same claim were brought in a district court in the Ninth Circuit, that same plaintiff, with the same factual allegations and the same claims, would have an opportunity to take discovery to prove her case.

**3. The Washington Supreme Court rejected a CDA defense to an identical claim to Petitioners'**

The conflict detailed above is not mere speculation—it has already occurred in a state court of last resort within the Ninth Circuit. In September 2015, the Washington Supreme Court confronted a case with nearly identical facts to those alleged here, brought by similarly situated plaintiffs against the exact same defendants, advancing substantively similar claims. The Washington Supreme Court, following the Ninth Circuit's lead, allowed that case to proceed to discovery.

In *J.S.*, as here, plaintiffs who had been trafficked for sex on Backpage.com while they were minors brought a complaint alleging that respondents had facilitated their sexual exploitation. 359 P.3d 714. *J.S.* and her two co-plaintiffs, like the plaintiffs here, were raped multiple times while minors by adults who responded to Backpage.com advertisements. *Id.* at 716. *J.S.* brought suit in Washington state court alleging violations of a variety of state law claims, including sexual exploitation of children. *Ibid.*; see *id.* at 717 n.3. As here, respondents moved to dismiss, arguing that they were

immune from liability under Section 230. *Id.* at 716. And as here, the plaintiffs responded that respondents were not protected from suit because their website was “designed to help pimps develop advertisements that can evade the unwanted attention of law enforcement, while still conveying the illegal message”—specifically, Backpage.com had intentionally structured its posting requirements in a manner that it knew would allow and encourage the trafficking of children for sex, and respondents’ supposed preventative measures were in reality “a fraud and a ruse” designed to help Backpage.com and the traffickers who use it “evade law enforcement by giving the [false] appearance that Backpage.com does not allow sex trafficking on its website.” *Id.* at 716, 717-718.

The state trial court in *J.S.* denied defendants’ motion to dismiss and allowed the case to proceed to discovery. The defendant took an interlocutory appeal, and in an en banc decision, the Washington Supreme Court affirmed. 359 P.3d at 715-716. Relying on the Ninth Circuit’s decision in *Roommates.com*, the court held that the plaintiffs’ allegations created a plausible inference that respondents were not protected by Section 230 of the CDA: where plaintiffs offered plausible allegations of participation in child sex trafficking, those allegations, if proved, would demonstrate that Backpage.com did more than passively “maintain neutral policies prohibiting or limiting certain content,” as the CDA required for protection from liability. *Id.* at 717. Under these circumstances, the court held that discovery was necessary to “ascertain whether in fact Backpage designed its posting rules to induce sex traf-

ficking,” because, if it had, the CDA would not provide any protection. *Ibid.*

On almost identical allegations in the present case, against the same defendants as in *J.S.*, the First Circuit held the opposite. In stark contrast to the Washington court, the First Circuit failed to examine petitioners’ allegations of respondents’ participation in child sex trafficking. Instead, the court of appeals assumed *arguendo* that plaintiffs had stated a claim under the TVPRA’s private right of action yet did not treat that as determinative. App., *infra*, 12a-14a. Quite the opposite—the First Circuit held that *even if* the petitioners could show that respondents violated a criminal sex trafficking statute, the pertinent question was whether third-party content played any role in the causal chain leading to the plaintiffs’ injuries. See *ibid.*

The court of appeals’ holding in the present case creates a direct conflict with a state court of last resort. It is plain that the Washington Supreme Court, following the Ninth Circuit’s lead, would have permitted petitioners’ claims to survive a motion to dismiss. Petitioners alleged the same conduct by the same defendants as in the *J.S.* case, and they likewise sought to hold respondents liable for their participation in the sex trafficking of children based on this conduct. Yet, if *J.S.* had brought her claim in a federal district court in the First Circuit, that claim would not have survived a motion to dismiss. There is thus a fundamental disagreement on the question of whether a website operator can be held civilly liable for its own illegal conduct, specifically participation in child sex trafficking, where third-party content is a link in the chain of causation leading to a plaintiff’s injuries. This conflict produces the unac-



ceptable result that the forum in which claims against Backpage.com are brought determines their outcome.

### **B. The First Circuit’s Decision Fails To Properly Harmonize Intersecting Statutes**

It is well settled that the “classic judicial task of reconciling many laws enacted over time, and getting them to ‘make sense’ in combination, necessarily assumes that the implications of a statute may be altered by the implications of a later statute.” *United States v. Fausto*, 484 U.S. 439, 453 (1988); see also *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 143 (2000). This is particularly so where the scope of the earlier statute is broad but the subsequent statutes more specifically address the topic at hand. See *Brown & Williamson*, 529 U.S. at 143. The courts below ignored their obligation to parse the relevant statutes and determine if they can coexist. See *Morton v. Mancari*, 417 U.S. 535, 551 (1974) (“The courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.”); *J.E.M. AG Supply, Inc. v. Pioneer Hi-Bred Int’l, Inc.*, 534 U.S. 124, 144 (2001) (“Here we can plainly regard each statute as effective because of its different requirements and protections.”).

In *POM Wonderful LLC v. Coca-Cola Co.*, this Court considered the Lanham Act and the Federal Food, Drug, and Cosmetic Act (FDCA) and found that a plaintiff could maintain a private right of action under the Lanham Act in the face of an existing FDCA regulatory regime. 134 S. Ct. 2288, 2238-2239 (2014). Finding that “[n]othing in the text, history, or structure of

the FDCA or the Lanham Act shows the congressional purpose or design to forbid these suits,” *id.* at 2233, this Court concluded that the “best way to harmonize the statutes” was to allow the appellant’s Lanham Act claim to proceed. *Id.* at 2237. *POM Wonderful* teaches that when two statutes are not in conflict with one other, it would “show disregard for the congressional design to hold that Congress nonetheless intended one federal statute to preclude the operation of the other.” *Id.* at 2238.

In the present case, three victims of child sex trafficking seek redress against a key participant in the trafficking transactions that caused them grave harm. The relevant claims and defenses invoke, on the one hand, the federal TVPRA, which grants victims of sex trafficking ventures a private right of action, and, on the other hand, the CDA, enacted in 1996, which offers an ISP protection from claims that seek to “treat” it as the “publisher or speaker” of content that was created entirely by “another.” The TVPRA, which was originally enacted in 2000 and was reauthorized in 2003, 2005, 2008, 2011, and 2013, is a subsequent statute that “more specifically address[es] the topic at hand” than the CDA does. See *Brown & Williamson*, 529 U.S. at 143. “Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment.” *Morton*, 417 U.S. at 550-551. “Nor can it be said that the two statutes ‘cannot mutually coexist.’” *J.E.M.*, 534 U.S. at 143 (quoting *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 155, (1976)). In passing the TVPRA, Congress likely “did not intend” that a website operator would be immune from civil liability under the statute’s

private right of action provision simply because, in addition to the website operator’s own unlawful conduct, online content created by a third party was also a contributing “but-for” cause of the plaintiff’s injuries. See *POM Wonderful*, 134 S. Ct. at 2239. By the same token, there is nothing in the language or context of Section 230 of the CDA that Congress intended to immunize website operators from being held civilly liable for conduct that violates federal criminal law.

In arriving at its decision in *POM*, this Court observed that general preemption principles are “instructive” even in a dispute involving federal statutes. 134 S. Ct. at 2236. This observation informed the careful and deferential attention that the Court applied to discerning Congressional intent in that case. This approach to interpretation is dictated here not only because two federal statutes intersect, but for the additional reason that the CDA expressly preempts state laws that are “inconsistent” with the CDA. See 47 U.S.C. 230(e)(3). The First Circuit, however, declined to apply preemption principles to constrain its interpretation of the “treat as a publisher” language or to evaluate the relationship between the statutes.

The First Circuit acknowledged that there were two intersecting federal statutes at play as well as a parallel state statute. App., *infra*, 12a-17a. However, rather than construing Section 230(c)(1) of the CDA in a manner that would “harmonize” it with the TVPRA and enable the two statutes “to make sense in combination,” see *Fausto*, 484 U.S. at 453; *POM Wonderful*, 134 S. Ct. at 2237, the First Circuit prioritized a “broad” interpretation of the CDA at the expense of the TVPRA. Section 230(c)(1)’s plain language, however,

was susceptible to a narrower reading. Indeed, full effect can be given to the “treat as a publisher” language of the CDA by protecting those ISPs that are neutral intermediaries from potential liability related to illegal content by third parties and by exposing to potential liability for their own conduct those ISPs that deliberately use their websites to accomplish criminal purposes. This result would have avoided any conflict between the CDA and the TVPRA (and preserved the “not inconsistent” state statute as well). Under this Court’s precedents, this was the reading of Section 230(c)(1) that the First Circuit was obliged to adopt. See *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 518-520 (1992) (supporting a “narrow reading” of the outer limits of an express statutory preemption provision); see also *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996). Had the First Circuit done so, no conflict would have arisen between it and the decisions of the Ninth Circuit and Washington Supreme Court.

## II. THIS IS A CASE OF EXCEPTIONAL IMPORTANCE

This case presents the Court with an opportunity to address the CDA for the first time since *Reno v. ACLU*, and to resolve recurring questions concerning the scope of the protection from liability afforded by Section 230. 521 U.S. 844 (1997). In the twenty years since the passage of the CDA, lower courts frequently have grappled with disputes over the proper interpretation of the language of Section 230(c). Despite approximately five hundred lower court decisions, including almost fifty decisions by federal courts of appeal, Section 230 continues to generate controversy about the language and the proper mode of analysis of the statute. See, e.g., Ryan J.P. Dyer, *The Communication*

*Decency Act Gone Wild: A Case for Renewing the Presumption Against Preemption*, 37 Seattle U. L. Rev. 837 (2014); Joanna Schorr, *Malicious Content on the Internet: Narrowing Immunity under the Communications Decency Act*, 87 St. John's L. Rev. 733, 737 (2013); Gregory M. Dickinson, *An Interpretive Framework for Narrower Immunity Under Section 230 of the Communications Decency Act*, 33 Harv. J.L. & Pub. Pol'y 863 (2010); Ali Grace Ziegler, *Immoral Immunity: Using a Totality of the Circumstances Approach to Narrow the Scope of Section 230 of the Communications Decency Act*, 61 Hastings L.J. 1307 (2010). The First Circuit's decision dramatically sharpens the differences between the lower courts by extending Section 230 further than any other court and highlights the need for definitive guidance from this Court.

**A. The First Circuit's Decision Breaks With The Existing Consensus Concerning The Breadth Of Section 230**

In the twenty years since its passage, Section 230(c)(1) has been cited in over 500 state and federal opinions. These cases typically arise in the “heartland” of subject matter that Section 230 was designed to address—that is, cases in which a plaintiff seeks to hold an ISP liable for the passive transmission of defamatory or offensive content authored by third parties.<sup>4</sup> Such cases readily fit into Section 230's framework, because “publishing” is an element of a defamation claim. *See*

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<sup>4</sup> Section 230's specific focus on defamatory statements and publisher liability reflect Congress' goal to incentivize ISPs who acted in good faith to remove or restrict potentially offensive content. *See* H.R. Rep. No. 458, *supra*, at 194.

Restatement (Second) of Torts, *supra*, §§ 577, 581 (1977). To date, all federal circuits have addressed Section 230 at least once, and most of these decisions arise from defamation claims or allegations that sound in defamation against websites acting as neutral intermediaries.<sup>5</sup>

While decisions of the Ninth Circuit and other courts shared a common understanding regarding the limitations inherent in Section 230's scope, the First Circuit's decision breaks with that consensus regarding the scope of the statute. The First Circuit applied the protections of Section 230 where, by the court's own

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<sup>5</sup> See *Universal Commc'n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 419 (1st Cir. 2007) (claims against a message board operator for allegedly false and defamatory postings by pseudonymous posters); *Ricci v. Teamsters Union Local 456*, 781 F.3d 25 (2d Cir. 2015) (defamation claim against neutral web hosting service GoDaddy.com); *Green v. Am. Online, Inc.*, 318 F.3d 465 (3d Cir. 2003) (claim against a neutral ISP for failure to prevent the publication of defamatory information), cert denied, 540 U.S. 877 (2003); *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 328 (4th Cir. 1997) (claims against a neutral ISP for delay in removing defamatory messages posted by an unidentified third party); *Jones v. Dirty World Entm't Recordings, LLC*, 755 F.3d 398 (6th Cir. 2014) (defamation claims against an ISP that operated a user-generated online tabloid that published third-party content); *Johnson v. Arden*, 614 F.3d 785 (8th Cir. 2010) (defamation claims against a neutral ISP for defamatory statements posted by third parties); *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119 (9th Cir. 2003) (defamation claim against a neutral ISP for publication of a false profile on a dating website submitted by a third party); *Ben Ezra, Weinstein & Co. v. Am. Online, Inc.*, 206 F.3d 980, 985 (10th Cir. 2000) (claim against a neutral ISP for defamation claims based on third-party postings); *Dowbenko v. Google, Inc.*, 582 Fed. App'x 801 (11th Cir. 2014) (defamation claim against Google, a neutral search engine, for defamatory search results that resulted from content on third-party websites).

reasoning, the ISP at issue was not a neutral intermediary. The First Circuit assumed for the purposes of its decision that respondents' conduct violated the TVPRA, which by definition means it could not have been "neutral" for the purposes of Section 230 immunity. In doing so, the First Circuit expanded Section 230 beyond what any other court of appeals has previously held. This Court's guidance is necessary to assure that the application of Section 230 in cases that fall outside the "heartland" of defamation-like claims is faithful to the limited intentions of Congress and that plaintiffs across the country with claims such as petitioners have equal access to the courts.

**B. The Court Of Appeals' Decision Has Broad Consequences For Internet Crime Generally And Online Child Sex Trafficking In Particular**

The First Circuit's opinion effectively immunizes an array of criminal conduct by ISPs, expanding the already broad reach of Section 230. In a society now dominated by digital technology, criminal activity on the internet has increased markedly, and some portion of that activity involves affirmative wrongdoing by ISPs themselves. As just one example of the Internet serving as a hub for criminal enterprise, the creator of the website "Silk Road," who designed a "sophisticated and extensive [Internet] criminal marketplace" that enabled thousands of individuals to anonymously transact in illegal drugs without detection, was convicted last year of seven criminal charges, including narcotics and money laundering conspiracies. See *United States v. Ulbricht*, 31 F. Supp. 3d 540, 549 (S.D.N.Y. 2014); Jury Verdict, *Ulbricht*, 31 F. Supp. 3d 540 (Feb. 5, 2015)

(No. 14cr68). The indictment alleged that Ulbricht, through the operation of his website, had engaged in “specific and intentional conduct to join with narcotics traffickers or computer hackers to help them sell illegal drugs or hack into computers, and to be involved in enforcing rules (including using murder-for-hire) regarding such sales and taking commissions.” 31 F. Supp. 3d at 568. Yet, under the First Circuit’s interpretation of Section 230, through that provision, Congress immunized Ulbricht, a convicted federal felon, from liability to any person harmed by the illegal activities that took place via Silk Road—even, potentially, the family of a victim of a murder-for-hire—could not maintain a civil claim against Ulbricht, a convicted federal felon.

The consequences of the First Circuit’s broad interpretation are particularly troublesome for efforts to combat child sex trafficking. In its reauthorizations of the TVPRA, Congress has been well aware that sex trafficking has moved from the street corner to the internet, where websites like Backpage.com create virtual red light districts. The TVPRA is a tool that Congress plainly expected that the Department of Justice and private plaintiffs would use to expand the scope of enforcement to create further disincentives to sex trafficking. In particular, the TVPRA’s civil enforcement provision empowers victims to pursue a private right of action against any persons who “knowingly benefit[ ] financially \* \* \* from participation in [the underlying sex trafficking] venture.” 18 U.S.C. 1595. This provision expressly expands the potential defendants beyond mere “perpetrators” under 1591(a)(1)—*i.e.*, traffickers—to participants who provide support for the “[the underlying sex trafficking] venture.” 18 U.S.C.



1591(a)(2). There is nothing in the language or context of the statute that suggests that Congress intended to exclude websites that facilitate the commercial sex business from the reach of the TVPRA. Such an exemption would be akin to an exemption for brick-and-mortar hotels that openly solicit and support illegal commercial sex on their premises, which is directly inconsistent with the interpretation taken by the United States. See, e.g., Dep't of Justice, *Louisiana Motel Owner Pleads Guilty in Sex Trafficking Case* (July 1, 2015), <https://www.justice.gov/opa/pr/louisiana-motel-owner-pleads-guilty-sex-trafficking-case> (prosecution of motel owner for financially benefiting from sex trafficking ventures).

In this case, the First Circuit's "but-for" gloss on the "treat as a publisher" language of Section 230 plainly undermines legislative efforts to curtail the sexual exploitation of children. The decision therefore transforms the CDA from a shield for neutral ISPs from defamation suits and analogous forms of civil liability into a dangerous sword wielded by Backpage.com and other criminal enterprises to enable their unlawful conduct. Indeed, the First Circuit's interpretation essentially rejects the common sense proposition that Section 230 does not relieve websites of the obligation to "comply with laws of general applicability," including those prohibiting the sale of children for sex. *Roommates.com*, 521 F.3d at 1164 n.15. This is a stunning proposition that bears careful examination and analysis. This case presents an opportunity to correct and reconcile the boundaries of Section 230 with the TVPRA and its goal of protecting children from sex trafficking.

### C. The First Circuit's Reasoning Extends To Other Statutory Private Rights Of Action

The First Circuit's treatment of the TVPRA and the MATA could have ramifications in other contexts where Congress or the States have created private rights of action that are integral to the enforcement of criminal or civil statutes. This Court has often recognized the value and importance of private civil remedies in statutory enforcement schemes. See, *e.g.*, *Rotella v. Wood*, 528 U.S. 549, 557-558 (2000) (holding the object of the RICO civil enforcement provision "is thus not merely to compensate victims but to turn them into prosecutors \* \* \* dedicated to eliminating racketeering activity"); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 634-635 (1985) ("Without doubt, the private cause of action plays a central role in enforcing [the Sherman Act antitrust] regime.") .

Congress has frequently included such private rights of action to enhance statutory enforcement schemes. For example, the Anti-Terrorism Act contains a civil liability provision, 18 U.S.C. 2333(a), that allows victims of "act[s] of international terrorism" to recover damages for their injuries. Numerous statutes similarly afford private rights of actions that are integral to enforcement goals. See, *e.g.*, 18 U.S.C. 1964(c) (authorizing private plaintiffs to sue for violations of the Racketeer Influenced and Corrupt Organizations Act); 18 U.S.C. 2252A (authorizing private plaintiffs to sue for violations of the Child Pornography Prevention Act of 1996); 18 U.S.C. 1030(g) (authorizing private plaintiffs to sue for violations of the Computer Fraud and Abuse Act); 18 U.S.C. 1836(b)(1) (authorizing pri-

vate plaintiffs to sue for violations of the Defend Trade Secrets Act of 2016).<sup>6</sup>

Nothing in the language of the CDA, the TVPRA, or these other specialized enforcement statutes suggests that an ISP that participates in terrorism, racketeering, or sex trafficking ought to be shielded against statutory civil liability for their own aid to and participation in that illegal conduct. Yet the First Circuit’s reasoning in this sex trafficking case, applied to these other statutes, likely will foreclose a civil action against a website operator for its affirmative conduct so long as third-party content appearing on the internet forms some part of the chain of events that leads to liability. This case provides this Court with an opportunity to resolve whether, as petitioners contend, this is a result that Congress “did not intend.” *POM Wonderful v. Coca Cola Co.*, 134 S. Ct. 2228, 2239 (2014).

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<sup>6</sup> In addition, the civil code contains numerous statutory provisions creating private rights of action. See 42 U.S.C. 2000e-2(a) (authorizing private plaintiffs to sue for violations of Title VII of the Civil Rights Act); 15 U.S.C. 1125(a)(1) (authorizing private plaintiffs to sue for violations of the Lanham Act); 15 U.S.C. 1691e(a) (authorizing private plaintiffs to sue for violations of the Equal Credit Opportunity Act); 15 U.S.C. 1640(a) (authorizing private plaintiffs to sue for violations of the Truth in Lending Act); 15 U.S.C. 15(a) (authorizing private plaintiffs to sue for violations of the Clayton Antitrust Act).

**CONCLUSION**

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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AUGUST 2016

## **APPENDIX**

APPENDIX A

UNITED STATES COURT OF APPEALS  
FOR THE FIRST CIRCUIT

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No. 15-1724

JANE DOE NO. 1 ET AL.,  
Plaintiffs, Appellants,  
v.

BACKPAGE.COM, LLC ET AL.,  
Defendants, Appellees.

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Appeal from the United States District Court for the  
District of Massachusetts

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[Hon. Richard G. Stearns, U.S. District Judge]

Before

Barron, Circuit Judge,  
Souter,\* Associate Justice,  
and Selya, Circuit Judge.

John T. Montgomery, with whom Ching-Lee Fukuda, Aaron M. Katz, Christine Ezzell Singer, Jessica L. Soto, Rebecca C. Ellis, and Ropes & Gray LLP were on brief, for appellants.

Maura Healey, Attorney General of Massachusetts, and Genevieve C. Nadeau, Deputy Chief, Civil Rights Division, on brief for Commonwealth of Massachusetts, amicus curiae.

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\* Hon. David H. Souter, Associate Justice (Ret.) of the Supreme Court of the United States, sitting by designation.

Dennis J. Herrera, City Attorney, Victoria Wong, Mollie Lee, Elizabeth Pederson, and Mark D. Lipton, Deputy City Attorneys, on brief for City and County of San Francisco, amici curiae.

Cathy Hampton, City Attorney, on brief for City of Atlanta, amicus curiae.

Michael N. Feuer, City Attorney, James P. Clark, Mary Clare Molidor, Anh Truong, Sahar Nayeri, and Office of the Los Angeles City Attorney, on brief for City of Los Angeles, California, amicus curiae.

Tracy Reeve, City Attorney, and Harry Auerbach, Chief Deputy City Attorney, on brief for City of Portland (Oregon), amicus curiae.

Donna L. Edmundson, City Attorney, on brief for City of Houston, amicus curiae.

Shelley R. Smith, City Solicitor, on brief for Michael A. Nutter, Mayor of Philadelphia, amicus curiae.

Jeffrey Dana, City Solicitor, on brief for City of Providence and Mayor Jorge O. Elorza, amicus curiae.

Stacey J. Rappaport and Milbank, Tweed, Hadley & McCloy LLP on brief for Covenant House, Demand Abolition, ECPAT-USA, Human Rights Project for Girls, My Life, My Choice of Justice Resource Institute, National Crime Victim Law Institute, Sanctuary for Families, and Shared Hope International, amici curiae.

Jenna A. Hudson, Kami E. Quinn, Gilbert LLP, and Andrea Powell, Executive Director, on brief for FAIR Girls, amicus curiae.

Michael Rogoff, Robert Barnes, Oscar Ramallo, and Kaye Scholer LLP, on brief for National Center

for Missing and Exploited Children, amicus curiae.

Jeffrey J. Pyle, with whom Robert A. Bertsche, Prince Lobel Tye LLP, James C. Grant, Ambika K. Doran, and Davis Wright Tremaine LLP were on brief, for appellees.

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March 14, 2016

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**SELYA, Circuit Judge.** This is a hard case — hard not in the sense that the legal issues defy resolution, but hard in the sense that the law requires that we, like the court below, deny relief to plaintiffs whose circumstances evoke outrage. The result we must reach is rooted in positive law. Congress addressed the right to publish the speech of others in the Information Age when it enacted the Communications Decency Act of 1996 (CDA). See 47 U.S.C. § 230. Congress later addressed the need to guard against the evils of sex trafficking when it enacted the Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA), codified as relevant here at 18 U.S.C. §§ 1591, 1595. These laudable legislative efforts do not fit together seamlessly, and this case reflects the tension between them. Striking the balance in a way that we believe is consistent with both congressional intent and the teachings of precedent, we affirm the district court’s order of dismissal. The tale follows.

## I. BACKGROUND

In reviewing the grant or denial of a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), we draw upon the well-pleaded facts as they appear in the operative pleading (here, the second amended com-



plaint). See SEC v. Tambone, 597 F.3d 436, 438 (1st Cir. 2010) (en banc).

Backpage.com provides online classified advertising, allowing users to post advertisements in a range of categories based on the product or service being sold.<sup>1</sup> Among the categories provided is one for “Adult Entertainment,” which includes a subcategory labeled “Escorts.” The site is differentiated by geographic area, enabling users to target their advertisements and permitting potential customers to see local postings.

This suit involves advertisements posted in the “Escorts” section for three young women — all minors at the relevant times — who claim to have been victims of sex trafficking. Suing pseudonymously, the women allege that Backpage, with an eye to maximizing its profits, engaged in a course of conduct designed to facilitate sex traffickers’ efforts to advertise their victims on the website. This strategy, the appellants say, led to their victimization.

Past is prologue. In 2010, a competing website (Craigslist) shuttered its adult advertising section due to concerns about sex trafficking. Spying an opportunity, Backpage expanded its marketing footprint in the adult advertising arena. According to the appellants, the expansion had two aspects. First, Backpage engaged in a campaign to distract attention from its role in sex trafficking by, for example, meeting on various occasions with hierarchs of the National Center for Missing and Exploited Children (NCMEC) and making

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<sup>1</sup> The appellants sued Backpage.com, LLC, Camarillo Holdings, LLC, and New Times Media, LLC. For ease in exposition, we refer to these three affiliated companies, collectively, as “Backpage.”

“false and misleading representations” to the NCMEC and law enforcement regarding its efforts to combat sex trafficking. But this campaign, the appellants suggest, was merely a ruse.

The second aspect of Backpage’s expansion strategy involved the deliberate structuring of its website to facilitate sex trafficking. The appellants aver that Backpage selectively removed certain postings made in the “Escorts” section (such as postings made by victim support organizations and law enforcement “sting” advertisements) and tailored its posting requirements to make sex trafficking easier.<sup>2</sup>

In addition, the appellants allege that Backpage’s rules and processes governing the content of advertisements are designed to encourage sex trafficking. For example, Backpage does not require phone number verification and permits the posting of phone numbers in alternative formats. There is likewise no e-mail verification, and Backpage provides users with the option to “hide” their e-mail addresses in postings, because Backpage provides message forwarding services and auto-replies on behalf of the advertiser. Photographs uploaded for use in advertisements are shorn of their metadata, thus removing from scrutiny information

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<sup>2</sup> The appellants note that (among other things) the process of posting an advertisement in the “Escorts” section does not require the poster to provide either identifying information or the subject of the advertisement. And even though the website does require that posters verify that they are 18 years of age or older to post in that section, entering an age below 18 on the first (or any successive) attempt does not block a poster from entering a different age on a subsequent attempt. Backpage also allows users to pay posting fees anonymously through prepaid credit cards or digital currencies.

such as the date, time, and location the photograph was taken. While Backpage's automated filtering system screens out advertisements containing certain prohibited terms, such as "barely legal" and "high school," a failed attempt to enter one of these terms does not prevent the poster from substituting workarounds, such as "brly legal" or "high schl."

The appellants suggest that Backpage profits from having its thumb on the scale in two ways. First, advertisements in the "Adult Entertainment" section are the only ones for which Backpage charges a posting fee. Second, users may pay an additional fee for "Sponsored Ads," which appear on the right-hand side of every page of the "Escorts" section. A "Sponsored Ad" includes a smaller version of the image from the posted advertisement and information about the location and availability of the advertised individual.

Beginning at age 15, each of the appellants was trafficked through advertisements posted on Backpage. Jane Doe #1 was advertised on Backpage during two periods in 2012 and 2013. She estimates that, as a result, she was raped over 1,000 times. Jane Doe #2 was advertised on Backpage between 2010 and 2012. She estimates that, as a result, she was raped over 900 times. Jane Doe #3 was advertised on Backpage from December of 2013 until some unspecified future date. As a result, she was raped on numerous occasions.<sup>3</sup> All of the rapes occurred either in Massachusetts or Rhode

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<sup>3</sup> Once the parents of Doe #3 located some of the Backpage advertisements featuring their daughter, they demanded that the advertisements be removed from the website. A week later (after at least one other entreaty to Backpage), the postings remained on the website.

Island. Sometimes the sex traffickers posted the advertisements directly and sometimes they forced the victims to post the advertisements.

Typically, each posted advertisement included images of the particular appellant, usually taken by the traffickers (but advertisements for Doe #3 included some pictures that she herself had taken). Many of the advertisements embodied challenged practices such as anonymous payment for postings, coded terminology meant to refer to underage girls, and altered telephone numbers.

The appellants filed suit against Backpage in October of 2014. The operative pleading is the appellants' second amended complaint, which limns three sets of claims. The first set consists of claims that Backpage engaged in sex trafficking of minors as defined by the TVPRA and its Massachusetts counterpart, the Massachusetts Anti-Human Trafficking and Victim Protection Act of 2010 (MATA), Mass. Gen. Laws ch. 265, § 50(a). The second set consists of claims under a Massachusetts consumer protection statute, which forbids "unfair or deceptive acts or practices in the conduct of any trade or commerce." Mass. Gen. Laws ch. 93A, § 2(a). The last set consists of claims alleging abridgements of intellectual property rights.

In due season, Backpage moved to dismiss the second amended complaint for failure to state claims upon which relief could be granted. See Fed. R. Civ. P. 12(b)(6). Although the appellants vigorously opposed the motion, the district court dismissed the action in its entirety. See Doe ex rel. Roe v. Backpage.com, LLC, 104 F. Supp. 3d 149, 165 (D. Mass. 2015). This timely appeal ensued.

## II. ANALYSIS

The appellants, ably represented, have constructed a series of arguments. Those arguments are buttressed by a legion of amici (whose helpful briefs we appreciate). We review the district court's dismissal of the appellants' complaint for failure to state any actionable claim de novo, taking as true the well-pleaded facts and drawing all reasonable inferences in the appellants' favor. See Tambone, 597 F.3d at 441. In undertaking this canvass, we are not bound by the district court's ratiocination but may affirm the dismissal on any ground apparent from the record. See Santiago v. Puerto Rico, 655 F.3d 61, 72 (1st Cir. 2011). It is through this prism that we evaluate the appellants' as-severational array.

### A. Trafficking Claims.

The appellants challenge the district court's conclusion that section 230 of the CDA shields Backpage from liability for a course of conduct that allegedly amounts to participation in sex trafficking. We begin our consideration of this challenge with the text of section 230(c), which provides:

(c) Protection for "Good Samaritan" blocking and screening of offensive material

(1) Treatment of publisher or speaker

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.

## (2) Civil liability

No provider or user of an interactive computer service shall be held liable on account of —

(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or

(B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in [subparagraph (A)].

47 U.S.C. § 230(c). 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, e.g., Stratton Oakmont, Inc. v. Prodigy Servs. Co., 1995 WL 323710, at \*1, \*5 (N.Y. Sup. Ct. May 24, 1995) (explaining that Prodigy was liable because, unlike some other website operators, it had taken steps to screen or edit content posted on its message board). Section 230(c) limits this sort of liability in two ways. Principally, it shields website operators from being

“treated as the publisher or speaker” of material posted by users of the site, 47 U.S.C. § 230(c)(1), which means that “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,” Zeran v. Am. Online, Inc., 129 F.3d 327, 330 (4th Cir. 1997). Relatedly, it allows website operators to engage in blocking and screening of third-party content, free from liability for such good-faith efforts. See 47 U.S.C. § 230(c)(2)(A).

There has been near-universal agreement that section 230 should not be construed grudgingly. See, e.g., 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); Almeida v. Amazon.com, Inc., 456 F.3d 1316, 1321-22 (11th Cir. 2006); Carafano v. Metrosplash.com, Inc., 339 F.3d 1119, 1123 (9th Cir. 2003). This preference for broad construction recognizes that websites that display third-party content may have an infinite number of users generating an enormous amount of potentially harmful content, and holding website operators liable for that content “would have an obvious chilling effect” in light of the difficulty of screening posts for potential issues. Zeran, 129 F.3d at 331. The obverse of this proposition is equally salient: Congress sought to encourage websites to make efforts to screen content without fear of liability. See 47 U.S.C. § 230(b)(3)-(4); Zeran, 129 F.3d at 331; see also Lycos, 478 F.3d at 418-19. Such a hands-off approach is fully consistent with Congress’s avowed desire to permit the continued development of the internet with minimal regulatory interference. See 47 U.S.C. § 230(a)(4), (b)(2).

In holding Backpage harmless here, the district court found section 230(c)(1) controlling. See Backpage.com, 104 F. Supp. 3d at 154-56. Section 230(c)(1) can be broken down into three component parts. It shields conduct if the defendant (1) "is a 'provider or user of an interactive computer service'; (2) the claim is based on 'information provided by another information content provider'; and (3) the claim would treat [the defendant] 'as the publisher or speaker' of that information." Lycos, 478 F.3d at 418 (quoting 47 U.S.C. § 230(c)(1)). The appellants do not allege that Backpage fails to satisfy either of the first two elements.<sup>4</sup> Instead, they confine themselves to the argument that their asserted causes of action do not treat Backpage as the publisher or speaker of the contents of the advertisements through which they were trafficked. It is to this argument that we now turn.

The broad construction accorded to section 230 as a whole has resulted in a capacious conception of what it means to treat a website operator as the publisher or speaker of information provided by a third party. Courts have recognized that "many causes of action might be premised on the publication or speaking of what one might call 'information content.'" Barnes v. Yahoo!, Inc., 570 F.3d 1096, 1101 (9th Cir. 2009). The ultimate question, though, does not depend on the form of the asserted cause of action; rather, it depends on

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<sup>4</sup> Certain amici advance an argument forsworn by the appellants in the district court: that Backpage's activities amount to creating the content of the advertisements. It is, however, clear beyond hope of contradiction that amici cannot "interject into a case issues which the litigants, whatever their reasons might be, have chosen to ignore." Lane v. First Nat'l Bank of Bos., 871 F.2d 166, 175 (1st Cir. 1989).



whether the cause of action necessarily requires that the defendant be treated as the publisher or speaker of content provided by another. See id. at 1101-02. Thus, courts have invoked the prophylaxis of section 230(c)(1) in connection with a wide variety of causes of action, including housing discrimination, see Chi. Lawyers' Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc., 519 F.3d 666, 671-72 (7<sup>th</sup> Cir. 2008), negligence, see Doe, 528 F.3d at 418, Green v. Am. Online (AOL), 318 F.3d 465, 470-71 (3d Cir. 2003); and securities fraud and cyberstalking, see Lycos, 478 F.3d at 421-22.

The appellants have an uphill climb: the TVPRA claims that they appear to treat Backpage as the publisher or speaker of the content of the challenged advertisements. After all, the appellants acknowledge in their complaint that the contents of all of the relevant advertisements were provided either by their traffickers or by the appellants themselves (under orders from their traffickers). Since the appellants were trafficked by means of these advertisements, there would be no harm to them but for the content of the postings.

The appellants nonetheless insist that their allegations do not treat Backpage as a publisher or speaker of third-party content. They rest this hypothesis largely on the text of the TVPRA's civil remedy provision, which provides that victims may bring a civil suit against a perpetrator "or whoever knowingly benefits, financially or by receiving anything of value from participation in a venture which that person knew or should have known has engaged in an act" of sex trafficking. 18 U.S.C. § 1595(a); see id. § 1591. Characterizing their allegations as describing "an affirmative course of conduct" by Backpage distinct from the exer-

cise of the “traditional publishing or editorial functions” protected under the CDA, the appellants contend that this course of conduct amounts to participation in sex trafficking and, thus, can ground liability without treating Backpage as the publisher or speaker of any of the underlying content. This contention comprises more cry than wool.

We begin with the appellants’ assertion that Backpage’s activities do not involve traditional publishing or editorial functions, and are therefore outside the protective carapace of section 230(c)(1). In support, the complaint describes choices that Backpage has made about the posting standards for advertisements — for example, rules about which terms are permitted or not permitted in a posting, the lack of controls on the display of phone numbers, the option to anonymize e-mail addresses, the stripping of metadata from photographs uploaded to the website, the website’s reaction after a forbidden term is entered into an advertisement, and Backpage’s acceptance of anonymous payments. The appellants submit that these choices are distinguishable from publisher functions. We disagree.

As an initial matter, some of the challenged practices — most obviously, the choice of what words or phrases can be displayed on the site — are traditional publisher functions under any coherent definition of the term. See Zeran, 129 F.3d at 330 (describing decisions about “whether to publish, withdraw, postpone or alter content” as “traditional editorial functions”). And after careful consideration, we are convinced that the “publisher or speaker” language of section 230(c)(1) extends to the formulation of precisely the sort of website policies and practices that the appellants assail.

Precedent cinches the matter. In Lycos, we considered the argument that the prophylaxis of section 230 (c) did not encompass “decisions regarding the ‘construct and operation’” of a defendant’s websites. 478 F.3d at 422. There, the plaintiffs alleged that Lycos permitted users to register under multiple screen names and provided links to “objective financial information” from a finance-related message board, thus enabling “individuals to spread misinformation more credibly.” Id. at 420. We noted that, at bottom, the plaintiffs were “ultimately alleging that the construct and operation of Lycos’s web sites contributed to the proliferation of misinformation” and held that as long as “the cause of action is one that would treat the service provider as the publisher of a particular posting, immunity applies not only for the service provider’s decisions with respect to that posting, but also for its inherent decisions about how to treat postings generally.” Id. at 422. In short, “Lycos’s decision not to reduce misinformation by changing its web site policies was as much an editorial decision with respect to that misinformation as a decision not to delete a particular posting.” Id.

The case at hand fits comfortably within this construct. Without exception, the appellants’ well-pleaded claims address the structure and operation of the Backpage website, that is, Backpage’s decisions about how to treat postings. Those claims challenge features that are part and parcel of the overall design and operation of the website (such as the lack of phone number verification, the rules about whether a person may post after attempting to enter a forbidden term, and the procedure for uploading photographs). Features such as these, which reflect choices about what content can

appear on the website and in what form, are editorial choices that fall within the purview of traditional publisher functions.<sup>5</sup>

At oral argument in this court, the appellants placed particular emphasis on Backpage’s provision of e-mail anonymization, forwarding, auto-reply, and storage services to posters. In the last analysis, however, the decision to provide such services and the parallel decision not to impose the same conditions on messaging services as are applied to “Escorts” section postings are no less publisher choices, entitled to the protections of section 230(c)(1).

We add, moreover, that applying section 230(c)(1) to shield Backpage from liability here is congruent with the case law elsewhere. Relying on that provision, courts have rejected claims that attempt to hold website operators liable for failing to provide sufficient protections to users from harmful content created by others. For instance, where a minor claimed to have been sexually assaulted by someone she met through the defendant’s website and her suit alleged that the website operator “fail[ed] to implement basic safety measures to protect minors,” the Fifth Circuit rejected the suit on the basis that the claims were “merely another way of claiming that [the website operator] was liable for publishing the communications and they speak to [the website operator’s] role as a publisher of online third-party-generated content.” Doe, 528 F.3d at 419-20.

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<sup>5</sup> The appellants argue that a concurring opinion in J.S. v. Village Voice Media Holdings, L.L.C., 359 P.3d 714, 718-24 (Wash. 2015) (en banc) (Wiggins, J., concurring), points to a different conclusion. But our reasoning in Lycos — which the J.S. concurrence failed to address — defeats this argument.

Although the appellants try to distinguish Doe by claiming Backpage’s decisions about what measures to implement deliberately attempt to make sex trafficking easier, this is a distinction without a difference. Whatever Backpage’s motivations, those motivations do not alter the fact that the complaint premises liability on the decisions that Backpage is making as a publisher with respect to third-party content.

Nor does the text of the TVPRA’s civil remedy provision change this result. Though a website conceivably might display a degree of involvement sufficient to render its operator both a publisher and a participant in a sex trafficking venture (say, that the website operator helped to procure the underaged youths who were being trafficked), the facts pleaded in the second amended complaint do not appear to achieve this duality. But even if we assume, for argument’s sake, that Backpage’s conduct amounts to “participation in a [sex trafficking] venture” — a phrase that no published opinion has yet interpreted — the TVPRA claims as pleaded premise that participation on Backpage’s actions as a publisher or speaker of third-party content. The strictures of section 230(c) foreclose such suits.<sup>6</sup>

Contrary to the appellants’ importunings, the decision in Barnes does not demand a different outcome. There, the Ninth Circuit concluded that a promissory estoppel claim based on a Yahoo executive’s statements that the company would remove explicit photographs

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<sup>6</sup> To be sure, the complaint contains a few allegations that do not involve the publication of third-party content. Yet those allegations, treated in detail in Part II(B) infra, rely on sententious rhetoric rather than well-pleaded facts. Thus, they cannot suffice to alter our conclusion here.

that had been posted online without the consent of the person depicted was not barred by section 230(c)(1). See Barnes, 570 F.3d at 1098-99, 1109. Withal, this promissory estoppel claim did not attempt to treat Yahoo as the publisher or speaker of the photograph's content but, instead, the claim sought to hold Yahoo liable for its "manifest intention to be legally obligated to do something" (that is, to delete the photographs). Id. at 1107. No comparable promise has been alleged here.

That ends this aspect of the matter. We hold that claims that a website facilitates illegal conduct through its posting rules necessarily treat the website as a publisher or speaker of content provided by third parties and, thus, are precluded by section 230(c)(1). This holding is consistent with, and reaffirms, the principle that a website operator's decisions in structuring its website and posting requirements are publisher functions entitled to section 230(c)(1) protection.

In this case, third-party content is like Banquo's ghost: it appears as an essential component of each and all of the appellants' TVPRA claims. Because the appellants' claims under the TVPRA necessarily treat Backpage as the publisher or speaker of content supplied by third parties, the district court did not err in dismissing those claims.<sup>7</sup>

In an effort to shift the trajectory of the debate, the appellants try a pair of end runs. First, the appel-

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<sup>7</sup> Although the parties do not separately parse the text of the MATA, those claims fail for essentially the same reasons: they treat Backpage as the publisher or speaker of content provided by third parties. As a result, the MATA — at least in this application — is necessarily inconsistent with the protections provided by section 230(c)(1) and, therefore, preempted. See 47 U.S.C. § 230(e)(3).

lants call our attention to section 230(c)(2), which provides that decisions made by website operators to block or remove content are protected from liability as long as they are made in good faith. Building on this foundation, the appellants assert that the district court relied on Backpage’s descriptions of its efforts to block and screen the postings in the “Escorts” section of its website, and that those descriptions amount to an implicit invocation of section 230(c)(2). So, the appellants say, the district court should have allowed discovery into Backpage’s good faith (or lack of it) in blocking and screening content. The district court’s refusal to allow them to pursue this course, they charge, eviscerates section 230(c)(2) and renders it superfluous.

The appellants start from a faulty premise: we do not read the district court’s opinion as relying on Backpage’s assertions about its behavior. That Backpage sought to respond to allegations of misconduct by (among other things) touting its efforts to combat sex trafficking does not, without more, invoke section 230(c)(2) as a defense.

The appellants’ suggestion of superfluity is likewise misplaced. Courts routinely have recognized that section 230(c)(2) provides a set of independent protections for websites, *see, e.g., Barnes*, 570 F.3d at 1105; *Chi. Lawyers’ Comm.*, 519 F.3d at 670-71; *Batzel v. Smith*, 333 F.3d 1018, 1030 n.14 (9th Cir., and nothing about the district court’s analysis is at odds with that conclusion.

Next, the appellants suggest that their TVPRA claims are saved by the operation of section 230(e)(1). That provision declares that section 230 should not “be construed to impair the enforcement of . . . any . . . Fed-

eral criminal statute.” The appellants posit that the TVPRA’s civil suit provision is part of the “enforcement” of a federal criminal statute under the plain meaning of that term and, thus, outside the protections afforded by section 230(e)(1). This argument, though creative, does not withstand scrutiny.

We start with the uncontroversial premise that, where feasible, “a statute should be construed in a way that conforms to the plain meaning of its text.” In re Jarvis, 53 F.3d 416, 419 (1st Cir. 1995). The plain-language reading of section 230(e)(1)’s reference to “the enforcement of . . . any . . . Federal criminal statute” dictates a meaning opposite to that ascribed by the appellants: such a reading excludes civil suits. See Backpage.com, 104 F. Supp. 3d at 159 (pointing out that “the common definition of the term ‘criminal,’ as well as its use in the context of Section 230(e)(1), specifically excludes and is distinguished from civil claims” (quoting Doe v. Bates, No. 5:05-CV-91-DF-CMC, 2006 WL 3813758, at \*21 (E.D. Tex. Dec. 27, 2006))). Other traditional tools of statutory construction reinforce this conclusion. Although titles or captions may not be used to contradict a statute’s text, they can be useful to resolve textual ambiguities. See Bhd. of R.R. Trainmen v. Balt. & Ohio R.R. Co., 331 U.S. 519, 528-29 (1947); Berniger v. Meadow Green-Wildcat Corp., 945 F.2d 4, 9 (1st Cir. 1991). Here, the subsection’s title, “[n]o effect on criminal law,” quite clearly indicates that the provision is limited to criminal prosecutions.

It is equally telling that where Congress wanted to include both civil and criminal remedies in CDA provisions, it did so through broader language. For instance, section 230(e)(4) states that the protections of section



230 should not “be construed to limit the application of the Electronic Communications Privacy Act of 1986,” a statute that contains both criminal penalties and civil remedies. See 18 U.S.C. §§ 2511, 2520. Preserving the “application” of this Act contrasts with Congress’s significantly narrower word choice in safeguarding the “enforcement” of federal criminal statutes. The normal presumption is that the employment of different words within the same statutory scheme is deliberate, so the terms ordinarily should be given differing meanings. See Sosa v. Alvarez-Machain, 542 U.S. 692, 711 n.9 (2004).

This holding is entirely in keeping with the policies animating section 230(e)(1). Congress made pellucid that it sought “to ensure vigorous enforcement of Federal criminal laws to deter and punish” illicit activities online, 47 U.S.C. § 230(b)(5); and this policy coexists comfortably with Congress’s choice “not to deter harmful online speech through the . . . route of imposing tort liability on companies that serve as intermediaries for other parties’ potentially injurious messages,” Lycos, 478 F.3d at 418 (omission in original) (quoting Zeran, 129 F.3d at 330-31). Seen in this light, the distinctions between civil and criminal actions — including the disparities in the standard of proof and the availability of prosecutorial discretion — reflect a legislative judgment that it is best to avoid the potential chilling effects that private civil actions might have on internet free speech.

To say more about these attempted end runs would be pointless. They are futile, and do not cast the slightest doubt on our conclusion that the district court ap-

propriately dismissed the appellants' sex trafficking claims as barred by section 230(c)(1).

### **B. Chapter 93A Claims.**

We turn next to the appellants' state-law unfair trade practices claims. A Massachusetts statute, familiarly known as Chapter 93A, creates a private right of action in favor of any individual "who has been injured by another person's use or employment" of unfair or deceptive business practices. See Mass. Gen. Laws ch. 93A, § 9(1). The appellants' Chapter 93A claims (as framed on appeal) target misrepresentations allegedly made by Backpage to law enforcement and the NCMEC regarding Backpage's efforts at self-regulation. The district court jettisoned these claims, concluding that the causal chain alleged by the appellants was "too speculative to fall as a matter of law within the penumbra of reasonabl[e] foreseeability." Backpage.com, 104 F. Supp. 3d at 162.

As this ruling hinges on the plausibility of the appellants' allegations of causation, we first rehearse the plausibility standard. It is, of course, apodictic that a plaintiff must supply "a short and plain statement of the claim showing that [she] is entitled to relief." Fed. R. Civ. P. 8(a)(2). Although this requirement does not call for the pleading of exquisite factual detail, the complaint must allege "enough facts to state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007).

Evaluating the plausibility of a complaint is a two-step process. First, "the court must separate the complaint's factual allegations (which must be accepted as true) from its conclusory legal allegations (which need not be credited)." Morales-Cruz v. Univ. of P.R., 676

F.3d 220, 224 (1st Cir. 2012). Second, the court must determine whether the remaining facts allow it “to draw the reasonable inference that the defendant is liable for the misconduct alleged.” Id. (quoting Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009)). In carrying out this evaluation, the court must view the claim as a whole, instead of demanding “a one-to-one relationship between any single allegation and a necessary element of the cause of action.” Rodriguez-Reyes v. Molina-Rodriguez, 711 F.3d 49, 55 (1st Cir. 2013).

With this standard in mind, we proceed to the appellants’ assignment of error. To prevail on a Chapter 93A claim of this sort, the “plaintiff must prove causation — that is, the plaintiff is required to prove that the defendant’s unfair or deceptive act caused an adverse consequence or loss.” Rhodes v. AIG Domestic Claims, Inc., 961 N.E.2d 1067, 1076 (Mass. 2012). This requirement entails showing both “a causal connection between the deception and the loss and that the loss was foreseeable as a result of the deception.” Smith v. Jenkins, 732 F.3d 51, 71 (1st Cir. 2013) (quoting Casavant v. Norwegian Cruise Line Ltd., 952 N.E.2d 908, 912 (Mass. 2011)). In other words, the plaintiff must lay the groundwork for findings of both actual and proximate causation. If an examination of the claim leads to the conclusion that it fails plausibly to allege a causal chain sufficient to ground an entitlement to relief, that claim is susceptible to dismissal under Rule 12(b)(6). See A.G. ex rel. Maddox v. Elsevier, Inc., 732 F.3d 77, 82 & n.2 (1st Cir. 2013).

Here, the second amended complaint attempts to forge the causal chain as follows: Backpage made a series of disingenuous representations to law enforce-

ment officers and the NCMEC regarding its supposed commitment to combating sex trafficking, including representations about technical changes to its website and its efforts to screen and monitor postings; Backpage neither kept these commitments nor made the technical changes that had been discussed; instead, Backpage engaged in a series of pretextual actions to generate the appearance of combating sex trafficking (though it knew that these actions would not actually eliminate sex trafficking from the website); this amalgam of misrepresentations and deceptive practices “minimized and delayed” any real scrutiny of what Backpage was actually doing, thus allowing Backpage to gain a dominant market share in the online advertising of sex trafficking; and this sequence of events harmed the appellants by increasing their risk of being trafficked.

This causal chain is shot through with conjecture: it pyramids speculative inference upon speculative inference. This rampant guesswork extends to the effect of the alleged misrepresentations on an indeterminate number of third parties, the real impact of Backpage’s behavior on the overall marketplace for sex trafficking, and the odds that the appellants would not have been victimized had Backpage been more forthright.

When all is said and done, it is apparent that the attenuated causal chain proposed by the appellants is forged entirely out of surmise. Put another way, the causation element is backed only by “the type of conclusory statement[s] that need not be credited at the Rule 12(b)(6) stage.” Maddox, 732 F.3d at 80. Charges hinting at Machiavellian manipulation (such as the charge that Backpage’s “communications with NCMEC

were simply an effort to create a diversion as Backpage.com solidified its market position” or the charge that Backpage’s posting review program “appears to be merely superficial”) cannot serve as surrogates for well-pleaded facts.

To be sure, the complaint does plead a few hard facts. For example, it indicates that some meetings occurred involving Backpage and the NCMEC. It also indicates that Backpage made some efforts (albeit not the ones that the NCMEC recommended) to address sex trafficking. But beyond these scanty assertions, the complaint does not offer factual support for its attenuated causal analysis.

In an effort to plug this gaping hole, the appellants argue that in a Chapter 93A case the plausibility of causation should be tested at the pleading stage not by looking at facts but, rather, by employing “common economic sense.” Bos. Cab Dispatch, Inc. v. Uber Techs., Inc., No. 13-10769, 2015 WL 314131, at \*4 (D. Mass. Jan. 26, 2015); accord Katin v. Nat’l Real Estate Info. Servs., Inc., No. 07-10882, 2009 WL 929554, at \*7, \*10 (D. Mass. Mar. 31, 2009). Yet, facts are the linchpin of plausibility; and the cases that the appellants cite are inapposite. Those cases involve competitors suing each other pursuant to section 11 of Chapter 93A. This distinction is significant because although causation in section 11 cases between competitors turns on the decisions of third parties (customers), the causal chain between the unfair act and the harm to the plaintiff is much shorter and more direct than the chain that the appellants so laboriously attempt to construct.

The short of it is that the pertinent allegations in the second amended complaint are insufficient “to re-

move the possibility of relief from the realm of mere conjecture.” Tambone, 597 F.3d at 442. It follows inexorably that the district court did not err in dismissing the appellants’ Chapter 93A claims.<sup>8</sup>

### C. Intellectual Property Claims.

This brings us to the appellants’ intellectual property claims. Section 230 provides that “[n]othing in this section shall be construed to limit or expand any law pertaining to intellectual property.” 47 U.S.C. § 230(e)(2). We assume, without deciding, that the appellants’ remaining claims come within the compass of this exception.<sup>9</sup>

**1. Unauthorized Use of Pictures of a Person.** All of the appellants brought claims under state laws (Massachusetts and/or Rhode Island) guarding against the unauthorized use of a person’s picture. See Mass. Gen. Laws ch. 214, § 3A; R.I. Gen. Laws § 9-1-28. These nearly identical statutes, reprinted in relevant part in

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<sup>8</sup> For the sake of completeness, we note that the court below held, in the alternative, that the appellants’ Chapter 93A claims were barred by section 230(c)(1). See Backpage.com, 104 F. Supp. 3d at 162-63. We express no opinion on this alternative holding.

<sup>9</sup> The application of the exemption to the appellants’ state law claims for the unauthorized use of pictures is not free from doubt. At least one court of appeals has suggested that state law intellectual property claims are not covered by this exemption. See Perfect 10, Inc. v. CCBill LLC, 488 F.3d 1102, 1118-19, 1119 n.5 (9th Cir. 2007); but cf. Lycos, 478 F.3d at 422-23, 423 n.7 (applying section 230(e)(2) to a claim under state trademark law, albeit without detailed analysis). To make a muddled matter even murkier, Backpage argues that the unauthorized use of pictures claims do not involve intellectual property but, rather, stem from privacy rights protected by tort law. We need not reach either of these issues.

the margin,<sup>10</sup> confer private rights of action upon individuals whose images are used for commercial purposes without their consent. The appellants insist that Backpage, by garnering advertising revenues from their traffickers, profited from the unauthorized use of their photographs. This fusillade is wide of the mark: the statutes in question impose liability only upon persons or entities who deliberately use another's image for commercial gain. As we explain below, Backpage (on the facts alleged here) is not such an entity.

Neither the Massachusetts Supreme Judicial Court (SJC) nor the Rhode Island Supreme Court has confronted the exact scenario that is presented here. Our

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<sup>10</sup> Mass. Gen. Laws ch. 214, § 3A provides in relevant part that:

Any person whose name, portrait or picture is used within the commonwealth for advertising purposes or for the purposes of trade without his written consent may bring a civil action . . . against the person so using his name, portrait or picture, to prevent and restrain the use thereof; and may recover damages for any injuries sustained by reason of such use.

R.I. Gen. Laws § 9-1-28(a) provides, as pertinent here, that:

Any person whose name, portrait, or picture is used within the state for commercial purposes without his or her written consent may bring an action . . . against the person so using his or her name, portrait, or picture to prevent and restrain the use thereof, and may recover damages for any injuries sustained by reason of such use.

To the modest extent that the wording of these statutes differs, neither the appellants nor Backpage suggests that the differences affect our analysis in any way. We therefore treat the statutes interchangeably.

task, then, is to make an informed determination of how each court would rule if it faced the question, taking into account analogous state decisions, cases from other jurisdictions, learned treatises, and relevant policy rationales. See Andrew Robinson Int'l, Inc. v. Hartford Fire Ins. Co., 547 F.3d 48, 51-52 (1st Cir. 2008). Here, the tea leaves are easy to read.

The SJC has articulated the key point in the following way: “the crucial distinction . . . must be between situations in which the defendant makes an incidental use of the plaintiff’s name, portrait or picture and those in which the defendant uses the plaintiff’s name, portrait or picture deliberately to exploit its value for advertising or trade purposes.” Tropeano v. Atl. Monthly Co., 400 N.E.2d 847, 850 (Mass. 1980). Exploitation for advertising or trade purposes requires that the use of the image be “for the purpose of appropriating to the defendant’s benefit the commercial or other values associated with the name or likeness.” Id. (quoting Nelson v. Me. Times, 373 A.2d 1221, 1224 (Me. 1977)). So, too, the nearly identical Rhode Island statute requires a showing that by using the image “the defendant commercially exploited [the plaintiff] without his permission.” Leddy v. Narragansett Television, L.P., 843 A.2d 481, 490 (R.I. 2004); accord Mendonsa v. Time Inc., 678 F. Supp. 967, 971 (D.R.I. 1988).

The appellants argue that the use of their images cannot be written off as incidental because their pictures were “the centerpieces of commercial advertisements.” But this argument misapprehends both the case law and the rationale that animates the underlying right. Tropeano exemplifies the point. That case involved the publication of the plaintiff’s image to illus-



trate a magazine article in which she was not even mentioned. See 400 N.E.2d at 848. The SJC concluded that this was an incidental use of the image, notwithstanding that the article and accompanying picture could be said to benefit the publisher. See id. at 851. The fact that the publisher was a for-profit business did “not by itself transform the incidental publication of the plaintiff’s picture into an appropriation for advertising or trade purposes.” Id.

In our view, Tropeano establishes that even a use leading to some profit for the publisher is not a use for advertising or trade purposes unless the use is designed to “appropriat[e] to the defendant’s benefit the commercial or other values associated with the name or likeness.” Id. at 850 (quoting Nelson, 373 A.2d at 1224). That is the rule in Massachusetts, and we are confident that essentially the same rule prevails in Rhode Island.

Here, there is no basis for an inference that Backpage appropriated the commercial value of the appellants’ images. Although Backpage does profit from the sale of advertisements, it is not the entity that benefits from the misappropriation. A publisher like Backpage is “merely the conduit through which the advertising and publicity matter of customers” is conveyed, Cabaniss v. Hipsley, 151 S.E.2d 496, 506 (Ga. Ct. App. 1966), and the party who actually benefits from the misappropriation is the advertiser. Matters might be different if Backpage had used the pictures to advertise its own services, see id., but the appellants proffer no such claim.

Basic policy considerations reinforce this result. There would be obviously deleterious consequences to a rule placing advertising media, such as newspapers,

television stations, or websites, at risk of liability every time they sell an advertisement to a party who engages in misappropriation of another person's likeness. Given this verity, it is hardly surprising that the appellants have identified no case in which a publisher of an advertisement furnished by a third party has been held liable for a misappropriation present within it. The proper target of any suit for damages in such a situation must be the advertiser who increases his own business through the misappropriation (in this case, the traffickers).<sup>11</sup>

We need not tarry. On this understanding, we uphold the district court's dismissal of the appellants' claims under the aforementioned state statutes.

**2. Copyright.** The last leg of our journey takes us to a singular claim of copyright infringement. Shortly after the institution of suit, Doe #3 registered a copyright in one of the photographs used by her traffickers. In the second amended complaint, she included a claim for copyright infringement. The court below dismissed this claim, reasoning that it identified no redressable injury. See Backpage.com, 104 F. Supp. 3d at 165. Doe #3 challenges this ruling.

Assuming (without deciding) that Backpage could be held liable for copyright infringement, the scope of Doe #3's potential recovery is limited by the fact that she did not register her copyright until December of 2014 — after the instant action had been filed. By then,

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<sup>11</sup> This is precisely the situation reflected in the earliest right of privacy cases, see, e.g., Henry v. Cherry & Webb, 73 A. 97 (R.I. 1909), and the state statutes in this case are designed to codify liability for that sort of commercial conduct, see Mendonsa, 678 F. Supp. at 969-70; Tropeano, 400 N.E.2d at 850-51.

Backpage was no longer displaying the copyrighted image. Given the timing of these events, Doe #3 cannot recover either statutory damages or attorneys' fees under the Copyright Act. See 17 U.S.C. § 412; Johnson v. Gordon, 409 F.3d 12, 20 (1st Cir. 2005). Any recovery would be restricted to compensatory damages under 17 U.S.C. § 504(b), which permits a successful suitor to recover “the actual damages suffered by . . . her as a result of the infringement, and any profits of the infringer that are attributable to the infringement and are not taken into account in computing the actual damages.”

The prospect of such a recovery, however, is purely theoretical: nothing in the complaint raises a plausible inference that Doe #3 can recover any damages, or that discovery would reveal such an entitlement. See Twombly, 550 U.S. at 556 (stating that factual allegations must at least “raise a reasonable expectation that discovery will reveal evidence” to suffice as plausible). A showing of actual damages requires a plaintiff to prove “that the infringement was the cause of [her] loss of revenue.” Data Gen. Corp. v. Grumman Sys. Support Corp., 36 F.3d 1147, 1170 (1st Cir. 1994). Such a loss is typically measured by assessing the diminution in a copyrighted work's market value (say, by calculating lost licensing fees). See Bruce v. Weekly World News, Inc., 310 F.3d 25, 28-29 (1st Cir. 2002); Data Gen., 36 F.3d at 1170. No facts set forth in the second amended complaint suggest that the market value of Doe #3's image has been affected in any way by the alleged infringement, and Doe #3 points to nothing that might plausibly support such an inference.

By the same token, nothing in the complaint plausibly suggests a basis for a finding that Doe #3 would be

entitled to profits attributable to the infringement. The closest that the complaint comes is an optimistic assertion that because photographs “enhance the effectiveness of advertisements,” Backpage necessarily reaps a financial benefit from these images (including, presumably, Doe #3’s photograph). But a generalized assertion that a publisher/infringer profits from providing customers with the option to display photographs in advertisements, standing alone, cannot plausibly be said to link the display of a particular image to some discrete portion of the publisher/infringer’s profits. Cf. Mackie v. Rieser, 296 F.3d 909, 914-16 (9th Cir. 2002) (concluding, at summary judgment, that the effect of including a photograph in an advertising brochure was too speculative to make out a triable issue on advertiser’s profits attributable to infringement). In short, the link that Doe #3 attempts to fashion between the copyrighted photograph and Backpage’s revenues is wholly speculative and, thus, does not cross the plausibility threshold. After all, “[f]actual allegations must be enough to raise a right to relief above the speculative level.” Twombly, 550 U.S. at 555.

In a last ditch effort to bell the cat, Doe #3 contends that the district court erred in failing to determine whether she was entitled to injunctive relief under 17 U.S.C. § 502(a), which permits such relief “to prevent or restrain infringement of a copyright.” She says, in effect, that Backpage may still possess the copyrighted photograph and that, therefore, she remains at risk of future infringement. We reject this contention.

To begin, the mere fact of past infringement does not entitle a plaintiff to permanent injunctive relief: the plaintiff must also show “a substantial likelihood of in-

fringement in the future.” Harolds Stores, Inc. v. Dillard Dep’t Stores, Inc., 82 F.3d 1533, 1555 (10th Cir. 1996); see 5 Melville B. Nimmer & David Nimmer, Nimmer on Copyright § 14.06[B][1][a] (2015). Nothing in the complaint suggests that there is any substantial likelihood of future infringement by Backpage with respect to the copyrighted photograph. The known facts strongly suggest that no such risk exists: the photograph was posted by a third party who no longer has any sway over Doe #3, and Backpage is not alleged to post material or create advertisements entirely of its own accord. Thus, any fears of future infringement would appear to be unfounded.

Viewing the complaint as a whole, see Twombly, 550 U.S. at 569 n.14, we conclude that the distinctive facts alleged here simply do not suffice to ground a finding that Doe #3 is plausibly entitled to any relief on her copyright claim. Consequently, we discern no error in the district court’s dismissal of this claim.

### III. CONCLUSION

As a final matter, we add a coda. The appellants’ core argument is that Backpage has tailored its website to make sex trafficking easier. Aided by the amici, the appellants have made a persuasive case for that proposition. But Congress did not sound an uncertain trumpet when it enacted the CDA, and it chose to grant broad protections to internet publishers. Showing that a website operates through a meretricious business model is not enough to strip away those protections. If the evils that the appellants have identified are deemed to outweigh the First Amendment values that drive the CDA, the remedy is through legislation, not through litigation.

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We need go no further. For the reasons elucidated above, the judgment of the district court is affirmed. All parties shall bear their own costs.

**Affirmed.**

APPENDIX B

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

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Civil Action No. 14-13870-RGS

JANE DOE NO. 1, a minor child,  
by her parent and next friend MARY ROE;  
JANE DOE NO. 2; and JANE DOE NO. 3, a minor  
child, by her parents and next friends SAM LOE AND  
SARA LOE

v.

BACKPAGE.COM, LLC, CAMARILLO HOLDINGS,  
LLC (f/k/a VILLAGE VOICE MEDIA HOLDINGS,  
LLC), and NEW TIMES MEDIA, LLC

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MEMORANDUM AND ORDER  
ON DEFENDANTS' MOTION TO DISMISS

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May 15, 2015

STEARNS, D.J.

In this litigation, two important public policies collide head on – the suppression of child sex trafficking and the promotion of a free and open Internet. Plaintiffs Jane Doe No. 1, Jane Doe No. 2, and Jane Doe No. 3 (the Doe plaintiffs) seek redress in the form of money damages from defendants Backpage.com, LLC; Camarillo Holdings, LLC (f/k/a Village Voice Media Holdings, LLC); and New Times Media, LLC. The Doe

plaintiffs allege that they were molested and repeatedly raped after being advertised as sexual wares on defendants' website, backpage.com (Backpage). Defendants contend that most of the Doe plaintiffs' claims are preempted by the Communications Decency Act (CDA), 47 U.S.C. § 230, and that the remaining intellectual property claims (unauthorized use of a person's image and copyright infringement) fail to state claims upon which relief may be granted.

#### BACKGROUND<sup>12</sup>

Backpage is an online classifieds forum that groups goods and services advertised for sale by geographic location and subject matter. At issue in this case is the forum's adult entertainment section and its subcategory offering the services of "escorts." The Doe plaintiffs allege that in the scungy world of adult entertainment, this section of Backpage is a notorious haven for promoters of the illicit sex trade, and even more troubling, the trafficking of children for sex. The Doe plaintiffs contend that Backpage's business model depends in large part on the revenues it earns from its involvement in the trafficking of children. To this end, Backpage is alleged to have structured its adult entertainment section to lightly camouflage its illegal content to divert the attention of law enforcement. In support, the Second Amended Complaint (SAC) marshals the following facts:

- Backpage charges a fee for posting advertisements in the adult entertainment section (and not in most other licit areas of the web-

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<sup>12</sup> On a motion to dismiss, the court accepts as true the well-pleaded facts of a complaint.



site). The fee for the “adult” ads ranges from \$12.00 to \$17.00 per posting. Backpage charges an additional fee for each reposting of an adult ad, and for featuring the ad (with a selection of text and photos) prominently on the right side of the website.

- Backpage does not require posters in the adult entertainment section to verify their identity. The website also does not require that the poster use a registered credit card linked with a name and address, and accepts anonymous payments in the form of prepaid credit cards, or pseudo-currencies, such as Bitcoin.
- Backpage does not require a poster to verify the age of an “escort” whose services are offered on the website. Although the website will not accept an ad when the poster enters an age of less than 18, it will permit the poster to immediately re-enter an assumed age.
- Backpage does not require any verification of the telephone numbers posted in its adult entertainment section. It also permits users to enter telephone numbers using any combination of character strokes rather than in the more traceable (by law enforcement) nominal numbers required in other sections of the website (such as “two013fourFive678niNe” rather than “201-345-6789”). Backpage does not require posters in the adult entertainment section to use their actual email addresses, but provides an email forwarding service that protects a poster’s anonymity.

- Backpage strips out metadata associated with photographs (such as date, time, geolocation and other identifying information) before publishing the photographs on its website. This prevents law enforcement from effectively searching for repostings of the same photograph.
- While Backpage bars the use of certain words and phrases through its “automatic filtering” system, such as “barely legal,” “high school,” “innocent,” “sex,” “blow job,” “hand job,” “schoolgirl,” “teen”, and “teenage,” it readily permits the use of suggestive circumlocutions like “girl,” “young,” “underage,” and “fresh.” It also does not filter out easily recognizable abbreviations of forbidden words, such as “brly legal” or “high schl.”

The Doe plaintiffs further allege that defendants have waged a phony war against sex traffickers to divert attention from their illegal activities. While Backpage claims that its adult entertainment advertisements are screened by trained moderators, it has refused to install readily available technology that would far more accurately detect the trafficking of children. According to the Second Amended Complaint, Backpage’s highly touted claim to make regular referrals to the National Center of Missing & Exploited Children has led to few instances of identification or rescue. Although Backpage will on request remove an offending ad in the geographic location in which it is posted, it does nothing to report or remove the identical ad posted in other geographical areas, or other ads involving the same child. The overall effect, the Doe plaintiffs

contend, is to create a Potemkin-like “façade of concern” that obscures the shady source of its filthy lucre. SAC ¶ 34.

Jane Doe No. 1, Jane Doe No. 2, and Jane Doe No. 3 aver that they have been each personally harmed by defendants’ unsavory business practices. Jane Doe No. 1 was first trafficked by pimps on Backpage after running away from home in February of 2012, when she was 15 years old. She was again sold on Backpage in March of 2013, after she ran away a second time. Between June of 2013 and September 10, 2013, her “services” were advertised on Backpage each and every day. As a result of the ads, she engaged in 10 to 12 sex transactions daily with adult men in Massachusetts and Rhode Island. Her pimp moved her from town to town every two days to avoid detection. Jane Doe No. 1 appeared on some 300 ads on Backpage and was raped over 1,000 times.

Backpage listed each ad featuring Jane Doe No. 1 as an offer of “escort” services, a common euphemism for prostitution. The Jane Doe No. 1 ads included known signifiers for child prostitution such as “young,” “girl,” “fresh,” “tiny,” “roses,” and “party.” Jane Doe No. 1’s pimp provided a prepaid mobile phone and a prepaid credit card to conceal Jane Doe No. 1’s identity when Jane Doe No. 1 placed ads on Backpage. When Jane Doe No. 1 attempted to enter her true age (which was under 18) during the purchase of an ad, Backpage would instruct her to enter her age as 18 or older. Photographs of Jane Doe No. 1 (with her facial features obscured, but at least on one occasion displaying a unique tattoo) accompanied all of her ads.

Jane Doe No. 2 was trafficked on Backpage by her pimp during various periods between 2010 and 2012 at different locations in Massachusetts. She first appeared on Backpage when she was 15 years old, after she had absconded from a residential program. Ads featuring Jane Doe No. 2 were posted either by her pimp or an older woman who worked with him (his “bottom”). The ads would appear on Backpage on average six times a day. Jane Doe No. 2 was given a prepaid mobile phone to answer calls from would-be customers generated by the Backpage ads. As a result of the ads, she was coerced into 5-15 sex transactions every day. Like the ads of Jane Doe No. 1, those of Jane Doe No. 2 featured her photograph. The ads were placed using a prepaid credit card. Altogether, Jane Doe No. 2 was raped over 900 times while in the thrall of her pimp.

Jane Doe No. 3 was trafficked on Backpage in December of 2013 by her pimp and one or more of his associates. The Backpage solicitations for the underage Jane Doe No. 3 described her as “new,” “sweet,” and “playful.” As with the other Jane Does, the ads were paid for with a prepaid credit card. Jane Doe No. 3 was also given a mobile phone to take calls and texts from customers. She was taken to a hotel in Foxborough, Massachusetts, where she was raped by men who responded to the ads. Photos of Jane Doe No. 3, including one that she had taken of herself, appeared with the ads on Backpage.<sup>13</sup>

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<sup>13</sup> At some point, Jane Doe No. 3’s parents became aware of the ads featuring their daughter on Backpage and demanded that they be taken down. A week later, the illicit ads still appeared on the website.

The Doe plaintiffs brought this lawsuit in October of 2014. In their Second Amended Complaint, they allege that defendants’ business practices violate the Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA), 18 U.S.C. § 1595 (Count I); the Massachusetts Anti-Human Trafficking and Victim Protection Act of 2010 (MATA), Mass. Gen. Laws ch. 265, § 50 (Count II); and constitute unfair and deceptive business practices under the Massachusetts Consumer Protection Act, Mass. Gen. Laws ch. 93A, § 9 (Count III). The Doe plaintiffs also bring claims for unauthorized use of pictures of a person, Mass. Gen. Laws ch. 214, § 3A and R.I. Gen. Laws § 9-1-28 (Count IV), and copyright infringement (specific to the photograph taken by Jane Doe No. 3 of herself) (Count V). In January of 2015, defendants moved to dismiss the Second Amended Complaint pursuant to Fed. R. Civ. P. 12(b)(6). The parties and several amici curiae<sup>14</sup> filed helpful briefs. The court heard oral argument on April 15, 2015.

#### DISCUSSION

To survive a Rule 12(b)(6) motion to dismiss, the factual allegations of a complaint must “possess enough heft” to set forth “a plausible entitlement to relief.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557, 559 (2007); *see also Thomas v. Rhode Island*, 542 F.3d 944,

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<sup>14</sup> The City and County of San Francisco, the City of Atlanta, the City and County of Denver, the City of Houston, the City of Philadelphia, and the City of Portland (Oregon) (collectively the local government amici) and the Commonwealth of Massachusetts submitted two amicus briefs in support of plaintiffs. The Electronic Frontier Foundation, the Center for Democracy & Technology, and Professor Eric Goldman (of Santa Clara University School of Law) (collectively EFF) submitted an amicus brief in support of defendants.

948 (1st Cir. 2008). As the Supreme Court has emphasized, this standard “demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation. A pleading that offers labels and conclusions or a formulaic recitation of the elements of a cause of action will not do. Nor does a complaint suffice if it tenders naked assertion[s] devoid of further factual enhancement.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal citations and quotation marks omitted).

Defendants rely primarily on the immunity provided by Congress in enacting 47 U.S.C. § 230, that “[n]o 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,” *id.* § 230(c)(1), and the concomitant preemption of “cause[s] of action . . . brought . . . under any State or local law that is inconsistent with this section.” *Id.* § 230(e)(3).<sup>15</sup> There is no dispute that defendants are, as the operators of Backpage, providers of an interactive computer service. Defendants contend that because the Doe plaintiffs allege they were harmed by the contents of postings that defendants had no part in

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<sup>15</sup> The Doe plaintiffs argue that the court should first assess the plausibility and sufficiency of the factual allegations relevant to each claim before reaching the immunity issue. However, the entitlement to immunity under section 230 is not only an affirmative defense, but also the right to be immune from being sued. *See, e.g., Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1125 (9th Cir. 2003); accord *Klayman v. Zuckerberg*, 753 F.3d 1354, 1357 (D.C. Cir. 2014) (Section 230 “can [] support a motion to dismiss if the statute’s barrier to suit is evident from the face of the complaint.”); *Ricci v. Teamsters Union Local 456*, 781 F.3d 25, 28 (2d Cir. 2015) (same). As the Supreme Court counsels, a claim of entitlement to immunity should be “resolv[ed] . . . at the earliest possible stage in litigation.” *Hunter v. Bryant*, 502 U.S. 224, 227 (1991).

creating, the claims fall squarely within Congress's exemption of interactive computer service providers from liability for third-party Internet content.

Congress enacted section 230 in 1996, while the Internet was still in its infancy. Congress explained the purposes of the law in five pertinent findings:

- (1) The rapidly developing array of Internet and other interactive computer services available to individual Americans represent an extraordinary advance in the availability of educational and informational resources to our citizens.
- (2) These services offer users a great degree of control over the information that they receive, as well as the potential for even greater control in the future as technology develops.
- (3) The Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.
- (4) The Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation.
- (5) Increasingly Americans are relying on interactive media for a variety of political, educational, cultural, and entertainment services.

47 U.S.C. § 230(a). Consistent with these findings, section 230 reflects the “policy of the United States”

- (1) to promote the continued development of the Internet and other interactive computer services and other interactive media;
- (2) 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;
- (3) to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services;
- (4) to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children’s access to objectionable or inappropriate online material; and
- (5) to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.

*Id.* § 230(b).

The Doe plaintiffs argue that because the Internet has matured since the enactment of section 230, the principal policy consideration that animated Congress



(promoting the growth of the Internet by insulating it from regulatory restrictions and lawsuits) no longer has the assuasive force that it may once have had. They cite the characterization of section 230's immunity guarantee as an affirmative defense in cases like *Klayman* and *Ricci* as evidence that the courts have been whittling back the scope of section 230 immunity as the Internet has shed its training wheels. See *Klayman*, 753 F.3d at 1357; *Ricci*, 781 F.3d at 28. The argument, however, does not bear scrutiny. Both the *Klayman* and *Ricci* courts, whatever the label they used to describe section 230's effect, found the interactive computer service providers at issue to be immune from any imputation of liability for third-party speech. *Klayman*, 753 F.3d at 1357-1359; *Ricci*, 781 F.3d at 27-28. Moreover, Congress, far from lowering the immunity bar, ratcheted it up in 2010 by expanding the scope of section 230 immunity to preempt the enforcement of inconsistent foreign judgments. See 28 U.S.C. § 4102(c)(1).<sup>16</sup>

The local government amici attempt to repackage Backpage as an “information content provider,” an entity that section 230 defines 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.” 47

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<sup>16</sup> Section 4102(c)(1) reads as follows: “Notwithstanding any other provision of Federal or State law, a domestic court shall not recognize or enforce a foreign judgment for defamation against the provider of an interactive computer service, as defined in section 230 of the Communications Act of 1934 (47 U.S.C. 230) unless the domestic court determines that the judgment would be consistent with section 230 if the information that is the subject of such judgment had been provided in the United States.”

U.S.C. § 230(f)(3). Their ultimate point is that information content providers are excluded from the immunity granted by section 230. The amici contend that Backpage generates content by: (1) posting illegal materials in sponsored ads; (2) stripping metadata from posted photos; (3) coaching the crafting of ads by allowing misspellings of suggestive terms; and (4) designing the escorts section of the website in such a way as to signal to readers that sex with children is sold here. The amici argument relies heavily on *Fair Hous. Council of San Fernando Valley v. Roommates.Com, LLC*, 521 F.3d 1157 (9th Cir. 2008). In that case, the Ninth Circuit determined Roommates.com, a roommate matching service, to be an “information content provider” shorn of section 230 immunity because it elicited information about personal characteristics of users that is forbidden by the Fair Housing Act. *Id.* at 1169-1170. The Court reasoned that

Roommate’s connection to the discriminatory filtering process is direct and palpable: Roommate designed its search and email systems to limit the listings available to subscribers based on sex, sexual orientation and presence of children. Roommate selected the criteria used to hide listings, and Councils allege that the act of hiding certain listings is itself unlawful under the Fair Housing Act, which prohibits brokers from steering clients in accordance with discriminatory preferences.

*Id.*

To get to its result, the Court in *Roommates* attempted to draw a line between active control of the content of a web posting and the provision of a neutral interactive service that simply replicates offending third-party matter.<sup>17</sup>

If an individual uses an ordinary search engine to query for a “white roommate,” the search engine has not contributed to any alleged unlawfulness in the individual’s conduct; providing *neutral* tools to carry out what may be unlawful or illicit searches does not amount to “development” for purposes of the immunity exception. . . . Similarly, a housing website that allows users to specify whether they will or will not receive emails by means of *user-defined* criteria might help some users exclude email from other users of a particular race or sex. However, that website would be immune, so long as it does not **require** the use of discriminatory criteria. A website operator who edits user-created content – such as by correcting spelling, removing obscenity or trimming for length – retains his immunity for any illegality in the user-created content, provided that the edits are unrelated to the illegality.

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<sup>17</sup> *Roommates* is one of the few sentinels denying section 230 immunity left standing among some 300 cases (as of 2012) that have decided the issue. See *Hill v. StubHub, Inc.*, 219 N.C. App. 227, 239 (2012).

*Id.* at 1169 (bold emphasis added). This latter passage lays out the distinction that afforded immunity to craigslist.com, an online classifieds forum that also published discriminatory housing ads. “Nothing in the service craigslist offers induces anyone to post any particular listing or express a preference for discrimination; for example, craigslist does not offer a lower price to people who include discriminatory statements in their postings.” *Chicago Lawyers’ Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666, 671-672 (7th Cir. 2008).

Singly or in the aggregate, the allegedly sordid practices of Backpage identified by amici amount to neither affirmative participation in an illegal venture nor active web content creation. Nothing in the escorts section of Backpage requires users to offer or search for commercial sex with children. The existence of an escorts section in a classified ad service, whatever its social merits, is not illegal. The creation of sponsored ads with excerpts taken from the original posts reflects the illegality (or legality) of the original posts and nothing more. Similarly, the automatic generation of navigational path names that identify the ads as falling within the “escorts” category is not content creation. *See Seldon v. Magedson*, 2014 WL 1456316, at \*5-6 (D. Ariz. April 15, 2014). The stripping of metadata from photographs is a standard practice among Internet service providers. Hosting anonymous users and accepting payments from anonymous sources in Bitcoins, peppercorns, or whatever, might have been made illegal by Congress, but it was not. Backpage’s passivity and imperfect filtering system may be appropriate targets for criticism, but they do not transform Backpage into an information content provider.

Although the Doe plaintiffs recognize that defendants did not author the content of the offending ads, *see* Opp’n at 16 (“Plaintiffs’ trafficking claims do not seek to ‘impute’ to [d]efendants any advertisements created by others”), they challenge the breadth of the immunity sought by defendants. Count I alleges a violation of a section of the TVPRA, a federal statute that criminalizes sex trafficking. As the Doe plaintiffs note, section 230 expressly states that “[n]othing in this section shall be construed to impair the enforcement of section 223 or 231 of this title, chapter 71 (relating to obscenity) or 110 (relating to sexual exploitation of children) of Title 18, or *any other Federal criminal statute.*” 47 U.S.C. § 230(e)(1) (emphasis added). Plaintiffs contend that defendants’ business practices, “even if the advertisements had never been posted,” Opp’n at 16, are sufficient to make out a violation of the TVPRA. Furthermore, according to the Doe plaintiffs, section 230 only immunizes “action voluntarily taken in *good faith* to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected.” 47 U.S.C. § 230(c)(2)(A) (emphasis added). The Doe plaintiffs argue that their claims are of a different sort – they allege that defendants have intentionally and in bad faith hidden behind ineffectual counter-trafficking measures to deflect the scrutiny of law enforcement and social services agencies. Count II alleges a violation of the MATA, the Massachusetts analog to the TVPRA. The Doe plaintiffs argue that, because claims under the TVPRA are exempt from the scope of section 230’s immunity, the claim under MATA does not depend on “*inconsistent state law*” preempted

by section 230. Count III, which presses a claim of unfair and deceptive businesses practices under Massachusetts law, is alleged to arise not from the posted ads and their contents, but from the architecture of Backpage itself, which the Doe plaintiffs contend is constructed to conceal illegal activity from law enforcement. Finally, the Doe plaintiffs rely on Congress's stricture that section 230 "shall not be construed to limit or expand any law pertaining to intellectual property," *id.* § 230(e)(2), as preserving the intellectual property claims (unauthorized publicity and copyright infringement).<sup>18</sup> I will examine the viability of each count in turn.

### *Civil Remedy under the TVPRA*

18 U.S.C. § 1595 provides victims of trafficking the right to bring a private civil action for restitution against "whoever knowingly benefits, financially or by receiving anything of value from participation in a venture which that person knew or should have known has engaged in an act in violation of this chapter." The parties dispute whether a civil action authorized by a criminal statute can be construed as "enforcement of . . . a Federal criminal statute" exempt from the immunity provided by section 230(e)(1).<sup>19</sup>

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<sup>18</sup> Defendants do not rely on section 230 immunity with respect to the copyright infringement claim, but contend, to be discussed *infra*, that it should be dismissed on other grounds.

<sup>19</sup> The Doe plaintiffs, citing *Barnes v. Yahoo!*, 570 F.3d 1096 (9th Cir. 2009), also contend that their TVPRA claim falls outside of the protections of section 230 immunity because section 1595 imposes a duty of care on defendants wholly independent of their role as publishers of speech. In *Barnes*, the Ninth Circuit barred a negligent undertaking claim under Oregon law that sought to hold Yahoo

The Doe plaintiffs maintain that the statutory language, “enforce[ing] . . . a Federal criminal statute,” implies more than a dependence on criminal prosecution alone. *See* Black’s Law Dictionary (10th ed. 2014) (to “enforce” is “[t]o give force or effect to” or “[l]oosely, to compel a person to pay damages for not complying with . . .”). Further, plaintiffs contend that civil actions are frequently authorized as part and parcel of the enforcement regime behind criminal statutes. *See Luka v. Procter & Gamble Co.*, 785 F. Supp. 2d 712, 719 (N.D. Ill. 2011) (“[C]ivil enforcement mechanisms [] permit private parties to sue *to enforce* statutory prohibitions.” (emphasis added)). Plaintiffs also rely on

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liable for an alleged failure to remove indecent profiles of a plaintiff that had been posted by her ex-boyfriend because the claim attempted to impose publisher liability on Yahoo for content created by a third party. *Id.* at 1102-1105 (“The word ‘undertaking,’ after all, is meaningless without the following verb. That is, one does not merely undertake; one undertakes *to do* something. And what is the undertaking that Barnes alleges Yahoo failed to perform with due care? The removal of the indecent profiles that her former boyfriend posted on Yahoo’s website. But removing content is something publishers do, and to impose liability on the basis of such conduct necessarily involves treating the liable party as a publisher of the content it failed to remove.”).

The Court did, however, allow a claim of promissory estoppel to stand on the allegation that a Director of Communications at Yahoo had contacted plaintiff and promised to remove the offending ads, but failed to do so in a timely manner. *Id.* at 1107-1109. “Contract liability here would come not from Yahoo’s publishing conduct, but from Yahoo’s manifest intention to be legally obligated to do something, which happens to be removal of material from publication.” *Id.* at 1107. There is no claim by the Doe plaintiffs that any such assurance was given to them by Backpage. As *Barnes* illustrates, the existence of a statutory remedy without more does not give rise *mirabile dictu* to a tort duty. If it did, there would no need to create such a remedy in the first place.

*dicta* in *Nieman v. Versuslaw, Inc.*, 2012 WL 3201931, at \*9 (C.D. Ill. Aug. 3, 2012), surmising that section 230 “arguably . . . may not be used to bar a civil RICO claim because that would impair the enforcement of a Federal criminal statute.”

Defendants, for their part, point out that courts have consistently rejected this argument in a section 230 immunity context. In *Doe v. Bates*, 2006 WL 3813758 (E.D. Tex. Dec. 27, 2006), the court held that Yahoo could not be held civilly liable for allegedly knowingly hosting child pornography on a user site styled as the Candyman e-group. The Magistrate Judge examined “th[is] issue of first impression” in scholarly detail that is worth quoting at length. *Id.*, at \*3.

The plain text of the statute establishes that the 230(e)(1) exception does not encompass private civil claims. As argued by Defendant, the common definition of the term “criminal,” as well as its use in the context of Section 230(e)(1), specifically excludes and is distinguished from civil claims. The term “criminal” is defined as “[c]onnected with the administration of penal justice.” Black’s Law Dictionary 302; *see also* American Heritage Dictionary of the English Language 430 (4th ed. 2000) (defining “criminal” as “[r]elating to the administration of penal law”). The term “civil” is defined as follows: “[o]f or relating to private rights and remedies that are sought by action or suit, *as distinct from*



*criminal proceedings.*” Black’s Law Dictionary 262 (emphasis added). In addition, Congress’ use of the word “enforcement” in Section 230(e)(1) again confirms that the exception refers to governmental action, not civil actions by a private litigant.

Congress did not bifurcate any statutes as asserted by Plaintiffs. Rather, as noted by Defendant, it preserved the ability of law enforcement officials to enforce the federal criminal laws to their fullest extent while at the same time eliminating the ability of private plaintiffs to pursue service-provider defendants. Given the complexity of Title 18 and the availability of civil remedies in statutes throughout the criminal code, Congress achieved its intended result using simple language making it clear that Section 230’s limits on civil liability would not affect governmental enforcement of federal criminal laws.

As noted by Defendant, Plaintiffs’ invocation of Section 230(e)(1) rests on their generalized policy arguments rather than the text of the statute. Plaintiffs’ core argument appears to be that Section 230(e)(1) must exempt civil claims under the child pornography statutes because child pornography is “not to be tolerated” and “[i]f the prospect of civil liability provides a disincentive for en-

gaging in child pornography over and above that provided by the prospect of fines and jail time, then that is a good thing.”

Child pornography obviously is intolerable, but civil immunity for interactive service providers does not constitute “tolerance” of child pornography any more than civil immunity from the numerous other forms of harmful content that third parties may create constitutes approval of that content. Section 230 does not limit anyone’s ability to bring criminal or civil actions against the actual wrongdoers, the individuals who actually create and consume the child pornography. Here, both the neighbor [who created the child pornography] and the moderator of the Candyman web site have been prosecuted and are serving sentences in federal prison. Further, the section 230(e)(1) exemption permits law enforcement authorities to bring criminal charges against even interactive service providers in the event that they themselves actually violate federal criminal laws.

Regarding civil liability, however, Congress decided not to allow private litigants to bring civil claims based on their own beliefs that a service provider’s actions violated the criminal laws. As Defendant explained in its briefing, the

reason is evident. If civil liability were possible, the incentive to bring a civil claim for the settlement value could be immense, even if a plaintiff's claim was without merit. Even if it ultimately prevailed, the service provider would face intense public scrutiny and substantial expense. Given the millions of communications that a service provider such as Defendant enables, the service provider could find itself a defendant in numerous such cases. Congress determined that it wanted to eliminate the resulting disincentives to the development of vibrant and diverse services involving third-party communication, while maintaining the ability of criminal prosecutions by the government for violations of federal criminal law. In sum, Congress did intend to treat civil and criminal claims differently and carefully crafted Section 230(e)(1) to achieve exactly that result. Plaintiffs' claim, although novel, is untenable and without merit.

*Id.*, at \*21-22.

The District Judge adopted the Magistrate Judge's opinion, also noting that

[t]he legislative history [] buttresses the Congressional policy against civil liability for internet service providers. One key proponent of an amendment containing the language of § 230 at issue

explained that “the existing legal system provides a massive disincentive for the people who might best help us control the Internet to do so.” 141 Cong. Rec. H8469. Several legislators identified “obscenity” in particular as material that could be more freely regulated as a result of the immunity provided by the statute. Another proponent noted that “[t]here is no way that any of [the internet service providers], 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 . . . thousands of pages of information every day, and to have that imposition imposed on them is wrong.” *Id.* at H8471. The House approved the amendment by a vote of 410 to 4. *Id.* at H8478.

*Id.*, at \*4. The court concluded that on the basis of this legislative history, “Congress decided not to allow private litigants to bring civil claims based on their own beliefs that a service provider’s actions violated the criminal laws.” *Id.*, at \*5.

In *M.A. ex rel. P.K. v. Vill. Voice Media Holdings, LLC*, 809 F. Supp. 2d 1041 (E.D. Mo. 2011), the court adopted the reasoning of *Bates* and rejected the *identical* argument from plaintiff, a victim of child sex trafficking, that section 230 carved out an exemption for the civil claim that she had brought against Backpage under 18 U.S.C. § 1595. *Id.* at 1055-1056. Similarly, in

*Obado v. Magedson*, 2014 WL 3778261 (D.N.J. July 31, 2014), the court rejected plaintiff’s effort to claim private redress for defendants’ alleged criminal conspiracy to violate his rights. *Id.*, at \*8. “Even if Plaintiff had alleged any facts to sustain this claim, the CDA exception for federal criminal statutes applies to government prosecutions, not to civil private rights of action under stat[utes] with criminal aspects.” *Id.*

Although the Doe plaintiffs challenge this line of cases as “flawed,” the court is persuaded that criminal and civil actions differ in kind and that section 230 exempts only criminal prosecutions. Section 1595 itself recognizes that although a private right of action may be complementary to government interests in combating trafficking, a civil action primarily vindicates private interests and must take a back seat to a criminal prosecution. *See* 18 U.S.C. § 1595(b)(1) (“Any civil action filed under this section shall be stayed during the pendency of any criminal action arising out of the same occurrence in which the claimant is the victim.”). The court also finds persuasive amici EFF’s argument that only criminal prosecutions are exempted from section 230’s immunity because they are subject to the filter of prosecutorial discretion and a heightened standard of proof, making them less likely to have a chilling effect on the freedom of online speech.<sup>20</sup>

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<sup>20</sup> Defendants also contend that plaintiffs fail to make out a case under 18 U.S.C. § 1595 because they do not allege that defendants shared the traffickers’ criminal intent. Plaintiffs counter that section 1595 imposes liability not only for aiding and abetting, but more broadly for “*participation* in a venture which that person knew or should have known has engaged in an act in violation of this chapter.” *Id.* § 1595(a) (emphasis added). The court need not

The Doe plaintiffs' next argument, that section 230 only immunizes "good faith" efforts to restrict access to offensive materials, has also failed to find support in the decided cases. Section 203(c)(1) states that "[n]o 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." Section 230(c)(2) further provides that

[n]o provider or user of an interactive computer service shall be held liable on account of –

(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or

(B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).

Where section 230(c)(1) exempts an interactive service provider from liability for publishing third-party content, section 230(c)(2) also immunizes these providers from liability for actions taken in good faith to restrict offensive content.

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decide this issue because it holds that this claim is preempted by section 230 immunity.

[Section] 230(c)(1) contains no explicit exception for impermissible editorial motive, whereas § 230(c)(2) does contain a “good faith” requirement for the immunity provided therein. That § 230(c)(2) expressly provides for a good faith element omitted from § 230(c)(1) indicates that Congress intended not to import a subjective intent/good faith limitation into § 230(c)(1). “[W]here Congress includes particular language in one section of a statute but omits it in another . . . , it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.” *Keene Corp. v. United States*, 508 U.S. 200, 208 [] (1993). Accordingly, the text of the two subsections of § 230(c) indicates that (c)(1)’s immunity applies regardless of whether the publisher acts in good faith.

*Levitt v. Yelp! Inc.*, 2011 WL 5079526, at \*7 (N.D. Cal. Oct. 26, 2011), *aff’d*, 765 F.3d 1123 (9th Cir. 2014).<sup>21</sup>

### ***Unfair and Deceptive Business Practices***

The Doe plaintiffs contend that the claim for unfair and deceptive business practices under the Massachusetts Consumer Protection Act, Gen. Laws ch. 93, § 9, survives section 230 immunity because it does not de-

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<sup>21</sup> Because the CDA immunizes Backpage from private litigants seeking redress under civil law, the parallel state law claim under the MATA is necessarily inconsistent with, and therefore preempted by, the CDA.

pend on the content of the advertisements themselves, but rather on the “deceptive” design of Backpage. Without the offending ads, however, no nexus would exist between Backpage and the harms suffered by the Doe plaintiffs. Their theory – that absent the permissive website design and imperfect filtering, their pimps would not have trafficked them or, if they had attempted to do so, law enforcement would have scrutinized Backpage more closely and would possibly have intervened to prevent their injuries – is too speculative to fall as a matter of law within the penumbra of reasonably foreseeability.

Moreover, courts have repeatedly rejected this “entire website” theory as inconsistent with the substance and policy of section 230. In *Universal Commc’n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413 (1st Cir. 2007), the First Circuit refused to hold Lycos (a search engine) liable for the “construct and operation” of its website. *Id.* at 422. “Lycos’s decision not to reduce misinformation by changing its web site policies was as much an editorial decision with respect to that misinformation as a decision not to delete a particular posting. Section 230 immunity does not depend on the form that decision takes.” *Id.*; see also *StubHub, Inc.*, 219 N.C. App. at 245 (rejecting the “entire website” approach in determining whether the Internet ticket marketplace may be held responsible for scalpers’ unfair or deceptive trade practices); *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 257 (4th Cir. 2009) (finding a “structure and design” approach inapplicable where, unlike in *Roommates*, the



design of website did not “require[] users to input illegal content as a necessary condition of use.”<sup>22</sup>

Also problematic is the suggestion that either knowledge or tacit encouragement of illegal content (but not the content itself) can be the basis for interactive web services liability. “It 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.” *Lycos*, 478 F.3d at 420; *see also Zeran v. Am. Online, Inc.*, 129 F.3d 327, 332 (4th Cir. 1997) (“The simple fact of notice surely cannot transform one from an original publisher to a distributor in the eyes of the law.”). Moreover,

there is simply no authority for the proposition that [encouraging the publication of defamatory content] makes the website operator responsible, in whole or in part, for the ‘creation or development’ of every post on the site. . . . Unless Congress amends the [CDA], it is legally (although perhaps not ethically) beside the point whether defendants refuse to remove the ma-

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<sup>22</sup> Court have also rejected consumer protection claims under section 230(c)(1) that seek to hold interactive service providers liable for third-party content. *See, e.g., Lycos*, 478 F.3d at 421-422 (Florida securities and cyberstalking laws); *Hinton v. Amazon.com*, 2014 WL 6982628, at \*1 (S.D. Miss. Dec. 9, 2014) (Mississippi Consumer Protection Act); *Obado*, 2014 WL 3778261, at \*1 (New Jersey Consumer Fraud Act); *Goddard v. Google*, 2008 WL 5245490, at \*1 (N.D. Cal. Dec. 17, 2008) (California Unfair Competition Law).

terial, or how they might use it to their advantage.

*Ascentive, LLC v. Opinion Corp.*, 842 F. Supp. 2d 450, 476 (E.D.N.Y. 2011) (internal quotation marks omitted, ellipsis in original). Indeed,

an encouragement test would inflate the meaning of “development” to the point of eclipsing the immunity from publisher-liability that Congress established. Many websites not only allow but also actively invite and encourage users to post particular types of content. Some of this content will be unwelcome to others – *e.g.*, unfavorable reviews of consumer products and services, allegations of price gouging, complaints of fraud on consumers, reports of bed bugs, collections of cease-and-desist notices relating to online speech. And much of this content is commented upon by the website operators who make the forum available. Indeed, much of it is “adopted” by website operators, gathered into reports, and republished online. Under an encouragement test of development, these websites would lose the immunity under the CDA and be subject to hecklers’ suits aimed at the publisher. Moreover, under the district court’s rule, courts would then have to decide what constitutes “encouragement” in order to determine immunity under the CDA – a concept that is certainly more

difficult to define and apply than the Ninth Circuit's material contribution test. *See Zeran*, 129 F.3d at 333. Congress envisioned an uninhibited, robust, and wide-open internet, *see* § 230(a)(1)-(5), but the muddiness of an encouragement rule would cloud that vision. Accordingly, other courts have declined to hold that websites were not entitled to the immunity furnished by the CDA because they selected and edited content for display, thereby encouraging the posting of similar content.

*Jones v. Dirty World Entm't Recordings LLC*, 755 F.3d 398, 414-415 (6th Cir. 2014).<sup>23</sup>

#### Right of Publicity

Mass. Gen. Laws ch. 214, § 3A, provides that

[a]ny person whose name, portrait or picture is used within the commonwealth for advertising purposes or for the purposes of trade without his written consent may bring a civil action in the superior court against the person so using his name, portrait or picture, to prevent and restrain the use thereof;

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<sup>23</sup> Defendants also argue that the Chapter 93A claim, in so far as it is based on alleged misrepresentations to law enforcement and social services agencies, lacks an essential foundational element because law enforcement and social services agencies have no connection in a commercial context to defendants as "consumers" of goods and services.

and may recover damages for any injuries sustained by reason of such use.

R.I. Gen. Laws § 9-1-28 provides in almost identical language that

[a]ny person whose name, portrait, or picture is used within the state for commercial purposes without his or her written consent may bring an action in the superior court against the person so using his or her name, portrait, or picture to prevent and restrain the use thereof, and may recover damages for any injuries sustained by reason of such use.

Accepting, *dubitante*, the Doe plaintiffs' assertion that the right to publicity constitutes an intellectual property claim exempt from immunity under section 230,<sup>24</sup> the

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<sup>24</sup> Although certain publicity rights are akin to "intellectual property" rights, a person's image is not a "product of the human intellect." Black's Law Dictionary (10th ed. 2014). "[T]he right of publicity flows from the right to privacy," *Alvarez Guedes v. Marcano Martinez*, 131 F. Supp. 2d 272, 278 (D.P.R. 2001) (citing numerous cases), which is an intangible right of a different nature. Despite the Doe plaintiffs' attorney's contention at oral argument that a photograph may be copyrightable, it does not follow that the underlying image is *ipso facto* protectable under intellectual property law. See *Meshwerks, Inc. v. Toyota Motor Sales U.S.A., Inc.*, 528 F.3d 1258, 1264 (10th Cir. 2008) ("Recognizing that Oscar Wilde's inimitable visage does not belong, or 'owe its origins' to any photographer, the Supreme Court noted that photographs may well sometimes lack originality and are thus not *per se* copyrightable. . . . [P]hotographs are copyrightable, if only to the extent of their *original* depiction of the subject. Wilde's image is not copyrightable; but to the extent a photograph reflects the photographer's decisions regarding pose, positioning, background, light-

court agrees with defendants that plaintiffs have not pled plausible claims for unauthorized use of their images. Plaintiffs do not allege that defendants used their images to extract any direct benefit (such as featuring plaintiffs on advertisements *for* Backpage). Rather, the allegation is that defendants benefitted incidentally from the fee charged for posting advertisements with the Doe plaintiffs' pictures in the escorts section of the website. The argument, however, has been explicitly rejected by the Massachusetts Supreme Judicial Court.<sup>25</sup>

[T]he crucial distinction under G.L. c. 214, s 3A, must be between situations in which the defendant makes an incidental use of the plaintiff's name, portrait or picture and those in which the defendant uses the plaintiff's name, portrait or

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ing, shading, and the like, those elements can be said to 'owe their origins' to the photographer, making the photograph copyrightable, at least to that extent."), *citing Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 59 (1884). Courts also disagree as to whether state law intellectual property claims are exempted under section 230. *Compare Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1119 (9th Cir. 2007) ("In the absence of a definition from Congress, we construe the term "intellectual property" to mean "federal intellectual property.") *with Doe v. Friendfinder Network, Inc.*, 540 F. Supp. 2d 288, 302 (D.N.H. 2008) ("[Section] 230(e)(2) applies simply to 'any law pertaining to intellectual property,' not just federal law.").

<sup>25</sup> "[A]s a federal court considering state law claims, we must apply the state's law on substantive issues and 'we are bound by the teachings of the state's highest court.'" *Phoung Luc v. Wyndham Mgmt. Corp.*, 496 F.3d 85, 88 (1st Cir. 2007), *citing N. Am. Specialty Ins. Co. v. Lapalme*, 258 F.3d 35, 37-38 (1st Cir. 2001).

picture deliberately to exploit its value for advertising or trade purposes.

*Tropeano v. Atl. Monthly Co.*, 379 Mass. 745, 749 (1980). “The fact that the defendant is engaged in the business of publication, for example of a newspaper, out of which he makes or seeks to make a profit, is not enough to make the incidental publication a commercial use of the name or likeness.” *Id.*, quoting *Nelson v. Maine Times*, 373 A.2d 1221, 1224 (Me. 1977) (in turn quoting Restatement (Second) of Torts § 652C, cmt. d (1977)); see also *Intercity Maint. Co. v. Local 254 Serv. Employees Int’l Union*, 62 F. Supp. 2d 483, 506 (D.R.I. 1999), *aff’d in part, vacated in part on other grounds, remanded sub nom. Intercity Maint. Co. v. Local 254, Serv. Employees Int’l Union AFL-CIO*, 241 F.3d 82 (1st Cir. 2001) (“The Rhode Island legislature borrowed the Privacy Act’s scheme of four privacy torts, including the tort of false light, from the doctrine of privacy torts promulgated by the *Restatement (Second) of Torts*. See *Liu v. Striuli*, 36 F. Supp. 2d 452, 479 (D.R.I. 1999); *Restatement (Second) of Torts* §§ 652B-E (establishing the four privacy torts). Accordingly, Rhode Island courts have often turned to the *Restatement* as an authority on the matter of privacy torts.”).

#### *Copyright Infringement*

Jane Doe No. 3 obtained a registration for her photograph on December 18, 2014, after this lawsuit was filed. Although registration is not a jurisdictional prerequisite of bringing a suit for copyright infringement, *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 166 (2010), it is a “condition precedent for obtaining certain remedies, such as statutory damages and attorneys’ fees.” *Johnson v. Gordon*, 409 F.3d 12, 20 (1st Cir.

2005); *see also* 17 U.S.C § 412 (“[N]o award of statutory damages or of attorney’s fees . . . shall be made for – (1) any infringement of copyright in an unpublished work commenced before the effective date of its registration.”).

The only recovery remaining open to Jane Doe No. 3 is compensatory damages under 17 U.S.C. § 504. Section 504 permits recovery of “the actual damages suffered by [] her as a result of the infringement, and any profits of the infringer that are attributable to the infringement and are not taken into account in computing the actual damages.” With respect to the latter, Jane Doe No. 3 alleges that “[t]he Backpage Defendants derive a financial benefit directly attributable to the public display of such photographs by virtue of the payment of fees by the pimps and traffickers to Backpage.com.” SAC ¶ 139. However, she may only recover profits from defendants that are causally linked to specific acts of infringement. *See On Davis v. The Gap, Inc.*, 246 F.3d 152, 159-161 (2d Cir. 2001). Here no plausible link exists between defendants’ generalized profits and any common-law copyright vesting in Jane Doe No. 3’s photo for the simple reason that the fee for posting an ad is the same whether or not it includes a photograph. Jane Doe No. 3 does not allege that she suffered any loss of revenues or licensing fees for her photo as a result of the infringement (nor does she allege that the protectable elements of the photo, *see n.12 supra*, have any market value).

Because she does not plead any redressable damages, Jane Doe No. 3’s copyright infringement claim must also be dismissed.

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To avoid any misunderstanding, let me make it clear that the court is not unsympathetic to the tragic plight described by Jane Doe No. 1, Jane Doe No. 2, and Jane Doe No. 3. Nor does it regard the sexual trafficking of children as anything other than an abhorrent evil. Finally, the court is not naïve – I am fully aware that sex traffickers and other purveyors of illegal wares ranging from drugs to pornography exploit the vulnerabilities of the Internet as a marketing tool. Whether one agrees with its stated policy or not (a policy driven not simply by economic concerns, but also by technological and constitutional considerations), Congress has made the determination that the balance between suppression of trafficking and freedom of expression should be struck in favor of the latter in so far as the Internet is concerned. Putting aside the moral judgment that one might pass on Backpage’s business practices, this court has no choice but to adhere to the law that Congress has seen fit to enact.

ORDER

For the foregoing reasons, defendants’ motion to dismiss the Second Amended Complaint is AL-LOWED. The Clerk is directed to enter judgment accordingly and close this case.

SO ORDERED.

/s/ Richard G. Stearns

UNITED STATES DISTRICT  
JUDGE



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APPENDIX C

UNITED STATES COURT OF APPEALS  
FOR THE FIRST CIRCUIT

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No. 15-1724

JANE DOE (1); JANE DOE (2); JANE DOE (3), A  
MINOR CHILD, BY HER PARENTS AND NEXT  
FRIENDS, SAM LOE AND SARA LOE

Plaintiffs - Appellants

v.

BACKPAGE.COM, LLC; CAMARILLO HOLDINGS,  
LLC, f/k/a Village Voice Media Holding, LLC; NEW  
TIMES MEDIA, LLC

Defendants – Appellees

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Before

Howard, Chief Judge,  
Souter,\* Associate Justice,  
Torruella, Selya, Lynch, Thompson,  
Kayatta and Barron, Circuit Judges.

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ORDER OF COURT

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Entered: May 3, 2016

Pursuant to First Circuit Internal Operating Pro-  
cedure X(C), the petition for rehearing en banc has also

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\* Hon. David H. Souter, Associate Justice (Ret.) of the Supreme  
Court of the United States, sitting by designation.

been treated as a petition for rehearing before the original panel. The petition for rehearing having been denied by the panel of judges who decided the case, and the petition for rehearing en banc having been submitted to the active judges of this court and a majority of the judges not having voted that the case be heard en banc, it is ordered that the petition for rehearing and petition for rehearing en banc be denied.

By the Court:

/s/ Margaret Carter, Clerk

cc:

John T. Montgomery  
Dara Ann Reppucci  
Ching-Lee Fukuda  
Aaron M. Katz  
Christine Ezzell Singer  
Jessica Lucia Soto  
Rebecca C. Ellis  
Robert A. Bertsche  
Jeffrey J. Pyle  
James C. Grant  
Ambika Kumar Doran  
Genevieve C. Nadeau  
Mark David Lipton  
Stacey J. Rappaport  
Michael A. Rogoff  
Jenna A. Hudson

APPENDIX D

18 U.S.C. § 1591

§ 1591. Sex trafficking of children or by force, fraud, or coercion

(a) Whoever knowingly—

(1) in or affecting interstate or foreign commerce, or within the special maritime and territorial jurisdiction of the United States, recruits, entices, harbors, transports, provides, obtains, advertises, maintains, patronizes, or solicits by any means a person; or

(2) benefits, financially or by receiving anything of value, from participation in a venture which has engaged in an act described in violation of paragraph (1), knowing, or, except where the act constituting the violation of paragraph (1) is advertising, in reckless disregard of the fact, that means of force, threats of force, fraud, coercion described in subsection (e)(2), or any combination of such means will be used to cause the person to engage in a commercial sex act, or that the person has not attained the age of 18 years and will be caused to engage in a commercial sex act, shall be punished as provided in subsection (b).

(b) The punishment for an offense under subsection (a) is—

(1) if the offense was effected by means of force, threats of force, fraud, or coercion described in subsection (e)(2), or by any combination of such means, or if the person recruited, enticed, harbored, transported, provided, obtained, advertised, patronized, or solicited had not attained the age of 14 years at

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the time of such offense, by a fine under this title and imprisonment for any term of years not less than 15 or for life; or

(2) if the offense was not so effected, and the person recruited, enticed, harbored, transported, provided, obtained, advertised, patronized, or solicited had attained the age of 14 years but had not attained the age of 18 years at the time of such offense, by a fine under this title and imprisonment for not less than 10 years or for life.

(c) In a prosecution under subsection (a)(1) in which the defendant had a reasonable opportunity to observe the person so recruited, enticed, harbored, transported, provided, obtained, maintained, patronized, or solicited, the Government need not prove that the defendant knew, or recklessly disregarded the fact, that the person had not attained the age of 18 years.

(d) Whoever obstructs, attempts to obstruct, or in any way interferes with or prevents the enforcement of this section, shall be fined under this title, imprisoned for a term not to exceed 20 years, or both.

(e) In this section:

(1) The term “abuse or threatened abuse of law or legal process” means the use or threatened use of a law or legal process, whether administrative, civil, or criminal, in any manner or for any purpose for which the law was not designed, in order to exert pressure on another person to cause that person to take some action or refrain from taking some action.

(2) The term “coercion” means—

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(A) threats of serious harm to or physical restraint against any person;

(B) any scheme, plan, or pattern intended to cause a person to believe that failure to perform an act would result in serious harm to or physical restraint against any person; or

(C) the abuse or threatened abuse of law or the legal process.

(3) The term “commercial sex act” means any sex act, on account of which anything of value is given to or received by any person.

(4) The term “serious harm” means any harm, whether physical or nonphysical, including psychological, financial, or reputational harm, that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to perform or to continue performing commercial sexual activity in order to avoid incurring that harm.

(5) The term “venture” means any group of two or more individuals associated in fact, whether or not a legal entity.

APPENDIX E

18 U.S.C. § 1595

§ 1595. Civil remedy

(a) An individual who is a victim of a violation of this chapter may bring a civil action against the perpetrator (or whoever knowingly benefits, financially or by receiving anything of value from participation in a venture which that person knew or should have known has engaged in an act in violation of this chapter) in an appropriate district court of the United States and may recover damages and reasonable attorneys fees.

(b)(1) Any civil action filed under this section shall be stayed during the pendency of any criminal action arising out of the same occurrence in which the claimant is the victim.

(2) In this subsection, a “criminal action” includes investigation and prosecution and is pending until final adjudication in the trial court.

(c) No action may be maintained under this section unless it is commenced not later than 10 years after the cause of action arose.

APPENDIX F

47 U.S.C. § 230

§ 230. Protection for private blocking and screening of offensive material

(a) Findings The Congress finds the following:

(1) The rapidly developing array of Internet and other interactive computer services available to individual Americans represent an extraordinary advance in the availability of educational and informational resources to our citizens.

(2) These services offer users a great degree of control over the information that they receive, as well as the potential for even greater control in the future as technology develops.

(3) The Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.

(4) The Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation.

(5) Increasingly Americans are relying on interactive media for a variety of political, educational, cultural, and entertainment services.

(b) Policy It is the policy of the United States—

(1) to promote the continued development of the Internet and other interactive computer services and other interactive media;

(2) 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;

(3) to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services;

(4) to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material; and

(5) to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.

(c) Protection for "Good Samaritan" blocking and screening of offensive material

(1) Treatment of publisher or speaker

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.

(2) Civil liability No provider or user of an interactive computer service shall be held liable on account of—

(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene,



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lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or

(B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).[1]

(d) Obligations of interactive computer service

A provider of interactive computer service shall, at the time of entering an agreement with a customer for the provision of interactive computer service and in a manner deemed appropriate by the provider, notify such customer that parental control protections (such as computer hardware, software, or filtering services) are commercially available that may assist the customer in limiting access to material that is harmful to minors. Such notice shall identify, or provide the customer with access to information identifying, current providers of such protections.

(e) Effect on other laws

(1) No effect on criminal law

Nothing in this section shall be construed to impair the enforcement of section 223 or 231 of this title, chapter 71 (relating to obscenity) or 110 (relating to sexual exploitation of children) of title 18, or any other Federal criminal statute.

(2) No effect on intellectual property law

Nothing in this section shall be construed to limit or expand any law pertaining to intellectual property.

(3) State law

Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section. No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.

(4) No effect on communications privacy law

Nothing in this section shall be construed to limit the application of the Electronic Communications Privacy Act of 1986 or any of the amendments made by such Act, or any similar State law.

(f) Definitions As used in this section:

(1) Internet

The term “Internet” means the international computer network of both Federal and non-Federal interoperable packet switched data networks.

(2) Interactive computer service

The term “interactive computer service” means 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.

(3) Information content provider

The term “information content provider” means 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.

(4) Access software provider The term “access software provider” means a provider of software (including client or server software), or enabling tools that do any one or more of the following:

- (A) filter, screen, allow, or disallow content;
- (B) pick, choose, analyze, or digest content; or
- (C) transmit, receive, display, forward, cache, search, subset, organize, reorganize, or translate content.

APPENDIX G

Mass. Gen. Laws ch. 265, § 50

§ 50. Trafficking of persons for sexual servitude; trafficking of persons under 18 years for sexual servitude; trafficking by business entities; penalties; tort actions brought by victims

(a) Whoever knowingly: (i) subjects, or attempts to subject, or recruits, entices, harbors, transports, provides or obtains by any means, or attempts to recruit, entice, harbor, transport, provide or obtain by any means, another person to engage in commercial sexual activity, a sexually-explicit performance or the production of unlawful pornography in violation of chapter 272, or causes a person to engage in commercial sexual activity, a sexually-explicit performance or the production of unlawful pornography in violation of said chapter 272; or (ii) benefits, financially or by receiving anything of value, as a result of a violation of clause (i), shall be guilty of the crime of trafficking of persons for sexual servitude and shall be punished by imprisonment in the state prison for not less than 5 years but not more than 20 years and by a fine of not more than \$25,000. Such sentence shall not be reduced to less than 5 years, or suspended, nor shall any person convicted under this section be eligible for probation, parole, work release or furlough or receive any deduction from his sentence for good conduct until he shall have served 5 years of such sentence. No prosecution commenced under this section shall be continued without a finding or placed on file.

(b) Whoever commits the crime of trafficking of persons for sexual servitude upon a person under 18 years of age shall be punished by imprisonment in the state prison for life or for any term of years, but not less than

5 years. No person convicted under this subsection shall be eligible for probation, parole, work release or furlough or receive any deduction from his sentence for good conduct until he shall have served 5 years of such sentence.

(c) A business entity that commits trafficking of persons for sexual servitude shall be punished by a fine of not more than \$1,000,000.

(d) A victim of subsection (a) may bring an action in tort in the superior court in any county wherein a violation of subsection (a) occurred, where the plaintiff resides or where the defendant resides or has a place of business. Any business entity that knowingly aids or is a joint venturer in trafficking of persons for sexual servitude shall be civilly liable for an offense under this section.