No. 16-276

IN THE

Supreme Court of the United States

JANE DOE NO. 1, ET AL.,

Petitioners,

v.

BACKPAGE.COM, LLC, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF IN OPPOSITION

ROBERT A. BERTSCHE
JEFFREY J. PYLE
PRINCE LOBEL TYE LLP
One International Place
Suite 3700
Boston, MA 02110
(617) 456-8000

ROBERT CORN-REVERE
Counsel of Record
RONALD G. LONDON
DAVIS WRIGHT TREMAINE LLP
1919 Pennsylvania Ave., N.W.
Suite 800
Washington, DC 20006
(202) 973-4200
bobcornrevere@dwt.com

JAMES C. GRANT
DAVIS WRIGHT TREMAINE LLP
1201 Third Avenue
Seattle, WA 98101
(206) 622-3150

Counsel for Respondents

LEGAL PRINTERS LLC, Washington DC • 202-747-2400 • legalprinters.com

QUESTION PRESENTED

Whether civil claims against a website operator were properly dismissed under Section 230 of the Communications Decency Act, 47 U.S.C. § 230, where they sought to hold the website liable for publishing content posted by third parties, and for editorial decisions about publishing and prohibiting content.

RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, Respondents make the following disclosure:

Backpage.com, LLC is a Delaware limited liability company that is a subsidiary of and owned by several other privately held companies, respectively: IC Holdings, LLC; Dartmoor Holdings, LLC; Atlantische Bedrijven C.V.; Kickapoo River Investments, LLC; Lupine Investments LLC; and Amstel River Holdings, LLC. No publicly held corporation owns any interest in Backpage.com, LLC or its parent companies.

Camarillo Holdings, LLC, is owned by Leeward Holdings LLC, which is owned by Medalist Holdings Inc. Each of these entities is privately held, and no publicly held corporation owns an interest in any of them.

New Times Media, LLC is a wholly owned subsidiary of Voice Media Group, Inc. No publicly held corporation owns an interest in either company.

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INTRODUCTION

This case involves a straightforward application of Section 230 of the Communications Decency Act, which precludes suits against interactive computer services for content provided by third-party users. In the two decades since Congress enacted Section 230, hundreds of cases have interpreted the law in a manner consistent with Congress's intent to foster free speech on the Internet and to encourage online providers to self-police content rather than face potentially crippling liability. The First Circuit's decision affirming dismissal in this case comports with the "near-universal agreement that Section 230 should not be construed grudgingly." As courts have observed for 20 years, Section 230 was intended to prevent the "obvious chilling effect" that would occur if websites were held liable for third-party content, given the enormous amounts of such content posted online every day. App. 10a (quoting *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997)).

The First Circuit, in its unanimous panel opinion (joined by former Justice Souter, sitting by designation), correctly concluded that dismissal in this case was "rooted in positive law," and "fits comfortably" within established Section 230 precedent. App. 3a, 14a. It is undisputed that the online ads giving rise to petitioners' claims were created, developed and posted by third-party users, not Backpage.com. The First Circuit correctly held that petitioners' arguments to impose liability on Backpage.com for these ads were merely attempts to "end run" Section 230, which did "not cast the slightest doubt" on the conclusion that dismissal was proper. App. 20a. This too is entirely consistent with Section 230 case

law holding that plaintiffs may not evade Section 230 by artful pleading.

The Petition for Certiorari misconstrues the decision below and attempts to invent disagreement among the circuits where none exists. Petitioners contend the First Circuit decided that websites are immune from liability whenever "content created by a third party was a part of the chain of causation leading to the plaintiff's injury." Petition at 11. The First Circuit said no such thing. Rather, it held that Petitioners' claims amounted to an attack on Backpage.com's editorial decisions and practices, which the uniform case law holds that Section 230 protects. Petitioners' assertion that the Ninth Circuit "explicitly rejected the First Circuit's view," Petition at 13, both relies on this mischaracterization of the First Circuit's decision and misconstrues the few cases that have denied Section 230 immunity based on circumstances entirely different from this case.

The Petition for Certiorari raises no issue that warrants review by this Court.

STATEMENT OF THE CASE

A. Section 230 of the CDA

"By its plain language, § 230 creates a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service." *Zeran*, 129 F.3d at 330. Section 230(c)(1) states: "No provider … of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1). Section 230 expressly

preempts all civil claims and all state-law claims whether civil or criminal. *Id.* § 230(e)(3) ("[N]o liability may be imposed under any State or local law that is inconsistent with this section.").

Congress enacted Section 230 to achieve two goals. First, it "wanted to encourage the unfettered and unregulated development of free speech on the Internet, and to promote the development of e-commerce." *Batzel v. Smith*, 333 F.3d 1018, 1027 (9th Cir. 2003); *see also Ben Ezra, Weinstein, & Co. v. Am. Online Inc.*, 206 F.3d 980, 985 n.3 (10th Cir. 2000) (Section 230 is meant "to promote freedom of speech"); 47 U.S.C. § 230(b)(2) (statute intended to "preserve the vibrant and competitive free market that presently exists for the Internet"). Second, it sought to encourage online providers to "self-police" for potentially harmful or offensive material by providing immunity for such efforts. *Batzel*, 333 F.3d at 1028; *see also* 47 U.S.C. § 230(c)(2).

As courts interpreting Section 230 have uniformly held, the statute reflects a "'policy 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.'" *Universal Commc'n Sys. Inc. v. Lycos, Inc.*, 478 F.3d 413, 418 (1st Cir. 2007) (quoting *Zeran*, 129 F.3d at 330-31). Congress sought to eliminate the "obvious chilling effect" that such liability would cause, "given the volume of material communicated through [the Internet], the difficulty of separating lawful from unlawful speech, and the relative lack of incentives to protect lawful speech." *Id.* at 418-19 (quoting *Zeran*, 129 F.3d at 331). "Section 230 therefore sought to prevent

lawsuits from shutting down websites ...." *Batzel*, 333 F.3d at 1028.

Thus, courts have consistently interpreted Section 230 to establish immunity for online providers, as the First Circuit held in this case: "There has been near-universal agreement that Section 230 should not be construed grudgingly." App. 10a; *see also id.* 11a (noting the "broad construction accorded to section 230" resulting in the "capacious conception of what it means to treat a website operator as the publisher or speaker of information provided by a third-party"). Nine other circuit courts have interpreted Section 230 the same way, recognizing the broad immunity and protections it provides.[1] Hundreds of reported decisions have intepreted Section 230, and "[a]ll but a handful ... find that the website is entitled to immunity from

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[1] *Zeran*, 129 F.3d at 330-31; *Ben Ezra*, 206 F.3d at 985 n.3; *Green v. Am. Online*, 318 F.3d 465, 471 (3d Cir. 2003); *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1123-24 (9th Cir. 2003) (noting a "consensus" that "§ 230(c) provides broad immunity for publishing content provided primarily by third parties"); *Almeida v. Amazon.com, Inc.*, 456 F.3d 1316, 1321 (11th Cir. 2006) ("federal circuits have interpreted [§ 230] to establish broad federal immunity to any cause of action that would make service providers liable for information originating with a third-party user") (internal citation and quotation marks omitted); *Johnson v. Arden*, 614 F.3d 785, 791 (8th Cir. 2010) (same); *Doe v. MySpace, Inc.*, 528 F.3d 413, 418 (5th Cir. 2008) ("Courts have construed the immunity provisions in § 230 broadly ...."); *Chicago Lawyers' Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666, 671 (7th Cir. 2008); *Jones v. Dirty World Entm't Recordings LLC,* 755 F.3d 398, 406-07 (6th Cir. 2014); *Klayman v. Zuckerberg,* 753 F.3d 1354, 1359 (D.C. Cir. 2014).

liability." *Hill v. StubHub, Inc.*, 727 S.E.2d 550, 558 (N.C. Ct. App. 2012). And for its part Congress—far from disavowing Section 230 as the courts have interpreted it—has extended the statute to preempt the enforcement of certain foreign judgments. App. 44a (citing 28 U.S.C. § 4102(c)(1)).

B. Petitioners' Claims Against Backpage.com

Backpage.com operates an online classified advertising service through which users can post ads in a range of categories. App. 4a. The website is organized geographically by state and municipality. *Id.*; *see also Backpage.com, LLC v. Cooper*, 939 F. Supp. 2d 805, 813 (M.D. Tenn. 2013). Users post millions of ads every month, making Backpage.com the second-largest online classified ad service in the country, after Craigslist. *Backpage.com, LLC v. McKenna*, 881 F. Supp. 2d 1262, 1266 (W.D. Wash. 2012).

Petitioners (plaintiffs below) alleged that pimps trafficked them for sex and posted ads about them in the escort section of Backpage.com. Petitioners conceded that all of the ads were created and posted by the pimps (or by Petitioners themselves at their pimps' direction). App. 12a. They expressly disclaimed any contention that Backpage.com created or developed any of the content of the ads. *Id.* 11a n.6; *see also* App. 48a ("the Doe plaintiffs recognize that defendants did not author the content of the offending ads").

Instead, Petitioners alleged (largely in conclusory fashion) that Backpage.com's voluntary efforts to prevent misuse of the site were inadequate and amounted to a mere ruse to "facilitate" crime. For

example, Petitioners complained that Backpage.com did not require phone number verification, that phone numbers can be displayed in advertisements in alternative formats, that photographs uploaded for use in ads were shorn of metadata, and that users have the option to hide email addresses in postings. App. 5a-6a. Based on these and other similar allegations, Petitioners sued Backpage.com under the Trafficking Victims Protection Reauthorization Act of 2008, 18 U.S.C. § 1591, *et seq.* ("TVPRA"), the Massachusetts Anti-Trafficking Act, Mass. Gen. Laws c. 265 § 50, and other causes of action.

C. Proceedings Below

Respondents (defendants below) moved to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), arguing that plaintiffs' claims were based entirely on harms allegedly incurred from Backpage.com's publication of advertisements posted by third parties—exactly the kind of claims that are precluded by Section 230. The District Court (Stearns, J.), dismissed the action in its entirety.

Petitioners appealed, and the First Circuit (Barron, Selya and Souter, JJ.), unanimously affirmed. The panel noted that in enacting Section 230, Congress recognized that websites "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." App. 10a (quoting *Zeran*, 129 F.3d at 331). Accordingly, the uniform Section 230 case law reflects a "capacious conception" of what it means to treat a website as a

publisher of third-party content. App. 11a-12a. The court recognized that the "ultimate question" does not depend on how plaintiffs seek to characterize their claims, but rather on whether the "cause of action necessarily requires that the defendant be treated as the publisher or speaker of content provided by another." App. 12a (citing cases).

The court found plaintiffs' argument that their claims sought to hold Backpage.com liable not for publishing but for "participation in sex trafficking" "comprise[d] more cry than wool," because at bottom, plaintiffs' allegations all concern "the formulation of precisely the sort of website policies and practices" that Section 230(c)(1) protects. App. 13a. Accordingly, the First Circuit found that "[t]he case at hand fits comfortably within [Section 230's] construct" and that "[p]recedent cinches the matter." App. 14a.

Petitioners sought rehearing *en banc* before the Court of Appeals, which was denied. This Petition followed.

REASONS FOR DENYING THE WRIT

I. THE FIRST CIRCUIT'S DECISION IS CONSISTENT WITH UNIFORM SECTION 230 CASE LAW IMMUNIZING ONLINE PROVIDERS FOR CLAIMS BASED ON THIRD-PARTY CONTENT.

The First Circuit's decision was directly in line with the consensus among the circuit courts that Section 230 precludes claims against websites for their actions and practices in publishing third-party content. Petitioners' argument that the First Circuit's reasoning creates a circuit split is based on

a misreading of the decision below and a skewed analysis of Section 230 cases generally.

A. The First Circuit Did Not Adopt a "But For" Causation Test.

The First Circuit upheld dismissal of Petitioners' claims because they expressly sought to hold Backpage.com "'liable for its exercise of a publisher's traditional editorial functions – such as deciding whether to publish, withdraw, postpone or alter [third-party] content.'" App. 10a (quoting *Zeran*, 129 F.3d at 330). The court explained that appellants' claims "[w]ithout exception" turned on "Backpage's decisions about how to treat postings," including such things 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." It found that decisions about "the structure and operation of the Backpage website," "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." App. 14a-15a.

The First Circuit also correctly noted that its holding and reasoning is "congruent with the case law" of the other circuits, which have long held editorial decisions about third-party content to be protected under Section 230. *See*, *e.g.*, *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.,* 591 F.3d 250, 257 (4th Cir. 2009) (Section 230 precluded suit based on the "structure and design" of website); *MySpace,* 528 F.3d at 413 (dismissing claim for alleged failure to protect users of site from sexual assault by other users, finding claim was another

way of treating site as the publisher of third-party posts); *Zeran*, 129 F.3d at 330 ("[L]awsuits 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.").

In an attempt to invent a disagreement where none exists, Petitioners mischaracterize the First Circuit's reasoning. Petitioners assert the First Circuit held immunity lies wherever third-party speech appears in the "chain of causation" of a plaintiff's injuries. Petition at 3; *see also id.* at 11, 13, 14, 15, 18. That is quite plainly not what the First Circuit held. App. 17a. Rather, in the court's own words: "We hold that claims that a website facilitates illegal content 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)," and "a website operator's decisions in structuring its website and posting requirements are publisher functions entitled to section 230(c)(1) protection." *Id.* The court nowhere stated or suggested that it applied Section 230 on some "chain of causation" theory, as Petitioners assert.[2]

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[2] The First Circuit addressed causation only with regard to Petitioners' state-law claim under Massachusetts's unfair trade practices statute, Mass. Gen. Laws ch. 93A. For that claim, Petitioners alleged that Backpage.com had been disingenuous because it had cooperated with law enforcement authorities, which "'minimized and delayed' any real scrutiny" of the website, and the continued existence of the website therefore harmed Petitioners. App. 22a-23a. The First Circuit affirmed the district court's decision dismissing the ch. 93A claim, noting that it was "shot through with conjecture" and "pyramids

Nonetheless, proceeding from their mischaracterization of the First Circuit's decision, Petitioners point to Ninth Circuit cases to allege a conflict with their invented "but for" causation rule for Section 230 immunity. Those Ninth Circuit cases, however, are perfectly consistent with the First Circuit's *actual* holding: that claims attacking publisher's actions and editorial choices concerning third-party speech are immunized by Section 230. In *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC,* 521 F.3d 1157 (9th Cir. 2008), for example, the Ninth Circuit held the roommate-matching website could not be held liable for user-supplier content in a "comments" field on the website, despite the plaintiffs' claims—indistinguishable from those here—that the website and its features otherwise "encouraged" users to state discriminatory preferences.[3] *Id.* at 1174. The Ninth

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speculative inference upon speculative inference." App. 23a. Petitioners do not mention that this is the only portion of the First Circuit's decision addressing causation, and they do not seek certiorari to review the decision of the First Circuit and the district court that their allegations about this state-law claim were implausible.

[3] Petitioners (at 14) quote a portion of the Ninth Circuit's decision in *Roommates* holding that Roommates was not entitled to Section 230 protection for another part of its website that *required* users to provide discriminatory preferences "as a condition of accessing its service," because the site thereby became "the *developer*, at least in part, of that information." 521 F.3d at 1166 (emphasis added). Petitioners fail to mention that they disclaimed any assertion that Backpage.com acted as a content provider, App. 11a n.4 (noting that "content creation" argument was "forsworn" by plaintiffs below), such that this part of the *Roommates* decision is irrelevant here.

Circuit observed—again consistent with interpretations of Section 230 across the country—that any claim that can be "boiled down to the failure of an interactive computer service to edit or block user-generated content," amounts to an attack on the "very activity Congress sought to immunize by passing the section." *Id.* at 1172 n.32. *See also Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1102 (9th Cir. 2009) (immunity lies where "the duty that the plaintiff alleges the defendant violated derives from the defendant's status or conduct as a 'publisher or speaker'"); *Doe v. Internet Brands, Inc.*, 824 F.3d 846, 852 (9th Cir. 2016) (Section 230 immunizes websites from claims based on "efforts, or lack thereof, to edit, monitor, or remove user generated content.").

B. No Circuit Court Has Limited Section 230 Protections to "Neutral Intermediaries."

Petitioners next assert that the First Circuit's decision is contrary to a national "consensus" that CDA immunity is limited to online providers that act as "neutral intermediaries" of online speech. Not only does no such "consensus" exist—no federal appellate court has ever limited Section 230 in the way Petitioners suggest. To the contrary, the courts routinely hold that websites are immune from liability for third-party content even if they "encourage" or "promote" actionable speech.

Petitioners base their fictional "neutral intermediary" test on passages in a few Section 230 cases that examine whether a website was responsible for *developing* the allegedly actionable content at issue. For example, in *FTC v. Accusearch, Inc.*, 570 F.3d

1187, 1201 (10th Cir. 2009), the Tenth Circuit denied CDA immunity not because the website failed some abstract "neutrality" standard, but because the website operator actually hired and paid researchers to obtain confidential telephone records illegally. These actions made it "responsible for the *development* of the specific content that was the source of the alleged liability," and thus potentially liable as an "information content provider" as defined in Section 230(f)(3). *Id.* at 1198 (emphasis added).

Here, Petitioners repeatedly disclaimed the argument that Backpage.com acted as an "information content provider." App. 11a. In both the district court and the First Circuit, they conceded that all of the content that allegedly led to their injuries was supplied by third parties. In light of this acknowledgment, the First Circuit declined to address the argument advanced improperly by some *amici* urging that Backpage.com be treated as an "information content provider" so as to avoid the protections of Section 230.[4] App. 11a. There is no conflict between the First Circuit's opinion, which held that Petitioners' claims treated Backpage.com as a pub-

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[4] Petitioners' waiver also renders inapposite the Washington Supreme Court decision in *J.S. v. Village Voice Media Holdings, LLC*, 184 Wash. 2d 95 (2015), (Petition at 20), which was based entirely on the allegation that Backpage.com creates content. The Washington court held (on a considerably more lenient pleadings standard than permitted in federal court), that plaintiffs' allegations that Backpage.com might be considered an information content provider could survive a dismissal motion. *Id.* at 103. Petitioners' assertion that the First Circuit's decision "creates a direct conflict with a state court of last resort" is wrong.

lisher of third-party content because they challenged publisher functions, and cases such as *Accusearch* addressing the issue of whether websites may be liable for creating and developing content themselves.

Nor do any of the other circuit cases Petitioners cite impose an all-purpose "neutral intermediary" limitation on Section 230 immunity. Several, like *Accusearch,* address the question of whether a website's actions constituted content development,[5] the issue eschewed by Petitioners in this case. Some of the cases referred to websites acting as intermediaries or providing neutral tools (which users misused to post allegedly unlawful content) in the course of explaining that Section 230 immunity applied,[6] but none have stated this as a dispositive test or even a relevant consideration for application

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[5] *Klayman*, 753 F.3d at 1358 (Facebook held immune where complaint "nowhere alleges or even suggests that Facebook provided, created, or developed any portion of the content that Klayman alleges harmed him"); *Carafano*, 339 F.3d at 1124 ("that Matchmaker classifies user characteristics into discrete categories and collects responses to specific essay questions does not transform Matchmaker into a 'developer' of the 'underlying misinformation'"); *Ben Ezra*, 206 F.3d at 983 (America Online did act as an information content provider outside the scope of § 230 immunity by providing access to allegedly inaccurate information).

[6] *See, e.g.*, *Doe v. GTE*, 347 F.3d 655, 657-58 (7th Cir. 2003) (noting that service provider acted in a "passive" manner, but not holding that "passivity" is a requirement for Section 230 immunity).

of Section 230.[7] No circuit court has ever imposed such a requirement.

In fact, the consensus is the opposite of what Petitioners assert. Decisions from the circuit courts (and other courts) have routinely barred plaintiffs from pleading around Section 230 by alleging a website "encouraged" actionable third-party content. In the *Jones v. Dirty World* case, for example, the plaintiff sued a gossip website for disparaging remarks a third-party user posted about her. The district court refused to apply Section 230 because it concluded the site "intentionally encourage[d] illegal or actionable third-party postings,"[8] but the Sixth Circuit reversed. It noted that "[m]any websites not only allow but also actively invite and encourage users to post particular types of content" that might be "unwelcome to others." 755 F.3d at 414. The court held, however, that websites cannot be sued on an "encouragement" theory because that would "eclips[e] the immunity from publisher-liability that Congress established." *Id.* "Congress envisioned an uninhibited, robust, and wide-open internet, but the muddiness of an encouragement rule would cloud that vision." *Id.* at 415 (citation omitted).

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[7] In fact, the cases Petitioners cite as supposedly creating a "neutral intermediary" standard, *see* Petition at 17-18 n.3, do not even use this phrase, much less suggest that it is a requirement for Section 230 immunity. *See, e.g.*, *Carafano*, 339 F.3d 1119; *Ben Ezra*, 206 F.3d 980.

[8] *Jones v. Dirty World Entm't Recordings LLC*, 965 F. Supp. 2d 818, 821 (E.D. Ky. 2013), *rev'd*, 755 F.3d 398.

Similarly, in *Roommates.com*, 521 F.3d at 1174, the Ninth Circuit rejected arguments that a website lost Section 230 immunity by implicitly encouraging unlawful speech. In many cases, the court noted, "a clever lawyer could argue that *something* the website operator did encourage the illegality," but such cases "must be resolved in favor of immunity, lest we cut the heart out of section 230 by forcing websites to face death by ten thousand duck-bites, fighting off claims that they promoted or encouraged—or at least tacitly assented to—the illegality of third parties." *Id.* at 1174. *See also Lycos*, 478 F.3d at 420 ("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.").

"[T]here is simply no authority for the proposition that [encouraging unlawful content] makes the website operator responsible, in whole or in part, for the creation ... of every post on the site." *Ascentive, LLC v. Opinion Corp.*, 842 F. Supp. 2d 450, 476 (E.D.N.Y. 2011) (internal quotation marks omitted). The First Circuit's decision is fully consistent with the consensus of courts across the country that application of Section 230 cannot turn on whether a website's decisions about publishing third-party content are sufficiently "neutral" or instead allegedly "encourage" unlawful content. [9]

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[9] *See also*, *e.g.*, *S.C. v. Dirty World, LLC*, 2012 WL 3335284, at *4 (W.D. Mo. Mar. 12, 2012) ("[E]ncouraging defamatory posts is not sufficient to defeat CDA immunity."); *Goddard v. Google, Inc.,* 640 F. Supp. 2d 1193, 1196 (N.D. Cal. 2009) (holding Google immune despite allegations it "encourages[,] collaborates in the development of … and, effectively, requires"

II. THERE IS NO NEED TO "HARMONIZE" FEDERAL STATUTES.

Petitioners also assert the Court should grant certiorari to "harmonize" Section 230 with the civil remedy provision of the TVPRA, 18 U.S.C. § 1595. However, the First Circuit affirmed dismissal of Petitioners' claims not because of a conflict between the terms of two statutes, but because Petitioners' TVPRA claim sought to treat Backpage.com as a publisher of third party speech. Petitioners' claims are barred by Section 230, and no "harmonization" is needed.

The TVPRA permits an individual who is a victim of sex trafficking to bring a civil action against the perpetrator or one who "knowingly benefits" from "participation in a venture" which that person "knew or should have known" violated the statute. 18 U.S.C. § 1595(a). Section 230 provides that an online provider may not "be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1).

The First Circuit found no conflict between the two statutes in this case. It recognized that a TVPRA claim could conceivably lie against a website operator if it was "a participant in a sex trafficking

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illegal content in ad program); *Global Royalties, Ltd. v. Xcentric Ventures, LLC*, 544 F. Supp. 2d 929, 933 (D. Ariz. 2008) (ripoffreport.com immune despite allegations it encouraged defamatory reviews); *Shiamili v. Real Estate Grp. of N.Y., Inc.*, 952 N.E.2d 1011, 1018 (N.Y. 2011) (enforcing Section 230 immunity despite claims that ShittyHabitats.com "encouraged users to post negative comments").

venture"—for example if "the website operator helped to procure the underaged youths who were being trafficked." App. 16a. But the court observed that plaintiffs alleged no such thing and, instead, "the TVPRA claims as pleaded premise[d alleged] participation on Backpage's actions as a publisher or speaker of third-party content," falling squarely within "[t]he strictures of section 230(c)" which "foreclose such suits." *Id.*

Plainly, the First Circuit's fact-bound holding—that plaintiffs' second amended complaint does not allege sufficient facts to demonstrate Backpage.com acted in any way other than as a publisher of third-party content—provides no cause for review by this Court. It does not point to a "conflict" between Section 230 and the TVPRA, any more than between Section 230 and any other federal statute establishing a civil cause of action. *Cf. POM Wonderful LLC v. Coca-Cola Co.,* 134 S. Ct. 2228, 2239 (2014) (harmonizing provisions of Lanham Act and federal Food, Drug, and Cosmetic Act as they pertain to drink labeling). Nor could it be said Section 230 and the later-enacted TVPRA are in such "irreconcilable conflict" that the TVPRA worked an implied repeal of Section 230. *Carcieri v. Salazar*, 555 U.S. 379, 395 (2009) (holding implied repeal is found only where two statutes "are in irreconcilable conflict, or where the latter Act covers the whole subject of the earlier one and 'is clearly intended as a substitute'") (internal quotation marks and citation omitted). Here, there is nothing to reconcile. The TVPRA allows plaintiffs to bring civil claims against their traffickers, while Section 230 precludes asserting such claims against website operators based solely on their actions in publishing third-party content.

Petitioners next erroneously claim that nothing in Section 230 "immunize[s] website operators from being held civilly liable for conduct that violates federal criminal law." Petition at 25. But that is *precisely* what the statute does. Section 230 precludes all civil claims contrary to its protections.[10] Its broad prohibition against claims that treat a website as the "publisher or speaker" of third-party content is limited only by certain enunciated exceptions, none of which include civil claims based on federal criminal statutes. 47 U.S.C. § 230(e).

The First Circuit correctly held that the exception in Section 230(e)(1) for criminal enforcement applies only to federal criminal *prosecutions*; it does not permit private plaintiffs' civil actions based on alleged violations of criminal statutes. App. 18a-20a. 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." App. 20a. In this regard, too, the First Circuit's decision is consistent with every other federal court that has considered the issue.[11]

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[10] Section 230 expressly preempts state laws, 47 U.S.C. § 230(e)(3) ("no liability may be imposed under any State or local law that is inconsistent with this section"), and also provides immunity for federal civil claims that would violate Section 230's protections of online providers, *see, e.g.*, *Chicago Lawyers' Comm. for Civil Rights*, 519 F.3d at 668-69 (Section 230 precluded claim under Fair Housing Act).

[11] *See, e.g.*, *Obado v. Magedson*, 2014 WL 3778261, at *8 (D.N.J. July 31, 2014) ("[T]he CDA exception for federal

Petitioners also argue their state-law claims survive because they are "not inconsistent" with Section 230. Opp. at 23-25. But subsection 230(e)(3) permits application of laws that, like Section 230, bar claims based on third-party content. To the extent Plaintiffs argue Section 230 does not apply because they are not suing Backpage.com as a publisher, that is not true (as discussed), and in any event, this circular logic would render subsection 230(e)(3) meaningless.

III. THE PETITION RAISES NO LEGAL ISSUE OF IMPORTANCE MERITING REVIEW BY THIS COURT.

The Petition does not raise a legal issue of importance for this Court's review. At bottom, Petitioners' disagreement is not with the First Circuit's legal analysis, which simply applied the plain meaning of Section 230 to the complaint before it. Rather, their quarrel is with the scope of the immunity enacted by Congress. As the First Circuit aptly explained:

> Congress did not sound an uncertain trumpet when it enacted the CDA, and it chose to grant broad protections to internet publishers …. If the evils that [Petitioners] have identified are

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criminal statutes applies to *government prosecutions*, *not* to civil private rights of action under [statutes] with criminal aspects.") (emphasis added); *Backpage.com v. McKenna*, 881 F. Supp. 2d at 1275; *M.A. v. Village Voice Media Holdings, LLC*, 809 F. Supp. 2d 1041, 1055-56 (E.D. Mo. 2011); *Hinton v. Amazon.com.dedc, LLC*, 72 F. Supp. 3d 685, 690-91 (S.D. Miss. 2014); *Goddard v. Google, Inc.*, 2008 WL 5245490, at *5 n.5 (N.D. Cal. Dec. 17, 2008); *Doe v. Am. Online, Inc.*, 783 So. 2d 1010, 1017 (Fla. 2001)

> deemed to outweigh the First Amendment values that drive the CDA, the remedy is through legislation, not through litigation.

App. 32a. Petitioners' arguments that the dictates of Section 230 should give way to their private claims or their contentions about combatting sex trafficking are not appropriately addressed to this Court.

Impassioned though they may be, the various *amici curiae* supporting the Petitioners add nothing to alter that conclusion. Some of the *amici* try, in vain, to resurrect the long-waived argument that Backpage.com can be held liable to Petitioners as an "information content provider." *See*, *e.g.*, Brief of States of Washington, Colorado, et al., at 7-10; Brief of National Center for Missing and Exploited Children, et al., at 17-18. However, it is well settled that an *amicus curiae* may not promote an argument renounced by a party. *New Jersey v. New York*, 523 U.S. 767, 781 (1998) ("[W]e must pass over the arguments of the named amici for the reason that" the party to the case "has in effect renounced them."), judgment entered, 526 U.S. 589 (1999).[12]

Other *amici* would have this Court grant certiorari to drastically restrict the scope of Section 230 in a way that Congress did not intend, and that no reported decision has ever done. *See* Brief of Legal Momentum, et al., at 14-15. Specifically, these *amici* maintain that Section 230 immunity is limited

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[12] The rule that *amici* cannot independently present issues to justify certiorari is uniquely appropriate here, because the First Circuit refused to address the same arguments of the same *amici* offered below. App. 11a n.6.

to the so-called "innocent" website operator who does not have "knowledge" that the site is being misused, with the result that "distributor" liability remains for a website that has "notice" of harmful content. But Section 230 contains no such limitation, and this whole-cloth argument would contradict the uniform interpretation of Section 230 and Congress's intent.

As the Fourth Circuit comprehensively explained in the first appellate decision to apply Section 230(c), "[l]iability upon notice would defeat the dual purposes advanced by § 230 of the CDA," *Zeran*, 129 F.3d at 333, namely, to protect free speech online and to incentivize self-regulation. In particular, since any affirmative steps to screen content could also potentially put a website on notice of allegedly actionable postings, "notice" liability would have the perverse effect of disincentivizing such efforts. *Id.* at 332-33. *See also Lycos*, 478 F.3d at 420 ("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."). The *amici* supporting Petitioners disagree with this as a matter of policy, but it is not the province of this Court to grant certiorari to rewrite the law. *Badaracco v. Comm'r*, 464 U.S. 386, 398 (1984) ("Courts are not authorized to rewrite a statute because they might deem its effects susceptible of improvement.")

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

ROBERT CORN-REVERE
Counsel of Record
RONALD G. LONDON
DAVIS WRIGHT TREMAINE LLP
1919 Pennsylvania Ave., N.W.
Suite 800
Washington, DC 20006
(202) 973-4200

JAMES C. GRANT
DAVIS WRIGHT TREMAINE LLP
1201 Third Avenue
Seattle, WA 98101
(206) 622-3150

ROBERT A. BERTSCHE
JEFFREY J. PYLE
PRINCE LOBEL TYE LLP
One International Place
Suite 3700
Boston, MA 02110
(617) 456-8000

Counsel for Respondents

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