

Inconsistencies in Combatting the Sex Trafficking of  
Minors: Backpage’s Deceptive Business Practices Should  
Not Be Immune from State Law Claims

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## INTRODUCTION

Human trafficking<sup>1</sup>—mainly for the purpose of forced labor and sex trafficking—is the world’s fastest growing criminal industry.<sup>2</sup> Globally, there are more than twenty million victims of human trafficking each year.<sup>3</sup> Every thirty seconds, someone becomes a victim.<sup>4</sup> There are an estimated twenty-seven million people in bondage across the globe—men, women, and children are exploited for manual and sexual labor against their will.<sup>5</sup> The average age of a trafficking victim is twelve years old.<sup>6</sup> Sex trafficking’s most devastating effects are on children, undermining their basic human needs; inflicting long-lasting physical and psychological trauma; and resulting in drug addiction, malnutrition, social ostracism, and sometimes death.<sup>7</sup> In the United States, child victims are often runaways and homeless youth.<sup>8</sup> Only 1%–2% of victims *are ever rescued*.<sup>9</sup>

Such victimization has flourished due to its profitability. Sex traffickers realized more profits in 2010 than the combined profits of Wal-Mart and Exxon Mobil, the top two Fortune 500 companies that year.<sup>10</sup> In the U.S., sex traffickers have found a loophole in federal regulations that allows them to exploit minors more easily and without fear of retribution: the Internet.<sup>11</sup> Sex traffickers can post advertisements for

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1. The term “human trafficking” is used to describe many forms of exploitation. *Human Trafficking Prosecution Unit*, U.S. DEP’T OF JUSTICE (Feb. 6, 2017), <https://www.justice.gov/crt/human-trafficking-prosecution-unit-htpu> [https://perma.cc/6X2X-CLU7] [hereinafter *Human Trafficking Prosecution Unit*]. Human trafficking crimes focus on the act of compelling or coercing a person’s labor, services, or commercial sex acts. *Id.* When the term “sex trafficking” is used, it describes subtle or overt, physical or psychological, coercion to a victim into performing commercial sex acts. *Id.*

2. A21, <http://www.a21.org/index.php?site=true> [https://perma.cc/P3QD-6CER].

3. President Barack Obama, Remarks by the President to the Clinton Global Initiative, (Sept. 25, 2012), <https://www.whitehouse.gov/the-press-office/2012/09/25/remarks-president-clinton-global-initiative> [https://perma.cc/67BG-Y6AS] [hereinafter Remarks by the President].

4. *Human Trafficking*, A21, <http://www.a21.org/content/human-trafficking/gl0ryw?percode=gl0ryw&site=true> [https://perma.cc/K8RP-UCNA].

5. *Id.*

6. *Id.*

7. U.S. DEP’T OF STATE, TRAFFICKING IN PERSONS REPORT 7 (2015), <http://www.state.gov/documents/organization/245365.pdf> [https://perma.cc/X872-PLAN] [hereinafter TRAFFICKING IN PERSONS REPORT].

8. *Sex Trafficking*, WASH. ST. OFF. ATT’Y GEN., <http://www.atg.wa.gov/sex-trafficking> [https://perma.cc/66NZ-5XDK] [hereinafter *Sex Trafficking*].

9. *Human Trafficking*, *supra* note 4.

10. Ryan Dalton, Note, *Abolishing Child Sex Trafficking on the Internet: Imposing Criminal Culpability on Digital Facilitators*, 43 U. MEM. L. REV. 1097, 1102 (2013).

11. The dark net, which is beyond the scope of this Note, has also become a major hub for illegal activity. The dark net is a network of encoded websites that is hidden from publicly available search

prostitutes online on websites such as Backpage.com (Backpage), a free online advertising service, which is estimated to be the second-largest online classifieds service in the U.S.<sup>12</sup> Until January 9, 2017, Backpage hosted ads for “escort services,” arguably operating as a sort of “online brothel” and generating millions of dollars from the illegal sex trade.<sup>13</sup>

After Craigslist eliminated its “erotic services” category in 2008, Backpage saw a huge spike in traffic and ads; the ads that had been found on Craigslist were merely transferred to Backpage.<sup>14</sup> Backpage capitalized on this increased traffic by raising fees and expanding its operations by creating sites in hundreds of cities throughout the world.<sup>15</sup>

In 2013, the California Department of Justice (California DOJ) began investigating Backpage because of reports of children who were repeatedly exploited for commercial sex on Backpage from the National Center for Missing and Exploited Children (NCMEC) and the media.<sup>16</sup> Since 2012, the NCMEC has worked on more than 400 cases involving children sold for commercial sex on Backpage and has reported 2,900 instances to California law enforcement where suspected child sex trafficking occurred on Backpage.<sup>17</sup> In the last five years, NCMEC has reported a more than 800% increase in reports of suspected child sex trafficking, much of it the result of online trafficking.<sup>18</sup> Backpage was involved in 73% of all child trafficking reports that the NCME received from the general public.<sup>19</sup>

The California DOJ’s investigation found that many of the ads for prostitution services involved victims of sex trafficking, including

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engines. See *The Dark Net and Human Trafficking: Is There A Connection?*, A21, <http://www.a21.org/content/the-dark-net-and-human-trafficking-is-there-a-connection/gjdplv> [<https://perma.cc/4YRH-BVAS>]. According to Ernie Allen, the founder of the National Council for Missing and Exploited Children, there are 22 million photos and videos involving child pornography that have been reported—largely due to the use of the dark net. *Id.* This amount contributes to making child pornography one of the largest industries to date, grossing \$20–\$30 billion a year. *Id.*

12. *Backpage.com, LLC v. Cooper*, 939 F. Supp. 2d 805, 813 (M.D. Tenn. 2013).

13. *Attorney General Kamala D. Harris Announces Criminal Charges Against Senior Corporate Officers of Backpage.com for Profiting from Prostitution and Arrest of Carl Ferrer, CEO*, CAL. ST. OFF. ATT’Y GEN. (Oct. 6, 2016), <https://oag.ca.gov/news/press-releases/attorney-general-kamala-d-harris-announces-criminal-charges-against-senior> [<https://perma.cc/LA3R-C8TE>] [hereinafter *Attorney General Kamala Harris*].

14. *Cooper*, 939 F. Supp. 2d at 815; Decl. in Supp. of Arrest Warrant & Warrant at \*3, *People v. Ferrer*, No. 16FE019224 (Cal. Super. Ct. 2016), 2016 WL 6091120 [hereinafter *Arrest Warrant*].

15. *Arrest Warrant*, *supra* note 14.

16. *Id.* at 4.

17. *Id.* at 5.

18. *Attorney General Kamala Harris*, *supra* note 13.

19. PERMANENT SUBCOMM. ON INVESTIGATIONS, U.S. SENATE 114TH CONG., *BACKPAGE.COM’S KNOWING FACILITATION OF ONLINE SEX TRAFFICKING 1 (2017)* [hereinafter *BACKPAGE.COM’S KNOWING FACILITATION*].

children.<sup>20</sup> Additionally, since 2010, Backpage has been expanding operations, creating sites in hundreds of cities throughout the world, including more than thirty cities in California.<sup>21</sup> “Operating in 97 countries and 943 locations worldwide—and last valued at more than a half-billion dollars—Backpage is the world’s second-largest classified advertising website.”<sup>22</sup> Backpage’s internal revenue reports show that from January 2013 to March 2015, 99% of its worldwide income was directly attributable to its “adult” section.<sup>23</sup> During this period, their gross monthly income from California rose to \$2.5 million per month, with more than \$51 million in revenue derived from California during that 29-month period.<sup>24</sup> Approximately \$50.9 million out of that \$51.7 million—98.43% of Backpage’s total earnings out of California—was derived from “adult” entertainment advertising.<sup>25</sup>

Backpage’s worldwide revenue for June 22–28, 2015, was a little more than \$3.1 billion.<sup>26</sup> Seventeen percent of this total revenue was attributable to California—72.8% of which was generated from female escorts; 18.8% from body rubs; 5.5% from transsexual escorts; and the remaining 2.9% divided between all other categories (which include adult jobs, datelines, domination, fetish, male escorts, and strippers).

Although Backpage’s general counsel, Liz McDougall, states that employees review each advertisement submitted to the “adult” category and report suspicious ads to the NCMEC, the review process is not comprehensive enough nor effective.<sup>27</sup> McDougall, a First Amendment lawyer, states that when it comes to fighting sex trafficking, “[she is] a true believer that [Backpage] is one of the most valuable tools there is on the Internet.”<sup>28</sup> Yet it has been suggested that Backpage’s Terms of Use help shield users’ identity and allow for the sex trafficked minors to go undetected.<sup>29</sup>

The U.S. government is taking steps to address the issue. On September 25, 2012, on the 150th anniversary of the Emancipation

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20. Attorney General Kamala Harris, *supra* note 13.

21. *Id.*

22. BACKPAGE.COM’S KNOWING FACILITATION, *supra* note 19, at 1.

23. Attorney General Kamala Harris, *supra* note 13. In April 2015, this percentage dropped to 97% and in May 2015 to 90%, and the drop coincides with the decision of credit card companies, like American Express, to stop processing Backpage payments. Arrest Warrant, *supra* note 14, at 11.

24. Attorney General Kamala Harris, *supra* note 13.

25. Arrest Warrant, *supra* note 14, at 11.

26. *Id.* at 12.

27. *See infra* Part II.A.

28. Martha Irvine, *Backpage Ad Site: Aider of Traffickers, or Way to Stop Them?*, SEATTLE TIMES (Aug. 16, 2015, 6:44 PM), <http://www.seattletimes.com/seattle-news/backpage-ad-site-aider-of-traffickers-or-way-to-stop-them/>.

29. Stephanie Silvano, Note, *Fighting a Losing Battle to Win the War: Can States Combat Domestic Minor Sex Trafficking Despite CDA Preemption?*, 83 FORDHAM L. REV. 375, 383 (2014).

Proclamation, President Obama spoke about global and domestic sex trafficking issues.<sup>30</sup> Obama stated, “Our fight against human trafficking is one of the great human rights causes of our time, and the United States will continue to lead it.”<sup>31</sup> Obama labeled human trafficking—including sex trafficking—“modern slavery” and spoke about progressive measures to combat sex trafficking issues globally and domestically.<sup>32</sup> However, despite Obama’s efforts to significantly reduce or eliminate this issue, federal laws such as the Communications Decency Act of 1996 (CDA) impede state action and diminish federal efforts at combatting the sex trafficking of adults and minors.<sup>33</sup>

One of the ways the CDA impedes state and federal efforts is through its civil immunity provision. The civil immunity provision, which courts have interpreted broadly, grants expansive immunity to websites as both publishers and distributors of content.<sup>34</sup> Sex traffickers have utilized Backpage, among other websites, to post advertisements of sex trafficked minors.<sup>35</sup> The immunity provision of the CDA preempts state statutes criminalizing online commercial sex advertisements because of the Supremacy Clause of the U.S. Constitution. The Supremacy Clause declares that federal legislation is “the supreme Law of the Land”;<sup>36</sup> therefore, federal legislation can create legal obligations to state law and preempt states from making or enforcing statutes that are in conflict with it.<sup>37</sup> Section 230 of the CDA shields online intermediaries and hosts of speech from a range of laws that would otherwise hold them legally responsible.<sup>38</sup>

In previous litigation, Backpage has defended itself by arguing that it is an “interactive computer service” (also known as an Internet Service Provider or ISP) under the CDA, thus providing it with immunity and allowing it to circumvent state law claims.<sup>39</sup> Recently in *J.S. v. Village*

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30. Remarks by the President, *supra* note 3.

31. *Id.*

32. *Id.*

33. Silvano, *supra* note 29.

34. *See id.* at 375.

35. *Id.* at 381.

36. U.S. CONST. art. VI, § 2.

37. U.S. GOV’T PUBL’G OFFICE, ARTICLE VI: PRIOR DEBTS, NATIONAL SUPREMACY, AND OATHS OF OFFICE 918 (1992), <http://www.gpo.gov/fdsys/pkg/GPO-CONAN-1992/pdf/GPO-CONAN-1992-9-7.pdf> [<https://perma.cc/ZST9-645G>].

38. 47 U.S.C. § 230(e)(3) (2012) (“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.” (emphasis added)).

39. *See Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12 (1st Cir. 2016). The court concluded that the plaintiffs had “made a persuasive case” and “Backpage has tailored its website to make sex

*Voice Media Holdings LLC*, three minors who were featured in advertisements for sexual services on Backpage brought a case against Backpage.<sup>40</sup> This case is particularly intriguing because it raises suspicions that many others have raised—that Backpage assists in developing the content—and determines that contributing or encouraging content can lead to liability previously attributed only to those who developed the content.<sup>41</sup> *Village Voice* is also controversial because the Washington State Supreme Court’s analysis and decision has deviated from other states’ decisions.<sup>42</sup>

Under federal law, the CDA has created a loophole for pimps and johns to exploit minors through the Internet. This Note uses Backpage as an example of how interactive computer services consistently evade liability under the current language of the CDA, and examines the need for an amendment to the language of the CDA. This Note argues that an interactive computer service should be held responsible under state law if it helps create the content, thus becoming an “information content provider” under the CDA. Part I provides the groundwork for what sex trafficking is and its relationship to prostitution. Additionally, it sets out federal and Washington State laws regarding the sex trafficking of minors over the Internet. Part II discusses how Backpage operates and analyzes *J.S. v. Village Voice Media Holdings LLC*, a case currently pending in Washington State Superior Court. This section also discusses the recent arrest on pimping charges of Backpage’s CEO Carl Ferrer and the California DOJ’s investigation into Backpage. Lastly, this section discusses why Backpage decided to shut down its “adult” ad section and how it continues to maintain operations across the world. Part III calls on Congress to take action and amend the CDA. Two proposals for amending the CDA are provided that would prevent interactive computer services, which aid in publishing illicit content, from being immune from State liability.

#### I. THE EVOLUTION OF SEX TRAFFICKING UNDER FEDERAL AND WASHINGTON STATE LAW

To understand issues surrounding sex trafficking, it is imperative to understand the history of prostitution and how sex trafficking relates to and intersects with prostitution.<sup>43</sup> Due to the national prominence of

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trafficking easier”; however, the court nevertheless upheld the dismissal of the suit under the CDA noting that “the remedy is through legislation, not through litigation.” *Id.* at 29.

40. *J.S. v. Vill. Voice Media Holdings LLC*, 359 P.3d 714, 715–16 (Wash. 2015).

41. See *BACKPAGE.COM’S KNOWING FACILITATION*, *supra* note 19.

42. See, e.g., *Fair Hous. Council v. Roommates.com, LLC*, 521 F.3d 1157 (9th Cir. 2008); *Corbis Corp. v. Amazon.com, Inc.*, 351 F. Supp. 2d 1090, 1118 (W.D. Wash. 2004).

43. For an elaboration on the history of prostitution in the United States, see Allison K. Capaul, *An Examination of Prostitution and Sex Trafficking Laws Within the U.S.* (Apr. 1, 2013) (unpublished

Internet-based sex trafficking and prostitution, both federal and state laws need to be analyzed to ensure that their efforts are *consistent* with each other.

#### *A. A Brief History of American Prostitution*

Prostitution is the exchange of a sexual activity with another person in exchange for money or something else of value.<sup>44</sup> Those who promote prostitution, or induce or entice others into prostitution, are called “pimps”; those who solicit or patronize prostitutes are called “johns”; and “prostitutes” are those who perform sexual acts in exchange for money or other financial compensation.<sup>45</sup> Prostitution may occur in brothels, hotels, bars, restaurants, massage parlors, or through the Internet.<sup>46</sup>

Prostitution has been a part of American society since before the Thirteen Colonies fought for independence.<sup>47</sup> Between 1900 and 1920, states began implementing criminal sanctions prohibiting prostitution throughout the U.S.<sup>48</sup> In 1910, Congress passed the Mann Act, which prohibited any man from taking a woman across state lines for the purpose of prostitution.<sup>49</sup> The Supreme Court upheld the Mann Act in *Hoke v. United States*.<sup>50</sup> In 1948, Congress amended the Mann Act, to make it illegal for anyone to knowingly transport an individual interstate with the intent for that individual to engage in prostitution.<sup>51</sup> In effect, Congress left the determination of how to regulate prostitution to the states, while the transportation of persons across state borders for sexual purposes fell under federal regulation.<sup>52</sup> However, in 1971 Congress made prostitution illegal across the U.S., and it has remained illegal since, with the exception of thirteen counties in Nevada.<sup>53</sup>

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honors thesis, Hamline University), <http://digitalcommons.hamline.edu/cgi/viewcontent.cgi?article=1003&context=dhp>.

44. Danielle Augustson & Alyssa George, *Prostitution and Sex Work*, 16 GEO. J. GENDER & L. 229, 234 (2015).

45. Tamar R. Birkhead, *The “Youngest Profession”: Consent, Autonomy, and Prostituted Children*, 88 WASH. U. L. REV. 1055, 1067 (2011).

46. Augustson & George, *supra* note 44, at 230.

47. Jessica N. Drexler, *Governments’ Role in Turning Tricks: The World’s Oldest Profession in the Netherlands and the United States*, 15 DICK. J. INT’L L. 201, 205 (1996).

48. *Id.* at 204.

49. *Id.*

50. *Hoke v. United States*, 227 U.S. 308, 322 (1913).

51. 18 U.S.C. § 2421 (2012).

52. *See Hoke*, 227 U.S. at 322.

53. Drexler, *supra* note 47, at 204.

*B. Prostitution and its Relation to Sex Trafficking*

“Human trafficking” and “modern slavery” have been used interchangeably to describe “recruiting, harboring, transporting, providing, or obtaining a person for compelled labor or commercial sex acts through the use of force, fraud, or coercion.”<sup>54</sup> Within the broader term of “human trafficking” is “sex trafficking,” which describes the subtle or overt, physical or psychological coercion of a victim into performing commercial sex acts.<sup>55</sup> Domestic minor sex trafficking has become a significant risk for American youth; prostituting minors is a major source of income and traffickers have discovered that American children are easier to recruit and sell than foreign victims because there is no need to cross the border.<sup>56</sup> Children that are particularly vulnerable in the U.S. are runaways, homeless, those in the child welfare system, and those in the juvenile justice system.<sup>57</sup>

An issue revolving around sex trafficking and prostitution is that it is often hard to distinguish between those who are being trafficked and those who “choose” to stay in the profession after the age of eighteen.<sup>58</sup> The distinction between prostitution and sex trafficking is difficult to make because adult women and men who are currently involved in prostitution began, in many cases, as children and may be coerced to continue a life of prostitution.<sup>59</sup>

Many adult prostitutes start as minors and do not have the resources to extract themselves from the industry.<sup>60</sup> Some of the reasons people remain in prostitution include a lack of education, family and social

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54. TRAFFICKING IN PERSONS REPORT, *supra* note 7, at 7.

55. *Human Trafficking Prosecution Unit*, *supra* note 1.

56. *Sex Trafficking*, *supra* note 8.

57. *Id.*

58. See BRIAN BONLENDER, WASH. STATE DEP'T OF COMMERCE, STATEWIDE COORDINATING COMM. ON SEX TRAFFICKING 13 (2014), <http://www.commerce.wa.gov/wp-content/uploads/2016/03/Commerce-Sex-Trafficking-Final-2014.pdf> [<https://perma.cc/LR7X-QSZH>].

59. *Id.*

60. An example of this is provided by Rachel Moran, the founder of Space International and a fierce advocate of the abolition of prostitution due to her own experience in prostitution in Ireland. Rachel Moran, *Buying Sex Should Not Be Legal*, N.Y. TIMES (Aug. 28, 2015), <http://www.nytimes.com/2015/08/29/opinion/buying-sex-should-not-be-legal.html>. When Moran was fourteen, her father committed suicide and her mother suffered from a mental illness, which resulted in her placement in the care of the State. *Id.* Within a year, she was on the streets, uneducated, and without a home. *Id.* At age fifteen, she met a man who took advantage of her economic and social dilemma and psychologically coerced her to prostitute herself. *Id.* Moran then became dependent on drugs to numb her pain, starting the cycle of abuse and a life of prostitution that lasted seven years. *Id.* This story is one of many and is an example of how it is hard to distinguish those who begin as sex trafficked minors, as opposed to those who begin prostitution after the age of eighteen. Because this line is hard to draw, many prostitutes who are criminalized in the U.S. are actually the victims of minor sex trafficking. To learn more about Rachel Moran and her experience through prostitution, see RACHEL MORAN, PAID FOR: MY JOURNEY THROUGH PROSTITUTION (2015).

background, sexual abuse, economic necessity, or drug use.<sup>61</sup> Coercion for minors and adults may take many societal forms and it is not always physical. Once traffickers successfully recruit their victims, they employ methods of coercion and control to maintain their dominance.<sup>62</sup> The methods traffickers use to coerce and control their victims include economic exploitation, social isolation, verbal abuse, threats, physical violence, sexual assault, and captivity.<sup>63</sup>

The U.S. Department of State classifies minors as victims of sex trafficking when they are recruited, enticed, harbored, transported, provided, obtained, or maintained to perform a commercial sex act.<sup>64</sup> Force, fraud, or coercion is not necessary to prove the crime of sex trafficking of children and there are no exceptions to this rule.<sup>65</sup> The Department of State asserts that “no cultural or socioeconomic rationalizations alter the fact that children who are prostituted are trafficking victims” and the use of children in the commercial sex trade is prohibited under federal law.<sup>66</sup> Similarly, an adult who engages in a commercial sex act, such as prostitution, as the result of force, threat of force, fraud, coercion, or any combination of such means, is also a victim of sex trafficking.<sup>67</sup> An adult’s consent to participate in prostitution is not legally determinative; after providing consent, if someone is held in service through psychological manipulation or physical force, he or she is a trafficking victim.<sup>68</sup>

### C. Federal Trafficking Laws

Federal laws emphasize that minors who engage in prostitution are victims rather than offenders. The DOJ has long enforced criminal laws against involuntary servitude.<sup>69</sup> The U.S. has directed its efforts to combat

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61. Capaul, *supra* note 43, at 12–16.

62. *Id.*

63. Melissa Farley, *Prostitution, Trafficking, and Cultural Amnesia: What We Must Not Know in Order to Keep the Business of Sexual Exploitation Running Smoothly*, 18 *YALE J.L. & FEMINISM* 109, 111 (2006).

64. *TRAFFICKING IN PERSONS REPORT*, *supra* note 7, at 7.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. The DOJ includes: (1) the Child Exploitation and Obscenity Section, which prosecutes cases of child pornography, sex trafficking of children, parental child abduction, and sex tourism; (2) the Civil Rights Division, which includes the Human Trafficking Prosecution Unit for trafficking crimes; (3) the Bureau of Justice Assistance, which funds collaborative law enforcement and non-governmental partner Task Forces around the U.S through the Anti-Human Trafficking Task Force Initiative; (4) the Office of Victims of Crime, which provides technical assistance to the Anti-Human Trafficking Task Forces, victim services funding for foreign national victims of trafficking, and pilot sites for U.S. citizen minor victims of trafficking; (5) the Bureau of Justice Statistics, which maintains

sex trafficking by prosecuting sex traffickers, protecting victims, and preventing the crime. This has been accomplished by expanding criminal statutes, introducing victim protections, and developing anti-sex trafficking programs through the Trafficking Victims Protection Act (TVPA).<sup>70</sup>

In 2000, Congress enacted the TVPA to address various sex trafficking issues,<sup>71</sup> and since then, Congress has maintained support for this framework by reauthorizing the TVPA four times.<sup>72</sup> The most recent reauthorization of the TVPA in 2013 enhanced support for state and local efforts to address sex trafficking investigations, prosecutions, and victim services.<sup>73</sup> This reauthorization focuses particularly on the sex trafficking of minors.<sup>74</sup> The reauthorization requires the DOJ to ensure that “all task forces and working groups within the Innocence Lost National Initiative<sup>75</sup> engage in activities, programs, or operations to increase the investigative capabilities of *state and local law enforcement officers in the detecting, investigating, and prosecuting persons who patronize or solicit children for sex[.]*”<sup>76</sup> In sum, it requires the DOJ to support state and local law enforcement to execute investigations and prosecutions of traffickers.

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The Human Trafficking Reporting System and tracks and analyzes sex trafficking crimes reported to the Anti-Human Trafficking Task Forces in conjunction with Northeastern University; (6) the National Institute of Justice, which funds research on sex trafficking in the U.S. and around the world; (7) the Office of Juvenile Justice and Delinquency Prevention, which investigates Internet crimes through the Internet Crimes Against Children Task Force and implements a number of training and capacity-building initiatives related to the commercial sexual exploitation of children; and (8) the Federal Bureau of Investigation, which investigates civil rights crimes of sex trafficking and participates in the Anti-Human Trafficking Task Forces, Internet Crimes Against Children Task Force, and Innocence Lost National Initiative, and investigates crimes involving sex trafficking of children, and collaborates with the NCMC and Child Exploitation and Obscenity Section. See U.S. DEP'T OF JUSTICE, <http://www.justice.gov> [<https://perma.cc/4HWW-WXXU>].

70. *Federal Law*, NAT'L HUMAN TRAFFICKING HOTLINE, <https://humantraffickinghotline.org/what-human-trafficking/federal-law> [<https://perma.cc/BU82-U3SQ>].

71. DEP'T OF JUSTICE, DEP'T OF HEALTH & HUMAN SERVS., & DEP'T OF HOMELAND SECURITY, FED. STRATEGIC ACTION PLAN ON SERV. FOR VICTIMS OF HUMAN SEX TRAFFICKING IN THE U.S. 2013–2017 5 (2014), <http://www.ovc.gov/pubs/FederalHumanTraffickingStrategicPlan.pdf> [<https://perma.cc/2YQX-8ART>] [hereinafter FED. STRATEGIC ACTION PLAN].

72. *Id.*

73. *Id.*

74. *Id.*

75. The FBI leads the Innocence Lost National Initiative (ILNI) to address children being recruited into prostitution by sex traffickers. U.S. DEP'T OF JUSTICE, REPORT TO CONGRESS, THE NAT'L STRATEGY FOR CHILD EXPLOITATION PREVENTION AND INTERDICTION 1 (2016), <https://www.justice.gov/psc/file/842411/download> [<https://perma.cc/2LRJ-79QZ>]. The ILNI operates as part of seventy-one Child Exploitation Task Forces nationwide. Under the ILNI, the FBI conducts operations each year to recover children from sex traffickers and coordinate victim services for victims.

76. Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22, § 110, 129 Stat. 227, 239 (2015) (emphasis added).

The reauthorization of the TVPA mentions the Internet three times. First, Title II, Subtitle B, Section 211 states, “This subtitle amends the Missing Children’s Assistance Act to confirm that the cyber tipline for reporting Internet-related child sexual exploitation includes child prostitution as a form of child sex trafficking.”<sup>77</sup> Second, Title III, Section 302, states:

[The Department of Homeland Security] shall also operate, within the Cyber Crimes Center, a Cyber Crimes Unit (CCU). The CCU shall: (1) oversee the cybersecurity strategy . . . (2) enhance the ability of ICE to combat criminal enterprises operating on or through the Internet, (3) provide training and technical support in cyber investigations . . . (4) participate in research and development in the area of cyber investigations, and (5) recruit participants in the Human Exploitation Rescue Operative (HERO) Child Rescue Corps program for investigative and forensic positions.<sup>78</sup>

Finally, Title IX, Section 905 states, “This section expands the purposes for which funds from the Domestic Trafficking Victims’ Fund may be used to include grant funding for state and local Internet Crimes Against Children Task Forces to combat child exploitation.”<sup>79</sup> Moreover, in 2013, the Obama Administration developed the Federal Strategic Action Plan on Services for Victims of Human Sex Trafficking in the United States (“Federal Strategic Action Plan”) to increase the coordination of federal agencies and nongovernmental agencies in combatting sex trafficking and to further provide support for the TVPA.<sup>80</sup>

In order to assume accountability for sex trafficking investigations and prosecutions, and to follow through with the goals set out in the TVPA and the Federal Strategic Action Plan, Congress needs to amend the CDA. The CDA, by its effect, prevents the federal government from fully realizing its anti-sex trafficking efforts.

#### *D. Washington State Trafficking Laws*

According to Shared Hope International, 8 of the 112 minors trafficked from out of state to Nevada for prostitution between August

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77. *Id.* at § 211.

78. *Id.* at § 302.

79. *Id.* at § 905.

80. See FED. STRATEGIC ACTION PLAN, *supra* note 71. Other federal Acts include the Justice for Victims of Trafficking Act (JVTA) of 2015 and the Preventing Sex Trafficking and Strengthening Families Act of 2014. NAT’L HUMAN TRAFFICKING HOTLINE, *supra* note 70. The JVTA improves the U.S. response to human trafficking and contains a number of amendments that strengthen services for victims. *Id.* The Preventing Sex Trafficking and Strengthening Families Act seeks to reduce the incidence of sex trafficking among youth involved in the foster care system. *Id.*

2005 and December 2006 were from Washington.<sup>81</sup> In September 2009, the Seattle PI reported that a 33-year-old Seattle man had forced two underage girls who had run away from home—a 13-year-old and a 17-year-old—to prostitute themselves for his own financial benefit.<sup>82</sup> In November 2014, the Washington DOJ's office reported that a King County man had been convicted of trafficking teenage girls across state lines, forcing them to work as prostitutes.<sup>83</sup> These are only a few examples of the sex trafficking of minors in Washington.

Washington is described as a high-risk area for sex trafficking, due in part to its abundance of ports, robust tourism sector, and proximity to an international border.<sup>84</sup> However, the state is also a national leader in combating sex trafficking crimes and was the first state to pass a law criminalizing sex trafficking in 2003.<sup>85</sup> Since then, Washington's legislature has signed more than thirty other pieces of legislation into law addressing various aspects of labor and sex trafficking.<sup>86</sup> Under Washington law, sex trafficking is the "recruitment, harboring, transportation, provision, or obtaining of a person for the purposes of a commercial sex act, in which the commercial sex act is induced by force, fraud, or coercion."<sup>87</sup> If the victim is under eighteen years old, fraud, force, or coercion are *not* necessary elements of the offense.<sup>88</sup> Whether the juvenile "consented" or appeared to consent to the sexual act is not a defense that the crime did not occur.<sup>89</sup> In short, there is no such thing as a "child prostitute" in Washington.

The state's culture has shifted to view sex trafficked minors as victims. Washington State established the Statewide Coordinating Committee on Sex Trafficking to encourage collaborations between law enforcement and organizations that serve victims.<sup>90</sup> As of 2015, thirty-four states have passed safe harbor legislation, each varying in function.<sup>91</sup> Washington's Safe Harbor Law declares that a minor arrested for a first violation of prostitution should have their case diverted, and subsequent

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81. *Sex Trafficking*, *supra* note 8.

82. *Id.*

83. *Id.*

84. BONLENDER, *supra* note 58, at 4.

85. *Id.*

86. *Id.* at 5.

87. WASH. REV. CODE § 9A.40.100 (2016).

88. *Id.*

89. *Id.*

90. Engrossed Substitute H.B. 1291, 63rd Leg., Reg. Sess. (Wash. 2013).

91. SARAH WASCH ET AL., THE FIELD CTR. FOR CHILDREN'S POLICY, PRACTICE & RESEARCH UNIV. OF PA., AN ANALYSIS OF SAFE HARBOR LAWS FOR MINOR VICTIMS OF COMMERCIAL SEXUAL EXPLOITATION: IMPLICATIONS FOR PENNSYLVANIA AND OTHER STATES 2 (2016), <http://impact.sp2.upenn.edu/fieldctr/wp-content/uploads/2013/05/SafeHarborWhitePaperFINAL.pdf> [<https://perma.cc/JD5G-RP74>].

offenses can also be diverted at the discretion of the prosecutor.<sup>92</sup> These laws create the presumption that a juvenile arrested for prostitution meets the federal criteria for a victim of a severe form of trafficking in persons.<sup>93</sup>

Traffickers condition minors to fear punishment from law enforcement, thus decreasing the likelihood that the child will seek help.<sup>94</sup> With this in mind, Washington law enforcement officers and prosecutors are working to build rapport with victims of exploitation in their communities in hopes of getting them to reach out on their own and testify against their traffickers.<sup>95</sup> To do this, law enforcement and prosecutors are finding that they should approach victims with nonjudgmental and empathetic questions in order to increase the chances that they cooperate during an investigation.<sup>96</sup> New measures focus on expanding the definitions of pimps and johns and punishing them for their involvement in prostitution.<sup>97</sup> For example, in 2014 King County police agencies shifted their focus to arresting johns on patronizing charges, while decreasing the arrests of prostituted women.<sup>98</sup> The countywide program, led by King County Senior Deputy Prosecuting Attorney Val Richey, is called the “Buyer Beware” initiative; it aims at reducing the local demand for prostitution by targeting those who pay for sex.<sup>99</sup>

An estimated 300–500 minors are trafficked in Seattle each day.<sup>100</sup> However, there are many reasons why this estimate, along with similar nationwide estimates of trafficked victims, is not reliable. Police reports, social service observations, and victims’ testimony reveal a wide disparity in the estimates of sex trafficking victims, and the reality is that most juvenile victims go unidentified.<sup>101</sup>

Seattle, like many cities, has seen increases in Internet-based prostitution over the last decade. The illicit value of Seattle’s sex market has increased from \$50.3 million per year in 2003 to \$112 million per year

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92. WASH. REV. CODE § 13.40.070 (2016); Engrossed Substitute S.B. 6476, 61st Leg., Reg. Sess. (Wash. 2010).

93. See Engrossed Substitute S.B. 6476.

94. WASCH ET AL., *supra* note 91, at 8.

95. *Id.*

96. *Id.*

97. Lisa Ko, *Targeting Sex Buyers, Not Sex Sellers: Arresting Demand for Prostitution*, PBS (Jan. 23, 2015), <http://www.pbs.org/independentlens/blog/targeting-sex-buyers-not-sex-sellers-arresting-demand-for-prostitution/> [<https://perma.cc/7YWW-LKNZ>].

98. Sara Jean Green, ‘Buyer Beware’: Early Success for Initiative Targeting Johns Instead of Prostitutes, SEATTLE TIMES (May 16, 2015, 3:04 PM), <http://www.seattletimes.com/seattle-news/crime/buyer-beware-early-success-for-initiative-targeting-johns-instead-of-prostitutes/>.

99. *Id.*

100. Brief of Amici Curiae at \*5, *J.S. v. Vill. Voice Media Holdings, LLC*, 359 P.3d 714 (Wash. 2014) (No. 90510-0), 2014 WL 4808973.

101. BONLENDER, *supra* note 58, at 16.

in 2007.<sup>102</sup> Internet prostitution allows new entrants to the market, and many individuals are moving from street-based to Internet-based pimping.<sup>103</sup> Because the Internet provides an easy and cost-effective way for traffickers to sell sex with children, new and vast markets for the commercial sex industry have flourished there.

Due to the success of law enforcement efforts to stop visible street prostitution, and the ease of using websites such as Backpage, Washington has seen an increase in Internet-based prostitution over the last decade.<sup>104</sup> This shift has paradoxically made sex trafficking and prostitution less visible while increasing the availability of online commercial sex to buyers.<sup>105</sup> Washington State officials need to focus efforts on prosecuting and cracking down on forums that are most profitable to pimps and harder to detect—i.e., online classified ads like Backpage.

Unfortunately, although state laws are aligned with federal sex trafficking laws, state efforts have ultimately been undermined by federal preemption under the CDA. Although Washington is one of the leaders on sex trafficking issues, its efforts are inhibited by CDA preclusion.

## II. BACKPAGE AND *J.S. v. VILLAGE VOICE MEDIA*<sup>106</sup>

A deeper look into Backpage's business practices demonstrates how its status as an interactive computer service is deceptive and how its rules and regulations actually help to create the unlawful content published on the website. These deceptive business practices are highlighted in *J.S. v. Village Voice Media Holdings, LLC*,<sup>107</sup> a Washington State case that is currently pending. The plaintiffs in *Village Voice* argue that Backpage actually assists in the development of the illegal content, and therefore, it should be held accountable under state law claims.<sup>108</sup> Until January 9, 2017, Backpage operated its "adult" ad section in the U.S.<sup>109</sup> On January 9, Backpage shut down this section in the U.S. because of political scrutiny

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102. *Id.* at 13.

103. See generally *More Bang for Your Buck*, *ECONOMIST* (Aug. 7, 2014), <http://www.economist.com/news/briefing/21611074-how-new-technology-shaking-up-oldest-business-more-bang-your-buck> [<https://perma.cc/9FS6-DFNS>].

104. BONLENDER, *supra* note 58, at 13.

105. *Id.*

106. In 2012, Village Voice Media cut ties with Backpage and is no longer affiliated with the website. James King, *Village Voice Under New Ownership; Cuts Ties with Backpage.com*, *VILLAGE VOICE* (Sept. 24, 2012, 11:35 AM), <http://www.villagevoice.com/news/village-voice-under-new-ownership-cuts-ties-with-backpagecom-6689623> [<https://perma.cc/78EB-HWCY>].

107. *J.S. v. Vill. Voice Media Holdings, LLC*, 359 P.3d 714 (Wash. 2015).

108. *Id.* at 110.

109. Derek Hawkins, *Backpage.com Shuts Down Adult Services Ads After Relentless Pressure from Authorities*, *WASH. POST* (Jan. 10, 2017), [https://www.washingtonpost.com/news/morning-mix/wp/2017/01/10/backpage-com-shuts-down-adult-services-ads-after-relentless-pressure-from-authorities/?utm\\_term=.75dd2b2f2856](https://www.washingtonpost.com/news/morning-mix/wp/2017/01/10/backpage-com-shuts-down-adult-services-ads-after-relentless-pressure-from-authorities/?utm_term=.75dd2b2f2856) [<https://perma.cc/9GWZ-XM9Z>].

from the federal government.<sup>110</sup> But the “adult” ad section still operates everywhere else in the world.<sup>111</sup> For purposes of this Note, this section discusses how Backpage operated successfully, prior to removing this section, while claiming an immunity defense under the CDA.

#### *A. Backpage*

Backpage is an online classifieds forum that posts advertisements for sale by subject matter and geographical location.<sup>112</sup> The classifieds forum has an “adult” section, which includes an “escorts” section.<sup>113</sup> Backpage does not charge a fee for posting advertisements in most areas of the forum but does charge a fee for posting advertisements in the “adult” section.<sup>114</sup> This fee for “adult” ads ranges from \$12.00–\$17.00 per posting, with additional fees for each reposting of an “adult” ad, and additional fees for featuring the ad prominently on the right side of the website.<sup>115</sup> Backpage does not require those posting ads in the “adult” section to verify their identity.<sup>116</sup> Backpage also does not require that those posting use a registered credit card linked with a name and address and accepts anonymous payments in the form of prepaid credit cards and pseudo-currencies such as Bitcoin.<sup>117</sup>

Backpage does not require age verification of an “escort” whose services are offered on the website.<sup>118</sup> The website will not accept an ad when the poster enters an age of less than eighteen, but it will permit the poster to immediately reenter an assumed age.<sup>119</sup> Likewise, Backpage does not require a verification of the telephone numbers posted in its “adult” ads and permits users to enter telephone numbers using any combination of character strokes, which is less traceable by law enforcement, rather than nominal numbers required in other sections of the website—for example, Backpage will allow “one2threeFOUR5six78Nine9” rather than “123-456-7899.”<sup>120</sup> Backpage further protects poster anonymity because it does not require verification of their email addresses.<sup>121</sup>

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110. *Id.*

111. See BACKPAGE, <http://www.backpage.com> [<https://perma.cc/6NGH-UA4B>]; see also BACKPAGE.COM’S KNOWING FACILITATION, *supra* note 19, at 45.

112. See *Seattle*, BACKPAGE, <http://seattle.backpage.com> [<https://perma.cc/Q9P3-8BYZ>].

113. *Id.*

114. Doe *ex rel.* Roe v. Backpage.com, LLC, 104 F. Supp. 3d 149, 152 (D. Mass. 2015).

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

Moreover, Backpage strips out metadata associated with photographs—such as the date, time, geolocation, and other identifying information—before publishing the photographs on its website, further preventing law enforcement from effectively searching for a repost of a photograph.<sup>122</sup> Although Backpage has an automatic filtering system, which bars the use of certain words, it permits the use of suggestive phrases such as “girl,” “young,” “underage,” and “fresh.”<sup>123</sup> The website also allows the use of recognizable abbreviations of forbidden words, such as “brly legal” and “high schl” (suggesting “barely legal” and “high school”).<sup>124</sup> Additionally, at the direction of CEO Carl Ferrer, the company programmed an electronic filter to delete hundreds of words indicative of sex trafficking or prostitution.<sup>125</sup> By late 2010, Backpage’s own internal estimate was that they were editing “70 to 80% of ads” in the “adult” ad section either manually or automatically.<sup>126</sup> In short, Backpage has not established appropriate safeguards against the sex trafficking of minors on its website. The vast majority of prosecutions for sex trafficking now involve online advertising, and most of those advertisements appear on Backpage.<sup>127</sup>

Despite the lack of precautions taken by Backpage, the company’s general counsel, Liz McDougall, states that Backpage is actually helping prevent sex trafficking of minors.<sup>128</sup> McDougall reports that the employees remove advertisements from the site every month by running through a keyword filter.<sup>129</sup> Backpage says that employees manually review each advertisement submitted to the “adult” category in order to subjectively decide whether minors are depicted for illegal activity.<sup>130</sup> Backpage then reports ads it suspects involve minors to the NCMEC each month.<sup>131</sup>

Although Backpage claims that it takes precautions to report the sex trafficking of minors, it is not taking the necessary steps to truly combat illegal depictions of minors. Backpage derives 90% of its revenue from sex ads, many of which solicit children.<sup>132</sup> Backpage’s “monitoring

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122. *Id.*

123. *Id.*

124. *Id.*

125. BACKPAGE.COM’S KNOWING FACILITATION, *supra* note 19, at 2.

126. *Id.* (citation omitted).

127. See Abigail Kuzma, *A Letter to Congress: The Communications Decency Act Promotes Human Trafficking*, 34 CHILD. LEGAL RTS. J. 23, 27–30 (2013).

128. Erin Fuchs, *Here’s a Heartbreaking Look at Child Sex Slavery in America*, BUS. INSIDER (Oct. 18, 2016, 6:00 PM), <http://www.businessinsider.com/child-sex-trafficking-victims-sue-backpage-2014-10> [<https://perma.cc/PX59-LRKK>].

129. Silvano, *supra* note 29.

130. *Id.*

131. *Id.*

132. Arrest Warrant, *supra* note 14, at 11.

program” rarely produces helpful information leading to the identification or rescue of exploited children, or to the prosecution of their traffickers.<sup>133</sup> “The number of investigations and prosecutions for which Backpage provides useful assistance is far outweighed by the number of illegal transactions that Backpage facilitates on a daily basis.”<sup>134</sup> And with sweeping immunity under the CDA, Backpage is allowed to substantially profit off of these ads and lacks any true incentive to implement necessary safeguards.

### *B. Washington State Case: J.S. v. Village Voice Media*

The Washington State Supreme Court has deviated from past precedent and has suggested that a website that was thought to be an “interactive computer service” could be held responsible under state law if it helped create the content, thus becoming an “information content provider” (content provider). Under the CDA, an interactive computer service is immune from suit under state law claims in relation to merely hosting such content on a website.<sup>135</sup> An interactive computer service passively displays content that is created by third parties.<sup>136</sup> Conversely, a content provider may be subject to state law liability in relation to the content it develops.<sup>137</sup> A content provider may be responsible, in whole or in part, for developing the content on its website. Importantly, a website may simultaneously be a service and content provider with respect to different aspects of the site.<sup>138</sup>

*J.S. v. Village Voice Media Holdings LLC* turns on whether Backpage merely hosted advertisements or whether it also helped develop the content published. If Backpage merely hosted advertisements, it would be immune; if Backpage helped develop the content published, it would not be protected by CDA immunity. The facts of the case are as follows: ads featuring three minor girls, collectively named “J.S.,” were posted on the defendants’ website, collectively referred to as “Backpage.”<sup>139</sup> The three minor girls were raped multiple times by adult customers who responded to the ads.<sup>140</sup> J.S. then filed a complaint alleging state law claims

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133. Brief of Amicus Curiae Commonwealth of Massachusetts in Support of Plaintiffs’ Opposition to Motion to Dismiss at 10, *Jane Doe No. 1 v. Backpage.com* (D. Mass. Feb. 20, 2015), (No. 14-13870-RGS) <http://www.mass.gov/ago/docs/press/2015/backpage-amicus.pdf> [<https://perma.cc/C5TF-QBHL>].

134. *Id.*

135. See *J.S. v. Vill. Voice Media Holdings, LLC*, 359 P.3d 714, 717 (Wash. 2015).

136. *Id.*

137. *Id.*

138. *Fair Hous. Council v. Roommates.com*, 521 F.3d 1157, 1162–63 (9th Cir. 2008).

139. *Vill. Voice*, 359 P.3d at 716.

140. *Id.*

for damages against Backpage.<sup>141</sup> The claims included negligence, outrage, sexual exploitation of children, ratification/vicarious liability, unjust enrichment, invasion of privacy, sexual assault and battery, and civil conspiracy.<sup>142</sup> J.S. was featured in Backpage ads in the “adult” section. The ads were posted in accordance with instructions on Backpage’s website, and all of the advertisements featuring J.S. complied with Backpage’s content requirements.<sup>143</sup>

The heart of the dispute is whether Backpage should be held liable for the posts of the plaintiffs found on Backpage’s website. Backpage moved to dismiss on the theory that it is immune from suit from J.S.’s state law claims because of CDA preemption.<sup>144</sup> J.S. countered by arguing that Backpage is not immune from suit because its advertisement posting rules were “designed to help pimps develop advertisements that can evade the unwanted attention of law enforcement, while still conveying the illegal message.”<sup>145</sup> The plaintiffs asserted that Backpage (1) created its unlawful escort hearings; (2) developed the unlawful content by making it useable and available; and (3) encouraged unlawful content.<sup>146</sup>

The trial court denied the motion to dismiss, although the plaintiffs’ third argument was the only one to survive.<sup>147</sup> When Backpage moved for discretionary review, the Court of Appeals granted review and certified the case to the Supreme Court of Washington for direct review.<sup>148</sup> The appeal was taken from a ruling to dismiss a claim under CR 12(b)(6) and was reviewed de novo; thus, all of J.S.’s allegations were assumed to be correct along with any reasonable inferences.<sup>149</sup> The Court noted that for a 12(b)(6) motion to be granted, it must be “beyond a reasonable doubt that no facts exist that would justify recovery.”<sup>150</sup>

The Washington State Supreme Court ruled against Backpage, denying a motion to dismiss the case based on the CDA immunity.<sup>151</sup> The Court’s majority determined that J.S. pleaded a case and held that if the

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141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.* (citation omitted).

146. *Id.* at 725.

147. *Id.*

148. *Id.* at 726.

149. *Id.*

150. *Id.* at 716 (citation omitted).

151. *See id.* at 718. By contrast, the U.S. Court of Appeals for the First Circuit recently rejected a similar theory in a separate lawsuit against Backpage. In *Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12 (1st Cir. 2016), “the plaintiffs alleged that Backpage’s platform, categories, and filters ‘assist[ed] in the crafting, placement, and promotion of illegal advertisements offering plaintiffs for sale.’” BACKPAGE.COM’S KNOWING FACILITATION, *supra* note 19, at 8 (quoting Amended Complaint ¶ 4, *Doe ex rel. Roe v. Backpage.com, LLC*, No. 14-cv-13870, Doc. No. 9 (D. Mass. 2014)).

plaintiffs' allegations are true, it would show that Backpage did more than maintain neutral policies and that it helped to develop the unlawful content because it "contribute[d] materially to the alleged illegality of the conduct."<sup>152</sup> On the other hand, Justice McCloud, in her dissenting opinion, emphasized that Congress was aware of competing policy concerns and already weighed those competing policies when it enacted the CDA.<sup>153</sup> Therefore, Justice McCloud concluded that the plaintiffs did not have a case and that precedent had settled the issue.<sup>154</sup> But in the end, the trial court's decision was affirmed and the case was remanded for further proceedings.<sup>155</sup> The case is currently pending to be heard on remand and trial is scheduled for May 22, 2017, in Pierce County Superior Court.<sup>156</sup>

*C. Backpage CEO Carl Ferrer Arrested on Felony Pimping Charges*<sup>157</sup>

On October 6, 2016, Carl Ferrer, the CEO of Backpage, was arrested with pimping charges under California law.<sup>158</sup> Michael Lacey and James Larkin, former owners of Backpage, were arrested for the charge of conspiring to commit pimping under California law.<sup>159</sup> California's DOJ alleges that there is probable cause to believe that since 2010, Ferrer, Lacey, and Larkin have knowingly received earnings from the prostitution of minors through Backpage.<sup>160</sup> After Craigslist shut down its "adult services" category in 2012, Backpage took advantage of the increased traffic by raising fees and expanding to hundreds of cities throughout the world.<sup>161</sup> In late 2014, Ferrer bought Backpage through foreign shell companies<sup>162</sup> and created Backpage's new parent company, UGC Tech

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152. *Fair Hous. Council v. Roommates.com*, 521 F.3d 1157, 1168 (9th Cir. 2008); *Vill. Voice*, 359 P.3d at 718.

153. *Vill. Voice*, 359 P.3d at 724 (McCloud, J., dissenting).

154. *Id.* at 739.

155. *Id.* at 718. ("Given J.S.'s allegations, it does not appear 'beyond a reasonable doubt that no facts exist that would justify recovery' in this case, and, therefore, dismissal of J.S.'s claims under CR 12(b)(6) is not appropriate.")

156. *See* *J.S. v. Vill. Voice Media Holdings, LLC*, Pierce County Superior Court Civil Case 12-2-11362-4, LEGAL INFO. NETWORK EXCH., [https://linxonline.co.pierce.wa.us/linxweb/Case/CivilCase.cfm?cause\\_num=12-2-11362-4](https://linxonline.co.pierce.wa.us/linxweb/Case/CivilCase.cfm?cause_num=12-2-11362-4) [<https://perma.cc/7ND8-GUZH>].

157. Please note that this section contains allegations against the defendants and that Carl Ferrer, Michael Lacey, and James Larkin must be presumed innocent unless proven guilty.

158. Supporting Memorandum of Points and Authorities at \*2, *People v. Ferrer*, No. 16FE109224 (Cal. Super. Ct. 2016), <https://assets.documentcloud.org/documents/3149076/Notice-of-Demurrer-and-Demurrer.pdf> [<https://perma.cc/PB3H-TVX9>] [hereinafter Supporting Memorandum].

159. Arrest Warrant, *supra* note 14, at 2. Also, see *supra* INTRODUCTION for specific statistics on Backpage's profits.

160. Arrest Warrant, *supra* note 14, at 2.

161. *Id.* at 3.

162. BACKPAGE.COM'S KNOWING FACILITATION, *supra* note 19, at 42.

Group C.V. (UGC), a Dutch company domiciled in Curacao.<sup>163</sup> Ferrer is the only named partner of UGC and remained the CEO of Backpage.<sup>164</sup> For Ferrer, this move was made in order to expand Backpage globally.<sup>165</sup>

In addition to making millions of dollars off the sale of “adult” ads on Backpage, Ferrer devised a way to promote Backpage by creating other prostitution-related sites.<sup>166</sup> These sites serve as an escort directory comprised entirely of Backpage users.<sup>167</sup> Allegedly, Ferrer took data from Backpage users to create content for Backpage-affiliated sites such as EvilEmpire.com and BigCity.com.<sup>168</sup> An investigation by the DOJ found that EvilEmpire.com featured photos and contact information from Backpage and offered no apparent way for users to submit content directly.<sup>169</sup> These schemes enabled Ferrer and his co-conspirators to expand Backpage’s market of online sex advertising.<sup>170</sup>

There are numerous communications from the NCMEC and others informing Ferrer, Lacey, and Larkin about the number of children being exploited on Backpage.<sup>171</sup> Ferrer and other Backpage representatives have acknowledged the fact that prostitution occurs on Backpage but have attempted to evade culpability by claiming that they have mitigated criminal activity through their screening process.<sup>172</sup> At the same time, Ferrer has asked payment processing partners whether he

should not send email addresses to processors/banks when we do transactions? Example of customer email addresses: sexygirl69[redacted]l.com, porn\_star\_[redacted].com, Naked\_goddess[redacted].com. We could send an account number instead? Do banks see these email addresses when we send the transaction to the processor? We think for example Chase might block transactions for their card holders based on overtly sexy email address names.<sup>173</sup>

In July 2015, major credit cards stopped processing Backpage transactions. Backpage began to allow users to post “adult” ads for free while still collecting fees for promoted/sponsored ads and then created

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163. *Id.* at 47; Arrest Warrant, *supra* note 14, at 3.

164. Arrest Warrant, *supra* note 14, at 3.

165. BACKPAGE.COM’S KNOWING FACILITATION, *supra* note 19, at 44–45.

166. *Id.*

167. Arrest Warrant, *supra* note 14, at 3.

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.* at 3–4.

172. *Id.* at 4.

173. *Id.* at 12.

complex payment processing procedures to avoid detection from financial institutions.<sup>174</sup>

Ferrer, Lacey, and Larkin argue that they have no culpability for the exploitation of minors. Attorneys for Ferrer, Lacey, and Larkin have carefully crafted arguments to counter the felony pimping charges.<sup>175</sup> Attorney James C. Grant begins by writing, “The AG’s Complaint and theory of prosecution are frankly outrageous. The AG seeks to impose criminal liability on a website simply because it published and received fees for third-party ads.”<sup>176</sup> To combat these charges, Grant has raised First Amendment arguments and asserted CDA immunity.<sup>177</sup> He argues that the “First Amendment . . . expressly precludes state authorities from imposing criminal liability on parties that publish or distribute speech absent proof of scienter, *i.e.*, *that the publisher knew the specific information published was unlawful.*”<sup>178</sup> In regards to the Section 230 immunity, Grant states, “[T]he AG’s theory expressly violates Section 230, which Congress enacted twenty years ago to preserve and promote free speech on the Internet by immunizing website operators from liability for publishing content provided by third-party users. Section 230 preempts all contrary state laws—including state criminal laws.”<sup>179</sup> The attorney’s argument relies on the presumption that Ferrer, Lacey, and Larkin did not know “*the specific information published was unlawful*” and that they did not assist in the creation of the illegal content.<sup>180</sup> The second argument involving the CDA is also the crux of the Washington case, *J.S. v. Village Voice Media Holdings LLC*.

#### 1. California’s Department of Justice Investigation

Since 2012, the NCMEC has worked on more than 400 cases involving children sold for commercial sex on Backpage.<sup>181</sup> The NCMEC has reported more than 2,900 instances to California law enforcement where suspected child sex trafficking occurred via Backpage during that same time period.<sup>182</sup> The California DOJ began investigating Backpage in 2013 because of these reports from the NCMEC and news stories of

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174. *Id.*

175. *Id.*

176. Supporting Memorandum, *supra* note 158, at 1.

177. *Id.*

178. *Id.* (emphasis added).

179. *Id.* at 1–2.

180. *Id.* at 1 (emphasis added).

181. Arrest Warrant, *supra* note 14, at 5.

182. *Id.*

children who were repeatedly exploited for commercial sex on Backpage.<sup>183</sup>

Some of the California DOJ's observations are as follows. In May 2014, the California DOJ conducted an undercover sting operation, which involved an undercover agent responding to an "adult escort" ad listed on Backpage.<sup>184</sup> Agents arranged several "dates" with these "escorts," each resulting in meeting in a hotel room and the "escort" negotiating sex acts for money with the undercover agent.<sup>185</sup> The agents were thus able to confirm that the sole purpose of the "escort" ad posted on Backpage was to offer money in exchange for sex.<sup>186</sup>

In March 2015, California DOJ Special Agent Brian Fichtner created advertisements on Backpage.<sup>187</sup> One of the ads was posted in the "escort" section, offering adult companionship for money.<sup>188</sup> The special agent also posted an ad for the sale of a sofa in the "buy, sell, trade" section.<sup>189</sup> Backpage offers an upgrade of an ad for an additional fee, allowing the ad to be automatically reposted to the top of the page several times.<sup>190</sup> For the special agent to upgrade the ad in the "escort" section, it cost \$111.20; to upgrade the ad in the "buy, sell, trade" section, it cost \$1.22.<sup>191</sup> The responses to the "escort" ad began minutes after going live.<sup>192</sup> There were hundreds of inquiries for the "escort" ad requesting sexual acts; there was only one inquiry for the sofa.<sup>193</sup>

Later, Special Agent Fichtner personally reported his "escort" ad to Ferrer and to abuse@backpage, at which point the ad was taken down.<sup>194</sup> Other posts put up by Agent Fichtner, containing sexual verbiage such as "cum" and "quickie," were similarly taken down by Backpage because the words were "forbidden in this category"; but other posts, including verbiage such as "come" and "quick session," were alternatively submitted and accepted for use in ads on Backpage.<sup>195</sup> Furthermore, although Backpage restricted the sexual verbiage in Agent Fichtner's undercover ad, when he conducted random searches he viewed numerous "escort" ads that contained photos and videos of fully nude individuals simulating

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183. *Id.* at 4.

184. *Id.* at 5.

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.* at 6.

195. *Id.* at 6-7.

and/or performing sexual acts.<sup>196</sup> In Agent Fichtner’s declaration in support of an arrest warrant, Fichtner stated, “B[ackpage] states they moderate their ads and implement a policy against posting obscene or lewd and lascivious graphics and photographs, however, my personal observations have indicated otherwise.”<sup>197</sup>

## 2. Court’s Final Ruling on Ferrer

On December 9, 2016, the Honorable Judge Michael G. Bowman granted Carl Ferrer, Michael Lacey, and James Larkin’s demurrer, dismissed their charges, and exonerated their bonds.<sup>198</sup> Judge Bowman stated that the “[c]ourt understands the importance and urgency in waging war against sexual exploitation.”<sup>199</sup> But, he further opined, regardless of the grave potential of harm that results from the conduct of Carl Ferrer, Michael Lacey, and James Larkin, “Congress has precluded liability for online publishers for the action of publishing third party speech and thus provided for both a foreclosure from prosecution and an affirmative defense at trial.”<sup>200</sup> Judge Bowman concluded, “it is for Congress, not this [c]ourt, to revisit.” Again, this is an example where courts have not deviated from precedent in fear of its effect on the CDA.<sup>201</sup>

### *D. Backpage Shuts Down “Adult” Ads*

For more than twenty months, the Permanent Subcommittee on Investigations for the U.S. Senate investigated the problem of online sex trafficking.<sup>202</sup> The investigation led the Subcommittee to focus on Backpage.<sup>203</sup> The Subcommittee made three principal findings.<sup>204</sup> First, “Backpage has knowingly concealed evidence of criminality by systematically editing its ‘adult’ ads.”<sup>205</sup> Through subpoenas, the Subcommittee found that Backpage internally estimated that it was editing “70 to 80% of the ads” in the adult section either manually or automatically.<sup>206</sup> Second, “Backpage knows that it facilitates prostitution

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196. *Id.* at 7.

197. *Id.* For a more detailed account of *some* of the Backpage victims, see Arrest Warrant, *supra* note 14, at 7–11.

198. Court’s Final Ruling on Demurrer at \*1, *People v. Ferrer*, No. 16FE019224 (Cal. Super. Ct. 2016), <http://courthousenews.com/wp-content/uploads/2016/12/Backpage-Order.pdf> [<https://perma.cc/N5KV-8W5V>].

199. *Id.* at 14–15.

200. *Id.* at 15.

201. *Id.*

202. BACKPAGE.COM’S KNOWING FACILITATION, *supra* note 19, at 1.

203. *Id.*

204. *Id.* at 2.

205. *Id.*

206. *Id.*

and child sex trafficking.”<sup>207</sup> “Backpage moderators told the Subcommittee that everyone at the company knew the adult-section ads were for prostitution and their job was to ‘put[] lipstick on a pig’ by sanitizing them.”<sup>208</sup> Third, although Backpage was sold to an undisclosed foreign company in 2014, “the true beneficial owners of the company are James Larkin, Michael Lacey, and Carl Ferrer.”<sup>209</sup> Lacey and Larken lent Ferrer more than \$600 million to purchase Backpage from them.<sup>210</sup> According to the consultant who structured the deal, the transaction provides no tax benefits.<sup>211</sup> “Instead, it serves only to obscure Ferrer’s United States-based ownership and conceal Lacey and Larkin’s continued beneficial ownership.”<sup>212</sup>

After the Senate’s findings, Backpage<sup>213</sup> closed its “adult” ad section in the U.S.<sup>214</sup> on January 9, 2017.<sup>215</sup> Backpage stated that the scrutiny they received from the site by government officials has made it too costly for them to keep operating the adult section in the U.S.<sup>216</sup> Backpage rejected the Subcommittee’s findings and claimed that its decision to shut down the adult section was the result of “unconstitutional government censorship.”<sup>217</sup> Backpage also said, “For years, the legal system protecting freedom of speech prevailed, but new government tactics, including pressuring credit card companies to cease doing business with Backpage, have left the company with no other choice but to remove the content in the United States.”<sup>218</sup> Backpage responded to the Subcommittee stating,

This act of censorship will not reduce the problem of human trafficking, and those who suggest otherwise are deluding themselves and their constituencies. Instead, it undermines efforts by Backpage.com to cooperate with law enforcement and provide information to identify, arrest and prosecute those who engage in human trafficking. We are gratified by the supportive messages of appreciation from law enforcement across the country with whom we have worked to identify, arrest, and prosecute criminals. Second, it

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207. *Id.* at 3.

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.*

213. To view more of Backpage’s arguments, see Press Release, Backpage.com Removes Adult Content Due to Unconstitutional Government Censorship. . . . Vows to Fight First Amendment Battles (Jan. 9, 2017), <http://www.backpage.com/classifieds/Media> [<https://perma.cc/BY5H-4K2X>].

214. Backpage’s “adult” section is still up and running in other countries. See BACKPAGE, *supra* note 111; see also BACKPAGE.COM’S KNOWING FACILITATION, *supra* note 19, at 45.

215. Hawkins, *supra* note 109.

216. *Id.*

217. *Id.*

218. *Id.* (citation omitted).

will not end the fight for online freedom of speech. Backpage.com will continue to pursue its efforts in court to vindicate its First Amendment rights and those of other online platforms for third party expression.<sup>219</sup>

Backpage's counsel wrote to the Subcommittee and said that Congress had interfered with its First Amendment privileges by subpoenaing documents on what material it would and would not publish.<sup>220</sup> The letter also stated:

Backpage and the people who work for the company agree that human trafficking is abhorrent and should be eradicated. That is why Backpage has spent thousands of hours and millions of dollars working with, and at times training, the front lines of law enforcement in seeking to bring to justice those who impermissibly sought to use the Internet as a platform to commit abhorrent crimes.<sup>221</sup>

Disclaimers now appear on Backpage's "adult section" reading "CENSORED" in red letters and that "[t]he government has unconstitutionally censored this content."<sup>222</sup> Backpage also has posted links on its website with information on how to "protect free speech." It has also posted a donation link to the Children of the Night (an organization dedicated to rescuing children from prostitution) and a hashtag to support free speech (#FREESPEECH #BACKPAGE).<sup>223</sup> In response to Backpage shutting down the "adult" section, Senators Rob Portman (R–Ohio) and Claire McCaskill (D–Mo.) reportedly said, "Backpage's decision to close the adult section showed that it was 'complicit' in online sex trafficking."<sup>224</sup> "Backpage's response wasn't to deny what [the Subcommittee] said. It was to shut down their site . . . That's not 'censorship'—it's validation of our findings."<sup>225</sup>

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219. Statement of Backpage.com Regarding the U.S. Permanent Subcommittee on Investigations' Censorship of Adult Classified Advertisements (Jan. 9, 2017), <http://www.backpage.com/statements/Backpage-Statement-20170109.pdf> [<https://perma.cc/4BHQ-AP6B>].

220. Letter from Stanley M. Brand et al., Counsel for Backpage, to Senate Permanent Subcommittee on Investigations (Jan. 9, 2017), <http://www.backpage.com/statements/Backpage-Letter-to-Committee-20170117.pdf> [<https://perma.cc/X283-V3QR>].

221. *Id.*

222. See *Seattle Adult Entertainment*, BACKPAGE, <http://seattle.backpage.com/FemaleEscorts/classifieds/Censored?category=4443> [<https://perma.cc/HZ4E-6E9P>].

223. *Id.*

224. Hawkins, *supra* note 109.

225. *Id.*

## III. CRITIQUE

The CDA has classified an interactive computer service to include a wide-range of websites that host third-party content, including eBay.com, Amazon.com, and AOL.com.<sup>226</sup> Backpage has been identified as an interactive computer service, allowing it to use broad immunity as a defense to state law claims for the sex trafficking of minors.<sup>227</sup> A look into Congress's intent when drafting the CDA suggests that the CDA was not meant to provide immunity to users like Backpage. Backpage is clearly more than a mere interactive computer service; it actually assists in creating the unlawful content. Courts refuse to adopt this interpretation because of precedent.<sup>228</sup> But federal and state leaders have voiced their disapproval of Backpage and its business practices,<sup>229</sup> and those federal leaders have the power to address this. Congress needs to amend the CDA to clarify to whom it is intended to provide immunity from liability.

*A. The Communications Decency Act*

The Communications Decency Act of 1996 was one of Congress's first attempts to regulate the growing medium of the Internet.<sup>230</sup> The purpose of the CDA is to promote the development of the Internet, to protect children from obscene and objectionable content, and to ensure the enforcement of federal criminal laws.<sup>231</sup> As stated in the statutory language, the purpose is

to promote the continued development of the Internet [and] to preserve the vibrant and competitive free market that presently exists for the Internet [and] 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] to ensure vigorous enforcement of Federal criminal laws to deter *and punish trafficking in obscenity, stalking, and harassment by means of computer*.<sup>232</sup>

These provisions in the statutory text indicate that Congress was concerned about both the development of the Internet *and* the protection of children.<sup>233</sup>

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226. Silvano, *supra* note 29, at 386.

227. See Court's Final Ruling on Demurrer, *supra* note 198, at \*14–15.

228. See *id.* “[I]t is for Congress, not this Court, to revisit.” *Id.* at 15.

229. See BACKPAGE.COM'S KNOWING FACILITATION, *supra* note 19, at 1–2.

230. 47 U.S.C. § 230 (2014).

231. BACKPAGE.COM'S KNOWING FACILITATION, *supra* note 19, at 7.

232. 47 U.S.C. § 230 (b)(1)–(5) (emphasis added).

233. Congressional Record states, “Sexual Crimes Against Children Prevention: House agreed to the Senate amendment to H.R. 1240, to combat crime by enhancing the penalties for certain sexual crimes against children—clearing the measure for the President.” 141 CONG. REC. D1451 (daily ed.

Definitions and distinctions of key terms in the CDA are important to determine who is eligible for immunity under the Act. An “information content provider” is “any person or entity responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.”<sup>234</sup> An “interactive computer service,” on the other hand, is “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.”<sup>235</sup> Under the CDA, an information content provider may be subject to state law liability in relation to content that it develops, but an interactive computer service is immune from suit for state law claims in relation to merely hosting such content on its website.<sup>236</sup> A website operator does not “develop” content simply by maintaining neutral policies prohibiting or limiting certain content.<sup>237</sup>

The CDA also provides that “[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.”<sup>238</sup> Additionally, the Supremacy Clause of the Constitution declares that federal legislation is “the supreme Law of the Land.” Thus, federal legislation can create legal obligations on state law, which preempts states from making statutes that are in conflict with it.<sup>239</sup> In regards to immunity from civil liability, the CDA states:

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

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Dec. 12, 1995); 104 CONG. REC. S2308-01 (daily ed. June 14, 1995) (statement of Sen. Coats: “Mr. President, all you have to do is pick up the telephone and call the FBI, ask their child exploitation task force about the volume of over-the-Internet attempts to seduce, abuse, and lure children into pornography and sexual exploitation”); 141 CONG. REC. H8470 (daily ed. Aug. 4, 1995) (statement of Rep. Cox: “We want to encourage people like Prodigy, like CompuServe, like America Online, like the new Microsoft network, to do everything possible for us, the customer, to help us control, at the portals of our computer, at the front door of our house, what comes in and what our children see”).

234. 47 U.S.C. § 230(f)(3).

235. 47 U.S.C. § 230(f)(2).

236. *See* Carafano v. Metrosplash.com, Inc., 339 F.3d 1119, 1123 (9th Cir. 2003); *see also* 47 U.S.C. § 230(c)(1) (“No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”).

237. *See, e.g.*, Dart v. Craigslist, 665 F. Supp. 2d 961, 968–69 (N.D. Ill. 2009).

238. 47 U.S.C. § 230(e)(3).

239. U.S. CONST. art. VI, § 2.

harassing, or otherwise objectionable, whether or not such material is constitutionally protected.<sup>240</sup>

Unfortunately, courts have interpreted the CDA so broadly that they have granted immunity to interactive computer services who maintain minimal efforts at monitoring offensive or unlawful third-party content—making the threshold of what constitutes a “good faith effort” to be very little action as long as the appearance of regulation is maintained.<sup>241</sup>

As long as sex ads on a classified-ads websites like Backpage are created by a third-party user, websites like Backpage will have immunity from civil and criminal liability.<sup>242</sup> The exception to this rule is when an interactive computer service provider crosses the line between acting neutrally to actually publishing the content because its rules and regulations assist in the creation of illegal content.<sup>243</sup> This is the fine line that Backpage has been walking, and that line keeps getting thinner and thinner with CEO Carl Ferrer’s actions to maximize profits off the “escorts” section.

As a result of court interpretations of the CDA, state laws that try to combat sex trafficking over the Internet have been unsuccessful because websites such as Backpage have been able to circumvent liability by claiming a blanket immunity. An example of this is *Doe ex rel. Roe v. Backpage.com, LLC*, where the court dismissed state law claims brought by three minors who sought redress for having been victims of sex trafficking.<sup>244</sup> The court in that case, like many others, held that “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.”<sup>245</sup>

### *B. In Favor of the Broad Immunity*

Those who oppose holding interactive computer services liable have similar concerns. One argument is that before the CDA was passed, “Congress weighed the competing policies of fostering robust interactive service provider growth, promoting self-policing by the interactive service

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240. 47 U.S.C. § 230(c)(2)(A) (emphasis added).

241. BACKPAGE.COM’S KNOWING FACILITATION, *supra* note 19, at 7; Abby R. Perer, *Policing the Virtual Red Light District: A Legislative Solution to the Problems of Internet Prostitution and Sex Trafficking*, 77 BROOK. L. REV. 823, 833 (2012).

242. *Id.*

243. See *J.S. v. Vill. Voice Media Holdings, LLC*, 359 P.3d 714 (Wash. 2015).

244. *Doe ex rel. Roe v. Backpage.com, LLC*, 104 F. Supp. 3d 149 (D. Mass. 2015).

245. *Id.* at 165. State efforts are thwarted by the CDA itself and the court’s interpretation of the CDA immunity, thus begging the question of why the federal government and United States Attorney General have not gotten involved. The federal government is not precluded under the CDA from bringing action. So, why hasn’t anything been done on their part either?

provider industry, and protecting against victimization by Internet advertisements.”<sup>246</sup> In the CDA, Congress struck that balance in favor of immunity for “interactive service providers” but not for “content providers.”<sup>247</sup>

Another argument is that holding interactive computer service liable will infringe on First Amendment protections.<sup>248</sup> Constitutional scholars believe that the arguments used in efforts to shut down Backpage lack substance and set a dangerous precedent for disregarding the First Amendment.<sup>249</sup> Online intermediaries are essential for the Internet to remain a vital medium of free expression.<sup>250</sup> This allows users to exchange ideas and information around the world.<sup>251</sup> These intermediaries come in many forms—search engines, social networks, advertising platforms, and content-hosting sites—and offer forums to post or access user-generated content.<sup>252</sup> The argument is that the growth of the Internet would be stifled by holding intermediaries liable for content that is hosted on their sites because creators of these intermediaries would, in turn, be disincentivized from creating such forums.<sup>253</sup>

### *C. Proposal: Amending the Communications Decency Act*

In order to prevent websites from claiming to be an interactive computer service provider while covertly acting as the information content provider, Congress should amend the CDA to make clear to whom the immunity was meant to apply to.

A statute must be interpreted according to the intent of the Legislature as derived from its language and considered in connection with the cause of its enactment.<sup>254</sup> The intention of the CDA was not to give developers of websites sweeping abilities to evade illicit action, but to promote the growth of the Internet and to protect children.<sup>255</sup> Therefore, the CDA should be construed to treat websites, like Backpage, as not merely hosting such content when their guidelines minimally screen for

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246. *Vill. Voice*, 359 P.3d at 724.

247. *Id.*

248. *See, e.g.*, Letter from Stanley M. Brand et al., *supra* note 220.

249. Amy Zimmerman, *Backpage Is Bad. Banning It Would Be Worse*, DAILY BEAST (Jan. 14, 2017, 9:00 PM), <http://www.thedailybeast.com/articles/2017/01/15/backpage-is-bad-banning-it-would-be-worse.html> [<https://perma.cc/CE5M-C4SK>].

250. BACKPAGE, FIRST AMENDMENT BACKGROUND ON PSI SUBPOENA SEEKING DOCUMENTS ON BACKPAGE.COM EDITORIAL PROCESS 1, <http://www.backpage.com/statements/Backpage-First-Amendment-Fact-Sheet.pdf> [<https://perma.cc/K5PY-A648>].

251. *Id.*

252. *Id.*

253. *Id.*

254. *Commonwealth v. Figueroa*, 982 N.E.2d 1173, 1176 (Mass. 2013).

255. *Id.*

illicit conduct and help perpetrators of criminal conduct to evade detection. Because courts have, time and time again, decided not to change their interpretation of the CDA, Congress should amend the CDA either to allow state law claims and/or establish that a content provider becomes the creator of the content when it helps facilitate the illicit content by absent or weak regulatory provisions.

The first proposal has been supported by forty-seven attorney generals from different states within the U.S.<sup>256</sup> and would amend Section 230(e)(1) of the CDA to the following (added language in italics): “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 *or State* criminal statute.”<sup>257</sup>

The second proposal is to amend Section 230(c) of the CDA to the following (added language in italics): 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 paragraph (1). *(C) (1)-(2) of this provision applies unless, it can be proven that a provider or user of an interactive computer service makes a substantial amount of its revenue by the obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected, material; or does not place significant safeguards to aid in the detection and prevention of the publishers of the obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected, content.*

Either proposal would allow for website providers, such as Backpage, to be held accountable under state law for illegal content it helps create. In light of the frequent litigation in relation to this matter and

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256. Letter from Nat’l Ass’n of Att’ys Gen. to Sen. John Rockefeller IV et al., Chairman, Senate Comm. on Commerce, Sci., & Transp. (July 23, 2013), <https://assets.documentcloud.org/documents/3147245/Cda-Ag-Letter.pdf> [<https://perma.cc/76FH-H8FG>].

257. *Id.*

backlash from federal leaders, Congress should make explicit what types of websites are able to raise an immunity defense, rather than allow courts to construe a blanket immunity. Numerous members of Congress have voiced their disapproval of Backpage's actions—they should take further action in light of their words.<sup>258</sup> Congress should alter the language of the CDA to match Congress's original intent for this statute.

*D. Outcome of J.S. v. Village Voice Media Holdings LLC*<sup>259</sup>

As Justice Gonzalez opined in the Washington State Supreme Court decision of *J.S. v. Village Voice Media Holdings LLC*:

It is important to ascertain whether in fact Backpage designed its posting rules to induce sex trafficking to determine whether Backpage is subject to suit under the CDA because “a website helps to develop unlawful content, and thus falls within the exception to section 230, [and is thus not protected by section 230], if it contributes materially to the alleged illegality of the conduct.”<sup>260</sup>

Without a statutory amendment to the CDA, this case turns on whether Backpage's rules helped develop the content of those advertisements—in which case Backpage is not protected by CDA immunity.<sup>261</sup>

A website can be both a service provider and a content provider.<sup>262</sup> If the website operator just passively displays content that is created entirely by third parties, then it is only a service provider with respect to that content.<sup>263</sup> In regard to the content that the website operator creates itself or is responsible, in part or whole, for creating or developing the website, it is also a content provider.<sup>264</sup> “Thus, a website may be immune

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258. One example of protest against Backpage is a unanimous resolution from the U.S. Senate which “call[ed] on [Backpage] to act as a responsible global citizen and immediately eliminate the ‘adult entertainment’ section of the classified *advertising website* Backpage.com to terminate the website’s rampant facilitation of online sex trafficking.” S. Res. 439, 112th Cong. (2012) (emphasis added). In addition, Representative Ann Wagner introduced, and the House ultimately passed with overwhelming bipartisan support, the Stop Advertising Victims of Exploitation Act (the SAVE Act). Alan Scher Zagier, *Wagner Promotes Bill to Shut Down Online Sex Ads*, WASH. TIMES (Mar. 13, 2014), <http://www.washingtontimes.com/news/2014/mar/13/wagner-promotes-bill-to-shut-down-online-sex-ads/> [<https://perma.cc/AW9X-GYCG>]. The SAVE Act is aimed at websites “that post third-party ads for massages, body rubs, escort services and other thinly veiled references to prostitution.” *Id.*

259. This case is currently pending—once decided, a better analysis of how the outcome of the case affects the future of CDA interpretation, website operators, and Washington State law can be made.

260. *J.S. v. Vill. Voice Media Holdings, LLC*, 359 P.3d 714, 718 (Wash. 2015) (citing *Fair Hous. Council v. Roommates.com*, 521 F.3d 1157, 1168 (9th Cir. 2008)).

261. *See* 47 U.S.C. § 230 (2012).

262. *Fair Hous. Council*, 521 F.3d at 1162.

263. *Id.*

264. *Id.* at 1163.

from liability for some of the content it displays to the public but be subject to liability for other content.”<sup>265</sup> A website operator, however, does not “develop” content by simply maintaining neutral policies prohibiting or limiting certain content.<sup>266</sup>

Most courts have broadly construed Section 230 to provide near complete criminal and civil immunity for ISPs when they publish content website users have created.<sup>267</sup> However, the U.S. Court of Appeals for the Ninth Circuit has suggested that ISPs that edit user-created content can lose their CDA immunity. The court in *Fair Housing Council of San Fernando Valley v. Roommates.com*<sup>268</sup> wrote that Section 230 “was not meant to create a lawless no-man’s-land on the Internet”<sup>269</sup> and that

a website operator who edits user-created content . . . retains his immunity for any illegality in the user-created content, provided that the edits are unrelated to the illegality. However, a website operator who edits in a manner that contributes to the alleged illegality . . . is directly involved in the alleged illegality and thus not immune.<sup>270</sup>

In that case, the plaintiffs claimed that Backpage designed its posting rules to induce sex trafficking and to help pimps evade law enforcement.<sup>271</sup> If proven true by the facts presented before the superior court, the plaintiffs have a potentially winning case. Backpage created a business model to knowingly promote, support, contribute, and benefit from prostitution and sex trafficking of minors. This business model has been profitable in the U.S. and worldwide, and is in violation of federal and Washington State laws. While other websites allow, and perhaps even enable, some amount of unlawful activity as a consequence of hosting forums for lawful speech or commerce, Backpage’s very business model is premised on facilitating and profiting from sex trafficking—Backpage makes 90% of its worldwide income directly from the “adult” ads section, which is used for prostitution.<sup>272</sup>

Pierce County Superior Court should hold Backpage accountable and rule in the plaintiffs’ favor because Backpage has taken various

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265. *Id.*

266. *See, e.g., Dart v. Craigslist*, 665 F. Supp. 2d 961, 968–69 (N.D. Ill. 2009).

267. *Hill v. Stubhub, Inc.*, 727 S.E.2d 550, 558 (N.C. Ct. App. 2012) (“According to our research, there have been approximately 300 reported decisions addressing immunity claims advanced under 47 U.S.C. § 230 in the lower federal and state courts. All but a handful of these decisions find that the website is entitled to immunity from liability.”); *cf.* Brief for Legal Momentum et al. as Amici Curiae in Support of Petition for a Writ of Certiorari, *Jane Doe No. 1 v. Backpage.com, LLC* (2016), (No. 16-276) (arguing that courts have wrongly extended Section 230 beyond congressional intent).

268. *Fair Hous. Council*, 521 F.3d at 1157.

269. *Id.* at 1164.

270. *Id.* at 1169.

271. *J.S. v. Vill. Voice Media Holdings, LLC*, 359 P.3d 714, 718 (Wash. 2015).

272. Arrest Warrant, *supra* note 14, at 11.

affirmative steps to facilitate sex traffickers and to hinder law enforcement. The court should rely on the 9th Circuit's ruling in *Fair Housing Council of San Fernando Valley v. Roommates.com* and on Backpage's deceptive practices in making its decision. Backpage protects posters' anonymity because it does not require verification of email addresses and does not require a verification of the telephone numbers posted in its "adult" ads.<sup>273</sup> Backpage strips out metadata associated with photographs—such as date, time, geolocation, and other identifying information—before publishing photographs on its website, further preventing law enforcement from effectively searching for a repost of the same photograph.<sup>274</sup> Backpage allows the use of recognizable abbreviations of forbidden words, such as "brly legal" and "high schl."<sup>275</sup> Finally, Backpage has expanded its business globally and is affiliated with other prostitution-based sites—such as *EvilEmpire.com*—where photos and contact information from Backpage are posted.<sup>276</sup> Victims should be able to seek justice against those that facilitate their trafficking and facilitators should be held accountable for their actions.

#### CONCLUSION

Prostitution and sex trafficking have always been prominent in American history and flourish today on the Internet. The current interpretation of CDA immunity creates a federal internal inconsistency. The inconsistency is that the federal government has enacted laws and committed resources to combat the sex trafficking of minors and extract them from bondage, but the CDA gives the leading source of sex trafficking—the Internet—a sweeping immunity defense. This inconsistency prevents a state's ability to enforce regulations and hold traffickers accountable. The issue regarding the sex trafficking of minors will not be properly addressed and tackled until federal laws and state efforts are able to function concurrently. In order to combat the "modern slavery" of sex trafficking, particularly the sex trafficking of minors, the CDA needs to be amended. An amendment will allow state efforts to operate in accord with federal law efforts and prevent state courts from hiding behind precedent when interpreting CDA cases before them.

To further assist these efforts, the court for the pending case in Washington State—*J.S. v. Village Voice Media Holdings LLC*—should rule in favor of the respective plaintiffs. On Backpage, a pimp can easily

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273. See *Doe ex rel. Roe v. Backpage.com, LLC*, 104 F. Supp. 3d 149, 152 (D. Mass. 2015).

274. *Id.*

275. *Id.*

276. Arrest Warrant, *supra* note 14, at 3.

circumvent detection because Backpage has set up guidelines that foster evasion by stripping metadata, failing to vigorously screen ads, and requiring no personal information of ad creators. In so doing, Backpage assists in the development of unlawful content by guiding pimps in the ways to post depictions of sex trafficked minors in a way that law enforcement is unable to detect.

Combatting the sex trafficking of minors globally is an enormous task; the U.S. should take strict efforts domestically and ensure that the current initiatives Congress has enacted are not wasted due to preemption by the CDA. As global leaders, the U.S. should lead by example.