No. 16A49

In The Supreme Court Of The United States

JANE DOE NO. 1, JANE DOE NO. 2 & JANE DOE NO. 3,
A MINOR CHILD, BY HER PARENTS AND NEXT FRIENDS
SAM LOE AND SARA LOE,

PETITIONERS,

v.

BACKPAGE.COM, LLC, CAMARILLO HOLDINGS, LLC
(FORMERLY KNOWN AS VILLAGE VOICE MEDIA
HOLDINGS, LLC), AND NEW TIMES MEDIA, LLC,

RESPONDENTS.

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

BRIEF OF THE STATES OF WASHINGTON, COLORADO, HAWAI'I, INDIANA, KANSAS, LOUISIANA, MARYLAND, MICHIGAN, MINNESOTA, MISSISSIPPI, MONTANA, NEBRASKA, NEW HAMPSHIRE, OHIO, OKLAHOMA, OREGON, RHODE ISLAND, SOUTH CAROLINA, SOUTH DAKOTA, UTAH, AND VERMONT AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTEREST OF AMICI CURIAE

Sex trafficking is the fastest-growing organized crime in the world. According to the FBI, "young girls are sold to traffickers, locked up in rooms or brothels for weeks or months, drugged, terrorized, and raped repeatedly."[1] Children exploited through sex trafficking are typically given a quota by their trafficker of 10 to 15 buyers a night, and sold up to 45 times a day during high demand sports events and conventions.[2] The States have vigorously responded to this problem by enacting laws providing a civil cause of action and criminalizing human trafficking.[3] In addition, the National Association of Attorneys General has undertaken an initiative to combat trafficking.

The Internet is the primary method of advertising the availability of children for sex. Although the Communications Decency Act (CDA) provides website operators with broad protection from liability for posting content generated by third parties, nothing in the CDA shields websites from a cause of action based on their participation in

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[1] Amanda Walker-Rodriguez & Rodney Hill, *Human Sex Trafficking*, FBI Law Enforcement Bulletin (Mar. 2011), https://leb.fbi.gov/2011/march/human-sex-trafficking.

[2] Linda A. Smith et al., *The National Report on Domestic Minor Sex Trafficking: America's Prostituted Children* Shared Hope Int'l (May 2009), http://sharedhope.org/wp-content/uploads/2012/09/SHI_National_Report_on_DMST_2009.pdf.

[3] *See, e.g.*, Wash. Rev. Code § 9A.82.100(1)(a) (2016); Wash. Rev. Code § 9.68A.100 (2016); Okla. Stat. tit. 21, § 748.2(B) (2016); Okla. Stat. tit. 21, § 748(B) (2016); Vt. Stat. tit. 13, § 2662 (2016); Vt. Stat. tit. 13, § 2652(a)(1) (2016).

creating or developing the third-party content. Yet in the absence of statutory language or ambiguity, the First Circuit expanded the CDA to preclude a cause of action against websites that both publish third-party content and assist in developing the content. This sweeping expansion of the law preempts state laws criminalizing sex trafficking, leaving the states and victims without a cause of action against webpages that knowingly devise means of altering content, metadata, and payment practices to prevent law enforcement from detecting traffickers and locating victims. The undersigned Attorneys General have a compelling interest in ensuring that the lower court's erroneous interpretation of the CDA is rejected.

ARGUMENT

A. The Communications Decency Act Does Not Establish Blanket Immunity for Interactive Service Providers

The courts have uniformly recognized that the Communications Decency Act facilitates use and development of the Internet by conferring broad protection from liability for publication of information originating from a third source. *See, e.g.*, *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1162 (9th Cir. 2008) (en banc). As a result, an Internet retailer may passively post material provided by third parties without fear of being held liable as the publisher or speaker of the content.

The First Circuit opinion incorrectly expands the scope of this statutory defense by closing the courthouse doors to action against interactive

Internet services that create or develop material in violation of state law. As explained in decisions from the Seventh, Ninth, and Tenth Circuits and the Washington State Supreme Court, the First Circuit's preemption of state law conflicts with the plain language of the CDA. "It is difficult to reconcile an expansive reading finding 'broad immunity' with the actual language of the statute, which used specific terms and does not include the words 'immunity' or any synonym." *J.S. v. Village Voice Media Holdings, L.L.C.*, 184 Wash. 2d 95, 109 (2015) (Wiggins, J., concurring).

1. Section 230(c)(1) only protects websites from a cause of action based on publication

Rather than granting blanket immunity, the CDA provides protection from liability for prescribed classes of activity. Section 230(c)(1) of the CDA states that:

> 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.

Liability cannot be imposed under any state law that is inconsistent with section 230. 47 U.S.C. § 230(e)(3).

As the Ninth Circuit has explained, whether a claim is preempted by section 230(c)(1) depends on whether the cause of action "inherently requires the court to treat the defendant as the 'publisher or speaker' of content provided by another. To put it

another way, courts must ask whether the duty that the plaintiff alleges the defendant violated derives from the defendant's status or conduct as a 'publisher or speaker.'" *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1102 (9th Cir. 2009) (holding that section 230(c)(1) did not bar a promissory estoppel claim for failing to fulfill a promise to remove offensive postings). The provision precludes the "chilling effect upon Internet free speech" that would occur if websites that do not create harmful material were held liable for simply acting as "intermediaries." *Doe v. Internet Brands, Inc.*, 824 F.3d 846, 852 (9th Cir. 2016).

Contrary to other circuits, the First Circuit has expanded the scope of section 230(c)(1) to insulate companies from a state law cause of action directed not at passive publication, but at the website operator's development of means of covertly signaling to buyers that a child is being sold for sex and development of ruses to evade law enforcement. *Jane Doe No. 1 v. Backpage.com, LLC,* 817 F.3d 12, 22 (1st Cir. 2016). Given that the language of the CDA only provides protection against a cause of action directed at posting information provided by another party, the First Circuit could reach this conclusion only by expanding the reach of section 230(c)(1) to include assisting a third party in creating or developing material, if the third-party material is ultimately published by the website. *See id.*

In direct conflict with the First Circuit, other circuits have rejected the premise that "a website operator's decisions in structuring its website and post requirements are publisher functions." *Id.* For example, in *Fair Housing Council v. Roommates.com*,

the Ninth Circuit held that an action cannot be pursued against a website operator that "passively displays content that is created entirely by third parties," but a website operator can be subject to liability for content it is wholly or partially responsible for creating, including elements of the structure of the website itself if they facilitate illegal conduct. *Fair Housing*, 521 F.3d at 1162-63.

The Tenth Circuit has also read section 230(c)(1) as a limited protection against liability for passive provision of third-party content, rather than a grant of sweeping immunity against all civil liability. *F.T.C. v. Accusearch Inc.*, 570 F.3d 1187 (10th Cir. 2009). The Court held that posting personal telephone records provided by third parties was not sufficient to shield the website from an unfair practice claim brought by the Federal Trade Commission. Although the Court noted that the website would not have committed the unfair practice if it had not published the telephone records, it held that the CDA does not protect a website operator for liability in creating content. *See id.* at 1197; *see also Ben Ezro, Weinstein, and Co., Inc. v. America Online Inc.*, 206 F.3d 980 (10th Cir. 2000) (finding that application of section 230(c)(1) turns on whether the website does anything other than post material created entirely by a third party).

In keeping with the decisions of the Ninth and Tenth Circuits, the Seventh Circuit also has held that section 230 only preempts claims against an interactive computer service acting in its role as a publisher of third-party content. *City of Chicago v. StubHub!, Inc.*, 624 F.3d 363, 366 (7th Cir. 2010). The Court held that section 230(c)(1) does not

immunize Internet service providers from state tax laws. *Id.* Because the tax action did not turn on who publishes the material on StubHub's website, or who is acting as the "speaker," the Court held that "[s]ection 230(c) is irrelevant." *Id.*

Backpage does not come within the scope of section 230(c)(1) because the cause of action here is not directed at the website's posting of material received from other parties—it is directed at the active steps taken by Backpage to promote sex trafficking of children, including encouraging use of language that will attract customers seeking children for sex, encouraging payment methods that make financial transactions with the traffickers untraceable, stripping metadata to impair law enforcement's ability to locate victims, and deleting "sting ads" posted by law enforcement. App. 4a-7a.

As this Court recognized in the context of copyright infringement, when a computer service goes beyond posting illegal material and intentionally promotes violation of the law, a cause of action may be pursued. *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005). When a rule premises liability on "purposeful, culpable expression and conduct" it "does nothing to compromise legitimate commerce or discourage innovation having a lawful promise." *Id.* at 937. The same principle is applicable here. Section 230(c) does not preclude a trial court from hearing evidence that Backpage expanded its activity beyond publication of third-party content. As the Seventh Circuit noted, "*Grokster* is incompatible with treating § 230(c)(1) as a grant of comprehensive immunity from civil liability for content provided by a third party."

Chicago Lawyers' Committee for Civil Rights Under Law, Inc. v. Craigslist, 519 F.3d 666, 670 (7th Cir. 2008).

2. The CDA does not shield websites that are both publishers *and* Internet content providers

Section 230(c)(1) only shields websites acting as passive conduits of content "provided by another information content provider." The protection is lost if the service provider also functions as an information content provider. *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1122 (9th Cir. 2003). An "information content provider" is defined by the CDA as "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service." 47 U.S.C. § 230(f)(3).

As the First Circuit previously acknowledged, "[t]his is a broad definition, covering even those who are responsible for the development of content only 'in part.'" *Universal Commc'ns Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 419 (1st Cir. 2007). As a result, a single piece of content may have been created or developed by multiple information content developers. Rather than finding that the presence of a third party justifies summary judgment in favor of the website, other courts have focused on whether the cause of action seeks to hold the website liable for the *content* of the material posted or its *conduct* in creating the material.

In conflict with the First Circuit, other courts have recognized that section 230(c)(1) does not shield

websites from liability for their conduct if they have a level of responsibility for creating or developing third-party material. In *Fair Housing*, the Ninth Circuit held that the CDA did not create immunity for Roommates.com, a website that permits users to search or post listings of housing opportunities. *Fair Housing*, 521 F.3d at 1162. Before searching the listings, Roommates.com subscribers were required to complete a questionnaire regarding housing preferences. *Id.* at 1161. Many of the questions facilitated violations of state and federal fair housing laws. *Id.* at 1162.

The Ninth Circuit held that the "the party responsible for putting information online may be subject to liability, even if the information originated with a user." *Id.* at 1165 (citing *Batzel v. Smith*, 333 F.3d 1018, 1033 (9th Cir. 2003)). The Court held that "[t]he CDA does not grant immunity for inducing third parties to express illegal preferences." *Id.* at 1165. "Roommate's own acts—posting the questionnaire and requiring answers to it—are entirely its doing and thus section 230 of the CDA does not apply to them." *Id.*

The Tenth Circuit also held that a website that publishes third-party content can be held liable if in addition to publishing, the website's conduct includes aiding in development of the third-party material. *Accusearch*, 570 F.3d 1187. Like Backpage, the website at issue knew it was posting legally protected, confidential information. *Id.* at 1199. It encouraged third parties to find the information, knowing that the information was obtained "through fraud or other illegality." *Id.* Applying the dictionary definition of "development," the Tenth Circuit held

that the website was an "information content provider" because it made the third-party information more "visible" or "usable." *Id.* at 1198.

Following the federal court decisions, the Washington State Supreme Court held that a trial court improperly dismissed a case against Backpage on summary judgment. *Village Voice*, 184 Wash. 2d 95. The Court held that the "case turns on whether Backpage merely hosted the advertisements" and therefore is protected by the CDA, "or whether Backpage also helped develop the content of those advertisements, in which case Backpage is not protected by CDA immunity." *Id.* at 101-02. Viewing the allegations in the light most favorable to the plaintiff, the Court held that the claims related to development of content rather than publication, and therefore were sufficient to proceed to trial. *Id.* at 103. The Court explained that in determining whether the CDA is applicable, "[i]t is important to ascertain whether in fact Backpage designed its posting rules to induce sex trafficking," since helping to develop unlawful content is not an activity shielded from liability. *Id.* at 103 (citing *Fair Housing Council*, 521 F.3d at 1168). This factual determination is best made at the trial court level.

This is directly contrary to the First Circuit's decision, holding that even if a website "facilitates illegal conduct," it is part of the publisher function shielded from liability by section 230(c)(1). By prematurely dismissing the case against Backpage, the First Circuit foreclosed the victims' opportunity to prove a cause of action based on Backpage's conduct in altering formatting and metadata to

promote sex trafficking of children and impede law enforcement.

3. Read in full, section 230 indicates that it does not protect against liability for actions in addition to publication

In addition to expanding the plain language of section 230(c)(1), the First Circuit failed to read section 230(c) as a whole. Read in full, the context indicates that section 230(c)(1) only applies to liability for publication, not other actions a website may take in addition to publication.

Section 230(c)(2) prevents a cause of action based on efforts taken in good faith to restrict access to objectionable material. It states:

> (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).

Statutory interpretation considers "the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997). Read together, sections 230(c)(1) and (2) indicate that the CDA does not create blanket immunity from suit for providers who do more than passively post third-party material. Section 230(c)(2) protects interactive service providers from liability if in addition to publishing third-party material, they create or develop means of restricting "access to or availability of" obscene posts. If the protection afforded by section 230(c)(1) included all actions undertaken in addition to publication, section 230(c)(2) would be superfluous.

The First Circuit refused to address the conflict between its broad construction of section 230(c)(1), and the simultaneous enactment of section 230(c)(2). The Court dismissed the statutory construction argument by stating that section 230(c)(2) is simply irrelevant because the appellants' claims treat Backpage as the publisher of third-party content, and section 230(c)(2) addresses "independent protections." *Backpage.com*, 817 F.3d at 22.

The First Circuit's decision renders section 230(c)(2) wholly superfluous. If section 230(c)(1) imposed unlimited immunity, regardless of whether the provider alters the accessibility of the third-party information, section 230(c)(2) would be meaningless. As this Court has long held, wherever possible,

statutes should be construed so that no clause is rendered superfluous, void, or insignificant. *Young v. United Parcel Serv., Inc.*, 135 S. Ct. 1338, 1352 (2015). The First Circuit flips this "Good Samaritan" provision on its head, by protecting Backpage from liability for content it assisted in developing.

B. The CDA Is Not Intended to Block Enforcement of State Laws Targeting Development of Sex Trafficking Schemes

Like the plain language of the Act, the purpose of the CDA demonstrates that it was not intended to impede enforcement of state laws targeting website operators that help create or develop means of more efficiently selling children for sex and evading law enforcement.

The Act expresses a policy of "continued development of the Internet" and preserving the Internet's "vibrant and competitive free market." 47 U.S.C. § 230(b)(1), (2). However, the policies also include encouraging "development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet;" removing disincentives for "development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material;" and ensuring "vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer." 47 U.S. § 230(b)(3)-(5). In furtherance of these policy objectives, the CDA provides that nothing in section 230 shall be construed to prevent enforcement of

state law that is consistent with section 230. 47 U.S.C. § 230(e)(3).

Consistent with Congressional policy, section 230(c) protects webpages from liability when they act as neutral intermediaries hosting third-party information. Nothing in the policy or language of section 230 extends that protection to information content providers, or websites that participate in the creation or development of content. Ironically, while Congress intended to remove disincentives to restricting Internet access to objectionable material, the First Circuit's decision creates blanket immunity for those who strive to increase sales of children for sex. Where the CDA explicitly provides that state law enforcement will be permitted consistent with the Act, the First Circuit expands the language of the statute to make virtually any action against a webpage impermissible.

This expansion of the law has a devastating impact on the States' ability to combat sex trafficking. Under the First Circuit's reasoning, any webpage that publishes a third party's advertisement of a child is immune from liability for developing means of increasing the advertisement's ability to lure pedophiles while avoiding police detection. This stops victims from pursing a civil cause of action against a webpage that actively participates in illegal conduct. *See, e.g.*, *M.A. v. Village Voice Media Holdings, LLC*, 809 F. Supp. 2d 1041 (E.D. Mo. 2011) (holding that the CDA entitles Backpage to immunity).

CONCLUSION

The judgment of the First Circuit Court of Appeals should be reversed.

RESPECTFULLY SUBMITTED.

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