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NO. 90510-0

SUPREME COURT OF THE STATE OF WASHINGTON

Village Voice Media Holdings, L.L.C., d/b/a Backpage.com;
Backpage.com, L.L.C.; and
New Times Media, L.L.C., d/b/a/ Backpage.com,

Appellants,

v.

J.S., L.L., and L.C. minor children,

Respondents.

AMICUS BRIEF OF THE STATE OF WASHINGTON IN SUPPORT OF RESPONDENTS

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I. INTRODUCTION

The Respondents here were children sold as prostitutes in advertisements on Backpage.com. They filed an action alleging that Backpage.com materially contributed to at least some of the content that was posted, effectively helping promote illegal victimization of children. If their factual allegations are supported, it would disqualify Backpage.com from the immunity it claims under § 230 of the Communications Decency Act, 47 U.S.C. § 230. The Respondents should be allowed to develop those facts.

The Respondent children have alleged credible facts that, if supported by discovery, would demonstrate that Backpage.com is not merely a computer service that passes third-party advertisements of pimps and traffickers to the public, but rather a partner who specifically solicits those advertisements and is complicit in developing their content—i.e., that Backpage.com "is responsible, in whole or in part, for the creation or development of information[.]" 47 U.S.C. § 230(f)(3). A trial court should presume the truth of these factual allegations when deciding a motion to dismiss under CR 12(b)(6). *Bowman v. Two*, 104 Wn.2d 181, 704 P.2d 140 (1985). If the alleged facts are supported by discovery, Backpage.com could not claim the immunity § 230 provides.

Because it is possible that facts can be established to support the allegations in the complaint, the Respondent children have stated a claim upon which relief can be granted. *McCurry v. Chevy Chase Bank, FSB*, 169 Wn.2d 96, 101-03, 233 P.3d 861 (2010). This Court should affirm the superior court's denial of the motion to dismiss and remand to allow the case to proceed.

II. IDENTITY AND INTEREST OF AMICUS CURIAE

Amicus curiae is the State of Washington. Its interests are set out more fully in the accompanying motion to file an amicus brief. In summary, Washington has a strong interest in combatting the trafficking of children for sex through advertisements on the Internet.

III. STATEMENT OF THE CASE

The State adopts the statement of the case provided by the Respondents. This appeal comes to the Court on Backpage.com's motion for discretionary review after the superior court denied its motion to dismiss under CR 12(b)(6). On July 23, 2014, after briefing was completed in the Court of Appeals, this case was transferred to the Supreme Court.

IV. ARGUMENT

A. Backpage.com Cannot Claim Immunity Under § 230 of the Communications Decency Act if It Acts as an Information Content Provider

Backpage.com claims absolute immunity under § 230(c) of the Communications Decency Act (CDA), 47 U.S.C. § 230. The central issue at this stage of this case is whether the Respondent children alleged facts in their complaint that, if proved, would disqualify Backpage.com from the immunity it claims.

There are three relevant provisions in the CDA intended to provide protection from liability for "Good Samaritan" blocking and screening of offensive material[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." 47 U.S.C. § 230(c)(1).
- A provider may not be liable for "any action voluntarily taken in good faith to restrict access to or availability of" material that is "obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable[.]" 47 U.S.C. § 230(c)(2)(A).
- "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." 47 U.S.C. § 230(e)(3).

[1] 47 U.S.C. § 230(c). For a brief history of the Communications Decency Act, focusing on § 230, *see* Ryan J.P. Dyer, *The Communication Decency Act Gone Wild: A Case for Renewing the Presumption Against Preemption*, 37 Seattle U. L. Rev. 837, 839-41 (Winter 2014).

Backpage.com claims it is solely a provider of an "interactive computer service," as that term is defined in 47 U.S.C. § 230(f)(2). But the Respondent children have alleged credible facts that, if supported by evidence obtained through appropriate discovery, could demonstrate that Backpage.com also acts as an "information content provider," which is defined in 47 U.S.C. § 230(f)(3) 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." (Emphases added.) An "information content provider" cannot claim immunity under § 230; and an interactive computer services provider cannot claim immunity under § 230 if it *also* is an information content provider. *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1162 (9th Cir. 2008) (en banc); *accord Fed. Trade Comm'n v. Accusearch, Inc.*, 570 F.3d 1187, 1197 (10th Cir. 2009); *see also Universal Commc'n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 419 (1st Cir. 2007) (47 U.S.C. § 230(f)(3) provides a "broad definition" of "information content provider," "covering even those who are responsible for the development of content only 'in part.' ").

In *Roommates.com*, the Ninth Circuit held that a service provider "helps to develop unlawful content, and thus falls within the exception to § 230, if it contributes materially to the alleged illegality of the conduct."

Roommates.com, 521 F.3d at 1168. Relatedly, in *Accusearch*, the Tenth Circuit held that a service provider is "responsible" for the development of offensive content "if it in some way specifically encourages development of what is offensive about the content." *Accusearch*, 570 F.3d at 1199.

B. The Respondent Children Have Alleged Facts That Would Qualify Backpage.com as an Information Content Provider Under § 230 of the Communications Decency Act

The Respondent children allege at least three sets of facts to support that claim. First, they allege the choice of the term "Escorts" by Backpage.com to label that section of its website contributes materially to facilitating the advertisement of prostitution. First Amended Complaint, ¶ 3.5. Second, they allege Backpage.com has deliberately made itself the go-to website for on-line marketing of prostitution in the United States. First Amended Complaint, ¶¶ 3.1 to 3.4, 3.17. Third, they allege the "self-policing measures" Backpage.com claims to have implemented are a sham, intended to further their profits and prevent more intense scrutiny by the public and law enforcement. First Amended Complaint, ¶¶ 3.6 to 3.16. These factual allegations distinguish this case from all or almost all the cases Backpage.com has cited that found immunity under § 230 of the CDA.

1. The Respondent Children Allege the Very Choice of the Term "Escorts" by Backpage.com to Describe That Section of its Website Evidences Its Transparent Plan to Solicit and Facilitate the Advertisement of Prostitution

The Respondents allege the term "escort" is well understood as a synonym for prostitution and that Backpage.com chose that term for that reason. By creating a portion of its website specifically designed to facilitate prostitution, including the sexual exploitation of children, Backpage.com materially contributed to the illegality of the content posted in this section, effectively encouraging and soliciting the posting of such illegal content.

In response, Backpage.com claims the term "escort" has a legitimate reference which need not be misunderstood. *See* Appellant's Opening Br. at 29. But many courts have recognized that the term "escort" is a well-recognized euphemism for prostitute. There are many reported cases, for example, involving federal prosecutions and convictions for money laundering by persons operating "escort" businesses that are engaged in prosecution.[2] There are even more reported federal and state cases in which persons operating "escort" businesses or

[2] *See, e.g., United States v. Lineberry*, 702 F.3d 210 (5th Cir. 2012), *cert. denied*, 133 S. Ct. 2839 (2013); *United States v. Evans*, 272 F.3d 1069 (8th Cir. 2001), *cert. denied*, 535 U.S. 1029, 535 U.S. 1072, 535 U.S. 1087, 537 U.S. 857 (2002); *United States v. Taylor*, 239 F.3d 994 (9th Cir. 2001); *United States v. Montague*, 29 F.3d 317 (7th Cir. 1994); *United States v. Kinzler*, 55 F.3d 70 (2d Cir. 1995).

selling "escort" services were prosecuted and convicted of pimping, sex trafficking of children, or similar crimes.[3]

Moreover, cases in Washington courts have included evidence that persons working for an "escort service" engaged in prostitution. *See, e.g.*, *State v. Gregory*, 158 Wn.2d 759, 782, 147 P.3d 1201 (2006) (witness "admitted to working as a prostitute through an escort service in 1996 and early 1997"); *State v. Elliott*, 114 Wn.2d 6, 785 P.2d 440, *cert. denied*, 498 U.S. 838 (1990); *State v. McKinzy*, 72 Wn. App. 85, 863 P.2d 594 (1993); *see also First Global Commc'ns, Inc. v. Bond*, 413 F. Supp. 2d 1150,

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[3] Federal cases. *See, e.g.*, *United States v. Tavares*, 705 F.3d 4 (1st Cir.), *cert. denied*, 133 S. Ct. 2371, 134 S. Ct. 450 (2013); *United States v. Daniels*, 653 F.3d 399 (6th Cir. 2011), *cert. denied*, 132 S. Ct. 1069 (2012); *United States v. Diaz*, 597 F.3d 56 (1st Cir. 2010); *United States v. Pipkins*, 378 F.3d 1281 (11th Cir. 2004), *judgment vacated*, 544 U.S. 902, 125 S. Ct. 1617, 161 L. Ed. 2d 275 (2005), *opinion reinstated*, 412 F.3d 1251 (11th Cir. 2005); *United States v. Taylor*, 239 F.3d 994 (9th Cir. 2001); *United States v. Footman*, 66 F. Supp. 2d 83 (D. Mass. 1999), *aff'd*, 215 F.3d 145 (1st Cir. 2000); *United States v. Sabatino*, 943 F.2d 94 (1st Cir. 1991).

State cases. *See, e.g.*, *Spangler v. State*, 711 So. 2d 1125 (Ala. Crim. App. 1997), *cert. denied*, 525 U.S. 1044 (1998); *Lee v. Mun. of Anchorage*, 70 P.3d 1110 (Alaska Ct. App. 2003); *State v. Schwartz*, 188 Ariz. 313, 935 P.2d 891 (Ct. App. 1996) (review denied 1997); *People v. Mays*, 148 Cal. App. 4th 13, 55 Cal. Rptr. 3d 356 (2007); *People v. Dell*, 232 Cal. App. 3d 248, 283 Cal. Rptr. 361 (1991); *People v. Jacobs*, 91 P.3d 438 (Colo. App. 2003), *cert. denied*, 2004 WL 1302212 (Colo. June 14, 2004); *Helms v. State*, 38 So. 3d 182 (Fla. Dist. Ct. App. 2010); *Vaughn v. State*, 711 So. 2d 64 (Fla. Dist. Ct. App. 1998), *review denied*, 722 So. 2d 195 (Fla. 1998); *Dorn v. State*, 819 N.E.2d 516 (Ind. Ct. App. 2004); *State v. Serio*, 641 So. 2d 604 (La. Ct. App. 1994), *writ denied*, 648 So. 2d 388 (La. 1994); *Doe v. Sex Offender Registry Bd.*, 466 Mass. 594, 999 N.E.2d 478 (2013); *Commonwealth v. Halstrom*, 84 Mass. App. Ct. 372, 996 N.E.2d 892, *review denied*, 466 Mass. 1111 (2013); *Commonwealth v. Asmeron*, 70 Mass. App. Ct. 667, 875 N.E.2d 870, *review denied*, 450 Mass. 1105 (2007); *People v. Prevete*, 10 Misc. 3d 78, 809 N.Y.S.2d 777 (App. Term 2005); *State v. Carpenter*, 122 Ohio App. 3d 16, 701 N.E.2d 10, *appeal dismissed*, 88 Ohio St. 3d 1446 (1997), *cert denied*, 523 U.S. 1082 (1998); *State v. Dupree*, 164 Or. App. 413, 992 P.2d 472 (1999), *review denied*, 330 Or. 361 (2000); *State v. Coleman*, 130 Or. App. 656, 883 P.2d 266 (1994), *review denied*, 320 Or. 569 (1995).

1152, 1151 (W.D. Wash. 2006) ("Plaintiff's counsel acknowledged at oral argument that 'escort services' is essentially a euphemism for prostitution services.").

The Respondent children should be permitted to adduce evidence that "escort" is a commonly understood synonym for "prostitute," and conduct discovery to show whether Backpage.com knew, understood, and intended to convey precisely that meaning in attracting advertisers to its internet service. Respondents should have the opportunity to conduct discovery and provide evidence to support their allegation that this was Backpage.com's business model.

2. The Respondent Children Allege That Backpage.com Has Deliberately Made Itself the Go-to Website for On-line Marketing of Prostitution in the United States

The Respondents allege that virtually every advertisement in Backpage.com's "Escorts" section is a direct or coded advertisement for prostitution. They already have provided evidence that they were sold for sex through advertisements located in that section, and they have made credible factual allegations that every advertisement solicits prostitution or other sexual services, many of them involving minors. *See* Br. of Resp'ts at 9-11. These are not hypothetical facts, but are credible factual allegations appropriate for findings by a jury, and Plaintiffs should be entitled to discovery to determine, at minimum, the extent to which

Backpage.com actively solicits such advertisements and shapes their content.

3. The Respondent Children Allege the "Self-Policing Measures" Backpage.com Claims to Have Implemented Are a Sham

The Respondents allege that Backpage.com's "self-policing measures" are not intended to protect children from sex trafficking or to weed out advertisements for illegal activities, but instead are intended to further Backpage.com's profits and prevent more intense scrutiny by the public and law enforcement. The Respondents should be entitled to discovery as to how Backpage.com developed those particular measures; what actions, if any, that Backpage.com takes to implement the measures it has posted; and the extent to which other of Backpage.com's practices, such as the acceptance of prepaid debit cards as payment, and payment of advertisements for more than one girl from the same source, have been adopted to circumvent its own "self-policing measures."

C. This Is Not the First Case to Survive a Motion to Dismiss Where a Defendant Claimed Immunity Under § 230 of the Communications Decency Act

This is not the first case in which a court denied a motion to dismiss by a defendant computer service provider claiming immunity under § 230 of the CDA. In *Federal Trade Commission v. LeanSpa, LLC*, 920 F. Supp. 2d 270 (D. Conn. 2013), for example, the court denied a

motion by defendant LeadClick.com to dismiss because of § 230 immunity. The court explained that the allegations in the amended complaint "can plausibly be read to allege that the LeadClick defendants were 'actively responsible' for the 'development of' at least part of the deceptive content" on the websites. *LeanSpa*, 920 F. Supp. 2d at 276-77. The court concluded, "on the face of the Amended Complaint, it is plausible that LeadClick is an information content provider; and the LeadClick defendants cannot claim immunity under the CDA." *Id.* at 277 (citing *Accusearch*, 570 F.3d at 1197).

In *Cybersitter, LLC v. Google Inc.*, 905 F. Supp. 2d 1080 (C.D. Cal. 2012), the plaintiff alleged that both Google and another website intentionally made false statements concerning the plaintiff's products and services. Google argued the false advertisements were created by the other website alone, and not by Google. The court denied Google's motion to dismiss under § 230 of the CDA: "Because Defendant's entitlement to immunity under the CDA depends on whether Defendant 'developed' or materially contributed to the content of these advertisements, it is too early at this juncture to determine whether CDA immunity applies." *Id.* at 1086.

Also potentially relevant to the present appeal is the court's conclusion in *Cybersitter* that, "to the extent Plaintiff's claims arise from

Defendant's tortious conduct related to something other than the content of the advertisements, CDA immunity does not apply." *Cybersitter*, 905 F. Supp. 2d at 1086 (citing *Jurin v. Google Inc.*, 695 F. Supp. 2d 1117, 1122 (E.D. Cal. 2010); *Universal Commc'n Sys., Inc.*, 478 F.3d at 419). *Universal Communication System, Inc.* had held that "[a] key limitation [of the CDA] is that immunity only applies when the information that forms the basis for the state law claim has been provided by '*another* information content provider.'" *Universal Commc'n Sys., Inc.*, 478 F.3d at 419. In the present case against Backpage.com, the Respondent children have alleged that Backpage.com developed unlawful content through its mechanisms of soliciting and organizing advertisements, advising pimps how to write them, and the creation and management of its "Escort" section. *See* Br. of Resp'ts at 4-9. Those allegations, if supported in discovery, could provide a separate basis for concluding § 230 immunity does not apply.

In *Hy Cite Corp. v. BadBusinessBureau.com, L.L.C.*, 418 F. Supp. 2d 1142, 1149 (D. Ariz. 2005), the court denied a motion to dismiss because the plaintiffs had made credible factual allegations in their complaint that could support a finding that the defendants were responsible for the "creation or development of information" provided by individuals in certain reports submitted in response to the defendants' solicitation.

D. Congress Did Not Intend to Immunize Websites Engaged in Blatantly Criminal Activity When It Enacted the Communications Decency Act

Backpage.com cites cases such as *M.A. v. Village Voice Media Holdings, LLC*, 809 F. Supp. 2d 1041 (E.D. Mo. 2011), in which a magistrate judge ruled that the fact that Backpage.com specifically solicited advertisements for prostitution to increase its revenues was "immaterial" under § 230. But this case is contradicted by others that recognize that "[t]he Communications Decency Act was not meant to create a lawless no-man's-land on the Internet." *Roommates.com*, 521 F.3d at 1164. It was intended to immunize legitimate websites that serve as mere conduits for content created by third parties. *Id.* at 1171-72. In other words, § 230 immunity is appropriate where a challenged website is engaged in displaying legitimate, lawful content and the offending material unpredictably originated entirely from a third party. In contrast, assuming the truth of Plaintiffs' allegations, Backpage.com's entire business model is predicated on advertising prostitution and similar illicit activities, including sex with children, and it actively encourages and develops that specific advertising content through its methods of operation, as summarized below.

Section 230 of the CDA is titled "Protection for private blocking and screening of offensive material." Referencing that title, the Ninth

Circuit observed that § 230 was created in part to "remove disincentives for the development and utilization of blocking and filtering technologies[.]" *Roommates.com*, 521 F.3d at 1179 n.6 (quoting 47 U.S.C. § 230(b)(4)). It held that "Congress sought to immunize the *removal* of user-generated content, not the *creation* of content[.]" *Id.* at 1163. Plaintiffs here are alleging that Backpage.com materially contributes to the *creation* of content.

In light of these facts, cases decided after *M.A. v. Village Voice Media Holdings* are more consistent with the CDA's original purpose and plain language than is the reading suggested by Backpage.com. As one commentator has noted, the first major case to apply § 230 was the Fourth Circuit's decision in *Zeran v. Am. Online, Inc.*, 129 F.3d 327 (4th Cir. 1997), in which the court broadly interpreted the scope of immunity. Ryan J.P. Dyer, *The Communication Decency Act Gone Wild: A Case for Renewing the Presumption Against Preemption*, 37 Seattle U. L. Rev. 837, 842 (Winter 2014).[4] Mr. Dyer explains how that very broad interpretation stood as an "insurmountable barrier for plaintiffs" until the Ninth Circuit's decision in *Roommates.com*, 521 F.3d 1157. Dyer, 37 Seattle U. L. Rev.

[4] For a more extended critique of the *Zeran* decision, *see* Patricia Spiccia, *The Best Things in Life Are Not Free: Why Immunity Under Section 230 of the Communications Decency Act Should be Earned and Not Freely Given*, 48 Val. U. L. Rev. 369, 401-06 (Fall 2013).

at 843-45. The *Roommates.com* decision opened the door for plaintiffs, although apparently not very wide.

Mr. Dyer concludes that modern courts applying § 230 immunity "frequently accept the broad preemptive effect given to the statute by earlier courts. Missing from virtually every court's analysis is a presumption *against* section 230's preemption of traditional state police powers in non-publisher contexts." Dyer, 37 Seattle U. L. Rev. at 854. He suggests that if a court were to reexamine Congress's preemptive intent, it would find that a plain language reading of § 230 and its legislative history show that Congress intended to preempt only state laws that imposed publisher liability.[5] In Mr. Dyer's words, "Congress's purpose was to preempt state and local laws that imposed civil liability for websites that took voluntary efforts to remove offensive material provided by third parties[.]" Dyer, 37 Seattle U. L. Rev. at 856. Because some courts have expanded immunity beyond Congress's intent, the consequence has been "that increasingly more criminal activity finds a

[5] At common law, a "publisher" could be held liable in tort for any statement it published, even if that statement came from someone else, on the theory that the publisher has the knowledge, opportunity, and ability to exercise editorial control. *See Restatement (Second) of Torts* § 581, cmts. c, g (1977); W. Page Keeton, et al., *Prosser & Keeton on the Law of Torts* § 113, at 810 (5th ed. 1984).

safe haven on websites dedicated to facilitating unlawful activity." Dyer, 37 Seattle U. L. Rev. at 858. "Congress did not intend to immunize websites engaged in blatantly criminal activity." *Id.*

Advertisements for sex with children involve blatant criminal activity. If the Respondents are able to produce evidence that Backpage.com was actively involved in soliciting and developing such advertisements, they will have demonstrated the factual basis to support a legal conclusion that Backpage.com is not entitled to immunity under § 230 of the Communication Decency Act. The Respondent children should be given that opportunity.

V. CONCLUSION

The trial court's denial of Backpage.com's motion to dismiss should be affirmed.

RESPECTFULLY SUBMITTED this 5th day of September 2014.

ROBERT W. FERGUSON
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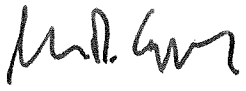

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