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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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J.S., S.L., and L.C.,  
Respondents

v.

VILLAGE VOICE MEDIA HOLDINGS, L.L.C.,  
d/b/a Backpage.com; BACKPAGE.COM, L.L.C.;  
NEW TIMES MEDIA, L.L.C., d/b/a Backpage.com

Petitioners.

**AMICUS CURIAE BRIEF OF THE NATIONAL CENTER FOR  
MISSING AND EXPLOITED CHILDREN**

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**I. AMICUS CURIAE THE NATIONAL CENTER FOR MISSING AND EXPLOITED CHILDREN**

The National Center for Missing and Exploited Children (“NCMEC”) was established in 1984 and serves as the Congressionally-designated “official national resource center and information clearinghouse for missing and exploited children.” 42 U.S.C. § 5773(b)(1)(B). NCMEC assists in reducing child sexual exploitation, preventing child victimization, and eliminating child sex trafficking and child pornography.

In cooperation with the United States Department of Justice’s Office of Juvenile Justice and Delinquency Prevention, NCMEC performs 22 statutorily-authorized functions. *See* 42 U.S.C. § 5773(b). NCMEC provides support, information, and technical assistance to families, law enforcement, and child-serving professionals in identifying, locating, and recovering victims of child sex trafficking.

For several years, NCMEC has engaged in numerous discussions and meetings with Backpage regarding child sex trafficking ads on its site and explained how Backpage’s business practices encourage an online environment for child sex trafficking. These meetings have included Backpage’s owners and operational and legal executives. Subsequent to these meetings, Backpage has made minimal, but largely ineffective, adjustments to its practices, and it continues to facilitate the sale of children for sex on its website. Backpage voluntarily reports only selective information to NCMEC about ads suspected of child sex trafficking. NCMEC refers these ads to the appropriate law enforcement authorities. These reports account for what NCMEC believes to be only a small fraction of the children trafficked online at backpage.com.

NCMEC has unique knowledge and experience regarding how traffickers use online classified advertising to facilitate child sex trafficking. NCMEC operates the CyberTipline, the national reporting mechanism for suspected child sexual exploitation, and the Child Sex Trafficking Team (CSTT), a dedicated staff providing technical and victim assistance and analysis on domestic child sex trafficking cases. Because of NCMEC's work and its experience with Backpage, NCMEC is specially situated to aid the Court's consideration of this appeal. The Court should accept and consider this brief.

NCMEC has no financial interest in the outcome of this case. No counsel for a party authored any part of this brief or funded its preparation or submission. This brief is solely the work of NCMEC and its counsel.

**II. BACKPAGE ENABLES CREATION AND ENCOURAGES DISSEMINATION OF CHILD SEX TRAFFICKING CONTENT ON ITS WEBSITE**

“On a [CR] 12(b)(6) motion, a challenge to the legal sufficiency of the plaintiff's allegations must be denied unless no state of facts which plaintiff could prove, consistent with the complaint, would entitle the plaintiff to relief on the claim.” *McCurry v. Chevy Chase Bank, FSB*, 169 Wn. 2d 96, 101 (2010) (internal quotation omitted). When reviewing a motion to dismiss, the “court may consider hypothetical facts not part of the formal record.” *Hoffer v. State*, 110 Wn. 2d 415, 420 (1988). In deciding this appeal, this Court should take into account the additional facts set forth in this brief.

As documented in detail in the numerous publications referenced in the briefs of other amici, child sex trafficking is a pervasive and destructive crime. Thousands of children every day all over this country suffer traumatic criminal abuse similar to that alleged by the three

Plaintiffs in this case.

Last year, one in seven runaways reported missing to NCMEC was likely a child sex trafficking victim. In 2013 alone, NCMEC documented over 10,000 reports of child sex trafficking. This is only a tiny percentage of the abuse, misery, and exploitation suffered by children who are victimized through child sex trafficking.<sup>1</sup> In the past five years, NCMEC has seen a 1,432% increase in reports of suspected child sex trafficking. This enormous increase is directly correlated to the increased use of the Internet to sell children for sex.

Technology has fundamentally changed how children are victimized through sex trafficking. Today, an adult can shop online from the privacy of his home or hotel room to purchase a sexual experience. Pimps and predatory offenders are aware that escort ads on backpage.com provide a marketplace of young girls and boys to purchase for rape and other sexual activities. Backpage knows that it actively encourages a lucrative marketplace for child sex trafficking, and yet has rejected most proposals to meaningfully reduce the selling and buying of children for unlawful sex through its website. *A majority of the child sex trafficking cases being reported to NCMEC now involve ads posted on backpage.com.*

**A. Backpage's Ads Facilitate Sex With Children**

As the Court is aware from the record, ads in the "escorts" section on backpage.com typically consist of a headline, a photograph, and a brief

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<sup>1</sup> Electronic service providers are obligated to report to NCMEC instances of apparent child pornography. *See* 18 U.S.C. § 2258A(a). No federal or state law imposes a comparable requirement to report child sex trafficking.

text regarding the services being sold. Escort ads require customers to enter their age, but Backpage conducts no age verification to determine the veracity of the submitted age. Backpage will not process an escort ad when an age under 18 years old is entered. Instead, the customer receives a message stating "Oops! Sorry, the ad poster must be over 18 years of age." Even though Backpage has been alerted to the fact that the customer is trying to create an escort ad involving a child, it enables the customer to change the age to 18 or above and then still allows the submission of the same text and the same photograph of the child. In practice, Backpage's age filter guides pimps on how to successfully create a child sex trafficking ad.

Ads reported to NCMEC by concerned members of the public, and by Backpage itself, often feature highly suggestive and graphic photographs of what appear to be children. Often, it is plain from the ad's photograph that the person being offered for paid sex is a child who looks younger, and sometimes much younger, than 18 years old. Invariably, the ad's photograph is accompanied by text that unambiguously and luridly describes the sexual experience being sold. Law enforcement has confirmed to NCMEC that each of the following Backpage ads advertised a child for sex:

- "Hi, GUYS I'm NEW TO [ ], NOT TO THE LIFE, YOUNG HOT (u need that) THAT YOUNG GIRL LOOK/BODY SKILLS OF A WELL TRAINED WOMAN FETISH ALERT-LIL-GIRL-ROLE PLAY//DRESS UP, MORE DOM., THEN SUBMISSIVE."
- "Enjoy both me and my girlfriend for an hour of the most pleasure you can experience as one man."
- "I enjoy catering to mature gentlemen. My body is a gentleman's playground."

- “LETS PARTY!\* I LOVE TO MAKE . . . -THOSE TOES CURL- - - -!!\* - - - - - INDULGE \* THESE,SOFT- . - - THICK THIGHS, PULL THIS LONG RED HAIR & SLAP THIS FATT JIGGLEY AZZ!”

- “You pay to get it just how you like it, and juicy and waiting on you - - - I promise your going to enjoy me . . .”

Regrettably, these ads are just a few of many Backpage child sex trafficking ads reported to NCMEC. Some of these ads are reported by Backpage moderators and some are received from members of the public. Of these public reports, 64% were reporting suspected child sex trafficking on backpage.com.

Behind the tens of thousands of Backpage ads investigated by law enforcement there are victims with stories much like “Alissa,” who over a two year period “was sold to johns seven days a week, 365 days a year,” was transferred like chattel from pimp to pimp for roughly \$10,000 per transaction, and had her jaw and ribs broken when she tried to escape. See Nicholas D. Kristof, *Where Pimps Peddle Their Goods*, New York Times (Mar. 17, 2012).

Recent cases handled by NCMEC tell similarly grim stories of children sold repeatedly for sex on Backpage. In one case, a child was reported missing thirteen times before she was 15 years old. The trafficker forced the child to get a large “Daddy’s Princess” tattoo on her stomach. A member of the public reported a Backpage ad to NCMEC that was visually matched to the missing child. She was recovered by local law enforcement, but went missing again. A year later, a Backpage moderator reported another ad for the same child because she “appeared young.” NCMEC ran a basic Google search of the telephone number in

the reported ad and identified more than fifty active Backpage ads using the same telephone contact number and depicting the same child. Backpage did not report any of these other active ads to NCMEC, even though the one ad it did report contained the same telephone number and showed the same child being sold for sex. When law enforcement again recovered the child, she disclosed being sold and raped at least five times every night for three years.

In another case reported to NCMEC, a 16 year old went missing from a Georgia home in December 2012. In May 2013, NCMEC matched online images of the child from her Facebook account to sexually graphic photos believed to be the child on an active Backpage ad. The ad remained live on Backpage; Backpage never reported the ad to NCMEC.

Backpage enables the public to “report” an ad and include an explanatory comment. Backpage voluntarily reports to NCMEC some ads reported by the public. Backpage also reports certain ads flagged by its moderators for possible child sex trafficking. NCMEC has no specific information about the work of these moderators, but a significant slice of the ads Backpage reports to NCMEC have already been reported to Backpage by family members of the children featured in the ads.

Even after reporting ads to NCMEC for suspected child sex trafficking, Backpage refuses to implement obvious measures to remove these ads from public view or block traffickers from placing new ads for the same child over and over again with the same email address, the same telephone number, the same credit card information, or the same or very similar photos. Discovery of Backpage’s files likely would reveal a volume of similarly disturbing evidence demonstrating Backpage’s complicity in enabling and encouraging child sex trafficking in

Washington and throughout the United States.

These are some of the many comments submitted by family members when reporting escort ads to Backpage for child sex trafficking:<sup>2</sup>

- “No the girl in the is 16 shes my cousin she ra[n] away from home two months ago . . . The cops r trying to get her and her pimp She is a runaway She got tattoos of her pimp on her lower stomach and upper right eyebrow.”

- “The following posting is of my son, age 15 dressed in drag. You will delete this posting today before I contact the [ ] Attorney General’s Office.”

- “This ad has photos of my 16 year old sister who currently being trafficked and we are trying to get home. We have an active investigation going on and am trying to get her away from her pimp and bring her home. Please stop allowing whoever it is to post her. She only a minor and we want her home.”

- “How dare you allow a post of my juvenile daughter being used in a sex trafficking post! Shame on you backpage- you know what you’re really all about and I am on a mission to take you down. . . . Shame shame shame!”

NCMEC’s experience is that Backpage does not consistently remove ads it reports to NCMEC for possible child sex trafficking. Instead, even though the children offered in the ads have been reported to NCMEC as likely sex trafficking victims, Backpage continues to host many of these ads, enabling and encouraging adults to continue to purchase these apparent children for rape and other sexual exploitation.

**B. Backpage Knows Its Claimed Efforts To Reduce Child Sex Trafficking On Its Website Are Ineffective**

Carl Ferrer, a Backpage executive, has stated in court testimony that the site’s “Report Ad” button is an effective means to “remove ads

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<sup>2</sup> These posts have been edited to remove personally identifying information.

when they are brought to our attention by other users as being possibly illegal.” This statement is contradicted by what happens when someone reports an ad for removal. When a user clicks the “Report Ad” button, Backpage delivers the following message: “If you accidentally reported this ad, do not worry. It takes multiple reports from multiple people for an ad to be removed.” Comments submitted by family members who report ads of their children being sold for sex make clear that they are painfully aware their reports do not result in Backpage removing ads of their children; instead the cycle of sexual exploitation and abuse for these children and their families continues:

- “My name is [ ] and my wife is [ ]. Your website has ads featuring our 16 year old daughter [ ], posing as an escort. - She is being pimped out by her old bf, and she is underage. - I have emailed the ad multiple times using your website, but have gotten no response. . . . - For God’s sake, she’s only 16. Her bf is having her use a prepaid card. You need better means of age verification. Stuff like this shouldn’t be allowed to happen.”

- “Please remove this. This is my 16 year old daughters picture. I e-mailed already. Whoever’s posting this please block there card or email from posting.”

- “THIS CHILD IS 16 AND MY DAUGHTER I am demanding that you remove this ad and deactivate her account. Her name is not Ashley and she is not 18. I am contacting the local authorities. This kind of trash is really unnecessary whether it be my daughter or someone else’s. I get carded for cigarettes and am 44 years old, and you allow teens to post any age on something far more dangerous. . . .”

While Backpage refuses to consistently remove ads reported for suspected child sex trafficking, it regularly removes “sting ads” placed by law enforcement to investigate traffickers and recover trafficked minors. Backpage has indicated that “sting ads” violate its terms of use, but does

not apply these terms of use consistently to also remove ads reported by parents whose children are being bought and sold for sex on its site.

Backpage has repeatedly claimed in public statements and court filings that it is working to reduce child sex trafficking on its website. The unpleasant reality is that Backpage publicizes carefully selected operational processes as a subterfuge to avoid increased scrutiny, while providing traffickers with easy access to an online venue to sell children for sex. In practice, Backpage's stated interest in doing something meaningful to stop child sex trafficking ads on its site is apparently overridden by the enormous revenue it generates from its escort ads, including ads selling children for sex.

It is NCMEC's experience that Backpage fails to search its own system for, or report ads linked by, a name, photograph, email address, telephone number, or credit card to a previously reported child trafficking ad. As a sophisticated electronic information provider, Backpage surely has the technical ability to generate these links and use them to block and/or report new ads to protect child victims from further abuse by the same trafficker. Backpage has testified it can easily search its ads,<sup>3</sup> but has told NCMEC that it cannot undertake this process to protect children from being repeatedly trafficked on its website. Even if Backpage removes an ad reported to NCMEC, it permits the trafficker to use the same credit or debit card to create new or additional ads with the same

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<sup>3</sup> Backpage's National Accounts Manager for "nonadult moderation" has testified that Backpage can use Google or another search engine to locate ads if they "have snippets of ads, specific pieces of texts, telephone numbers, [or] any type of other pertinent specific information that's been listed in an advertisement." See *U.S. v. Custis*, No. 11-60065-LENARD (Nov. 16, 2011), pp. 161-62.

email address, telephone number, and even the same photograph of the same child.

Backpage optimizes the ability of traffickers to post escort ads by imposing less stringent posting rules for sex trafficking ads than it does for other ad categories. A user wanting to post an ad on Backpage to sell a boat, motorcycle, or pet must provide a valid telephone number to “prevent scam ads from being posted.” Yet Backpage refuses to require verified email addresses or telephone numbers for escort ads. Backpage does more to protect customers from scam pet ads than to protect children from being sold for sex, and maintains this position even though it knows its site is used to sell children for sex.

Backpage encourages and facilitates child sex trafficking ads in many other ways. For example, it accepts anonymous forms of payment, such as prepaid credit cards and, most recently, bitcoin, which often are difficult, if not impossible, to track. Backpage repeatedly refuses to require that ads be purchased with a bank-recognized credit or debit card. In an April 14, 2010 blog to users, Backpage even provided guidance on how to remain anonymous when posting an ad: “If you want to remain completely anonymous, get an AMEX or VISA gift card, which are sold at most grocery stores and online. They work just like credit and debit cards, only they are prepaid, and no personal data is attached to them.”

Backpage’s pricing model maximizes revenue for escort ads. While it is *free* to post an ad on Backpage to sell *any* item or service in a *non-adult/dating* category, there is always a fee to post an escort ad. Backpage’s Carl Ferrer has testified they “charge for adult ads to help insure that the content is legal.” A Backpage blogpost on November 6, 2008 said charging a fee “is perhaps the best way to reduce the prank

postings, illegal postings, and postings by under aged users.” Backpage executives have told NCMEC that they charge for escort ads only because law enforcement asked them to do so. Yet Backpage rigorously calibrates its escort ad prices depending on the market, demonstrating that its pricing motivation is to maximize revenues, not to comply with an alleged law enforcement request.

As of September 2, 2014, Washington escort ad prices on backpage.com ranged from a high in Seattle of \$12 to post, \$32 to sponsor, and \$48 to auto repost, to a low in Pullman/Moscow of \$3 to post, \$4 to sponsor and \$12 to auto repost. Not surprisingly, Backpage generates tremendous revenues from trafficking ads. *See* Mark Whittaker, *Backpage Raises Rates Again, Escort-Ad Revenue Jumps 55 Percent* (April 1, 2013). Discovery in this matter likely will indicate to what extent Backpage’s reluctance to institute or enforce protective measures to ensure children are not trafficked for sex on its site is driven by an interest in maintaining high revenues.

Through its various business practices and because of its financial self-interest, Backpage encourages and is actively complicit in promoting child sex trafficking through its ads. The Plaintiffs in this case should be allowed to conduct discovery of Backpage’s records to determine the scope of that complicity and, if proven, obtain appropriate compensation for their consequential injuries.

**C. Backpage Refuses To Modify Its Business Practices To Minimize Child Sex Trafficking**

The number of Backpage ads reported to NCMEC is only a small fraction of the true number of Backpage’s child victims. In 2012 Backpage’s Carl Ferrer told the National Association of Attorneys General

that Backpage identifies more than 400 “adult entertainment” posts each month that may involve a child. More recently, Backpage’s General Counsel Liz McDougall was reported as stating the website “removes or blocks about a million ads per month, notably those that appear to involve minors or sex for money.” Despite Backpage’s admissions regarding the heavy volume of ads selling children for sex on its site, Backpage does not report most of these ads to NCMEC, takes insufficient (if any) steps to block these ads from being re-posted, and accepts repeat payments for these and identical ads.

NCMEC has long pressed Backpage to take meaningful and permanent steps to ensure it does not facilitate ads offering paid sex with children. In an effort to provide guidance on how to reduce the likelihood of children being trafficked for sex online, NCMEC has compiled a set of recommended sound practices that can be implemented to reduce the possibility that a classified ad website will be used for child sexual trafficking. NCMEC has repeatedly made these recommendations available to Backpage. NCMEC’s recommended sound practices include:

- Prohibit payment sources that mask the customer’s identify, such as prepaid or gift cards;
- Verify identity and age of the customer and person in the ad;
- Require and validate the customer’s email address and telephone number;
- Capture and store the customer’s IP address when ad is created;
- Block and remove ads believed to involve children sold for sex;
- Require revised ads to undergo moderator review; recapturing the customer’s IP address and revalidating their email address and telephone number;

- Digitally “hash” photographs from blocked or removed ads and compare with photographs in other ads submitted for posting;
- Flag and store for comparison identifiers from ads reported for child sex trafficking, including the customer’s name, telephone number, email address, credit card information, and photographs, and use this information to screen incoming ads;
- Reject ads with previously reported images, phone numbers, credit card numbers, or email addresses;
- Refuse to post ads from customers previously reported for posting potential child sex trafficking ads; and
- Monitor and enforce Terms prohibiting trafficking of minors.

Backpage has refused to adopt most of these recommended practices. To all intents and purposes, Backpage has instituted no effective procedures to prevent child sex trafficking ads from being created on its site. Instead Backpage has implemented a system of voluntarily reporting certain ads to NCMEC based on its own self-selected, limited, and (based on the results) wholly inadequate criteria. Even when Backpage does report an ad to NCMEC, it is after collecting and keeping the ad fee, and often without removing the reported ad from public view. And, as noted earlier, Backpage routinely permits new ads featuring photos of the same victim or the same contact information to be created and remain active over the following days and months.

Of course, virtually any website is vulnerable to abuse by users. However, to the outside observer, Backpage’s business practices seem designed to provide an environment enabling pimps to traffic children for paid sex through online ads at backpage.com.

Under well-established principles of Washington pleading law, Plaintiffs here have pleaded sufficient facts, as supplemented by the facts set forth in this and other amicus briefs, to defeat a motion to dismiss their

complaint. Discovery will show the extent to which Backpage's professed efforts to screen out child sex trafficking ads are genuine (for example, by reviewing the records of Backpage's ad screeners and its protocols for creating an ad, screening for and rejecting ads offering children, and flagging and banning repeat offenders). Similarly, discovery will determine the extent to which Backpage's processes are, as it claims, well-intentioned rules designed to prevent illegal conduct on its site.

NCMEC has had extensive interaction with Backpage and its website operations. Backpage manages its escort ads as a lucrative profit center and facilitates the use of its website for the sexual victimization of children, while simultaneously maintaining a veneer of concern for its victims. Discovery from Backpage likely would confirm that conclusion, creating liability that is not immunized by Section 230 of the Communications Decency Act.

### **III. THE COMMUNICATIONS DECENCY ACT DOES NOT REQUIRE DISMISSAL OF THIS CASE**

Backpage hides behind Section 230 of the Communications Decency Act ("CDA"). Backpage's defense belittles and denigrates this statute. Congress never intended the CDA to empower, in the name of Internet freedom, a website whose purpose, structure, and effect is to enable traffickers to advertise the sale of unlawful sex with children.

Section 230(c)(1) of the CDA provides that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1). Section 230 is intended to promote the dissemination of information through the Internet, not to facilitate the sexual exploitation of children for corporate financial gain.

Congress never intended Section 230 to immunize the deliberate promotion of child sex trafficking. To the contrary, Section 230 was part of a larger Congressional effort *to protect children* from pernicious content online. No appellate court has ever squarely held that Section 230's immunity extends to the unrestricted publication of child sex trafficking ads. This Court should not be the first to cross that line.

Moreover, even if Congressional intent is ignored, the text of Section 230(c) exempts website operators from liability for content posted by their users only when the website operator acts neutrally with respect to what is objectionable about the content. Once a website operator "in some way specifically encourages development of what is offensive about the content," *FTC v. Accusearch, Inc.*, 570 F.3d 1187, 1199 (10th Cir. 2009), the website operator becomes an "information content provider" who may be held responsible for the site's contents under 47 U.S.C. § 230(f)(3). On the facts as pleaded and as stated in this brief, Backpage fits within the *Accusearch* parameters.

The CDA was intended "to provide much-needed protection for children" by prohibiting the distribution of obscene and indecent material to children over the Internet. 141 Cong. Rec. S8088 (June 9, 1995) (Sen. Exon). What is now Section 230 was an amendment tacked onto a bill intended to protect children from exploitative content on the Internet, including child sex trafficking and pornography. Whatever Congress intended in Section 230, it most certainly did not intend to immunize child sex trafficking ads or websites that published those ads.

Introducing what became the CDA, Senator Exon stated:

The information superhighway should not become a red light district. . . . Once passed, our children and families will be better protected from those who would electronically

cruise the digital world to engage children in inappropriate communications and introductions.

Robert Cannon, *The Legislative History of Senator Exon's Communications Decency Act*, 49 Fed. Comm'ns Law J. 51, 54 (1996). "The fundamental purpose of the Communications Decency Act is to provide much needed protection for children." *Id.* at 57. Backpage's escort sex ads are a virtual "red light district" engaging "children in inappropriate . . . introductions." *Id.* Any legal immunity for such conduct flies in the face of Congress' intent when it passed the CDA.

The CDA emerged from the House-Senate Conference Committee containing both a prohibition on disseminating "indecent and obscene" materials to children and the publisher immunity in what is now Section 230(c). *Id.* at 64. Congress passed that bill and President Clinton signed it. *Id.* at 92. Subsequently, the Supreme Court invalidated, on First Amendment grounds, that part of the CDA prohibiting dissemination of "indecent" materials online to children, leaving intact only the prohibition against disseminating obscene materials to children and Section 230. *See Reno v. ACLU*, 521 U.S. 844, 885 (1997). But contrary to Backpage's suggestion, this paring of the statute provides no legal cover for a website that encourages and facilitates advertising for paid sex with children. When the Supreme Court found part of the CDA constitutionally overbroad, it did not question — much less reject — the essential Congressional intent underlying the *whole* statute, including Section 230, to *protect* children from online "red light"-type activities. The Plaintiffs here are entitled to this protection from Backpage and its customers.

No constitutional principle or legitimate policy goal is served by immunizing from liability a website's encouragement of sexual exploitation of children for financial gain. *See Osborne v. Ohio*, 495 U.S.

103, 110 (1990) (upholding statute banning possession of child pornography because “[i]t rarely has been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute”); *Ginsberg v. New York*, 390 U.S. 629, 639-40 (1968) (state can enact laws to protect children against obscenity that would not be constitutional if applied to adults).

Protecting children from those who encourage and enable their sexual victimization is the most compelling of governmental interests. *See Osborne*, 495 U.S. at 109 (“It is evident beyond the need for elaboration that a State’s interest in safeguarding the physical and psychological well-being of a minor is compelling.”). In enacting the CDA, Congress chose to protect neutral conduits of information and Good Samaritans from liability. The Supreme Court did not take away from this (or any other) State the power to hold accountable those who structure and encourage use of their websites to sexually exploit children. *See Accusearch*, 570 F.3d at 1199. Plaintiffs J.S., S.L., and L.C. should be allowed an opportunity to hold Backpage accountable for their injuries.<sup>4</sup>

No appellate court has ever held that the CDA immunizes business practices that knowingly encourage, promote, and profit from advertising for child sex trafficking. Indeed, while Backpage’s brief talks about

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<sup>4</sup> *See* Ryan Dyer, *The Communications Decency Act Gone Wild: A Case For Renewing The Presumption Against Preemption*, 37 Seattle Univ. L.R. 837, 854 (2014) (“As more and more criminal activity migrates to the Internet and with the apparent difficulty of states to criminalize complicity by intermediaries, section 230’s preemptive effect on traditional state laws is mounting. These civil and criminal laws stand at the heart of states’ historic police powers. Surely, this was not Congress’s intent when it enacted section 230.”).

“hundreds” of cases finding Section 230 immunity, in practice, immunity has been denied in more than forty percent of adjudicated CDA cases. *See* David S. Ardia, *Free Speech or Shield for Scoundrels: An Empirical Study of Intermediate Immunity Under Section 230 of the Communications Decency Act*, 43 Loy. L.A. L.R. 373, 435 (2010).

As the Tenth Circuit explained, “one is not ‘responsible’ for the development of offensive content if one’s conduct was neutral with respect to the offensiveness of the content,” but an Internet service provider *is responsible* for content “if it in some way specifically encourages development of what is offensive about the content.” *Accusearch*, 570 F.3d at 1199.

Backpage promotes a highly visible advertising platform broken down by states and communities to facilitate pimps to reach buyers in whatever market a child is being sold on any particular day. Backpage has not implemented most of the sound practices NCMEC recommends to reduce child sex trafficking ads on its site. Backpage guides traffickers through the process of developing ads, and prompts users to enter an adult age, rather than a child’s age, to create an escort ad. Backpage allows traffickers to pay to advertise children for sex using anonymous payment methods, making it nearly impossible for law enforcement to track the source of payments. For traffickers not savvy enough to think of using anonymous gift cards on their own, Backpage has advised them exactly how to get and use them. Backpage removes sting ads placed by law enforcement for investigating child sex trafficking. Backpage accepts and retains payment not only for ads it believes relate to child sex trafficking, but also for ads repeatedly reported by parents and loved ones of child victims. And Backpage does not remove from public view all active ads

that it reports to NCMEC for suspected child sex trafficking.

Even when suspected child sex trafficking ads are removed, Backpage's procedures ensure such removals are more of an irritant to pimps rather than an impediment or deterrent. Backpage does not screen or remove other active ads with the same photographs or contact information as in the ads it reports to NCMEC for suspected child sex trafficking. Nor does Backpage identify or bar repeat violators of its terms of use. If an ad is taken down, the pimp can, with Backpage's acquiescence, re-post the ad selling the same child for sex using the same photograph, telephone number, or credit card information. Because of Backpage's deliberate design and absence of protective protocols, children are advertised for sex on its site every day and, as a direct result, are raped repeatedly by adults who pay Backpage's customer, the child's pimp, for their perverse pleasure. The law — surely — does not allow that.

The clear Congressional intent is that the CDA should *protect* children from predators looking for paid sex with children, not promote the sexual victimization of children. To hold otherwise would place a judicial imprimatur on the activities of pimps and their customers. Congress intended the statute to have the reverse effect. This Court should conclude that, in the procedural context of this case, Plaintiffs have pleaded sufficient facts at least to avoid dismissal now, and that they have the right to proceed to discovery with Backpage.

A ruling against Backpage will not threaten website operators who passively deliver user content or operators who act as Good Samaritans in screening unlawful material. Such operators will still be able to free themselves of lawsuits “at the earliest possible stage of the case” and avoid “having to fight costly and protracted legal battles.” *Fair Housing*

*Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1175 (9th Cir. 2008) (en banc). Only where, as is the case with Backpage, a plaintiff can allege the website operator “in some way specifically encourages development of what is offensive about the content,” will a website operator face litigation, discovery, and potential damages. *Accusearch, Inc.*, 570 F.3d at 1199.

Backpage runs, at considerable profit, a business optimized to promote child sex trafficking, and has specifically instructed its users on how to make the most out of the tools Backpage provides. Encouragement and facilitation of child rape is beyond the immunity afforded by Section 230. Accordingly, NCMEC urges this Court to allow Plaintiffs’ case to proceed so Plaintiffs may have their deserved day in court against Backpage.

#### **IV. CONCLUSION**

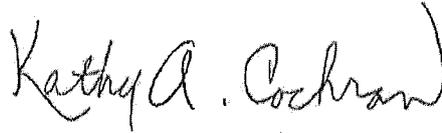
For the foregoing reasons, and also for the reasons set forth in Respondents’ brief and the briefs of other amici, NCMEC requests this Court affirm the decision of the Superior Court denying Backpage’s motion to dismiss.

Dated: September 4, 2014

Respectfully submitted,

WILSON SMITH COCHRAN  
DICKERSON

KAYE SCHOLER LLP

A handwritten signature in cursive script that reads "Kathy A. Cochran".

By:

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Kathy A. Cochran, WSBA #5775  
*Attorneys for Amicus Curiae*  
*The National Center for Missing and*  
*Exploited Children*

## CERTIFICATE OF SERVICE

The undersigned certifies that under penalty of perjury under the laws of the State of Washington, that on the below date I caused to be served and filed the attached documents as follows:

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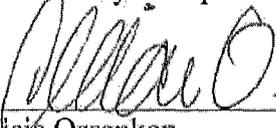
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