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ORIGINAL

No. 44920-0-II

COURT OF APPEALS
DIVISION II
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., S.L., and L.C.,

Respondents.

BRIEF OF RESPONDENTS J.S., S.L, and L.C.

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I. INTRODUCTION

The Appellants, through their website www.backpage.com, make over $20 million per year as the nation's largest purveyors of child sex trafficking online. Because of websites like www.backpage.com, it has been estimated that 100,000 children are trafficked each year nationwide.

The Respondents (collectively referred to as the "child victims") were in the seventh and ninth grades when they were repeatedly trafficked and purchased for sex on www.backpage.com. Hundreds of sex trafficking customers were directed to these young girls by the backpage.com website, and as a result, they were raped, beaten, and humiliated countless times.

The Appellants (collectively referred to as "backpage" or "the backpage defendants") argued in their 12(b)(6) motion that the child victims' case should be dismissed because backpage believes it is immune under a federal statute, the Communications Decency Act § 47 U.S.C. 230 ("CDA § 230"). The Honorable Susan K. Serko denied backpage's motion, and ruled that the child victims had alleged sufficient facts in their complaint that would negate immunity. Backpage then filed this appeal.

The immunity statute in question, CDA § 230, was part of a broader Congressional act intended to protect children, and does not confer absolute immunity to websites. The statute only grants conditional immunity to websites that qualify.

In order to obtain immunity under CDA § 230, backpage cannot be responsible, in whole or in part, for the creation or development of illegal information provided through their website. The leading case on this

subject is the Ninth Circuit *en banc* decision in *Fair Housing Council of San Fernando Valley v. Roommates.com LLC*, 521 F.3d 1157 (9th Cir. 2008). The Ninth Circuit stressed that if a website is responsible, in whole or in part, for the creation or development of illegal content, which are two separate concepts, then it is not entitled to immunity under CDA § 230.

In their complaint, the child victims alleged that backpage has undertaken a number of calculated efforts that render it responsible, at least in part, for the development and creation of both a marketplace for sex trafficking advertisements and the content of the advertisements themselves. Most notably, they alleged backpage aided the development of sex trafficking on its website through "posting rules" and "content requirements" that were intended to instruct pimps how to post sex trafficking ads that evade law enforcement while still attracting clientele and generating profits. Backpage also created content in the form of headings and titles, which in and of themselves void immunity.

The trial court committed no error in agreeing with the allegation of the child victims that the "posting rules" and "content requirements" are, in reality, an effort by backpage to maintain and expand their illicit red light marketplace by instructing pimps how to draft sex trafficking ads, and as such backpage is not entitled to immunity.

Backpage suggests the trial court somehow erred in accepting the foregoing allegations and inferences as true, and asserts that the child victims only provided "conclusory" allegations. However, as detailed below, the child victims' complaint extensively describes numerous efforts

taken by backpage to promote sex tracking on its website, and thus negate CDA immunity. The trial court properly denied backpage's CR 12(b)(6) motion.

II. RESTATEMENT OF ISSUES ON APPEAL

The trial court properly denied backpage's CR 12(b)(6) motion to dismiss the claims of the child victims based on CDA § 230 because (1) the child victims allege they were advertised for sex through backpage.com, (2) the child victims alleged facts that establish that backpage was responsible, at least in part, for creating or developing the content of the advertisements, (3) the child victims allege they were sexually abused and exploited countless times by men who were directed to them through those advertisements, and (4) CDA § 230 does not provide immunity for the owners and operators of websites who are responsible, at least in part, for creating or developing illegal content on their websites.

The trial court also committed no error in applying CR 12(b)(6) to the backpage defendants' motion to dismiss, rather than Federal Rule of Civil Procedure 12(b)(6), because (1) the venue for this case is Pierce County Superior Court, (2) Washington state courts apply Washington procedural law, (3) neither this Court, nor any other Washington appellate court, has ever concluded that Washington state courts should apply federal procedural law, and (4) even if this Court announced a new rule that Washington state courts should apply federal procedural law, the trial court's application of Washington law was harmless because the

backpage.com defendants cannot show any prejudice from the application of Washington law rather than federal procedural law.

III. COUNTER-STATEMENT OF THE CASE

A. Factual Background

1. The Child Victims Allege the Backpage Defendants Were Responsible for Creating and/or Developing Unlawful Content on Backpage.com

In their First Amended Complaint, the child victims allege the backpage defendants are liable for the abuse and exploitation they suffered because backpage is responsible, at least in part, for creating and/or developing the unlawful content of the advertisements on the backpage.com website. CP 2, 4-16. The child victims allege backpage did so in order to generate tens of millions in annual profit. CP 2, 6.

First, the child victims allege the sex traffickers who exploited them chose the backpage.com website because backpage has purposely developed a nationwide online marketplace for sex trafficking. *Id.* Pimps and johns know that backpage.com is devoted to sex trafficking, and backpage has developed and marketed its website for that purpose. CP 5. Backpage has developed a widespread reputation that its website is the "go to" site where sex traffickers can advertise commercial sex online and where men can purchase sex with women and children. *Id.* Backpage does more to promote illicit human sex trafficking than any other entity in the United States. CP 5

Central to their illicit marketplace, the backpage defendants actively created and developed unlawful content through the creation and management of an "escort" section where sex traffickers post advertisements for sex, including advertisements for sex with children. *Id.* The child victims allege "escort" is a street name for prostitution within the world of human sex trafficking and that the backpage defendants deliberately used "escorts" as the title of this section to identify sex trafficking ads to their users. *Id.*

Furthermore, the child victims allege that once sex traffickers submit an advertisement for sex, backpage divides the ad into convenient and distinct geographic areas so their customers only need to click on the word "escorts" to find nearby women and children for sale. CP 13-14. Additionally, the term "escorts" is featured at the top of each advertisement right under the backpage.com logo, and is a term the child victims allege the backpage defendants supply in order to ensure their customers know that the advertisements are for illicit sex. CP 6. By using the term "escorts" instead of "prostitutes" or "sex trafficking," the backpage defendants are also able to identify women and children for sale while at the same time providing themselves and sex traffickers with some amount of plausible deniability. CP 6-10.

Additionally, the child victims allege the backpage defendants created and developed this unlawful marketplace by providing commissions

to traffickers who refer other traffickers, and by readily accepting pre-paid credit card payments for the advertisements of more than one girl from the same source, which shows a sex trafficker is trafficking more than one girl. CP 15. The backpage defendants also charge their users a higher fee to post in the "escorts" section than they do for any other section on their website. *Id.* As a result, the vast majority of the income from backpage.com is derived from sex trafficking. CP 6.

Once the backpage defendants had created a marketplace for sex trafficking, the child victims allege backpage developed unlawful content by providing "posting rules" and "content requirements" that instruct sex traffickers not to use certain words and graphics in their sex advertisements in order to avoid growing scrutiny by the public and law enforcement, all with the goal of allowing backpage to continue profiting from its illegal marketplace. CP 8-13. Specifically, the "posting rules" and "content requirements" ostensibly instruct paid advertisers to refrain from the following conduct:

- Do not post naked images, e.g. uncovered genitalia, bare butts, nipple or nipple area, sex acts, etc.;
- Do not post images using transparent clothing, graphic box or pixelization to cover bare breasts or genitalia.
- Pricing for legal adult services must be for a minimum of one hour Example: 15 minute services are not allowed, no blank pricing, etc.
- Ads can be a maximum length of 500 characters.

- Do not use code words such as 'greek', gr33k 'bbbj', 'blow', GFE, PSE, 'trips to greece', etc.
- Do not suggest an exchange of sex acts for money.
- Do not post content which advertises an illegal service.[1]
- I will not post obscene or lewd and lascivious graphics or photographs which depict genitalia or actual or simulated sexual acts;
- I will not post any solicitation directly or in "coded" fashion for any illegal service exchanging sexual favors for money or other valuable consideration;
- I will not post any material on the Site that exploits minors in any way; I will not post any material on the Site that in any way constitutes or assists in human trafficking;
- I am at least 18 years of age or older and not considered to be a minor in my state or residence.[2]

CP 8-10.

Although backpage suggests that its posting rules and content requirements are aimed at preventing and prohibiting unlawful content (i.e., sex trafficking), the child victims contend the exact opposite is true, and that the posting rules and content requirements are a fraud and a ruse aimed at helping sex traffickers and the backpage defendants evade law enforcement by giving the false appearance that backpage does not allow sex trafficking on its website. CP 10. Furthermore, the child victims allege that co-defendant Hopson and other pimps utilized and relied on backpage's

[1] These are the backpage.com "posting rules." CP 8.

[2] These are the backpage.com "content requirements." CP 9-10.

posting rules and content requirements to advertise them on backpage.com and sexually exploit them for profit, as backpage intended. CP 16, 18, and 20.

In support of their allegation that the "posting rules" and "content requirements," and other efforts as outlined above, are actually intended to encourage and develop unlawful content, the child victims attached to their complaint a copy of the advertisements in the "escorts" section of backpage.com as they appeared on July 27, 2012, for only the Seattle, Washington, and Tacoma, Washington areas.[3] CP 495-2774. As discussed in more detail below, the trial court agreed with the child victims' allegation that virtually every one of these roughly 1,000 paid advertisements is obviously for sex, despite backpage's claim that its website is not for trafficking sex.[4] Moreover, and as the trial court also observed, the child victims allege that every single one of those advertisements for sex violate the "posting rules" and "content requirements" that backpage claims it enforces to prevent children from being trafficked on their website.[5]

Finally, the child victims allege backpage knowingly takes all of these efforts to promote child sex trafficking. For instance, unlike

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[3] The backpage.com defendants omitted these materials from their Designation of Clerk's Papers, even though the materials were attached as Exhibit A to the child victims' complaint.

[4] Verbatim Report of Proceedings, 49:14-50:12; CP 5-6, 10-11, 13.

[5] Verbatim Report of Proceedings, 49:14-50:12

backpage's online "escorts" section, co-appellant Village Voice Media Holdings, LLC's print publication, the Seattle Weekly, requires in-person photo identification to verify the individual in the ad is over the age of 18 before the newspaper will publish the "escort" advertisement. CP 13.

Rather telling, at no point, even in their opening brief with this Court, has backpage denied that its website was created and developed for sex trafficking, and at no point has backpage denied that each and every advertisement attached as Exhibits A and B to the child victims' complaint was an advertisement for sex that violated their supposed "posting rules" and "content requirements." Likewise, at no point have they denied that they have generated, and continue to generate, tens of millions of dollars in profit from that illegal activity, and that the main function of their website is to facilitate and promote sex trafficking.

2. The Backpage Defendants Trafficked Each of the Child Victims on Backpage.com

Through backpage's organized and calculated efforts as outlined above, each of the child victims was advertised for sex on www.backpage.com, and as a result, each was sexually abused and exploited countless times by men who found them through those advertisements. CP 16-21.

In September 2010, Respondent S.L. was thirteen years old and in the seventh grade when she ran away from home and was picked up by a

pair of sex traffickers. CP 17. The sex traffickers dressed S.L. in lingerie and took photographs of her to create advertisements for backpage.com in accordance with backpage's "posting rules" and content requirements." CP 17-18. They then paid the backpage defendants a fee, and, using the backpage format, uploaded written advertisements of S.L. in the backpage.com "escorts" section. *Id.* The advertisements were drafted in accordance with backpage's "posting rules" and "content requirements," and were obviously for prostitution services. *Id.* At no time did the backpage defendants attempt to verify S.L.'s age or to otherwise protect her from being advertised for sex on their website, even though from the appearance of her photographs it was obvious she was underage. *Id.* As a result of the advertisements on backpage.com, S.L. was raped and exploited numerous times. CP 18-19.

In July 2010, Respondent L.C. had just finished seventh grade when she left home and was introduced to the same pair of sex traffickers who victimized S.L. CP 20. After paying the backpage defendants' fee with a prepaid credit card, the sex traffickers posted photographs of L.C. in skimpy clothing in backpage's "escorts" section. CP 20. The advertisements were developed in accordance with backpage's "posting rules" and "content requirements," were obvious invitations for commercial sex acts with L.C., and from the appearance of her photographs it was obvious she was a child. *Id.* The title of one of the ads that included a photograph of L.C. stated "80

DOLLAR DAY SPECIAL, ask for Tasha." *Id.* Another advertisement stated "Face down Ass Up." *Id.* Still another stated "Let Em BLOW YOUR MIND." *Id.* All of the advertisements had photographs of L.C. under the alias "Tasha." At no time did the backpage defendants attempt to verify L.C.'s age or to otherwise protect her from being advertised for sex on their website. CP 21. As a result of the advertisements on backpage.com, L.C. was raped countless times. CP 21-22.

Respondent J.S. was also trafficked on backpage's website. CP 16-17. In 2010, she was fifteen years old when pimps posted photographs and sold her for sex on backpage.com. CP 16. Like the other child victims, J.S. clearly appeared underage. *Id.* Furthermore, the advertisements that sold her on www.backpage.com were developed in accordance with backpage's "posting rules" and "content requirements" and used language that obviously offered sex for money. CP 16. For example, one advertisement promised J.S. was "W`E`L`L _W`O`R`T`H_I`T ***^*** 150HR" and "IT WONT TAKE LONG AT ALL !!!!!!!" *Id.* At no time did the backpage defendants attempt to verify J.S.'s age or to otherwise protect her from being advertised for sex on their website. *Id.* As a result, J.S. was raped countless times by men who found her on backpage.com. CP 16-17.

B. Procedural History

On September 5, 2012, the child victims filed their First Amended Complaint for Damages, which included all of the foregoing allegations.

CP 1-26. The child victims also served backpage with a number of interrogatories and requests for production, including requests for the advertisements in which they were exploited on the backpage.com website.[6] CP 127-54. After the child victims agreed to a number of extensions for the backpage defendants to file an answer or move to dismiss, the defendants tried to remove the case to federal district court. On March 5, 2013, the federal court agreed with the child victims that removal was improper and remanded the case back to state court. CP 2775-2781.

On March 21, 2013, the child victims filed a motion to compel the backpage defendants to provide overdue responses to discovery requests that were specifically targeted at the child victims' allegations with respect to the CDA § 230 immunity defense. CP 26-40. More specifically, the motion asked the trial court to compel certain discovery responses that would reveal the extent to which backpage helped create and develop an illicit marketplace for sex trafficking and then helped sex traffickers create and develop their advertisements for sex. *Id.*; *see also* CP 131-143.

Four days after receiving the child victims' motion to compel answers to these and other discovery requests, the backpage defendants moved to dismiss the child victims' claims, asserting they are immune from suit under section CDA § 230. CP 155-184. In response, the child victims

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[6] Backpage argues in its brief that Respondents failed to attach to their complaint the ads in which they were sold on the backpage.com website. But backpage defendants fail to mention that they have refused to produce this material in discovery.

argued that CDA § 230 does not provide absolute immunity from suit, particularly for those who are responsible, at least in part, for creating or developing illegal content.

The trial court, the Honorable Susan K. Serko, agreed with the child victims and denied the motion:

> I have to say that this case is disturbing on many levels. And as I've said several times ... I don't think anyone condones the type of advertising and what's happening on these websites.
>
> . . .
>
> These are where I'm most concerned, this is what I highlighted over and over again and reread, [and] it's the posting guidelines.
>
> . . .
>
> And, frankly, my note to myself in the sideline was ["]Backpage doesn't know this is for prostitution and isn't assisting with the development?["][7]

Ultimately the trial court concluded that appellate review would be appropriate, and on July 26, 2013, this Court granted discretionary review.

IV. ARGUMENT

A. Standard of Review

A trial court's ruling on a motion to dismiss pursuant to CR 12(b)(6) is reviewed de novo. *Kinney v. Cook*, 159 Wn.2d 837, 842, 154 P.2d 206 (2007). Dismissal is appropriate only where the trial court concludes, beyond a reasonable doubt, that plaintiffs cannot prove "any set of facts

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[7] Verbatim Report of Proceedings, 49:14-50:12.

which would justify recovery." *Tenore v. AT&T Wireless Servs.*, 136 Wn.2d 322, 329-30, 962 P.2d 104 (1998). All alleged facts are presumed to be true and the court may also consider hypothetical facts supporting the plaintiffs' claims that are not part of the formal record. *Id.* (citing *Cutler v. Phillips Petroleum Co.*, 124 Wn.2d 749, 755, 881 P.2d 216 (1994)). Motions to dismiss pursuant to CR 12(b)(6) should be granted "sparingly and with care" and "only in the unusual case in which plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief." *Tenore*, 136 Wn.2d at 330 (quoting 27 Federal Procedure Pleadings and Motions § 62:465 (1984)). Thus, a complaint survives a CR 12(b)(6) motion if any set of facts could exist that would justify recovery. *Lawson v. State*, 107 Wn.2d 444, 448, 730 P.2d 1308 (1986).

B. Congress Did Not Enact CDA § 230 to Immunize Websites That Create or Develop Unlawful Content Online

Contrary to the suggestion in the backpage defendants' briefing, CDA § 230 does not give websites absolute immunity. Although section 230 can provide immunity to certain websites, "even this broad statutory immunity does not apply without limitation." *Almeida v. Amazon, Inc.*, 456 F.3d 1316, 1322 (11th Cir. 2006). Most notably, neither Congress nor the courts have stated that section 230 was intended to provide immunity for criminal conduct: "[t]he Communications Decency Act was not meant to create a lawless no-man's-land on the Internet." *Roommates,* 521 F.3d at

1164 (footnote omitted). "When Congress passed CDA 230, it didn't intend to prevent the enforcement of all laws online." *Id.* at 1175.

Enacted in 1996, section 230 was part of a much broader piece of regulatory legislation titled the Communications Decency Act ("CDA")—a bill that was designed *to protect children*. Indeed, in introducing the bill to Congress, the lead sponsor, Senator James Exon (D-Neb.) explained:

> The information superhighway should not become a red light district. This legislation will keep that from happening and extend the standards of decency which have protected telephone users to new telecommunications devices.
>
> 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. The Decency Act will also clearly protect citizens from electronic stalking and protect the sanctuary of the home from uninvited indecencies.[8]

Through enactment of Section 230, Congress sought to provide immunity to websites for content created wholly by third parties. In most cases, "the prototypical service qualifying for this statutory immunity is an online messaging board (or bulletin board) on which Internet subscribers post comments and respond to comments posted by others." *F.T.C. v. Accusearch Inc.*, 570 F.3d 1187, 1195 (10th Cir. 2009).

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[8] 141 Cong. Rec. S1953 (daily ed. Feb. 1, 1995).

C. CDA § 230 Does Not Immunize Websites That Are Responsible, In Whole or In Part, for the "Development" of Illegal Content

"Information Content Providers" are not entitled to CDA immunity. *Roommates*, 521 F.3d at 1162 (citing 47 U.S.C. § 230 (f)(3)).

CDA § 230 broadly defines "Information Content Provider" 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) (emphasis added). "This is a broad definition, covering even those who are responsible for the development of content only 'in part.'" *F.T.C.*, 570 F.3d at 1197 (citation omitted). As the child victims allege here, "there may be several information content providers with respect to a single item of information, each being 'responsible,' at least 'in part,' for its 'creation or development.'" *Id.*

According to the Ninth Circuit, "the fact that users are information content providers does not preclude [the website] from also being an information content provider by helping 'develop' at least 'in part' the [tortious] information." *Roommates*, 521 F.3d at 1165. The Ninth Circuit has further noted that "[a]s we explained in *Batzel*, the party responsible for putting information online may be subject to liability, even if the information originated with a user." *Id.* (citing *Batzel v. Smith*, 333 F.3d

1018, 1033 (9th Cir.2003)). The *Roommates* Court refers to such users and websites as "co-developers."

D. Websites Like Backpage.com That "Materially Contribute" to Unlawful Content Are "Co-Developers" of That Content and Are Not Entitled to CDA § 230 Immunity

Discussing the scope of CDA § 230 immunity, the Ninth Circuit has defined the term "development" as follows:

> We believe that both the immunity for passive conduits and the exception for co-developers must be given their proper scope and, to that end, we interpret the term "development" as referring not merely to augmenting the content generally, but to materially contributing to its alleged unlawfulness.
>
> *Roommates*, 521 F.3d at 1168-69.

For instance, "ordinary search engines do not use unlawful criteria to limit the scope of searches conducted on them, nor are they designed to achieve illegal ends. . . . Therefore, such search engines play no part in the 'development' of any unlawful searches." *Id.* at 1167. The backpage escort website, on the other hand, does nothing but "achieve illegal ends."

Simply put, "a website helps to 'develop' unlawful content, and thus falls within the exception to section 230, if it contributes materially to the alleged illegality of the conduct." *Id.* at 1168-69. Backpage does not dispute that promoting sex trafficking is illegal.

To provide even greater clarity, the Ninth Circuit has approved of several definitions of the term "develop" and several methods by which a provider can become a "developer," "in whole or in part," thus voiding

CDA immunity. *Id.* For example, a website "develops" unlawful content when it makes the content more "usable and available." *Id.* The *Roommates* Court also notes the term "web content development," can be defined as "the process of researching, writing, gathering, organizing and editing information for publication on websites." *Id.*

Perhaps even more notable given the child victims' allegations regarding the backpage defendants, the Ninth Circuit has concluded that the term "development" must have an independent and separate meaning to the term "creation." Thus, to *develop*, in whole or in part, must mean something more than to *create*, in whole or in part. Otherwise, the term "development" would be superfluous. *Id.* ("we are advised by the Supreme Court that we must give meaning to all statutory terms, avoiding redundancy or duplication wherever possible") (citing *Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 197 (1985)).

The Tenth Circuit has similarly adopted a broad definition of "development":

> The CDA does not define the term development. [The website defendant] would construe the word narrowly. It relies on two dictionary definitions, correctly noting that develop can mean to "[m]ake something new" and "[c]ome into existence."
>
> . . .
>
> But the CDA uses the phrase "creation or development of information," 47 U.S.C. § 230 (f)(3), and if the meaning of the word develop were limited to the two senses relied upon by [the website defendant], the word development would

> add nothing not already conveyed by the word creation. "Under a long-standing canon of statutory interpretation, one should avoid construing a statute so as to render statutory language superfluous." *McCloy v. U.S. Dept. of Agric.*, 351 F.3d 447, 451 (10th Cir. 2003); *see Roommates*, 521 F.3d at 1168. We therefore examine whether we can reasonably construe development more broadly.
>
> We can. . . .
>
> *F.T.C.*, 570 F.3d at 1197-98.

In more broadly defining the term "develop," the Tenth Circuit explained that "[t]he dictionary definitions for 'develop' correspondingly revolve around the act of drawing something out, making it 'visible,' 'active,' or 'usable.'" *Id.* (citing Webster's Third New International Dictionary 618 (2002)). "Thus, a photograph is developed by chemical processes exposing a latent image." *Id.* "Land is developed by harnessing its untapped potential for building or for extracting resources." *Id.* "Likewise, when confidential telephone information was exposed to public view through [the website defendant], that information was 'developed.'" *Id.* The Court also pointed out, again citing Webster's Third International Dictionary, that "one definition of develop is 'to make actually available or usable (something previously only potentially available or usable).'" *Id.* Thus, "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." *Id.*

E. Backpage is an "Information Content Provider" Because it is Responsible, at Least in Part, for the *Development* of Unlawful Child Sex Trafficking Advertisements

The trial court correctly concluded the child victims have pled facts that would negate CDA § 230 immunity for the backpage defendants because a website cannot assert immunity for content they "develop," even if only "in part." *Roommates*, 521 F.3d at 1162 (quoting 47 U.S.C. § 230 (f)(3)).

Although the backpage defendants go to great lengths to suggest this Court must decide now whether they are in fact liable, that is not what the trial court decided, that is not the issue the trial court certified for appeal, and that is not the issue this Court accepted for review. To the contrary, the trial court correctly accepted all of the child victims' allegations as true, including all reasonable inferences, and concluded that dismissal was not appropriate because the defendants have not shown beyond a reasonable doubt that they will be immune from suit. *Atchison v. Great Western Malting Co.*, 161 Wn.2d 372, 376, 166 P.3d 662 (2007) ("A trial court should grant a motion to dismiss pursuant to CR 12(b)(6) only "if it appears beyond a reasonable doubt that no facts exist that would justify recovery.")

In their complaint, the child victims allege that backpage "develops" unlawful prostitution advertisements on its website through various calculated efforts, which independently negate CDA § 230 immunity. Backpage has expended great effort to become the nation's largest promoter

of prostitution. Their entire escort website is devoted to human sex trafficking including child sex trafficking.

For instance, the child victims allege the backpage defendants "developed" the content of the escort advertisements themselves by providing phoney "posting rules" and "content requirements" to instruct sex traffickers not to use certain words and graphics in order to avoid growing scrutiny by the public and law enforcement, all with the goal of allowing the backpage defendants to continue profiting from their illegal marketplace for sex. CP 6-11. Put another way, the child victims allege the backpage defendants are "co-developers" of the unlawful "escort" advertisements because backpage helps its users draft effective prostitution ads by requiring them to avoid certain language and content. The child victims allege backpage provides these instructions because their profits would fall if they allowed traffickers to more openly and directly advertise women and children for sex.

Exhibits A and B to the child victims' complaint provide powerful examples of backpage's influence on content. CP 495-2774. By providing certain "posting rules" and "content requirements" backpage instructs sex traffickers to draft sex advertisements that fit the "backpage format," which, as previously discussed, allow its users to advertise prostitution on the website so long as the ads do not expressly say so. For instance, according to its "posting rules" and "content requirements," backpage discourages

overt prostitution advertisements such as "I will have sex with you in exchange for $150.00." Instead, backpage instructs its users to draft more discreet ads, such as "Ass up face down, $80 specials," as was the case with Respondent L.C.

The backpage defendants strenuously argued to the trial court that these "posting rules" and "content requirements" are some sort of "cutting edge system" to prevent sex trafficking, and suggested a Parade of Horribles would follow if the trial court denied their motion because they claimed it will mean that all websites would be liable for their content.

However, not only did their position grossly mischaracterize the child victims' allegations,[9] but nowhere in their opening brief to this Court do the backpage defendants even acknowledge their "posting rules" and "content requirements." Moreover, nowhere in their opening brief do the defendants address (or even acknowledge) the trial court's observation that every single one of the roughly 1,000 "escort" advertisements in the Seattle and Tacoma sections of www.backpage.com were obviously for sex trafficking.

After carefully considering these allegations, the trial court correctly denied the backpage defendants' motion because, taking all of the child

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[9] The backpage defendants repeatedly suggest in their briefing that the child victims agree that backpage.com takes great efforts to prohibit prostitution. Nothing could be further from the truth, as reflected by even a cursory review of the child victims' complaint. While making misleading statements about a party's position is always wrong, it is particularly egregious given the nature of what happened to these girls.

victims' allegations as true, the defendants have not shown beyond a reasonable doubt that they will be immune from suit. Backpage has not shown beyond a reasonable doubt that the sex traffickers and pimps are 100% responsible for the development and creation of all of the illegal content on their website. Most convincing to the trial court were the posting rules and content requirements, which appear to make the sex trafficking advertisements on www.backpage.com more "usable and available," and is exactly the type of "encouragement of unlawful content" and "material contribution" that *Roommates.com* and *F.T.C.* explained would make websites a "developer, at least in part" of the illegal content, and thus potentially subject to civil liability.

Furthermore, backpage encourages unlawful content by accepting such a large volume of obviously unlawful ads that are supposedly "forbidden" by their "posting rules" and "content requirements." Pimps become aware of other pimps getting away with posting trafficking advertisements on backpage.com and decide to post ads themselves. Backpage has developed a reputation for accepting unlawful ads that encourages such a thriving business. "If they can get away with it, so can I," is the herd mentality that these traffickers follow, and backpage knows it. The traffickers are aware that the posting rules are simply "cover" for both them and backpage. The traffickers also become aware through the "posting rules" and "content requirements" that backpage wants them to

"play it cool" in order to evade law enforcement; and if they do so, backpage will readily display their sex trafficking advertisement.

Also, the child victims allege that backpage promoted and expanded its unlawful marketplace by providing commissions to pimps who refer other pimp customers, thus encouraging sex trafficking content in the form of a financial benefit. Backpage also readily accepts pre-paid credit card payments for the advertisements of more than one girl from the same source, which shows a sex trafficker is selling more than one girl. CP 15. The child victims also allege the defendants charge their users a higher fee to post in their "escort" section than they do for any other section on their website. *Id.* Not surprisingly, the child victims allege that the vast majority of the income from www.backpage.com is derived from sex trafficking. CP 6.

The trial court correctly concluded that the child victims have pled sufficient facts to show that the backpage defendants are not entitled to CDA immunity for having developed, at least in part, the unlawful sex advertisements.

F. By Encouraging Sex Trafficking on its Website and Aiding in the Development of That Content, Backpage Materially Contributes to Unlawful Material Online, and Therefore is Not Entitled to CDA Immunity

"When Congress passed CDA 230, it didn't intend to prevent the enforcement of all laws online." *Roommates*, 521 F.3d. at 1175. As noted above, "[t]he Communications Decency Act was not meant to create a

lawless no-man's-land on the internet." *Id.* at 1164. "If you don't encourage illegal content, or design your website to require users to input illegal content, you will be immune." *Id.* at 1175. Another way of stating this holding from *Roommates* is "if a website encourages illegal content, it is a 'co-developer' of that content and loses immunity."

Backpage without question encourages illegal content. As alleged in the child victims' complaint, selling sex online is backpage's business model. Backpage.com is the website johns select to purchase women and children, and it is the website pimps choose to traffic their victims.

As noted by the Ninth Circuit when discussing the liability of Roommates.com, an online roommate matching service:

> For example, a real estate broker may not inquire as to the race of a prospective buyer, and an employer may not inquire as to the religion of the prospective employee. <u>If such questions are unlawful when posed face-to-face or by telephone, they don't magically become lawful when asked electronically online. The Communications Decency Act was not meant to create a lawless no-man's-land on the Internet</u>.
>
> *Roommates*, 521 F.3d at 1164 (emphasis added).

It is not legal to advertise or promote sex trafficking on television; it is not legal to advertise or promote human sex trafficking in print or by telephone solicitation; and it is not legal to offer sex for sale in face to face

encounters. It does not "magically" become lawful when done online on www.backpage.com.[10]

The child victims allege a host of criminal statutes that backpage aids others in violating, including RCW 9A.88.080 and RCW 9A.88.060, which makes Promoting Prostitution illegal:

> (1) A person is guilty of promoting prostitution in the second degree if he or she knowingly
>
> a. Profits from prostitution; or
>
> b. Advances prostitution.

The following definitions are applicable in RCW 9A.88.070 through 9A.88.090:

> (1) "Advances Prostitution." A person "advances prostitution" if, acting other than as a prostitute or as a customer thereof, he or she causes or aids a person to commit or engage in prostitution, procures or solicits customers for prostitution, provides persons or premises for prostitution purposes, operates or assists in the operation of a house of prostitution or a prostitution enterprise, or engages in any other conduct designed to institute, aid, or facilitate an act or enterprise of prostitution.
>
> (2) "Profits from prostitution." A person "profits from prostitution" if, acting other than as a prostitute receiving compensation for personally rendered prostitution services, he or she accepts or receives money, or any other property

[10] Backpage seeks to compare itself to websites like Amazon or Ebay, claiming that an adverse ruling by this Court would strip Amazon and Ebay of immunity for claims based on third party advertisements selling stolen goods. However, Amazon and Ebay are content neutral websites. They neither encourage nor specialize in unlawful content like backpage does. Hypothetically, if Amazon or Ebay had a section titled "fell off a truck" that offered nothing but stolen goods, and provided "posting rules" and "content requirements" that stated: "Do not show pictures of filed off serial numbers," "Do not show photos of jimmied ignitions," and "Do not use code words such as 'Hot' or 'boosted,'" then they should also be denied their CDA 230 immunity defense at the CR 12(b)(6) phase, just like backpage was denied in this case.

> pursuant to an agreement or understanding with any person whereby he or she participates or is to participate in the proceeds of prostitution activity.
>
> CP 10-11.

"Conduct designed to aid or facilitate an act or enterprise of prostitution" is exactly what backpage does with the "escorts" section of its website.

Additionally, RCW 9A.08.020, Washington's accomplice liability statute, states that "a person is an accomplice of another person in the commission of a crime if, with knowledge that it will promote or facilitate the commission of a crime, he or she . . . encourages or requests such other person to commit it or aids or agrees to aid such other person in planning or committing it."

It is obvious that backpage is encouraging or aiding sex traffickers to promote prostitution. But the child victims do not have to prove that backpage is guilty of these crimes beyond a reasonable doubt in order to void CDA immunity and pursue discovery; rather, at this early pleading stage, they only need to show that it is "possible" that backpage is partly responsible for developing unlawful content, encouraging others to post unlawful content, or any of the other many ways in which backpage influences content.

In a rather transparent effort to legitimize the "escorts" section on its website, backpage cites municipal and state tax provisions regulating the

"escort" industry. But it is undeniable that the ads on backpage's "escorts" section offer sex for money, which is illegal in the State of Washington. Just because backpage seeks to hide its sex trafficking empire behind the word "escort" does not, as the Ninth Circuit put it, "magically" turn sex trafficking into a legitimate business endeavor.

Backpage argues that its knowledge about sex trafficking on its website is not relevant for purposes of CDA immunity, but its knowledge about the illicit ads in its "escorts" section shows that it is well aware that the services offered on its website are (1) illegal and (2) not the same as any of the *lawful* services regulated by state or municipal law.[11]

In *First Global Communications, Inc v. Bond,* 413 F. Supp 2d 1150, 1152 (2006) for example, Judge Pechman declined to grant equitable relief to the owners of an "escort website," recognizing "escort was a euphemism for prostitution services," which is illegal in Washington State:

> [W]hile prostitution is legal in some countries and parts of the state of Nevada, Washington state law prohibits "advancing" prostitution, including conduct that is "designed to institute, aid, or facilitate an act or enterprise of prostitution." RCW 9A.88.060. . . . Many materials on Plaintiff's website could be construed as 'advancing' prostitution under this definition," since "the reviews' on the Plaintiff's website essentially provide information to assist third parties in procuring prostitution services" (Dkt. 42 at 2)

[11] Incidentally, the "backpage.com" name is a reference to the back pages of weekly print publications where "escort" ads are commonly displayed.

> Here the Court concludes that the issuance of a preliminary injunction would have the effect of encouraging illegal activity and would serve an unconscionable purpose.

Accessory before the fact and accessory after the fact are hallmarks of accomplice liability. It is not lawful to assist others in avoiding detection or apprehension by law enforcement. Backpage has created an enormous online marketplace for sex trafficking and is helping pimps develop effective prostitution advertisements that evade law enforcement. By encouraging and participating in this criminal activity, Backpage loses CDA immunity.

G. Backpage.com is an "Information Content Provider" Because it is Responsible for the *Creation* of Unlawful Content

"[A]s to content that it creates itself, or is responsible in whole or in part for creating ..., the website is also a content provider." *Roommates*, 521 F.3d at 1162.

Backpage created and used the term "escorts" as the title of its prostitution section, which is enough to void CDA immunity.

In *MCW, Inc. v. badbusinessbureau.com*, the website operated a consumer complaint forum where consumers could post grievances against businesses. The website created titles such as "con-artists," "scam," and "ripoff" and organized the reports from consumers under those headings, some of which were defamatory. The court denied badbusinessbureau.com immunity under CDA § 230 stating:

> [T]he CDA does not distinguish between acts of creating or developing the contents of reports, on the one hand, and acts of creating or developing the titles or headings of those reports, on the other. The titles and headings are clearly part of the web page content. Accordingly, the defendants were information content providers with respect to the website postings and thus are not immune from MCW's claims.

MCW, Inc. v. badbusinessbureau.com, 2004 WL 833595 (N.D. Tex. 2004).

Backpage chose the term "escorts" as its heading because it means "prostitutes" in the world of sex trafficking, and thus would most effectively identify the internet location of illicit sex ads to johns.

The backpage-supplied heading materially contributes to the success of backpage's sex trafficking efforts in this regard because it informed johns that all advertisements contained in the "escorts" section were in fact prostitution advertisements, even if the individual advertisements did not explicitly say so. It is not just a passive word on the website—indeed it is material and critical to the success of backpage.com's prostitution empire.[12]

Additionally, backpage placed the term "escort" on all individual ads in its "escorts" section, including the ads that resulted in the child victims' abuse. Exhibits A and B are illustrative. CP 495-2774. Additionally, the backpage logo is on each escort ad. In the world of human

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[12] Incidentally, the "backpage.com" name is a reference to the back pages of weekly print publications where "escort" ads are commonly displayed.

sex trafficking, the backpage reputation is such that a child identified as a "backpage girl" is readily identified as a child prostitute. Like the creation of the "escorts" section, creating and placing "escort" on every single prostitution advertisement was critical to the success of backpage.com—it is the material information that up to twenty johns per day relied upon when they picked up the telephone to make arrangements to rape the seventh grader L.C. and her co-plaintiffs.

H. Backpage "Polices" Its Website in Bad Faith and Therefore Is Not Immune Under CDA § 230

Backpage cannot claim immunity from liability under section 230(c)(2) of the CDA. Section 230(c)(2) does not apply to the allegations made in the child victim's suit because that section only applies to instances where the website defendant is being held liable for its efforts to block or screen offensive material. That is, the plaintiff's cause of action must arise from damages caused by the defendant's removal of objectionable material.

Section 230(c)(2)(A) states that no internet content service provider shall be held liable on account of "any action voluntarily taken in good faith to restrict access" to offensive material. As detailed in the child victims' complaint, backpage's "posting rules" and "content requirements" are not developed or enforced in a *good faith* effort to restrict offensive content, but rather in a surreptitious effort to evade law enforcement, skirt legal liability, and maintain the profitability of its escort website. Given the extensive

allegations of *bad faith* on the part of backpage.com in "restricting" unlawful sex trafficking content, Section 230(c)(2) cannot confer immunity to backpage in this CR 12(b)(6) setting.

Exhibits A and B to the child victims' complaint demonstrate backpage's lack of good faith. Further, backpage is free to argue at trial that its so-called efforts to police its website are done in good faith; however, the child victims have clearly alleged the opposite which must be accepted as true for purposes of a CR 12(b)(6) motion.

I. Courts Nationwide Refuse to Grant CDA Immunity in Cases Where the Plaintiff Alleges Facts That Show the Website is Promoting Unlawful Postings

The majority of cases cited by backpage are defamation cases involving legitimate websites with an occasional unlawful posting by a website user. These cases were plead much differently than the child victims' claims—most notably, they did not present evidence (e.g. Exhibits A and B) or plead allegations that the website created and/or developed unlawful content, or that the website's entire function was to promote unlawful activity.

In an effort to circumvent the holding of *Roommates*, backpage relies largely on a Missouri Magistrate's decision in *M.A. v. Village Voice Media*, 809 F.Supp.2d 1041 (E.D. Miss. 2011). But while *M.A.* involved similar facts (i.e. a minor trafficked on backpage.com), it was plead much differently than the child victims' case and the Missouri court was thereby

limited in its analysis. Most notably, the Missouri trial court stated, "there is no allegation that backpage was responsible for the development of any portion of the content of McFarland's posted ads or specifically encouraged the development of the offensive nature of that content." *Id.* at 1053. In the present case, the child victims allege that backpage developed and created unlawful prostitution advertisements on its website through various efforts that would independently negate CDA immunity, including creating and operating a marketplace for sex and instructing its users how to draft effective prostitution advertisements. Furthermore, the *M.A.* trial court mistakenly seemed to regard backpage.com as an innocent classified ads website, instead of a deliberate purveyor of prostitution. Indeed, *M.A.* quotes *Dart v. Craigslist*, 665 F. Supp. 2d 967 (2009), and refers to the "misuse of its services by its customers." According to the current child victims' allegations, however, backpage's website is not being "misused" by its customers. Rather, backpage's customers are using the site to post prostitution advertisements just as backpage intends.

Additionally, backpage attempts to mislead this Court by aligning itself with the supposed "300" CDA cases where website immunity has been upheld. But backpage conspicuously ignores that courts nationwide consistently refuse to grant CDA immunity in cases where the Plaintiff alleges facts that show the website is promoting unlawful postings.

In *Anthony v. Yahoo, Inc.*, the court refused to grant CDA immunity to the website, Yahoo!, because the plaintiff had alleged Yahoo! created and published false profiles in order to encourage its users to renew their subscriptions in the website's dating service. *Anthony v. Yahoo, Inc.*, 421 F. Supp. 2d 1257, 1263 (N.D. Cal. 2006) ("If, as Anthony claims, Yahoo! manufactured false profiles, then it is an 'information content provider' itself and the CDA does not shield it from tort liability.")

In another case, *NPS LLC v. StubHub, Inc.*, 2009 WL 995483 (Mass. Super. 2009), the court refused to grant CDA immunity to StubHub because the plaintiff had plead facts that, if true, showed the website promoted ticket scalping, which is illegal in Massachusetts. In *StubHub*, the New England Patriots football organization sued StubHub, Inc., a website that served as an online clearinghouse for buying and selling tickets to sporting, concert, and other events. StubHub charged a percentage of each sale of tickets for the use of its website. The New England Patriots sued StubHub for tortious interference alleging that StubHub was facilitating violations of Massachusetts' anti-scalping laws by listing the tickets for sale on the StubHub website. Very similar to the backpage.com's strategy, StubHub had a list of phony disclaimers on its website. For example, StubHub members had to agree among other things to "comply with all applicable local, state, federal and international laws, statutes and regulations regarding the use of the site and the selling of tickets." *Id.* at 11.

Additionally, StubHub assisted scalpers' criminal conduct by "allowing [them] to 'mask' ticket locations by listing a different row, up to five rows away, than that printed on the original ticket and by not informing the buyer of the exact location of the ticket until the buyer received them in a fashion which made it difficult for the New England Patriots to identify fans who had unlawfully purchased scalped tickets." *Id.* at 8.

In holding that StubHub was not immune under the CDA, the Court concluded StubHub "intentionally induced or encouraged" third parties to use its site to violate anti-scalping laws. *Id.* at 11. Furthermore, StubHub actively and knowingly profited from these violations. *Id.* at 10. These actions were enough to take StubHub outside the scope of § 230 immunity. *Id.* at 11.

Backpage's activities are very similar to those of StubHub, but involve far more heinous conduct. For example, just like the "masking" tools offered by StubHub to its users, backpage.com disguises the criminal activity of its users through sham posting rules and requirements that are designed to facilitate prostitution while hindering law enforcement. Furthermore, like StubHub, backpage ostensibly prohibits unlawful use of its sites through these same phony "requirements," disclaimers, and other rules that are obviously not enforced in good faith (*see e.g.*, Exhibits A and B; CP 495-2774). StubHub was in the unlawful business of marketing

scalped tickets despite its disclaimers. Backpage is in the far worse unlawful business of marketing humans for sex.

Finally, in *Jones v. Dirty World Entertainment Recordings, LLC*, 840 F.Supp.2d 1008 (E.D. Kent. 2012), the court refused to grant CDA immunity because the website encouraged unlawful postings by its users. *Dirty World* involved a website called "thedirty.com" that published comments by individuals revealing "dirt" (i.e., embarrassing gossip) about others. According to the court, the website was full of nothing but offensive content. The plaintiff filed a lawsuit alleging defamatory comments about her were posted on the website. The *Dirty World* Court rejected the website's CDA 230 immunity: "This Court holds by reason of the very name of the site, the manner in which it is managed, and the personal comments of defendant Richie, the defendants have specifically encouraged development of what is offensive about the content of the site." *Id.* at 1012.

While backpage ignores these cases, it is quite clear federal courts reject CDA immunity when, like here, the plaintiff alleges the website created, developed, or encouraged unlawful content.[13] Like *Roommates*,

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[13] *See also Whitney Information Network, Inc. v. Xcentric Venture, LLC*, 199 Fed. Appx. 738 (11th Cir. 2006); *HyCite Corp. v. badbusinessbureau.com*, 418 F.Supp.2d 1142, 1148-49 (D. Ariz. 2005) (immunity not appropriate at the pleading stage where the plaintiff alleged that the defendant created the allegedly defamatory content); *MCW, Inc. v. badbusinessbureau.com*, 2004 WL 833595 (N.D. Tex. 2004) (declining to grant defendants' motion to dismiss based on CDA immunity because plaintiffs alleged that defendants added editorial comments, titles, and original content to third-party complaints posted on defendants' website); *Doctor's Assoc., Inc. v. QIP Holder LLC*, 2010 WL 669870 (D. Conn. 2010) ("A reasonable jury may well conclude that the Defendants did not merely post the arguably disparaging content contained in the contestant videos, but instead

Yahoo!, *StubHub*, and *Dirty World*, backpage is not entitled to CDA immunity at this stage because the child victims have alleged facts showing it developed and created unlawful content on its website.

J. Granting Immunity to the Backpage Defendants at the CR 12(b)(6) Phase of Litigation Would Result In Absurdity

When Congress enacted CDA § 230, it did not intend to grant absolute immunity to websites let alone immunity to websites whose primary business is to generate profit from the sex trafficking of women and children. If Congress intended to protect manipulative websites from liability, they would not have included the conditional language of CDA § 230 as discussed herein.

The CDA is known as the Communications Decency Act. Not the Communications *Indecency* Act. Nowhere do the backpage defendants cite evidence or legal authority for their suggestion that public policy somehow favors them over the young girls who allege they were sexually abused and exploited because of their business.

The Supreme Court of the United States instructed long ago that the power to prevent absurd results rests with the courts:

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actively solicited disparaging representations about Subway [on their website] and thus were responsible for the creation or development of the offending contestant videos."); *Alvi Armani Medical, Inc. v. Hennessey*, 629 F. Supp. 2d 1302 (S.D. Fla. 2008) (CDA immunity denied where plaintiff alleged facts to show the website created the impression that posters were bona fide disgruntled patients of Plaintiffs when in fact the poster were either fictitious persons or undisclosed affiliates of doctors who are on the website's "recommended list.").

> It is a familiar rule that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit nor within the intention of its makers. This has often been asserted, and the Reports are full of cases illustrating its application. This is not the substitution of the will of the judge for that of the legislator; for frequently words of general meaning are used in a statute, words broad enough to include an act in question and yet a consideration of the whole legislation or of the circumstances surrounding its enactment, or of the absurd results which follow from giving such broad meaning to the words, makes it unreasonable to believe that the legislator intended to include the particular act.

Holy Trinity Church v. U.S., 143 U.S. 457, 459 (1892); *see also Pressley v. Capital Credit & Collection Service, Inc.*, 760 F.2d 922, 924 (9th Cir. 1985) ("In interpreting statutes, the Supreme Court has often recognized the rule 'that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers.'") (citing *United Steelworkers of America v. Weber*, 443 U.S. 193, 201 (1979)).

Likewise, in Washington, it is a well-established principle of law that courts "will construe a statute so as to avoid strained or absurd consequences." *State v. Keller*, 98 Wn.2d. 725, 728, 657 P.2d 1384 (1983). "In so doing, the spirit and intent of the law should prevail over the letter of the law." *In re the Matter of the Detention of R*, 97 Wn.2d. 182, 187, 641 P.2d 704 (1982).

Congress intended to protect "Good Samaritan" websites that tried to eliminate unlawful content, not websites whose entire business model is

profiting from unlawful conduct. It is not reasonable to believe that Congress intended to protect the unlawful activities of a website like www.backpage.com, and this Court should avoid applying the immunity statute in a way that would result in such an absurd result. *Holy Trinity Church*, 143 U.S. at 459.

The backpage defendants assert some sort of Doomsday for the internet will occur if this Court allows the child victims to conduct limited discovery regarding their allegations. Despite the fact that the child victims provided evidence of approximately 1,000 advertisements for sex trafficking on their website on just one day for just the Seattle and Tacoma areas, the defendants claim that allowing the child victims to proceed will somehow bring legitimate websites to a grinding halt. The problem with their hyperbolic rhetoric is that legitimate websites do not intentionally create and develop an online marketplace for sex trafficking, and legitimate websites do not help sex traffickers create and develop their advertisements for sex. To the extent they do, and to the extent they choose to do business in Washington, they must recognize that Washington has a compelling state interest not only in protecting children from being sexually abused and exploited, but in providing children who are abused and exploited with a means to redress for those who enabled it.

K. Washington State Public Policy Expressly Aims to Protect Children From Sexual Abuse and Exploitation

Both through its legislature and its courts, Washington State has long recognized a compelling interest in protecting children from being sexually abused and exploited and in providing the means for redress to those who are abused and exploited:

> The legislature finds that the prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance. The care of children is a sacred trust and should not be abused by those who seek commercial gain or personal gratification based on the exploitation of children.
>
> RCW 9.68A.001.

The legislature expressed this same public policy when it enacted a special statute of limitations for victims of childhood sexual abuse, and when it passed mandatory reporting laws for certain individuals who suspect a child is being abused. RCW 4.16.340 (special statute of limitations for survivors of childhood sexual abuse); RCW 26.44.030 (mandatory reporting of child sexual abuse); *see also C.J.C. v. Corporation of the Catholic Bishop of Yakima*, 138 Wn.2d 699, 712-13, 985 P.2d 262, 268-69 (1999) (analyzing the legislative history behind Washington's special statute of limitations for victims of childhood sexual abuse and acknowledging the legislature made "clear that its primary concern was to provide a broad avenue of redress for victims of childhood sexual abuse

who too often were left without a remedy under previous statutes of limitation").

Nowhere do the backpage defendants acknowledge this compelling state interest in protecting children, and nowhere do they acknowledge this compelling state interest in providing redress to children who are abused and exploited, like the child victims. Instead, the backpage defendants argue the child victims' complaint should be dismissed. Not only do their arguments run contrary to Washington law and public policy, but they also run contrary to the very federal law they so heavily rely upon:

> Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section.
>
> 47 U.S.C. § 230 (e)(3).

L. The Washington State Trial Court Properly Applied Washington's CR 12(b)(6) Pleading Standard

The trial court also committed no error in applying CR 12(b)(6) to the backpage defendants' motion to dismiss, rather than Federal Rule of Civil Procedure 12(b)(6), because (1) the venue for this case is Pierce County Superior Court, (2) Washington state courts apply Washington procedural law, (3) neither this Court, nor any other Washington appellate court, has ever concluded that Washington state courts should apply federal procedural law, (4) the backpage defendants fail to show that the trial court deprived them of a federal right by applying Washington procedural law, and (5) even if this Court announced a new rule that Washington state courts

should apply federal procedural law, the trial court's application of Washington law was harmless because the backpage defendants cannot show any prejudice from the application of Washington law rather than federal procedural law.

i. The Washington Supreme Court Has Expressly Rejected Any Effort to Adopt a Heightened Pleading Standard for CR 12(b)(6) Motions

This case was filed in Pierce County Superior Court. After much delay, the backpage defendants eventually tried to remove this case to federal court, but the federal court concluded the removal was improper and returned this case to Pierce County Superior Court.

When the backpage defendants thereafter filed their motion to dismiss the child victims' claims, they did not assert the child victims must meet the heightened pleading standard required in federal court. It was not until after the child victims filed their response to that motion that the backpage defendants asserted, for the first time in their Reply, that Washington state courts should not apply Washington state law regarding CR 12(b)(6), but should instead apply the heightened pleading standard that is required by Federal Rule of Civil Procedure 12(b)(6). CP 370-75.

Not only did the trial court properly reject that argument, but the Washington Supreme Court just four years ago rejected that argument, including any argument that the rights of defendants are somehow deprived

or unfairly prejudiced by Washington state courts applying Washington's procedural law:

> The [United States] Supreme Court's plausibility standard is predicated on policy determinations specific to the federal trial courts. The Twombly Court concluded: federal trial courts are incapable of adequately preventing discovery abuses, weak claims cannot be effectively weeded out early in the discovery process, and this makes discovery expensive and encourages defendants to settle "largely groundless" claims. See 550 U.S. at 557–58, 559, 127 S.Ct. 1955. Neither party has shown these policy determinations hold sufficiently true in the Washington trial courts to warrant such a drastic change in court procedure.
>
> Currently this court lacks the type of facts and figures (specific to the Washington trial courts) that were presented to, and persuaded, the United States Supreme Court to alter its interpretation of Fed.R.Civ.P. 12(b)(6). See Twombly, 550 U.S. at 557–58, 559, 127 S.Ct. 1955. We thus have no similar basis to fundamentally alter our interpretation of CR 12(b)(6) that has been in effect for nearly 50 years, see Christensen, 59 Wn.2d at 548, 368 P.2d 897, and decline to do so here.
>
> Even if such facts and figures had been presented, this court would be hesitant to effectively rewrite CR 12(b)(6) based on policy considerations. The appropriate forum for revising the Washington rules is the rule-making process. See Twombly, 550 U.S. at 579, 595, 127 S.Ct. 1955 (Stevens, J., dissenting). This process permits policy considerations to be raised, studied, and argued in the legal community and the community at large.

McCurry v. Chevy Chase Bank, FSB, 169 Wn.2d 96, 103, 233 P.3d 861 (2010).

Not only do the backpage defendants fail to provide any sort of facts or figures to justify their request that this Court rewrite the CR 12(b)(6)

standard in Washington, but as the Court made clear in *McCurry*, any such new rule should be left to the rule-making process. If the child victims are unable to discover evidence to support their allegations, then the backpage.com defendants can bring a motion for summary judgment and claim immunity under section 230.

ii. <u>The Backpage Defendants Do Not Have a Substantive Federal Right to Create, Develop, and/or Encourage Unlawful Content on Their Website</u>

It is unclear how the state court could have deprived the backpage defendants of a federal substantive right when the trial court has not deprived them of anything. To the contrary, the trial court simply denied a CR 12(b)(6) motion because it concluded the child victims sufficiently pled facts that, if true, would mean the defendants may not be immune from suit under section 230.

The backpage defendants cite no legal authority for their argument that section 230 create a federal substantive right, particularly where, on its face, section 230 requires a factual inquiry in order to determine whether the defendants are immune. Put another way, the suggestion that the immunity afforded by section 230 creates a substantive right ignores the fact that the immunity is qualified, not absolute.

Notably, none of the cases cited by the backpage defendants hold that a state court's lower pleading standard infringed on a defendant's assertion of qualified immunity under federal law. For example, in *Brown*

v. Western Ry. Of Ala., 338 U.S. 294 (1949), the U.S. Supreme Court reversed a state court's dismissal of the plaintiff's federal tort claim because the state court improperly decided issues of fact, thereby negating the plaintiff's federal right to bring a lawsuit under the Federal Employers' Liability Act. That is not the situation in the present case.

iii. <u>The Backpage Defendants Fail to Show the Result Would Be Any Different if the Trial Court Had Applied the Heightened Pleading Standard</u>

Even if this Court was willing to rewrite the CR 12(b)(6) standard in Washington, and even if the backpage defendants could establish that a federal right was at issue, they have failed to show that the result would be any different. In other words, any asserted error was harmless.

As described in detail above, the child victims have alleged specific facts that, if proven true, would establish that the backpage.com defendants intentionally created and developed an online marketplace for sex trafficking and then helped traffickers create and develop their advertisements for sex. Backpage also created headings and titles which are partial content. In support of these specific allegations, the child victims included with their complaint roughly 1,000 advertisements that vividly illustrate this illegal marketplace for sex trafficking. In accepting the child victims' factual allegations as true, the trial court astutely observed that each of these advertisements, which appeared for the Seattle and Tacoma area on a single day in July 2012, were advertisements for sex trafficking. The trial

court committed no error in accepting the child victims' factual allegations that, if true, will establish that the backpage defendants created this illicit online marketplace and then helped traffickers create and develop their sex advertisements. Put another way, the trial court committed no error in agreeing that the child victims have alleged much more than "conclusory" allegations and should be allowed to proceed with discovery, including discovery regarding immunity.

Applying Washington's CR 12(b)(6) standard, the trial court correctly accepted these factual allegations as true, just like the trial court would be required to do under the heightened pleading standard in federal court. Despite much rhetoric about "conclusory allegations," nowhere do the backpage defendants address these factual allegations, nowhere do they explain how the trial court erred in accepting the child victims' factual allegations as true, and nowhere do they meet their burden of showing how the trial court's decision would have been any different if it applied a heightened pleading standard.

V. CONCLUSION

J.S., S.L., and L.C. respectfully request the Court affirm the trial court's ruling because the trial court committed no error in denying the backpage defendants' motion to dismiss.

In the event the Court concludes the child victims did not meet the requisite pleading standard and reverses the trial court's order denying the

motion to dismiss, the child victims respectfully request the Court grant them leave to file an amended complaint that addresses any asserted deficiency.

Respectfully submitted this 7th day of March 2014.

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CERTIFICATE OF SERVICE

Laura Neal, being first duly sworn upon oath, deposes and says:

I am a citizen of the United States of America and of the State of Washington, over the age of twenty-one years, not a party to the above-entitled matter and competent to be a witness therein.

That on March 7, 2014, I delivered via Personal Service / Email and sent for delivery via U.S. Mail a true and correct copy of the above document, directed to:

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