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Appellants file this response to the five amicus briefs submitted by various non-governmental organizations¹ and the Washington Attorney General in support of Plaintiffs/Respondents in this appeal.

I. INTRODUCTION

This appeal raises one central legal issue: the proper application of Section 230 of the Communications Decency Act (“CDA”), 47 U.S.C. § 230, and the immunity it grants websites for claims based on third-party content. Amici do not address this issue or *any* legal issues. Instead, they attack Backpage.com and urge it is not entitled to immunity because they do not like the website, disagree with its approach for combatting sex trafficking, and instead argue that censorship is the best approach to fight trafficking. Amici’s briefs are, in the main, irrelevant.²

The issue here is not the policy debate about how best to battle sex trafficking. Experts, advocates and law enforcement officials have differing views about effective approaches to the problem. Contrary to amici’s positions, many assert the solution is not censorship but instead to use technology and work with responsible websites to prevent sex trafficking, identify and rescue victims, and prosecute the individuals responsible for these abhorrent crimes.

¹ The NGO amicus briefs were filed by (1) the Coalition Against Trafficking in Women (“CATW”); (2) FAIR Girls; (3) the National Center for Missing and Exploited Children (“NCMEC”); and (4) the National Crime Victim Law Institute, Shared Hope International, Covenant House, and Human Rights Project for Girls (“NCVLI”).

² Appellants renew and restate their objection to these briefs under RAP 10.6(a). *See* Appellants’ Opposition to Motions to File Amicus Briefs (Sept. 12, 2014).

To the extent the AG and other amici advance legal arguments, they merely repeat ones Plaintiffs have made. The nationwide uniform law interpreting Section 230 makes clear Plaintiffs have no basis to avoid the statute or deny Backpage.com this federal immunity.

II. ARGUMENT

A. This Court Should Disregard Amici's Non-Legal Arguments, Which Are Irrelevant.

The four NGO amicus briefs contain almost no legal arguments about Section 230.³ Instead, they focus on describing the problem of sex trafficking and criticizing Backpage.com for failing to do more to prevent it. Backpage.com agrees that sex trafficking is abhorrent, and the website takes extensive measures to prevent and combat trafficking. But censorship is not the answer to this problem.

As the American Psychological Association has written:

“Preventing the trafficking of women and girls is a complex problem that requires cross-disciplinary research, training and education, public awareness and new policies at every level of government.” *APA Task Force Report Highlights Problem of Human Trafficking of US Women and Girls* (Mar. 12, 2014).⁴ “Prevention, protection, prosecution and

³ Indeed, some of the NGOs acknowledge they do not provide legal arguments, *see* CATW Motion for Leave to File Amicus Brief at v (stating that “the particular legal questions on appeal will be covered by the parties”), and say their briefs “share [their] own unique experience” and “present evidence” against Backpage.com, *see* FAIR Girls Motion for Leave, at 4; NCMEC Motion for Leave to File, at 4.

⁴ *See* <http://www.apa.org/news/press/releases/2014/03/human-trafficking.aspx>.

partnership constitute the fundamental framework, but programs are not always guided by a comprehensive understanding of the problem.” *Id.* (internal quotation marks omitted).

The approach amici advocate—that governments or courts should shut down a website if it permits adult-oriented advertising—ignores the national policy to foster and protect Internet speech. As one FCC Commissioner said recently, “we ... have a duty to protect what has made the Internet the most dynamic platform for free speech ever invented. It is our printing press. It is our town square. It is our individual soapbox and our shared platform for opportunity.” Statement of Commissioner Jessica Rosenworcel Federal Communications Commission Before the Congressional Forum on Net Neutrality (Sept. 24, 2014).⁵

Consistent with this sentiment, Congress enacted Section 230, which provides broad immunity to websites for claims that third-party content is unlawful. Without this protection, “[f]aced with potential liability for each message republished by their services,” online providers “might choose to severely restrict the number and type of messages posted.” *See Zeran v. Am. Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997); *Batzel v. Smith*, 333 F.3d 1018, 1027-28 (9th Cir. 2003) (“Making interactive computer services ... liable for the speech of third parties would severely restrict the information available on the Internet.”). That amici advocate a different policy is irrelevant to the issue before the Court:

⁵ *See* http://transition.fcc.gov/Daily_Releases/Daily_Business/2014/db0924/DOC-329575A1.pdf.

whether Section 230, as written, provides immunity to Backpage.com for what is concededly content provided by third parties. Congress has made the policy choice, and this Court must respect that choice.

Moreover, amici's arguments represent only one perspective on how best to combat sex trafficking. For example, the National Research Council recently issued a lengthy report demonstrating the complexity of sex trafficking and the myriad solutions advocated by researchers, advocates, and law enforcement. Inst. of Med. & Nat'l Research Council, *Confronting Commercial Sexual Exploitation and Sex Trafficking of Minors in the United States*, at 3 (Ellen Wright Clayton *et al.* eds., 2013).⁶ Among several recommendations, the NRC suggests increasing awareness through training and public campaigns because, it found, those who interact with youth "either are unaware that commercial sexual exploitation and sex trafficking of minors occur in their communities or lack the knowledge and tools to identify and respond to victims, survivors, and minors at risk." *Id.* at 6. NRC also recommends creating a national research agenda because the "evidence base related to these crimes" is "extremely limited ... particularly in the areas of prevention and intervention strategies." *Id.* at 9. In addition, in response to its finding that children, adolescents, and their caregivers lack information on

⁶ See http://www.iom.edu/~media/Files/Report%20Files/2013/Sexual-Exploitation-Sex-Trafficking/sextraffickingminors_rb.pdf. The NRC is the advisory arm of the National Academy of Sciences. It conducted this study in response to a request from the Department of Justice.

commercial sexual exploitation, the NRC advises developing guidelines on and providing assistance to support information sharing. *Id.* at 12.

The NRC also made recommendations with which at least one amicus, Shared Hope International (“SHI”) agrees—development of laws and policies that redirect victims from the criminal justice system to services equipped to meet their needs; and laws to hold exploiters, traffickers, and solicitors accountable, with particular focus on deterring demand. *Id.* at 9, 378. *See* Shared Hope International, 2013 Protected Innocence Challenge: A Legal Framework of Protection for the Nation’s Children.⁷ Similarly, SHI emphasizes the need to address four “preliminary” policy issues: eliminating the demand for trafficking by punishing those who buy sex, prosecuting traffickers without relying entirely on the victim’s testimony, identifying victims as such rather than criminals, and providing protection, services, and shelter to victims. *Id.* at 9. Each year, SHI issues a report ranking states on their efforts to pass laws that address sex trafficking. *Id.*

Although many states are strengthening their laws in the ways the NRC urges, some have regrettably (and unsuccessfully) pursued censorship. Three states—Washington, Tennessee, and New Jersey—passed statutes that criminalize hosting certain content (purportedly ads for sex trafficking although the laws’ terms were far broader). Courts enjoined all three laws. *See Backpage.com, LLC v. Hoffman*, 2013 WL

⁷ *See* <http://sharedhope.org/wp-content/uploads/2014/02/2013-Protected-Innocence-Challenge-Report.pdf>.

4502097 (D.N.J. 2013); *Backpage.com, LLC v. Cooper*, 939 F. Supp. 2d 805 (M.D. Tenn. 2013); *Backpage.com, LLC v. McKenna*, 881 F. Supp. 2d 1262, 1266 (W.D. Wash. 2012). In *McKenna*, Judge Martinez found the Washington law was likely invalid because (among other things) it violated Section 230 and the First Amendment. 881 F. Supp. 2d at 1271-78. The statute, the court found, would have compelled online providers “who did not abstain from publishing large categories of speech altogether to review every ... online post ... to ensure that none ran afoul of the law,” a “collateral burden[] on protected speech” that the “Constitution does not permit.” *Id.* at 1278. The law also “drastically shift[ed] the unique balance that Congress created with respect to the liability of online service providers that host third party content.” *Id.* at 1274.

In light of these protections and given the complexities of sex trafficking, many experts, researchers, advocates and law enforcement officials disagree with the approach amici advocate. They praise the visibility the Internet brings, and warn that shutting down one website or another will merely give traffickers an incentive to find new ones. As one detective stated, “[t]he Internet is that frontier out there. Anyone can post, even if it’s about something illegal. The good thing about that is we have a place to look.” Shoshana Walter, *Online Sex Trade Is Flourishing Despite Efforts to Curb It*, N.Y. Times, Mar. 16, 2012.⁸ As another

⁸ A copy of the article is available at <http://www.nytimes.com/2012/03/16/us/online-sex-trade-flourishing-despite-efforts-to-curb-it.html?pagewanted=all>. See also M. Latonero, *et al.*, *The Rise of Mobile and the Diffusion of Technology-Facilitated Trafficking*, at 26-27 (quoting law enforcement official as saying

scholar has explained: “Going after specific sites where exploitation becomes visible and attempting to eradicate the visibility does nothing to address the networks of supply and demand—it simply pushes them to evolve and exploiters find new digital haunts and go further underground.” d. boyd, *Combating Sexual Exploitation Online: Focus on the Networks of People, not the Technology*, Statement to Massachusetts Attorney General Martha Coakley as part of the Hearing on Sexual Exploitation Online (October 19, 2010).

Many experts and others recognize that technology is a valuable tool to combat trafficking if used intelligently and cooperatively with responsible online providers. President Obama has expressed the point: “Just as [traffickers] are now using technology and the Internet to exploit their victims, we’re going to harness technology to stop them.” Press Release, The White House, Remarks by the President to the Clinton Global Initiative (Sept. 25, 2012).⁹ And California Attorney General Kamala Harris has noted that technology can provide a “digital trail” for law enforcement, prevent and disrupt human trafficking online, and provide new ways of outreach to victims and raising public awareness. *See* Letter from Attorney General Harris, *Human Trafficking*.¹⁰

Craigslist was “always very cooperative. Yeah, we don’t like it. But guess what? If you shut that down, they’re going to go somewhere else.”), available at <http://technologyandtrafficking.usc.edu/files/2012/11/USC-Annenberg-Technology-and-Human-Trafficking-2012.pdf>.

⁹ *See* <http://www.whitehouse.gov/the-press-office/2012/09/25/remarks-president-clinton-global-initiative>.

¹⁰ Available at <http://oag.ca.gov/human-trafficking>.

Technology companies increasingly are committing resources and expertise to use technology in the fight against sex trafficking. Mark Latonero, *et al.*, *The Rise of Mobile and the Diffusion of Technology-Facilitated Trafficking*, at 16 (2012). In June 2012, Microsoft Digital Crimes Unit and Microsoft Research created an initiative to support researchers with ideas for clarifying the role of technology in domestic minor sex trafficking. *Id.* In December 2011, Google granted \$11.5 million to counter-trafficking organizations, in part to support initiatives using technology to combat trafficking. *Id.* Other efforts are underway by Palentir Technologies, LexisNexis, and JP Morgan. *Id.* As scholar Mark Latonero noted, “[t]he private sector routinely mines consumer behavior data from online sources in order to craft marketing and advertising campaigns; the next logical step . . . is to mine the same data to craft solutions to social problems.” *Id.*

Backpage.com shares the view that technology can help fight sex trafficking. It thus takes numerous steps to discourage misuse of its website, making clear that users may not offer illegal services, and repeatedly emphasizing that it prohibits content relating to child exploitation. Its Terms of Use forbid any postings related to “exchanging sexual favors for money or other valuable consideration,” and “any material . . . that exploits minors in any way.”¹¹ Its Posting Rules state: **“Any post exploiting a minor in any way will be subject to criminal**

¹¹ <http://www.backpage.com/en-us/classifieds/TermsOfUse>.

prosecution and will be reported to the Cybertipline for law enforcement.” *McKenna*, 881 F. Supp. 2d at 1266.¹² The site urges users to report any post that may relate to suspected exploitation of minors or human trafficking and provides links to websites for the National Center for Missing and Exploited Children (“NCMEC”) and the National Human Trafficking Resource Center. *Id.*¹³

Backpage.com also takes extensive voluntary measures to police user posts. It uses a multi-tiered system that includes automated filtering of nearly all ads and two levels of manual review by more than 100 personnel. The filter pre-scans posts for over 98,000 “red-flag” terms, phrases, codes, e-mail addresses, URLs, and IP addresses. Through its monitoring and review system, Backpage.com blocks over a million posts every month. In addition, the site refers any ads (more than 450 in August 2014 alone) that may indicate child exploitation to NCMEC. *See generally McKenna*, 881 F. Supp. 2d at 1267.

Further, Backpage.com regularly cooperates with law enforcement, including by responding to subpoenas (the majority within 24 hours), and using its tools to mine additional evidence for investigations and

¹² *See also* <http://posting.seattle.backpage.com/online/classifieds/PostAdPPI.html/sea/seattle.backpage.com/?u=sea&serverName=seattle.backpage.com&superRegi on=Seattle§ion=4381&category=4443>.

¹³ *See, e.g.*, <http://www.backpage.com/en-us/online/classifieds/PopUp?page=StopTrafficking>; <http://posting.seattle.backpage.com/online/classifieds/ReportAd?oid=9616975>; <http://posting.seattle.backpage.com/online/classifieds/PostAdPPI.html/sea/seattle.backpage.com/>; <http://www.backpage.com/online/UserSafety>.

prosecutions. Law enforcement agencies often praise Backpage.com for its prompt responses and vigilance in the fight against trafficking and child exploitation. The following are a few of hundreds of similar messages:

From an FBI official:

Mr. Ferrer,

You just made my day. ... We want to submit your name for recognition of your assistance following this case. Thanks

From a Texas official:

Certainly Carl, your staff did a great job! We appreciate Backpage's vigilance to help protect kids. On our team over the weekend were the Secret Service, Department of Homeland Security, the United States Attorney's Office and several local law enforcement agencies and all commented on how effective Backpage was on getting the ads removed quickly and blocking future ads from the same poster's. ... Thanks.

From the FBI:

Dear Backpage Staff,

As always, thank you for the exceptionally prompt response and for your research efforts. It is always a pleasure to deal with Backpage.

From a Massachusetts official:

... I can't thank you and your staff enough for being so responsive and supportive of my and other law enforcement efforts concerning these cases. Your company's level of cooperation is not the norm and makes a huge difference in our ability to target and ultimately arrest the offender.

Indeed, in the past amicus NCMEC praised Backpage.com for "aggressively reviewing their ads and trying to remove those ads that are unlawful and suggest they involve the sale of kids for sex." Cornelius Frolik, *Sex trade thrives by exploiting Internet*, Dayton Daily News, Sept.

27, 2011 (quoting NCMEC's then CEO and executive director Ernie Allen).¹⁴ Its CEO also commented that Backpage.com appears to be genuinely committed to helping stop sex trafficking. *Id.* Indeed, Backpage.com believes no other website does as much to locate and report suspected sex trafficking and to aid law enforcement efforts to rescue victims and prosecute and convict traffickers.

Backpage.com undertakes these efforts because it is committed to fighting sex trafficking. Section 230 is an important component to enable these efforts. One of Congress's express purposes in section 230 was to "remove disincentives for the development and utilization of blocking and filtering technologies ... to restrict ... access to objectionable or inappropriate online material." 47 U.S.C. § 230(b)(4); *see also McKenna*, 881 F. Supp. 2d at 1273 (making Backpage.com and other sites liable for prohibiting content would "create[] an incentive for online service providers *not* to monitor the content that passes through [their] channels[,] precisely the situation that the CDA was enacted to remedy").

This case is about Section 230; it is not about the evils of sex trafficking, which no one disputes. Amici's theories would contradict the express language and purpose of Section 230. Amici certainly may advocate their opinions and views publicly, but they add nothing to the legal issue to be decided in this case.

¹⁴ *See* <http://www.daytondailynews.com/news/crime/sex-trade-thrives-by-exploiting-internet-1260014.html>.

B. Amici's Legal Arguments Repeat Those of Plaintiffs and Similarly Lack Merit.

1. Amici Disregard Established Case Law Interpreting Section 230.

To the extent amici raise legal arguments (and, for the most part, only the Attorney General does), they repeat what Plaintiffs have said.¹⁵ Like Plaintiffs, amici cannot negate Section 230 and the hundreds of cases enforcing websites' broad immunity for third-party content, including several decided since Backpage.com filed its reply.¹⁶

The AG argues Plaintiffs have sufficiently pled their claims to avoid Section 230 immunity by alleging (a) Backpage.com labels a category on its website "Escorts"; (b) Backpage.com has supposedly "made itself the go-to website" for prostitution; and (c) Backpage.com's self-policing measures to prohibit and prevent ads for illegal activities are allegedly a sham. AG Amicus Br. at 5. The AG contends "[t]hese ... allegations distinguish this case from all or almost all the cases Backpage.com has cited that found immunity under [Section] 230." *Id.* In fact, however, the AG offers nothing to distinguish the extensive case law upholding Section 230's broad immunity, and simply ignores it.

¹⁵ This, too, is inappropriate for an amicus. See *Ryan v. Commodity Futures Trading Comm'n*, 125 F.3d 1062, 1063 (7th Cir. 1997) (amicus briefs that merely duplicate arguments of a party are improper).

¹⁶ See, in particular, *Jones v. Dirty World Entertainment Recordings LLC*, 755 F.3d 398 (6th Cir. 2014) and *Klayman v. Zuckerberg*, 753 F.3d 1354 (D.C. Cir. 2014). Both are addressed in more detail below.

First, five cases (four concerning Backpage.com) have held that ads for escort services are protected by the First Amendment, websites such as Backpage.com and Craigslist cannot be held liable for permitting third parties to post such ads, and these sites are entitled to Section 230 immunity. *See* App. Br. at 24-26; App. Reply Br. at 12-13, 16-18. The AG does not address these cases.¹⁷ Most notably, the AG does not mention *McKenna*, 881 F. Supp. 2d at 1273-75, in which it made and lost the same argument that “all online advertisements for escort services are actually offers for prostitution.” *Id.* at 1282; *see* AG Amicus Br. at 8 (repeating argument).¹⁸

The AG’s string-cites of thirty-odd criminal cases do not support its position. *See* AG Amicus Br. at 6-7 nn.2, 3. Even assuming these cases were as the AG describes them—cases where “persons operating ‘escort’ businesses [were] engaged in prosecution [sic]”¹⁹—none holds

¹⁷ The AG cites one of these cases, *M.A. v. Village Voice Media Holdings, LLC*, 809 F. Supp. 2d 1041 (E.D. Mo. 2011), but says only that the Court should disregard it, *see* AG Amicus Br. at 12, 13, notwithstanding that *M.A.* involved facts and claims essentially identical to this case, *see* App. Reply Br. at 12-13.

¹⁸ The State also ignores the two other cases enjoining Tennessee and New Jersey laws patterned after Washington’s law on the same grounds. *See Cooper*, 939 F. Supp. 2d at 822-26; *Hoffman*, 2013 WL 4502097, at *5-6.

¹⁹ Several cases mention the term “escort” in passing. *See, e.g., United States v. Tavares*, 705 F.3d 4, 18 (1st Cir.) (mentioning only that defendant had referred to escort services), *cert. denied*, 133 S. Ct. 2371 (2013); *State v. Gregory*, 158 Wn.2d 759, 786, 789, 147 P.3d 1201 (2006) (no error in exclusion of evidence that rape victim had worked for escort service); *State v. Coleman*, 130 Or. App. 656, 660-61, 883 P.2d 266 (1994) (referring to “escorts” only to note that defendant was not linked to another party’s escort service); *State v. Schwartz*, 188 Ariz. 313, 935 P.2d 891 (Ariz. Ct. App. 1996) (referring only to a fictitious escort business an undercover officer falsely told the defendant she operated).

that escort services are unlawful.²⁰ None involved prosecution for publishing third-party escort ads. If anything, the AG's cases show that state and federal criminal laws provide appropriate redress for sex trafficking victims. This is consistent with Section 230, which permits liability for those who create and post unlawful content on a website, but not for the site itself. *See Jones*, 755 F.3d at 417.²¹

The claim that Plaintiffs may avoid Section 230 immunity merely by alleging a name or title is a euphemism for something else severely undermines the immunity Congress intended. If that were true, nothing would prevent plaintiffs from maintaining claims on the premise that representing sports memorabilia as "authentic" must mean "fake," *cf. Gentry v. eBay, Inc.*, 99 Cal. App. 4th 816, 121 Cal. Rptr. 2d 703 (2002), that references to ticket re-sales mean scalping, *see Hill v. StubHub, Inc.*, 727 S.E.2d 550 (N.C. Ct. App. 2012), or that housing ads euphemistically suggest discrimination, *see Chicago Lawyers' Comm. for Civil Rights*

²⁰ As also noted before, this argument contravenes laws throughout Washington and the country that escort services and ads for such services are legal. *See App. Br.* at 30-31 & n.13; *see also McKenna*, 881 F. Supp. 2d at 1279, 1282 ("numerous states license, tax and otherwise regulate escort services as legitimate businesses"); *Dart v. Craigslist, Inc.*, 665 F. Supp. 2d 961, 968 (N.D. Ill. 2009) ("Plaintiff is simply wrong when he insists that [the adult services category and related subcategories] are all synonyms for illegal sexual services.").

²¹ The State also cites one civil case, *First Global Communications, Inc. v. Bond*, 413 F. Supp. 2d 1150 (W.D. Wash. 2006), in the same misleading fashion as Plaintiffs. *Resp. Br.* at 28. The case was a trademark dispute involving competing website domain names in which the court made no findings about the term "escort," but simply noted that the plaintiff in that case admitted the discussion of "escort services" on that site was "essentially a euphemism for prostitution services." 413 F. Supp. 2d at 1152.

Under Law, Inc. v. Craigslist, Inc., 519 F.3d 666 (7th Cir. 2008). As is true of the AG's other arguments, this too has been consistently rejected by courts. *See, e.g., Jones*, 755 F.3d at 416 (rejecting district court's conclusion that TheDirty.com was not entitled to Section 230 immunity because the site's name encouraged defamatory material, *see Jones v. Dirty World Entm't Recordings, LLC*, 840 F. Supp. 2d 1008, 1012 (E.D. Ky. 2012)); *S.C. v. Dirty World, LLC*, 2012 WL 3335284, at *5 (W.D. Mo. Mar. 12, 2012) (rejecting same argument; "the CDA focuses on the specific content at issue and not the name of a website").²²

The AG's assertions about "Backpage.com's business model," that it "profits" from ads on the site, and that it supposedly is the "go-to website" for online prostitution, AG Amicus Br. at 5, 8, all are likewise irrelevant under Section 230. Allegations that a website should know (or does know) about unlawful content cannot overcome Section 230 immunity. *See App. Reply Br.* at 10-13; *M.A.*, 809 F. Supp. 2d at 1050 ("It is, by now, well established that notice of the unlawful nature of the information provided is not enough to make it the service provider's own speech." (quoting *Universal Comm'n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 420 (1st Cir. 2007))). Allegations that a website earns profits from

²² *See also Ascentive, LLC v. Opinion Corp.*, 842 F. Supp. 2d 450, 475-76 (E.D.N.Y. 2011) (same for PissedConsumer.com); *GW Equity LLC v. Xcentric Ventures LLC*, 2009 WL 62173 (N.D. Tex. Jan. 9, 2009) (same for Ripoffreport.com and Badbusinessbureau.com and category for "corrupt companies"); *Global Royalties, Ltd. v. Xcentric Ventures, LLC*, 544 F. Supp. 2d 929 (D. Ariz. 2008) (same for ripoffreport.com); *Whitney Info. Network, Inc. v. Xcentric Ventures, LLC*, 2008 WL 450095 (M.D. Fla. Feb. 15, 2008) (same).

third-party postings are similarly irrelevant. *M.A.*, 809 F. Supp. 2d at 1050; *Hill*, 727 S.E.2d at 560.

The AG's arguments are variations on Plaintiffs' theme that Backpage.com "developed" content because the website allegedly "encourages" unlawful postings. This is a theory many courts have rejected before. *See, e.g., Nemet Chevrolet Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 257-58 (4th Cir. 2009) (rejecting argument that website loses Section 230 immunity because of its "structure and design" and allegations that it "solicited" content). And the Sixth Circuit again rejected this argument months ago in *Jones*, 755 F.3d 398.

Jones concerned TheDirty.com, a website that solicited users to provide "dirt" about private parties, then selected, featured, and commented on user posts. The district court held the website was not entitled to Section 230 immunity because it allegedly "encourage[d] illegal or actionable third-party postings," and therefore was a "developer" of the posts. *Jones v. Dirty World Entm't Recordings, LLC*, 965 F. Supp. 2d 818, 821 (E.D. Ky. 2013). The Sixth Circuit reversed and held that interpreting "development" to encompass allegations about what a website "encourages" would eclipse Section 230 immunity. 755 F.3d at 413-14. "Many websites not only allow but also actively invite and encourage users to post particular types of content. Some of this content will be unwelcome to others." *Id.* at 414. An encouragement theory would leave courts to the vagaries of assessing what "constitutes 'encouragement' in order to determine immunity under the CDA," and subject websites to

“heckler’s suits” by any person who objects to content, forcing websites to take it down or face liability. *Id.* at 414-15. The court wrote: “Congress envisioned an uninhibited, robust, and wide-open internet, *see* § 230(a)(1)-(5), but the muddiness of an encouragement rule would cloud that vision.” *Id.* at 415.²³ Thus, the AG’s assertions that Section 230 affords no protection if a plaintiff alleges a website encourages, solicits, knows or should know of unlawful content are irrelevant under established law.

The AG also parrots Plaintiffs’ arguments that Backpage.com’s rules and restrictions prohibiting improper posts “are a sham,” AG Amicus Br. at 5, and instead should be interpreted as encouraging unlawful ads, *id.* at 9. Again, allegations that a website “encourages” content cannot defeat Section 230 immunity. Moreover, to allow Plaintiffs (or amici) to assert that Backpage.com or other websites should lose Section 230 immunity because of allegations that posting rules and monitoring are not sufficiently effective or a “sham” would destroy the CDA’s purpose to encourage self-policing. *See* App. Reply Br. at 18-20. For if this were the case, websites would stop imposing or enforcing rules. As the D.C. Circuit recently held, any reading of Section 230 that *permits* liability for steps a website voluntarily takes to restrict offensive content “would put Section 230 at war with itself.” *Klayman*, 753 F.3d at 1358.

²³ The Sixth Circuit’s interpretation of Section 230 is consistent with prior cases, particularly *Roommates.com*, in which the Ninth Circuit concluded that forcing websites to “fight[] off claims that they promoted or encourage—or at least tacitly assented to—the illegality of third parties” would “cut the heart out of section 230.” *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1174 (9th Cir. 2008) (en banc).

Indeed, while Plaintiffs and the AG argue that Backpage.com’s rules are illusory because they are too detailed, *see* Resp. Br. at 21, AG Amicus Br. at 9, other amici argue that Backpage.com should impose additional and more specific rules and restrictions, *see, e.g.*, NCVLI Amicus Br. at 17-18; CATW Amicus Br. at 18-19; NCMEC Amicus Br. at 11-14. Either way, these arguments contradict Section 230’s prohibition of liability for exercising publisher functions—any decision or activity about whether to exclude third-party content or how to screen such content “is perforce immune.” *Roommates.com*, 521 F.3d at 1170-71; *see* App. Reply Br. at 20.

Plaintiffs and amici cannot override section 230 by insisting Backpage.com should implement more measures to screen ads. *See Doe v. MySpace, Inc.*, 528 F.3d 413, 420 (5th Cir. 2008) (dismissing claims based on assault of minor who met a man through the MySpace website, where plaintiff sought to hold site liable “for its failure to implement measures that would have prevented [the abuse]”); *Doe II v. MySpace Inc.*, 175 Cal. App. 4th 561, 573, 96 Cal. Rptr. 3d 148 (2009) (dismissing claims that website did not take steps to prevent sexual predators from using the site, because that “activity—to restrict or make available certain material—is expressly covered by section 230”). *See* App. Br. at 28-29 & n.12. Likewise, they cannot avoid Section 230 with their “white-is-black” allegation that Backpage.com’s posting rules and extensive screening must be the opposite of what they are.

2. Dismissal Under CR 12(b)(6) Is Appropriate and Necessary to Respect CDA Section 230.

The AG also repeatedly claims the Court should allow this case to go forward under the 12(b)(6) standards “[b]ecause it is possible that facts can be established to support the allegations in the complaint,” and so the AG contends Plaintiffs should be entitled to discovery. AG Amicus Br. at 2, 8, 9. This too ignores the law under Section 230, which directs courts to apply the immunity “at the earliest possible stage of the case,” because the statute’s aim is not just to protect websites from ultimate liability but also “from ‘having to fight costly and protracted legal battles.’” *Nemet Chevrolet*, 591 F.3d at 255 (quoting *Roommates.com*, 521 F.3d at 1175). See App. Br. at 41; App. Reply Br. at 22-25. The Sixth Circuit reiterated the point: “Given the role that the CDA plays in an open and robust internet by preventing the speech-chilling threat of the heckler’s veto, we point out that determinations of immunity under the CDA should be resolved at an earlier stage of litigation.” *Jones*, 755 F.3d at 417.

In response, the AG points to three cases that survived motions to dismiss based on Section 230. AG Amicus Br. at 9-11. But all three concerned claims against defendants for content *they created*, not third-party content.²⁴ (This is also a rehash of Plaintiffs’ argument. See App.

²⁴ *F.T.C. v. LeanSpa, LLC*, 920 F. Supp. 2d 270 (D. Conn. 2013), involved a defendant that created fake news sites to market weight-loss products. *Id.* at 273. The court denied the motion to dismiss because the FTC alleged the defendant planned and coordinated creation of the fake news sites and the strategy of using the deceptive content. *Id.* at 276-77. In *CYBERsitter, LLC v. Google Inc.*, 905 F. Supp. 2d 1080 (C.D. Cal. 2012), the court denied a motion to dismiss where the plaintiff claimed Google, through its “AdWords” program, sold to a third party

Reply Br. at 8-9.) Here, in contrast, the Plaintiffs *admit* Backpage.com did *not* create the ads Plaintiffs allege caused them harm. *See* App. Br. at 4; CP 2 ¶ 1.2; CP 17-18 ¶ 5.2.

It bears repeating that courts *routinely* grant motions to dismiss on the pleadings in Section 230 cases. *See* App. Reply Br. at 23-24. Indeed, in just the four months since Appellants filed their reply brief, over a dozen new cases have granted or affirmed such dismissals. A few examples: *Klayman*, 753 F.3d 1354 (affirming 12(b)(6) dismissal of claims against Facebook, on ground that Section 230 prohibits liability for website's failure to remove offensive post); *Jones*, 755 F.3d 398; *Dowbenko v. Google Inc.*, — F. App'x —, 2014 WL 4378742 (11th Cir. Sept. 5, 2014) (affirming 12(b)(6) dismissal based on Section 230).²⁵

the right to use the plaintiff's trademark and assisted in incorporating and displaying the trademark in the third party's advertising. *Id.* at 1087. In *Hy Cite Corp. v. Badbusinessbureau.com, L.L.C.*, 418 F. Supp. 2d 1142 (D. Ariz. 2005), the court denied dismissal where the plaintiff alleged the defendant (operator of the Ripoff Report website) produced the content at issue—editorial comments and derogatory headings—and solicited individuals to submit reports by compensating them. *Id.* at 1149. Later cases have recognized this distinction in *granting* Section 230 dismissal motions. *See, e.g., Global Royalties, Ltd. v. Xcentric Ventures, LLC*, 2007 WL 2949002, at *3 (D. Ariz. Oct. 10, 2007) (granting Ripoff Report's motion to dismiss); *Dart*, 665 F. Supp. 2d at 969 n.9 (distinguishing *Hy Cite* as a case where "plaintiff alleged that the defendant created the allegedly defamatory content").

²⁵ *See also Am. Income Life Ins. Co. v. Google, Inc.*, 2014 WL 4452679, at *6-8 (N.D. Ala. Sept. 8, 2014) (granting 12(b)(6) motion and holding that Section 230 immunizes Google from liability for search results leading to third-party content); *Joseph v. Amazon.com, Inc.*, — F. Supp. 2d —, 2014 WL 4269505, at *7-9 (W.D. Wash. Aug. 28, 2014) (granting dismissal and alternatively summary judgment of claims based on allegedly defamatory reviews on Amazon.com); *Obado v. Magedson*, 2014 WL 3778261 (D.N.J. July 31, 2014) (granting motion to dismiss claims against Ripoff Report and others based on Section 230).

Amici, like Plaintiffs, argue the complaint here should survive under Washington's standard for assessing 12(b)(6) motions. AG Amicus Br. at 2 (citing *McCurry v. Chevy Chase Bank FSB*, 169 Wn.2d 96, 101-03, 233 P.3d 861 (2010)); NCMEC Amicus Br. at 2 (urging the Court should consider hypothetical facts). They are wrong for several reasons.

First, what they ask the Court to accept are not facts but conclusions, *e.g.*, that Backpage.com allegedly assisted in the development of content on the website. On a CR 12(b)(6) motion, Washington courts do *not* credit conclusory allegations, *Haberman v. Wash. Pub. Power Supply Sys.*, 109 Wn.2d 107, 120, 744 P.2d 1032, 750 P.2d 254 (1987), particularly not ones about “the fundamental legal issue of the case.” *Pirak v. Schoettler*, 45 Wn.2d 367, 370, 274 P.2d 852 (1954). App. Br. at 39-43.

Second, even assuming Plaintiffs' allegations were factual, courts may disregard facts that are irrelevant. *Haberman*, 109 Wn.2d at 121; *see also* App. Reply Br. at 21-24. In applying Section 230 immunity, it is not relevant that a website “encourages” content, it earns money, or a plaintiff

One other recent case deserves brief mention, *Doe v. Internet Brands, Inc.*, — F.3d —, 2014 WL 4627993 (9th Cir. Sept. 17, 2014), but only to note that it has no bearing here. The plaintiff in that case, an aspiring model who posted her profile on defendants' website, alleged that two individuals used the site to lure her to a fake audition then drugged and raped her. *Id.* at *1. She alleged the website knew of the rape scheme and asserted a failure to warn claim under California law. The Ninth Circuit did not address whether such a claim was viable, *id.* at *2, but held that it did not fall within Section 230 because the plaintiff did not seek to hold the website liable as the publisher or speaker of any content or for failing to remove content (the rapists did not post anything on the website but merely used it to contact plaintiff). *Id.* at *3-4. Unlike *Doe*, Plaintiffs' claims here are based solely on the ads the pimps created and posted, and seek to hold Backpage.com liable for publishing the ads.

contends the site is not “legitimate.” What is relevant is which party created the content that allegedly caused harm (Plaintiffs admit the pimps created the ads here), and whether a website required the content (obviously, Backpage.com did not), *see Roommates.com*, 521 F.3d at 1172, or retained and compensated someone to create the content (also concededly not so here), *see F.T.C. v. Accusearch, Inc.*, 570 F.3d 1187, 1199-1200 (10th Cir. 2009). None of Plaintiffs’ allegations can change the fact that their claims seek to hold Backpage.com liable for publishing third-party content, and that is what Section 230 forbids.

Finally, if Plaintiffs and amici could avoid Section 230 in Washington State by artful pleading or offering speculation as “hypothetical facts,” that would defeat federal rights of immunity, and such a result would be preempted. In general, federal substantive rights cannot be defeated by state procedural practice, *Brown v. W. Ry. of Ala.*, 338 U.S. 294, 296 (1949), as that would result in different outcomes depending on whether claims are heard in state or federal court, *Felder v. Casey*, 487 U.S. 131, 138 (1988). More importantly here, a state rule or interpretation denying immunity would be expressly preempted by Section 230 itself. Section 230 not only precludes imposing liability on websites, but provides that “[n]o *cause of action may be brought* ... under any State or local law that is inconsistent with this section.” 47 U.S.C. 230(e)(3). Section 230 prescribes an objective test to apply immunity. To allow Plaintiffs to

continue with their claims by offering speculation or hypotheses would be inconsistent with Section 230.²⁶

3. The Court Should Ignore Amici's Attempt To Rewrite the Congressional Intent of Section 230

The AG and NCMEC invite the Court to “reexamine” Congress’s intent in Section 230, notwithstanding courts’ uniform interpretation that it provides “broad immunity,” *Carafano v. Metroplash.com, Inc.*, 339 F.3d 1119, 1123 (9th Cir. 2003), to promote “unregulated development of free speech on the Internet” and encourage self-policing, *Batzel v. Smith*, 333 F.3d 1018, 1027-28 (9th Cir. 2003); *see* App. Br. at 10-16.

NCMEC repeats Plaintiffs’ argument that Congress intended Section 230 to “protect children from pernicious content online.” NCMEC Amicus Br. at 15-16. Just as Plaintiffs did, NCMEC cites statements of Senator Exon that did not concern Section 230, but a

²⁶ NVIC raises one other argument—that applying Section 230 here would somehow deny Plaintiffs their federal “constitutional right to access the courts” for redress. NVIC Amicus Br. at 18. The Court should disregard this argument, first, because it is raised solely by amici. *See Long v. Odell*, 60 Wn.2d 151, 154, 372 P.2d 548 (1962) (“case must be made by the parties litigant, and its course and the issues involved cannot be changed or added to by friends of the court”). In any event, the right of access does not convey a substantive right to any particular cause of action. *Christopher v. Harbury*, 536 U.S. 403, 415 (2002) (“the constitutional right of access to courts...is ancillary to the underlying claim, without which a plaintiff cannot have suffered injury by being shut out of court”). As such, it is not violated, or even implicated, by a statutory defense like Section 230. “The right to petition... is not violated by a statute that provides a complete defense to a cause of action or curtails a category of causes of action.” *City of New York v. Beretta U.S.A. Corp.*, 524 F.3d 384, 397-98 (2d Cir. 2008) (statute immunizing gun manufacturers from suit based on third-party criminal’s use of a weapon did not violate right of access); *Laws v. City of Seattle*, 2009 WL 3836122, at *3-4 (W.D. Wash. Nov. 12, 2009) (malicious prosecution statute does not violate right to petition).

different amendment to the Telecommunications Act of 1996 (which ultimately became part of Section 223). *See Reno v. ACLU*, 521 U.S. 844, 858-60 (1997). Senator Exon's amendment imposed criminal penalties on websites for transmitting indecent or patently offensive materials to minors, allowing affirmative defenses that a defendant took effective actions to restrict minors' access or required age verification. *See id.* at 860 & n.26 (quoting 47 U.S.C. § 223(d) and (e) as they then existed). Section 230 came later, in a House amendment offered by Representatives Wyden and Cox in opposition to Senator Exon's amendment, with the aim instead of "proclaim[ing] an Internet free of government interference." Robert Cannon, *The Legislative History of Senator Exon's Communication's Decency Act: Regulating Barbarians on the Information Superhighway*, 49 FED. COMM. L.J. 51, 67 (1996). Both amendments passed, and the law as a whole is referred to as the Communications Decency Act.

However, just a year later, in *Reno* the Supreme Court struck down the provisions from the Exon amendment, holding that they infringed free speech rights and the age verification defense itself burdened speech and was unreasonable given the realities of the Internet. 521 U.S. at 874-79, 881-82; *see also* App. Reply at 3 n.1. Thus, the lesson of the competing CDA amendments is that Senator Exon's effort to legislate decency violated the First Amendment, while Section 230 and its objective of protecting Internet free speech survived. Given this history, NCMEC and

Plaintiffs cannot plausibly contend that enforcing Backpage.com's immunity offends Congress's intent.

Otherwise, the AG cites a student law review comment to suggest the Court should reinterpret Section 230. *See* AG Amicus Br. at 13-14 (citing and quoting Ryan J.P. Dyer, Comment, *The Communications Decency Act Gone Wild: A Case for Renewing the Presumption Against Preemption*, 37 SEATTLE U. L. REV. 837, 854 (Winter 2014)). The AG asks the Court to accept the view expressed in the comment that Section 230 should only preclude claims for publisher liability, not distributor liability, AG Amicus Br. at 14, though no court has ever interpreted Section 230 this way, and the argument is irrelevant here because Plaintiffs seek to hold Backpage.com liable as a publisher. Moreover, the comment acknowledges its proposal to narrow Section 230 immunity is based on an "expansive reading" of the statute, *see* 37 SEATTLE U. L. REV. at 859-60, "would not be a practical solution given the enormous burden it would place on legitimate websites and the dampening effect it would have on free speech," *id.* at 860, and ultimately would require new legislation amending Section 230, *id.* at 861. The Court should not reinterpret Section 230, but should respect its consistent interpretation by courts across the country in the eighteen years since it was enacted.

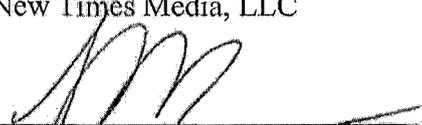
III. CONCLUSION

Amici ask this Court to ignore Section 230 and to find some basis to conclude Backpage.com is not entitled to the broad immunity it provides because they would like to shut down the website. Amici's

arguments have virtually nothing to do with Section 230 or the hundreds of cases interpreting the law. Permitting this case to proceed based on such arguments—and notwithstanding that Section 230 immunity is apparent here—would create a troubling prospect for *all* online service providers, for the Internet as a whole, and for the First Amendment.

RESPECTFULLY SUBMITTED this 10th day of October, 2014.

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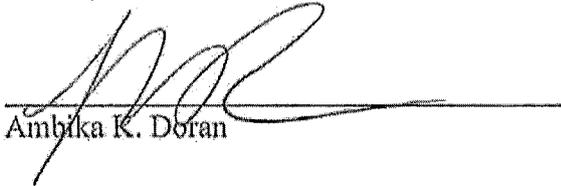
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Declared under penalty of perjury under the laws of the state of
Washington this 10th day of October, 2014.


Ambika K. Doran

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Subject: RE: Supreme Court Case No. 90510-0 - J.S., et al v. Village Voice Media Holdings - Appellants' Consolidated Response to Amicus Briefs

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Subject: Supreme Court Case No. 90510-0 - J.S., et al v. Village Voice Media Holdings - Appellants' Consolidated Response to Amicus Briefs

Attached for filing is Appellants' Consolidated Response to Amicus Briefs.

Case Name: J.S., et al., Respondents v. Village Voice Media Holdings, LLC, et al., Appellants
Case Number: Supreme Court No. 90510-0
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Thank you, Keith Morton, Secretary to Ambika Doran

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