

No. 15-1724

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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

v.

BACKPAGE.COM, LLC; CAMARILLO HOLDINGS, LLC (F/K/A VILLAGE
VOICE MEDIA HOLDINGS, LLC); AND NEW TIMES MEDIA, LLC,
Defendants – Appellees.

Appeal from a Final Judgment of the
United States District Court for the District of Massachusetts

**BRIEF OF *AMICUS CURIAE* COMMONWEALTH OF MASSACHUSETTS
IN SUPPORT OF PLAINTIFFS-APPELLANTS AND REVERSAL**

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October 5, 2015

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STATEMENT OF INTEREST

The Attorney General for the Commonwealth of Massachusetts respectfully submits this *amicus curiae* brief on behalf of the Commonwealth in support of plaintiffs-appellants pursuant to Federal Rule of Appellate Procedure 29(a).

As the Commonwealth's chief law enforcement officer, the Attorney General has a statutory and common law duty to protect the public interest and enforce state law for the benefit of the residents of the Commonwealth, including those who are most vulnerable to abuse and victimization. Because human trafficking is a serious and widespread problem in the Commonwealth, causing unspeakable physical, psychological, and financial harm, the Attorney General's Office has been aggressive in its efforts to tackle the problem. It established a Human Trafficking Division and led efforts to pass the comprehensive human trafficking legislation at issue in this case. The Attorney General also chairs a statewide Interagency Human Trafficking Task Force charged with addressing all aspects of human trafficking. Accordingly, the Attorney General has a particular interest in ensuring that state laws, including Mass. Gen. Laws c. 265, § 49 *et seq.* ("Massachusetts Anti-Trafficking Law") and Mass. Gen. Laws c. 93A, § 2 ("Chapter 93A"), remain viable tools for redressing conduct by individuals and

entities—including websites—that facilitate human trafficking in the Commonwealth.¹

Appellants’ experiences being trafficked for sex as minors in Massachusetts are both heartbreaking and much too familiar. A staggering number of minors are trafficked each year in the United States, often through the Internet. Modern sex trafficking operations frequently target at-risk young people, advertise them online, and then transport them within and between states to be sold for sex. In fact, online advertising is now a critical component of sex trafficking, and Backpage dominates the market. But, appellants allege that Backpage does far more than host third-party advertisements selling minors for sex. According to appellants’ allegations, Backpage has perfected a business model predicated on facilitating pimps and traffickers in illegal sex trafficking, including by deceiving the public and law enforcement in order to protect its profits and prevent more intense scrutiny. If these allegations are true, subjecting Backpage to liability under the Massachusetts Anti-Trafficking Law and Chapter 93A is entirely consistent with both the purpose and scope of the Communications Decency Act, 47 U.S.C. § 230 (“CDA”)—a law that was enacted in large part to protect children. Because

¹ Though appellants have asserted claims under a number of state and federal laws, this brief focuses on the state laws for which the Attorney General has primary enforcement authority.

appellants sufficiently stated claims against Backpage that are not precluded by the CDA, Backpage's motion to dismiss those claims should have been denied.

ARGUMENT

I. APPELLANTS' COMPLAINT TELLS A FAMILIAR AND INCREASINGLY COMMON STORY ABOUT CHILD SEX TRAFFICKING

Appellants' allegations are consistent with the Commonwealth's experience and understanding of the problem of human trafficking generally, and sex trafficking in particular.

A. The Problem of Human Trafficking

Human trafficking is a form of criminal enterprise in which women and girls in particular, but also men and boys, are exploited for labor and commercial sex. It is a widespread and urgent problem in Massachusetts and throughout the country. In fact, human trafficking is one of the largest and fastest growing criminal enterprises in the world—second only to narcotics trafficking.² The nature of the crime and the isolation of its victims make statistical research difficult, but some experts estimate that there are as many as 27 million victims of human trafficking

² U.S. Dep't of Homeland Security, *Blue Campaign: What is Human Trafficking?*, <http://www.dhs.gov/blue-campaign/what-human-trafficking> (last visited Oct. 5, 2015).

worldwide at any given time,³ including 4.5 million people trapped in sexual exploitation.⁴

The widespread nature of human trafficking is driven by high profits and low risk. Like narcotics and arms trafficking, human trafficking is a market-driven criminal industry. Unlike drugs or weapons, however, human beings are a reusable resource. The same girl can be sold for sex hundreds or thousands of times by the same trafficker, and the demand is substantial. Jane Doe Nos. 1 and 2 were sold for sex between 5 and 15 times per day, and as many as 1,000 times overall. (SAC ¶¶ 71, 73, 90, 94). It is therefore no surprise that human trafficking brings in billions of dollars per year in profits for traffickers.⁵

B. Victims of Sex Trafficking

According to the Department of Justice, over 80% of suspected human trafficking incidents in the United States involve sex trafficking,⁶ and children are at particular risk. Some studies suggest that sex traffickers victimize hundreds of

³ U.S. Department of State, *Trafficking in Persons Report June 2013*, at 7 (2013), <http://www.state.gov/documents/organization/210737.pdf>.

⁴ Polaris, *Sex Trafficking in the U.S.*, <http://www.polarisproject.org/human-trafficking/sex-trafficking-in-the-us> (last visited Oct. 5, 2015).

⁵ Polaris, *Human Trafficking Overview*, <http://www.polarisproject.org/human-trafficking/overview> (last visited Oct. 5, 2015).

⁶ Banks, D. & Kyckelhahn, T., U.S. Dep't of Justice, Bureau of Justice Statistics *Characteristics of Suspected Human Trafficking Incidents, 2008-2010*, at 1 (April 2011), <http://bjs.ojp.usdoj.gov/content/pub/pdf/cshti0810.pdf>.

thousands of children annually in the United States and that over half of sex trafficking victims are under age 18.⁷ On average, girls first enter into the sex trade between the ages of 12 and 14 years old.⁸ Jane Doe Nos. 1, 2, and 3 each were first trafficked when they were only 15 years old. (SAC ¶¶ 72, 91, 105). These children are brought into the sex industry—often referred to as “the life”—and are then forced, through a variety of physical, psychological, and emotional forms of abuse, to stay there.⁹ Jane Doe No. 1, for example, was trafficked for a year and a half, while Jane Doe No. 2 was trafficked over the course of two years. (SAC ¶¶ 71, 91). Many victims remain in the life much longer.

Not all victims of human trafficking are young girls, but some data suggest that almost 95 percent of sex trafficking victims are female. The data also suggest that more than half are Latina or African-American—far exceeding their

⁷ U.S. Dep’t of Justice, Office of Juvenile Justice & Delinquency Prevention, *Literature Review: Commercial Sexual Exploitation of Children/Sex Trafficking*, at 3 (2014), <http://www.ojjdp.gov/mpg/litreviews/CSECSEXtrafficking.pdf> [hereinafter *DOJ Literature Review*].

⁸ Clawson, H., Dutch, N., Solomon, A., & Goldblatt Grace, L., U.S. Dep’t of Health & Human Services, *Human Trafficking Into and Within the United States: A Review of the Literature* (August 2009), <http://aspe.hhs.gov/hsp/07/humantrafficking/litrev/>.

⁹ U.S. Dep’t of Health & Human Services, *Sex Trafficking Fact Sheet*, http://www.acf.hhs.gov/sites/default/files/orr/fact_sheet_sex_trafficking.pdf [hereinafter *HHS Fact Sheet*].

representation in the general population.¹⁰ In addition, there is evidence that LGBTQ youth are especially susceptible to sex trafficking.¹¹

Irrespective of gender, race, or sexual orientation, however, most victims of sex trafficking share certain characteristics that leave them particularly vulnerable to traffickers, including poverty, limited education, lack of work opportunities, lack of family support, histories of physical or sexual abuse, substance abuse, and mental health problems.¹² Reports suggest that anywhere from 70 to 90 percent of commercially sexually exploited youth have a history of sexual abuse, and that a majority are or were formerly involved with child welfare services.¹³ The National Center for Missing & Exploited Children (NCMEC) also estimates that one in six endangered runaways become sex trafficking victims.¹⁴ Jane Doe No.1 was trafficked after twice running away from home. (SAC ¶¶ 72-73). Jane Doe No. 2 was trafficked after she left the residential program where she was living. (SAC ¶

¹⁰ See DOJ Literature Review, *supra* note 7, at 3.

¹¹ U.S. Dep't of Health & Human Services, Administration for Children, Youth & Families, *Guidance to States and Services on Addressing Human Trafficking of Children and Youth in the United States*, at 5 (September 2013), <http://www.acf.hhs.gov/programs/cb/resource/human-trafficking-guidance> [hereinafter *HHS Guidance*].

¹² Clawson et al., *supra* note 8, at 7.

¹³ HHS Guidance, *supra* note 11, at 3-4.

¹⁴ National Center for Missing & Exploited Children, <http://www.missingkids.com/KeyFacts> (last visited Oct. 5, 2015).

91). These young people are commonly recruited in public places like shopping malls and bus stops, around youth shelters, near schools and group homes, and over the Internet—all locations where vulnerable youth are easily targeted.¹⁵

C. Perpetrators of Sex Trafficking

Sex trafficking most often takes place in the context of pimp-controlled prostitution—on the street, through “escort” services, and at strip clubs, massage parlors, truck stops, hotels, and brothels. It also takes place within intimate partner relationships and families.¹⁶ Most trafficking operations in the Northeast are transient, mobile, and operating under layers of deception.¹⁷ Unlike other illicit markets, the sex trade is made up of mostly small-scale operations.¹⁸

Appellants’ experiences in this case are fairly typical examples of sex trafficking operations. Jane Doe No. 1’s trafficker required her to place daily advertisements on Backpage. (SAC ¶¶ 72-75). At his direction, she posted the advertisements using a pre-paid mobile phone and included the phone number for customers to call. (SAC ¶¶ 78-79). She was required to post the advertisements in

¹⁵ HHS Guidance, *supra* note 11, at 4.

¹⁶ *Id.* at 2; *see generally* Raymond, J. & Hughes, D., Coalition Against Trafficking in Women (2001), *Sex Trafficking of Women in the United States: International and Domestic Trends*, <https://www.ncjrs.gov/pdffiles1/nij/grants/187774.pdf>.

¹⁷ *Id.*

¹⁸ Annie Lowrey, *In-Depth Report Details Economics of Sex Trade*, N.Y. Times (March 12, 2014), http://www.nytimes.com/2014/03/12/us/in-depth-report-details-economics-of-sex-trade.html?_r=0.

multiple cities at the same time. (SAC ¶ 80). Her trafficker then moved her from city to city every one or two days, so that she was sold for sex in a number of different locations across both Massachusetts and Rhode Island. (SAC ¶¶ 80-81).

Jane Doe No. 2 was part of a trafficking operation including at least two other girls. (SAC ¶ 93). She was advertised on Backpage by either a pimp or an older female who worked closely with him (sometimes referred to as his “bottom”). (SAC ¶ 93). The advertisements were placed with either stolen or pre-paid credit cards, and Jane Doe No. 2 was given a pre-paid mobile phone to answer customer calls. (SAC ¶¶ 96-97). Jane Doe No. 2 and the other girls were trafficked in several cities in the Boston area. (SAC ¶ 98). Their pimp kept the girls in one place for no more than a week at a time. (SAC ¶ 98).

Jane Doe No. 3 was trafficked by a man and woman who picked her up at a friend’s home. (SAC ¶ 101). They took her to an apartment in Boston and then posted advertisements on Backpage using an anonymous, pre-paid debit card. (SAC ¶ 101). After receiving responses to the advertisements, Jane Doe No. 3’s traffickers drove her to a hotel in Foxborough, where she was raped by men who paid her trafficker. (SAC ¶ 103).

Appellants’ stories are also similar to many cases investigated and prosecuted by the Attorney General’s Office. In one of its first cases under the Massachusetts Anti-Trafficking Law, the Attorney General’s Office arrested a

Dorchester man in connection with an extensive human trafficking operation in and around Boston. The defendant allegedly recruited women with substance abuse problems, advertised them on Backpage, and then brought them to either hotels or “johns” homes to be sold for sex. In its most recent case, the Attorney General’s Office indicted a Randolph man who allegedly targeted and recruited a number of vulnerable women, advertised them on Backpage, and then brought them to hotels in Randolph and surrounding communities to be sold for sex. The defendant allegedly used violence and threats of violence to control the women.

D. The Role of the Internet

The Internet has had a profound effect on the sex trade and intensified the problem of human trafficking. In 2014, the Urban Institute issued the most comprehensive study of its kind, analyzing a number of different aspects of the economics of the sex trade. Consistent with the findings of earlier studies, the Urban Institute determined that the Internet has “transformed the street-based sex market.”¹⁹ The study concluded that as a result of the Internet, “the overall sex market has expanded, some sex workers are able to solicit dates to a broader clientele and are displaced from the streets, johns are able to organize dates more

¹⁹ Urban Institute, *Estimating the Size and Structure of the Underground Commercial Sex Economy in Eight Major US Cities*, at 234 (March 2014), <http://www.urban.org/uploadedpdf/413047-underground-commercial-sex-economy.pdf>.

covertly, and law enforcement detection has been reduced.”²⁰ The results of the study are consistent with appellants’ experiences. Jane Doe No. 1 estimates that she was advertised on Backpage as many as 300 times, often simultaneously in multiple cities. (SAC ¶¶ 80, 89). Jane Doe No. 2’s traffickers posted advertisements of her an average of six times per day. (SAC ¶ 94). Jane Doe No. 3’s traffickers also posted repeated advertisements of her each day. (SAC ¶ 101). Each of the hundreds of online advertisements for Jane Doe Nos. 1, 2 and 3 also led to anonymous communications with “johns” and to the girls being sold for sex repeatedly and in multiple locations.

The results of the Urban Institute study are also consistent with the experience of state and federal law enforcement agencies. The vast majority of prosecutions for sex trafficking now involve online advertising, and most of those advertisements appear on Backpage.²¹ In Massachusetts, seventy-five percent of the cases that the Attorney General has prosecuted under our state human trafficking law, plus a number of additional investigations, involve advertising on Backpage. While the Internet has been a useful investigative and evidentiary tool

²⁰ *Id.*

²¹ See Abigail Kuzma, *A Letter to Congress: The Communications Decency Act Promotes Human Trafficking*, 34 Child. Legal Rts. J. 23, 27-30 (2013).

in these particular cases, it has also contributed to a proliferation of prostitution and sex trafficking.

Websites like Backpage allow customers to shop for sex covertly from the privacy of their own homes or hotel rooms, and to further hide behind coded communications and anonymous transactions. In the experience of law enforcement—and Jane Doe Nos. 1, 2 and 3—these websites also allow sex traffickers to exploit a greater number of victims and to advertise their services more frequently and across geographic boundaries. Thus, overall, there are now many more trafficking cases that go undetected and/or unprosecuted.

E. Human Trafficking Is a Priority of State Attorneys General, Who Have Long Been Skeptical of Backpage’s Claims Regarding Its Efforts to Curb Child Sex Trafficking On Its Website

Given the scope of the sex trade and the profound harms it causes our residents, attorneys general across the country recognize that human trafficking has emerged as one of the most serious civil rights threats within the United States.²² All fifty states and the District of Columbia have passed human trafficking laws. The National Association of Attorneys General (“NAAG”) also made combating human trafficking a top priority by establishing a Special Committee on Human Trafficking to investigate and promote tools for combating trafficking at the state

²² NAAG, *Resolution in Support of the Principles Embodied within the NAAG 2012 Presidential Initiative on Human Trafficking*, http://www.naag.org/assets/files/pdf/resolution.201203.Human_Trafficking.pdf.

level.²³ These include law enforcement and prosecution strategies, educational outreach efforts, and alliances with partner agencies and non-governmental organizations. As a part of these efforts, NAAG and state attorneys general have paid particular attention to Backpage.

It is well known that Backpage gets its name from the New York-based Village Voice newspaper, whose “back pages” were once known for classified advertisements for commercial sex. (SAC ¶ 23). It is no accident, therefore, that Backpage makes its money by selling ad space to individuals peddling sex. Nevertheless, Backpage continues to make public and private pronouncements concerning its efforts to curb prostitution and the sexual exploitation of children, including in letters and testimony to NAAG and state attorneys general.²⁴ For example, Backpage maintains that it enforces strict policies prohibiting illegal activity and aggressively monitors its website for illegal content. It also reportedly

²³ NAAG Human Trafficking Committee, <http://www.naag.org/naag/committees/naag-special-committees/human-trafficking-committee.php> (last visited Oct. 5, 2015).

²⁴ *See, e.g.*, Letter from Samuel Fifer, Esq. on Behalf of Backpage.com to NAAG (Sept. 23, 2011), http://agportals3bucket.s3.amazonaws.com/uploadedfiles/Another/News/BACKPAGE_com%20RESPONSE%20TO%20NAAG.PDF; Written Testimony by Samuel Fifer, Esq. on Behalf of Backpage.com, Massachusetts Attorney General’s Hearing on Sexual Exploitation Online (Oct. 29, 2010), <http://www.mass.gov/ago/docs/community/testimony/backpage-ma-ag.pdf>.

filters or screens terms that suggest the subjects of advertisements are minors, and reports suspected child sex trafficking to NCMEC.

State attorneys general have long been skeptical of Backpage's claims about its efforts to limit the exploitation of women and children.²⁵ The reality is that despite its assurances, Backpage has grown its share of the online market for commercial sex in recent years—a market that is premised almost entirely on illegal activity.²⁶ It now hosts an estimated 80 percent of online commercial sex advertising.²⁷ Backpage also reportedly generates more than \$30 million per year in revenue from advertising in the “adult entertainment” section of its website—the primary source of its revenue.²⁸ Even a cursory review of the website suggests that the vast majority of advertisements posted in the “escorts” sections of the website offer sex for sale, and that Backpage does not enforce its policies restricting the

²⁵ *C.f.* Kuzma, *supra* note 21, at 41-42.

²⁶ With the exception of a few counties in Nevada, prostitution is illegal throughout the United States.

²⁷ AIM Group, *Monthly Revenue from Online Prostitution Ads Crosses \$5 Million* (April 22, 2013), <http://aimgroup.com/2013/04/22/monthly-revenue-from-online-prostitution-ads-crosses-5-million/> (last visited Oct. 5, 2015); AIM Group, *Online Prostitution-Ad Revenue Crosses Craigslist Benchmark* (July 10, 2013), <http://aimgroup.com/2013/07/10/online-prostitution-ad-revenue-crosses-craigslist-benchmark/> (last visited Oct. 5, 2015).

²⁸ *Id.*

content of such advertisements.²⁹ Furthermore, studies suggest that in some jurisdictions nearly ten percent of the advertisements on the website feature minors who are being sold for sex.³⁰ Backpage itself has acknowledged that it identifies more than four hundred advertisements per month that likely involve minors.³¹

Moreover, as discussed above, the vast majority of state and federal prosecutions for sex trafficking involve advertisements posted on Backpage. While Backpage is responsive to requests for information and assistance by law enforcement in connection with specific investigations, the affirmative monitoring and reporting efforts it touts rarely yield results. As appellants allege, Backpage's "monitoring program" rarely produces helpful information leading to the identification and/or rescue of exploited children, or to the prosecution of their traffickers. (SAC ¶ 34(iii)). The reality is that the number of investigations and

²⁹ Backpage purports to prohibit postings containing "obscene or lewd and lascivious graphics or photographs which depict genitalia or actual or simulated sexual acts," and "any solicitation directly or in 'coded' fashion for any illegal service, including exchanging sexual favors for money or other valuable consideration." Backpage Terms of Use (updated Jan. 9, 2014), <http://boston.backpage.com/online/TermsOfUse>.

³⁰ See, e.g., *Study Finds Extensive Prostitution Ads On Backpage.com* (Sept. 24, 2012), ASU News, https://asunews.asu.edu/20120924_backpage_study (last visited Oct. 5, 2015).

³¹ Letter from NAAG to Samuel Fifer, Esq., Counsel for Backpage.com LLC (Sept. 16, 2011) (referencing admission by Backpage), <http://www.kirk.senate.gov/pdfs/naagbackpage.pdf>.

prosecutions for which Backpage provides useful assistance is far outweighed by the number of illegal transactions that Backpage facilitates on a daily basis.

In sum, Backpage's recent growth and dominant position in the market belie its supposed efforts to curb prostitution and child exploitation. State attorneys general, including the Massachusetts Attorney General, therefore remain deeply concerned about Backpage's conduct and its role in facilitating sex trafficking.

II. THE COMMUNICATIONS DECENCY ACT DOES NOT PRECLUDE LIABILITY UNDER STATE LAW FOR ACTIVE PARTICIPATION IN SEX TRAFFICKING

The Communications Decency Act should not be interpreted so broadly as to shield websites like Backpage from liability for their own unlawful conduct simply because that conduct bears some relation to third-party content. By its own terms, the "immunity" that the CDA confers on websites is not without limitation.³² In fact, the CDA explicitly preserves state law claims that are consistent with the statute. *See* 47 U.S.C. § 230(e)(3). Accordingly, basic principles of preemption

³² The CDA itself makes no reference to "immunity" and the plain language of the statute makes clear that websites can be subject to liability under state law so long as the application of state law does not treat the website as a "publisher or speaker" of third-party content and the law is otherwise consistent with the CDA. Although many courts have simply assumed that the CDA confers "broad immunity," others have rejected this interpretation. *See, e.g., Barnes v. Yahoo! Inc.*, 570 F.3d 1096, 1100 (9th Cir. 2009); *Chicago Lawyers Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666, 669 (7th Cir. 2008); *see also, J.S. v. Village Voice Media Holdings, LLC et al.*, 2015 WL 5164599 (Wash. 2015) (Wiggins, J., concurring).

require that courts refrain from readily interpreting the CDA to preclude the enforcement of state law.³³ Instead, the analysis in this case should begin with a presumption in favor of the enforceability of laws enacted by the Commonwealth in the exercise of its traditional police powers. *See Wyeth v. Levine*, 555 U.S. 555, 565 (2009) (“[W]e start with the assumption that the historic police powers of the States were not to be superseded by [federal law] unless that was the clear and manifest purpose of Congress.”) (citation omitted); *Massachusetts Ass’n of Health Maint. Orgs. v. Ruthardt*, 194 F.3d 176, 179 (1st Cir. 1999).

The CDA does not—as Backpage suggests—categorically bar all state law claims involving third-party content. Rather, even if a claim does in fact implicate third-party content,³⁴ the CDA bars only those claims that (1) treat the defendant website as a publisher or speaker of the content, or (2) seek to hold the defendant liable for *good faith* efforts to restrict objectionable material. 47 U.S.C. § 230(c) (emphasis added). The relationship between these defenses to liability is critical. Congress clearly anticipated circumstances—not unlike those here—under which a defendant website could be held liable under state law for *bad faith* efforts to

³³ *See e.g.*, Ryan J.P. Dyer, *The Communications Decency Act Gone Wild: A Case for Renewing the Presumption Against Preemption*, 37 Seattle U. L. Rev. 837 (Winter 2014).

³⁴ For the reasons set forth in the Brief of *Amici Curiae* San Francisco et al., appellants have also adequately alleged that Backpage is an information content provider and therefore not protected by the CDA.

restrict objectionable third-party content *without* being treated as the publisher or speaker of the content. Any other interpretation of the CDA would render subsection (c)(2) meaningless and unreasonably restrict the application of state law. *Novak v. Bank of New York Mellon Trust Co.*, 783 F.3d 910, 913 (1st Cir. 2015) (“It is a ‘cardinal principle of statutory construction that we must give effect, if possible, to every clause and word of a statute.’”) (quoting *Williams v. Taylor*, 529 U.S. 362, 404 (2000)); *see also Village Voice Media Holdings*, at *6 (“[I]t would be absurd to ignore this language [in § 230(c)(2)] in order to protect the actions of Backpage.com, taken in bad faith, that have nothing to do with publishing or speaking another’s content.”) (Wiggins, J., concurring).

Because appellants’ claims under the Massachusetts Anti-Trafficking Law and Chapter 93A seek to hold Backpage liable not for simply hosting third-party content, but for its own allegedly bad faith business conduct—including purposefully aiding sex traffickers in breaking the law and evading law enforcement—these state law claims are consistent with both the purpose and scope of the CDA and should be allowed to proceed.

A. If Proven, Appellants’ Allegations Would Establish That Backpage Does More Than Simply Publish Third-Party Advertisements

Appellants’ Second Amended Complaint alleges that Backpage is engaged in affirmative, unlawful conduct that exceeds traditional publishing functions and therefore is not protected from liability under the CDA.

Appellants allege that Backpage developed its business specifically to profit from the online advertisement of illegal commercial sex—beginning by naming the website with an explicit reference to classified advertisements for sex. (SAC ¶ 23). Backpage also hosts a separate “adult entertainment” section where, unlike the rest of the site, users are required to pay substantial fees to post advertisements.³⁵ (SAC ¶ 43). Within that section, it hosts “escorts” subsections that no reasonable person could understand as offering anything other than illegal prostitution. (SAC ¶¶ 38-39). Backpage “coaches” users through the process of posting advertisements in these subsections, allowing them unlimited attempts at entering an appropriate age and an acceptable “description.” (SAC ¶¶ 48, 55). Acceptable description terms include numerous words and phrases that clearly convey that the advertisement is

³⁵ Although Backpage reportedly has ceased charging fees for advertisements—at least temporarily—as a result of major credit card companies’ refusal to do business with the site, it did charge substantial fees at all times relevant to this case. Moreover, Backpage apparently acknowledges that it depends on these fees to support its business. *See Backpage.com, LLC v. Dart*, 2015 WL 5174008, *7, 12 (N.D. Ill. 2015).

for some form of prostitution, and in some cases, that the subject of the advertisement is a minor—but exclude words and phrases most likely to be flagged by law enforcement. (SAC ¶¶ 52-58). Backpage also allows users to pay and post anonymously, and to obscure their contact information (e.g., phone numbers) so as to make the information difficult to search. (SAC ¶¶ 43, 47-49). Backpage even creates (for an extra charge) special “Sponsored Ads” that actually highlight advertisements clearly offering sex for sale, including advertisements that violate Backpage’s own supposedly “strict” policies regarding content. (SAC ¶¶ 61-67).

At the same time, appellants allege, Backpage has taken various affirmative steps to maximize the security of the website for traffickers and to hinder law enforcement, including stripping metadata from uploaded photos and removing advertisements posted by victim support organizations and the police. (SAC ¶¶ 40, 51). Appellants also allege that Backpage intentionally exaggerates its “monitoring” and “automatic filtering” programs—while at the same time refusing to utilize available technology to identify instances of child sex trafficking—as part of a deliberate effort to shield pimps and traffickers and mislead law enforcement. (SAC ¶¶ 34-35, 58).

In short, appellants allege that Backpage is not a passive host of third-party advertisements that happen to include advertisements for commercial sex. Rather, appellants allege that Backpage has implemented and honed a business model

designed to profit from actively aiding pimps and traffickers in illegal activity, including the sexual exploitation of children. In other words, Backpage knowingly and actively engaged in conduct that materially assisted the men who trafficked Jane Doe Numbers 1, 2, and 3. Courts have declined to grant CDA “immunity” in cases involving far less troubling conduct.

In *Fair Housing Council of San Fernando Valley v. Roommates.com LLC*, 521 F.3d 1157 (9th Cir. 2008), for example, the Ninth Circuit found that the defendant website could be held liable for “inducing third parties to express illegal preferences” via its own questionnaire including unlawful criteria, in violation of the Fair Housing Act. *Id.* at 1165-69. The court reasoned that a website helps to develop unlawful content if it contributes materially to the alleged illegality of the conduct. *Id.* at 1168. Similarly, in *FTC v. Accusearch, Inc.*, 570 F.3d 1187 (10th Cir. 2009), the Tenth Circuit found that the defendant website could be held liable “for the conversion of the legally protected records from confidential material to publicly exposed information,” even though it essentially acted as an intermediary between the customers seeking the information and the researchers providing the information. *Id.* at 1199. The court emphasized the fact that the defendant knew the information was confidential and that researchers were likely to use improper methods. *Id.* at 1201. The court concluded that the defendant’s actions were not “neutral” with respect to the offensive content, but rather “the offensive postings

were [the defendant's] *raison d'etre* and it affirmatively solicited them.” *Id.* at 1200.

Finally, in *Moving and Storage, Inc. v. Panayotov*, 2014 WL 949830 (D. Mass. 2014, O’Toole, J.), the court found that the operators of a moving company review website could be held liable for their “ill-intentioned” manipulation of customer reviews, coupled with their representations as to the accuracy and quality of the information available on the site. *Id.* at *2. The court reasoned that the plaintiffs’ claims against the website (including claims under Chapter 93A) did not seek to treat the defendants as the publisher or speaker of the customer reviews, and that the plaintiffs “[brought] ‘causes of action based not on the defendants’ publishing conduct but on [their] representations regarding such conduct, [which] would not be immunized under [the CDA].’” *Id.* (alterations in original) (citations omitted). The court went on to reject the defendants’ claims that they merely filtered out inaccurate or suspect content, concluding that the plaintiffs had sufficiently alleged bad faith and that the issue was “better resolved on a developed factual record.” *Id.*; see also *Xcentric Ventures v. Borodkin*, 2015 WL 5010674 (9th Cir. 2015) (claims alleging misrepresentations by website that it was a neutral forum for customer reviews not barred by CDA).

As in those cases, appellants here allege that Backpage's own conduct runs afoul of laws intended to protect the public from a number of serious harms.³⁶ If appellants' allegations are true, Backpage does not operate as a neutral host for online speech and commerce (as contemplated by Section 230(c)(1)), nor does it engage in good faith efforts to monitor and remove offensive content from its website (as contemplated by Section 230 (c)(2)).

B. Appellants' Claims Against Backpage Are also Consistent with the Purposes of the CDA

Congress's reasons for enacting the applicable provisions of Section 230 were essentially twofold. Congress wanted to ensure the continued growth of free speech and free markets on the Internet. 47 U.S.C § 230(b). At the same time, Congress also wanted to encourage the development and utilization of technologies

³⁶ A number of other courts in Massachusetts and elsewhere have denied motions to dismiss based on factual disputes as to whether the defendants in those cases participated in the development or creation of the content at issue and therefore were not eligible for CDA immunity. *See, e.g., FTC v. LeanSpa, LLC*, 920 F. Supp. 2d 270 (D. Conn. 2013); *Chang v. Wozo LLC*, 2012 WL 1067643 (D. Mass. 2013); *Cybersitter, LLC v. Google Inc.*, 905 F. Supp. 2d 1080 (C.D. Cal. 2012); *Fraleay v. Facebook, Inc.*, 830 F. Supp. 2d 785 (N.D. Cal. 2011); *Alvi Armani Med., Inc. v. Hennessey*, 629 F. Supp. 2d 1302 (S.D. Fla. 2008); *Hy Cite Corp. v. Badbusinessbureau.com*, 418 F. Supp. 2d 1142 (D. Ariz. 2005); *MCW, Inc. v. Badbusinessbureau.com*, 2004 WL 833595 (N.D. Tex. 2004); *NPS LLC v. Stubhub, Inc.*, 2009 WL 995483 (Mass. Super. 2009)(Gants, J.).

that shield children from obscene or otherwise objectionable online material.³⁷ *Id.* Appellants' claims against Backpage are consistent with these dual purposes.

Because freedom of speech requires the protection of objectionable speech, Congress had good reason to shield legitimate websites from liability for harmful content posted by third parties, even when such content is foreseeable. *See Zeran v. America Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997) (“The specter of tort liability in an area of such prolific speech [as the Internet] would have an obvious chilling effect”). This logic behind CDA immunity does not apply, however, when the sole object of the website (or a portion thereof) is to host *illegal* content, or even worse, when the website is used by the host as part of a scheme to facilitate illegal activity. Unlike America Online or Yahoo!, for example, which were sued for failing to restrict defamatory or otherwise tortious material (and appropriately protected under the CDA), Backpage's alleged role in sex trafficking is not an unfortunate or unavoidable consequence of free speech and commerce online. *See Barnes v. Yahoo!, Inc.*, 570 F.3d 1096; *Zeran*, 129 F.3d 327. Instead, assuming the truth of appellants' allegations, Backpage actively encourages, develops, and

³⁷ One of Congress's primary goals in enacting the CDA was to protect children. In fact, the CDA originally contained provisions that criminalized the transmission of obscene or indecent materials to minors. The Supreme Court struck down these provisions on First Amendment grounds in *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997). This history is one more reason that the CDA should be interpreted narrowly enough that it cannot be used by websites like Backpage to avoid liability for the sexual exploitation of children.

safeguards online advertisements selling sex and similar illicit content. In fact, its business model is predicated on facilitating and protecting criminal activity. Neither of Congress's purposes for enacting the CDA is furthered by applying the CDA to preclude state law liability in this context.

Accordingly, subjecting Backpage to potential civil liability is entirely consistent with both the purpose and scope of the CDA. To find that the CDA preempts state law and shields Backpage from liability would unreasonably and unnecessarily undermine state law. It would also allow Backpage and others like it to break the law with impunity, deprive victims of adequate remedies for the harms inflicted on them, and impede effective law enforcement. Certainly this is not the result Congress intended.

III. BACKPAGE'S ALLEGED FACILITATION OF SEX TRAFFICKING VIOLATES STATE LAW

While other websites allow, and perhaps even enable, some amount of unlawful activity as a consequence of hosting forums for lawful speech or commerce, appellants allege that Backpage's very business model is premised on facilitating and profiting from criminal conduct. These allegations place Backpage's business conduct squarely within the ambit of both the Massachusetts Anti-Trafficking Law and Chapter 93A.

A. Massachusetts Anti-Trafficking Law

The Massachusetts Anti-Trafficking Law includes civil enforcement provisions intended to allow victims of human trafficking to vindicate their own rights and to recover damages directly from their traffickers for the physical, psychological, and financial harms inflicted on them. The statute also recognizes that many different kinds of business operations—both legitimate and otherwise—facilitate human trafficking. Accordingly, the statute makes it unlawful to benefit financially from sex trafficking and provides that “[a]ny business entity that knowingly aids . . . in trafficking of persons for sexual servitude shall be civilly liable.” Mass. Gen. Laws c. 265, § 50(d).

Appellants have alleged that Backpage runs a very lucrative business premised on facilitating pimps and traffickers in the sale of women and children for sex. Backpage allegedly knows that its website and related services (e.g., its messaging services and affiliate program) are critical components of the methods employed by many traffickers, and that minors are trafficked through its website. (SAC ¶¶ 4-6, 50, 68-70). In fact, assuming the truth of appellants’ allegations, Backpage intentionally promotes sex trafficking by protecting (or even expanding) the market for illegal commercial sex and by helping traffickers both to develop effective advertisements and to evade detection and prosecution. These actions fall within the plain meaning of the terms “knowingly” and “aid,” and constitute

precisely the type of conduct that the Massachusetts Anti-Trafficking Law was intended to prohibit.³⁸ See *Go-Best Assets Ltd. v. Citizens Bank of Mass.*, 463 Mass. 50, 64, 972 N.E.2d 426, 438 (2012), (a defendant may be liable for aiding and abetting a tort where it knew the primary wrongdoer was committing the tort and actively participated or substantially assisted in the commission of the tort); Restatement (Second) of Torts, § 876(b).

B. Chapter 93A

Chapter 93A contains a broad prohibition against “unfair or deceptive acts or practices in the conduct of any trade or commerce.” Mass. Gen. Laws c. 93A, § 2. The plain language of the statute is disjunctive, prohibiting unfair *or* deceptive business conduct. While particular acts or practices may be (and often are) both unfair *and* deceptive, proof of deception is not required to sustain a claim under the statute. See, e.g., *Massachusetts Farm Bureau Fed’n, Inc. v. Blue Cross of Massachusetts, Inc.*, 403 Mass. 722, 729, 532 N.E.2d 660, 664 (1989); *Serv. Publ’ns, Inc. v. Goverman*, 396 Mass. 567, 578-79, 487 N.E.2d 520, 527 (1986).

³⁸ The Oxford English Dictionary defines “knowingly” to mean: “With knowledge or awareness (of what one is doing, of a fact, etc.); consciously, intentionally.” It defines “aid” to mean any of the following: “(a) To give help, support, or assistance to (a person); to relieve from difficulty or distress, to succour; (b) To be or constitute an aid to (a person or thing); to promote or encourage; to facilitate; or (c) To give help, support, or assistance; to help *to* do something; to assist *in* (also *with*) an undertaking; to be of assistance.”

Accordingly, appellants can—and do—state a claim against Backpage under Chapter 93A based solely on grossly unfair business conduct.

The Supreme Judicial Court of Massachusetts has established three bases for finding unfairness: (1) when an act or practice is within at least the penumbra of some common law, statutory, or other established concept of unfairness; (2) when it is immoral, unethical, oppressive, or unscrupulous; or (3) when it causes substantial injury to consumers. *Klairmont v. Gainsboro Restaurant, Inc.*, 465 Mass. 165, 175, 987 N.E.2d 1247, 1255 (2013) (citing *PMP Assocs., Inc. v. Globe Newspaper Co.*, 366 Mass. 593, 596, 321 N.E.2d 915, 917 (1975)). Backpage’s allegedly calculated facilitation of illegal sex trafficking arguably falls within all three categories of unfairness. Importantly, these theories of liability are not premised on the overall design or “construct and operation” of Backpage’s website, *Universal Commc’n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 422 (1st Cir. 2007), but on Backpage’s overall business conduct, including Backpage’s alleged misrepresentations regarding its policies and practices and deliberate facilitation of illegal activity. *See, e.g., Moving and Storage, Inc. v. Panayotov*, 2014 WL 949830.

Moreover, appellants have met their burden at this stage of pleading a plausible causal connection between Backpage’s facilitation of sex trafficking and the undisputed harm appellants suffered. *See, e.g., Katin v. Nat’l Real Estate Info.*

Servs., Inc., 2009 WL 929554, at *7, 10 (D. Mass. 2009) (explaining *Twombly* standards for pleading injury in fact and causation can be met by establishing the overall effect of the defendant’s unlawful behavior on the relevant market and the likelihood of harm to the plaintiff). Backpage allegedly fostered a market for the illegal sale of children for sex, helped to increase the number of “sales” of each girl, and protected the traffickers from identification and prosecution. It is enough that appellants were injured as an indirect result of Backpage’s alleged business conduct, even though the appellants did not themselves purchase ad space or engage in any financial transaction with Backpage.³⁹ See Mass. Gen. Laws c. 93A, § 1(b) (“‘Trade’ and ‘commerce’ . . . shall include any trade or commerce directly or indirectly affecting the people of this commonwealth.”) (emphasis added). It is well-established state law that parties need not be in privity for their actions to come within the reach of Chapter 93A, and that *any* person who has been injured may pursue claims under the statute. See *Ciardi v. F. Hoffmann-La Roche, Ltd.*, 436 Mass. 53, 58-60 762 N.E.2d 303, 308-09 (2002); *Kattar v. Demoulas*, 433 Mass. 1, 14-15, 739 N.E.2d 246, 258 (2000). Moreover, in light of the fact that

³⁹ The Attorney General has successfully relied on a similar theory of liability in a number of cases involving unfair or deceptive practices in the mortgage industry. For example, in recovering hundreds of millions of dollars in relief for distressed homeowners, the Attorney General obtained settlements from investment banks based, in part, on the theory that they facilitated unlawful conduct, even though these entities did not directly interact with borrowers.

appellants allege conduct by Backpage *intended* to facilitate illegal sex trafficking, the damages appellants suffered as a result of being trafficked were reasonably foreseeable. *See, e.g., Jupin v. Kask*, 447 Mass. 141, 149 n.8, 849 N.E.2d 829, 837 n.8 (2006) (tort liability attaches when the risk of a harmful criminal act “was not only foreseeable, but was actually foreseen” and regardless of whether the defendant actually did or should have foreseen the particular plaintiff and the particular circumstances of the harm that eventually occurred) (citations omitted).

Finally, Backpage’s argument below—that certain of appellants’ allegations “sound in fraud” and therefore must be pled with particularity—misinterprets Chapter 93A. Backpage’s alleged efforts to deceive law enforcement are better viewed as a component of its unfair business practices, rather than an independent basis for liability under Chapter 93A. However, to the extent that appellants are seeking to hold Backpage liable for separately deceptive acts and practices, it still is not fair to characterize their allegations as triggering the heightened pleading standard imposed by Federal Rule of Civil Procedure 9(b). Massachusetts courts interpreting Chapter 93A have consistently held that the statute is “*sui generis*” in that “[i]t is neither wholly tortious nor wholly contractual in nature, and is not subject to the traditional limitations of preexisting causes of action such as tort for fraud and deceit.” *Slaney v. Westwood Auto, Inc.*, 366 Mass. 688, 703-04, 322 N.E.2d 768, 779 (1975). In fact, the elements of a Chapter 93A claim are

materially different than the elements of common law fraud. *See Kattar*, 433 Mass. at 12-13 (“[A]nalogies between common law claims for breach of contract, fraud, or deceit and claims under c. 93A are inappropriate because c. 93A dispenses with the need to prove many of the essential elements of those common law claims.”) (*citing Nei v. Burley*, 388 Mass. 307, 313, 446 N.E.2d 674, 678 (1983)); *U.S. Funding, Inc. of America v. Bank of Boston Corp.*, 28 Mass. App. Ct. 404, 407, 551 N.E.2d 922, 925 (1990) (specifically refusing to apply Mass. R. Civ. P. 9(b)). Accordingly, to equate deception under Chapter 93A with common law fraud by demanding the same pleading requirements would improperly undercut this critical state law.

In sum, the district court erred in dismissing appellants’ state law claims against Backpage. As alleged, appellants’ claims are not precluded by the CDA because they do not seek to hold Backpage liable either for simply publishing third-party content or for engaging in good faith efforts to restrict objectionable content, and appellants have otherwise met their burden of stating claims under the Massachusetts Anti-Trafficking Law and Chapter 93A.

CONCLUSION

For the foregoing reasons, the court should reverse the district court's judgment dismissing appellants' Second Amended Complaint.

Respectfully submitted,

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Dated: October 5, 2015

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Counsel for Amicus Curiae

Dated: October 5, 2015

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I hereby certify that I electronically filed a true, correct, and complete copy of the foregoing *Brief of Amicus Curiae Commonwealth of Massachusetts in Support of Plaintiffs-Appellants* with the Clerk of the Court for the United States Court of Appeals for the First Circuit by using the appellate CM/ECF system on October 5, 2015.

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Dated: October 5, 2015