NO. 44920-0-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

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

Appellees,

v.

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

Appellants.

APPELLANTS' OPENING BRIEF

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I. INTRODUCTION

In 1996, Congress enacted crucial protections for websites and other online service providers to promote the free flow of information on the Internet. In Section 230 of the Communications Decency Act, Congress directed that online providers cannot be liable under state laws for content posted by users or for taking steps to restrict or screen content. 47 U.S.C. § 230. Section 230 has become the cornerstone of free speech on the Internet, and some 300 cases in federal and state courts across the country have recognized and enforced the broad immunity Section 230 provides, including Division I of this Court. *Schneider v. Amazon.com, Inc.*, 108 Wn. App. 454, 31 P.3d 37 (2001). The Superior Court in this case failed to properly apply Section 230 and the extensive case law when it refused to dismiss claims against Backpage.com[1] that are indisputably based on content posted by users.

Plaintiffs (Appellees here) are three minors who allege they were prostituted by adult pimps. In this lawsuit, they seek to hold Backpage.com responsible for this abuse because the pimps allegedly posted ads concerning Plaintiffs on the Backpage.com website. Backpage.com asserts that Section 230 precludes such claims.

The Superior Court rejected all but one of Plaintiffs' attempts to avoid Section 230. The court ultimately credited Plaintiffs' allegations

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[1] Appellants (Defendants in the Superior Court) Village Voice Media Holdings, LLC; Backpage.com, LLC; and New Times Media, LLC are referred to collectively here as "Backpage.com."

that, because Backpage.com imposes and enforces rules banning improper posts, the website itself is "responsible, in whole or in part, for the creation or development" of content and therefore outside Section 230's protections. The court found that those rules could show Backpage.com might or should know that some posts are "for prostitution," and, as the court put it, "[I]sn't [that] assisting with development?" The short answer is *no*; indeed, the law is precisely the opposite.

No court has ever held that a website loses Section 230's protections by imposing rules to *prohibit* unlawful content. This would turn Section 230 on its head. Rather than encourage providers to police third-party content, as Congress expressly intended, this would discourage websites from imposing rules or reviewing content at all. Moreover, under well-established precedent, Section 230 immunity cannot be overcome by allegations that a website knows or should know third-party content is unlawful. In fact, a website is immune even if it receives *actual notice* of the alleged illegality and fails to remove the content. A contrary rule would destroy Congress's intent to protect providers for exercising traditional publisher functions of reviewing, editing, and deciding whether or not to post content. Equally clear, a plaintiff may not overcome Section 230 by alleging that the nature of a website "encourages" illegality. That would contravene the fundamental principle that a website can be liable only if it creates or requires *the specific content that is unlawful.*

The Superior Court acknowledged its decision conflicts with reported case law. The court also admitted it struggled with

Backpage.com's motion in light of Washington's liberal CR 12(b)(6) standards, stating that the motion "really walks the line" and was "the closest [the Court had] ever come" to granting a 12(b)(6) dismissal. But, if Washington's pleading standards require a state court *not* to find Section 230 immunity in a circumstance when a federal court undoubtedly would, the Superior Court's ruling also cannot stand because state procedural rules cannot undermine federal substantive rights. This Court need not reach this issue, however, because Section 230 immunity *does* apply to Backpage.com, and the result should be the same in any court.

Fortunately, the Superior Court certified its order for immediate review under RAP 2.3(b)(4), and this Court granted review. Prompt review (and reversal) is particularly important given that Section 230 provides *immunity from suit*, not merely a defense to liability. Websites lose this immunity if a court refuses to apply Section 230 at the earliest stage of the case (*i.e.*, on a 12(b)(6) motion), forcing them to fight protracted and costly legal battles.

This Court should reverse the Superior Court's ruling, direct that all claims against Backpage.com be dismissed, and thus preserve and respect Section 230 immunity and the critical First Amendment rights it protects across the Internet.

II. ASSIGNMENT OF ERROR

The Superior Court improperly refused to dismiss claims against Backpage.com based on content provided by third parties, instead ruling that Backpage.com is not entitled to the protections of Section 230

because it imposes rules to prohibit improper content, an unprecedented result that contravenes Section 230 and its purposes.

III. STATEMENT OF THE CASE

A. Factual Background

According to their First Amended Complaint, Plaintiffs are three minors who ran away from home and were recruited into prostitution by "professional adult pimps," defendant Baruti Hopson and two "unnamed individuals." *See* CP 2 ¶ 1.2. The complaint says almost nothing about the pimps, except that they prostituted the three Plaintiffs, "engaged in [immoral] communications" with them, "took naked and illicit photographs" of them, and posted ads about them on Backpage.com. *See* CP 3-20 ¶¶ 2.8, 5.1-5.2, 6.1-6.3. Everything else in Plaintiffs' 26-page complaint targets Backpage.com.

It is undisputed that Backpage.com did not create the ads; Plaintiffs admit the pimps created, posted and uploaded the ads about them. *See, e.g.*, CP 2 ¶ 1.2 ("adult pimps ... posted advertisements for the girls"); CP 17 ¶ 5.2 ("adult pimps ... create[d] ... and then uploaded [the] advertisements of S.L. onto ... Backpage.com"); CP 3-20 ¶¶ 2.8, 4.1, 6.2, 6.3. Plaintiffs also admit that all users post ads on Backpage.com through an automated process and have no personal contact with anyone at Backpage.com. CP 12-13 ¶ 3.19. Consistent with their allegations challenging Backpage.com as a whole, Plaintiffs attached to their complaint hundreds of ads from the website posted by and concerning others, *see* CP 7-10 ¶¶ 3.7, 3.8, 3.14 & CP 495-2771, but did not provide

or quote the specific ads they challenge, except to reference certain headlines, *see* CP 16, 20 ¶¶ 4.1, 6.3.

Plaintiffs further acknowledge that Backpage.com imposes rules prohibiting improper ads on the website, including specifically ads that concern or allude to prostitution or underage sex trafficking. *See* CP 6-10 ¶¶ 3.6-3.13. For example, Plaintiffs allege that "[s]exually explicit language is forbidden by Backpage.com and ads containing such are rejected," CP 7 ¶ 3.6; Backpage.com imposes rules prohibiting "naked images [or] images using transparent clothing," any "content which advertises an illegal service," and any "suggest[ion of] an exchange of sex acts for money," CP 8 ¶ 3.9; and users seeking to post ads must accept the posting rules, attest that they are at least 18 years of age, CP 12 ¶ 3.19, and agree *not* to post any "obscene or lewd ... photographs," "any solicitation directly or in 'coded' fashion for any illegal service," or "any material ... that exploits minors in any way," CP 9 ¶ 3.13. Plaintiffs also admit Backpage.com "removes ads that violate [its] requirements." CP 8 ¶ 3.9. Plaintiffs do not allege that the ads in this case violated the posting rules; to the contrary, they allege the ads by all appearances complied with the rules banning improper posts. CP 16-20 ¶¶ 4.1, 5.2, 6.4.

These are essentially all the *factual* allegations in Plaintiffs' First Amended Complaint. The balance of the complaint consists of many variations of Plaintiffs' arguments (couched as allegations offered "upon information and belief") that all escort ads are ads for prostitution, CP 4-6 ¶¶ 3.1, 3.2, 3.5, and that the website's rules and restrictions prohibiting

improper content are "window dressing," CP 7 ¶ 3.7, and "a fraud and a ruse" CP 10 ¶ 3.14, to allow Backpage.com to "fly under the radar," CP 6 ¶ 3.6. In essence, Plaintiffs allege that Backpage.com's efforts to monitor, police and restrict content demonstrate that "the purpose" of the "entire website" "is exactly what its content requirements ... prohibit." CP 10 ¶ 3.14. Based on this and assertions about the website's "context," CP 4-5 ¶ 3.1, Plaintiffs contend Backpage.com is not entitled to Section 230 immunity but instead is liable for *all claims* by any person allegedly based on *any and all ads* on the site. *See, e.g.*, CP 185-210. More specifically, Plaintiffs claim Backpage.com is liable for their claims of negligence, outrage, sexual exploitation in violation of RCW ch. 9.68A, vicarious liability, unjust enrichment, invasion of privacy, and civil conspiracy. CP 22-25 ¶¶ 7.1-7.21, 7.25-26.

B. Procedural History

Plaintiffs filed their original complaint on July 30, 2012, against two of the Backpage.com Defendants and Baruti Hopson, the pimp who is an indigent and is currently in prison after his conviction for crimes of abusing and prostituting Plaintiff J.S. CP 3 ¶ 2.8. Plaintiffs never served the original complaint on Backpage.com, but instead filed a First Amended Complaint on September 5, 2012, which they did serve. Backpage.com removed the action to federal court on December 5, 2013 on the basis that Plaintiffs misjoined Hopson as a defendant to defeat

diversity jurisdiction. The federal court remanded the case on March 5, 2013.[2]

On March 25, 2013, Backpage.com moved in the Superior Court to dismiss Plaintiffs' First Amended Complaint because Section 230 provides immunity to online service providers for state-law claims based on content provided by third parties. CP 155-184. In opposition, Plaintiffs did not dispute that Backpage.com satisfied the three requisite elements for Section 230 protection (as discussed below). Instead, they argued their complaint should survive based on their allegations that Backpage.com itself "develops" content because the website (1) contains a category for escort ads; (2) makes information useable and available; and (3) imposes posting rules and restrictions expressly prohibiting unlawful content, which, they contend, are meant to encourage such content. *See* CP 185-210.

The Superior Court (Hon. Susan K. Serko) heard argument on April 26, 2013. *See* Verbatim Report of Proceedings ("RP"). The court rejected Plaintiffs' first two arguments, noting that a website cannot be a content developer for making information available and useable (since all websites do this) nor for having a category for escort ads (a legal activity). RP 13:24-15:8, 23:8-23:19. The court also rejected Plaintiffs' contention that Backpage.com "conspires" with users who access its site and post ads,

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[2] Although Plaintiffs acknowledge that Hopson is the person responsible for prostituting Plaintiff J.S. and creating and posting ads about her, they have done nothing to pursue claims against him, notwithstanding that he has been in default in this action for over 15 months.

as that would destroy the purposes of Section 230. *Id.* at 45:14-46:6; 50:1-50:5.

However, the court denied Backpage.com's motion to dismiss because it credited Plaintiffs' allegations that Backpage.com's posting rules prohibiting improper content showed the website "assist[ed] with the development" of user content and knew or should have known that users might post unlawful ads. The court stated:

> These are where I'm most concerned, this is what I highlighted over and over again and reread, it's the posting guidelines. And, frankly, my note to myself in the sideline was Backpage doesn't know this is for prostitution and isn't assisting with the development? And, despite the case law, I answer that question just on the side of the plaintiffs and I'm denying a 12(b)(6).

Id. at 50:5-50:12. The court indicated it had reviewed some federal cases concerning Section 230, including *M.A. v. Village Voice Media Holdings, LLC*, 809 F. Supp. 2d 1041 (E.D. Mo. 2011), which held that Backpage.com *was immune* for identical claims. *See* RP 4:13-5:7; 18:14-18:17; 26:10-26:12; 27:7-27:19; 35:4-35:10; 39:8-39:15; 43:14-44:21. The court denied Backpage.com's motion "despite the case law." *Id.* at 50:10.

In denying Backpage.com's motion, the court emphasized the "high standard" under CR 12(b)(6), requiring it to credit Plaintiffs' allegations. *Id.* at 18:7-18:8 ("a defendant's motion to dismiss based on 12(b)(6) is a pretty high standard"); *id.* at 29:6-29:9 (stating in response to Plaintiffs' assertion that they are entitled to every inference: "You're

preaching to the choir."); *id.* at 4:13-4:14 ("the decision of the Court turns on the allegations"). In the end, the court said this case was the closest it had ever come to granting a 12(b)(6) motion:

> [T]he question is did Congress tell Superior Court trial judges that you have to – that you are entitled to ignore the CDA or do you have to enforce it? This case is – honestly, this is, I think, of all the cases in terms of the 12(b)(6) or summary judgment for that matter, is the closest that I've ever come. I mean, it's right on the line and with due respect to the fabulous briefing and the great arguments, it really walks the line for me this case, it's right on the edge.

Id. at 49:18-50:1. But the court also stated, "I think this needs appellate review," *id.* at 50:12-50:13, and recommended certification under RAP 2.3(b)(4), while staying all other proceedings in the trial court. *Id.* at 50:24-50:25; 52:16-52:19; *see also* CP 484-85.

Backpage.com filed a motion for discretionary review in this Court on June 12, 2013. Mot. for Discretionary Review. Plaintiffs responded by agreeing that the Superior Court's decision presents a controlling question of law and immediate review would materially advance the litigation. Pls.' Resp. to Mot. for Discretionary Review at 4-5. Two public interest groups devoted to Internet free speech (the Electronic Frontier Foundation and the Center for Democracy and Technology) filed an amicus brief underscoring the need for this Court to correct the Superior Court's "reversible error" and "ensure the proper application of [Section 230's] protections." Amicus Br. at 2, 18.

This Court granted Backpage.com's motion for discretionary review on July 26, 2013, finding that it presented "a controlling question of law" and "the issue of immunity from suit warrants review pursuant to RAP 2.3(b)." Ruling Granting Discretionary Review at 3, 4. The Court outlined the questions for review as (1) whether an Internet service provider loses Section 230 immunity based on allegations that it "encourages" unlawful third-party content or allegedly should know that users may post such content, (2) whether "mere creation of posting guidelines is [sufficient] to transform [the website] into an information content provider;" and (3) whether "our state's pleading standards [under CR 12(b)(6)] improperly trump[] federal law" "in reviewing claims of immunity under federal law." *Id.* at 4-6.

IV. ARGUMENT

A. Congress Enacted Section 230 to Promote Free Speech and Encourage Self-Policing on the Internet.

Section 230(c)(1) unambiguously bars suits against websites and other online service providers predicated on content provided by third parties. Its key provision states: "No provider ... of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1). A website user who submits content – as millions of users do on thousands of websites every day – is an "information content provider" under the statute's definition of a party "responsible, in whole or in part, for the creation or development of information." *Id.* § 230(f)(3). Thus, a

website or other online provider loses Section 230 immunity only if it "create[s]" or "develop[s]" the allegedly unlawful content itself. Section 230 expressly preempts state laws that would impose liability on online providers contrary to its terms: "[N]o liability may be imposed under any State or local law that is inconsistent with this section." *Id.* § 230(e)(3).

Congress enacted Section 230 to achieve two goals. First, it "wanted to encourage the unfettered and unregulated development of free speech on the Internet, and to promote the development of e-commerce." *Batzel v. Smith*, 333 F.3d 1018, 1027 (9th Cir. 2003); *see also Ben Ezra, Weinstein, & Co. v. Am. Online Inc.*, 206 F.3d 980, 985 n.3 (10th Cir. 2000) (Section 230 is meant "to promote freedom of speech"); 47 U.S.C. § 230(b)(2)(3) (Section 230 is intended to "preserve the vibrant and competitive free market that presently exists for the Internet."). Second, Congress sought to encourage online service providers to "self-police" potentially harmful or offensive material on their services by providing immunity for such efforts. *Batzel*, 333 F.3d at 1028; *see also* 47 U.S.C. § 230(c)(2).

Congress made these goals manifest in expressly rejecting *Stratton Oakmont, Inc. v. Prodigy Services Co.*, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995), with the passage of Section 230. *See* S. Conf. Rep. No. 104-230 (1996) (expressing intent to overrule *Stratton Oakmont* and "any other similar decisions"). In *Stratton Oakmont*, a New York trial court held the online service Prodigy liable for defamatory comments posted by a user on one of its bulletin boards, applying common law principles that a

publisher (unlike a distributor) can be liable for posts even if it did not know or have any reason to know they were defamatory. 1995 WL 323710 at *5. The court treated Prodigy as a publisher (rather than as a distributor) because it screened and edited bulletin board messages to prevent offensive content. *Id.* By overruling this result, Congress eliminated the "grim choice" such a precedent would present to online service providers, *i.e.*, those that voluntarily police content could be responsible for all posts, while "providers that bury their heads in the sand and ignore problematic posts would escape liability altogether." *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1163 (9th Cir. 2008) (en banc); *see also Batzel*, 333 F.3d at 1029 ("If efforts to review and omit third-party defamatory, obscene or inappropriate material make a computer service provider or user liable for posted speech, then website operators and Internet service providers are likely to abandon efforts to eliminate such material from their site[s].").

Section 230 reflects the practical realities of the Internet. It is simply impossible for online service providers to screen all third-party content and decide what may or may not be unlawful, given the Internet's "millions of users" and "staggering" amount of information. *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997). "Section 230 therefore sought to prevent lawsuits from shutting down websites and other services on the Internet." *Batzel*, 333 F.3d at 1028. "The specter of tort liability in an area of such prolific speech would have an obvious chilling effect," because "[f]aced with potential liability for each message republished ...,

providers might choose to severely restrict the number and type of messages posted." *Zeran*, 129 F.3d at 331.

Congress also recognized that some material posted on the Internet could be harmful but made a policy choice that "plaintiffs may hold liable the person who creates or develops unlawful content, but not the interactive computer service provider who merely enables that content to be posted online." *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 254 (4th Cir. 2009); *see also Doe v. MySpace, Inc.*, 528 F.3d 413, 419-20 (5th Cir. 2008) (finding social networking site immune for claims premised on sexual assault resulting from online communications); *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1123 (9th Cir. 2003) (matchmaking website immune from claims stemming from fake profile that led to threats against the plaintiff); *Zeran*, 129 F.3d at 331 (AOL immune for false advertisements created by users and for failing to remove the ads promptly after notice, even though plaintiff received death threats).

B. Section 230 Provides Broad Immunity to Online Service Providers.

Consistent with its express terms and Congress's purposes, courts nationwide have interpreted Section 230 to establish broad immunity for online service providers. The eight federal circuit courts that have addressed Section 230 have all found that the statute broadly insulates online providers for claims based on third-party content. *See Carafano*, 339 F.3d at 1123 (noting a "consensus" among "courts of appeal that

§ 230(c) provides broad immunity for publishing content provided primarily by third parties").[3] Numerous federal district courts have reached the same conclusion. *See, e.g.*, *Klayman v. Zuckerberg*, 910 F. Supp. 2d 314, 318 (D.D.C. 2012) ("By its plain terms, then, the CDA immunizes internet computer service providers from liability for the publication of information or speech originating from third parties.").[4]

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[3] *See also Johnson v. Arden*, 614 F.3d 785, 791 (8th Cir. 2010) ("The majority of federal circuits have interpreted [Section 230] to establish broad federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service." (internal quotations marks omitted)); *Doe v. MySpace*, 528 F.3d at 418 ("Courts have construed the immunity provisions in § 230 broadly in all cases arising from the publication of user-generated content."); *Chicago Lawyers' Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666, 671 (7th Cir. 2008) (dismissing claims against Craigslist based on Section 230, noting "[a]n interactive computer service 'causes' postings only in the sense of providing a place where people can post"); *Universal Commc'n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 419 (1st Cir. 2007) ("[W]e too find that Section 230 immunity should be broadly construed."); *Green v. Am. Online*, 318 F.3d 465, 471 (3d Cir. 2003) ("By its terms, § 230 provides immunity to AOL as a publisher or speaker of information originating from another information content provider."); *Ben Ezra*, 206 F.3d at 984-85 (Section 230 "creates a federal immunity to any state law cause of action that would hold computer service providers liable for information originating with a third-party"); *Zeran*, 129 F.3d at 331 ("Congress considered the weight of the speech interests implicated and chose to immunize service providers to avoid any such restrictive effect.").

[4] *See also Courtney v. Vereb*, 2012 WL 2405313, at *4-6 (E.D. La., June 25, 2012); *Goddard v. Google, Inc.*, 640 F. Supp. 2d 1193, 1197 (N.D. Cal. 2009); *Murawski v. Pataki*, 514 F. Supp. 2d 577, 591 (S.D.N.Y. 2007); *Doe v. MySpace, Inc.*, 474 F. Supp. 2d 843, 851-52 (W.D. Tex. 2007); *Parker v. Google, Inc.*, 422 F. Supp. 2d 492, 500-01 (E.D. Pa. 2006); *Dimeo v. Max*, 433 F. Supp. 2d 523, 530-31 (E.D. Pa. 2006), *aff'd*, 248 Fed. App'x (3d Cir. 2007); *Noah v. AOL Time Warner Inc.*, 261 F.

The same is true of state courts, one of which noted that some 300 reported decisions have construed Section 230, and "[a]ll but a handful ... find that the website is entitled to immunity from liability." *Hill v. StubHub, Inc.*, 727 S.E.2d 550, 558 (N.C. App. 2012) (holding ticket exchange website immune under Section 230 notwithstanding plaintiff's allegations that it knew of or encouraged ticket scalping in violation of state law).[5]

Division I of this Court reached the same conclusion in *Schneider*, 108 Wn. App. 454. There, an author asserted claims against Amazon for allegedly defamatory third-party comments posted about him on the Amazon.com website. On a CR 12(b)(6) motion, the trial court dismissed the claims with prejudice on the ground that Amazon was immune under Section 230. *Id.* It did so even though the plaintiff alleged he provided notice to Amazon that the posts were improper and that Amazon admitted one or more violated its guidelines yet still failed to remove them. *Id.* at 458. Division I affirmed, recognizing that Section 230 was intended to

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Supp. 2d 532, 538-40 (E.D. Va. 2003), *aff'd*, 2004 WL 602711 (4th Cir. Mar. 24, 2004); *Blumenthal v. Drudge*, 992 F. Supp. 44, 50-52 (D.D.C. 1998).

[5] *See also Shiamili v. Real Estate Grp. of N.Y.*, 17 N.Y.3d 281, 952 N.E.2d 1011, 1017 (2011) ("we follow what may fairly be called the national consensus and read section 230 as generally immunizing Internet service providers from liability for third-party content" (internal citations omitted)); *Barrett v. Rosenthal*, 40 Cal. 4th 33, 146 P.3d 510, 522 (2006) (Section 230 "broadly shield[s] *all* providers from liability for 'publishing' information received from third parties"); *Doe v. Am. Online, Inc.*, 783 So. 2d 1010, 1018 (Fla. 2001).

preserve the vibrant and free flow of information on the Internet and to remove disincentives for service providers to block and filter information. *Id.* at 461-62. It found the plaintiff's claims would hold Amazon liable for editorial functions – *i.e.*, "deciding whether to publish, withdraw, postpone or alter content" or "the failure to remove [content]" – exactly what "Congress sought to protect." *Id.* at 463, 466. Indeed, the Court opined that Section 230 provides immunity "even where the interactive service provider has an active, even aggressive role in making available content prepared by others." *Id.* at 466-67 (citation omitted). Noting that Section 230 overruled *Stratton Oakmont*, the Court found that Congress "deliberately chose not to deter harmful online speech by means of civil liability on companies that 'serve as intermediaries for other parties' potentially injurious messages.'" *Id.* at 463 (quoting *Zeran*, 129 F.3d at 330-31). To the contrary, as the Court noted, Congress "intended to "encourage self-regulation, and immunity is the form of that encouragement." *Id.*

C. Backpage.com Did Not "Develop" Content Under the Case Law Interpreting Section 230, Particularly *Roommates.com.*

Section 230 sets forth a three-part test to determine when an online service provider is entitled to immunity from suit. An online service is immune if: (1) it is a "provider ... of an 'interactive computer service,'" (2) the plaintiff's claim treats it "as a publisher or speaker of information," and (3) that information is "provided by another 'information content

provider.'" *See Schneider*, 108 Wn. App. at 460; *accord Batzel*, 333 F.3d at 1037; *Lycos*, 478 F.3d at 418.

All three elements are present here, and the Superior Court did not find otherwise. First, Backpage.com, as a website, is a "provider ... of an interactive computer service." 47 U.S.C. § 230(c)(1); *see Schneider*, 108 Wn. App. at 461-63; *Roommates.com*, 521 F.3d at 1162 n.6 (websites are the "most common interactive computer services"). Second, Plaintiffs base their claims on "information provided by another information content provider," *i.e.*, the ads created and posted by the pimps. *See, e.g.*, CP 3-21 ¶¶ 2.8, 4.1, 4.2, 5.2, 5.3, 6.2, 6.3, 6.5.[6] Finally, Plaintiffs' claims treat Backpage.com "as the publisher or speaker" of the ads because they "seek[] to hold" it liable for "exercis[ing] a publisher's traditional editorial functions, such as deciding whether to publish, withdraw, postpone or alter content." *See Zeran*, 129 F.3d at 330.

Rather than contest these elements, Plaintiffs contended Backpage.com is not entitled to immunity because, they argued, the website is itself an "information content provider." CP 194-201. The Superior Court rejected nearly all of Plaintiffs' asserted theories, but ultimately agreed with their conclusion, holding that Plaintiffs sufficiently

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[6] The fact that Plaintiffs seek the same relief from Backpage.com for operating its website as they do against Hopson for posting ads and exploiting, prostituting and assaulting Plaintiff J.S. underscores that they are seeking to treat Backpage.com as the publisher or speaker of the ads. *See Zeran*, 129 F.3d at 333 ("Our view that [plaintiff's] complaint treats AOL as a publisher is reinforced because AOL is cast in the same position as the party who originally posted the offensive messages.")

alleged that Backpage.com "assist[ed] with the development" of content because they alleged the site imposes rules to preclude improper content. RP 50:5-50:12. The court's conclusion is entirely unprecedented, inconsistent with the terms and intent of Section 230, and contradicts essentially *all* case law interpreting the statute.

Section 230 defines "information content provider" as "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service." 47 U.S.C. § 230(f)(3). Because Section 230 immunity is "quite robust," courts have "adopt[ed] a relatively expansive definition of 'interactive computer service and a relatively restrictive definition of 'information content provider.'" *Carafano*, 339 F.3d at 1123. Thus, courts have held that websites "develop" content only if they directly participate in creating the specific content alleged to be unlawful or require users to provide such content. *Roommates.com*, 521 F.3d at 1174; *FTC v. Accusearch Inc.*, 570 F.3d 1187, 1199 (10th Cir. 2009). On the other hand, courts have rejected attempts to evade Section 230 through allegations that a website "encouraged" or acquiesced in the submission of content, because such theories would "cut the heart out of" Section 230. *Roommates.com*, 521 F.3d at 1174 (discussed below).

In their efforts to characterize Backpage.com as an "information content provider," Plaintiffs have relied primarily on the Ninth Circuit's decision in *Roommates.com*, *see* CP 186, 192-198, 204; Pls.' Resp. to Mot. for Discretionary Review at 6, 7, 12, and the Superior Court focused

on that case too, *see* RP 4:13-5:7; 9:7-9:9; 12:11-13:23; 16:25-17:18. Yet, Plaintiffs have merely taken snippets of the Ninth Circuit's opinion out of context,[7] while ignoring the facts and holdings of the case, the court's reasoning, and the narrow exception to Section 230 immunity it found. In fact, *Roommates.com* rejected the same theories Plaintiffs advance.

Roommates.com concerned a website designed to match prospective roommates. One portion of the site required users to answer questions by making selections from drop-down menus, including about their gender, sexual orientation, and whether they lived with children. *Roommates.com*, 521 F.3d at 1161. The site also required users to specify whether they would prefer to live with others based on the same criteria and created profile pages searchable by these criteria. *Id.* Two housing groups sued Roommates.com, arguing it did online what a housing broker could not lawfully do in person, *i.e.*, use discriminatory factors for housing rentals. *Id.* at 1162.

Roommates.com argued that Section 230 shielded it from these claims, but the Ninth Circuit disagreed, because, it found as to certain features the site was "responsible ... for the creation or development" of the allegedly unlawful content. The court held that "a website helps to develop unlawful content, and thus falls within the exception to Section

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[7] *See, e.g.*, Pls.' Resp. to Mot. for Discretionary Review at 8-9 ("The [CDA] was not meant to create a lawless no-man's-land on the internet." (quoting *Roommates.com*, 521 F.3d at 1164)); CP 198 (asserting *Roommates.com* means that "if a website encourages illegal content, it loses immunity," although the decision says no such thing).

230, *if it contributes materially to the alleged illegality of the content*." *Id.* at 1168 (emphasis added). Roommates.com did this, the court found, because it authored questions to elicit discriminatory preferences and required users to answer the questions. *Id.* at 1166. "By requiring subscribers to provide the information as a condition of accessing its service, and by providing a limited set of pre-populated answers," the court wrote, "Roommate becomes much more than a passive transmitter of information provided by others; it becomes the developer, at least in part, of that information." *Id.*

As the Ninth Circuit emphasized, the crux of its decision was that the site *required* users to submit allegedly unlawful content.[8] Courts applying *Roommates.com* have interpreted it the same way – as "carv[ing] out only a narrow exception" that "turned entirely on the website's decision to *force* subscribers to divulge the protected characteristics and discriminatory preferences as a condition of using its services." *Goddard*, 640 F. Supp. 2d at 1198-99 (internal quotation marks omitted).[9]

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[8] *See, e.g.*, 521 F.3d at 1167 ("Roommate designed its search system ... based on the preferences and personal characteristics that Roommate itself forces subscribers to disclose."); *id.* at 1170, n.26 ("it is Roommate that *forces* users to express a preference and Roommate that forces users to disclose the information that can form the basis of discrimination by others"); *id.* at 1172 ("Roommate does not merely provide a framework that could be utilized for proper or improper purposes; rather, Roommate's work in developing the discriminatory questions, discriminatory answers and discriminatory search mechanism is directly related to the alleged illegality of the site.").

[9] *See also Atl. Recording Corp. v. Project Playlist, Inc.*, 603 F. Supp. 2d 690, 701 (S.D.N.Y. 2009) (finding *Roommates.com* "readily

Yet, the Ninth Circuit also emphasized that courts must not read the term "develop" so broadly as to sap Section 230 of its meaning:

> It's true that the broadest sense of the term "develop" could include ... just about any function performed by a website. But to read the term so broadly would defeat the purposes of section 230 by swallowing up every bit of the immunity that the section otherwise provides.

Rommates.com, 521 F.3d at 1167. The court made this distinction plain in a second holding, concluding Roommates.com *was immune* from claims stemming from a section of the site for users to provide "Additional Comments." Roommates.com was "not responsible, in whole or in part, for the development of this content," because the website could not review every post, making it "precisely the kind of situation for which section 230 was designed to provide immunity." *Id.* at 1174. The court analogized this part of the Roommates.com website to Craigslist (which, notably, is structured the same as Backpage.com), in that users are given an open field to enter information they choose "without any ... requirement to enter discriminatory information." *Id.* at 1172 n.33.

The plaintiffs alleged that the site *encouraged* subscribers to make discriminatory statements in the comments field because it required discriminatory preferences in the registration process. *Id.* at 1174. The

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distinguishable" because it "was based solely on the fact that the content on the website that was discriminatory was supplied by Roommates.com itself"); *Doe v. MySpace, Inc.*, 629 F. Supp. 2d 663, 665 (E.D. Tex. 2009) (distinguishing *Roommates.com* because "[t]he Ninth Circuit repeatedly stated ... that the Roommates.com website *required* its users to provide certain information as a condition of its use ....").

Ninth Circuit rejected this argument, emphasizing that courts must reject theories of "implicit encouragement," as they would gut Section 230:

> [T]here will always be close cases where a clever lawyer could argue that *something* the website operator did encouraged the illegality. *Such close cases, we believe, must be resolved in favor of immunity, lest we cut the heart out of section 230 by forcing websites to face death by ten thousand duck-bites, fighting off claims that they promoted or encouraged – or at least* tacitly assented – to the illegality of third parties. Where it is very clear that the website directly participates in developing the alleged illegality – as it is clear here with respect to Roommate's questions, answers and the resulting profile pages – immunity will be lost. *But in cases of enhancement by implication or development by inference* – such as with respect to the "Additional Comments" here – *section 230 must be interpreted to protect websites* not merely from ultimate liability, but from having to fight costly and protracted legal battles.

Id. at 1174-75 (emphasis added).

The line drawn by *Roommates.com* is clear. To find that a website is an "information content provider" not entitled to Section 230 immunity, it must be "very clear" that it directly participated in developing the specific content claimed to be illegal – by creating and posting the unlawful content itself or requiring users to submit such content. But when a plaintiff alleges a website "promoted or encouraged" or "tacitly assented" to the illegality of third-party content, that will not defeat Section 230 immunity. Plaintiffs' claims in this case are exactly what *Roommates.com* cautioned against—a "clever lawyer ... argu[ing] that *something* the website operator did encouraged the illegality" – a

circumstance that "must be resolved in favor of immunity, lest we cut the heart out of Section 230." 521 F.3d at 1174 (emphasis in original).

Roommates.com is consistent with many other cases holding that a plaintiff cannot evade Section 230 immunity by alleging a website somehow "encourages" unlawful content. *See, e.g.*, *Hill*, 727 S.E.2d at 560 ("the fact that a website acted in such a manner as to encourage the publication of unlawful material does not preclude a finding of immunity pursuant to [Section] 230"); *Ascentive, LLC v. Opinion Corp.*, 842 F. Supp. 2d 450, 476 (E.D.N.Y. 2011) ("[T]here is simply 'no authority for the proposition that [encouraging the publication of defamatory content] makes the website operator responsible, in whole or in part, for the 'creation or development' of every post on the site" (internal quotation marks omitted)); *Global Royalties, Ltd. v. Xcentric Ventures, LLC*, 544 F. Supp. 2d 929, 933 (D. Ariz. 2008) (holding the ripoffreport.com website was not an information content provider even though it allegedly encouraged defamatory reviews by others for its financial benefit); *S.C. v. Dirty World, LLC*, 2012 WL 3335284, at *4 (W.D. Mo. Mar. 12, 2012) ("As a matter of law, and even if true, encouraging defamatory posts is not sufficient to defeat CDA immunity.").

This makes good sense. If any plaintiff could eliminate Section 230 simply by alleging that a website "encouraged" unlawful content,

Section 230 would become meaningless and websites would be forced to preclude or severely restrict user speech to avoid liability.[10]

D. Until Now, Every Court Has Rejected Claims Such as Plaintiffs Assert.

Plaintiffs' claims are a virtual carbon copy of ones that have been rejected before. Courts have held that classified advertising websites – Backpage.com specifically, but also Craigslist – are *not* information content providers and *are immune* from claims alleging they promoted or aided prostitution or sex trafficking because of user ads.

In *M.A. v. Village Voice Media Holdings, LLC*, 809 F. Supp. 2d 1041 (E.D. Mo. 2011), a federal court granted dismissal under Fed. R. Civ. P. 12(b)(6) of a sex trafficking victim's nearly identical claims against Backpage.com advancing the same arguments to avoid Section 230 as here. In that case, the minor plaintiff alleged she was victimized by an adult pimp who took illicit photos and posted them in ads on Backpage.com, resulting in "multiple sexual liaisons for money with adult male customers." *Id.* at 1043-44. She claimed Backpage.com was "responsible in part for the development and/or creation of information provided through the internet" because it "creat[ed] a highly viewed website" with "categorized advertising for escorts," imposed "posting

[10] To avoid any doubt created by Plaintiffs' mischaracterizations in the Superior Court, Backpage.com categorically denies that its website "encourages" illegal content of any kind. In fact, it employs extensive measures (including using automated filters and manually reviewing ads) to *prevent* illegal or improper content. However, as explained above, Section 230 applies regardless.

rules and limitations which ... create the veil of legality," but allegedly "had knowledge" that "postings on their website were advertisements for prostitution" and that the website "was used for advertisements for illegal sexual contact with minors." *Id.* at 1044. She further alleged that Backpage.com therefore "had a desire that these posters accomplish[] their nefarious illegal prostitution activities so that the posters would return to the website and pay for more posting." *Id.* at 1045.

Examining *Roommmates.com* and other cases, the *M.A.* court rejected all these arguments, held Backpage.com immune under Section 230, and dismissed the case outright. The court found that the plaintiff could not overcome Section 230 based on arguments about the nature of the website or that it provided a category for adult escort ads, because users, not Backpage.com, create the content of ads and choose the categories where ads will appear. *Id.* at 1044, 1049. Similarly, it was irrelevant that the plaintiff alleged Backpage.com encouraged ads to generate revenues because "[t]he fact that a website elicits online content for profit is immaterial," and the only relevant inquiry is whether the service provider or third parties create the content at issue. *Id.* at 1050 (quoting *Goddard v. Google, Inc.*, 2008 WL 5245490, at *3 (N.D. Cal. Dec. 17, 2008)). The court likewise rejected arguments that Backpage.com should not be immune on grounds that it allegedly knew or should have known "of minors being sexually trafficked on its website,'" because "notice of the unlawful nature of the information provided is not

enough to make it the service provider's own speech." *Id.* at 1050 (quoting *Lycos*, 478 F.3d at 420).[11]

Finally, the *M.A.* court rejected the plaintiff's attempt to treat Backpage.com as a "developer" of content under Section 230 because of the nature of the website and content generally. The court noted that the key question is whether the website was "responsible for the development of the specific content that was the source of the alleged liability," *id.* at 1051 (quoting *Accusearch*, 570 F.3d at 1198), or, put more simply, whether the website "created the offending ads," *id.* (quoting *Dart v. Craigslist, Inc.*, 665 F. Supp. 2d 961, 967 (N.D. Ill. 2009)). The *M.A.* court held that, despite the plaintiff's accusations about Backpage.com as a whole, it was not an "information content provider" under Section 230 because the plaintiff had not alleged the site was "responsible for the development of any portion of the *content* of [the pimp's] posted ads or specifically encouraged the development of the offensive nature of that content." *Id.* at 1052 (emphasis in original).

The *M.A.* court recognized the plaintiff's "dismay with the scope of [Section 230] immunity," but found that Congress's choice is clear – Section 230 "errs on the side of robust communication and prevents the plaintiffs from moving forward with their claims." *Id.* at 1053 (quoting

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[11] The near-verbatim similarities between the allegations in *M.A.* and Plaintiffs' complaint in this case cannot be overemphasized and can only be appreciated by comparing the two. *See M.A.*, 809 F. Supp. 2d at 1043-45.

PatentWizard, Inc. v. Kinko's, Inc., 163 F. Supp. 2d 1069, 1072 (D.S.D. 2001)).

Dart v. Craigslist, 665 F. Supp. 2d 961, reached the same result, rejecting claims by the Cook County sheriff that Craigslist created a public nuisance and aided and abetted prostitution. The sheriff alleged that even though Craigslist prohibited illegal content, users routinely posted ads promising sex for money, and therefore Craigslist allegedly made it easier for prostitutes, pimps, and patrons to conduct business. *Id.* at 962-63. The court dismissed the claims on a 12(b)(6) motion, holding that Craigslist could not be culpable for content provided by customers who misuse its service. *Id.* at 967. Even if "users routinely flout Craigslist's guidelines," Craigslist had not caused them to do so, except "in the sense that no one could post [unlawful content] if craigslist did not offer a forum." *Id.* at 967, 969 (quotation marks and citation omitted). The court found that "[n]othing in the service craigslist offers induces anyone to post any particular listing." *Id.* at 968 (quoting *Chicago Lawyers' Comm.*, 519 F.3d at 671). And it explained that "Plaintiff's argument that Craigslist causes or induces illegal content is further undercut by the fact that Craigslist repeatedly warns users not to post such content." *Id.* at 969. In the end, the court disregarded the sheriff's "conclusory allegations ... that Craigslist induces users to post ads for illegal services," reasoning that Section 230 "would serve little purpose if companies like Craigslist were found liable under state law for 'causing' or 'inducing' users to post unlawful content in this fashion." *Id.* The court concluded: "Sheriff Dart

may continue to use Craigslist's website to identify and pursue individuals who post allegedly unlawful content ... [b]ut he cannot sue Craigslist for their conduct." *Id.* (citation omitted).

The *M.A.* and *Dart* decisions are not alone. In many other cases, plaintiffs have sued websites claiming they were sexually abused as a result of third-party content on the sites, and in every case courts have dismissed the claims under Section 230. *See, e.g.*, *Doe v. MySpace*, 528 F.3d at 420 (dismissing claims brought on behalf of a minor who was sexually assaulted after meeting a man through the MySpace website: "[Plaintiffs'] claims are barred by [Section 230], notwithstanding their assertion that they only seek to hold MySpace liable for its failure to implement measures that would have prevented [the abuse]. Their allegations are merely another way of claiming that MySpace was liable for ... third-party-generated content."); *Doe II v. MySpace Inc.*, 175 Cal. App. 4th 561, 96 Cal. Rptr. 3d 148, 156-57 (2009) ("[Plaintiffs] want MySpace to ensure that sexual predators do not gain access to (i.e., communicate with) minors on its Web site. That type of activity – to restrict or make available certain material – is expressly covered by section 230."); *Doe v. SexSearch.com*, 502 F. Supp. 2d 719, 727-28 (N.D. Ohio 2007) ("At the end of the day ... Plaintiff is seeking to hold SexSearch liable for its publication of third-party content and harms

flowing from the dissemination of that content. ... Section 230 specifically proscribes liability in such circumstances." (citations omitted)).[12]

This does not mean that injured parties have no recourse – "they may sue the third-party user who generated the content, but not the interactive computer service that enabled them to publish the content online." *Doe v. MySpace*, 528 F.3d at 419; *accord Schneider*, 108 Wn. App. at 463 (Congress "deliberately chose not to deter harmful speech by means of civil liability on 'companies that serve as intermediaries for other parties' potentially injurious messages.'" (quoting *Zeran*, 129 F.3d at 330-31)); *Nemet Chevrolet*, 591 F.3d at 254. Thus, in this case, Plaintiffs may pursue claims against Hopson and the other alleged pimps, but they cannot seek recovery from Backpage.com for ads the pimps created and posted on the Backpage.com website.

E. The Superior Court Misconstrued Section 230 As No Court Has Ever Done.

Plaintiffs advanced three arguments in the Superior Court to avoid Section 230 immunity, and the court rejected all but one. Plaintiffs first

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[12] *See also Doe v. Am. Online*, 783 So. 2d at 1017 (affirming dismissal of claims against AOL brought by mother of a minor after a predator photographed him and marketed the photos in an AOL chat room: "AOL falls squarely within [the] traditional definition of a publisher and, therefore, is clearly protected by § 230's immunity .... It is precisely the liability based upon negligent failure to control the content of users' publishing of allegedly illegal postings on the Internet that is the gravamen of [plaintiff's] alleged cause of action."); *Gibson v. Craigslist, Inc.*, 2009 WL 1704355, at *4 (S.D.N.Y. June 14, 2009) (dismissing claims that Craigslist failed to adequately monitor and police sales of merchandise on its website, including a handgun used to shoot the plaintiff).

asserted that Backpage.com is not immune because it has a category for "escorts," *see* CP 195 ("[t]he information created by Backpage is the term 'escorts'"), which, they argued, is a euphemism for prostitution, meaning that *all* ads in the category are unlawful, *see* CP194-196, 198-201. The Superior Court rejected this argument, noting that escort advertising has "been held to be legal," *see* RP 23:4-23:15, and the court's conclusion in this regard is unquestionably correct.[13] *See also Backpage.com, LLC v.*

[13] Escort services have long been recognized as legal, just as escort advertising has appeared in newspapers and telephone directories for decades. For example, Washington law defines retail sales subject to state B&O taxes as including escort services, RCW 82.04.050, and many other states recognize and regulate escort services, *see, e.g.*, Tenn. Code Ann. §§ 7-51-1102(11) & (12); 7-51-1116; Utah Code Ann. §§ 59-27-101 to -108; Ariz. Rev. Stat. § 13-422; Colo. Rev. Stat. Ann. §§ 12-25.5-103 to 5-115. Some thirty-five cities and counties in Washington have license requirements, impose taxes and fees, and otherwise regulate escorts and escort services. *See, e.g.*, Bellevue Mun. Code §§ 4.09.030.BB, 5.04.040; Blaine Mun. Code ch. 5.12; Buckley Mun. Code § 6.12.030(16) & (17); Carnation Mun. Code § 5.48.030; Cheney Mun. Code § 5.25.030; Cosmopolis Mun. Code § 3.45.030; Darrington Mun. Code § 5.04.030; DuPont Mun. Code §§ 3.07.040(p)(7), 5.04.060(b); Duvall Mun. Code § 5.02.030.C.5 & .I; Ellensburg Mun. Code § 13.49.060; Everett Mun. Code § 3.24.030; Fife Mun. Code § 19.06.235; Franklin County Code §§ 5.16.010, 5.16.150; Gold Bar Mun. Code §§ 5.68.030, 5.68.070; Jefferson County Code § 5.10.030; Kelso Mun. Code § 5.42.020.G & 5.42.100; Kitsap County Code § 10.52.010(j); Lynnwood Mun. Code §§ 3.104.010, 5.49.010.A & .B; Monroe Mun. Code § 5.48.020; Olympia Mun. Code §§ 5.04.040, 5.16.030.6;; Normandy Park Mun. Code § 4.14.030; Pierce County Code §§ 18.25.030, 18A.33.270; Port Townsend Mun. Code §§ 5.04A.030, 5.92.030.N & .O; Poulsbo Mun. Code ch. 5.10 & § 3.12.040(F); Redmond Mun. Code § 5.68.030(P) & (Q); Ridgefield Mun. Code § 3.04.030; Ruston Mun. Code § 5.01.030; SeaTac Mun. Code §§ 5.40.030.H & 5.40.120; Snohomish County Code § 6.30.010(10) & (11); University Place Mun. Code § 19.10.030; Stanwood Mun. Code §§ 5.32.020(g) & (n) & 5.32.110; Thurston County

McKenna, 881 F. Supp. 2d 1262, 1282 (W.D. Wash. 2012); *see also Dart*, 665 F. Supp. 2d at 968 ("Plaintiff is simply wrong when he insists that [the 'erotic services' category and subcategories] are all synonyms for illegal sexual services."). Plaintiffs also claimed Backpage.com "develops" content because it makes ads "usable and available" and "gather[s] and organiz[es]" information. CP 196-197. The Superior Court also rejected this argument; *all* websites do this, RP 15:1-15:8, and a contrary rule "would sap section 230 of all meaning." *See Roommates.com*, 521 F.3d at 1172 ("Of course, any classification of information ... could be construed as 'develop[ment]' under an unduly broad reading of the term. But, once again, such a broad reading would sap section 230 of all meaning.").

However, the Superior Court ultimately credited Plaintiffs' allegations that Backpage.com was not entitled to Section 230 immunity because it imposes rules prohibiting improper content. The court said it was "most concerned [about] the posting guidelines," which could be taken to mean that Backpage.com "know[s] this [*i.e.*, ads on the website] is for prostitution," and therefore is "assisting with the development" of content on the site. RP 50:5-50:12. This conclusion is wholly unprecedented, turns Section 230 upside down, and threatens to destroy this statutory immunity for all online service providers.

Significantly, courts have often held that Section 230 immunity is *supported* by websites' rules and restrictions for user-generated content; no

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Code § 22.04.543.G; Tumwater Mun. Code § 5.50.020.A.7; Woodinville Mun. Code § 17.19.030(g); Woodland Mun. Code §§ 5.50.020, 5.50.090.

court has ever held that immunity can be *defeated* by such rules. In *Dart*, for example, the court concluded that the "[sheriff's] argument that Craigslist causes or induces illegal content" was "*undercut* by the fact that Craigslist repeatedly warns users not to post such content." 665 F. Supp. 2d at 969 (emphasis added). Even accepting the sheriff's allegations that "users routinely flout Craigslist's guidelines," the court reasoned that "Section 230(c)(1) would serve little if any purpose if companies like Craigslist were found liable under state law for 'causing' or 'inducing' users to post unlawful content" based on users' violations of its rules. *Id.* Similarly, in *Roommates.com*, the Ninth Circuit explained its decision in *Carafano*, 339 F.3d at 1125, finding a dating site immune from a claim premised on a user's defamatory post, as based in part on the fact that the post was "contrary to the website's express policies." 521 F.3d at 1171. As a result, the court noted, "[t]he claim against the website was in effect, that it failed to [sufficiently] review each user-created profile," "precisely the kind of activity for which Congress intended to grant absolution with the passage of Section 230." *Id.* at 1171-72. *See also Goddard*, 640 F. Supp. 2d at 1198 (rejecting plaintiff's attempt to hold Google liable for third-party ads where they were "contrary to Google's express policy" (internal quotation and alterations omitted)).

Furthermore, while the Superior Court credited Plaintiffs' allegations that the posting rules could show that Backpage.com might "know" that some ads on the site "[are] for prostitution," RP 50:9, "[i]t 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," *Lycos*, 478 F.3d at 420. In *Schneider*, Division I of this Court found that Amazon.com was immune under Section 230 even though it had *actual knowledge* of defamatory posts (because the plaintiff provided notice), acknowledged that one or more of the posts violated its guidelines, and failed to remove them. 108 Wn. App. at 463-64. This is the uniform rule across the country, for "[l]iability upon notice would defeat the dual purposes advanced by § 230." *Zeran*, 129 F.3d at 333 (notice-based liability would destroy "the vigor of Internet speech and ... service provider self-regulation").[14] Thus, even if a provider has actual knowledge that third parties are posting illegal content, "the service provider's failure to intervene is immunized." *Goddard*, 2008 WL 5245490, at *3; *see also Gregerson v. Vilano Fin., Inc.*, 2008 WL 451060, at *9 n.3 (D. Minn. Feb. 15, 2008) (upholding Section 230 immunity even after website operator was made aware of objections to third-party comments posted on site); *M.A.*, 809 F. Supp. 2d at 1050-51.

Given that *actual knowledge* cannot defeat Section 230 immunity, mere allegations that a website *implicitly knew or should have known* of unlawful content cannot defeat immunity. This also is well established. For example, in *M.A.*, the plaintiff alleged Backpage.com should have been

[14] Notice-based liability would also subject websites to a "heckler's veto" anytime anyone objects, because it would always be safer for online providers to remove content rather than risk liability – giving anyone who complains unfettered power to censor speech. *See Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 880 (1997).

"on notice that its website might be ... used for illegal purposes [but did not] stop the ads from being posted and instead profited from such ads," but the court found it clear under Section 230 that "neither notice or profit make Backpage liable for the content and consequences of the ads posted by [the pimp]." 809 F. Supp. 2d at 1051; *see also Hill*, 727 S.E.2d at 559-60 (finding Stubhub immune under Section 230, notwithstanding allegations it knew or should have known users were selling tickets on the website in violation of state anti-scalping laws). In short, until this case, no court has ever held an online provider loses Section 230 immunity because it allegedly knew, should have known, or might have known that content on its site could be unlawful.

The Superior Court contradicted the case law in another important respect by basing its decision on Plaintiffs' allegations about the Backpage.com website as a whole, rather than focusing on whether Backpage.com created or developed the specific ads at issue.[15] But, under the established law, online service providers can be liable only for *directly participating* in creating, requiring, or developing *the specific content that is unlawful*. As the Ninth Circuit said in *Roommates.com*, immunity is lost only when "the website directly participates in developing the alleged illegality." 521 F.3d at 1174. Similarly, the Tenth Circuit in *Accusearch*

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[15] Plaintiffs' complaint does not even identify the specific ads they challenge, except to quote certain headlines (admittedly authored by the pimps and not Backpage.com). *See* CP 16, 20 ¶¶ 4.1, 6.3. Otherwise, their allegations concern the website as a whole and ads having nothing to do with Plaintiffs. *See* CP 7-10 ¶¶ 3.7, 3.8, 3.14 & CP 495-2771.

held that a provider is responsible for user content "only if it ... specifically encourages development of what is offensive about the content." 570 F.3d at 1199. Likewise, *S.C. v. Dirty World, LLC*, 2012 WL 3335284 (W.D. Mo. Mar. 12, 2012), found a gossip website immune and rejected the plaintiff's claims against the website as a whole "because [Section 230] focuses on the specific post at issue." *Id.* at *4. And, in *Hill v. Stubhub*, the court opined that the "'entire website' approach was fatally flawed" in light of Section 230 and its purposes. 727 S.E.2d at 562.[16]

That the Superior Court improperly accepted an "entire website" approach is clear from its misunderstanding of the *M.A* case. The court said it believed *M.A.* was distinguishable from the present case because, in *M.A.*, "there [was] no allegation that Backpage was responsible for development of any portion of the content" on the website. RP 43:19-43:25. In fact, the plaintiff in *M.A. did allege* that Backpage.com was responsible for development of content on the website generally, 809 F. Supp. 2d at 1044, but the court rejected *all* such allegations as insufficient to defeat Section 230 immunity. Instead, the court found immunity

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[16] *See also Whitney Info. Network, Inc. v. Xcentric Ventures, LLC*, 2008 WL 450095, at *12 (M.D. Fla. Feb. 15, 2008) ("The issue ... is whether Defendants are responsible, in whole or in part, for the creation or development *of the particular postings* relating to [Plaintiff] that are the subject of this lawsuit." (emphasis added)); *Carafano*, 339 F.3d at 1125 (noting the key issue is whether the online service provider "created or developed the particular information at issue"); *Gentry v. eBay, Inc.*, 99 Cal. App. 4th 816, 121 Cal. Rptr. 2d 703, 717 n.11 (2002) ("The critical issue is whether eBay acted as an information content provider with respect to the information that appellants claim is false or misleading.").

applied because the plaintiff did not allege (and could not show) that "Backpage was responsible for the development of any portion of the *content* of [the] posted ads" at issue. 809 F. Supp. 2d at 1152 (emphasis in original). Again, the allegations in this case are no different; the complaint does not allege Backpage.com created *any* of the content of the ads concerning Plaintiffs but rather admits that the pimps authored the content and posted these ads. CP 2-20 ¶¶ 1.2, 2.8, 4.1, 6.2, 6.3. In such circumstances, Section 230 plainly applies.

If Plaintiffs' bare allegations that Backpage.com's rules forbidding improper content are sufficient to defeat immunity, Section 230 could be avoided in every case merely by alleging a website's rules and restrictions mean the opposite of what they say. For example, Plaintiffs' warped interpretation would mean the result in *Schneider* should have been the opposite, because Amazon.com's rules prohibit defamatory reviews by users, but the user in that case violated the rules. *See* 108 Wn. App. at 464. Or, under Plaintiffs' theory, eBay would lose immunity for user listings about misrepresented or counterfeit goods because the site's rules prohibit such posts.[17] Even more to the point, online providers such as Craigslist, Facebook, YouTube, Match.com, and countless others would be at risk, because their posting rules are similar to or the same as Backpage.com's

[17] Courts have found eBay immune from such claims. *See, e.g., Gentry v. eBay*, 121 Cal. Rptr. 2d at 715-18 (refusing to hold eBay responsible for third-party sales of forged sports memorabilia).

rules.[18] Given these similarities, as well as Plaintiffs' admission that Backpage.com *does remove ads* that violate its rules, *see* CP 8 ¶ 3.9, Plaintiffs' efforts to paint the Backpage.com posting rules as a nefarious scheme should be seen for what they really are, *i.e.*, Plaintiffs' scheme to avoid Section 230 with nothing but unsupported arguments.

Simply put, if allowed to stand, the Superior Court's decision would eviscerate Section 230; it would cause online providers to do the opposite of what Congress intended. Rather than police user content, websites would be far better off to impose *no rules or restrictions and do no monitoring*, because they would only create liability risks by undertaking such efforts. *See Backpage.com v. McKenna*, 881 F. Supp. 2d at 1273 (making Backpage.com or other websites liable for efforts to prohibit content would "create[] an incentive for online service providers *not* to monitor the content that passes through [their] channels[,] precisely

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[18] For example, Craigslist's "Adult Services Posting Guidelines" are essentially identical to Backpage.com's rules; they also prohibit (1) "content that is unlawful, obscene, or which advertises illegal services," (2) ads that "suggest or imply an exchange of sexual favors for money" including by use of "any and all code words" (giving sexually explicit examples); (3) any "attempt to avoid detection of forbidden language by using spelling variations" (again providing explicit examples); and (4) "ads containing obscene images." *See* www.craigslist.org/about/help/Adult_Services_Posting_Guidelines. Match.com imposes rules for user-submitted images precluding "[p]hotos with nudity or sheer, or otherwise 'see-through,' material below the waist," www.match.com/photomanager/phototips.aspx, as well as other rules similar to Backpage.com's, www.match.com/registration/membagr.aspx. Facebook's and YouTube's rules are also similar. *See* www.facebook.com/communitystandards, www.youtube.com/t/community_guidelines.

the situation that [Section 230] was enacted to remedy"); *see also Nemet Chevrolet*, 591 F.3d at 258 (plaintiff's claims would thwart Congress's purpose to "remove disincentives for the development and utilization of blocking and filtering technologies" (quoting 47 U.S.C. § 230(b)(4))); *Batzel*, 333 F.3d at 1028; *Langdon v. Google, Inc.*, 474 F. Supp. 2d 622, 631 (D. Del. 2007).

At bottom, Congress made a policy choice in Section 230 to promote robust Internet free speech and encourage online providers to self-police user content, "and immunity is the form of that encouragement." *Schneider*, 108 Wn. App at 463. It is not for the Superior Court, this Court, or any other court to substitute a different choice. *See Doe v. MySpace*, 528 F.3d at 419; *Carafano*, 339 F.3d at 1123. The Superior Court's decision would undermine Section 230 and the critical national policies it reflects.

F. Dismissal Is Appropriate, Irrespective of Any Differences Between State and Federal Pleading Standards.

In refusing to find Backpage.com immune under Section 230, the Superior Court apparently felt constrained by Washington's pleading standards for CR 12(b)(6) motions, *see* RP 4:13-4:14, 18:7-18:8, 29:6-29:9, which are more deferential toward plaintiffs than the rule in federal courts. *See McCurry v. Chevy Chase Bank*, 169 Wn.2d 96, 102-03, 233 P.3d 861 (2010). However, the Superior Court should have dismissed this case regardless. Washington's procedural rules do not require courts to

accept legal conclusions, arguments, or irrelevant fact allegations, which is all that Plaintiffs' complaint offers. Moreover, if state procedural standards interfere with enforcement of federal substantive rights – here, Backpage.com's right to Section 230 immunity – the state standards are preempted.

1. Washington CR 12(b)(6) Standards Require Dismissal of Plaintiffs' Claims.

Civil Rule 12(b)(6) is intended to "weed[] out complaints where, even if what the plaintiff alleges is true, the law does not provide a remedy." *McCurry*, 169 Wn.2d at 102. "Dismissal under CR 12(b)(6) is appropriate in those cases where the plaintiff cannot prove any set of facts, consistent with the complaint that would entitle the plaintiff to relief." *Perry v. Rado*, 155 Wn. App. 626, 635-36, 230 P.3d 203 (2010).

Dismissal under CR 12(b)(6) is particularly appropriate for claims preempted under federal law or barred by immunity. *Schneider*, 108 Wn. App. at 454, is the most analogous example, as the Court there affirmed a 12(b)(6) dismissal and found Amazon immune under Section 230, rejecting all of the plaintiff's attempts to avoid the statute. But many other cases demonstrate the same principle. *See, e.g.*, *Gorman v. Garlock, Inc.*, 155 Wn.2d 198, 215-219, 118 P.3d 311 (2005) (affirming 12(b)(6) dismissal of shipyard workers' claims as preempted by the federal Longshore and Harbor Workers' Compensation Act); *Parsons v. Comcast of Cal./Colo./Wash., Inc.*, 150 Wn. App. 721, 729, 208 P.3d 1261 (2009) (preemption under federal Cable Act); *Regan v. McLachlan*, 163 Wn.

App. 171, 257 P.3d 1122 (2011) (affirming 12(b)(6) dismissal based on quasi-judicial immunity).[19] Since the purpose of immunity is to provide "an *immunity from suit* rather than a mere defense to liability ..., it is critical that insubstantial claims be resolved as quickly as possible." *Robinson v. City of Seattle*, 119 Wn.2d 34, 65, 830 P.2d 318 (1992) (emphasis supplied by the court) (internal quotation and citation omitted); *see Bailey v. State*, 147 Wn. App. 251, 259, 191 P.3d 1285 (2008).[20]

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[19] *See also, e.g., Parrott-Horjes v. Rice*, 168 Wn. App. 438, 450, 276 P.3d 376 (2012) (preemption under Federal Employees' Group Life Insurance Act); *Howell v. Alaska Airlines, Inc.*, 99 Wn. App. 646, 652-53, 994 P.2d 901 (2000) (preemption under Airline Deregulation Act); *Rodriguez v. Loudeye Corp.*, 144 Wn. App. 709, 719-20, 189 P.3d 168 (2008) (statutory immunity of corporate directors); *Jeckle v. Crotty*, 120 Wn. App. 374, 386, 85 P.3d 931 (2004) (immunity of attorneys and law firms for acts arising out of representing their clients).

Both preemption and immunity are issues of law. *McCurry*, 169 Wn.2d at 101 (preemption); *Michaels v. CH2M Hill, Inc.*, 171 Wn.2d 587, 597, 257 P.3d 532 (2011) (statutory immunity).

[20] This is especially important in cases implicating free speech rights, such as this one. The Washington Supreme Court has explained that "summary procedures are ... essential" to prevent "long and expensive litigation" threatening "First Amendment rights [by] the harassment of lawsuits" because, otherwise, the result will be "self-censorship affecting the whole public, [which] is hardly less virulent for being privately administered." *Mark v. Seattle Times*, 96 Wn.2d 473, 484-85, 635 P.2d 1081 (1981); *accord Mohr v. Grant*, 153 Wn.2d 812, 821, 108 P.3d 768 (2005) ("Serious problems regarding the exercise of free speech and free press guaranteed by the First Amendment are raised if unwarranted lawsuits are allowed to proceed to trial. The chilling effect of the pendency of such litigation can itself be sufficient to curtail the exercise of these freedoms." (internal quotations omitted)).

This is precisely the point of Section 230 – the statute provides *immunity from suit*, and so should be applied at the earliest possible juncture, *i.e.*, a 12(b)(6) motion to dismiss:

> As we have often explained in the qualified immunity context, "immunity is an *immunity from suit* rather than a mere defense to liability" and "it is effectively lost if a case is erroneously permitted to go to trial." *Brown v. Gilmore*, 278 F.3d 362, 366 n.2 (4th Cir.2002) (quotations omitted) (emphasis in original). We thus aim to resolve the question of § 230 immunity at the earliest possible stage of the case because that immunity protects websites not only from "ultimate liability," but also from "having to fight costly and protracted legal battles." *Roommates.com*, 521 F.3d at 1175.

Nemet Chevrolet, 591 F.3d at 254-55; *see also MCW, Inc. v. Badbusinessbureau.com, LLC*, 2004 WL 833595, at *7 (N.D. Tex. Apr. 19, 2004) (recognizing Section 230 "is an appropriate ground for dismissal ... under Rule 12(b)(6)" because defendant's immunity under the statute "would preclude [plaintiff] from establishing a set of facts that would entitle it to relief").

Plaintiffs' mantra below was that the Superior Court had to accept all their allegations, whether arguments or fact allegations, and despite whether they were conclusory, unsupported or based on speculation. *See, e.g.*, CP 190. In response to Plaintiffs' assertions that they were entitled all inferences, the Superior Court stated "You're preaching to the choir. " RP 29:6-29:9. As noted, the court expressed reluctance to grant dismissal because of the CR 12(b)(6) standards, commenting "honestly, ... of all the

cases in terms of the 12(b)(6) [this] is the closest I've ever come. ... [I]t's right on the line." RP 49:21-49:24.

In fact, Plaintiffs' arguments are wrong and the Superior Court's reticence was mistaken under CR 12(b)(6) standards. While a court must treat well-pleaded factual allegations in a complaint as true, it need not accept legal conclusions or conclusory allegations. *Haberman v. Wash. Pub. Power Supply Sys.*, 109 Wn.2d 107, 120, 744 P.2d 1032, 750 P.2d 254 (1987); *Rodriguez*, 144 Wn. App. at 717-18; *Clallam Cnty. Citizens for Safe Drinking Water v. City of Port Angeles*, 137 Wn. App. 214, 227, 151 P.3d 1079 (2007). The Washington Supreme Court's decision in *State ex rel. Pirak v. Schoettler*, 45 Wn.2d 367, 369, 274 P.2d 852 (1954), *cited in Haberman*, 109 Wn.2d at 120, illustrates this distinction. There, the court rejected the plaintiff's argument that the director of fisheries had violated a state statute prohibiting the use of "fish traps" or "fixed appliance[s]" to catch salmon by issuing licenses for "reef nets." 45 Wn.2d at 369. The plaintiff repeatedly referred to reef nets as "fish traps" and "fixed appliances" in his petition and argued that, because the case was on a demurrer, the court had to accept his allegations. The Supreme Court disagreed, finding the allegations did not state facts, but went to "the fundamental legal issue in the case," *i.e.*, whether the statutory definitions of "fish traps" and "fixed appliances" included reef nets. *Id.* at 370. "Only facts stated in the petition which are well pleaded are to be considered, and conclusions of the pleader are to be disregarded." *Id.*

In this case, the Superior Court went beyond just accepting Plaintiffs' factual allegations,[21] instead crediting Plaintiffs' contentions that Backpage.com "assisted in developing" content and therefore could be considered an "information content provider" under Section 230, because it imposes rules to prevent improper posts. As in *Pirak*, these are the "fundamental legal issue[s]" about the meaning of Section 230, which the court should *not* have accepted.[22]

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[21] The *facts* Plaintiffs alleged in their complaint are that they are minors, CP 1-2 ¶¶ 1.1, 1.2; they were victimized and prostituted by three adult pimps, CP 2-20 ¶¶ 1.2, 4.1, 4.2, 5.1, 5.2, 6.1, 6.2, the pimps created and posted ads about the Plaintiffs on Backpage.com, *id.* ¶¶ 1.2, 2.8, 4.1, 5.2, 6.2, 6.3; the Backpage.com website includes an "escorts" category, with various subcategories, *id.* ¶¶ 3.5, 3.13; the website charges a fee for ads posted in that category; *id.* ¶ 3.2; Backpage.com imposes rules for ads precluding (among other things) sexually explicit language, naked images, solicitations for prostitution or illegal services, or materials that exploit minors, *id.* ¶¶ 3.6, 3.9, 3.13, 3.19; Backpage.com removes ads that violate these requirements, *id.* ¶ 3.9; users have no contact with Backage.com except through an automated process, *id.* ¶ 3.19; and the ads posted by Hopson and the other pimps concerning the Plaintiffs appeared to comply with the site's rules, *id.* ¶¶ 4.1, 5.2, 6.4. Backpage.com acknowledged the Superior Court should accept these facts on a CR 12(b)(6) motion, but urged that the court should not credit Plaintiffs' arguments and conclusions. *See* CP 370.

[22] Even if the court could have treated Plaintiffs' arguments and conclusions as fact allegations, it still should have disregarded them as irrelevant. When factual allegations are immaterial because they would not entitle the plaintiff to relief regardless, a court should disregard them and dismiss the complaint as a matter of law. *Haberman*, 109 Wn.2d at 121. As shown above, Plaintiffs cannot defeat Section 230 immunity by (1) attacking the Backpage.com website as a whole; (2) alleging Backpage.com knows or should know of unlawful content on its site; (3) alleging Backpage.com encourages unlawful content; or (4) claiming the site earns revenues and profits. None of this matters, because, as explained above, such allegations cannot overcome Section 230 immunity.

2. State Procedural Rules Cannot Usurp Federal Substantive Rights.

As discussed above, two federal courts previously enforced Section 230 and dismissed identical claims against Backpage.com, *M.A. v. Village Voice* , 809 F. Supp. 2d 1041, and substantially similar claims against Craigslist, *Dart v. Craigslist*, 665 F. Supp. 2d 961. *See* Section IV.D, above. As also shown, if properly applied, the CR 12(b)(6) standards and the principles of Section 230 should lead to the same result here. *See* Section IV.F.1, above. To the extent the Superior Court felt constrained to reject federal case law because of Washington's more lenient CR 12(b)(6) pleading standards, it erred for the separate reason that state procedural rules cannot trump federal substantive rights.

As the United States Supreme Court has held, when a state court confronts a federal substantive right, "the 'federal right cannot be defeated by the forms of local practice.'" *Brown v. W. Ry. of Ala.*, 338 U.S. 294, 296 (1949). Thus, in *Brown*, the Court reversed dismissal of a claim under the federal Employers' Liability Act, where the lower court had relied on a state pleading standard construing allegations "most strongly against the pleader." *Id.* at 295. The Court held the state procedural standard preempted because it would have interfered with a federal substantive right. *Id. See also Felder v. Casey*, 487 U.S. 131, 138 (1988) (refusing to enforce state law requiring notice of claim under 42 U.S.C. § 1983, in part because it would "frequently and predictably produce different outcomes in § 1983 litigation based solely on whether the claim is asserted in state or

federal court"). Washington courts recognize and apply this doctrine. *See Stanton v. Bayliner Marine Corp.*, 123 Wn.2d 64, 82, 866 P.2d 15 (1993) (federal maritime law precluded application of state economic loss rule; "the extent to which state law may be used to remedy maritime injuries is constrained by a so-called 'reverse-*Erie*' doctrine which requires that substantive remedies afforded by the States conform to governing federal maritime standards").

Thus, although "[f]ederal law takes state courts as it finds them," *Felder*, 487 U.S. at 150, that is so only when state rules do not "impose unnecessary burdens upon rights ... authorized by federal laws." *Brown*, 338 U.S. at 298-99. That would be the result here if Washington's CR 12(b)(6) standard allows Plaintiffs' claims to proceed in state court, notwithstanding overwhelming authority barring such claims in federal court. Otherwise, online service providers would face unique and unpredictable results when they seek to enforce Section 230 rights in Washington. But "the [I]nternet does not recognize geographic boundaries," *Am. Booksellers Found. v. Dean*, 342 F.3d 96, 103 (2d Cir. 2003), and that is why Congress granted immunity from state laws to eliminate a patchwork of different and potentially inconsistent state regulation. *PSINet, Inc. v. Chapman*, 362 F.3d 227, 240 (4th Cir. 2004) (a state's efforts to regulate the Internet "highlights the likelihood that a single actor might be subject to haphazard, uncoordinated, and even outright inconsistent regulation ...." (quoting *Am. Libraries Ass'n v. Pataki*, 969 F. Supp. 160, 168 (S.D.N.Y. 1997)).

This Court can and should respect Section 230 immunity and Congress's intent without having to address whether Washington CR 12(b)(6) standards must yield or are preempted. The Court need only confront this issue if it concludes that the result in Washington state courts would differ from the uniform, overwhelming body of law in federal courts, which it should not.

V. CONCLUSION

The Superior Court erred by denying Backpage.com's motion to dismiss. Its decision contravenes the letter and intent of Section 230, as well as an enormous body of established law interpreting the statute for over seventeen years since its passage. The court's decision, if allowed to stand, would threaten online service providers across the Internet and could expose providers to different, contrary and unpredictable liability risks in Washington, as nowhere else. This Court should respect the broad and important immunity afforded by Section 230, to preserve robust free speech and encourage self-policing on the Internet, as Congress intended.

RESPECTFULLY SUBMITTED this 9th day of December, 2013.

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I hereby certify that I caused the document to which this certificate is attached to be delivered to the following as indicated:

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Declared under penalty of perjury under the laws of the state of Washington this 9th day of December, 2013.

Ambika K. Doran