NO. 44920-0-II

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

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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.

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# APPELLANTS' REPLY BRIEF

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## I. INTRODUCTION

Section 230 of the Communications Decency Act ("CDA"), 47 U.S.C. § 230, prohibits holding a website liable for state-law claims based on content created or developed by third parties. In this case, Plaintiffs allege and admit that pimps created and posted the ads that harmed them. It is undisputed Backpage.com did not author the ads or require any of the content in the ads. Under the plain terms of the statute and hundreds of cases interpreting it, this is third-party content, and Section 230 bars this lawsuit.

Plaintiffs try to muddy this straightforward application of Section 230. Their response effectively makes one argument, repeated in different ways. Plaintiffs contend their allegation that Backpage.com "promotes" or "encourages" unlawful conduct erases Section 230 immunity and exposes the website to claims and litigation based on any and all third-party content on the site. This theory would nullify Section 230.

Under settled law, allegations a website "promoted or encouraged ... the illegality of third parties[]" "must be resolved in favor of immunity, lest we cut the heart out of section 230 ...." *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1174 (9th Cir. 2008). An online provider does not create or develop content unless it directly participates in and materially contributes to the alleged unlawfulness of the content at issue. *Id.* at 1167-68. In contrast, when a website provides an open text field allowing users to post content they

choose—as Backpage.com does—"[t]his is precisely the kind of situation for which section 230 was designed to provide immunity." *Id.* at 1174.

Moreover, an online provider loses Section 230 immunity only if it creates or develops *the particular content that allegedly caused the plaintiff's harm.* Plaintiffs' challenges to Backpage.com's Section 230 immunity are based on the website's structure, terms and operation, but such generalized criticisms are wholly irrelevant.

Otherwise, Plaintiffs' arguments are all variations on the same erroneous theme. They contend Backpage.com "creates" content by providing a category for escort ads. Yet, five cases (four concerning Backpage.com) have held that publishing escort ads online is *not* illegal and is protected by the First Amendment and Section 230. Plaintiffs also argue Backpage.com "develops" unlawful content by imposing posting rules that prohibit unlawful content. This is not only illogical, it would destroy the express purpose of Section 230 to *encourage* self-regulation by websites to prevent unlawful, harmful or offensive content.

It bears repeating that the Superior Court rejected all of Plaintiffs' arguments, except this last one—that, by imposing posting rules, Backpage.com may know third parties can misuse its website for illegal activity, meaning it arguably "assist[ed] with the development" of such content. This was error. Section 230 immunity turns on who created or developed the content that allegedly caused Plaintiffs' harm. Here, the admitted and only answer is that third parties, *not* Backpage.com, created and developed the ads. Backpage.com is immune under Section 230.

## II. ARGUMENT

### A. Plaintiffs' Interpretation of "Information Content Provider" Contradicts Section 230 and the Case Law.

Plaintiffs contend Backpage.com is an "information content provider," *i.e.*, it is "responsible, in whole or in part, for the creation or development of information provided through the Internet ...." 47 U.S.C. § 230(f)(3). But they misinterpret the term, selectively quoting from *Roommates.com* and *FTC v. Accusearch Inc.*, 570 F.3d 1187 (10th Cir. 2009), while ignoring the holdings in those cases. *See* App. Br. at 18-23. In fact, the case law establishes several principles that Plaintiffs ignore.[1]

#### *1. A Website Must Directly Participate In and Materially Contribute To the Content at Issue.*

First, to be an "information content provider," a website must directly and actively participate in or require creation of the allegedly unlawful content. As the Ninth Circuit stated in *Roommates.com*, "a website helps to develop unlawful content, and thus falls within the exception to section 230, if it *contributes materially to the alleged illegality of the conduct*." 521 F.3d at 1168 (emphasis added).

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[1] Plaintiffs quote a statement from Senator Exon to argue the CDA was "designed to protect children," Resp. Br. at 15 (emphasis omitted), but that statement related to a bill to impose criminal penalties for transmission of indecent materials to minors, *not* Section 230, which was proposed later. *See* David S. Ardia, *Free Speech Savior or Shield for Scoundrels: An Empirical Study of Intermediary Immunity Under Section 230 of the Communications Decency Act*, 43 Loy. L. A. L. Rev. 373, 377 (2009-10). The CDA ultimately included both provisions, but *Reno v. ACLU*, 521 U.S. 844, 849 (1997), struck down the anti-indecency provisions. Section 230 remained intact, and is now called the CDA.

Plaintiffs wrongly suggest *Roommates.com* "approved of several definitions of the term 'develop,'" including to make "usable and available," or to "gather" or "organize." Resp. Br. at 17. To the contrary, recognizing the term "develop" could include "just about any function performed by a website," the Ninth Circuit found such a reading would "defeat the purposes of section 230 by swallowing up every bit of the immunity that the section otherwise provides." 521 F.3d at 1167. Instead, a website loses immunity *only* "[w]here it is very clear that the website directly participates in developing the alleged illegality." *Id.* at 1174.

In *Accusearch*, the Tenth Circuit adopted the "materially contributes" test and stated that an online "provider is 'responsible' for the development of content only if it in some way specifically encourages development of what is offensive about the content." 570 F.3d at 1199, 1200. Plaintiffs mention *Accusearch* but refer only to dicta. *See* Resp. at 19. The court held Accusearch *was* responsible for developing content because it sold private telephone records and hired researchers to obtain them, which required violating or circumventing the Telecommunications Act by fraud or theft. 570 F.3d at 1192, 1199. "By paying its researchers to acquire telephone records, knowing that the confidentiality of the records was protected by law, [the website] contributed mightily to the unlawful conduct of its researchers." *Id.* at 1200.

Many cases applying *Roommates.com* and *Accusearch* reinforce that a website is not an "information content provider" unless it directly

participates in and materially contributes to the creation of the unlawful content at issue. Plaintiffs simply ignore this principle and the cases.

For example, in *Hill v. StubHub, Inc.*, 727 S.E.2d 550 (N.C. App. 2012), the court found Section 230 barred claims that Stubhub violated state anti-scalping laws, even though the plaintiff alleged Stubhub designed and intended its website to violate the law. "[T]o 'materially contribute' to the creation of unlawful material," the court explained, "a website must *effectively control the content* posted by [the] third parties or take other actions which *essentially ensure the creation* of unlawful material." *Id.* at 561 (emphasis added). Even if the website "encouraged the posting[s]" or was on notice of "unlawful sales," third-party users posted the ticket offers and set prices, and the plaintiff's attacks on the website as a whole could not "support a conclusion that Defendant's website essentially ensured that unlawful content would be posted." *Id.*; *see also id.* at 562 (an "'entire website' approach [is] fatally flawed").[2]

*Goddard v. Google, Inc.*, 640 F. Supp. 2d 1193 (N.D. Cal. 2009), found Google immune despite allegations it "encourages illegal conduct,

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[2] Plaintiffs cite another case involving StubHub, a state trial court decision, *NPS LLC v. StubHub, Inc.*, 2009 WL 995483, at *13 (Mass. Super.Ct. Jan. 26, 2009). *See* Resp. Br. at 34. That court denied summary judgment, stating only that "there is evidence in the record that StubHub materially contributed to the illegal 'ticket scalping' of its sellers." Every court that has considered *NPS* has rejected it. *See, e.g., Milgram v. Orbitz Worldwide, Inc.*, 419 N.J. Super. 305, 16 A.3d 1113, 1126-27 (2010) (finding online ticket marketplace immune; dismissing *NPS* as inconsistent with other cases, and noting it was "quite frankly, unclear ... which facts the court used in reaching the conclusion that § 230 did not apply"); *Hill*, 727 S.E.2d at 563 ("declin[ing] to follow" *NPS* as "inconsistent with the decisions concluding that knowledge of unlawful content does not strip a website of [Section 230] immunity").

collaborates in the development of illegal content and, effectively, requires [it]" through its online advertising program. *Id.* at 1196. A website does not "contribute materially" to unlawfulness by giving third parties "neutral tools to create web content, even if the website knows that the third parties are using such tools to create illegal content." *Id.* at 1196-98. To find a website "developed" content, "[s]ubstantially greater involvement is required," such as directly eliciting and making "aggressive use" of the content. *Id.* at 1198 (quoting *Roommates.com*, 521 F.3d at 1172); *see also id.* at 1199 ("direct and palpable involvement ... is required").[3]

### 2. *Allegations that a Website Promotes or Encourages Unlawful Content Are Irrelevant.*

Second, allegations that a website "promotes" or "encourages" unlawful content cannot overcome Section 230 immunity because, as the Ninth Circuit emphasized in *Roommates.com*, "a clever lawyer" "could argue that *something* the website operator did encouraged the illegality." *Id.* at 1174 (emphasis in original). Such cases "*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

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[3] *See also S.C. v. Dirty World, LLC*, 2012 WL 3335284, at *3 (W.D. Mo. Mar. 12, 2012) (reading *Roommates.com* and *Accusearch* to mean immunity is lost only if the provider "require[s] the posting of actionable material [or] pay[s] for such information"); *Vazquez v. Buhl*, — A.3d. —, 2014 WL 1795574, at *10-11 (Conn. App. May 13, 2014) (upholding immunity because plaintiff failed to show the website "'materially contributed,' 'prompted,' 'specifically encouraged,' 'apparently requested,' or 'actively solicited'" the allegedly unlawful content, nor that it "supervised, communicated or collaborated with" the author); *Parisi v. Sinclair*, 774 F. Supp. 2d 310, 313, 317 (D.D.C. 2011) (Section 230 protected providers who did not write, contribute to, actively solicit, encourage or communicate with author of allegedly defamatory statements).

promoted or encouraged—or at least tacitly assented to—the illegality of third parties." *Id.* (emphasis added); *see also id.* at 1174-75 ("[I]n cases of enhancement by implication or development by inference ... section 230 must be interpreted to protect websites not merely from ultimate liability, but from having to fight costly and protracted legal battles.").

Plaintiffs ignore this principle, just as they ignore the holdings in *Roommates.com*. *See* Resp. Br. at 16-18. The Ninth Circuit held the website was "not responsible, in whole or in part, for the development of content" in its "Additional Comments" section because that was an open text field where users could write what they chose. 521 F.3d at 1174. The plaintiff argued that because Roommates.com required answers to discriminatory questions elsewhere, it encouraged discriminatory content in the comments. But "[s]uch weak encouragement cannot strip a website of its section 230 immunity, lest that immunity be rendered meaningless as a practical matter." *Id.* Further, the website could not possibly review every comment, "precisely the kind of situation for which section 230 was designed to provide immunity." *Id.* Backpage.com is structured the same as the Roommates.com comments section; it provides open text fields and does not *require* users to post *any content*. *See* App. Br. at 20-21.

Other cases emphasize that allegations a website "encourages" unlawful content cannot defeat Section 230. In *Shiamili v. Real Estate Group of New York, Inc.*, 17 N.Y.3d 281, 952 N.E.2d 1011 (2011), New York's high court rejected claims the defendants' website, ShittyHabitats.com, "implicitly encouraged users to post negative

comments about the New York City real estate industry." 952 N.E.2d at 1018. Applying *Roommates.com*'s "materially contributes" test and finding that case and *Accusearch* "easily distinguishable," the court enforced Section 230, because "[c]reating an open forum for third parties to post content—including negative commentary—is at the core of what section 230 protects." *Id.* at 1018-19. Similarly, *Ascentive, LLC v. Opinion Corp.*, 842 F. Supp. 2d 450 (E.D.N.Y. 2011), rejected the plaintiffs' arguments that the website PissedConsumer.com encouraged defamatory postings. "[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." *Id.* at 476 (internal alteration by the court) (quoting *Global Royalties, Ltd. v. Xcentric Ventures, LLC*, 544 F. Supp. 2d 929, 933 (D. Ariz. 2008)); *see also* App. Br. at 23.

Plaintiffs do not address these cases either, but instead cite inapposite ones to argue that courts "nationwide consistently refuse to grant CDA immunity ... where the Plaintiff alleges ... the website is promoting unlawful postings." Resp. Br. at 33; *see also id.* at 36-37 & n.13. Plaintiffs' cases do not concern third-party content at all, but rather content websites created *themselves*. *See, e.g.*, *Anthony v. Yahoo! Inc.*, 421 F. Supp. 2d 1257, 1259-60, 1263 (N.D. Cal. 2006) (fake dating profiles Yahoo! created); *Whitney Info. Network, Inc. v. Xcentric Ventures, LLC*, 199 Fed. App'x 738, 740, 742 (11th Cir. 2006) (ripoffreport.com allegedly authored fake consumer complaints and re-wrote others); *HyCite*

*Corp. v. Badbusinessbureau.com, LLC*, 418 F. Supp. 2d 1142, 1149 (D. Ariz. 2005) (ripoffreport.com produced comments and other content); *MCW, Inc. v. Badbusinessbureau.com, LLC*, 2004 WL 833595, at *9 (N.D. Tex. Apr. 19, 2004) ("defendants themselves create, develop, and post original, defamatory information").

### *3. Courts Must Focus On the Specific Content that Allegedly Caused Harm.*

Third, to decide whether a website is an "information content provider," the focus must be on the *specific content* that allegedly caused the harm, *not* the *website as a whole*, as Plaintiffs urge. The issue is whether the website was "responsible for the development of the specific content that was the source of the alleged liability." *Accusearch*, 570 F.3d at 1198-99; *accord Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1125 (9th Cir. 2003) ("The critical issue is whether [the website] acted as an information content provider with respect to the information that [plaintiffs] claim is [unlawful]"; Section 230 "bar[s] claims unless [the website] created or developed the particular information at issue.").

Allegations that a website generally creates *some* content are irrelevant. *Gentry v. eBay, Inc.*, 99 Cal. App. 4th 816, 121 Cal. Rptr. 2d 703, 717 n.11 (2002) ("[T]he fact [plaintiffs] allege eBay is an information content provider is irrelevant if eBay did not itself create or develop the content for which the [plaintiffs] seek to hold it liable."). Conversely, when "a third party willingly provides the essential published content, the interactive service provider receives full immunity ...." *Carafano*, 339

F.3d at 1124; *see also Doe v. MySpace, Inc.*, 528 F.3d 413, 418 (5th Cir. 2008) ("Courts have construed the immunity provisions in § 230 broadly in all cases arising from the publication of user-generated content.").[4]

#### *4. Allegations that a Website Fosters Illegal or Criminal Conduct Are Irrelevant.*

Fourth, and as a corollary, allegations that a website fosters a forum for illegal or criminal content cannot defeat Section 230 immunity. Courts have consistently rejected these attacks too.[5]

For example, in *Doe v. Bates*, the plaintiff alleged Yahoo! knowingly hosted and profited from a forum for "illegal child pornography," but the court upheld immunity because third parties

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[4] This principle appears in countless cases. *See, e.g., Doe v. Bates*, 2006 WL 3813758, at *17 (E.D. Tex. Dec. 27, 2006) ("[T]he immunity analysis turns on who was responsible for the specific harmful material at issue, not on whether the service provider was responsible for the general features and mechanisms of the service ...."); *Beckman v. Match.com*, 2013 WL 2355512, at *4 (D. Nev. May 29, 2013) ("Whether a website is an 'information content provider' turns on whether the website 'created or developed' the particular information or content alleged to have resulted in the harm at issue."); *S.C. v. Dirty World, LLC*, 2012 WL 3335284, at *4 (rejecting allegations about "the general structure and operation of the Website" because "the CDA focuses on the specific post at issue"); *M.A. v. Village Voice Media Holdings, Inc.*, 809 F. Supp. 2d 1041, 1051-52 (E.D. Mo. 2011) (focusing on the "specific content" at issue).

[5] Plaintiffs' brief goes beyond the pale of fair argument, asserting, for example, Backpage.com "knowingly ... promote[s] child sex trafficking," and does not "den[y] that each and every [escort] advertisement" is for sex trafficking. Resp. Br. at 8-9. In fact, Backpage.com has repeatedly and categorically denied these claims. *See, e.g.*, App. Br. at 24 n.10. Backpage.com takes extensive efforts to *prevent* possible sex trafficking ads, including by enforcing its posting rules, using automated filters to block ads, manually reviewing ads twice, encouraging users to flag inappropriate ads, and reporting suspicious ads to the National Center for Missing and Exploited Children. *See Backpage.com, LLC v. Cooper*, 939 F. Supp. 2d 805, 814, 825 (M.D. Tenn. 2013). Plaintiffs cannot hide behind CR 12(b)(6) to make baseless allegations. *See* CR 11.

supplied the content. 2006 WL 3813758, at *16. Section 230 does not have an exception for allegations a website intentionally violated criminal law, as that "would effectively abrogate the immunity" whenever "a plaintiff simply alleged intentional [criminal] conduct." *Id.* at *4.

Similarly, *GoDaddy.com, LLC v. Toups*, 2014 WL 1389776, at *1 (Tex. App. Apr. 10, 2014), rejected a plaintiff's allegations that a "revenge porn" website published and promoted "obscenity and child pornography." "[T]he plain language of [Section 230] contemplates application of immunity ... for interactive computer service providers even when the posted content is illegal, obscene, or otherwise may form the basis of a criminal prosecution." *Id.* at *7. "Congress decided not to allow private litigants to bring civil claims based on their own beliefs that a service provider's actions violated the criminal laws." *Id.* at *8 (quoting *Doe v. Bates*, 2006 WL 3813758, at *5);[6] *see also S.C. v. v. Dirty World, LLC*, 2012 WL 3335284, at *4 (rejecting allegations that TheDirty.com was intended to elicit defamatory content).[7]

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[6] *Accord Hill*, 727 S.E.2d at 562 (disregarding allegations that the purpose of StubHub was to violate anti-scalping laws and that all ticket offers on the site violated those laws); *Global Royalties, Ltd. v. Xcentric Ventures, LLC*, 544 F. Supp. 2d at 933 (upholding immunity even though "[i]t is obvious that a website entitled Ripoff Report encourages the publication of defamatory content"); *Stoner v. eBay Inc.*, 2000 WL 1705637, at *3 (Cal. Super. Nov. 1, 2000) (finding eBay immune despite plaintiff's allegations that it knew of and routinely allowed sales of illegal recordings, including ones posted as "bootleg").

[7] Plaintiffs avoid *S.C.* but rely on *Jones v. Dirty World Entertainment Recordings, LLC*, 840 F. Supp. 2d 1008 (E.D. Ky. 2012), *see* Resp. Br. at 36, which has been discredited and is on appeal. The *S.C.* court "distance[d] itself" from *Jones*'s "narrow interpretation of CDA immunity." 2012 WL 3335284, *5. In the Sixth Circuit appeal, nine of the nation's ten largest websites (and others) weighed in as

And, the case most directly on point, *M.A. v. Village Voice Media Holdings, LLC*, 809 F. Supp. 2d 1041 (E.D. Mo. 2011), rejected the very same attacks Plaintiffs make here, *i.e.*, that Backpage.com is responsible for all escort ads on the site and intends users will "accomplish their nefarious illegal prostitution activities," including "sexual contact with minors." *Id.* at 1044-45; *see* App. Br. at 24-27, 35-36. Plaintiffs claim *M.A.* "was plead [sic] much differently" because the plaintiff there failed to allege Backpage.com "developed and created unlawful prostitution advertisements." Resp. Br. at 32-33. This is wrong.

The plaintiff in *M.A.* plainly alleged that Backpage.com was "responsible in part for the development and/or creation of information provided through the internet." 809 F. Supp. 2d at 1044. Indeed, she asserted nearly identical allegations as Plaintiffs, but the court rejected them. *See* App. Br. at 24-25.[8] Noting the focus must be on "the specific content that was the source of the alleged liability," 809 F. Supp. 2d at 1051 (quoting *Accusearch*, 570 F.3d at 1198), the court held Backpage.com

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amici, urging reversal. *See* E. Goldman, "Should TheDirty Website Be Liable For Encouraging Users To Gossip?" Forbes, www.forbes.com/sites/ericgoldman /2013/11/25/ should-thedirty-website-be-liable-for-encouraging-users-to-gossip.

[8] The court held that (1) having an "adult" category for escort ads could not override CDA immunity, 809 F. Supp. 2d.at 1049; (2) whether "a website elicits online content for profit is immaterial," *id.* at 1050; (3) "[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," *id.* (quoting *Universal Commc'n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 420 (1st Cir. 2007)); and (4) the same cases Plaintiffs cite here (*Roommates.com* and *Anthony v. Yahoo! Inc.*,), were "unavailing," because M.A. failed to allege Backpage.com "active[ly] controlled" or itself "*created*" the ads at issue. *Id.* at 1052 (emphasis in original).

immune because "there is no allegation that Backpage was responsible for the development of any portion of the *content* of McFarland's [the pimp's] posted ads or specifically encouraged the development of the offensive nature of that content." *Id.* at 1052. (emphasis in original) (footnote omitted). *Compare* Resp. Br. at 33 (relying upon but misquoting this sentence out of context). Thus, M.A.'s claims failed because she could not allege Backpage.com created or developed *the content of the ads* that allegedly caused her harm. This case is the same.[9]

### B. Plaintiffs' Argument that Backpage.com is an "Information Content Provider" Contradicts the Overwhelming Case Law Interpreting Section 230.

Backpage.com undisputedly did not write, post or otherwise create the ads about Plaintiffs. In fact, Plaintiffs allege the opposite, *i.e.*, pimps created and uploaded the ads. *See, e.g.*, CP 2 ¶ 1.2; CP 17 ¶ 5.2; *see* App. Br. at 4. Backpage.com certainly did not force the pimps to post the ads, require them to submit unlawful content (but, instead, bans such content), or have any contact with them at all. *See* CP 12-13 ¶ 3.19 (admission in complaint that users submit ads through an automated process). Plaintiffs

[9] For the reasons stated above, Plaintiffs' allusions to "a host of criminal statutes that backpage aids others in violating," Resp. at 26, are irrelevant. Plaintiffs cannot avoid Section 230 immunity by alleging their own beliefs that third-party content is criminal. Plaintiffs also misinterpret the statutes they cite, as even they do not (and cannot) allege Backpage.com had any knowledge that the pimps were posting ads, much less that it knew the specific ads concerned minors or were for prostitution. *See Dart v. Craigslist, Inc.*, 665 F. Supp. 2d 961, 969 (N.D. Ill. 2009) (rejecting similar allegations that Craigslist aided or abetted prostitution). Indeed, Plaintiffs allege the ads *complied* with the posting rules permitting only legal escort services. *See* CP 16-20 ¶¶ 4.1, 5.2, 6.4.

do not allege (nor could they) that the website participated in any way—much less actively or directly—in creating or developing the ads.

Instead, Plaintiffs impermissibly attack the website as a whole,[10] insisting Backpage.com must show "beyond a reasonable doubt that the ... pimps are 100% responsible for the development and creation of all ... illegal content on their website," while Plaintiffs "only need to show that it is 'possible' that backpage is partly responsible for ... encouraging others to post unlawful content, or ... influences content." Resp. Br. at 23, 27. No court has *ever* interpreted Section 230 in this way, as doing so would nullify the statute. A plaintiff or clever lawyer could avoid immunity in every case by alleging a website in some way "encourages" unlawful conduct or merely "influences" content. Such a nebulous standard would leave online providers with no idea what the law protects.

Plaintiffs' brief repeats their theme countless times, with much rhetorical excess, but virtually no fact allegations, except that Backpage.com (1) has a category for escort ads and (2) imposes posting rules. Again, the Court should reject this "entire website" attack as "fatally flawed." *Hill*, 727 S.E.2d at 562. But it should also reject these arguments because the escort category and posting rules *are lawful.*

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[10] As noted previously, Plaintiffs did not submit copies of the ads with their complaint. App. Br. at 4-5. They now suggest that is because Backpage.com did not provide discovery. Resp. Br. at 12 n.6. Yet, Plaintiffs obviously have the ads—the complaint describes them and even offers selected quotes, *see* CP 16, 17, 20 ¶¶ 4.1, 5.2, 6.3—but they have chosen not to provide them, preferring instead that the Court have only their characterizations.

Allowing Plaintiffs to defeat Section 230 by alleging lawful activity is unlawful also would render the statute meaningless.[11]

### *1. The Escort Category Is Protected By the First Amendment and Section 230.*

Plaintiffs argue Backpage.com "creates" content by having a category for "escort" ads. *See, e.g.*, Resp. Br. at 5; 21, 29-31.[12] The trial court saw the lie of this argument, *see* RP 23:8-23:15 (noting escort ads have "been held to be legal" and "there is also a ... legal category of escort" services).[13] Backpage.com noted previously that escort services are legal in Washington (and many other states) and thirty-five of its cities and counties. *See* App. Br. at 30-31 & n.13. Plaintiffs admit these are "*lawful* services," but insist all escort ads on Backpage.com are for

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[11] Plaintiffs also claim Backpage.com should lose immunity because they allege it acted in bad faith, citing Section 230(c)(2). Resp. at 31-32. Regardless of whether Section 230(c)(2) also applies, Backpage.com moved to dismiss under Section 230(c)(1), which contains no good faith element. *See Levitt v. Yelp! Inc.*, 2011 WL 5079526, at *7 (N.D. Cal. Oct. 26, 2011) ("[230](c)(1)'s immunity applies regardless of whether the publisher acts in good faith.").

[12] Plaintiffs cite one case for this argument, *First Global Commnc'ns, Inc. v. Bond*, 413 F. Supp. 2d 1150 (W.D. Wash. 2006), claiming it "recognize[ed] 'escort was a euphemism for prostitution services.'" Resp. Br. at 28 (misquoting case). In fact, that case involved claims between two competing websites that admittedly provided information about prostitution, including user reviews. 413 F. Supp. 2d at 1151-52. Judge Pechman made no findings about the term "escort;" rather, she wrote *the plaintiff admitted* "escort services" on the sites was "essentially a euphemism for prostitution services." *Id.* at 1152.

[13] The trial court did *not* "observ[e] that every single one of the roughly 1,000 'escort' advertisements [in exhibits A and B to Plaintiffs' complaint] were obviously for sex trafficking," as Plaintiffs urge. Resp. Br. at 22. This is a gross mischaracterization; the Superior Court said nothing of the sort. Plaintiffs cite a portion of the court's ruling, *see id.* at 8 & n.4 (citing RP 49:14-50:12), but all the court said there was that no one condones the advertising and misuse of the website that apparently occurred in this case. *See* RP 49:15-49:17.

"illegal" services. Resp. Br. at 28 (emphasis in original). Here, as elsewhere, Plaintiffs offer no factual support, only their say-so.

In fact, five cases (four addressing the escort category on Backpage.com) have held the opposite—ads for escort services are protected by the First Amendment, and Section 230 preempts efforts to impose state civil *or criminal* liability for publishing escort ads.

*Backpage.com, LLC v. McKenna*, 881 F. Supp. 2d 1262 (W.D. Wash. 2012), declared unconstitutional a Washington statute targeted at Backpage.com, RCW 4.68A.104, which created a criminal offense for "advertising commercial sexual abuse of a minor." *Id.* at 1268, 1270. The court rejected the State's argument that "all online advertisements for escort services are actually offers for prostitution," and found the law would "likely chill protected speech." *Id.* at 1282, It also held Section 230 preempted the law, as it would have "create[d] an incentive for online service providers *not* to monitor the content[,] ... precisely the situation that the CDA was enacted to remedy." *Id.* at 1273 (emphasis in original).

*Backpage.com, LLC v. Cooper*, struck down a similar Tennessee law, Tenn. Code Ann. § 39-13-315, also aimed at Backpage.com. 939 F. Supp. 2d at 805. The law impermissibly "impose[d] liability on websites such as Backpage.com for selling or offering to sell advertisements, activity inherent in their role as publishers." *Id.* at 823 ("Backpage.com is the quintessential publisher" because "it hosts and maintains an ongoing forum for user-generated postings"). Doing so likely would force Backpage.com and other websites to "eliminate vast amounts of

permissible adult-oriented speech" and was "directly at odds with Congress's goal of self-policing." *Id.* at 825.

In *Backpage.com, LLC v. Hoffman*, 2013 WL 4502097, at *3 (D.N.J. Aug. 20, 2013), another court rejected a New Jersey statute, N.J.S.A. 2C:13-10, patterned after the Washington law. The court found the law unconstitutional and rejected claims that it only "regulate[d] illegal advertisements ... not protected by the First Amendment." *Id.* at *10-11.[14]

The fourth case expressly upholding Section 230 immunity of Backpage.com is *M.A.*, 809 F. Supp. 2d 1041, which Plaintiffs misread, as discussed above. *See also* App. Br. at 24-27, 35-36.

Finally, in *Dart v. Craigslist, Inc.*, 665 F. Supp. 2d 961 (N.D. Ill. 2009), the court rejected the Cook County sheriff's claims that Craigslist promoted prostitution by providing categories for adult-oriented ads, and held Craigslist was entitled to Section 230 immunity, even though some users violated its rules and misused its service. *Id.* at 967, 969. Plaintiffs mention *Dart* only in passing, suggesting again that everything turns on how they characterize their pleading. *See* Resp. Br. at 33 (asserting *Dart* is distinguishable because Plaintiffs do not allege "backpage's website is ... being 'misused,'" but rather that users "post prostitution advertisements

[14] Notably, the Washington, Tennessee and New Jersey laws all proscribed "knowingly" publishing unlawful ads. *See McKenna*, 881 F. Supp. 2d at 1276; *Cooper*, 939 F. Supp. 2d at 828-29; *Hoffman*, 2013 WL 4502097, at *7-8. Requiring proof of criminal knowledge is far more stringent than Plaintiffs' allegations a website should be liable if it "encourages," "promotes" or "influences" some content in some fashion.

just as backpage intends"). Again, as in *M.A.*, *Dart* rejected the same allegations and arguments Plaintiffs make here. *See* App. Br. at 27-28.

This Court need not (and should not) accept Plaintiffs' arguments that legal and constitutionally protected speech is illegal, merely because they call their arguments "allegations." Escort services (and speech about them) are legal. Backpage.com cannot lose Section 230 immunity by providing a category for lawful speech. *Cf. Nemet Chevrolet, Ltd. v. Consumer Affairs.com, Inc.*, 591 F.3d 250, 257 (4th Cir. 2009) (rejecting attacks on Consumeraffairs.com because it is a "legal undertaking").[15]

### 2. *Backpage.com's Posting Rules Are Lawful and a Publisher's Function Protected by Section 230.*

Plaintiffs argue Backpage.com "develops" content by providing "'posting rules' and 'content requirements,'" demanding the Court accept not only the facts about the rules, but also Plaintiffs' arguments that the rules are "phoney" [sic] and "intended to instruct pimps how to post sex

[15] Plaintiffs now contend Backpage.com "created" content by "plac[ing] the term 'escort' on all individual ads in its 'escorts' section," which they disingenuously refer to as "headings and titles." Resp. Br. at 2, 5, 29-31, 45. The complaint contains none of these allegations, *see* CP 6, and instead alleges users create *all content* for ads, including titles. *See, e.g.*, CP 2 ¶ 1.2; App. Br. at 4. Apparently, Plaintiffs are referring to an auto-generated line on webpages identifying the ad category a user views, whether that's "backpage.com > seattle buy, sell, trade > seattle furniture for sale," or "backpage.com > seattle adult entertainment > seattle escorts." Other courts have rejected this argument. *See Seldon v. Magedson*, 2014 WL 1456316, at *4-6 (D. Ariz. Apr. 15, 2014) ("software that automatically published and filed a third-party's statements [as "philip-seldon | Ripoff Report | Complaints Reviews Scams Lawsuits Frauds Reported"] does not undercut Xcentric's claim to immunity under the CDA").

trafficking ads." Resp. Br. at 2, 21.[16] Plaintiffs claim Backpage.com's opening brief did not "even acknowledge [the] 'posting rules' and 'content requirements,'" Resp. Br. at 22, but it did so at length, App. Br. at 5-6, 31-38, noting that no court has held a plaintiff can avoid Section 230 by alleging rules mean the opposite of what they say, while many have upheld immunity when users *violated* posting rules, *id.* at 31-32.

Plaintiffs' theory would put countless websites at risk—most have rules prohibiting unlawful content—and any plaintiff could evade Section 230 by alleging that rules are illusory or a website failed to enforce its rules. Perversely, according to Plaintiffs' reasoning, the more specific a website's rules are (*e.g.*, prohibiting code words, naked images, etc.), the more it risks *losing* immunity, on the theory it is covertly instructing users how to violate the rules and the law. *See, e.g.*, Resp. Br. at 21. Here again, many websites would be vulnerable—including Craigslist, Facebook, Match.com, and many others that have rules as specific and much the same as Backpage.com's. *See* App. Br. at 37 & n.18.

Plaintiffs offer no answer, except to suggest "legitimate," "lawful," "innocent," or "content neutral" websites need not fear. *See* Resp. Br. at

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[16] Plaintiffs' position about the posting rules is unclear and contradictory. Their complaint alleges the ads posted by the pimps did not violate the rules and appeared permissible on their face. *See* CP 16-20 ¶¶ 4.1, 5.2, 6.4; *see also* App. Br. at 5. Yet, now they argue for the first time that "every single one of [the] advertisements [in the escort category] violate[s] the 'posting rules' and 'content requirements.'" Resp. Br. at 8; *see also id.* at 23. Plaintiffs' complaint also admitted Backpage.com "removes ads that violate [its] requirements," CP 8 ¶ 3.9, but they now contend Backpage.com does not enforce its rules and say it is "egregious" to point out their prior contrary admission, *see* Resp. Br. at 22 & n.9.

26 n.10, 28, 32, 33, 39. Certainly, Section 230's protections cannot turn on the plaintiffs' opinions about what is legitimate or allegations about what is not. This too would render the statute hollow and destroy Congress's purpose to *encourage* self-regulation. *See, e.g., Schneider v. Amazon.com, Inc.*, 108 Wn. App. 454, 463, 31 P.3d 37 (2001); *Batzel v. Smith*, 333 F.3d 1018, 1028 (9th Cir. 2003). Websites would be better off eliminating rules and self-monitoring altogether, as the Good Samaritan efforts Congress sought to promote would instead create liability.

Plaintiffs' attack on the posting rules contradicts Section 230 in another fundamental way. Section 230 expressly immunizes a website from claims for acting as a publisher. 47 U.S.C. § 230(c)(1); *see* App. Br. at 11-16. "[A]ny activity that can be boiled down to deciding whether to exclude material that third parties seek to post online *is perforce immune* under section 230." *Roommates.com*, 521 F.3d at 1170–71 (emphasis added); *see also Zeran v. Am. Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997) ("§ 230 forbids the imposition of publisher liability on a service provider for the exercise of its editorial and self-regulatory functions"). Backpage.com's posting rules are an integral part of regulating content on the website. They help prevent or reduce the amount of improper content users submit, lessening the burden of monitoring. These are quintessential publisher functions and are perforce immune. Plaintiffs cannot avoid Section 230 by attacking the very conduct it is meant to immunize.

More generally, and no matter how they try to re-characterize their claims, Plaintiffs' claims as a whole seek to hold Backpage.com liable for

not blocking the pimps' ads. *See* Resp. Br. at 10-11 (asserting "[a]t no time did the backpage defendants attempt to verify [Plaintiff's] age or to otherwise protect her from being advertised for sex on their website"). This is a transparent effort to hold Backpage.com liable *as a publisher—i.e.*, for its actions in allowing or disallowing third-party content. That is what Section 230 precludes. *See, e.g., Green v. Am. Online,* 318 F.3d 465, 471 (3d Cir. 2003) (where plaintiff's fundamental claim was that website was negligent in not preventing harmful content and sought to hold it "liable for decisions relating to monitoring, screening, and deletion of content from its network," "Section 230 specifically proscribes liability" (internal quotation omitted)).[17] This case falls in the heart of Section 230; claims such as Plaintiffs' are precisely what the statute prevents.[18]

### C. Dismissal Is Appropriate Under CR 12(b)(6) to Preserve the Important Federal Rights in Section 230.

Plaintiffs accuse Backpage.com of asking the Court to evaluate its motion under Fed. R. Civ. P. 12(b)(6) rather than Washington CR 12(b)(6).

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[17] *Accord Doe v. MySpace, Inc.*, 528 F.3d at 419-20 (rejecting claims that MySpace failed to take measures to protect children from abuse; "[n]o matter how artfully Plaintiffs seek to plead their claims, [they are] directed toward MySpace in its publishing, editorial, and/or screening capacities" (internal quotation omitted)); *Gibson v. Craigslist, Inc.*, 2009 WL 1704355, at *4 (S.D.N.Y. June 15, 2009) (rejecting claims that Craigslist failed to police website for illegal gun sales, as it was "clear that Plaintiff's claims are directed toward Craigslist as a 'publisher' of third party content and Section 230 specifically proscribes liability in such circumstances" (internal quotation omitted)).

[18] Plaintiffs also suggest Backpage.com is not entitled to immunity because it profits from advertisements. *See, e.g.*, Resp. Br. at 21. But, as explained previously, "neither notice or profit make Backpage liable for the content and consequences of the ads posted by [users]." *M.A.*, 809 F. Supp. 2d at 1051. *See* App. Br. at 25, 32-34. Plaintiffs ignore this principle as well.

*See, e.g.*, Resp. Br. at 42. The Court should disregard this red herring. Backpage.com has never claimed the federal standard should be applied and does not ask the Court to "rewrite the CR 12(b)(6) standard." Resp. Br. at 43-44. Rather, Backpage.com contends the Superior Court misinterpreted and misapplied the CR 12(b)(6) standard. *See* App. Br. at 39.

Plaintiffs do not dispute the established Washington law that a court need not credit legal conclusions or conclusory allegations. *See Haberman v. Wash. Pub. Power Supply Sys.*, 109 Wn.2d 107, 120, 744 P.2d 1032, 750 P.2d 254 (1987); App. Br. at 42. But the Superior Court failed to follow this rule. It did not merely accept fact allegations (*e.g.* that Backpage.com imposes posting rules), but also Plaintiffs' arguments and conclusions about the fundamental legal issue (*i.e.*, that the rules mean Backpage.com "assist[ed] with development" of unlawful content and thus is an "information content provider"). RP 50:5-50:12. Under CR 12(b)(6), this was error, not only because it assumed the legal conclusion, but also because Plaintiffs' assertions about the posting rules and the website as a whole have no bearing on Section 230 immunity. *See supra* Section II.A.3; App. Br. at 42-43 & n.22.

Alternatively, Backpage.com also contends that, to the extent the Superior Court felt CR 12(b)(6)'s more liberal standards required it to deny Backpage.com's motion, *see* RP 50:10-50:12 (Superior Court stating it denied the motion, "despite the case law"), it erred for the additional reason that state pleading rules cannot supplant a federal right. Rather than address this doctrine (and largely ignoring Supreme Court authority for the

doctrine, *see* App. Br. at 44-46), Plaintiffs incorrectly assert that "[t]he backpage defendants cite no legal authority for their argument that section 230 create [sic] a federal substantive right, particularly where, on its face, section 230 requires a factual inquiry in order to determine whether the defendants are immune." Resp. Br. at 44. This reasoning is flawed.

First, some 300 cases have held Section 230 provides immunity to online service providers for publishing third-party content and preempts contrary state law claims. It is frankly unfathomable how Plaintiffs can contend Section 230 *does not* confer a federal right—it does, a crucial one designed to preserve free speech on the Internet.

Second, Plaintiffs' assertion that Section 230 "on its face ... requires a factual inquiry," Resp. Br. at 44, has no basis in law and would destroy the statute's objective to provide immunity from suit. If this were the rule, no court could ever decide Section 230 immunity on a 12(b)(6) motion, because all plaintiffs would urge (as Plaintiffs do), that they should be entitled to "discover evidence to support their allegations." *Id.* In fact, hundreds of cases in both federal and state courts have enforced Section 230 on 12(b)(6) motions, including Division I of this Court in *Schneider*, 108 Wn. App. 454.[19] Indeed, courts must "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

[19] Here again, there are far too many cases to cite them all. *See, e.g.*, *Nemet Chevrolet*, 591 F.3d 250; *Lycos*, 478 F.3d 413; *Doe v. MySpace, Inc.*, 175 Cal. App. 4th 561, 96 Cal. Rptr. 3d 148 (2009); *Shiamili*, 952 N.E.2d 1011.

to fight costly and protracted legal battles." *Nemet Chevrolet*, 591 F.3d at 255 (quoting *Roommates.com*, 521 F.3d at 1175).

Third, Plaintiffs in effect contend Section 230 requires nothing more than artful pleading, yet courts across the country have rejected this too. Plaintiffs cannot "plead around" Section 230 when, at bottom, their claims are based on publication of third-party content. *See Lycos*, 478 F.3d at 418 ("Congress intended that [websites] would not be held responsible for the postings made by others [and] [n]o amount of artful pleading can avoid that result."); *Schneider*, 108 Wn. App. at 459.[20]

Finally, the cases holding state procedural rules cannot defeat federal substantive rights have nothing to do with whether federal immunity is qualified, as Plaintiffs assert. Resp. Br. at 44-45. Instead, they hold that a federal right cannot be defeated by state procedural practice, *Brown v. W. Ry. of Ala.*, 338 U.S. 294, 296 (1949), especially where efforts to enforce federal rights would "produce different outcomes ... based solely on whether the claim is asserted in state or federal court," *Felder v. Casey*, 487 U.S. 131, 138 (1988); *Dice v. Akron, Canton & Youngstown R.R.*, 341 U.S. 359, 361 (1952) (state rules regarding enforceability of releases were preempted for claims under FELA because "federal rights ... could be defeated if states were permitted to have the

[20] *See Nemet Chevrolet*, 591 F.3d at 259 (rejecting plaintiff's "pure speculation and a conclusory allegation" that website operator may have created consumer complaints itself); *Doe v. MySpace*, 528 F.3d at 419-20 (rejecting plaintiff's "artful pleading [as] disingenuous"); *Goddard*, 640 F. Supp. 2d at 1196 (rejecting allegations that Google encourages, collaborates in development and requires illegal content as "mere labels and conclusions" that could not defeat immunity).

final say as to what defenses could and could not be properly interposed to suits"); *see* App. Br. at 44-45. Thus, if a Washington court must reject Section 230 immunity because of the CR 12(b)(6) pleading standard—when no other court would—this state's pleading rules would improperly defeat fundamental federal rights.

Again, the Court need not reach this issue if it properly applies CR 12(b)(6) (as the Superior Court did not). *See* App. Br. at 39-43.

## III. CONCLUSION

Accepting their allegations, Plaintiffs were victimized by the pimps who advertised them for sex. Section 230 gives Plaintiffs recourse; they can pursue claims against the pimps. Instead, they seek to impose liability on Backpage.com—and overcome its Section 230 immunity and the fundamental protections Congress sought to ensure—for having a website the pimps misused. Backpage.com did not create or develop the ads in any sense. These claims are *exactly* what Section 230 precludes.[21]

[21] In the last sentence of their brief, Plaintiffs request leave to amend if the Court reverses and upholds Backpage.com's Section 230 immunity. Resp. Br. at 47-48. This would be a futile exercise, since it is clear the ads Plaintiffs claim caused their harm are third-party content. *See Syputa v. Druck, Inc.*, 90 Wn. App. 638, 649, 954 P.2d 279 (1998) ("a trial court appropriately denies a motion to amend when a claim is without merit"); *Kabbaj v. Google, Inc.*, 2014 WL 1369864, at *6 (D. Del. Apr. 7, 2014) (enforcing Section 230 and denying leave to amend when defendants hosted third-party content but did not author or create it).

RESPECTFULLY SUBMITTED this 22nd day of May, 2014.

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## CERTIFICATE OF SERVICE

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 22nd day of May, 2014.

Ambika K. Doran