

No. 16-276

---

**In the Supreme Court of the  
United States**

---

JANE DOE, ET AL., PETITIONERS

v.

BACKPAGE.COM LLC, ET AL. RESPONDENTS

*ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE FIRST CIRCUIT*

---

**MOTION FOR LEAVE TO FILE *AMICUS CURIAE*  
BRIEF AND BRIEF OF *AMICUS CURIAE*  
THE NATIONAL CENTER FOR MISSING AND  
EXPLOITED CHILDREN  
IN SUPPORT OF PETITIONERS**

---

Robert Barnes  
*Counsel of Record*  
Oscar Ramallo  
KAYE SCHOLER LLP  
1999 Avenue of the Stars, Suite 1600  
Los Angeles, California 90067  
Telephone: 310.788.1000  
rbarnes@kayescholer.com

---

**MOTION FOR LEAVE TO FILE *AMICUS CURIAE*  
BRIEF IN SUPPORT OF PETITIONERS**

*Amicus Curiae* The National Center for Missing and Exploited Children (“NCMEC”) respectfully moves for leave of Court to file the accompanying brief under Supreme Court Rule 37.3(b). Counsel of Record for all parties were given timely notice pursuant to Supreme Court Rule 37.3(a) of NCMEC’s intent to file an *amicus curiae* brief. Petitioners granted their consent to filing of this brief. Respondents refused.

As detailed in the Identity and Interest of *Amicus Curiae* section of the accompanying brief, NCMEC is recognized by Congress as the official “national resource center and clearinghouse” for issues pertaining to missing and exploited children and serves as a key component in protecting children from sexual exploitation and preventing future victimization. 42 U.S.C. § 5771(9). NCMEC has unique knowledge of how child sex trafficking is conducted on the Internet in general and on Backpage’s website in specific. NCMEC also has unique expertise regarding the devastating impact of sex trafficking on its child victims and the value to those victims of a private right of action.

For the reasons detailed in the accompanying brief, NCMEC respectfully submits that its knowledge and expertise are helpful to and should be considered by this Court.

September 27, 2016

Respectfully submitted,

Robert Barnes  
*Counsel of Record*  
Oscar Ramallo  
KAYE SCHOLER LLP  
1999 Avenue of the Stars  
Suite 1600  
Los Angeles, California 90067  
Telephone: 310.788.1000  
rbarnes@kayescholer.com

*Counsel for Amicus Curiae*  
*The National Center for Missing and Exploited*  
*Children*

**TABLE OF CONTENTS**

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF PETITIONERS..... i

TABLE OF CONTENTS .....iii

TABLE OF AUTHORITIES..... v

IDENTITY AND INTEREST OF *AMICUS CURIAE*..... 1

SUMMARY OF ARGUMENT..... 3

ARGUMENT..... 5

    I.    The Internet is Uniquely Suited to Facilitate Child Sex Trafficking..... 5

    II.   Backpage’s Policies and Practices are Optimized to Encourage Sex Trafficking on Its Website..... 8

    III.  Backpage Intentionally Facilitates Child Sex Trafficking by Structuring its Website and Editing Content to Help Avoid Law Enforcement Scrutiny ..... 14

    IV.  The First Circuit Has Created a Circuit Split By Granting Immunity to Websites That Knowingly Benefit Financially From Child Sex Trafficking..... 17

V.	Sex Trafficking Victims' Private Right of Action Should Not Depend on Whether the Victim Was Trafficked Online.....	21
	CONCLUSION .....	25

## TABLE OF AUTHORITIES

Page(s)

### CASES

<i>Carazani v. Zegarra</i> , 972 F. Supp. 2d 1 (D.D.C. 2013) .....	22
<i>Chicago Lawyers' Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc.</i> , 519 F.3d 666 (7th Cir. 2008) .....	19
<i>Ditullio v. Boehm</i> , 662 F.3d 1091 (9th Cir. 2011) .....	23, 24
<i>Doe No. 1 v. Backpage.com, LLC</i> , 817 F.3d 12 (1st Cir. 2016).....	19, 20
<i>F.T.C. v. Accusearch Inc.</i> , 570 F.3d 1187 (10th Cir. 2009) .....	19
<i>Fair Housing Council of San Fernando Valley v. Roommates.com, LLC</i> , 521 F.3d 1157 (9th Cir. 2007) .....	4, 18, 21
<i>Ferrer v. Senate Subcommittee on Investigations</i> , U.S. Supreme Court No. 16A236 (Sept. 13, 2016).....	15
<i>Johnson v. Arden</i> , 614 F.3d 785 (8th Cir. 2010) .....	19

<i>Jones v. Dirty World Entertainment Recordings LLC</i> , 755 F.3d 398 (6th Cir. 2014) .....	18-19
<i>Kimzey v. Yelp! Inc.</i> , __ F.3d __, 2016 W.L. 4729492 (9th Cir. Sept. 12, 2016) .....	18
<i>Klayman v. Zuckerberg</i> , 753 F.3d 1354 (D.C. Cir. 2014) .....	19
<i>Lagasan v. Al-Ghasel</i> , 92 F. Supp. 3d 445 (E.D. Va. 2015) .....	22
<i>Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.</i> , 591 F.3d 250 (4th Cir. 2009) .....	19
<i>O'Brien v. Western Union Tel. Co.</i> , 113 F.2d 539 (1st Cir. 1940) .....	20
<i>Rotella v. Wood</i> , 528 U.S. 549 (2000) .....	22
<i>Senate Subcommittee on Investigations v. Ferrer</i> , D.D.C. No. 1:16-mc-00621-RMC (Sept. 16, 2016) .....	16

## STATUTES AND OTHER AUTHORITIES

18 U.S.C. § 1595 .....	<i>passim</i>
18 U.S.C. § 1595(a) .....	21, 23

42 U.S.C. § 5771(9)-10 .....	1
42 U.S.C. § 5773(b) .....	1
42 U.S.C. § 5773(b)(1)(V) .....	5
47 U.S.C. § 230 .....	4, 17
47 U.S.C. § 230(f)(3) .....	17
162 Cong. Rec. S1563 (daily ed. Mar. 17, 2016) .....	17
Recommendation to Enforce Subpoena Issued to the CEO of Backpage.com, LLC, Staff Report to the Permanent Subcommittee on Investigations, Nov. 19, 2015, S. Hrg. No. 114-179, 114th Cong. 85-86 (2015) .....	<i>passim</i>
Kathleen Kim and Kusia Hreshchyshyn, <i>Human Trafficking Private Right of Action: Civil Rights for Trafficked Persons In the United States</i> , 16 Hastings Women’s L.J. 1 (2004). .....	24
Tenderoni, Wikipedia, <a href="https://en.wikipedia.org/wiki/Tenderoni">https://en.wikipedia.org/wiki/Tenderoni</a> (last visited Sept. 23, 2016) .....	16



**IDENTITY AND INTEREST OF  
*AMICUS CURIAE***

The National Center for Missing and Exploited Children (“NCMEC”) is recognized by Congress as the official “national resource center and clearinghouse” on all issues relating to missing and exploited children and serves as a “key component” in protecting vulnerable children against sexual exploitation and preventing future victimization.<sup>1</sup> 42 U.S.C. § 5771(9)-10. For over thirty-two years, NCMEC has pursued its mission to reduce child sexual exploitation, prevent child victimization, and help eliminate child sex trafficking and child pornography.

In cooperation with the United States Department of Justice’s Office of Juvenile Justice and Delinquency Prevention, families, child advocates, and a wide range of private and corporate partners, NCMEC performs 22 core programs. *See* 42 U.S.C. § 5773(b). NCMEC provides support, information, and technical assistance to families, law enforcement, and child-serving professionals in identifying, locating, recovering, and providing support for victims of child sex trafficking.

---

<sup>1</sup> No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

NCMEC has unique knowledge and experience regarding how traffickers use online classified advertising websites to facilitate child sex trafficking. NCMEC operates the CyberTipline, the national reporting mechanism for suspected child sexual exploitation, and created the Child Sex Trafficking Team, a dedicated staff providing technical and victim assistance and analysis on domestic child sex trafficking cases.

As part of its core mission to protect children from sexual exploitation, including the increasingly prominent scourge of online child sex trafficking, NCMEC engaged in numerous discussions and meetings with Backpage regarding child sex trafficking ads on its website. NCMEC informed Backpage repeatedly how its business practices create an online environment conducive to child sex trafficking, and proposed practical steps Backpage can take to curb and discourage child sex trafficking on its site. These meetings included Backpage's owners and operational and legal executives.

Despite these meetings, Backpage has made minimal, but largely ineffective, adjustments to its practices. Backpage continues to facilitate the sale of children for sex on its website. Backpage has refused to adopt consistent policies to take down escort ads its own staff have reported to NCMEC as potentially selling children for sex; to report other escort ads clearly linked to ads it has already reported as potentially involving children; or to block access to users after they were reported for placing escort ads potentially involving children. NCMEC identified these and other actions Backpage could

take to avoid abetting child sex trafficking, but Backpage has rejected most of NCMEC's recommendations. Based on reports from families of child victims, and NCMEC's experience searching for missing children who are being sold for sex online, NCMEC believes that Backpage reports to NCMEC only a small fraction of the actual number of children trafficked for sex on backpage.com.

Because of NCMEC's work to combat child sex trafficking and its experience with Backpage, NCMEC is specially situated to aid the Court's consideration of the Petition. The Court should accept and consider this brief.

### **SUMMARY OF ARGUMENT**

Today, any person with the desire to purchase a child for rape and sexual abuse need only reach for a smartphone, search the escort section of backpage.com for terms like "highschl" or "young," and take his pick from the abundant supply of girls and boys available for purchase online. Child sex trafficking has expanded exponentially on the Internet, and Backpage is the leading business on the Internet selling children for sex. NCMEC receives, on average, approximately 10,000 reports relating to suspected child sex trafficking every year. A disturbingly high proportion of those reports involve children trafficked for paid sex on Backpage's website—much more than any other source.

Recognizing the need to combat the burgeoning crime of human trafficking, Congress enacted the Trafficking Victims Protection Reauthorization Act of

2003 (“TVPRA”). TVPRA, Pub. L. 108-193 § 4 (codified as 18 U.S.C. § 1595). The TVPRA created a private right of action in favor of victims of criminal sex trafficking. Petitioners are all children who were trafficked for sex on Backpage’s website. They sued Backpage under the TVPRA, seeking damages for Backpage’s knowing and active participation in child sex trafficking on its website.

The First Circuit found that Petitioners and the submissions of multiple *amici* parties had made a persuasive case that Backpage designed its website to make sex trafficking easier. It nevertheless dismissed Petitioners’ claims, finding that section 230 of the Communications Decency Act (“CDA”), 47 U.S.C. § 230, bars any claim that may touch on a website’s editorial functions. The First Circuit’s decision is contrary to the law in every other circuit to address the issue to date.

The prevailing view among all other circuits is that a website operator who “materially contributes” to the illegality of content posted by third-parties cannot use a claim of editorial discretion to hide behind the CDA’s protections. *See, e.g., Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1183-84 (9th Cir. 2007). The First Circuit’s decision is also contrary to the plain Congressional intent expressed in the TVPRA to provide victims of child sex trafficking with a private right of action against *all* participants in the sex trafficking scheme.

Congress gave child victims a right to sue companies such as Backpage that knowingly

contribute to and profit from their rape and sexual abuse. NCMEC respectfully requests the Court grant review to allow these Petitioners to vindicate their rights.

## ARGUMENT

### I. **The Internet is Uniquely Suited to Facilitate Child Sex Trafficking.**

For more than 32 years, pursuant to its long-standing private, nonprofit mission and fulfillment of its Congressionally-recognized role as the national resource center and clearinghouse, NCMEC has closely tracked the emergence and dramatic expansion of child sex trafficking on the Internet, and how this “business” is conducted in the United States. *See* 42 U.S.C. § 5773(b)(1)(V). In NCMEC’s experience, the Internet has become, by far, the most effective tool to commodify the abuse of children through sex trafficking. The move of the criminal enterprise of sex trafficking to the Internet is directly linked to the tremendous growth in the numbers of children being bought and sold for sex today.

In the pre-Internet era, child sex traffickers seeking a broad customer base were required to solicit in public, putting both the buyer and seller in that transaction at high risk of detection by law enforcement. In addition to the risk of police scrutiny, many buyers seeking to purchase sex with children were deterred from going to the kinds of neighborhoods where children might be more easily purchased for sex. This is true for all prostitution

solicitations; it is especially true for predators who seek to buy a child for sex.

All this has changed with the emergence of the viable business model of child sex trafficking on the Internet. Child sex trafficking online not only erases traditional barriers for sellers and buyers to consummate transactions, but it also exploits a business model that current law largely protects from the legal scrutiny applied to brick-and-mortar businesses facilitating the same illegal transactions. A buyer can now purchase a child from the comfort of his home, hotel room, workplace, or car using a smartphone, laptop or tablet. Both buyer and seller benefit from the increased anonymity the Internet provides, and under the First Circuit's holding, the website operator intentionally facilitating these criminal transactions operates free of civil liability to a child victims.

The Internet also gives traffickers more complete control over their victims. Rather than being marketed in public on an established "track" in a particular city, children sold for sex on the Internet are kept isolated and confined. They are less likely to have an opportunity to reach out to law enforcement, non-profits, good Samaritans, or their families for help. Victims become dependent on traffickers for basic needs (food, clothing, and shelter), making it all-but-impossible to challenge the abuser's control over them. This problem is exacerbated when the victim is a child with few resources, social and emotional challenges, and limited life skills.

The Internet is so attractive to traffickers because it delivers a more lucrative business model with less risk than an offline, street-based sex trafficking scheme. Trafficking on the Internet has virtually no barriers to entry compared to traditional methods. Traffickers need not be part of a criminal gang or organized group to traffic children for sex. They do not need to know the location of the local “track.” All a pimp needs is five minutes to sign up on Backpage, take some photos, and post an ad selling a child.

Rather than limiting business to a single city, an online trafficker can advertise a child for paid sex by simultaneously running ads in multiple cities. This enables traffickers to move the child from market to market according to where they have the most interested buyers. A trafficker need not rely on the uncertain and slow—and potentially dangerous—process of soliciting customers one-by-one on the street. Instead, a trafficker can work from his car, hotel room, or at home using the Internet to book multiple clients throughout the evening who, in exchange for payment, will rape the child again and again through the course of the night.

NCMEC has assisted with many child sex trafficking cases where the efficiencies of the Internet business model contributed to the repeated rape and sexual abuse of children. In one case, a child was sold for sex more than 50 times on backpage.com beginning when she was 12 years old. After this level of trauma, it was not surprising that when she was recovered she could not even estimate the total number of times that she had been sold for rape and sexual abuse.

The Internet also provides traffickers with the commercial advantage of “upselling” a customer by offering a younger child after a customer responds to an ad. This practice allows a trafficker to more efficiently respond to the high demand from buyers of sex with children. Online child sex trafficking has turned selling children for sex from a grubby street-corner grind into a technologically efficient and highly lucrative enterprise—and, in the process, greatly enriched the companies that run such sites, of which Backpage is the most prominent and most successful.

Backpage has repeatedly claimed that its website benefits law enforcement, proclaiming itself the “sheriff of the Internet” on trafficking issues. It goes so far as to publicly portray itself as a partner with law enforcement and NCMEC in preventing child sex trafficking. None of this is true. As discussed below and in Petitioners’ complaint, Backpage optimizes its website and encourages its customers’ exploitation of the Internet’s unique capacity as a tool for child sex trafficking.

## **II. Backpage’s Policies and Practices are Optimized to Encourage Sex Trafficking on Its Website.**

NCMEC has worked on more than 420 cases in which a missing child was trafficked for sex on Backpage’s website. Of reports made to NCMEC by members of the public relating to child sex trafficking, more than 73% report child sex trafficking ads on backpage.com. Because of the prevalent link between trafficked children and



Backpage, NCMEC always looks on backpage.com first when searching for a missing child.

Backpage says it enables the public to “report” an ad and include an explanatory comment. A significant slice of the ads Backpage voluntarily reports to NCMEC have already been the subject of complaints to Backpage itself by family or friends of the children in the ads. The anguish in these appeals is heightened by these family members’ painful realization that their reports do not result in Backpage removing the ads of their children. Instead, even though the ad has been flagged as featuring a child, the cycle of sexual exploitation and abuse continues as the ad remains online for predators to peruse and patronize. What follows are just a few examples of the thousands of reports NCMEC has received from people whose loved-ones were trafficked on Backpage:<sup>2</sup>

- im reporting this because my little sister is.t old enough to be escort she’s 15, years old I tried flagging her post down nothing happen can u guys plz removed her posting . . . .
- This ad is of my 17 year old daughter. This is my 3rd email request to have this ad removed!!!

---

<sup>2</sup> Personally identifying information has been removed from these posted comments.

- I would highly advise u to take this page down my daughter is only 16 years Of age. I have already sent two emails reporting this and its still up . . . .

Even after reporting these ads to NCMEC for suspected child sex trafficking, Backpage refuses to implement obvious measures to remove these and similar ads from public view or block traffickers from placing new ads for the same child over and over again with the same email address, same telephone number, same payment information, and often the same photos. Backpage fails to utilize free, publicly-available Internet browser features to search its system for ads linked by identical photographs, names, email addresses, telephone numbers or payment methods. Backpage has not used “hashing” technology to search its system internally for matching photos or other data in suspected child sex trafficking ads. Online companies routinely use these tools to help reduce child sexual exploitation.

As a sophisticated Internet company with considerable financial resources, Backpage has the technical ability to generate these links and block and/or report new ads to protect child victims from further abuse. This technology could help remove and prevent the posting of illegal ads, but Backpage has told NCMEC it will not take these simple steps to minimize child sex trafficking on its site.

Here is one recent example from the many cases NCMEC has worked on that demonstrates the impact of Backpage’s business model on children:

“H,” a child who first went missing three years ago was “branded” on her torso with her pimp’s initials before she was eventually recovered. H’s pimp controlled her with threats of violence and multiple physical beatings to dominate and force her into submission. She was repeatedly advertised for sex on backpage.com over the years and had been located several times by law enforcement. After she was reported to NCMEC as a missing child, NCMEC searched backpage.com for her cell phone number, and found 35 different ads containing H’s same phone number and the same or similar images in two different states. After this information was forwarded to law enforcement they found H the same day at a hotel with her pimp. The day *after* H’s rescue and her pimp’s arrest, Backpage reported one of the ads to NCMEC. It had never reported any of the other ads.

Backpage optimizes its site for its trafficker customers by imposing less stringent posting rules for “escort” ads than for other ad categories. To post an ad on Backpage to sell a boat, motorcycle, or pet, the seller must provide a valid telephone number to “prevent scam ads from being posted.” Yet Backpage refuses to require verified telephone numbers for escort ads, even though it acknowledges its site is used to sell children for sex.

Backpage’s business model encourages and facilitates child sex trafficking ads in other ways. For example, Backpage accepts anonymous forms of payment that are difficult, if not impossible, to track. When the minor Petitioners were being sold for sex on backpage.com, Backpage allowed customers to

place ads with anonymous, prepaid credit cards. In an April 14, 2010 blog post to its customers, backpage explained how to use these payment methods to avoid detection by law enforcement: “If you want to remain completely anonymous, get an AMEX or VISA gift card, which are sold at most grocery stores and online. They work just like credit and debit cards, only they are prepaid, and no personal data is attached to them.” Backpage repeatedly refused NCMEC’s and law enforcement’s recommendations that Backpage require ads be purchased with a bank-recognized credit or debit card. The practice of using anonymous credit cards ended only when Visa, MasterCard, and American Express all began refusing to process payments from Backpage in summer of 2015.

During the time Backpage facilitated the sale of Petitioners for sex on backpage.com, its pricing models maximized revenue for escort ads. While it was *free* to post an ad on Backpage to sell *any* item or service in a *non*-adult/dating category, there was a fee to post an escort ad. Backpage told NCMEC it charged for escort ads because law enforcement asked them to. Yet Backpage rigorously calibrated escort ad prices. This pricing scheme served to maximize revenues, not comply with an alleged law enforcement request. Although the credit-card ban forced Backpage to offer all ads for free, it still charges geographically-determined fees for escort ad upgrades.

NCMEC long pressed Backpage directly to take meaningful and permanent steps to screen out ads for the sale of children for sex and to make sure its

practices did not facilitate the posting of such ads. After more than a dozen meetings between 2010 and 2013, Backpage ultimately refused to adopt most of NCMEC's recommended practices, referencing the First Amendment and concerns about alienating its customer base.

At their last meeting on August 27, 2013, Backpage complained that NCMEC had not sufficiently publicly endorsed Backpage's screening efforts. Since then, the number of Backpage's reports to NCMEC of suspected child sex trafficking ads has decreased dramatically. There is no reason to believe that child sex trafficking on Backpage has diminished: to the contrary, 71% of all recent reports to NCMEC's CyberTipline about possible child sex trafficking involved ads on backpage.com. In the past five years, NCMEC has seen a 98% increase in reports of suspected child sex trafficking to the CyberTipline. Yet, between 2013 and 2015, Backpage reported 62% fewer ads of suspected child sex trafficking. And this year, Backpage is on pace to report just 21% of the number of ads it reported in 2013.

These facts reinforce Petitioners' allegations that Backpage's self-proclaimed role as the "sheriff" of the Internet is a corporate PR subterfuge to deter negative attention and support Backpage's maintenance of a business model that benefits handsomely from criminal sex trafficking.

### **III. Backpage Intentionally Facilitates Child Sex Trafficking by Structuring its Website and Editing Content to Help Avoid Law Enforcement Scrutiny.**

Petitioners' Second Amended Complaint alleges that Backpage intentionally solicited money from sex traffickers "in exchange for assisting in the crafting, placement, and promotion of illegal advertisements offering the plaintiffs for sale that would attract potential customers yet escape detection by law enforcement." SAC ¶ 4. A recent Senate Permanent Subcommittee on Investigations staff report substantiates Petitioners' claims.<sup>3</sup>

The Senate investigation discovered that Backpage instructed its moderators to delete ads that included words like "schoolgirl," "teen," and "yung"—trigger words that predators would understand as advertisements for sex with a child. But, when the deletion policy resulted in too many profitable ads being removed, Backpage backtracked, requiring its moderators instead to forward the ads for additional review by Backpage's senior executives. Senate Report, *supra* note 3, at 15-16.

---

<sup>3</sup> Recommendation to Enforce Subpoena Issued to the CEO of Backpage.com, LLC, Staff Report to the Permanent Subcommittee on Investigations, Nov. 19, 2015, reprinted in Human Trafficking Investigation: Hearing Before the Permanent Subcomm. on Investigations of the Senate Comm. on Homeland Security and Governmental Affairs, S. Hrg. No. 114-179, 114th Cong., 85-86 (2015) ["Senate Report"].

The Senate Report suggests that Backpage’s policies are intended to help avoid law-enforcement scrutiny by “remov[ing] explicit references to the likely illegality of the underlying transaction[s].” *Id.* at 21. Internal Backpage emails disclosed in the Senate Report demonstrate that Backpage intentionally keeps its sex trafficker clientele satisfied at the expense of sex trafficking victims. As described in one email thread, after a moderator “unnecessarily” edited an ad, Backpage’s head of the moderation department, Andrew Padilla, instructed a supervisor “I’d rather see zero edits from a moderator than any edits that were unnecessary.” *Id.* at App. 110. Backpage’s CEO Carl Ferrer concurred: “UGH. [The moderator] cost us \$1k in freebies to pacify the client.” *Id.* Weeks after this exchange, additional guidance was provided to moderators that stated “IF IN DOUBT ABOUT UNDERAGE: The process for now should be to accept the ad and note the link . . . **ONLY DELETE IF YOU REALLY VERY SURE PERSON IS UNDERAGE.**” *Id.* at App. 122.

The Senate Committee subpoenaed Mr. Ferrer and Mr. Padilla to testify about Backpage’s moderation practices. Both asserted their Fifth Amendment rights against self-incrimination rather than testify. *Id.* at 30. After unsuccessfully seeking an emergency stay from this Court, Mr. Ferrer has been compelled to produce records to the Committee. *See* Order Denying Stay, *Ferrer v. Senate Subcommittee on Investigations*, U.S. Supreme Court No. 16A236 (Sept. 13, 2016); Order re Motion for Extension of Time to Comply with Subpoena,

*Senate Subcommittee on Investigations v. Ferrer*,  
D.D.C. No. 1:16-mc-00621-RMC (Sept. 16, 2016).

According to the Senate Report, “Backpage today contains innumerable advertisements for sexual transactions with ‘girls’ described as ‘young,’ ‘babies,’ [and] ‘fresh.’” Senate Report, *supra* note 3, at 20. Indeed, text in Backpage’s escort ads is ubiquitously used to signal that the sex being sold is with a child. Law enforcement has confirmed to NCMEC that backpage.com ads containing the following text were selling a child for sex:

- Hi Guys im STAR the new hottie A Young PHAT BOOTY/Tender Roni<sup>4</sup> with very low mileage and ready to play.
- If u are ready for a taste of this got young thing hit me up. I’ll b waiting.
- I’m what you have been waiting for real freaky hot nasty open minded and spontaneous.
- Sweet young cheerleader 18. I’m just a sweet young hs senior trying to pay for college.

On the Senate floor, Senator Portman described an escort ad on backpage.com that

---

<sup>4</sup> “Tenderoni” is a slang term for a person who should be avoided because she is too young. Tenderoni, Wikipedia, <https://en.wikipedia.org/wiki/Tenderoni> (last visited Sept. 23, 2016).



actually contained a missing-child poster of that same child. So the ad advertising sex actually used the missing-child poster of that child. That poster had the child's real name on it, real age, real picture, and the date she went missing. The other pictures in the ad included topless photos.

162 Cong. Rec. S1563 (daily ed. Mar. 17, 2016).

By design, Backpage has become a safe harbor for pimps who traffic in underage boys and girls for paid sex. Contrary to the decision below, federal law was never intended to immunize that conduct.

**IV. The First Circuit Has Created a Circuit Split By Granting Immunity to Websites That Knowingly Benefit Financially From Child Sex Trafficking.**

By expanding the immunity for websites' editorial conduct to include protecting abettors of criminal child sex trafficking, the First Circuit's decision below represents a dramatic break from legal tradition. As a consequence, it puts the most vulnerable children at greater risk for sexual abuse, makes it easier for predators to use online websites to anonymously search for child victims to purchase for sexual abuse, and immunizes from liability companies, like Backpage, that have built a lucrative business based on facilitating these crimes.

The CDA provides no immunity for "information content providers." 47 U.S.C. § 230(f)(3) (defining term 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”). It shields website operators from liability only for content developed solely by third-parties. Courts have, until now, circumscribed the scope of section 230 immunity.

In *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1169 (9th Cir. 2007), the Ninth Circuit held that a website operator exercising traditional editorial functions is not an information content provider, “*provided that the edits are unrelated to the illegality*” of the content at issue. *Id.* (emphasis added). The Ninth Circuit reasoned that “[t]he Communications Decency Act was not meant to create a lawless no-man’s-land on the Internet.” *Id.* at 1164. Thus, a website operator will not be immune if a plaintiff can show “substantial affirmative conduct on the part of the website creator promoting the use of such [otherwise neutral website] tools for unlawful purposes.” *Id.* at 1174 n.37.

Before the First Circuit’s decision below, every circuit considering the issue had effectively agreed with the Ninth Circuit’s demarcation that a website is not immune from liability if the website operator’s editorial practices materially contribute to the illegality of third-party content. *Kimzey v. Yelp! Inc.*, \_\_ F.3d \_\_, 2016 W.L. 4729492, at \*4 n.4 (9th Cir. Sept. 12, 2016) (“sister circuits have generally adopted *Roommates.com*’s ‘material contribution’ to activity test”); *see also Jones v. Dirty World Entertainment Recordings LLC*, 755 F.3d 398, 409-

10 (6th Cir. 2014) (“*some* state tort claims will lie against website operators acting in their publishing, editorial, or screening capacities”); *Klayman v. Zuckerberg*, 753 F.3d 1354, 1358 (D.C. Cir. 2014) (case did not present an occasion to address whether website is liable for contributing to illegality of content); *Johnson v. Arden*, 614 F.3d 785, 792 (8th Cir. 2010) (no immunity if operators “intentionally designed their systems to facilitate illegal acts” or “induce the third party” to act illegally); *F.T.C. v. Accusearch Inc.*, 570 F.3d 1187, 1199 (10th Cir. 2009) (website operator is “responsible” for content if it “specifically encourages development of what is offensive about the content”); *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 257 (4th Cir. 2009) (no immunity when “development” of content “includes ‘materially contributing’ to a given piece of information’s ‘alleged unlawfulness’”); *Chicago Lawyers’ Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666, 671-72 (7th Cir. 2008) (no immunity if website operator “induces” unlawful ads). The First Circuit’s decision broke this national consensus.

The First Circuit concluded that Petitioners, aided by the submissions of a range of *amici* parties, “made a persuasive case” that “Backpage has tailored its website to make sex trafficking easier.” *Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12, 29 (1st Cir. 2016). It accepted as true the well-pleaded allegation that “Backpage’s rules and processes governing the content of advertisements are designed to encourage sex trafficking.” *Id.* at 16. Nevertheless, breaking with all other circuits, the First Circuit dismissed Petitioners’ claims because

Backpage’s “choices about what content can appear on the website and in what form, are editorial choices that fall within the purview of traditional publisher functions.” *Id.* at 21. The First Circuit’s decision allows a business to intentionally design and operate a website that facilitates the rape and sexual abuse of children for profit without fear of civil liability—even though that same business enterprise, if conducted offline, would be open to criminal prosecution and civil liability to its victims.

Backpage argues that holding it accountable is a slippery slope to burdening legitimate websites with countless frivolous lawsuits. But Backpage’s child sex trafficking ads are not legitimate. While users can misuse any website, Backpage’s practices are designed to facilitate and encourage a business model that enables pimps to traffic children for illegal paid sex in online ads. That sets Backpage far apart from any well-intentioned, socially valuable website that may fall subject to abuse by a user.

Backpage also argues that denying a remedy to its child trafficking victims is necessary because of the unique and novel nature of Internet businesses as intermediaries for third-parties’ communications. The argument that important intermediaries require absolute immunity for technology is at least as old as the telegraph. It was rejected 76 years ago, and should be rejected today. *See O’Brien v. Western Union Tel. Co.*, 113 F.2d 539, 542-43 (1st Cir. 1940) (holding in appropriate “rare cases” telegraph companies can be liable for third-party content, despite transmitting almost 200 million messages per year).

Indeed, until the First Circuit’s decision below, every Court of Appeals considering the issue separated website operators who use editorial discretion in a “neutral” manner from those who use it to “contribute[ ] materially to the alleged illegality” of content. *Roommates.com*, 521 F.3d at 1168-69. The Internet nevertheless remains robust and vibrant. Courts are capable of protecting legitimate website operators while requiring intentional wrongdoers to face their victims in court. Backpage should face the same consequences it would face outside the First Circuit—and everywhere, including in the First Circuit, if it were a brick-and-mortar store rather than an Internet site—for participating in a commercial enterprise that facilitates child sex trafficking.

**V. Sex Trafficking Victims’ Private Right of Action Should Not Depend on Whether the Victim Was Trafficked Online.**

This Court should also grant the Petition to vindicate the TVPRA’s private right of action against websites benefitting financially from child sex trafficking.

The TVPRA’s private right of action, 18 U.S.C. § 1595(a), puts the trafficked person in control of his or her enforceable civil rights and places the victim at the center of a retributive process in which the trafficker’s criminal punishment by the State is a necessary, but incomplete, part. The TVPRA’s private right of action provides the victim a means to obtain personal compensation for the criminal

violation by holding liable those who profited from the victim's sexual exploitation. *See generally Rotella v. Wood*, 528 U.S. 549, 557-58 (2000) (private right of action "is thus not merely to compensate victims but to turn them into prosecutors").

Just as Congress has opened up the right to seek economic compensation to victims of crimes involving child pornography, anticompetitive misconduct, and race and gender discrimination, so the TVPRA's private right of action provides a potent deterrent against, and remedy for, actions that we, as a democratic society, have condemned as immoral and abhorrent.

Criminal prosecution of the trafficker who inflicts abuse on a victim is a societal obligation. It punishes the perpetrator, removes a dangerous person from society who could victimize others, and deters other would-be criminals. In contrast, a private right of action focuses on restitution to the victim for the harm *directly* inflicted *on her alone*. The victim, through a civil suit, a compliant jury, and an executable damages award, assumes responsibility to exact her own retributive justice for the sexual violence suffered, turning the power relationship with her abuser on its head. With the TVPRA's private right of action, a victim gets to determine her own fate. *See, e.g., Lagasan v. Al-Ghasel*, 92 F. Supp. 3d 445, 449 (E.D. Va. 2015) (awarding victim almost \$750,000 in damages for TVPRA claim); *Carazani v. Zegarra*, 972 F. Supp. 2d 1, 27 (D.D.C. 2013) (awarding almost \$1.2 million damages to victim under TVPRA).

Sex trafficking victims' ability to directly sue their traffickers, and the profiteering enablers of those traffickers, for damages serves a fundamental purpose whether the crime occurred online or through a traditional person-to-person solicitation. The goals (and, indeed, the text) of the TVPRA's private right of action make no distinction between a child trafficked for sex through an Internet ad or through a non-virtual medium. A child sold for paid sex is no less a victim if the child was sold to a customer through an online ad or by a street-corner interaction—whatever the medium in which the sale is transacted, the child-victim is entitled to exercise the self-empowering rights Congress granted in the TVPRA.

There should be no greater immunity for an entity that facilitates trafficking online, like Backpage. According to the Senate Report, Backpage selectively modified pimps' online ads to obfuscate the illegality of the solicitations for paid sex with children. *See* Senate Report, *supra* note 3, at 17-21. That should make Backpage equally liable to the victim under the TVPRA as the pimp who recruits children for paid sex on a street corner. *See Ditullio v. Boehm*, 662 F.3d 1091, 1095-97 (9th Cir. 2011) (juvenile victim of sex trafficking can seek punitive damages from pimp); 18 U.S.C. § 1595(a)(holding liable anyone who “knowingly benefits financially . . . from participation in a venture which that person knew or should have known has engaged” in child sex trafficking).

The notion—which the First Circuit's decision compels—that a brick-and-mortar business offering

children for paid sex can be sued but an online store doing the same thing is immune is more than absurd; it is surely not what Congress intended in enacting the TVPRA. Whatever the medium that delivers the abuse, the victim's pain, exploitation, and long-term trauma are the same, and the scope of her rights to compensation should be the same too. *See* Kathleen Kim and Kusia Hreshchyshyn, *Human Trafficking Private Right of Action: Civil Rights for Trafficked Persons In the United States*, 16 *Hastings Women's L.J.* 1, 16-18 (2004).

Indeed, with Backpage responsible for a significant number of online child sex trafficking interactions, excluding its online activity from TVPRA liability, as the First Circuit has done, effectively denies a large number of child victims access to rights that Congress enacted over significant opposition. *See Ditullio*, 662 F.3d at 1104 (Callahan, J., dissenting) (describing legislative history of TVPRA's private right of action). Moreover, by erasing Backpage from the TVPRA damages picture, the First Circuit has also denied victims access to a culpable party with very deep pockets, leaving only a lesser remedial right against an invariably empty-pocketed, incarcerated pimp in whose activities Backpage participated and profited. Senate Report, *supra* note 3, at 3, 25 (Backpage's revenues estimated at \$135 million in 2014 with owners enjoying an estimated 82.4% profit margin).

The TVPRA's private right of action is not an afterthought. It is both an essential complement to criminal prosecution and a crucial tool for stamping out child sex trafficking and allowing victims to win



compensation on their own terms. Promoting the rights of child victims to fight back legally against behind-the-scenes corporate profiteers participating in their sexual exploitation and abuse neither jeopardizes the expansion of the Internet for societal benefit nor otherwise curtails the actions of good corporate citizens online.

### CONCLUSION

For the foregoing reasons, NCMEC respectfully urges the Court to grant the Petition.

September 27, 2016

Respectfully submitted,

Robert Barnes  
*Counsel of Record*  
Oscar Ramallo  
KAYE SCHOLER LLP  
1999 Avenue of the Stars  
Suite 1600  
Los Angeles, California 90067  
Telephone: 310.788.1000  
robert.barnes@kayescholer.com

*Counsel for Amicus Curiae*  
*The National Center for Missing and Exploited*  
*Children*