

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 *AMICI CURIAE*
BRIEF AND *AMICI CURIAE* BRIEF OF COALITION
AGAINST TRAFFICKING WOMEN, COVENANT
HOUSE INTERNATIONAL, DEMAND ABOLITION,
ECPAT-USA, GIRLS EDUCATION & MENTORING
SERVICES, MY LIFE, MY CHOICE OF JUSTICE
RESOURCE INSTITUTE, NATIONAL CRIME
VICTIM LAW INSTITUTE, RIGHTS4GIRLS,
SANCTUARY FOR FAMILIES AND SHARED HOPE
INTERNATIONAL IN SUPPORT OF PETITION
FOR A WRIT OF CERTIORARI**

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**MOTION FOR LEAVE OF *AMICI CURIAE* TO
FILE A BRIEF IN SUPPORT OF PETITION FOR
WRIT OF CERTIORARI**

Pursuant to Sup. Ct. R. 37(2)(b), *Amici Curiae* Coalition Against Trafficking in Women (“CATW”), Covenant House International (“Covenant House”), Demand Abolition, ECPAT-USA, Girls Educational & Mentoring Services (“GEMS”), My Life, My Choice of Justice Resource Institute (“MLMC”), National Crime Victim Law Institute (“NCVLI”), Rights4Girls, Sanctuary for Families (“Sanctuary”), and Shared Hope International (“Shared Hope”), collectively, “*Amici*”, respectfully move the Court for leave to file the following *amici curiae* brief in support of the petition for writ of certiorari by Petitioners Jane Doe No. 1, *et al.* Counsel of Record for both parties received timely notice of the intention to file an *amici curiae* brief. Counsel for the Petitioners consents to the filing of this brief and counsel for Backpage.com does not consent.

Amici are nonprofit education, service, and advocacy organizations that work with, and on behalf of, among others, child victims of sex trafficking. These organizations seek to advance and protect the rights and interests of sex trafficking victims, and to prevent future victimization. *Amici* thus have a substantial interest in preventing the illegal marketing and sale of sex trafficking victims on Backpage.com. Because *Amici* have extensive experience assisting sex trafficking victims and addressing ways to eliminate sex trafficking, including detailed knowledge of how traffickers use the Internet to facilitate the marketing and sale of sex trafficking victims, they are uniquely positioned to inform the Court regarding issues relevant

to this case. More specifically, this brief raises issues not specifically addressed by the parties regarding the context of sex trafficking, as well the legislative history of the private right of action afforded by the Trafficking Victim's Protection Reauthorization Act of 2003, and leave should therefore be granted to file it.

Respectfully submitted

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INTEREST OF *AMICI CURIAE*¹

CATW engages in advocacy, education, and prevention programming for victims of trafficking and commercial sexual exploitation across the globe. CATW addresses human trafficking by combating the demand for commercial sex as gender-based violence and discrimination and provides services for victims through its Asia and Latin America regional offices.

Covenant House serves homeless, abandoned, abused, trafficked, and exploited youth, providing services to over 50,000 at-risk and homeless children in thirty cities across the United States, Canada, and Central America. Covenant House offers a wide array of training programs, healthcare and mental health services, educational support, and legal services.

Demand Abolition works to eradicate the illegal commercial sex industry, including sex trafficking, by directly targeting the sources of demand for purchased sex. Demand Abolition's efforts are focused on persuading policymakers within the criminal justice system to implement practices shown to be effective in combating demand for purchased sex.

1. No counsel for any party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amici curiae*, their members or their counsel made a monetary contribution to its preparation or submission. Counsel of Record for the parties received timely notice of the intention to file. Counsel for Petitioner consents to this filing. Counsel for Respondent does not consent.

ECPAT-USA, part of the global ECPAT-International network, was the first American non-profit to focus its efforts on the commercialized sexual exploitation of children. ECPAT-USA advocates for legislation at the federal level, and in all fifty states, to prevent the exploitation of children, and the protection of victims of sexual exploitation and sex trafficking.

GEMS is the only organization in New York specifically designed to serve and empower young women and girls who have been the victims of commercialized sexual exploitation. GEMS provides prevention and outreach programming, drives educational initiatives, provides housing services, and advocates on victims' behalf within the criminal justice system.

MLMC provides a continuum of services aimed at preventing and intervening in the commercial sexual exploitation of children. This survivor-led organization offers preventative education, trains law enforcement and service providers, delivers direct services to victims, and organizes advocacy efforts.

NCVLI works to promote balance and fairness in the justice system through victim-centered legal advocacy and education. NCVLI litigates victims' rights in state, federal and military courts nationwide and provides active technical assistance to attorneys, victim advocates, and various allied professionals. NCVLI also trains victim service providers and manages and directs grants and projects focused on rights of various victim populations.

Rights4Girls is a human rights organization working to end sex trafficking and gender-based violence in

the United States. It advances public policy through legislative advocacy, engagement, research, and education. Rights4Girls advocates for the dignity and rights of young women and girls—so that every girl may live a life free of violence and exploitation.

Sanctuary is the largest nonprofit in New York dedicated exclusively to serving victims of domestic violence, sex trafficking, and related forms of gender violence. Every year, Sanctuary offers legal, shelter, clinical, and economic empowerment services to over 15,000 survivors. Sanctuary also engages in extensive community outreach, education, and training, and advocates for policies and legislation designed to protect survivors.

Shared Hope works to prevent conditions that foster sex trafficking by training professionals and community members to identify those victimized by and vulnerable to trafficking; assists sex trafficking victims by offering supportive care and resources; and advocates for the development of legislation and policies to combat sex trafficking.

SUMMARY OF ARGUMENT

Amici urge the Court to issue a writ of certiorari accepting Petitioners' case for review. This case presents a significant question of statutory interpretation that only this Court can resolve. If permitted to stand, the First Circuit's ruling that the Communications Decency Act of 1996 ("CDA") immunizes Backpage.com from a private suit enforcing the Trafficking Victims Protection Reauthorization Act of 2008 ("TVPRA") will deprive

victims of sex trafficking of the statutory right of recovery conferred on them by Congress. The First Circuit’s misreading of the CDA abridges not only a statutory private right of action, but also the ability of state actors to stop the use of the Internet to advertise sex with children.

Backpage.com facilitates sex trafficking, which includes the commercial sexual exploitation of children,² by providing a cheap, convenient, and anonymous marketplace for traffickers and buyers to trade in illegal sex. As the Internet has replaced street corners as the main venue for traffickers to solicit customers,³ Backpage.com has become the leader in this sordid industry—the “epicenter of illegal sex trafficking.”⁴ In this online sex trafficking marketplace, Backpage.com enables the “most hideous, and possibly least acknowledged, human rights violation of our time.”⁵

2. See, e.g., Trafficking Victims Protection Act of 2000 (hereinafter “TVPA”) § 103(9), (14), 22 U.S.C. § 7101.

3. See Dank, Meredith *et al.*, *Estimating the Size and Structure of the Underground Commercial Sex Economy in Eight Major US Cities*, 211-12 (The Urban Institute Mar. 2014)

4. See Staff of S. Permanent Subcomm. on Investigations, 114th Cong., Recommendation to Enforce a Subpoena Issued to the CEO of Backpage.com, LLC 1, App. 47 (Nov. 19, 2015) (hereinafter “PSI Report”).

5. Dillon, Sara, *What Human Rights Law Obscures: Global Sex Trafficking and the Demand for Children*, 17 UCLA WOMEN’S L.J. 121, 139 (2008).

Children are particularly vulnerable to sex traffickers and account for more than half of sex trafficking victims.⁶ Because they have not fully developed emotionally and intellectually, and depend on adults financially, they fall prey to traffickers in alarming numbers.⁷ With over one million ads per month in its “adults” section⁸—where children are marketed—Backpage.com earns millions in annual revenues.⁹

To protect these revenues, Backpage.com has relied on the CDA—a statute that was designed to protect children from “indecency” on the Internet. By virtue of a provision in the CDA that purports to protect “Good Samaritans,” this statute has been misinterpreted by the First Circuit as a grant of immunity to Backpage.com. The CDA should not be construed to impair the “enforcement” of statutes bearing on the sexual exploitation of children. The First Circuit therefore erred in construing the CDA as a bar to the plaintiffs’ private right of action, a classic form of “enforcement.”

6. U.S. Dep’t of Justice, Office of Juvenile Justice & Delinquency Prevention, *Literature Review: Commercial Sexual Exploitation of Children/Sex Trafficking*, 3 (2014); *see* S. REP. NO. 114-214, at 3 (2016).

7. *See* Annitto, Megan, *Consent, Coercion, and Compassion: Crafting a Commonsense Approach to Commercial Sexual Exploitation of Minors*, 30 YALE L. & POL’Y REV. 1, 7 (2011).

8. *See* PSI Report, *supra* note 4, at App. 62.

9. *See id.* at 21, 25.

As the First Circuit acknowledged, the circumstances of the plaintiffs “evoke outrage.”¹⁰ Also outrageous are the unjust implications of the decision below. The First Circuit is the first to rule that the CDA grants Backpage.com immunity from private suit. As victims of sex trafficking continue to pursue their rights under the TVPRA, this issue will continue to be litigated, as will the right of states to address legislatively the harm caused by Backpage.com. Now is the time for this Court to interpret the CDA, before more children are trafficked for sex.

For the reasons set forth in this brief and in Petitioners’ brief, *amici* urge the Court to grant certiorari.

ARGUMENT

I. THE SEX TRAFFICKING INDUSTRY ROUTINELY VICTIMIZES CHILDREN

Trafficking for the purpose of commercial sexual exploitation impacts thousands of girls in the U.S.¹¹ Some estimate that the U.S. has the third-largest number of children being prostituted in the world¹² and that more than half of sex-trafficking victims in the U.S. are 17 years old or younger.¹³ Children are illegally sold for sex

10. *Doe v. Backpage.com, LLC*, 817 F.3d 12, 15 (1st Cir. 2016).

11. See Smith, Linda & Coloma, Cindy, *Renting Lucy: A Story of America’s Prostituted Children*, 95 (Shared Hope Int’l 2009).

12. See Dillon, *supra* note 5, at 130.

13. See S. REP. No. 114-214, at 3 (2016).

throughout the country¹⁴ and come from all backgrounds and are of all races.¹⁵ Females comprise the vast majority of victims.¹⁶

Children are particularly vulnerable to sex trafficking because of their lack of experience, still developing brains, economic dependence on adults, and emotional needs. They are generally not yet able to appreciate the full consequences of their actions,¹⁷ making it difficult for them to distinguish between “bad” options and “good” options.¹⁸ They often do not understand how certain behavior affects their well-being, and are susceptible to negative influences and outside pressures.¹⁹ Children can be lured into sex trafficking without understanding that they are being exploited or in danger.²⁰

14. See, e.g., Press Release, Polaris Project, *National Human Trafficking Hotline Takes 100,000th Call* (Jan. 27, 2014).

15. See, e.g., Polaris Project, *Victims & Traffickers*.

16. See Charles Puzzanchera, *Juvenile Arrests 2012, Juv. Offenders and Victims: National Report Series* (U.S. Dep’t of Justice, D.C.), Dec. 2014.

17. *Roper v. Simmons*, 543 U.S. 551, 569, (2005).

18. Steinberg, Lawrence, *Risk Taking in Adolescence: New Perspectives from Brain and Behavioral Science*, 16 *CURRENT DIRECTIONS IN PSYCHOL. SCI.* 55, 56 (2007).

19. See, e.g., *Miller v. Alabama*, 132 S. Ct. 2455, 2464 (2012).

20. See, e.g., Annitto, *supra* note 7, at 13-14 (“[W]hen the pimp introduces the young girl into prostitution, she fails to recognize that she is a victim and becomes trapped.”).

Children are also vulnerable because of their dependence on adults to provide essential needs. Traffickers use this vulnerability to attract and trap children, targeting the most economically and socially vulnerable populations.²¹ These children likely do not have stable, trusted adults and are unaware of the services available from government or non-profit groups.²² The adults they turn to for help may exploit them in the commercial sex trade or otherwise.²³ Many victims believe that their trafficker is their only option for survival.²⁴

Traffickers also take advantage of children's emotional immaturity.²⁵ They nurture a connection with a child,

21. See *United States v. Brooks*, 610 F.3d 1186, 1199-1200 (9th Cir. 2010) (adults targeted minors with “no money, no job, and . . . nowhere to live” to engage in prostitution); *In re B.W.*, 313 S.W.3d at 825-26 (children with a history of abuse and/or neglect are most at risk of sexual exploitation); Covenant House, *Homelessness, Survival Sex and Human Trafficking: As Experienced by the Youth of Covenant House New York*, 6, 14-15, 20 (May 2013) (hereinafter “Covenant House Study”), available at <http://www.covenanthouse.org/sites/default/files/attachments/Covenant-House-trafficking-study.pdf> (discussing the particular susceptibility of troubled youth to sex trafficking).

22. See Covenant House Study, *supra* note 21, at 14-15.

23. See, e.g., *id.* at 11, 14-15.

24. See, e.g., *id.*

25. See Reid, Joan A., *Doors Wide Shut: Barriers to the Successful Delivery of Victim Services for Domestically Trafficked Minors in a Southern U.S. Metropolitan Area*, 20 WOMEN & CRIM. JUST. 147, 148-50, 158 (2010).

acting as her lover or protector,²⁶ and providing affection or affirmation.²⁷ Children frequently display symptoms of “traumatic bonding” with their traffickers. Once the child begins to depend on a trafficker, he or she uses his or her position of trust and power to sexually exploit her.²⁸

As a result of children’s vulnerabilities, the TVPRA and numerous other laws recognize that a minor requires protection from decisions related to sexual activity.²⁹ Under the TVPRA and most state laws, children who are prostituted are deemed victims of a “severe form of trafficking,” without proof of force, fraud, or coercion.³⁰ For the same reason, the majority of states have criminalized sex between an adult and a minor, and have carved out only narrow and careful exceptions.³¹ Many states recognize that laws criminalizing prostitution should not apply to children because they are victims, not criminals.³²

26. See Anitto, *supra* note 7, at 13; Covenant House Study, *supra* note 21, at 11.

27. See, e.g., Smith & Coloma, *supra* note 11, at 119-20.

28. See *id.* at 29 (trafficker exercises emotional control over children, acting as “dictator and boyfriend at the same time”).

29. See, e.g., DAVIS, NOY S. & TWOMBLY, JENNIFER, STATE LEGISLATOR’S HANDBOOK FOR STATUTORY RAPE ISSUES 1, 8-13 (6th ed. 2000).

30. TVPRA § 103(8), (13).

31. See, e.g., DAVIS & TWOMBLY, *supra* note 29, at 1, 8-13.

32. Protected Innocence Challenge http://sharedhope.org/wp-content/uploads/2015/09/SharedHopeStateLawSurvey_Non-criminalizationofminors.pdf.

The result of sex trafficking is a life of repeated rapes, the consequences of which cannot be overstated.³³ Most sex trafficking victims suffer from significant mental health issues, including depression, anxiety, and nightmares, and feel socially ostracized and blamed.³⁴ Victims are susceptible to drug or alcohol addiction³⁵ and often suffer from severe weight loss, malnutrition, and eating disorders.³⁶

Nearly all sex trafficking victims suffer physical injuries.³⁷ Traffickers use “beatings, burnings, cuttings, gang rape, and sodomy” as means of controlling their victims,³⁸ and victims are subject to the whims—sometimes

33. See U.S. Department of State, *Trafficking in Persons Report* (June 2013) (hereinafter “2013 TIP Report”), at 31.

34. See Lederer, Laura J. *et al.*, *The Health Consequences of Sex Trafficking and Their Implications for Identifying Victims in Healthcare Facilities*, 23 *ANNALS HEALTH L.* 61, 62, 70 (Winter 2014); Smith, Linda A. *et al.*, *The National Report on Domestic Minor Sex Trafficking: America’s Prostituted Children*, Shared Hope, 41-42 (May 2009).

35. See, *e.g.*, Lederer *et al.*, *supra* note 34, at 75-76; *The Prostitution of Children*, U.S. Dept. of Just., (hereinafter “Prostitution of Children”).

36. 2013 TIP Report, *supra* note 33, at 31; Lederer *et al.*, *supra* note 34, at 68, 71-74, 79.

37. See, *e.g.*, Melissa Farley, *Prostitution, Trafficking, and Cultural Amnesia: What We Must Not Know in Order to Keep the Business of Sexual Exploitation Running Smoothly*, 18 *YALE J.L. & FEMINISM* 109, 112- 17 (2006).

38. See Geist, Darren, *Finding Safe Harbor: Protection, Prosecution, and State Strategies to Address Prostituted Minors*,

extraordinarily violent—of those who purchase them.³⁹ The victims also have an increased risk of contracting serious diseases and an increased risk of reproductive issues.⁴⁰

These consequences affect almost all victims of sex trafficking, but they are even more pronounced for children.⁴¹ Not surprisingly, given the multifaceted trauma inflicted by sex trafficking, victims have an extraordinarily high rate of attempted suicide and post-traumatic stress disorder.⁴²

II. BACKPAGE.COM FACILITATES AND PROMOTES THE VICTIMIZATION OF CHILDREN

The sex trafficking of children in America depends on traffickers' ability to consistently reach customers to whom to sell their wares. In the past 20 years the Internet has provided traffickers and sex buyers with a remarkably easy and cost-effective way to sell and purchase children,

4 LEG. & POL'Y BRIEF 67, 75-76 (2012); *see also* Prostitution of Children, *supra* note 35.

39. *See* Geist, *supra* note 38, at 76-77.

40. *See* TVPA §102(b)(11); 2013 TIP Report, *supra* note 33, at 31; Lederer, *supra* note 34, at 68, 71-74, 79.

41. *See* Alexander, Mary P. *et al.*, *Community and Mental Health Support of Juvenile Victims of Prostitution*, 1 MED., LEGAL, & SOC. SCI. ASPECTS OF CHILD SEXUAL EXPLOITATION 397, 397-98 (2005); 2013 TIP Report, *supra* note 33, at 31.

42. *See* Lederer *et al.*, *supra* note 34, at 70; Farley, Melissa & Barkan, Howard, *Prostitution, Violence, and Posttraumatic Stress Disorder*, 27(3) WOMEN & HEALTH 37-49 (1998).

opening up new and expanded markets for the commercial sex industry.⁴³

The commercial sex trade was once a low-tech criminal enterprise, involving face-to-face interactions.⁴⁴ The growing use of the Internet has had a substantial impact on the commercialized sex trade, transforming the characteristics of child sex trafficking.⁴⁵ The Internet allows traffickers and buyers to remain anonymous, which substantially diminishes the risk of detection and prosecution.⁴⁶ The “anonymity and accessibility” of Backpage.com create the “perfect storm for the proliferation of sex trafficking.”⁴⁷ In the last five years, the National Center for Missing and Exploited Children (“NCMEC”) reported an 846% increase in reports of suspected child sex trafficking” to its tip line—an increase NCMEC believes is directly correlated to the use of the Internet to sell children for sex.⁴⁸

43. See, e.g., *Exploiting Americans on American Soil: Domestic Trafficking Exposed: Hearing on H.R. 972 Before the Comm’n on Sec. & Cooperation in Eur.*, 109th Cong. 33 (2005); Smith *et al.*, *supra* note 34, at 17 (“the accessibility to commercial sex markets on the Internet is staggering”).

44. See Farley, Melissa *et al.*, *Online Prostitution and Trafficking*, 77 ALB. L. REV. 1039, 1042–43 (2014).

45. Leary, Mary Graw, *Fighting Fire with Fire: Technology in Child Sex Trafficking*, 21 DUKE J. GENDER L. & POL’Y 289, 307 (2014).

46. See Dank *et al.*, *supra* note 3, at 129.

47. Shared Hope, *Memorandum: Facilitation of Domestic Minor Sex Trafficking*, 1 (Sept. 9, 2013).

48. See Testimony of Yiota G. Souras, Senior Vice President & General Counsel, National Center for Missing & Exploited

Perpetrators of child sex trafficking use and rely on the Internet to identify, recruit, and market children. As a result, the primary “marketplace” for the sale of children has become online advertising.⁴⁹ Advertising sites “provide traffickers with a quick, easy, user-friendly platform” that grants them a ready market wherever they travel to traffic their victims.⁵⁰ It is now the case that the vast majority of prostitution solicitations take place online.⁵¹ Police in one metropolitan area estimated that 90% of the city’s prostitution marketing was conducted online between 2009 and 2011.⁵² Today, three out of every four child sex-trafficking cases processed in federal courts involve the use of technology.⁵³

Backpage.com has the notorious distinction of being the “leader in prostitution advertising online.”⁵⁴ After

Children, before S. Permanent Subcomm. on Investigations, at 2 (Nov. 19, 2015) (hereinafter “Souras Testimony”).

49. Leary, *supra* note 45, at 308.

50. See Souras Testimony, *supra* note 48, at 2.

51. See Farley *et al.*, *supra* note 44, at 1043.

52. Douglas Dowty, *Syracuse Police Charge 36 in Prostitution Sting Originating on Internet*, SYRACUSE.COM (Dec. 7, 2012, 12:18 PM), http://www.syracuse.com/news/index.ssf/2011/04/syracuse_police_charge_36_in_p.html.

53. Leary, *supra* note 45, at 302.

54. DeLateur, Monica J., *From Craigslist to Backpage.com: Conspiracy As A Strategy to Prosecute Third-Party Websites for Sex Trafficking*, 56 SANTA CLARA L. REV. 531, 539-541 (2016) (describing how Backpage.com “largely replaced” Craigslist’s role in online prostitution advertising).

Craigslist shut down its “adult services” section in 2010,⁵⁵ Backpage.com acquired a huge portion of the online prostitution business and is now the nation’s leading publisher of online prostitution advertising.⁵⁶ Backpage.com’s adult section carries ads in 400 cities in the U.S.⁵⁷

Sex traffickers regularly use the “adult” section of Backpage.com as their primary method to solicit customers for sex with children.⁵⁸ Backpage.com has acknowledged that at least 400 advertisements a month in its “adult services” section potentially involve minors—although the actual number is likely much higher.⁵⁹ One study found that 72% of child victims in the care of service providers were bought and sold for sex online and 53% of those child victims reported being trafficked on Backpage.com.⁶⁰ *Amicus* Shared Hope has found that “[s]ervice providers working with sex-trafficking victims have reported that between 80% and 100% of their clients

55. Suarez, Paul, *Craigslist Adult Services Shut Down*, PCWORLD (Sept. 5, 2010).

56. See Souras Testimony, *supra* note 48, at 2; see also AIMGroup, *Online prostitution-ad revenue crosses Craigslist benchmark* (2013), available at <http://aimgroup.com/2013/07/10/online-prostitution-ad-revenue-crosses-craigslist-benchmark/>.

57. See AIMGroup, *supra* note 56.

58. See generally, *id.*

59. S. Res. 439, 112th Cong. (2012). The company leaves the advertisements on its website. See Deborah Feyerick & Sheila Steffen, *A Lurid Journey Through Backpage.com*, CNN (May 10, 2012).

60. Shared Hope, *supra* note 47.

have been bought and sold on Backpage.com.”⁶¹ Shared Hope has catalogued more than 400 reported cases of children being trafficked using Backpage.com across 47 States.⁶² NCMEC has found that Backpage.com is linked to 71% of all suspected child sex-trafficking reports it receives through its CyberTipline.⁶³

The widespread use of Backpage.com as an essential component of sex trafficking violations is evident from the large number of criminal prosecutions by the U.S. Department of Justice for sex trafficking in which Backpage.com is featured. Since December 2015, the Department of Justice has charged at least 18 sex traffickers with crimes in which Backpage.com was used to solicit customers for commercial sex with underage girls.⁶⁴

Backpage.com is well aware of this appalling use of its platform. Not only has it become accustomed to being singled out in Department of Justice press, Backpage.com has been called out by state prosecutors as a key component of the sex trafficking industry. In September 2011, the National Association of Attorneys General wrote an open letter to Backpage.com on its ongoing failure to effectively limit prostitution and sexual trafficking on

61. *Id.*

62. *Id.*

63. *See* PSI Report, *supra* note 4, at 2.

64. *See, e.g.*, Press Release, U.S. Dep’t of Justice, Boise Man Pleads Guilty to Sex Trafficking of Children (Aug. 16, 2016), <https://www.justice.gov/usao-id/pr/boise-man-pleads-guilty-sex-trafficking-children> (mentioning Backpage.com).

its website,⁶⁵ asking Backpage.com to follow the lead of Craigslist. Backpage.com declined, and has successfully challenged state laws outlawing advertising commercial sexual abuse of a minor.⁶⁶

Backpage.com employs practices that make it very easy for sex traffickers to use the site without detection or fear of prosecution.⁶⁷ Traffickers post ads in the “escorts” section of Backpage.com with sexually suggestive photographs of children, their faces blurred to hide some evidence of their youth. Metadata is stripped from the photos, hindering identification of a child who has been reported missing.⁶⁸ Phone numbers and email addresses are also removed, further frustrating pursuit of the sex trafficker by law enforcement.⁶⁹ Backpage.com also does not preserve information such as IP addresses, which would help locate victims and prosecute traffickers.⁷⁰

When posting ads on Backpage.com, traffickers use common code words like “young,” “new to town,” and

65. Letter from the National Association of Attorneys General to Samuel Fifer, dated Aug. 31, 2011, at 1.

66. *See, e.g., Backpage.com, LLC v. Cooper*, 939 F. Supp. 2d 805 (M.D. Tenn. 2013).

67. *See* Souras Testimony, *supra* note 48, at 5-9.

68. *See* PSI Report, *supra* note 4, at 77.

69. *Human Trafficking Investigation: Hearing Before the S. Permanent Subcomm. on Investigations of the S. Comm. on Homeland Sec. and Governmental Affairs*, 114th Cong. 22 (2015) (hereinafter “Subcomm. Hearing”).

70. *Id.* at 17.

“fresh” to attract those looking to purchase sex with children.”⁷¹ When phrases explicitly linked to sexual acts are used, Backpage.com merely deletes the phrases, rather than disallowing the advertisement.⁷²

The identities of persons posting ads on the “adults” page are not verified. Remarkably, Backpage.com has more stringent rules to post an ad to sell a pet, a motorcycle, or a boat,⁷³ which require a verified phone number. There is also no mechanism in place for verifying the age of persons pictured in the “adults” section. If a user records an age as less than 18, the ad will be rejected with the message, “Oops! Sorry, the ad poster must be over 18 years of age.” The user can then enter a new age greater than 18 without submitting any additional information.⁷⁴

Backpage.com has been richly rewarded for its facilitation of sex trafficking. According to one industry analysis in 2013, \$8 out of every \$10 spent on online commercial sex advertising in the United States goes to Backpage.com.⁷⁵ While Backpage.com is privately owned and does not disclose its finances, the Senate’s Permanent Subcommittee on Investigations (“PSI”) calculated that Backpage.com earned revenues of \$135 million in 2014,⁷⁶

71. See Gerhart, Ann, *Sex-trafficking Opponents Fight Craigslist’s ‘Adult Services’ Ads*, WASH. POST (Aug. 7, 2010).

72. See PSI Report, *supra* note 4, at 19-20.

73. See Souras Testimony, *supra* note 48, at 8.

74. See PSI Report, *supra* note 4, at 13.

75. Subcomm. Hearing, *supra* note 69, at 1-2.

76. See *id.*, at 2; see PSI Report, *supra* note 4, at 25-26.

and was expected to net more than \$153 million in 2015.⁷⁷ Nearly all of these revenues are profit.⁷⁸

III. CONGRESS HAS PROVIDED SEX TRAFFICKING VICTIMS WITH A PRIVATE RIGHT OF ACTION TO “ENFORCE” THE TVPRA THAT IS NOT BARRED BY THE CDA

A. Congress has Specifically Sought to Prevent Backpage.com’s Sex Trafficking

In December 2012, the U.S. Senate unanimously adopted a resolution expressing “the sense of the Senate” that Backpage.com should eliminate its “adult entertainment” section.⁷⁹ In calling for Backpage.com to terminate “the website’s rampant facilitation of online sex trafficking,” the Senate noted that the CDA does “not preclude a service provider from voluntarily removing a portion of a website known to facilitate the sexual exploitation of minors in order to protect children in the United States.”⁸⁰

Backpage.com has used the CDA to impede an investigation of its business practices by the PSI. In April 2015, the PSI began an investigation on sex trafficking via the Internet, which focuses on Backpage.com.⁸¹ The

77. See Subcomm. Hearing, *supra* note 69, at 5.

78. See PSI Report, *supra* note 4, at 26.

79. S. Res. 439, 112th Cong. (2012).

80. *Id.*

81. See PSI Report, *supra* note 4, at 10.

Subcommittee subpoenaed information on Backpage.com’s process for “moderating” its ads. Backpage.com resisted producing documents in response to a subpoena issued in October 2015, relying, in part, on the CDA.⁸² This Court recently denied Backpage.com’s request for a stay of the Senate’s contempt action.⁸³

This Court did not countenance Backpage.com’s use of the CDA as a shield in the Senate’s subpoena enforcement proceeding, and it should not do so here. Amici respectfully submit that this Court should grant *certiorari* in this case so that victims of sex trafficking, including plaintiffs and children currently trafficked on Backpage.com, can seek justice through the private right of action Congress provided to them in the TVPRA.

B. Congress Gave Victims of Sex Trafficking a Private Right of Action

The Trafficking Victims Protection Act of 2000⁸⁴ had three goals: to combat trafficking in persons; to ensure just and effective punishment of traffickers; and to protect their victims.⁸⁵ The numerous statutory means to achieve these goals included providing new definitions of

82. *See id.* at App. 14.

83. *Ferrer v. Senate Subcomm. on Investigations*, No. 16A236 (U.S. Sept. 13, 2016) (order denying application for stay).

84. Pub. L. No. 106-386, 114 Stat. 1466.

85. *See* TVPA § 102(a); U.S. DEP’T OF STATE, THE 3Ps: PREVENTION, PROTECTION, PROSECUTION (June 30, 2016).

trafficking⁸⁶ and criminalizing its various forms.⁸⁷ These provisions did not include a private right of action for victims, who would recover under the initial legislation only by receiving restitution in any criminal case against the sex traffickers themselves.

While urgent violations of human rights had motivated the legislation,⁸⁸ it was acknowledged at the time that the compromise bill that became law would not effectively end trafficking.⁸⁹ The Congressional Budget Office opined that the newly defined crimes would not increase federal costs for law enforcement significantly “because of the relatively small number of cases likely to be involved.”⁹⁰ The prediction proved accurate. From 2001 through 2004, the Justice Department filed 60 cases, convicting 118 defendants. Meanwhile, the State Department estimated that 58,000 to 70,000 individuals were trafficked into the United States each year.⁹¹

86. See TVPA § 103.

87. See TVPA § 112(a).

88. *Trafficking of Women and Children in the International Sex Trade: Hearing Before the Subcomm. on Internal Operations and Human Rights of the H. Comm. on Int'l Relations*, 106th Cong. 6 (1999) (statement of Rep. Chris Smith).

89. Democrats found the bill to be a “modest improvement over current law,” but believed that the committee “falls well short of the protections it could have provided to the victims of these horrific acts” H.R. REP. NO. 106-487, pt. 2, at 40 (2000).

90. *Id.* at 23.

91. Note, *Remedying the Injustices of Human Trafficking through Tort Law*, 119 HARV. L. REV. 2574, 2583 (2006).

After passage of the TVPA, advocates for trafficked persons recognized the limitations in an exclusively criminal prosecution-based approach.⁹² It was obvious that there were far more trafficking victims in the United States than the number of victims identified and receiving assistance under the TVPA.⁹³ Critics recognized that public enforcement alone was insufficient to address the complex nature of trafficking cases and the overall trafficking industry.⁹⁴ Private civil actions were promoted as one means for deterring trafficking.⁹⁵

Three years after the TVPA was enacted, Congress passed the Trafficking Victims Protection Reauthorization Act of 2003,⁹⁶ which, among other things, established a private right of action for victims of severe forms of trafficking in persons. Section 1595 of the TVPRA allowed an individual who was a victim of § 1591, which prohibits sex trafficking by force, fraud, or coercion and sex trafficking of children, to bring a civil action. In this

92. Kim, Kathleen & Hreshchyshyn, Kusia, *Human Trafficking Private Right of Action: Civil Rights for Trafficked Persons in the United States*, 16 HASTINGS WOMEN'S L. J. 1 (2004).

93. Nam, Jennifer S., *The Case of the Missing Case: Examining the Civil Right of Action for Human Trafficking Victims*, 107 COLUM. L. REV. 1655, 1661 (2007).

94. See Chacon, Jennifer M., *Misery and Myopia: Understanding the Failures of U.S. Efforts to Stop Human Trafficking*, 74 FORDHAM L. REV. 2977, 3023-25 (2006).

95. Hyland, Kelly E., *Protecting Human Victims of Trafficking: An American Framework*, 16 BERKELEY WOMEN'S L.J. 29, 50-51 (2001).

96. Pub. L. No. 108-193, 117 Stat. 2875.

early form of private civil action, plaintiffs had to prove that the defendant violated § 1591 in order to bring the action.⁹⁷

This new express private right of action in TVPRA was viewed as a means for “enforcing” the rights conveyed by the TVPA. Most notably, a representative of the U.S. Attorney General referred to the proposed private right of action as “additional enforcement activity” in a letter to Congress opposing the new provision.⁹⁸ The private right of action granted by the TVPRA is of the same nature as other private rights of action that deputize victims to act as “private attorneys general” in order to enforce civil rights.⁹⁹ Similar to private civil actions pursuant to Title VII, or § 1983 of the Civil Rights Act, a TVPRA action for damages is more than a private tort suit benefitting only the individual plaintiffs whose rights were violated.¹⁰⁰ As recognized in *City of Riverside v. Rivera*, 477 U.S. 561, 574 (1986), a civil rights plaintiff seeks to vindicate important civil and constitutional rights that cannot be valued solely in monetary terms. Thus, like other private actions that enforce criminal laws, the TVPRA authorizes attorney

97. See Nam, *supra* note 93, at 1673, 1668 n.81 (“The legislative reports accompanying the 2003 TVPRA are in fact devoid of any insight into Congress’s intentions or expectations in creating the civil remedy.”).

98. H.R. REP. NO. 108-264, pt. 2, at 16 (2003).

99. Kim, Kathleen, *The Trafficked Worker as Private Attorney General: A Model for Enforcing the Civil Rights of Undocumented Workers*, 2009 U. CHI. LEGAL F247 (2009); Rubenstein, William, *On What a “Private Attorney General” Is—And Why it Matters*, 57 VAND. L. REV. 2127, 2146 (2004).

100. See Karlan, Pamela S., *Disarming the Private Attorney General*, 2003 U. ILL. L. REV. 183, 200 (2003).

fees for the private plaintiff, should she prevail.¹⁰¹ And, as in successful private actions asserting the violation of civil rights, the damages a plaintiff recovers would contribute significantly to the deterrence of violations in the future.¹⁰²

As an enforcement mechanism for violations of § 1591, the original version of the private right of action under the TVPRA was not a success. From the time of its creation, in 2003, to 2007, sex trafficking victims had not filed a single lawsuit under the provision.¹⁰³ Whatever the explanation for this phenomenon,¹⁰⁴ it was clear that simply providing victims of sexual trafficking with a private remedy was not sufficient.

The TVPRA private right of action assumed its current form with the reauthorization of the statute in 2008. It enhanced existing penalties against traffickers, in two important respects, demonstrating Congress's commitment to protecting victims and prosecuting traffickers.¹⁰⁵ First, it gave prosecutors the authority to indict a person who benefitted from trafficking.¹⁰⁶ Second, it added strict liability for trafficking minors, eliminating the need to show force, fraud, or coercion.¹⁰⁷ These two enhancements to § 1591 carried over to the private right of

101. 18 U.S.C. § 1595(a).

102. *Id.*

103. Nam, *supra* note 93, at 1656.

104. *See generally id.* at 1679-91.

105. *See* H.R. REP. NO. 110-430, pt. 1, at 33 (2007).

106. 18 U.S.C. § 1591(a)(2).

107. *Id.* § 1591(a).

action in § 1595. For the first time, children who were sex trafficked could sue persons who “knowingly” benefited from trafficking. With the 2008 amendments, Congress put in place a powerful mechanism for trafficked children to enforce their rights against traffickers profiting from their crimes.

C. The CDA Does Not Bar this Private Right of Action

The CDA was originally an amendment to the Telecommunications Act of 1996, which deregulated the broadcasting market in the telecommunication arena.¹⁰⁸ Initially, the CDA contained anti-indecency and anti-obscenity provisions, as its name suggests.¹⁰⁹ The Senator who introduced the bill said that it would protect children from “those who would electronically cruise the digital world to engage children in inappropriate communications and introductions.”¹¹⁰

After the Supreme Court struck down the CDA’s core provision in 1997,¹¹¹ all that remained of the original bill was a separate provision found at 47 U.S.C. § 230,

108. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified in scattered sections of 47 U.S.C.); H.R. Rep. No. 104-458, at 81 (1996) (Conf. Rep.).

109. H.R. REP. No. 104-458, at 187-97.

110. Cannon, Robert, *The Legislative History of Senator Exon’s Communications Decency Act*, 49 FED. COMM’NS LAW J. 51, 53-54 (1996).

111. *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 873, 895 (1997).

entitled “Protection for private blocking and screening of offensive material.” This remaining portion of the CDA originated with the House’s “Internet Freedom and Family Empowerment Act,” which was intended to allow parents, rather than the State, to make decisions about what was considered decent in their household.¹¹² It reads in pertinent part:

(1) Treatment of publisher or speaker

No provider or user of an interactive computer services shall be treated as the publisher or speaker of any information provided by another information content provider.

Some courts, including the court below, have read it to provide immunity from all civil claims to an interactive computer service that publishes third-party content. Such an interpretation is fundamentally flawed. Judge Easterbrook and others have questioned a broad interpretation of § 230, pointing out that its title—“Good Samaritan blocking”—is hardly apt if the principal effect of the law is to induce ISPs to do nothing about the distribution of indecent or offensive materials via their services.¹¹³ The text can harmonize with the title if § 230(c)(1) is read as definitional rather than as a grant of immunity.

112. Rheingold, Howard, *Internet Censors Close to Success*, CMC MAG. (Dec. 1, 1995).

113. *Chicago Lawyers’ Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666, 670 (7th Cir. 2008), *as amended* (May 2, 2008).

Regardless of the interpretation of this provision, a separate provision in the CDA, § 230(e)(1), entitled “No effect on criminal law,” supports overturning the decision below. It states:

“[n]othing in this section shall be construed to impair the enforcement of section 223 or 231 of this title, chapter 71 (relating to obscenity) or 110 (relating to sexual exploitation of children) of Title 18, or any other Federal criminal statute.”

This provision expressly carves out claims enforcing chapter 110 of Title 18, which is entitled “Sexual Exploitation and Other Abuse of Children.” Within chapter 110 is an express civil remedy, § 2255, for personal injuries suffered by children who were victims of a violation of § 1591 (sex trafficking). § 230(e)(1), on its face, refers to the private right of action for personal injury by a sex trafficking victim as one “enforcing” the statute.

The private right of action afforded by § 1595 is, likewise, an enforcement of § 1591, and is not barred by the CDA.

CONCLUSION

For the reasons stated above, *Amici* respectfully urge the Court to grant the petition herein for a writ of certiorari.

Respectfully submitted.

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