No. 16-276

IN THE

Supreme Court of the United States

JANE DOE NO. 1, *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 BRIEF OF PROFESSORS CHAD FLANDERS, MEG GARVIN, MARY GRAW LEARY, SHEA RHODES AND AUDREY ROGERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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Professors Chad Flanders, Meg Garvin, Mary Graw Leary, Shea Rhodes and Audrey Rogers (collectively, "*amici*") hereby move, pursuant to S. Ct. R. 37.2(b), for leave to file an *amici curiae* brief in support of the Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit (the "Petition"). A copy of the proposed brief is attached. Counsel of record for the parties were given timely notice of *amici's* intention to file an *amici curiae* brief, pursuant to S. Ct. R. 37.2(a). Respondents refused *amici's* request for consent to file.[1]

As detailed in section I of the attached brief ("Interest of *Amici Curiae*"), *amici* are law professors from across the country who teach and write about criminal law and one or more other areas relevant to this case, including: human trafficking, constitutional law, civil procedure, child exploitation, and/or victims' rights law.

This brief will assist the Court in determining whether to grant *certiorari* because *amici* are well positioned to provide important background about the intersection of private rights of action, the enforcement of criminal law, and the Communications Decency Act of 1996. *Amici* also have a unique understanding of how the First Circuit's ruling, absent this Court's review, will facilitate and strengthen illegal markets that jeopardize the safety and security of all Americans.

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1. An email requesting consent was sent to Petitioners and Respondents on September 12, 2016. Petitioners consented, but Respondents did not.

Accordingly, *amici* respectfully request that the Court grant leave to file the attached *amici curiae* brief.

September 29, 2016

Respectfully submitted,

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I. INTEREST OF *AMICI CURIAE*

Professors Chad Flanders, Meg Garvin, Mary Graw Leary, Shea Rhodes, and Audrey Rogers (collectively, *amici*) respectfully submit this brief as *amici curiae* in support of Petitioners Jane Doe No. 1, Jane Doe No. 2, Jane Doe No. 3, Sam Loe, and Sara Loe (collectively, "Petitioners").[1] *Amici* are all law professors who teach and write about criminal law and one or more other areas relevant to this case, including: human trafficking, constitutional law, civil procedure, child exploitation, and/or victims' rights law.

Doctor Chad Flanders is a member of the faculty at Saint Louis University School of Law. A Fulbright Scholar, Dr. Flanders teaches, researches, and writes in the areas of criminal law, constitutional law, and the philosophy of law. He is the editor of two books, one on religious freedom and the other on the philosophy of criminal law, and is a recognized expert on use of force.

Professor Meg Garvin is a clinical professor of law at Lewis & Clark Law School, focusing on crime victims' rights. Professor Garvin is recognized as a leading national expert on victims' rights law. She has testified before Congress, state legislatures, and the Judicial Proceedings Panel on Sexual Assault in the Military.

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1. 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 *amici* or their counsel made any monetary contribution intended to fund the preparation or submission of this brief. *See* Sup. Ct. R. 37.6.

Professor Mary Graw Leary is a member of the faculty at The Catholic University of America, Columbus School of Law. Professor Leary's scholarship examines the intersection of criminal law, constitutional criminal procedure, technology, and contemporary victimization. She is a recognized expert in the areas of criminal law, victimization, exploitation, human trafficking, and technology. Professor Leary is a former state and federal prosecutor, the former deputy director for the Office of Legal Counsel at the National Center for Missing and Exploited Children, and former director of the National Center for the Prosecution of Child Abuse.

Shea Rhodes is the Director and Co-Founder of the Villanova University Charles Widger School of Law's Institute to Address Commercial Sexual Exploitation. Director Rhodes authors and coordinates scholarship and policy papers and best practices in addressing human trafficking, commercial sexual exploitation, and prostitution. Prior to academia, she has had significant experience working with sex trafficking survivors as a prosecutor and member of Pennsylvania's Anti-Human Trafficking Advocacy Work Group.

Professor Audrey Rogers is a professor of law at the Elizabeth Haub School of Law at Pace University. Professor Rogers teaches criminal law, civil procedure, family law, and computer crime law. Her scholarship includes a focus on computer and family law. She is a nationally-recognized authority on the exploitation of children and child pornography.

Amici have dedicated their legal careers to the areas of law directly affected by the issues raised in the Petition. They have an interest in ensuring not only that

the Supreme Court protect basic canons of construction, but also that the Court properly apply Congress' intent to stop the sexual exploitation of children. *Amici* also have a unique understanding of how the First Circuit's ruling in this case will facilitate and strengthen the ability of individuals and entities to engage in illegal conduct that jeopardizes the safety and security of all Americans.

II. SUMMARY OF ARGUMENT

The lower courts relied upon the Communications Decency Act of 1996 ("CDA") to reject the claims of three minors – young girls who were trafficked and purchased for sex on Backpage.com, and then repeatedly raped. The reasoning, as rationalized by the District of Massachusetts and accepted by the First Circuit, was that, "Congress [through the CDA] has made the determination that the balance between suppression of trafficking and freedom of expression should be struck in favor of the latter in so far as the Internet is concerned." *Doe ex rel. Roe v. Backpage.com, LLC*, 104 F. Supp. 3d 149, 165 (D. Mass. 2015), *aff'd sub nom. Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12 (1st Cir. 2016).

In actuality, the plain language of the CDA shows that the "balance" Congress chose to strike was in favor of protecting children from sexual exploitation, including, of course, sex trafficking. Congress did so by explicitly providing in the CDA that:

> Nothing 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.

47 U.S.C. § 230(e)(1). Thus, Congress specifically carved out from the protections available to an internet service provider ("ISP") all statutes targeting sexual exploitation. A plain reading shows that this would include the explicit private right of action available as an enforcement mechanism for criminal behavior covered by the Trafficking Victims Protection and Reauthorization Act of 2008 ("TVPRA"). The wording is deliberate, and its plain meaning should be respected. The First Circuit's interpretation of the CDA is counter to Congress' conscious choice, and creates an unnecessary conflict between the CDA and the TVPRA, as well as its state counterparts, such as the Commonwealth of Massachusetts' Anti-Human Trafficking and Victim Protection Act of 2010.

This Court's review is necessary to ensure the adherence to basic tenets of statutory construction the First Circuit unnecessarily and wrongly violated here.

On a more fundamental, human level, this Court's review is crucial to prevent catastrophic consequences. The overbroad interpretation of the CDA protects an ISP from its role in criminal activity simply because it uses the internet to carry out its actions. The dangerous discord of the First Circuit's interpretation is further highlighted by its split from the existing consensus that immunity under the CDA does not extend to ISPs for their facilitation of criminal activity.[2]

For the reasons set forth below, *amici* urge this Court to grant the petition for a writ of certiorari.

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2. *See* Section II.A in Petitioners' Petition for Writ of Certiorari for a more full discussion of this split.

III. ARGUMENT

A. CERTIORARI SHOULD BE GRANTED AS THE FIRST CIRCUIT HAS NEEDLESSLY PLACED FEDERAL STATUTES IN CONFLICT WITH ONE ANOTHER

1. Supreme Court Review Will Ensure that Federal Statutes that Can Coexist Will Be Read Together

This Court's review is needed to remedy the direct conflict the First Circuit creates when finding that the CDA bars a TVPRA action[3] against Backpage. Whenever

3. The relevant TVPRA Section, Section 1591, reads:

> **(a)** Whoever knowingly—
>
> **(1)** in or affecting interstate or foreign commerce, or within the special maritime and territorial jurisdiction of the United States, recruits, entices, harbors, transports, provides, obtains, advertises, maintains, patronizes, or solicits by any means a person; or
>
> **(2)** benefits, financially or by receiving anything of value, from participation in a venture which has engaged in an act described in violation of paragraph (1), knowing, or, except where the act constituting the violation of paragraph (1) is advertising, in reckless disregard of the fact, that means of force, threats of force, fraud, coercion described in subsection (e)(2), or any combination of such means will be used to cause the person to engage in a commercial sex act, or that the person has not attained the age of 18 years and will be caused to engage in a commercial sex act, shall be punished as provided in subsection (b).

18 U.S.C. § 1591(a).

possible, federal statutes should be interpreted to avoid conflict with other federal statutes. *See*, *e.g.*, *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 155 (1976) ("Rather, 'when two statutes are capable of co-existence, it is the duty of the courts . . . to regard each as effective.'") (quoting *Morton v. Mancari,* 417 U.S. 535, 550-51 (1974)); *Levin v. U.S.*, 568 U.S. ___, 133 S. Ct. 1224, 1233 (2013) (rejecting construction of a statute that would result in conflict with another statute). The CDA and the TVPRA can, and should, be read together. Congressional intent behind both of these actions is entirely consistent.

The TVPRA was enacted to stop human trafficking, including the sex trafficking of children. *See*, *e.g.*, William J. Clinton, Statement on Signing the Victims of Trafficking and Violence Protection Act of 2000, 2000 WL 1617225, at *3 (Oct. 28, 2000) ("The Act creates new felony criminal offenses to combat trafficking with respect to slavery or peonage [including] sex trafficking in children . . . ."); 146 Cong. Rec. H2684 (daily ed. May 9, 2000) (statement of Rep. Smith) ("The [TVPRA] focuses on the most severe forms of trafficking in human beings; on the buying and selling of children into the international sex industry, on sex trafficking of women and children alike by force, fraud, or coercion, and on trafficking into slavery, involuntary servitude, and forced labor."); 146 Cong. Rec. S7781 (daily ed. July 27, 2000) (statement of Sen. Wellstone) ("The [TVPRA] is a comprehensive bill that aims to prevent trafficking in persons, provide protection and assistance to those who have been trafficked, and strengthen prosecution and punishment of those responsible for trafficking."). By explicitly authorizing a private right of action, Congress also enlisted and empowered victims to assist in achieving the TVPRA's goals. *See*, *e.g.*, Kathleen

Kim & Kusia Hreshchyshyn, *Human Trafficking Private Right of Action: Civil Rights for the Trafficked Person in the United States*, 16 Hastings Women's L.J. 1 (2004) (recognizing that, because public enforcement lacks resources to enforce civil rights of human trafficking victims, including these private rights of actions in the TVPRA "is indicative that the state is willing to rely on private actors to enforce the civil rights of trafficked persons…"); *id.* at 16 (The private right of action "provides a powerful tool" to victims by "advanc[ing] their substantive civil rights by enforcing a remedy that targets the actual harm inflicted upon them – modern day slavery. . . ."). *See also Ditullio v. Boehm*, 662 F.3d 1091, 1098 (9th Cir. 2011) (holding that permitting punitive damages under the TVPRA is consistent with Congress' purposes in enacting the TVPRA, "which include increased protection for victims of trafficking and the punishment of traffickers.").

Similarly, the CDA was implemented to protect children. *See* 141 Cong. Rec. S8088 (daily ed. June 9, 1995) (statement of Sen. Exon) ("The fundamental purpose of the [CDA] is to provide much needed protection for children."). There too, Congress contemplated that private rights of actions would assist in protecting children from sexual exploitation. 47 U.S.C. § 230(e)(1) (providing that CDA immunity should not impair the enforcement of the entirety of Chapter 110, which included private rights of action for sex crimes against children).

a. The First Circuit should not be allowed to interfere with the enforcement of the TVPRA, in violation of the plain language of the CDA

The harmony between the CDA and the TVPRA is established, first and foremost, by the plain language of the CDA. The plain language reflects Congress' efforts to ensure that the CDA not protect ISPs that facilitate sex crimes against children. The CDA states that:

> Nothing 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.

47 U.S.C. § 230(e)(1). Therefore, on its face, the CDA provides that the enforcement of criminal statutes, in particular those relating to sexual exploitation of children, takes precedence over the CDA's limitation on liability. *See Puerto Rico v. Franklin Cal. Tax-Free Tr.*, 136 S. Ct. 1938, 1946, 195 L. Ed. 2d 298 (2016) (relying upon the plain language of the statute to guide the Court's analysis); *Moskal v. United States*, 498 U.S. 103, 108 (1990) (underscoring the importance of a statute's plain meaning when determining its scope); *Nat'l R.R. Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407, 417 (1992) (holding that before adopting a particular interpretation of a statute, the court must first look to whether the interpretation conflicts with the "plain language of the statute"). Despite the statutes' shared goal of protecting children, Backpage has been allowed to turn the CDA on its head to instead protect Backpage from accountability

under the TVPRA for Backpage's role in the sexual exploitation of children.

The First Circuit premised its analysis on the assumption that private rights of action are civil – not criminal – procedural actions. *Jane Doe No. 1*, 817 F.3d at 23; *see also Doe ex rel. Roe*, 104 F. Supp. 3d at 160-61. *Amici* do not disagree. That does not mean, however, that a private right of action within a criminal statute is an exclusively *civil* remedy. And, it does not mean that the carve-out in Section 230(e)(1) does not apply here.

In pursuing a claim under the TVPRA, Petitioners seek to hold Backpage accountable for criminal, not civil, conduct. The issue, therefore, is whether a private right of action for criminal conduct is a method of enforcing a federal criminal statute that provides for such a cause of action. It is.

When a private right of action is explicitly included within a criminal statute, the civil action is, and was meant to be, an additional mechanism for enforcing that criminal statute. *See*, *e.g.*, Mary Cheh, *Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal—Civil Law Distinction*, 42 HASTINGS L.J. 1325, 1345 (1991) (noting that civil remedies increase the degree of punishment and, "satisfy a perceived need for greater punishment or enhanced deterrence"); *id.* at 1355 (asserting, "when it comes to deterrence, civil and criminal remedies are essentially indistinguishable and interchangeable"); Kim, 16 HASTINGS WOMEN'S L.J., at 16 ("civil litigation can achieve substantial deterrence of trafficking activities… and "justice through direct

accountability"); 144 Cong. Rec. 10886-01 (noting that the Wilberforce Act will, "enhance the protections of victims"). Congress has repeatedly provided for private rights of action as a means to enforce criminal statutes. *See*, *e.g.*, 18 U.S.C. § 2333(a); 18 U.S.C. § 1964; 18 U.S.C. § 2255. Even this Court has long recognized the indispensable role private civil remedies play in statutory enforcement schemes. *See*, *e.g.*, *Rotella* v. *Wood*, 528 U.S. 549, 557-58 (2000) (holding the object of the RICO civil enforcement provision "is thus not merely to compensate victims but to turn them into Prosecutors . . . dedicated to eliminating racketeering activity"); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 634-35 (1985) ("Without doubt, the private cause of action plays a central role in enforcing [the Sherman Act antitrust] regime.").

The TVPRA should be treated no differently. *See* 18 U.S.C. § 1595(a). The private right of action under the TVPRA is essential for its effectiveness in preventing the sexual abuse of minors for financial gain. Kathleen Kim, *The Trafficked Worker as Private Attorney General: A Model for Enforcing the Civil Rights of Undocumented Workers*, U. Chi. Legal F. 247, 251 (2009) (characterizing § 1595 as "codifying a new class of private attorneys general" to enforce victims' rights). Therefore, stripping private rights of action from the TVPRA "impairs the enforcement" of that statute and is at odds with the CDA's plain language.

In addition, Section 230 states that the CDA should not impair the *enforcement of* federal criminal statutes. The "enforcement of" language is not there as mere filler, but, instead, modifies "federal criminal statutes." In other words, the enforcement of federal criminal statutes must

cover more than just criminal prosecutions. Otherwise, "the enforcement of" language is unnecessary. Such an outcome is not possible. Statutes cannot be interpreted in such a way that renders certain language within the statute superfluous, and the Court has granted review where lower courts promote such constructions. *See*, *e.g.*, *Dole Food Co. v. Patrickson*, 538 U.S. 468, 476–77 (2003) ("Absent a statutory text or structure that requires us to depart from normal rules of construction, we should not construe the statute in a manner that is strained and, at the same time, would render a statutory term superfluous."); *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 258 (1993) ("We will not read the statute to render the modifier superfluous."); *Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 837 (1988) (stating that the Supreme Court is "hesitant to adopt an interpretation of a congressional enactment which renders superfluous another portion of that same law").

Lastly, the private right of action under the TVPRA is codified in Title 18 of the U.S. Code, reserved for "Crimes and Criminal Procedure." Particularly when considering that other sections of the TVPRA were codified in other titles, including Title 22 and Title 8, Congress' placement of the private right of action within Title 18 further demonstrates not only that it is part of a criminal statute, but also that Congress viewed it as such.

b. The First Circuit's broad reading of the CDA ignores, and is inconsistent with, Congress' many legislative efforts to combat sex trafficking

Moreover, the plain language of the CDA specifically carved out from immunity violations of child sexual exploitation laws (Chapter 110). 47 U.S.C. § 230(e)(1). From the beginning, this carve-out included private rights of action by victims of child sex exploitation. *See* 18 U.S.C. § 2255(a) (1996); 18 U.S.C. § 230(e)(1). For the CDA to now immunize ISPs from their role in trafficking children for sex and remain consistent with the statute's plain language, one of two assumptions must be true: *either* an ISP that knowingly participates in, and financially benefits from, trafficking children for sex is not engaged in the sexual exploitation of children, *or* Congress wanted to provide special immunity to ISPs engaged in the sexual exploitation of children. Both of these presumptions are false.

The first presumption is invalid because Congress has already recognized that sexual exploitation of children includes sex trafficking. *See*, *e.g.*, 18 U.S.C. § 2252A(g) (defining child exploitation enterprises as including violations of Section 1591, child sex trafficking); 18 U.S.C. § 2255 (including private right of action for Section 1591 as part of Chapter 110).

As for the second presumption, Congress did not intend that the internet serve as a safe haven for those sexually exploiting children. This position is irreconcilable with the CDA itself, which, through the Chapter 110 carve-out, permits private rights of action against ISPs for their role in sex crimes against children.

The presumption is also inconsistent with Congress' more than 40-year commitment to targeting perpetrators of sex crimes. *See*, *e.g.*, Protection of Children Against Sexual Exploitation Act of 1977, Pub. L. No. 95-225, 92 Stat. 7 § 2 (1978) (codified at 18 U.S.C. §§ 2251-2253); Child Protection Act of 1984, Pub. L. No. 98-292, 98 Stat. 204. In its efforts to stop child exploitation, Congress also attacked those who benefit financially from child exploitation, including those who financially benefit from the child pornography industry. *See* Child Sexual Abuse and Pornography Act of 1986, Pub. L. No. 99-628, 100 Stat. 3510; Child Abuse Victims' Rights Act, Pub. L. No. 99-500, 100 Stat. 1783, Title I, § 101(b) [Title VII, §§ 701-05 (1986)] and amended by Pub. L. No. 99-591, 100 Stat. 3341-75, Title I, §101(b) [Title VII, §§ 701-705 (1986)].

For more than a decade, as criminal enterprises embraced the internet,[4] Congress responded with additional legislation addressing the internet's role in the sexual exploitation of children. *See* Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003, Pub. L. No. 108-21, Title V, Subtitle A, § 501, 117 Stat. 676 (Apr. 13, 2003) ("The Supreme Court's 1982 Ferber v. New York decision holding that child pornography was not protected drove child pornography off the shelves of adult bookstores. Congressional action is necessary now to ensure that open and notorious trafficking in such materials does not reappear, and even increase, on the Internet."); Adam

4. Both the Petitioners and the other *amici* in support of Petitioners have already addressed or will address the role of the internet in trafficking children for sex. *Amici* rely upon the representations made in those briefs, without restating those arguments herein.

Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, Title V, § 501, 120 Stat. 623, Congressional Findings (July 27, 2006) ("The interstate market in child pornography is carried on to a substantial extent through the mails and other instrumentalities of interstate and foreign commerce, such as the Internet. The advent of the Internet has greatly increased the ease of transporting, distributing, receiving, and advertising child pornography in interstate commerce….[t]aken together, these technological advances have had the unfortunate result of greatly increasing the interstate market in child pornography").

Congress has been similarly active in restricting sex trafficking of children – reauthorizing the TVPRA, and expanding its federal criminal and civil reach four times since its original passage in 2000. These expansions included targeting entities benefitting from child sex trafficking. From the inception of this legislation, Congress has expressed its deep concern and motivation to protect women and girls who are, "forced through physical violence to engage in sexual acts…and suffer from other forms of sexual abuse…." Pub. L. No. 106-386 § 102, 114 Stat. 1466 § 102(b)(6).

In short, Congress did not intend to bar private rights of action against ISPs for sexual exploitation of children. Because Congress did not intend for the CDA to preclude such actions, and because of the CDA's plain language, the CDA need not conflict with the TVPRA. Therefore, this Court's review is needed to harmonize federal statutes as Congress intended and as is reflected in the CDA's plain language. *See*, *e.g.*, *Lawson v. FMR LLC*, 571 U.S. ___, 134 S. Ct. 1158, 1161, 1165 (2014) (granting certiorari to correct

the First Circuit's statutory construction of Sarbanes-Oxley whistleblower provision because the lower court's definition of the term was too narrow in view of the term's plain meaning); *Levin*, 133 S. Ct. at 1232-33 (reviewing the Ninth Circuit's reading of a statute to immunize the Government from tort liability and rejecting that reading because it ignored the statute's plain language, which stated that *there was no* immunity for the Government); *Schindler Elevator Corp. v. United States ex rel. Kirk*, 563 U.S. 401, 406-07 (2011) (certifying case for review where the Second Circuit's interpretation of terms conflicted with their plain meaning).

2. Supreme Court Review is Necessary to Ensure that a Later-Enacted Statute is Not Trumped by an Earlier Statute

Even if there was a conflict between the CDA and the TVPRA, which there is not, the later-enacted statute should prevail. *See, e.g.*, *Posadas v. Nat'l City Bank of New York*, 296 U.S. 497, 503 (1936) (noting that where two statutes are in "irreconcilable conflict," the later act impliedly repeals and replaces the earlier one); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 143 (2000) (interpreting an earlier statute in light of subsequent acts of Congress dealing with the same topic); *Lamie v. U.S. Tr.*, 540 U.S. 526, 534 (2004) ("The starting point in discerning congressional intent is the existing statutory text . . . and not the predecessor statutes." (internal citations omitted)).

Here, two statutes more recent than the CDA specifically provide for Petitioners' private right of action: (1) The TVPRA, and (2) the 2013 amendment to 18 U.S.C. § 2255(a),[5] which provided a private right of action under Chapter 110 against entities financially benefitting from the trafficking of children. In enacting these laws, Congress chose protecting children over Section 230 immunity.[6] The First Circuit has ignored Congress' preference, and such errors are exactly the types of mistakes this Court should correct. *See FDA*, 529 U.S. at 143-44 (interpreting the Food, Drug and Cosmetic Act in light of subsequent statutes that show Congress' intention to withhold authority to regulate tobacco from the FDA); *see also Levin*, 133 S. Ct. at 1233-34 (correcting the Ninth Circuit's construction of Gonzalez Act that would create a conflict with Liability Reform Act and holding that immunity waived under the Federal Tort Claims act for battery claims resulting from treatment by military medical personnel).

B. THIS COURT'S REVIEW IS NEEDED TO PRESERVE EACH STATE'S INTEREST IN PROTECTING ITS CHILDREN

Without this Court's review, this First Circuit's decision undermines a critical federal-state balance of interests. There is a presumption against interpretations

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5. 18 U.S.C. § 2255(a), as amended by Violence Against Women Reauthorization Act of 1994, Pub. L. No. 113-4, Title XII, Subtitle B, Part I, § 1212(a), 127 Stat. 143 (2013).

6. Had Congress intended for the CDA to carve out Chapter 110 only as it existed at the time the CDA was passed, it would have provided for this limitation. It did not.

of federal statutes that preempt state law, particularly regarding areas of law traditionally reserved for the states, such as law enforcement. *See*, *e.g.*, *United States v. Bass*, 404 U.S. 336, 339 (1971) ("Because its sanctions are criminal and because, under the Government's broader reading, the statute would mark a major inroad into a domain traditionally left to the States, we refuse to adopt the broad reading in the absence of a clearer direction from Congress.").

Criminal law enforcement is traditionally a state function and naturally includes protecting a state's children from exploitation. *Hillsborough Cty. v. Automated Medical Labs. Inc.*, 471 U.S. 707, 715 (1985); *United States v. Lopez*, 514 U.S. 549, 561, 567 (1995) (stating that under their traditional police powers, states possess the primary authority for defining and punishing criminal offenses).[7] Therefore, federal law should not preempt state laws regarding sex crimes against children unless it was the "clear and manifest purposes of Congress." *See Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

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7. Since Washington became the first state to criminalize human trafficking in 2003, every state has enacted laws establishing criminal penalties for trafficking. *See* Nat'l Conf. of State Legis. Report: Human Trafficking, *available at* http://www.ncsl.org/Portals/1/Documents/cj/Criminal_Penalties.pdf. Even prior to such legislation specifically targeting trafficking, states, as part of their criminal policing power, have long been protecting children from sexual exploitation. *See*, *e.g.*, *State v. Eggert*, 358 N.W.2d 156 (Ct. App. Minn. 1984); *Bethany v. State*, 565 S.W.2d 900 (Tenn. Crim.App. 1978); *State v. Verdugo*, 109 Ariz. 391, 510 P.2d 37 (1973); *People v. Osuna*, 161 Cal.App.3d 429 (Cal. Ct. App. 4th Dist. 1984).

Congress demonstrated no clear and manifest intent to displace a private right to enforce federal criminal statutes targeting sexual exploitation and trafficking of children. To the contrary, Congress specifically provided for deference to these rights in the CDA. By extension, Congress had no clear and manifest purpose to displace almost identical state statutes protecting children from sexual exploitation.

In addition to Massachusetts, almost every state provides for private rights of action as one means of protecting children from sex trafficking.[8] The First Circuit's broad interpretation in this case prevents each of these states from implementing laws aimed at preventing conduct that exploits children for financial gain.

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8. *See* Ala. Code § 13A-6-157; Alaska Stat. § 09.10.065; A.C.A. § 16-118-109; Ariz. Rev. Stat. Ann. § 13-807; Cal. Civ. Code § 52.5; C.R.S. 13-21-127; Conn. Gen. Stat. § 52-571; 11 Del. Code § 787; D.C. Code § 22-1840; Fla. Stat. Ann. § 772.104; O.C.G.A. § 9-3-33.1; Haw. Rev. Stat. Ann. § 663J-3; 740 Ill. Comp. Stat. 128/15; Ind. Code Ann. § 35-42-3.5-3; K.S.A. § 60-5003; KRS § 431.082; La. R.S. § 46:2163; Me. Rev. Stat. Ann. Tit. 5, § 4701; H.B.3808, 187th Gen. Ass. (Mass.); MCL 752.983; Minn. Stat. § 609.284; Miss. Code Ann. § 97-3-54.6; MO. Rev. Stat. § 566.223; 27-1-755, MCA; R.R.S. Neb. § 25-21,299; Nev. Rev. Stat. Ann. § 41.1399; N.H. Rev. Stat. Ann. 633:11; N.J. Stat. § 2C:13-8.1; N.M. Stat. Ann. § 30-52-1.1; NY CLS Soc. Servs. § 483-bb; N.D. Cent. Code § 12.1-41-15; ORC Ann. 2307.51; Okla. Stat. Ann. Tit. 21, § 748.2; OR. Rev. Stat. § 30.867; 18 Pa.C.S. § 3051; S.C. Code Ann. § 16-3-2060; S.D. Codified Laws § 20-9-46; Tenn. Code Ann. § 39-13-314; Tex. Civ. Prac. & Rem. Code § 98.002; Utah Code Ann. § 77-38-15; Va. Code Ann. § 8.01-42.4; Vt. Stat. Ann. Tit. 13, § 2662; Wash. Rev. Code Ann. § 9A.82.100; W. Va. Code § 61-2-17; Wis. Stat. § 948.051.

Permitting the First Circuit's interpretation to stand would encroach upon these states' rights and weaken their power to protect their citizens. Certiorari is necessary to correct this intrusion, particularly when such an intrusion has such dangerous ramifications for a state's most vulnerable citizens. *See*, *e.g.*, *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475, 485 (1996) (granting review to narrow federal invalidation of state law because health and safety of their citizens is primarily a state issue and, therefore, there is a "presumption against the pre-emption of state police power regulations"); *Gregory v. Ashcroft*, 501 U.S. 452, 460, 464, 467 (1991) (granting certiorari to ensure that congressional intent was properly analyzed in a ruling that preempted an important state power).

C. THIS COURT'S REVIEW AT THIS JUNCTURE IS CRITICAL AS THE POLICY IMPLICATIONS OF THE FIRST CIRCUIT'S RULING ARE TOO GREAT TO IGNORE

1. Against Congress' Will, the First Circuit Has Provided Unprecedented Immunity to a Non-State Actor

The First Circuit's ruling offers ISPs a blanket of immunity far broader than that intended by Congress. It grants ISPs a level of immunity for criminal activity that Congress has reserved only for sovereign actors: immunity from all criminal and civil liability, regardless of the action. But, ISPs are not sovereign actors, and, therefore, not entitled to this immunity and certainly not entitled to receive it from the First Circuit. What the CDA's plain language provides for is a limitation on the theory of civil liability under which an ISP can be sued,

not blanket immunity for criminal conduct by a non-state actor. Here, the Petitioners are seeking to hold Backpage accountable for *criminal* rather than tortious conduct. The ISPs are not sovereign actors, and therefore not entitled to what is tantamount to sovereign immunity for even criminal activity.

2. If the First Circuit's Interpretation Stands, the Internet Will Become a Safe Haven For Criminal Activity

The First Circuit's interpretation of the CDA enables the use of the internet in criminal activity that threatens the life, liberty, and security of the most vulnerable members of society. Absent this Court's intervention, victims of such criminal activity lose the rights Congress intended them to have and society loses an additional means of enforcement simply because criminals today can access the internet with an ease unimagined 20 years ago.

Dangerous criminal enterprises are exponentially more powerful (and exponentially more dangerous) because of their access to the "Dark Web" through ISPs. *See*, *e.g.*, Melissa Farley *et. al.*, *Online Prostitution and Trafficking*, 77 Alb. L. Rev. 1039, 1044-48 (2014) (describing the essential role the internet plays in sex trafficking of women and children and reporting that organized crime is an essential element in the sex trafficking industry, profits from which contribute to the expansion of organized crime in the United States and worldwide). The criminality that thrives on the Dark Web is, and will remain, a threat to society unless and until any financial incentive for an ISP's participation in it no longer exists. *See*, *e.g.*, Linda Smith & Samantha Healy Vardaman, *A Legislative Framework for Combating Domestic Minor Sex Trafficking*, 23 Regent

U. L. Rev. 265, 288-89 (2011) (noting increased revenues by Backpage.com after Craigslist closed its adult services page due to the requests of law enforcement and states attorneys general, and arguing that anti-trafficking laws need to target facilitators such as websites, the dominant means of trafficking); Doug Lichtman & Eric Posner, *Holding Internet Service Providers Accountable*, 14 Sup. Ct. Econ. Rev. 221, 223, 233-36 (2006) (asserting that ISPs are in the best economic position to stop illegal internet activities and arguing for increased liability for ISPs who facilitate such activity). Instead of discouraging participation, the First Circuit's ruling has caused it to be even more financially appealing for ISPs to engage in this conduct. Congress did not intend such an outcome when it passed the CDA in the nascent days of the internet. *See, e.g.*, Michael Chertoff & Tobby Simon, *The Impact of the Dark Web on Internet Governance and Cyber Security*, (Global Comm'n on Internet Governance, Paper Series No. 6, Feb. 2015), https://www.cigionline.org/sites/default/files/gcig_paper_no6.pdf (finding that the "Dark Web" provides a platform for communication and funding of terrorism, arms and drug trafficking, pedophilia, and other criminal activity).

Moreover, the sheer breadth of the First Circuit's ruling has significant implications well beyond human trafficking. Under this interpretation, an entity can engage in criminal activity, such as partnering with terrorists to create and facilitate a market for weapons to be used in terrorist attacks, or a market to transfer funds for terrorist violence. But, as long as the entity attaches to its criminal venture a web platform that allows its criminal partners to post whatever they wish, the market creator/facilitator can hide behind the CDA and claim immunity.

Petitioners have asserted claims against Backpage for its criminal acts of partnering with human traffickers to create the largest marketplace for child sex trafficking in the world and profiting from it. *See Senate Permanent Subcomm. v. Ferrer*, No. 16-mc-621 (RMC), 2016 WL 4179289, at *1 (D.D.C. Aug. 5, 2016) (quoting Yiota Souros, Sr. VP and Gen Counsel for NCMEC, S. Hrg. No. 114-79 at 39) (asserting "most child sex trafficking is facilitated by online classified advertising websites. . . ."). Even prior to discovery, the First Circuit has precluded Petitioners' claims by allowing Backpage to hide behind the CDA because it is an ISP. This was not the intent of Congress and cannot be the proper role of the CDA in society. *See Jane Doe No. 14 v. Internet Brands*, 824 F.3d 846, 853 (9th Cir. 2016) (concluding that barring a failure to warn claim would stretch the CDA beyond its narrow language and its purpose).

The First Circuit's dangerous precedent permits the CDA to bar private rights of action for criminal activity unimaginable in 1996, but of ever-present concern to Congress and the country now. *See*, *e.g.*, 18 U.S.C. § 2333(a) (providing United States nationals with private rights of action when they have been injured by an act of international terrorism and a right to recover threefold the damages and attorneys' fees). The policy implications of the First Circuit's error make this Court's review crucial.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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