

No. 90510-0
SUPREME COURT
OF THE STATE OF WASHINGTON

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

v.

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

***AMICI CURIAE BRIEF OF THE ELECTRONIC FRONTIER
FOUNDATION AND THE CENTER FOR DEMOCRACY &
TECHNOLOGY IN SUPPORT OF APPELLANTS***

Venkat Balasubramani (WSBN 28269) *On the brief:*

FOCAL PLLC
800 Fifth Avenue, Suite 4100
Seattle, WA 98104
Tel: (206) 718-4250
Fax: (206) 260-3966
venkat@focallaw.com

David Greene
ELECTRONIC FRONTIER
FOUNDATION
815 Eddy Street
San Francisco, CA 94109
Tel: (415) 436-9333
Fax: (415) 439-9993
davidg@eff.org

*Attorneys for Amici Curiae
Electronic Frontier Foundation and
Center for Democracy & Technology*

Emma Llanso
CENTER FOR DEMOCRACY
& TECHNOLOGY
1634 I Street, NW, Suite 1100
Washington, DC 20006
Tel: (202) 637-9800
Fax: (202) 637-0968
ellanso@cdt.org

TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	IDENTITY AND INTEREST OF <i>AMICI</i>	2
III.	STATEMENT OF THE CASE.....	3
IV.	ARGUMENT.....	3
	A. Section 230 Categorically Shields Intermediaries from Liability Based on the Speech of Its Users	3
	B. Section 230 Preempts All Inconsistent State Laws.....	8
	C. Service Providers May Only Be Subject to Suit if They Become “Information Content Providers” by Actively Developing Potentially Actionable Content	10
	D. Section 230’s Grant of Immunity to Service Providers Is Automatic and Not Premised on a Lack of Knowledge of Actionable Content	15
	E. Section 230’s Grant of Immunity Is Not Voided By Terms of Service That Preserve Editorial Abilities	16
	F. A Plaintiff Seeking to Defeat Section 230 Immunity Cannot Rely on Vague Allegations That an Intermediary Is an “Information Content Provider”	18
V.	CONCLUSION	20

TABLE OF AUTHORITIES

Federal Cases

<i>Almeida v. Amazon.com, Inc.,</i> 456 F.3d 1316 (11th Cir. 2006)	7, 8
<i>Ascentive, LLC v. Opinion Corp.,</i> 842 F. Supp. 2d 450 (E.D.N.Y. 2011)	15
<i>Backpage.com, LLC v. McKenna,</i> 881 F. Supp. 2d 1262 (W.D. Wash. 2012).....	9, 10
<i>Batzel v. Smith,</i> 333 F.3d 1018 (9th Cir. 2003)	5, 6
<i>Ben Ezra, Weinstein & Co. v. America Online,</i> 206 F.3d 980 (10th Cir. 2000)	9
<i>Blumenthal v. Drudge,</i> 992 F. Supp. 44 (D.D.C. 1998).....	16, 17
<i>Carafano v. Metrosplash.com, Inc.,</i> 339 F.3d 1119 (9th Cir. 2003)	7, 17
<i>Chicago Lawyers' Comm. for Civil Rights Under Law, Inc. v. Craigslist,</i> <i>Inc.</i> , 519 F.3d 666 (7th Cir. 2008)	11
<i>Dart v. Craigslist, Inc.,</i> 665 F. Supp. 2d 961 (N.D. Ill. 2009)	9, 13
<i>Doe v. MySpace,</i> 528 F.3d 413 (5th Cir. 2008)	9
<i>F.T.C. v. Accusearch Inc.,</i> 570 F.3d 1187 (10th Cir. 2009)	15
<i>Fair Hous. Council of San Fernando Valley v. Roommates.com,</i> 521 F.3d 1157 (9th Cir. 2008)	<i>passim</i>

<i>Goddard v. Google, Inc.</i> , 640 F. Supp. 2d 1193 (N.D. Cal. 2009)	14, 15, 20
<i>Green v. America Online</i> , 318 F.3d 465 (3d Cir. 2003).....	6
<i>Jones v. Dirty World Entn't Recordings LLC</i> , 755 F.3d 398, (6th Cir. 2014)	<i>passim</i>
<i>Jones v. Dirty World Entn't Recordings, LLC</i> , 965 F. Supp. 2d 818 (E.D. Ky. 2013)	12
<i>Jones v. Rath Packing Co.</i> , 430 U.S. 519 (1977).....	8
<i>Klayman v. Zuckerberg</i> , 753 F.3d 1354 (D.C. Cir. 2014).....	2, 19
<i>M.A. v. Vill. Voice Media Holdings, LLC</i> , 809 F. Supp. 2d 1041 (E.D. Mo. 2011)	16
<i>Prickett v. Infousa, Inc.</i> , 561 F. Supp. 2d 646 (E.D. Tex. 2006).....	14
<i>Universal Commc'ns Sys., Inc. v. Lycos, Inc.</i> , 478 F.3d 413 (1st Cir. 2007).....	7, 15
<i>Zeran v. America Online</i> , 129 F.3d 327 (4th Cir. 1997)	4, 5, 15

State Cases

<i>Doe v. America Online</i> , 783 So. 2d 1010 (Fla. 2001).....	9
<i>Gentry v. eBay, Inc.</i> , 99 Cal. App. 4th 816 (Cal. Ct. App. 2002)	9, 13
<i>GoDaddy.com LLC v. Toups</i> , 429 S.W.3d 752 (Tex. App. 2014).....	17

Schneider v. Amazon.com, Inc.,
108 Wn. App. 454, 31 P.3d 37 (2001) 16, 17

Stratton Oakmont, Inc. v. Prodigy Servs. Co.,
1995 WL 323710 (N.Y. Sup. Ct. 1995) 4, 5

Vazquez v. Buhl,
90 A.3d 331 (Conn. App. 2014) 13, 19

Federal Statutes

47 U.S.C. § 230 *passim*

Federal Legislative Materials

141 Cong. Rec. H8470 (daily ed. Aug. 4, 1995) 7

State Legislative Materials

S.B. 6251, RCW 9.68A.104 (repealed 2013) 9

Other Authorities

Philip N. Howard, *et al.*, *Opening Closed Regimes: What Was the Role of Social Media During the Arab Spring?* (Project on Info. and Tech. & Political Islam, Working Paper 2011.1) 8

The State of Broadband 2012: Achieving Digital Inclusion for All,
Broadband Comm'n for Digital Dev., Sept. 2012 8

I. INTRODUCTION

A primary goal of Congress in passing Section 230 of the federal Communications Decency Act (“Section 230”) was to encourage the development of communications technologies by shielding intermediaries not only from liability but also from the cost and uncertainty associated with litigation. If online service providers were required to engage in protracted and expensive litigation whenever plaintiffs alleged that providers knew about or “developed” the offending content, those services would inevitably become more expensive, more restrictive, and ultimately less available for public speech. The trial court’s ruling sharply limiting the intermediary liability immunity created by Section 230 thus has ramifications far beyond the parties to this appeal.

Two aspects of the trial court’s decision do particularly disturbing damage to Congressional intent.

First, the trial court misinterpreted Section 230. According to the statute’s plain language and its all but universal interpretation by the courts, Section 230’s liability protections are not lost just because a service provider is aware of the potentially actionable substance of a user’s posting. Notice of a tortious posting does not negate the statutory immunity. Indeed, as the Sixth Circuit recently held, neither knowledge of the tortious content nor even encouragement to post it is sufficient to negate Section 230 immunity. *See Jones v. Dirty World Entertainment Recordings LLC*, 755 F.3d 398, 413-15 (6th Cir. 2014).

Second, the trial court specifically erred in rejecting Backpage’s Section 230 defense in the context of a motion to dismiss. The statute’s protections must necessarily be available to a defendant at the outset of the case to allow it to promptly dispose of the claims brought against it. This rule was recently confirmed by the D.C. Circuit. *See Klayman v. Zuckerberg*, 753 F.3d 1354, 1357-59 (D.C. Cir. 2014).

II. IDENTITY AND INTEREST OF AMICI

Amici are non-profit public interest organizations seeking to protect speech, and access to speech, on the Internet. The Electronic Frontier Foundation (“EFF”) is a member-supported civil liberties organization working to protect free speech and privacy rights in the online world. With more than 27,000 dues-paying members, EFF represents the interests of technology users in both court cases and in broader policy debates surrounding the application of law in the digital age. EFF actively encourages and challenges industry and government to support free expression, privacy, and openness in the information society. The Center for Democracy & Technology (“CDT”) is a non-profit public interest and Internet policy organization. CDT represents the public’s interest in an open, innovative and decentralized Internet, reflecting constitutional and democratic values of free expression, privacy and individual liberty. CDT has litigated or otherwise participated in a broad range of Internet free speech cases.

III. STATEMENT OF THE CASE

Amici adopt by reference the Statement of the Case in Backpage's Motion for Discretionary Review at pages 3-7, but specifically draw the Court's attention to the rationale that the trial court implicitly adopted in rejecting Backpage's motion to dismiss. In response to Plaintiffs' complaint, in which the Plaintiffs allege that Backpage should be held tortiously liable for the actions of third-party users who allegedly advertised the Plaintiffs for sex on Backpage's site, Backpage moved to dismiss on Section 230 grounds. In denying the motion to dismiss, the trial court appeared to identify two grounds warranting that denial: (1) Backpage included detailed posting guidelines regarding what was prohibited on the site (*see, e.g.*, Backpage Appendix E (Hearing Transcript) at 40:5-40:10) and (2) Plaintiffs in any case alleged that Backpage knew or should have known that some or even many of the posts on its site were for illegal activities (*see, e.g.*, Backpage Appendix E at 50:8-50:10).

IV. ARGUMENT

A. Section 230 Categorically Shields Intermediaries from Liability Based on the Speech of Its Users.

Section 230 of the Communications Decency Act was born from, and intended to dispense with, a broad range of legal uncertainty that enveloped Internet service providers in the early stages of the popular Internet. In the early to mid-1990s, the risk of potentially burdensome regulation and litigation emerged as a concrete threat to the proliferation

of speech on the Internet. Moreover, the imposition of common law publisher liability, including distributor liability, on service providers was acknowledged to be both inconsistent with how the Internet works and a brake on its growth and development. *Zeran v. America Online*, 129 F.3d 327, 330 (4th Cir. 1997).

Section 230 immunity thus serves three main purposes.

First, it keeps to a minimum governmental interference with the “robust nature of Internet communication.”” *Jones*, 755 F.3d at 407.

Second, “the immunity provided by § 230 protects against the ‘heckler’s veto’ that would chill free speech” because otherwise those disliked certain Internet content could pressure service providers to remove it simply by threatening litigation. *Jones*, 755 F.3d at 407.

Third, the immunity was deemed necessary in order to not discourage service providers from self-regulating, and policing and monitoring the content posted through them. *See Jones*, 755 F.3d at 407-08. This latter threat was underscored by the decision in *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, 1995 WL 323710 (N.Y. Sup. Ct. 1995), in which the New York state appellate court held that an Internet service provider could be held responsible for the defamatory words of one of its users where the provider attempted (and failed) to filter objectionable content from its site. Given their ability to host and invite the development of a far greater range and volume of speech than had ever been previously possible, Internet service providers were understandably wary of the potential exposure. Not only could service providers be held

responsible for online content that they created, “a person who published or distributed speech over the Internet could be held liable for defamation even if he or she was not the author of the defamatory text, and, indeed, at least with regard to publishers, even if unaware of the statement.” *Batzel v. Smith*, 333 F.3d 1018, 1026-27 (9th Cir. 2003) (citing *Stratton Oakmont*).

Indeed, the Internet would be a far more limited forum if websites were forced to second-guess their decisions about managing and presenting content that they themselves did not author. As the Fourth Circuit aptly noted, “It would be impossible for service providers to screen each of their millions of postings for possible problems. Faced with potential liability for each message republished by their services, interactive computer service providers might choose to severely restrict the number and type of messages posted.” *Zeran*, 129 F.3d at 331.

Congress thus chose to protect and foster the Internet as a forum for unrestrained robust communication and “not to deter harmful online speech through the separate route of imposing tort liability on companies that serve as intermediaries for other parties’ potentially injurious messages.” *Zeran*, 129 F.3d at 330-31. Congress clearly indicated that it was codifying a federal policy of non-regulation aimed at “preserv[ing] the vibrant and competitive free market that presently exists for the Internet and other interactive computer services.” 47 U.S.C. § 230(b)(2). Specifically, Congress found that:

- The Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique

opportunities for cultural development, and myriad avenues for intellectual activity;

- The Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation; and
- Increasingly Americans are relying on interactive media for a variety of political, educational, cultural, and entertainment services.

47 U.S.C. § 230(a)(3)-(5).

Congress implemented its policy preferences by granting statutory immunity to providers of “interactive computer services”¹ (such as website operators) for content posted on and through their services by third parties. *Batzel*, 333 F.3d at 1020; *Green v. America Online*, 318 F.3d 465, 471 (3d Cir. 2003). In relevant part, Section 230 provides:

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

47 U.S.C. § 230(c)(1). Although the statute does not affect the liability of users who create actionable material, Section 230 operates to “protect [online service providers] from taking on liability” and hence helps encourage the development of forums to host speech of all types in “what

¹ “The term ‘interactive computer service’ means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.” 47 U.S.C. § 230(f)(2).

is right now the most energetic technological revolution that any of us has ever witnessed.” 141 Cong. Rec. H8470 (daily ed. Aug. 4, 1995) (Rep. Christopher Cox speaking in support of Section 230).

Courts have recognized that Section 230 bars claims if “(1) the defendant asserting immunity is an interactive computer service provider, (2) the particular information at issue was provided by another information content provider, and (3) the claim seeks to treat the defendant as a publisher or speaker of that information.” *Jones*, 755 F.3d at 409.

Since the passage of Section 230, courts have routinely, and correctly, recognized the need to construe the statute’s terms broadly to effectively carry out Congress’s policy choice. *See Fair Hous. Council of San Fernando Valley v. Roommates.com*, 521 F.3d 1157, 1174-75 (9th Cir. 2008); *Universal Commc’ns Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 419 (1st Cir. 2007); *Almeida v. Amazon.com, Inc.*, 456 F.3d 1316, 1321 (11th Cir. 2006) “[R]eviewing courts have treated § 230(c) immunity as quite robust, adopting a relatively expansive definition of ‘interactive computer service’ and a relatively restrictive definition of ‘information content provider.’” *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1123 (9th Cir. 2003). As the Sixth Circuit recently recognized “The protection provided by § 230 has been understood to merit expansion.” *Jones*, 755 F.3d at 408.

Congress’s decision to categorically shield the providers of online speech channels has been instrumental to the development of the modern Internet: as of 2012, one third of the entire world population used the

Internet²—disproportionately utilizing U.S.-based services—to access and distribute all manner of content, from organizing in opposition to oppressive regimes³ to sharing pictures of children with grandparents. Today’s Internet hosts third-party contributions from a broad array of voices, facilitating the speech of billions.

B. Section 230 Preempts Inconsistent State Laws.

Section 230 represents a specific congressional approach to a problem of national and international dimension. Congress thus provided that it cannot be undermined by contradictory approaches by state or local governments: “any State or local law that is inconsistent with this section”—including state law that imposes relaxed pleading requirements—is explicitly preempted by Section 230. 47 U.S.C. § 230(e)(3). *See Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977) (citations and internal quotation marks omitted).

State and federal courts across the country have found state tort law claims to be preempted when they conflict with Section 230. *See Almeida*, 456 F.3d at 1321; *Ben Ezra, Weinstein & Co. v. America Online*,

² See The State of Broadband 2012: Achieving Digital Inclusion for All, Broadband Comm’n for Digital Dev. [UN agency for information and communications technology], Sept. 2012, available at <http://www.broadbandcommission.org/Documents/bb-annualreport2012.pdf> (last visited August 31, 2014).

³ See, e.g., Philip N. Howard, et al., *Opening Closed Regimes: What Was the Role of Social Media During the Arab Spring?* (Project on Info. and Tech. & Political Islam, Working Paper 2011.1), available at http://pitpi.org/wp-content/uploads/2013/02/2011_Howard-Duffy-Freelon-Hussain-Mari-Mazaid_pITPI.pdf.

206 F.3d 980, 984-85 (10th Cir. 2000); *Doe v. America Online*, 783 So. 2d 1010, 1013 (Fla. 2001); *Gentry v. eBay, Inc.*, 99 Cal. App. 4th 816, 830 (Cal. Ct. App. 2002). And indeed, courts have found preempted state law tort claims similar to the specific ones asserted in this case. *See Doe v. MySpace*, 528 F.3d 413, 420 (5th Cir. 2008) (Section 230 bars claims brought by minors asserting negligence in failing to institute safety measures to adequately protect them from online predators); *Dart v. Craigslist, Inc.*, 665 F. Supp. 2d 961, 969-70 (N.D. Ill. 2009) (Section 230 bars claims that an online service provider’s “erotic services” section constitutes a public nuisance because it caused or induced prostitution).

A Washington State criminal law seeking to effect a similar result as the claims in this case has been enjoined as inconsistent with Section 230 on one previous occasion. In 2012, then-Governor Gregoire signed into law SB 6251, which made it a felony to knowingly publish, disseminate, or display or to “directly or indirectly” cause content to be published, disseminated, or displayed, if it contains a “depiction of a minor” and any “explicit or implicit offer” of sex for “something of value.” RCW 9.68A.104 (repealed 2013). Following the passage of the bill, Backpage and the Internet Archive filed suit in the United States District Court for the Western District of Washington seeking to block the statute on Section 230 and other grounds. *Backpage.com, LLC v. McKenna*, 881 F. Supp. 2d 1262, 1269 (W.D. Wash. 2012). In granting the respective motions for a preliminary injunction, the district court found that the law was likely expressly preempted by Section 230 because it

treated websites like Backpage as the publisher or speaker of information created by its users “by imposing liability on Backpage.com . . . for information created by third parties—namely ads for commercial sex acts depicting minors.” *Id.* at 1273.

C. Service Providers May Only Be Subject to Suit if They Become “Information Content Providers” by Actively Developing Potentially Actionable Content.

Section 230’s immunity protections were designed and have repeatedly been judicially interpreted to be categorical. A website operator—or any other provider of an “interactive computer service”—falls outside the protections of Section 230 only if it also becomes an “information content provider” in its own right, and only then if it provides the specific content that is alleged to be actionable.

47 U.S.C. § 230(f)(3); *Jones*, 755 F.3d at 408-09. Thus, “immunity under the CDA depends on the pedigree of the content at issue.” *Jones*, 755 F.3d at 409.

Allegations that a website operator created “neutral tools” by which users engage in illegal activities are insufficient to bring a service provider outside the protections of the statute. In *Roommates.com*, the most recent case in which the Ninth Circuit Court of Appeals expansively considered the scope of the statute’s protections, the court held that discriminatory statements made by users in the “additional comments” section provided by the site—a neutral tool that allowed users to input additional information a blank text box—did not transform the site

operator into an information content provider: “Roommates is not responsible, in whole or in part, for the development of this content, which comes entirely from subscribers and is passively displayed by Roommates.” 521 F.3d at 1174. In *Chicago Lawyers’ Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666, 672 (7th Cir. 2008), the Seventh Circuit came to a similar conclusion, holding that an online classified ad site was not an information content provider of allegedly discriminatory housing postings where the site operator neither asked any inherently discriminatory questions nor required any unlawful information to participate in its service. *See id.* at 671. While the site operator created the classified ad forum where the offending content was posted, the court stated that treating the creation of open tools as “development” under the statute would be akin to holding that “people who save money ‘cause’ bank robbery, because if there were no banks there could be no bank robberies. An interactive computer service ‘causes’ postings only in the sense of providing a place where people can post.” *Id.*

Nor, as the Sixth Circuit recently explained, does a website operator lose the immunity by displaying or allowing access to content created by another, even if it encouraged the users to provide the content, or then comments approvingly on that content. *Jones*, 755 F.3d at 409, 410 (citing *Roommates.com*). *Jones* addressed the application of Section 230 immunity to the website *The Dirty*, a site which allows users, collectively and pseudonymously identified on the site as “The Dirty Army,” to submit for publication “dirt” about any subject. *Id.* at 403. The editors then sift

through the thousands of submissions they receive each day, select and edit for publication approximately 150 of them each day. The lead editor then typically adds a short comment to each post. *Id.* *The Dirty* was sued by the subject of several of the items it published and commented upon after it refused to remove the posts. *Id.* at 403-04. The publishers asserted Section 230 immunity. *Id.* at 405. But the district court rejected the application of the immunity finding that the publishers had acted as an information content provider because they had (1) intentionally encouraged illegal or actionable third party postings and added their own comments “ratifying or adopting” those posts, and (2) because they had “invite[d] invidious postings, elaborate[d] on them with comments of their own, and call[ed] upon others to respond in kind.” *Id.* at 413 (quoting *Jones v. Dirty World Entn’t Recordings, LLC*, 965 F. Supp. 2d 818, 821 (E.D. Ky. 2013)).

The Sixth Circuit reversed, explaining that the district court had elided the distinction between being broadly responsible for the fact that a statement was published, a traditional publishing function, and the fact that the content was illegal or actionable. *Id.* at 414. In the former situation, neither an affirmative decision to select the statements for publication nor one to decline to remove them voided the immunity. *Id.* at 416.

Interpreting the meaning of the statutory term “development” in Section 230(f)(3), the Sixth Circuit rejected the “encouragement” and “ratification” tests that had been adopted by the district court. Consistent

with the approach taken by other courts, the Sixth Circuit recognized that adopting these tests would “inflate the meaning of ‘development’ to the point of eclipsing the immunity from publisher-liability that Congress established.” *Id.* at 414-15.⁴

Nor do any similar actions short of actually creating the actionable content void Section 230 immunity. Website operators do not become information content providers by categorizing third party content. *See, e.g., Dart*, 665 F. Supp. 2d at 961 (rejecting argument that Craigslist became an information content provider “by having an ‘adult services’ category” and enabling users to search by sexual preference); *Gentry*, 99 Cal. App. 4th at 832 (rejecting argument that eBay became a content provider for auctions of counterfeit goods by collecting and displaying positive and negative feedback, hosting an auction site, and displaying seller’s product descriptions). Nor do they become information content providers by creating tools, such as search engines, to guide users in finding third party content, or by disseminating such content. *See Roommates.com*, 521 F.3d at 1167 (noting that “the broadest sense of the term ‘develop’ could include the functions of an ordinary search engine . . . [b]ut to read the term so broadly would defeat the purposes of

⁴ A Connecticut appeals court recently reached a similar conclusion. *See Vazquez v. Buhl*, 90 A.3d 331, 341-42 (Conn. App. 2014) (rejecting argument that the acts of hyperlinking to tortious content, adding a salacious title and commentary to the tortious content, and vouching for the original author’s credibility made website operator an “information content provider” of the tortious content).

section 230 by swallowing up every bit of the immunity that the section otherwise provides”); *Goddard v. Google, Inc.*, 640 F. Supp. 2d 1193, 1197 (N.D. Cal. 2009) (“[E]ven if a particular tool facilitates the expression of information, it generally will be considered ‘neutral’ so long as users ultimately determine what content to post, such that the tool merely provides a framework that could be utilized for proper or improper purposes.”) (citations and internal quotation marks omitted); *Prickett v. Infousa, Inc.*, 561 F. Supp. 2d 646, 651 (E.D. Tex. 2006) (providing user generated content “to other businesses who pay for the license to reproduce the information in their own mediums” does not result in loss of Section 230 protection).

By contrast, providers of interactive computer services become information content providers—and correspondingly lose Section 230 protections—only when they affirmatively author or otherwise develop the substance of the content in question. Although a provider may cross that threshold in multiple ways, at a minimum, a service provider must directly author or *require* others to author that offending content. In *Roommates.com*, for example, while the site operator enjoyed protections regarding the creation of its open “additional comments” section, the Ninth Circuit held that it could still be held liable for requiring users to use a form, authored by the website operator, to make selections that were allegedly actionable under the Fair Housing Act. 521 F.3d at 1166 (“By requiring subscribers to provide the information as a condition of accessing its service, and by providing a limited set of pre-populated

answers, Roommate becomes much more than a passive transmitter of information provided by others; it becomes the developer, at least in part, of that information.”). *See also Goddard*, 640 F. Supp. 2d at 1198 (“The Ninth Circuit’s partial denial of immunity to the website turned entirely on the website’s decision to *force* subscribers to divulge the protected characteristics and discriminatory preferences ‘as a condition of using its services.’”); *F.T.C. v. Accusearch Inc.*, 570 F.3d 1187, 1199 (10th Cir. 2009) (holding that a website operator that affirmatively solicited and paid researchers to publish confidential records protected by the law was an “information content provider” for Section 230 purposes).

D. Section 230’s Grant of Immunity to Service Providers Is Automatic and Not Premised on a Lack of Knowledge of Actionable Content.

Section 230 immunity applies regardless of whether the online service provider had notice of the criminal or tortious nature of the content posted through its service. As the Fourth Circuit explained in *Zeran*, 129 F.3d at 332-33, under common law principles, notice served to move a “distributor” into the role of “publisher,” and establishing immunity for those online intermediaries who would otherwise be treated as “publishers” under common law principles was precisely the intent of Congress in enacting Section 230. “Liability upon notice would defeat the dual purposes advanced by § 230 of the CDA.” *Id.* at 333. *See also Universal Commc’ns Sys.*, 478 F.3d at 420 (“It is . . . well established that notice of the unlawful nature of the information provided is not enough to

make it the service provider’s own speech.”). The trial court thus erred in denying Backpage’s motion to dismiss on the basis of notice.

Because notice is irrelevant, it also does not matter that the service provider is profiting from the third party publication. Making profits via publication is a traditional publication function. *See, e.g., M.A. v. Vill. Voice Media Holdings, LLC*, 809 F. Supp. 2d 1041, 1050 (E.D. Mo. 2011) (“[T]he fact that a website elicits online content for profit is immaterial; the only relevant inquiry is whether the interactive service provider ‘creates’ or ‘develops’ that content.”); *Blumenthal v. Drudge*, 992 F. Supp. 44, 52-53 (D.D.C. 1998) (holding that a website operator was immune from defamation liability, despite the fact that the site operator had contracted with a columnist to provide content, retained considerable editorial rights, and promoted the columnist as a new source of unverified instant gossip).

In this case, the trial court could only reject Backpage’s motion to dismiss if Plaintiffs had made specific factual allegations to support their conclusory assertions that Backpage fell outside the statute’s protections. They did not do so.

E. Section 230’s Grant of Immunity Is Not Voided By Terms of Service That Preserve Editorial Abilities.

A website operator’s posting of policies for third-party contributions does not make it an information content provider. The Washington Court of Appeals has already recognized as much in *Schneider v. Amazon.com, Inc.*, holding that Amazon.com was not liable

for defamatory comments on its website because it reserved through its terms of service the right to edit or remove comments. 108 Wn. App. 454, 31 P.3d 37, 41 (2001). *See also Carafano*, 339 F.3d at 1124 (“Under § 230(c), therefore, so long as a third party willingly provides the essential published content, the interactive service provider receives full immunity regardless of the specific editing or selection process.”).

Absent an “allegation that [a service provider is] responsible for creating or developing” the offending content, the existence of terms of service that ban certain content, “even where the self-policing is unsuccessful or not even attempted,” is “irrelevant.” *Schneider*, 31 P.3d at 43 (citing *Drudge*, 992 F. Supp. at 52). *See also GoDaddy.com LLC v. Toups*, 429 S.W.3d 752, 761 (Tex. App. 2014) (rejecting request to amend complaint when addition of breach of terms of service claim would not defeat Section 230 immunity).

In *Jones*, the editors as a matter of practice reviewed the submissions they received, selected a small percentage for publication and then edited them to remove nudity, obscenity, threats of violence, profanity, and racial slurs. 755 F.3d at 403. Yet, as explained above, these practices did not transform the publishers into creators of the content that was posted. *Id.* at 409-13. That a different result would have been reached if such practices were found in terms of service rather than as an established custom is absurd. The key, as the Sixth Circuit recognized, is not that the publishers had some standards for content submitted to it, but

that they did not force or require anyone to post actionable content. *Id.* at 413-14.

F. A Plaintiff Seeking to Defeat Section 230 Immunity Cannot Rely on Vague Allegations That an Intermediary is an “Information Content Provider”.

Section 230 is not only a grant of immunity from liability. It is a shield against lawsuits themselves. Congress correctly recognized that a grant of intermediary immunity alone would be insufficient to protect Internet speech carried on the platforms of service providers. Carrying the public speech of millions, service providers often lack sufficient incentives to vindicate their users’ interests through costly litigation—even if they would prevail—where “simply” removing user content will suffice to extricate them from suit.

Numerous courts have found that Section 230 confers on service providers “immunity from suit.” *See Carafano*, 339 F.3d at 1125; *Ben Ezra*, 206 F.3d at 983. Legal protections that take hold only at a later stage of a case—for example, permitting discovery even in the absence of specific fact-based allegations in a complaint of behavior that would bring a service provider outside of Section 230’s protections do not address the chilling effects Congress sought to prevent. “[I]mmunity is an immunity from suit rather than a mere defense to liability and it is effectively lost if a case is erroneously permitted to go to trial.” *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 254-55 (4th Cir. 2009) (citation and internal quotation marks omitted).

A Section 230 defense thus supports a motion to dismiss “if the statute’s barrier to suit is evident from the face of the complaint.” *Klayman*, 753 F.3d at 1357. *See also Vazquez*, 90 A.3d at 336 (holding that Section 230 can be basis for motion to strike complaint). The applicability of Section 230 will be “evident from the face of the complaint” if the complaint does not contain specific facts that explain why the defendant is in fact an “information content provider.” *See Klayman*, 753 F.3d at 1358-59 (dismissing a complaint on section 230 grounds in light of insufficient allegations). Thus in *Nemet*, 591 F.3d at 254-56, the Fourth Circuit affirmed the granting of motion to dismiss based on Section 230 immunity because the complaint failed to “plead sufficient facts to allow a court, drawing on ‘judicial experience and common sense,’ to infer ‘more than the mere possibility of misconduct.’”

Consistent with the narrow interpretation of “information content provider,” a plaintiff must do more than merely claim that a defendant is an “information content provider”; Congress’s intent cannot be so easily circumvented by a conclusory allegation, nor by plaintiffs’ desire to engage in discovery to determine whether or not a site operator actually did anything to fall outside of Section 230’s protections. Rather, plaintiffs must allege *specific, non-speculative* behavior that a provider authored or developed the content in question or else the claim must promptly be dismissed. *See Klayman*, 753 F.3d at 1358 (holding that allegations that Facebook controlled, allowed, furthered, and failed to remove the offending post, or had some contractual obligation to act, were insufficient

to defeat section 230 immunity); *Nemet*, 591 F.3d at 250 (granting Section 230 immunity to a consumer complaint website, finding allegations that the site operator was an information content provider insufficiently supported by facts to survive a motion to dismiss); *Goddard*, 640 F. Supp. 2d at 1196 (“Plaintiff has not come close to substantiating the ‘labels and conclusions’ by which she attempts to evade the reach of the CDA.”).

This rule is consistent with the language of the statute, furthers Congress’s stated policy preference, and should be followed here: in the face of possible Section 230 immunity, unless a plaintiff can make plausible and specific factual allegations that would support a showing that the provider directly authored or developed that content, claims against it must promptly fail at the outset.

V. CONCLUSION

For the above-stated reasons, this court should order the trial court to grant Backpage the full scope of the protections provided by Section 230.

Dated: September 5, 2014

Respectfully submitted,

By: /s/ Venkat Balasubramani
Venkat Balasubramani
FOCAL PLLC
800 Fifth Avenue, Suite 4100
Seattle, WA 98104
Tel: (206) 718-4250
Fax: (206) 260-3966
venkat@focallaw.com

On the brief:

David Greene
ELECTRONIC FRONTIER
FOUNDATION
815 Eddy Street
San Francisco, CA 94109
Tel: (415) 436-9333
Fax: (415) 436-9993
davidg@eff.org

Emma Llanso
CENTER FOR DEMOCRACY
AND TECHNOLOGY
1634 I Street, NW, Suite 1100
Washington, DC 20006
Tel: (202) 637-9800
Fax: (202) 637-0968
ellanso@cdt.org

Attorneys for Amici Curiae
Electronic Frontier Foundation and
Center for Democracy & Technology