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## Fighting a Losing Battle to Win the War: Can States Combat Domestic Minor Sex Trafficking Despite CDA Preemption?

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# FIGHTING A LOSING BATTLE TO WIN THE WAR: CAN STATES COMBAT DOMESTIC MINOR SEX TRAFFICKING DESPITE CDA PREEMPTION?

Stephanie Silvano\*

*The explosion of the internet and online communication has led to an alarming increase in an existing epidemic: domestic minor sex trafficking. Sex traffickers utilize websites, such as Backpage.com, to post trafficking advertisements depicting minors, which are minimally regulated as a result of the civil immunity provision of the Communications Decency Act (47 U.S.C. § 230). This immunity provision has been interpreted broadly by the courts, granting expansive immunity to websites as both publishers and distributors of content.*

*In an effort to combat minor sex trafficking at a local level, some state legislatures enacted statutes criminalizing the knowing publication of online commercial sex advertisements depicting minors. Backpage.com challenged these statutes in district courts with great success. Because these statutes could hold websites liable for the publication of third-party content, the courts enjoined the laws as preempted by the Communications Decency Act. Thus, preemption places the states in a lose-lose situation: states can enact legislation knowing that the legislation will likely be enjoined or attempt to litigate against websites with little promise for success.*

*This Note argues that courts should narrow the scope of § 230's immunity given changes in technology and the increase in offensive and illegal content online. This Note also argues for the enactment of a new federal criminal statute, in place of individual state legislation, which would put liability back in the right hands and avoid preemption, while reducing domestic minor sex trafficking online.*

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## INTRODUCTION

At only fourteen years old, she worked twelve hours a day servicing “johns” she would meet at local hotels.<sup>1</sup> A runaway, she was lured into prostitution at a time when she was young and vulnerable and was trapped thereafter with threats and beatings. To find customers, her pimp posted advertisements, complete with suggestive subject lines<sup>2</sup> and provocative pictures of her body, at Backpage.com with a price tag: \$300 an hour. She never saw a dime.

Stories such as these, though sickening, are all too familiar.<sup>3</sup> With the growth of the internet, sex traffickers are looking to a new channel for advertising prostitution: Backpage.com, a free online classifieds website with an active “adult” section. The site features thousands of advertisements that include provocative pictures of women and vague descriptions of their adult services.<sup>4</sup> Although each advertisement lists the poster’s age, the ages are often incorrect and many advertisements are actually promoting the prostitution and escort services of minors.

In response to the expansion of online sex trafficking on these sites, some states such as Washington, Tennessee, and New Jersey enacted legislation that effectively imposes criminal liability on sites that knowingly publish underage escort advertisements.<sup>5</sup> In recent federal litigation, Backpage.com battled with the states over whether this new legislation is constitutionally valid<sup>6</sup> or preempted by the Communications Decency Act<sup>7</sup> (CDA). Although the district courts in Washington, Tennessee, and New Jersey all

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1. This story is fictitious, adapted from stories featured in a series of news articles written after arrests of criminals who used Backpage.com for sex trafficking. *See, e.g.*, SHARED HOPE INT’L, MINOR SEX TRAFFICKING VIA BACKPAGE.COM CASES (2013), [http://www.azgovernor.gov/HTTF/documents/Materials/HTTF\\_091113\\_BackpageCases090513.pdf](http://www.azgovernor.gov/HTTF/documents/Materials/HTTF_091113_BackpageCases090513.pdf) (providing synopses of 232 cases throughout the United States involving minor sex trafficking on Backpage.com); Amber Lyon & Steve Turnham, *Underage Sex Trade Still Flourishing Online*, CNN (Feb. 5, 2011, 3:12 PM), <http://www.cnn.com/2011/CRIME/01/20/siu.selling.girl.next.door.backpage>.

2. These suggestive subject lines flood the pages of Backpage.com’s adult section. Many subject lines and advertisements are filled with code words and falsified ages, thereby disguising sex trafficking to the typical keyword scanner or untrained eye. For examples of these promiscuous advertisements, see Brief for Defendants at Ex. A, Backpage.com, LLC v. Hoffman, No. 13-03952 (D.N.J. Aug. 20, 2013), 2013 WL 4502097 [hereinafter *Hoffman Defendants’ Brief*] (“DIAMOND here let’s shine together – 19.’ . . . ‘KILLER CURVES . . . – 24.”).

3. *See* SHARED HOPE INT’L, *supra* note 1 (discussing 232 cases of minor sex trafficking via the internet).

4. *See Hoffman Defendants’ Brief, supra* note 2, at Ex. A.

5. *See* N.J. STAT. ANN. § 2C:13-10 (West 2013); TENN. CODE ANN. § 39-13-315 (West 2012); WASH. REV. CODE ANN. § 9.68A.104 (West 2012) (repealed 2013).

6. *See generally Hoffman*, 2013 WL 4502097; Backpage.com, LLC v. Cooper, 939 F. Supp. 2d 805 (M.D. Tenn. 2013); Backpage.com, LLC v. McKenna, 881 F. Supp. 2d 1262 (W.D. Wash. 2012).

7. *See* 47 U.S.C. § 230 (2012). The Communications Decency Act (CDA), or Title V of the Telecommunications Act of 1996, was Congress’s first attempt at regulating liability and content on the internet and provides civil immunity for websites and other interactive computer services that publish information provided by third parties. *See id.* The CDA also expressly preempts any state laws inconsistent with the federal statute. A more complete discussion of the history and effects of the CDA can be found in Part I.B.

enjoined this legislation, forty-nine attorneys general are still fighting to combat sex trafficking online.<sup>8</sup>

The litigation in these district courts poses an important question: are these new state statutes actually preempted by the CDA? Backpage.com argues that the broad immunity provided by the CDA preempts the legislation enacted to criminalize the knowing dissemination of minor sex trafficking advertisements.<sup>9</sup> In response, the states argue that the CDA only preempts inconsistent state laws, and thus the statutes in question are not preempted.<sup>10</sup> Although the courts ruled in favor of Backpage.com and enjoined the legislation, the litigation raised important issues over the existence and extent of CDA immunity.<sup>11</sup> As a result of this conflict, suggestions of an amendment to the CDA to remove this immunity produced spirited debate by many interested parties.<sup>12</sup>

This Note argues that CDA preemption creates unnecessary barriers to reform that could help to eliminate one of the largest channels of child trafficking, online classifieds.<sup>13</sup> The internet has exploded over the last two decades and is now widely used in society as an outlet for speech and creativity.<sup>14</sup> While internet discourse must be protected, the answer is not

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8. See Letter from Att’y Gen. to Congress (July 23, 2013) [hereinafter Att’y Gen. Letter], available at <http://www.naag.org/assets/files/pdf/signons/Final%20CDA%20Sign%20On%20Letter.pdf>.

9. See Brief for Plaintiff at 17, *Hoffman*, No. 13-03952, 2013 WL 4502097 [hereinafter *Hoffman* Plaintiff’s Brief]; Brief for Plaintiff at 9, *Cooper*, 939 F. Supp. 2d 805 (No. 12-00065) [hereinafter *Cooper* Plaintiff’s Brief]; Brief for Plaintiff at 8, *McKenna*, 881 F. Supp. 2d 1262 (No. 12-00954) [hereinafter *McKenna* Plaintiff’s Brief]; *infra* Part II.B.1.

10. See *Hoffman* Defendants’ Brief, *supra* note 2, at 11; see also Brief for Defendants at 13, *Cooper*, 939 F. Supp. 2d 805 (No. 12-00065) [hereinafter *Cooper* Defendants’ Brief]; Brief for Defendants at 9–10, *McKenna*, 881 F. Supp. 2d 1262 (No. 12-00954) [hereinafter *McKenna* Defendants’ Brief]; *infra* Part II.B.2.

11. Backpage.com also raises meritorious constitutional arguments, but preemption by the CDA immunizes the site before these important questions are reached. By creating an initial obstacle for states in enacting legislation, the debate over preemption effectively determines whether and how states can take action to combat trafficking on a local level.

12. See, e.g., Matt Zimmerman, *State AGs Ask Congress to Gut Critical CDA 230 Online Speech Protections*, ELEC. FRONTIER FOUND. (July 24, 2013), <https://www.eff.org/deeplinks/2013/07/state-ags-threaten-gut-cda-230-speech-protections> (arguing to keep CDA immunity for interactive computer services intact). *But see* Petition to the U.S. Senate, *Amend Communications Decency Act Section 230*, CHANGE.ORG, <http://www.change.org/petitions/the-u-s-senate-amend-communications-decency-act-section-230> (last visited Sept. 21, 2014) (asking supporters to sign petition in support of amending the CDA to reduce immunity for interactive computer services).

13. See MARK LATONERO, HUMAN TRAFFICKING ONLINE: THE ROLE OF SOCIAL NETWORKING SITES AND ONLINE CLASSIFIEDS 19 (2001), available at [https://technologyandtrafficking.usc.edu/files/2011/09/HumanTrafficking\\_FINAL.pdf](https://technologyandtrafficking.usc.edu/files/2011/09/HumanTrafficking_FINAL.pdf) (examining the impact of technology on sex trafficking and its prevalence online).

14. See Carl Johnson, *The Internet: Can’t Live Without It*, FORBES (Nov. 2, 2011, 4:31 PM), <http://www.forbes.com/sites/carljohanson/2011/11/02/the-internet-cant-live-without-it> (discussing a 2011 Cisco study finding that more than 50 percent of respondents between ages 18 and 29 claimed they could not live without internet access); see also Ryan Dalton, Note, *Abolishing Child Sex Trafficking on the Internet: Imposing Criminal Culpability on Digital Facilitators*, 43 U. MEM. L. REV. 1097, 1108 (2013) (observing that the internet has become more accessible than ever before as a majority of American adults own a computer, cell phone, or other device).

such expansive immunity. Because the internet is mature and websites can now better adapt to regulation, expansive immunity will no longer stunt free speech and online commerce.<sup>15</sup> As a result, *civil* immunity should be narrowed, but *criminal* liability should be strengthened to punish criminal activity online. Thus, a change in the current law is necessary to reduce minor trafficking by criminalizing the knowing publication from the source—sites like Backpage.com.

This Note examines the conflicting arguments regarding CDA preemption of these state criminal laws and explores the differing judicial interpretations of CDA immunity among the circuit courts, while also identifying possible solutions for states in the face of CDA preemption. Part I provides background information on online sex trafficking, the history of the CDA, and the law of preemption. Part II examines the current state legislation and Backpage.com litigation that has raised important preemption concerns. Part III focuses on the current conflict regarding the interpretation of CDA immunity and explores the potential alternatives for states in the face of CDA preemption. Finally, Part IV argues that a narrower interpretation of immunity and a new federal criminal statute are necessary to effectively combat domestic minor sex trafficking nationwide.

#### I. A PRIMER ON SEX TRAFFICKING, PREEMPTION, AND THE COMMUNICATIONS DECENCY ACT

As explained in greater detail below, online classifieds have become one of the major channels of minor sex trafficking. Part I.A explores the current landscape of sex trafficking with respect to online classifieds, illustrating the extensiveness of the nationwide problem. Part I.B reviews the history and purpose of the CDA and its impact on internet regulation. Part I.C provides an overview of preemption and its use by the courts.

##### A. *Domestic Minor Sex Trafficking and the Internet*

Minor sex trafficking is a growing problem in America, and the internet is one of the primary channels traffickers use to find customers.<sup>16</sup> Part I.A.1 defines minor sex trafficking and illustrates its prevalence in the United States. Part I.A.2 then explains online classifieds and how these sites are used as channels for sex trafficking.

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15. *See* Fair Hous. Council v. Roommates.com, LLC, 521 F.3d 1157, 1164 n.15 (9th Cir. 2008) (“The Internet is no longer a fragile new means of communication that could easily be smothered in the cradle by overzealous enforcement of laws.”).

16. *See* LINDA A. SMITH ET AL., SHARED HOPE INT’L, THE NATIONAL REPORT ON DOMESTIC MINOR SEX TRAFFICKING: AMERICA’S PROSTITUTED CHILDREN 19 (2009), available at [http://sharedhope.org/wp-content/uploads/2012/09/SHI\\_National\\_Report\\_on\\_DMST\\_2009.pdf](http://sharedhope.org/wp-content/uploads/2012/09/SHI_National_Report_on_DMST_2009.pdf).

## 1. Domestic Minor Sex Trafficking

In the Trafficking Victims Protection Act of 2000 (TVPA), Congress defined sex trafficking as “the recruitment, harboring, transportation, provision, or obtaining of a person for the purpose of a commercial sex act.”<sup>17</sup> The United States is a “source, transit, and destination country for men, women, and children . . . subjected to sex trafficking and forced labor.”<sup>18</sup> Experts estimate that more than 100,000 American children are victimized through sex trafficking in America each year.<sup>19</sup> This does not include foreign children who are victims of trafficking in the United States or victims over the age of eighteen.<sup>20</sup>

In an effort to protect victims of all ages, Congress enacted the TVPA—the first federal law enacted to protect victims and prosecute perpetrators of trafficking.<sup>21</sup> The TVPA creates a framework for the prevention of victimization and protection of victims, while establishing minimum standards for governments to help eliminate trafficking.<sup>22</sup> The TVPA also strengthens prosecution and punishment of traffickers by addressing the interpretation of the United States Sentencing Guidelines.<sup>23</sup> Although this statute and its framework are a step toward a solution, ambiguity in the TVPA’s application leaves room for improvement, as domestic minor sex trafficking remains a growing issue.<sup>24</sup> Accordingly, states enacted new laws to help fight domestic minor sex trafficking that criminalize commercial sex advertisements depicting minors.<sup>25</sup>

## 2. Online Classifieds

Since the expansion of the internet, a number of classified advertising websites have developed and are now a popular alternative to traditional print advertising in newspapers.<sup>26</sup> Sites like Craigslist, backpage.com, and

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17. Trafficking Victims Protection Act of 2000 (TVPA), 22 U.S.C. § 7102(9) (2012).

18. U.S. DEP’T OF STATE, TRAFFICKING IN PERSONS REPORT JUNE 2014 397 (2014), available at <http://www.state.gov/j/tip/rls/tiprpt/2014/index.htm>.

19. SMITH ET AL., *supra* note 16, at 4 (quoting Ernie Allen from the National Center for Missing and Exploited Children who noted that “[t]he best estimates, the best data, suggests that . . . at least [] 100,000 American kids a year are victimized through the practice of child prostitution”).

20. *See id.*

21. 22 U.S.C. §§ 7101–09 (2012).

22. *Id.* §§ 7104–07.

23. *Id.* § 7109.

24. Misperceptions of the definition of sex trafficking under the TVPA and confusion regarding its practical application have weakened the law’s efficacy. *See* SMITH ET AL., *supra* note 16, at 7. Further, the general public does not fully understand the issue and its prevalence in American society. *See id.* Although many children are runaways or part of the child welfare system, some are recruited from middle class families as well, illustrating the widespread scope of domestic minor sex trafficking. *See id.* at 9.

25. *See infra* Part II.A.

26. *See* Jeff Bercovici, *Sorry, Craig: Study Finds Craigslist Took \$5 Billion From Newspapers*, FORBES (Aug. 14, 2013, 7:40 AM), <http://www.forbes.com/sites/jeffbercovici/2013/08/14/sorry-craig-study-finds-craigslist-cost-newspapers-5-billion/> (discussing a recent study which found that Craigslist is an inexpensive online alternative to traditional print advertising and cost print newspapers \$5 billion in revenue from 2000 to 2007).

eBay Classifieds provide users with a forum for buying and selling goods and services to a broader audience on the web.<sup>27</sup> These websites group advertisements by location and category, similar to print advertisements.<sup>28</sup> The use of these websites has grown exponentially as internet use increases.<sup>29</sup>

Each website boasts a broad array of categories from appliances to roommates to job postings.<sup>30</sup> Many websites, however, also feature an “adult services” section with opportunities for users to post advertisements offering or requesting sexual services.<sup>31</sup> These websites have come under scrutiny for featuring adult classifieds because many postings are actually for the prostitution of women and children.<sup>32</sup>

Websites, including online classified sites like Backpage.com, have become one of the primary channels of sex trafficking.<sup>33</sup> This is in part due to technological advances on the internet that make information easily accessible and provide a forum for anonymity, which allows traffickers to post advertisements of minors for a world of customers to see with ease and security.<sup>34</sup> Only a few years ago, Craigslist was the leader in prostitution advertising online.<sup>35</sup> But, pressure from several state attorneys general led Craigslist to eliminate its adult services section.<sup>36</sup> Although some argued that this decision reduced the market for prostitution and trafficking online,

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27. See LATONERO, *supra* note 13, at 12–13.

28. See *id.*; see also BACKPAGE, <http://www.backpage.com> (last visited Sept. 21, 2014); CRAIGSLIST, <http://www.craigslist.com> (last visited Sept. 21, 2014); EBAY CLASSIFIEDS, <http://www.ebayclassifieds.com> (last visited Sept. 21, 2014).

29. See LATONERO, *supra* note 13, at 12 (noting that the percentage of online American adults that reported using sites such as Craigslist increased from 32 percent in 2007 to 53 percent in 2010).

30. See, e.g., BACKPAGE, *supra* note 28; CRAIGSLIST, *supra* note 28; EBAY CLASSIFIEDS, *supra* note 28.

31. See, e.g., BACKPAGE, *supra* note 28; CITYVIBE, <http://www.cityvibe.com> (last visited Sept. 21, 2014); EROS, <http://www.eros.com> (last visited Sept. 21, 2014); MYREDBOOK, <http://www.myredbook.com> (last visited Sept. 21, 2014) (seized by the FBI and IRS for money laundering based on prostitution). These websites all feature online classified advertisements for adult services. However, there are many other sites that host online classifieds of adult services that may go undetected, as many traffickers use code words and other tactics to post advertisements in other areas of classified websites (such as massage services) or to pass company keyword searches. See LATONERO, *supra* note 13, at 19.

32. See David A. Lieb, *Online Sex Ads Draw Scrutiny*, SEACOASTONLINE (Sept. 30, 2013, 2:00 AM), <http://www.seacoastonline.com/articles/20130930-BIZ-309300303>.

33. See generally SHARED HOPE INT’L, *supra* note 1 (listing 232 reported cases of sex trafficking via Backpage.com in forty-five states over the last several years); Abigail Kuzma, *A Letter to Congress: The Communications Decency Act Promotes Human Trafficking*, 34 CHILD. LEGAL RTS. J. 23, 27 (2013) (noting that websites such as Backpage.com have created “virtual brothels” for child sex trafficking).

34. See Dalton, *supra* note 14, at 1108.

35. See *Backpage Replaces Craigslist as Prostitution-Ad Leader*, AIM GROUP (Oct. 19, 2010) [hereinafter AIM GROUP 2010], <http://aimgroup.com/2010/10/19/backpage-replaces-craigslist-as-prostitution-ad-leader>.

36. See Christopher Leonard, *Craigslist Adult Services Section REMOVED*, HUFFINGTON POST (Sept. 4, 2010, 11:50 PM), [http://www.huffingtonpost.com/2010/09/04/craigslist-adult-services\\_0\\_n\\_705758.html](http://www.huffingtonpost.com/2010/09/04/craigslist-adult-services_0_n_705758.html).

in reality many of these ads migrated to other websites including Backpage.com.<sup>37</sup>

Backpage.com is now the leader in adult services advertising and is facing the same pressure as Craigslist encountered only a few years ago.<sup>38</sup> In the month following Craigslist's decision, Backpage.com saw its revenue increase 15.3 percent due to the migration of adult advertisements to new channels.<sup>39</sup> Recent studies estimate that Backpage.com's monthly revenue from its online escort and "body rub" sections, which host many suspected prostitution and sex trafficking advertisements, is more than \$4 million.<sup>40</sup> These profits are derived in part from the fee Backpage.com currently charges for posting adult advertisements, though this fee differs by category and location.<sup>41</sup> In order to post an adult advertisement on Backpage.com, a user must enter a title, age, description, and email.<sup>42</sup> Users may upload up to twelve images, though this is not required.<sup>43</sup> After completing this form and choosing the frequency of the posting, the user must enter valid credit card information to purchase the advertisement.<sup>44</sup> After review,<sup>45</sup> the advertisement is published on Backpage.com.

This increase in prostitution advertising on Backpage.com led attorneys general to ask the site to remove its adult services section, a request that Backpage.com has continuously refused.<sup>46</sup> Rather than eliminate its

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37. See Marissa Louie, *Craigslist Saga: Sex Ads Get Pushed Elsewhere, but Kroobe Says No*, HUFFINGTON POST (Dec. 17, 2010, 3:32 PM), [http://www.huffingtonpost.com/marissa-louie/craigslist-saga-sex-ads-g\\_b\\_798043.html](http://www.huffingtonpost.com/marissa-louie/craigslist-saga-sex-ads-g_b_798043.html) (noting that sex advertisements have migrated to Backpage.com, Oodle, and eBay's LoQuo.com following Craigslist's removal of its adult services section).

38. According to a recent study by the AIM Group, a consulting group that researches interactive media and classified advertising, Backpage.com generated 82.3 percent of the estimated revenue from online prostitution advertising from June 2012 to May 2013. *Online Prostitution-Ad Revenue Crosses Craigslist Benchmark*, AIM GROUP (July 10, 2013) [hereinafter AIM GROUP 2013], <http://aimgroup.com/2013/07/10/online-prostitution-ad-revenue-crosses-craigslist-benchmark>. These statistics illustrate Backpage.com's growth in the illicit advertising market. See *id.*

39. AIM GROUP 2010, *supra* note 35.

40. AIM GROUP 2013, *supra* note 38. The AIM Group acknowledges its use of estimations in its data collection and the potential inaccuracies in its results given that the study only researched select markets where Backpage.com is localized. See *id.* However, the study still provides a helpful illustration of the prevalence of prostitution and trafficking online and how websites profit from such illicit activity. *Id.*

41. For example, advertisements for escort services in northern New Jersey cost \$12.00 per posting, with higher fees charged regularly for highlighted or repeated postings. See *North Jersey, N.J.*, BACKPAGE, <http://posting.northjersey.backpage.com/online/classifieds/PostAdPPI.html/nj/northjersey.backpage.com> (last visited Sept. 21, 2014) (click "adult entertainment"; "escorts"; "North Jersey"; "Continue"). In contrast, escort advertisements in Provo, Utah, cost only \$3.00 per advertisement. See *Provo, Utah*, BACKPAGE, <http://posting.provo.backpage.com/online/classifieds/PostAdPPI.html/pvu/provo.backpage.com> (last visited Sept. 21, 2014) (click "adult entertainment"; "escorts"; "Provo"; "Continue").

42. See *North Jersey, N.J.*, *supra* note 41.

43. See *id.*

44. See *id.*

45. See *infra* notes 47–53 and accompanying text.

46. See Martha Kessler, *Backpage Calls for National Taskforce to Study Prevention of Illegal Online Ads*, 15 Elec. Com. & L. Rep. 16–19 (BNA) (Oct. 27, 2010).

lucrative adult services section, Backpage.com purports to have taken steps to combat online prostitution and trafficking.<sup>47</sup> In a recent article, Backpage.com General Counsel Liz McDougall discussed the steps Backpage.com has taken to screen advertisements for illicit activity.<sup>48</sup> McDougall claimed that employees remove more than one million advertisements from the site every month, approximately 18,000 of which are from the adult category.<sup>49</sup> After running all classified advertisements through a keyword filter, McDougall asserted that Backpage.com employs a team of 110 employees to manually review each advertisement submitted to the adult category.<sup>50</sup> The priority of employees during the review process is to look for minors and illegal activity.<sup>51</sup> Since implementing this system, McDougall claimed that Backpage.com reports to the National Center for Missing and Exploited Children approximately 400 advertisements each month that it suspects involve a minor.<sup>52</sup>

Although the review process may appear comprehensive and effective, with multiple reviews and reports to national agencies, employees review posts subjectively based on their own estimates of age and legality.<sup>53</sup> Consequently, many cases of minor sex trafficking may go unreported if the particular employee reviewer guesses that the person depicted is over eighteen. Further, Backpage.com's Terms of Use do not prohibit users from posting on behalf of another individual, which permits traffickers to post on behalf of their victims, possibly without detection.<sup>54</sup> Accordingly, many minor sex trafficking advertisements—and victims—go undetected.

### *B. The Communications Decency Act of 1996*

The Communications Decency Act of 1996<sup>55</sup> was one of Congress's first attempts at regulating the new and growing internet medium. Part I.B.1 explains the state of the law before the enactment of the CDA. Part I.B.2 discusses the history and purpose of the legislation. Part I.B.3 clarifies the distinction between interactive computer services and information content providers. Part I.B.4 examines the exceptions to § 230 immunity.

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47. See Julie Ruvolo, *Sex Trafficking on Backpage.com: Much Ado About (Statistically) Nothing*, TECHCRUNCH.COM (Oct. 6, 2012), <http://techcrunch.com/2012/10/06/sex-trafficking-on-backpage-com-much-ado-about-statistically-nothing/>. Google claims to screen advertisements through both automated and manual review as well. See Kessler, *supra* note 46.

48. See Ruvolo, *supra* note 47.

49. See *id.*

50. See *id.* Employees review advertisements once before publishing, and then a different group of employees reviews the advertisements again after going live on the site. See *id.*

51. See *id.*

52. See *id.*

53. See *id.*

54. See *id.*; see also *Terms*, BACKPAGE.COM, <http://www.backpage.com/online/TermsOfUse> (last visited Sept. 21, 2014).

55. 47 U.S.C. § 230 (2012).

### 1. Before the Communications Decency Act

Before Congress enacted the CDA in 1996, the internet was a new medium and regulation was minimal.<sup>56</sup> Legal liability for user-generated content was not considered by courts or legislatures until 1995, when a New York State Supreme Court examined whether an online publisher could be held liable for defamatory statements made by a third party in *Stratton Oakmont, Inc. v. Prodigy*.<sup>57</sup> Defendant Prodigy, the owner and operator of a computer network, produced the online bulletin board “Money Talk.”<sup>58</sup> A third-party user made allegedly defamatory statements about plaintiff Stratton Oakmont, a securities firm.<sup>59</sup> The court held that Prodigy was a “publisher” because “[b]y actively utilizing technology and manpower to delete notes from its computer bulletin boards on the basis of offensiveness . . . PRODIGY is clearly making decisions as to content . . . and such decisions constitute editorial control.”<sup>60</sup> Therefore, Prodigy was a publisher for the purposes of plaintiff’s libel claims.<sup>61</sup>

### 2. The Communications Decency Act

In response to *Stratton Oakmont*, Congress enacted § 230 of the CDA.<sup>62</sup> Section 230 provides immunity in two ways to interactive computer services, defined as an “information service, system, or access software provider that provides or enables computer access by multiple users to a computer server.”<sup>63</sup> First, under the CDA no interactive computer service may be treated as the publisher or speaker of third-party content.<sup>64</sup> Second, interactive computer services are immune from civil liability if they voluntarily take action to restrict access to obscene and objectionable

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56. See KrisAnn Norby-Jahner, Comment, “Minor” Online Sexual Harassment and the CDA § 230 Defense: New Directions for Internet Service Provider Liability, 32 HAMLINE L. REV. 207, 234 (2009) (“Before the CDA was enacted, courts had to deal with legal claims in the Internet medium without legislative guidance. Using common-law principles, the courts applied publishing and distributing standards to online claims.”).

57. See *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, No. 31063/94, 1995 WL 323710, at \*1 (N.Y. Sup. Ct. May 24, 1995).

58. See *id.*

59. See *id.*

60. *Id.* at \*4 (internal citations omitted).

61. See *id.*

62. See John E. D. Larkin, *Criminal and Civil Liability for User Generated Content: Craigslist, A Case Study*, 15 J. TECH. L. & POL’Y 85, 104 (2010).

63. 47 U.S.C. § 230(f)(2) (2012).

64. *Id.* § 230(c)(1) (“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.”). Although some argue that § 230 only confers publisher immunity and does not impact distributor liability, the majority of courts have not recognized this distinction. See, e.g., David R. Sheridan, *Zeran v. AOL and the Effect of Section 230 of the Communications Decency Act Upon Liability for Defamation on the Internet*, 61 ALB. L. REV. 147, 167–72 (1997); David Lukmire, Note, *Can the Courts Tame the Communications Decency Act?: The Reverberations of Zeran v. America Online*, 66 N.Y.U. ANN. SURV. AM. L. 371, 389–90 (2010). Whether distributor liability remains intact is not considered in this Note.

content online.<sup>65</sup> This effectively repudiated *Stratton Oakmont* and drastically departed from traditional defamation jurisprudence at common law.<sup>66</sup>

Although the statute was a legislative response to the *Stratton Oakmont* decision, the purpose of the CDA as stated in the statutory text is “to promote the continued development of the Internet . . . [and] to preserve the vibrant and competitive free market that presently exists for the Internet . . . unfettered by Federal or State regulation.”<sup>67</sup> At the time, the internet was in its infancy and Congress feared that the new technology would be stifled by burdensome regulations and litigation.<sup>68</sup> The CDA was intended in part to promote the prosperity of the internet as a medium and a marketplace.<sup>69</sup>

However, the CDA’s purpose is twofold—Congress also recognized the challenges that the internet presented in policing obscene content and preventing children’s access to objectionable material online.<sup>70</sup> Therefore, Congress enacted the CDA “to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children’s access to objectionable or inappropriate online material” and “to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.”<sup>71</sup> These two reasons behind the CDA, as listed in the statutory text,<sup>72</sup> indicate that Congress was also concerned with protecting children.<sup>73</sup>

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65. 47 U.S.C. § 230(c)(2) describes civil liability:

No provider or user of an interactive computer service shall be held liable on account of— (A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or (B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).

Based on an expansive interpretation of the “interactive computer service” definition, courts have construed these immunity provisions to provide broad immunity to websites and other online operators facing both criminal and civil liability. *See infra* Part III.A.1.

66. *See* Larkin, *supra* note 62, at 104. The publisher or distributor’s level of control over the defamatory material determines liability for third-party content in common law defamation cases. Under the common law of torts, “one who only delivers or transmits defamatory matter published by a third person is subject to liability if, but only if, he knows or has reason to know of its defamatory character.” RESTATEMENT (SECOND) OF TORTS § 581 (1977). Courts have held traditional print media outlets liable for the knowing publication of defamatory or criminal third-party content, which directly contradicts Congress’s decision for websites in the CDA. *See* *Dart v. Craigslist, Inc.*, 665 F. Supp. 2d 961, 967 (N.D. Ill. 2009) (noting that print newspapers and magazines may be held liable for publishing advertisements that harm third parties (citing *Braun v. Soldier of Fortune*, 968 F.2d 1110, 1114 (11th Cir. 1992))).

67. 47 U.S.C. § 230(b)(1)–(2).

68. *See id.*

69. *See id.*

70. *Id.* § 230(b)(4).

71. *Id.* § 230(b)(4)–(5).

72. Section 230(b) lists the policy reasons behind Congress’s decision to enact the CDA:

### 3. Interactive Computer Services and Information Content Providers

The distinction between “interactive computer services” and “information content providers” is critical to determine immunity.<sup>74</sup> The statute defines an interactive computer service as “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.”<sup>75</sup> Using this definition, courts have recognized that interactive computer services include a wide range of websites and services other than just internet services providers.<sup>76</sup> For example, courts have found that eBay, Amazon.com, America Online, Inc. (AOL), and other websites that host third-party content are interactive computer services.<sup>77</sup>

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(1) to promote the continued development of the Internet and other interactive computer services and other interactive media; (2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation; (3) to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services; (4) to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children’s access to objectionable or inappropriate online material; and (5) to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.

*Id.* § 230(b). These provisions illuminate the reasons behind Congress’s choices in drafting § 230. *See id.*

73. *See* 141 CONG. REC. 15,502–05 (1995); 141 CONG. REC. 22,044–46 (1995). Congress enacted an additional section of the CDA to fulfill its purpose of protecting children and reducing obscenity in response to the increasing presence of online sex sales and pornography online. *See* Abby R. Perer, Note, *Policing the Virtual Red Light District: A Legislative Solution to the Problems of Internet Prostitution and Sex Trafficking*, 77 BROOK. L. REV. 823, 831 (2012). Section 223(a) criminalizes the knowing transmission of obscene images to any person under the age of 18, and § 223(d) forbids the knowing sending of any message “that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs.” *Reno v. ACLU*, 521 U.S. 844, 859–60 (1997) (discussing § 223 and the provisions under scrutiny in the litigation). The Supreme Court invalidated § 223 in *Reno v. ACLU*, 521 U.S. 844. In its analysis, the Court distinguished the internet from other types of media and examined the text of the statute in this context. *Id.* at 870. The Court noted that the distinctions between the internet and broadcast media meant that precedent provides no basis for qualifying the level of First Amendment scrutiny in this case. *Id.* Ultimately, the Court held that § 223 was unconstitutional under the First Amendment. *Id.* at 870–85. Although the decision removed the provision of the CDA that most clearly protected children from online obscenity, both Congress clearly discussed the need for online protection in the meetings leading up to enactment. *See* 141 CONG. REC. 15,502–05 (1995); 141 CONG. REC. 22,044–46 (1995).

74. *See* 47 U.S.C. § 230.

75. *Id.* § 230(f)(2).

76. *See* *Batzel v. Smith*, 333 F.3d 1018, 1030 n.15 (9th Cir. 2003) (discussing the broad definition of interactive computer services and citing cases that have applied the definition to grant immunity).

77. *See id.*; *see also* *Carafano v. Metrosplash.com*, 207 F. Supp. 2d 1055, 1065 (C.D. Cal. 2002) (holding that a website is an interactive service provider because it provides or enables computer access by multiple users to a server).

By contrast, an information content provider is “any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the internet or any other interactive computer service.”<sup>78</sup> Courts have narrowly construed this definition to recognize users of websites that personally create and develop content as information content providers that can face liability.<sup>79</sup> Though this distinction may seem insignificant at first blush, it has become intensely debated in the courts and has led to broad immunity for websites from both civil and criminal liability.<sup>80</sup> Although interactive computer services are not immunized when explicitly developing informational content, judicial interpretations of § 230(c) found that interactive computer services do have some flexibility when making editorial changes before becoming exposed to liability as information content providers.<sup>81</sup>

#### 4. Exceptions to the Communications Decency Act

The CDA also contains a few important exceptions that greatly impact immunity and further these policy goals.<sup>82</sup> Under § 230(e), Congress explained the effect that the CDA would have on other laws.<sup>83</sup> For example, the CDA has no impact on “any law pertaining to intellectual property” and will not “be construed to limit the application of the Electronic Communications Privacy Act of 1986.”<sup>84</sup> The provisions that are most critical to this Note dictate the effect of the CDA on criminal law and on state laws.<sup>85</sup>

Under § 230(e)(1), Congress expressly directed that “[n]othing in [§ 230] 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.”<sup>86</sup> This provision seems logical, given that one of the stated policy goals of the CDA is to vigorously enforce *federal* criminal laws to deter and punish computer crimes such as trafficking, obscenity, and stalking.<sup>87</sup> Under § 230(e)(3), the CDA cannot be construed “to prevent any State from

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78. 47 U.S.C. § 230(f)(3).

79. See Eric Weslander, Comment, *Murky “Development”*: How the Ninth Circuit Exposed Ambiguity Within the Communications Decency Act, and Why Internet Publishers Should Worry, 48 WASHBURN L.J. 267, 268 (2008) (“For years, courts have construed the terms ‘creation’ and ‘development’ narrowly. As a result, websites have been allowed to solicit, encourage, edit, and aggressively promote information supplied by third parties without being potentially liable for its contents.”).

80. See generally Larkin, *supra* note 62; see also *infra* Part III.

81. See RAYMOND T. NIMMER & HOLLY K. TOWLE, THE LAW OF ELECTRONIC COMMERCIAL TRANSACTIONS ¶ 10.09[3] (2009); see also *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 332 (4th Cir. 1997) (noting that under § 230(c)(1) websites must have some editorial discretion to decide whether to publish, edit, or withdraw content without facing liability).

82. See 47 U.S.C. § 230(e) (entitled “Effect on other laws”).

83. See *id.*

84. *Id.* § 230(e)(2), (4).

85. *Id.* § 230(e)(1), (3).

86. *Id.* § 230(e)(1).

87. *Id.* § 230(b)(5).

enforcing any State law that is consistent with this section,” but “[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.”<sup>88</sup> Although this provision may seem clear, it has been challenging for courts to interpret because it does not define what type of state laws are consistent with the CDA.<sup>89</sup>

Courts engage in a three-part inquiry to determine whether immunity exists under the CDA and consequently whether a state law claim is consistent with the CDA: “[i] whether Defendant is a provider of an interactive computer service; [ii] if the postings at issue are information provided by another information content provider; and [iii] whether Plaintiff’s claims seek to treat Defendant as a publisher or speaker of third party content.”<sup>90</sup> If the answer to each question is “yes,” immunity should be granted, and thus the state law cause of action is inconsistent with the CDA.<sup>91</sup>

These provisions have given rise to controversy, as some plaintiffs have attempted to prosecute interactive computer services under *state* criminal laws.<sup>92</sup> However, the plain text of § 230(e)(1) exempts “[f]ederal criminal statutes” specifically and does not mention state laws and therefore eliminates any argument for state law exemption.<sup>93</sup> Further, most courts have read § 230(e)(1) and (e)(3) together to find that Congress only intended to give interactive computer services immunity from state laws that are consistent with the CDA; any state criminal law that is inconsistent with the CDA is preempted.<sup>94</sup> It is clear, however, that Congress did not

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88. *Id.* § 230(e)(3).

89. *See* *Atl. Recording Corp. v. Project Playlist, Inc.*, 603 F. Supp. 2d 690, 702 (S.D.N.Y. 2009) (“230(e)(3) provides no substantive content”); *Zeran v. Am. Online, Inc.*, 958 F. Supp. 1124, 1130 (E.D. Va. 1997), *aff’d*, 129 F.3d 327 (4th Cir. 1997) (observing that the CDA “contains no explicit expression of congressional intent with respect to the scope of preemption”).

90. *Gibson v. Craigslist, Inc.*, No. 08 Civ. 7735 (RMB), 2009 WL 1704355, at \*3 (S.D.N.Y. June 15, 2009) (quoting *Nemet Chevrolet, Ltd. v. ConsumerAffairs.com, Inc.*, 564 F. Supp. 2d 544, 548 (E.D. Va. 2008)); *see also* *Batzel v. Smith*, 333 F.3d 1018, 1037 (9th Cir. 2003) (Gould, J., concurring in part and dissenting in part).

91. *See Gibson*, 2009 WL 1704355, at \*3–4.

92. *See generally* *Doe v. Bates*, No. 5 Civ. 00091 (DF), 2006 WL 3813758 (E.D. Tex. Dec. 27, 2006) (unsuccessfully sued Yahoo for hosting child pornography on its “Candyman” group). A number of civil cases have attempted to hold websites liable as a result of sex crimes against children. *See, e.g.*, *Doe v. MySpace, Inc.*, 528 F.3d 413 (5th Cir. 2008) (negligence claim against MySpace after thirteen-year-old girl was sexually assaulted by an adult she met on MySpace); *Doe v. Am. Online, Inc.*, 783 So.2d 1010 (Fla. 2001) (negligence action against internet service provider for creating chat rooms where users market obscene photographs to minors). The majority of cases involving CDA immunity are civil in nature and relate to claims of libel and defamation. *See infra* Part III.A–B. However, these cases granting immunity for negligence and criminal claims show the unbridled reach of the CDA that poses a significant challenge to young victimized plaintiffs.

93. *See Voicenet Commc’ns, Inc. v. Corbett*, No. 04 Civ. 01318, 2006 WL 2506318, at \*4 (E.D. Pa. Aug. 30, 2006) (finding that “if Congress had wanted state criminal statutes to trump the CDA as well, it knew how to say so”).

94. *See id.*

intend, expressly or impliedly, to automatically preempt *all* state law causes of action pertaining to interactive computer services.<sup>95</sup>

### C. *The Supremacy Clause and Federal Preemption*

Preemption is “the principle . . . that a federal law can supersede or supplant any inconsistent state law or regulation.”<sup>96</sup> This principle is derived from the Supremacy Clause, which states that the “Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land.”<sup>97</sup> Under the Supremacy Clause, federal law will override any conflicting state law in cases where both valid state and federal law could apply.<sup>98</sup> Under the preemption doctrine, however, states completely lose the power to regulate an area of law regardless of any conflict with federal law due to Congress’s express or implied intent to preempt state law.<sup>99</sup>

A federal law expressly preempts state laws when Congress explicitly states an intention to preempt any state laws.<sup>100</sup> Preemption can be implied in two ways: field preemption and conflict preemption.<sup>101</sup> Field preemption allows Congress to indicate the intent to occupy an entire field of regulation, thereby preempting states from enacting any laws in that area.<sup>102</sup> Conflict preemption allows Congress to preempt any state law that directly conflicts with federal law.<sup>103</sup> Conflict preemption typically occurs when an individual cannot possibly comply with both state and federal law.<sup>104</sup> It also occurs where state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”<sup>105</sup>

Each kind of preemption poses unique challenges for courts.<sup>106</sup> Despite these differences, all questions of preemption begin with an examination of

95. See *Zeran v. Am. Online, Inc.*, 958 F. Supp. 1124, 1130 (E.D. Va. 1997), *aff’d*, 129 F.3d 327 (4th Cir. 1997) (“Congress did not intend to occupy the field of liability . . . to the exclusion of state law. Section 230’s language and legislative history [reflect] that Congress’s purpose in enacting that section was not to preclude any state regulation of the internet, but rather to eliminate obstacles to the private development of blocking and filtering technologies capable of restricting inappropriate online content.”).

96. BLACK’S LAW DICTIONARY 1368–69 (10th ed. 2009).

97. U.S. CONST. art. VI, cl. 2.

98. Stephen A. Gardbaum, *The Nature of Preemption*, 79 CORNELL L. REV. 767, 771 (1994) (discussing the distinction between supremacy and preemption, noting that supremacy does not strip power from the states).

99. See *id.* (observing that “preemption is a significantly more radical inroad on state power than supremacy”).

100. See *Gade v. Nat’l Solid Wastes Mgmt. Ass’ns*, 505 U.S. 88, 98 (1992) (plurality opinion).

101. See *id.*

102. See *id.*

103. See *id.*

104. See *id.*

105. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

106. See Note, *New Evidence on the Presumption Against Preemption: An Empirical Study of Congressional Responses to Supreme Court Preemption Decisions*, 120 HARV. L. REV. 1604, 1606 (2007).

congressional intent.<sup>107</sup> In order to discern congressional intent, courts generally look to the structure and the text of the federal statute at issue.<sup>108</sup> Unfortunately, congressional intent is often difficult to determine,<sup>109</sup> and thus “multiple interpretations of the preemptive scope of a federal statute are almost always plausible.”<sup>110</sup> Courts are then confronted with the additional challenge of reconciling the many interpretations before coming to a decision.<sup>111</sup>

The Supreme Court recognizes a presumption against federal preemption, where the Court “start[s] with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.”<sup>112</sup> This presumption helps courts determine whether Congress intended preemption and, if so, the scope of the statute’s intended preemption.<sup>113</sup>

Because the preemption question can only be answered by the specific statutory scheme at issue, there exists no uniform resolution for the courts and cases are often disparate.<sup>114</sup> Therefore, interpretation of the scope of CDA preemption here is influenced by the specific cases that have previously addressed the statutory scheme, as discussed in Part III.

## II. THE LAWS AND THE LITIGATION: BACKPAGE.COM VERSUS THE STATES

Recent state statutes, enacted by Washington, Tennessee, New Jersey, and Connecticut, criminalizing the knowing publication of minor sex trafficking advertisements online led to contentious litigation in district courts between Backpage.com and the states. Part II of this Note examines the laws and the litigation involved in *Backpage.com v. McKenna*,<sup>115</sup> *Backpage.com v. Cooper*,<sup>116</sup> and *Backpage.com v. Hoffman*<sup>117</sup> and

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107. *See id.*

108. *See Gade*, 505 U.S. at 98 (discussing how courts should interpret whether a state regulation is preempted by a federal statute).

109. *See Note, supra* note 106, at 1606. (“In implied preemption cases, there are no statutory provisions explaining which state laws Congress intended to preempt, and even when Congress includes an express preemption clause in a statute, such clauses are often absurdly vague . . .”). This is the challenge at the heart of this Note, as courts grapple with the difficult task of determining congressional intent to decide whether the CDA preempts a particular state law.

110. *See id.*

111. *See id.* at 1607.

112. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). The Court has offered rationales for this presumption which all center around promoting federalism. *See Note, supra* note 106, at 1607. Because of the serious issues raised by this presumption, scholarly debate over the justification and applicability of the presumption against preemption will continue. *See id.* at 1626.

113. *See Medtronic*, 518 U.S. at 485.

114. *See City of Burbank v. Lockheed Air Terminal Inc.*, 411 U.S. 624, 638 (1973) (“Our prior cases on pre-emption are not precise guidelines in the present controversy, for each case turns on the peculiarities and special features of the federal regulatory scheme in question.”).

115. 881 F. Supp. 2d 1262 (W.D. Wash. 2012).

116. 939 F. Supp. 2d 805 (M.D. Tenn. 2013).

117. No. 13 Civ. 03952, 2013 WL 4502097 (D.N.J. Aug. 20, 2013).

highlights the important conflict regarding CDA preemption that effectively decides these cases. Part II.A discusses the state statutes at issue and the purposes behind their enactment. Part II.B outlines the arguments presented by each party and explains the courts' decisions in *McKenna*, *Cooper*, and *Hoffman*.

A. *States Outlaw Commercial Sex Advertisements Depicting Minors*

Washington was the first state to enact a law criminalizing “advertising commercial sexual abuse of a minor.”<sup>118</sup> The statute effectively outlaws the knowing publication of commercial sex advertisements depicting children.<sup>119</sup> It served as a model for the Tennessee and New Jersey statutes enacted thereafter.<sup>120</sup> The statutory text is nearly identical, with only a few key distinctions. However, the effect is the same in that the statutes criminalize the knowing publication or dissemination of minor sex trafficking advertisements online or in print.<sup>121</sup>

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118. The relevant provisions of the Washington statute as enacted in 2012 are as follows:

A person commits the offense of advertising commercial sexual abuse of a minor if he or she knowingly publishes, disseminates, or displays, or causes directly or indirectly, to be published, disseminated, or displayed, any advertisement for a commercial sex act, which is to take place in the state of Washington and that includes the depiction of a minor. . . .

In a prosecution under this statute it is not a defense that the defendant did not know the age of the minor depicted in the advertisement. It is a defense, which the defendant must prove by a preponderance of the evidence, that the defendant made a reasonable bona fide attempt to ascertain the true age of the minor depicted in the advertisement by requiring, prior to publication, dissemination, or display of the advertisement, production of a driver's license, marriage license, birth certificate, or other governmental or educational identification card or paper of the minor depicted in the advertisement and did not rely solely on oral or written representations of the minor's age, or the apparent age of the minor as depicted. In order to invoke the defense, the defendant must produce for inspection by law enforcement a record of the identification used to verify the age of the person depicted in the advertisement.

WASH. REV. CODE ANN. § 9.68A.104 (West 2012) (repealed 2013); *see also* N.J. STAT. ANN. § 2C:13-10 (West 2013); TENN. CODE ANN. § 39-13-315 (West 2012). The New Jersey statutory text is almost identical to the Washington text, although it presents more findings and guidance behind the legislature's policy choices in the statutory text. *See* N.J. STAT. ANN. § 2C:13-10.

119. WASH. REV. CODE ANN. § 9.68A.104.

120. *See id.*; *see also* N.J. STAT. ANN. § 2C:13-10; TENN. CODE ANN. § 39-13-315.

121. The Washington and New Jersey statutes are almost identical in text and effect in that they criminalize the knowing publication, dissemination, or display, as well as the direct or indirect causation, of advertisements of commercial sex acts depicting minors. *See* N.J. STAT. ANN. § 2C:13-10; WASH. REV. CODE ANN. § 9.68A.104. Thus, the law applies to both traffickers and hosts, and websites like Backpage.com could face criminal liability if they knowingly published or displayed such advertisements. The Tennessee statute is phrased differently, but was also attacked because it criminalizes the knowing sale or offer for sale of an advertisement featuring a criminal sex act with a minor, and therefore has the same practical effect as the Washington and New Jersey statutes. *See* TENN. CODE ANN. § 39-13-315. The Connecticut statute enacted in 2012 has withstood scrutiny because it only applies to users of these websites, not the websites themselves. A person must “knowingly [purchase] advertising space for an advertisement for a commercial sex act that includes a depiction of a minor” to have committed the crime. CONN. GEN. STAT. ANN. § 53a-196i (West 2012). Therefore, the Connecticut statute has not faced judicial scrutiny and may be a

Further, these statutes each contain a prohibited defense and an affirmative defense.<sup>122</sup> First, the laws expressly state that it is *not* a defense that the defendant did not know the age of the minor depicted in the advertisement.<sup>123</sup> Second, the laws state that it *is* a defense that a defendant made a reasonable, good faith effort to ascertain the true age of the minor depicted in the advertisement prior to publication.<sup>124</sup> But, this defense poses a hurdle for most defendants as it requires that, prior to publication, the defendant requested “production of a driver’s license, marriage license, birth certificate, or other governmental or educational identification card or paper of the minor depicted and did not rely solely on oral or written representations of the minor’s age, or the apparent age of the minor as depicted.”<sup>125</sup> This poses a challenge to Backpage.com and other websites that screen for depicted minors based on the apparent age of the minor and require no other proof of age.<sup>126</sup>

The states enacted these statutes in an effort to combat sex trafficking online. The New Jersey legislature outlined its findings in the statutory text, noting that “[a]dvertisements for selling the services of girls as escorts on Internet websites falsely claim that these girls are 18 years of age or older, when the girls actually are minors.”<sup>127</sup> After acknowledging the Washington and Connecticut laws previously enacted to combat sex trafficking online, the New Jersey legislature concluded that “[s]ex trafficking of minors should be eliminated in conformity with federal laws prohibiting the sexual exploitation of children” and criminalized advertising commercial sexual abuse of a minor.<sup>128</sup> These laws reflect the legislatures’ recognition that “the sale of children for commercial sexual abuse either online or in print is unacceptable,” and legislative action is needed to help society’s most vulnerable citizens.<sup>129</sup> However, the legislative targeting of minor sex trafficking advertising online poses unique issues in light of the CDA’s immunity provision.

### B. *Backpage.com versus the States: The Preemption Question*

Part II.B discusses the first issue presented in the litigation and the crux of this Note—whether the state legislation that criminalizes the publication

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viable alternative for state legislatures should they choose to abandon their crusade against the websites that host these advertisements. *See Dalton, supra* note 14, at 1115 n.82.

122. *See* N.J. STAT. ANN. § 2C:13-10(g); TENN. CODE ANN. § 39-13-315(c); WASH. REV. CODE ANN. § 9.68A.104(2).

123. *See* N.J. STAT. ANN. § 2C:13-10(g); TENN. CODE ANN. § 39-13-315(c); WASH. REV. CODE ANN. § 9.68A.104(2).

124. *See* N.J. STAT. ANN. § 2C:13-10(g); TENN. CODE ANN. § 39-13-315(c); WASH. REV. CODE ANN. § 9.68A.104(2).

125. WASH. REV. CODE ANN. § 9.68A.104(2); *see also* N.J. STAT. ANN. § 2C:13-10(g); TENN. CODE ANN. § 39-13-315(c).

126. *See supra* notes 47–53 and accompanying text.

127. N.J. STAT. ANN. § 2C:13-10(a)(3).

128. *Id.* § 2C:13-10(a)(8).

129. *Delvin Bill to Combat Online Child Escort Ads Passes House*, WASHINGTON STATE SENATE REPUBLICAN CAUCUS (Feb. 28, 2012), <http://src.wastateleg.org/delvin-bill-to-combat-online-child-escort-ads-passes-house>.

of minor sex trafficking advertisements is preempted by the CDA. Part II.B.1 explains the arguments for CDA preemption, and Part II.B.2 outlines the arguments against preemption. Part II.B.3 discusses the district courts' ultimate decision in finding that the CDA likely preempts the state legislation at issue.<sup>130</sup>

### 1. Backpage.com: Arguments for Preemption

In its *McKenna*, *Cooper*, and *Hoffman* briefs, plaintiff Backpage.com<sup>131</sup> argued for a broad interpretation of CDA immunity as applied by the majority of circuit courts.<sup>132</sup> Backpage.com cited the many cases that have granted websites immunity from civil liability, noting that “this broad immunity avoids the ‘obvious chilling effect’ on free speech” Congress sought to prevent.”<sup>133</sup>

Backpage.com argued that § 230(e)(3) grants interactive computer services immunity “under any state law of whatever kind, including criminal laws,” noting that there are exceptions for federal criminal laws but not for similar state laws.<sup>134</sup> Backpage.com argued that if Congress intended to exempt state criminal laws as well, it would have expressly included the language in § 230(e)(3).<sup>135</sup> As a result, Backpage.com concluded that the criminal statutes at issue are inconsistent with § 230

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130. The district courts in these cases were tasked with deciding whether a preliminary injunction should be granted. As a result, the arguments for preemption, First Amendment, and the Commerce Clause, were all addressed under the umbrella question of whether the plaintiffs would likely succeed on the merits; this is one of the prongs of the test for preliminary injunctions. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); *see also* *Backpage.com, LLC v. McKenna*, 881 F. Supp. 2d 1262, 1269 (W.D. Wash. 2012). Thus, the court only goes so far as to decide whether the statutes would *likely* be preempted or violate the Constitution. *See McKenna*, 881 F. Supp. 2d at 1271.

131. Although the Internet Archive is also a plaintiff in these cases, its position is not the focus of the litigation or within the scope of this Note.

132. *See McKenna* Plaintiff's Brief, *supra* note 9, at 8–12; *see also Hoffman* Plaintiff's Brief, *supra* note 9, at 17–22; *Cooper* Plaintiff's Brief, *supra* note 9, at 9–13. This Note will discuss the arguments Backpage.com presented in the *McKenna*, *Cooper*, and *Hoffman* litigation collectively due to the extensive similarities among the briefs submitted. In all three cases, plaintiff Backpage.com filed nearly identical briefs in support of its motions that presented the same key arguments relating to CDA preemption. *See Hoffman* Plaintiff's Brief, *supra* note 9, at 17–22; *Cooper* Plaintiff's Brief, *supra* note 9, at 9–13; *McKenna* Plaintiff's Brief, *supra* note 9, at 8–12. The *Hoffman* brief may be the only outlier, as it engaged in an even more thorough analysis of the key arguments supporting CDA immunity. Further, the *Hoffman* brief used the decisions from *McKenna* and *Cooper* to strengthen the argument for preemption. *See Hoffman* Plaintiff's Brief, *supra* note 9, at 17–22.

133. *McKenna* Plaintiff's Brief, *supra* note 9, at 9; *see also Hoffman* Plaintiff's Brief, *supra* note 9, at 20; *Cooper* Plaintiff's Brief, *supra* note 9, at 10; *see also infra* Part III.A.

134. *McKenna* Plaintiff's Brief, *supra* note 9, at 10; *see also Hoffman* Plaintiff's Brief, *supra* note 9, at 20; *Cooper* Plaintiff's Brief, *supra* note 9, at 11.

135. *See* Reply Brief for Plaintiff at 8, *Backpage.com, LLC v. McKenna*, 881 F. Supp. 2d 1262 (W.D. Wash. 2012) (No. 12-00954) [hereinafter *McKenna* Plaintiff's Reply Brief]; *see also* Reply Brief for Plaintiff at 13, *Backpage.com, LLC v. Cooper*, 939 F. Supp. 2d 805 (M.D. Tenn. 2013) (No. 12-00654) [hereinafter *Cooper* Plaintiff's Reply Brief].

because they treat Backpage.com as a publisher of third-party content and thus are preempted by the CDA.<sup>136</sup>

When discussing Congress's intent in passing the CDA, Backpage.com argued that Congress intended to encourage interactive computer services to restrict access to objectionable online material through voluntary participation in self-policing.<sup>137</sup> Backpage.com therefore found the problems with this state legislation two-fold. On the one hand, these statutes "in one sense [made] review and monitoring mandatory, given the risk of state criminal liability."<sup>138</sup> Conversely, Backpage.com noted that the statutes' "knowing" mens rea requirement may actually dissuade websites from reviewing third-party content to avoid criminal liability, thus contradicting § 230 and Congress's intent.<sup>139</sup>

Lastly, Backpage.com echoed important public policy concerns raised in *Zeran v. America Online, Inc.*<sup>140</sup> and other cases finding CDA immunity.<sup>141</sup> Backpage.com highlighted the differences between internet and brick-and-mortar stores, including the global nature of online business and the challenges of requiring identification before third-party posting.<sup>142</sup> Backpage.com contended that verifying identification before posting will dissuade individuals from posting content because of privacy burdens.<sup>143</sup> Thus, Backpage.com argued, these statutes "would severely restrict speech on the Internet, exactly what Congress sought to avoid."<sup>144</sup>

Legal scholar Eric Goldman speaks out frequently in support of the CDA and its immunity provision.<sup>145</sup> Shortly after the district court's decision in *McKenna*, Goldman penned an article in support of Backpage.com and the decision.<sup>146</sup> Goldman argued that the Washington statute could undermine § 230's immunity by making websites undertake costly verification and

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136. *McKenna* Plaintiff's Brief, *supra* note 9, at 11; *see also Hoffman* Plaintiff's Brief, *supra* note 9, at 22; *Cooper* Plaintiff's Brief, *supra* note 9, at 13.

137. *See McKenna* Plaintiff's Reply Brief, *supra* note 135, at 9; *see also Cooper* Plaintiff's Reply Brief, *supra* note 135, at 14.

138. *See McKenna* Plaintiff's Reply Brief, *supra* note 135, at 9; *see also Cooper* Plaintiff's Reply Brief, *supra* note 135, at 14.

139. *See McKenna* Plaintiff's Reply Brief, *supra* note 135, at 9; *see also Cooper* Plaintiff's Reply Brief, *supra* note 135, at 14.

140. 129 F.3d 327 (4th Cir. 1997).

141. *See McKenna* Plaintiff's Brief, *supra* note 9, at 11–12; *see also Hoffman* Plaintiff's Brief, *supra* note 9, at 21–22; *Cooper* Plaintiff's Brief, *supra* note 9, at 12.

142. *See McKenna* Plaintiff's Brief, *supra* note 9, at 11–12; *see also Hoffman* Plaintiff's Brief, *supra* note 9, at 21–22; *Cooper* Plaintiff's Brief, *supra* note 9, at 12.

143. *See McKenna* Plaintiff's Brief, *supra* note 9, at 12; *see also Hoffman* Plaintiff's Brief, *supra* note 9, at 22; *Cooper* Plaintiff's Brief, *supra* note 9, at 12.

144. *McKenna* Plaintiff's Brief, *supra* note 9, at 12.

145. On Forbes.com and in his Technology & Marketing Law Blog, Eric Goldman has posted many articles concerning § 230 and its immunity provision. *See* Eric Goldman, *Why The State Attorneys General's Assault On Internet Immunity Is A Terrible Idea*, FORBES (June 27, 2013, 10:44 AM), <http://www.forbes.com/sites/ericgoldman/2013/06/27/why-the-state-attorneys-generals-assault-on-internet-immunity-is-a-terrible-idea>; *infra* notes 146–49 and accompanying text.

146. *See* Eric Goldman, *Backpage Gets Important 47 USC 230 Win Against Washington Law Trying to Combat Online Prostitution Ads*, TECH. & MKTG. L. BLOG (July 31, 2012), [http://blog.ericgoldman.org/archives/2012/07/backpage\\_gets\\_i.htm](http://blog.ericgoldman.org/archives/2012/07/backpage_gets_i.htm).

record-keeping efforts.<sup>147</sup> As a result, operation of user-generated content websites would be cost prohibitive, especially for small businesses and new entrants to the market.<sup>148</sup> In a blog post after *Cooper*, Goldman noted that the courts' interpretation of § 230 is favorable because "it focuses on statutory effect, not just the statute's literal words" and noted that other courts should follow *Cooper*'s approach so that states cannot "come up with other tricky legislative workarounds to Section 230."<sup>149</sup> Kevin Bankston, an attorney for the Center for Democracy & Technology, also spoke out supporting CDA immunity in the *Backpage.com* litigation.<sup>150</sup> Bankston noted that liability for third-party content, as imposed by these state statutes, "would be devastating to the free expression environment online."<sup>151</sup> Bankston and Goldman both echoed the policy arguments made by *Backpage.com* in its briefs in support of CDA immunity.

## 2. States: Arguments Against Preemption

In response to *Backpage.com*'s motion for a preliminary injunction in each case, the state attorney general filed an opposition brief arguing that the CDA did not preempt the legislation in question.<sup>152</sup>

The states addressed the merits of *Backpage.com*'s facial attack on the statutes in question.<sup>153</sup> The states argued that, to succeed in a facial challenge, *Backpage.com* must show that the statute would not be valid under any circumstances.<sup>154</sup> Because the statutes also apply to other forms of media and traffickers themselves, the states argued that *Backpage.com* failed to meet this burden and thus the statute survives CDA preemption.<sup>155</sup>

Further, the states argued that the statutes in question are consistent with the CDA based on the CDA's stated purpose of protecting minors from obscenity on the internet and thus are not preempted under § 230(e)(3).<sup>156</sup>

147. *See id.*

148. *See id.*

149. Eric Goldman, *Some 47 USC 230 Cases From the Past Year You Might Have Missed (Because I Didn't Blog Them)*, TECH. & MKTG. L. BLOG (July 5, 2013), [http://blog.ericgoldman.org/archives/2013/07/some\\_47\\_usc\\_230.htm](http://blog.ericgoldman.org/archives/2013/07/some_47_usc_230.htm).

150. *See* Timothy B. Lee, *Here's How an Anti-Prostitution Campaign Could Threaten Free Speech Online*, WASH. POST (Aug. 9, 2013), <http://www.washingtonpost.com/blogs/the-switch/wp/2013/08/09/heres-how-an-anti-prostitution-campaign-could-threaten-free-speech-online/>.

151. *Id.*

152. *See Hoffman* Defendants' Brief, *supra* note 2, at 10–18; *see also Cooper* Defendants' Brief, *supra* note 10, at 12–17; *McKenna* Defendants' Brief, *supra* note 10, at 8–17.

153. *See McKenna* Defendants' Brief, *supra* note 10, at 11–12; *see also Cooper* Defendants' Brief, *supra* note 10, at 12–14.

154. *See McKenna* Defendants' Brief, *supra* note 10, at 11–12; *see also Cooper* Defendants' Brief, *supra* note 10, at 12–14.

155. *See McKenna* Defendants' Brief, *supra* note 10, at 11–12; *see also Cooper* Defendants' Brief, *supra* note 10, at 12–14.

156. *See Hoffman* Defendants' Brief, *supra* note 2, at 14–17; *see also Cooper* Defendants' Brief, *supra* note 10, at 16–17; *McKenna* Defendants' Brief, *supra* note 10, at 12–17. The state in *McKenna* engages in an examination of the word "consistent" and its ordinary meaning—"in agreement with, compatible, or conforming to the same principles or

The states viewed § 230(e)(3) as an explicit statement of congressional intent to grant interactive computer services immunity under state or local proceedings but not as automatic preemption.<sup>157</sup> Rather, the states argued that the CDA only preempts state laws that are *inconsistent with* the CDA.<sup>158</sup> Thus, the states contended that the “criminal statute can exist in tandem with [the CDA], and the two statutes do not conflict.”<sup>159</sup> Because the statutes at issue regulate conduct, not speech, and thus do not treat Backpage.com as a publisher or speaker of information, they are not preempted by the CDA.<sup>160</sup>

Lastly, the states argued that the statutes are consistent with the purposes behind § 230 and federal criminal laws, which are exempt from CDA immunity, and thus consistent with the CDA.<sup>161</sup> Therefore, the states conclude that the statutes in question are not preempted by the CDA.<sup>162</sup>

### 3. The District Court Decisions

In *McKenna*, *Cooper*, and *Hoffman*, the courts all ruled in favor of Backpage.com under a broad interpretation of CDA immunity.<sup>163</sup> Because plaintiff Backpage.com sought a preliminary injunction of the statutes, it

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course of action”—to conclude that the statute is in fact consistent with the CDA. *McKenna* Defendants’ Brief, *supra* note 10, at 14. This, the state claims, is supported by the legislative history of the CDA. *Id.* at 15–16.

157. See *McKenna* Defendants’ Brief, *supra* note 10, at 8, 10; see also *Hoffman* Defendants’ Brief, *supra* note 2, at 13–17; *Cooper* Defendants’ Brief, *supra* note 10, at 16–17. This theory is based entirely on the plain text of the statute. Section 230(e)(3) states: “No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.” 47 U.S.C. § 230(e)(3) (2012). However, it does not say that no law may be enacted to impose liability for third-party content; rather, states can enact legislation but its application may be preempted depending on the specific facts of a case.

158. See *Hoffman* Defendants’ Brief, *supra* note 2, at 11 (“Under this express pronouncement, the Act is not preempted by the CDA unless it is inconsistent with the CDA.”).

159. *Id.* at 10.

160. The statutes each differ in their application to an interactive service provider. The Tennessee statute criminalizes the selling or offering to sell of advertisements, not the posting. As a result, the state argues that the statutes impose liability regardless of dissemination, so long as a sale was made. Therefore, the statute does not treat an interactive service provider as a publisher. In contrast, the Washington and New Jersey statutes criminalize the knowing publication of advertisements. See *supra* note 121.

161. *McKenna* Defendants’ Brief, *supra* note 10, at 12–17.

162. The states contend that Congress’s focus in enacting the CDA was to provide interactive computer services with immunity from civil liability. In the *Hoffman* brief, the state goes so far as to argue that Congress did not intend to apply CDA immunity to criminal prosecutions at all, though this is disputed by the plaintiffs and other court interpretations of the CDA. See *Hoffman* Defendants’ Brief, *supra* note 2, at 13–14. The state noted that the CDA “was not meant to create a lawless no-man’s-land on the Internet.” *Hoffman* Defendants’ Brief, *supra* note 2, at 17 (quoting *Fair Hous. Council v. Roommates.com, LLC*, 521 F.3d 1157, 1164 (9th Cir. 2008)).

163. See *Backpage.com, LLC v. Hoffman*, No. 13 Civ. 03952, 2013 WL 4502097 (D.N.J. Aug. 20, 2013); *Backpage.com, LLC v. Cooper*, 939 F. Supp. 2d 805 (M.D. Tenn. 2013); *Backpage.com, LLC v. McKenna*, 881 F. Supp. 2d 1262 (W.D. Wash. 2012). The court opinions are very similar in both reasoning and text and are identical in outcome: all three judges granted preliminary injunctions in favor of Backpage.com.

“must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.”<sup>164</sup> With this framework in mind, the courts examined whether the plaintiff was likely to succeed on the merits in part by determining the likelihood of CDA preemption.

In making this decision, the courts first looked to the relevant provisions: § 230(c) and § 230(e)(3).<sup>165</sup> The courts analyzed Congress’s purpose in enacting the statute, noting that Congress purposely decided not to treat interactive computer services like newspapers, magazines, or television stations, which may face liability based on third-party content.<sup>166</sup> There are two primary reasons behind this decision: to encourage free speech and development of the internet and to encourage computer services to self-police the internet for obscenity.<sup>167</sup>

After highlighting the standards for preemption, the courts found that the statutes here are likely expressly preempted by the CDA and likely conflict with federal law.<sup>168</sup> After analyzing the consistency between the statutes in question and the CDA, the courts ultimately held that these criminal statutes would treat interactive computer services as publishers and would contradict the stated purposes of Congress by discouraging self-policing online.<sup>169</sup> Therefore, the courts decided that § 230 likely preempts the statutes.<sup>170</sup>

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164. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); *see also McKenna*, 881 F. Supp. 2d at 1269.

165. *See Hoffman*, 2013 WL 4502097, at \*5–6; *Cooper*, 939 F. Supp. 2d at 822–23; *McKenna*, 881 F. Supp. 2d at 1271.

166. *See Hoffman*, 2013 WL 4502097, at \*5; *Cooper*, 939 F. Supp. 2d at 824–25; *McKenna*, 881 F. Supp. 2d at 1271.

167. *See Hoffman*, 2013 WL 4502097, at \*5; *Cooper*, 939 F. Supp. 2d at 824–25; *McKenna*, 881 F. Supp. 2d at 1271.

168. *See Hoffman*, 2013 WL 4502097, at \*5; *Cooper*, 939 F. Supp. 2d at 823–26; *McKenna*, 881 F. Supp. 2d at 1273.

169. *See Hoffman*, 2013 WL 4502097 at \*5–7; *Cooper*, 939 F. Supp. 2d at 824; *McKenna*, 881 F. Supp. 2d at 1273.

170. *See Hoffman*, 2013 WL 4502097, at \*6; *Cooper*, 939 F. Supp. 2d at 828; *McKenna*, 881 F. Supp. 2d at 1275. Backpage.com raised two additional claims in this litigation: violation of the First and Fourteenth Amendments and violation of the Commerce Clause. *See Hoffman* Plaintiff’s Brief, *supra* note 9, at 22–23, 35; *see also Cooper* Plaintiff’s Brief, *supra* note 9, at 13–14, 22; *McKenna* Plaintiff’s Brief, *supra* note 9, at 12–13, 22. Backpage.com argues that this new legislation violates the First Amendment by “requir[ing] online service providers to become the government’s censors of the Internet,” consequently blocking protected speech, dispensing with scienter, and failing strict scrutiny. *See Hoffman* Plaintiff’s Brief, *supra* note 9, at 13; *see also Cooper* Plaintiff’s Brief, *supra* note 9, at 12; *McKenna* Plaintiff’s Brief, *supra* note 9, at 12. In response, the states argued that the legislation does include a scienter requirement and does not violate the First Amendment because it regulates unprotected illegal speech and thus is content neutral, surviving both intermediate and strict scrutiny. *See Hoffman* Defendants’ Brief, *supra* note 2, at 20–38; *see also Cooper* Defendants’ Brief, *supra* note 10, at 17–23; *McKenna* Defendants’ Brief, *supra* note 10, at 17–20. Backpage.com also argues that the new legislation violates the Commerce Clause by regulating commerce outside state borders because the internet does not recognize geographic borders. *See Hoffman* Plaintiff’s Brief, *supra* note 9, at 35–38; *see also Cooper* Plaintiff’s Brief, *supra* note 9, at 22–24; *McKenna* Plaintiff’s Brief, *supra* note

### C. *The Current Landscape*

In each case, the district courts ruled in favor of Backpage.com and granted a preliminary injunction that effectively prevented enforcement of the new legislation.<sup>171</sup> The Washington legislature went so far as to repeal the enjoined statute.<sup>172</sup> A district court in the Middle District of Tennessee issued a decision granting a permanent injunction,<sup>173</sup> and a district court in the District of New Jersey issued a decision granting a preliminary injunction, which was appealed to the Third Circuit but ultimately dismissed in June 2014.<sup>174</sup> Preemption was one of the key issues in the appeal.<sup>175</sup> In August 2014, Backpage.com moved for summary judgment in the District Court of New Jersey, seeking to convert the preliminary injunction into a permanent injunction.<sup>176</sup> The defendants submitted a letter advising the court that the state does not oppose Backpage.com's summary judgment motion.<sup>177</sup>

A year prior, in July 2013, the attorneys general of forty-nine states wrote to Congress requesting that the CDA be amended to expressly state that it does not preempt *state* criminal statutes.<sup>178</sup> In response, the American Civil

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9, at 22–23. The states contend that there is no Commerce Clause violation because the laws “further a legitimate local public interest without imposing an excessive burden on interstate commerce.” *Hoffman* Defendants’ Brief, *supra* note 2, at 38–42; *see also Cooper* Defendants’ Brief, *supra* note 10, at 30–35; *McKenna* Defendants’ Brief, *supra* note 10, at 33–36. Although the courts here could have simply stopped at preemption, as preemption bars the litigation before even answering the constitutional questions, they decided otherwise. The courts disagreed with the states, finding that Backpage.com would likely succeed on the merits of both the First Amendment and Commerce Clause claims. *See Hoffman*, 2013 WL 4502097 at \*7–10, \*12; *Cooper*, 939 F. Supp. 2d at 828–45; *McKenna*, 881 F. Supp. 2d at 1275, 1286. Thus, the courts ruled in favor of Backpage.com and granted the preliminary injunction.

171. *See generally Hoffman*, 2013 WL 4502097; *Cooper*, 939 F. Supp. 2d at 805; *McKenna*, 881 F. Supp. 2d at 1262.

172. S. 5488, 63rd Leg. (Wash. 2013), available at <http://apps.leg.wa.gov/documents/billdocs/2013-14/Pdf/Bill%20Reports/Senate/5488%20SBR%20FBR%2013.pdf> (repealing WASH. REV. CODE ANN. § 9.68A.104 (West 2012)).

173. *See* David Gialanella, *Law Banning Underage Escort Ads Enjoined as Constitutionally Flawed*, N.J. L.J. (Aug. 9, 2013, 5:44 PM), <http://www.law.com/jsp/nj/PubArticleFriendlyNJ.jsp?id=1202614767613>.

174. *See id.*; *see also* Dismissal Order, *Backpage.com, LLC v. Hoffman*, No. 13-3850 (3d Cir. June 10, 2014).

175. Concise Summary of the Case at 2, *Backpage.com, LLC v. Hoffman*, No. 13-3850 (3d Cir. Oct. 8, 2013). The appeal raised two other issues: “Whether N.J. Stat. Ann. § 2C:13-10b(1) comports with the First and Fourteenth Amendments [and] [w]hether N.J. Stat. Ann. § 2C:13-10b(1) runs afoul of the dormant Commerce Clause.” *Id.*

176. Motion for Summary Judgment at 1–2, *Backpage.com, LLC v. Hoffman*, No. 2-03952 (D.N.J. Aug. 20, 2013), 2013 WL 4502097.

177. Letter from Defendants to Hon. Claire Cecchi, *Hoffman*, No. 2-03952.

178. *See* Att’y Gen. Letter, *supra* note 8. The attorneys general first noted that sex traffickers use online classifieds as a vehicle for sex trades in many cases. *See id.* As a result, websites such as Backpage.com.com have built their businesses around this income from “adult” advertisements. *See id.* After highlighting the purposes of the CDA and stories of recent online trafficking victims, the attorneys general requested that Congress amend the CDA to read (amended language italicized): “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 *or State*

Liberties Union (ACLU) and other interested groups submitted a letter to Congress in support of the CDA in its current form, raising similar arguments to those made by Backpage.com.<sup>179</sup> Eric Goldman boldly wrote that “amending Section 230 to address online prostitution would be a spectacularly bad idea.”<sup>180</sup>

### III. VARYING INTERPRETATIONS OF CDA IMMUNITY AND THE STATES’ OPTIONS IN THE FACE OF PREEMPTION

The dispute concerning whether these state criminal laws are preempted by the CDA highlights important concerns with respect to CDA immunity and interpretation. Part III of this Note examines the growing conflict regarding interpretation of the CDA’s immunity provision that has developed among the courts over the past decade. Part III.A analyzes how courts have interpreted immunity under the CDA differently, which effectively decides the preemption question. Part III.B explores the litigation and legislation options states have to combat minor sex trafficking when confronting CDA preemption.

#### A. *Conflicting Interpretations of CDA Immunity*

Since the enactment of the CDA, courts have disagreed over the interpretation of the immunity granted to interactive computer services. Although the majority of courts have interpreted CDA immunity broadly, some courts and legal scholars are beginning to argue for a narrower interpretation in light of the growth and changes of the internet since the enactment of the CDA. Part III.A.1 assesses the broad interpretation of CDA immunity implemented by the majority of courts. Part III.A.2 examines the narrower interpretation applies in a number of recent cases.

##### 1. Broad Interpretation of “Interactive Computer Service” and Immunity Under the CDA

The Fourth Circuit’s decision in *Zeran v. America Online, Inc.*<sup>181</sup> has become the foundation of the extensive jurisprudence applying a broad

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criminal statute.” *Id.* (emphasis in original). This, according to the letter, will restore to state authorities the “traditional jurisdiction to investigate and prosecute those who promote prostitution and endanger our children.” *Id.*

179. See Letter to Congress (July 30, 2013), available at <https://www.cdt.org/files/pdfs/coalition-230-letter-congress.pdf>. This letter was undersigned by a number of advocacy organizations, associations, investors, and legal scholars who opposed the suggestion of the Attorneys General to amend the CDA. See *id.* The letter concluded that amending the CDA would “jeopardize the continued growth of the entire Internet industry and the free expression rights of Internet users everywhere” by disincentivizing websites from hosting third-party content. *Id.* In the letter, the undersigned stressed the importance of the need to work together to find a solution to the problem of sex trafficking while preserving free speech and innovation online but noted that the amendment suggested “should not be the starting point for . . . a productive dialogue between Congress, the State AGs, and the Internet community.” *Id.*

180. Goldman, *supra* note 146.

181. *Zeran v. Am. Online, Inc.*, 129 F.3d 327 (4th Cir. 1997).

interpretation of CDA immunity.<sup>182</sup> The decision, rendered shortly after the statute's enactment in 1996, was one of the first cases to interpret the CDA and has been cited by the majority of circuit courts that grant CDA immunity to websites and other interactive computer services.<sup>183</sup>

In *Zeran*, plaintiff Kenneth Zeran brought a civil action against AOL, arguing that AOL had acted negligently when “unreasonably delay[ing] removing defamatory messages posted by an unidentified third party, refus[ing] to post retractions of those messages, and fail[ing] to screen for similar postings thereafter.”<sup>184</sup> AOL argued that the newly enacted CDA immunized AOL as an interactive computer service from civil liability for third-party content.<sup>185</sup> The district court ruled in favor of AOL, and Zeran appealed to the Fourth Circuit.<sup>186</sup>

The court first established that AOL is in fact an interactive computer service under the CDA, as it allows subscribers to access information stored on its network.<sup>187</sup> The court then addressed the immunity provision under § 230(c), finding that “lawsuits seeking to hold a service provider liable for its exercise of a publisher’s traditional editorial functions . . . are barred.”<sup>188</sup> Congress, the court found, recognized that the threat of tort-based liability would likely chill free speech on the “new and burgeoning Internet medium” as interactive computer services would likely choose to restrict posted messages.<sup>189</sup> Although scanning each post to determine if it contains defamatory information may be feasible for a traditional print publisher, the court found that “the sheer number of postings on interactive computer services would create an impossible burden in the Internet context.”<sup>190</sup>

Therefore, by immunizing interactive computer services from liability, Congress could still enforce federal criminal laws against the original culpable party while “encourag[ing] service providers to self-regulate the dissemination of offensive material over their services.”<sup>191</sup> Noting that Congress enacted the “broad immunity” of § 230 with these purposes in mind, the court found that Zeran’s negligence claim incorrectly treated AOL as a traditional publisher, and thus the court immunized AOL from liability.<sup>192</sup>

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182. See Cecilia Ziniti, *The Optimal Liability System for Online Service Providers: How Zeran v. America Online Got It Right and Web 2.0 Proves It*, 23 BERKELEY TECH. L.J. 583, 585 (2008).

183. See Mark D. Quist, “Plumbing the Depths” of the CDA: *Weighing the Competing Fourth and Seventh Circuit Standards of ISP Immunity Under Section 230 of the Communications Decency Act*, 20 GEO. MASON L. REV. 275, 286 (2012) (observing that *Zeran* “remains the most commonly cited case in statutory analyses of Section 230”).

184. *Zeran*, 129 F.3d at 328.

185. See *id.*

186. See *id.*

187. *Id.* at 328–29.

188. *Id.* at 330.

189. *Id.*

190. *Id.* at 333.

191. *Id.* at 331.

192. *Id.*

Other circuits have repeatedly applied *Zeran*'s broad interpretation of CDA immunity from civil liability, referencing *Zeran*'s reasoning and interpretation in granting CDA immunity.<sup>193</sup> The analysis in these cases is substantially similar. First, courts restate the relevant provisions of § 230 that call for immunity of interactive computer services.<sup>194</sup> The courts then address Congress's dual purpose in enacting the CDA: "to encourage the unfettered and unregulated development of free speech on the Internet, and to promote the development of e-commerce."<sup>195</sup> Courts then engage in an analysis of these purposes and the dangers posed to free speech on the internet without immunity, citing to *Zeran* and other subsequent cases.<sup>196</sup> Finally, the courts grant immunity to the website at issue.<sup>197</sup>

In addition to expansively interpreting the CDA's immunity provision, these cases have broadly interpreted the definition of an interactive computer service while rejecting any argument that would label the same interactive computer service an information content provider.<sup>198</sup> In effect, this has led to an even broader grant of immunity under the CDA, as websites are immune even if engaging in activities that could be considered the "creation or development of information."<sup>199</sup> Supporters of this expansive immunity reason that the CDA ensures free speech online, while fostering the growth and development of the internet, and oppose attempts at CDA reform that would threaten these First Amendment protections.<sup>200</sup>

Some courts and legal scholars have acknowledged the challenges posed by this immunity. In *Blumenthal v. Drudge*,<sup>201</sup> the court noted that "[i]f it were writing on a clean slate, this Court would agree with plaintiffs."<sup>202</sup> However, the court acknowledged that Congress made a different policy

193. See, e.g., *Universal Commc'n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 419–420 (1st Cir. 2007); *Almeida v. Amazon.com, Inc.*, 456 F.3d 1316, 1321 (11th Cir. 2006); *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1123–24 (9th Cir. 2003); *Batzel v. Smith*, 333 F.3d 1018, 1027–28 (9th Cir. 2003); *Green v. Am. Online, Inc.*, 318 F.3d 465, 471 (3d Cir. 2003); *Ben Ezra, Weinstein, & Co. v. Am. Online, Inc.*, 206 F.3d 980, 986 (10th Cir. 2000).

194. See, e.g., *Lycos*, 478 F.3d at 418–19; *Almeida*, 456 F.3d at 1320–22; *Carafano*, 339 F.3d at 1123–24; *Batzel*, 333 F.3d at 1026–29; *Green*, 318 F.3d at 470–71; *Ben Ezra*, 206 F.3d at 985; *Zeran*, 129 F.3d at 330.

195. *Batzel*, 333 F.3d at 1027.

196. See, e.g., *Almeida*, 456 F.3d at 1323; *Carafano*, 339 F.3d at 1122–23; *Batzel*, 333 F.3d at 1028; *Ben Ezra*, 206 F.3d at 985 n.3; *Zeran*, 129 F.3d at 330.

197. See, e.g., *Lycos*, 478 F.3d at 422; *Almeida*, 456 F.3d at 1324; *Carafano*, 339 F.3d at 1125; *Batzel*, 333 F.3d at 1035; *Green*, 318 F.3d at 473; *Ben Ezra*, 206 F.3d at 980, 987–988; *Zeran*, 129 F.3d at 335.

198. *Carafano*, 339 F.3d at 1123 ("In light of these concerns, reviewing 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'").

199. See 47 U.S.C. § 230(f)(3) (2012).

200. See *Quist*, *supra* note 183, at 308–09 (noting that if Congress wishes to resolve the CDA conflict, it must do so without undermining the internet's development); see also William H. Freivogel, *Does the Communications Decency Act Foster Indecency?*, 16 COMM. L. & POL'Y 17, 44 (2011) ("Even some of the most moderate of the reforms . . . could raise First Amendment problems.").

201. 992 F. Supp. 44 (D.D.C. 1998).

202. *Id.* at 51.

choice and “has conferred immunity from tort liability as an incentive to Internet service providers to self-police the Internet for obscenity and other offensive material, even where the self-policing is unsuccessful or not even attempted.”<sup>203</sup> This statement expresses the inherent challenge that has led some courts to narrow their interpretation of CDA immunity. Moreover, with the increasing prevalence of cyberbullying, defamatory posts on social media, and online sex trafficking, many legal scholars and government officials have noted that the CDA’s vague language has resulted in overly broad immunity for proper internet regulation.<sup>204</sup> Section 230(e) also acts as an obstacle for state legislatures attempting to combat these issues by establishing new criminal laws that are often preempted by the CDA.<sup>205</sup> As a result, some courts and scholars have become skeptical of the broad immunity conferred by § 230, and a growing minority of cases have narrowed the interpretation of the CDA.

## 2. Narrowing Interpretation of “Interactive Computer Service” and Immunity Under the CDA

In a number of recent cases, courts have conducted a more searching review of the acts of interactive computer services and have narrowed the interpretation of CDA immunity to impose liability on websites for third-party content. First, in two Seventh Circuit cases, Judge Easterbrook expressed his views in dicta that a narrower interpretation may be more appropriate, and other judges have agreed.<sup>206</sup> Next, the Ninth Circuit in *Fair Housing Council of San Fernando Valley v. Roommates.com*<sup>207</sup> denied CDA immunity and imposed liability on the interactive computer service Roommates.com.<sup>208</sup> Finally, the Tenth Circuit, following the lead of the Ninth Circuit in *Roommates.com*, also denied CDA immunity to an interactive computer service in *FTC v. Accusearch*.<sup>209</sup>

Although the facts of these minority cases are markedly different than the ones discussed in Part III.A.1, the reasoning behind the decisions is crucial

203. *Id.* at 52.

204. *See* Freivogel, *supra* note 200, at 19 (“One impetus for limiting Section 230 immunity comes from instances of anonymous Internet abuse that have grabbed headlines and largely escaped legal consequences . . . abuses include cyberbullying of teens, the humiliation of female college students, racially discriminatory housing postings, ubiquitous pornography.”).

205. *See id.*; *see also supra* Part II.

206. *See, e.g.*, *Chi. Lawyers’ Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666 (7th Cir. 2008); *Doe v. GTE Corp.*, 347 F.3d 655 (7th Cir. 2003).

207. 521 F.3d 1157 (9th Cir. 2008).

208. *See id.*

209. *See* *FTC v. Accusearch Inc.*, 570 F.3d 1187 (10th Cir. 2009). The Eastern District of Kentucky in *Jones v. Dirty World Entertainment Recordings*, 766 F. Supp. 2d 828, 836 (E.D. Ky. 2011), also applied the *Roommates.com* holding to find interactive computer service liability, illustrating the shift from the typical broad immunity conferred to websites occurring in a minority of courts. The court denied CDA immunity to Dirty World LLC, noting that “[t]he immunity afforded by the CDA is not absolute and may be forfeited if the site owner invites the posting of illegal materials or makes actionable postings itself,” as Dirty World did here by posting defamatory statements written by an employee as part of the website’s businesses. *Id.*

to understanding this change in interpretation. In *Doe v. GTE Corp.*<sup>210</sup> and *Chicago Lawyers' Community for Civil Rights Under Law v. Craigslist*,<sup>211</sup> the Seventh Circuit addressed the need for narrower interpretation of the CDA.<sup>212</sup> Judge Easterbrook penned these two opinions, urging judges to interpret the CDA in the context of its title, "Protection for 'Good Samaritan' blocking and screening of offensive material."<sup>213</sup> Under the current broad interpretation, Judge Easterbrook noted that interactive computer services are encouraged to do nothing about the distribution of indecent and offensive materials and still enjoy immunity under § 230(c), which is exactly contrary to the intentions of Congress as outlined in § 230(b).<sup>214</sup> However, Judge Easterbrook also acknowledged that the CDA does not provide "a grant of comprehensive immunity from civil liability for content provided by a third party."<sup>215</sup>

Although the decisions in both *Doe* and *Chicago Lawyers' Community* granted CDA immunity, Judge Easterbrook addressed important concerns about the broad, majority interpretation of immunity.<sup>216</sup> He noted in dicta that "causing a particular statement to be made, or perhaps [causing] the discriminatory content of a statement" to be made by a third party may be sufficient to deny CDA immunity and hold an interactive computer service liable for that content.<sup>217</sup> This is the same reasoning that is used by a minority of courts in denying CDA immunity to interactive computer services.

Only five years later, the Ninth Circuit issued a striking opinion in *Roommates.com* that utilized a narrow interpretation of CDA immunity to find that Roommates.com acted as an information content provider.<sup>218</sup> Roommates.com "elicit[ed] the allegedly illegal content and [made] aggressive use of it in conducting its business" by requiring users to answer discriminatory questions before creating housing profiles and thus acted as an information content provider for the purposes of § 230.<sup>219</sup>

Judge Kozinski pointed out an important distinction in the congressional intent of the CDA overlooked by many other circuits.<sup>220</sup> In enacting the CDA, "Congress sought to immunize the *removal* of user-generated content, not the *creation* of content."<sup>221</sup> If an interactive computer service posts original content or is responsible for the creation or development of

210. 347 F.3d 655 (7th Cir. 2003).

211. 519 F.3d 666 (7th Cir. 2008).

212. *Id.* at 666; *see also GTE Corp.*, 347 F.3d at 655.

213. *See* 47 U.S.C. § 230(c) (2012); *see also GTE Corp.*, 347 F.3d at 660.

214. *See GTE Corp.*, 347 F.3d at 660 ("Why should a law designed to eliminate ISPs' liability to the creators of offensive material end up defeating claims by the victims of tortious or criminal conduct?").

215. *Chi. Lawyers' Comm.*, 519 F.3d at 670.

216. *See* Quist, *supra* note 183, at 296.

217. *Chi. Lawyers' Comm.*, 519 F.3d at 671.

218. *See* Fair Hous. Council v. Roommates.com, LLC, 521 F.3d 1157 (9th Cir. 2008).

219. *Id.* at 1172.

220. *See id.* at 1163.

221. *Id.*

such content, it may also be an information content provider.<sup>222</sup> When an interactive computer service acts as an information content provider, Congress did not intend for CDA immunity to apply.<sup>223</sup> It is based on this reasoning that the Ninth Circuit denied Roommates.com immunity.

The court noted an important policy concern that justifies a narrow interpretation of CDA immunity and preemption:

The Internet is no longer a fragile new means of communication that could easily be smothered in the cradle by overzealous enforcement of laws and regulations applicable to brick-and-mortar businesses. Rather, it has become a dominant—perhaps the preeminent—means through which commerce is conducted. And its vast reach into the lives of millions is exactly why we must be careful not to exceed the scope of the immunity provided by Congress and thus give online businesses an unfair advantage over their real-world counterparts, which must comply with laws of general applicability.<sup>224</sup>

The court recognized the changes in the internet and its maturity over the last decade and reasoned that this is a strong indication that a narrower interpretation of CDA immunity is more appropriate.<sup>225</sup> “[S]uch a broad reading[,]” as in cases such as *Carafano v. Metrosplash.com, Inc.*,<sup>226</sup> “would sap section 230 of all meaning.”<sup>227</sup> Thus, the Ninth Circuit created a new rule that has been applied by a minority of circuits over the past five years: “a website helps to develop unlawful content, and thus falls within the exception to [§ 230 immunity], if it contributes materially to the alleged illegality of the conduct.”<sup>228</sup>

In *FTC v. Accusearch*, the Tenth Circuit looked at the meaning of the words “development” and “responsible” in the definition of information content provider to determine whether, as in *Roommates.com*, the website operator should be denied CDA immunity.<sup>229</sup> The Court construed the term “development” broadly, and held that an interactive computer service is responsible for the development of offensive content only if it in some way

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222. *See id.* at 1162–63.

223. *See id.* (“When Congress passed section 230 it didn’t intend to prevent the enforcement of all laws online; rather, it sought to encourage interactive computer services that provide users *neutral* tools to post content online to police that content without fear that through their ‘good samaritan . . . screening of offensive material,’ . . . they would become liable for every single message posted by third parties on their website.”).

224. *Id.* at 1164–65 n.15.

225. *See id.*

226. 339 F.3d 1119 (9th Cir. 2003).

227. *See Roommates.com*, 521 F.3d at 1172. The court engaged in an extensive discussion of why its holding does not contradict other Ninth Circuit precedent such as *Carafano v. Metrosplash*. *See id.* at 1171–76. The court concluded that the case at bar is quite different than *Carafano* in that Roommates.com explicitly elicited the discriminatory information from users. *See id.*

228. *Id.* at 1168. Judge Kozinski opined: “The message to website operators [after this case] is clear: If you don’t encourage illegal content, or design your website to require users to input illegal content, you will be immune.” *See id.* at 1175.

229. *FTC v. Accusearch Inc.*, 570 F.3d 1187, 1197–200 (10th Cir. 2009).

specifically encourages the development of the offensive content; thus, Accusearch was liable as an information content provider.<sup>230</sup>

The primary argument against narrower immunity is the threat to free speech and innovation on the internet.<sup>231</sup> However, there is still support for narrower immunity both within these opinions and in the legal world.<sup>232</sup> For example, in a Harvard Journal of Law & Public Policy article, Gregory Dickinson argued against broad immunity when stating that the internet “and its extremely broad immunity seems slightly out of step with modern policy objectives.”<sup>233</sup> He reasoned that as a “robust and integral part of modern life[,]” the internet can now be safely subjected to some regulation.<sup>234</sup> Thus, a narrower interpretation of CDA immunity would be more appropriate to regulate conduct online.<sup>235</sup> Further, the notion that holding websites liable for third-party content or requiring review of online posts would be too burdensome is losing traction as many websites, including Backpage.com, have started to actively screen material before publication with little imposition.<sup>236</sup>

Although these arguments for limited immunity are logically consistent with the purposes of the CDA,<sup>237</sup> narrower CDA immunity is still the minority viewpoint among the courts. Therefore, when confronted with CDA immunity, those looking to impose civil or criminal liability on interactive computer services such as Backpage.com must tackle a challenging obstacle and consider new solutions to an enduring problem.

#### *B. Potential Solutions to Combat Domestic Minor Sex Trafficking in the Face of CDA Preemption*

States have litigation and legislation options to stop minor sex trafficking online despite CDA preemption. Since the enactment of the CDA, a

230. *Id.*

231. *See, e.g.,* Gregory M. Dickinson, *An Interpretive Framework for Narrower Immunity Under Section 230 of the Communications Decency Act*, 33 HARV. J.L. & PUB. POL’Y 863 (2010); Matthew G. Jeweler, *The Communications Decency Act of 1996: Why § 230 Is Outdated and Publisher Liability for Defamation Should Be Reinstated Against Internet Service Providers*, 8 U. PITT. J. TECH. L. POL’Y 3 (2007) (arguing that distributor liability should be reinstated to narrow CDA immunity); Miree Kim, *Narrowing the Definition of an Interactive Service Provider Under § 230 of the Communications Decency Act*, 2003 B.C. INTELL. PROP. & TECH. F. 33102 (arguing that Congress should create a narrower definition of interactive computer service in order to protect the internet).

232. *See* Dickinson, *supra* note 231, at 874.

233. *Id.*

234. *Id.*

235. *See id.*

236. *See* Larkin, *supra* note 62, at 110–11. Larkin notes: “every court which has granted immunity under Section 230 has noted the impossibility of manually reviewing each post for potential liability. Craigslist’s decision to recruit a staff to review each proposed post undercuts this rationale for immunity.” *Id.* at 110. In reviewing its posts with even more manpower and levels of review than Craigslist, Backpage.com is also undercutting this justification. *See supra* notes 47–53 and accompanying text.

237. *See* Quist, *supra* note 183, at 296 (noting that “insomuch as [limited immunity] embraces the limited goal of incentivizing content monitoring under the CDA, it remains logically consistent” with congressional intent).

number of legal scholars, courts, and other interested parties have suggested that a change in the CDA may be necessary to combat minor sex trafficking online. Part III.B.1 examines the litigation strategies states may employ to hold websites such as Backpage.com liable for permitting prostitution advertising on its “adult” section. Part III.B.2 outlines the legislative options that Congress has to permit states to effectively combat sex trafficking online.

### 1. Litigation Options

Legal scholars have examined the possible litigation strategies that can be pursued against websites such as Backpage.com.<sup>238</sup> In the face of CDA preemption of inconsistent state criminal laws, such as the statutes at issue in the Backpage.com litigation, these strategies may prove useful in helping hold websites criminally accountable for posting minor sex trafficking advertisements.

One of the stated policy goals of § 230 is “to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.”<sup>239</sup> With this in mind, Congress expressly created an exception to CDA immunity under federal law.<sup>240</sup> Therefore, the strongest avenue of criminal prosecution against Backpage.com and other websites may be through federal law.<sup>241</sup>

Prosecutors may have success by charging Backpage.com under federal obscenity law.<sup>242</sup> One of the expressly exempted federal laws, 18 U.S.C. § 1465, criminalizes the knowing production with the intent to transport, or the knowing transportation, of an interactive computer service for the purpose of the sale or distribution of obscene media.<sup>243</sup> Advertisements in Backpage.com’s “adult” section often contain obscene images and text, thus constituting obscene media under the statute.<sup>244</sup> Because Backpage.com admits to manually filtering the posts in its adult section, “*mens rea* will be

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238. See generally Larkin, *supra* note 62 (discussing prosecution strategies for civil and criminal liability); see also Ashley Ingber, *Cyber Crime Control: Will Websites Ever Be Held Accountable for the Legal Activities They Profit from?*, 18 CARDOZO J.L. & GENDER 423, 441–45 (2012) (discussing different prosecution options for liability under criminal law).

239. 47 U.S.C. § 230(b)(5) (2012).

240. *Id.* § 230(e)(1) (“No effect on criminal law. 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.”).

241. See Larkin, *supra* note 62, at 95.

242. See *id.*

243. 18 U.S.C. § 1465 (2012); see also Larkin, *supra* note 62, at 95 (discussing prosecution under obscenity); Lawrence G. Walters, *Shooting the Messenger: An Analysis of Theories of Criminal Liability Used Against Adult-Themed Online Service Providers*, 23 STAN. L. & POL’Y REV. 171, 191–92 (2012) (discussing potential for obscenity prosecutions against online service providers).

244. See *Hoffman Defendants’ Brief*, *supra* note 2, at Ex. A (displaying Backpage.com advertisements including promiscuous pictures and text).

all but a non-issue,” and criminal liability may follow.<sup>245</sup> However, there is little case law thus far to support the use of § 1465 against corporate website operators.

Prosecutors may also look to prosecute Backpage.com under an accomplice liability theory of aiding and abetting prostitution.<sup>246</sup> Under 18 U.S.C. § 2, a defendant is punishable as a principal if he or she “aids, abets, counsels, commands, induces or procures” or “willfully causes an act to be done which if directly performed by him or another would be an offense against the United States.”<sup>247</sup> In theory, if Backpage.com knowingly published an advertisement for prostitution depicting a minor, it could be liable for the same crime as the original third-party poster under the federal prostitution statute.<sup>248</sup> However, it will be a significant challenge to prove that Backpage.com aided or “willfully caused” prostitution under the federal statute because proving knowledge will be difficult given the volume of advertisements Backpage.com reviewers see each day.<sup>249</sup>

Prosecutors may also be successful in charging Backpage.com under federal child pornography laws.<sup>250</sup> According to a symposium article by scholar Lawrence Walters, under 18 U.S.C. § 2252A, the government must prove:

- (1) The defendant knowingly received or possessed an item or items of child pornography, as charged;
- (2) Such items of child pornography had been transported, shipped or mailed in interstate or foreign commerce, including by computer; and
- (3) At the time of such reception or possession of the materials, the defendant believed that such items constituted or contained child pornography.<sup>251</sup>

Thus, the government may be able to prove these elements by showing that Backpage.com allowed third parties to post sexual advertisements depicting pornographic images of minors, especially because these laws do not specifically require proof of defendant’s knowledge of the minor’s age.<sup>252</sup> Nevertheless, prosecutors will still face the challenge of proving

245. Larkin, *supra* note 62, at 97; *see also supra* notes 47–53 and accompanying text (discussing Backpage.com’s review procedures).

246. *See* Larkin, *supra* note 62, at 97; *see also* Ingber, *supra* note 238, at 444 (discussing potential accomplice liability for online service providers); Walters, *supra* note 243, at 191–92 (same).

247. 18 U.S.C. § 2.

248. *See* Larkin, *supra* note 62, at 97; *see also* 18 U.S.C. § 2421 (“Whoever knowingly transports any individual in interstate or foreign commerce . . . with intent that such individual engage in prostitution . . . can be charged with a criminal offense . . .”). Larkin argued that Backpage.com may also be prosecuted under state promotion laws because the website charges fees for the posting of adult advertisements, but the preemption of state law claims under § 230(e)(3) may be problematic unless the court decides, as Larkin assumes throughout his article, that Backpage.com is an information content provider. *See* Larkin, *supra* note 62, at 95 n.72, 99–100; *see also* Ingber, *supra* note 238, at 445.

249. *See* Larkin, *supra* note 62, at 98; *see also supra* notes 47–53 and accompanying text.

250. *See* Walters, *supra* note 243, at 195.

251. *Id.*

252. *See id.* at 195–96.

that this posting was made knowingly given the vast amount of posts reviewed by Backpage.com staff each day.<sup>253</sup> Further, there is a safe harbor provision, 18 U.S.C. § 2258A, which would immunize Backpage.com from liability when good faith policing efforts were taken to report child exploitation.<sup>254</sup> Backpage.com clearly has demonstrated its efforts to report offenses to federal authorities and would thus likely find immunity from a child pornography charge under this federal provision.<sup>255</sup>

When predicting the success of these prosecutions, it becomes clear that Backpage.com and other interactive computer services will not bear responsibility for minor sex trafficking on their sites “unless either legislatures reform the language of Section 230 to explicitly allow for criminal liability, or judges start interpreting and enforcing it differently.”<sup>256</sup> Therefore, although states may be able to encourage federal prosecution of Backpage.com under the aforementioned laws, legislative change is necessary to truly hold websites responsible for sex trafficking.

## 2. Legislative Options

Litigation options will likely be ineffective in holding sites like Backpage.com responsible for its users’ posts, and most state legislation is preempted by the CDA.<sup>257</sup> Therefore, Congress could act to amend the CDA, slightly curtailing CDA immunity for interactive computer services while giving plaintiffs and state legislatures some ability to combat minor sex trafficking online. Part III.B.2.a discusses an amendment to the CDA that incorporates the notice-and-takedown model of the Digital Millennium Copyright Act (DMCA). Part III.B.2.b examines the attorneys general’s suggestions for a CDA amendment. Part III.B.2.c describes an amendment to the CDA exempting all state human trafficking and prostitution laws.

### a. *CDA Amendment Incorporating the Digital Millennium Copyright Act’s Notice-and-Takedown Model*

In a note for the New York University Annual Survey of American Law, David Lukmire suggested that the notice-and-takedown model used in applying the DMCA would be effective in applying the CDA.<sup>258</sup> The DMCA provides a liability shield for interactive computer services for copyright-infringing content posted by third parties if the websites do not have knowledge of infringement.<sup>259</sup> The DMCA also provides that a

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253. See Larkin, *supra* note 62, at 98 (discussing challenges of proving a knowledge requirement in cases against Craigslist); see also *supra* notes 47–53 and accompanying text.

254. See Walters, *supra* note 243, at 197–98.

255. See *supra* notes 47–53 and accompanying text.

256. Ingber, *supra* note 238, at 445.

257. See *supra* Part II.B.1.

258. See Lukmire, *supra* note 64, at 406–07. Judge Berzon also endorsed this idea in a footnote in *Batzel v. Smith*, where she mentioned that the DMCA notice-and-takedown model may be a possible solution to the troubling results created by § 230. 333 F.3d 1018, 1031–32 n.19 (9th Cir. 2003).

259. 17 U.S.C. § 512(c)(1) (2012).

website cannot be liable if “upon notification of claimed infringement . . . [it] responds expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity.”<sup>260</sup>

If Congress amended the CDA to include a similar notice-and-takedown provision, it would provide a limited safe harbor for websites.<sup>261</sup> There are two conflicting viewpoints regarding the effectiveness of this limited immunity. Some argue that if a website were given notice of a defamatory or otherwise offensive posting, the website would be incentivized to remove postings to maintain immunity under the notice-and-takedown amendment.<sup>262</sup> Thus, congressional intent behind the CDA immunity would be preserved because offensive postings would be removed.<sup>263</sup> On the other hand, some argue that websites would be incentivized *not* to police the content on their website so as to avoid “knowingly” permitting infringed material to be posted and would instead merely wait for notification of offensive content.<sup>264</sup>

*b. CDA Amendment to § 230(e)(1) Exempting All State Criminal Laws*

The attorneys general of forty-nine states recommended that Congress amend the CDA to exempt all state criminal laws from its purview, as previously only federal criminal laws were exempt.<sup>265</sup> By adding two words—“or State”—the attorneys general argue that Congress can restore local authorities’ “traditional jurisdiction to investigate and prosecute those who promote prostitution and endanger our children.”<sup>266</sup> Those who support a CDA amendment note that the modification would only create liability for illegal and injurious posted content.<sup>267</sup> Therefore, eliminating preemption of state criminal laws will give states an opportunity to combat minor sex trafficking at a local level within their state.

260. *Id.* § 512(c)(1)(C).

261. *See* Lukmire, *supra* note 64, at 406.

262. *See id.*

263. *See id.*; *see also* 47 U.S.C. § 230(b)(5).

264. *See* Ziniti, *supra* note 182, at 604–08; *see also* Jeweler, *supra* note 231, at 25. Jeweler noted that “some courts and scholars worry that this type of notice-based liability for entities classified as distributors will encourage those entities to ignore the content that is posted through their websites to avoid having the required notice.” Jeweler, *supra* note 231, at 25. He also described the obvious contradiction identified by courts narrowly interpreting § 230: “It is counterproductive to attempt to encourage websites to self-regulate offensive content by immunizing them for the same offensive content, regardless of whether the websites actually screen and police content.” *Id.* at 25–26. Therefore, notice-and-takedown may be more successful than critics expect. *See id.* at 26–27. Conversely, Ziniti argued that copyright law is too distinct from the CDA and thus it would be ineffective and far too complicated to implement notice-and-takedown. *See* Ziniti, *supra* note 182, at 607–08.

265. *See* Att’y Gen. Letter, *supra* note 8.

266. *Id.* Abigail Lawlis Kuzma also discussed this amendment. *See* Kuzma, *supra* note 33, at 54–55. However, she acknowledged the shortcomings of the suggestion, noting that the amendment would likely be ineffective given that attempts at using federal criminal laws, which are exempt from the CDA, have been unsuccessful. *See id.* at 55.

267. *See* Petition, *supra* note 12.

In response, the ACLU and other interest groups penned a letter to Congress strongly opposing the suggestion by the attorneys general to amend the CDA.<sup>268</sup> These critics argued that this amendment would dramatically reduce free expression online and plague websites with “open-ended legal risk” from individualized state criminal statutes.<sup>269</sup> Thus, when faced with expensive and inconsistent obligations from state laws, opponents argue that websites will be forced to comply with the most restrictive statutes or shut down.<sup>270</sup> Critics also argue that this amendment is unnecessary.<sup>271</sup> The CDA only bars inconsistent state laws,<sup>272</sup> and states can enact criminal laws to combat minor sex trafficking and prosecute the actual traffickers or any “service providers who actually aid and abet the illegal conduct of others.”<sup>273</sup> In concluding their criticism, the signers acknowledged the problem of sex trafficking and encouraged cooperation between Congress, the attorneys general, and the internet community, but they did not yet propose a specific amendment or suggestion for change.<sup>274</sup>

*c. CDA Amendment to § 230(e) Exempting  
State Human Trafficking and Prostitution Laws*

The CDA already includes a number of important exceptions for different laws that Congress felt § 230 immunity should not affect.<sup>275</sup> An amendment to the CDA creating an additional carve-out for human trafficking and prostitution laws may be an effective way to permit states to act without eliminating civil liability altogether.<sup>276</sup> Abby Perer proposed a “Commercial Sex Distribution Amendment” to the CDA where an interactive computer service “would become a distributor once local or national law enforcement officials alerted the provider to the presence of illegal sex-sales ads” and traditional distributor liability would apply from there.<sup>277</sup> This, she argued, would force websites to take responsibility for third-party commercial sex advertisements and preserve the underlying policy goals of the CDA by treating websites as distributors, not publishers.<sup>278</sup>

Most critics of this amendment argued that it would crush free speech on the internet.<sup>279</sup> The court in *Zeran* also directly rejected this distinction and held that distributor liability is merely a subset of publisher liability precluded by § 230.<sup>280</sup> Further, the court noted that distributor liability

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268. See Letter to Congress, *supra* note 179.

269. See *id.* at 2.

270. See Zimmerman, *supra* note 12.

271. See *id.*

272. 47 U.S.C. § 230(e)(3) (2012).

273. See *id.*

274. See Letter to Congress, *supra* note 179.

275. See *supra* notes 82–89 and accompanying text.

276. See Perer, *supra* note 73, at 847.

277. *Id.*

278. See *id.* at 847–50.

279. See *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 333 (4th Cir. 1997).

280. *Id.* at 331–32.

would require that interactive computer services review all postings to avoid liability, which would prove challenging given the large number of postings on the internet.<sup>281</sup>

Regardless of the variation of amendment selected, the greatest challenge of all for states will be encouraging Congress to act and amend the CDA.<sup>282</sup>

#### IV. THE BEST SOLUTIONS IN THE FACE OF CDA PREEMPTION: THE CASE FOR NARROWER IMMUNITY AND A FEDERAL CRIMINAL STATUTE

The unresolved questions are: First, should the CDA be broadly interpreted to preempt state laws. Second, if states are confronted with CDA preemption, what is the best course of action to effectively combat minor sex trafficking online? Part IV of this Note attempts to reconcile this conflict by arguing for a narrower interpretation of the CDA and a change in the law. Part IV.A argues that a narrower interpretation of the CDA is desirable given the development of the internet and the prevalence of minor sex trafficking online. Part IV.B proposes a federal criminal statute that punishes the knowing publication of online commercial sex advertisements depicting minors that will effectively combat minor sex trafficking while maintaining free speech and uniformity of law on the internet.

##### A. *The Advantages of Narrowly Interpreting CDA Immunity*

When Congress initially enacted the CDA, the internet was a new and burgeoning medium filled with uncertainty.<sup>283</sup> At the time, there were few laws regulating the internet, and Congress recognized a problem with the availability of obscene material online to children.<sup>284</sup> Congress also understood the large differences between the internet and traditional print, recognizing the internet's potential as a forum for both speech and commerce.<sup>285</sup> Therefore, in enacting the CDA, Congress attempted to reconcile these purposes by creating *civil* immunity for interactive computer services, those providers that hosted third-party content.<sup>286</sup> By providing immunity from civil suits traditionally faced by print media, such as defamation, to those who merely provided website services and did not *create* content, Congress hoped to encourage providers to self-police their websites for obscene content.<sup>287</sup> When considering the numerous exceptions from immunity Congress included in § 230, there is little evidence that Congress realized or intended the expansive immunity that has resulted from circuit court interpretations of these key definitions: "interactive computer services" and "information content provider."<sup>288</sup> The distinction between the two is at the heart of the debate and determines

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281. *See id.* at 333.

282. *See* Lukmire, *supra* note 64, at 407.

283. *See supra* note 56 and accompanying text.

284. *See supra* notes 69–71 and accompanying text.

285. *See supra* notes 69–71 and accompanying text.

286. *See supra* notes 63–66 and accompanying text.

287. *See supra* notes 71–73 and accompanying text.

288. *See supra* Part I.B.3.

which websites are liable for third-party content and which are immune under the CDA.<sup>289</sup>

In effect, the majority of circuit courts provide immunity under the CDA to a variety of websites and internet hosts that walk a fine line between providing and creating content.<sup>290</sup> Although immunity is appropriate in cases where third parties are solely responsible for creating the defamatory content, extending this immunity to those websites that engage in substantial modification of this content is inapposite and beyond Congress's intent in enacting the CDA.<sup>291</sup>

The internet has changed significantly since 1996 and is now an established medium with the capability of surviving under more restrictive regulation.<sup>292</sup> Now, the internet is a robust and developed technology that can still flourish despite more regulation and liability, similar to regulation of print media.<sup>293</sup> Yet print media engaged in the same traditional publishing *functions* do not have blanket immunity from all civil suits.<sup>294</sup> Because posting online is more accessible for third-party users than publishing in print media, the laws for each cannot be identical.<sup>295</sup> Congress considered these differences in choosing to grant civil immunity to interactive computer services that merely publish third-party content.<sup>296</sup> The current expansive interpretation, however, provides too much freedom to websites and internet hosts, such as Backpage.com, which post potentially illegal content with no repercussions.<sup>297</sup>

Narrowing the interpretation of an "interactive computer service" offers a number of advantages. First, a narrower interpretation would more effectively assign responsibility to websites capable of removing defamatory and criminal content. Given the current state of technology that has led to a surge in cyberbullying, commercial sex advertisements, and other immoral or illegal content, this shifting responsibility is increasingly important.<sup>298</sup> In the digital age, as exemplified by Backpage.com's current monitoring efforts, monitoring content is much easier and less costly for websites in part due to advancements in keyword searching and filtering technology.<sup>299</sup> Holding websites accountable as information content providers for knowingly publishing third-party content that is criminal in nature is not so burdensome as to cripple e-commerce and chill free

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289. *See supra* note 223 and accompanying text.

290. *See supra* note 223 and accompanying text.; *see also supra* note 227 and accompanying text (discussing Judge Kozinski's observation that a broad reading of § 230 eliminates its meaning).

291. *See supra* note 225 and accompanying text; *see also supra* notes 233–35 and accompanying text.

292. *See supra* notes 233–35 and accompanying text.

293. *See supra* notes 233–35 and accompanying text.

294. *See supra* note 66 and accompanying text.

295. *See supra* note 66 and accompanying text.

296. *See supra* note 72 and accompanying text.

297. *See supra* notes 231–36 and accompanying text.

298. *See supra* notes 231–36 and accompanying text.

299. *See supra* notes 231–36 and accompanying text.

speech.<sup>300</sup> As a result, scrutinizing internet publishing and narrowing the definition of an immune interactive computer service would better regulate a now-mature technology by holding those websites that extensively edit and post third-party-created defamatory or criminal material liable as “information content providers.”<sup>301</sup>

Second, a narrower interpretation of the CDA would give plaintiffs and prosecutors the tools to pursue justice when interactive computer services deliberately act in an unlawful manner.<sup>302</sup> If the courts applied a narrower interpretation of CDA immunity in the litigation against Backpage.com, the courts may have found Backpage.com liable under the CDA for encouraging illegal content on its website.<sup>303</sup>

### *B. The Legislative Solution: A Federal Criminal Statute*

The ideal way to achieve a narrower interpretation of the CDA—and combat domestic minor sex trafficking online—is to change federal law. Legislative action is more likely to succeed than judicial action, because websites that do not create or substantially modify content may still qualify for immunity, even under the Ninth Circuit’s approach in *Roommates.com*.

Scholars have made numerous suggestions for what a legislative change should look like and how it should affect the internet regulatory scheme.<sup>304</sup> This Note proposes a new federal criminal statute that provides a uniform standard for websites to follow and avoids preemption by the CDA, with the same practical effect as those enacted by Washington, Tennessee, and New Jersey. This new federal statute would criminalize the *knowing* publication of online minor sex trafficking advertisements for traffickers who purchased advertising space and websites who knowingly publish or fail to take down advertisements despite having notice of illegality.

While it is true that the attorneys general’s suggestion to eliminate preemption for all state law criminal claims would give states more power at a local level to combat trafficking, the amendment presents a number of problems for websites and other service providers because of the internet’s

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300. *See supra* notes 231–36 and accompanying text. Under a narrower interpretation of CDA immunity, immunity will still be granted when websites are acting solely as publishers and not to create or develop content. Based on the rule in *Roommates.com* and the definition of creation or development, under a narrower interpretation websites still must have personally created or substantially modified the content. In order for a website to ensure immunity, it must closely monitor anything its employees modify before publication. Therefore, while some argue that narrower immunity may be burdensome on smaller websites or new entrants, in order to maintain immunity a website must carefully monitor only the content that it edits and reviews before publication. If it is capable of reviewing this content, even a small website should be able to review it for defamatory or illegal material without an excessive burden, especially given improvements in technology and filtering software.

301. *See supra* notes 231–36 and accompanying text.

302. *See supra* note 228 and accompanying text.

303. *See supra* note 228 and accompanying text; *see also* Part II.B.

304. *See supra* Part III.B.

global nature.<sup>305</sup> Even with the existing technological advances, requiring websites to comply with inconsistent state laws for any crime would be burdensome.<sup>306</sup> Moreover, because some states have criminal defamation laws, an exemption for all state criminal laws would open the floodgates to liability for the exact claim Congress intended to immunize.<sup>307</sup>

Additionally, an amendment to the CDA to exempt state laws specific to sex crimes, such as minor sex trafficking, would not resolve all of the problems presented by the attorneys general's suggestion either.<sup>308</sup> While websites would not be open to extensive liability for all crimes, they would still be required to comply with fifty states' sex crimes laws.<sup>309</sup> Although these criminal statutes appear similar in ways, websites still must comply with all state laws because of the global scope of the internet.<sup>310</sup> The internet does not recognize state borders in the same way print and other media can, and thus, websites like Backpage.com are open to liability from all states unless a geographic limitation is placed on its offerings and advertisements.<sup>311</sup> This type of limitation would cripple speech.<sup>312</sup> Therefore, an amendment to the CDA exempting only state sex crime laws would be ineffective and overly burdensome.<sup>313</sup> Thus, the aforementioned suggestions have a number of limitations that lead to overbreadth and insufficiency and show that an amendment to the CDA may not be the right solution.

This Note proposes a better and more effective legislative solution: a federal statute criminalizing the knowing publication of online commercial sex advertisements of minors. A federal statute modeled after the Washington, Tennessee, and New Jersey state laws would have many advantages over individual state laws while still punishing those websites that knowingly publish illicit advertisements.<sup>314</sup>

This federal criminal statute regulating online sex advertisements of minors would be exempt from CDA immunity.<sup>315</sup> Under § 230(e), the CDA expressly exempts *all* federal criminal laws.<sup>316</sup> This statute therefore resolves the preemption challenge states have faced in the district court cases addressed in Part II of this Note.<sup>317</sup> Further, because these statutes

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305. *See supra* Part III.B.2.b (discussing the differing viewpoints regarding the Attorneys General's recent proposition for a CDA amendment).

306. *See supra* notes 269–70 and accompanying text.

307. *See supra* notes 63–66 and accompanying text.

308. *See supra* Part III.B.2.c (discussing Abby Perer's proposed "Commercial Sex Distribution Amendment" to the CDA).

309. *See supra* note 270 and accompanying text. Although the opponents to the attorneys general's amendment presented this idea, the same reasoning would apply here.

310. *See supra* note 270 and accompanying text.

311. *See supra* note 170 (discussing the Commerce Clause claims brought by Backpage, which highlight the global nature of the internet).

312. *See supra* note 279 and accompanying text.

313. *See supra* note 279 and accompanying text.

314. *See supra* Part II.A; *see also supra* notes 119–21 and accompanying text.

315. *See supra* notes 82–87 and accompanying text.

316. *See supra* notes 82–87 and accompanying text.

317. *See supra* Part II.B (discussing the litigation between Backpage.com and the states in which the courts found the state legislation was preempted by the CDA).

have been tested in the district courts, Congress can learn from the mistakes made by state legislatures and draft a federal statute that resolves the First Amendment vagueness and overbreadth concerns raised by Backpage.com and other websites.<sup>318</sup> A federal statute can regulate interstate commerce online and thus resolve the Commerce Clause issues argued in the district courts.<sup>319</sup>

This federal criminal statute would punish those who knowingly publish online sex advertisements. It directly furthers the states' goal of combating minor trafficking on online classifieds such as Backpage.com.<sup>320</sup> By eliminating mistake of age as a defense, a federal criminal statute would encourage companies to better monitor their posts and provide some form of age verification.<sup>321</sup> This statute furthers the states' mission to fight online sex trafficking. It also furthers Congress's intent by encouraging self-policing of obscene and illicit content online.<sup>322</sup> Self-policing continues to be an important goal today, as evidenced by the recommendations for reform raised by senators and representatives.<sup>323</sup>

To ensure the continuation of content hosting on the internet, this federal criminal statute would effectively reduce the risk of liability for websites and other interactive computer services by including a notice-and-takedown provision, similar to the DMCA.<sup>324</sup> Given that Backpage.com and many other websites already use technology and manual review to screen third-party postings, this model would be easy to implement.<sup>325</sup> Further, the statute is limited to content that advertises sex acts with minors.<sup>326</sup> Thus, sites that do not host punishable content, such as those run by small businesses and retailers, will not be impacted by this statute.<sup>327</sup> Lastly, this notice-and-takedown model gives websites an opportunity to avoid liability by taking down the offensive content and reporting the sex trafficking of minors, something that many websites such as Backpage.com already purport to do.<sup>328</sup> However, it would still permit prosecution of websites that knowingly post such advertisements or fail to remove illegal content.<sup>329</sup>

This federal criminal statute is not without flaws. It will not effectively address the problem at a local level by giving states the power to enact

318. *See supra* note 170.

319. *See supra* note 170.

320. *See supra* notes 127–29 and accompanying text.

321. *See supra* notes 122–26 and accompanying text.

322. *See supra* notes 70–73 and accompanying text.

323. *See supra* notes 70–73 and accompanying text.

324. *See supra* Part III.B.2.a (examining Lukmire's suggestion of a DMCA-style notice-and-takedown provision for the CDA).

325. *See supra* notes 47–53 and accompanying text.

326. *See supra* notes 119–21 and accompanying text.

327. *See supra* notes 119–21 and accompanying text.

328. *See supra* notes 260–61 and accompanying text. Congress could also consider including a minimum standards provision, similar to the TVPA's minimum standards. *See supra* note 22 and accompanying text. This provision could require websites that host third-party content to engage in some form of review, such as keyword searches, filtering, manual review, or age verification. This decision, however, would best be left to Congress after careful research and consideration of the costs and benefits of implementing such standards.

329. *See supra* notes 260–63 and accompanying text.

individual legislation; however, that approach is inapt given the global scope of the internet and its cross-border impact. It may also contain loopholes that permit Backpage.com and other websites to host some minor sex trafficking advertisements without consequence. Nevertheless, by creating a manageable and effective regulatory model for online advertisements, a federal criminal statute will further the states' interests in combating minor sex trafficking at the source, while balancing the concerns of internet providers and other interest groups.

#### CONCLUSION

Minor sex trafficking is a growing problem in the United States. The explosion of classified advertisements on the internet provides a new outlet for traffickers to find customers for prostitution and sexual exploitation. Although these websites, such as Backpage.com, claim to monitor "adult entertainment" postings, advertisements are hardly censored and posters' ages are taken at face value. Change is necessary to control these illegal advertisements, and states may be better situated to address this growing problem. However, courts' broad interpretation of the CDA effectively preempts states from passing legislation to take steps toward a solution.

Although changes in society and the maturing of the internet dictate that a narrower interpretation of the CDA is appropriate, courts are unlikely to change their interpretation because of strong judicial precedent favoring immunity. With federal preemption creating barriers for state legislation, states are left with few options. States can continue to enact creative criminal statutes that narrowly avoid preemption or attempt to prosecute these websites under federal law. The most effective resolution, however, comes from Congress in the form of a federal statute criminalizing the advertising of commercial sex acts depicting minors. A federal statute will provide a uniform law for websites to follow while still taking steps to combat minor sex trafficking online. Congress can build upon the states' experiences to draft improved legislation that resolves the constitutional challenges states in district court litigation face. Further, including a notice-and-takedown provision will allow Backpage.com and other websites to avoid liability by removing known minor sex trafficking advertisements. By enacting this federal criminal statute, Congress and the states will together make strides to protect America's children from victimization and online sex trafficking.