IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY

BACKPAGE.COM, LLC, : Civil No. 13-cr-3952-DMC

Plaintiff, :

v. : TRANSCRIPT OF PROCEEDINGS

JOHN JAY HOFFMAN, Acting Attorney General of the State of New Jersey, et al., :

Defendants. :

THE INTERNET ARCHIVE, : Civil No. 13-cv-3953-DMC

Plaintiff, :

v. :

JOHN JAY HOFFMAN, Attorney General of the State of New Jersey, et al., :

Defendants. :

Newark, New Jersey
August 9, 2013

BEFORE:

THE HON. DENNIS M. CAVANAUGH, U.S.D.J.

Reported by:
CHARLES P. McGUIRE, C.C.R.
Official Court Reporter

Pursuant to Section 753, Title 28, United States Code, the following transcript is certified to be an accurate record as taken stenographically in the above entitled proceedings.

s/CHARLES P. McGUIRE, C.C.R.

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THE COURT CLERK: All rise.

THE COURT: Be seated.

Shocking this created such interest.

All right. This is the matter of Backpage.com, LLC, v. John Jay Hoffman, Attorney General of the State of New Jersey, and Internet Archive v. Hoffman, Civil Number 13-3952.

Could we have your appearances, please?

MR. ROSEN: Bruce Rosen, McCusker Anselmi Rosen & Carvelli, local counsel for Backpage.com.

MR. GRANT: Jim Grant, also on behalf of Backpage.com, and with the Court's indulgence, I'd like to introduce Ms. Elizabeth McDougall, who is general counsel of Backpage.com.

THE COURT: Okay.

MR. CORRADO: Good morning, Your Honor.

I'm Frank Corrado, from Barry, Corrado & Grassi in Wildwood. I'm here on behalf of Plaintiff Internet Archive.

MR. ZIMMERMAN: And Matt Zimmerman, here also on behalf of Plaintiff Internet Archive.

THE COURT: Fine. Be seated.

MR. FEINBLATT: Good morning, Your Honor.

Stuart Feinblatt, Assistant Attorney General, State of New Jersey, on behalf of the Defendants.

And I have with me two of my colleagues who

assisted in preparing for the stay, Deputy Attorneys General Ashlea Thomas and Eric Pasternack.

THE COURT: Okay.

MS. VENETIS: Good morning, Your Honor.

Penny Venetis from Rutgers Law School, representing amici in this case. There are approximately 50 public-interest and service organizations that work in New Jersey and throughout the world to combat human trafficking.

THE COURT: Okay. Be seated.

Plaintiffs Backpage.com and the Internet Archive bring this action to preliminarily and permanently enjoin section 12(b)(1) of New Jersey statute 2C:13-10, which was approved May 6, 2013, titled the Human Trafficking Prevention, Protection and Treatment Act, known as "the Act."

Federal Courts in Tennessee and Washington have entered permanent injunctions prohibiting those states from enforcing statutes that are identical to the Act in all material respects. In both cases, the courts held that the statutes were unconstitutional and unenforceable on the ground that the Plaintiffs have advanced here. See Backpage.com, LLC v. McKenna, 881 F. Supp. 2d 1262 (W.D. Washington 2012) and Backpage.com, LLC v. Cooper, 2013 WL 1558785 (M.D. Tenn. January 3, 2013).

This Court temporarily restrained the statute from going into effect after a hearing on June 28th, 2013.

In determining whether a preliminary injunction should be granted, a District Court must consider four factors: First, whether the movant has shown a reasonable probability of success on the merits; second, whether the movant will be irreparably injured by denial of the relief; third, whether granting preliminary relief will result in even greater harm to the nonmoving party; and, four, whether granting preliminary relief will be in the public interest. See Gerardi v. Pelullo, 16 F.3d 1363, 1373 (3d Cir. 1994).

I'll now hear oral argument.

MR. GRANT: Good morning, Your Honor.

Again, Jim Grant on behalf of Backpage.com.

THE COURT: Okay. Also, I want you to be aware that I have read the papers, so I'm assuming what we're going to do is highlight things. We don't have to repeat everything in the papers.

MR. GRANT: That's my aim, Your Honor, plus --

THE COURT: I'm sure it was, but I just always like to let you know.

MR. GRANT: Plus to focus my comments to any questions or comments that the Court has specifically.

Let me start with what I think are three basic points that are not in dispute by anyone in this courtroom.

The first is that human trafficking is an atrocity, and trafficking in -- sex trafficking in minors is especially abhorrent. No one disputes that, and specifically, my client does not dispute that, and fully supports effective measures to combat sex trafficking and human trafficking, and, in fact, works closely with law enforcement to identify and prosecute and to rescue children.

Second, the Internet represents perhaps the greatest expansion of free speech in the world and its history, but like any forum or open forum for speech, some of the content is offensive, it's deplorable, and some of it is illegal.

The issue here is whether the State can criminalize the online service providers who provide the forum for the speech, the platform that people can misuse.

Third, the protections of the First Amendment are the cornerstone of the Constitution, and section 230 of the Communications Decency Act is Congress' embodiment of the protection of free speech on the Internet. Congress was aware that people may misuse the Internet and made a specific policy choice to leave open the robust speech of the Internet and to immunize online service providers from third parties' speech, and no matter how atrocious a problem it is that the State seeks to combat, it must do so

consistently with First Amendment principles that are the foundation of the society.

THE COURT: What do you say, by the way, about -- I guess it's Rutgers' position or the argument that they made that if you're dealing with the preemption, we don't even have to get to the constitutional issue? What do you say about that?

MR. GRANT: Well, I think, in fact, the Court should reach the constitutional issues. First, I think, quite clearly, the Act's section 13-10 is preempted under section 230, but, aside from that, we're bringing a facial challenge to the entire statute except the portion that has to do with liability of individuals. But that means all people, all speakers, all online content providers, all publishers, whether that's print, online or otherwise. And there are very serious constitutional problems with the statute. So as the courts did in McKenna and Cooper, the Washington and Tennessee cases, I believe this Court also needs to reach those constitutional issues because they are intertwined, they are part and parcel with the section 230 issues as well. 230 is free speech on the Internet. We also need to talk about free speech in the Constitution.

THE COURT: Okay. Thank you.

MR. GRANT: The Court's familiar with how we got here. The Washington statute was passed after craigslist

shut down its adult-oriented category under pressure from attorneys general. Backpage.com refused to do that, believing that was not a solution to sex trafficking. Washington passes its statute. That's struck down on the same grounds. It's the identical statute for all present purposes. Tennessee then passes a follow-on statute that's materially the same, also struck down, also permanently enjoined.

One of the central problems throughout this case, I think, is that the Legislature first and then the Defendants since have tried to characterize the Act, section 13-10, in all sorts of different ways. But the issue here is not what the State says the Act is; rather, it's what the actual terms of the Act are and what its effect would be.

I don't know if it would be useful to the Court. I can provide you copies of the relevant terms of the statute or I can just address them, but --

THE COURT: You can just address them.

MR. GRANT: Okay.

The actual term of the law creates a first-degree crime for anyone who either knowingly publishes, disseminates, or displays, or causes, directly or indirectly, to be published, disseminated, or displayed any ad or posted online content that concerns an explicit or implicit offer for sex for which something of value is given

or received by any person and includes the depiction of a minor.

Let me boil that down a little bit. So basically a web site distributor of third party speech would be criminally liable if they incorrectly caused dissemination of speech that contains an implicit offer of sex for something of value if it contains a depiction of a minor. And bear in mind that the last part of that, the depiction of a minor, is a strict liability element of the crime. The Defendants concede that. There is no defense under the statute about not knowing the age of the person depicted, except for the provisions about getting government-issued ID directly from every third party who posts on the Internet or otherwise provides content.

The statute is enormously overbroad and vague in numerous ways, and I'll only touch on a few because much of this is in the briefing.

First, the statute is overbroad as to the parties that are targeted, and this specifically implicates section 230 of the Communications Decency Act. It's overbroad because it encompasses any party that directly or indirectly causes offending content to be disseminated or displayed, and that means not just Backpage.com, that means craigslist, that means Facebook, that means Google, that means thousands of online service providers, and it would make the online

service providers essentially the censors of the Internet. They would either have to review, verify, and restrict selected ads by reviewing everything that's submitted as third party content, or -- and this is the safer course -- simply block third-party content altogether because they'd never be able to determine where an offending ad may appear and where it wouldn't.

This directly violates section 230 of the CDA, which prohibits online service providers from being held liable as the publisher or speaker of any information provided by third parties, or for taking steps to monitor or block inappropriate or illegal content.

And the Act does exactly what section 230 provides. In effect, it would penalize web sites for not reviewing content or not in diversion of reviewing content that the State says it mandated, effectively the Government ID.

And here I should point out that Backpage does take extensive measures to monitor or to block content, especially anything that may be suspected of relating to child sex trafficking. It includes an automated filtering system and manual review by more than 100 personnel to look at the ads that are posted in the adult sections.

I only want to say one other thing about section 230 because Mr. Zimmerman will address some of that as well,

and that is this. It really should no longer be an issue here because Defendants have admitted that section 230 does preempt the Act. On July 23 of 2013, the group of attorneys general, including Attorney General Hoffman, sent a letter to four U.S. senators and representatives, and Ms. Venetis submitted that letter to the Court.

THE COURT: I think there were 49. Didn't almost every Attorney General in the country --

MR. GRANT: Almost every Attorney General in the country, that's right.

THE COURT: Who didn't do it?

MS. VENETIS: You know, Your Honor, I don't know, I didn't go through the list, but there are attorneys general from other districts and protectorates who signed as well, so they made up for the 50th dissenter.

THE COURT: Just wondering.

MR. GRANT: The attorneys general date back for some time, as well as other politicians, but with the campaign to try to shut down web site after web site, first craigslist, now Backpage.com.

The letter that Attorney General Hoffman, who, by the way, represents all the Defendants here in the case, said he -- he and the other attorneys general urge that section 230 should be amended to exclude state criminal laws from immunity and from preemption. And I'll quote from the

letter, because he left no doubt, the Attorney General left no doubt as to why they advocate that position. They said because they seek to prosecute online classified advertising services such as Backpage.com, and because the courts have broadly interpreted the immunity provided by the CDA, and he specifically mentioned the decision in McKenna, in short, the AG here has expressly admitted that 230 requires amendment and Congress would have to amend it in order to target Backpage.com and in order to support the Act. Otherwise, section 230 pre-empts the Act.

As I say, I'll leave other issues as to section 230 to Mr. Zimmerman.

But the Court pointed out the constitutional issues as well, and let me touch on some of those.

First, the statute lacks the kind of scienter that's required under Supreme Court precedent. Now, here is another case where the Defendants attempt to rewrite the Act in a number of different ways. They say that the Act only makes it a crime for a publisher or other provider to knowingly publish an ad promoting prostitution of a minor, but here again, I urge the Court, you have to focus on the actual terms of the law. That's not what it says. What it says is that -- if we read the statute the way the Defendants suggest, the concept of "knowingly" would receive rather strained readings: A provider or defendant can be

guilty if it knowingly causes indirectly an implicit offer of sex to be disseminated. As the Court said in McKenna, nobody has any idea what that would mean.

The other problem with Defendants' argument about how the scienter now works is they effectively can't have it both ways. On the one hand, they're arguing for a very narrow interpretation of the Act in order to try to save it. On the other hand, though, they acknowledge that the Act is meant to close the advertising market -- this is quoting from their brief -- and to quash the entire industry in all of its manifestations. The media said the same thing. Essentially, this is to shut down everything that is adult-oriented on Backpage and then presumably on other web sites as well. And, in fact, the findings of the Legislature said the same thing, that this was targeted specifically at Backpage.com. Both McKenna and Cooper accepted the same arguments about how to interpret knowing to apply to the entire statute, and both still struck down the statute as having insufficient scienter under the Constitution, and that's because, even if you accept the State's argument, it still misses scienter as to the age of the person depicted in the advertisement. That, Your Honor, is constitutionally required. That's the X-Citement Video case. For 50 years, the Supreme Court has said you cannot impose liability on distributors of speech based on the age

of someone depicted in an ad unless you have knowledge -- the Defendant has knowledge of that depiction and the age of the party.

Defendants' response to this is sort of a misdirection argument, to say that we are urging that there has to be a mistake-of-age defense built into the statute.

Your Honor, we pointed this out in the briefing, and I won't go into detail unless you would like, but that's completely off the mark. That's not our argument. And the mistake-of-age cases that they are talking about are statutes that penalize conduct, not distribution of speech. They're completely separate.

The Defendants also attempt to avoid constitutional analysis altogether, stating repeatedly that if the State has legitimate purpose, it may restrict speech as it chooses.

Again, Your Honor, that is not the law. We like to think that the State always has a legitimate purpose when it sets about to pass legislation to combat some social issue. That does not mean, for instance, that the State could ban all speech on the Internet that's adult-oriented because they presume that some of it may have to do with sex trafficking. The question is, what does the statute say and what is the breadth of the statute. And because the statutes here seeks to criminalize or to restrict speech,

it's subject to the most exacting scrutiny under the Constitution, strict scrutiny. Under strict scrutiny, the statute is presumed invalid, the State has to show that it's narrowly tailored to promote a compelling interest of the State, and that it is the least restrictive alternative available. Almost no statute has ever passed that standard.

The difficulty with this statute is that it affects vast swaths of commercial -- of constitutionally protected speech, and not only in the sense of the broadly defined definitions, but because what it required web sites and other online providers to do is to review essentially every content that has any relation or could have any relation to sex and would have depiction in it. So you'd have to review all that material, or, again, the alternative would be simply to block it. That includes dating ads, personal ads, chat rooms, and vast additional amounts.

The State argues that this is a content-neutral ad. Your Honor, I suggest that's completely off the mark as well. The Act is a quintessential example of a content-specific ad because it defines the crime and defines the penalty based on what is said. That is content-specific, and that is subject to strict scrutiny.

Your Honor, as well, the Act is dramatically underinclusive and ultimately would not be effective. It only criminalizes, for example, ads, of course, that contain

the depiction, so ads that don't have a depiction but could advertise anything, even, say, sex with a 15-year-old, $100, that would not be prohibited under the Act.

It also does nothing to affect offshore web sites. The McKenna court pointed this out in particular. And the problem that we've seen -- the craigslist experience teaches this -- is that once you ban one web site, and then try to ban the next, it's simply going to push the issue to other web sites and potentially offshore web sites that do not cooperate with law enforcement in the way that Backpage.com does.

And under Defendants' latest interpretation of the Act, if this knowledge requirement works as they say, then it would encourage web sites not to review ads at all, so as to never to have any knowledge. That would be exactly contrary to the intent of the CDA, which was to give immunity to reviewing and from blocking inappropriate content. It would also lead to the perverse result that, potentially, you could have more sex trafficking rather than less.

Your Honor, there are many appropriate and worthwhile approaches to combat sex trafficking. In fact, other provisions of the Legislature's Human Trafficking Prevention, Protection and Treatment Act, of which section 13-10 is a part, are commendable, and they're worthwhile

approaches. But censoring speech and imposing criminal liability on web sites and other distributors and undercutting the openness of the Internet that Congress intended is not the answer, and it is not an answer within the bounds of the First Amendment or the CDA.

We urge that the preliminary injunction be entered.

THE COURT: Thank you.

MR. ZIMMERMAN: Good morning, Your Honor. My name, again, is Matt Zimmerman, here on behalf of the Plaintiffs, the Internet Archives.

THE COURT: Good morning.

MR. ZIMMERMAN: I am going to go somewhat to the comments made by Mr. Grant, but I'm here on behalf of the Internet Archive, that has a slightly different perspective and a slightly different reason for --

THE COURT: Keep your voice up just a bit.

MR. GRANT: Excuse me.

I'm Here on behalf of the Archive. The Internet Archive is seeking to challenge the statute for slightly different reasons than Backpage.com is.

As Mr. Grant described, the Act clearly attacks direct publishers, and, indeed, the legislative history of the Act specifically points out Backpage.com, but the language of the statute certainly was not limited to that --

to a specific narrow application like that, and, indeed, the language of the statute is not only broad, but extraordinarily broad, and explicitly so and intentionally so. The statute does not extend to direct publishers, but the statute explicitly extends to entities who directly or indirectly cause to be published, disseminated, or displayed, and the statute makes no attempts to actually define those terms and to explain any kind of limiting principle whatsoever, and indeed, the purpose of the Act is to -- appears to be, and the language backs it up, that the goal is to cast as broad a net as possible. And that broad net captures a number of other -- other players, such as my client.

The Internet Archive -- the goal of the Internet Archive is to be a 21st-century library. Basically, their primary function is to record archives of the Internet and all other kinds of digital content or born-digital material so that future generations are able to have access to it. And there are any number of reasons, just as with a traditional library, that entities may want to have access to the types of material that are on the Internet, and the Act makes no distinction between subsequent types of players like the Archive. Indeed, the language extends -- wouldn't extend simply to an archive such as my client, but also to players such as Internet service providers or web posting

companies or others who not only publish material but indirectly cause to be displayed information that is covered by the statute at hand.

I want to focus primarily on the Communications Decency Act. Both the Defendants' and the amici attempt to carve out a very narrow role or a very narrow Congressional intent for the CDA, and it's simply inconsistent with the language of the statute. It's inconsistent with what Congress was trying to do. Recall in 1996, when the statute was passed, Congress was presented with this exciting, important new technology, the Internet, that was promising to be the most important development, not only for speech, but for democratizing speech. This allowed not only direct actors to publish, but it allowed millions of people around the world to speak directly on their own behalf and to speak directly to other people in a way that they were never able to do -- to do so in the past.

On the flip side of that, because so many people were allowed to speak in an unfiltered kind of way, Congress was certainly concerned about the negative or objectionable kind of content that the Internet permitted. So Congress did a number of things, tried to keep in mind both of those priorities: One, certainly to preserve the unregulated, robust nature of the Internet, but also wanted to combat or provide tools to try to combat the dissemination of

objectionable content, and it did it in a number of ways. It tried to direct -- it banned the publication of indecent material in one part of the CDA, and in another part of the CDA, Congress wanted to make sure that we -- that Congress set forth clear lines for who would be responsible given this new reality. This was something that we hadn't seen before, that we had millions of people speaking on their own. So in addition to the direct prohibition on the distribution of indecent material that not so incidentally was promptly struck down by the Supreme Court the next year as it was violating First Amendment, Congress also ensured that Internet intermediary service providers would not be held responsible for the postings of third-party users. And that was a direct response to a particular case. There was a case in New York called Stratton Oakmont v. Prodigy, and the Court, the New York court there said that because Prodigy in that case was attempting to do the right thing, that they had made themselves specifically aware of the type of content that was on their message board, they actively monitored it, they were attempting to cultivate it, that that gave them liability, that imposed liability on them as a publisher. And specifically in response to that kind of ruling and in response to this concern that Internet intermediaries would start to self-censor, would overcensor, would start to shut down these avenues for speech, Congress

passed section 230, which very clearly, without exception -- well, without exception other than the inapplicable ones in this case, would protect service providers from liability based on what their users did. And none of the exceptions that are built into the statute applied.

Now, the Defendants argue that the exception in the statute that -- excuse me -- the exception in the statute that consistent laws, state laws can actually be applied, it's a true statement of fact that consistent laws can be upheld and if they're not in conflict with 230.

But this law plainly is in conflict with the statute. There is a blanket protection protecting intermediaries, service providers from liability, and only -- again, only if a statute is consistent with this section, as the statute says, this section being section 230, the immunity provisions, will a statute be upheld. And clearly this is not the case. CDA 230 says we are not going to treat Internet service providers as publishers, and, indeed, that's the way the statute wants to do. In fact, it goes beyond that: It says not only the direct publisher, but every subsequent player in the chain, anyone who directly or indirectly causes to be published, disseminated, or displayed, anyone in this chain can be held responsible. And that obviously raises concerns for our client, whose objection is to archive the entire Internet.

The Defendants also argue that there is a criminal law carve-out out of section 230, and that's true, but incomplete. There is a carve-out for Federal criminal law, not state criminal law. No court has ever held that state criminal law -- that there's a state criminal law carve-out. The language doesn't support that, and, indeed, the reading that only a Federal law carve-out is appropriate is completely consistent with what Congress was trying to do, in fact, to the point of passing the CDA, that this is a nationalized policy, that this is a blanket rule for the Internet. Congress was trying to specifically prevent a patchwork set of regulations governing the Internet from emerging, and what the Defendants argue here -- have argued in their papers would present just that, just that risk.

Aside from the CDA, Mr. Grant has touched on a number of the other constitutional concerns. I won't go into them very deeply here. Essentially, it is unconstitutionally vague, the language I mentioned before, the State makes no attempts to define what the terms indirect, indirectly distribute, or what an implicit advertisement offering sex trafficking is supposed to mean. It makes no attempts to contain them or to limit their application, indeed, because the language doesn't actually have a limiting principle, so we don't know precisely what it is that that -- that language is supposed to cover, and

the concern is a very real one. The statute isn't just designed to get at direct publishers, but indirect ones as well.

There's also an overbreadth problem. The section should be struck down if a substantial number of the applications are unconstitutional. This is the case here. There's no intent requirement, for example, so anyone who, for example, wanted to criticize these advertisements, made reproductions, handed them out, pointed it to people and said, This is an advertisement that is abhorrent, there's nothing in the statute that prevents that from being a felony under New Jersey law. Again, there's no -- the intent, again, does not save the Legislature from its obligation to actually comply with the Constitution and to comply with the CDA.

I stand on our papers for the other issues, and again, we ask the Court to convert the TRO into a preliminary injunction.

Thank you.

THE COURT: Thank you.

Counsel?

MR. FEINBLATT: Good morning again, Your Honor.

THE COURT: Good morning.

MR. FEINBLATT: On behalf of the State Defendants, Stuart Feinblatt.

I was happy to see that Mr. Grant started out asserting points on which we do agree. I think there is one that should be added to the list, which is that there's no doubt that the ads that are really being targeted by the statute, such as those that are on the adult sections for Backpage.com, do facilitate the sexual exploitation of children. I don't think there could be any dispute about that.

And I note that recently, there's been some press about the fact that the F.B.I., about a week ago, and it was referenced in the reply brief, one of the articles, had done a rescue of 105 young people around the country, and, predictably, in the article I have in front of me, the Court said -- the agency, I should say, what do they do to get, to find out about these crimes and locate the victims? They went and monitored Backpage.com.

And the fact is that Backpage.com has been used, as is mentioned in another Attorney General letter that's in the record from 2011, there have been dozens if not hundreds of prosecutions for sexual exploitation of children that involved the use of advertisements on Backpage.com. And in this particular article, the general counsel of Backpage.com, who I understand is here today, is quoted, and she points out that she was proud that the information that they provided from their advertisements led to the rescues.

She said: "We feel very strongly that we're doing the right thing, and we're going to continue to do the right thing, and we congratulate the F.B.I. and everybody with the task force involved in the program."

It's the State's position that this is, to a certain extent, twisted logic. There's no question here that there's a recognition that these advertisements are used to connect the sex victim to the customer in what is no doubt an illegal transaction. The issue is, can the State take steps to pass laws that will try to prevent this from happening in the first place --

THE COURT: Without violating the law.

MR. FEINBLATT: Right, without violating the First Amendment.

THE COURT: I don't think anybody's quarreling with the issue that these advertisements are terrible. I mean, nobody's -- well, not nobody -- most of us, I think, would feel that way. And I think, while they don't want to dwell on it, I think even the Plaintiffs recognize that.

But that's not our problem, is it?

MR. FEINBLATT: Well, I think that's the first step, to find out.

THE COURT: That is a problem --

MR. FEINBLATT: Well, because we need to start by looking at the statute and what the purposes were behind the

statute; and in this case, the New Jersey statute, perhaps unusually, didn't start by just stating what the law was and what the criminal violation was. It provided several findings that I think are not disputed here regarding why the law was passed.

THE COURT: But there's no question that our elected officials weren't trying to do the right thing. They were trying to --

MR. FEINBLATT: Right.

THE COURT: -- solve this issue. And I can understand why they did that, and I can understand why the law was signed. But that's not really why we're here.

MR. FEINBLATT: Right, but I think that plays a role in interpreting the statute. I think we need to take into account the purpose and findings of the State when reviewing the statute, and we state respectfully that there has been -- I know they are arguing in their reply papers that the State has misconstrued the statute, rewritten it to make it easier to defend. We submit that it's the other side that is overplaying their hand, that this statute is not overbroad, is designed in a narrow way to deal with the knowing publication of ads that seeks to sexually exploit minors.

So let's look at the language. It defines a new type of crime called advertising commercial sexual abuse of

a minor. That's what we're dealing with here.

The next provision, which is the critical one, is the one that we were told here today is overbroad, vague, underinclusive, it's wrong in many ways.

We disagree. And I think if you look at the language of (b)(1), there are really two clauses to it. The first is that a person is subject to the Act if the person "knowingly publishes, disseminates, or displays," and then we go down below that, to "an advertisement for commercial sexual act which is to take place in the state which includes the depiction of a minor."

That is what I would call and the other courts that have looked at this have called the publishing clause.

There's no doubt that "knowingly" modifies that section, and so there's no question about scienter there.

What's being argued here is that the second clause, which says -- which I'll call the causing clause -- "or causes, directly or indirectly, to be published, disseminated, or displayed," these ads.

The question is, what does that mean? And our position is that that has got to be tied into the first part, and what's being approached here is the issue of people facilitating the publication of the ad - in other words, the pimp or the person who's hired by the pimp indirectly to have this ad being published. This is not

designed to deal with Google, which, if you put a search entry into Google for Backpage, will lead you to Backpage. It's not designed to deal -- they argue actually in their brief that, you know what, computer monitor manufacturers could be liable under this statute; after all, without the monitor, who would be able to read the, you know, the ad for Backpage.com?

It's our position that these are ludicrous, way overreaching, irresponsible and unreasonable readings of the statute; that this is designed simply to deal with the person who facilitates the placing of the ad on the site. It's not designed to deal with everybody in the Internet who might somehow have a link or a reference to that advertisement.

And also, it's very important to point out as we did in our brief that New Jersey law under the criminal statutes provides that "knowingly," if using a "knowingly" standard, it has to apply to all the material elements of the action unless indicated otherwise.

So it's our position that it does apply to all material elements, other than the issue of age that we'll get to in a moment.

There's also the argument that, you know, the statute's vague for many reasons, and one of them, I think, should be mentioned right now, which is that the statute

talks about either explicit or implicit offer of sex, right, for a commercial sex act to occur.

What does "implicit" mean? The indication here from the Plaintiffs is: That's so vague. What could that mean? Why is that here?

It's very obvious why that is here: Because these advertisements, including the ones that were provided to Your Honor from Lisa Shea, those ads, of course, do not explicitly say sex or prostitution, but I could pull one out now, we can go over it on the record if Your Honor would like, there's no question there's an implicit offer for sex.

And I point out that Backpage.com understands the reality of this, that these offers are typically not going to be explicit. I look at their own terms of use that they have provided, you know, in the record. There's one here that says, we prohibit -- I'm sorry. It says, "We ask that users agree to refrain from the following," and one is "posting any solicitation directly -- " -- which I would say is explicit -- " -- or in coded fashion for any illegal service, exchanging sexual favors for money or other valuable consideration."

What is "coded"? It's another word for "implicit."

The reality is that human language is not perfect. This law had to deal with the practical situation, that

these advertisements are not necessarily going to be explicit. They will be implicit. But prosecutors will use common sense. Courts and juries that have to deal with trials on this statute will understand what "implicit" and "explicit" are, and it's well understood in our everyday lives.

I also mentioned that the term of use also uses the term, "or other valuable consideration." Again, one of their arguments is that the statute, when defining commercial sex, talks about something of value.

Again, the idea there is that we're dealing with reality. It is possible that sex will be exchanged for something other than money, it may be drugs, it may be trips, it may be other things, and they themselves recognize that valuable consideration can be something other than money.

So we think, again, that the provision is not overbroad, it's not vague, it's dealing with the reality of the situation, that there will be prostitution where people will not be paid with money but with other valuable consideration.

And we also feel that when you look at the wording of the statute, beyond the fact that the State statutes say that "knowingly" has to apply to all material elements, but if you look at the way the paragraph is organized, (b)(1),

there's a comma there between the publishing and causing clause, and it's our view that that's pretty clear that the structure, that the "knowingly" does modify the entire provision.

When we get to the CDA, of course, that is one of the big issues here. We again believe that there has been an overreading of the statute, and it requires a careful look at the actual language of the statute.

And I should mention right off the top that we do not believe that the letter that was submitted by the National Association of Attorneys General on July 23 is in any way an admission that there is immunity under the statute. What this letter describes is a description of the history of the rulings in this case -- not in this case, in the other two jurisdictions. It doesn't say necessarily that they agree with the rulings, it just says these are the rulings. And we respectfully submit, of course, Your Honor, in our papers that the Court is not bound by those rulings and, of course, needs to take a fresh look, and we believe should come out with a contrary ruling.

But if we look at the CDA, they're arguing that this preempts our efforts to enforce this statute.

Now, preemption is a very, very significant doctrine. As Your Honor knows, there are only three ways that it can be invoked. They are arguing here, my

understanding, that there's conflict preemption. But if we really look, parse carefully at the terms of this statute, there is no conflict. I think we have to look at what it's really all about. This statute is focused on protection. Look at the title: "Protection for private blocking and screening of offensive material."

This statute was focused on something that came out of the Prodigy decision, which is, the focus at this time was on what can parents do to prevent offensive materials from getting to their children, their minor children. And that's referenced all the way through this statute. So it talks about the policy of the United States in subsection (b), and among other things, it says we want to encourage the development of technologies which maximize user control over what information is received. Paragraph four says we want to remove disincentives from the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material. That was the focus of the statute, and that's why, in subsection (c), which is the one that the Plaintiffs rely upon, it says, we are going to allow for protection of Good Samaritan blocking and screening of offensive material. There's no question that that's there, but the question is, does that preempt the criminal statute, a state criminal

statute, which we say is consistent with the general purposes of the statute.

Now, to determine the preemptive effect, we think that the real focus has to be on subsection (e), which talks about effect on other laws. After all, preemption is -- what is it? It's a doctrine that affects other laws. And if we look at subsection (e), it expressly says -- it deals with state law, and it says that nothing in this section shall be construed to prevent any state from enforcing any state law that is consistent with this section. Of course, it also says if it's inconsistent, it can't be enforced.

But, again, if you look at the focus of the statute, and we mentioned in our brief, we attached the committee report, the focus of Congress was on civil issues, civil liability. They did not want a situation where an AOL or some other site put in place parental controls and did other things to try to prevent inappropriate materials getting to minors and others to then have the possibility that if it doesn't work out that those sites were going to be sued for defamation, invasion of privacy, or other things. And, of course, that's true. But the State statute that we're dealing with is not dealing with that situation. It's dealing with criminal law that is designed to prevent the sexual exploitation of minors.

And it's important to point out that one of the

purposes of this CDA provision, 230(b)(5), it's stated there that one of the policies of the United States is to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.

Then there's another provision talking about no effect on criminal law, which refers to other statutes dealing with things like sexual exploitation of children and other things.

And our position is that our statute deals expressly with the same category of evils that this Federal statute says are not preempted.

And I should note that the State statute was aware of the CDA because it specifically talked about the fact that -- and let me find the language -- that in its purposes, it says that "We are passing this law so that sex trafficking of minors should be eliminated in conformity with Federal laws prohibiting the sexual exploitation of children."

So it's our position that this is entirely consistent with the CDA, that the CDA should not be read as providing a situation where there can be no regulation of the Internet by the State, and that the CDA would not preempt this statute.

When we get to the First Amendment, very briefly,

the first issue, of course, again, is scienter, as I've said. It's our position that the scienter requirement is met here, that "knowingly" does apply to all the elements of the crime except for knowledge of the age of the victim, for two reasons: One, because of the statute that mandates that as a matter of interpretation, that's N.J.S.A. 2C:2-2(b)(2), and, secondly, based on the way the provision is worded.

In terms of the mistake of age, we disagree with the proposition that the mistake of age is -- I'm sorry, that the knowledge of age is always required in these kinds of statutes, and we cited a number of cases dealing with other statutes seeking to protect children from sexual exploitation. They're cited in I think primarily pages 21 and 22 of our brief. And the courts there have said that the knowledge of the age of the victim is not required. We believe that that law should apply here.

I understand that the Plaintiffs are taking the position that, well, wait a minute, it should not apply necessarily to the entity that publishes what somebody else is saying. But there are several cases that we cited that have applied that type of doctrine to book publishers and distributors.

In terms of the First Amendment issues, again, we disagree with the idea that -- it's our position that offers to engage in illegal transactions are not protected by the

First Amendment, and we did cite a number of cases that cite that, that stand for that proposition. The Plaintiffs say, well, wait a minute; again, you're -- this criminal statute's not just dealing with those who place the ads -- and I should point out publicly they're not challenging that provision -- but the reality is that there are a number of cases that we cited, for example, the Pittsburgh Press case, the New York v. Ferber, and the Connection Distribution case, where the courts did apply to distributors.

And I should make one other point about the CDA before I forget. Our statute applies not only to electronic media but also print media. So even if the Court were to find that the CDA were to preempt the State statute, it can't apply to the print media.

The issue of whether the State statute is content-neutral, again, we disagree on that. We do rely heavily on Free Speech Coalition v. AG of the United States, the 3rd Circuit decision, which, again, that statute also dealt with trying to protect the sexual exploitation of children by pornographers who were imposing -- by imposing an age-reporting requirement which was on both primary, the ones who created the content, and the secondary producers or distributors. And in finding that that statute was content-neutral, the Court noted that:

"We agree with certain other circuits that the

statute is content-neutral. The Congress enacted the statute for the purposes of protecting children from exploitation by pornographers. Congress singled out the types of depictions covered by the statute not because of their effect on audiences or any disagreement with the underlying message, but because doing so was the only pragmatic way to enforce its ban on child pornography. Any impact by the statutes on plaintiff's protected speech is collateral to the statute's purpose of protecting children from pornographers."

We would say that that analysis should apply here. This statute, the State statute being challenged here, was designed to protect children from sexual exploitation. The purpose was on that, not on speech, not on the way the audience reviewed the speech or its reaction, but this is the only pragmatic way we believe to attempt to stanch the widespread sexual exploitation of children, and we believe that it can't be limited to those who actually post the ad. It has to be extended to those who knowingly publish ads that are clearly for prostitution involving minors.

We believe that the statute is subject to intermediate scrutiny and therefore meets all the requirements. It does promote a substantial public interest. We don't believe it's -- we believe the scope of the statute is such that it does not burden substantially

more speech than necessary. Again, we don't believe it's overbroad. We think the issue of whether it's something for value has an understood meaning, that it does not extend to people dating or posting ads to get together for a Saturday night out, and, in fact, that the language really tracks their own, Backpage.com's own terms of use.

Now, one of the interesting things that's been brought up today is this issue of policing the ads. The Plaintiffs say, you know, if this law is enforced, we will be encouraged not to review the ads, we'll just let them go.

Hard to answer that one because we agree that -- this is why the Internet Archive really in our view has no standing at all. This statute is designed to deal with entities that knowingly publish these ads, not someone like the Internet Archive, which says in their papers they don't have the ability to review these ads. And also, of course, that these ads are generally historical in nature. The statute has nothing to do with historical ads. It's designed to prevent the current exploitation of children.

But in any event, the conundrum here can only be answered this way, at least in my view, which is, if an entity such as Backpage.com is going to keep having these sections dealing with adult escorts and other sites which by definition are going to relate to subject matters that inevitably will deal, at least in certain circumstances,

with sexual -- commercial sex, that they have to review these advertisements. I don't think they would stand up in public and say that they wouldn't.

So the issue is, if they are going to review these ads, can we criminalize those situations where they knowingly publish ads that are for prostitution or other commercial sexual exploitation of minors. And we think that we can do that.

I think those are really our major points.

Does the Court have any questions?

THE COURT: No. Thank you. I appreciate your comments.

MR. FEINBLATT: Thank you.

MS. VENETIS: Your Honor, thank you for giving me some time to argue the points of amici in this case.

As I mentioned, I represent 50 public-interest organizations, some religious, most secular, that are concerned with protecting the rights of children and women and in combatting trafficking.

The reason we submitted a brief in this case is to take it out of the realm of the abstract. I teach constitutional law and international human rights at Rutgers. I care deeply about protecting the constitutional rights of anyone whose rights are being infringed upon. But my clients feel here that the voices of the clients they

serve, trafficking victims, have not been represented.

We are talking here about slavery. Putting all euphemisms aside, human trafficking is modern-day slavery. This is not my definition, it's not my clients' definition, but as we talk about in our papers and we give extensive citations about this, this is the definition of the United States Government and almost every government around the world that has signed a multilateral treaty, called the Palermo Protocol, that defines human trafficking as slavery, and also that talks about collaborative efforts to combat slavery.

The U.S. State Department estimates that in 2013, this year, 27 million people --

THE COURT: I don't mean to cut you off, but I don't really want to get into -- again, there is no one, no thinking person that I can imagine that would not be appalled at these types of things, at slavery; but that's not really the issue before me. Nobody's quarreling with the unfortunate effect that this might have. The question is whether it's preempted and whether it's constitutional.

It's not my job to write the laws, but, as a trial judge, I've got to look at them and interpret them.

And I'm not disagreeing with some of the effect that you've set forth in your brief. I mean, you say some of your clients haven't been heard. I think you made a very

fine argument on their behalf on this, and I've read it.

And, again, I'm as appalled by all of that as any, I think, normal person would be. But I don't think that's our issue.

MS. VENETIS: Your Honor, it's relevant in that it really --

THE COURT: It might be relevant, but I don't think it's the issue. I mean, it troubles me that I've already seen two courts strike this down, but they made very, very reasonable arguments in so doing.

MS. VENETIS: Well, Your Honor, as we talk about in our papers, those courts went well out of their way to portray Backpage as a constitutional white knight, and the purpose of our --

THE COURT: Well, I don't know about that. I think that you're probably talking more about Judge Nixon in the Tennessee case. I think he went through a very complete recitation of his view of the First Amendment and why it was in violation.

You know, as I understand it, it's your position that I shouldn't even get there, that we should just look at the preemption issue, and, if it's preempted, then there's no need to get to the --

MS. VENETIS: Right, Your Honor, and that's why we put a brief here, and we wanted to refocus the Court's

attention on two issues.

The first is the preemption issue.

Counsel for Backpage said that the preemption issue and the constitutional, the First Amendment issues are intertwined.

That's really not the case here. Federal Courts are courts of limited jurisdiction. Both the U.S. Supreme Court and the 3rd Circuit have made abundantly clear that if a trial court doesn't have to reach constitutional issues, it shouldn't, it should not make lofty pronouncements and extensive pronouncements if it doesn't have to.

THE COURT: Well, it's somewhat discretionary. I think there's a lot more discretion involved there. But beside that, this issue is going to be met some other place, sometime, and decided in some way, on a constitutional level or whatever, and the papers that I have before me, they do deal with the constitutional issue as well as the preemption issue.

MS. VENETIS: Your Honor, and it's true, I understand that the papers are very broad, but that doesn't mean that the Court has to discuss every single argument that has been raised.

THE COURT: Well, I don't know if I'm agreeing with you that they're very broad. I just said both of those things. I think they anticipated, and these were issues

dealt with by both of the other District Courts, and I recognize that I am not bound by other District Courts in other states, but that doesn't mean that I don't look at what they say and look at their reasoning. And I must tell you, in this case, their reasoning in my view kind of answers the question.

MS. VENETIS: Your Honor, you don't have to go there, you really don't. As the Court just stated a few seconds ago, it's fully within your discretion how the Court chooses to approach this case and what the Court decides to address.

THE COURT: I understand that.

MS. VENETIS: And it is our position that if the Court does find that the CDA preempts the New Jersey statute -- and I think that Mr. Feinblatt made a very fine argument about how the statute actually does survive that --

THE COURT: Yes, he did.

MS. VENETIS: -- in the event that the Court does find that preemption exists, the Court really can stop there. And both the U.S. Supreme Court in the New Orleans Broadcasting Association, Inc. v. U. S. case, and the Third Circuit recently in Gulf v. Whitmer, they make very, very clear that if -- that they urge courts not to go beyond statutory issues, and even though preemption is a constitutional issue technically, that it's treated as a

statutory issue because it doesn't go to the broad constitutional analyses.

THE COURT: I think, though, under the circumstances that we have here, so you don't waste a lot of time on that argument, I am going to address the constitutional issue as well as preemption.

MS. VENETIS: Okay, Your Honor. If you are going to do that, then we ask the Court to keep in mind the constitutional rights of the victims of trafficking as well as the Plaintiffs.

THE COURT: The Constitution covers everyone.

MS. VENETIS: Exactly.

Let me move to my second issue here, which is standing.

THE COURT: Go ahead.

MS. VENETIS: The Federal Courts are courts of limited jurisdiction, and a party must have a case or controversy to appear before the Court. In other words, under Article III of the Constitution, a party must have an actual injury that's protected by a Federal statute.

THE COURT: I'm fully cognizant of the standard.

MS. VENETIS: I know, and that is your job. This is by way of introduction, Your Honor.

With all due respect, the Electronic Foundation Frontier, which I have partnered on in many occasions, they

have no business before this Court. Their client, the Internet Archive, is in absolutely no danger of prosecution under this New Jersey statute. The Internet Archive has suffered no injury and will not suffer any injury under the New Jersey statute if it goes into effect. As a digital library and repository of information, it does not profit in any way from exploiting anyone. It merely gathers and saves information. And, frankly, it exercises a function that Congress meant to be protected under the CDA. By its own definition, the Internet Archive is not engaged in commerce, it's not protected under -- it's not covered by the statute at all, and the best way that the Internet Archive could have been heard would have been as amicus in the case, as we have asked the Court to be heard, but not as a party to this lawsuit, because it really is not covered at all by the statute in any way.

I want to address some of the issues that were raised by the parties.

Backpage discuss how they work closely with law enforcement to rescue children, and that they have turned over materials to -- that led to the prosecution of people who advertise children for sex.

Our position is that they really don't do enough. The company -- the adults services section of Backpage brought in over $30 million last year. That's an increase

of over eight percent from the year before. It has cornered the market in the adult services section, it has 80.4 percent of the market share, and as we said in our papers, if Johns and the police can figure out what a sex ad is, a company that rakes in that much money can do a much better job at filtering these ads.

They talk about the slippery slopes, all these ads are going to go offshore. Well, I don't think that that's the case, because U.S. laws protect credit cards and they protect all sorts of personal material, that Nigerian princes and Russian criminals don't offer the same protection. So I don't think there's any danger that pimps are going to start placing ads with companies that are based overseas.

Amici ask this Court to keep in mind in deciding the case that part of Backpage's business model is to profit from the selling of women, boys, girls, and men, and that they, too, have human rights and constitutional rights, and we urge this Court to keep that in mind in making its determinations.

Thank you, Your Honor.

THE COURT: Thank you.

Do you want a short response, or no?

MR. GRANT: I do.

I'm sorry.

THE COURT: Notice I said "short."

(Laughter)

MR. ZIMMERMAN: Very briefly, Your Honor.

THE COURT: "Brief" is another word.

(Laughter)

MR. ZIMMERMAN: Very briefly.

With respect to the respective standing arguments from amici and counsel, with respect to their arguments, I take little comfort, nor does my client take much comfort that they don't believe that prosecutors will interpret the statute in a way that might send my client to prison for 20 years, and I take little comfort further from the State's position that prosecutors will certainly know what this statute means. The point is that the general public does not know what it means, and I think the statute, in fact, fairly extends to the type of behavior that my client engages in. The limiting principles that they propose are nowhere to be found in the statute.

Amici suggest that we fall outside the coverage of the statute because the Internet Archive does not profit from these ads.

There's no such requirements in the statute.

The State suggests that the statute does not extend to them because the Internet Archive doesn't have the ability to review advertisements. That's false. We say

quite the contrary, that the declaration from the Internet Archive -- the point is, by archiving the entire planet, it would be quite a logistical and financial burden for the Internet Archive to have to respond to these types of ads.

Again, no effort was made, no reasonable effort was made to restrict the language of the statute than to apply some wishful application of what they believed the statute might extend to. And this is the point of -- this is the problem with every overbroad statute. It's not a question whether we can sit down and find some advertisement, some behavior that is barred by this statute. The question is, what doesn't it cover? And neither the State nor the amici make any effort to cabin this, cabin this very vague and overbroad statute.

I point the Court specifically to the United States v. Stevens case that dealt with other fanciful applications of a criminal statute, but again, the Supreme Court there says that the statute covers these and there's no limiting principle, so the statute has to apply.

Thank you.

THE COURT: Thank you.

Anything further, counsel?

MR. GRANT: A couple points, Your Honor.

I should start that we do fundamentally disagree with Mr. Feinblatt's point at the outset that all of the ads

that appear on Backpage.com, whether in the adult section or the personal section, further child sex trafficking. We adamantly disagree with that because we go through great efforts to prevent that.

I should respond just very briefly to Ms. Venetis's comments. While much of what she said really doesn't go to the legal issue before the Court, as the Court pointed out, the fact is that scholars and other experts disagree fundamentally with the principle that she's raised and the AGs have raised and others have raised that it's an effective solution to child sex trafficking to play Whac-A-Mole by trying to shut down web sites, that several have suggested that that's exactly the wrong approach, and instead, we should be using technology to try to combat the child sex trafficking directly.

I listened to Mr. Feinblatt's comments as well. It occurs to me that the State is still continuing to rewrite the statute. We've now heard today that the causing section of the statute, as he referred to it, is meant to refer to pimps, and when it says indirectly disseminating or displaying, that doesn't refer to Google or to the Internet Archive or to other online service providers in the chain of distribution.

Your Honor, it's the words in the statute that count. It's not the State's characterization that counts.

And in fact, much of what the State was arguing today sort of suggested on one hand the statute, again, is narrow, but it's broad, because I heard an argument that essentially says all of the adult-oriented ads on Backpage.com would violate the statute, but then an argument that seemed to suggest that --

THE COURT: I didn't hear -- I don't recall hearing that argument.

MR. GRANT: Well, perhaps -- I was trying to -- I was trying to understand it.

THE COURT: I thought what was said as the legitimate concern about the trafficking in minors. That's, I think, the focus of, the main -- a large focus of this.

MR. GRANT: And I appreciate that there is legitimate concern about the trafficking of minors, and I don't denigrate that whatsoever.

i don't believe, however, Your Honor, that the State's purpose is a panacea to create any law that it seems to think is appropriate. That, I think, is incorrect, and I suggest that --

THE COURT: No, but as I said before, I think that the motives are honorable here. This is a problem. Whether or not this is the way to solve it, I think that's a legitimate argument.

MR. GRANT: And I think that was the problem as

well of what the State's argument was today. All we have is the assertions of the State that this is the only way to stanch the problem. Well, Your Honor, there are many ways to address the problem, and as I said, many ways that the State itself has looked at to address the problem, including penalizing the sex traffickers who misuse the Internet and who inappropriately post things on the Internet.

THE COURT: Well, they do. I've had a number of them before me. I think the State does try to do that, and the Federal Government. But there must be so many out there that they just can't keep up with everything.

MR. GRANT: The question is, can you combat that problem by shutting down, by burdening vast categories of speech. And that, I think, Your Honor, is really the fundamental problem, because the State acknowledges it's going to have to look at personal ads, you're going to have to look at dating ads, because this information could move to those.

One comment, too, about the notion of offshore, because I think Ms. Venetis was suggesting that's not going to happen. I can tell you it does happen, and it specifically happened in Ireland, because, there --

THE COURT: Watch it, now. Don't go after Ireland.

(Laughter)

MR. GRANT: With a perfectly pure and great motive:

In Ireland, a law was passed to ban online advertisements of escorts, and what happened was, those kinds of escort sites appeared coming from Great Britain and elsewhere. So it does happen. They very certainly would happen.

Your Honor, at bottom, we've heard the State's arguments, and we've heard their urging that this is the way to combat sex trafficking. We've seen no evidence and no showing of any of that. I urge that none of this remotely passes the strict scrutiny test or comes close to showing that. Even though the State may have a compelling purpose, and I'm not going to argue about that, even though that may be the case, it still must pursue that purpose with the least narrow -- with the least restrictive alternative available. And this is not it.

I thank the Court for your time.

THE COURT: All right.

Nothing further; correct, counsel?

MR. FEINBLATT: No, Your Honor.

THE COURT: This is very troubling, obviously, and I certainly recognize the interests that groups and people have in this. I commend Rutgers on their showing, telling me about these problems, and I'm sure they're trying to do

their best. But I think the statute is just problematic.

Again, I have said it a couple of times: I attribute, certainly, no bad motive to our elected officials, who are trying to resolve and stop this problem; but here, I do think that the Plaintiffs have shown a likelihood of success on the merits, especially when taking into account the findings of both the Washington and Tennessee courts. Plaintiffs have also adequately satisfied the remaining elements required to secure a preliminary injunction.

With respect to preemption, the Act is likely preempted by Section 230 of the Communications Decency Act (CDA). Plaintiffs' first argue that section 12(b)(3) of the Act is both expressly preempted and conflict preempted by Section 230 of the Communications Decency Act. Plaintiffs allege the Act violates their rights under 47 U.S.C. section 230(e)(3) because enforcement of the new law would treat Plaintiffs, providers of an interactive computer service, as the publisher or speaker of information provided by another information content provider. Defendants argue that the Act is not preempted by the CDA because the CDA does not preempt state criminal laws and that the Act is consistent with "Federal criminal laws regarding the sexual exploitation of children." Essentially, the Defendants urge this Court to find fault in

the reasoning of both the McKenna court and the Cooper court and decline to follow their holdings (Id.). The Court is not persuaded by the Defendants' arguments and finds that it is likely that the Plaintiffs would prevail on the merits of their preemption claim.

There are three circumstances in which Congress has the power to preempt state law. First, Congress may expressly preempt inconsistent state laws. See Arizona v. United States, 132 S.Ct. 2492, 2500-01 (2012) ("There is no doubt that Congress may withdraw specified powers from the States by enacting a statute containing an express preemption provision.") Second, "the states are precluded from regulating conduct in a field that Congress, acting within its proper authority, has determined must be regulated by its exclusive governance." Again, that's from the same case. Third, under the doctrine of conflict preemption, state laws are preempted when they conflict with Federal law. Crosby v. National Foreign Trade Council, 530 U.S. 363, 372 (2000). "This includes cases where compliance with both Federal and state regulations is a physical impossibility and those instances where the challenged state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Again, Arizona v. U.S., 132 S.Ct. at 2501.

Here, the Plaintiffs are likely to succeed on their claim that the Act is preempted both because it is likely expressly preempted and because it likely conflicts with Federal law. Under Section 230, "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. Section 230(c)(1). It goes on to state that "no liability may be imposed under any State or local law that is inconsistent with" Section 230. Id. Section 230(e)(3). Finally, Section 230 dictates that providers may not be held liable for "any action voluntarily taken in good faith to restrict access to or availability" of material that is "obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable. Id. Section 230(c)(2)."

In enacting the CDA, "Congress decided not to treat providers of interactive computer services like other information providers such as newspapers, magazines or television and radio stations, all of which may be held liable for publishing or distributing obscene or defamatory material written or prepared by others." Batzell v. Smith, 333 F.3d 1018, 1026 (9th Cir. 2003). Congress enacted Section 230 to achieve two goals. First, "Congress wanted to encourage the unfettered and unregulated development of free speech on the Internet, and to promote the development

of E-commerce." Id. At 1027. Second, Congress wanted to "encourage interactive computer services and users of such services to self-police the Internet for obscenities and other offensive material." Id. at 1028.

The Act in question is likely inconsistent with and therefore expressly preempted by Section 230. Section 230 prohibits "treat[ing)" a "provider or user of an interactive computer service" as the "publisher or speaker of any information provided by another information content provider." 47 U.S.C. Section 230. Both Backpage and Internet Archive are providers of an interactive computer service within the meaning of CDA Section 230. See 47 U.S.C. Section 230(f)(2) (defining 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). Section 12(b)(1) of the Act runs afoul of Section 230 by imposing liability on backpage.com and IA for information created by third parties - namely ads for commercial sex acts depicting minors - so long as it "knows" that it is publishing, disseminating, displaying, or causing to be published, disseminated or displayed such information. See Johnson v. Arden,

614 F.3d 785, 791 (8th Circuit 2010). ("The majority of federal circuits have interpreted Section 230 to establish broad federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service."

In Barnes v. Yahoo!, Inc., 570 F.3d 1096, 1101-02 (9th Circuit 2009), "[W]hat matters is not the name of the cause of action...[but] whether [it] inherently requires the Court to treat the Defendant as the 'publisher or speaker' of content provided by another.")

Additionally, the Act is inconsistent with Section 230 of the CDA because it criminalizes the "knowing" publication, dissemination, or display of specified content. As Judge Martinez said in McKenna, "in doing so, it creates an incentive for online service providers not to monitor the content that passes through its channels. This was precisely the situation that the CDA was enacted to remedy." McKenna, 881 F. Supp. 2d at 1273.

Even if the language of Section 230 did not expressly preempt the Act, the Act likely conflicts with the CDA because "the challenged state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of the Congress." Arizona v. U.S., 132 S.Ct. at 2501. "Like the strict liability imposed by the Stratton Oakmont court, liability upon notice reinforces service

providers' incentives to restrict speech and abstain from self-regulation." Zeran v. America Online, 129 F.3d 327.

With regard to the constitutional claims raised by Plaintiffs, this Court agrees and relies upon the reasoning set forth by both Judge Martinez and Judge Nixon in the Washington and Tennessee cases respectively, and, while I choose to reserve a more thorough analysis for a written Opinion, I am satisfied that the Plaintiffs have shown a likelihood of success on the merits of the following claims:

First, the Act likely violates the First Amendment scienter requirement; second, the Act likely cannot survive strict scrutiny because it is a content based restriction that is not narrowly tailored to serve the State's asserted interests and it is not the least restrictive alternative available; third, the Act is likely overbroad as it criminalizes fully protected speech and unduly vague as it imposes severe criminal liability without providing reasonable notice of which speech is prohibited; and, four, the Act is likely unconstitutionally vague, specifically in its definitions of "advertisement for a commercial sex act," including "any implicit offer" of sex for "something of value"; and, finally, the Act is likely violative of the commerce clause as it seeks to control conduct that falls outside New Jersey."

Having shown a likelihood of success on the

merits, the Plaintiffs adequately satisfy the remaining elements for securing a preliminary injunction: Irreparable harm, that the balance of equities weighs in their favor, and that the injunction would be in the public interest.

First, the loss of First Amendment freedoms for even minimal periods of time unquestionably constitutes irreparable injury. Elrod v. Burns. Absent injunctive relief, the Plaintiffs may face serious criminal liability.

Second, the balance of equities weighs in the Plaintiffs' favor. "No prosecutions have yet been undertaken under the law, so none will be disrupted if the injunction stands." Ashcroft v. American Civil Liberties Union, 543 U.S. 656. While the injunction is upheld, New Jersey can enforce other laws banning prostitution and the exploitation of minors.

Third, an injunction is in the public interest. This is because "Where a prosecution is a likely possibility and yet only an affirmative defense is available, speakers may self-censor rather than risk the perils of trial. There is the potential for extraordinary harm and a serious chill upon protected speech."

The Court acknowledges the great public interest in preventing and prosecuting human trafficking and child prostitution, but also understands the great necessity of upholding constitutional protections.

For the above reasons and the Opinion to be issued by the Court on a later date, I find that the preliminary injunction is appropriate to enjoin the enactment of New Jersey Statute Annotated Section 2C:13-10.

Thank you, counsel.

MR. ROSEN: Your Honor, will the Court prepare an order, or should we?

THE COURT: You do it.

(Matter concluded)

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