On Tuesday, October 21, 2014 the Washington State Supreme Court heard arguments on the case of Backpage LLC v Mckenna. In it, two teenage girls allege that Backpage should be held liable for their abuse that happened after they were advertised for sex on Backpage. In particular, they invoke a statute that Washington passed in 2012 which made it a felony to advertise sex acts with minors. This case, along with the other cases analyzed below, is the latest of a series of cases where states try to hold internet providers liable for third party advertisement of sex with a minor.[1]

This memo was originally prepared by Hannah Kim in summer of 2013 when these cases were first appearing and the Renewal Forum was consulting with states as to whether there could be a law holding Backpage and similar corporations that profit off the sexual exploitation of others that held up to constitutional muster. The Renewal Forum ultimately determined that it would be almost impossible to write a state law that was not preempted by the Communications Decency Act's (CDA) immunity. The memo dissects the reasoning of the court cases so far and explains this conclusion.

[1] If you want to read further about the Washington case, please check out the amicus curie briefs as well as the arguments by the appellants and respondents at http://www.missingkids.com/Amicus.

410 Constitution Ave NE
Washington, DC 20002
Tel: 202-544-3344
www.renewalforum.org

Congress could possibly change this by revoking or amending the immunity provided by the CDA. A bill was introduce into the 113th Congress, the SAVE Act of 2014,[2] that originally sought to amend the CDA and hold internet providers of advertising liable. Instead, the version that has passed the House and has yet to be considered by the Senate, simply adds "advertises" as another method through which to traffic a person. This amendment is proper and will help to continue to prosecute traffickers who knowingly advertise minors for sex, but there is much doubt as to whether it could apply to a forum provider such as Backpage.

[2] https://www.govtrack.us/congress/bills/113/hr4225/text

Issue Presented:

Can states constitutionally hold internet providers liable for third party advertisements for sex with a minor?

Short Answer:

Most likely not.

Statement of Facts:

This year Tennessee, New Jersey, and Washington enacted statutes criminalizing the act of publishing advertisements for sex acts with minors, which created a backlash from internet providers. The courts held that although the Commercial Sexual Exploitation of Children (CSEC) is "an evil that states have an undisputed interest in dispelling…the Constitution tells us that- when freedom of speech hangs in the balance- the state may not use a butcher knife on a problem that requires a scalpel to fix. Nor may a state enforce a law that flatly conflicts with federal law."[3]

Discussion:

A recurring objection by Backpage in all of these cases is that these laws violate the immunity afforded by the Communications Decency Act of 1996 (CDA).[4] The relevant section, §230(c)(1) provides immunity from liability for providers and users of "interactive computer service". Specifically it states that "no provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another

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[3] *Backpage.com, LLC, v. Robert Cooper, Jr., Attorney Gen.*, No. 3:12-cv-00654, 2013 WL 1558785, at * 2 (M.D. Tenn. Jan. 3, 2013).
[4] The Communications Decency Act of 1996. 47 U.S.C. § 230

information content provider."[5] Backpage contends that this immunity extends to them and also pre-empts any state law to hold them liable.

The CDA was originally enacted to protect minors on the internet from being exposed to "any comment, request, suggestion, proposal, image, or other communication that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs." §230 added protections for online service providers to protect them from being prosecuted of content by third parties.

Tennessee:

In May 2013, Tennessee passed T. C. A. § 39-13-315, holding internet providers accountable for third-party advertisements for sex with a minor. The unconstitutionality of such a statute is dissected in *Backpage.com, LLC, v. Robert Cooper, Jr., Attorney Gen*.[6]. Backpage.com (BP), an operator of an online classified advertising service, brought suit against the Tennessee Attorney General claiming the statute unconstitutional. BP moved for a temporary restraining order (TRO) and a preliminary injunction to enjoin enforcement. The court held that the statute was likely unconstitutional for various reasons.[7]

First, the Court held that BP had standing because (1) the statute specifically targeted BP; (2) BP sufficiently demonstrated that it had suffered an "injury in fact"; (3) that was "fairly traceable" to the Defendant's behavior; and (4) that redress was available.[8] Legislative history named BP as the largest internet source for advertisements of sex acts

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[5] Id. at 230(c)(1).

[6] *Backpage.com, LLC, v. Robert Cooper, Jr., Attorney Gen.*, No. 3:12-cv-00654, 2013 WL 1558785, at * 2 (M.D. Tenn. Jan. 3, 2013).

[7] The court held that it was likely unconstitutional because: (1) standing was met; (2) the statute was likely preempted by the Communications Decency Act (CDA); (3) it did not satisfy the First Amendment's scienter requirements; (4) it was likely overbroad; (5) it is vague; (6) it amounts to content-based restriction on speech and fails strict scrutiny; (7) it likely violated the First Amendment; and (8) likely violated the Commerce Clause. *Id.* at *1.

[8] *Id.* at *7.

and there were sworn statements and a letter from the Defendant to BP stating "that ads for prostitution—including ads trafficking children—are rampant on the site".[9] BP also claimed that the statute was flawed as it failed to target sites offering free advertisement, requiring only sites such as BP to do an individual review of each advertisement.

Second, the Court held that Back page falls within the CDA immunity that prohibits states from holding interactive computer services liable for unlawful third-party content.[10] BP claims the statute violates CDA's broad federal immunity violating Congress's goals of protecting internet freedom. The Government claims the law regulates the *conduct* of "selling advertisements" and not *speech,* comparing the state law to the "the federal sex law whose enforcement is not impaired by the CDA."[11] The Court, however, finds the statute expressly preempted by CDA § 230(e)(3).[12] The inconsistency is found between the language that prohibits laws from treating interactive computer service providers as the publishers or speakers of third-party content and the court's assertion that the providers are in fact being treated as publishers.[13] In addition, the statute prevents the execution of Congress's purpose to have websites self-police indecent communication because websites would restrict speech or relax their current self-policing issues.[14] BP also contended that it is going beyond its affirmative obligations by engaging in an automated screening, review, report suspicious postings to the National Center for Missing and Exploited Children, as well as collecting credit card information.[15]

Third, the Court held that the statute did not met the First Amendment's scienter

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[9] *Id.* at *9.
[10] *Id.* at *10.
[11] *Id.* at *10.
[12] The Communications Decency Act of 1996. 47 U.S.C. § 230(e)(3).
[13] *See* 47 U.S.C. § 230(c)(1).
[14] *Backpage.com, LLC, v. Robert Cooper, Jr., Attorney Gen*. at *20.
[15] *Id.* at *13.

requirement. BP claims its First Amendment right is violated because the statute does not contain an element of scienter regarding age while Defendants claim that scienter is not a constitutional requirement, but instead a question of first impression. The relevant provision states that "a person commits the offense of advertising commercial sexual abuse of a minor if the person *knowingly* sells or offers to sell…that would appear to a reasonable person to be for the purpose of engaging in a…sex act … with a minor."[16] In this case, the Court considered the word's ordinary meaning, the context of the statute, and its full effect. When the text is ambiguous the court turns to legislative history[17]; if the statute is 'readily susceptible' to a narrowing construction that would make it constitutional, it will be upheld.[18] However, there is no bright line rule, and "in *Smith v. California,* the Court held that a local ordinance imposing criminal sanctions on the selling of obscene books must require the seller to have some knowledge of the books' contents."[19] This was in order to prevent a *chilling* effect. In another case, *Mishkin v. State of New York,* the court held that "the Constitution requires proof of scienter to avoid the hazard of self-censorship of constitutionally protected material and to compensate for the ambiguities inherent in the definition of obscenity."[20] This was in order to prevent innocent behavior from being punished. More recently, the Court in *X–Citement Video* concluded "that a statute completely bereft of a scienter requirement as to the age of the performers would raise serious constitutional doubts."[21] The Court holds, based on this precedent, the statute does not meet the constitutional minimum.

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[16] Tenn.Code Ann. § 39–13–315(a).
[17] *Backpage.com, LLC, v. Robert Cooper, Jr., Attorney Gen*. at *16.
[18] *Id* at *17.
[19] *Id.* at *17.
[20] *Id* at *17.
[21] *Id.* at *18.

The Attorney General argued that the statute would not impose knowledge of a minor's age under because *X–Citement Video* required knowledge of a minor's age only because the criminality of the conduct relied specifically on age. In that case, the Government could criminalize materials regarding minors but not for adults. Defendants point out that prostitution involving subjects of any age is illegal. The Court disagrees with this line of reasoning because the statute criminalizes the potential sale of advertisements not prostitution. There is no state statute criminalizing the advertisement of sex with adults. The Court accuses the state of taking advantage of lowered First Amendment standards relating to child safety and obscenity in order to regulate speech, while, on the other hand, claiming to regulate an activity that affects both adults and minors alike. The court found this to be a contradictory defense and concluded that the element of scienter was most likely not met.

Fourth, the Court held that the statute is likely overbroad, and covers aspects not related to sex trafficking.[22] BP argues that the law is too broad because it does not require actual minors to *appear* in advertisements and because "commercial sex act" is defined too broadly. The Court reasons that any law imposing restrictions so broad that it chills speech outside its regulatory purpose will be struck down.[23]

Fifth, the Court finds the term "commercial sex act" too vague and does not provide a fair warning and enforcement mechanism. The statute is vague under the Due Process Clause of the 5th and 14th Amendments. "Commercial sex act" is defined as a sexual act for which something of value is given or received. The court takes issue with the fact that it does not further define the "sexual act" or "something of value." The Defendant claims the

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[22] *Id.* at *20.
[23] *Id* at *20.

definition is "almost identical" to the definition contained in the federal sex trafficking law, which has been upheld by two district courts in Florida and Connecticut.[24] However, the Court fails to see the terms defined within the context of child sex trafficking and claims that this uncertainty will lead to a chilling of speech and to arbitrary and discretionary enforcement by officials.[25]

Moreover, the Court finds the statute is an example of a content-based restriction because the law "singles out" publishers who *sell* advertisements. Content-based restrictions "enforced by severe criminal penalties, have the constant potential to be a repressive force in the lives and thoughts of a free people."[26] This sort of restriction is "presumed invalid," and the Government bears the burden of showing its constitutionality.[27] The court held that BP convincingly argued that the statute is sufficiently underinclusive which raises concerns about "whether the Government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint."[28] The Court reasons that advertisements are the same in content and delivery, whether the speaker paid for it or not, proving underinclusive. Importantly, the Government has not established that the statute would reduce sex trafficking in a material way and only offer "commonsensical statements" as proof. However, BP offered a study showing that advertisers move to unpaid mediums. In 2010, Craigslist shut down its adult section, which then led to advertisements moving to other websites or different categories within Craigslist.[29] According to the study, no material reduction took place.

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[24] *Id. at *21.*
[25] *Id.* at *21.
[26] *Id.* at *24.
[27] *Id* at *25.
[28] *Id.* at *26.
[29] *See Id.* at *27.

Last, BP successfully argued that the statute violates the Commerce Clause. First, the Court finds the statute is a violation because it does not place any geographic limitations within the state.[30] Second, even if the statute were read to have limited jurisdiction, the Court finds the burden it would place on interstate commerce not proportional to local benefits. Defendant claims an interest in protecting minors by eliminating sex trafficking of children in the state. However, under Defendants' reading of the law, any paid advertisement "directed to" Tennessee residents creates liability unless the seller personally verifies a government-issued identification of any potential minor. The Court reasons that this poses a serious burden on interstate commerce because Tennessee borders eight other states with many metropolitan areas.

The court ultimately found that Backpage was likely to prevail on its claim that the Tennessee law violated the First Amendment, the Commerce Clause, and is preempted by the CDA. It instituted an injunction from the enforcement of the law. The court later made the injunction permanent in March 23, 2013.[31]

Washington:

In 2012, Washington passed SB 6251; making it a class C felony to advertise sex acts with minors, however, the law holds internet providers liable for publishing such advertisements. The court held this to be an invalid statute in *Backpage.com, LLC v. McKenna*.[32]

The Court first discusses the CDA.[33] The CDA grants immunity for providers if the site simply refrains from encouraging or requiring the input of illegal content and extends

[30] *See Id.* at *29.
[31] *Backpage.com, LLC, v. Robert Cooper, Jr., Attorney Gen.*, No. 3:12-cv-00654
[32] *Backpage.com, LLC v. McKenna*, 881 F.Supp.2d 1262 (W.D. Wash. 2012).

[33] *Id.* at 1271.

providers the right to self-policing. The Supremacy Clause sets out that "Courts should assume that 'the historic police powers of the States' are not superseded 'unless that was the clear and manifest purpose of Congress."[34] Consequently, the Court concludes that SB 6251 is likely inconsistent with and is preempted by § 230 for two reasons. First, § 230 prohibits treating "online service providers" as the "publisher or speaker of any information provided by another information content provider."[35] Second, it is inconsistent because it criminalizes the *knowing* publication of certain content, creating an incentive for online service providers' to cease the monitoring of its contents cutting against the CDA's purpose.

Next, the Court addresses the plaintiff's challenges that the statute violates the First and 14th Amendments on three grounds: (1) the statute is unconstitutional because it creates strict liability for publishing unprotected speech and in doing so chills protected speech; (2) vagueness; and (3) overbroadness restricting both protected and unprotected speech. And they claim that the statute fails strict scrutiny because this is not the least restrictive method of combatting CSEC.

In addressing the strict liability issue the Court states that the Constitution prohibits the "imposition of criminal sanctions on the basis of strict liability where doing so would seriously chill protected speech."[36] Plaintiffs contend that speech is chilled because the word *knowingly* only applies to the first clause of the statute and the lack of scienter regarding age. In response, the Government claims that strict liability only applies to age. To be clear, SB 6251 is comprised of two clauses: (1) "publishes, disseminates, or displays" as the *publishing clause*; and (2) "causes directly or indirectly, to be published disseminated, or

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[34] *Id.* at 1272.
[35] 47 U.S.C. § 230.
[36] *Backpage.com, LLC v. McKenna* at 1275.

displayed" as the *causing clause*.[37] BP claims that *knowingly* apply only to the *publishing clause* and that the *causing clause* lacks scienter. The Court holds the Plaintiff's reading as the most grammatically correct; *knowingly* is before the *publishing clause*, but not the *causing clause*. The *publishing clause* is separated from the *causing clause* by interruptive punctuation and the word or. The operative verb in the *causing clause*, *cause*, is already modified by two other adverbs, directly or indirectly. Under the Government's reading, a person commits a felony by "knowingly … causing … indirectly to be … displayed" illegal content.[38] However awkward, the Government's interpretation is reasonable. The two clauses are not in separate sections of the statute and the punctuation that separates the clauses is only a comma.[39] The court then turns to legislative intent. In the Senate Hearing on SB 6251, Senator Kohl–Welles indicated that the primary motivation for the law was to require online service providers like BP to obtain identification before posting ads for prostitution. There is no indication in the legislative history intending to punish companies who did not *know* that they were publishing illegal content. Therefore, the Court interprets the statute as requiring scienter as to both the publishing and causing clauses. The court holds that it may seem commonsensical to require publishers to check identification before publishing an escort ad just as bar bouncers check ID for entry, however, there is a key difference because this is between conduct and speech.

In addressing the vagueness issue the Court holds that laws regulating speech are void when a reasonable person cannot tell what expression is allowed.[40] Here, the vagueness of SB 6251 is very important because it is both a content-based regulation of

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[37] *See Id.* at 1276.
[38] *See Id.* at 1276.
[39] *See Id.* at 1276.
[40] *See, e.g., Smith v. Goguen,* 415 U.S. 566, 569, 94 S.Ct. 1242, 39 L.Ed.2d 605 (1974).

speech and a criminal statute. These terms are not defined: "know", "indirect", "direct", "implicit" and "offer", which renders the statute vague. Much of this vagueness derives from the third party liability aspect. The pimp that publishes the advertisement certainly *knows* whether his offer is for sex. However, the Court takes issue because it is entirely different for the website operator to *know* that an advertisement implicitly offers sex.

The Court then states that a statute regulating speech is overbroad if it "reaches a substantial amount of constitutionally protected conduct."[41] SB 6251 states *any offer* for "any act of sexual contact or sexual intercourse … for which something of value is given or received by any person," so long as that offer involves a portrayal of a minor. Assuming that the undefined term "something of value" means anything that can be traded SB 6251's definition of "commercial sex act" encompasses a huge portion of legal, consensual, non-commercial sexual activity. In addition, there is no requirement that the minor depicted with the offer have any relation to the offer itself in-effect allowing liability when an adult posts a high school photo on her dating profile where she mentions that she is "good in bed".[42]

The court finds that SB 6251 likely violates the dormant commerce clause under each of the tests articulated above. Plaintiff's final claim is that SB 6251 violates the Commerce Clause, which is an affirmative grant of authority to Congress encompassing an implicit limitation on the authority of the States to enact legislation affecting interstate commerce.[43] Plaintiffs claim that this violates the dormant commerce clause because it regulates conduct outside the state and regulates an issue demanding national treatment. State statutes with incidental effects on interstate commerce will be upheld if it even-handedly regulates for a legitimate public interest and where the burden imposed on

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[41] *Backpage.com, LLC v. McKenna.* at 1280.
[42] *See Id.* at 1281.
[43] *See Id.* at 1285.

interstate commerce is not clearly compared to the local benefits.[44] "The practical effect of the statute must be evaluated not only by considering the consequences of the statute itself, but also by considering how the challenged statute may interact with the legitimate regulatory regimes of other States and what effect would arise if not one, but many or every, State adopted similar legislation."[45]

Although, SB 6251 defines "advertisement for a commercial sex act" as an offer for a sex act "to occur in Washington," an advertisement outside of the state triggers liability even if the act does not happen in Washington making the out-of-state burden significant. To escape liability, online service providers that post content that might be construed as containing implicit offers for sex will be required to identify customers. Such a burden would be exponentially exacerbated if every state were permitted to legislate its own requirements. Washington's interest in prosecuting criminals is undermined by the practical obstacles of jurisdiction. The internet is likely a unique aspect of commerce that demands national treatment. Therefore, Plaintiffs are likely to succeed on their claims that SB 6251 violates the dormant Commerce Clause.

New Jersey:

New Jersey passed the Human Trafficking Prevention, Protection, and Treatment Act, a statute identical in most respects to the statutes discussed above on May 6, 2013.[46] BP and The Internet Archive (IA) moved for an injunction and were granted a temporary restraining order.[47] The Electronic Frontier Foundation (EFF), representing the IA, argued that the new law conflicts with federal statutes and imposes too rigid of punishments and

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[44] *See Id.* at 1285.
[45] *Id.* at 1286.
[46] 2013 N.J. Laws Ch. 51
[47] *Backpage & Internet Archive v Hoffman,* No. 2-13-CV-03952, 2013

steep fines on ISPs, internet cafes, and libraries. The law prohibits indirectly causing the publication, dissemination, or display of content that contains an implicit offer of a commercial sex act if the content includes an image of a minor. EFF argues that given the vagueness of the standard, service providers would feel massive pressure to block access to a broad range of materials otherwise protected. EFF disagrees that internet providers should be criminally liable for providing access to third parties' materials, claiming that such a state law conflicts directly with federal law and threatens the free flow of information on the Internet.

EFF is arguing that the New Jersey law conflicts with the First Amendment and §230 of the CDA. The First Amendment bars vague criminal statutes because it runs the risk of far-reaching and inappropriate application. Void for vagueness analysis comes from due process clauses in 5th and 14th amendments, the issue here is that it violates the First Amendment because it would likely chill legitimate speech. CDA § 230 ensures that internet intermediaries are not held liable for third party postings.

The Court enjoined New Jersey from enforcing its laws on June 28, 2013 and finalized its decision on August 20, 2013.[48] The court emulated the decision of the Connecticut and Washington courts, deciding that 1) the act is likely preempted by Section 230 of the Communications Decency Act; 2) the act likely violates the First and Fourteenth Amendments because it imposes strict liability and eliminates scienter and because it is content based restriction it will not survivor strict scrutiny; 3) the act is both unconstitutionally overbroad and vague and finally 4) the act likely violates the commerce clause.[49]

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[48] *Backpage & Internet Archive v. Hoffman*, Civil Action No. 13-cv-03952(DMC)(JAD)
[49] *Id.*

Conclusion:

States have a legitimate interest in protecting children from the tremendous harm of sex trafficking via websites such as BP and Craigslist. Overall, obscenity is an unprotected form of speech, and preventing the posting of advertisements for obscene acts involving minors, leading to actual abuse, is a substantial and compelling government interest. Since obscenity is unprotected the government can create regulation based on a rational basis, which is the lowest form of scrutiny.[50] The culprit who posts such an advertisement surely has no constitutional protection. It seems though that the courts are unwilling to extend the power to hold internet providers liable to states.

However, at the federal level, the legislature can argue that the CDA's policy encourages the protection of CSEC victims against violations occurring through this form of communication because it states that it is the policy of the United States to "ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity… by means of computer" (§230 CDA (b)(5)). If children are being trafficked online, the U.S. Government has an overwhelming interest to regulate this form of abuse. This interest could possibly outweigh the internet provider's interest in free speech only in the exceptional instance of an obscenity, or more specifically, when a child is implicated in prostitution.

[50] *See* Chaplinsky v. State of New Hampshire (62 S.Ct. 766 1942).