

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY

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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. :

-----x

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

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

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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.

CHARLES P. McGUIRE, C.C.R.

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1 THE COURT CLERK: All rise.

2 THE COURT: Be seated.

3 Shocking this created such interest.

4 All right. This is the matter of Backpage.com,
5 LLC, v. John Jay Hoffman, Attorney General of the State of
6 New Jersey, and Internet Archive v. Hoffman, Civil Number
7 13-3952.

8 Could we have your appearances, please?

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

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

15 THE COURT: Okay.

16 MR. CORRADO: Good morning, Your Honor.

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

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

21 THE COURT: Fine. Be seated.

22 MR. FEINBLATT: Good morning, Your Honor.

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

25 And I have with me two of my colleagues who

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

3 THE COURT: Okay.

4 MS. VENETIS: Good morning, Your Honor.

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

10 THE COURT: Okay. Be seated.

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

17 Federal Courts in Tennessee and Washington have
18 entered permanent injunctions prohibiting those states from
19 enforcing statutes that are identical to the Act in all
20 material respects. In both cases, the courts held that the
21 statutes were unconstitutional and unenforceable on the
22 ground that the Plaintiffs have advanced here. See
23 Backpage.com, LLC v. McKenna, 881 F. Supp. 2d 1262
24 (W.D. Washington 2012) and Backpage.com, LLC v. Cooper,
25 2013 WL 1558785 (M.D. Tenn. January 3, 2013).

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

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

12 I'll now hear oral argument.

13 MR. GRANT: Good morning, Your Honor.

14 Again, Jim Grant on behalf of Backpage.com.

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

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

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

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

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

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

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

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

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

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

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

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

23 THE COURT: Okay. Thank you.

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

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

9 One of the central problems throughout this case,
10 I think, is that the Legislature first and then the
11 Defendants since have tried to characterize the Act, section
12 13-10, in all sorts of different ways. But the issue here
13 is not what the State says the Act is; rather, it's what the
14 actual terms of the Act are and what its effect would be.

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

18 THE COURT: You can just address them.

19 MR. GRANT: Okay.

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

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

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

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

18 First, the statute is overbroad as to the parties
19 that are targeted, and this specifically implicates section
20 230 of the Communications Decency Act. It's overbroad
21 because it encompasses any party that directly or indirectly
22 causes offending content to be disseminated or displayed,
23 and that means not just Backpage.com, that means craigslist,
24 that means Facebook, that means Google, that means thousands
25 of online service providers, and it would make the online

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

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

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

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

24 I only want to say one other thing about section
25 230 because Mr. Zimmerman will address some of that as well,

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

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

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

11 THE COURT: Who didn't do it?

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

16 THE COURT: Just wondering.

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

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

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

11 As I say, I'll leave other issues as to section
12 230 to Mr. Zimmerman.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

21 Your Honor, there are many appropriate and
22 worthwhile approaches to combat sex trafficking. In fact,
23 other provisions of the Legislature's Human Trafficking
24 Prevention, Protection and Treatment Act, of which section
25 13-10 is a part, are commendable, and they're worthwhile

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

6 We urge that the preliminary injunction be
7 entered.

8 THE COURT: Thank you.

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

12 THE COURT: Good morning.

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

17 THE COURT: Keep your voice up just a bit.

18 MR. GRANT: Excuse me.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

19 Thank you.

20 THE COURT: Thank you.

21 Counsel?

22 MR. FEINBLATT: Good morning again, Your Honor.

23 THE COURT: Good morning.

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

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

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

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

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

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

12 THE COURT: Without violating the law.

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

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

20 But that's not our problem, is it?

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

23 THE COURT: That is a problem --

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

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

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

9 MR. FEINBLATT: Right.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 When we get to the First Amendment, very briefly,

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

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

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

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

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

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

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

25 "We agree with certain other circuits that the

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

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

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

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

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

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

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

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

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

9 I think those are really our major points.

10 Does the Court have any questions?

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

13 MR. FEINBLATT: Thank you.

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

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

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

1 serve, trafficking victims, have not been represented.

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

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

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

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

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

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

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

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

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

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

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

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

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

1 attention on two issues.

2 The first is the preemption issue.

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

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

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

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

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

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

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

12 THE COURT: I understand that.

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

17 THE COURT: Yes, he did.

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

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

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

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

11 THE COURT: The Constitution covers everyone.

12 MS. VENETIS: Exactly.

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

15 THE COURT: Go ahead.

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

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

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

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

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

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

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

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

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

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

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

21 Thank you, Your Honor.

22 THE COURT: Thank you.

23 Do you want a short response, or no?

24 MR. GRANT: I do.

25 I'm sorry.

1 THE COURT: Notice I said "short."

2 (Laughter)

3 MR. ZIMMERMAN: Very briefly, Your Honor.

4 THE COURT: "Brief" is another word.

5 (Laughter)

6 MR. ZIMMERMAN: Very briefly.

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

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

22 There's no such requirements in the statute.

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

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

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

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

20 Thank you.

21 THE COURT: Thank you.

22 Anything further, counsel?

23 MR. GRANT: A couple points, Your Honor.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 (Laughter)

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

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

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

18 I thank the Court for your time.

19 THE COURT: All right.

20 Nothing further; correct, counsel?

21 MR. FEINBLATT: No, Your Honor.

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

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

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

11 With respect to preemption, the Act is likely
12 preempted by Section 230 of the Communications Decency Act
13 (CDA). Plaintiffs' first argue that section 12(b)(3) of the
14 Act is both expressly preempted and conflict preempted by
15 Section 230 of the Communications Decency Act. Plaintiffs
16 allege the Act violates their rights under
17 47 U.S.C. section 230(e)(3) because enforcement of the new
18 law would treat Plaintiffs, providers of an interactive
19 computer service, as the publisher or speaker of information
20 provided by another information content provider.

21 Defendants argue that the Act is not preempted by the CDA
22 because the CDA does not preempt state criminal laws and
23 that the Act is consistent with "Federal criminal laws
24 regarding the sexual exploitation of children."

25 Essentially, the Defendants urge this Court to find fault in

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

6 There are three circumstances in which Congress
7 has the power to preempt state law. First, Congress may
8 expressly preempt inconsistent state laws. See
9 Arizona v. United States, 132 S.Ct. 2492, 2500-01 (2012)
10 ("There is no doubt that Congress may withdraw specified
11 powers from the States by enacting a statute containing an
12 express preemption provision.") Second, "the states are
13 precluded from regulating conduct in a field that Congress,
14 acting within its proper authority, has determined must be
15 regulated by its exclusive governance." Again, that's from
16 the same case. Third, under the doctrine of conflict
17 preemption, state laws are preempted when they conflict with
18 Federal law. Crosby v. National Foreign Trade Council,
19 530 U.S. 363, 372 (2000). "This includes cases where
20 compliance with both Federal and state regulations is a
21 physical impossibility and those instances where the
22 challenged state law stands as an obstacle to the
23 accomplishment and execution of the full purposes and
24 objectives of Congress." Again, Arizona v. U.S., 132 S.Ct.
25 at 2501.

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

16 In enacting the CDA, "Congress decided not to
17 treat providers of interactive computer services like other
18 information providers such as newspapers, magazines or
19 television and radio stations, all of which may be held
20 liable for publishing or distributing obscene or defamatory
21 material written or prepared by others." Batzell v. Smith,
22 333 F.3d 1018, 1026 (9th Cir. 2003). Congress enacted
23 Section 230 to achieve two goals. First, "Congress wanted
24 to encourage the unfettered and unregulated development of
25 free speech on the Internet, and to promote the development

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

5 The Act in question is likely inconsistent with
6 and therefore expressly preempted by Section 230. Section
7 230 prohibits "treat[ing]" a "provider or user of an
8 interactive computer service" as the "publisher or speaker
9 of any information provided by another information content
10 provider." 47 U.S.C. Section 230. Both Backpage and
11 Internet Archive are providers of an interactive computer
12 service within the meaning of CDA Section 230. See 47
13 U.S.C. Section 230(f)(2) (defining an interactive computer
14 service as "any information service, system, or access
15 software provider that provides or enables computer access
16 by multiple users to a computer server, including
17 specifically a service or system that provides access to the
18 Internet and such systems operated or services offered by
19 libraries or educational institutions). Section 12(b)(1) of
20 the Act runs afoul of Section 230 by imposing liability on
21 backpage.com and IA for information created by third parties
22 - namely ads for commercial sex acts depicting minors - so
23 long as it "knows" that it is publishing, disseminating,
24 displaying, or causing to be published, disseminated or
25 displayed such information. See Johnson v. Arden,

1 614 F.3d 785, 791 (8th Circuit 2010). ("The majority of
2 federal circuits have interpreted Section 230 to establish
3 broad federal immunity to any cause of action that would
4 make service providers liable for information originating
5 with a third-party user of the service."

6 In Barnes v. Yahoo!, Inc., 570 F.3d 1096, 1101-02
7 (9th Circuit 2009), "[W]hat matters is not the name of the
8 cause of action...[but] whether [it] inherently requires the
9 Court to treat the Defendant as the 'publisher or speaker'
10 of content provided by another.")

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

19 Even if the language of Section 230 did not
20 expressly preempt the Act, the Act likely conflicts with the
21 CDA because "the challenged state law stands as an obstacle
22 to the accomplishment and execution of the full purposes and
23 objectives of the Congress." Arizona v. U.S., 132 S.Ct. at
24 2501. "Like the strict liability imposed by the Stratton
25 Oakmont court, liability upon notice reinforces service

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

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

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

25 Having shown a likelihood of success on the

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

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

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

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

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

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

5 Thank you, counsel.

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

8 THE COURT: You do it.

9 (Matter concluded)

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