

In The
Supreme Court of the United States

—◆—
JANE DOE NO. 1, et al.,

Petitioners,

v.

BACKPAGE.COM, LLC, et al.,

Respondents.

—◆—

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The First Circuit**

—◆—

**MOTION FOR LEAVE TO FILE *AMICUS CURIAE*
BRIEF AND BRIEF OF *AMICI CURIAE* THE
HUMAN TRAFFICKING INSTITUTE AND FORMER
FEDERAL HUMAN TRAFFICKING PROSECUTORS
IN SUPPORT OF PETITIONERS**

—◆—

VICTOR BOUTROS
Counsel of Record

JOHN COTTON RICHMOND
HUMAN TRAFFICKING INSTITUTE
3705 Taft Avenue
Alexandria, Virginia 22304
(202) 372-5707
john.richmond@traffickinginstitute.org
victor.boutros@traffickinginstitute.org

**MOTION FOR LEAVE TO FILE *AMICUS*
CURIAE BRIEF IN SUPPORT OF PETITIONERS**

Amici Curiae The Human Trafficking Institute and Former Federal Human Trafficking Prosecutors respectfully move for leave of Court to file the accompanying brief under Supreme Court Rule 37.3(b). Counsel of Record for all parties were given timely notice pursuant to Supreme Court Rule 37.3(a) of The Human Trafficking Institute's intent to file an *amicus curiae* brief. Petitioners granted their consent to the filing of this brief. Respondents refused.

For the reasons detailed in the accompanying brief, the Human Trafficking Institute respectfully submits that its knowledge and expertise are helpful to and should be considered by this Court.

October 5, 2016

Respectfully submitted,

VICTOR BOUTROS

Counsel of Record

JOHN COTTON RICHMOND

HUMAN TRAFFICKING INSTITUTE

3705 Taft Avenue

Alexandria, Virginia 22304

(202) 372-5707

john.richmond@traffickinginstitute.org

victor.boutros@traffickinginstitute.org

Counsel for Amici Curiae

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IDENTITY AND INTEREST OF *AMICI CURIAE*¹

The Human Trafficking Institute (Institute) exists to decimate modern slavery at its source by empowering police and prosecutors to stop traffickers. Working inside criminal justice systems, the Institute provides the embedded experts, world-class training, investigative resources, and evidence-based research necessary to free victims.

The Institute's founders are both former federal human trafficking prosecutors with the United States Department of Justice's Human Trafficking Prosecution Unit. With almost two decades of experience working victim-centered forced labor and sex trafficking cases, Victor Boutros and John Cotton Richmond have investigated and prosecuted numerous human trafficking cases throughout the United States. It is notable given the facts of this case that Mr. Richmond served as the lead prosecutor in the nation's first successful sex trafficking conviction based solely upon the "benefiting" theory of liability.

As former federal human trafficking prosecutors, the Institute's founders regularly found Backpage.com working with human traffickers to advertise adult and minor victims for sale to purchasers seeking to engage

¹ Pursuant to Rule 37, the Human Trafficking Institute states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

in commercial sex acts. In their experience, backpage.com has become the current industry leader in the crowded online marketplace for commercial sex acts.

Because of the Institute's work and its experience with backpage.com, the Institute is specially situated to aid the Court's consideration of this Petition for Certiorari. Given the Institute's interest in combatting all forms of human trafficking, including the sex trafficking of minors, and backpage.com's business model which benefits from engaging in sex trafficking ventures, the Institute has a particular interest in this matter. More generally, the Institute has an interest in preserving the robust use of the Trafficking Victims Protection Act's "benefiters" theory of liability and the civil right of action, which are both essential components of the United States' anti-human trafficking enforcement mechanism. The Institute respectfully requests that the Court accept this *amicus* brief.



REASONS FOR ACCEPTING THE PETITION

The Court should grant petitioners' Petition for Certiorari because the First Circuit's decision thwarts Congress's intent and grants blanket immunity to businesses that engage in sex trafficking ventures that happen to use the Internet.

Consider a business that actively engages in a lucrative venture selling illegal sex with children. In exchange for a fee, the business provides a protected

space within its facility for sex traffickers to connect with those interested in purchasing sex with boys and girls. Then the business takes steps to make it more difficult for the authorities to identify the traffickers and purchasers.

Such a business would be subject to the criminal and civil provisions of the Trafficking Victims Protection Act. The business could not avoid accountability because it did not directly recruit, groom, coerce, transport, or engage in sex acts with the children. By benefiting financially from engaging in a sex trafficking venture, the business is subject to criminal and civil liability.

The only significant distinction between this hypothetical and the facts pled by petitioners in this case is that Backpage.com's business exists on the Internet. Under the First Circuit's holding in this case, a business can avoid liability for its own unlawful acts simply by operating its business online.

As discussed below, the appellate court misapplied a well-intentioned protection for online actors who merely serve as neutral intermediaries of content. By unnecessarily pitting two statutory schemes against each other, the decision below guts the laws that protect human trafficking victims and expands the ability of businesses to engage in, and profit from, sex trafficking operations.

A. The First Circuit Effectively Grants Immunity to all Benefitters who use the Internet to Engage in Sex trafficking.

1. Petitioners' civil suit clearly states that their theory of liability rests in the Trafficking Victim's Protection Act's (TVPA) "benefiting" provision. 18 U.S.C. §1591(a) and Second Am. Compl. ¶¶ 4, 11, and Counts 1-3. Petitioners allege that Backpage.com actively engaged in a venture, knowing or in reckless disregard of the fact, that minor children were being sold for commercial sex acts. Second Am. Compl., Counts 1-3. The statute broadly defines the term "venture" to include "any group of two or more individuals associated in fact, whether or not a legal entity." 18 U.S.C. § 1591(e).

To avoid civil liability under the TVPA, Backpage.com seeks shelter under the Communication Decency Act's (CDA) "Good Samaritan" provision, which provides a qualified immunity from civil liability for providers or users of interactive computer services. The statute states:

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

47 U.S.C. § 230(c)(1). To stand in the shoes of the Good Samaritan, Backpage.com must be a "provider or user of an interactive computer service" being sued as the "publisher or speaker" of information generated by "another information content provider."

The crux of the First Circuit's error is that it fundamentally misunderstands the nature of petitioners' claims in Counts 1 through 3. The civil TVPA counts do not seek to hold Backpage.com liable for the content provided by others, but instead for Backpage.com's own willful acts in the sex trafficking venture. At no point do petitioners seek to assign Backpage.com responsibility for the content of traffickers' postings. To the contrary, petitioners' claims focus exclusively on Backpage.com's own conduct within the sex trafficking venture.

2. Petitioners' well-pled allegations contain a significant list of Backpage.com's conduct in the sex trafficking venture and how it treats its commercial sex advertisements differently than the non-sex-related classifieds. For instance, Backpage.com requires numeric phone numbers (which are searchable by law enforcement) for non-sex-related classifieds, but it created a system to allow non-numeric phone numbers for advertisements of commercial sex. Second Am. Compl. ¶ 49.

Backpage.com also strips uploaded photographs off all metadata (Second Am. Compl. ¶ 51), doesn't require age or email verification (*Id.* at ¶¶ 48, 50), and refuses to gather traceable credit card data (*Id.* at ¶ 47) for commercial sex advertisements. In a decision against its own financial interest that reveals Backpage.com's actual sex trafficking business model, it removes *paid* advertisements by anti-trafficking groups placed to notify potential sex trafficking victims of

their rights, and it removes *paid* undercover law enforcement advertisements seeking to identify victims and their traffickers (*Id.* at ¶ 40). At this stage of the proceedings, all of petitioners' allegations must be taken as true, and reasonable inferences must be drawn in petitioners' favor. *SEC v. Tambone*, 597 F.3d 436, 441 (1st Cir. 2010).

In declaring that the CDA's Good Samaritan provision protects Backpage.com, the First Circuit relied on the concept of a publisher's "traditional editorial functions." It noted the CDA's interest in protecting a "provider or user of an interactive computer service" in the exercise of a publisher's traditional editorial functions such as deciding "whether to publish, withdraw, postpone or alter content." Pet. App. 10a (quoting *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997)). The First Circuit found that the litany of Backpage.com's activities all fall within the protected category of "traditional publishing activities." The appellate court characterized petitioners' list of Backpage.com's active participation in a sex trafficking venture as:

part and parcel of the overall design and operation of the website (such as the lack of phone number verification, the rules about whether a person may post after attempting to enter a forbidden term, and the procedure for uploading photographs). Features such as these, which reflect choices about what content can appear on the website and in what form, are editorial choices that fall within the purview of traditional publisher functions.

Pet. App. 14a-15a. Little consideration was given to Backpage.com’s conduct that did not involve decisions regarding, “what content can appear on the website and in what form.” Instead, the First Circuit either ignored or dismissed this conduct as “sententious rhetoric rather than well-pleaded facts.” Pet. App. 16a, n.6.

The circuit court decision bends the term “traditional publishing activities” to the point of fracture. It provides no examples of stripping metadata from uploaded photos, deleting paid undercover law enforcement postings, and refusing to retain payment details and identifying information about those posting content, as having ever been determined to be “traditional publishing activities.” By affirming the dismissal of petitioners’ suit, the First Circuit prejudged the merits of petitioners’ allegations instead of having drawn reasonable inferences in favor of petitioners.

Absent from the First Circuit’s rationale were examples of other entities engaging in a criminal enterprise, like a sex trafficking venture, operating under a publishing cloak. The First Circuit gave a host of examples where the CDA protected providers or users of “interactive computer services” when they were asked to affirmatively screen third party content or protect innocent victims from the spread of misinformation. Pet. App. 15a-16a. None of these examples involves a provider or user of an “interactive computer service” actively participating in a criminal enterprise or structuring its services to advance a criminal venture, as petitioners allege.

Remarkably, the First Circuit’s opinion failed to meaningfully address or distinguish contrary persuasive authority based on almost identical facts. In 2015, the Washington State Supreme Court tackled Backpage.com’s invocation of the CDA’s Good Samaritan Provision after three minor sex trafficking victims brought suit in Washington State Court. The court noted that, “[a]ccording to [the plaintiffs], Backpage’s advertisement posting rules were not simply neutral policies prohibiting or limiting certain content but were instead ‘specifically designed . . . so that pimps can continue to use Backpage.com to traffic in sex.’” *J.S. v. Village Voice Media Holdings LLC*, 359 P.3d 714, 718 (Wa. 2015) (quoting plaintiffs’ complaint). Affirming the trial court’s denial of Backpage.com’s motion to dismiss, the court stated: “Viewing [the plaintiffs’] allegations in the light most favorable to [the plaintiffs], as we must at this stage, [the plaintiffs] alleged facts that, if proved true, would show that Backpage did more than simply maintain neutral policies prohibiting or limiting certain content.” *Id.* By ignoring the Washington State Supreme Court’s decision, the First Circuit reached the wrong conclusion and created a confusing split in authority.

3. The sweeping scope of the First Circuit’s decision is found in its own analysis. The court recognized that a provider or user of an “interactive service provider” could be both a “benefiter” under the TVPA and a “publisher or speaker” as defined by the CDA. See Pet. App. 16a. That is, there can be situations in which

a website unlawfully engages in a sex trafficking venture that causes minor children to engage in illegal commercial sex acts and still avoid all civil accountability as a CDA Section 230 Good Samaritan. The First Circuit explained:

But even if we assume, for argument's sake, that Backpage's conduct amounts to "participation in a [sex trafficking] venture" . . . the TVPRA claims as pleaded premise that participation on Backpage's actions as a publisher or speaker of third-party content. The strictures of section 230(c) foreclose such suits.

Ibid. The First Circuit's opinion serves as an open invitation to those interested in avoiding liability for criminal activity to hide beneath their rationale.

The Court should grant certiorari, not merely to correct the misapplication of law in this case, but to avoid the adverse consequences that could result if the First Circuit decision is allowed to stand as precedent.

B. The First Circuit Undermines Congress's Intent and Purposes in Enacting the Criminal and Civil Enforcement Regimes.

1. The First Circuit's opinion undermines Congress's intent and purposes in enacting the TVPA. In particular, the First Circuit's holding limits Congress's intentional expansion of the TVPA to penalize individuals who benefit from trafficking.

The TVPA and its “benefiting” provision demonstrates that the individuals and businesses that drive trafficking come in varying shapes and sizes. Congress passed the first iteration of today’s TVPA in 2000. TVPA, Pub. L. No. 106-386, 114 Stat. 1464 (2000). This law was passed with the explicit mandate “to combat trafficking in persons . . . , to ensure just and effective punishment of traffickers, and to protect their victims.” *Id.* at § 102. While many provisions of the law targeted more traditional trafficking defendants (*e.g.*, those who break 18 U.S.C. § 1589(a)(1) by obtaining labor “by means of force” or those who break 18 U.S.C. § 1591 by actively recruiting and coercing sex trafficking victims), the statute also made it illegal for an individual to “benefit, financially or by receiving anything of value,” from sex trafficking. *Id.* at § 112. The statute has been reauthorized multiple times. TVPA of 2003, Pub. L. No. 108-193, 117 Stat. 2875; TVPA of 2005, Pub. L. No. 109-164, 119 Stat. 3558 (2006); William Wilberforce TVPA of 2008, Pub. L. No. 110-457, 122 Stat. 5044; TVPA of 2013, Pub. L. No. 113-4, 127 Stat. 54; Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22, 129 Stat. 227.

The 2003 version of the TVPA added a civil remedy provision. See 18 U.S.C. § 1595 (2003). The 2008 amendments added the “benefiting” provision to 18 U.S.C. § 1589 (2008), which applies to forced labor, and 18 U.S.C. § 1595 (2008), which is the civil remedy for trafficking violations. The “benefiting” provision has been a part of the TVPA’s sex trafficking statute since the statute’s enactment in 2000. 18 U.S.C. § 1591

(2000). The “benefiting” provision, found throughout the TVPA since the 2008 amendments, creates criminal and civil liability for those who “knowingly benefit, financially or by receiving anything of value,” from trafficking. See, e.g., 18 U.S.C. § 1595(a) (2015). The 2008 amendments also expanded liability by adding a new “reckless disregard” *mens rea* to the existing “knowing” *mens rea* found in 18 U.S.C. § 1589 (2008) and 18 U.S.C. § 1591 (2008).

These expansions of liability reflect Congress’s response to the serious effects of trafficking. Representative Ileana Ros-Lehtinen has said that “[t]he abuse of the world’s most defenseless and vulnerable citizens for revenue and personal benefits is unconscionable.” *Enhancing the Global Fight to End Human Trafficking: Hearing and Briefing Before the H. Comm. on International Relations*, 109th Cong. 4 (2006) (statement of Rep. Ileana Ros-Lehtinen, Chairwoman, H. Comm. on International Relations). Representative Smith, one of the original sponsors of the bill, provided two purposes for incorporating improvements like the civil action into the 2003 reauthorization. First, these improvements were aimed at “mitigating the suffering of victims.” 108 Cong. Rec. H10,285 (2003) (statement of Rep. Smith). Second, the improvements allowed prosecutors and the public to go “after those who traffic and the countries that harbor traffickers who are part of the problem themselves.” *Ibid.* Representative Smith specifically said that these dual purposes are pursued by “allow[ing] trafficking victims to sue their traffickers in U.S. courts.” *Ibid.*

Then-Senator Joe Biden summarized the Senate version of the 2008 amendments as “amend[ing] the trafficking statutes to hold accountable those who knowingly or in reckless disregard financially benefit from participation in a trafficking venture.” 110 Cong. Rec. S4,799 (2008) (statement of Sen. Biden). Representative Tom Lantos submitted a report that similarly stated that the same subsection “enhances the civil action by providing that an action is also available against any person who knowingly benefits from trafficking.” H.R. Rep. No. 110-430, pt. 1, at 55 (2007). Representative Howard Berman spoke to the expanded *mens rea* – saying that this addition “would have the advantage of reaching those who turn a willfully blind eye toward a person in commercial sexual activity who is being physically abused or is underage.” 110 Cong. Rec. H10,904 (2008) (statement of Rep. Berman). In the 2008 amendments, Congress intentionally targeted those who benefit from trafficking.

The Executive Branch has actively enforced the TVPA’s “benefiting” provision. In *United States v. Patel*, the Department of Justice successfully secured a conviction based solely on a violation of the “benefiting” prong in a sex trafficking case. See No. 2:13-cr-00286 (E.D. La. July 1, 2015), ECF No. 227; see also Press Release, U.S. Dep’t of Justice, Louisiana Motel Owner Pleads Guilty in Sex Trafficking Case (July 1, 2015), <http://www.justice.gov/opa/pr/louisiana-motel-owner-pleads-guilty-sex-trafficking-case>. See John Cotton Richmond, *Human Trafficking: Understanding the Law and Deconstructing Myths*, 60 St. Louis U. L.J.

1, 9 (2015) (citing *Patel* as the first successful human trafficking conviction brought “solely on the benefiter theory”). In *Patel*, a hotel owner, rented rooms to sex traffickers. Press Release, U.S. Dep’t of Justice, Louisiana Motel Owner Pleads Guilty in Sex Trafficking Case (July 1, 2015), <http://www.justice.gov/opa/pr/louisiana-motel-owner-pleads-guilty-sex-trafficking-case>. He was charged under a benefiter theory, and he pled guilty. *Ibid.* Patel admitted that, “although he never personally recruited, groomed or coerced any of the victims, he benefited financially from the sex trafficking operation.” *Ibid.*

The Department of Justice has successfully brought many suits under the “benefiting” provisions alongside other trafficking charges. See, e.g., *United States v. Cook*, 782 F.3d 983, 990 (8th Cir. 2015), *cert. denied*, 136 S. Ct. 262 (2015); *United States v. Flanders*, 752 F.3d 1317, 1331 (11th Cir. 2014), *cert. denied*, 135 S. Ct. 1188 (2015), *reh’g denied*, 135 S. Ct. 1757 (2015); *United States v. Tutstone*, 525 F. App’x 298, 300 (6th Cir. 2013); *United States v. Wild*, 143 F. App’x 938, 945 (10th Cir. 2005).

On the civil side, the statute gives victims a cause of action against “whoever knowingly benefits, financially or by receiving anything of value from participation in a venture which that person knew or should have known has engaged in an act in violation of this chapter.” 18 U.S.C. § 1595 (2008); see also Charles Doyle, Cong. Research Serv., R40190, *The William Wilberforce Trafficking Victims Reauthorization Act of 2008 (P.L. 110-457): Criminal Law Provisions 16* (2009)

(“[I]t gives victims a cause of action against those who have profited from their exploitation. . . .”). Private parties have brought successful suits under this civil “benefiting” provision. See, e.g., *Nunag Tanedo v. Placide*, 632 F. App’x 896, 898 (9th Cir. 2015); *Lagayan v. Odeh*, No. 15-CV-01953 (APM), 2016 WL 4148189, at *5 (D.D.C. Aug. 2, 2016); *Aguilera v. Aegis Commc’ns Grp., LLC*, 72 F. Supp. 3d 975, 979-80 (W.D. Mo. 2014).

The Court should grant certiorari because the First Circuit’s opinion frustrates Congress’s intent to expand trafficking liability through the criminal and civil “benefiting” provisions of the TVPA.

2. The implications of the First Circuit’s ruling extend beyond the TVPA and frustrate other criminal and civil enforcement provisions. The Court should grant certiorari because this misapplication of the CDA’s Section 230 Good Samaritan immunity provision frustrates Congress’s intent in a host of criminal and civil enforcement regimes.

Congress has created private rights of actions in statutes as diverse as the False Claims Act, 31 U.S.C. §§ 3729 *et seq.*, the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1964(c), and the Anti-Terrorism Act, 18 U.S.C. § 2333(a). The First Circuit’s interpretation of Section 230 of the CDA, 47 U.S.C. §§ 201 *et seq.*, would foreclose these civil actions whenever website operators can point to a third-party who contributed to the commission of the violation of law.

A federal district court rejected the contention that Section 230 of the CDA provided the operator of

an online marketplace for drugs and criminal activity with immunity. *United States v. Ulbricht*, 31 F. Supp. 3d 540, 568 (S.D.N.Y. 2014). The First Circuit’s ruling would seem to reverse this outcome. See Pet. App. 17a (holding that the district court did not err because third-party content “appears as an essential component of each and all of the appellants’ [TVPA] claims.”). The First Circuit’s ruling has the potential to immunize defendants from similar civil liability arising from the production of child pornography, 18 U.S.C. § 2252A, terrorism, 18 U.S.C. § 2333(a), and RICO offenses, 18 U.S.C. § 1964(c).

In addition to private rights of action, the First Circuit’s logic would also inhibit the government’s own civil enforcement actions. While Section 230 of the CDA has a carve-out for federal criminal prosecutions, 47 U.S.C. § 230(e)(1), it does not have a similar carve-out for federal civil enforcement actions. The First Circuit’s expansion of Section 230 immunity would likely create problems for federal enforcement of acts like the Federal Trade Commission Act, 15 U.S.C. §§ 41 *et seq.*, and the Fair Housing Act, 42 U.S.C. §§ 3601 *et seq.*

This Court should grant certiorari because this misapplication of the CDA immunity provision threatens to unsettle and limit the application of the many civil enforcement provisions Congress has established.

Section 230 of the CDA was designed to protect providers and users of “interactive computer services” in their capacity as “neutral intermediaries” and does

not immunize a defendant from its own alleged violations of “laws of general applicability.” *Fair Housing Council v. Roommates.com*, 521 F.3d 1157, 1164 n.15 (2008). Instead of allowing the First Circuit’s interpretation to stand, this Court should clarify that Section 230 differentiates between passive, neutral publishers and website operators who intentionally engage in illegal activity. The TVPA should be construed to extend to everyone who actively engages in human trafficking, including providers and users of “interactive computer services.” Section 230 should not immunize this illegal behavior from civil liability just because it was done on the Internet.

C. The TVPA and CDA Protections Can Be Reconciled Without Damaging Either Statute.

1. The Court should grant certiorari because the First Circuit’s opinion unnecessarily finds conflict between the TVPA and CDA when they can be effectively reconciled. This case touches two fundamental principles: (1) that vulnerable people deserve protection from heinous sexual crimes, and (2) that the Internet is the frontline of innovation, deserving staunch protection. Without deeper scrutiny, the First Circuit has misconstrued this case as a tragic collision of these two principles. However, the values undergirding the TVPA and the CDA do not conflict. In fact, allowing petitioners’ case to proceed and hold Backpage.com accountable for its sex trafficking venture not only protects the purposes of the CDA, but also further supports

Congress's goal to allow the Internet to expand appropriately by condemning the misappropriation of the CDA's protections for criminal goals.

The Internet is a growing frontier that has revolutionized the way education and business function globally. CDA, Pub. L. No. 104-104, 110 Stat. 56 (1996); 47 U.S.C. § 230. Congress affirmed that the Internet's successful expansion requires certain protections for companies who use online forms of marketing when it passed the Communications Decency Act in 1996. CDA, Pub. L. No. 104-104, 110 Stat. 56 (1996); 47 U.S.C. § 230. At its best, the CDA delineates a safe space for technological innovation and free competition in the market. 47 U.S.C. § 230(b). Specifically, the CDA shields online intermediaries who make a good faith attempt to "restrict access to the availability of [obscene, lewd, lascivious] . . . material" by prohibiting them from being treated as active publishers of that material. 47 U.S.C. § 230(c)(2)(A). Section 230 protects online intermediaries who "merely provide[] a neutral means by which third parties can post information of their own independent choosing." See, e.g., *Klayman v. Zuckerberg*, 753 F.3d 1354, 1358 (D.C. Cir. 2014). Although Section 230 guards neutral content hosts, Courts recognize that it "cannot be understood as a general prohibition of civil liability" for all online information-hosting entities. See *Chicago Lawyers' Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666, 669 (7th Cir. 2008).

Congress passed the TVPA in response to the acknowledgment that sex trafficking of women and children is “a [growing] debasement of our common humanity” that requires a targeted attack. 110 Cong. Rec. S10,937 (2008) (remarks by Sen. Dubin quoting President-elect Barack Obama). It contains a broad, three-fold approach purpose: to combat trafficking, to provide “just and effective punishment,” and to protect victims. TVPA, Pub. L. No. 106-386, 114 Stat. 1464, § 102 (2000).

After gaining a broader understanding of the relationships between traffickers and third parties, Congress expanded the TVPA to attack third parties who may be “complicit in trafficking,” and benefiting from trafficking as a result. 108 Cong. Rec. H10,285 (2003) (remarks by Rep. Smith). “[T]he means used by modern-day traffickers are increasingly subtle” and the benefiter provision of Congress’s civil remedy is an attempt to respond effectively to that subtlety by reaching actors whose involvement in trafficking appears attenuated. See *United States v. Dann*, 652 F.3d 1160, 1169 (9th Cir. 2011). The “benefiter provision” requires only that a third party need “knowingly benefit” from trafficking activity to be guilty of trafficking. TVPA, Pub. L. No. 108-193, 117 Stat. 2878, § 4(a)(4)(A) (2003). Congress added the benefiter provision with a recognition that its enforcement would further combat trafficking, while empowering victims to effectively punish traffickers, thus meeting its overarching goals of the TVPA. TVPA, Pub. L. No. 106-386, 114 Stat. 1464, § 102 (2000).

2. Unfortunately, while the Internet has vastly expanded empowering methods for education and healthy competition in the free market, it has also made a space for brazen illegal conduct, including a virtual red-light district for the sale of children for illegal sex. Furthermore, Backpage.com has encouraged the spread of child sex trafficking by strategically tailoring its business practices to enable illegal online sexual commerce. Monica J. DeLateur, *From Craigslist to Backpage.com: Conspiracy as a Strategy to Prosecute Third-Party Websites for Sex Trafficking*, 56 Santa Clara L. Rev. 531, 541-42 (2016). Performing the traditional role of a brothel owner, middleman, or pimp, Backpage.com now profits by connecting minor children with sexual predators with a sense of impunity because it operates online. Pet. App. 28a.

It is at this junction that the respondents claim that the principles underlying the TVPA and the CDA seemingly conflict. However, the purposes of the TVPA and the CDA both desire to protect neutral intermediaries and hold active criminals accountable. The real conflict that lies at the heart of this case results from the First Circuit's inappropriate expansion of the CDA to Backpage.com's conduct.

Other courts have found the limits of the CDA's Good Samaritan provision and refused to immunize websites just because of their online activity. In *Fair Housing Council v. Roomates.com*, the Court found that the mere existence of third-party content on an internet service provider's website did not relieve it of

liability where it acted as “more than a passive transmitter of information provided by others” by “‘develop[ing]’ at least ‘in part’” online information. 521 F.3d 1157, 1165-66 (2008). Additionally, the Tenth Circuit found that a website operator was not acting neutrally where its business practices were “intended to generate [offensive] content.” See *FTC v. Accusearch, Inc.*, 570 F.3d 1187, 1201 (10th Cir. 2009); *J.S. v. Village Voice Media Holdings LLC*, 359 P.3d 714, 718 (Wa. 2015).

Backpage.com is similar to *Roommates.com* and *Accusearch*. Backpage.com developed and maintains business practices to encourage the posting of escort advertisements on their website, with the knowledge that those advertisements likely include child and adult sex trafficking victims. The list of Backpage.com’s activities to further its sex trafficking venture (as alleged by petitioners) extends beyond neutrality, and protecting Backpage.com from liability obscures the CDA’s actual intent to protect passive websites.

On September 20, 2016, the Eastern District of Michigan entered a \$500,000 judgment against Dr. Mamoun Dabbagh, a benefiter from sex trafficking venture. *Jane Doe v. Mamoun Dabbagh*, 2:15-cv-10724 (E.D. Mich. September 20, 2016). Dr. Dabbagh knowingly provided Adderall to traffickers who drugged their victims. Complaint at 11, *Jane Doe v. Mamoun Dabbagh*, No. 2:15-cv-10724 (E.D. Mich. September 20, 2016). In essence, Dr. Dabbagh was found liable for facilitating sex trafficking by conducting business with

traffickers, knowing that they were using prescription medication to control their victims. Although he did not personally compel the victim to engage in sex acts, Dr. Dabbagh was held liable as a benefiter, for selling medication to his patient for a profit, an act that is, in other situations, merely a neutral professional action. *Id.* at 7-9. Backpage.com knowingly facilitates sex trafficking in the same way that Dr. Dabbagh knowingly facilitated sex trafficking: by knowingly conducting business that aids in the proliferation of child sex trafficking. It should similarly be found liable.

3. It is tempting to interpret the TVPA's benefiter provision as an affront to the protective goals of the CDA, but the scope of protection that the First Circuit imputes to the CDA misinterprets Congress's purposes. Congress did not intend to contravene public policy by protecting criminal behavior when it passed the CDA. Nor is it likely that it sought to relieve providers of interactive computer services of liability in cases where they actively contribute to the sexual exploitation of thousands of women and children.

Rather, Congress intended to free passive online content providers from voluminous and unnecessary legal interferences, redirecting liability to the people who actively publish information online. The TVPA and the CDA both function to protect the public from active online criminal behavior while preserving the freedom of neutral Internet service providers to publish information in support of a free market system.

When two statutes are able to co-exist, the Court has a responsibility to give proper meaning to both statutes without compromising the interpretation of either. See *Morton v. Mancari*, 417 U.S. 535, 551 (1974). The First Circuit erred in interpreting that the TVPA and the CDA conflicted, inappropriately expanding the broad scope of the CDA's protections while undercutting the specific, intended reach of the TVPA's benefiter provision. "Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment." See *Morton*, 417 U.S. at 550-51. The First Circuit has a responsibility to honor the intent of Congress, and its decision distorts the scope of the CDA's protections while it precludes the proper applicability of the TVPA's benefiter provision, thus creating an unnecessary tension between the two statutes.

The First Circuit's decision creates a misperception that the CDA and the TVPA are incompatible. However, the CDA's goal to protect passive Internet content providers from unjustified liability is only bolstered by the TVPA's extension of liability to entities that actively participate in and benefit from child sex trafficking. This Court can give full effect to both clauses and restore the appropriate scope of the CDA's protections by allowing petitioners' case to proceed so that a fact finder can determine if Backpage.com is liable as a sex trafficking benefiter under the TVPA.



CONCLUSION

As former federal human trafficking prosecutors, the Institute's founders join with petitioners in respectfully requesting this Court to grant certiorari in this case, to clarify for other courts the boundaries of the CDA's Good Samaritan provision and to protect the rights of those individuals whom human traffickers view as nothing more than a commodity.

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Respectfully submitted,

VICTOR BOUTROS

Counsel of Record

JOHN COTTON RICHMOND

HUMAN TRAFFICKING INSTITUTE

3705 Taft Avenue

Alexandria, Virginia 22304

(202) 372-5707

john.richmond@traffickinginstitute.org

victor.boutros@traffickinginstitute.org