NOTE

As Justice So Requires: Making the Case for a Limited Reading of § 230 of the Communications Decency Act

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ABSTRACT

Section 230 of the Communications Decency Act was originally enacted to protect online providers from liability for exercising publishing functions over content posted by third parties on their websites. Since its enactment, courts have expanded the provision and conferred close to absolute immunity to online intermediaries who do not exercise traditional publisher functions, contrary to Congress's intent. Further, the broadest immunity conferred by courts has prevented plaintiffs, particularly victims of online harassment, from receiving rightly deserved legal redress. This Note argues that the current expansive interpretation of § 230 is diametrically opposed to Congress's policy goals. It proposes and outlines an interpretation of § 230 immunity that resolves the quandary based on the current language of the statute, rather than relying on Congress to close the loophole created by the courts. The elements of the proposed test are rooted in relevant case law and judicial interpretations of § 230. The test seeks to return the scope of immunity under § 230 back within the realm that Congress intended and to grant justice to unfairly injured plaintiffs.

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Introduction

Natalie was only fifteen years old when she was first advertised on Backpage.com.[1] An older acquaintance took provocative pictures of her and posted them on the website, essentially pimping Natalie out

[1] *See* Gloria Riviera et al., *Daughters for Sale: How Young American Girls Are Being Sold Online*, ABC News (May 25, 2016, 9:56 PM), http://abcnews.go.com/US/daughters-sale-young-american-girls-sold-online/story?id=39350838.

to strangers on the internet.[2] The acquaintance forced Natalie to "work" every day, gaining clientele through advertisements posted on Backpage.com.[3] Similarly, a fourteen-year-old girl was forced by her friend's boyfriend's mother to have intercourse with men who found posts advertising her services on Backpage.com.[4] Another fifteen-year-old girl attended a party hosted by her friend's boyfriend, expecting to have a good time and then return home.[5] Instead, she was not allowed to leave and was forced to take racy photos that were later posted on Backpage.com.[6] Because of the Backpage.com advertisements, these three young girls were forced into prostitution, raped, and abused while they were effectively held captive.[7] After the girls were finally rescued, they sought compensation for the horrible wrongs that had been unfairly imposed upon them, filing suit against Backpage.com for alleged violations of anti–human trafficking laws.[8] Backpage.com moved to dismiss, asserting immunity under § 230 of the Communications Decency Act of 1996 ("CDA"),[9] which extends immunity from liability to certain online intermediaries for third-party content that is posted on their platforms.[10] Both the District Court for the District of Massachusetts and the First Circuit ruled for Backpage.com, dismissing the complaint after holding that § 230 effectively barred the sex trafficking claims.[11]

These three young girls are not the only victims of Backpage.com advertisements—an estimated seventy-three percent of reports received by the National Center for Missing and Exploited Children about suspected underage trafficking involved Backpage.com.[12] The three minors described above are also not the only ones who have been denied the legal redress they deserve after facing hardships facilitated by online intermediaries.[13]

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2 *See id.*; *see also* Doe *ex rel.* Roe v. Backpage.com, LLC (*Backpage.com I*), 104 F. Supp. 3d 149, 153 (D. Mass. 2015).

3 *See* Riviera et al., *supra* note 1.

4 *See id.*

5 *See id.*

6 *See id.*

7 Doe v. Backpage.com, LLC (*Backpage.com II*), 817 F.3d 12, 17 (1st Cir. 2016).

8 *See Backpage.com I*, 104 F. Supp. 3d. 149, 154 (D. Mass 2015).

9 Communications Decency Act of 1996, Pub. L. No. 104-104, tit. V, 110 Stat. 56, 133–43 (codified in scattered sections of 18 and 47 U.S.C.).

10 47 U.S.C. § 230 (2012); *Backpage.com I*, 104 F. Supp. 3d. at 154.

11 *Backpage.com I*, 104 F. Supp. 3d. at 165; *Backpage.com II*, 817 F.3d at 24, 29.

12 Riviera et al., *supra* note 1.

13 *See, e.g.*, Jones v. Dirty World Entm't Recordings LLC, 755 F.3d 398, 417 (6th Cir. 2014) (holding that § 230 barred plaintiff's claim after pictures and defamatory content were uploaded to TheDirty.com); Zeran v. Am. Online, Inc., 129 F.3d 327, 328 (4th Cir. 1997) (affirming deci-

Section 230 of the CDA provides immunity to online platforms for content posted by third parties on their websites.[14] Courts traditionally interpreted § 230 as a bar to defamation claims against online platforms to protect the exercise of free speech.[15] Since its enactment, however, courts have expanded the immunity provided by § 230, providing online platforms with blanket immunity against most forms of liability,[16] such as negligence,[17] invasion of privacy and misappropriation of the right to publicity,[18] and violations of the Fair Housing Act.[19] This Note argues that the absolute immunity afforded to defendants based on § 230 is contrary to Congress's intent in enacting the statute.

Part I of this Note discusses the history of the CDA. It explains the common law approaches to distributor and publisher liability and details *Stratton Oakmont, Inc. v. Prodigy Services Co.*,[20] the seminal case that sparked the implementation of the § 230 immunity defense. Part I also explains the statutory language of § 230 and its key legislative history. Part II explores the landmark judicial decisions that have shaped the current expansive reading of § 230, including prevailing and minority interpretive approaches. Part III discusses the primary criticisms that scholars and some courts have with interpreting § 230 to confer absolute immunity. Finally, Part IV argues in favor of a narrower interpretation of § 230 immunity by proposing a new test for courts to implement when faced with claims of § 230 immunity and suggesting new standards for defining key terms in the statute.

The proposed test bifurcates § 230's application, separating the analysis of claims that implicate traditional publisher liability for an online provider's exercise of editorial functions from all others. First, the courts must determine the nature of the claim—i.e., whether the asserted cause of action seeks to treat an interactive computer service as a publisher or speaker of the content at issue.[21] Second, the courts

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sion to bar plaintiff's claim under § 230 where plaintiff was sent threatening messages based on an advertisement posted on AOL's website).

14 *See* 47 U.S.C. § 230.

15 *See* Matthew Schruers, Note, *The History and Economics of ISP Liability for Third Party Content*, 88 VA. L. REV. 205, 212–13 (2002).

16 *See infra* Section II.A.

17 *See, e.g.*, Ben Ezra, Weinstein, & Co. v. Am. Online Inc., 206 F.3d 980, 983 (10th Cir. 2000).

18 *See, e.g.*, Carafano v. Metrosplash.com, Inc., 339 F.3d 1119, 1122, 1125 (9th Cir. 2003).

19 Fair Housing Act, 42 U.S.C. §§ 3601–3619; *see, e.g.*, Chi. Lawyers' Comm. for Civil Rights Under the Law, Inc. v. Craigslist, Inc., 519 F.3d 666, 671–72 (7th Cir. 2008).

20 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995).

21 *See infra* Section IV.A.1.

must determine the internet computer service's conduct in relation to third-party content—i.e., whether the interactive computer service also acted as an information content provider, withholding § 230 immunity if it is found to have done so.[22] Using this approach will result in limited immunity for online intermediaries by narrowing the scope of § 230 while still achieving Congress's stated policy goals in enacting § 230.

I. History of the Communications Decency Act

The CDA, in its current form, confers immunity to online intermediaries for third-party content posted on their websites.[23] The following Sections provide background on the pre-CDA internet world, the cases that provided the impetus for the CDA, and the legislative history surrounding its enactment.

A. Pre–Communications Decency Act Internet Liability

Since its creation, the internet has transformed into a massive network that connects over 1.7 billion people worldwide.[24] Following the first mention of the internet in a 1991 decision by the Second Circuit,[25] the field of internet law has rapidly developed through statutory and judicial advancements.[26] The expansion of the internet has led to new claims that arise from the online platform.[27] For example, plaintiffs have brought claims against online providers for, inter alia, invasion of privacy,[28] copyright infringement,[29] and libel.[30] However, before the enactment of the CDA in 1996, courts adjudicating defamation claims for statements made online were forced to rely on traditional common law principles that distinguish between distributors and publishers.[31] The common law treated distributors as having no

22 *See infra* Section IV.A.2.

23 *See* 47 U.S.C. § 230(c) (2012).

24 Oliver Burkeman, *Forty Years of the Internet: How the World Changed For Ever*, Guardian (Oct. 23, 2009, 3:00 AM), https://www.theguardian.com/technology/2009/oct/23/internet-40-history-arpanet.

25 United States v. Morris, 928 F.2d 504, 505 (2d Cir. 1991) (affirming the conviction of graduate student who released a "worm" into the internet in violation of the Computer Fraud and Abuse Act of 1986); *see* Michael L. Rustad & Diane D'Angelo, *The Path of Internet Law: An Annotated Guide to Legal Landmarks*, 2011 Duke L. & Tech. Rev., no. 12, 2011, ¶ 28.

26 *See* Rustad & D'Angelo, *supra* note 25, ¶ 27.

27 *See id.* ¶¶ 23, 28.

28 *See, e.g.*, Zeran v. Diamond Broad., Inc., 19 F. Supp. 2d 1249, 1250 (W.D. Okla. 1997).

29 *See, e.g.*, Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd., 545 U.S. 913, 920–21 (2005).

30 *See, e.g.*, Cubby, Inc. v. CompuServe Inc., 776 F. Supp. 135, 137–38 (S.D.N.Y. 1991).

31 KrisAnn Norby-Jahner, Note, *"Minor" Online Sexual Harassment and the CDA § 230*

control over the content of the material.[32] In the pre-internet world, a public library or a newsstand was a distributor of content; neither had any editorial control over the content but still may have had knowledge of the content that it supplied.[33] A distributor could only be held liable for defamatory content if a plaintiff proved that the distributor knew or should have known about the content.[34] Conversely, a publisher, like a newspaper, is an entity that exercises significant editorial control over the content.[35] A publisher would generally be held strictly liable for the content it distributed.[36] Two pre-CDA cases illustrate these common law principles in the context of defamation suits brought against online providers.[37]

Cubby, Inc. v. CompuServe, Inc.[38] explored the relationship between CompuServe Information Service, a paid electronic library accessible from personal computers, and Rumorville USA, a daily online newsletter hosted on CompuServe's Journalism Forum.[39] Cubby, Inc. was a developer of Skuttlebut, an online news and gossip database and a rival to CompuServe's Rumorville.[40] Cubby claimed that Rumorville published false statements about Skuttlebut on multiple occasions in 1990, and Cubby filed suit against CompuServe for the defamatory statements.[41] Other than hosting Rumorville, CompuServe had no relationship to the publication; Rumorville was curated and published by a third party, Don Fitzpatrick Associates of San Francisco.[42] Because CompuServe exercised no editorial control over Rumorville, the court, applying New York state law that reflected common law principles, characterized CompuServe as a dis-

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Defense: New Directions for Internet Service Provider Liability, 32 HAMLINE L. REV. 207, 234–35 (2009).

32 *See, e.g.*, *Cubby, Inc.*, 776 F. Supp. at 139; *see also* Matthew G. Jeweler, *The Communications Decency Act of 1996: Why § 230 Is Outdated and Publisher Liability for Defamation Should Be Reinstated Against Internet Service Providers*, 8 PITT. J. TECH. L. & POL'Y, Art. 3, at 4 (2007).

33 *See Cubby, Inc.*, 776 F. Supp. at 139–40.

34 *See id.* (quoting Smith v. California, 361 U.S. 147, 152–53 (1959)); Stratton Oakmont, Inc. v. Prodigy Servs. Co., 1995 WL 323710, at *3 (N.Y. Sup. Ct. May 24, 1995).

35 *See* Cianci v. New Times Publ'g Co., 639 F.2d 54, 60–61 (2d Cir. 1980).

36 *See id.*; *see also* RESTATEMENT (SECOND) OF TORTS § 578 (AM. LAW INST. 1977).

37 *See Cubby, Inc.*, 776 F. Supp. at 140–41; *Stratton Oakmont, Inc.*, 1995 WL 323710, at *3.

38 776 F. Supp. 135 (S.D.N.Y. 1991).

39 *Id.* at 137–38.

40 *Id.* at 138.

41 *Id.*

42 *Id.* at 137.

tributor that had no knowledge, or reason to know, of the allegedly defamatory statements.[43]

A New York state court considered a similar case but arrived at an incongruous result four years later in *Stratton Oakmont, Inc. v. Prodigy Services Co.*[44] Prodigy Services owned and operated "Money Talk," an online bulletin board.[45] Stratton Oakmont, Inc., a securities investment banking firm, had recently facilitated the initial public offering of Solomon-Page.[46] Following the IPO, an anonymous user posted statements on "Money Talk" claiming that Stratton and Solomon-Page behaved fraudulently in connection with the IPO.[47] The court concluded that Prodigy had acted as a publisher and, based on common law defamation principles, held that it was strictly liable for the posted content.[48] The court distinguished Prodigy from CompuServe on two bases: first, by advertising to the public that it controlled the content of its online bulletin boards, Prodigy effectively removed itself from the realm of distributor liability; second, by deleting comments "on the basis of offensiveness and 'bad taste,'" Prodigy actually exercised editorial control over the content.[49] The results in *Stratton Oakmont* and *Cubby* created a paradox—the former imposed liability on a website that attempted to screen for unlawful content, while the latter provided immunity to a website that made no such attempts.[50] The conflict between these two decisions drove the early discussion behind the CDA.

B. The Communications Decency Act

The *Stratton Oakmont* decision caused a bit of an uproar among legal scholars and members of Congress.[51] On its face, the case

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43 *Id.* at 139–41.

44 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995).

45 *Id.* at *1.

46 *Id.*

47 *Id.*

48 *Id.* at *3–4.

49 *Id.* at *4; *see* Cara J. Ottenweller, Note, *Cyberbullying: The Interactive Playground Cries for a Clarification of the Communications Decency Act*, 41 VAL. U. L. REV. 1285, 1300–01 (2007).

50 *Compare Stratton Oakmont, Inc.*, 1995 WL 323710, at *4, *with* Cubby, Inc. v. CompuServe, Inc., 776 F. Supp. 135, 140–41 (S.D.N.Y. 1991).

51 *See, e.g.*, David P. Miranda, *Defamation in Cyberspace:* Stratton Oakmont, Inc. v. Prodigy Services Co., 5 ALB. L.J. SCI. & TECH. 229, 240 (1996) (recognizing the unworkable standard that the *Stratton Oakmont* decision would impose upon website operators); Finley P. Maxson, Note, *A Pothole on the Information Superhighway: BBS Operator Liability for Defamatory Statements*, 75 WASH. U. L.Q. 673, 690 (1997) (observing that "Congress reacted to *Stratton Oakmont* because of heavy lobbying by the online industry" in its enactment of the CDA).

seemed like an appropriate application of common law defamation principles, but at second glance, the *Stratton Oakmont* and *Cubby* decisions created a paradox that Congress immediately sought to remedy.[52] Read together, *Stratton Oakmont* and *Cubby* subjected website operators who voluntarily screened their content for obscenity and indecency to a strict liability standard, while the operators who made no efforts to block inappropriate material were deemed distributors that escaped liability.[53] In practice, this paradox incentivized website operators to take no action and allow all content, unlawful and otherwise, on their websites.[54] These contrary decisions spurred the 104th Congress to take action and enact § 230 of the CDA, specifically to "overrule *Stratton-Oakmont v. Prodigy*" and address the paradox that it created.[55]

1. Legislative History

The Communications Decency Act of 1996 was originally composed of two main provisions: § 223 and § 230.[56] Section 223 prohibited both the "knowing transmission of obscene or indecent messages" to a minor with a telecommunications device and the "knowing sending or displaying of patently offensive messages in a manner that is available" to a minor, specifically through interactive computer services.[57] In 1997, however, the Supreme Court found § 223 to be unconstitutional as an infringement upon the First Amendment guarantee of free speech.[58] By limiting the access of minors to potentially harmful speech, Justice Stevens wrote, § 223 suppressed speech that adults have a constitutional right to send and receive.[59] Despite

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52 Andrea L. Julian, Comment, *Freedom of Libel: How an Expansive Interpretation of 47 U.S.C. § 230 Affects the Defamation Victim in the Ninth Circuit*, 40 IDAHO L. REV. 509, 514–15 (2004).

53 *Id.* at 514.

54 *See id.* at 515.

55 S. REP. NO. 104-230, at 194 (1996) (Conf. Rep.) (overruling, additionally, "any other similar decisions which have treated such providers . . . as publishers or speakers of content that is not their own *because* they have restricted access to objectionable material" (emphasis added)); *see also* 141 CONG. REC. 16,025 (1995) (statement of Sen. Coats) (ensuring that CDA as proposed would not hold website operators who try to "prevent obscene or indecent material" liable for defamatory statements).

56 *See* Pub. L. No. 104-104, §§ 501–509, 110 Stat. 56, 133–39.

57 Reno v. ACLU, 521 U.S. 844, 859 (1997).

58 *Id.* at 874–75.

59 *Id.*

similar First Amendment concerns about § 230, the provision remains in force today.[60]

Section 230(c) of the CDA, entitled "Protection for 'Good Samaritan' blocking and screening of offensive material," was a direct response to the *Stratton Oakmont* decision.[61] The statute explicitly overruled *Stratton Oakmont* by stating that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."[62] Congress defined an "interactive computer service" as "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server."[63] In practice, courts have allowed online newsletters,[64] online bulletin boards,[65] and online classifieds websites[66] to fall within the statutorily defined "interactive computer service." In contrast, the statute defines an "information content provider" as "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service."[67]

Parties in litigation generally do not dispute whether a website qualifies as an interactive computer service within the meaning of the statute.[68] In some circumstances, however, certain actions by an interactive computer service can transform it into an information content provider, thus opening it up to potential liability.[69] Because the statute does not explicitly define when a provider is "responsible" for the content, courts must determine when information computer services become information content providers.[70] If this ambiguity was not pre-

60 *See* Batzel v. Smith, 333 F.3d 1018, 1028 (9th Cir. 2003) (describing background of § 230 and its goal of shielding minors from online obscenity while still protecting free speech).

61 47 U.S.C. § 230(c) (2012); *see* S. REP. NO. 104-230, at 194 (1996) (Conf. Rep.).

62 47 U.S.C. § 230(c)(1).

63 *Id.* § 230(f)(2).

64 *See, e.g.*, Batzel v. Smith, 372 F. Supp. 2d 546, 549 (C.D. Cal. 2005).

65 *See, e.g.*, Doe v. Am. Online, Inc., 783 So. 2d 1010, 1015 (Fla. 2001).

66 *See, e.g.*, Dart v. Craigslist, Inc., 665 F. Supp. 2d 961, 965 (N.D. Ill. 2009).

67 47 U.S.C. § 230(f)(3).

68 *See, e.g.*, Zeran v. Am. Online, Inc., 129 F.3d 327, 330 n.2 (4th Cir. 1997) (parties agreed AOL was an interactive computer service under § 230); Doe v. Am. Online, 783 So. 2d at 1015 (same).

69 *See, e.g.*, Fair Hous. Council v. Roommates.com, LLC, 521 F.3d 1157, 1162–63, 1167–68 (9th Cir. 2008); Ben Ezra, Weinstein, & Co. v. Am. Online Inc., 206 F.3d 980, 985–86 (10th Cir. 2000).

70 *See* Karen Alexander Horowitz, *When Is § 230 Immunity Lost?: The Transformation from Website Owner to Information Content Provider*, 3 SHIDLER J.L. COM. & TECH., ¶ 12

sent, courts would be able to apply § 230 immunity with greater ease because they could more readily identify those situations.

Further, § 230 sets forth a "Good Samaritan" exception that exempts a provider or user of an interactive computer service from civil liability for

> (A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or
>
> (B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material.[71]

This language is the only mention of immunity from civil suits in § 230, yet courts have since expanded its provisions to confer broad immunity to interactive computer services for all third-party content.[72]

2. The Scope of the Communications Decency Act

When interpreting a statute, it is imperative that courts first look to the statutory language before considering judicial decisions on the matter.[73] The language of § 230 demonstrates that the provision should be interpreted in accordance with Congress's explicitly listed policy goals in the statute.[74] Most notably, Congress indicated its intent to "promote the continued development of the Internet" while also restricting children's access to pornography and indecent material on the internet by incentivizing interactive computer services to make efforts to screen content and remove objectionable posts from their websites.[75]

(2007); *see also Ben Ezra, Weinstein, & Co.*, 206 F.3d at 983 (central issue was whether AOL acted as an information content provider).

71 47 U.S.C. § 230(c)(2).

72 *See infra* Section II.A. Some courts refer to § 230(c)(2) as the "Good Samaritan" provision, suggesting that the immunity provided for in the Good Samaritan provision was intended to be read separately from the publisher/speaker clause in § 230(c)(1). *See* Claudia G. Catalano, Annotation, *Validity, Construction, and Application of Immunity Provisions of Communications Decency Act, 47 U.S.C.A. § 230*, 52 A.L.R. Fed. 2d 37, § 24 (2011).

73 *See* Ross v. Blake, 136 S. Ct. 1850, 1856 (2016) ("Statutory interpretation . . . begins with the text . . . ."); Caraco Pharm. Labs., Ltd. v. Novo Nordisk A/S, 566 U.S. 399, 412 (2012) ("[A]ll such inquiries must begin . . . with the language of the statute itself." (quoting United States v. Ron Pair Enters., Inc., 489 U.S. 235, 241 (1989))).

74 *See* 47 U.S.C. § 230(b).

75 47 U.S.C. § 230(b)(1), (4); *see* Rachel Kurth, *Striking a Balance Between Protecting Civil Rights and Free Speech on the Internet: The Fair Housing Act vs. The Communications Decency Act*, 25 CARDOZO ARTS & ENT. L.J. 805, 823 (2007).

Further, when Representatives Cox and Wyden originally proposed § 230 as an amendment to the Communications Act of 1934, they intended to protect only online "Good Samaritans" who engaged in good faith efforts to screen offensive material from their websites.[76] An earlier version of § 230 reflected Congress's intent to construe the provision narrowly to provide a defense only to interactive computer services that simply provide access to a network that is not otherwise under their control.[77] As enacted, § 230 contains no provision that grants interactive computer services absolute immunity for third-party content.[78]

II. Judicial Interpretation of the Communications Decency Act

Since the enactment of § 230, some courts have taken an expansive view of the immunity that the statute affords to interactive computer services.[79] Other courts have more narrowly construed the terms of § 230, limiting the scope of its protections.[80] The following Sections detail the two approaches that have developed in the courts regarding immunity under § 230 and the prevailing judicial interpretations that drive discussions of § 230 today.

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76 141 Cong. Rec. 22,045 (1995) (statement of Rep. Cox) ("[The amendment] will protect . . . anyone who . . . takes steps to screen indecency and offensive material for their customers."); 141 Cong. Rec. 16,024–25 (1995) (statements of Sens. Exon and Coats) (stating that attempts to prevent or remove objectionable material are not an assertion of editorial control that would impose liability).

77 *See* 141 Cong. Rec. 16,025 (1995) (statement of Sen. Exon)

78 Congress dictated that § 230 immunity would not protect defendants who allegedly violate federal criminal statutes, intellectual property law, or communications privacy law, which indicates its intent that § 230 should not provide interactive computer services with blanket immunity for third-party content. 47 U.S.C. § 230(e). Courts that have given weight to Congress's intent regarding § 230 have declined to construe the statute as conferring absolute immunity. *See* Barnes v. Yahoo!, Inc., 570 F.3d 1096, 1100 (9th Cir. 2009); J.S. v. Vill. Voice Media Holdings, LLC, 359 P.3d 714, 720 (Wash. 2015) (en banc) (Wiggins, J., concurring). *But see* Universal Commc'ns Sys., Inc. v. Lycos, Inc., 478 F.3d 413, 418–19 (1st Cir. 2007) (concluding that Congress intended to grant broad immunity to interactive service providers based on Congress's policy choices).

79 Gregory M. Dickinson, Note, *An Interpretive Framework for Narrower Immunity Under Section 230 of the Communications Decency Act*, 33 Harv. J.L. & Pub. Pol'y 863, 867–68 (2010).

80 *See, e.g.*, Fair Hous. Council v. Roommates.com, LLC, 521 F.3d 1157, 1175 (9th Cir. 2008); NPS LLC v. StubHub, Inc., No. 06-4874-BLS1, 2009 WL 995483, at *13 (Mass. Super. Ct. Jan. 26, 2009).

A. The Growing Reach of § 230 Immunity

1. Zeran v. America Online, Inc.

The Fourth Circuit was the first to interpret § 230 in *Zeran v. America Online, Inc.*[81] Zeran fell victim to an anonymous prank, in which the prankster posted a message on an America Online ("AOL") bulletin board advertising the sale of merchandise that featured "offensive and tasteless slogans" related to the 1995 Oklahoma City bombing and instructed interested buyers to call Zeran's home phone number.[82] Zeran received angry and threatening phone calls for almost a month after the original post was published, leading Zeran to contact AOL multiple times in an attempt to have the post taken down.[83] Shortly thereafter, Zeran filed suit against AOL for defamation, seeking to hold AOL liable for the anonymous prankster's posts because AOL failed to remove the posts within a reasonable time and refused to post retractions of the defamatory messages.[84] Zeran further claimed that § 230 did not preclude the imposition of distributor liability, and consequently, that AOL had a duty to remove the defamatory posts after being given sufficient notice.[85]

The Fourth Circuit affirmed the district court's holding that § 230 precluded Zeran's claims against AOL.[86] The Fourth Circuit interpreted § 230 as creating absolute immunity to "any cause of action that would make service providers liable for information originating with a third-party user of the service."[87] The court also rejected Zeran's argument, finding that because distributors are merely a type of publisher, notice-based distributor liability was also foreclosed by § 230.[88]

Zeran provided a broad interpretation of § 230 which most courts have elected to follow—that § 230 confers absolute immunity to interactive computer services acting as both publishers and distributors for content originating from third parties on their websites.[89] *Zeran* has been criticized for "ascrib[ing] to Congress an intent to create a far broader immunity than that body actually had in mind or is necessary

81 129 F.3d 327 (4th Cir. 1997).

82 *Id.* at 329.

83 *Id.*

84 *Id.* at 330.

85 *Id.* at 331–32.

86 *Id.* at 328.

87 *Id.* at 330.

88 *Id.* at 332.

89 *See* Dickinson, *supra* note 79, at 868.

to achieve its purposes."[90] Nevertheless, four circuit courts that have considered § 230 immunity have followed and even expanded upon the *Zeran* decision.[91]

2. *Post-*Zeran *Expansion of the Immunity Standard*

Post-*Zeran*, courts have continued to extend the reach of § 230 immunity by reinterpreting three parts of the statute to (1) expand the definition of "interactive computer service," (2) restrict the definition of "information content provider," or (3) allow § 230 immunity to cover causes of action other than defamation.[92] While the early cases analyzing § 230 only deemed internet service providers like AOL, Verizon, or Comcast to be interactive computer services, subsequent decisions have broadened § 230 immunity to include a wide range of cyberspace services.[93] Other decisions considering the provision took an alternative approach, limiting the scope of what actions would make a website an information content provider and expanding § 230 immunity in the process.[94]

For example, in *Blumenthal v. Drudge*,[95] the District Court for the District of Columbia considered Sidney Blumenthal's claims that AOL should be held liable for the defamatory statements published by the Drudge Report, an online gossip column that had a licensing

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90 Barrett v. Rosenthal, 9 Cal. Rptr. 3d 142, 154 (Ct. App. 2004); *see also* Lyrissa Barnett Lidsky, *Silencing John Doe: Defamation & Discourse in Cyberspace*, 49 DUKE L.J. 855, 871 (2000) (arguing that courts that have interpreted § 230(c) have "broadened its ambit far beyond merely protecting 'Good Samaritan' editorial control").

91 *See* Chi. Lawyers' Comm. for Civil Rights Under the Law, Inc. v. Craigslist, Inc., 519 F.3d 666, 670–71 (7th Cir. 2008); Universal Commc'ns Sys., Inc. v. Lycos, Inc., 478 F.3d 413, 415 (1st Cir. 2007); Green v. Am. Online (AOL), 318 F.3d 465, 470 (3d Cir. 2003); Ben Ezra, Weinstein, & Co. v. Am. Online Inc., 206 F.3d 980, 986 (10th Cir. 2000).

92 *See* Carafano v. Metrosplash.com, Inc., 339 F.3d 1119, 1122–23, 1125 (9th Cir. 2003) (recognizing definitional expansion of "interactive computer service" and restriction of "information content provider" and allowing § 230 to bar, inter alia, claims alleging invasion of privacy and negligence); H. Brian Holland, *In Defense of Online Intermediary Immunity: Facilitating Communities of Modified Exceptionalism*, 56 U. KAN. L. REV. 369, 374–75 (2008); *see also Chi. Lawyers' Comm.*, 519 F.3d at 671–72 (holding that § 230 immunity precludes claim that defendant violated Fair Housing Act); *Ben Ezra, Weinstein, & Co.*, 206 F.3d at 983 (finding that § 230 immunity disallows claims of defamation and negligence).

93 *See, e.g.*, *Carafano*, 339 F.3d at 1123–24 (finding an online dating service to be an interactive computer service); *see also* Batzel v. Smith, 333 F.3d 1018, 1030 n.15 (10th Cir. 2003) (discussing cases that have expanded definition of "interactive computer service").

94 *See, e.g.*, Jones v. Dirty World Entm't Recordings LLC, 755 F.3d 398, 414–15 (6th Cir. 2014) (applying a material contribution test to determine whether an internet service provider was an information content provider); Blumenthal v. Drudge, 992 F. Supp. 44, 51–53 (D.D.C. 1998).

95 992 F. Supp. 44 (D.D.C. 1998).

agreement with AOL.[96] Despite Matt Drudge's contractual agreement with AOL, which gave AOL limited editorial rights over the Drudge Report and monthly royalty payments to Drudge, the court ruled that AOL was still not an information content provider and granted AOL § 230 immunity.[97]

The Sixth Circuit used similar reasoning to award § 230 immunity to the defendant in *Jones v. Dirty World Entertainment Recordings LLC*.[98] Sarah Jones, a teacher and Cincinnati Bengals cheerleader, brought suit against Dirty World and Nik Lamas-Richie for defamatory content posted on their website, "TheDirty.com."[99] Jones alleged that the defendants were information content providers, within the meaning of § 230, because they selected and made edits to the third-party content prior to its publication.[100] The Sixth Circuit, like the court in *Blumenthal*, construed the definition of an information content provider narrowly, concluding that an interactive computer service's intentional encouragement of objectionable content was not enough to make it liable for the content.[101] Further, like the defendants in this case, an interactive computer service that exercises editorial control by commenting on, ratifying, or adopting the objectionable posts would still be protected by § 230 immunity.[102] Courts that took any of these expansive approaches to interpreting § 230 have conferred near-absolute immunity to interactive computer services.

B. Narrowing the Scope of § 230

Despite this apparent expansion in the scope of § 230, some courts have taken the opposite track—rejecting the narrow definition of "information content provider" that the Sixth Circuit adopted and instead effectively limiting the protections that § 230 affords.[103] The Ninth Circuit is the only circuit to explicitly call for a limited reading of § 230 immunity.[104] In *Fair Housing Council of San Fernando Valley*

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96 *Id.* at 47–48.

97 *Id.* at 51–53.

98 755 F.3d 398, 413–14 (6th Cir. 2014).

99 *Id.* at 401–02.

100 *Id.* at 403, 409.

101 *Id.* at 414.

102 *Id.* at 413–15.

103 *See, e.g.*, Fair Hous. Council v. Roommates.com, LLC, 521 F.3d 1157, 1175 (9th Cir. 2008); NPS LLC v. StubHub, Inc., No. 06-4874-BLS1, 2009 WL 995483, at *13 (Mass. Super. Ct. Jan. 26, 2009).

104 *Roommates.com*, 521 F.3d at 1175.

v. Roommates.com, LLC,[105] the Ninth Circuit considered the extent of § 230 immunity when the defendant, an interactive computer service, operated a website that matched people renting out rooms with those in need of housing.[106] Roommates.com required new users to answer a series of questions before they could establish a profile on the website.[107] The questions required the disclosure of, inter alia, a user's sex, sexual orientation, and number of children.[108] This practice made the website vulnerable to claims alleging that the mandatory questions violated the federal Fair Housing Act and California discrimination laws.[109] The court held that Roommates.com was not entitled to § 230 immunity because the website was designed to force its users into violations of the Fair Housing Act.[110] The court based its decision on a broader interpretation of "development" of the offending content, gleaned from the statutory definition of "information content provider."[111] This broad definition established a "material contribution test"—a website helps to develop objectionable content, and thus becomes an information content provider, "if it contributes materially to the alleged illegality of the conduct."[112] This interpretation differs from the text of § 230 because it adopts a broader interpretation of the statutory definition of an information content provider to which some courts subscribed.[113]

Going a step further than the Ninth Circuit in *Roommates.com*, a Massachusetts state court narrowly interpreted the scope of § 230 immunity in *NPS LLC v. StubHub, Inc.*[114] StubHub is an online ticket marketplace that enables fans to buy and sell tickets to various sporting and music events.[115] Here, the New England Patriots brought an action against StubHub for participating in the resale of Patriots tickets on its website.[116] The court held that StubHub would not be protected by § 230 immunity if it materially contributed to or even

105 521 F.3d 1157 (9th Cir. 2008).

106 *Id.* at 1161–62.

107 *Id.* at 1161.

108 *Id.*

109 *Id.*

110 *See id.* at 1166, 1175 (noting that Roommates.com required answers to discriminatory questions that could be used to limit a user's access to housing).

111 *Id.* at 1167–68.

112 *Id.* at 1168.

113 *Id.*

114 No. 06-4874-BLS1, 2009 WL 995483, at *13 (Mass. Super. Ct. Jan. 26, 2009).

115 *See About Us*, StubHub, https://www.stubhub.com/about-us [https://perma.cc/2LBK-KEL3] (last visited Nov. 5, 2017).

116 *StubHub, Inc.*, 2009 WL 995483, at *3.

knowingly participated in the alleged unlawful behavior.[117] In this case, StubHub materially contributed to the unlawful conduct because (1) its pricing structure was designed to profit from the violation of state anti-scalping laws and (2) it encouraged buyers to purchase underpriced tickets and resell them at higher prices.[118]

Finally, in dicta in *Doe v. GTE Corp.*,[119] the Seventh Circuit called for a definitional reading of § 230(c)(1).[120] By the court's interpretation, an interactive computer service remains a provider or user of the service, and therefore immune from liability, as long as it does not create the objectionable material.[121] If it does create the objectionable material, the entity becomes a publisher or speaker and an information content provider, losing the protection of § 230 immunity.[122] The court adopted this approach because it "harmonize[d] the text with the caption" of § 230, incorporating the reasoning of other circuits.[123]

C. Summary of the Prevailing Judicial Approaches to § 230

Although courts disagree on the scope of immunity under § 230, they employ one of two predominant approaches when interpreting the provision: (1) a presumption standard, or (2) a three-part test to determine whether § 230's protections apply. Many courts that have considered the statute, including the Fourth, Sixth, and Ninth Circuits, currently interpret § 230 as affording a presumption of immunity to interactive computer services for third-party content.[124] Under this approach, an interactive computer service is not liable for third-party content unless it takes some action to contribute to the development of the content, thereby incurring status as an information content provider.[125]

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117 *Id.* at *13.

118 *Id.* at *11, *13.

119 347 F.3d 655 (7th Cir. 2003).

120 *Id.* at 660.

121 *Id.*

122 *Id.*

123 *Id.*

124 *See* Jones v. Dirty World Entm't Recordings LLC, 755 F.3d 398, 408–09 (6th Cir. 2014); Fair Hous. Council v. Roommates.com, LLC, 521 F.3d 1157, 1162 (9th Cir. 2008); Zeran v. Am. Online, Inc., 129 F.3d 327, 330 (4th Cir. 1997).

125 *See, e.g.*, Carafano v. Metrosplash.com, Inc., 339 F.3d 1119, 1123 (9th Cir. 2003) (finding that an interactive computer service qualifies for § 230 immunity "so long as it does not also function as an 'information content provider' for the portion of the statement or publication at issue").

Courts differ, however, on how extensive an action must be to constitute a "development" of content sufficient to impose liability on the interactive computer service.[126] The Ninth Circuit, specifically in *Roommates.com*, takes a broad view of development: any action by an interactive computer service that materially contributes to the alleged illegality of the content at issue is sufficient to impose liability upon it.[127] Other circuits, however, are less inclined to adopt the Ninth Circuit's broad approach in construing "development"—they require more than mere editing or ratifying the content at issue to constitute development and thereby overcome immunity.[128]

Courts that do not subscribe to the presumption standard, such as the Tenth Circuit in *FTC v. Accusearch Inc.*,[129] use a conjunctive three-part test based on the language of § 230 to determine whether its immunity protections should apply.[130] First, the defendant must be a provider or user of an interactive computer service.[131] Second, the claims brought against the defendant must seek to treat the defendant as a publisher or speaker of the content.[132] Lastly, the content at issue must be information provided by another information content provider, not the defendant.[133] If the defendant fails to meet any one of the requirements, it will not be allowed to assert § 230 immunity as a defense.[134] While the presumption standard and the three-part test are the prevailing methods of interpreting § 230 in the judicial community, the approaches are not without their criticisms.

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126 *Compare Roommates.com*, 521 F.3d at 1167–68 (holding that any action that materially contributes to the content at issue is enough to impose liability), *with* Ben Ezra, Weinstein, & Co. v. Am. Online Inc., 206 F.3d 980, 985–87 (10th Cir. 2000) (finding that defendant's revising of the content at issue is not sufficient to impose liability).

127 *Roommates.com*, 521 F.3d at 1167–68.

128 *E.g.*, *Jones*, 755 F.3d at 415 (rejecting definition of "development" that imposed liability if interactive computer service encouraged or adopted the content at issue); *Ben Ezra, Weinstein, & Co.*, 206 F.3d at 985–86 (concluding that defendant's editing and alteration of third-party content did not constitute development of the content).

129 570 F.3d 1187 (10th Cir. 2009).

130 *See id.* at 1196–97; *see also* Gibson v. Craigslist, Inc., No. 08 Civ. 7735, 2009 WL 1704355, at *3 (S.D.N.Y. June 15, 2009).

131 *See Accusearch*, 570 F.3d at 1196.

132 *See id.* at 1197.

133 *See id.* at 1197–201.

134 *Compare id.* (denying § 230 immunity to defendant that failed to satisfy third prong of test because its actions were intended to generate the content at issue, thereby making it an information content provider), *with Gibson*, 2009 WL 1704355, at *3–4 (finding that § 230 barred claims because the defendant met all three prongs of the test).

III. Current Status

As detailed above, many courts have taken an expansive view of immunity under § 230, pushing its scope far beyond that provided for in the plain language of the statute.[135] Rather than adhere to the language of the statute, which confers immunity to a limited group of entities, courts have given near-absolute immunity to almost all interactive computer services.[136] Unsurprisingly, this overly broad interpretation resulting in close-to-absolute immunity has engendered criticism. Further, the problems with the majority approach are clear when applied to the Backpage.com scenario.

A. Criticisms of a Broad Interpretation of Immunity Under § 230

The courts' various interpretations of § 230 have garnered reactions from legal and nonlegal communities alike.[137] Legal scholars primarily criticize the presumption standard because it fails to meet the policy goals apparent from § 230's text and legislative history.[138] Congress enacted § 230 to achieve the dual goals of promoting decency on the internet and encouraging interactive computer services to make good faith attempts to monitor offensive content on their websites.[139] Under the prevailing interpretation of the statute, an interactive computer service can be made specifically aware of offensive or defamatory content, created by a third party and distributed on its website, yet still face no liability for failing to remove the information.[140] Thus, the interactive computer service can actively choose to take no action to remedy the situation, avoiding any liability and, ironically, perpetuating the indecency on the internet.[141]

Similarly, some courts have conferred § 230 immunity to interactive computer services that go beyond Congress's stated policy goals in enacting the statute.[142] Early versions of § 230 indicate Congress's

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135 *See supra* Section II.A.

136 *See supra* Section II.A.

137 *See* Corey Omer, Note, *Intermediary Liability for Harmful Speech: Lessons from Abroad*, 28 Harv. J.L. & Tech. 289, 304 (2014) (noting the responses of technology and law enforcement communities to the implementation of § 230).

138 *See* 47 U.S.C. § 230(b) (2012); Stephanie Silvano, Note, *Fighting a Losing Battle to Win the War: Can States Combat Domestic Minor Sex Trafficking Despite CDA Preemption?*, 83 Fordham L. Rev. 375, 411–13 (2014).

139 47 U.S.C. § 230(b)(5), (c)(2)(A); *see also* 141 Cong. Rec. 3203 (1995) (statement of Sen. Exon) ("[The] legislation . . . will free the private sector to create the information superhighway . . . and extend the standards of decency . . . to new telecommunications devices.").

140 Doe v. Am. Online, Inc., 783 So. 2d 1010, 1024–25 (Fla. 2001) (Lewis, J., dissenting).

141 *See id.*

142 *See* Abby R. Perer, Note, *Policing the Virtual Red Light District: A Legislative Solution*

intent to limit the statute's immunity provisions to online intermediaries that engaged in good faith efforts to screen for unlawful or offensive content.[143] Courts, however, have extended § 230 to provide absolute immunity to interactive computer services for all third-party content, regardless of whether the service screened or filtered the content.[144] For example, in *Dart v. Craigslist, Inc.*,[145] the District Court for the Northern District of Illinois held that § 230 barred the plaintiff's allegations that Craigslist.com facilitated prostitution and constituted a public nuisance.[146] The court dismissed the suit despite the fact that Craigslist did not screen or monitor the user-created posts at issue.[147] If courts interpret § 230 to grant blanket immunity to interactive computer services for any third-party content, despite their lack of efforts to screen content, these websites will have no incentive whatsoever to self-regulate, the opposite effect that § 230 was intended to have.[148]

Further, § 230 has raised concerns that its implementation would inhibit the effective prosecution of online intermediaries that violate state criminal law.[149] Prior to its enactment, Kent Markus, the then–Acting Assistant Attorney General, sent a letter to the Senate objecting to the defenses provided by § 230 to defendants who lacked editorial control or did not create or alter the content at issue.[150] The defenses, Markus noted, "would hamper the government's ongoing work in stopping the dissemination of obscenity and child pornography."[151] Senator Leahy called attention to this letter during debate on the Senate floor, specifically to Markus's determination that § 230 would "undermine the ability of the Justice Department to prosecute online service providers," but the Senate did not change the language

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to the Problems of Internet Prostitution and Sex Trafficking, 77 BROOK. L. REV. 823, 831–32 (2012).

143 *See* 141 CONG. REC. 22,045 (1995) (statement of Rep. Cox).

144 *See, e.g.*, Carafano v. Metrosplash.com, Inc., 339 F.3d 1119, 1124 (9th Cir. 2003) ("[S]o long as a third party willingly provides the essential published content, the interactive service provider receives full immunity regardless of the specific editing or selection process.").

145 665 F. Supp. 2d 961 (N.D. Ill. 2009).

146 *Id.* at 961, 969–70.

147 *See id.* at 966, 969–70.

148 *See* 141 CONG. REC. 22,045 (1995) (statement of Rep. Cox) (Congress intended § 230 to incentivize online intermediaries to self-regulate for unlawful content without fear of liability); *see also* Chi. Lawyers' Comm. for Civil Rights Under the Law, Inc. v. Craigslist, Inc., 461 F. Supp. 2d 681, 697 (N.D. Ill. 2006).

149 *See* Letter from Kent Markus, Acting Assistant Attorney Gen., to Sen. Patrick J. Leahy (May 3, 1995), *reprinted in* 141 CONG. REC. 16,022–23 (1995).

150 *Id.*

151 *Id.*

of the statute in response.[152] More recently, the attorneys general of forty-nine states addressed a letter to Congress, advocating for an amendment to § 230 that would create an exception to its grant of immunity for violations of state criminal statutes.[153] The attorneys general noted that the courts' broad interpretation of § 230 preempts state criminal law and greatly hinders the prosecution of internet-facilitated sex traffickers.[154] Backpage.com is a frequently cited facilitator of child sex trafficking—the immunity conferred by § 230 as it now stands, however, has allowed Backpage.com to perpetuate online sex trafficking while escaping liability.[155]

B. Case Study: Doe v. Backpage.com

The recent decision by the First Circuit in *Doe v. Backpage.com, LLC* ("*Backpage.com II*")[156] exemplifies the courts' problematic construction of § 230. Backpage.com is an online classifieds provider that allows users to post advertisements on its website.[157] Similar to Craigslist, the website is split by geographic area and posts are made in categories delineated by the product or service sold.[158] The advertisements at issue in this case were posted in the "Escorts" subcategory within an "Adult Entertainment" category.[159] Three female minors, victims of online sex trafficking, were advertised on Backpage.com between 2010 and 2013 and subsequently sexually assaulted.[160] The victims brought suit against Backpage.com, claiming that it engaged in conduct that was designed to facilitate sex traffickers' efforts to advertise the underage victims on the website in violation of federal and state anti–human trafficking statutes.[161] These statutes allow victims to bring civil claims against their perpetrators.[162] The District Court for the District of Massachusetts granted Backpage.com's motion to dis-

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152 141 CONG. REC. 16,021–22 (1995) (statement of Sen. Leahy).

153 Letter from Nat'l Ass'n of Attorneys Gen. to Senator Rockefeller, Senator Thune, Representative Upton & Representative Waxman (July 23, 2013) [hereinafter NAAG Letter], https://www.eff.org/files/cda-ag-letter.pdf.

154 *Id.*; *see also* Backpage.com, LLC v. McKenna, 881 F. Supp. 2d 1262, 1273 (W.D. Wash. 2012) (holding that § 230 expressly preempted a state criminal statute that criminalized the offense of advertising commercial sexual abuse of a minor).

155 *See McKenna*, 881 F. Supp. 2d at 1267; NAAG Letter, *supra* note 153.

156 817 F.3d 12 (1st Cir. 2016).

157 *Id.* at 16.

158 *Id.*

159 *Id.*

160 *See id.* at 17.

161 *Id.* at 16–17.

162 18 U.S.C. § 1595 (2012); MASS. ANN. LAWS ch. 265, § 50(a) (LexisNexis 2010).

miss the claim, holding that § 230 barred the plaintiffs' claims because they sought to treat Backpage.com as publisher of the third-party content.[163]

On appeal at the First Circuit, the plaintiffs argued that they were not claiming that Backpage.com was a publisher or speaker of third-party content.[164] Rather, the plaintiffs sought to impose liability based on Backpage.com's conduct in facilitating the traffickers' ability to post such advertisements.[165] The plaintiffs alleged that Backpage.com engaged in conduct that encouraged sex trafficking by profiting from the advertisements in two ways.[166] First, Backpage.com charged a posting fee only for the advertisements in the Adult Entertainment section; second, users could pay an additional fee for "Sponsored Ads" to appear on every page of the Escorts section.[167] The First Circuit, however, rejected these claims and affirmed the district court's holding that Backpage.com was precluded from liability because its decisions on how to structure posts on the website fell within traditional publisher functions protected by § 230.[168] Ironically, seven months after the First Circuit's decision, Carl Ferrer, the CEO of Backpage.com, was arrested on felony pimping charges for his role in sex trafficking via the website, while the same conduct was insufficient to hold Backpage.com civilly liable to its victims.[169]

The First Circuit's decision in *Backpage.com II* applied the presumption standard to which many courts subscribe.[170] Backpage.com profited from the advertisements posted by third parties in its Adult Entertainment and Escorts sections; yet the court held that Backpage.com's treatment of such posts fell within traditional pub-

163 *Backpage.com I*, 104 F. Supp. 3d 149, 161, 165 (D. Mass. 2015).

164 *Backpage.com II*, 817 F.3d at 20.

165 *Id.* The plaintiffs relied primarily on the text of the Trafficking Victims Protection Reauthorization Act of 2008 to support this claim; they alleged that § 230 should not shield Backpage.com from civil liability when it "knowingly . . . benefit[ed], financially or by receiving anything of value, from participation" in sex trafficking. 18 U.S.C. § 1591(a) (2012); *see Backpage.com II*, 817 F.3d at 20.

166 *Backpage.com II*, 817 F.3d at 17.

167 *Id.*

168 *Id.* at 22.

169 Camila Domonoske, *CEO of Backpage.com Arrested, Charged with Pimping*, NPR: THE TWO-WAY (Oct. 7, 2016, 11:17 AM), http://www.npr.org/sections/thetwo-way/2016/10/07/497006100/ceo-of-backpage-com-arrested-charged-with-pimping; *see also* STAFF OF S. PERMANENT SUBCOMM. ON INVESTIGATIONS, 114TH CONG., BACKPAGE.COM'S KNOWING FACILITATION OF ONLINE SEX TRAFFICKING 9 (2017) (discussing California's filing of new pimping charges shortly after state court dismissed felony charges on CDA grounds).

170 *See Backpage.com II*, 817 F.3d at 21–23; *supra* Section II.C.

lisher duties, foreclosing a finding of liability.[171] The decision in *Backpage.com II* illustrates how courts apply § 230 broadly to confer absolute immunity to websites, even when, as the First Circuit recognized, the actions of the website demand relief for "plaintiffs whose circumstances evoke outrage."[172] The proposed test will remedy such situations.

IV. A Proposed Judicial Solution to Effectively Limit the Scope of § 230

The following Section details a two-step test that courts should adopt when considering a claim of § 230 immunity. It discusses the free speech implications of a limited reading of § 230 and applies the suggested test to the facts of *Backpage.com II* to show how such a reading will still adhere to Congress's intent in enacting the statute.

A. The Test

The Ninth Circuit recognized that "[t]he Communications Decency Act was not meant to create a lawless no-man's-land on the Internet."[173] If courts continue to interpret § 230 as conferring absolute immunity on interactive computer services, however, the internet will continue down this dangerous trajectory. This Note proposes a new test that seeks to resolve the current interpretive debate on the scope of immunity under § 230 and prevent interactive computer services from escaping liability when they are at fault. This test is an altered version of the statutorily based three-part test adopted by a minority of courts, such as the Tenth Circuit.[174] Generally, the test requires that the court make two inquiries. First, the court must consider whether the cause of action treats the interactive computer service as a publisher or speaker of the third-party content. If so, § 230 bars the claim and potential liability. If the action does not treat the interactive computer service as a publisher or speaker of third-party content, the court must then determine whether the interactive computer service is *also* acting as an information content provider—if it is, § 230's immunity protections do not apply. If the court finds that the interactive computer service is not acting as an information content provider, then § 230 precludes it from facing liability.

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171 *See Backpage.com II*, 817 F.3d at 21.

172 *Id.* at 15.

173 Fair Hous. Council v. Roommates.com, LLC, 521 F.3d 1157, 1164 (9th Cir. 2008).

174 *See supra* notes 129–34 and accompanying text.

1. *Step One: Nature of the Claim*

As a preliminary matter, when deciding whether § 230 bars a cause of action, the courts frequently will be faced with potentially conflicting facts. Section 230 immunity, however, is most often asserted as an affirmative defense in support of a motion to dismiss or for summary judgment.[175] When considering a motion to dismiss or motion for summary judgment, courts must accept the plaintiff's pleading as true and construe all facts in the light most favorable to the nonmoving party.[176] Therefore, a test that determines whether § 230 immunity applies should generally view the facts in the light most favorable to the plaintiff.

When considering a claim of § 230 immunity, courts must first decide whether the cause of action purports to treat an interactive computer service as a publisher or speaker of third-party content.[177] In other words, is the lawsuit a claim for damages based on defamation or any other cause of action that implicates traditional publisher liability?[178] This distinction addresses one of the original reasons for the enactment of § 230: Congress wanted to overrule the *Stratton Oakmont* case that imposed liability on an online intermediary for taking actions on third-party content that fell squarely within traditional publisher functions.[179] If the cause of action does not treat the interactive computer service as a publisher, courts must move on to step two of the proposed test.[180] If, however, the cause of action seeks to impose liability for the interactive computer service's exercise of traditional editorial functions, the majority interpretation would apply and § 230 would bar the suit.[181] In fact, precluding liability for an interactive computer service's actions as a traditional publisher is consistent with virtually all judicial interpretations,[182] the First

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175 *See* Schruers, *supra* note 15, at 214, 220.

176 *See* Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (finding that for motions to dismiss, a court "must take all of the factual allegations in the complaint as true").

177 *See supra* text accompanying note 132.

178 *See supra* text accompanying note 132. Publisher liability is implicated when the cause of action seeks to hold defendant liable for exercising traditional editorial control over the third-party content. *See* Zeran v. Am. Online, Inc., 129 F.3d 327, 330 (4th Cir. 1997).

179 *See supra* text accompanying notes 51–55.

180 *See infra* text accompanying notes 186–88.

181 *See supra* text accompanying notes 124–25.

182 *Compare Zeran*, 129 F.3d at 331 (conferring immunity on defendant for actions taken because screening posts fell within traditional publisher duties), *with* Fair Hous. Council v. Roommates.com, LLC, 521 F.3d 1157, 1173–74 (9th Cir. 2008) (upholding § 230 immunity for defendants who simply published third-party comments as written).

Amendment,[183] and the language of the statute itself.[184] This inquiry reconciles the three-part test approach with dicta from *Doe v. GTE Corp.*, where the Seventh Circuit found that § 230(c)(1) "forecloses any liability that depends on deeming the [interactive computer service] a 'publisher.'"[185]

2. *Step Two: Conduct in Relation to Third-Party Content*

While step one of the proposed test requires an inquiry into the nature of the claim alleged against the online intermediary, step two looks at the online intermediary's conduct in relation to the third-party content at issue. The second step of the proposed test requires courts to determine whether the interactive computer service is also acting as an information content provider. Thus, this step requires an inquiry into whether the interactive computer service is "responsible, in whole or in part, for the creation or development" of the content.[186] Section 230 does not, however, elucidate any of the terms used in the definition of "information content provider," leading to a disparity between various courts' interpretation of the statute.[187] Specifically, courts debate how extensive the interactive computer service's conduct must be to impose liability on it for acting as an information content provider.[188]

The proposed test adopts a broad definition of development and effectively limits the protections of § 230. The statutory terms "creation" and "development" in § 230(f)(3) must be interpreted to mean different things to "avoid construing [§ 230] so as to render statutory language superfluous."[189] While "create" is defined as "bring[ing] into being [or] caus[ing] to exist,"[190] the definitions of "develop" revolve around the act of making something actually active, usable, or availa-

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183 Critics of a limited reading of § 230 immunity predict that it will lead online intermediaries to excessively screen their content for fear of being sued for defamation. *See infra* Section IV.B. The proposed test, however, would continue to provide immunity to online intermediaries who screen content, as claims based on these actions would rely solely on the defendant acting in its capacity as a publisher. *See infra* Section IV.A.2.

184 47 U.S.C. § 230(c)(1) (2012) ("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." (emphasis added)).

185 Doe v. GTE Corp., 347 F.3d 655, 660 (7th Cir. 2003).

186 47 U.S.C. § 230(f)(3).

187 *See supra* text accompanying notes 124–28.

188 *See supra* text accompanying notes 124–28.

189 FTC v. Accusearch Inc., 570 F.3d 1187, 1198 (10th Cir. 2009) (quoting McCloy v. U.S. Dept. of Agric., 351 F.3d 447, 451 (10th Cir. 2003)).

190 *Create*, BLACK'S LAW DICTIONARY (6th ed. 1990).

ble, when it previously was only potentially available.[191] For an interactive computer service to be considered an information content provider, and therefore held liable, based on its "creation" of content, it would have to be the originator of such content. In contrast, an interactive computer service can contribute to the "development" of unlawful content by, for example, making content available to the public when it was not originally tendered to be posted online[192] or changing the content's words "in a manner that contributes to the alleged illegality."[193] Defining "creation" and "development" discretely allows for an interpretation of the statute that aligns with the Ninth and Tenth Circuits' limited approach to the scope of § 230 immunity.[194]

Section 230 defines an information content provider as someone who is "responsible" for the creation or development of content, but again, does not further explain the term.[195] The suggested test proposes a new standard to define "responsible" in this context. If the interactive computer service knowingly profits from or provides encouragement for the alleged unlawful activity, it is responsible for the content and will not be entitled to § 230 immunity.[196] First, the plaintiff must allege that the provider had *actual* knowledge of the illegality of the content to recover on its claim.[197] After the plaintiff alleges actual knowledge, the burden will shift to the defendant to prove that it did not have such knowledge to successfully invoke § 230 immunity.[198] This aspect of the test stems from the common law distributor liability described in *Cubby*, where a provider would only be held liable for content created by a third party if it knew or should have known about the unlawful content.[199] If the court finds that the interactive

191 *See Accusearch*, 570 F.3d at 1198 (citing WEBSTER'S THIRD NEW INT'L DICTIONARY 618 (2002)).

192 *See* Batzel v. Smith, 333 F.3d 1018, 1035 (9th Cir. 2003).

193 Fair Hous. Council v. Roommates.com, LLC, 521 F.3d 1157, 1169 (9th Cir. 2008).

194 *See Accusearch*, 570 F.3d at 1198 (construing "development" broadly to impose liability on defendant that paid researchers to acquire confidential phone records in violation of federal law); *Roommates.com*, 521 F.3d at 1167–68 (interpreting "development" as materially contributing to the conduct).

195 47 U.S.C. § 230(f)(3) (2012).

196 *See, e.g.*, NPS LLC v. StubHub, Inc., No. 06-4874-BLS1, 2009 WL 995483, at *13 (Mass. Super. Ct. Jan. 26, 2009).

197 *See, e.g.*, Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd., 545 U.S. 913, 919 (2005) (imposing liability on defendant who had knowledge that software was being used for copyright infringement and knowingly profited from the infringement); *StubHub, Inc.*, 2009 WL 995483, at *13 (finding that "evidence of knowing participation in illegal 'ticket scalping'" was sufficient to preclude defendant from obtaining § 230 immunity).

198 *See infra* text accompanying notes 206–10 (discussing applicable burden of proof).

199 Cubby, Inc. v. CompuServe, Inc., 776 F. Supp. 135, 139 (S.D.N.Y. 1991).

computer service is not responsible for, nor participated in, the creation or development of the content at issue, it would not be deemed an information content provider and § 230 immunity would apply.

Supporters of absolute § 230 immunity will likely criticize this aspect of the test as being contrary to Congress's intent in enacting § 230. The Fourth Circuit, for example, declined to impose distributor liability after an online intermediary was given notice of the defamatory content, relying on the reasoning that distributor liability was simply a subset of traditional publisher liability.[200] The plain language of § 230, however, does not indicate that Congress intended to foreclose traditional, common law secondary liability analysis.[201] Congress made a specific reference to publisher liability in § 230, barring any interactive computer service from being treated as a "publisher or speaker" of information created by a third party.[202] Nowhere, however, did Congress mention distributor liability in the statute, providing support for the notion that "Congress intended to leave distributor liability intact."[203] Further, "Congress did not enact the CDA fast on the heels of *Cubby*, nor mention an intent to overrule *Cubby* in the legislative history of the CDA."[204] Rather, Congress passed § 230 as a direct response to *Stratton Oakmont*, which imposed publisher, not distributor, liability on an online bulletin board that exercised editorial control over content posted by third parties.[205]

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200 Zeran v. Am. Online, Inc., 129 F.3d 327, 331–32 (4th Cir. 1997).

201 *See* 47 U.S.C. § 230 (2012); *see also* Samantar v. Yousuf, 560 U.S. 305, 320 (2010) (noting that Congress is presumed to have enacted a statute within the backdrop of common law); Joseph Monaghan, Comment, *Social Networking Websites' Liability for User Illegality*, 21 SETON HALL J. SPORTS & ENT. L. 499, 506 (2011).

202 47 U.S.C. § 230(c).

203 Doe v. Am. Online, Inc., 783 So. 2d 1010, 1025 (Fla. 2001) (Lewis, J., dissenting) (quoting *Developments in the Law—The Law of Cyberspace, III The Long Arm of Cyber-Reach*, 112 HARV. L. REV. 1610, 1613 (1999)).

204 *Id.* at 1023. While critics of this approach may express skepticism that Congress would enact legislation in response to a single district court case, the facts behind the enactment of § 230 suggest otherwise. It is reasonable to expect that Congress would enact legislation in response to *Cubby* if it felt strongly about the result because Congress did, in fact, enact § 230 directly in response to *Stratton Oakmont*, a New York state trial court decision. *See* S. REP. NO. 104-230, at 194 (1996) (Conf. Rep.); *see also* Stratton Oakmont, Inc. v. Prodigy Servs. Co., 1995 WL 323710, at *3, *5 (N.Y. Sup. Ct. May 24, 1995).

205 *Stratton Oakmont*, 1995 WL 323710, at *3, *5; *see also* S. REP. NO. 104-230, at 194 (1996) (Conf. Rep.).

3. Burden of Proof Requirements

Because § 230 is frequently used as an affirmative defense, the burden of proof rests on the defendant.[206] To succeed on the proposed test, the defendant would first have to prove that the claim seeks to treat it as a publisher or speaker of the content at issue. If the court finds, however, that the claim does not seek to do so, the defendant would then have to prove that it was not responsible for the creation or development of the content. This poses some practical problems—namely, that it would be difficult for the defendant to prove a negative, i.e., that it was not responsible for the content.[207]

Further, courts that employ the presumption standard have placed the burden on the plaintiff, requiring the plaintiff to make arguments as to why the defendant acted as an information content provider.[208] This, however, would be turning the proper burden of an affirmative defense on its head. The Supreme Court has frequently required that a party will be held to prove a negative where the facts with regard to the issue "lie peculiarly" in its knowledge.[209] The situations where courts revoke § 230 immunity often involve a single plaintiff against a corporate defendant that has unlimited resources and a disproportionate access to knowledge—exactly the sort of situation where the burden should be placed on the defendant.[210] Therefore, in applying the proposed test, courts should place the burden of proof solely on the defendant.

The proposed test synthesizes the rationales of the courts that employ the presumption standard as well as that of courts that use the three-part test in determining whether § 230 immunity applies, leading to a favorable result that is consistent with the statute's language and Congress's intent in enacting it.

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206 *See* Patterson v. New York, 432 U.S. 197, 211 (1977); *see also* Buck v. Gallagher, 307 U.S. 95, 102 (1939).

207 *See* Elkins v. United States, 364 U.S. 206, 218 (1960).

208 *See, e.g.*, Ben Ezra, Weinstein, & Co. v. Am. Online Inc., 206 F.3d 980, 985 (10th Cir. 2000); NPS LLC v. StubHub, Inc., No. 06-4874-BLS1, 2009 WL 995483, at *11 (Mass. Super. Ct. Jan. 26, 2009).

209 Smith v. United States, 568 U.S. 106, 112 (2013) (quoting Dixon v. United States, 548 U.S. 1, 9 (2006)); *see also* Ransom v. Williams, 69 U.S. (2 Wall.) 313, 317 (1864).

210 *See, e.g.*, Zeran v. Am. Online, Inc., 129 F.3d 327, 328 (4th Cir. 1997) (single plaintiff against AOL, mass media company); Dart v. Craigslist, Inc., 665 F. Supp. 2d 961, 961 (N.D Ill. 2009) (single plaintiff against Craigslist, multinational classified advertising website).

B. Free Speech Implications

The most obvious concern that critics would have with the proposed test is the same concern that has characterized the debate of § 230 immunity since its enactment. Supporters of absolute immunity argue that interactive computer services' fear of liability would force them to excessively censor third-party content, thereby chilling free speech on the internet.[211] Indeed, one of Congress's stated policies in § 230 was to promote free speech in the "new and burgeoning Internet medium."[212] But the internet is no longer a new medium—it has become a well-established and necessary part of everyday life. The internet has "grown into a vigorous and muscular adolescent," and its development has brought more complications and threats to public safety since § 230's enactment.[213] With the vast progression of technology has come a corresponding increase in "cyberbullying, commercial sex advertisements, and other immoral or illegal content" that must be curtailed.[214]

The CDA, originally intended to protect minors from inappropriate online content, has since been transformed into a "sword of harm and extreme danger which places technology buzz words and economic considerations above the safety and general welfare of our people."[215] In other words, the judicial decisions that have greatly expanded § 230 immunity since its enactment demonstrate the overemphasis placed on free speech over public safety and welfare.[216] The concept of regulating the internet as we know it today could not have been on Congress's mind in the 1990s because the internet "did not yet exist as a society-wide communications medium."[217] In the digital age, however, the internet has become sufficiently robust to withstand some minimal regulation instead of receiving absolute immunity.[218]

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211 *Zeran*, 129 F.3d at 333; *see also* Carafano v. Metrosplash.com, Inc., 339 F.3d 1119, 1124 (9th Cir. 2003) (noting that imposing tort liability on internet speech would have an "obvious chilling effect").

212 *Zeran*, 129 F.3d at 330; *see also* 47 U.S.C. § 230(b) (2012).

213 Jae Hong Lee, Note, Batzel v. Smith *&* Barrett v. Rosenthal*: Defamation Liability for Third-Party Content on the Internet*, 19 BERKELEY TECH. L.J. 469, 491 (2004).

214 Silvano, *supra* note 138, at 412.

215 Doe v. Am. Online, Inc., 783 So. 2d 1010, 1019 (Fla. 2001) (Lewis, J., dissenting).

216 *See* Maureen Horcher, Comment, *World Wide Web of Love, Lies, and Legislation: Why Online Dating Websites Should Screen Members*, 29 J. MARSHALL J. COMPUTER & INFO. L. 251, 268 (2011).

217 Yochai Benkler, *Net Regulation: Taking Stock and Looking Forward*, 71 U. COLO. L. REV. 1203, 1205 (2000).

218 Dickinson, *supra* note 79, at 874 (noting the lack of "coherent purpose" to, for example, "treat defamatory content in the print edition of the *New York Times* differently than that in the

Monitoring third-party content for unlawful material is much less burdensome than it was twenty years ago due to vast technological advancements in searching and filtering.[219] Thus, it only makes sense for contemporary interpretation of § 230 to catch up with the technology that has since become ubiquitous in modern society.

C. Application to Doe v. Backpage.com

The proposed test can be applied to the facts of *Backpage.com II* to demonstrate how it would work in practice. As a threshold issue, the test first requires an inquiry into the nature of the claim—whether the cause of action treats the defendant as speaker or publisher of the third-party content.[220] In *Backpage.com II*, the plaintiffs alleged that the interactive computer service violated, inter alia, the Trafficking Victims Protection Reauthorization Act of 2008[221] and the Massachusetts Anti–Human Trafficking and Victim Protection Act of 2010.[222] Neither of these anti–human trafficking laws implicate traditional publisher liability nor seek to hold the bad actor liable as a publisher of any third-party material. Therefore, the claims withstand the initial inquiry and would not be foreclosed based on traditional § 230 immunity.

Next, the test inquires into the defendant's conduct in relation to the third-party content—whether the defendant is "responsible," in part or in whole, for the "creation" or "development" of the content at issue.[223] It is most useful to analyze each piece of this step separately. First, did the defendant contribute to the "creation" of the content? As defined earlier, to "create" means to bring something new into existence.[224] Backpage.com did not create the content at issue; the advertisements were posted by third parties in the "Escorts" section of the website.[225] Second, was the defendant responsible for the "development" of the content? Under the proposed standard, an interactive computer service is responsible for the development of third-party content if it knowingly profits from or encourages the alleged

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online version"). Scholars have even noted that the growth of "electronic networks" would actually lead to pressures of more regulation, rather than less. *See, e.g.*, Stephen L. Carter, *Technology, Democracy, and the Manipulation of Consent*, 93 YALE L.J. 581, 598 (1984) (reviewing ITHIEL DE SOLA POOL, TECHNOLOGIES OF FREEDOM (1983)).

219 Silvano, *supra* note 138, at 412.

220 *Supra* Section IV.A.1.

221 18 U.S.C. §§ 1591, 1595 (2012).

222 MASS. ANN. LAWS ch. 265, § 50(a) (LexisNexis 2010).

223 *Supra* Section IV.A.2.

224 *Supra* text accompanying note 190.

225 *Backpage.com II*, 817 F.3d 12, 16 (1st Cir. 2016).

illegality of the material.[226] While Backpage.com did not create the content, it did profit from the objectionable posts by taking actions similar to those that were sufficient to hold StubHub liable in 2009.[227] Backpage.com charged a fee only for advertisements posted in the Adult Entertainment section of the website and charged an additional fee for "Sponsored Ads," which gave information about the location and availability of the person advertised.[228] Backpage.com profited from the additional fees it collected specifically from the posts in "Adult Entertainment," the section of the website where the objectionable advertisements were posted.[229] Based on this analysis, the causes of action did not seek to treat Backpage.com as a speaker or publisher of the advertisements, and Backpage.com would be responsible for the content at issue. Therefore, under the proposed test, websites like Backpage.com would not be entitled to § 230 immunity, finally allowing the court to impose liability where liability was due.

Conclusion

Section 230 of the Communications Decency Act was originally enacted to prevent online service providers from being treated as publishers and held liable for content posted by third parties. Since then, courts have interpreted § 230 to be a grant of near-absolute immunity for any and all third-party content that is posted on a website. By doing so, however, courts have applied § 230 in a manner that is contrary to Congress's intent and allows parties at fault to escape liability for truly egregious conduct. The test proposed in this Note, which requires inquiries into (1) whether the cause of action treats the interactive computer service as publisher or speaker of the content, and (2) whether the interactive computer service was responsible for the creation or development of the content at issue, provides a framework for courts to use when faced with claims of § 230 immunity. The test appropriately narrows § 230 to a scope that is still consistent with Congress's intent and allows plaintiffs, like Natalie and other victims of online trafficking, to achieve the legal redress they deserve.

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226 *Supra* Section IV.A.2.

227 *See Backpage.com II*, 817 F.3d at 17; NPS LLC v. StubHub, Inc., No. 06-4874-BLS1, 2009 WL 995483, at *11 (Mass. Super. Ct. Jan. 26, 2009) (imposing liability on StubHub for creating a price structure that encouraged users to buy and resell tickets in violation of anti-scalping laws).

228 *Backpage.com II*, 817 F.3d at 17.

229 *Id.* at 16.