

United States Court of Appeals for the Seventh Circuit

BACKPAGE.COM, LLC,
PLAINTIFF-APPELLANT

v.

THOMAS J. DART,
DEFENDANT-APPELLEE

*APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF
ILLINOIS, EASTERN DIVISION, No. 15- CV-06340, HON. JOHN J. THARP, JR., PRESIDING*

**BRIEF AMICI CURIAE FOR THE CATO INSTITUTE,
REASON FOUNDATION, AND DKT LIBERTY PROJECT IN SUPPORT
OF PLAINTIFF-APPELLANT AND REVERSAL**

Of Counsel:

Manuel S. Klausner*

Law Offices of Manuel S. Klausner

One Bunker Hill Building

601 W. Fifth St., Suite 800

Los Angeles, CA 90071

(213) 617-0414

mklausner@mac.com

Ilya Shapiro

Counsel of Record

Randal J. Meyer*

Cato Institute

1000 Massachusetts Ave. NW

Washington, DC 20001

(202) 842-0200

ishapiro@cato.org

rmeyer@cato.org

**Not admitted in this court.*

CORPORATE & FINANCIAL DISCLOSURE STATEMENTS

Pursuant to Seventh Circuit Local Rule 26.1, *amici* make the following declaration:

The Cato Institute, Reason Foundation, and DKT Liberty Project are each nonprofit public policy research foundations dedicated in part to the defense of constitutional liberties secured by law. None of *amici* has a parent corporation and none issue shares of stock.

No publicly held corporation has a direct financial interest in the outcome of this litigation due to *amici*'s participation.

TABLE OF CONTENTS

CORPORATE & FINANCIAL DISCLOSURE STATEMENTS	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
INTEREST OF <i>AMICI CURIAE</i>	1
SUMMARY OF THE ARGUMENT	2
ARGUMENT	2
I. THERE IS NO “EPIDEMIC” OF SEX TRAFFICKING IN THE UNITED STATES AND EFFORTS TO FIGHT THIS “EPIDEMIC” HAVE MIRRORED THE FOLLIES OF THE WAR ON DRUGS	2
A. Sex Trafficking Has Not Increased, and May Have Declined, in the Last 15 Years	2
B. The War on Sex Trafficking Mimics the War on Drugs, Alas	5
II. THE DISTRICT COURT IMPROPERLY ACCEPTED SHERRIFF DART’S ALLEGATIONS ABOUT AN EPIDEMIC OF SEX TRAFFICKING	9
A. Sherriff Dart’s “Evidence” Fails to Prove His Claims	9
B. As a Matter of Law, the District Court Could Not Assume That All Adult Advertisements on Backpage.com Are Illegal	11
III. SHERRIFF DART’S CRUSADE WILL DESTROY INVALUABLE AND IRREPLACEABLE TOOLS FOR THE INVESTIGATION AND PREVENTION OF SEX TRAFFICKING	13
IV. SHERRIFF DART’S ACTIONS INFRINGE BASIC DUE PROCESS	14
CONCLUSION	15
CERTIFICATE OF COMPLIANCE	17
CERTIFICATE OF SERVICE	18

TABLE OF AUTHORITIES

Cases

<i>Backpage.com, LLC v. Cooper</i> , 939 F. Supp. 2d 805 (M.D. Tenn. 2013)	12
<i>Backpage.com, LLC v. Dart</i> , No. 15-c-06340, 2015 WL 5174008 (N.D. Ill. Sept. 2, 2015)	<i>passim</i>
<i>Backpage.com, LLC v. Hoffman</i> , No. 13-CV-03952 DMC JAD, 2013 WL 4502097 (D.N.J. Aug. 20, 2013)	12
<i>Backpage.com, LLC v. McKenna</i> , 881 F. Supp. 2d 1262 (W.D. Wash. 2012)	12
<i>Dart v. Craigslist, Inc.</i> , 665 F. Supp. 2d 961 (N.D. Ill. 2009)	11
<i>Doe ex rel. Roe v. Backpage.com, LLC</i> , No. CIV.A. 14-13870-RGS, 2015 WL 2340771 (D. Mass. May 15, 2015)	12
<i>United States v. Raddatz</i> , 447 U.S. 667 (1980)	14

Statutes

Justice for Victims of Trafficking Act, Pub. L. 114-22, 129 Stat. 227 (May 29, 2015)	8
PROTECT Act, Pub. L. 108-21, 117 Stat. 649 (April 30, 2003)	8
Trafficking Victims Protection Act, Pub. L. 106-386, 114 Stat. 1464 (Oct. 28, 2000)	8
TVPA Reauthorization 2005, Pub. L. 109-164, 119 Stat. 3357 (Jan. 10, 2006)	8
TVPA Reauthorization Act 2013, Pub. L. 113-4, 127 Stat. 54 (Mar. 7, 2013)	8

William Wilberforce Trafficking Victims Protection Reauthorization Act, Pub. L. 110-457, 122 Stat. 5044 (Dec. 2, 2008)	8
---	---

Other Authorities

App. Motion for Expedited Appeal, Ex. B, C at App. A026-37	2
Alison Siskin & Liana Wyler, <i>Trafficking in Persons: U.S. Policy and Issues for Congress</i> , Cong. Research Serv., RL34317 (2013)	3
Crimes Against Children Research Center, <i>How Many Juveniles are Involved in Prostitution in the U.S.?</i> (2008)	4
Elizabeth Nolan Brown, <i>The War on Sex Trafficking Is the New War on Drugs</i> , Reason, Sept. 30, 2015	3, 5, 8
Glenn Kessler, <i>The Bogus Claim that 300,000 U.S. Children Are ‘At Risk’ of Sexual Exploitation</i> , Wash. Post, May 28, 2015, https://www.washingtonpost.com/news/fact-checker/wp/2015/05/28/the-bogus-claim-that-300000-u-s-children-are-at-risk-of-sexual-exploitation	3, 4
Glenn Kessler, <i>The Four-Pinocchio Claim That ‘On Average, Girls First Become Victims of Sex Trafficking at 13 Years Old,’</i> Wash. Post, June 11, 2015, https://www.washingtonpost.com/blogs/fact-checker/wp/2015/06/11/the-dubious-claim-that-on-average-girls-first-become-victims-of-sex-trafficking-at-13-years-old	5
James Finckenauer & Ko-lin Chin, <i>Researching and Rethinking Sex Trafficking: The Movement of Chinese Women to Asia and the United States for Commercial Sex</i> (2011)	6, 7
Julie Ruvolo, <i>Sex Trafficking on Backpage.com: Much Ado About (Statistically) Nothing</i> , Tech Crunch (Oct. 6, 2012), http://techcrunch.com/2012/10/06/sex-trafficking-on-backpage-com-much-ado-about-statistically-nothing	10, 11, 13, 14
Melissa Ditmore & Juhu Thukral, <i>Accountability and the Use of Raids to Fight Trafficking</i> , 1 Anti-Trafficking Rev. 134 (2012)	9
Meridith Dank et al., <i>Surviving the Streets of New York: Experiences of LGBTQ Youth, YMSM, and YWSW Engaged in Survival Sex</i> (2015)	7
NAAG Joint Statement, available at, https://www.azag.gov/sites/default/files/craigslist%20final%20statement.pdf	13

Radley Balko, <i>Rise of the Warrior Cop: The Militarization of America's Police Forces</i> (2013)	9
Richard Curtis et al., <i>Commercial Sexual Exploitation of Children in New York: The CSEC Population in New York: Size, Characteristics, and Needs</i> (2008)	7
Todd Zywicki, "Operation Choke Point," Wash. Post (May 24, 2014), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/05/24/operation-choke-point	14, 15
Tom Ragan, <i>Nevada Movement Draws the Line on Human Trafficking</i> , Las Vegas Review-Journal, May 26, 2013, http://www.reviewjournal.com/news/las-vegas/nevada-movement-draws-line-human-trafficking	9
U.S. Dep't of State, <i>Trafficking in Persons Report</i> (2000)	3
U.S. Dep't of State, <i>Trafficking in Persons Report</i> (2004)	3
U.S. Dep't of State, <i>Trafficking in Persons Report</i> (2005)	3
U.S. Dep't of State, <i>Trafficking in Persons Report</i> (2015)	7
U.S. GAO, <i>Human Trafficking: Better Data, Strategy, and Reporting Needed to Enhance U.S. Antitrafficking Efforts Abroad</i> , GAO-06-825 (2006).....	4
Weitzer, <i>The Social Construction of Sex Trafficking: Ideology and Institutionalization of a Moral Crusade</i> , 35 Pol. & Soc'y 447 (2007)	3, 4, 6

INTEREST OF *AMICI CURIAE*¹

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to promote the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato conducts conferences, publishes books, studies, and the annual *Cato Supreme Court Review*, and files *amicus* briefs with the courts.

Reason Foundation is a nonpartisan public policy think tank founded in 1978. Its mission is to advance a free society by developing and promoting libertarian principles and policies. Reason supports market-based solutions that encourage individuals and voluntary institutions to flourish. Reason advances its mission by publishing *Reason* magazine, online commentary, and policy research reports. To further its commitment to "Free Minds and Free Markets," Reason files briefs on significant constitutional issues.

The DKT Liberty Project was founded in 1997 to promote individual liberty against all levels of government, and to defend the right to privacy.

The present case concerns *amici* because Sherriff Dart's threat poses a grave threat to individual rights and can cause irreparable harm to at-risk youth, along with inhibiting the ability of law enforcement to combat human trafficking. Sherriff Dart's crusade against websites like Backpage.com and Craigslist.org has distorted police practices and, in many cases, led to an informal prior restraint that violates the First Amendment.

¹ Fed. R. App. P. 29 Statement: Only Plaintiff-Appellant consented to this filing, so a motion for leave to file is attached. No counsel for either party authored this brief in whole or in part. No person or entity other than *amici* and their members made a monetary contribution to its preparation and submission.

SUMMARY OF THE ARGUMENT

Sherriff Dart claims that his letter to Visa and MasterCard was necessitated by “years of growth in the . . . sex trade.” App. Motion for Expedited Appeal, Ex. B, C at App. A026-37. No empirical evidence supports such an accusation. Instead, the “war on prostitution” has created public-policy reactions and legal proceedings eerily similar to those that led to mass incarceration under the Drug War. The district court, erring as a matter of both law and fact, apparently accepted this rubric in ruling against Backpage.com. While Sherriff Dart’s crusade against the website may be based on his sense of moral duty, his actions actually inhibit law enforcement’s ability to investigate human trafficking and rescue its victims by destroying an important method to identify and prosecute real offenders.

ARGUMENT

I. THERE IS NO “EPIDEMIC” OF SEX TRAFFICKING IN THE UNITED STATES AND EFFORTS TO FIGHT THIS “EPIDEMIC” HAVE MIRRORED THE FOLLIES OF THE WAR ON DRUGS

A. Sex Trafficking Has Not Increased, and May Have Declined, in the Last 15 Years.

Sherriff Dart claims that there have been “years of growth in the . . . sex trade,” “driving demand even higher and increasing the enslavement of prostituted individuals, including children.” App. Motion for Expedited Appeal, Ex. B, C at App. A026-37. There is no empirical basis for this assertion; State Department data suggest that the opposite may be true. Allegedly scary and shocking statistics about human trafficking have either been debunked or revealed to be mere anecdotes.

According to the State Department, human trafficking into the United States decreased 71 percent between 2000 and 2005, from around 50,000 estimated victims to 14,500-17,500 estimated victims annually. U.S. Dep't of State, *Trafficking in Persons Report* 23 (2004); U.S. Dep't of State, *Trafficking in Persons Report* 2 (2000); Elizabeth Nolan Brown, *The War on Sex Trafficking Is the New War on Drugs*, Reason, Sept. 30, 2015, at 20. "As of January 2013, [14,500-17,500] remains the most recent U.S. government estimate of trafficking victims." Alison Siskin & Liana Wyler, *Trafficking in Persons: U.S. Policy and Issues for Congress*, Cong. Research Serv., RL34317, at 16 (2013). The numbers are not precise but, if anything, trafficking seems to have declined in the early 2000s and remained steady thereafter. Even more damning for Sherriff Dart's claims, this apparent decrease in human trafficking is concurrent with the popular rise of Backpage.com, Craigslist.org, and other websites and social media through which people can meet for amorous purposes. As one researcher points out, "[i]t is conceivable that the number of sex-for-sale transactions has increased with the growth of the Internet . . . but whether this has substantially increased the aggregate amount of prostitution, as claimed, is impossible to estimate." Weitzer, *The Social Construction of Sex Trafficking: Ideology and Institutionalization of a Moral Crusade*, 35 Pol. & Soc'y 447, 456 (2007). In short, "claims regarding a growing worldwide epidemic cannot be confirmed." *Id.*

Data problems plague the entire field of human-trafficking measurement. The 2005 State Department Trafficking in Persons Report (TIP) claims that there may be upwards of 300,000 juvenile prostitutes in the United States, Dep't of State, *2005 TIP*, *supra*, at 6, though it turns out that this figure is a rather speculative estimate of youth "at

risk.” Glenn Kessler, *The Bogus Claim that 300,000 U.S. Children Are ‘At Risk’ of Sexual Exploitation*, Wash. Post, May 28, 2015, <https://www.washingtonpost.com/news/fact-checker/wp/2015/05/28/the-bogus-claim-that-300000-u-s-children-are-at-risk-of-sexual-exploitation>. Other estimates for this category of trafficking victims range so widely as to make the numbers meaningless. Weitzer, *Social Construction*, *supra*, at 455. According to the Crimes Against Children Research Center (CACRC), however, “[a] close look at these diverse estimates reveals that none are based on a strong scientific foundation. They are mostly educated guesses or extrapolations based on questionable assumptions.” CACRC, *How Many Juveniles are Involved in Prostitution in the U.S.? 1* (2008). The CACRC goes on to implore people, in all-caps fashion: “PLEASE DO NOT CITE THESE NUMBERS[.]” *Id.*

The reason for the massive discrepancy in State Department data has been described well by the Government Accountability Office (GAO): “The accuracy of the estimates is in doubt because of methodological weaknesses, gaps in data, and numerical discrepancies.” U.S. GAO, *Human Trafficking: Better Data, Strategy, and Reporting Needed to Enhance U.S. Antitrafficking Efforts Abroad*, GAO-06-825, at 1 (2006). The GAO continues: “[T]he U.S. government’s estimate was developed by one person who did not document all his work, so the estimate may not be replicable, casting doubt on its reliability.” *Id.* In addition, “there is also a considerable discrepancy between the numbers of observed and estimated victims of human trafficking.” *Id.* One researcher summed up the problem nicely: “there are no reliable statistics on the magnitude of trafficking.” Weitzer, *Social Construction*, *supra*, at 455.

Perhaps the most egregious example of statistical manipulation is the aforementioned claim that 300,000 U.S. children are “at risk” for—let alone victims of—sex trafficking. That number, repeated in popular discussion and “uncritically cited in . . . government documents,” is based not on any government finding, but on “1990s data published in a non-peer-reviewed paper that the primary researcher, Richard Estes, no longer endorses.” Brown, *War on Sex Trafficking*, *supra*, at 20-21; Glenn Kessler, *The Four-Pinocchio Claim That ‘On Average, Girls First Become Victims of Sex Trafficking at 13 Years Old,’* Wash. Post, June 11, 2015, https://www.washingtonpost.com/blogs/fact-checker/wp/2015/06/11/the-dubious-claim-that-on-average-girls-first-become-victims-of-sex-trafficking-at-13-years-old. “Common sense should preclude believing the 300,000 number in the first place. If even a third of those ‘at risk’ youth were peddled for sex in a given year, we’d be looking at nearly 110,000 victims . . . that would be—using the lowest number—1.1 million commercial child rapes in America each day . . . nearly 8 million Americans [with] a robust and ongoing child rape habit, in addition to the alleged millions who pay for sex with adults.” Brown, *War on Sex Trafficking*, *supra*, at 21.

Such numbers strain credulity. Simply stated, there is no reliable data suggesting an increase in sex trafficking in recent years or that the growth of the Internet has affected trafficking rates. Dart’s claims are at best unsupported and at worst disingenuous, being based on statistics that have been misstated and discredited.

B. The War on Sex Trafficking Mimics the War on Drugs, Alas.

The complete misstatement of the actual scope of the problem of human trafficking has contributed to a moralistic crusade—employed by various groups with

various agendas—that is similar to that of the Drug War. Human trafficking “warriors” have repeated the same mantra drug warriors made in the 1970s and 1980s: expanding criminal enforcement as a “one-size-fits-all” solution that fails to address the root causes of complex social phenomena.

The anti-trafficking movement picked up political steam in the first decade of the new millennium with an unlikely coalition of the religious right and ultra-feminists—those who wish to abolish prostitution and pornography—represented by such organizations as Focus on the Family and the Coalition Against Trafficking in Women. Weitzer, *Social Construction*, *supra*, at 449. One of the core beliefs underlying this crusade is that “prostitution more than anything else . . . is the root cause of trafficking.” *Id.* at 454. In fact, the “conflation of trafficking and prostitution” is central to the “crusade’s ultimate goal of eliminating the entire sex trade.” *Id.* at 455.

But voluntary prostitution—whatever one thinks of it—is not human trafficking, under popular conceptions or as a definition for effective policymaking. Trafficking, as it is commonly understood, is a very different crime than street prostitution, full-service escorts, or even transporting a willing prostitute across state boundaries. It traditionally refers to the involuntary smuggling or harboring of a person for coerced sex or non-sex labor, similar to slavery. Prostitution, on the other hand, refers to simply the sale of sex. It can certainly involve trafficked persons, but not all prostitutes are trafficked.

Indeed, reliable studies show that the many prostitutes are voluntarily “trafficked” across borders to seek better paying opportunities in the trade. James Finckenauer & Kolin Chin, *Researching and Rethinking Sex Trafficking: The Movement of Chinese Women*

to *Asia and the United States for Commercial Sex* 47 (2011). Thus, “this suggests that the definition of who is and is not a victim is not as clear cut as might be supposed.” *Id.* And often it is difficult to leave the profession because adequate shelter and income alternatives are lacking, not because prostitutes are being held under lock and key. U.S. Dep’t of State, *Trafficking in Persons Report* 355 (2015) (“Shelter and housing for all trafficking victims, especially male and labor trafficking victims, continued to be insufficient, and in some cases resulted in victims returning to unsafe situations.”).

Specifically in the case of youth prostitution, it is the exception rather than the rule that the underage “victim” is involuntarily trafficked. “Studies focused on New York City consistently report that homeless youth often trade sex for a place to stay each night because of the absence of available shelter beds, and that approximately a quarter of homeless youth in New York City have traded sex at some point.” Meridith Dank et al., *Surviving the Streets of New York: Experiences of LGBTQ Youth, YMSM, and YWSW Engaged in Survival Sex* 5 (2015). Indeed, the total of “homeless youth who report trading sex for shelter corresponds to the number of youth involved in the sex trade who report having experienced homelessness Homelessness is thus a driver for involvement in survival sex.” *Id.* at 5-6. In fact, 83.5 percent of the youth prostitution market in New York City does not involve a “market facilitator”—someone who might be called a “trafficker” even in the absence of coercion. For the majority of kids trapped in this lifestyle, the problem is not traffickers, but the necessity of sustenance. Richard Curtis et al., *Commercial Sexual Exploitation of Children in New York: The CSEC Population in New York: Size, Characteristics, and Needs* 77 (2008).

Like the Drug War, the war on prostitution has also brought about perverse federal incentive grant programs for law enforcement and the broadening of law enforcement's powers. Between 2000 and 2015, Congress greatly expanded the powers of prosecutors and investigators to intercept human trafficking. The Trafficking Victims Protection Act of 2000 (TVPA) and the Justice for Victims of Trafficking Act of 2015 provide significant tools to prosecutors and law enforcement to prosecute sex traffickers, including wiretaps, stiffer penalties, RICO, state-federal collaboration, forfeiture, administrative subpoenas, and extraterritorial jurisdiction. *See generally* Justice for Victims of Trafficking Act, Pub. L. 114-22, 129 Stat. 227, 238, at Tit. I, § 106 (May 29, 2015); TVPA Reauthorization Act 2013, Pub. L. 113-4, 127 Stat. 54, 142, at Tit. XII, Subtit. B, Part I, § 1211(a) (Mar. 7, 2013); William Wilberforce Trafficking Victims Protection Reauthorization Act, Pub. L. 110-457, 122 Stat. 5044, 5067-72, at Tit. II, Subtit. A, §§ 222-23, 244(b) (Dec. 2, 2008); TVPA Reauthorization 2005, Pub. L. 109-164, 119 Stat. 3357, 3563-64, at § 103 (Jan. 10, 2006); PROTECT Act, Pub. L. 108-21, 117 Stat. 649, 660, at Tit. II, § 201 (April 30, 2003); Trafficking Victims Protection Act, Pub. L. 106-386, 114 Stat. 1464, 1486-88, at Div. A, § 112 (Oct. 28, 2000).

This proliferation of federal laws has been matched by state legislation. “In 2014 alone, 31 states passed new laws concerning human trafficking. Since the start of 2015, at least 22 states have done so.” Brown, *War on Sex Trafficking*, *supra*, at 24. Twenty-one states have passed laws targeting the buyers of sex and enhancing penalties, at least 21 states now allow court orders for wiretapping for trafficking offenses, and 41 states allow for the use of asset forfeiture in trafficking cases. *Id.* at 25.

Originally intended as a measure to sanction countries that did not fight human trafficking, the TVPA has “changed into one big federal grant program” with around \$10 million a year flowing to local police, according to bill architect Mike Horowitz of the Urban Institute. Tom Ragan, *Nevada Movement Draws the Line on Human Trafficking*, Las Vegas Review-Journal, May 26, 2013, <http://www.reviewjournal.com/news/las-vegas/nevada-movement-draws-line-human-trafficking>. Much anti-trafficking money allocated this way ends up being spent on street-level, routine prostitution operations. Melissa Ditmore & Juhu Thukral, *Accountability and the Use of Raids to Fight Trafficking*, 1 Anti-Trafficking Rev. 134, 136-37 (2012). (“[TVPA trafficking] raids are driven by, and sometimes indistinguishable from, efforts to curb prostitution and other forms of sex work. Government funding streams reflect, in particular, the conflation of trafficking with prostitution.”). This parallels DOJ’s Byrne Grant program, which allocates money to police departments based on total arrests. Radley Balko, *Rise of the Warrior Cop: The Militarization of America’s Police Forces* 244 (2013).

II. THE DISTRICT COURT IMPROPERLY ACCEPTED DART’S ALLEGATIONS ABOUT AN EPIDEMIC OF SEX TRAFFICKING

A. Sherriff Dart’s “Evidence” Fails to Prove His Claims.

In denying Backpage.com’s application for a preliminary injunction, the district court found that “Backpage.com’s adult section is the leading forum for unlawful sexual commerce on the Internet,” and that “a substantial majority of the ads appearing in that section are ‘exhortations to illegal conduct’ unprotected by the First Amendment.”

Backpage.com, LLC v. Dart, No. 15-c-06340, 2015 WL 5174008, at *12 n.11 (N.D. Ill. Sept. 2, 2015). This finding is not warranted either by the facts or the law.

The district court made this finding based on fact that 64 percent of reports to the National Center for Missing and Exploited Children’s (NCMEC) tip line relate to ads on Backpage.com; on Sherriff Dart’s self-serving description of his own Backpage.com stings resulting in arrests “100 percent” of the time; and on the affidavits of law enforcement officers claiming the “some basic correlation between advertising on Backpage.com and unlawful sexual activity.” *Id.* at *2 & n.1. The court noted that “Backpage.com has produced no evidence whatsoever regarding the lawfulness of the ads placed on its adult site.” *Id.*

Tips to NCMEC—which includes those submitted by Backpage.com itself—and the claims of a law enforcement officer known for his decade-long crusade against online erotic services should not be sufficient to establish that *any* of the ads on Backpage.com are illegal. Such evidence lacks scientific rigor, individualization, and methodological consistency. Indeed, analyses of Backpage.com’s web traffic indicate that “[a]ll the figures quoted in the media come from a single source, a consultancy called AIM Group But AIM Group’s methodology is shaky at best. . . . [They] assume all ads for escort services and body rubs—services that are not illegal—are code for prostitution, another leap in logic.” Julie Ruvolo, *Sex Trafficking on Backpage.com: Much Ado About (Statistically) Nothing*, Tech Crunch (Oct. 6, 2012), <http://techcrunch.com/2012/10/06/sex-trafficking-on-backpage-com-much-ado-about-statistically-nothing>.

“Of the 9 million ads live on the site on any given day, about 11 percent, or just under 1 million ads, are listed in the Adult Services Category . . . Only 1.6 percent of the ads they remove from the site in a given month are from the Adult Category. . . . Only 2 percent of that 1.6 percent . . . are suspected of advertising a minor.” *Id.* Yet, “Backpage reports those ads immediately (and under no legal obligation) to the National Center for Missing and Exploited Children.” *Id.*

While the district court “[h]appily” avoided actually examining any ads on Backpage.com due to its duty not to investigate *ex camera*, *Backpage.com, LLC v. Dart*, 2015 WL 5174008, at *12 n.11, it certainly could have taken judicial notice of the above facts, or allowed evidence about them into its evidentiary hearing. What a court should not do is take law enforcement’s statistical claims at their word with no critical examination of the underlying methodology.

B. As a Matter of Law, the District Court Could Not Assume That All Adult Advertisements on Backpage.com Are Illegal.

The law simply does not permit a court to infer that Backpage.com’s ads are illegal. A court cannot assume that all or most “adult ads” are illegal solicitations.

The Northern District of Illinois had already addressed this point—when Sherriff Dart raised it against Craigslist in 2009: “The phrase ‘adult,’ even in conjunction with ‘services,’ is not unlawful in itself nor does it necessarily call for unlawful content.” *Dart v. Craigslist, Inc.*, 665 F. Supp. 2d 961, 968 (N.D. Ill. 2009). The court continued: “The same is true of the subcategories. [Dart] is simply wrong when he insists that these terms are all synonyms for illegal sexual services. . . . A woman advertising erotic dancing for

male clients (‘w4m’) is offering an ‘adult service,’ yet this is not prostitution. . . . It may even be entitled to some limited protection under the First Amendment.” *Id.* The district court here made no mention of the First Amendment interests of the adult advertisements on Backpage.com, yet took time to lump those services with prostitution as “seedy offerings.” *Backpage.com, LLC v. Dart*, 2015 WL 5174008, at *10.

Other courts that have addressed this question have found similarly. *See, e.g., Doe ex rel. Roe v. Backpage.com, LLC*, No. CIV.A. 14-13870-RGS, 2015 WL 2340771, at *6 (D. Mass. May 15, 2015) (“The existence of an escorts section in a classified ad service, whatever its social merits, is not illegal.”); *Backpage.com, LLC v. Cooper*, 939 F. Supp. 2d 805, 830-32 (M.D. Tenn. 2013) (noting that “purposefully coy and playful” language can appear to be an illegal ad, yet still be protected “legal, consensual, non-commercial sexual activity”); *Backpage.com, LLC v. McKenna*, 881 F. Supp. 2d 1262, 1279 (W.D. Wash. 2012) (“[W]here an online service provider publishes advertisements that employ coded language, a reasonable person could believe that facts exist that do not in fact exist: an advertisement for escort services may be just that . . . if the offer is implicit, how can a third party ascertain that which is being offered before the transaction is consummated?”); *Backpage.com, LLC v. Hoffman*, No. 13-CV-03952 DMC JAD, 2013 WL 4502097, at *8-10 (D.N.J. Aug. 20, 2013), appeal dismissed (May 1, 2014) (“The Court disagrees with Defendant’s reading of the language and agrees with both the *McKenna* and *Cooper* Courts’ thorough analysis. . . . Describing criminal conduct as anything that is “implicit” is inherently vague”).

Considering the assumptions made by the district court in conjunction with the actual facts regarding the number of offending ads on Backpage—and the clear law stating not to make such assumptions—the district court erred.

III. SHERIFF DART’S CRUSADE WILL DESTROY INVALUABLE AND IRREPLACEABLE TOOLS FOR THE INVESTIGATION AND PREVENTION OF SEX TRAFFICKING

There is no evidence that sex trafficking will decrease without Backpage.com’s adult-services sections. Without the credit card records that Backpage.com provides to law enforcement as a matter of course, however, investigators will be hamstrung in preventing sex trafficking.

In 2008 when the National Association of Attorneys General (NAAG) reached an agreement with Craigslist.org over its erotic services sections, the agreement *required* the use of “a valid credit card” to post an ad—”Credit card verification provides additional identifying information that will enable craigslist to block the accounts of persons who violate craigslist’s terms of use. Credit card information would be available to law enforcement agencies through a subpoena process.” *NAAG Joint Statement 1-2*, available at <https://www.azag.gov/sites/default/files/craigslist%20final%20statement.pdf>.

The present credit card system is helping to catch real offenders to the tune of hundreds a month. *See Ruvolo, Sex Trafficking, supra*. Street prostitution is harder to track than online prostitution. With a willing website, such as Backpage.com, able to provide credit card records, police are better able to investigate incidences of child or adult trafficking advertising. Credit card records leave hard evidence and are immensely helpful at the initial stages of an investigation. Backpage.com “responds to most of the

three to five incoming subpoenas it receives per day within 24 hours, and often turns over data before receiving the official subpoena.” Ruvolo, *Sex Trafficking, supra*.

In sum, Dart’s actions inhibit the ability to fight trafficking by removing the valuable investigatory tool of credit card records for adult ads and eliminating a partner to law enforcement. According to one of the foremost experts in the field, “[s]hutting down Backpage would mean that approximately 400 persons per month would not be identified as suspicious and would thus fall off the radar screen.” Ruvolo, *Sex Trafficking, supra*.

IV. SHERIFF DART’S ACTIONS INFRINGE BASIC DUE PROCESS

Sheriff Dart’s censorship of Backpage “erodes principles that strike near the heart of the constitutional order,” *United States v. Raddatz*, 447 U.S. 667, 714 (1980) (Marshall & Brennan, JJ., dissenting), especially regarding the limited power of government agents to operate outside of official processes and the prohibition on prior restraints. It is part of an unfortunate governmental trend of using informal methods of soft power to “nudge” financiers and transactional companies into not doing business with legal enterprises.

Dart’s use of his title, office, letterhead, and legal authority is not unlike the Justice Department’s Operation Choke Point. Choke Point was an effort to cut off disfavored businesses from the financial institutions that are the lifeblood of any commercial operation—without engaging in formal legal process. Under the guise of reducing fraudulent transactions, DOJ used the threat of subpoenas and investigations to pressure banks and other financial institutions to stop dealing with politically incorrect businesses like ammunition suppliers and payday lenders. Todd Zywicki, *“Operation*

Choke Point,” Wash. Post (May 24, 2014), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/05/24/operation-choke-point>.

Much like that controversial and constitutionally dubious scheme, Sherriff Dart’s admitted aim is to isolate Backpage from its financial backbone in order to kill the company without any evidence that it has done anything wrong—just that its business model offends his general sense of morality. *See Backpage*, 2015 WL 5174008, at *3, Were Sherriff Dart devoting his department’s resources to pursuing actual instances of human trafficking or fraud instead of threatening credit card companies, there would be a much better chance of actually reducing the number of trafficked persons and preventing child prostitution. Moreover, he would be respecting the legal protections due any subject of law enforcement investigation, rather than on an extra-constitutional crusade that inevitably *reduces* the number of trafficked persons recovered, *see supra* Section III.

Constitutional governance in law enforcement, protected by the courts is an essential part of ensuring that what businesses operate in this country are the result of a free market, not the preferences of government officials who happen to occupy an office at some point in time. It also contributes to effective and efficient law enforcement. Without the intervention of the courts to restore reasonable constitutional order by lifting the informal prior restraint against Backpage, individual rights get trampled, as with both Dart’s operation and Operation Choke Point.

CONCLUSION

For the foregoing reasons, and those presented by the appellant, *amici* urge the court to reverse the district court and grant a preliminary injunction.

Of Counsel:
Manuel S. Klausner*
Law Offices of Manuel S. Klausner
One Bunker Hill Building
601 W. Fifth St., Suite 800
Los Angeles, CA 90071
(213) 617-0414
mklausner@mac.com

October 23, 2015

Respectfully submitted,

Ilya Shapiro
Counsel of Record
Randal J. Meyer*
Cato Institute
1000 Massachusetts Ave. NW
Washington, DC 20001
(202) 842-0200
ishapiro@cato.org
rmeyer@cato.org

**Not admitted in this court.*

CERTIFICATE OF COMPLIANCE

1. This memorandum complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 4,085 words, excluding the parts exempted by Fed. R. App. P. 32(a)(7)(B)(iii).
2. This memorandum complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in Times New Roman, 13-point font.

/s/ Ilya Shapiro
October 23, 2015

CERTIFICATE OF SERVICE

I hereby certify that, I electronically filed the foregoing with the Clerk of Court, who will enter it into the CM/ECF system, which will send a notification of such filing (NEF) to the appropriate counsel.

/s/ Ilya Shapiro
October 23, 2015