

# Testimony of Chris Cox

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before the

U.S. House Committee of the Judiciary

Subcommittee on Crime, Terrorism, Homeland Security, and

Investigations

**'Online Sex Trafficking and the Communications Decency Act'**

October 3, 2017

## Executive Summary<sup>1</sup>

No federal prosecution for sex trafficking has yet been brought under the Stop Advertising Victims of Exploitation Act (the “SAVE Act”), signed into law by President Obama in 2015. Congress gave this potent new tool to prosecutors precisely so that sex trafficking can be brought to heel. Moreover, by its express terms, Section 230 of the Communications Decency Act<sup>2</sup> provides no immunity whatsoever to defendants in federal criminal cases. This means that whether a federal prosecutor chooses to bring a case under the SAVE Act or any other criminal provision, Section 230 is no impediment.

Since the release of the Staff Report of the Senate Permanent Subcommittee on Investigations concerning Backpage.com (the “Senate Report,”) no state civil or criminal case has made the factual allegations set out in the report.<sup>3</sup> The facts alleged in the Senate Report would clearly permit state attorneys general, local prosecutors, and civil litigants suing under state law to proceed without interference from Section 230.

Nonetheless, there is a move afoot to amend Section 230 in ways that could sow chaos. Whereas the existing law establishes a uniform federal policy that applies to all civil and criminal offenses, pending bills would carve out sex trafficking as a unique exception. For the tens of thousands of state and federal crimes other than sex trafficking – including such heinous crimes as murder for hire and terrorism, which are often accomplished using the Internet – not so. The unfortunate inference a judge would be compelled to draw from this statutory exception is that Congress chose to make it easier to prosecute one offense, and correlatively, more difficult to prosecute all other offenses not covered by the amendment to Section 230. This is an undesirable result that could easily be avoided through better legal craftsmanship.

The correct view of the problem facing Congress is stated in the preamble to the two leading bills that would amend Section 230 concerning sex trafficking cases. Section 230 was never intended to provide legal protection to websites that promote sex trafficking. The plain language of the statute makes clear that Section 230 does not in fact do so. Moreover, Section 230 was never intended to provide legal protection to websites that commit *any* crime. Any website operator that is responsible even partly for

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<sup>1</sup> NetChoice testimony represents its own views and not necessarily the views of all NetChoice members.

<sup>2</sup> 47 USC § 230 (hereinafter, “Section 230”).

<sup>3</sup> The California action is based on 2016 facts and the 1<sup>st</sup> Circuit case is based on 2014 facts. See [People v. Ferrer](#), Case No. 16FE019224 (Cal. Super. Ct. Dec. 9, 2016), *Jane Doe No. 1, et al. v. Backpage.com LLC, et al.*, No. 15-1724 (1st Cir. 2016). For further discussion of the procedural problems in these cases, see the discussion at p. 15 and note 41 below.

content that furthers the commission of a crime is denied Section 230 protection. Even if a website does not create content, but only contributes in part to the development of another's content after it is submitted, the website loses the protection of Section 230.

Repeatedly, courts have held that Section 230 does not immunize unlawful conduct. To be sure, not every court has maintained this view, which is to say that not all judges have been successful in applying the plain language of the statute as Congress intended.

For this reason, Congress should take the extraordinary step of enacting a Concurrent Resolution restating the clear intent of Section 230, and reemphasizing the plain meaning of its language that denies protection to internet platforms even partly complicit in the creation or development of illegal content. This will be the wind at the back of state law enforcement and civil plaintiffs who should be able to bring such cases entirely consistently with the language and purpose of Section 230.

Congress should remind the courts of what Section 230 already says: No website operator who is responsible even in part for creating or developing illegal content – including but not limited to the promotion of sex-trafficking – can hide behind Section 230.

There are additional steps that Congress can and should responsibly take:

- Call on the Department of Justice to bring criminal cases against known bad actors
- File amicus briefs to stress congressional intent in Section 230
- Create a joint federal-state Strike Force and a joint strategic plan with state AGs
- Amend the Travel Act to add another tool to combat sex trafficking

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United States House of Representatives  
'Online Sex Trafficking and the Communications Decency Act'

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Chairman Sensenbrenner, Ranking Member Jackson Lee, and members of the Subcommittee, thank you for the opportunity to testify on behalf of NetChoice regarding online sex trafficking and the Communications Decency Act (CDA). Prosecution of crimes facilitated using the internet, including sex trafficking, is of vital importance. Providing both criminal and civil law enforcement the tools they need to succeed in the courts is entirely consonant with maintaining the benefits of a vibrant internet.

As the co-author, with then Rep. Ron Wyden, of what became Section 230 of the CDA ("Section 230"),<sup>4</sup> I am particularly concerned that the original intent of Congress be upheld so that a law that has done so much for the success of the internet will also achieve its fundamental objective of incentivizing website operators and internet service providers to keep the internet free of objectionable material. My aim is shared by NetChoice, a trade association of leading e-commerce and online companies that works to make the internet safe for free enterprise and free expression. NetChoice is significantly engaged in the states, in Washington DC, and in international internet governance organizations.

## Introduction

Sex trafficking – the use of force, fraud, or coercion to obtain some type of labor or commercial sex act – is a serious crime punishable under both federal and state law. It is one of approximately 4,000 federal

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<sup>4</sup> 47 U.S.C. § 230.

crimes<sup>5</sup> and thousands more state law crimes that include terrorism, extortion, mass murder, airline hijacking, rape, hate crimes, hostage taking, sexual battery, torture, and treason. Any one of these crimes can be facilitated using the internet. As with the telephone and the telegraph before it, the internet is frequently a tool of criminals.

As Chairman of the House Committee on Homeland Security, I saw firsthand how terrorists use the internet to direct violent extremist acts. Neither in America nor anywhere in the world should terrorists find a “safe space” to operate and disseminate their murderous propaganda of mass destruction. Prime Minister Theresa May, in her recently statement to the United Nations General Assembly, put the challenge succinctly. “The internet and social media can and should be forces for good. But they have also been co-opted by terrorists to incite acts of evil. The internet is one way groups like Al-Qaeda and Daesh recruit, radicalise and direct their supporters, and it is proving increasingly effective.”<sup>6</sup>

When violent extremists further their plots and grow their ranks by use of the internet, it stands to reason that a nation of laws would not wish to permit laws enacted for another purpose to be used as a shield for such acts. Likewise, when criminal gangs kidnap innocent tourists for exorbitant ransom, using threats of torture and murder, no law should provide them any form of immunity. When assassins target our president, lawmakers, or Supreme Court, no one would want to grant the murderers a legal advantage because they happened to use the internet in the commission of their crimes.

Section 230 was drafted with these concerns in mind. It was intended to protect the innocent from being held liable for wrongs committed by others. It was equally intended to ensure that those who actually commit wrongs will be subject to prosecution by both civil and criminal law enforcement. One need not rely on the legislative history or the words of the authors for this proposition. The language of the statute is plain enough. If a website, or anyone who provides what the law describes as interactive computer services, is complicit in the creation of unlawful content then it may not claim protection under Section 230.

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<sup>5</sup> Cottone, Michael Anthony, *Rethinking Presumed Knowledge of the Law in the Regulatory Age* (Winter 2015). Tennessee Law Review, Vol. 82, No. 137, 2015. Available at SSRN: <https://ssrn.com/abstract=2584034> For a useful catalog of summary categories of federal crimes, see <http://www.clarifacts.com/resources/federal-crimes-list/> for a useful catalog of summary categories of federal crimes.

<sup>6</sup> Speech of Prime Minister Theresa May to the United Nations General Assembly side event, "Preventing Terrorist Use of the Internet," September 20, 2017.

Sex trafficking, a horrible crime, is like most crimes today accomplished in part using the internet. There is ample evidence to support this, including the recent Staff Report of the Senate Permanent Subcommittee on Investigations.<sup>7</sup> For this reason, the investigation and prosecution of sex trafficking must not be impeded by federal law meant to protect the innocent and punish the guilty. Equally importantly, the same must be true for all other crimes. It would make little sense to countenance an interpretation of Section 230 that could interfere with the prosecution of thousands of crimes, while addressing the situation only for a single offense, however heinous.

Two bills now pending, one in the House and one in the Senate, would nonetheless take this approach. The rationale is that carving out a unique standard for the single crime of sex trafficking is narrowly tailored and conservative. In fact, it is the opposite. This is an unfortunate approach that will communicate to judges looking at prior decisional law that the handful of Section 230 cases to which Congress objects is good precedent, while a different rule should be applied only in sex trafficking cases.

Carving out sex trafficking for differential treatment will create significant new legal ambiguities and inexplicable horizontal disparities in both federal and civil litigation. Judges faced with a new Section 230 standard for sex trafficking cases will be hard pressed not to infer that cases involving other crimes must be decided using a different rule. Undoubtedly the sponsors of the two sex-trafficking carveout bills do not intend this, but neither did any of them intend for courts to interpret Section 230 to shield online criminal enterprises engaged in sex trafficking.

It is notable that the most of the nation's attorneys general have written to Congress suggesting a different approach – one that will encompass not only sex trafficking but all criminal enforcement actions.<sup>8</sup> Such an approach would ensure that courts do not decide to make some internet crimes easier, and some crimes harder, to prosecute. While it would be a mistake to do this by scrapping the uniform federal policy with respect to publisher liability for internet platforms, it is unquestionably

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<sup>7</sup> "Backpage.com's Knowing Facilitation of Online Sex Trafficking," Staff Report of the Senate Permanent Subcommittee on Investigations, January 5, 2017 (the "Senate Report"). Recognizing that the claims against Backpage.com are pending resolution in the courts, NetChoice does not make any representation, express or implied, concerning the truth of the specific allegations in the Senate Report. NetChoice has no independent information concerning these specific allegations.

<sup>8</sup> Letter from National Association of Attorneys General, subscribed by 50 NAAG members, to U.S. Senate and House committee leaders, dated August 16, 2017. Available on NAAG website at [www.naag.org](http://www.naag.org).

correct that uniformity in the application of the federal policy to all crimes is necessary to prevent unintended consequences such as the creation of loopholes that benefit criminals.

Criminal prosecutions under federal law, by the very words of the statute, are unaffected by Section 230. Likewise, state criminal prosecutions are unaffected so long as they are consistent with the federal policy that the innocent should not be punished for the offenses of guilty third parties.

As detailed below, this means that state criminal prosecutions of sex trafficking should in no way be inhibited by existing Section 230 in any case where the interactive computer service provider is wittingly involved in creating or developing content – including but not limited to sex-trafficking.

For the most part, the courts have held that Section 230 does not protect guilty parties who happen to be using a website in the commission of their offenses. Not all courts, however, have read the statute in the same way. It should be the business of this Congress to use its considerable tools to assist the courts in interpreting the statute as did virtually the entirety of the House and the Senate when they voted for it, and as did President Clinton when he signed it. My recommendations in this respect are set forth below. To help shed light on why the law is written as it is, and why desultory carveouts of specific crimes would be a mistake, it will be useful to revisit the back story of Section 230.

## **History and purpose of Section 230**

Section 230 was signed into law more than 20 years ago.<sup>9</sup> When my colleague Ron Wyden (D-OR) and I conceptualized the law in 1995, roughly 20 million American adults had access to the internet, compared to 7.5 billion today.

Those who were early to take advantage of this opportunity, including many in Congress, quickly confronted this essential aspect of online activity: many users converge through one portal. The difference between newspapers and magazines, on the one hand, and the World Wide Web (as it was then called), on the other hand, was striking. In the print world, human beings reviewed and cataloged editorial content. On the Web, users themselves created content which became accessible to others immediately. While the volume of users was only in the millions, not the billions as today, it was even then evident to almost every user of the Web that no group of human beings would ever be able to keep pace with the growth of content on the Web.

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<sup>9</sup> 104 P.L. 104, 110 Stat. 56

At the time, however, not all in Congress were users of the Web. The Communications Decency Act (“CDA”) was premised on the notion that the FBI could filter the web, screening out offensive content. This was a faulty premise based on a fundamental misunderstanding of the scale and the functioning of the internet. Nonetheless, in large part because the stated target of the CDA was pornography, the Senate voted overwhelmingly (the vote was 84-16) in favor of it.<sup>10</sup>

Section 230 was not part of the original Senate bill. Instead, it was introduced in the House as the Internet Freedom and Family Empowerment Act, and intended as an *alternative* to the CDA. Offered as a standalone floor amendment, it passed the House nearly unanimously. As is so often the case in legislative battles between House and Senate, the conferees on the Telecommunications Act of 1996, which became the vehicle for this subject matter, agreed to include both diametrically opposed bills in the Conference Report. Subsequently, the U.S. Supreme Court gutted the CDA’s indecency provisions, which it found violated the First Amendment, giving Rep. Wyden and I an ultimate victory we did not at first win in conference.<sup>11</sup>

The fundamental flaw of the CDA was its misunderstanding of the internet as a medium. We can now easily see that it would have been impossible for the bulletin boards, chat rooms, forums, and email that were then budding on the Web to be screened in any meaningful way by the FBI, or by the operators of the websites and fledgling ISPs such as CompuServe and Prodigy that existed then. Worse, if the law were to demand such screening, the fundamental strength of the new medium – facilitating the free exchange of information among millions of users – would be lost.

### ***The Prodigy and CompuServe cases***

In 1995, I was on a flight from California to Washington, DC during a regular session of Congress when I read a *Wall Street Journal* story about a New York Superior Court case<sup>12</sup> that troubled me deeply. The case involved a bulletin board post on the Prodigy web service by an unknown user. The post said disparaging things about an investment bank. The bank filed suit for libel, but couldn’t locate the individual who wrote the post. So instead, the bank sought damages from Prodigy, the site that hosted the bulletin board.<sup>13</sup>

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<sup>10</sup> *Id.*

<sup>11</sup> *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997).

<sup>12</sup> Milo Geyelin, *New York judge rules Prodigy responsible for on-line content*, Wall St. Jo., May 26, 1995.

<sup>13</sup> *Stratton Oakmont v. Prodigy Services Co.*, 1995 WL 323710 (N.Y.Sup.Ct. May 24, 1995)



Up until then, the courts had not permitted such claims for third-party liability. In 1991, a federal district court in New York held that CompuServe was not liable in circumstances like the Prodigy case. The court reasoned that CompuServe “had no opportunity to review the contents of the publication at issue before it was uploaded into CompuServe’s computer banks,” and therefore was not subject to publisher liability for the third party content.<sup>14</sup>

But in the 1995 New York Superior Court case, the court distinguished the CompuServe precedent. The reason the court offered was that unlike CompuServe, Prodigy sought to impose general rules of civility on its message boards and in its forums. While Prodigy had even more users than CompuServe and thus even less ability to screen material on its system, the fact it announced such rules and occasionally enforced them was the judge’s basis for subjecting it to liability that CompuServe didn’t face.

The perverse incentive this case established was clear: any provider of interactive computer services should avoid even modest efforts to police its site. If the holding of the case didn’t make this clear, the damage award did: Prodigy was held liable for \$200 million.<sup>15</sup>

By the time I landed in Washington, I had roughed out an outline for a bill to overturn the holding in the Prodigy case.

### ***Creating Section 230 and its goals***

The first person I turned to as a legislative partner on my proposed bill was Rep. Ron Wyden (D-OR). We had previously agreed to seek out opportunities for bipartisan legislation. As this was a novel question of policy that had not hardened into partisan disagreement (as was too often the case with so many other issues), we knew we could count on a fair consideration of the issues from our colleagues on both sides of the aisle.

For the better part of a year, we conducted outreach and education on the challenging issues involved. In the process, we built not only overwhelming support, but also a much deeper understanding of the unique aspects of the internet that require clear legal rules for it to function.

The rule established in the bill, which we called the Internet Freedom and Family Empowerment Act,<sup>16</sup> was crystal clear: the government would impose liability on criminals and tortfeasors for wrongful

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<sup>14</sup> *Cubby, Inc. v. CompuServe, Inc.*, 776 F. Supp. 135, 140 (S.D.N.Y. 1991) (emphasis added).

<sup>15</sup> *Stratton Oakmont v. Prodigy Servs Co.*, 1995 WL 323710 (N.Y.Sup.Ct. May 24, 1995).

<sup>16</sup> Internet Freedom and Family Empowerment Act, H.R. 1978, 104 Cong. (1995)

conduct. It would not shift that liability to third parties, because doing so would directly interfere with the essential functioning of the internet.

Rep. Wyden and I were well aware that whether a person is involved in criminal or tortious conduct is in every case a question of fact. Simply because one operates a website, for example, does not mean that he or she cannot be involved in lawbreaking. To the contrary, as the last two decades of experience have amply illustrated, the internet – like all other means of telecommunication and transportation – can be and often is used to facilitate illegal activity.

Section 230 was written, therefore, with a clear fact-based test:

- Did the person create the content? If so, that person is liable for any illegality.
- Did someone else create the content? Then that someone else is liable.
- Did the person do anything to develop the content created by another, even if only in part? If so, the person is liable along with the content creator.

The plain language of the statute directly covers the situation in which someone (or some company) is only partly involved in creating the content. Likewise, it covers the situation in which they did not create the content but were, at least in part, responsible for developing it. In both cases, Section 230 comes down hard on the side of law enforcement. A website operator involved only in part in content creation, or only in part in the development of content created by another, is nonetheless treated the same as the content creator.

Here is the precise language of section 230 in this respect:

The term “information content provider” means any person or entity that is responsible, in whole or *in part*, for the creation *or development of* information provided through the Internet ....<sup>17</sup>

These words in Section 230 – “in part” and “development of” – are the most important part of the statute. That is because in enacting Section 230, it was not our intent to create immunity for criminal and tortious activity on the internet. To the contrary, our purpose (and that of every legislator who voted for the bill) was to ensure that innocent third parties will not be made liable for unlawful acts committed wholly by others. If an interactive computer service becomes complicit, in whole or in part,

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<sup>17</sup> 47 USC § 230(f) (emphasis added).

in the creation of illicit content – even if only by partly “developing” the content – then it is entitled to no Section 230 protection.

Rep. Wyden and I knew that, in light of the volume of content that even in 1995 was crossing most internet platforms, it would be unreasonable for the law to presume that the platform will screen all material. We also well understood the corollary of this principle: if in a specific case a platform actually did review material and edit it, then there would be no basis for assuming otherwise. As a result, the plain language of Section 230 deprives such a platform of immunity.

We then created an exception to this deprivation of immunity, for what we called a “Good Samaritan.”<sup>18</sup> If the purpose of one’s reviewing content or editing it is to restrict obscene or otherwise objectionable content, then a platform will be protected. Obviously, this exception would not be needed if Section 230 provided immunity to those who only “in part” create or develop content.

### ***The importance of Section 230 for user-generated content***

In simplest terms, Section 230 protects website operators that are not involved in content creation from liability for content created by third party users. That liability protection has not only become the foundation supporting sites like Yelp, eBay, Facebook, Amazon, Twitter, the *New York Times*, and other well-known web brands that provide user-generated content (UGC), but also the entire Web 2.0 revolution through which thousands of smaller, innovative platforms have offered a range of socially useful services.

Without Section 230, small social media platforms would be exposed to lawsuits for everything from users’ product reviews to book reviews. Airbnb would be exposed to lawsuits for its users’ negative comments about a rented home. Any service that connects buyers and sellers, workers and employers, content creators and a platform, victims and victims’ rights groups, or provides any other interactive engagement opportunity we can imagine, could not continue to function on the internet displaying user-generated content.

How important is user generated content? Without it, many contending with hurricanes Maria, Irma and Harvey could not have found their loved ones. Every day, millions of Americans rely on “how to” and educational videos for everything from healthcare to home maintenance to pre-K, primary, and

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<sup>18</sup> 47 U.S.C. § 230 (c)(2)(A).

secondary education and lifelong learning. Over 85% of businesses use it.<sup>19</sup> The vast majority of Americans feel more comfortable buying a product after researching user generated reviews,<sup>20</sup> and over 90% of consumers find user-generated content helpful in making their purchasing decisions.<sup>21</sup> User generated content is vital to law enforcement and social services. Following the recent devastating Mexico earthquake, relief volunteers and rescue workers used online forums to match people with supplies and services to victims who needed life-saving help, directing them with real-time maps.

### ***Protecting the innocent and punishing the guilty***

Throughout the history of the internet, Congress has sought to strike the right balance between opportunity and responsibility. Section 230 is such a balance – holding content creators liable for illegal activity while protecting internet platforms from liability for content created entirely by others. At the same time, Section 230 does not protect platforms liable when they are complicit – even if only in part – in the creation or development of illegal content.

The plain language of Section 230 makes clear its deference to criminal law. The entirety of federal criminal law enforcement is unaffected by Section 230. So is all of state law that is consistent with the policy of Section 230.<sup>22</sup>

Still, state attorneys general support a wholesale exemption of state criminal law from Section 230. Why did Congress not choose this course?

First, and most fundamentally, it is because the essential purpose of Section 230 is to preempt state law in favor of a uniform federal policy, applicable across the internet, that avoids results such as the state court decision in *Prodigy*.<sup>23</sup> The internet is the quintessential vehicle of interstate, and indeed international, commerce. Its packet-switched architecture makes it uniquely susceptible to multiple sources of conflicting state and local regulation, since even a message from one cubicle to its neighbor can be broken up into pieces and routed via servers in different states.

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<sup>19</sup> <https://www.semrush.com/blog/50-stats-about-9-emerging-content-marketing-trends-for-2016/>

<sup>20</sup> Wu, Y. (2015). What Are Some Interesting Statistics About Online Consumer Reviews? Dr4ward.com. Available at: <http://www.dr4ward.com/dr4ward/2013/03/what-are-some-interesting-statistics-about-online-consumer-reviews-infographic.html>

<sup>21</sup> Kimberly Morrison, "Why Consumers Share User-Generated Content," Adweek, May 17, 2016.

<sup>22</sup> 47 USC § 230(e)(3).

<sup>23</sup> *Stratton Oakmont v. Prodigy Servs Co.*, 1995 WL 323710 (N.Y.Sup.Ct. May 24, 1995).

Were every state free to adopt its own policy concerning when an internet platform will be liable for the criminal or tortious conduct of another, not only would compliance become oppressive, but the federal policy itself could quickly be undone. All a state would have to do to defeat the federal policy would be to place platform liability laws in its criminal code. Section 230 would then become a nullity.

Congress thus intended Section 230 to establish a uniform federal policy, but one that is entirely consistent with robust enforcement of state criminal and civil law. As detailed in the Backpage example below, every state and every federal prosecutor can successfully target online criminal activity by properly pleading that the defendant was at least partially involved in content creation, or at least the later development of it. Indeed, lack of such facts seems to be the main reason that some prosecutions for sex-trafficking online have not thus far been successful.

## Coverage of Section 230

Some mistakenly claim that Section 230 prevents action against websites that knowingly engage in, solicit, or support sex-trafficking. This is simply wrong. But since this claim is the principal basis for amending Section 230, it bears repeating that Section 230 provides no protection for any website, user, or other person or business involved *even in part* in the creation *or development* of content that is tortious or criminal.

Today, as federal and state law enforcement investigate and undertake to prosecute Backpage.com, we have a clear example of how the language of Section 230 as presently written is consistent with vigorous enforcement of the criminal law.

### ***Why Backpage cannot use Section 230 as a shield from federal prosecution***

Section 230 provides online platforms no protection whatsoever from prosecution for violations of federal criminal law. Specifically, Backpage cannot rely on Section 230 as a shield from federal criminal prosecution because, by its express terms, Section 230 has no effect on federal criminal law. Section 230(e)(1) clearly states:

***No effect on criminal law*** - Nothing in this section shall be construed to impair the enforcement of section 223 or 231 of this title, chapter 71 (relating to obscenity) or 110 (relating to sexual exploitation of children) of title 18, *or any other Federal criminal statute.*<sup>24</sup>

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<sup>24</sup> 47 U.S.C. § 230 (e)(1) (emphasis added).

As this is a matter of black-letter law, nothing more need be said on the point. The question, then, is whether existing federal criminal law suffices to prosecute the offenses of which Backpage is allegedly guilty. The answer is yes because there are strong federal criminal proscriptions of sex-trafficking.<sup>25</sup> In addition to federal crimes long on the books, Congress recently passed, and President Obama signed, the Stop Advertising Victims of Exploitation Act of 2014 (the “SAVE Act”). The express purpose of this new federal law enforcement weapon is to clamp down on online marketplaces for the victims of the child sex trade and those forced to engage in commercial sex acts against their will. The statute covers any internet platform that knowingly distributes advertising for a commercial sex act in a manner prohibited under existing federal sex trafficking statutes.

Additional federal tools include 18 U.S.C. § 1592(c)(3), covering facilitation of the promotion of unlawful activity,<sup>26</sup> and 18 U.S.C. § 2255, providing for add-on civil suits by victims of sex-trafficking.<sup>27</sup>

Unfortunately, no federal prosecution for sex trafficking has yet been brought under the federal SAVE Act. Thus, Members of Congress have asked the Department of Justice why it has not brought prosecutions:

*[W]e believe that the U.S. Department of Justice already has the tools it needs to bring a strong criminal case against Backpage.com. If there are additional legal tools or support required for this investigation, we request that you make these clear so we may work quickly to provide them to the Justice Department.*

*-- Reps. Wagner and Maloney on July 13, 2017*<sup>28</sup>

Reps. Wagner and Maloney are entirely correct. In any action to combat sex-trafficking on the internet under federal criminal law, federal prosecutors will face no restrictions whatsoever from Section 230.

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<sup>25</sup> The leading federal criminal prohibition is at 18 U.S.C. § 1591, “Sex trafficking of children or by force, fraud, or coercion.”

<sup>26</sup> “Whoever obstructs, attempts to obstruct, or in any way interferes with or prevents the enforcement of this section, shall be subject to the penalties described in subsection (a).” 18 U.S.C. § 1592(c)(3)

<sup>27</sup> “(a) In General.— Any person who, while a minor, was a victim of a violation of section 1589, 1590, 1591, 2241(c), 2242, 2243, 2251, 2251A, 2252, 2252A, 2260, 2421, 2422, or 2423 of this title and who suffers personal injury as a result of such violation, regardless of whether the injury occurred while such person was a minor, may sue in any appropriate United States District Court and shall recover the actual damages such person sustains and the cost of the suit, including a reasonable attorney’s fee. Any person as described in the preceding sentence shall be deemed to have sustained damages of no less than \$150,000 in value.” 18 U.S.C. § 2255.

<sup>28</sup> Wagner & Maloney Call on U.S. Department of Justice to Investigate Backpage.com, Press Release (July 13, 2017) (emphasis added).

It is not surprising that the evidence concerning Backpage set out in the Senate Report has energized Congressional supporters to demand action. The fact that there have been no successful federal prosecutions of Backpage, however, is not a function of infirmity in either federal criminal law or Section 230. Rather, it follows directly from the fact that no federal criminal prosecutions have been brought.

### ***Why Backpage cannot use Section 230 as a shield from state prosecution***

Section 230, under the caption “State Law,” plainly states that it shall not “be construed to prevent any State from enforcing any State law that is consistent with this section.”

Any state or local criminal prosecution, and any civil suit, may therefore be maintained so long as it does not seek to violate the uniform national policy that internet platforms shall not be held liable for third party content created and developed wholly by others. Since no website operator who is responsible even in part for creating or developing illegal content – including but not limited to the promotion of sex-trafficking – can hide behind Section 230, neither can Backpage.com.

For purposes of analysis, let us assume the facts as they are presented in the Senate Report.<sup>29</sup> These detailed factual allegations about the illegal conduct of Backpage.com, if true, establish not only federal criminal offenses but also state criminal offenses. They also constitute a variety of both federal and state civil offenses.

Backpage, according to the Senate Report, systematically edits advertising for activity that is expressly made criminal under both federal and state law. Furthermore, Backpage proactively deletes incriminating words from sex ads prior to publication, in order to facilitate this illegal business while shielding it from the purview of investigators. Beyond this, Backpage moderators have manually deleted incriminating language that the company's automatic filters missed. Moreover, Backpage coaches its users on how to post apparently "clean" ads for illegal transactions.

Furthermore, according to the Senate Report, Backpage knows that it facilitates prostitution and child sex-trafficking.<sup>30</sup> It knows its website is used for these purposes because it assists users who are involved in sex-trafficking to post customized content for that purpose. Its actions are calculated to continue pursuing this business for profit, while evading law enforcement.

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<sup>29</sup> Recognizing that the claims against Backpage.com are pending resolution in the courts, NetChoice does not by its assumption *arguendo* make any representation, express or implied, concerning the truth of the specific allegations in the Senate Report. NetChoice has no independent information concerning these specific allegations.

<sup>30</sup> Staff Report at 37.

The detailed allegations in the Senate Report include the following:

- **Backpage has knowingly concealed evidence of criminality by systematically editing its adult ads.** “Carl Ferrer, Backpage CEO instructed the company’s Operations and Abuse Manager to scrub local Backpage ads that South Carolina authorities might review to conceal illegal sex-trafficking activity. ‘Sex act pics remove ... In South Carolina, we need to remove any sex for money language also.’ (Sex for money is, of course, illegal prostitution in every jurisdiction in the United States, except some Nevada counties.) Significantly, Ferrer did not direct employees to reject ‘sex for money’ ads in South Carolina, but rather to sanitize those ads to give them a veneer of lawfulness. Padilla replied to Ferrer that he would ‘implement the text and pic cleanup in South Carolina only.’”<sup>31</sup>
- **Backpage coached its users on how to post “clean” ads for illegal transactions.** Backpage CEO Ferrer wrote, “Could you please clean up the language of your ads before our abuse team removes the postings?”<sup>32</sup> Ferrer did not reject the ad for an illegal transaction, but rather sought to edit the language in order to facilitate it.
- **Backpage deliberately edited ads in order to facilitate prostitution.** “Another former Backpage moderator, Backpage Employee A, similarly told the Subcommittee that ‘everyone’ knew that the Backpage adult advertisements were for prostitution, adding that ‘[a]nyone who says [they] w[ere]n’t, that’s bullshit.’”<sup>33</sup>
- **Backpage prescribed the language used in ads for prostitution.** “Backpage Employee A also explained that Backpage wanted everyone to use the term ‘escort,’ even though the individuals placing the ads were clearly prostitutes. According to this moderator, Backpage moderators did not voice concerns about the adult ads for fear of losing their jobs.”<sup>34</sup>
- **Backpage moderated content on the site in order to cover up prostitution.** “An October 8, 2010 email [from] a Backpage moderator ... suggested the user was a prostitute. In response, Padilla rebuked the moderator: ‘Until further notice, DO NOT LEAVE NOTES IN USER ACCOUNTS. ... Leaving notes on our site that *imply that we’re aware of prostitution*, or in any

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<sup>31</sup> Senate Report at 19.

<sup>32</sup> Staff Report at 35.

<sup>33</sup> Senate Report at 37.

<sup>34</sup> *Id.*



position to define it, *is enough to lose your job over*. ... If you don't agree with what I'm saying completely, you need to find another job."<sup>35</sup>

This detail from a *Washington Post* report adds to the picture of Backpage as a highly active content creator:

The documents show that Backpage hired a company in the Philippines to lure advertisers — and customers seeking sex — from sites run by its competitors. The spreadsheets, emails, audio files and employee manuals were revealed in an unrelated legal dispute and provided to The Washington Post.

Workers in the Philippines call center scoured the Internet for newly listed sex ads, then contacted the people who posted them and offered a free ad on Backpage.com, the documents show. ***The contractor's workers even created each new ad*** so it could be activated with one click.

***Workers also created*** phony sex ads, offering to "Let a young babe show you the way" or "Little angel seeks daddy," adding photos of barely clad women and explicit sex patter, the documents show. The workers posted the ads on competitors' websites. Then, when a potential customer expressed interest, an email directed that person to Backpage.com, where they would find authentic ads, spreadsheets used to track the process show.

... [T]he workers in the Philippines either call or email with an offer to post their ad on Backpage free of charge, with the ad already created and ready to go.

... Invoices and call sheets indicate Backpage was pushing Avion to get as many new listings as possible, generating ads from competing sites including Locanto in Europe, Australia and South America, Eurogirlsescort.com, Privategirls.com, PrivateRomania, Gumtree and many others.<sup>36</sup>

And again, from the Senate Report:

"[Your team] should stop Failing ads and ***begin Editing ... As long as your crew is editing and not removing the ad entirely, we shouldn't upset too many users. Your crew has permission to edit out text violations and images and then approve the ad.***"<sup>37</sup>

Assuming the facts alleged in the Senate Report and in the *Washington Post* are true, it is abundantly clear that Backpage is not a "mere conduit" of content created by others. It has been actively involved in modifying content in order to conceal the illegal activity on its site of which it is well aware. The company specifically instructed its employees and contractors to edit the language of advertisements

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<sup>35</sup> Staff Report at 37-38.

<sup>36</sup> Tom Jackman and Jonathan O'Connell, "Backpage has always claimed it doesn't control sex-related ads. New documents show otherwise," *Washington Post* July 11, 2017 (emphasis added).

<sup>37</sup> Staff Report at 28 (emphasis added).

for prostitution, and to create such ads from whole cloth. It rebuked them for suggesting that ads for prostitution be removed. In all of this, Backpage was acting as a content creator as that term is defined in Section 230 – thus surrendering any protections from state criminal or civil prosecution under Section 230.

It is well established in the case law that under Section 230, a website “can be both a service provider and a content provider: If it passively displays content that is created entirely by third parties, then it is only a service provider with respect to that content. But as to content that it creates itself, or is responsible in whole or *in part* for creating or *developing*, the website is also a content provider.”<sup>38</sup> And once the website becomes a content provider, it loses its Section 230 protection. As the U.S. Court of Appeals for the Ninth Circuit, ruling *en banc*, has stated: “[Section 230’s] grant of immunity applies only if the interactive computer service provider is not also an ‘information content provider,’ which is defined as someone who is ‘responsible, in whole or *in part*, for the creation or *development* of’ the offending content.”<sup>39</sup>

I note that the recent decision of the First Circuit in *Jane Doe No. 1 v. Backpage.com LLC*<sup>40</sup> is an apparent anomaly in this respect. That case rejected federal and state civil sex trafficking claims against Backpage on the ground that the entirety of the lawsuit was based on content created by third parties, thus entitling the defendant to Section 230 protection. However, in that case the pleadings did not include the factual allegations abundantly laid out in the Senate Report, detailing Backpage’s extensive role in both the creation and the development of content.

To the contrary, as the First Circuit pointedly noted, the record before it expressly *did not* allege that Backpage contributed to the development of the sex trafficking content, even “in part.” Instead, the argument that Backpage was an “information content provider” under Section 230 was “forsworn” in the district court and on appeal.<sup>41</sup> If these facts are properly pleaded, therefore, Backpage will not be

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<sup>38</sup> *Stayart v. Yahoo! Inc.*, 651 F. Supp.2d 873, 886 (E.D. Wis. 2009) (quoting *Roommates.com*, 521 F.3d at 1167) (emphasis added).

<sup>39</sup> *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1167 (emphasis added).

<sup>40</sup> *Jane Doe No. 1, et al. v. Backpage.com LLC, et al.*, No. 15-1724 (1st Cir. 2016).

<sup>41</sup> *Id.* at 11 and n. 4. The same apparent failure occurred in pleading the facts in *People v. Ferrer*, 16FE024013 (Cal. Superior Ct. Aug. 23, 2017), where the court noted that prosecutors conceded the advertisements were created by third parties. Nonetheless, the court allowed the prosecutors’ claims of money laundering against Backpage.com to proceed.

able to hide behind Section 230 protections. Moreover, I have not found any other example of a court looking to Section 230 to determine the availability of a remedy under 18 U.S.C. § 1595.<sup>42</sup>

State prosecutors and civil attorneys will have the same ample basis to plead these facts that vitiate Section 230 protection for Backpage in other venues. There is no reason to think that they will not prevail on the law, since based on the facts as presented in the Senate Report, Backpage was not just a passive conduit for third-party content, but rather was creating and editing content to promote illegal activity and conceal its illegality. The plain language of Section 230 denies protection to one who is, even in part, involved in creating or developing content. For this reason, the Supreme Court of Washington ruled that Section 230 does not forestall a lawsuit against Backpage for sex trafficking.<sup>43</sup> Likewise, recent decisions by the Ninth Circuit Court of Appeals have held that a platform's "duty to warn" is not protected by Section 230.<sup>44</sup> Decisions by the Seventh Circuit Court of Appeals<sup>45</sup> and in the Fourth Circuit<sup>46</sup> have similarly rejected defendants' claims that Section 230 protects them from suit.

Just as Backpage cannot use Section 230 as a shield from federal criminal prosecution, neither will the statute protect it from criminal or civil prosecution under state law.

## **The unintended consequences of a sex trafficking carveout**

Bills introduced in both the House and the Senate would erect a unique standard for sex trafficking as compared to all other federal and state crimes and civil offenses under Section 230. This will, of necessity, create a new thread of case law under Section 230. Judges would have to decide what the new standard for sex trafficking means for all other crimes. Manifestly, they could not apply the

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<sup>42</sup> In two cases, neither of which included allegations that Backpage colluded in the drafting of advertisements, Backpage successfully used Section 230 to prevent civil suits. See *M.A. v. Village Voice Media*, 809 F.Supp.2d 1041 (E.D. Miss. 2011), and *The People of California v. Ferrer, et al.*, No. 16FE019224 (Cal. Super. Ct. Dec. 9, 2016). Neither court had before it the evidence set out in the Senate Report that Backpage was not just a passive conduit for third-party content, but rather was editing content to conceal its illegality.

<sup>43</sup> *J.S., S.L, and L.C. v. Backpage*, No. 90510-0 (S. Ct. WA Sep. 3, 2016)

<sup>44</sup> See, e.g., *Beckman v. Match.com*, No. 13-16324 (9th Cir. Sept. 1, 2016) ("In *Doe Number 14*, we held that at the pleading stage, the CDA did not preclude a plaintiff from alleging a state law failure to warn claim against a website owner who had obtained information "from an outside source about how third parties targeted and lured victims" through that website platform....Importantly, Doe's claim did not seek to impose liability for the website owner's role as a "publisher or speaker" of third-party content, for its failure to remove that content, or for its failure to monitor third-party content on its website."), *Doe #14 v. Internet Brands*, 2016 WL 3067995 (9th Cir. May 31, 2016).

<sup>45</sup> *Huon v. Denton*, 2016 WL 6682931 (7th Cir. Nov. 14, 2016).

<sup>46</sup> *McDonald v. LG Electronics USA, Inc.*, 2016 WL 6648751 (D. Md. Nov. 10, 2016)

standard in the new statute to non-sex trafficking cases, since by its terms the new law would be limited to sex trafficking.

Courts would have to give meaning to the fact that Congress singled out sex trafficking and no other offenses. This would make it harder for them to reach the result we would all presumably want in, say, an internet terrorism case: that is, we would not want Section 230 to be a barrier to prosecution of a website that was complicit in creating web content in violation of laws against terrorism. Singling out one crime in a revised Section 230 could easily distort the results in other criminal cases.

Throwing this curve into the developing Section 230 case law would come at a particularly bad time, as courts are just now beginning to rationalize two fundamental aims of the law. Section 230 means to incentivize standards of good behavior on the internet (through the “Good Samaritan” provision), and to preserve robust enforcement of criminal and civil laws against wrongdoers (through the designation of internet platforms that create or develop content “in part” as content providers themselves). While some courts have viewed these as competing goals and so weighed one more heavily than the other, the increasingly common view is that both purposes can be upheld. A sampling of the case law will make the point.

In *FTC v. LeadClick Media LLC*,<sup>47</sup> the Second Circuit held that websites linking to “fake news” could be liable for the content notwithstanding Section 230, when it was alleged they were aware of the content and edited some of it. The court ruled that even though it was an “interactive computer service,” the company was also an “information content provider” because of its activities. The court correctly noted that within the statutory architecture of Section 230, one is not being “treated as the publisher or speaker of any information provided by another information content provider” when it is being treated as a content provider itself due to its responsibility “in part” for content creation or development.

In *Vision Security LLC v. Xcentric Ventures LLC*,<sup>48</sup> a Utah district court denied Section 230 protection to a website whose “very *raison d’etre*” was to encourage negative posts about businesses, and then sell those same businesses a program “to counter the offensive content [it] encouraged.” It was thus responsible in part for developing the third party content, and so fell within the definition of content creator itself.

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<sup>47</sup> 838 F.3d 158 (2d Cir. 2016).

<sup>48</sup> 2:13-cv-00926-CW-BCW (D. Utah August 27, 2015).

Similarly, in *FTC v. Accusearch Inc.*,<sup>49</sup> the Tenth Circuit held that specific encouragement of unlawful content makes one responsible in part for developing that content, thereby vitiating Section 230 immunity.

In *eDrop-Off Chicago LLC v. Burke*,<sup>50</sup> the straightforward allegation that a website owner “engaged in the selective editing and deletion of Plaintiffs’ own posts/comments (or the comments/posts of others attempting to add a favorable view of Plaintiffs and their activities)” was sufficient to defeat Section 230 immunity.

*Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*<sup>51</sup> is a particularly faithful application of the statute. Ruling *en banc*, the Ninth Circuit held that even though illegal content was created by third parties, the website itself was also a content creator by reason of its design of the interactive features of the website.

In *Huon v. Denton*, 841 F.3d 733 (7th Cir. 2016), the court found that the Gawker website was not entitled to Section 230 protection because it allegedly encouraged defamation by its users, edited the content of their comments, selected defamatory comments for publication, and employed individuals who may have authored some of the comments.

And in *People v. Gourlay*, No. 278214, 2009 WL 529216 (Mich. Ct. App. Mar. 3, 2009), a web hosting company was held criminally responsible for hosting the illegal content of a minor’s website, despite a claim of Section 230 immunity. While acknowledging that the website was the content creator, the court held that so too was the web hosting company, because its activities made it responsible in part for developing the content.

These decisions, and others like them, stand collectively for the proposition that Section 230 does not protect bad actors whose violations of criminal or civil law are accomplished by means of the internet. They show that existing law should be sufficient not only to prosecute Backpage.com but also any other persons or entities who commit any of the thousands of crimes and civil offenses on the federal and state statute books. On the other hand, changing Section 230 could have major unintended consequences, including making prosecution of other crimes more difficult and eroding the law’s

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<sup>49</sup> 570 F.3d 1187 (10th Cir. 2009).

<sup>50</sup> No. CV 12-4095 GW (FMOX), 2013 WL 12131186 at \*27 (C.D. Cal. Aug. 9, 2013)

<sup>51</sup> 521 F.3d 1157 (9th Cir. 2008).

intended protections for innocent web platforms that rely on user-generated content. There are more effective and responsible ways to strengthen law enforcement against sex traffickers and all criminals.

## **Recommendations for congressional action**

There are immediate actions that Congress can take to advance the cause of law enforcement in pending cases and investigations, both federal and state, involving sex-trafficking. The following actions will be faster than changing the law, more effective, and less prone to unintended consequences – including the serious risk that courts will not interpret an amendment to Section 230 as narrowly and benignly as Congress intended.

### ***Pass a Concurrent Resolution restating the original intent of Congress***

Because of the broad bipartisan agreement that exists today concerning the proper application of Section 230, Congress has a unique opportunity to authoritatively restate the intended purpose of the law. When Section 230 came before the House for a floor vote as a freestanding amendment, it likewise enjoyed nearly unanimous support. For nearly 20 years, the unbroken position of the Congress has been that Section 230 is meant to incentivize good behavior on the internet and to ensure the continued robust enforcement of federal and state criminal laws. It was never intended as a shield for criminal activity of any kind.

As written, Section 230 already makes clear that one who is responsible even in part for the creation or development of illegal web content cannot enjoy the protection it offers to innocent platforms. Yet some courts have strayed from this plain language, in dicta that would extend the law’s immunity for the innocent to those who clearly participate in content creation or development.

The law is premised on the notion that an internet portal or website cannot be expected to read or screen vast amounts of user generated content. When web platforms actually do read and screen content, however, they are protected only to the extent they are “Good Samaritans.” Certainly a platform that not only reads but edits content is, in the language of the statute, responsible at least in part for the creation or development of that content. Yet a few courts have averred that “merely editing,”<sup>52</sup> or deciding whether to “alter content,”<sup>53</sup> is not enough to make one a content provider. Such interpretations are at odds with the plain language of the statute.

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<sup>52</sup> *Batzel v. Smith*, 333 F.3d 1018, 1031 (9th Cir. 2003).

In addition, Congress should use this resolution to clarify that the Good Samaritan provision of Section 230 extends to internet platforms that block or delete content they believe is associated with illegal activities. That is, Section 230 provides that an internet platform is not subject to civil action by third parties whose content is blocked or deleted by that platform. This clarification is especially important since enabling these kinds of disconnections and deletions is essential to keeping sex trafficking off the internet.

Taking care to lay out the foundational premises of Section 230, its legislative history, its careful language, and its stated purposes, a concurrent resolution can underscore the purpose of the law to deny protection to internet platforms even partly complicit in the creation or development of illegal content. Given the strong support for this interpretation in both the House and Senate, it should pass both chambers with overwhelming margins. Such an authoritative statement will help judges struggling with case law that is still under development, as well as state and local prosecutors and civil plaintiffs who have every right to proceed with their cases under existing law.

Congress should remind the courts of what Section 230 already says: No website operator who is responsible even in part for creating or developing illegal content – including but not limited to the promotion of sex-trafficking – can hide behind Section 230.

### ***Call on U.S. DoJ to bring criminal cases against known bad actors***

Congressional representatives have repeatedly called on the Department of Justice to act to address the problems of sex trafficking via the internet.<sup>54</sup> Congress should step up its insistence that the Department initiate enforcement actions in this area. Beyond the individual Member letters that have already been directed to the Attorney General and responsible officials at the Department of Justice, the Judiciary Committee can initiate a bipartisan letter from all Members. So, too, can other interested committees, as well as the entire House and Senate. The Appropriations Committees in both chambers

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<sup>53</sup> *Zeran v. America Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997).

<sup>54</sup> See, e.g., Letter from Reps. Ann Wagner and Carolyn B. Maloney to U.S. Attorney General Jeff Sessions (July 13, 2017), calling on the Department of Justice to investigate Backpage.com's involvement in online sex-trafficking (July 13, 2017); Sen. John McCain suggestion that results of hearing might lead to prosecutions (November 19, 2016); Sen. James Lankford suggestion that Department of Justice step in "with full force" (November 19, 2016); Sen. Claire McCaskill suggestion of RICO prosecutions (November 19, 2016); Letter from Brent Fischer, Adams County Sheriff, and 35 Illinois police and sheriff's departments to Attorney General Loretta Lynch, Deputy Attorney General Sally Yates, and Federal Bureau of Investigations Director James Comey (February 2, 2016); Letter from Sen. Mark Kirk to Attorney General Loretta Lynch (October 26, 2015); Letter from Sen. Mark Kirk *et al.* to Attorney General Loretta Lynch (August 7, 2015).

can use language in appropriations bills to ensure the Department of Justice is attending to enforcement in this area.

Engaging the Department of Justice will not only help enforcement domestically, but also internationally. The scourge of sex-trafficking websites is not limited to jurisdictions within the United States. The prevalence of such notorious websites as Locanto, Eurogirlescort.com, Privategirls.com, PrivateRomania, and Gumtree State, located in Europe, Australia and South America, make it essential that our national government coordinate with allies around the world in cooperative cross-border enforcement. Lacking an international base of operations, state Attorneys General are typically unable to bring actions against extra-territorial bad actors. The Department of Justice is in the best position to move against such sites. By encouraging the Justice to use its full power and its international relationships with law enforcement abroad, Congress can help attack the problem of online sex trafficking at its roots, both within and outside the United States.

### ***File amicus briefs to stress congressional intent in Section 230***

Pending cases before federal and state appellate courts could benefit from commentary, legal arguments, and evidence of Congressional intent provided in the form of amicus curiae briefs.

By filing an amicus brief, Congress can assist courts in applying Section 230 as written and as intended. This approach can bring benefits both in the short term, by achieving positive results in individual cases, and in the long term by clearly establishing the rights of prosecutors and plaintiffs to move against bad actors.

### ***Create a joint federal-state Strike Force and a joint strategic plan with state AGs***

Instead of wrestling over whether to amend Section 230, Congress and federal law enforcement should work together on putting criminal sex traffickers in jail. DoJ's Criminal Division Child Exploitation and Obscenity Section (CEOS) should appoint all interested state Attorneys General to a joint state-federal "strike force." Together they should develop a plan to maximize their joint resources and authorities, and implement it swiftly.

As part of this joint action, DoJ should use its power to appoint participating state Attorneys General as "Special Attorneys" under 28 U.S.C. §543.<sup>55</sup>

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<sup>55</sup> 28 U.S.C. §543 (Special Attorneys)



The authority of the Attorney General to appoint “Special Attorneys” dates to 1966. (The statutory authority was most recently amended in 2010.) The internal Department of Justice authority appears in the United States Attorneys Manual (USAM) at USAM §3-2-200.<sup>56</sup> The authority is very broad, and the terms of the appointment are entirely negotiable.

In this way, every state Attorney General who wishes to do so can exercise the full authority not only of his or her state law, but also federal law. As Section 230 has no application to federal criminal law, any theoretical arguments about its application to a given state prosecution will immediately evaporate.

Even without deputation as “Special Attorneys,” state Attorneys General can enforce Section 5 of the FTC Act.<sup>57</sup> Section 5 allows enforcement against websites that knowingly and actively fail to enforce their own policies. Under “little Section 5,” state Attorneys General can take enforcement actions

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(a) The Attorney General may appoint attorneys to assist United States attorneys when the public interest so requires, including the appointment of qualified tribal prosecutors and other qualified attorneys to assist in prosecuting Federal offenses committed in Indian country.

(b) Each attorney appointed under this section is subject to removal by the Attorney General.

(c) Indian Country.— In this section, the term “Indian country” has the meaning given that term in section 1151 of title 18.

<sup>56</sup> USAM 3-2.300 - Special Assistants

Section 543 of Title 28 authorizes the Attorney General to appoint Special Assistants to assist the United States Attorney when the public interest so requires, and to fix their salaries. These Assistants are designated as Special Assistants to the United States Attorney and are appointed for the purpose of assisting in the preparation and presentation of special cases. Their salaries, if any, are a matter of agreement between the Department and the individual, and are fixed at an annual, monthly, per diem, or when-actually-employed rate. Under the appropriate circumstances, a private attorney may receive a Special Assistant appointment pursuant to 28 U.S.C. Sec. 543, with or without compensation, to assist the United States Attorney with specific matters. Such appointments raise ethics and conflict of interest issues that must be addressed. To appoint private attorneys as Special Assistant United States Attorneys pursuant to 28 USC Section 543, compensated or not, approval is required by EOUSA.

Attorneys employed in other departments or agencies of the federal government may be appointed as Special Assistants to United States Attorneys, without compensation other than that paid by their own agency, to assist in the trial or presentation or cases when their services and assistance are needed. Such appointments, and appointments of Assistant United States Attorneys from one United States Attorney's office to another, may be made by the United States Attorney requiring their services.

In instances where an entire United States Attorney's Office recuses itself, the Attorney General may, pursuant to 28 U.S.C. Sec. 515, appoint any officer of the Department of Justice, or any attorney specially appointed under law, to conduct any kind of legal proceeding which United States Attorneys are authorized by law to conduct, whether or not such appointee is a resident of the district in which the proceeding is brought. Said appointee specially retained under authority of the Department of Justice is appointed as a Special Assistant or a Special Attorney to the Attorney General and reports directly to the Attorney General or delegee. Such appointments are executed by the Executive Office for United States Attorneys.

<sup>57</sup> See, e.g., Conn. Gen. Stat. § 42-110(B); Mass. Gen. Laws Ann. Ch. 93a, § 2(B); S.C. Code § 39-5-20(B); Vt. Stat. Tit. 9, § 2453(B); Wash. Rev. Code § 19.86.920; W. Va. Code § 46a-6-101.

directly. Collaborating on such prosecutions through the Strike Force will ensure that both federal and state law enforcement aims are achieved, and that federal legal expertise is made available to the states in these actions.

Finally, as part of its mandate under the Strike Force umbrella, the Department of Justice should be asked to examine the language of pending bills to amend Section 230 and report back to the appropriate Congressional committees. Such an analysis will help this and other committees in Congress avoid unforeseen consequences in the application of federal and state criminal laws in other areas, while ensuring that any new statutory language does not unintentionally incentivize private litigants to sue small e-commerce businesses over matters having nothing to do with the bill's stated purposes – thereby harming innovation and making U.S. e-commerce less competitive.

### ***Amend the Travel Act to add another tool to combat sex trafficking***

The Travel Act, 18 U.S.C. 1952, was enacted during the Kennedy Administration in response to the determination by the Department of Justice that state and local law enforcement lacked the tools to go after organized crime. Operating a business enterprise involving, among other things, prostitution in violation of the laws of the state where the offense is committed (or in violation of the laws of the United States) comprises the underlying offense. Because websites engaged in sex trafficking are effectively criminal enterprises, adaptation of the Travel Act to the specific circumstances of such internet businesses could provide a more suitable vehicle for prosecutors to combat them.

The law as currently on the books applies to any persons who “further” the “unlawful activity” of forced “prostitution.” This provision should be amended to provide for enhanced penalties, up to and including life in prison, when the prostitution at issue involves sex trafficking. There should also be provision for victim restitution.

Finally, rather than a carveout from Section 230, which as noted would needlessly introduce interpretive challenges for judges and create great uncertainty, such an amendment should include a contextually appropriate restatement of the law and its original intent. The restatement should be of the Section 230 text that applies equally to criminal and civil, federal and state actions. I have attached a proposed draft of such legislation as Exhibit A to this testimony.

## Conclusion

Congress wisely established a uniform national policy of internet platform liability that applies to all criminal and civil actions in the United States. Aggressive prosecution of sex-trafficking – by federal and states prosecutors as well as private litigants – is perfectly consistent with this policy.

By its terms, Section 230 in no way restricts any federal prosecution. There is never any Section 230 immunity whatsoever for defendants in federal criminal cases. Yet to date, no federal prosecution for sex trafficking has been brought under the 2014 SAVE Act. Congress should urge federal prosecutors to bring cases under the SAVE Act and other sections of the federal criminal code, since in all such cases Section 230 is no impediment.

Moreover, the plain language of the statute prevents actors such as Backpage.com from claiming Section 230 immunity from state prosecution, whenever they are responsible even “in part” for merely “developing,” if not creating, content. The extensive factual allegations against Backpage.com in the Senate Report will amply support both federal and state prosecutions, in criminal and in civil actions, which may be brought successfully without any interference from Section 230. State law enforcement and civil plaintiffs have full authority to bring cases against any and all wrongdoers using the internet to promote sex trafficking, without any interference from Section 230.

The House and Senate should take the extraordinary step of restating, in the form of a Concurrent Resolution, the clear intent of Congress that Section 230 was never intended as a shield for criminal behavior. Congress should use its considerable influence to quicken the pace of federal law enforcement against sex trafficking, and it should file amicus briefs in appropriate cases to assist courts in correctly interpreting Section 230. Finally, Congress should further strengthen federal law by adding enhanced penalties against sex trafficking and providing for victim restitution following convictions.

In each of these areas, NetChoice stands ready to help. I personally agree with the demands of victims of sex trafficking for more robust prosecutions, and I share the outrage of victims’ rights groups. As the original co-author of Section 230, I am frustrated that some courts have subverted the intent of the law and ignored its plain language. Like Reps. Wagner and Maloney, I am disappointed that the Department of Justice has not yet initiated any action against Backpage. And I agree with these Members that

Justice “already has the tools it needs to bring a strong criminal case against Backpage.com.”<sup>58</sup> The same is true for state law enforcement and every other plaintiff.

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<sup>58</sup> Wagner & Maloney Call on U.S. Department of Justice to Investigate Backpage.com, Press Release (July 13, 2017) (emphasis added).

## Exhibit A

### Amendment to 18 U.S.C. §1952

(Existing law in black; proposed language in red)

(a) ~~Whoever~~ **Except as otherwise provided in this section, whoever** travels in interstate or foreign commerce or uses the mail or any facility in interstate or foreign commerce, with intent to—

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity, and thereafter performs or attempts to perform—

(A) an act described in paragraph (1) or (3) shall be fined under this title, imprisoned not more than 5 years, or both; or

(B) an act described in paragraph (2) shall be fined under this title, imprisoned for not more than 20 years, or both, and if death results shall be imprisoned for any term of years or for life.

(b) As used in this section (i) “unlawful activity” means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics or controlled substances (as defined in section 102(6) of the Controlled Substances Act), or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States, or (3) any act which is indictable under subchapter II of chapter 53 of title 31, United States Code, or under section 1956 or 1957 of this title and (ii) the term “State” includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States.

(c) Investigations of violations under this section involving liquor shall be conducted under the supervision of the Attorney General.

(d) If the offense under this section involves an act described in paragraph (1) or (3) of subsection (a) and also involves a pre-retail medical product (as defined in section 670), the punishment for the

offense shall be the same as the punishment for an offense under section 670 unless the punishment under subsection (a) is greater.

(e)

(1) This section shall not apply to a savings promotion raffle conducted by an insured depository institution or an insured credit union.

(2) In this subsection—

(A) the term “insured credit union” shall have the meaning given the term in section 101 of the Federal Credit Union Act (12 U.S.C. 1752);

(B) the term “insured depository institution” shall have the meaning given the term in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813); and

(C) the term “savings promotion raffle” means a contest in which the sole consideration required for a chance of winning designated prizes is obtained by the deposit of a specified amount of money in a savings account or other savings program, where each ticket or entry has an equal chance of being drawn, such contest being subject to regulations that may from time to time be promulgated by the appropriate prudential regulator (as defined in section 1002 of the Consumer Financial Protection Act of 2010 (12 U.S.C. 5481)).

(f) **ENHANCED PENALTIES FOR CERTAIN OFFENDERS.**—If, in the commission of an offense under this section involving an act described in paragraph (3) of subsection (a) with regard to unlawful activity under subsection (b)(i)(1), the offender acted in reckless disregard of the fact that—

(1) means of force, threats of force, fraud, or coercion (as described in section 591(e)(2)), or any combination of such means has been used to cause any person to engage in a commercial sex act; or

(2) any person who has not attained the age of 18 years has been caused to engage in a commercial sex act;

and such reckless disregard was a contributing factor to any person being a victim of a violation of section 1591(a)(1), then the offender may be imprisoned for any term of years or for life or fined under this title, or both. The court shall order restitution by any person who is punished under this subsection, in accordance with section 3663A, be paid to any such victim. Consistent with Section 230 of the

Communications Act of 1934 (47 U.S.C. 230), nothing in this section shall be construed to prevent any State from enforcing any State law against an offender whose furtherance of unlawful activity hereunder includes responsibility for the creation (even if only in part) or for the development (even if only in part) of information provided through any interactive computer service.