

The Honorable Mitch McConnell
Majority Leader
United States Senate
Washington, DC 20510

The Honorable Chuck Schumer
Minority Leader
United States Senate
Washington, DC 20510

August 3, 2017

RE: New Liability for Online Intermediaries Would Discourage Companies from Combatting Sex Trafficking, While Undermining Internet Freedom for Everyone

Dear Majority Leader McConnell and Minority Leader Schumer,

On behalf of the undersigned think tanks and civil-society organizations, we write to express our deep concerns about the Stop Enabling Sex Traffickers Act of 2017 (S.1693). We wholeheartedly share the bill's goal: curbing human trafficking. But federal criminal law already punishes human trafficking as well as conspiracies to facilitate it — severely. The problem today is not a lack of legal remedies but under-enforcement (or slow enforcement) by the U.S. Justice Department. The bill would do nothing to address this problem. Instead, it would discourage online platform operators from policing their sites and generally undermine America's uniquely innovative online ecosystem.

In 1996, Congress passed Section 230 of the Communications Decency Act, 47 U.S.C. § 230. This statute works by providing limited immunity for online platforms that give users an opportunity to disseminate their material. Notably, this immunity does *not* extend to federal criminal laws. Moreover, Section 230 allows online platforms to engage in Good Samaritan blocking and filtering of user content without risking civil liability for something that someone else said or wrote. Without these protections, online platforms as small as a personal blog or as big as Wikipedia would face a flood of frivolous lawsuits and potentially devastating filtering costs. It is no exaggeration to say that Section 230 is the law that made today's Internet possible.

While we would welcome discussion of the proper scope of intermediary liability and the difficult balancing of legal and business concerns involved, rushing through amendments to Section 230 — such as by attaching them to the National Defense Authorization Act — would be a mistake of historic proportions. It would also be exceptionally inappropriate to circumvent the normal committee process and solicitation of stakeholder input on a matter of such importance and complexity.

Congress struck a careful balance in crafting Section 230. The law's safe harbor shields platforms from criminal liability under state law, but not federal law, in order to ensure that the Justice

Department is responsible for policing the uniquely interstate medium that is the Internet. In other words, Section 230, properly understood, does not confer immunity from criminal law: it simply, and plainly, specifies that criminal charges against online platforms are the sole purview of federal law enforcement. That is precisely as it should be. If DOJ is not using that authority adequately, Congress should use its oversight powers to investigate why — starting with hearings.

The purpose of this new bill — like the similar one recently introduced by Rep. Ann Wagner, R-MO (H.R. 1865)¹ — is ostensibly to target website operators like Backpage.com, which has been accused of wantonly facilitating and benefiting from illegal activity including prostitution and human trafficking. The Justice Department can *already* prosecute those who violate federal criminal sex trafficking laws. Indeed, we applaud the recent letter to Attorney General Sessions pressing the DOJ for a criminal investigation into Backpage.com’s alleged activities.² We also note that a federal grand jury is currently hearing evidence against the founders of Backpage.com, whose lawyers acknowledged, several months ago, that “indictments may issue anytime.”³ Additionally, new laws such as the Justice for Victims of Trafficking Act of 2015 explicitly prohibit advertising for, or otherwise financially benefitting from, sex trafficking of children⁴ — as Backpage allegedly did.

The balance under current law encourages online platforms to monitor and moderate their own services and user-generated content, but it does not hold them liable for failing to do so or for doing so imperfectly. Expanding platforms’ liability for the behavior of their users would hurt, not help, trafficking victims. By lowering the bar for what constitutes “participation in a venture” — from intent to facilitate sex trafficking to knowledge of sex trafficking — this bill will, perversely, reduce the incentive for platform operators to engage in Good Samaritan policing of their sites and invest in the research and development that has produced invaluable tools such as Project Vic and Spotlight. Or, conversely, platforms might over-filter user content to avoid approaching the boundary of liability, perhaps disallowing communications on their site altogether rather than facing the insurmountable costs of monitoring every user’s comments. Moreover, the proposed bill is unclear as to what constitutes “knowing conduct:” Is it actual knowledge of specific ads for human trafficking, general awareness that some human trafficking is taking place, or something else? That ambiguity would be inappropriate and intolerable for online platforms, who would be forced to assume the worst and take extreme measures to protect themselves from liability, as discussed above.

Appropriately, Section 230’s immunity is not absolute: it does not apply to information that the platform operator has itself created or developed, “in whole or in part.” 47 U.S.C. § 230(f)(3). Thus, as the Ninth Circuit declared in *Roommates.com*, while “a website operator who edits user-created

¹ Allow States and Victims to Fight Online Sex Trafficking Act of 2017, H.R. 1865, 115th Congress, available at <https://goo.gl/NjTC9q>.

² Rob Portman, Tom Carper & Claire McCaskill, (July 13, 2017), available at <https://goo.gl/Lgijxr>.

³ Sarah Jarvis, Lily Altavena & Kelsey Hess, *As allegations increase against Backpage, founders have become big political donors in Arizona*, AZCentral (April 14, 2017), available at <https://goo.gl/1Z7gqU>.

⁴ *Justice for Victims of Trafficking Act of 2015*, Section 118(a) (2015), available at <https://goo.gl/BtftHN>. (this section is also called the Stop Advertising Victims of Exploitation Act of 2015).

content... retains his immunity for any illegality in the user-created content... a website operator who edits in a manner that contributes to the alleged illegality... is directly involved in the alleged illegality and thus not immune.”⁵ The extent to which Backpage could be subject to civil suit under existing law will depend on the specific facts of the case, which are still being developed.

If, as published court filings indicate, indictments of Backpage’s founders are “imminent,” that will very likely be because the evidence collected by DOJ indicates that the site was “directly involved in the alleged illegality” — and “thus not immune” from civil suit. The Supreme Court of Washington state has already allowed a civil restitution suit against Backpage brought by trafficking victims to proceed, holding that the plaintiffs had provided sufficient evidence to show, as a preliminary matter, that Backpage had stepped outside its role as a platform operator by inducing sex trafficking⁶ — and this was *prior* to recent revelations about Backpage’s involvement. Any evidence produced in the DOJ criminal prosecution will undoubtedly drive that civil litigation and the other civil litigation that will likely follow grand jury indictments in Arizona.⁷ Legislating in advance of such litigation to allow for civil liability that may already be viable under Section 230 would be a mistake.

In addition to amending Section 230, the bill would also dramatically expand federal criminal law by expanding the definition of “participation in a venture” in 18 U.S.C. § 1591. While this amendment might appear to focus on advertising — a term Congress added to Section 1591(a)(1) in 2015⁸ — the effects would be far broader. Online platforms could be accused of participating in sex trafficking that occurs through ordinary, non-advertising uses of their sites — and benefitting from it, if only because their sites are generally supported by advertising. Mere inactivity by online platforms could be characterized as tolerance for and, in turn, as participation in wrongdoing — even if unwitting. Platforms would be forced either to pre-screen all user communications on the platform or disallow user communications altogether — precisely the opposite of what Congress intended in crafting Section 230. These costs would have been prohibitive for today’s leading platforms when they were mere startups, and they will be no less prohibitive for the next generation of online entrepreneurs.

There is no need to create such broad liability for “assist[ing], support[ing], or facilitat[ing]” sex trafficking. Federal conspiracy statutes already allow law enforcement officials to target website operators that knowingly facilitate trafficking. 18 U.S.C. §§ 1591, 1594(c). Federal law also already criminalizes inducement of sex trafficking. 18 U.S.C. § 2422. The bill’s amendment to Section 1591 would open the door to unnecessarily aggressive prosecution of online platforms, especially by state law enforcement.

⁵ Fair Hous. Council of San Fernando Valley v. Roommates.com, 521 F.3d 1157, 1169 (2008).

⁶ J.S. v. Village Voice Media Holdings, 184 Wash. 2d 95 (Sept. 3, 2015).

⁷ The First Circuit has held that posting rules are part of website configuration, a core aspect of what it means to be a “publisher,” and thus covered by Section 230’s immunity. Jane Doe No. 1 v. Backpage.com, LLC, 817 F.3d 12 (2016). But this decision was based on general allegations about Backpage’s rules for posting on its site, and did not reflect evidence of Backpage’s collaboration with traffickers.

⁸ See *supra* note 4

Indeed, there is nothing today to stop state law enforcement from conducting their own investigations, and bringing their cases to DOJ to prosecute. This is also as it should be: we should not have 56 state and territorial law enforcement regimes — let alone countless local prosecutors — bringing criminal cases in an inconsistent, uneven, and unpredictable manner.

We understand that part of the intent of this legislation is to provide an avenue for restitution for victims. Again, Section 230 (and its bar to civil liability) simply does not apply when a site operator is held to have created or developed content even “in part.” No federal court has yet had an opportunity to decide whether Backpage.com crossed this line based on current evidence, and additional evidence that appears likely to come to light as the result of DOJ’s criminal prosecution. Regardless, Congress excluded civil liability for intermediaries (insofar as they are covered by Section 230) with good reason: existing law already provides for civil restitution to trafficking victims from perpetrators including those who traffic in child pornography images.⁹ Amending Section 230 to make online platforms civilly liable would not provide additional benefits to past victims and would actively discourage platforms from acting as Good Samaritans to identify perpetrators and protect *future* victims. While well-intentioned, this would have an overwhelmingly detrimental impact on the proactive efforts of companies to identify and prevent sex trafficking.

Section 230 need not be treated as sacrosanct. A carefully considered reassessment of the law, like all statutes, is perfectly appropriate. But the Senate should exercise the utmost caution in any re-consideration of Section 230, especially outside of the normal committee process. Upending the balance struck in 1996 without a careful consideration of the effects of doing so could have devastating consequences for the Internet, perversely undermine efforts to combat sex trafficking, and serve as a first step toward further amendments that serve less-laudable purposes.

Sincerely,

R Street Institute
TechFreedom
FreedomWorks
Heritage Action
New America’s Open Technology Institute
International Center for Law and Economics
Campaign for Liberty
Free the People
Copia Institute
Demand Progress
Access Now

⁹ 18 U.S.C. §§ 1595, 2252A(f).

Niskanen Center
Citizen Outreach