

February 23, 2018

Hon. Mitch McConnell
Majority Leader
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Hon. Charles Schumer
Minority Leader
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(Additional addressees below)

Dear Legislators,

We, the undersigned organizations, have been actively engaged in the debate over the last year regarding legislation intended to combat sex trafficking online. We share that goal: the sexual exploitation of minors, and the enslavement of unwilling adults, is a moral abomination. Any new legislation should empower prosecutors and compensate victims *without* inadvertently discouraging responsible websites from helping to combat sex trafficking.

The House Judiciary Committee has done just that. But we write to express our concern regarding yesterday's announcement that House Leadership has scheduled a floor vote next week on a version of the House bill that would incorporate a radically different Senate bill.¹ The Senate legislation would harm, not help, sex trafficking victims, whereas the House bill would not raise the same significant concerns. Thus, the two bills cannot simply be merged. We urge leadership in both chambers to commit to holding further hearings, particularly in the Judiciary Committees in each chamber, before attempting to transport unworkable concepts from the Senate bill into the House bill.

In December, the House Judiciary Committee marked up a bill introduced by Rep. Ann Wagner (R-MO), the Allow States and Victims to Fight Online Sex Trafficking Act of 2017 (FOSTA). On Wednesday, the House Judiciary Committee reported that bill to the House.² FOSTA creates a new federal crime: the *intent* to promote or facilitate prostitution using media of interstate commerce (e.g., the Internet). By contrast, the Senate's Stop Enabling Sex Traffickers Act (SESTA) criminalizes "knowingly assisting, supporting, or facilitating [sex trafficking]." But as the FOSTA committee report notes:

general knowledge that sex trafficking occurs on a website will not suffice as the knowledge element must be proven as to a specific victim ... A new statute that instead targets promotion and facilitation of prostitution is far more useful to prosecutors.³

¹ Press Release, Rep. Mimi Walters, Rep. Mimi Walters' Amendment Included In Major Sex Trafficking Legislation (Feb. 21, 2018), <https://goo.gl/dgkV9n>.

² H.R. Rep. No. 115-572 on H.R. 8165 Allow States and Victims to Fight Online Sex Trafficking Act of 2017, (Feb. 20, 2018), <https://goo.gl/ars2x5>.

³ *Id.*

For the same reasons, FOSTA is *more* likely than SESTA to deliver monetary compensation to victims. If, as we expect and experienced prosecutors have suggested, SESTA would not result in more criminal convictions, neither would it supply plaintiffs with court-ordered restitution or the evidence that would be most effective in winning civil damage awards for victims. FOSTA would not actually require a criminal conviction prior to civil suit; a civil plaintiff could establish a violation of the criminal law under the lower civil burden of proof. Prosecutors will always play a critical role in enabling civil lawsuits, as they have unique advantages in the difficult investigative task of distinguishing good websites from bad ones. In that sense, FOSTA, by enabling prosecutions, will help civil plaintiffs, while SESTA, by failing to enable prosecutions, will not.

FOSTA offers a third benefit: responsible sites trying to stop sex trafficking, and to cooperate with law enforcement, will not be discouraged from doing so. But SESTA, by tying criminal liability to mere “knowledge” of sex trafficking, creates a perverse incentive for websites to stop monitoring user activity on their sites, lest they later be accused of having acquired “knowledge.” This has been called the “Moderator’s Dilemma;” avoiding it was the primary purpose of the Section 230 immunity: “to remove disincentives for the development and utilization of blocking and filtering technologies.” 47 U.S.C. § 230(a)(4).

SESTA’s sponsors seem implicitly to recognize the Moderator’s Dilemma, because the bill explicitly preserves the immunity in Section 230(c)(2)(A). Unfortunately, they misunderstand how that immunity works: it protects blocking or filtering but *not* the monitoring of user content necessary for filtering, and it is in the course of monitoring user content that websites risk gaining “knowledge” of illegal activity. Section 230 has no explicit reference to monitoring, but its current immunity protects the full range of what websites do — thus *implicitly* protecting websites from liability for knowledge gained in monitoring content as well as from claims that they should have done even more monitoring. Ending the heart of that immunity (§ 230(c)(1)) necessarily means ending these protections for monitoring. That, in turn, will cause sites to do less monitoring, content moderation, and cooperation with law enforcement.

For these reasons, among others,⁴ we do not believe SESTA’s language is workable. We would be happy to help lawmakers parse the differences between the two bills and explore ways to address concerns about FOSTA. But any attempt to simply merge the two bills on the House floor would be an abdication of lawmakers’ responsibility to the victims of sex trafficking. Lawmakers owe it to them to take the time to carefully consider what they are doing. That cannot be done on the House floor, or in conference, or without the expertise of both Judiciary Committees.

We urge House Leadership not to attempt to merge the bill produced by the careful work of the House Judiciary Committee with a Senate bill that simply bypassed that chamber’s Judiciary Committee. Major changes to federal criminal law should never be made without careful scrutiny by the Judiciary Committee in each chamber.

⁴ TechFreedom’s Letter to Rep. Goodlatte & Rep. Wagner on FOSTA Markup (Dec. 11, 2018), <https://goo.gl/uYI4pq>.

Failing that, should the House leadership attempt to perform conjunctive surgery on the House floor of two radically different bills, we urge the Senate Judiciary Committee to assert itself when the chimera bill returns to the Senate — and to hold its own hearings on this most difficult of topics.

A federal district court is set to rule any day now on whether to allow civil litigation against Backpage to proceed under existing law⁵ (because Section 230's immunity does not apply if website operators can be shown to be "responsible, in whole or in part, for the creation or development of information"⁶). This critical decision could make clear that Section 230 is not, in fact, the bar to civil litigation that many assume today. Such a decision could call into question whether Section 230 really needs to be amended at all; certainly, at a minimum, it would suggest that FOSTA's approach to civil litigation (preserving Section 230 qualified immunity against civil suits) will allow meritorious civil suits to proceed while properly shielding sites as Congress originally intended. Congress would be well served to consider this decision, whatever its outcome, before taking any floor vote.

House Leadership is not merely dismissing crucial questions about the effectiveness of SESTA; it is planning to violate its own most basic procedural safeguards. The House Energy and Commerce Committee (E&C) and the House Judiciary Committee (HJC) have not exchanged the traditional jurisdictional waiver letters — meaning that E&C has not properly notified HJC of the waiver that would be necessary for the bill to proceed to the House floor. We can only surmise that this normal step was bypassed in order to advance FOSTA, which HJC only just reported out of Committee, to the floor to meet an arbitrary political timetable.

Such deviations from standard procedure of the House are troubling in their own right; they also indicate that vital sex trafficking legislation is simply not getting the time and attention it deserves. The

There is simply no excuse, or reason, for rushing through a bill that ends up hurting the victims of sex trafficking.

Respectfully,

TechFreedom

Engine

FreedomWorks

Citizens Outreach

R Street Institute

Committee for Justice

⁵ Doe No. 1 et al v Backpage, LLC et al, No. 1:2017cv11069 (D.Mass. filed June 12, 2017).

⁶ 47 U.S. Code § 230 (f) (3).

Additional Addressees:

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