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Testimony before the

U.S. Senate Committee

on Commerce, Science, and Transportation

Hearing on:

S. 1693, The Stop Enabling Sex Traffickers Act of 2017 (SESTA)

September 19, 2017

Executive Summary¹

Today's hearing will hopefully raise questions about whether DoJ is pursuing Backpage, and whether federal law should be amended to enable more effective pursuit of Backpage. Moreover, we hope the hearing will drive greater action by law enforcement to address the horrible crime of sex-trafficking.

In our testimony, we describe the origins and motivations for Section 230, clarify legal limitations of Section 230 in providing platform immunity for content created and posted by others, detail the likely legal liability against Backpage for alleged activity in sex-trafficking, and discuss opportunities for Congress to address and combat the problem of sex-trafficking on the internet.

Section 230 does not shield Backpage.com and other bad actors from prosecution. Section 230 was never intended to be a shield for knowingly complicit illegal activity such as sex-trafficking. As such, there are existing opportunities for state law enforcement and civil plaintiffs to bring cases without any interference from Section 230.

Federal criminal law, by the very words of the statute, is wholly exempt from any effect of Section 230. And as detailed below, state criminal prosecutions 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.

We ask that prior to moving forward on S. 1693, *The Stop Enabling Sex Traffickers Act of 2017 S. 1693*, Congress should also seek answers to three critical questions:

- Why hasn't DoJ used its power and enforced the law?
- Does DoJ need additional powers?
- Do we need to amend the federal criminal law?

In our testimony, we make the following recommendations for Congressional action:

- Call on U.S. DoJ 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

¹ *NetChoice testimony represents its own views and not necessarily the views of all NetChoice members.*

We thank the Senate Commerce Committee for holding this important hearing on S. 1693, The Stop Enabling Sex Traffickers Act of 2017 (“SESTA”). This is the testimony of Carl Szabo, Senior Policy Counsel, NetChoice. In preparing this testimony we are grateful for the review and comments of our outside counsel, Chris Cox of Morgan, Lewis & Bockius LLP, who as a Member of Congress was the lead author and sponsor of Section 230 of the Communications Decency Act (“Section 230”).²

NetChoice is a trade association of leading e-commerce and online companies. We work to make the internet safe for free enterprise and free expression, and are significantly engaged in the states, in Washington, 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 crimes³ that include terrorism, extortion, mass murder, airline hijacking, rape, female genital mutilation, hate crimes, hostage taking, sexual battery, torture, and treason. State law covers many more criminal offenses than does federal law.

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.

SESTA would carve out a different federal rule for the treatment of one of the thousands of federal and state crimes. In doing so it would create significant new legal ambiguities and inexplicable horizontal disparities in both federal and civil litigation.

The authors of SESTA have targeted their legislation at Backpage.com, a website that is the subject of a damning Senate investigative report. However, before moving forward with SESTA, it is incumbent to have a robust discussion of the scope of Section 230 and whether there are existing laws available to act against bad actors like Backpage.

² 47 USC § 230.

³ 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.

One question for this hearing is, why have differential treatment for one federal crime? To resolve that question requires first answering another, more basic question: *Why did Congress choose to establish a uniform federal policy with respect to publisher liability for internet portals?*

Understanding the premise and application of Section 230 is essential before undertaking to perform surgery on it.

For our part, NetChoice is fully aware that sex-trafficking is a serious problem, and we support aggressive prosecution of any facilitation of this activity via the internet.

Moreover, we fundamentally agree with the premise of SESTA⁴ in important respects. Section 2(1) of SESTA states that Section 230 "was never intended to provide legal protection to websites that facilitate traffickers in advertising the sale of unlawful sex acts with sex-trafficking victims." It is absolutely correct that Section 230 is not and was not intended to be a shield for knowing complicity in illegal activity. That is manifest not only from the legislative history but the clear language of the statute itself.

Section 230 already says in plain English that it has "no effect" on federal criminal law, and specifically that Section 230 may not be construed "to impair the enforcement" of "any" federal criminal statute.⁵ Clearly, that already includes sex-trafficking.

Federal criminal law, by the very words of the statute, is wholly exempt from any effect of Section 230. And as detailed below, state criminal prosecutions 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.

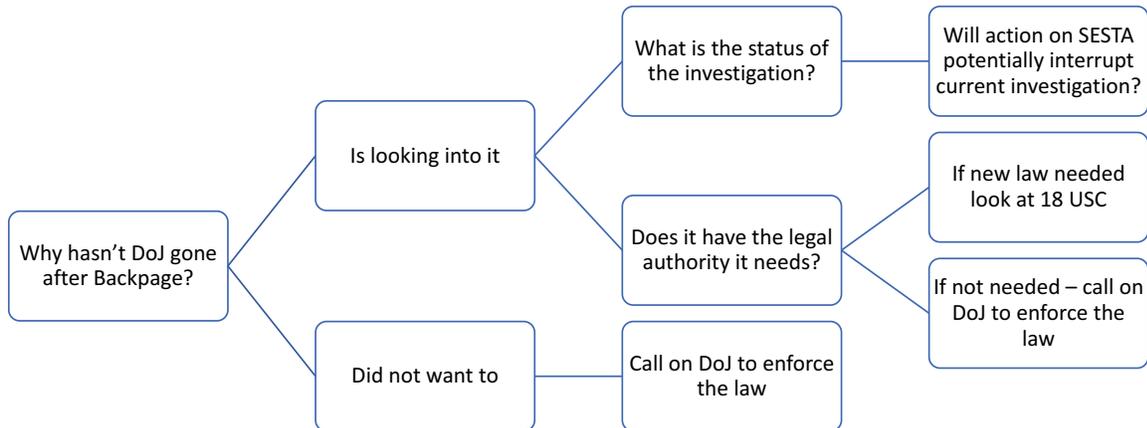
For that reason, we hope that today's hearing will raise questions about the availability of existing federal and state law to pursue targets such as Backpage.

Regarding federal enforcement of criminal law against sex-trafficking, our questions are set forth in the decision tree below:

⁴ Stop Enabling Sex Traffickers Act of 2017, S. 1693, 115 Cong. (2017)

⁵ 47 USC § 230(e)(1)

Questions to address before moving forward with SESTA



History and purpose of Section 230

Section 230 was signed into law more than 20 years ago.⁶ When the law was conceptualized by Reps. Chris Cox (R-CA) and Ron Wyden (D-OR) in 1995, roughly 20 million American adults had access to the internet.

Those who took 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 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 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.

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.

⁶ 104 P.L. 104, 110 Stat. 56

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.⁷

Section 230 was not part of the original Senate bill. Instead, it was introduced as the Internet Freedom and Family Empowerment Act in the House, which was intended *as an alternative to the CDA*. 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. Subsequently, the U.S. Supreme Court gutted the CDA's indecency provisions, which it found violate of the First Amendment, giving Reps. Cox and Wyden an ultimate victory they did not at first win in conference.⁸

From the point of view of Section 230's authors, the fundamental flaw of the CDA was its misunderstanding of the internet as a medium. It was simply impracticable, they realized, 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 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

Then-Rep. Cox was on a flight from California to Washington, DC during a regular session of Congress in 1995 when he read a Wall Street Journal story about a New York Superior Court case⁹ that troubled him 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.¹⁰

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.

⁷ *Id.*

⁸ *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997).

⁹ Milo Geyelin, *New York judge rules Prodigy responsible for on-line content*, Wall St. Jo., May 26, 1995.

¹⁰ *Stratton Oakmont v. Prodigy Servs Co.*, 1995 WL 323710 (N.Y.Sup.Ct. May 24, 1995)

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.¹¹

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.¹²

By the time he landed in Washington, Rep. Cox 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 Rep. Cox turned to as a legislative partner on his proposed bill was Rep. Ron Wyden (D-OR). The two 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), the two knew they could count on a fair consideration of the issues from their colleagues on both sides of the aisle.

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

The rule established in their bill, which they called the Internet Freedom and Family Empowerment Act,¹³ was pellucid: the government would impose liability on criminals and tortfeasors for wrongful

¹¹ *Cubby, Inc. v. CompuServe, Inc.*, 776 F. Supp. 135, 140 (S.D.N.Y. 1991) (emphasis added)

¹² *Stratton Oakmont v. Prodigy Servs Co.*, 1995 WL 323710 (N.Y.Sup.Ct. May 24, 1995)

¹³ Internet Freedom and Family Empowerment Act, H.R. 1978, 104 Cong. (1995)

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

The Congressmen 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.

- If one is a content creator, then one is liable for any illegality associated with that content.
- If one is not the content creator, then one is not so liable.

And what of the case where someone (or some company) is just partly involved in creating the content? What if, moreover, they were only indirectly involved? In that case, Section 230 comes down hard on the side of law enforcement. In such cases, a website operator who is involved only in part, and only indirectly, is nonetheless deemed just as guilty 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 Internet¹⁴

At a recent forum in Washington, D.C., Rep. Cox, the lead drafter of Section 230, stated that these words in Section 230 – “in part” and “development of” – are the most important part of the statute.¹⁵

The clear intent of this plain language, and of Congress in enacting Section 230, was not to create immunity for criminal and tortious activity on the internet, but to ensure that innocent third parties will not be made liable for unlawful acts committed wholly by others. If an interactive computer service becomes

¹⁴ 47 USC § 230(f) (emphasis added).

¹⁵ Armchair discussion with Former Congressman Cox, Back to the Future of Tech Policy, YouTube (August 10, 2017), https://www.youtube.com/watch?time_continue=248&v=iBEWXIn0JUY.

complicit, in whole or in part, in the creation of illicit content – even if only by “developing” the content – then the service has no Section 230 protection.

This language in the statute proceeds directly from the legislators’ recognition that given the volume of content that passes through most internet portals, it is unreasonable for the law to presume that the portal will screen all material. If in a specific case there is evidence that a portal did review material and edit it, then the plain language of Section 230 would deprive that portal of immunity.

Today, as federal and state law enforcement and civil litigants pursue Backpage.com, we have a clear example of how the law is designed to function. For purposes of analysis, let us assume the facts as they are presented in the Staff Report of the Senate Permanent Subcommittee on Investigations, “Backpage.com’s Knowing Facilitation of Online Sex Trafficking” (the “Senate Report”).¹⁶

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, 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.¹⁷ It knows that its website is used for these purposes, and 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.

In sum, assuming these facts in the Senate Report are true, it is abundantly clear that Backpage is not a “mere conduit” of content created by others. The company is actively involved in concealing the illegal activity on its site by directly involving itself in modifying the content. This goes far beyond the minimum level of activity that eliminates immunity by Section 230's standard of “indirect” involvement or mere “development” of content created by others.

¹⁶ 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.

¹⁷ Staff Report at 37.

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 such content created entirely by others. At the same time, Section 230 holds platforms liable when they are complicit, even if only indirectly and even if only in part, in the 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 230.¹⁸

Why did Congress not create a wholesale exemption of state criminal law, or state civil law, from the operation of Section 230?

First, and most fundamentally, it is because the essential purpose of Section 230 is to preempt state law like the court decision in *Prodigy*.¹⁹ Congress meant to establish a uniform federal policy, applicable across the internet, that would not punish an internet platform for the criminal or tortious conduct of another. Obviously, were state laws to be exempted from the coverage of Section 230, then Section 230 itself would become a nullity.

Even if such a wholesale exemption were limited to state criminal law, this would risk negating the federal policy. All a state would have to do to defeat the federal policy would be to place intermediary liability laws in its criminal code.

But in all other respects, Congress intended Section 230 to be entirely consistent with robust enforcement of state criminal law and state civil law. As detailed in the Backpage example above, 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.

¹⁸ 47 USC § 230(e)(3).

¹⁹ *Stratton Oakmont v. Prodigy Servs Co.*, 1995 WL 323710 (N.Y.Sup.Ct. May 24, 1995)

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 or conduct by third party users. There is one exception to the rule that a website operator will become liable for “in part” developing content. If the website operator is involving itself in order to delete content that is “obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected,” then it is protected as a “Good Samaritan.”²⁰

That liability protection has not only become the foundation supporting sites like eBay, Facebook, Amazon, Yelp, 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 liability for everything from users’ product reviews to book reviews. AirBNB would be exposed to liability for its users’ negative comments about a rented a home. Without Section 230, 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.

Coverage of Section 230

Some mistakenly claim that Section 230 prevents action against websites that knowingly engage in, solicit, or support sex-trafficking. As extensively discussed above, this is wrong. And since the claim is the principal basis for SESTA, it bears repeating that Section 230 provides no protection for any website, user, or other person or business involved even indirectly in the creation or development of content that is tortious or criminal.

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

²⁰ 47 U.S.C. § 230 (c)(2)(A).

prosecution because, by its express terms, Section 230 has no effect on federal criminal law. As noted above, 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.*²¹

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 is a federal criminal proscription of sex-trafficking. Additional federal tools include 18 U.S.C. § 1592(c)(3), covering facilitation of the promotion of unlawful activity,²² and 18 U.S.C. § 2255, providing for add-on civil suits by victims of sex-trafficking.²³

Thus, Members of Congress have already weighed in asking why DoJ hasn't 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*²⁴

In all its actions to combat sex-trafficking on the internet under federal criminal law, DoJ will face no restrictions from Section 230.

²¹ 47 U.S.C. § 230 (e)(1) (emphasis added).

²² "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)

²³ "(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.

²⁴ Wagner & Maloney Call on U.S. Department of Justice to Investigate Backpage.com, Press Release (July 13, 2017) (emphasis added).

Likewise, federal civil remedies for victims of sex-trafficking are also available without any restrictions from Section 230. Federal law provides:

An individual who is a victim of a violation of this chapter may bring a civil action against the perpetrator (or whoever knowingly benefits, financially or by receiving anything of value from participation in a venture which that person knew or should have known has engaged in an act in violation of this chapter) in an appropriate district court of the United States and may recover damages and reasonable attorneys fees.²⁵

We note that the decision of the First Circuit in *Jane Doe No. 1 v. Backpage.com LLC*²⁶ is an apparent anomaly in this respect. However, in that case the pleadings did not include the factual allegations abundantly laid out in the Senate Report showing how Backpage was far more than “indirectly” involved in the “development” of content – for example, by hiring contractors to assist in the drafting of sex-trafficking advertisements. Under Section 230, even indirect involvement in content creation or development eliminates any protection from suit. If these facts are properly pleaded, therefore, Backpage will not be able to hide behind Section 230 protections.

Moreover, we have not found any other example of a court looking to Section 230 to determine the availability of a remedy under 18 USC § 1595.²⁷

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. It is rather follows directly from the fact that no federal criminal prosecutions have been brought.

As noted, the allegations in the Staff Report make clear that Backpage executives knew their website facilitated illegal activity, including child sex-trafficking.²⁸ It shows that:

- Backpage has knowingly concealed evidence of criminality by systematically editing its adult ads:

²⁵ 18 U.S.C. 1595(a)

²⁶ *Jane Doe No. 1, et al. v. Backpage.com LLC, et al.*, No. 15-1724 (1st Cir. 2016).

²⁷ 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.

²⁸ *Id.*

- “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.”²⁹
- 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?”³⁰
- Backpage knows its site facilitates 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.’ 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.”³¹
 - “Until further notice, DO NOT LEAVE NOTES IN USER ACCOUNTS. Backpage, and you in particular, cannot determine if any user on the site in [sic] involved with prostitution. Leaving notes on our site that imply that we’re aware of prostitution, or in any position to define it, is enough to lose your job over. There was not one mention of prostitution in the power point presentation. That was a presentation designed to create a standard for what images are allowed and not allowed on the site. If you need a definition of ‘prostitution,’ get a dictionary. Backpage and you are in no position to re-define it.

²⁹ Carl Ferrer, Backpage CEO “instructed the company’s Operations and Abuse Manager Andrew Padilla to scrub local Backpage ads that South Carolina authorities might review: ‘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.’” Staff Report at 19.

³⁰ Staff Report at 35.

³¹ Staff Report at 37.

This isn't open for discussion. If you don't agree with what I'm saying completely, you need to find another job."³²

Given this evidentiary record, liability for Backpage would clearly exist under 18 USC § 1592, and almost certainly under any number of complementary federal crimes for which the company could be charged.

Why Backpage cannot use Section 230 as a shield from state or civil prosecution

The detailed factual allegations in the Senate Report about the illegal conduct of Backpage.com, if true, establish not only federal criminal offenses but also state criminal offenses, as well as both federal and state civil offenses. Section 230 should not be a bar to any of those prosecutions.

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.”³³

“[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.”³⁴

Since the Senate Report found that Backpage's CEO specifically instructed his team to edit advertisements, Backpage was acting as a content creator – thus surrendering any protections under Section 230.

This detail from a *Washington Post* report makes the case abundantly:

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 Philippine call center scoured the Internet for newly listed sex ads, then contacted the people who posted them and offered a free ad on

³² Staff Report at 38.

³³ *Stayart v. Yahoo! Inc.*, 651 F. Supp.2d 873, 886 (E.D. Wis. 2009) (quoting *Roommates.com*, 521 F.3d at 1167) (emphasis added).

³⁴ *Roommates.com*, 521 F.3d at 1167 (emphasis added).

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, Eurogirlseescort.com, Privategirls.com, PrivateRomania, Gumtree and many others.³⁵

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."*³⁶

State prosecutors and civil attorneys have the same ample basis to plead these facts that vitiate Section 230 protection for Backpage as federal prosecutors do. To the extent that the facts alleged in the Senate Report constitute a violation of state sex-trafficking laws, Section 230 should not be a bar to prosecuting any such violations. That is because on the facts as presented in the Senate Report, Backpage was not just a passive conduit for third-party content, but rather was editing content to conceal its illegality. The plain language of Section 230 denies protection to one who is, even in part, involved in creating or developing content.

Recently, the Supreme Court of Washington ruled that Section 230 does not forestall a lawsuit against Backpage for sex-trafficking.³⁷

³⁵ Tom Jackman and Jonathan O'Connell, *Backpage has always claimed it doesn't control sex-related ads. New documents show otherwise.*, The Wash. Post (July 11, 2017) (emphasis added)

³⁶ Staff Report at 28 (emphasis added).

³⁷ *J.S., S.L. and L.C. v. Backpage*, No. 90510-0 (S. Ct. WA Sep. 3, 2016)

Likewise, recent decisions by the Ninth Circuit Court of Appeals have held that a platform’s “duty to warn” is not protected by Section 230.³⁸

Decisions by the Seventh Circuit Court³⁹ and rulings in the Fourth Circuit⁴⁰ have rejected defendants’ claims that Section 230 protects them from suit.

To this end, rather than amend Section 230 and create new bodies of law – potentially slowing any ongoing or future lawsuits – clarifications of intent from Congress will provide a more purposeful path of action.

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. These actions will be faster and more effective than amending Section 230, with the short-term delay inherent in legislation and the longer-term and very serious risk that courts will not interpret SESTA as narrowly and benignly as Congress intended. We recommend the following:

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

Congressional representatives have repeatedly called on DoJ to act to address the problems of sex-trafficking on the internet.⁴¹ However, Congress retains the power to take stronger actions to compel DoJ enforcement. For example, it can:

³⁸ 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).

³⁹ *Huon v. Denton*, 2016 WL 6682931 (7th Cir. Nov. 14, 2016).

⁴⁰ *McDonald v. LG Electronics USA, Inc.*, 2016 WL 6648751 (D. Md. Nov. 10, 2016)

⁴¹ Letter sent to DoJ Congresswomen Ann Wagner (R-MO) and Carolyn B. Maloney (D-NY) sent a joint letter to U.S. Attorney General Jeff Sessions calling on the Department of Justice to open an immediate criminal investigation into Backpage.com’s knowing advertisement and facilitation of online sex-trafficking (July 13, 2017), Sen. McCain suggesting results of hearing might lead to prosecutions (Nov. 19, 2016), Sen. Lankford suggesting U.S. Attorney and Department of Justice should step in “with full force” (Nov. 19, 2016), Sen. McCaskill suggesting laying a foundation for a RICO prosecution (Nov. 19, 2016), Letter from Brent Fischer, Adams County Sheriff et al. to Attorney General Loretta Lynch, Deputy Attorney General Sally Yates, and Federal Bureau of Investigations Director James Comey (21 police departments and 14 sheriff’s

- send a letter from the entire Senate or House
- pass a resolution
- use language in appropriations bills to ensure DOJ is attending to enforcement in this area

Engaging the DoJ will not only help enforcement domestically, but also internationally. The scourge of sex-trafficking websites is not limited to the jurisdiction of the United States. Take, for example, sites like Locanto, Eurogirlescort.com, Privategirls.com, PrivateRomania, and Gumtree State – located in Europe, Australia and South America. Due to this international base of operations, state Attorneys General are typically unable to bring actions against these extra-territorial bad actors. DoJ is in the best position to move against such sites. By encouraging the DoJ to use its full power and its international relationships with law enforcement abroad, we can help address the problems of sex-trafficking websites both within and outside the United States.

File amicus briefs to stress congressional intent in Section 230

Pending cases before the US Supreme Court⁴² and in Washington state⁴³ among others could benefit from supplemental comments, legal arguments, and evidence of Congressional intent.

By filing an amicus brief, Congress can help ensure that the judiciary applies Section 230 as written and as intended – and as stated in the policy preamble to SESTA. 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.” They should develop a plan to maximize their joint resources and authorities, and implement it swiftly.

departments from across Illinois signed the letter) (Feb. 2, 2016), Sen. Mark Kirk to Attorney General Loretta Lynch (Oct. 26, 2015), Letter from Sen. Mark Kirk et al. to Attorney General Loretta Lynch (Aug. 7, 2015).

⁴² *Jane Doe No. 1, et al. v. Backpage.com LLC, et al.*, No. 15-1724 (1st Cir. 2016)

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

As part of this joint action, DoJ should use its power to appoint these state Attorneys General as "Special Attorneys" under 28 U.S.C. §543.⁴⁴

The authority of the Attorney General to appoint "Special Attorneys" dates to 1966. (The statutory authority was most recently amended in 2010.) The internal DoJ authority appears in the United States Attorneys Manual (USAM) at USAM §3-2-200.⁴⁵ 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 prosecution will evaporate.

⁴⁴ 28 U.S.C. §543 (Special Attorneys)

(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.

⁴⁵ 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.

Even without deputation as “Special Attorneys,” state Attorneys General can enforce Section 5 of the FTC Act.⁴⁶ Section 5 allows enforcement against websites that knowingly and actively fail to enforce their own policies. Under “little Section 5”, state AGs can take enforcement actions. Collaborating on such prosecutions through the Strike Force will ensure that both federal and state law enforcement aims are achieved, and that proper legal expertise is made available to the states in these actions.

Finally, as part of its mandate under the Strike Force umbrella, DoJ should be asked to examine the language of SESTA and report back to the appropriate Congressional committees. Such an analysis will help Congress avoid unforeseen consequences in the application of federal and state criminal laws in other areas, while ensuring that statutory language does not 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.

Conclusion

As demonstrated by the extensive factual allegations against Backpage in the Senate Report, both federal and state prosecutions, in criminal and in civil actions, may be brought successfully against Backpage and like offenders without any interference from Section 230.

By its terms, Section 230 clearly has no application to any federal prosecution. Moreover, the plain language of the statute prevents actors such as Backpage from claiming Section 230 immunity federal or state prosecution, whenever they are responsible even “in part” for merely “developing,” if not creating, content. This provides ample opportunity for state law enforcement and civil plaintiffs to bring cases without any interference from Section 230.

On the other hand, if Section 230 were amended as proposed in SESTA, not just bad actors such as Backpage but every website and interactive computer service in the United States would be impacted.

Congress wisely established a uniform policy of interactive computer services liability that applies to all criminal and civil actions in the United States. Aggressive prosecution of sex-trafficking, by the federal government, states, and private litigants, is perfectly consistent with this policy.

⁴⁶ 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.

Congress should follow the recommendations we have offered to quicken the pace of such prosecutions. NetChoice stands ready to help in stopping bad actors on the internet and ensuring that courts continue to apply Section 230 as even the authors of SESTA acknowledge Congress originally intended.

We agree with the concerns of victims of sex-trafficking and share the outrage of victims' rights groups. We are all frustrated that DoJ has not yet taken definitive action against Backpage. And we agree with Reps. Wagner and Maloney that DoJ "already has the tools it needs to bring a strong criminal case against Backpage.com."⁴⁷ The same is true for state law enforcement and every other plaintiff.

⁴⁷ Wagner & Maloney Call on U.S. Department of Justice to Investigate Backpage.com, Press Release (July 13, 2017) (emphasis added).