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VIA ELECTRONIC MAIL

Honorable Marsha Blackburn
Chairman, Subcommittee on Communications and Technology
Committee on Energy & Commerce
U.S. House of Representatives
2125 Rayburn Building
Washington, DC 20015

Honorable Michael F. Doyle
Ranking Member, Subcommittee on Communications and Technology
Committee on Energy & Commerce
U.S. House of Representatives
2322A Rayburn Building
Washington, DC 20015

Dear Chairman Blackburn and Ranking Member Doyle:

At the invitation of the Subcommittee, I write to provide additional perspective as you consider legislation to more effectively combat sex trafficking via the internet.

As your former House colleague, together with then-Rep. Ron Wyden, I authored the Internet Freedom and Family Empowerment Act in 1995, which passed the House as a standalone bill that year and later became law as Section 230 of the Communications Decency Act. Having followed the development of the case law over the last two decades, I have been alternately pleased and disappointed with various judicial interpretations of the statute. Like many, many people, I am angered by the findings of the Staff Report of the Senate Permanent Subcommittee on Investigations concerning Backpage.com, and therefore frustrated with the success that Backpage has enjoyed (albeit not consistently) in fending off civil and criminal claims.

For these reasons, I completely support the current effort underway to ensure that courts understand what Congress intended when we voted for this legislation in the first place. As stated in the preamble to H.R. 1865, 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." The internet, just like the mails, telegraph, and telephone before it, can be and regularly is used to commit crimes.

I agree with Chairman Blackburn that while the Senate bill "isn't perfect," and while the House bill requires "some more work," Congress can "take a proactive step in protecting current and potential victims of sex trafficking" with well-drafted legislation. Crafting the legislative language carefully will be vitally important to ensure that courts do not again misread Congressional intent.

Background and Purpose of Section 230

When Rep. Wyden 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.

That year, on a flight from California to Washington, DC during a regular session of Congress, I read a newspaper account of a New York Superior Court case that troubled me deeply. The case involved a bulletin board post by an unknown user on the Prodigy web service. 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.

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.

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 attempted to enforce 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.

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

The first person I turned to as a legislative partner on my proposed bill was my Democratic colleague, Rep. Wyden. 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, was crystal clear: the government would impose liability on criminals and tortfeasors for their wrongful conduct online. It would not shift that liability to internet platforms, except where the platforms themselves were complicit in the illegal online conduct, 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 ….

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, 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." 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

The important task you have undertaken is to draft legislation to give prosecutors and civil litigants better tools to prosecute sex traffickers. In doing so, it will also be important to preserve the Good Samaritan protections for internet platforms that take action "in good faith to restrict access to … obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable" material. This is central to the operation of Section 230. Without this protection, the perverse incentive will be for platforms to avoid any effort to monitor third party content –

the situation that would have existed had Congress not acted 20 years ago.

The language in H.R. 1865 as introduced does not fit well within the existing statutory framework. Instead of harmonizing with the Good Samaritan provision, it simply exempts "any … Federal or State law that provides causes of action, restitution, or other civil remedies" related to sex trafficking. It also grafts onto Section 230's objective test – was the defendant a content creator or developer, at least in part? – a new and very different test: did the defendant know, or should the defendant have known? (The latter is what courts often use as the test for recklessness.)

Section 230 is supposed to be about incentives. Congress should want to reinforce incentives for platforms to keep the internet free of obscenity and other objectionable content. The law recognizes that it would be impossible for most platforms to read all of the user-generated content to screen out objectionable material, and so does not penalize them for acting against only some of it.

If a new standard of "knew or should have known" is added to the mix, what does this do to the incentive to be a Good Samaritan? Now the platform intermediary can be second-guessed. This is the opposite of the Section 230 approach. If such language is added to Section 230, the law will be at war with itself. Undoubtedly the new language would win the war, trumping the Good Samaritan protection because of the opportunity for second guessing whether the website knew or should have known. In response to the new language, internet platforms might attempt to read all user-generated content, if they can (most could not); alternatively, they might go to great lengths to show (as CompuServe did back in the 1990s) that their business model is "anything goes" and thus they routinely screen out nothing. In that case they might more easily argue they should not reasonably be expected to have known about illegality in user-generated content. But the easiest thing to do would be to eliminate user-generated content, since that is the source of liability risk to the internet platform.

Even so, Congress might conclude that losing some user-generated content is a small price to pay for getting sturdier legal tools against sex trafficking. What is so important about user-generated content? Why, even as we strengthen prosecutorial tools to attack sex trafficking, is it necessary to protect website operators that are not involved in content creation from liability for content created by third party users?

Ensuring that liability is not shifted *from* criminals and tortfeasors who create illegal content and *onto* internet platforms is essential to the operation of the modern internet. This principle is the foundation supporting sites like Yelp, eBay, Wikipedia, Facebook, Amazon, Twitter, the New York Times, and every website that allows user comments, reviews, rankings, editorials, and so forth. User-generated content today powers thousands of innovative platforms that offer a range of socially useful services.

Without the Good Samaritan and liability protection of Section 230, social media platforms would be exposed to lawsuits for everything from users' product reviews to book reviews. Airbnb could be sued for its users' unfairly negative comments about a rented home. Any service that connects buyers and sellers, workers and employers, victims and victims' rights groups, or any other community of interested people we can imagine, would assume substantial new legal risk if they continued to display user-generated content on their website.

How widespread is user-generated content? Over 85% of businesses use it. Over 90% of consumers find user-generated content helpful in making their purchasing decisions. Without it, people hunting for their loved ones at the peak of hurricanes Maria, Irma and Harvey would not have been able to use social media to that purpose. The millions of Americans who every day rely on "how to" and educational videos (for everything from healthcare to home maintenance to pre-K, primary, and secondary education and lifelong learning) would find that many of them have suddenly disappeared.

User generated content is vital to law enforcement and social services. Following this year's 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.

Given that user-generated content is important and worth preserving, is there a way to write a law that strengthens prosecutorial tools against sex trafficking, and also keeps today's positive incentives in place? There is.

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 as originally written, though not always as interpreted, is such a balance. 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.

Still, there is not an 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.

Second, it is because 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. Even a message from one cubicle to its

neighbor can be broken up into pieces and routed via servers in different states. 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.

The key to writing new legislation in this area, then, is to avoid carving out exceptions for various state laws, without any means of harmonizing those laws with the federal policy. The best way to accomplish this objective is to give prosecutors better legal tools to work with, rather than simply carving up Section 230 in piecemeal fashion.

Specifically, I recommend that Congress and the states establish a new crime specifically focused on sex trafficking via website, with the purpose of giving federal and state prosecutors a powerful new weapon. State prosecutions of state law crimes with the same elements should be expressly authorized. As with the Travel Act, 18 U.S.C. 1952, the predicate offense can be defined as engaging in the business of prostitution, which presents prosecutors with fewer problems of proof. Sex trafficking, defined to include alternative elements such as a victim who is underage or who was subject to coercion, can then provide the basis for an enhanced penalty, allowing the criminal litigation to proceed to trial while the requisite facts are gathered.

To ensure that civil restitution is available to victims without need of commencing a separate follow-on civil proceeding, the new law should provide for a unitary proceeding, with the judge in the criminal trial assigned responsibility for overseeing claims for civil restitution immediately following the establishment of criminal liability. This will spare victims many months and much uncomfortable adversarial process.

By writing such provisions into the substantive criminal and civil law dealing with sex trafficking, lawmakers can avoid the thorny problems created by a single-crime carveout, which is the "narrowly targeted" but broadly problematic approach of HR 1865.

Section 230 and Sex Trafficking

The Report of the Senate Permanent Subcommittee on Investigations concerning Backpage.com has highlighted the fact that one website, estimated to be responsible for three-quarters of all sex trafficking activity in the United States, has thus far been able to operate with seeming impunity despite litigation brought by criminal prosecutors and civil plaintiffs. In lawsuits brought in state courts, Section 230 has figured as a staple element of Backpage's defense.

It bears repeating in this connection 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. Moreover, 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.

As this is a matter of black-letter law, your colleague Rep. Wagner, author of HR 1865, joined Rep. Maloney on July 13 of this year in formally stating, "we believe that the U.S. Department of Justice already has the tools it needs to bring a strong criminal case against Backpage.com." Specifically, 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, and 18 U.S.C. § 2255, providing for add-on civil suits by victims of sex-trafficking.

Unfortunately, to date no federal prosecution for sex trafficking has yet been brought under the federal SAVE Act. If and when a U.S. Attorney brings federal sex-trafficking charges against Backpage.com, the prosecution will face no restrictions whatsoever from Section 230.

Based on the abundant evidence in the Senate Report that Backpage participated in creating and developing the sex-trafficking content on its website on multiple occasions, Backpage should not be able to 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* content can hide behind Section 230, neither can Backpage.com.

For purposes of the following analysis, I will assume the facts as they are presented in the Senate Report. 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. 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.

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.'"

- 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?" 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.'"

- 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."

• 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 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."

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.

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."

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 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.'" 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.'"

The recent decision of the U.S. Court of Appeals for the First Circuit in *Jane Doe No. 1 v. Backpage.com LLC* came as a blow to efforts to hold Backpage liable to victims of sex trafficking. The court in that case rejected federal and state civil sex trafficking claims against Backpage. But the court did so 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. The court held that the record before it expressly *did not* allege that Backpage contributed to the development of the sex trafficking content, even "in part." Instead, the court said, the argument that Backpage was an "information content provider" under Section 230 was "forsworn" in the district court and on appeal.[1]

If these facts are properly pleaded, therefore, Backpage will not be able to hide behind Section 230 protections.

And indeed, a new complaint has been filed in the case of *Doe No. 1 et al v. Backpage.com, LLC et al*. in U.S. District Court in Boston. This complaint expressly references the Senate Report findings and contains abundant allegations demonstrating that Backpage participated both in creating and developing content. The court is expected to rule on Backpage's motion to dismiss

[1] A similar result was reached in the California case of People v. Ferrer, 16FE024013 (Cal. Superior Ct. Aug. 23, 2017), and for the same reason. The court specifically noted that prosecutors conceded that Backpage's web ads were created not by Backpage but by third parties. It is not clear why this concession was made. The Staff Report of the Senate Permanent Subcommittee on Investigations concerning Backpage.com makes clear the opposite is true. A properly pleaded indictment should be expected to make at least summary allegations on this point.

by the end of the year. If the court follows the clear language of Section 230 as written, the complaint will stand.

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 recently ruled that Section 230 *does not* forestall a lawsuit against Backpage for sex trafficking. In *J.S. v. Village Voice Media Holdings*, LLC, 184 Wash. 2d 95, 359 P.3d 714 (2015), the court stated the test of Section 230 exactly correctly: Backpage would not be a content creator if it "merely hosted the advertisements." But if "Backpage also helped develop the content of those advertisements," then "Backpage is not protected by CDA immunity." *Id.* at 717.

The court cited the allegations in the complaint that Backpage's "content requirements are specifically designed to control the nature and context of those advertisements," so that they can be used for "the trafficking of children." Moreover, the complaint alleged that Backpage has a "substantial role in creating the content and context of the advertisements on its website."

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. Decisions by the Seventh Circuit Court of Appeals and in the Fourth Circuit have similarly rejected defendants' claims that Section 230 protects them from suit.

These cases – including *Jane Doe, Ferrer*, and *J.S. v. Village Voice* – are fairly representative of the case law regarding Section 230 and Backpage. They illustrate what happens when prosecutors properly plead that Backpage is itself a content creator, and what happens when they fail to adequately plead this element. I should add, as the author of Section 230, that both the majority opinion and the concurrence in *J.S. v. Village Voice* have perfectly described the congressional intent and accurately parsed the plain meaning of the statutory language. If the re-filed *Jane Doe* complaint is upheld in Massachusetts, there will be significant momentum in the case law supporting Backpage prosecutions under state law without any interference from Section 230.

The Unintended Consequences of a Sex Trafficking Carveout

Both SESTA, recently reported from the Senate Committee on Commerce, Science and Transportation, and H.R. 1865, which you are considering in this Subcommittee today, have a common feature. They would establish a specific standard within Section 230 that applies only to sex trafficking, but not to any other federal or state crimes and civil offenses.

Today, Section 230 applies equally to all offenses, criminal and civil. By structure and purpose, it is panoptic. This is to ensure that the application of Section 230 is as consistent as possible.

Were the statute to be amended to introduce new elements limited to a specific criminal or civil offense, the immediate question for judges and practitioners would be what impact the new standard would have on other offenses. It is an established norm of statutory construction that if a statute specifies one exception to a general rule, other exceptions or effects are excluded. Application of this principle to Section 230, so amended, could lead to the inference that the unwelcome judicial interpretations of Section 230 to which the amended law is putatively addressed (many of which deal with different crimes and civil offenses) are left untouched. Alternatively, a judge might attempt to graft the new standard for the one crime onto other criminal and civil offenses; but to do so would require analogy and much creativity because of the difference in the substantive offenses. This would essentially require judicial lawmaking and lead to uneven results from court to court and across jurisdictions.

A parallel problem from amending Section 230 "one crime at a time" is that Congress will surely be asked to follow up any such amendment with further amendments along the same lines. How can it be said that, for example, sex trafficking is worthy of special congressional attention but terrorism or murder for hire are not? The list of heinous criminal offenses is long enough – running at least into the hundreds, as measured only by state laws currently on the books. But civil offenses will need to be added as well. This approach is violative of the principles of both legislative economy and judicial economy. Congress will be forced repetitively to deal with each new exception. Courts will have to attempt to make sense of the growing complexity of the statute. The *expressio unus est* questions that will arise, difficult enough with the first carveout from Section 230, will become exponentially more difficult as each new exception is created.

A further problem is the new thread of case law that will develop under Section 230. The current architecture of HR 1865, the premises of which I fully accept and the ends of which I fully support, adds needless complexity and uncertainty to the law by making it more difficult for judges to evenly apply what is now a straightforward standard. That is because it would establish different rules for sex trafficking than for even very similar offenses such as child pornography. The language of the bill does not purport to generally amend Section 230 as it applies to all civil and criminal offenses. Because it does not likewise amend Section 230 with respect to these thousands of other offenses, it necessarily establishes one set of rules for sex

trafficking and a different set of rules for everything else.

What does this mean? What will judges infer from the decision by Congress to treat sex trafficking as a unique subject under Section 230? Will courts attempt to borrow conceptually from the new statutory language? Will they seek to import concepts of recklessness or strict liability into other interpretive contexts? They might.

Alternatively, they might do the opposite. Judges might fully credit Congress for lapidary style, meaning exactly what it said, no more, no less. In that case, only sex trafficking will be treated according to the new standard. The inescapable consequence of this reasoning, unfortunately, will be that other crimes and civil offenses will be treated according to the pre-HR 1865 rule that Congress did not like as it was applied in sex trafficking cases. We will then witness a profusion of decisions reading approximately as follows: "If Congress wishes to rectify this unjust result, it will have to amend the law for this offense as it did for sex trafficking." This outcome would push decisional law in the direction of less sensitivity to the concerns of crime victims.

Across the spectrum between these opposite approaches, there are other reasonable variations that judges can be expected to adopt. The only certainty is that, because the approach of a single-crime carveout is inherently destabilizing, any number of outcomes is possible. This is the opposite of uniformity.

For the two decades of its existence, Section 230 has applied uniformly to all offenses, civil and criminal. Its standards are agnostic concerning the nature of the offense. There is nothing in the statute, express or implied, to lead courts in any other direction. This has been important in establishing predictability in the law's application. Without predictable outcomes, the law's purpose is severely undermined. By introducing a significant new element of unpredictability by virtue of its singular treatment of sex trafficking, HR 1865 as presently drafted would change all of this. It would make it more likely that courts will reach divergent results, undermining a consistent national standard that is coherent and predictable.

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 the 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*, 838 F.3d 158 (2d Cir. 2016), 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*, 2:13-cv-00926-CW-BCW (D. Utah, August 27, 2015), 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.

Similary, in *FTC v. Accusearch Inc*., 570 F.3d 1187 (10th Cir. 2009), 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*, No. CV 12-4095 GW (FMOX), 2013 WL 12131186 at *27 (C.D. Cal. Aug. 9, 2013), 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, 521 F.3d 1157 (9th Cir. 2008), 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 Section 230 need not be a bar to prosecution of Backpage.com or any other persons or entities who commit any of the thousands of crimes and civil offenses on the federal and state statute books.

These cases also point to reasons that grafting unique provisions for sex trafficking onto Section 230 itself in the manner of H.R. 1865 as initially drafted could have major unintended consequences. By disrupting decisional law in unpredictable ways and unintentionally but effectively altering the law's incentives for innocent web platforms that rely on user-generated content, the approach of carving a single crime out of Section 230 creates unnecessary problems.

There more effective and responsible approach is the direct one: strengthen law enforcement against sex traffickers by giving prosecutors and civil plaintiffs better tools.

Summary and Conclusion: Recommendations for Congressional Action

1. *Amend H.R. 1865 to directly, rather than indirectly, attack the problem of sex trafficking via the internet*. Eliminate the one-crime carveout from Section 230. Establish a new crime of sex trafficking via website, with the purpose of giving federal and state prosecutors a powerful new weapon. As with the Travel Act, 18 U.S.C. 1952, the predicate offense can be defined as engaging in the business of prostitution, which presents prosecutors with fewer problems of proof. Sex trafficking, defined to include alternative elements such as a victim who is underage or who was subject to coercion, can then provide the basis for an enhanced penalty, allowing the criminal litigation to proceed to trial while the requisite facts are gathered.

State prosecutions of state law crimes with the same elements should be expressly authorized. In this way, the specified federal crimes, including sex trafficking via website, can serve as a model statute for state legislatures.

In addition, H.R. 1865 should expressly authorize state Attorneys General to enforce federal anti-sex trafficking laws. There is ample precedent for this. For example, Congress authorized state Attorneys General to prosecute "unfair, deceptive or abusive acts and practices" under the Consumer Financial Protection Act provisions of Dodd-Frank. Several state Attorneys General, most notably in Illinois, have filed cases in federal court under that authority. Similarly, certain federal antitrust statutes may be enforced by the state Attorneys General. It is common for DOJ's Antitrust Division and state Attorneys General to jointly file cases. Further examples are to be found in the many federal environmental statutes that authorize state Attorneys General, along with DOJ, to enforce criminal and civil provisions of federal law. In the same way, state Attorneys General can enforce Section 5 of the FTC Act. 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 directly.

To ensure that civil restitution is available to victims without need of commencing a separate follow-on civil proceeding, the new law should provide for a unitary proceeding, with the judge in the criminal trial assigned responsibility for overseeing claims for civil restitution immediately following the establishment of criminal liability. This will spare victims many months and much uncomfortable adversarial process.

Finally, rather than a carveout from Section 230, which as noted would needlessly introduce interpretive challenges for judges and create great uncertainty, H.R. 1865 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.

By writing all of these provisions into the substantive criminal and civil law dealing with sex trafficking, lawmakers can avoid the thorny problems created by a single-crime carveout, which is the "narrowly targeted" but broadly problematic approach of H.R. 1865 as first introduced.

2. *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 measure, it likewise enjoyed nearly unanimous support. For 20 years, the consistent 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," or deciding whether to "alter content," is not enough to make one a content provider. Such interpretations are at odds with the plain language of the statute.

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.

3. *Call on U.S. DoJ to bring criminal cases against known bad actors.* As noted, Section 230 has no application to federal sex trafficking prosecutions. Individual congressional representatives have already called on the Department of Justice to act to address the problems of sex trafficking via the internet. Congress should act in concert, demonstrating the massive bipartisan support for federal enforcement actions in this area, by initiating a bipartisan letter from all Members to the Attorney General and responsible officials at the Department of Justice. Every interested committee should be encouraged to participate in this effort, in the Senate as well as the House.

4. *Use the power of the purse*. The Appropriations Committees in both chambers can use language in appropriations bills to ensure the Department of Justice is attending to enforcement in this area.

5. *Engage internationally*. The scourge of sex-trafficking websites is not limited to jurisdictions within the United States. The prevalence of such notorious websites as Locanto, Eurogirlsescort.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. This committee and the full Congress should encourage Justice to use its full power and its international relationships with law enforcement abroad to attack the problem of online sex trafficking at its roots, both within and outside the United States.

6. *File amicus briefs to stress congressional intent in Section 230.* As prosecutors and civil plaintiffs continue to bring cases before federal and state appellate courts, they 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.

7. *Create a joint federal-state Strike Force and a joint strategic plan with state AGs.* Congress should insist that federal and state law enforcement 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. 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. 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.

There is precedent for this approach. The U.S. Department of Justice has long appointed state and local prosecutors as uncompensated "Special Assistant United States Attorneys" (SAUSAs), using its statutory authority. These appointments have included collaborative federal-state work on matters such as reducing the supply of illegal drugs in the United States. The counter narcotics collaboration has extended to investigating and prosecuting priority national and international drug trafficking groups and providing sound legal, strategic and policy guidance in support of that end. Through this joint federal-state approach, the federal government has assisted the states with policy advice and support, drawing on its unique resources including intelligence and international enforcement relationships.

The Justice Department has also appointed state and local prosecutors as SAUSAs to prosecute violent crimes under the Organized Crime Drug Enforcement Task Forces (OCDETF) and High Intensity Drug Trafficking Areas (HIDTA) programs. In these cases, the Special Attorneys would typically be compensated by their employer – either the state Attorney General or a state or county District Attorney. They would be given the same authority to prosecute cases in federal court as any other federal prosecutor. Currently, U.S. Attorneys across the country as well as various decision units at DOJ rely upon SAUSAs to handle these types of crimes today.

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.

In each of these areas, NetChoice stands ready to help.

Sincerely,

Chris Cox
Outside Counsel, NetChoice