

**United States House of Representatives**  
**Committee on Energy and Commerce**  
**Subcommittee on Communications and Technology**

**Hearing: Latest Developments in Combating Online Sex Trafficking**  
**November 30, 2017**

Testimony of Congresswoman Ann Wagner (R-MO)  
Sponsor of H.R. 1865, *Allow States and Victims to Fight Online Sex Trafficking Act*

Thank you, Madame Chairman and Ranking Member Doyle, for hosting this hearing today. I appreciate your commitment to addressing online sex trafficking and especially appreciate that so many members of this Subcommittee have cosponsored H.R. 1865. I am also very grateful that the Chairman publicly supported the legislation earlier this year and has become one of my closest allies. In addition, Subcommittee members Representatives Yvette Clarke and Adam Kinzinger were both original cosponsors of the bill.

I hope that this hearing will be a productive discussion on how Congress can best protect victims and end the immunity that websites that facilitate human trafficking have enjoyed under Section 230 of the Communications Decency Act (CDA). For far too long, victims of this crime have been overlooked and underserved, and it has been my top priority in Congress, as trafficking has moved from the streets to the internet, to stop the victimization of America's children and adults.

My first major piece of legislation concerning online trafficking was the *Stop Advertising Victims of Exploitation Act* (the "SAVE Act"), which became law in 2015. The SAVE Act was a good first step in addressing federal-level prosecutions,<sup>1</sup> but it did not enable state and local prosecutors to

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<sup>1</sup> Unfortunately, the SAVE Act has not yet been used by the Department of Justice, presumably because the *mens rea* standard used in the legislation—"knowingly"—is too high. I have learned a lot since then, and I am adamant that we

protect their communities.<sup>2</sup> This is why, over a year and a half ago, I began work on H.R. 1865, the *Allow States and Victims to Fight Online Sex Trafficking Act* (or “FOSTA”). I introduced the bill in April after extensive consultations with victims, advocacy groups, civil attorneys, law enforcement, and prosecutors.

I believe that this bill is in many ways the gold standard in addressing online trafficking. It has three main prongs: 1) it would allow victims of sex trafficking and sexual exploitation of children crimes to pursue civil cases under federal and state law; 2) it would allow state and local prosecutors to enforce state statutes that prohibit sex trafficking or sexual exploitation of children; and 3) it would amend the federal criminal code to essentially create a new crime that makes it unlawful for websites to publish information provided by a user with reckless disregard that the information is in furtherance of a sex trafficking offense.<sup>3</sup>

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pass a bill to address online trafficking that is of practical use in disrupting the sex trade and preventing exploitation of victims.

<sup>2</sup> See *Online Sex Trafficking and the Communications Decency Act: Hearing before the Committee on the Judiciary, Subcommittee on Crime, Terrorism, Homeland Security, and Investigations, October 3, 2017, House of Representatives, 115th Cong. (2017) (Testimony of Mary Leary)*, at page 12 (explaining that “The Internet has grown all aspects of our modern economy including the illicit economy of sex trafficking. Often state and local prosecutors are uniquely situated to be the first to see the emergence of new websites engaged in such illegal activity. They must have the ability to respond quickly to these harmful sites that are preying on children and vulnerable adults in their local communities. Federal prosecution is discretionary. Because of the limited resources of the federal government, traditionally, federal prosecutors take cases only of certain magnitudes and with broad impact. Each advertising site that partners with traffickers is often first seen on the local level. Therefore, it is more effective to enable state and local prosecutors to investigate and prosecute these sites when they are small – before they become large enough to exploit larger numbers of victims and garner federal attention. This is not only effective law enforcement, it is essential in the sex trafficking context because each ad represents a person being monetized for brutal rape and sexual exploitation multiple times a day. The more effective law enforcement approach is to investigate and prosecute those websites that participate in trafficking victims as they emerge and before the number of “hits” from purchasers number in the thousands. In so doing hundreds of trafficking victims will not be sold and thousands of rapes can be prevented”).

<sup>3</sup> The bill also expresses the intent of Congress that Section 230 was never intended to provide legal protection to websites that facilitate traffickers in advertising the sale of unlawful sex with sex trafficking victims.

The bill is written for victims—not only because it would allow victims to pursue civil justice, but because it would empower local prosecutors to take down websites that facilitate trafficking before they ever reach the size and scope of Backpage.com.

The bill prevents victimization because it would produce more prosecutions of bad actor websites, more convictions, and more predators behind bars. If Congress establishes a real tool to ensure that businesses cannot commit crimes online that they could never commit offline, fewer businesses will enter the sex trade, and fewer victims will ever be sold and raped.

The U.S. House of Representatives understands that enabling vigorous criminal enforcement is not just important, but *mandatory* in any legislation we pass. That is why over 170 of our colleagues cosponsored FOSTA when I personally explained to them how websites can perpetuate modern day slavery with impunity.

Why are these websites able to sell our children? Because multiple judges have ruled that Section 230 of the Communications Decency Act preempts the ability of victims and state and local prosecutors to combat websites that exploit the most vulnerable members of our society. For example, in August 2017, the California Attorney General tried to hold Backpage.com accountable for pimping. Sacramento Superior Court Judge Lawrence Brown wrote that “If and until Congress sees fit to amend the immunity law [Section 230], the broad reach of the CDA even applies to those alleged to support the exploitation of others by human trafficking.”

When Congress passed the Communications Decency Act in 1996, it never intended for the internet to become a red-light district.<sup>4</sup> It clearly did not believe that rape was a prerequisite of the

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<sup>4</sup> Senator J. James Exon, author of the Communications Decency Act, said on the Senate floor at the time that “the information superhighway should not become a red light district. This legislation will keep that from happening and extend the standards of decency which have protected telephone users to new telecommunications devices. Once

free and open internet;<sup>5</sup> or that intellectual property should be better protected under federal law than the lives of America's children. So Congress' response to rulings from the Sacramento Superior Court and other jurisdictions must be patently clear: businesses that sell trafficking victims should be vigorously held accountable, and Section 230 does not stand in the way of justice.

Importantly, Congress cannot pass a bill that amends Section 230 but is so narrow that it could only be a means of prosecuting Backpage.com. I support the Senate's recent action on my legislative proposal,<sup>6</sup> and I believe that it is a step in the right direction. I appreciate that the Senate efforts have retained the carve-out for the federal private right of action established in the *Trafficking Victims Protection Reauthorization Act* (18 U.S.C. 1595) that was used in *Doe vs. Backpage.com*.<sup>7</sup> I understand that the Senate companion bill was negotiated in a complicated strategic environment, but the bill in its current form is not the full, future-oriented solution.

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passed, our children and families will be better protected from those who would electronically cruise the digital world to engage children in inappropriate communications and introductions." But the CDA in practice *has* allowed the internet to become a red light district. The anti-indecency provisions of the CDA were struck down a year after passage in *Reno vs. ACLU*. Only Section 230 remained.

<sup>5</sup> See Testimony of Mary Leary, *supra* note 2, at 7 (explaining that "The CDA was never intended to provide absolute immunity to service providers. However, since its enactment in 1996, forces have combined to create an atmosphere of de facto absolute immunity for online businesses. The CDA, as the name implies, was passed as part of a broad Congressional effort to address the impending challenges of the nascent Internet. Section 230, entitled Protection for Private Blocking and Screening of Offensive Material, manifested Congress's intent to have a flourishing Internet, which was then in its infancy, and remove disincentives to develop and utilize technology to block harmful content. Congress struck that balance by providing limited immunity for service providers, allowing immunity for Good Samaritan providers and those who host third party content but do not create it. However, Congress explicitly stated that this immunity should not be construed to limit enforcement of federal criminal laws or consistent state laws. Although Congress intended limited immunity, the current interpretation of the CDA perversely undermines that Congressional intent").

<sup>6</sup> Senator Portman and Senator Blumenthal introduced the *Stop Enabling Sex Traffickers Act* in the U.S. Senate in August 2017, a companion bill to H.R. 1865 with some changes made to gain the endorsement of tech companies, helpful for passage, that unfortunately weakened tools for state and local prosecutors.

<sup>7</sup> Unfortunately, FOSTA's carve-out for state civil cases was removed in the Senate companion. The Senate version of the federal civil carve-out has been narrowed and is now based on the "knowingly" *mens rea* standard, which will not provide operational recourse to justice for victims across the country and thus may not actually prevent future victimization. Moreover, claims using the carve-out cannot be brought in state/local courts and would be subject to a heightened pleading standard. I continue to stand in solidarity with victims who are pursuing cases based on state laws, and believe Congress should keep working toward a comprehensive solution.

Backpage.com is currently the largest of the websites that facilitate trafficking in America, but it is already under federal investigation, and it is just a small piece of this growing criminal ecosystem. Advertisements are already shifting off Backpage.com and to other websites. Since Backpage.com began successfully claiming Section 230 immunity in 2010, hundreds of advertising sites have jumped into the marketplace of illegal sex. For instance, Eros serves the high-end market; Escorts in College advertises women close to and under the age of consent; and Massage Troll is popular in my district. Beyond these advertising hubs, there are also hobby boards: websites where johns post reviews of their sexual encounters. The Erotic Review serves as the Yelp of the sex market, allowing users to rate victims on shockingly graphic details that I will not repeat here.

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I ask this Committee to consider whether under section 1595, if the Senate companion were to pass, the plaintiff would have to establish that the website (1) “knowingly” benefitted financially through “participation in a [trafficking] venture” (defined as, “knowingly assisting, supporting, or facilitating” someone who “knowingly . . . recruits, entices, harbors, transports, provides, obtains, advertises, maintains, patronizes or solicits by any means a person”), (2) “knowing . . . means of force, threats of force, fraud, or coercion will be used to cause the person to engage in a commercial sex act, or knowing that the person has not attained the age of 18 and will be caused to engage in a commercial sex act.” This would raise several questions:

- a. What evidence would a civil attorney or DA need and expect to rely upon to establish the website “knew” the specific plaintiff was engaged in commercial sex?
- b. What evidence would a civil attorney or DA need and expect to rely upon to establish the website “knew” the specific plaintiff was forced or coerced to engage in commercial sex?
- c. What evidence would a civil attorney or DA need and expect to rely upon to establish the website “knew” the individual advertised on the site was a minor?
- d. Does the “knowledge” standard require the website specifically know the individual is underage, either by self-reporting or some other means?
- e. Does the website “know” a minor is being trafficked if the ad includes code words, such as “New in Town” or “Fresh,” or a photo that appears to depict someone underage?
- f. Does the website “know” it is benefitting financially through knowingly assisting in a [trafficking] venture simply by hosting an “escort” advertisement of an individual in the ad who is later found to be a minor?
- g. Does the website “know” it is benefitting financially through knowingly assisting in a [trafficking] venture simply by hosting an “escort” advertisement of an adult who is later found to have been forced/coerced to engage in commercial sex?
- h. Does the website “know” it is facilitating commercial sex transactions simply by hosting an “escort” ad?

A wealth of evidence against Backpage.com has been discovered over the past year, and while it might now be possible, though still incredibly difficult, to prove that Backpage.com “knowingly” assisted in a sex trafficking violation, it is not possible to gather this level of evidence for the hundreds of other websites that are profiting from the sex trade. Because of these legal realities, prosecutors across America have told me that any legislation that depends exclusively on the “knowingly” *mens rea* standard to hold websites accountable will merely be a Washington, D.C., “feel good” exercise.<sup>8</sup> Congress might pat itself on the back, but local prosecutors won’t be able to ensure that bad actor websites do not facilitate the sale of victims. This is why FOSTA is built around the reckless disregard *mens rea* standard that prosecutors and victims need to have a meaningful chance at success. We must find a creative way to maintain the reckless disregard standard or at the very least, not raise the very high bar that victims and prosecutors must already meet in the federal criminal code. House efforts must complement and enhance the steps the Senate Commerce Committee has taken.

I have spoken with local prosecutors across the country who have asked the House of Representatives to pass a practical solution that will allow them to take predatory websites off the internet. I believe that every victim has a right to use their private rights of action, at both the federal and state levels, and I am beyond thrilled that *J.S. v. Village Voice Media Holdings* provided a successful case study in how to prosecute bad actor websites. But in order to help as many victims as possible, to prevent victimization in the first place, and to enable the success of more civil cases, we need more state and local prosecutions. A group of law professors weighed

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<sup>8</sup> Indeed, the “knowingly” *mens rea* standard has inadvertently made it *more* difficult to bring cases, both criminal and civil, than the original 1591 text allows for. The Committee must pay particular attention to prosecutors and lawyers who will be impacted by this standard.

in on the need to enhance state criminal enforcement in a recent [blog post published](#) by Shared Hope International:

Sex trafficking, like all social problems, requires a comprehensive response from many quarters: the criminal law, civil law, business regulations, etc. These mechanisms are necessary to deter, prevent, and when prevention fails, punish trafficking or facilitating the trafficking of people. For many crimes we look to federal, state, local, civil, criminal, medical, and educational institutions to respond. Human trafficking is no different.

There is an important aspect of federal prosecution that is worth mentioning here: federal prosecution is discretionary. Because of the limited resources of the federal government, federal prosecutors do not and cannot take every case. They select certain cases to handle based on a variety of factors. Most criminal charges, therefore, take place on the local and state level. For example, although it is a federal crime to distribute narcotics, the Department of Justice does not handle every narcotics case. Rather, it selects a small number of cases, leaving the primary job of prosecuting these crimes to the states...

The problem of human trafficking is massive. This is an extremely lucrative criminal enterprise with many tentacles. One of the reasons human trafficking is growing so rapidly is the large role the internet plays in its execution. We need many pressure points to contain and eradicate this form of victimization on both the state and federal level. Indeed most of the prosecution of criminal cases of human trafficking is based on state laws.

Furthermore, states have the right – indeed the obligation – to protect their citizens. Since the founding of our nation, there have been many sources of criminal law for all forms of victimization. States have their criminal codes for crimes that state legislatures see affecting their citizens. The federal criminal code addresses federal crimes and these are forms of victimization that the United States Congress has identified as crimes with a federal interest. While some crimes just have a federal interest – treason for example, most crimes are local and the federal government chooses to supplement the state criminal laws, not replace them...<sup>9</sup>

If we are serious about helping victims, we must be serious about creating laws that allow for robust state and local criminal enforcement. Criminal enforcement means businesses will stay out of the illegal sex trade; fewer vulnerable people will ever become victims; demand will be reduced; and civil suits will be easier to bring. There is tremendous momentum to pass a bill that prevents the exploitation of trafficking victims, deters criminal conduct, and incentivizes practices that will reduce online sex trafficking. Indeed, Congress has a moral obligation to shut down these websites.

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<sup>9</sup> Mary G. Leary, Shea Rhodes, Chad Flanders, and Audrey Rogers, “Law Professors Weigh in on Amending the CDA – Part 1,” <https://sharedhope.org/2017/09/law-professors-weigh-amending-cda-part-1/>, (September 14, 2017).

I am committed to collaborating with this Subcommittee, the House Judiciary Committee, House Leadership, and the Senate to end the online trafficking industry in America, and I will work with you to mark up a forward-facing bill (or bills) that will provide justice to victims of all bad actor websites, not just Backpage.com. I adamantly believe we can pass bipartisan House legislation that includes meaningful tools to prevent future victimization. Together, the 115<sup>th</sup> Congress can hold online marketplaces accountable for facilitating the sale of our most vulnerable.

Thank you.