



U.S. Senate Committee on Commerce, Science, and Transportation
September 19, 2017 Hearing
“S. 1693, the Stop Enabling Sex Traffickers Act of 2017”

Written Remarks of Professor Eric Goldman
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Members of the Committee:

I appreciate this opportunity to testify about the Stop Enabling Sex Traffickers Act of 2017. Sex trafficking is a horrific crime, and I applaud Congress’ ongoing efforts to combat it. However, I am concerned that SESTA is not the right solution to stop sex trafficking.

Specifically, SESTA will counterproductively lead to more socially harmful content and more online sex trafficking promotions. Instead of stopping bad actors, SESTA will help them proliferate. To understand why, it’s helpful to review why Section 230 has worked so well.

When I started practicing Internet Law in 1994, before Congress enacted Section 230, we advised online services to handle third party content and activity in one of two ways. The service could either: (1) accept that it will be fully liable for third party content, and manage that risk by exercising editorial control through content pre-screening or other costly and cumbersome editorial procedures, or (2) take minimal steps to moderate third party content and thereby avoid any knowledge that might lead to liability.

Section 230 mooted that advice. Section 230 instead allows online services to safely adopt a wide range of moderation practices between those two extremes. By reducing online services’ moderation costs and liability exposure, Section 230 spurred new innovative services and fostered their growth, contributing to the Internet’s success. Virtually every waking hour of every day, we use online services that owe their existence to Section 230’s protections.

SESTA would reinstate the moderation dilemma that Section 230 eliminated. Because of Section 230, online services today voluntarily take many steps to suppress socially harmful content (including false and malicious content, sexual material, and other lawful but unwanted content) without fearing liability for whatever they miss. Post-SESTA, some services will conclude that they cannot achieve this high level of accuracy, or that moderation procedures would make it

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impossible to serve their community. In those cases, the services will reduce or eliminate their current moderation efforts. As more services do less to moderate third party content, we will see more socially harmful content online that would have been moderated today. Indeed, some online services that are actively suppressing sex trafficking promotions will stop those efforts, leading to the unintended consequence that SESTA will foster the expansion of online sex trafficking promotion.

SESTA tries to avoid the moderation dilemma by focusing on “bad actors” who promote sex trafficking. This doesn’t work because only some sex trafficking promotions clearly self-identify as such. Sex trafficking promotion can take less obvious forms, such as online prostitution ads, ads for adult services that are legal, and indeed every type of user content ranging from videos to dating profiles to message board comments to tweets (and use coded phrases and euphemisms to mask the promotional objective).

As a result, online services can’t magically find and eradicate only the online sex trafficking promotions. Automated filters are costly and suffer from high error rates. Furthermore, if the services decide to moderate their content, they will have to undertake the larger and harder effort to review their entire universe of third party content—even content that lacks any obvious “red flags”—to find every impermissible promotion. So SESTA doesn’t limit itself to bad actors; it applies to the entire Internet and force services doing moderation to comprehensively review all content they receive.

Finally, SESTA isn’t necessary to fight online sex trafficking promotions. Section 230’s immunity expressly doesn’t apply to federal criminal prosecutions. Congress has enacted numerous crimes against sex trafficking and its promotion, including most recently the SAVE Act passed just two years ago to target sex trafficking promotions on Backpage. If the Department of Justice prosecutes Backpage for any crimes Backpage may have committed (whether the SAVE Act or other crimes), Section 230 will not shield Backpage. A federal grand jury is currently investigating Backpage. Congress should wait for the results of that investigation—which I hope will come soon—to help identify if any gaps exist in the law and how Congress should best respond.

SESTA is a complex law implicating important social issues. I’m grateful that this committee is paying close attention to it. Thank you for the opportunity to testify.

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I supplement my oral remarks with two attachments:

- “Congress Is About to Ruin Its Online Free Speech Masterpiece,” an essay more fully outlining my concerns about the bill.
- “SESTA Would Eliminate the Good Samaritan Defense,” an essay rebutting Sen. Portman’s claims that SESTA would not modify Section 230’s “Good Samaritan” defense.

Attachment 1: Congress Is About To Ruin Its Online Free Speech Masterpiece*

In 1996, Congress became concerned that excessive liability would threaten the free flow of information over the Internet. To protect the Internet from this risk, Congress passed 47 USC § 230 (Section 230), which eliminates (with limited exceptions) the liability of online services for publishing third party content.

By any measure, Section 230 has been a remarkable success. Think about the Internet services you use daily, such as Google, Facebook, YouTube, Wikipedia, Twitter, eBay, Snapchat, LinkedIn, and Yelp. All of them publish third party content, and all of them have flourished because of Section 230's immunity. Section 230 also promotes competitive markets by reducing entry costs. New entrants can challenge the marketplace leaders without having to match the incumbents' editorial investments or incurring fatal liability risks.

Section 230 is a globally unique policy; no other country has passed a law similar to it.¹ As a result, the United States has a global competitive advantage for online services that republish third party content. This has helped create trillions of dollars of social wealth in the U.S.²

* * *

Section 230 has remained essentially unchanged since its passage,³ but that could change imminently—in significant and troubling ways.

Backpage is an online classified service that publishes prostitution ads. Protected by Section 230's immunity, Backpage has defeated multiple legal challenges. Frustrated by Backpage's continued existence, and fueled by anti-trafficking advocates who want Backpage gone, Congress is considering two bills to amend Section 230. The Senate bill is Stop Enabling Sex Traffickers Act of 2017 (SESTA), S. 1693,⁴ and the House bill is Allow States and Victims to Fight Online Sex Trafficking Act of 2017, H.R. 1865.⁵ Both bills have many co-sponsors.

* A version of this was first published as Eric Goldman, *Congress Is About To Eviscerate Its Greatest Online Free Speech Achievement*, ACSblog, Sept. 11, 2017, <https://www.acslaw.org/acsblog/congress-is-about-to-eviscerate-its-greatest-online-free-speech-achievement>.

¹ ERIC GOLDMAN, *INTERNET LAW: CASES & MATERIALS* 330 (July 14, 2017 ed.).

² Christian M. Dippon, *Economic Value of Internet Intermediaries and the Role of Liability Protections*, NERA Consulting, June 5, 2017, <https://cdn1.internetassociation.org/wp-content/uploads/2017/06/Economic-Value-of-Internet-Intermediaries-the-Role-of-Liability-Protections.pdf>.

³ Eric Goldman, *WARNING: Draft “No Immunity for Sex Traffickers Online Act” Bill Poses Major Threat to Section 230*, Tech. & Marketing L. Blog, Mar. 25, 2017, <http://blog.ericgoldman.org/archives/2017/03/warning-draft-no-immunity-for-sex-traffickers-online-act-bill-poses-major-threat-to-section-230.htm>.

⁴ For more discussion about SESTA, see Eric Goldman, *Senate’s “Stop Enabling Sex Traffickers Act of 2017”—and Section 230’s Imminent Evisceration*, Tech. & Marketing L. Blog, July 31, 2017, <http://blog.ericgoldman.org/archives/2017/07/senates-stop-enabling-sex-traffickers-act-of-2017-and-section-230s-imminent-evisceration.htm>.

⁵ For more discussion about H.R. 1865, see Eric Goldman, *The “Allow States and Victims to Fight Online Sex Trafficking Act of 2017” Bill Would Be Bad News for Section 230*, Tech. & Marketing L. Blog, Apr. 10, 2017, <http://blog.ericgoldman.org/archives/2017/04/the-allow-states-and-victims-to-fight-online-sex-trafficking-act-of-2017-bill-would-be-bad-news-for-section-230.htm>.

For simplicity, I'll focus on SESTA's provisions. SESTA would make three major substantive changes to Section 230's immunity. It would:

- 1) Exclude state criminal prosecutions related to sex trafficking from Section 230's immunity. State attorneys general and other local prosecutors could prosecute online services for trafficking-related crimes without any Section 230 limits.
- 2) Exclude federal and state civil causes of action related to sex trafficking from Section 230's immunity. Sex trafficking victims (and others) could obtain money judgments and injunctions against online services.
- 3) Expand the scope of the existing federal crime (and associated civil claims) of sex trafficking. Section 230 expressly does not restrict federal criminal prosecutions, so the U.S. Department of Justice (DOJ) could pursue a wider range of prosecutions against online services.

I'm glad that Congress is combating sex trafficking, but SESTA is not the right policy solution for at least six reasons:

1) *SESTA may not help sex trafficking victims. It might hurt them.* Online prostitution ads are evidence of crimes being committed, providing a roadmap for law enforcement to find and prosecute criminals. That has occurred countless times. The ads also can help rescue sex trafficking victims.⁶ By investigating the ads, law enforcement and victim advocates have found and rescued many victims.⁷ SESTA might reduce the visibility of online prostitution ads; but sex trafficking will still occur, and so will the marketing of sex with trafficked victims via less visible means (such as "walking the streets"). SESTA will make it harder to find—and rescue—those victims.

2) *Congress is fighting sex trafficking on many fronts.* Congress is currently considering more than 30 bills referencing "sex trafficking;" and Congress' prior two sessions each included over 50 bills referencing "sex trafficking." (Note: an anti-sex trafficking bill may not reference the term, so the number of anti-sex trafficking bills may be higher). So SESTA is far from Congress' only anti-sex trafficking policy option; and even if Congress doesn't pursue SESTA, Congress can and will redress sex trafficking other ways.

3) *Congress already has statutorily targeted Backpage.* The 2015 SAVE Act⁸ created a new federal crime for publishing online ads that promote sex trafficking victims. A federal grand jury

⁶ Alex F. Levy, *How Section 230 Helps Sex Trafficking Victims (and SESTA Would Hurt Them)*, Tech. & Marketing L. Blog, Aug. 15, 2017, <http://blog.ericgoldman.org/archives/2017/08/how-section-230-helps-sex-trafficking-victims-and-sesta-would-hurt-them-guest-blog-post.htm>; Alexandra F. Levy, *The Virtues of Unvirtuous Spaces*, 50 WAKE FOREST L. REV. 403 (2017).

⁷ For a recent example of a rescue, see *People v. Jones*, 2017 WL 3633962 (Cal. Ct. App. Aug. 24, 2017), a case involving Craigslist ads.

⁸ Justice for Victims of Trafficking Act § 118 (2015); see also Eric Goldman, *Backpage Can't Challenge the SAVE Act—Backpage v. Lynch*, Tech. & Marketing L. Blog, Nov. 10, 2016, <http://blog.ericgoldman.org/archives/2016/11/backpage-cant-challenge-the-save-act-backpage-v-lynch.htm>.

in Phoenix is currently investigating backpage,⁹ and the SAVE Act may be part of that investigation (grand jury proceedings are secret). So the DOJ already may be using the new crime to achieve Congress' goal without SESTA.

4) *Other crimes may already apply to Backpage.* Though Backpage has had significant success in court, recently a California state court ruled that Backpage executives must defend charges of violating state money laundering laws.¹⁰ Also, in the past couple of years, the U.S. Department of Justice successfully prosecuted and shut down two sites publishing online prostitution ads (Rentboy¹¹ and MyRedbook¹²). The DOJ should be able to deploy similar legal theories against Backpage.

5) *No one knows how SESTA would change the law.* By reducing Section 230's immunity, SESTA would allow a range of laws to apply to Internet services for the first time. Which laws? Apparently, no one knows; I'm unaware of any attempt to inventory those laws. So what criminal prosecutions and civil claims will be brought post-SESTA, by whom, and against which services? Again, no one knows.

6) *SESTA would damage the Internet, perhaps radically.* We can only speculate how SESTA might affect the Internet services we know and love. For example, Airbnb has had numerous issues with short-term rentals being used for prostitution,¹³ likely including sex trafficking victims; and it's well-known that prostitution historically has been advertised on Facebook.¹⁴ After SESTA, will Airbnb and Facebook look radically different as they try to avoid substantial criminal and civil liability exposure?

Even if we could figure out how SESTA changes the law today, we can't contemplate how future state laws will take advantage of the new regulatory zones enabled by SESTA. Imagine a new state law requires services to prescreen all third party content to find and block sex trafficking ads. How would Twitter work with prescreened tweets?

⁹ E.g., Sarah Jarvis et al, *As Allegations Increase Against Backpage, Founders Have Become Big Political Donors In Arizona*, ARIZ. REPUBLIC, Apr. 14, 2017,

<http://www.azcentral.com/story/news/local/phoenix/2017/04/14/allegations-increase-against-backpage-founders-have-become-big-political-donors-arizona/100421528/>.

¹⁰ *People v. Ferrer*, 16FE024013 (Cal. Superior Ct. Aug. 23, 2017),

<http://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=2543&context=historical>, see also Eric Goldman, *Backpage Executives Must Face Money Laundering Charges Despite Section 230—People v. Ferrer*, Tech. & Marketing L. Blog, Aug. 24, 2017, <http://blog.ericgoldman.org/archives/2017/08/backpage-executives-must-face-money-laundering-charges-despite-section-230-people-v-ferrer.htm>.

¹¹ E.g., *U.S. v. Easy Rent Systems, Inc.*, No. 1:16-cr-00045 (E.D.N.Y. Jan. 27, 2016); *USA v. Hurant*, No. 1:15-mj-00780 (E.D.N.Y. Aug. 18, 2015).

¹² E.g., *U.S. v. Omuro*, No. 3:14-cr-00336 (N.D. Cal. Jun 24, 2014).

¹³ 'My Airbnb Flat Was Turned into a Pop-up Brothel', BBC, Apr. 8, 2017, <http://www.bbc.com/news/magazine-39528479>.

¹⁴ Rich Schapiro, *Facebook Friends Take on New Meaning as Hookers Are Said To Be Flocking To Social Networking Site*, N.Y. DAILY NEWS, Feb. 27, 2011, <http://www.nydailynews.com/news/crime/facebook-friends-new-meaning-hookers-flocking-social-networking-site-article-1.136789>. I understand that Facebook subsequently undertook additional efforts to suppress such advertising.

Finally, Section 230 does not distinguish between services that passively display third party content or actively manage that content: in both cases, publishers aren't liable for third party content. This policy allows online services to try to suppress illegal or socially harmful content without fearing legal exposure for whatever they miss. In response to SESTA's curtailed Section 230 immunity, many services probably will reduce their current suppression efforts to avoid having scienter that would create liability. If that happens, SESTA's attempt to suppress one type of illegal content will counter-productively cause the proliferation of illegal and socially harmful content—including, ironically, the proliferation of online prostitution ads if services dial back existing suppression efforts.

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The First Amendment is the foundation of free speech in our society. However, legislators can supplement the First Amendment's protections. Section 230 is a premier example of speech-enhancing legislation that enriches the free speech rights of speakers and their publishers. Undoubtedly, Section 230 has done more to advance free speech than anything else Congress has done in the past quarter-century; and Section 230 may be Congress' greatest pro-free-speech achievement ever. It's hard to believe that Congress would ruin its free speech masterpiece, but that's exactly what SESTA would do.

Attachment 2: SESTA Would Eliminate the Good Samaritan Defense*

When introducing the Stop Enabling Sex Traffickers Act of 2017 (S. 1693), Sen. Portman said (emphasis added):

There are some groups who have been critical of this effort to hold backpage accountable and stop this online exploitation. They have suggested that this bipartisan bill could impact mainstream websites and service providers—the good actors out there. That is false. **Our bill does not amend, and thus preserves, the Communications Decency Act’s Good Samaritan provision. This provision protects good actors who proactively block and screen for offensive material and thus shields them from any frivolous lawsuits.** That is in the legislation and needs to be in there.¹

This positioning makes it sound like websites who object to SESTA are overreacting. Why should they complain if they still have immunity? Unfortunately, Sen. Portman’s statement is wrong.

Section 230 has two main operative provisions. Section 230(c)(1) says websites aren’t liable for third party content. Section 230(c)(2) says websites aren’t liable for filtering content they consider offensive. Sen. Portman’s statement indicates that he thinks SESTA would create new exclusions only to Section 230(c)(1) and would not amend 230(c)(2). However, the bill clearly changes both 230(c)(1) and 230(c)(2) equally.

Section 230(e) enumerates four modifications to the immunity, including Section 230(e)(1), which the bill would amend to read (new language bolded):²

Nothing in this section shall be construed to impair **(A)** 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, **Section 1591 (relating to sex trafficking) of that title**, or any other Federal criminal statute **or (B) any State criminal prosecution or civil enforcement action targeting conduct that violates a Federal criminal law prohibiting (i) sex trafficking of children; or (ii) sex trafficking by force, threats of force, fraud, or coercion.**

The bill also would create a new Section 230(e)(5):³

No effect on civil law relating to sex trafficking. Nothing in this section shall be construed to impair the enforcement or limit the application of section 1595 of title 18, United States Code

* A version of this was first published as Eric Goldman, *Sen. Portman Says SESTA Doesn’t Affect the Good Samaritan Defense. He’s Wrong*, Tech. & Marketing L. Blog, Aug. 9, 2017, <http://blog.ericgoldman.org/archives/2017/08/senportmansestawrong.htm>.

¹ CONG. RECORD S4671 (Aug. 1, 2017), <https://www.gpo.gov/fdsys/pkg/CREC-2017-08-01/pdf/CREC-2017-08-01-pt1-PgS4669.pdf#page=3>.

² S. 1693 §3(a).

³ *Id.*

The added language to Section 230(e)(1) and the new Section 230(e)(5) would expose Internet services to countless new enforcement actions by state law enforcement and civil plaintiffs.⁴ Notice how both Section 230(e)(1) and the proposed Section 230(e)(5) start off with the statement: “Nothing in this section shall be construed to impair...” The only possible reading of “nothing in this section” is that it refers to all of Section 230, including both Section 230(c)(1) and (c)(2). I didn’t find any cases interpreting what “this section” means, but I found several cases implying that Section 230(c)(2) defenses are subject to Section 230(e)’s exceptions.⁵ Applying standard methods of statutory construction, Section 230(c)(1) and (c)(2) are equally affected by the existing and proposed Section 230(e) exceptions. As a result, Section 230(c)(2) would not limit any new enforcement actions unleashed by the proposed amendments.

[Caveat 1: A 2001 district court opinion contains a sentence saying: “Immunizing Mindspring from Plaintiff’s claims, therefore, would “limit” the laws pertaining to intellectual property in contravention of § 230(c)(2).”⁶ Although this language seemingly confirms my analysis, I believe the Section 230(c)(2) reference is a typo. The court meant to say 230(e)(2).⁷]

[Caveat 2: a few cases, including the Seventh Circuit’s *Doe v. GTE*⁸ and *Chicago Lawyers’ Committee for Civil Rights Under Law v. Craigslist*⁹ cases, have suggested that Section 230(c)(1) acts as a definitional section for Section 230(c)(2). These cases make a strained reading of the statute, but they also would further undermine Sen. Portman’s statement because, under this reading, Section 230(c)(2) would be the only operational immunity the bill could amend.]

Because I don’t see any possible way of interpreting the statutory language to say that Section 230(c)(2) is subject to different exclusions than Section 230(c)(1), Sen. Portman’s claims to the contrary appear to be a misreading of the existing statute or a misunderstanding of how the bill fits into the existing statutory language. Either way, Congress could easily effectuate Sen. Portman’s claim through different drafting. Instead of preceding Section 230(e)(1) and (e)(5) with “Nothing in this section...” the amendment could say “Nothing in Section 230(c)(1)...” thereby making Section 230(c)(2) not subject to those exclusions.

⁴ Eric Goldman, *Senate’s “Stop Enabling Sex Traffickers Act of 2017”—and Section 230’s Imminent Evisceration*, Tech. & Marketing L. Blog, July 31, 2017, <http://blog.ericgoldman.org/archives/2017/07/senates-stop-enabling-sex-traffickers-act-of-2017-and-section-230s-imminent-evisceration.htm>.

⁵ See, e.g., *e360Insight, LLC v. Comcast Corp.*, 546 F. Supp. 2d 605 (N.D. Ill. 2008); *Holomaxx Technologies v. Microsoft Corp.*, 783 F. Supp. 2d 1097 (N.D. Cal. 2011); *Milo v. Martin*, 311 S.W.3d 210 (Tex. Ct. App. 2010) (concurring opinion); *Davis v. Motiva Enterprises, L.L.C.*, 2015 WL 1535694 (Tex. Ct. App. Apr. 2, 2015).

⁶ *Gucci America v. Hall & Associates*, 135 F. Supp. 2d 409 (S.D.N.Y. 2001).

⁷ *Ford Motor v. GreatDomains.com*, 2001 WL 1176319 (E.D. Mich. Sept. 25, 2001) noted this error, and corrected it, when quoting the *Gucci* opinion’s language.

⁸ *Doe v. GTE Corp.*, 347 F.3d 655 (7th Cir. 2003).

⁹ *Chicago Lawyers’ Committee For Civil Rights Under Law v. Craigslist, Inc.*, 519 F.3d 666 (7th Cir. 2008); see also Eric Goldman, *Craigslist Gets Seventh Circuit 230 Win in Fair Housing Act Case—Chicago Lawyers’ Committee v. Craigslist*, Tech. & Marketing L. Blog, Mar. 14, 2008, http://blog.ericgoldman.org/archives/2008/03/craigslist_gets.htm.

There is another problem with Sen. Portman extolling Section 230(c)(2)'s protection: it's basically a defunct safe harbor¹⁰ that does not provide much protection from "frivolous" lawsuit. Unlike Section 230(c)(1), Section 230(c)(2) has a good faith requirement, i.e., to qualify for the safe harbor, the website's filtering decisions must be made in good faith. Plaintiffs can, and routinely will, allege that the defendant made a filtering decision in subjective bad faith, and courts routinely let those generic and unsupported allegations defeat a motion to dismiss. Thereafter, plaintiffs can do expensive and intrusive discovery into the website's subjective intent, raising defense costs substantially and extending the case to summary judgment or possibly a trial.¹¹ As a result, few if any websites actually rely on Section 230(c)(2)'s protection; everyone relies on Section 230(c)(1). Indeed, we've recently seen filtering cases—where Section 230(c)(2) clearly should have applied—decided on 230(c)(1) grounds instead.¹² It appears Sen. Portman may not appreciate how Section 230(c)(2) has effectively failed in the field.

I hope this essay helps explain why so many in the Internet community have expressed grave concerns about SESTA's effects despite Sen. Portman's efforts to marginalize the concerns. The sponsors apparently think the bill wouldn't change Section 230 for "good actors" when, in fact, it would eviscerate the immunity.

¹⁰ See generally Eric Goldman, *Online User Account Termination and 47 U.S.C. §230(c)(2)*, 2 U.C. IRVINE L. REV. 659 (2012), <https://ssrn.com/abstract=1934310>.

¹¹ E.g., *e-ventures Worldwide v. Google, Inc.*, 2:14-cv-00646-PAM-CM (M.D. Fla. Feb. 8, 2017); see also Eric Goldman, *First Amendment Protects Google's De-Indexing of "Pure Spam" Websites—e-ventures v. Google*, Tech. & Marketing L. Blog, Feb. 9, 2017, <http://blog.ericgoldman.org/archives/2017/02/first-amendment-protects-googles-de-indexing-of-pure-spam-websites-e-ventures-v-google.htm>.

¹² See, e.g., *Sikhs for Justice "SFJ", Inc. v. Facebook, Inc.*, 144 F. Supp. 3d 1088 (N.D. Cal. 2015), *aff'd*, No. 15-17441 (9th Cir. Sept. 13, 2017); see also Eric Goldman, *Facebook Can Legally Block Pages Without Any Explanation—Sikhs For Justice v. Facebook*, Tech. & Marketing L. Blog, Nov. 30, 2015, <http://blog.ericgoldman.org/archives/2015/11/facebook-can-legally-block-pages-without-any-explanation-sikhs-for-justice-v-facebook-forbes-cross-post.htm>.