Annie McAdams

From:	Annie McAdams
Sent:	Tuesday, May 26, 2020 5:28 PM
To:	Pandya, Brian (OASG)
Cc:	Willard, Lauren (OAG)
Subject:	RE: DOJ Section 230 workshop -- follow-up call?
Attachments:	2020-02-25 Pltf Resp MTD dkt36 (002).pdf; 2019 11 26 Response to Mandamus Petition (JD2).pdf; Record ISO Mandamus Petition (4) (1).pdf; 2019-11-04 SF 91a MTD 2ndAmndPet (FS).pdf

Brian & Lauren,

See attached briefing. I have included:

1. Facebook's mandamus on the 230/FOSTA/SESTA
2. Saleforce's motion to dismiss on 230/FOSTA/SESTA (pending our response)
3. Jane Doe's response to the Facebook mandamus
4. Jane Doe's response to Mailchimp motion to dismiss on 230/FOSTA/SESTA

I think the Facebook response is the best plain language. I also included the Mailchimp response because I think it extends the Facebook response clearly. I included both the Facebook mandamus and the Salesforce dismissal to give full view of the technology defendants arguments.

Thank you for your call today. Call anytime,

Annie

ANNIE MCADAMS PC
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From: Pandya, Brian (OASG) [redacted]>
Sent: Friday, May 22, 2020 3:06 PM
To: Annie McAdams <annie@mcadamspc.com>
Cc: Willard, Lauren (OAG) [redacted]>
Subject: RE: DOJ Section 230 workshop -- follow-up call?

Thanks Annie. Can we shoot for Tuesday afternoon, say at 4:30e/3:30c? This afternoon has gotten hectic (not what you want going into a holiday weekend) and I now have some meetings Tuesday morning although I could do 11:30e/10:30c if that is better for you.

From: Annie McAdams <annie@mcadamspc.com>
Sent: Friday, May 22, 2020 4:02 PM
To: Pandya, Brian (OASG) [redacted]>
Cc: Willard, Lauren (OAG) [redacted]>
Subject: Re: DOJ Section 230 workshop -- follow-up call?

Sorry for late reply. I can still make today work. And Tuesday works as well.

Annie

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On May 21, 2020, at 9:46 AM, Pandya, Brian (OASG) [redacted]> wrote:

How about tomorrow at 5e/4c, or 11e/10c on Tuesday? My colleague Lauren Willard, who you probably met at our conference in February, will also join us on the call.

From: Annie McAdams <annie@mcadamspc.com>
Sent: Wednesday, May 20, 2020 8:37 PM
To: Pandya, Brian (OASG) [redacted]>
Subject: Re: DOJ Section 230 workshop -- follow-up call?

Of course. Let me know best time for y'all.

Annie

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On May 20, 2020, at 4:18 PM, Pandya, Brian (OASG) [redacted]> wrote:

Hi Annie,

I hope all is well in Houston. I wanted to see if you had a few minutes on Friday afternoon or early next week for a follow-up discussion on Section 230. We wanted to share some thoughts post-workshop (which seems like an eon ago) and bounce some ideas.

Regards,
Brian

Brian H. Pandya
Deputy Associate Attorney General
U.S. Department of Justice
Direc [redacted]
Mobi [redacted]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

JANE DOE,	§	
	§	
Plaintiff,	§	
	§	
v.	§	Case No. 1:19-cv-05393-WMR
	§	
THE ROCKET SCIENCE	§	
GROUP LLC d/b/a MAILCHIMP,	§	
	§	
Defendant.	§	

PLAINTIFF'S RESPONSE TO
DEFENDANT MAILCHIMP'S MOTION TO DISMISS

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INTRODUCTION

Mailchimp's motion to dismiss centers on the core theme that Mailchimp is not an "actual" sex trafficker. Therefore, Mailchimp argues, it cannot be liable for damages stemming from sex trafficking that occurred as a result of its email marketing services. The law does not shield Mailchimp from liability.

In enacting the Trafficking Victims Protection Reauthorization Act (TVPRA), Congress did not limit the scope of civil liability to "actual" sex traffickers who engage directly with sex trafficking victims. Rather, the statute extends liability to those who benefit from assisting the actions of persons who they should have known were violating sex trafficking laws.

The statute permits victims of sex trafficking, like Jane Doe, to sue defendants who profit from business dealings with those who they should have known were violating sex trafficking laws. Here, Mailchimp chose to profit from entering into business with YesBackpage, an internet forum for sex trafficking whose openly stated goal was to replace the notorious sex trafficking hub Backpage following its seizure by the U.S. government. YesBackpage paid Mailchimp for its marketing services, which helped drive sex traffickers to YesBackpage. The TVPRA, however, does not permit a defendant to profit from assisting a customer in building its business when that business is an illegal sex trafficking enterprise.

While Mailchimp asserts that any state tort claims are preempted by the Communications Decency Act (CDA), Mailchimp's arguments are not consistent with the text or purpose of the CDA, nor can they be squared with the strong presumption against preemption. The original purpose of the CDA was to curb defamation liability for internet companies stemming from defamatory content posted online by third parties. Importantly, Section 230 of the CDA explicitly states that it is *not* intended to preempt state laws that are consistent with the section. Congress recently amended Section 230 to reinforce that the section has *no effect* on sex trafficking law. The purpose of this amendment was to remove any obstacles to claims designed to fight human trafficking, whether under federal or state law.

Jane Doe's state law claims are entirely consistent with Section 230 and its exemption for claims under Section 1595. Jane Doe's state law claims stem from the same sex trafficking conduct that Section 1595 was designed to punish. These state law claims are not preempted, are adequately pleaded and proper under Georgia state law, and should be allowed to proceed.

BACKGROUND

Sex trafficking is a multi-billion dollar industry that has experienced extreme growth in recent years due to the increased use of the internet to facilitate the sale of its victims. Dkt. 35 ¶¶ 4, 27-28. The website Backpage served as the internet's dominant marketplace for sex trafficking. *Id.* ¶¶ 3, 31-32. As a result, the U.S. government seized and shut down Backpage. *Id.* ¶¶ 3, 30-32. The seizure of Backpage was significant international news that resulted in policy changes at major technology companies. *Id.* ¶¶ 33-34.

YesBackpage openly claims to be a replacement for Backpage and, like its predecessor, serves as a forum for sex traffickers to advertise and sell sex trafficking victims. *Id.* ¶¶ 4-5, 9, 35, 38-39. YesBackpage hired defendant Mailchimp, an internet marketing company, to help advertise YesBackpage, which sought to reach sex traffickers who would post victims for sale on YesBackpage. *Id.* ¶¶ 6-11, 64-66.

Mailchimp sent email campaigns directly to sex traffickers, thereby driving sex traffickers to YesBackpage and expanding the pool of sex trafficking victims for sale on the website. *Id.* ¶¶ 6-11, 61-67, 81. For example, Mailchimp sent an email on YesBackpage's behalf to potential sex traffickers, highlighting that YesBackpage's servers had moved to the Netherlands so its users' "information is safer from the gov, as is the site." *Id.* ¶ 21. YesBackpage paid Mailchimp for its services. *Id.* ¶¶ 54, 63-66. Mailchimp knew or should have known that YesBackpage was engaged in advertising sex trafficking, particularly in light of YesBackpage's explicit references to Backpage and Mailchimp's active monitoring of the emails sent by its users. *Id.* ¶¶ 6-9, 30-41, 48-54, 76, 81. Mailchimp also collected information that it used for its own benefit. *Id.* ¶¶ 68-72.

Plaintiff Jane Doe is a sex trafficking victim. *Id.* ¶ 20. Following the seizure of Backpage, Jane Doe experienced a brief reprieve from the sex trafficking trade. *Id.* ¶ 21. On July 3, 2018, however, Mailchimp sent an email on behalf of YesBackpage to Jane Doe's sex trafficker. *Id.* ¶ 22. Throughout July and August of 2018, Mailchimp continued to send targeted emails to Jane Doe's sex trafficker. *Id.* After receiving emails from Mailchimp, Jane Doe's trafficker forcibly trafficked Jane Doe for sex through postings on YesBackpage. *Id.* ¶¶ 22, 55. Jane Doe was trafficked on YesBackpage throughout 2018, and during that time YesBackpage continuously contacted Jane Doe and her trafficker through Mailchimp. *Id.* ¶¶ 23-24. Jane Doe sustained irreversible injuries as a result of being trafficked on YesBackpage because of Mailchimp's email campaign. *Id.* ¶¶ 12, 20-24, 55, 81, 91-93. Jane Doe filed this lawsuit to seek compensation under the TVPRA and Georgia law. Dkt. 1. Mailchimp moved to dismiss. Dkt. 15-1. Jane Doe subsequently filed an amended complaint ("Complaint"). Dkt. 35.

LEGAL STANDARD

A plaintiff's pleading must offer a "short and plain statement of the claim showing that the pleader is entitled to relief." FED. R. CIV. P. 8(a)(2). To avoid dismissal under Rule 12(b)(6), a complaint must "state a claim to relief that is plausible on its face. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citations omitted). While the plaintiff's claim to relief must be plausible, it need not be probable. *Id.* In reviewing a motion to dismiss, the Court must "accept as true the facts alleged in the complaint, drawing all reasonable inferences in a plaintiff's favor." *Bailey v. Wheeler*, 843 F.3d 473, 480 (11th Cir. 2016).

<u>ARGUMENT</u>

I. <u>There Is No Basis To Dismiss The TVPRA Claim.</u>

A. The Complaint adequately alleges a violation of the TVPRA.

The TVPRA permits a sex trafficking victim to "bring a civil action against the perpetrator (or whoever knowingly benefits … from participation in a venture which that person knew or should have known has engaged in [sex trafficking])." 18 U.S.C. § 1595(a). Therefore, the statute permits a party to bring a civil claim against perpetrators *and* against a person who, although not the actual perpetrator of a violation, knowingly benefits from participating in a venture that it should have known was engaged in a violation. *See Plaintiff A v. Schair*, No. 2:11-CV-00145-WCO, 2014 WL 12495639, at *3 (N.D. Ga. Sept. 9, 2014). The Complaint adequately alleges that (1) YesBackpage violated 18 U.S.C. § 1591(a), (2) Mailchimp knowingly benefitted from participating in a venture with YesBackpage, and (3) Mailchimp should have known YesBackpage was perpetrating violations.

First, the Complaint alleges that YesBackpage perpetrated a violation of 18 U.S.C. § 1591(a) by advertising persons for sex trafficking or benefitting from participating in such advertisement. YesBackpage engages in sex trafficking under Section 1591(a)(1) by providing a forum for advertising sex trafficking victims for sale. Dkt. 35 ¶¶ 5-6, 22-24, 35-36, 42, 55, 63. YesBackpage openly states that it is a replacement for Backpage, a well-known sex trafficking hub on which sex traffickers advertised both children and adults for commercial sex before its seizure by the U.S. government. *Id.* ¶¶ 3-5, 30-39. Like Backpage, YesBackpage knowingly offers sex acts for sale by sex trafficking victims. *Id.* ¶¶ 35, 41. Alternatively, for essentially the same reasons, YesBackpage violated Section 1591(a)(2) by assisting sex traffickers in advertising their victims. *See* 18 U.S.C. § 1591(e)(4) (a party "participates" in a venture by "knowingly assisting" a violation).

Second, the Complaint alleges that Mailchimp knowingly benefited from participating in a venture with YesBackpage. Mailchimp helped YesBackpage market to sex traffickers and solicit additional advertisements for sex trafficking victims. Dkt. 35 ¶¶ 22-25, 54, 63-66. Mailchimp not only "participated" in the venture, but played an integral role in facilitating sex trafficking through YesBackpage by assisting YesBackpage in making targeted communications to sex traffickers and encouraging sex traffickers to post victims for sale. *Id.* ¶¶ 22-25, 60-61. YesBackpage was a paying customer of Mailchimp, and therefore Mailchimp knowingly benefitted financially from its work with YesBackpage. *Id.* ¶¶ 63-66. Further, Mailchimp benefitted through advertising itself on YesBackpage emails and collecting information on YesBackpage's contacts. *Id.* ¶¶ 67-72.

Third, the Complaint alleges that Mailchimp knew or should have known that the venture was engaged in violations of Section 1591. Mailchimp knew of the activity occurring through YesBackpage and knowingly facilitated YesBackpage's trafficking when it sent email campaigns to sex traffickers. *Id.* ¶¶ 11, 25, 61. Moreover, YesBackpage was created in the wake of the U.S. government's highly publicized seizure and shutdown of Backpage, a "hub of human trafficking" and the "dominant marketplace for illicit commercial sex." *Id.* ¶¶ 4-5, 9, 29-30, 32-35. As its name makes clear, YesBackpage served as a replacement for Backpage and openly advertised itself as such. *Id.* ¶¶ 4-5, 35-41. Moreover, Mailchimp learns about its customers' businesses and monitors their activities to ensure compliance with policies that prohibit promoting websites offering illegal activities or sexual encounters. *Id.* ¶¶ 37-40, 48-53. The Complaint sufficiently alleges that Mailchimp "should have known" that YesBackpage was engaged in violations of sex trafficking laws and that Mailchimp was assisting such violations.

B. Mailchimp's strawman arguments against Jane Doe's TVPRA claim do not align with Jane Doe's actual pleading obligations.

Nearly all of Mailchimp's alleged pleading deficiencies relate to facts that Jane Doe had no obligation to plead. Mailchimp claims that Jane Doe failed to state a claim that Mailchimp violated Section 1591(a)(2). *See* Dkt. 15-1 at 8-9. But she was not required to establish that *Mailchimp* was a perpetrator that violated Section 1591. Jane Doe can recover against Mailchimp under Section 1595 where *YesBackpage* was the perpetrator if Mailchimp knowingly benefitted from participation in a venture which Mailchimp knew or should have known has engaged in a violation. YesBackpage's violation of Section 1591 provides the "predicate act" for a claim against Mailchimp. *See M.A. v. Wyndham Hotels & Resorts, Inc.*, No. 2:19-CV-849, 2019 WL 4929297, at *2 (S.D. Ohio Oct. 7, 2019). Mailchimp's arguments fail based on its misunderstanding of this simple premise.

First, Mailchimp argues that Jane Doe fails to sufficiently allege Mailchimp's participation in a sex trafficking venture because Mailchimp's marketing emails advertised YesBackpage, but did not advertise "a person" for commercial sex. Dkt. 15-1 at 10-11. *Mailchimp* is not required to have advertised a person for sex for Jane

Doe to have a claim against Mailchimp. *See M.A.*, 2019 WL 4929297, at *7-8. It is sufficient that *YesBackpage* violated Section 1591, and that Mailchimp assisted.

Second, Mailchimp argues that Jane Doe has failed to allege facts sufficient to establish that Mailchimp had "actual knowledge" about her.[1] Dkt. 15-1 at 11-13. None of Mailchimp's authorities state that a plaintiff under Section 1595 must allege that the defendant had "victim-specific" knowledge of the plaintiff to plausibly plead a claim under the TVPRA. *Id.* at 12. This standard would allow a defendant to facilitate the sex trafficking of victims without liability if the defendant avoided learning details about any specific victim, which would be inconsistent with the TVPRA's remedial intent. *See Huett v. Weinstein Co. LLC*, No. 218CV06012SVWMRW, 2018 WL 6314159, at *1 (C.D. Cal. Nov. 5, 2018). The Complaint, however, does state that "Mailchimp directly and knowingly facilitated and profited from the trafficking of Jane Doe." Dkt. 35 ¶ 11.

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[1] Mailchimp also complains that there are no allegations regarding the "circumstances of Jane Doe's victimization" or the means used by Jane Doe's sex trafficker. Dkt. 15-1 at 13. The Complaint does contain allegations regarding Jane Doe's victimization and trafficker. Dkt. 35 ¶¶ 20-25, 55. In any event, a plaintiff is not required to plead that sex trafficking or a commercial sex act was actually completed. *See Ricchio v. McLean*, 853 F.3d 553, 557-58 (1st Cir. 2017).

Mailchimp also ignores Jane Doe's actual burden. Under Section 1595, Jane Doe is required to allege only that Mailchimp knew or *should have known* that the venture was engaged in a violation. *M.A.*, 2019 WL 4929297, at *9; *see also Ricchio v. Bijal, Inc.*, No. CV 15-13519-FDS, 2019 WL 6253275, at *9 (D. Mass. Nov. 22, 2019) (knowledge standard is akin to a negligence standard). Mailchimp had "knowledge of activity occurring through YesBackpage." Dkt. 35 ¶ 61. Further, the Complaint alleges that Mailchimp *should have known* YesBackpage was violating sex trafficking laws because YesBackpage advertised itself as a replacement for Backpage. *See supra* at 7. And because Mailchimp purports to monitor its users' activities, it should have known that YesBackpage was engaged in illegally posting sex for sale in violation of the law and Mailchimp's own policies. Dkt. 35 ¶¶ 37-40, 48-53. The Complaint sufficiently alleges that Mailchimp knew or should have known that YesBackpage was engaged in conduct violating sex trafficking laws.

II. Section 230 Of The CDA Does Not Bar Jane Doe's State Law Claims.

A. The standards for finding federal preemption are narrow and demanding.

Congressional intent must be the "ultimate touchstone" in any preemption analysis. *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 516 (1992). That intent is primarily discerned from the statutory language and framework. *Medtronic, Inc. v.*

Lohr, 518 U.S. 470, 486 (1996). Courts must also consider the context of the statute, including its history, structure, and purpose.

There is a strong presumption against preemption in areas of traditional state regulation. The Supremacy Clause invalidates state laws that are "contrary" to federal law. U.S. CONST. art. VI, cl. 2; *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 522 (1981). "[B]ecause the States are independent sovereigns in our federal system, [the Supreme Court has] long presumed that Congress does not cavalierly pre-empt state-law causes of action." *Medtronic*, 518 U.S. at 485. Any preemption analysis must therefore "start with the assumption that the historic police powers of the States [are] not to be superseded by [federal law] unless that [is] the clear and manifest purpose of Congress." *Id.*; *Cipollone*, 505 U.S. at 516.

The presumption against preemption applies to *whether* Congress preempted state law and to the *scope* of preemption. *Medtronic,* 518 U.S. at 485. While an express preemption provision means Congress intended some preemption, courts "must nonetheless 'identify the domain expressly pre-empted.'" *Id.* at 484. There is a strong presumption against preemption when the subject matter, such as remedies for personal injuries, has traditionally been regarded as within the scope of states' rights. *See Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 230 (1947).

B. Section 230 as amended does not preempt state civil claims for human trafficking.

1. *The relevant statutory language.*

There are three provisions of the CDA that are critical to the preemption analysis. Mailchimp relies entirely on the first and ignores the other two.

First, Section 230(c)(1) states:

> No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.

47 U.S.C. § 230(c)(1). Mailchimp contends this provision grants "immunity" to interactive computer services from any claim that depends on third-party content. Dkt. 15-1 at 14-19. Such a construction would effectively immunize internet and technology companies from *any liability* for torts committed, regardless of the company's level of knowledge or involvement. But as will be shown below, the plain statutory language, construed in light of its history and context, does not support such an all-encompassing construction. *See infra* Part II(B)-(C).

Second, Section 230(e)(3) contains the preemption clause and a savings clause that precedes it:

> Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section. No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.

47 U.S.C. § 230(e)(3). This is an unusual preemption provision in that it appears to merely reiterate the principle that a federal statute preempts inconsistent state law. The Court's task is to determine the scope of the provision's preemptive effect.

Third, Section 230(e)(5) clarified that the Allow States and Victims to Fight Online Sex Trafficking Act (FOSTA) had no effect on sex trafficking law. *See* 47 U.S.C. § 230(e)(5). Although the CDA, as originally passed in 1996, did not preempt state law civil sex trafficking claims, the 2018 FOSTA amendment to the CDA reemphasized that intent in light of the large body of federal cases that had held the CDA barred many varieties of civil and criminal cases against internet companies.

In FOSTA, Congress amended Section 230 by adding subsection (e)(5), which is entitled "No effect on sex trafficking law." It states that nothing in Section 230 "shall be construed to impair or limit":

(A) Civil claims under a federal statute, 18 U.S.C. § 1595, for facilitating sex trafficking if the underlying conduct violates 18 U.S.C § 1591;

(B) Criminal prosecutions under state law for conduct that violates the federal sex trafficking statute, 18 U.S.C § 1591; and

(C) Criminal prosecutions under state law for conduct that violates a new statute created by FOSTA, 18 U.S.C. § 2421A, that criminalizes the online facilitation of prostitution.

2. *Jane Doe's claims are consistent with the federal sex trafficking statute.*

Any analysis of Section 230's preemptive scope must consider the effect of the 2018 FOSTA amendments in Section 230(e)(5). *See Cipollone*, 505 U.S. at 520-21 (statute had different preemptive scope after amendment). The question is whether Jane Doe's claims are consistent with the exemptions in subsection (e)(5).

The CDA preemption provision, Section 230(e)(3), confirms that "any State law that is consistent" with Section 230 is not preempted. 47 U.S.C. § 230(e)(3). Because the FOSTA amendment is part of Section 230, state laws that are consistent with the amendment are not preempted. "[T]he phrase 'state law' [includes] common law as well as statutes and regulations." *Cipollone*, 505 U.S. at 522.

Section 1595 imposes civil liability on "whoever knowingly benefits . . . from participation in a venture which that person knew or should have known has engaged in [sex trafficking]." 18 U.S.C. § 1595(a). Jane Doe's common-law tort claims allege Mailchimp breached a duty: in failing to stop or allowing the online posting of Jane Doe; in failing to monitor emails sent on its platform to determine whether the emails contained illegal content or associations with illegal websites; and in failing to confirm that its customers were using the platform for legitimate business interests.

Dkt. 35 ¶ 81. Because these state law claims are the same sort of claims Congress protected against preemption, they are not preempted.

3. *FOSTA's language reinforces the lack of preemption.*

FOSTA's express language repeatedly confirms that Congress intended to remove *all* obstacles in the CDA to fighting human trafficking, including those that prevented victims from asserting civil claims under state law. Congress clearly stated its purpose for amending Section 230 in FOSTA's enacting clause:

> To amend the Communications Act of 1934 to clarify that section 230 of such Act does not prohibit the enforcement against providers and users of interactive computer services of Federal and *State* criminal and *civil* law relating to sexual exploitation of children or sex trafficking, and for other purposes.

FOSTA, Pub. L. No. 115-164, 132 Stat. 1253, 1253 (2018) (emphasis added). A statutory preamble or statement of purpose is a valid means of supporting a narrow scope of preemption. *See Medtronic,* 518 U.S. at 474, 487, 490. And Congress's statement of purpose in FOSTA is consistent with Section 230.

Section 2 of FOSTA further states the "sense of Congress" that Section 230 "was never intended to provide legal protection to . . . websites that facilitate traffickers in advertising the sale of unlawful sex acts with sex trafficking victims" and that "clarification of such section is warranted to ensure that such section does not provide such protection to such websites." Sec. 2, 132 Stat. at 1253. Again, Congress did not distinguish between state or federal claims.

Next, Section 4 of FOSTA, amending Section 230, is titled:

> **SEC. 4. ENSURING ABILITY TO ENFORCE FEDERAL AND STATE CRIMINAL AND CIVIL LAW RELATING TO SEX TRAFFICKING.**

Sec. 4, 132 Stat. at 1254. State civil law is expressly included and tied directly to the amendments. FOSTA also contains its own savings clause in Section 7:

> **SEC. 7. SAVINGS CLAUSE.**
>
> Nothing in this Act or the amendments made by this Act shall be construed to limit or preempt any civil action or criminal prosecution under Federal law or State law (including State statutory law and State common law) filed before or after the day before the date of enactment of this Act that was not limited or preempted by section 230 of the Communications Act of 1934 (47 U.S.C. 230), as such section was in effect on the day before the date of enactment of this Act.

Sec. 7, 132 Stat. at 1255. Thus, Congress confirmed that there are civil actions under state common law and statutory law that are not preempted.

FOSTA's legislative history reinforces the lack of preemption. Courts must interpret the statutory text "against the backdrop of regulatory activity undertaken by state legislatures and [the] federal [government]." *Cipollone*, 505 U.S. at 519. When Congress passed Section 230 in 1996, human trafficking was an unknown legal concept. By the time FOSTA was introduced in early 2017, however, every state had enacted criminal laws prohibiting human trafficking and nearly three-quarters had enacted civil remedies. Congress also knew that websites had "become one of the primary channels of sex trafficking." Bob Goodlatte, FOSTA Committee Report, H.R. Rep. No. 115-572, at 3 (2018). Congress knew "bad-actor websites" had been improperly shielded from liability by the CDA. *Id.* at 4.

4. *The presumption against preemption requires that Mailchimp's construction be rejected.*

Even if Mailchimp's construction was plausibly supported by the statutory text, the presumption against preemption imposes upon courts "a duty to accept the reading disfavoring pre-emption." *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005); *see also Cipollone*, 505 U.S. at 518 (noting the "presumption reinforces the appropriateness of a narrow reading" of an express preemption provision). Here, FOSTA's language and legislative history clearly show that Congress did not intend to preempt state law. *See also supra* Part II(A).

C. The sex trafficking claims do not treat Mailchimp as a publisher.

Claims consistent with those found in Section 230(e)(5) of the FOSTA 2018 amendment are not preempted regardless of whether they treat an internet company as the publisher of third-party content. But even if that provision did not apply, Jane Doe's claims would still not be preempted because they do not treat Mailchimp as the publisher of third-party content under a proper construction of Section 230(c)(1).

1. *The statutory language is narrow.*

Mailchimp relies on Section 230(c)(1) to argue internet companies have a broad immunity from any suit that arises from content generated by third parties.

> No provider or user of an interactive computer service shall be *treated as the publisher or speaker* of any information provided by another information content provider.

47 U.S.C. § 230(c)(1) (emphasis added). Congress could have simply adopted a provision that states:

> Providers and users of interactive computer services shall be *immune from any legal action that relates to* content provided by a third party.

Instead, it defined the area of protection using words with unique legal meanings.

As many courts have observed, the word "immunity" appears nowhere in the statute. *See Jones v. Dirty World Entm't Recordings LLC*, 755 F.3d 398, 406 (6th Cir. 2014); *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1100 (9th Cir. 2009); *City of Chi., Ill. v. StubHub!, Inc.*, 624 F.3d 363, 366 (7th Cir. 2010). That word originates with the Fourth Circuit's decision in *Zeran v. America Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997). Unfortunately, courts parroted *Zeran*'s language, expanding a narrow protection into broad immunity. But some courts declined to read so much into Congress's words. The Seventh Circuit, for example, held that "subsection (c)(1) does not create an 'immunity' of any kind," but "limits who may be called the publisher of information that appears online." *StubHub!*, 624 F.3d at 366.

2. *The terms "publisher" and "speaker" relate to defamation.*

The CDA does not define "publisher" or "speaker," so the words must be given their ordinary meaning by examining the context, legislative history, and judicial constructions of the words in other contexts. *See Yates v. United States*, 135 S. Ct. 1074, 1081-85 (2015). Properly construed, this is the language of defamation law. The context in which the words are used concerns liability for information provided online by third parties. And the statute's legislative history shows the kind of liability Congress had in mind. Section 230(c)(1) was proposed and adopted to overrule *Stratton Oakmont, Inc. v. Prodigy Services Co.*, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995). *See* 141 Cong. Rec. H8469-72 (daily ed. Aug. 4, 1995).

In *Stratton Oakmont*, the court held Prodigy liable for defamation. Prodigy had exercised editorial control akin to a publisher by promulgating content guidelines and using screening software, which subjected it to defamation liability despite its lack of knowledge of the content. 1995 WL 323710, at *3-4. Congress responded with Section 230. *See* 141 Cong. Rec. H8469-72 (daily ed. Aug. 4, 1995); H.R. Rep. No. 104-458, at 194 (1996); *see also* 47 U.S.C. § 230(b)(3)-(4).

Given this context, to treat an internet company as a "publisher or speaker" is to impose liability on it (1) for defamatory content provided by a third party (2) of which it had no knowledge (3) because it acted as a "Good Samaritan" by trying to screen objectionable material. Jane Doe asserts no claim for defamation. Dkt. 35 ¶¶ 43-47. She alleges Mailchimp *knew* or should have known that its emails were being used to solicit ads from sex traffickers. *Id.* ¶¶ 6-9, 30-41, 48-54, 61, 76, 81.

Even if the protections afforded by Section 230(c)(1) are broader than Congress intended, nothing indicates an intent to give the word "publisher" a broader meaning than it has in defamation law. Section 230 does not convey a "clear and manifest purpose" by Congress to preempt anything other than defamation and similar claims for which publication is an essential element.[2] *See Medtronic,* 518 U.S. at 485 (discussing the presumption against preemption); *see also StubHub!*, 624 F.3d at 366 (obscenity and copyright infringement might also be covered). Jane Doe's claims are not preempted regardless of FOSTA's effect on the statute.[3]

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[2] The Seventh Circuit has asked: "Why should a law designed to eliminate [an internet company's] liability to the creators of offensive material end up defeating claims by the victims of tortious or criminal conduct?" *Doe v. GTE Corp.*, 347 F.3d 655, 660 (7th Cir. 2003). It is absurd to conclude that Congress intended blanket immunity for internet companies that facilitated the new crime it created.

[3] Mailchimp cites a California decision that concluded claims brought by sex trafficking survivors were preempted by the CDA. Dkt. 15-1 at 19 n.8. Two Texas decisions, however, recently decided that state law claims brought by trafficking survivors are not preempted by the CDA. Nos. 2018-69816 & 2018-82214 (334th Dist. Ct. Harris Cty., Tex.); No. 2019-16262 (151st Dist. Ct. Harris Cty., Tex.). Counsel for Jane Doe here is counsel in all three cases, but the hearing in the California case was held in the absence of counsel representing Jane Doe here.

III. The Complaint Adequately Alleges Jane Doe's State Law Claims.

A. The Complaint states a claim for negligence.

Mailchimp argues that Jane Doe's negligence claim fails because she has not alleged a cognizable duty that Mailchimp owed to her. Dkt. 15-1 at 20-21. As Mailchimp has recognized, under Georgia law, duty can be imposed either "by a valid statutory enactment of the legislature" or "by a recognized common law principle." *Id.* at 20. Here, the TVPRA imposes a legal duty on Mailchimp to refrain from knowingly benefiting from assisting actions which it should have known violated sex trafficking laws. *See* 18 U.S.C. § 1595(a). This provision imposes a standard of care akin to a negligence standard. *See supra* at 10. Accordingly, the TVPRA gives rise to a duty sufficient to support Jane Doe's common law negligence claim. *See McLain v. Mariner Health Care, Inc.*, 631 S.E.2d 435, 437-38 & n.18 (Ga. Ct. App. 2006) (allegations of violations of federal statutes were competent to support a breach of duty). Further, Mailchimp undertook a duty to Jane Doe because Mailchimp purported to ensure that its clients complied with its policies prohibiting websites selling sexual encounters, but Mailchimp failed to adequately monitor the activities of its users. *See* Dkt. 35 ¶¶ 48-59.

Mailchimp also argues that Jane Doe fails to allege both cause in fact and proximate cause. Dkt. 15-1 at 21-23. As to cause in fact, Jane Doe was harmed directly because of Mailchimp's conduct. Jane Doe's sex trafficker received targeted emails from Mailchimp on behalf of YesBackpage on July 3, 2018 and through July and August 2018. Dkt. 35 ¶ 22. As a result, Jane Doe's sex trafficker forcibly sold her for sex on YesBackpage and trafficked her throughout 2018. *Id.* ¶¶ 22-23. During this time, YesBackpage continuously contacted Jane Doe and her sex trafficker through Mailchimp's email marketing campaigns. *Id.* ¶ 24. Thus, "Jane Doe was sex trafficked as a direct result of a Mailchimp driven YesBackpage advertisement." *Id.* ¶ 55. Mailchimp also caused Jane Doe's injuries by: failing to stop or allowing the online posting of Jane Doe, failing to monitor emails sent on its platform to determine whether the emails contained illegal content or associations with illegal websites, and failing to confirm that its customers were using the platform for legitimate business interests. *Id.* ¶ 81. At minimum, the Complaint permits a reasonable inference that Mailchimp's marketing caused Jane Doe's harm.

Mailchimp argues that Jane Doe cannot establish proximate cause because the "intervening criminal act" of her sex trafficker severs any possible causal link. Dkt. 15-1 at 22-23. If Mailchimp were correct, it would be impossible to bring a negligence claim against defendants who facilitate sex trafficking because their liability would always be cut off by the sex trafficker. While an intervening criminal act can defeat proximate cause, this rule is inapplicable where the intervening criminal act is a "reasonably foreseeable consequence of defendants' negligent act or omission." *Bethany Grp., LLC v. Grobman*, 727 S.E.2d 147, 150 (Ga. Ct. App. 2012). The question of reasonable foreseeability of a criminal act is "generally for a jury's determination rather than for summary adjudication by the courts." *Id.* Mailchimp's marketing campaign served to drive additional traffic to a sex trafficking hub and expand the number of sex trafficking victims for sale. Dkt. 35 ¶¶ 35-42, 61-66. The sex trafficker's criminal acts were the reasonably foreseeable (and even expected) results of Mailchimp's conduct. *See, e.g.*, *In re Equifax, Inc., Customer Data Sec. Breach Litig.*, 362 F. Supp. 3d 1295, 1319-21 (N.D. Ga. 2019); *Warner v. Arnold*, 210 S.E.2d 350, 352-54 (Ga. Ct. App. 1974).

B. Jane Doe is not prohibited from pleading negligence per se.

Mailchimp argues that Jane Doe's negligence per se claim fails because she is prohibited from maintaining a cause of action under state law where the TVPRA provides a private cause of action. Dkt. 15-1 at 23. Mailchimp's authority, however, does not address negligence per se. Rather, it addresses whether a plaintiff may bring a claim under both Georgia Code Section 51-1-6 and a federal statute. *See Higdon v. Jackson*, 393 F.3d 1211, 1221-22 (11th Cir. 2004). This Court has already rejected Mailchimp's argument that the same principles apply to a negligence per se claim. *See In re Arby's Rest. Grp. Inc. Litig.*, No. 1:17-CV-0514-AT, 2018 WL 2128441, at *9 & n.11 (N.D. Ga. Mar. 5, 2018). In any event, nothing prohibits Jane Doe from asserting alternative claims at the pleadings stage. *See* FED. R. CIV. P. 8(d)(2). Mailchimp's additional arguments that Jane Doe has failed to allege causation or a violation of the TVPRA are addressed above. *See supra* Parts I, III(A).

C. The Complaint states a claim for gross negligence.

Mailchimp argues that Jane Doe's claim for gross negligence fails because she failed to plead duty and causation and failed to allege how Mailchimp's conduct displays an absence of "slight diligence." Dkt. 15-1 at 24. As explained above, the Complaint adequately alleges duty and causation. *See supra* Part III(A). Mailchimp used its software to help promote a website that was engaged in sex trafficking and that advertised itself as a replacement for a known sex trafficking hub. Dkt. 35 ¶¶ 4-9, 22-26, 30-42, 81. Under the circumstances, any persons "of common sense" would recognize that their actions in driving traffic to the website would facilitate sex trafficking. *See* GA. CODE ANN. § 51-1-4 ("[S]light diligence is that degree of care which every man of common sense, however inattentive he may be, exercises under the same or similar circumstances."). The question of whether Mailchimp's conduct amounts to gross negligence is a question that is properly for the jury, not one resolved by the court as a matter of law. *See Fed. Deposit Ins. Corp. v. Boggus*, No. 2:13-CV-00162-WCO, 2014 WL 12479645, at *4 (N.D. Ga. Aug. 25, 2014); *Wood v. Olson*, 121 S.E.2d 677, 678 (Ga. Ct. App. 1961).

D. Georgia law does not prohibit aiding and abetting claims.

Mailchimp argues that Jane Doe's claim for aiding and abetting should be dismissed because Georgia law does not provide an independent cause of action for aiding and abetting. Dkt. 15-1 at 24-25. Mailchimp's authority states only that there is no need for an independent cause of action for aiding and abetting *fraud* because a person who aids and abets fraud is liable for fraud as a joint tortfeasor. *Siavage v. Gandy*, 829 S.E.2d 787, 790 (Ga. Ct. App. 2019). Georgia law recognizes a separate cause of action for aiding and abetting. *See Insight Tech., Inc. v. FreightCheck, LLC*, 633 S.E.2d 373, 378 (Ga. Ct. App. 2006) ("Georgia courts have acknowledged a cause of action for procuring an injury or aiding and abetting in a wide array of civil cases …."); *see also TMX Fin., LLC v. Goldsmith*, 833 S.E.2d 317, 336 & n.9 (Ga. Ct. App. 2019) (plaintiffs sufficiently pleaded a claim for aiding and abetting a breach of fiduciary duty, distinguishing fraud). There is no basis to prohibit Jane Doe from pleading an aiding and abetting claim here.

CONCLUSION

For these reasons, Jane Doe requests that the Court deny Mailchimp's motion to dismiss.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that this response to Mailchimp's motion to dismiss was electronically filed and served on counsel of record using the CM/ECF system this 25th day of February 2020.

/s/ *David E. Harris*
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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing response to motion to dismiss has been prepared using 14 point Times New Roman font, with a top margin of not less than 1.5 inches and a left margin of not less than 1 inch in compliance with Local Rule 5.1(C) and (D).

/s/ *David E. Harris*
David E. Harris

No. 14-19-00847-CV

Fourteenth Court of Appeals
in Houston, Texas

In re Facebook, Inc. and Facebook, Inc. d/b/a Instagram

Original Proceeding from No. 2018-82214, 334th District Court of Harris County, Texas, Hon. Steven Kirkland, presiding

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Oral Argument Requested

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Statement of the Case

Jane Doe has sued Facebook and several other defendants for their roles in facilitating her victimization by sex traffickers. The Respondent is the Honorable Steven Kirkland, 334th District Court, Harris County, Texas. Judge Kirkland denied Facebook's Rule 91a motion to dismiss Jane Doe's lawsuit.

Issue Presented

Jane Doe accuses Facebook of violating state statutory and common law by facilitating her victimization by sex traffickers. Nothing in the language, context, or history of Section 230 of the federal Communications Decency Act indicates a congressional intent to preempt her claims. Congress even amended Section 230 in 2018 to clarify that the statute was never intended to impair the assertion of sex trafficking claims. Did the trial court abuse its discretion in denying Facebook's 91a motion to dismiss?

Introduction

Facebook almost entirely avoids the real issue in this mandamus—did Congress intend for Section 230 of the Communications Decency Act (CDA) to preempt state civil remedies against internet companies that facilitate online sex trafficking of minors?

When analyzing questions of preemption, Texas courts must apply the rigorous standards established by the United States Supreme Court and adopt any reasonable construction of statutory language that disfavors preemption. Facebook, as the party urging preemption, has the difficult burden of overcoming the presumption against preemption. That is particularly true when dealing with subjects that are traditionally regulated by the states, such as tort and health and safety law. But in the trial court, Facebook barely mentioned preemption, and it says even less to this Court on the subject.

Perhaps even more remarkable, Facebook also almost entirely disregards the fact that Congress amended the CDA in 2018 with the Fight Online Sex Trafficking Act (FOSTA). The legislative history of FOSTA, particularly when viewed in the context of the development of the CDA jurisprudence, and the language of the amendment itself, makes it painfully clear that Congress never intended the CDA to preempt human trafficking claims.

But one would never know that from Facebook's petition for writ of mandamus.

Statement of Facts

A trial court's ruling on a motion to dismiss under Rule 91a must be based solely on the pleadings, taking them as true. Tex. R. Civ. P. 91a.1; *Estate of Savana*, 529 S.W.3d 587, 592 (Tex. App.—Houston [14th Dist.] 2017, no pet.). Thus, this statement of facts is drawn from Jane Doe's allegations in her Second Amended Petition. *See* MR258-330.

I. Facebook and Human Trafficking

A. Facebook Connects People—Including Minors and Sex Traffickers

Facebook views "its company mission to connect people in order to create profit." MR279, ¶ 191. The profit component of the mission is important. Facebook collects and sells user data to enable marketers to reach targeted groups of potential customers and it sells ads that appear on Facebook, Instagram, or other platforms. MR281, ¶ 201. In its 2019 10-K, Facebook reported: "If we are unable to maintain or increase our user base and user engagement, our revenue and financial results may be adversely affected." MR285-86, ¶ 224.

Facebook provides sex traffickers with unfiltered access to minor users. MR277, ¶ 181. Those traffickers use the platform to "stalk, exploit, recruit, groom, and extort children into the sex trade." MR278, ¶ 184. It is frequently the first point of contact between sex traffickers and their victims. MR278, ¶ 185.

Facebook uses the user data it harvests and buys to direct users to persons they might want to meet. MR281, ¶ 202. This can facilitate human trafficking by identifying potential targets to traffickers and providing traffickers with a means of contacting the target. MR281, ¶ 202. Traffickers "friend" a victim's acquaintances—classmates, for instance—and use them as a bridge to victims "through 'shared' friends." MR278, ¶ 188. The trafficker can then recruit or groom a target by gaining her trust. MR282, ¶ 213.

This grooming process involves repeated messages that are inappropriate for an adult to send to a minor, such as:

- "I love you,"
- "I think you're beautiful, I'll encourage you to show your body,"
- "I'll make your life better,"

- "I'll encourage you to take risks, you're an adult,"
- "I'll protect you," or
- "I'll make you successful."

Id. These are "red flag" messages that Facebook could be flagging when they occur in contexts that "indicate human trafficking[.]" MR283, ¶ 214. The technology to do this for private messages on Instagram has existed for a number of years. MR284, ¶ 218.

A trafficker can monitor a potential victim's activity and learn, for instance, that she is upset with her parents or is "Away from Family." MR278, ¶ 186; MR281, ¶ 199. From there, it is a reasonably easy process for the trafficker separate the minor from her family. MR278, ¶ 186.

B. Facebook Knows that Human Traffickers Use Its Platform to Find Victims Like Jane Doe

Facebook knows that human traffickers use its platform "to identify, cultivate, and then exploit human trafficking victims." MR282, ¶ 208. The characteristic internet interactions between predators and their victims and the increasing use of social media as a channel for sex trafficking has been well-known in law enforcement, academic, and social services communities for some time. *See, e.g.*, MR278, ¶ 186 (NYPD Vice Enforcement Unit); MR278, ¶ 188 (Indiana

State Police Internet Crimes Against Children Task Force); MR282, ¶ 209 (University of Toledo Human Trafficking and Social Justice Institute).

Facebook noted in its Content Standards Forum that "[m]any experts believe that we have a responsibility to educate the public about the nature of human trafficking." MR280, ¶ 196. In another human trafficking case, Facebook has pled that "Human Trafficking is abhorrent and is not allowed on Facebook." MR258, ¶ 2. Mark Zuckerberg has testified to Congress that "[t]he broadest mistake made was not taking a broad enough view of Facebook's responsibility to the community and content." MR279, ¶ 194. He has testified that Facebook needs to make sure that people are not using the platform to harm other people. MR280, ¶ 195. Facebook has the tools and resources to warn potential victims of human trafficking of the danger. MR280, ¶¶ 97-98.

Facebook collects data on every action taken by users on the platform and obtains detailed dossiers on users from commercial data brokers. MR280, ¶ 198. Facebook says that it can target users by "age, gender, locations, interest, and behaviors." MR280, ¶ 199. It can also micro-target groups "such as 40-year-old female motorcyclists in

Nashville, Tennessee," a group of 1,300 out of 1.4 billion users world-wide. MR279, ¶ 190; MR281, ¶ 200.

Facebook has claimed in the human trafficking case mentioned above that "[w]e use technology to thwart this kind of abuse and we encourage people to use the reporting links found across our site so that our team of experts can review content swiftly." MR258, ¶ 2. But Facebook does not warn potential victims of human trafficking: "Although it knows that its system facilitates human traffickers in identifying and cultivating victims, and it knows it has the capacity to target ads to specific groups, Facebook does not target warnings to its most vulnerable users." MR281, ¶ 203. Additionally, Facebook has made the situation worse by preventing adults from getting access to their children's Instagram accounts and does not require a minor to have parental authorization to open an account. MR285, ¶ 221.

II. Backpage.com and Human Trafficking

Jane Doe was trafficked on both Instagram and Backpage.com. MR289, ¶ 242; MR291, ¶ 253. Until recently, Backpage.com was the leading online marketplace for human trafficking and sexual exploitation of minors. MR289, ¶ 248; MR293, ¶ 259. Through various manual and digital techniques, it concealed the illegal nature of advertisements for sexual trafficking and prostitution to avoid detection by law enforcement. MR290, ¶ 249; MR291, ¶ 253; MR299, ¶ 285. According to the National Center for Missing and Exploited Children, Backpage.com was involved in 73% of all child trafficking reports before being seized and shut down by the FBI. MR293, ¶ 259.

III. The Use of Facebook to Subject Jane Doe to Sex Trafficking

Jane Doe was a 14 year old Facebook and Instagram user who became a sex trafficking victim. MR288, ¶¶ 236-37. She was "friended" through Instagram by another user. MR288, ¶ 238. That Instagram friend was an adult "well over the age of 18." *Id.*

This Instagram friend told Jane Doe he loved her and promised her a better future. MR288, ¶ 239. As Facebook knew, these kinds of messages between an adult and a minor have been identified by studies as red flags of human trafficking. MR288, ¶ 241. Facebook also knew that "these sorts of messages were precisely the ones it should be warning against." MR289, ¶ 241; *see also* MR289, ¶¶ 242-43, 245.

Jane Doe was both recruited through and trafficked on Instagram. MR259, ¶ 4; MR288, ¶¶ 237-38. Her traffickers used Instagram to sell Jane Doe to men looking for sex with minors. MR289,

¶ 242. Those encounters were arranged by posting partially nude photographs of her on Instagram. MR289, ¶ 243.

She was repeatedly trafficked in 2018 at a hotel on Wayside Drive owned by another defendant in the underlying litigation. MR312, ¶ 315. She was told by her trafficker to meet clients at the hotel where she would be sexually exploited. MR312, ¶ 316. Even after Jane Doe was rescued from sex trafficking, the traffickers continued to use her profile. Jane Doe's mother reported this to Facebook, which never responded. MR289, ¶ 245.

IV. Jane Doe's Liability Allegations Against Facebook

Facebook's system allowed Jane Doe's trafficker to target her. MR281, ¶ 205. "Facebook had extensive information about Jane Doe and knew she was a likely target for trafficking. Yet Facebook did not target warnings to Jane Doe about how its system helps traffickers find targets like her or about how traffickers lure victims through its platforms." MR281-82, ¶ 205. Had Jane Doe been warned, she would never have been raped, abused, and trafficked by a predator using Instagram. MR288-89, ¶¶ 240-42.

In addition to providing basic warnings, MR315, ¶ 330, Facebook could have conducted awareness campaigns to ensure users were aware that sex traffickers used the website. It also could have implemented safeguards to prevent adults from connecting with minors they did not know, or verified the identity and age of users and prevented unauthorized adults from contacting minors. It could have reported suspicious messages between minors and adults, required that minor accounts be linked to those of an adult, or prevented known sex traffickers from having an account on Facebook. MR315, ¶ 330.

Based on these allegations, Jane Doe has asserted causes of action against Facebook for:

- Knowingly facilitating human trafficking in violation of Texas Civil Practice and Remedies Code Chapter 98, MR313-14, ¶¶ 322-26;
- Negligent and grossly negligent failure to warn, MR314-15, ¶¶ 328-34; MR317, ¶¶ 348-53;
- Negligent undertaking, MR315-16, ¶¶ 335-340; and
- Strict products liability based on marketing defects, i.e., failures to warn, MR316-17, ¶¶ 341-47.

Facebook did not challenge the products liability claim in its 91a motion, so it was not ruled upon by the trial court and is not before this Court. MR071-88; *see also* Tex. R. Civ. P. 91a (motion to dismiss "must identify each cause of action to which it is addressed, and must state specifically the reasons the cause of action has no basis in law. . . .").

Statutory Overview

I. The CDA

A. Congress Sought to Limit Children's Access to Pornography via the CDA

Facebook begins its argument by espousing a few of the policy concerns of the Telecommunications Act of 1996, Petition at 7-8, which was a 100-page bill that had little to do with the internet and of which the CDA was a very small part. *See* Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56. The CDA itself reflected a narrower and more focused congressional purpose. *Id.* at 133-42. It was primarily concerned with preventing minors from accessing pornography and other materials deemed "obscene, lewd, lascivious, filthy, or indecent," whether over the phone, on television, or through the embryonic internet. *See* Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, 133-42. It criminalized virtually all conduct that could provide children with access to pornography and protected telecommunications companies that blocked or restricted access to pornography. *Id.*

When the CDA passed the Senate, it did not include any protections for internet companies. *See* S. 652, 104th Cong., tit. IV (June 15, 1995). The House amendment that ultimately became

Section 230 was titled "Protection for Private Blocking and Screening of Offensive Material." 141 Cong. Rec. H8460, H8468-69 (daily ed. Aug. 4, 1995).

Representative Cox, one of Section 230's sponsors, asked: How can Congress ensure that children have access to the "education and political discourse" available on the internet but not to pornography? *Id.* at H8469. He argued the federal government was ill-equipped for the task: "No matter how big the army of bureaucrats, it is not going to protect my kids because I do not think the Federal Government will get there in time." *Id.* Representative Wyden, the amendment's cosponsor, echoed that sentiment:

> The fact of the matter is that the Internet operates worldwide, and not even a Federal Internet censorship army would give our Government the power to keep offensive material out of the hands of children. . . .

Id. at H8470.

Instead, they "believe[d] that parents and families are better suited to guard the portals of cyberspace and protect our children than our Government bureaucrats." *Id.* at H8470. The answer, they believed, lay in technological screening devices parents could use to block pornography. *Id.*

B. Section 230 Was Intended to Incentivize the Development of Screening Technologies

Facebook repeatedly emphasizes that Section 230 confers broad immunity on it for facilitating sex trafficking. While there are decisions (all of which predate the 2018 amendment) that might support that notion, they are based in a profound misunderstanding of what Congress intended when it passed the CDA in 1996.

The problem that Section 230 was designed to address was that "the existing legal system provide[d] a massive disincentive for the people who might best help us control the Internet." *Id.* at H8469. Shortly before the CDA passed the Senate, a New York court held Prodigy, an internet service provider, liable for defamation based on remarks posted on its online bulletin board by an unknown user. *Stratton Oakmont, Inc. v. Prodigy Services Co.*, No. 31063/94, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995). Prodigy did not know about, control, or edit the defamatory posts. The court held it liable as a "publisher" that exercised "editorial functions" because it had implemented content guidelines, used screening and blocking software, and deleted offensive material of which it was aware. *Id.* at *3-4.

That result, according to the Congressmen, was "backward"—they wanted companies like Prodigy to help control what children see on the internet. 141 Cong. Rec. at H8470. Congress felt the *Prodigy* opinion sent a message "to stop policing" their sites. *Id.* at H8471. Section 230 would set things straight.

Representative Goodlatte described Section 230 as "remov[ing] the liability of providers such as Prodigy who currently make a good faith effort to edit the smut from their systems" and encouraging the development of "new technology, such as blocking software, to empower parents to monitor and control the information their kids can access." *Id.* at H8471-72.

As adopted, Section 230(c)—the provision on which Facebook relies to claim total immunity—reads:

> (1) Treatment of publisher or speaker
>
> No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information by another information content provider.
>
> (2) Civil Liability
>
> (A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or

> (B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).

47 U.S.C. § 230(c).

A House conference report observed that the section was specifically intended to overrule *Prodigy* and similar decisions that punished companies for "restrict[ing] access to objectionable material." H.R. Rep. 104-458, at 194 (1996).

II. *Zeran* Expansively Interpreted Section 230(c)(1) to Protect "the New and Burgeoning Internet"

Ironically, the Good Samaritan provisions were almost immediately interpreted by the courts as providing blanket protection to internet companies that had knowledge of offensive material on their sites and did not try to screen, block, or remove it.

The Fourth Circuit set the stage in *Zeran v. America Online, Inc.* 129 F.3d 327 (4th Cir. 1997)—the primary case upon which Facebook now relies. Based on Section 230, it refused to hold AOL liable for unreasonable delay in removing defamatory posts the plaintiff had reported, refusing to post retractions, and failing to screen for similar postings thereafter. *Id.* at 328. The court did not explain how these claims treated AOL as the publisher or speaker of the defamatory material. It simply asserted that "[b]y its plain language, § 230 creates a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service." *Id.* at 330.

The court based its decision almost entirely on Section 230's stated policies of minimizing government regulation of the internet. *Id.* Without reviewing any of the statute's legislative history, the court concluded that "Congress recognized the threat that tort-based lawsuits pose to freedom of speech in the new and burgeoning Internet medium." *Id.* It claimed Congress was concerned that the specter of tort liability "would have an obvious chilling effect" and that internet companies "might choose to severely restrict the number and type of messages posted." *Id.* at 331. And it claimed, "Congress considered the weight of the speech interests implicated and chose to immunize service providers to avoid any such restrictive effect." *Id.*

But, as just discussed, Congress wanted to restrict what was on the internet; it just wanted to do so through means other than traditional federal regulation. It showed little to no concern about chilling speech; two other provisions of the CDA were struck down on free speech grounds. *See Reno v. ACLU*, 521 U.S. 844 (1997). Congress was also not concerned about tort liability generally. It was concerned about defamation liability specifically, and even then, only to the extent such liability would prevent self-regulation.

On the other hand, providing broad immunity from tort claims *dis*-incentivizes self-regulation.

III. The Pre-Amendment Section 230 Jurisprudence Fragmented

A. Some Courts Expanded Section 230(c)(1) Further Still

Courts and internet companies like Facebook have since relied on *Zeran* and its explanation of Congress's intent to justify further expanding the application of Section 230(c)(1) to protect internet companies that facilitate arms dealers, posters of revenge porn, rapists, and sex traffickers.

Most of these courts, including the Beaumont Court of Appeals, hold immunity attaches whenever third-party content is a but-for cause of the plaintiff's injury, no matter how attenuated. *See, e.g., Davis v. Motiva Enters., L.L.C.*, No. 09-14-00434-CV, 2015 WL 1535694, at *4 (Tex. App.—Beaumont Apr. 2, 2015, pet. denied) (claims against technology company whose employee with history of inappropriate internet behavior posted fake sexual advertisements about plaintiff depended on postings); *GoDaddy.com, LLC v. Toups*, 429 S.W.3d 752, 758 (Tex. App.—Beaumont 2014, pet. denied) (claims based on company's knowledge that its services were used for revenge porn and illegal activities "stem" from publication); *Backpage.com*, 817 F.3d at 19-20 (finding "there would be no harm [from human trafficking] but for the content of the postings"); *Doe v. MySpace, Inc.*, 528 F.3d 413, 419-20 (5th Cir. 2008) (finding no liability for failure to implement safety features because plaintiff would not have been raped but for communications through social media platform); *Daniel v. Armslist*, LLC, 926 N.W.2d 710, 725-26 (Wis. 2019) (claim for intentionally facilitating illegal firearms sales depended on publishing third-party advertisements).

Courts have also broadly defined the term "publisher" to protect design and construction decisions and software features. *See, e.g., Backpage.com*, 817 F.3d at 21 (rejecting argument that Backpage.com was a content provider because its features facilitated illegal conduct); *Herrick v. Grindr LLC*, 765 Fed. App'x 586, 591 (2d Cir. 2019), *cert. denied* 140 S. Ct. 221 (allegations related to matching and geolocation features were barred).

Federal courts also explicitly and tacitly have applied the heightened plausibility pleading standard under *Twombly* and *Iqbal*[1] to reject allegations they viewed as attempts to plead around the CDA. *Compare J.S. v. Village Voice Media Holdings, L.L.C.*, 359 P.3d 714, 717 (Wash. 2015) (under state pleading standard, CDA did not apply to allegations that Backpage.com intentionally developed its website to facilitate sex trafficking) *with Backpage.com*, 817 F.3d at 21 (allegations that Backpage.com intentionally developed its website to facilitate sex trafficking did not support a plausible statutory human trafficking claim); *see also Dyroff v. Ultimate Software Group, Inc.*, 934 F.3d 1093, 1099-1100 (9th Cir. 2019) (Section 230(c)(1) applied because collusion theory was not plausible).

B. Other Courts Have Rejected *Zeran* and Read Section 230 More Narrowly

A growing number of appellate courts have recognized the disconnect between *Zeran*'s analysis and the statutory language and history of Section 230.

The Seventh Circuit has noted that subsection (c)(1) "limits who may be called the publisher of information that appears online," which "might matter to liability for defamation, obscenity, or copyright

[1] *Bell Atlantic Corp. v. Twombly*, 550 U.S. 554 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

infringement"—instances where publishing or speaking are elements of the claim. *City of Chicago, Ill. v. StubHub!, Inc.*, 624 F.3d 363, 366 (7th Cir. 2010); *see also Chicago Lawyers' Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666, 669-71 (7th Cir. 2008) (applying Section 230 to statute that made publishing discriminatory advertisements illegal). It does not, therefore, follow the "broad immunity" or "but-for" rationales upon which Facebook relies.

After initially following *Zeran*, the Ninth Circuit acknowledged its early opinions overstated the reach of Section 230(c)(1). *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1164-65, 1170-71 (9th Cir. 2008); *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1105 n.11 (9th Cir. 2009). It has determined that "courts must ask whether the duty that the plaintiff alleges the defendant violated derives from the defendant's status or conduct as a 'publisher or speaker.' If it does, Section 230(c)(1) precludes liability." *Barnes*, 570 F.3d at 1102. In *Doe v. Internet Brands, Inc.*, 824 F.3d 846 (9th Cir. 2016), it held that Section 230 did not apply to the plaintiff's failure to warn claim because the claim had "nothing to do with Internet Brands' efforts, or lack thereof, to edit, monitor, or remove user generated content." *Id.* at 852; *see also HomeAway.com, Inc. v. City of Santa Monica*, 918 F.3d 676, 682 (9th Cir. 2019) (*Internet Brands* rejected "but-for" test).

That narrower approach seems to be reflected in one of the Beaumont opinions. While it found a defamation claim barred, the Beaumont Court of Appeals recognized that a claim for intentional infliction of emotional distress claim was "arguably not within the reach" of Section 230. *Milo v. Martin*, 311 S.W.3d 210, 215-17 (Tex. App.—Beaumont 2010, no pet.). And one judge argued in concurrence that Section 230 should not apply to intentional torts "grounded on a defendant's alleged malicious conduct." *Id.* at 220-22.

IV. Congress Amended Section 230 to Protect Sex Trafficking Claims from Overly Broad Judicial Interpretations

There is no doubt the pre-amendment cases upon which Facebook relies can no longer be defended, if they ever could. When the CDA was passed in 1996, "human trafficking" did not exist as a legal concept. As the breadth of Section 230 grew in many federal circuits, awareness of sex trafficking was dawning on Congress. In 2000, it passed a statute criminalizing many types of human trafficking, including sex trafficking of minors. Trafficking Victims Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464; 18 U.S.C. § 1591. In 2003, Congress authorized a private cause of action for sex-trafficking victims. Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, sec. 4(a)(4), ¶ 1595, 117 Stat. 2875, 2878; 18 U.S.C. § 1595.

Also in 2003, Washington became the first state to pass a human trafficking statute, followed in short order by Texas. Erin N. Kauffman, *The Uniform Act on Prevention of & Remedies for Human Trafficking: State Law & the National Response to Labor Trafficking*, 41 J. of Legislation, 291, 299 (2015). As of 2014, all 50 states criminalized human trafficking and 36 had enacted statutes granting civil remedies. Polaris Project, *2014 State Ratings*, https://www.polarisproject.org/sites/default/files/2014-State-Ratings.pdf.

Like other marketplaces, sex trafficking moved to the internet. With one notable exception,[2] when litigants attempted to enforce their new private rights of action and other claims against online companies

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[2] In *J.S. v. Village Voice Media Holdings, L.L.C.*, 359 P.3d 714, 716-18 (Wash. 2015), the Washington Supreme Court held that Section 230 did not bar sex trafficking victims' claims against Backpage.com. It applied a more permissive pleading standard and did not employ the but-for test.

that facilitated sex trafficking, courts held that Section 230 nearly always protected the defendant. Eventually, Congress decided to step in and amended Section 230 with FOSTA.

A. Section 230 Was Interpreted to Protect Backpage.com's Sex Trafficking and Prostitution Business

The most notorious example of the federal courts extending protection under the CDA to defendants alleged of facilitating sex trafficking is *Doe v. Backpage.com, LLC*, 817 F.3d 12 (1st Cir. 2016). It involved claims under state and federal sex trafficking statutes and allegations that Backpage.com deliberately structured its site to facilitate sex trafficking by tailoring posts and creating processes that allowed traffickers to conceal their identities. *Id.* 16-17, 20, 24. The court held Backpage.com was protected by Section 230 because, "but for the content of the [trafficker's] postings," there would have been no harm. *Id.* at 19-20.

So, at this point, the federal courts had extended Section 230's protection to a defendant that was actively involved in sex trafficking of minors, which raises the question: Could this possibly have been Congress's intent?

B. The Senate Discovered Section 230 Protected Bad Actors by Investigating Backpage.com

Because Section 230 allowed dismissal on the pleadings, Backpage.com was able to avoid discovery and conceal its illegal activity. It took a Senate investigation to reveal the truth. Backpage.com was fighting a subpoena from the Senate's Permanent Subcommittee on Investigations when the First Circuit decided *Doe v. Backpage*. *See S. Perm. Subcomm. on Investigations v. Ferrer*, 856 F.3d 1080, 1084 (D.C. Cir. 2017). Eventually, Backpage.com was compelled to produce documents, and the Subcommittee issued a scathing report. *Backpage.com's Knowing Facilitation of Online Sex Trafficking: Staff Report* (Jan. 10, 2017).

The subcommittee concluded Backpage.com had "long claimed that it was a mere host of content created by others and therefore immune from liability under Communications Decency Act (CDA)." *Id.* at 59. But, "[t]he internal company documents obtained by the Subcommittee conclusively show that Backpage.com's public defense is a fiction." *Id.* The extent of Backpage.com's involvement had not previously been revealed because courts had "construed Section 230 to provide near complete criminal and civil immunity." *Id.* at 67.

Meanwhile, the bill that became FOSTA was introduced in the House in 2017. One of its objectives was to amend Section 230 to clarify that Congress never intended to protect websites that facilitate sex trafficking. The report on the Senate bill discussed the opinion in *Doe v. Backpage* and stated Section 230 "has been held by courts to shield from civil liability and State criminal prosecution nefarious actors, such as the website Backpage.com, that are accused of knowingly facilitating sex trafficking." S. Rep. No. 115-199, at 2 (2018). As enacted in 2018, FOSTA also created a new criminal statute specifically targeting websites that facilitate prostitution and enable online sex trafficking. Allow States and Victims to Fight Online Sex Trafficking Act of 2017 ("FOSTA"), Pub. L. No. 115-164, sec. 3, 132 Stat. 1253, 1253-54 (2018); 18 U.S.C. § 2421A.

Argument

I. Standard of Review

To obtain mandamus relief, Facebook must show the trial court clearly abused its discretion and that Facebook has no adequate remedy on appeal. *In re Union Pac. R.R. Co.*, 582 S.W.3d 548, 550 (Tex. App.—Houston [14th Dist.] 2018, orig. proceeding).

Rule 91a permits a party to "move to dismiss a cause of action on the grounds that it has no basis in law or fact." Tex. R. Civ. P. 91a.1.

Facebook's motion only argued that, based on Section 230 of the CDA, Jane Doe's claims have no basis in law; it did not challenge the factual basis of Jane Doe's claims.

A trial court's ruling on a Rule 91a motion to dismiss must be based solely on the plaintiff's pleadings. Tex. R. Civ. P. 91a.6. Dismissal on the grounds that a cause of action has no basis in law is only appropriate "if the allegations, taken as true, together with inferences reasonably drawn from them do not entitle the claimant to the relief sought." Tex. R. Civ. P. 91a.1. This Court "review[s] a ruling on a Rule 91a motion de novo because the availability of a remedy under the facts alleged is a question of law." *In re Union Pac.*, 582 S.W.3d at 550.

"To determine whether dismissal under Rule 91a is required in this case, [the Court must] consider whether the pleadings, liberally construed according to the pleader's intent, allege facts that trigger federal preemption" under Section 230 of the CDA. *Id.* at 550-51. Facebook, however, misconstrues Jane Doe's pleadings and does not discuss any aspect of the federal preemption doctrine, analyze the statutory text in context, take account of mandatory presumptions against preemption, or acknowledge the importance of the 2018 amendments. Accordingly, Facebook has not met its burden of establishing federal preemption. *See Great Dane Trailers, Inc. v. Estate of Wells*, 52 S.W.3d 737 (Tex. 2001) (party urging preemption has burden to establish its applicability).

II. The Standards for Finding Federal Preemption Are Narrow and Demanding

The basic question posed by this mandamus proceeding is whether Section 230 preempts Texas statutory and common-law claims against internet companies for facilitating sex trafficking. The doctrine of federal preemption is rooted in the Supremacy Clause, which invalidates state laws that are "contrary" to federal law. U.S. Const. art. VI; *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 522 (1981); *Moore v. Brunswick Bowling & Billiards Corp.*, 889 S.W.2d 246, 247 (Tex. 1994).

A. Congressional Intent, as Determined by Statutory Language and Context, Controls the Analysis

Congressional intent must be the "ultimate touchstone" in any preemption analysis. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992); *Moore*, 889 S.W.2d at 247. That intent is primarily discerned from the statutory language and its surrounding framework. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 486 (1996). But courts must also consider the context of the statute's enactment, including its history, structure, and purpose. *Id.*; *Great Dane*, 52 S.W.3d 737; *Hyundai Motor Co. v. Alvarado*, 974 S.W.2d 1, 5 (Tex. 1998).

B. There Is a Strong Presumption Against Preemption in Areas of Traditional State Regulation

"[B]ecause the States are independent sovereigns in our federal system, [the U.S. Supreme Court has] long presumed that Congress does not cavalierly pre-empt state-law causes of action." *Medtronic*, 518 U.S. at 485. Any preemption analysis must therefore "start with the assumption that the historic police powers of the States are not to be superseded by [federal law] unless that is the clear and manifest purpose of Congress." *Id.*; *Cipollone*, 505 U.S. at 516 (quoting *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 230 (1947)); *see also Reid v. People of State of Colorado*, 187 U.S. 137, 148 (1902) ("It should never be held that Congress intends to supersede, or by its legislation suspend, the exercise of the police powers of the states, even when it may do so, unless its purpose to effect that result is clearly manifested.").

The presumption against preemption "applies not only to *whether* Congress preempted state law at all, but also to the *scope* of preemption." *Graber v. Fuqua*, 279 S.W.3d 608, 611 (Tex. 2009) (citing *Medtronic,* 518 U.S. at 485) (emphasis in original). While the inclusion of an express preemption provision means Congress intended to preempt some state law, courts "must nonetheless identify the domain expressly pre-empted by that language." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 484 (1996). In particular, "there is a strong presumption against finding express preemption when the subject matter, *such as the provision of tort remedies to compensate for personal injuries*, is one that has traditionally been regarded as properly within the scope of the states' rights." *Ramsey v. Lucky Stores, Inc.*, 853 S.W.2d 623, 637 n.20 (Tex. App.—Houston [1st Dist.] 1993, writ denied) (citing *Rice,* 331 U.S. at 230) (emphasis added).

This Court has recently recognized that, "[g]iven the presumption that federal law does not supersede the States' historic police powers unless it is Congress's manifest purpose to do so, [] courts ordinarily accept a plausible reading of an express preemption provision that disfavors preemption" over a plausibly broader reading of the provision. *In re Union Pac. R.R. Co.*, 582 S.W.3d 548, 551 (Tex. App.—Houston [14th Dist.] 2018, orig. proceeding). In other words: "If the extent of Congress's preemptive intent is unclear, the presumption favors a finding of limited preemption." *Barnes ex rel. Estate of Barnes v. Koppers, Inc.*, 534 F.3d 357, 363 (5th Cir. 2008).

III. Section 230 As Amended Does Not Preempt State Civil Claims for Human Trafficking

A. The Relevant Statutory Language

Three provisions of the CDA are critical to the preemption analysis. Facebook relies entirely on the first, mentions the second in passing without analysis, and all but ignores the third.

1. 230(c)(1)—The "Publisher or Speaker" Provision

Subsection (c)(1) states:

> No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.

47 U.S.C. § 230(c)(1). Facebook contends this provision grants "immunity" to interactive computer services from any claim that depends—however remotely—on third-party content. Petition at 8-16.

Such a construction effectively immunizes internet companies like Facebook and Backpage from *any liability* for crimes or torts committed on their websites, regardless of the company's level of knowledge or involvement. But as will be shown in Part IV of the argument, the plain statutory language, construed in light of its history and context, does not support such an all-encompassing construction.

2. 230(e)(3)—The Preemption Clause and Savings Clause

Subsection (e)(3) contains the preemption clause quoted by Facebook. Petition at 9, 21. But Facebook ignores a savings clause that precedes it. The provision states in full:

> *Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section.* No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.

47 U.S.C. § 230(e)(3) (emphasis added). This is an unusual preemption provision in that it reiterates the principle that a federal statute preempts inconsistent state law. Indeed, that is the only meaning Facebook assigns to it, claiming its purpose is "[t]o ensure [subsection (c)(1)] is not frustrated by state or local laws." Petition at 9.[3]

But the preemption provision must be interpreted, if possible, as having some genuine meaning so it is not rendered superfluous. *See*

[3] A more typical express preemption provision would provide that a federal law preempts all state laws relating to a specific topic addressed by the federal law, *e.g., Boggs v. Boggs*, 520 U.S. 833, 841 (1997), or prohibit states from adopting or enforcing regulations that are not "identical" to federal regulations in a defined subject area, *e.g., Moore v. Brunswick Bowling & Billiards Corp.*, 889 S.W.2d 246, 248 (Tex. 1994).

Williams v. Taylor, 529 U.S. 362, 404 (2000) (every clause must be given effect if possible). According to a recent article in the Harvard Journal on Legislation: "The most natural [interpretation] is that Congress sought to emphasize that there are indeed consistent state laws which will and should remain in effect despite § 230. Such emphasis favors a narrower reading of § 230 instead of an expansive one." Benjamin Edelman & Abbey Stemler, *From the Digital to the Physical: Federal Limitations on Regulating Online Marketplaces*, 56 Harv. J. on Legis. 141, 176-77 (2019). This is an especially logical conclusion given the savings clause in the first sentence of (e)(3), which would have no meaning if there were not consistent state laws.

Thus, the Court's task is to determine the scope of the provision's preemptive effect.

3. 230(e)(5)—FOSTA's "No Effect on Sex Trafficking Law" Clarification

Congress amended Section 230 through FOSTA by adding subsection (e)(5), which is entitled "No effect on sex trafficking law." It states that nothing in Section 230 "shall be construed to impair or limit":

(A) Civil claims under the federal statute, 18 U.S.C. § 1595, for facilitating sex trafficking;

(B) Criminal prosecutions under state law for conduct that violates the federal sex trafficking statute, 18 U.S.C § 1591; and

(C) Criminal prosecutions under state law for conduct that violates a new statute created by FOSTA, 18 U.S.C. § 2421A, that criminalizes the online facilitation of prostitution.

Facebook accepts that these types of actions are "exempted" from Section 230. Petition at 20. That means they are not preempted regardless of whether they treat an internet company as the publisher or speaker of third-party content and do not trigger Section 230(c)(1).

Facebook contends the amendments have no bearing on Jane Doe's claims, however, because they do not expressly exempt civil claims for sex trafficking under state law. But Facebook:

- Fails to construe the amendments in conjunction with the preemption provision, which ensures the viability of consistent state-law claims,
- Ignores the purpose, context, and history of the amendments, and
- Does not account for the presumption against preemption in the realm of health and safety, which are within the historic police powers of the state.

Even if the Court assumes Jane Doe's claims treat Facebook as a publisher of third-party content, which Jane Doe denies, they are consistent with Section 230 as amended.

B. Jane Doe's Claims Are Consistent with the Federal Sex Trafficking Statute

Any analysis of Section 230's preemptive scope must consider the effect of the 2018 amendments in Section 230(e)(5). *See Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 520 (1992) (finding statute had different preemptive scope before and after amendment). This is a task no appellate court has previously undertaken. Given the presumption against preemption, the relevant questions are (1) whether the statute clearly states Congress's intent to preempt civil claims for human trafficking under state law and (2) whether such claims are consistent with the exemptions identified in subsection (e)(5).

Under Facebook's construction, such claims would be preempted solely because they are not expressly identified in the amendments. That construction ignores the preemption provision, which confirms that "any State law that is consistent" with Section 230 is not preempted. 47 U.S.C. § 230(e)(3). Because the amendment made by FOSTA is now part of Section 230, state laws that are consistent with the amendment are not preempted. And the U.S. Supreme Court has "recognized the phrase 'state law' to include common law as well as statutes and regulations." *Cipollone*, 505 U.S. at 522.

Facebook describes the first carve-out in the 2018 amendments, which involves 18 U.S.C. Sections 1591 and 1595, as "a federal civil action for facilitating sex trafficking." Petition at 20. Meanwhile, Jane Doe's statutory and common-law claims seek to hold Facebook civilly liable for "facilitating" sex trafficking. MR272, 281-82, 313-14. Jane Doe's claims are thus clearly consistent with Section 230(e)(5)(A) and not preempted.

More specifically, Section 1595 imposes civil liability upon "[w]hoever knowingly . . . benefits . . . from participation in a venture which has engaged in [sex trafficking]." 18 U.S.C. §§ 1591 & 1595. Texas's human trafficking statute upon which Jane Doe relies similarly imposes civil liability upon "[a] defendant who intentionally or knowingly benefits from participating in a venture that traffics another person." Tex. Civ. Prac. & Rem. Code § 98.002(a). And her common-law tort claims allege Facebook breached a duty to warn her of "known dangers" posed by sex traffickers on its platform because it profited from her ignorance. MR286, ¶ 225; MR314-17. Because these state law claims are the same sort of claims Congress took pains to protect against preemption, they too are not preempted.

C. FOSTA's Language Reinforces the Lack of Preemption

Despite the unequivocal mandate that any preemption analysis begin and end with congressional intent, *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992); *Moore v. Brunswick Bowling & Billiards Corp.*, 889 S.W.2d 246, 247 (Tex. 1994), Facebook's petition is silent as to Congress's intent in enacting FOSTA and amending the CDA. FOSTA's express language repeatedly confirms that Congress intended to remove *all* obstacles in the CDA to fighting human trafficking, including those that prevented victims from asserting civil claims under state law.

Congress clearly stated its purpose for amending Section 230 in FOSTA's enacting clause:

> To amend the Communications Act of 1934 to clarify that section 230 of such Act does not prohibit the enforcement against providers and users of interactive computer services of Federal and *State* criminal and *civil* law relating to sexual exploitation of children or sex trafficking, and for other purposes.

Pub. L. No. 115-164, 132 Stat. 1253 (2018) (emphasis added). Notably, this statement of purpose includes state civil laws. And a statutory preamble or statement of purpose is a valid means of supporting a narrow scope of preemption.[4] *See Medtronic, Inc. v. Lohr*, 518 U.S. 470, 474, 481 (1996); *Cipollone*, 505 U.S. at 518.

Section 2 of FOSTA further states the "sense of Congress" that Section 230 "was never intended to provide legal protection to . . . websites that facilitate traffickers in advertising the sale of unlawful sex acts with sex trafficking victims" and that "clarification of such section is warranted to ensure that such section does not provide such protection to such websites." S Pub. L. No. 115-164, sec. 2, 132 Stat. at 1253. Again, Congress did not distinguish between protection from state or federal claims. Construing the amended Section 230 to protect such websites from state civil claims, however, would clearly frustrate Congress's express intent.

Next, Section 4 of FOSTA contains the amendments to Section 230, and it is titled:

> SEC. 4. ENSURING ABILITY TO ENFORCE FEDERAL AND STATE CRIMINAL AND CIVIL LAW RELATING TO SEX TRAFFICKING.

[4] In the trial court, Facebook argued this statement of purpose should not be part of the analysis because it "cannot 'change the plain meaning of the operative clause' of the statute." MR149-50 (quoting *Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1978 (2016)). While Plaintiffs agree with this legal proposition, Congress's statements of purpose in FOSTA do *not* conflict the text of Section 230.

Id. at sec. 4, 132 Stat. at 1254. Again, state civil law is expressly included and tied directly to the amendments.

And FOSTA contains its own savings clause in Section 7, which states:

> **SEC. 7. SAVINGS CLAUSE.**
>
> Nothing in this Act or the amendments made by this Act shall be construed to limit or preempt any civil action or criminal prosecution under Federal law or State law (including State statutory law and State common law) filed before or after the day before the date of enactment of this Act that was not limited or preempted by section 230 of the Communications Act of 1934 (47 U.S.C. 230), as such section was in effect on the day before the date of enactment of this Act.

Id. at sec. 7, 132 Stat. at 1255. Thus, Congress confirmed that both before and after the amendment, there are civil actions under state common law and statutory law that are not preempted.

Finally, Facebook's reading of the amendments as the sole, exclusive categories of claims that are not preempted would mean that a new cause of action Congress created through FOSTA could never be used. As mentioned, FOSTA created a new statute that criminalizes the online facilitation of prostitution, Section 2421A. *Id.* at sec. 3, 132 Stat. at 1253-54.[5] But Congress also created a civil remedy through FOSTA

[5] Federal criminal statutes were already exempted under subsection (e)(1) from the preemptive effects of the CDA, and the amendments in (e)(5) expressly list state criminal prosecutions under the new Section 2421A as also being exempted. 47 U.S.C. §§ 230(e)(1) & (e)(5)(C).

for victims of online prostitution that is *not* expressly exempted from the CDA by Section 230(e)(5). *Id.* at sec. 3, § 2421A(c), 132 Stat. at 1254. Congress could not have intended the amendment to provide an exclusive list that would nullify a new civil claim against interactive computer services that it just created in the same act. Such civil claims, like Jane Doe's, do not need to be expressly identified because they are consistent with the claims that are identified.

D. FOSTA's Legislative History Reinforces the Lack of Preemption

When assessing preemption, courts must interpret the statutory text, when possible, "against the backdrop of regulatory activity undertaken by state legislatures and [the] federal [government]." *Cipollone*, 505 U.S. at 519. When Congress passed Section 230 in 1996, the internet was in its fledgling stage and human trafficking was an unknown legal concept. Congress therefore could not have contemplated how courts might use the publisher/speaker language in subsection (c)(1) to protect online sex traffickers.

But by the time FOSTA was introduced in early 2017, criminal laws prohibiting human trafficking had been enacted at the federal level and in every state, and statutes providing civil remedies to victims of human trafficking had been enacted at the federal level and in nearly three-quarters of the states. Congress also knew that websites had "become one of the primary channels of sex trafficking . . . in part due to technological advances on the Internet that make information easily accessible and provide a forum for anonymity." FOSTA Committee Report, H.R. Rep. No. 115-572, at 2 (2018). And it knew "bad-actor websites" had been shielded from liability by the CDA "despite engaging in actions that go far beyond publisher functions." *Id.* at 4.

The only legislative history for FOSTA that Facebook acknowledges in its petition is the fact that the bill was changed after its original introduction. It argues that the original bill "would have exempted certain private civil actions," but "that proposal was not adopted because Congress wanted to ensure a uniform national standard in this area rather than a patchwork of state laws." Petition at 20.

It is technically true that the original bill for FOSTA would have included in Section 230(e)(5) "any other Federal or State law that provides causes of action, restitution, or other civil remedies to victims of . . . sex trafficking," and that this provision was removed during the year the bill spent in committee. H.R. 1865, 115th Cong., p. 4 (1st Sess. Apr. 3, 2017). But that is only part of the story, and Facebook's explanation for the removal cannot be supported because Congress simply started anew.

The Committee on the Judiciary spent nearly a year wholly revising the original FOSTA bill. The *only* provision that survived this revision in original form was the enacting clause:

> FEBRUARY 20, 2018
> Reported from the Committee on the Judiciary with an amendment
> [Strike out all after the enacting clause and insert the part printed in italic]

H.R. 1865, 115th Cong., p. 3 (2d Sess. Feb. 20, 2018). The enacting clause states Congress's intent to clarify that Section 230 does not prohibit (among other things) state civil laws relating to sex trafficking. *Id.* at p. 4. The committee's amendments to the original bill do not, therefore, support an inference that Congress consciously rejected any protections of civil remedies for sex trafficking under state law.

Additionally, the Committee Report's section-by-section analysis notes that state laws were always fully enforceable against websites so long as they were consistent with Section 230. H.R. Rep. No. 115-572, at 9. It then explained the purpose of amending Section 230 to include the carve-outs:

> While the newly created law [Section 2421A], and the federal sex trafficking law [Section 1591], *should both be considered consistent with § 230*, as applied to certain bad-

> actor websites, in order to allow immediate and unfettered use of this provision, included is an explicit carve out to permit state criminal prosecutions.

Id. (emphasis added). In other words, Congress was not creating some new exception to immunity, as Facebook argues. It was merely clarifying—in light of the numerous cases that shielded websites from liability "despite engaging in actions that go far beyond publisher functions," *id.* at 4—that Section 230 was never intended to protect websites that facilitate sex trafficking.

The Committee's version of the bill also only carved out criminal prosecutions under state law; civil remedies under federal law (Section 1595) were later added to the final version. *Compare* H.R. 1865, 115th Cong., p. 8 (2d Sess. Feb. 20, 2018) *with* H.R. 1865, 115th Cong., p. 5 (2d Sess. Feb. 27, 2018) (enacted). The Committee explained that "[t]he language used in the carve out is designed to ensure that interactive computer services are subject to one set of criminal laws, rather than a patchwork of various state laws." H.R. Rep. No. 115-572, at 9-10. Thus, Congress was concerned with uniformity of criminal laws, not civil remedies as Facebook contends.

E. The Presumption Against Preemption Requires that Facebook's Construction Be Rejected

Even if Facebook's construction was plausibly supported by the statutory text, the presumption against preemption imposes upon courts "a duty to accept the reading disfavoring pre-emption." *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 432 (2005); *see also Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 518 (1992) (noting the "presumption reinforces the appropriateness of a narrow reading" of an express preemption provision).

During the hearing on its Rule 91a motion, Facebook argued that the presumption against preemption never arises when there is an express preemption provision. MR573. But the sole case upon which Facebook relied, *Puerto Rico v. Franklin California Tax-Free Tr.*, 136 S. Ct. 1938 (2016), did not overrule (or even mention) the century's worth of Supreme Court precedent firmly establishing a presumption against preemption in *all* cases, including those involving express preemption provisions.[6] Lower courts are not free to find Supreme Court precedent overruled by implication. *Agostini v. Felton*, 521 U.S. 203, 237 (1997).

Puerto Rico is also distinguishable. It concerned an unambiguous preemption provision in the Bankruptcy Code that had been consistently interpreted for 70 years and was not susceptible to any other interpretation. 136 S. Ct. at 1946-47. The presumption was therefore at its weakest in that area of traditional federal regulation, and it could not operate against clear statutory language. The Court merely stated that, given the express preemption clause, it did not need to invoke the presumption and would instead "focus on the plain wording of the clause." *Id.* at 1946. In Facebook's interpretation, on the other hand, Section 230 infringes on the historic police powers of the

[6] *E.g.*, *Bates v. Dow Agrosciences LLC*, 544 U.S. 431 (2005) (noting presumption requires courts to accept a reading of an express preemption provision that disfavors preemption); *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (applying presumption to determine scope of express preemption provision); *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 222-23, 230-37 (1947) (applying presumption to express clause but still finding preemption of some, but not all, claims due to language and context of enactment); *Reid v. People of State of Colorado*, 187 U.S. 137, 148 (1902) (presumption prevents finding Congress intended to occupy entire field of cattle transportation).

state—where the presumption is at its strongest—and is not explicit in its preemptive scope.

Additionally, courts across the country, including this Court, have continued to apply the presumption against preemption since *Puerto Rico* in cases involving express preemption provisions and areas of traditional state regulation. *See In re Union Pac. R.R. Co.*, 582 S.W.3d 548, 551 (Tex. App.—Houston [14th Dist.] 2018, orig. proceeding); *Sunset Transp., Inc. v. Texas Dep't of Transp.*, 557 S.W.3d 50, 65 (Tex. App.—Austin 2017, no pet.); *Lupian v. Joseph Cory Holdings LLC*, 905 F.3d 127, 132 n.5 (3d Cir. 2018); *Marentette v. Abbott Labs, Inc.*, 886 F.3d 112, 117 (2nd Cir. 2018); *Lazar v. Kroncke*, 862 F.3d 1186, 1195 (9th Cir. 2017).

IV. Jane Doe's Sex Trafficking Claims Do Not Treat Facebook as a Publisher or Speaker

Claims, such as Jane Doe's, that are consistent with the carve outs in the 2018 amendment are not preempted regardless of whether they treat an internet company as the publisher of third-party content. But even if the carve outs were exclusive, Jane Doe's sex trafficking claims would still not be preempted because they do not, in fact, treat Facebook as the publisher of third-party content under a proper construction of subsection (c)(1) that gives effect to its text, context, purpose, and history.

A. Section 230's Language Is Narrow

Again, Facebook relies on the following provision to argue internet companies enjoy a broad immunity from any suit that arises, in any way, from content generated by third parties.

> No provider or user of an interactive computer service shall be *treated as the publisher or speaker* of any information provided by another information content provider.

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

If Congress intended such seemingly limitless protection, "it chose a singularly obscure means of doing so." *Hyundai Motor Co. v. Alvarado*, 974 S.W.2d 1, 12 (Tex. 1998) (holding common-law claims not preempted by clause prohibiting state safety "standards" that are not identical to federal standards); *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 478 (1996) (holding Congress's choice to prohibit any additional "requirement" under state law, rather than "remedy," shows intent to permit common-law claims). If it had intended the preemptive scope Facebook urges, Congress could have simply adopted a provision that states:

> Providers and users of interactive computer services shall be *immune from any legal action that relates to* content provided by a third party.

Instead, it chose to define the area of protection with the words "publisher" and "speaker"—words that have unique legal meanings.

B. The Terms "Publisher" and "Speaker" Relate to Defamation

The CDA does not define the terms "publisher" or "speaker," so the words must be construed according to their ordinary meaning by examining the context in which they are used, the statute's legislative history, dictionary definitions, and judicial constructions of the words in other contexts. *Yates v. United States*, 135 S. Ct. 1074, 1082-85 (2015); *Jaster v. Comet II Constr., Inc.*, 438 S.W.3d 556, 563 (Tex. 2014). Properly construed, it is clear this is the language of defamation law.

The context in which the words are used concerns potential liability for information provided online by third parties. And the statute's legislative history clearly shows the kind of liability Congress had in mind. As we discussed in Part I.B of the Statutory Overview, Section 230(c)(1) was proposed and adopted for the express purpose of overruling *Stratton Oakmont, Inc. v. Prodigy Services Co.*, No. 31063/94, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995).

In *Stratton Oakmont*, the court held Prodigy liable for defamation based on its finding that Prodigy was a publisher—as opposed to a distributor—of defamatory statements posted by an unknown user on its online bulletin board. *Id.* at *3-4. The distinction between publisher and distributor was critical.

Under the applicable law, a publisher is liable regardless of whether it knows about the defamatory content. *Id.* at *3. But a distributor is considered a passive conduit and is only liable if it has actual or constructive knowledge of the defamation. *Id.* The court held Prodigy had exercised editorial control akin to a publisher by promulgating content guidelines and using screening software, which subjected it to defamation liability despite its lack of knowledge. *Id.* at *3-4.

In other words, Prodigy was held to a higher standard and punished *because* it took steps to make the internet a less offensive place. Congress responded with Section 230. Representative Cox explained that the amendment would do that by shielding "them from taking on liability such as occurred in the *Prodigy* case in New York that they should not face for helping us and for helping us solve this problem." 141 Cong. Rec. H8460, 8470 (Aug. 4, 1994).

The conference report issued days before the statute's enactment reiterates this explanation:

> One of the specific purposes of this section is to overrule *Stratton-Oakmont v. Prodigy* and any other similar decisions which have treated such providers and users as publishers or speakers of content that is not their own *because they have restricted access to objectionable material*. The conferees believe that such decisions create serious obstacles to the important federal policy of empowering parents to determine the content of communications their children receive through interactive computer services.

H.R. Rep. 104-458, at 194 (1996) (emphasis added). Section 230 also emphasizes this concern by stating policies "to encourage the development of technologies which maximize user control over what information is received," and "to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material." 47 U.S.C. § 230(b)(3)-(4).

Given this context, to treat an internet company as a "publisher or speaker" is to impose liability upon it (1) for defamatory content provided by a third party (2) of which it had no knowledge, (3) because it acted as a "Good Samaritan" by trying to screen content generally and restrict access to objectionable material. Jane Doe asserts no claim for defamation. She alleges Facebook *knew* its platform was being used by sex traffickers. And she alleges Facebook was not acting like a "Good Samaritan."

But even if the protections afforded by subsection (c)(1) are broader than Congress intended, nothing indicates an intent to give the word "publisher" a broader meaning than it has in defamation law. And the only definition of "publish" that makes sense in context is "[t]o communicate (defamatory words) to someone other than the person defamed." *Black's Law Dictionary* 1489 (11th ed.).

Section 230 does not convey a "clear and manifest purpose" by Congress to preempt anything other than defamation and similar claims for which publication is an essential element. *See Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (discussing the presumption against preemption); *City of Chicago, Ill. v. StubHub!, Inc.*, 624 F.3d 363, 366 (7th Cir. 2010) (opining that obscenity and copyright infringement might also be covered); *Chicago Lawyers' Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666, 669-71 (7th Cir. 2008) (concerning statutory claim based on publication of discriminatory advertisements). Jane Doe does not seek to hold Facebook liable for defamation or any other claim for which publication is an element. Her claims are therefore not preempted regardless of FOSTA's effect on the statute's preemptive scope.

C. The CDA Was Not Intended to Protect Those Who Facilitate the Sexual Victimization of Minors

Just as subsection (c)(1) must be construed within the context of Section 230 as a whole, Section 230 must also be construed within the context of the CDA as a whole. *See Harris County, Texas v. MERSCORP Inc.*, 791 F.3d 545, 554 (5th Cir. 2015) (quoting *Lamar Homes, Inc. v. Mid–Continent Cas. Co.,* 242 S.W.3d 1, 19 (Tex. 2007) ("In determining [a statute's] meaning, we must also consider the statute as a whole and construe it in a manner which harmonizes all of its various provisions.").

Congress's primary concern when it enacted the CDA was protecting children. It tried to protect them from "obscene or indecent" messages sent or displayed online.[7] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. at 133, sec. 502, § 223(a)(1), (d). It tried to protect them from pornography and other obscenity ordered online and transported through interstate commerce. *Id.* at sec. 507, § 1462. It tried to protect them from obscene and violent programming on television, and it protected cable providers that refused to air programs

[7] The Supreme Court deemed these provisions unconstitutional almost immediately after the CDA was enacted. *Reno v. ACLU*, 521 U.S. 844 (1997).

containing "obscenity, indecency, or nudity." *Id.* at sec. 503-06, §§ 639-41, sec. 551. And in part of Section 230, it protected internet companies from liability to content providers for restricting access to pornography and "otherwise objectionable" material. *Id.* at sec. 509, § 230(c)(2).

The Seventh Circuit has asked: "Why should a law designed to eliminate [an internet company's] liability to the creators of offensive material end up defeating claims by the victims of tortious or criminal conduct?" *Doe v. GTE Corp.*, 347 F.3d 655, 660 (7th Cir. 2003). This rhetorical question is even more astute when one considers the fact that the CDA, as originally enacted, criminalized smut peddling to minors in virtually every form. But more importantly, it also criminalized the use of any telecommunications facility to "knowingly persuade[], induce[], entice[], or coerce[] any [minor] to engage in prostitution or any sexual act for which any person may be criminally prosecuted." 110 Stat. at 137, sec. 508, § 2422. It is simply absurd to conclude that the same Congress would have intended blanket liability for internet companies that facilitated the new crime it created.

D. The Mere Existence of Third-Party Content Does Not Grant Immunity

Section 230 does not "grant *immunity* from suits that *arise from* content generated by third parties," as Facebook contends. Petition at 7; *see also id.* at 12 ("[A]ll of Plaintiffs' claims against Facebook arise from messages. . . ."). Immunity is much too broad a concept to describe what Section 230(c)(1) achieves, and barring any suit that arises from third-party content disregards Congress's decision to focus on treatment as a publisher.

First, as many courts have observed, the word "immunity" appears nowhere in the statute. *See Jones v. Dirty World Entertainment Recordings LLC*, 755 F.3d 398, 406 (6th Cir. 2014); *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1100 (9th Cir. 2009); *J.S. v. Village Voice Media Holdings, L.L.C.*, 359 P.3d 714, 718 (Wash. 2015) (Wiggins, J., concurring). The word "immunity" has an extraordinarily broad connotation as an exemption from all liability, "such as an exemption granted to a public official or governmental unit." *Black's Law Dictionary* 898 (11th ed.). That word, however, originates not with Congress, but with the Fourth Circuit's decision, *Zeran v. America Online, Inc.*, 129 F.3d 327, 330 (1997). *See* Statutory Overview, Part II, *supra*.

Unfortunately, many courts parroted *Zeran*'s language, expanding what should have been a narrow protection for internet companies into a broad immunity. Some courts, however, have declined to read so much into Congress's words. The Seventh Circuit, for example, has held that "subsection (c)(1) does not create an 'immunity' of any kind," but rather "limits who may be called the publisher of information that appears online." *City of Chicago, Ill. v. StubHub!, Inc.*, 624 F.3d 363, 366 (7th Cir. 2010).

Second, nothing in the text or history of Section 230 supports an interpretation that protects internet companies from claims that "arise from," i.e., to merely involve—no matter how remotely—third-party content. Again, such a construction would lead to immunity beyond anything contemplated by Congress. As the Ninth Circuit has recognized, "[p]ublishing activity is a but-for cause of just about everything [an internet platform] is involved in. . . . Without publishing user content, it would not exist." *Doe v. Internet Brands, Inc.*, 824 F.3d 846, 853 (9th Cir. 2016).

Congress chose to protect internet companies only from *treatment* as a publisher, not from any and all claims related to third-party content. And when it amended Section 230, Congress expressly rejected the but-for theory that had led to courts finding immunity for facilitating sex trafficking. The Committee Report for FOSTA complained:

> In civil litigation, bad-actor websites have been able to successfully invoke this immunity provision *despite engaging in actions that go far beyond publisher functions*.

H.R. Rep. No. 115-572, at 4 (2018). The opinion it used as an example of this over-expansive interpretation was *Jane Doe 1 v. Backpage.com, LLC*, 817 F.3d 12 (1st Cir. 2016). In that case, the court held Backpage.com immune from liability, stating: "Since the appellants were trafficked by means of these advertisements, there would be no harm to them *but for the content* of the postings." *Id.* at 19-20 (emphasis added).

The Ninth Circuit has articulated a more reasonable statement of the issue under subsection (c)(1): whether "the duty that the plaintiff alleges the defendant violated derives from the defendant's status or conduct as a 'publisher or speaker.'" *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1101-02 (9th Cir. 2009). Jane Doe alleges Facebook violated a duty to warn her and other minor users of the threat posed by sex traffickers Facebook knows are using its platform to find and recruit victims. That duty derives from Facebook's knowledge about how its platform is misused, not with Facebook's role in publishing content generated by the sex traffickers.

E. Facebook Mischaracterizes Jane Doe's Claims

All of Facebook's arguments flow from a faulty premise it never establishes—that Jane Doe's claims seek to hold Facebook liable for third-party content. Even if that were the applicable standard, Jane Doe's claims are not about content. They are about conduct—Facebook's conduct in failing to warn her and other minor victims about known predators on its platform and Facebook's conduct in failing to implement any protections to prevent such predators from contacting vulnerable young girls.

V. The Trial Court's Order

A. Facebook Misconstrues the Court's Reasoning

Facebook's attack on the trial court's order is strong on rhetoric but little else. Facebook initially invokes "the clear import of the statutory test and the overwhelming weight of the authority" that it contends support its position. Petition at 17. Jane Doe has discussed that language and those cases in this response.

Facebook complains that the trial court held "that Facebook's cases did not address" Plaintiffs' failure-to-warn claims, the Texas statutory sex trafficking statute, or FOSTA. *Id.* The trial court was completely correct with two of those observations—none of the cases Facebook cites discuss Texas's human trafficking statute, Chapter 98 of the Civil Practice and Remedies Code. Neither do any of them deal with FOSTA.

And Facebook simply misses the point with respect to the failure to warn argument. When comparing *Doe v. Internet Brands, Inc.*, 824 F.3d 846 (9th Cir. 2016) with *Doe v. MySpace, Inc.*, 528 F.3d 413 (5th Cir. 2008), the court noted that both dealt with similar injuries to Jane Doe's, but "the failure to warn cause of action presented in this case mirrors that presented in the 9th Circuit Case." MR205 The trial court understood that Jane Doe was 'not seeking to impose liability for the publication of the third party communications, but rather [she seeks] to impose liability for Facebook's independent actions or failure to act, specifically failure to warn," etc. *Id.* Thus, it not unreasonably felt that *Internet Brands* was more persuasive.

Facebook then moves to its analysis of *Huon v. Denton*, 841 F.3d 733 (7th Cir. 2016) and *Internet Brands*. Petition at 18. But the point of those cases, as the trial court recognized, is that the Seventh and Ninth Circuits apply a much narrower test than the *Zeran* line of cases to determine whether a claim treats an internet company as a publisher or speaker. MR205.

In short, Facebook's complaints about the trial court's order are not well-taken.

B. In Any Event, It's the Result, Not the Reasoning, that Matters

In *Luxenberg v. Marshall*, 835 S.W.2d 136 (Tex. App.—Dallas 1992, orig. proceeding), the Dallas Court of Appeals was confronted with an order striking the pleadings of a party for making a false verification. The court held that the order could not be upheld on the basis of Texas Rule of Civil Procedure 13. *Id.* at 141.

But the court concluded that the order *could* be upheld as a discovery sanction, commenting that "[w]hen a trial court gives an incorrect legal reason for its decision, we will nevertheless uphold the order on any other grounds supported by the record." *Id.* at 141-42 (citations omitted). Focusing on the result reached rather than the trial court's reasons is particularly compelling where, as here, the issue is an abuse of discretion: "A trial court cannot abuse its discretion if it reaches the right result, even for the wrong reasons." *Id.* at 142.

This Court has followed that authority. *See In re ExxonMobil Corp.*, 97 S.W.3d 353 (Tex. App.—Houston [14th Dist.] 2003, orig.

proceeding) (appellate court must uphold trial court's order on any ground supported by the record); *Hsin-Chi-Su v. Vantage Drilling Co.*, 474 S.W.3d 284, 298 (Tex. App.—Houston [14th Dist. 2015, pet. denied) (same in injunction context). So have many other courts of appeals. *See In re Tyndell*, No. 06-15-00086-CV, 2016 WL 269168, at *3 (Tex. App.—Texarkana 2016, orig. proceeding) (collecting cases).

In short, because the trial court reached the right result, it does not matter what the order states.

Prayer

The Court should deny Facebook's petition.

In the alternative, if the Court grants the petition to any extent, Jane Doe requests that the case be remanded to the trial court for further proceedings, including an opportunity for Jane Doe to amend her pleadings in light of the Court's disposition.

Finally, because Facebook did not move to dismiss Jane Doe's products liability cause of action, that cause of action should be remanded to the trial court for further proceedings.

Respectfully submitted,

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Certification of Facts

I certify that I have reviewed this Response to Relator's Petition for Mandamus and the attached appendix, and have concluded that every factual statement in the response is supported by competent evidence included in the appendix or record.

/s/ Timothy F. Lee

Certificate of Compliance

I certify that the Rule 9.4(i)(1) portions of this response contain 11,344 words.

/s/ Timothy F. Lee

Certificate of Service

On November 26, 2019, true and correct copies of this response were served via ProDoc eFiling service on the following counsel of record:

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Appendix A:
47 U.S.C. § 230

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

United States Code Annotated
Title 47. Telecommunications (Refs & Annos)
Chapter 5. Wire or Radio Communication (Refs & Annos)
Subchapter II. Common Carriers (Refs & Annos)
Part I. Common Carrier Regulation

47 U.S.C.A. § 230

§ 230. Protection for private blocking and screening of offensive material

Effective: April 11, 2018
Currentness

(a) Findings

The Congress finds the following:

(1) The rapidly developing array of Internet and other interactive computer services available to individual Americans represent an extraordinary advance in the availability of educational and informational resources to our citizens.

(2) These services offer users a great degree of control over the information that they receive, as well as the potential for even greater control in the future as technology develops.

(3) The Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.

(4) The Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation.

(5) Increasingly Americans are relying on interactive media for a variety of political, educational, cultural, and entertainment services.

(b) Policy

It is the policy of the United States--

(1) to promote the continued development of the Internet and other interactive computer services and other interactive media;

(2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation;

(3) to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services;

(4) to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material; and

(5) to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.

(c) Protection for "Good Samaritan" blocking and screening of offensive material

(1) Treatment of publisher or speaker

No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.

(2) Civil liability

No provider or user of an interactive computer service shall be held liable on account of--

(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or

(B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1). [1]

(d) Obligations of interactive computer service

A provider of interactive computer service shall, at the time of entering an agreement with a customer for the provision of interactive computer service and in a manner deemed appropriate by the provider, notify such customer that parental control protections (such as computer hardware, software, or filtering services) are commercially available that may assist the customer in limiting access to material that is harmful to minors. Such notice shall identify, or provide the customer with access to information identifying, current providers of such protections.

(e) Effect on other laws

(1) 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.

(2) No effect on intellectual property law

Nothing in this section shall be construed to limit or expand any law pertaining to intellectual property.

(3) State law

Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section. No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.

(4) No effect on communications privacy law

Nothing in this section shall be construed to limit the application of the Electronic Communications Privacy Act of 1986 or any of the amendments made by such Act, or any similar State law.

(5) No effect on sex trafficking law

Nothing in this section (other than subsection (c)(2)(A)) shall be construed to impair or limit--

(A) any claim in a civil action brought under section 1595 of Title 18, if the conduct underlying the claim constitutes a violation of section 1591 of that title;

(B) any charge in a criminal prosecution brought under State law if the conduct underlying the charge would constitute a violation of section 1591 of Title 18; or

(C) any charge in a criminal prosecution brought under State law if the conduct underlying the charge would constitute a violation of section 2421A of Title 18, and promotion or facilitation of prostitution is illegal in the jurisdiction where the defendant's promotion or facilitation of prostitution was targeted.

(f) Definitions

As used in this section:

(1) Internet

The term "Internet" means the international computer network of both Federal and non-Federal interoperable packet switched data networks.

(2) Interactive computer service

The term "interactive computer service" means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.

(3) Information content provider

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 or any other interactive computer service.

(4) Access software provider

The term "access software provider" means a provider of software (including client or server software), or enabling tools that do any one or more of the following:

(A) filter, screen, allow, or disallow content;

(B) pick, choose, analyze, or digest content; or

(C) transmit, receive, display, forward, cache, search, subset, organize, reorganize, or translate content.

CREDIT(S)

(June 19, 1934, c. 652, Title II, § 230, as added Pub.L. 104-104, Title V, § 509, Feb. 8, 1996, 110 Stat. 137; amended Pub.L. 105-277, Div. C, Title XIV, § 1404(a), Oct. 21, 1998, 112 Stat. 2681-739; Pub.L. 115-164, § 4(a), Apr. 11, 2018, 132 Stat. 1254.)

Footnotes

1 So in original. Probably should be "subparagraph (A)".

47 U.S.C.A. § 230, 47 USCA § 230
Current through P.L. 116-5. Title 26 current through 116-9.

End of Document

Appendix B:
CDA

AUTHENTICATED
U.S. GOVERNMENT
INFORMATION
GPO

PUBLIC LAW 104–104—FEB. 8, 1996

TELECOMMUNICATIONS ACT OF 1996

Public Law 104–104
104th Congress

An Act

Feb. 8, 1996
[S. 652]

To promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Telecommunications Act of 1996. Intergovernmental relations. 47 USC 609 note.

SECTION 1. SHORT TITLE; REFERENCES.

(a) SHORT TITLE.—This Act may be cited as the ''Telecommunications Act of 1996''.

(b) REFERENCES.—Except as otherwise expressly provided, whenever in this Act an amendment or repeal is expressed in terms of an amendment to, or repeal of, a section or other provision, the reference shall be considered to be made to a section or other provision of the Communications Act of 1934 (47 U.S.C. 151 et seq.).

SEC. 2. TABLE OF CONTENTS.

The table of contents for this Act is as follows:

TITLE V—OBSCENITY AND VIOLENCE

Communications Decency Act of 1996.
Law enforcement and crime.
Penalties.

Subtitle A—Obscene, Harassing, and Wrongful Utilization of Telecommunications Facilities

SEC. 501. SHORT TITLE.

47 USC 609 note.

This title may be cited as the ''Communications Decency Act of 1996''.

SEC. 502. OBSCENE OR HARASSING USE OF TELECOMMUNICATIONS FACILITIES UNDER THE COMMUNICATIONS ACT OF 1934.

Section 223 (47 U.S.C. 223) is amended—

(1) by striking subsection (a) and inserting in lieu thereof:

''(a) Whoever—

''(1) in interstate or foreign communications—

''(A) by means of a telecommunications device knowingly—

''(i) makes, creates, or solicits, and

''(ii) initiates the transmission of,

any comment, request, suggestion, proposal, image, or other communication which is obscene, lewd, lascivious, filthy, or indecent, with intent to annoy, abuse, threaten, or harass another person;

''(B) by means of a telecommunications device knowingly—

''(i) makes, creates, or solicits, and

''(ii) initiates the transmission of,

any comment, request, suggestion, proposal, image, or other communication which is obscene or indecent, knowing that the recipient of the communication is under 18 years of age, regardless of whether the maker of such communication placed the call or initiated the communication;

''(C) makes a telephone call or utilizes a telecommunications device, whether or not conversation or communication ensues, without disclosing his identity and with intent to annoy, abuse, threaten, or harass any person at the called number or who receives the communications;

''(D) makes or causes the telephone of another repeatedly or continuously to ring, with intent to harass any person at the called number; or

''(E) makes repeated telephone calls or repeatedly initiates communication with a telecommunications device, during which conversation or communication ensues, solely to harass any person at the called number or who receives the communication; or

''(2) knowingly permits any telecommunications facility under his control to be used for any activity prohibited by paragraph (1) with the intent that it be used for such activity,

shall be fined under title 18, United States Code, or imprisoned not more than two years, or both.''; and

(2) by adding at the end the following new subsections:

''(d) Whoever—

''(1) in interstate or foreign communications knowingly—

''(A) uses an interactive computer service to send to a specific person or persons under 18 years of age, or

''(B) uses any interactive computer service to display in a manner available to a person under 18 years of age,

any comment, request, suggestion, proposal, image, or other communication that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs, regardless of whether the user of such service placed the call or initiated the communication; or

''(2) knowingly permits any telecommunications facility under such person's control to be used for an activity prohibited by paragraph (1) with the intent that it be used for such activity,

shall be fined under title 18, United States Code, or imprisoned not more than two years, or both.

''(e) In addition to any other defenses available by law:

''(1) No person shall be held to have violated subsection (a) or (d) solely for providing access or connection to or from a facility, system, or network not under that person's control, including transmission, downloading, intermediate storage, access software, or other related capabilities that are incidental to providing such access or connection that does not include the creation of the content of the communication.

''(2) The defenses provided by paragraph (1) of this subsection shall not be applicable to a person who is a conspirator with an entity actively involved in the creation or knowing distribution of communications that violate this section, or who knowingly advertises the availability of such communications.

''(3) The defenses provided in paragraph (1) of this subsection shall not be applicable to a person who provides access or connection to a facility, system, or network engaged in the violation of this section that is owned or controlled by such person.

''(4) No employer shall be held liable under this section for the actions of an employee or agent unless the employee's or agent's conduct is within the scope of his or her employment or agency and the employer (A) having knowledge of such conduct, authorizes or ratifies such conduct, or (B) recklessly disregards such conduct.

''(5) It is a defense to a prosecution under subsection (a)(1)(B) or (d), or under subsection (a)(2) with respect to the use of a facility for an activity under subsection (a)(1)(B) that a person—

''(A) has taken, in good faith, reasonable, effective, and appropriate actions under the circumstances to restrict or prevent access by minors to a communication specified in such subsections, which may involve any appropriate measures to restrict minors from such communications, including any method which is feasible under available technology; or

''(B) has restricted access to such communication by requiring use of a verified credit card, debit account, adult access code, or adult personal identification number.

''(6) The Commission may describe measures which are reasonable, effective, and appropriate to restrict access to prohibited communications under subsection (d). Nothing in this section authorizes the Commission to enforce, or is intended to provide the Commission with the authority to approve, sanction, or permit, the use of such measures. The Commission shall have no enforcement authority over the failure to utilize such measures. The Commission shall not endorse specific products relating to such measures. The use of such measures shall be admitted as evidence of good faith efforts for purposes of paragraph (5) in any action arising under subsection (d). Nothing in this section shall be construed to treat interactive computer services as common carriers or telecommunications carriers.

''(f)(1) No cause of action may be brought in any court or administrative agency against any person on account of any activity that is not in violation of any law punishable by criminal or civil penalty, and that the person has taken in good faith to implement a defense authorized under this section or otherwise to restrict or prevent the transmission of, or access to, a communication specified in this section.

''(2) No State or local government may impose any liability for commercial activities or actions by commercial entities, nonprofit libraries, or institutions of higher education in connection with an activity or action described in subsection (a)(2) or (d) that is inconsistent with the treatment of those activities or actions under this section: *Provided, however*, That nothing herein shall preclude any State or local government from enacting and enforcing complementary oversight, liability, and regulatory systems, procedures, and requirements, so long as such systems, procedures, and requirements govern only intrastate services and do not result in the imposition of inconsistent rights, duties or obligations on the provision of interstate services. Nothing in this subsection shall preclude any State or local government from governing conduct not covered by this section.

''(g) Nothing in subsection (a), (d), (e), or (f) or in the defenses to prosecution under subsection (a) or (d) shall be construed to affect or limit the application or enforcement of any other Federal law.

''(h) For purposes of this section—

''(1) The use of the term 'telecommunications device' in this section—

''(A) shall not impose new obligations on broadcasting station licensees and cable operators covered by obscenity and indecency provisions elsewhere in this Act; and

''(B) does not include an interactive computer service.

''(2) The term 'interactive computer service' has the meaning provided in section 230(e)(2).

''(3) The term 'access software' means software (including client or server software) or enabling tools that do not create or provide the content of the communication but that allow a user to do any one or more of the following:

''(A) filter, screen, allow, or disallow content;

''(B) pick, choose, analyze, or digest content; or

''(C) transmit, receive, display, forward, cache, search, subset, organize, reorganize, or translate content.

''(4) The term 'institution of higher education' has the meaning provided in section 1201 of the Higher Education Act of 1965 (20 U.S.C. 1141).

''(5) The term 'library' means a library eligible for participation in State-based plans for funds under title III of the Library Services and Construction Act (20 U.S.C. 355e et seq.).''.

SEC. 503. OBSCENE PROGRAMMING ON CABLE TELEVISION.

Section 639 (47 U.S.C. 559) is amended by striking ''not more than $10,000'' and inserting ''under title 18, United States Code,''.

SEC. 504. SCRAMBLING OF CABLE CHANNELS FOR NONSUBSCRIBERS.

Part IV of title VI (47 U.S.C. 551 et seq.) is amended by adding at the end the following:

47 USC 560.

''SEC. 640. SCRAMBLING OF CABLE CHANNELS FOR NONSUBSCRIBERS.

''(a) SUBSCRIBER REQUEST.—Upon request by a cable service subscriber, a cable operator shall, without charge, fully scramble or otherwise fully block the audio and video programming of each channel carrying such programming so that one not a subscriber does not receive it.

''(b) DEFINITION.—As used in this section, the term 'scramble' means to rearrange the content of the signal of the programming so that the programming cannot be viewed or heard in an understandable manner.''.

SEC. 505. SCRAMBLING OF SEXUALLY EXPLICIT ADULT VIDEO SERVICE PROGRAMMING.

(a) REQUIREMENT.—Part IV of title VI (47 U.S.C. 551 et seq.), as amended by this Act, is further amended by adding at the end the following:

47 USC 561.

''SEC. 641. SCRAMBLING OF SEXUALLY EXPLICIT ADULT VIDEO SERVICE PROGRAMMING.

''(a) REQUIREMENT.—In providing sexually explicit adult programming or other programming that is indecent on any channel of its service primarily dedicated to sexually-oriented programming, a multichannel video programming distributor shall fully scramble or otherwise fully block the video and audio portion of such channel so that one not a subscriber to such channel or programming does not receive it.

Children and youth.

''(b) IMPLEMENTATION.—Until a multichannel video programming distributor complies with the requirement set forth in subsection (a), the distributor shall limit the access of children to the programming referred to in that subsection by not providing such programming during the hours of the day (as determined by the Commission) when a significant number of children are likely to view it.

''(c) DEFINITION.—As used in this section, the term 'scramble' means to rearrange the content of the signal of the programming so that the programming cannot be viewed or heard in an understandable manner.''.

47 USC 561 note.

(b) EFFECTIVE DATE.—The amendment made by subsection (a) shall take effect 30 days after the date of enactment of this Act.

SEC. 506. CABLE OPERATOR REFUSAL TO CARRY CERTAIN PROGRAMS.

(a) PUBLIC, EDUCATIONAL, AND GOVERNMENTAL CHANNELS.—Section 611(e) (47 U.S.C. 531(e)) is amended by inserting before the period the following: '', except a cable operator may refuse to transmit any public access program or portion of a public access program which contains obscenity, indecency, or nudity''.

(b) CABLE CHANNELS FOR COMMERCIAL USE.—Section 612(c)(2) (47 U.S.C. 532(c)(2)) is amended by striking ''an operator'' and inserting ''a cable operator may refuse to transmit any leased access program or portion of a leased access program which contains obscenity, indecency, or nudity and''.

SEC. 507. CLARIFICATION OF CURRENT LAWS REGARDING COMMUNICATION OF OBSCENE MATERIALS THROUGH THE USE OF COMPUTERS.

(a) IMPORTATION OR TRANSPORTATION.—Section 1462 of title 18, United States Code, is amended—

(1) in the first undesignated paragraph, by inserting ''or interactive computer service (as defined in section 230(e)(2) of the Communications Act of 1934)'' after ''carrier''; and

(2) in the second undesignated paragraph—

(A) by inserting ''or receives,'' after ''takes'';

(B) by inserting ''or interactive computer service (as defined in section 230(e)(2) of the Communications Act of 1934)'' after ''common carrier''; and

(C) by inserting ''or importation'' after ''carriage''.

(b) TRANSPORTATION FOR PURPOSES OF SALE OR DISTRIBUTION.—The first undesignated paragraph of section 1465 of title 18, United States Code, is amended—

(1) by striking ''transports in'' and inserting ''transports or travels in, or uses a facility or means of,'';

(2) by inserting ''or an interactive computer service (as defined in section 230(e)(2) of the Communications Act of 1934) in or affecting such commerce'' after ''foreign commerce'' the first place it appears;

(3) by striking '', or knowingly travels in'' and all that follows through ''obscene material in interstate or foreign commerce,'' and inserting ''of''.

(c) INTERPRETATION.—The amendments made by this section are clarifying and shall not be interpreted to limit or repeal any prohibition contained in sections 1462 and 1465 of title 18, United States Code, before such amendment, under the rule established in United States v. Alpers, 338 U.S. 680 (1950). 18 USC 1462 note.

SEC. 508. COERCION AND ENTICEMENT OF MINORS.

Section 2422 of title 18, United States Code, is amended—

(1) by inserting ''(a)'' before ''Whoever knowingly''; and

(2) by adding at the end the following:

''(b) Whoever, using any facility or means of interstate or foreign commerce, including the mail, or within the special maritime and territorial jurisdiction of the United States, knowingly persuades, induces, entices, or coerces any individual who has not attained the age of 18 years to engage in prostitution or any sexual act for which any person may be criminally prosecuted, or attempts to do so, shall be fined under this title or imprisoned not more than 10 years, or both.''.

SEC. 509. ONLINE FAMILY EMPOWERMENT.

Title II of the Communications Act of 1934 (47 U.S.C. 201 et seq.) is amended by adding at the end the following new section:

''SEC. 230. PROTECTION FOR PRIVATE BLOCKING AND SCREENING OF OFFENSIVE MATERIAL. 47 USC 230.

''(a) FINDINGS.—The Congress finds the following:

''(1) The rapidly developing array of Internet and other interactive computer services available to individual Americans represent an extraordinary advance in the availability of educational and informational resources to our citizens.

''(2) These services offer users a great degree of control over the information that they receive, as well as the potential for even greater control in the future as technology develops.

''(3) The Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.

''(4) The Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation.

''(5) Increasingly Americans are relying on interactive media for a variety of political, educational, cultural, and entertainment services.

''(b) POLICY.—It is the policy of the United States—

''(1) to promote the continued development of the Internet and other interactive computer services and other interactive media;

''(2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation;

''(3) to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services;

''(4) to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material; and

''(5) to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.

''(c) PROTECTION FOR 'GOOD SAMARITAN' BLOCKING AND SCREENING OF OFFENSIVE MATERIAL.—

''(1) TREATMENT OF PUBLISHER OR SPEAKER.—No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.

''(2) CIVIL LIABILITY.—No provider or user of an interactive computer service shall be held liable on account of—

''(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or

''(B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).

''(d) EFFECT ON OTHER LAWS.—

''(1) NO EFFECT ON CRIMINAL LAW.—Nothing in this section shall be construed to impair the enforcement of section 223 of this Act, chapter 71 (relating to obscenity) or 110 (relating to sexual exploitation of children) of title 18, United States Code, or any other Federal criminal statute.

''(2) NO EFFECT ON INTELLECTUAL PROPERTY LAW.—Nothing in this section shall be construed to limit or expand any law pertaining to intellectual property.

''(3) STATE LAW.—Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section. No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.

''(4) NO EFFECT ON COMMUNICATIONS PRIVACY LAW.—Nothing in this section shall be construed to limit the application of the Electronic Communications Privacy Act of 1986 or any of the amendments made by such Act, or any similar State law.

''(e) DEFINITIONS.—As used in this section:

''(1) INTERNET.—The term 'Internet' means the international computer network of both Federal and non-Federal interoperable packet switched data networks.

''(2) INTERACTIVE COMPUTER SERVICE.—The term 'interactive computer service' means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.

''(3) INFORMATION CONTENT PROVIDER.—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 or any other interactive computer service.

''(4) ACCESS SOFTWARE PROVIDER.—The term 'access software provider' means a provider of software (including client or server software), or enabling tools that do any one or more of the following:

''(A) filter, screen, allow, or disallow content;

''(B) pick, choose, analyze, or digest content; or

''(C) transmit, receive, display, forward, cache, search, subset, organize, reorganize, or translate content.''.

Subtitle B—Violence

SEC. 551. PARENTAL CHOICE IN TELEVISION PROGRAMMING.

(a) FINDINGS.—The Congress makes the following findings: 47 USC 303 note.

(1) Television influences children's perception of the values and behavior that are common and acceptable in society.

(2) Television station operators, cable television system operators, and video programmers should follow practices in connection with video programming that take into consideration that television broadcast and cable programming has established a uniquely pervasive presence in the lives of American children.

(3) The average American child is exposed to 25 hours of television each week and some children are exposed to as much as 11 hours of television a day.

(4) Studies have shown that children exposed to violent video programming at a young age have a higher tendency for violent and aggressive behavior later in life than children not so exposed, and that children exposed to violent video programming are prone to assume that acts of violence are acceptable behavior.

(5) Children in the United States are, on average, exposed to an estimated 8,000 murders and 100,000 acts of violence on television by the time the child completes elementary school.

(6) Studies indicate that children are affected by the pervasiveness and casual treatment of sexual material on television, eroding the ability of parents to develop responsible attitudes and behavior in their children.

(7) Parents express grave concern over violent and sexual video programming and strongly support technology that would give them greater control to block video programming in the home that they consider harmful to their children.

(8) There is a compelling governmental interest in empowering parents to limit the negative influences of video programming that is harmful to children.

(9) Providing parents with timely information about the nature of upcoming video programming and with the technological tools that allow them easily to block violent, sexual, or other programming that they believe harmful to their children is a nonintrusive and narrowly tailored means of achieving that compelling governmental interest.

(b) ESTABLISHMENT OF TELEVISION RATING CODE.—

(1) AMENDMENT.—Section 303 (47 U.S.C. 303) is amended by adding at the end the following:

''(w) Prescribe—

''(1) on the basis of recommendations from an advisory committee established by the Commission in accordance with section 551(b)(2) of the Telecommunications Act of 1996, guidelines and recommended procedures for the identification and rating of video programming that contains sexual, violent, or other indecent material about which parents should be informed before it is displayed to children: *Provided,* That nothing in this paragraph shall be construed to authorize any rating of video programming on the basis of its political or religious content; and

''(2) with respect to any video programming that has been rated, and in consultation with the television industry, rules requiring distributors of such video programming to transmit such rating to permit parents to block the display of video programming that they have determined is inappropriate for their children.''.

47 USC 303 note.

(2) ADVISORY COMMITTEE REQUIREMENTS.—In establishing an advisory committee for purposes of the amendment made by paragraph (1) of this subsection, the Commission shall—

(A) ensure that such committee is composed of parents, television broadcasters, television programming producers, cable operators, appropriate public interest groups, and other interested individuals from the private sector and is fairly balanced in terms of political affiliation, the points of view represented, and the functions to be performed by the committee;

(B) provide to the committee such staff and resources as may be necessary to permit it to perform its functions efficiently and promptly; and

(C) require the committee to submit a final report of its recommendations within one year after the date of the appointment of the initial members. Reports.

(c) REQUIREMENT FOR MANUFACTURE OF TELEVISIONS THAT BLOCK PROGRAMS.—Section 303 (47 U.S.C. 303), as amended by subsection (a), is further amended by adding at the end the following:

''(x) Require, in the case of an apparatus designed to receive television signals that are shipped in interstate commerce or manufactured in the United States and that have a picture screen 13 inches or greater in size (measured diagonally), that such apparatus be equipped with a feature designed to enable viewers to block display of all programs with a common rating, except as otherwise permitted by regulations pursuant to section 330(c)(4).''.

(d) SHIPPING OF TELEVISIONS THAT BLOCK PROGRAMS.—

(1) REGULATIONS.—Section 330 (47 U.S.C. 330) is amended—

(A) by redesignating subsection (c) as subsection (d); and

(B) by adding after subsection (b) the following new subsection (c):

''(c)(1) Except as provided in paragraph (2), no person shall ship in interstate commerce or manufacture in the United States any apparatus described in section 303(x) of this Act except in accordance with rules prescribed by the Commission pursuant to the authority granted by that section.

''(2) This subsection shall not apply to carriers transporting apparatus referred to in paragraph (1) without trading in it.

''(3) The rules prescribed by the Commission under this subsection shall provide for the oversight by the Commission of the adoption of standards by industry for blocking technology. Such rules shall require that all such apparatus be able to receive the rating signals which have been transmitted by way of line 21 of the vertical blanking interval and which conform to the signal and blocking specifications established by industry under the supervision of the Commission.

''(4) As new video technology is developed, the Commission shall take such action as the Commission determines appropriate to ensure that blocking service continues to be available to consumers. If the Commission determines that an alternative blocking technology exists that—

''(A) enables parents to block programming based on identifying programs without ratings,

''(B) is available to consumers at a cost which is comparable to the cost of technology that allows parents to block programming based on common ratings, and

''(C) will allow parents to block a broad range of programs on a multichannel system as effectively and as easily as technology that allows parents to block programming based on common ratings,

the Commission shall amend the rules prescribed pursuant to section 303(x) to require that the apparatus described in such section be equipped with either the blocking technology described in such section or the alternative blocking technology described in this paragraph.''.

(2) CONFORMING AMENDMENT.—Section 330(d), as redesignated by subsection (d)(1)(A), is amended by striking ''section 303(s), and section 303(u)'' and inserting in lieu thereof ''and sections 303(s), 303(u), and 303(x)''.

47 USC 330.

47 USC 303 note.

(e) APPLICABILITY AND EFFECTIVE DATES.—

(1) APPLICABILITY OF RATING PROVISION.—The amendment made by subsection (b) of this section shall take effect 1 year after the date of enactment of this Act, but only if the Commission determines, in consultation with appropriate public interest groups and interested individuals from the private sector, that distributors of video programming have not, by such date—

(A) established voluntary rules for rating video programming that contains sexual, violent, or other indecent material about which parents should be informed before it is displayed to children, and such rules are acceptable to the Commission; and

(B) agreed voluntarily to broadcast signals that contain ratings of such programming.

(2) EFFECTIVE DATE OF MANUFACTURING PROVISION.—In prescribing regulations to implement the amendment made by subsection (c), the Federal Communications Commission shall, after consultation with the television manufacturing industry, specify the effective date for the applicability of the requirement to the apparatus covered by such amendment, which date shall not be less than two years after the date of enactment of this Act.

47 USC 303 note.

SEC. 552. TECHNOLOGY FUND.

It is the policy of the United States to encourage broadcast television, cable, satellite, syndication, other video programming distributors, and relevant related industries (in consultation with appropriate public interest groups and interested individuals from the private sector) to—

(1) establish a technology fund to encourage television and electronics equipment manufacturers to facilitate the development of technology which would empower parents to block programming they deem inappropriate for their children and to encourage the availability thereof to low income parents;

(2) report to the viewing public on the status of the development of affordable, easy to use blocking technology; and

(3) establish and promote effective procedures, standards, systems, advisories, or other mechanisms for ensuring that users have easy and complete access to the information necessary to effectively utilize blocking technology and to encourage the availability thereof to low income parents.

Subtitle C—Judicial Review

47 USC 223 note.

SEC. 561. EXPEDITED REVIEW.

(a) THREE-JUDGE DISTRICT COURT HEARING.—Notwithstanding any other provision of law, any civil action challenging the constitutionality, on its face, of this title or any amendment made by this title, or any provision thereof, shall be heard by a district for the performance of activities described in section 9(a) of the Communications Act of 1934.

(c) FUNDING AVAILABILITY.—Section 309(j)(8)(B) (47 U.S.C. 309(j)(8)(B)) is amended by adding at the end the following new sentence: ''Such offsetting collections are authorized to remain available until expended.''.

Approved February 8, 1996.

LEGISLATIVE HISTORY S. 652 (H.R. 1555):

HOUSE REPORTS: No. 104 204, Pt. 1 accompanying H.R. 1555 (Comm. on Commerce).
SENATE REPORTS: Nos. 104 23 (Comm. on Commerce, Science, and Transportation) and 104 230 (Comm. of Conference).
CONGRESSIONAL RECORD:
Vol. 141 (1995): June 7, 8, 12 15, considered and passed Senate.
Aug. 2, 4, H.R. 1555 considered and passed House.
Oct. 12, S. 652 considered and passed House, amended, in lieu of H.R. 1555.
Vol. 142 (1996): Feb. 1, House and Senate agreed to conference report.
WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS, Vol. 32 (1996):
Feb. 8, Presidential remarks and statement.

Appendix C:
FOSTA

Public Law 115–164
115th Congress

An Act

To amend the Communications Act of 1934 to clarify that section 230 of such Act does not prohibit the enforcement against providers and users of interactive computer services of Federal and State criminal and civil law relating to sexual exploitation of children or sex trafficking, and for other purposes.

Apr. 11, 2018
[H.R. 1865]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Allow States and Victims to Fight Online Sex Trafficking Act of 2017.
18 USC 1 note.

SECTION 1. SHORT TITLE.

This Act may be cited as the "Allow States and Victims to Fight Online Sex Trafficking Act of 2017".

SEC. 2. SENSE OF CONGRESS. 47 USC 230 note.

It is the sense of Congress that—

(1) section 230 of the Communications Act of 1934 (47 U.S.C. 230; commonly known as the "Communications Decency Act of 1996") was never intended to provide legal protection to websites that unlawfully promote and facilitate prostitution and websites that facilitate traffickers in advertising the sale of unlawful sex acts with sex trafficking victims;

(2) websites that promote and facilitate prostitution have been reckless in allowing the sale of sex trafficking victims and have done nothing to prevent the trafficking of children and victims of force, fraud, and coercion; and

(3) clarification of such section is warranted to ensure that such section does not provide such protection to such websites.

SEC. 3. PROMOTION OF PROSTITUTION AND RECKLESS DISREGARD OF SEX TRAFFICKING.

(a) PROMOTION OF PROSTITUTION.—Chapter 117 of title 18, United States Code, is amended by inserting after section 2421 the following:

"§ 2421A. Promotion or facilitation of prostitution and reckless disregard of sex trafficking 18 USC 2421A.

"(a) IN GENERAL.—Whoever, using a facility or means of interstate or foreign commerce or in or affecting interstate or foreign commerce, owns, manages, or operates an interactive computer service (as such term is defined in defined in section 230(f) the Communications Act of 1934 (47 U.S.C. 230(f))), or conspires or attempts to do so, with the intent to promote or facilitate the prostitution of another person shall be fined under this title, imprisoned for not more than 10 years, or both.

"(b) AGGRAVATED VIOLATION.—Whoever, using a facility or means of interstate or foreign commerce or in or affecting interstate or foreign commerce, owns, manages, or operates an interactive computer service (as such term is defined in defined in section 230(f) the Communications Act of 1934 (47 U.S.C. 230(f))), or conspires or attempts to do so, with the intent to promote or facilitate the prostitution of another person and—

"(1) promotes or facilitates the prostitution of 5 or more persons; or

"(2) acts in reckless disregard of the fact that such conduct contributed to sex trafficking, in violation of 1591(a),

shall be fined under this title, imprisoned for not more than 25 years, or both.

"(c) CIVIL RECOVERY.—Any person injured by reason of a violation of section 2421A(b) may recover damages and reasonable attorneys' fees in an action before any appropriate United States district court.

"(d) MANDATORY RESTITUTION.—Notwithstanding sections 3663 or 3663A and in addition to any other civil or criminal penalties authorized by law, the court shall order restitution for any violation of subsection (b)(2). The scope and nature of such restitution shall be consistent with section 2327(b).

"(e) AFFIRMATIVE DEFENSE.—It shall be an affirmative defense to a charge of violating subsection (a), or subsection (b)(1) where the defendant proves, by a preponderance of the evidence, that the promotion or facilitation of prostitution is legal in the jurisdiction where the promotion or facilitation was targeted.".

18 USC prec. 2421.

(b) TABLE OF CONTENTS.—The table of contents for such chapter is amended by inserting after the item relating to section 2421 the following:

"2421A. Promotion or facilitation of prostitution and reckless disregard of sex trafficking.".

SEC. 4. ENSURING ABILITY TO ENFORCE FEDERAL AND STATE CRIMINAL AND CIVIL LAW RELATING TO SEX TRAFFICKING.

(a) IN GENERAL.—Section 230(e) of the Communications Act of 1934 (47 U.S.C. 230(e)) is amended by adding at the end the following:

"(5) NO EFFECT ON SEX TRAFFICKING LAW.—Nothing in this section (other than subsection (c)(2)(A)) shall be construed to impair or limit—

"(A) any claim in a civil action brought under section 1595 of title 18, United States Code, if the conduct underlying the claim constitutes a violation of section 1591 of that title;

"(B) any charge in a criminal prosecution brought under State law if the conduct underlying the charge would constitute a violation of section 1591 of title 18, United States Code; or

"(C) any charge in a criminal prosecution brought under State law if the conduct underlying the charge would constitute a violation of section 2421A of title 18, United States Code, and promotion or facilitation of prostitution is illegal in the jurisdiction where the defendant's promotion or facilitation of prostitution was targeted.".

Applicability. 47 USC 230 note.

(b) EFFECTIVE DATE.—The amendments made by this section shall take effect on the date of the enactment of this Act, and the amendment made by subsection (a) shall apply regardless of whether the conduct alleged occurred, or is alleged to have occurred, before, on, or after such date of enactment.

SEC. 5. ENSURING FEDERAL LIABILITY FOR PUBLISHING INFORMATION DESIGNED TO FACILITATE SEX TRAFFICKING OR OTHERWISE FACILITATING SEX TRAFFICKING.

Section 1591(e) of title 18, United States Code, is amended—

(1) by redesignating paragraphs (4) and (5) as paragraphs (5) and (6), respectively; and

(2) by inserting after paragraph (3) the following:

Definition.

"(4) The term 'participation in a venture' means knowingly assisting, supporting, or facilitating a violation of subsection (a)(1).".

SEC. 6. ACTIONS BY STATE ATTORNEYS GENERAL.

(a) IN GENERAL.—Section 1595 of title 18, United States Code, is amended by adding at the end the following:

"(d) In any case in which the attorney general of a State has reason to believe that an interest of the residents of that State has been or is threatened or adversely affected by any person who violates section 1591, the attorney general of the State, as parens patriae, may bring a civil action against such person on behalf of the residents of the State in an appropriate district court of the United States to obtain appropriate relief.".

(b) TECHNICAL AND CONFORMING AMENDMENTS.—Section 1595 of title 18, United States Code, is amended—

(1) in subsection (b)(1), by striking "this section" and inserting "subsection (a)"; and

(2) in subsection (c), in the matter preceding paragraph (1), by striking "this section" and inserting "subsection (a)".

SEC. 7. SAVINGS CLAUSE. 47 USC 230 note.

Nothing in this Act or the amendments made by this Act shall be construed to limit or preempt any civil action or criminal prosecution under Federal law or State law (including State statutory law and State common law) filed before or after the day before the date of enactment of this Act that was not limited or preempted by section 230 of the Communications Act of 1934 (47 U.S.C. 230), as such section was in effect on the day before the date of enactment of this Act.

SEC. 8. GAO STUDY. Time period. Reports.

On the date that is 3 years after the date of the enactment of this Act, the Comptroller General of the United States shall conduct a study and submit to the Committees on the Judiciary of the House of Representatives and of the Senate, the Committee on Homeland Security of the House of Representatives, and the Committee on Homeland Security and Governmental Affairs of the Senate, a report which includes the following:

(1) Information on each civil action brought pursuant to section 2421A(c) of title 18, United States Code, that resulted in an award of damages, including the amount claimed, the nature or description of the losses claimed to support the amount claimed, the losses proven, and the nature or description of the losses proven to support the amount awarded.

(2) Information on each civil action brought pursuant to section 2421A(c) of title 18, United States Code, that did not result in an award of damages, including—

(A) the amount claimed and the nature or description of the losses claimed to support the amount claimed; and

(B) whether the case was dismissed, and if the case was dismissed, information describing the reason for the dismissal.

(3) Information on each order of restitution entered pursuant to section 2421A(d) of title 18, United States Code, including—

(A) whether the defendant was a corporation or an individual;

(B) the amount requested by the Government and the justification for, and calculation of, the amount requested, if restitution was requested; and

(C) the amount ordered by the court and the justification for, and calculation of, the amount ordered.

(4) For each defendant convicted of violating section 2421A(b) of title 18, United States Code, that was not ordered to pay restitution—

(A) whether the defendant was a corporation or an individual;

(B) the amount requested by the Government, if restitution was requested; and

(C) information describing the reason that the court did not order restitution.

Approved April 11, 2018.

LEGISLATIVE HISTORY—H.R. 1865:

HOUSE REPORTS: No. 115–572, Pt. 1 (Comm. on the Judiciary).
CONGRESSIONAL RECORD, Vol. 164 (2018):
Feb. 27, considered and passed House.
Mar. 21, considered and passed Senate.
DAILY COMPILATION OF PRESIDENTIAL DOCUMENTS (2018):
Apr. 11, Presidential remarks.

Appendix D:
141 Cong. Rec. H8460

Watts (OK)	Wyden	Zeliff
Wolf	Yates	Zimmer

NOT VOTING—29

Andrews	Maloney	Spratt
Bateman	McDade	Thurman
Collins (MI)	McIntosh	Towns
Condit	Moakley	Tucker
Cooley	Ortiz	Waxman
de la Garza	Owens	Williams
Filner	Rangel	Wilson
Hayes	Reynolds	Young (AK)
Herger	Rose	Young (FL)
Kaptur	Scarborough	

□ 0910

The Clerk announced the following pair:

On this vote:

Mr. Scarborough for, with Mr. Filner against.

Mr. GILMAN, Mr. STOKES, and Ms. FURSE changed their vote from "aye" to "no."

Messrs. JONES, KIM, MFUME, BARCIA, HEFNER, and JEFFERSON, Ms. WOOLSEY, Mrs. KELLY, and Ms. McKINNEY changed their vote from "no" to "aye."

So the amendment was agreed to.

The result of the vote was announced as above recorded.

PERSONAL EXPLANATION

Mrs. MALONEY. Mr. Speaker, I inadvertently missed rollcall vote 627. Had I been present, I would have voted "yes."

The CHAIRMAN. It is now in order to consider amendment No. 2 1 printed in part 2 of House Report 104 223.

AMENDMENT NO. 2–1 OFFERED BY MR. STUPAK

Mr. STUPAK. Mr. Chairman, I offer an amendment, numbered 2 1.

The CHAIRMAN. The Clerk will designate the amendment.

The text of the amendment is as follows:

Amendment No. 2–1 offered by Mr. STUPAK: Page 14, beginning on line 8, strike section 243 through page 16, line 9, and insert the following (and conform the table of contents accordingly):

SEC. 243. REMOVAL OF BARRIERS TO ENTRY.

(a) IN GENERAL.—No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide interstate or intrastate telecommunications services.

(b) STATE AND LOCAL AUTHORITY.—Nothing in this section shall affect the ability of a State or local government to impose, on a competitively neutral basis and consistent with section 247 (relating to universal service), requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.

(c) LOCAL GOVERNMENT AUTHORITY.—Nothing in this Act affects the authority of a local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of the rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.

(d) EXCEPTION.—In the case of commercial mobile services, the provisions of section 332(c)(3) shall apply in lieu of the provisions of this section.

The CHAIRMAN. Pursuant to the rule, the gentleman from Michigan [Mr. STUPAK] will be recognized for 5 minutes, and a Member opposed will be recognized for 5 minutes.

Does the gentleman from Virginia rise to claim the time?

Mr. BLILEY. Mr. Chairman, I do.

The CHAIRMAN. The gentleman from Virginia [Mr. BLILEY] will be recognized for 5 minutes.

The Chair recognizes the gentleman from Michigan [Mr. STUPAK].

Mr. STUPAK. Mr. Chairman, I am offering this amendment with the gentleman from Texas [Mr. BARTON] to protect the authority of local governments to control public rights-of-way and to be fairly compensated for the use of public property. I have a chart here which shows the investment that our cities have made in our rights-of-way.

□ 0915

Mr. Chairman, as this chart shows, the city spent about $100 billion a year on rights-of-way, and get back only about 3 percent, or $3 billion, from the users of the right-of-way, the gas companies, the electric company, the private water companies, the telephone companies, and the cable companies.

You heard that the manage's amendment takes care of local government and local control. Well, it does not. Local governments must be able to distinguish between different telecommunication providers. The way the manager's amendment is right now, they cannot make that distinction.

For example, if a company plans to run 100 miles of trenching in our streets and wires to all parts of the cities, it imposes a different burden on the right-of-way than a company that just wants to string a wire across two streets to a couple of buildings.

The manager's amendment states that local governments would have to charge the same fee to every company, regardless of how much or how little they use the right-of-way or rip up our streets. Because the contracts have been in place for many years, some as long as 100 years, if our amendment is not adopted, if the Stupak-Barton amendment is not adopted, you will have companies in many areas securing free access to public property. Taxpayers paid for this property, taxpayers paid to maintain this property, and it simply is not fair to ask the taxpayers to continue to subsidize telecommunication companies.

In our free market society, the companies should have to pay a fair and reasonable rate to use public property. It is ironic that one of the first bills we passed in this House was to end unfunded Federal mandates. But this bill, with the management's amendment, mandates that local units of government make public property available to whoever wants it without a fair and reasonable compensation.

The manager's amendment is a $100 billion mandate, an unfunded Federal mandate. Our amendment is supported by the National League of Cities, the U.S. Conference of Mayors, the National Association of Counties, the National Conference of State Legislatures and the National Governors Association. The Senator from Texas on the Senate side has placed our language exactly as written in the Senate bill.

Say no to unfunded mandates, say no to the idea that Washington knows best. Support the Stupak-Barton amendment.

Mr. Chairman, I yield 2 minutes to the distinguished gentleman from Texas [Mr. BARTON], the coauthor of this amendment.

(Mr. BARTON of Texas asked and was given permission to revise and extend his remarks.)

Mr. BARTON of Texas. Mr. Chairman, first I want to thank the gentleman from Virginia [Mr. BLILEY], the gentleman from Texas [Mr. FIELDS], and the gentleman from Colorado [Mr. SCHAEFER], for trying to work out an agreement on this amendment. We have been in negotiations right up until this morning, and were very close to an agreement, but we have not quite been able to get there.

I thank the gentleman from Michigan [Mr. STUPAK] for his leadership on this. This is something that the cities want desperately. As Republicans, we should be with our local city mayors, our local city councils, because we are for decentralizing, we are for true Federalism, we are for returning power as close to the people as possible, and that is what the Stupak-Barton amendment does.

It explicitly guarantees that cities and local governments have the right to not only control access within their city limits, but also to set the compensation level for the use of that right-of-way.

It does not let the city governments prohibit entry of telecommunications service providers for pass through or for providing service to their community. This has been strongly endorsed by the League of Cities, the Council of Mayors, the National Association of Counties. In the Senate it has been put into the bill by the junior Republican Senator from Texas [KAY BAILEY HUTCHISON].

The Chairman's amendment has tried to address this problem. It goes part of the way, but not the entire way. The Federal Government has absolutely no business telling State and local government how to price access to their local right-of-way. We should vote for localism and vote against any kind of Federal price controls. We should vote for the Stupak-Barton amendment.

Mr. BLILEY. Mr. Chairman, I yield 1½ minutes to the gentleman from Colorado [Mr. SCHAEFER].

Mr. SCHAEFER. Mr. Chairman, I rise in strong opposition to this Stupak amendment because it is going to allow the local governments to slow down and even derail the movement to real competition in the local telephone market. The Stupak amendment strikes a critical section of the legislation that was offered to prevent local governments from continuing their longstanding practice of discriminating against new competitors in favor of telephone monopolies.

The bill philosophy on this issue is simple: Cities may charge as much or as little as they wanted in franchise fees. As long as they charge all competitors equal, the amendment eliminates that yet critical requirement.

If the consumers are going to certainly be looked at under this, they are going to suffer, because the cities are going to say to the competitors that come in, we will charge you anything that we wish to.

The manager's amendment already takes care of the legitimate needs of the cities and manages the rights-of-way and the control of these. Therefore, the Stupak amendment is at best redundant. In fact, however, it goes far beyond the legitimate needs of the cities.

Last night, just last night, we had talked about this in the author's amendment and we thought we worked out a deal, and we tried to work out a deal. All of a sudden I find that the gentleman, the author of the amendment, reneged on that particular deal, and now all of a sudden is saying well, we want 8 percent of the gross, the gross, of the people who are coming in. This is a ridiculous amendment. It should not be allowed, and we should vote against it.

Mr. BLILEY. Mr. Chairman, I yield 2 minutes to the gentleman from Texas [Mr. FIELDS], the chairman of the subcommittee.

(Mr. FIELDS of Texas asked and was given permission to revise and extend his remarks.)

Mr. FIELDS of Texas. Mr. Chairman, thanks to an amendment offered last year by the gentleman from Colorado [Mr. SCHAEFER], and adopted by the committee, the bill today requires local governments that choose to impose franchise fees to do so in a fair and equal way to tell all communication providers. We did this in response to mayors and other local officials.

The so-called Schaefer amendment, which the Stupak amendment seeks to change, does not affect the authority of local governments to manage public rights-of-way or collect fees for such usage. The Schaefer amendment is necessary to overcome historically based discrimination against new providers.

In many cities, the incumbent telephone company pays nothing, only because they hold a century-old charter, one which may even predate the incorporation of the city itself. In many cases, cities have made no effort to correct this unfairness.

If local governments continue to discriminate in the imposition of franchise fees, they threaten to Balkanize the development of our national telecommunication infrastructure.

For example, in one city, new competitors are assessed up to 11 percent of gross revenues as a condition for doing business there. When a percentage of revenue fee is imposed by a city on a telecommunication provider for use of rights-of-way, that fee becomes a cost of doing business for that provider, and, if you will, the cost of a ticket to enter the market. That is anticompetitive.

The cities argue that control of their rights-of-way are at stake, but what does control of right-of-way have to do with assessing a fee of 11 percent of gross revenue? Absolutely nothing.

Such large gross revenue assessments bear no relation to the cost of using a right-of-way and clearly are arbitrary. It seems clear that the cities are really looking for new sources of revenue, and not merely compensation for right-of-way.

We should follow the example of States like Texas that have already moved ahead and now require cities like Dallas to treat all local telecommunications equally. We must defeat the Barton-Stupak amendment.

Mr. STUPAK. Mr. Chairman, I yield such time as she may consume to the gentlewoman from California [Ms. PELOSI].

(Ms. PELOSI asked and was given permission to revise and extend her remarks.)

Ms. PELOSI. Mr. Chairman, I rise in strong support of the Stupak-Barton amendment, which is a vote for local control over zoning in our communities.

Mr. STUPAK. Mr. Chairman, I yield such time as she may consume to the gentlewoman from Texas [Ms. JACKSON-LEE].

(Ms. JACKSON-LEE asked and was given permission to revise and extend her remarks.)

Ms. JACKSON-LEE. Mr. Chairman, I rise in support of Stupak-Barton, that would ensure cities and counties obtain appropriate authority to manage local right-of-way.

Mr. STUPAK. Mr. Chairman, I yield such time as he may consume to the gentleman from Michigan [Mr. CONYERS].

(Mr. CONYERS asked and was given permission to revise and extend his remarks.)

Mr. CONYERS. Mr. Chairman, I congratulate my colleague from Michigan [Mr. STUPAK] on this very important amendment.

Mr. STUPAK. Mr. Chairman, I yield myself the balance of my time.

Mr. Chairman, we have heard a lot from the other side about gross revenues. You are right. The other side is trying to tell us what is best for our local units of government. Let local units of government decide this issue. Washington does not know everything. You have always said Washington should keep their nose out of it. You have been for control. This is a local control amendment, supported by mayors, State legislatures, counties, Governors. Vote yes on the Stupak-Barton amendment.

Mr. BLILEY. Mr. Chairman, I yield myself the balance of my time.

Mr. Chairman, first of all, let me say that I was a former mayor and a city councilman. I served as president of the Virginia Municipal League, and I served on the board of directors of the National League of Cities. I know you have all heard from your mayors, you have heard from your councils, and they want this. But I want you to know what you are doing.

If you vote for this, you are voting for a tax increase on your cable users, because that is exactly what it is. I commend the gentleman from Texas [Mr. BARTON], I commend the gentleman from Michigan [Mr. STUPAK] who worked tirelessly to try to negotiate an agreement.

The cities came back and said 10 percent gross receipts tax. Finally they made a big concession, 8 percent gross receipts tax. What we say is charge what you will, but do not discriminate. If you charge the cable company 8 percent, charge the phone company 8 percent, but do not discriminate. That is what they do here, and that is wrong.

I would hope that Members would defeat the amendment.

Mr. Chairman, I yield back the balance of my time.

The CHAIRMAN. All time on this amendment has expired.

The question is on the amendment offered by the gentleman from Michigan [Mr. STUPAK].

The question was taken; and the Chairman announced that the ayes appeared to have it.

Mr. BLILEY. Mr. Chairman, I demand a recorded vote.

The CHAIRMAN. Pursuant to the rule, further proceedings on the amendment offered by the gentleman from Michigan [Mr. STUPAK] will be postponed until after the vote on amendment 24 to be offered by the gentleman from Massachusetts [Mr. MARKEY].

It is now in order to consider amendment No. 22 offered by the gentleman from Michigan [Mr. CONYERS].

PARLIAMENTARY INQUIRY

Mr. NADLER. Mr. Chairman, I have a parliamentary inquiry.

The CHAIRMAN. The gentleman will state it.

Mr. NADLER. Mr. Chairman, can the Chair simply state if it plans to roll other votes? Some of us were waiting around for this vote.

The CHAIRMAN. It is the intention of the Chair to roll the next two votes on the next two amendments, 22 and 23, until after a vote on 24. We will debate the first Markey amendment.

Mr. NADLER. Could the Chair use names, please?

The CHAIRMAN. We will roll the next two amendments, the Conyers and Cox-Wyden amendments, until after the vote on the first Markey amendment.

AMENDMENT 2–2 AS MODIFIED OFFERED BY MR. CONYERS

Mr. CONYERS. Mr. Chairman, I offer a modified amendment.

The Clerk read as follows:

Amendment as modified offered by Mr. CONYERS: Page 26, strike line 6 and insert the following:

"(c) COMMISSION AND ATTORNEY GENERAL REVIEW.—

Page 26, lines 8 and 10, page 27, lines 6 and 9, strike "Commission" and insert "Commission and Attorney General".

Page 27, lines 4 and 12, insert "COMMISSION" before "DECISION".

Page 27, after line 21, insert the following new paragraph:

"(5) ATTORNEY GENERAL DECISION.—

"(A) PUBLICATION.—Not later than 10 days after receiving a verification under this section, the Attorney General shall publish the verification in the Federal Register.

"(B) AVAILABILITY OF INFORMATION.—The Attorney General shall make available to the public all information (excluding trade secrets and privileged or confidential commercial or financial information) submitted by the Bell operating company in connection with the verification.

"(C) COMMENT PERIOD.—Not later than 45 days after a verification is published under subparagraph (A), interested persons may submit written comments to the Attorney General, regarding the verification. Submitted comments shall be available to the public.

"(D) DETERMINATION.—After the time for comment under subparagraph (C) has expired, but not later than 90 days after receiving a verification under this subsection, the Attorney General shall issue a written determination, with respect to approving the verification with respect to the authorization for which the Bell operating company has applied. If the Attorney General fails to issue such determination in the 90-day period beginning on the date the Attorney General receives such verification, the Attorney General shall be deemed to have issued a determination approving such verification on the last day of such period.

"(E) STANDARD FOR DECISION.—The Attorney General shall approve such verification unless the Attorney General finds there is a dangerous probability that such company or its affiliates would successfully use market power to substantially impede competition in the market such company seeks to enter.

"(F) PUBLICATION.—Not later than 10 days after issuing a determination under subparagraph (E), the Attorney General shall publish a brief description of the determination in the Federal Register.

"(G) FINALITY.—A determination made under subparagraph (E) shall be final unless a petition with respect to such determination is timely filed under subparagraph (H).

"(H) JUDICIAL REVIEW.—

"(i) FILING OF PETITION.—Not later than 30 days after a determination by the Attorney General is published under subparagraph (F), the Bell operating company that submitted the verification, or any person who would be injured in its business or property as a result of the determination regarding such company's engaging in provision of interLATA services, may file a petition for judicial review of the determination in the United States Court of Appeals for the District of Columbia Circuit. The United States Court of Appeals for the District of Columbia shall have exclusive jurisdiction to review determinations made under this paragraph.

"(ii) CERTIFICATION OF RECORD.—As part of the answer to the petition, the Attorney General shall file in such court a certified copy of the record upon which the determination is based.

"(iii) CONSOLIDATION OF PETITIONS.—The court shall consolidate for judicial review all petitions filed under this subparagraph with respect to the verification.

"(iv) JUDGMENT.—The court shall enter a judgment after reviewing the determination in accordance with section 706 of title 5 of the United States Code. The determination required by subparagraph (E) shall be affirmed by the court only if the court finds that the record certified pursuant to clause (ii) provides substantial evidence for that determination."

Page 29, line 8, insert "and the Attorney General's" after "the Commission's".

Mr. CONYERS (during the reading). Mr. Chairman, I ask unanimous consent that the amendment be considered as read and printed in the RECORD.

The CHAIRMAN. Is there objection to the request of the gentleman from Michigan?

There was no objection.

☐ 0930

The CHAIRMAN. Under the rule, the gentleman from Michigan [Mr. CONYERS] will be recognized for 15 minutes, and a Member in opposition to the amendment is recognized for 15 minutes.

Mr. BLILEY. Mr. Chairman, I rise in opposition to the amendment.

The CHAIRMAN. The gentleman from Virginia [Mr. BLILEY] will be recognized for 15 minutes.

The Chair recognizes the gentleman from Michigan [Mr. CONYERS].

Mr. CONYERS. Mr. Chairman, I yield myself 3 minutes.

(Mr. CONYERS asked and was given permission to revise and extend his remarks.)

Mr. CONYERS. Mr. Chairman, I began this discussion on an amendment to reinstate the Department of Justice's traditional review role when considering Bell entry into new lines of business by congratulating the chairman of the full committee, the gentleman from Illinois [Mr. HYDE]. In the committee bill that the Committee on the Judiciary reported, we were able to come together and bring forward an amendment exactly like the one that is now being brought forward.

I appreciate the chairman's role in this matter.

The amendment is identical to the test approved by the Committee on the Judiciary, as I have said earlier this year, on a bipartisan basis. Everyone on the committee, with the exception of one vote, supported our amendment. It was named the Hyde-Conyers amendment. It received wide support, and I hope we continue to do that.

It provides simply that the Justice Department disapprove any Bell request to enter long-distance business as long as there is a dangerous probability that such entry will substantially impede competition.

Point No. 1: This amendment on the Department of Justice role is more modest than the same provision for a Department of Justice role in the Brooks-Dingell bill that passed the House on suspension by 430 to 5 last year. So, my colleagues, we are not starting new ground. This is not anything different. It has received wide scrutiny and wide support. It is a matter that should not be in contention and should never have been omitted from either bill and certainly not the manager's amendment.

The Justice Department is the principal Government agency responsible for antitrust enforcement. Please understand that the 1984 consent decree has given the Department of Justice decades of expertise in telecommunications issues. By contrast, the FCC has no antitrust background whatsoever.

Remember, we are taking the court completely out of the picture. So what we have is no more court reviews or waivers. We have a total deregulation of the business. Unless we put this amendment in, we will not have a modest antitrust responsibility in this huge, complex circumstance.

Given this state of facts, it makes unquestionable sense to allow the antitrust division to continue to safeguard competition and preserve jobs. For the last 10 years the Justice Department has done an excellent job in keeping local prices, which have gone up, and long-distance rates, which have gone down.

The amendment I'm offering will reinstate the Department of Justice's traditional review role when considering Bell entry into new lines of business. The amendment is identical to the test approved by the Judiciary Committee earlier this year on a bipartisan 29 to 1 basis. It provides that the Justice Department must disapprove a Bell request to enter the long-distance business so long as there is a dangerous probability that such entry will substantially impede competition.

This should not even be a point of contention. The Justice Department is the principal Government agency responsible for antitrust enforcement. Its role in the 1984 AT&T consent decree has given it decades of expertise in telecommunications issues. The FCC by contrast has no antitrust background whatsoever. Many in this body have slated the FCC for extinction or significant downsizing.

Given this state of facts it makes unquestionable sense to allow the Antitrust Division to continue to safeguard competition and preserve jobs. For the last 10 years the Justice Department has been given an independent role in reviewing Bell entry into new lines of business, and the result has been a 70-percent reduction in long-distance prices and an explosion in innovation.

At a time when the Bells continue to control 99 percent of the local exchange market, I, for one, think we should have the Antitrust Division continue in this role. Don't be fooled by the FCC checklist—the Bells could meet every single item on that list and still maintain monopoly control of the local exchange market.

Last Congress this body approved—by an overwhelming 430 to 5 vote—a bill which provided the Justice Department with a far stronger review than my amendment does. It's no secret that I would have preferred to see this same review role given to the Justice Department this Congress. However, in the spirit of bipartisan compromise I agreed to a more lenient review role with Chairman HYDE when the Judiciary Committee considered telecommunications legislation. I was shocked when this very reasonable compromise test was completely ignored when the two committees sought to reconcile their legislation.

Finally, I would note that the amendment has been revised to clarify that any determinations made by the Attorney General are fully subject to judicial review. It was never my intent to deny the Bells or any other party the right to appeal any adverse determination, so to accomplish this purpose I have borrowed the precise language from the Judiciary bill.

I urge the Members to vote for this amendment which gives a real role to the Justice Department and goes a long way toward safeguarding a truly competitive telecommunications marketplace. In an industry that represents 15 percent of our economy, we owe it to our constituents to do everything possible to make sure we do not return to the days of monopoly abuses.

Mr. Chairman, I reserve the balance of my time.

Mr. BLILEY. Mr. Chairman, I yield myself 1 minute.

(Mr. BLILEY asked and was given permission to revise and extend his remarks.)

Mr. BLILEY. Mr. Chairman, I rise in strong opposition to the amendment offered by the gentleman from Michigan [Mr. CONYERS].

The core principle behind H.R. 1555 is that Congress and not the Federal court judge should set telecommunications policy. This is one of the few issues that seems to have universal agreement, that Congress should reassert its proper role in setting national communications policy.

My colleagues, last November the citizens of this country said, loud and clear, we want less Government, less regulation. Getting a decision out of two Federal agencies is certainly a lot harder than getting it out of one. For that reason alone, this amendment ought to be defeated.

Mr. Chairman, I reserve the balance of my time.

Mr. CONYERS. Mr. Chairman, I yield 2 minutes to the gentleman from Texas [Mr. BRYANT], a member of the committee.

(Mr. BRYANT of Texas asked and was given permission to revise and extend his remarks.)

Mr. BRYANT of Texas. Mr. Chairman, the gentleman from Michigan [Mr. CONYERS] made a very important point a moment ago when he pointed out that last year when we passed the bill by an enormous margin, we had a stronger Justice Department provision in the bill than we do, than even the Conyers amendment today would be.

The House has adopted the manager's amendment over our strong objections, but for goodness sakes consider the fact that, while the gentleman from Virginia [Mr. BLILEY] makes the point that we have decided that Congress shall make the decision with regard to communications law rather than the courts, Congress cannot make the decisions with regard to every single case out there.

As is the case throughout antitrust law, all we are saying with the Conyers amendment is that the Justice Department ought to be able to render a judgment on whether or not entry into this line of business by one of the Bell companies is going to impede competition rather than advance it.

Now, what motive would the Justice Department have to do anything other than their best in this matter? They have done a fine job in this area now for many, many years. The Conyers amendment would just come along and say, we are going to continue to have them exercise some judgment.

What we had in the bill before was that when there is no dangerous probability that a company who is trying to enter one of these lines of business or its affiliates would successfully use its market power and the Bell companies have enormous market power, to substantially impede competition, and the Attorney General finds that to be the case, there will be no problem with going forward.

When they find otherwise, there will be a problem with going forward, and we want there to be a problem with going forward. For goodness sakes, we know that the developments with regard to competition in the last 12 years are a result of a court, a sanction agreement, supervised by a judge. I do not know that that is the best process, but the fact of the matter is we allowed competition where it did not exist before.

Why would we now come along and take steps that would move us in the direction of impeding competition or essentially impeding competition? Give the Justice Department the right to look at it as they look at so many other antitrust matters. The President has asked for it. I think clearly we asked for it a year ago.

Let us keep with that principle.

Mr. BLILEY. Mr. Chairman, I yield 3 minutes to the gentleman from Michigan [Mr. DINGELL].

(Mr. DINGELL asked and was given permission to revise and extend his remarks.)

Mr. DINGELL. Mr. Chairman, there are three things wrong with this amendment. The first is the agency which will be administering it, the Justice Department. The Justice Department is in good part responsible for the unfair situation which this country confronts in telecommunications. The Justice Department and a gaggle of AT&T lawyers have been administering pricing and all other matters relative to telecommunications by both the Baby Bells and by AT&T. So if there are things that are wrong now, it is Justice which has presided.

The second reason is that if we add the Justice Department to a sound and sensible regulatory system, it will create a set of circumstances under which it will become totally impossible to have expeditious and speedy decisions of matters of importance and concern to the American people.

The decisions that need to be made to move our telecommunications policy forward can simply not be made where you have a two-headed hydra trying to address the telecommunications problems of this country.

Now, the third reason: I want Members to take a careful look at the graph I have before me. It has been said that a B 52 is a group of airplane parts flying in very close formation. The amendment now before us would set up a B 52 of regulation. If Members look, they will find that those in the most limited income bracket will face a rate structure which is accurately represented here. It shows how long-distance prices have moved for people who are not able to qualify for some of the special goody-goody plans, not the people in the more upper income brackets who qualify for receiving special treatment.

This shows how AT&T, Sprint and MCI rates have flown together. They have flown as closely together as do the parts of a B 52. Note when AT&T goes down, Sprint and MCI go down. When MCI or AT&T go up, the other companies all go up. They fly so closely together that you cannot discern any difference.

This will tell anyone who studies rates and competition that there is no competition in the long distance market. What is causing the vast objection from AT&T, MCI and Sprint is the fact that they want to continue this cozy undertaking without any competition from the Baby Bells or from anybody else.

If Members want competition, the way to get it is to vote against the Conyers amendment. If you do not want it and you want this kind of outrage continuing, then I urge you to vote for the amendment offered by the gentleman from Michigan [Mr. CONYERS] who is my good friend.

Mr. CONYERS. Mr. Chairman, I yield myself 15 seconds.

Mr. Chairman, I say to my very dear colleague and the dean of the Michigan delegation, that ain't what he said when the Brooks-Dingell bill came up only last year, and he had a tougher provision with the Department of Justice handling this important matter.

Mr. Chairman, I yield 2 minutes to the gentleman from California [Mr. BERMAN], a very able member of the Committee on the Judiciary.

Mr. BERMAN. Mr. Chairman, I thank the gentleman for yielding time to me.

Everything that my friend from Michigan [Mr. DINGELL] said about the question of competition can be assumed to be true, and none of it would cause Members to vote against the Conyers amendment. Because I do not think we should put artificial restrictions on the ability of the Bell companies to go into long distance, I supported the manager's amendment because it got rid of a test that made it virtually impossible for them to ever enter that competition.

Now the only question is whether the Justice Department, that had the foresight starting under Gerald Ford, finishing under Ronald Reagan, to break up the Bell monopolies, should be allowed to have a meaningful role, a role defined by a test which is so restrictive that it says, unless, unless the burden supports, the assumption is with the Bell companies. It says unless the Attorney General finds that there is a dangerous probability that such company or its affiliates would successfully use market power to substantially impede competition in the market such company seeks to enter, it is an extremely rigorous test that must be met to stop them from entering the market. But it gives the division that has been historically empowered to decide whether there is anticompetitive practices a role in deciding whether or not that entry will impede competition.

This place voted last year by an overwhelming vote for a test that was far more rigorous, a test that said that they could not enter unless we found there was no substantial possibility that they could use monopoly power to impede competition. Do not overreach, the proponents of Bell entry into long distance, do not over reach. Do not shut the Justice Department out from an historic role that they have had, that they should have, to look at whether or not there is a high probability that they will cause, they will exercise monopoly power.

Support the Conyers amendment.

Mr. BLILEY. Mr. Chairman, I yield 3 minutes to the gentleman from Illinois [Mr. HYDE], the chairman of the Committee on the Judiciary.

(Mr. HYDE asked and was given permission to revise and extend his remarks.)

Mr. HYDE. Mr. Chairman, I want to congratulate the gentleman from Michigan for reviving the judiciary bill which did pass our committee 29 to 1, because it does go a long way toward establishing or reestablishing a principle that I believe in; namely, that antitrust laws should be reviewed and administered by that department of government specifically designed to do that, and that is the Department of Justice.

□ 0945

When a Baby Bell enters into manufacturing or into long distance, antitrust questions are brought into play. The Department of Justice, it seems to me, is the appropriate agency to oversee that transition and analyze the competitive implications.

Once the bills are in these new lines of business and operating, it becomes a regulatory proposition and then oversight by the Federal Communications Commission is appropriate.

Mr. Chairman, what the gentleman from Michigan [Mr. CONYERS] has done is to propose a more meaningful role for the Department of Justice, which is what the Judiciary Committee wanted to do. But the problem is, that DOJ comes in at the tail end of the regulatory process. It becomes a double hurdle for a Baby Bell trying to get into manufacturing or long distance. It is not the same quick, clean expedited process that we had in our legislation (H.R. 1528).

So, it adds additional hurdles for a company, a Bell company seeking to get into manufacturing or long distance. It will add considerably to the amount of time that is consumed. A Bell company can make all of the right moves and do everything it wants, and then at the end of the process be shot down by the Department of Justice.

Mr. Chairman, I had proposed and preferred a dual-track, dual-agency situation where options could be chosen by the Bells to get into these new businesses, but that is not to be.

Having said what I have just said, I do approve and appreciate the fact that a more expansive role is proposed to the Department of Justice in dealing with these important antitrust issues. After all, it is an antitrust decree that we are modifying, the modified final judgment.

Mr. CONYERS. Mr. Chairman, I yield 1 minute to the gentlewoman from Colorado [Mrs. SCHROEDER], ranking minority member of the Committee on the Judiciary.

Mrs. SCHROEDER. Mr. Chairman, I rise in strong support of the amendment of the gentleman from Michigan [Mr. CONYERS]. What we are doing here is we are getting ready to unleash these huge, huge economic forces. They are huge.

The Justice Department, I wish it were much stronger, to be perfectly honest. Last year, the bill that people voted for had this type of language in it. It is an independent agency. It is not the FCC.

Mr. Chairman, it seems to me that if we are getting ready to unleash these huge forces on the American consumer, we ought to want some watchdog, some watchdog out there someplace.

Granted, we want competition, but what we may end up with is one guy owning everything. If my colleagues want the Justice Department for heaven's sakes, vote "yes."

Mr. BLILEY. Mr. Chairman, I yield 2 minutes to the gentleman from Texas [Mr. FIELDS].

(Mr. FIELDS of Texas asked and was given permission to revise and extend his remarks.)

Mr. FIELDS of Texas. Mr. Chairman, the most difficult issue in this bill has been how the local loop is opened to competition. No question, that is where the focus of the controversy has been. It is a delicate question.

Mr. Chairman, what we have attempted to do is to open this in a sensible and fair way to all competitors. Consequently, we created a checklist on how that loop is opened. We have the involvement of the State public utility commissions in every State in that particular question. We have reviews by the Federal Communications Commission that the loop is open. Consequently, there is no need to give the Department of Justice a role in the opening of that loop.

We have worked with our good friends on the Committee on the Judiciary coming up with a consultative role for the Justice Department. It was never envisioned by Judge Greene in the modified final judgment that Justice would have a permanent role and this is the time we made the break. This is the time we move this telecommunications industry into the 21st century.

Mr. Chairman, a sixth of our economy is involved in this particular industry. Central to opening up telecommunications to competition is to open the loop correctly and as quickly as possible, because in opening the loop and creating competition, we have more services, we have newer technologies, and we have these at lower costs to the consumer. That is a desired result and that is something that we have worked for this particular bill.

Mr. Chairman, that is why we have spent so much time on how this loop is opened and there is no need for Justice to have an expanded role.

Mr. CONYERS. Mr. Chairman, I yield 1 minute to the gentleman from New Mexico [Mr. SCHIFF], a member of the Committee on the Judiciary from the other side of the aisle.

Mr. SCHIFF. Mr. Chairman, I want to make it clear, first, that I agree completely with the direction of the bill. I voted in favor of the manager's amendment of the gentleman from Virginia [Mr. BLILEY], because I think we want to go from the courts, the Congress, and ultimately get Congress out of this and let companies compete.

Mr. Chairman, I think the future is one of companies that compete in different areas simultaneously. Each company will offer telephone services, entertainment services, and so forth. But we must remember that this whole matter has arised from an antitrust situation. Even though we want all companies, including the regional Bells, to participate in all aspects of business enterprise, the fact of the matter is that there is still basically a control of the local telephone market.

For that reason, Mr. Chairman, for a period of time, the Department of Justice should have a specific identifiable role in this bill. That is why I urge my fellow Members of the House to support the Conyers amendment.

Mr. BLILEY. Mr. Chairman, I yield 1 minute to the gentleman from Florida [Mr. HASTINGS].

Mr. HASTINGS of Florida. Mr. Chairman, I am not a member of the Committee on the Judiciary, but I am interested in its findings.

Mr. Chairman, H.R. 1555 assigns to the FCC the regulatory functions to ensure that the Bell companies have complied with all of the conditions that we have imposed on their entry into long distance. This bill requires the Bell companies to interconnect with their competitors and to provide them the features, functions and capabilities of the Bell companies' networks that the new entrants need to compete.

The bill also contains other checks and balances to ensure that competition occurs in local and long distance growth. The Justice Department still has the role that was granted to it under the Sherman and Clayton Acts, and other antitrust laws. Their role is to enforce the antitrust laws and ensure that all companies comply with the requirements of the bill.

The Department of Justice enforces the antitrust laws of this country. It is a role that they have performed well. The Department of Justice is not, and should not be, a regulating agency. It is an enforcement agency.

Mr. CONYERS. Mr. Chairman, I yield 1 minute to the gentleman from California [Mr. BECERRA], a very able member of the Committee on the Judiciary.

(Mr. BECERRA asked and was given permission to revise and extend his remarks.)

Mr. BECERRA. Mr. Chairman, let us not forget that the Ma Bell operating company, AT&T was broken up because the company used its control of local telephone companies to frustrate long-distance competition. It was the Justice Department that pursued the case against AT&T, through Republican and Democratic administrations, to stop those abuses.

Mr. Chairman, the standard that is in the Conyers amendment, which is the standard adopted and passed by the Committee on the Judiciary, Republican and Democrats, except for 1 member voting for it, is the standard that we are trying to get included now. It is a standard that is softer than the standard that was passed by 430 to 5 last year by this same House.

It is a standard that is softened for the regional operating companies to be able to pursue and it is a very rigorous standard that the Justice Department must meet in order to be able to stop a local company from coming in.

Mr. Chairman, let us not forget that the Republican Congress is trying to eliminate the FCC, and now they are asking the FCC to be the watchdog for consumers in this area. We should have a safety net for consumers and ratepayers.

Vote for the Conyers amendment.

Mr. BLILEY. Mr. Chairman, I yield 2 minutes to the gentleman from Roanoke, VA [Mr. GOODLATTE], a member of the Committee on the Judiciary.

(Mr. GOODLATTE asked and was given permission to revise and extend his remarks.)

Mr. GOODLATTE. Mr. Chairman, I rise in strong opposition to the Conyers amendment.

Mr. Chairman, when Congress acts to end the current judicial consent decree management of the telecommunications industry, the Department of Justice should not simply take over. H.R. 1555 preserves all of the Department of Justice's antitrust powers. I agree with the chairman of my committee that when there are antitrust violations, the Department of Justice should step in.

Mr. Chairman, the Conyers amendment would dramatically increase the Department's statutory authority to regulate the telecommunications industry, a role for which the Department of Justice was never intended.

Currently, the Federal Communications Commission and the public service commissions in all 50 States and the District of Columbia regulate the telecommunications industry to protect consumers.

This combination of Federal and State regulatory oversight is effective and will continue unabated under both the House and the Senate legislation. There is no reason why two Federal entities, the Federal Communications Commission and the Department of Justice, should have independent authority in this area once Congress has set a clear policy.

The Department of Justice seeks to assume for itself the role currently performed by Judge Greene. The Department, in effect, wants to keep on doing things the way they are, but they are going to replace Judge Greene with themselves.

Mr. Chairman, I voted for the separate standard for the Department of Justice in the Committee on the Judiciary, but that was presuming, as the chairman of the committee informed us, it would be the sole separate standard. Now, they are seeking to impose that standard on top of the authority provided to the Federal Communications Commission in the bill.

All of the tests, one after the other, that the FCC will require, will have to be met and then a dual review will be imposed where the Department of Justice will step in at the end.

Mr. Chairman, I urge opposition to the amendment and support for the bill.

Mr. Chairman, I include the following for the RECORD.

STATEMENT OF REPRESENTATIVE GOODLATTE ON H.R. 1555, AUGUST 2, 1995

Mr. Chairman, I rise in support of H.R. 1555.

Mr. Chairman, I want to thank Chairmen HYDE, BLILEY and FIELDS for their able leadership in bringing this important legislation to the House floor. The American people will benefit from the increased availability of communications services, increased number of jobs, and a strengthened global competitiveness from this bill.

Throughout the debate on this legislation, I have aimed at bringing these benefits to Americans as soon as possible. I continue to believe that this goal can best be achieved by lifting all government-imposed entry restrictions in all telecommunications markets at the same time. Whether they are State laws that pervent cable companies or long distance companies from competing in the local exchange or the AT&T consent decree that prevents the Bell companies from competing in the long distance market, these artificial government-imposed restraints all inhibit the development of real competition.

Under this legislation, State laws that today prevent local competition will be lifted. Upon enactment, the local telephone exchange will be legally opened for any competitor to enter.

But the bill does not stop here and merely trust to fate. It goes further. It requires the Bell companies and other local exchange carriers such as GTE and Sprint-United to unbundle their networks and to resell to competitors the unbundled elements, features, functions, and capabilities that those new entrants need to compete in the local market. It also requires State commissions and the FCC to verify that the local carriers meet these obligations.

It gives new entrants the incentive to build their own local facilities-based networks, rather than simply repackaging and reselling the local services of the local telephone company. This is important if the information superhighway is to be truly competitive.

The bill also contains cross checks to ensure either that facilities-based competition is present in the local exchange or that the Bell companies have done all that the bill requires of them before they will be permitted to offer interLATA services and to manufacture. This is a strong incentive for them to comply with the requirements of this legislation.

It will take time for the Bell companies to satisfy all of the conditions in the bill. This built-in delay will provide the long distance and cable companies a head start into the local exchange.

The bill recognizes that there are several significant problems with such a government-mandated head start. And, it deals with those issues. While the bill does not create the simultaneity of entry that the Bell companies have requested, it also does not impose the artificial delay sought by the long distance companies.

This bill achieves a sound public policy. First, it gets the conditions right. Second, it requires verification that the conditions have been met. Third, it assures that they have begun to work. Then, fourth, it lets full competition flourish by lifting the remaining restrictions on the Bell companies.

You don't have to take my word on the soundness of this approach. None other than the Department of Justice advocated it 8 years ago.

As a member of the Judiciary Committee, I have been following this particular matter for several years. In 1987 the Department filed its first and only Triennial Review with the Decree Court. It recommended that if a Bell company shows that an area in its region is free of regulatory barriers to competition, then the interLATA restrictions should be lifted, even if—the Department noted—a residual core of local exchange services remains a natural monopoly at that time. That is, when there are no restrictions on either facilities-based intraLATA competition or on resale of Bell company services, interLATA relief should be granted.

The Department acknowledged that, with the removal of entry barriers and the requirement for resale of local exchange services, a majority of customers would likely stay with local exchange carriers and some areas of local exchange might remain natural monopolies. Nevertheless, it believed that the potential for discrimination would be significantly reduced because of (1) increased alternatives, especially for higher volume customers, and (2) increased need for Bell companies to interconnect with private networks.

Bell companies, according to the Department, immediately would be subject to substantial competitive pressures. The threat or possibility of competition would be sufficient that the residual risk posed by the Bell companies could be contained effectively through regulatory controls, according to the DOJ.

Noting that competition will reduce intraLATA toll and private line rates, the Department correctly concluded that only basic local exchange service and residential exchange access would remain as services capable of being inflated to cover misallocated costs of competitive activities. Indeed, intraLATA toll competition has been and is allowed in virtually every state and has already significantly eroded the Bell companies' market share of these services. Moreover, competition in the exchange access market also has grown significantly as the successes of companies like Teleport and MFS attest.

And, some very powerful and well-financed companies have targeted the local telephone market for competition. Companies like MCI are investing in local networks. So are cable companies that already have strong local presences. Significantly, AT&T has spent billions to move back into local telephony through its acquisition of McCraw Cellular and its success in bidding on PCS licenses.

As the Department prognosticated, this leaves only local services as a potential source of subsidy. However, as it also correctly recognized, basic local exchange and residential services are a very unlikely source of subsidy.

Those rates have been and are currently subsidized by other rates (i.e., residential rates are below costs and therefore cannot subsidize other services). And, they are beyond the unilateral power of the Bell companies to raise.

State regulators have clearly demonstrated over the years that they are unwilling to let basic residential charge rise. It is important to note that this bill preserves the State's ability to prevent the Bell companies from raising local exchange rates.

The bill also prevents interconnection rates from being the source of subsidy as it requires those rates to be just and reasonable before the Bell companies get intraLATA relief. It eliminates the Bell companies' ability to use their local exchange networks in a discriminatory fashion to impede their competitors.

This legislation achieves the conditions that DOJ set forth eight years ago, and in my view goes even further by requiring regulatory verifications before the Bell companies are actually relieved of the intraLATA restriction. First, upon enactment, it lifts all state and local laws that have previously barred cable and long distance companies from competing in the local exchange services market. In other words, it will ensure that there are no legal barriers to facilities-based competition.

Second, it not only requires the Bell companies to resell their local services, but it also identifies the elements, features, functions and capabilities that the Bell companies and other local exchange carriers will have to unbundle for their competitors. Although AT&T was required to resell its long distance services to its competitors in order to spur long distance competition, it was not required to make new services for its competitors through unbundling. Moreover, the bill's requirements on unbundling and resale are far more detailed and precise and therefore more enforceable by the commission, courts and competitors than the Department's general resale condition.

In the final analysis, Mr. Chairman, I support this bill because it strikes a balance that will bring competition in cable and telephony to the American people. It may not come as soon as some want or, indeed, as soon as I want, but it won't be delayed as long as others desire.

I am comforted as well that I do not have to take all of this on blind faith. I believe that the FCC and the State commissions will make sure the competition rolls out quickly and fairly and that local rate payers will not foot the bill. I am also sure that the Department of Justice is fully capable under this legislation of not only monitoring these developments but of playing an active role in the continued enforcement of the antitrust laws to shape the most robustly competitive telecommunications market in the world.

The American people deserve nothing less. We should not disappoint them. We should delay no further.

Mr. CONYERS. Mr. Chairman, I yield 1 minute to the distinguished gentlewoman from California [Ms. LOFGREN], a member of the Committee on the Judiciary.

Ms. LOFGREN. Mr. Chairman, like many of my colleagues, I have heard from Baby Bells, long-distance carriers, until I am really tired of hearing from them. What I have done is call Silicon Valley, who basically does not care about the Bells or the long-distance carriers. They do care about competition.

Mr. Chairman, the advice I have gotten is that there should be a little role for the Department of Justice. I realize that there are some on the Democratic side of the aisle, including the White House, who feel that this measure is way too weak; that we should have a much bigger role. Honestly I disagree with them.

Mr. Chairman, I think the gentleman from Illinois [Mr. HYDE] and the gentleman from Michigan [Mr. CONYERS] got it exactly right. A very high threshold, a 180-day turnaround, and a break in case things do not turn out the way we hope.

Mr. Chairman, I urge support of the amendment.

Mr. BLILEY. Mr. Chairman, I yield 1 minute to the gentleman from Louisiana [Mr. TAUZIN], a member of the Committee on Commerce.

(Mr. TAUZIN asked and was given permission to revise and extend his remarks.)

Mr. TAUZIN. Mr. Chairman, I have with me a small chart that shows the result of judge-made law when it comes to telecommunications. What we just debated on the manager's amendment was to end the system of the LATA lines, the lines on the map drawn by the judge regulating communications policy in America.

Mr. Chairman, this is one of those LATA lines, a line of restriction of competition. This line runs through Louisiana, through one of my parishes in Louisiana, separating the town of Hornbeck and Leesville.

Mr. Chairman, they are in the same parish. The school board in that parish, in order to communicate from one office to the other, has to buy a line that runs from Shreveport to Lafayette back to Leesville at a cost per year of $43,000 more than they would have to pay if they could simply call 16 miles across these two communities.

Mr. Chairman, the court-ordered line has cost that school board $43,000. This is the kind of court-made law we avoid in this bill. Let us not give it back to the Justice Department. Let us write communications law in this Chamber.

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Mr. CONYERS. Mr. Chairman, I yield 1 minute to the gentlewoman from Texas [Ms. JACKSON-LEE].

(Ms. JACKSON-LEE asked and was given permission to revise and extend her remarks.)

Ms. JACKSON-LEE. Mr. Chairman, I would really like to thank the gentleman from Illinois [Mr. HYDE] and the gentleman from Michigan [Mr. CONYERS] for their leadership and for their bipartisan approach to this amendment. I think that we should not be looking at the long-distance providers on one side and the regional Bells on the other side.

Really, what the input of the Committee on the Judiciary in this amendment is, is to simply go right down the middle in dealing with competition, by enhancing the opportunity for competition. In fact, unlike my colleagues who have opposed it, this is not a override. This equates to the Department of Justice and the FCC working together and complementing each other.

Mr. Chairman, what it says is, there will not be a limitation, there will not be a prohibition of the Antitrust Division of the DOJ from reviewing for acts that impede competition. The FCC and DOJ will work together, and the dual responsibility will not hinder the other. The DOJ will not delay the regional Bell's entry into other markets, for there is a time frame in which they must respond; and the courts are not there to inhibit, but are there to give the opportunity for any judicial review that either party to access. This is a fair amendment.

I believe that we must get away from who said what in this debate, and focus on competition for the consumers. Let us make this a better bill and support this amendment, Mr. Chairman.

I must rise in support of a strong role of the Justice Department to help ensure that the telecommunications industry is truly competitive. The telecommunications industry is a critically important industry as we enter the 21st century. The Conyers amendment provides a reasonable role for the Justice Department to determine whether competition exists in the telecommunications markets. The Justice Department, through its Anti-trust Division, has considerable experience in carrying out this important function. The Justice Department needs and deserves more than a consultative role that is envisioned in the manager's amendment to H.R. 1555.

The standard of review proposed in this amendment is a medium standard that allows the Justice Department to prohibit local telephone companies from entering long-distance services or manufacturing equipment if "there is a dangerous probability that the Bell company or its affiliates would successfully use market power to substantially impede competition" in the market. The amendment also provides the right to judicial review. This standard was overwhelmingly approved in the

House Judiciary Committee by a vote of 29 to 1. Let us ensure competition by supporting this amendment. The Conyers amendment will help the regional Bells, the long-distance providers, and most of all, our consuming public.

Mr. BLILEY. Mr. Chairman, I reserve the balance of my time.

Mr. CONYERS. Mr. Chairman, I yield 1 minute to the gentlewoman from California [Ms. WATERS], who has followed this matter with great interest.

Ms. WATERS. Mr. Chairman, I rise in support of the Conyers amendment. Just once this year, we should do something that protects consumers; this amendment would accomplish that purpose.

Mr. Chairman, we are entering a brave new world in telecommunications law. In theory, the deregulatory provisions contained in this legislation will unleash a new era of competition between local and long-distance carriers, as well as between the telecommunications and cable industries.

However, free market competition is predicated on nonmonopolistic power relationships between competing firms. The Conyers amendment would ensure that local telephone companies would not impede competition through monopoly behavior.

The Conyers compromise language would perfect language currently in the bill. It would preserve the Justice Department's traditional role as the primary enforcer of antitrust statutes. It would do so alongside, not in conflict with, the regulatory responsibilities of the FCC.

Mr. Chairman, this bill is an experiment. No one knows for sure what the outcome will be as we enter the 21st century telecommunications world. I ask for an ''aye'' vote.

Mr. CONYERS. Mr. Chairman, I yield 45 seconds to the gentleman from New York [Mr. FLAKE].

Mr. FLAKE. Mr. Chairman, I thank the gentleman and rise in support of the Conyers amendment.

This amendment will protect consumers of the long-distance market from potential anticompetitive conduct by Bell companies which currently monopolize local telephone service, but without the consuming bureaucratic requirements unfairly tying up the Bell companies. An active Department of Justice role will not delay a Bell entry into the market because the Justice Department would be required to reach its decision within 3 months.

Because the Conyers amendment is a balanced amendment designed to protect America's consumers from the dangers of anticompetitive conduct, Mr. Chairman, I urge my colleagues to vote ''yes'' on the Conyers amendment. It is in the best interest of the consumer.

Mr. CONYERS. Mr. Chairman, I yield such time as she may consume to the gentlewoman from Ohio [Ms. KAPTUR].

(Ms. KAPTUR asked and was given permission to revise and extend her remarks.)

Ms. KAPTUR. Mr. Chairman, I rise in strong support of the Conyers amendment to referee the gigantic money interests who have their hands in the pockets of the American people.

There has been enough money spent on lobbying this bill to sink a battleship.

I wish to insert in the RECORD a partial list of what over $40 million in lobbying contributions has bought. I leave it to the American people to make their own judgments. This bill is living proof of what unlimited money can do to buy influence and the Congress of the United States.

POLITICAL CONTRIBUTIONS BY REGIONAL BELL OPERATING COMPANIES [RBOC] HARD MONEY PAC CONTRIBUTIONS TO MEMBERS OF CONGRESS YEAR TO DATE 1995[1]

	Democrats	Republicans
Ameritech	38,950	113,588
Bell Atlantic	2,100	12,466
Pacific Telesis	10,500	27,949
Southwestern Bell	29,600	48,200
Partial total YTD	78,150	202,203

[1] Several of the RBOC's have chosen to report their contributions less frequently than once a month, as the law allows. Figures are not available for Bellsouth, NYNEX, or U.S. West.

POLITICAL CONTRIBUTIONS BY REGIONAL BELL OPERATING COMPANIES [RBOC] SOFT MONEY FIRST QUARTER 1995

Name	Democratic	Republican
Ameritech	250	0
Bell Atlantic	3,000	25,000
BellSouth	0	15,000
Nynex	20,000	25,000
Southwestern Bell	0	0
Pacific Telesis	250	22,000
US West	0	15,000
Total	23,500	122,000

[Excerpts from Common Cause newsletter, June 5, 1995]

''ROBBER BARONS OF THE '90s''

Telecommunications industries, which stand to gain billions of dollars from the congressional overhaul of telecommunications policy, have used $39,557,588 in political contributions during the past decade to aid their fight for less regulation and greater profits, according to a Common Cause study released today.

The four major telecommunications industries involved in this legislative battle—local telephone services, long distance service providers, broadcasters and cable interests—contributed $30.9 million in political action committee (PAC) funds to congressional candidates, and $8.6 million in soft money to Democratic and Republican national party committees, during the period January 1985 through December 1994, the Common Cause study found.

Top telecommunications industry PAC and soft money contributors, 1985–1994

AT&T	$6,523,445
BellSouth Corp	2,928,673
GTE Corp	2,899,056
Natl Cable Television Assn	2,211,214
Ameritech Corp	1,936,899
Pacific Telesis	1,742,512
US West	1,666,920
Natl Assn Of Broadcasters	1,629,988
Bell Atlantic	1,559,011
Sprint	1,531,596

''A strong case can be made that the war over telecommunications reform has done more to line the pockets of lobbyist and lawmakers than any other issue in the past decade.''—Kirk Victor, National Journal

Among the key findings of the Common Cause study:

Local telephone services made $17.3 million in political contributions during the past decade. Long distance providers gave $9.5 million in political contributions; cable television interests gave $8 million; and broadcasters gave $4.7 million.

The biggest single telecommunications industry donation came from Tele-Communications Inc, the country's biggest cable company. The company gave a $200,000 soft money contribution to the Republican National Committee five days before the last November's elections.

Telecommunication PACs were especially generous to members of two key committees that recently passed bills to rewrite telecommunication regulations. House Commerce Committee members received, on average, more than $65,000 each from telecommunications PACs; Senate Commerce Committee members received, on average, more than $107,000 each.

Two-thirds of House freshmen received PAC contributions from telecommunications interests immediately following their November election wins. Between November 9 and December 31, 1994, telecommunications PACs gave new Representatives-elect a total $115,500.

In January, top executives of telecommunications companies that gave a total $23.5 million in political contributions during the past decade were invited to closed-door meetings with Republican members of the House Commerce Committee. Consumer and rate-payer groups—who were not major political donors—were not invited to the special meetings.

Lobbyists for the telecommunications industry represent a wide array of Washington insiders. For example, former Reagan and Bush Administration officials represent long distance providers, while a former Clinton official represents local telephone interests. Lobbying on behalf of broadcast interests are former aids to both Republican and Democratic Members of Congress.

In addition to their political contributions during the past decade, telecommunications interests contributed $221,000 in soft money to the Republican National Committee during the first three months of 1995. (Democratic National Committee soft money information for the first six months of 1995 will be available in July.)

HOUSE COMMERCE COMMITTEE MEMBERS RECEIVE ON AVERAGE $65,000 EACH FROM TELECOM PACS—DOUBLE THE HOUSE AVERAGE

Telecommunications industry lobbyists ''have seldom met more receptive lawmakers,'' than the members of the House Commerce Committee.—The New York Times

Telecommunications industry Pacs gave a total $6,676,147 in contributions to current Senators during the past decade, an average $66,761 per Senator, according to the Common Cause study.

SENATE COMMERCE COMMITTEE MEMBERS RECEIVE ON AVERAGE $107,000 EACH FROM TELECOM PACS

The Common Cause study found that members of the Senate Commerce, Science and Transportation Committee received nearly twice as much PAC money on average from telecommunications interests during the past decade as other Senators—an average of $107,730 compared to $57,152 received by Senators not on the committee.

''ROBBER BARONS OF THE '90S''

''By and large, the public is not represented by the lawyers and the lobbyists in Washington. The few public advocates are overwhelmed financially. It's all very fine to say that you are in favor of competition. I am. The Administration is. Congress is. But competition won't give you everything the country needs from communications companies. We've got to be able to stand up to business on certain occasions and say, 'It's not just about competition, it's about the public interest.'"—Reed Hundt, Federal Communications Commission Chair as quoted in The New Yorker

Mr. CONYERS. Mr. Chairman, I yield such time as she may consume to the gentlewoman from Michigan [Miss COLLINS].

(Miss COLLINS of Michigan asked and was given permission to revise and extend her remarks.)

Miss COLLINS of Michigan. Mr. Chairman, I rise in strong support of the Conyers amendment and urge my colleagues to adopt it.

Many have argued during this debate that we must deregulate the telecommunications industry, and by eliminating any role for the Department of Justice in determining Regional Bell operating company entry into long distance, we are working toward and goal. Well I think you are making a terrible mistake if you confuse forbidding the proper anti-trust role of the Department of Justice with deregulation.

The Republicans in this body should recall it was under the Reagan administration that the Department of Justice broke up the Bell system over a decade ago. That decision has been an undisputed success. Without the role played by the Department of Justice, consumers would still be renting large rotary black phones and paying too much for long distance services. The Department of Justice actions promoted competition, not regulation.

Without the Department of Justice role, we can expect those communication's attorneys to be in court, fighting endless anti-trust battles. The role we give the Department of Justice in this amendment will make it less likely that we will end up back in court, and the Department will ensure that anti-trust violations would be minimal, prior to the decision granting a Bell operating company the ability to offer long distance service.

Calling this amendment regulatory, is doing a disservice to the potential for true deregulation—which is full competition in all markets. The structure provided by the Department of Justice ensures that the markets will develop quickly, and with less litigation.

Mr. Chairman, I urge my colleagues to support this amendment. I yield back the balance of my time.

Mr. CONYERS. Mr. Chairman, I yield 30 seconds to the gentleman from New York [Mr. HINCHEY].

(Mr. HINCHEY asked and was given permission to revise and extend his remarks.)

Mr. HINCHEY. Mr. Chairman, this bill has been described as a clash between the super rich and the super wealthy. That Is unquestionably true, but in the clash of these titans, the question is, who stands for the American public?

The answer to that question is, without the Conyers amendment, no one. The American people stand naked before the potential excesses of these giants unless we have some protection from them offered by the Justice Department.

There is an incredibly high standard in this bill, Mr. Chairman. There must be a dangerous probability of substantially impeding justice before the Justice Department comes in. Let us pass the Conyers amendment and protect the American people.

Mr. CONYERS. Mr. Chairman, I yield 30 seconds to the gentleman from Pennsylvania [Mr. KLINK].

Mr. KLINK. Mr. Chairman, I thank the gentleman from Michigan [Mr. CONYERS] for yielding the time.

The FCC is essentially the agency that would be able to consult with the Department of Justice under the manager's mark that we passed this morning. But when we talk about going from a monopoly industry, which telecom was after 1934, to a competition-based industry, the competition agency, those who keep the rule, those who decide if there is a dangerous probability, if those gigantic billionaires players are being fair, is the Department of Justice.

Mr. Chairman, I simply say that the Conyers amendment makes sure that fairness is done, that the referee is in place. I urge my colleagues to support the Conyers amendment.

Mr. BLILEY. Mr. Chairman, I yield 2½ minutes to the gentleman from Ohio [Mr. OXLEY] for purposes of closing the debate on our side.

(Mr. OXLEY asked and was given permission to revise and extend his remarks.)

Mr. OXLEY. Mr. Chairman, I rise in opposition to the Conyers amendment. This bill in all of its forms does not repeal the Sherman Act. We have had the Sherman Act for over 100 years.

It does not repeal the Clayton Act passed in 1914. Anticompetitive behavior will be reviewed by the Justice Department, whether it is the telecommunications industry or whether it is the trucking industry or any other kind of industry that we are talking about. The Justice Department is not going away.

What we are trying to do, Mr. Chairman, or what the Conyers amendment seeks to do, is basically replace one court with another, except a different standard.

This amendment guts the underlying concept of this bill, which is pure competition, and the idea to get Congress back into the decisionmaking process. How long do we have to have telecommunications policy made by an unelected Federal judge who has no accountability to anyone; when are we going to get back to providing the kind of responsible decisionmaking that we are elected to do?

Mr. Chairman, I suggest to my colleagues that the underlying bill provides that kind of ability and accountability for the duly elected representatives of the people.

This amendment creates needless bureaucracy by having not one, but two Federal agencies review the issue of Bell Co. entry into long distance. The purpose of this legislation is to create conditions for a competitive market and get the heavy hand of Government regulation out of the way. This Conyers amendment is inconsistent with that purpose.

Mr. Chairman, this is a huge opportunity to provide competitive forces in the marketplace away from Government. If we believe that competition and not bureaucracy is the answer to modernizing our telecommunications policy, to providing more choice in the marketplace, to providing lower prices, to making America the most competitive telecommunications industry in the entire world, we will vote against the Conyers amendment and support the underlying bill.

Mr. Chairman, I ask my colleagues to join me in opposition to the Conyers amendment.

The CHAIRMAN. All time on this amendment has expired.

The question is on the amendment offered by the gentleman from Michigan [Mr. CONYERS], as modified.

The question was taken; and the chairman announced that the ayes appeared to have it.

Mr. BLILEY. Mr. Chairman, I demand a recorded vote.

The CHAIRMAN. Pursuant to the rule, further proceedings on the amendment offered by the gentleman from Michigan [Mr. CONYERS], as modified, will be postponed until after the vote on amendment 2 4 to be offered by the gentleman from Massachusetts [Mr. MARKEY].

It is now in order to consider the amendment, No. 2 3, printed in part 2 of House Report 104 223.

AMENDMENT OFFERED BY MR. COX OF CALIFORNIA

Mr. COX of California. Mr. Chairman, I offer an amendment numbered 2 3.

The CHAIRMAN. The Clerk will designate the amendment.

The text of the amendment is as follows:

Amendment number 2–3 offered by Mr. COX of California:'

Page 78, before line 18, insert the following new section (and redesignate the succeeding sections and conform the table of contents accordingly):

SEC. 104. ONLINE FAMILY EMPOWERMENT.

Title II of the Communications Act of 1934 (47 U.S.C. 201 et seq.) is amended by adding at the end the following new section:

"SEC. PROTECTION FOR PRIVATE BLOCKING AND SCREENING OF OFFENSIVE MATERIAL; FCC REGULATION OF COMPUTER SERVICES PROHIBITED.

"(a) FINDINGS.—The Congress finds the following:

"(1) The rapidly developing array of Internet and other interactive computer services available to individual Americans represent an extraordinary advance in the availability of educational and informational resources to our citizens.

"(2) These services offer users a great degree of control over the information that they receive, as well as the potential for even greater control in the future as technology develops.

"(3) The Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.

"(4) The Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation.

"(5) Increasingly Americans are relying on interactive media for a variety of political, educational, cultural, and entertainment services.

"(b) POLICY.—It is the policy of the United States to—

"(1) promote the continued development of the Internet and other interactive computer services and other interactive media;

"(2) preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by State or Federal regulation;

"(3) encourage the development of technologies which maximize user control over the information received by individuals, families, and schools who use the Internet and other interactive computer services;

"(4) remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material; and

"(5) ensure vigorous enforcement of criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.

"(c) PROTECTION FOR 'GOOD SAMARITAN' BLOCKING AND SCREENING OF OFFENSIVE MATERIAL.—No provider or user of interactive computer services shall be treated as the publisher or speaker of any information provided by an information content provider. No provider or user of interactive computer services shall be held liable on account of—

"(1) any action voluntarily taken in good faith to restrict access to material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or

"(2) any action taken to make available to information content providers or others the technical means to restrict access to material described in paragraph (1).

"(d) FCC REGULATION OF THE INTERNET AND OTHER INTERACTIVE COMPUTER SERVICES PROHIBITED.—Nothing in this Act shall be construed to grant any jurisdiction or authority to the Commission with respect to content or any other regulation of the Internet or other interactive computer services.

"(e) EFFECT ON OTHER LAWS.—

"(1) NO EFFECT ON CRIMINAL LAW.—Nothing in this section shall be construed to impair the enforcement of section 223 of this Act, chapter 71 (relating to obscenity) or 110 (relating to sexual exploitation of children) of title 18, United States Code, or any other Federal criminal statute.

"(2) NO EFFECT ON INTELLECTUAL PROPERTY LAW.—Nothing in this section shall be construed to limit or expand any law pertaining to intellectual property.

"(3) IN GENERAL.—Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section.

"(f) DEFINITIONS.—As used in this section:

"(1) INTERNET.—The term 'Internet' means the international computer network of both Federal and non-Federal interoperable packet switched data networks.

"(2) INTERACTIVE COMPUTER SERVICE.—The term 'interactive computer service' means any information service that provides computer access to multiple users via modem to a remote computer server, including specifically a service that provides access to the Internet.

"(3) INFORMATION CONTENT PROVIDER.—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 by the Internet or any other interactive computer service, including any person or entity that creates or develops blocking or screening software or other techniques to permit user control over offensive material.

"(4) INFORMATION SERVICE.—The term 'information service' means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.".

The CHAIRMAN. Pursuant to the rule, the gentleman from California [Mr. COX] will be recognized for 10 minutes, and a Member opposed will be recognized for 10 minutes. Who seeks time in opposition?

PARLIAMENTARY INQUIRY

Mr. COX of California. Mr. Chairman, I have a parliamentary inquiry.

The CHAIRMAN. The gentleman will state it.

Mr. COX of California. Mr. Chairman, given that no Member has risen in opposition, would the Chair entertain a unanimous-consent request?

The CHAIRMAN. If no Members seeks time in opposition, by unanimous consent another Member may be recognized for the other 10 minutes, or the gentleman may have the other 10 minutes.

Let me put the question again: Is there any Member in the Chamber who wishes to claim the time in opposition?

If not, is there a unanimous-consent request for the other 10 minutes?

Mr. WYDEN. There is, Mr. Chairman. Although I am not in opposition to this amendment, I would ask unanimous consent to have the extra time because of the many Members who would like to speak on it.

The CHAIRMAN. Is there objection to the request of the gentleman from Oregon?

There was no objection.

The CHAIRMAN. The gentleman from California [Mr. COX] will be recognized for 10 minutes, and the gentleman from Oregon [Mr. WYDEN] will be recognized for 10 minutes.

The Chair recognizes the gentleman from California [Mr. COX].

Mr. COX of California. Mr. Chairman, I wish to begin by thanking my colleague, the gentleman from Oregon [Mr. WYDEN], who has worked so hard and so diligently on this effort with all of our colleagues.

We are talking about the Internet now, not about telephones, not about television or radios, not about cable TV, not about broadcasting, but in technological terms and historical terms, an absolutely brand-new technology.

The Internet is a fascinating place and many of us have recently become acquainted with all that it holds for us in terms of education and political discourse.

We want to make sure that everyone in America has an open invitation and feels welcome to participate in the Internet. But as you know, there is some reason for people to be wary because, as a Time Magazine cover story recently highlighted, there is in this vast world of computer information, a literal computer library, some offensive material, some things in the bookstore, if you will, that our children ought not to see.

As the parent of two, I want to make sure that my children have access to this future and that I do not have to worry about what they might be running into on line. I would like to keep that out of my house and off of my computer. How should we do this?

Some have suggested, Mr. Chairman, that we take the Federal Communications Commission and turn it into the Federal Computer Commission, that we hire even more bureaucrats and more regulators who will attempt, either civilly or criminally, to punish people by catching them in the act of putting something into cyberspace.

Frankly, there is just too much going on on the Internet for that to be effective. No matter how big the army of bureaucrats, it is not going to protect my kids because I do not think the Federal Government will get there in time. Certainly, criminal enforcement of our obscenity laws as an adjunct is a useful way of punishing the truly guilty.

Mr. Chairman, what we want are results. We want to make sure we do something that actually works. Ironically, the existing legal system provides a massive disincentive for the people who might best help us control the Internet to do so.

I will give you two quick examples: A Federal court in New York, in a case involving CompuServe, one of our online service providers, held that CompuServe would not be liable in a defamation case because it was not the publisher or editor of the material. It just let everything come onto your computer without, in any way, trying to screen it or control it.

But another New York court, the New York Supreme Court, held that Prodigy, CompuServe's competitor, could be held liable in a $200 million defamation case because someone had posted on one of their bulletin boards, a financial bulletin board, some remarks that apparently were untrue about an investment bank, that the investment bank would go out of business and was run by crooks.

Prodigy said, "No, no; just like CompuServe, we did not control or edit that information, nor could we, frankly. We have over 60,000 of these messages each day, we have over 2 million subscribers, and so you cannot proceed with this kind of a case against us."

The court said, "No, no, no, no, you are different; you are different than CompuServe because you are a family-friendly network. You advertise yourself as such. You employ screening and blocking software that keeps obscenity off of your network. You have people who are hired to exercise an emergency delete function to keep that kind of material away from your subscribers. You don't permit nudity on your system. You have content guidelines. You, therefore, are going to face higher, stricker liability because you tried to exercise some control over offensive material.''

□ 1015

Mr. Chairman, that is backward. We want to encourage people like Prodigy, like CompuServe, like America Online, like the new Microsoft network, to do everything possible for us, the customer, to help us control, at the portals of our computer, at the front door of our house, what comes in and what our children see. This technology is very quickly becoming available, and in fact every one of us will be able to tailor what we see to our own tastes.

We can go much further, Mr. Chairman, than blocking obscenity or indecency, whatever that means in its loose interpretations. We can keep away from our children things not only prohibited by law, but prohibited by parents. That is where we should be headed, and that is what the gentleman from Oregon [Mr. WYDEN] and I are doing.

Mr. Chairman, our amendment will do two basic things: First, it will protect computer Good Samaritans, online service providers, anyone who provides a front end to the Internet, let us say, who takes steps to screen indecency and offensive material for their customers. It will protect them from taking on liability such as occurred in the Prodigy case in New York that they should not face for helping us and for helping us solve this problem. Second, it will establish as the policy of the United States that we do not wish to have content regulation by the Federal Government of what is on the Internet, that we do not wish to have a Federal Computer Commission with an army of bureaucrats regulating the Internet because frankly the Internet has grown up to be what it is without that kind of help from the Government. In this fashion we can encourage what is right now the most energetic technological revolution that any of us has ever witnessed. We can make it better. We can make sure that it operates more quickly to solve our problem of keeping pornography away from our kids, keeping offensive material away from our kids, and I am very excited about it.

There are other ways to address this problem, some of which run head-on into our approach. About those let me simply say that there is a well-known road paved with good intentions. We all know where it leads. The message today should be from this Congress we embrace this new technology, we welcome the opportunity for education and political discourse that it offers for all of us. We want to help it along this time by saying Government is going to get out of the way and let parents and individuals control it rather than Government doing that job for us.

Mr. Chairman, I reserve the balance of my time.

Mr. WYDEN. Mr. Chairman, I rise to speak on behalf of the Cox-Wyden amendment. In beginning, I want to thank the gentleman from California [Mr. COX] for the chance to work with him. I think we all come here because we are most interested in policy issues, and the opportunity I have had to work with the gentleman from California has really been a special pleasure, and I want to thank him for it. I also want to thank the gentleman from Michigan [Mr. DINGELL], our ranking minority member, for the many courtesies he has shown, along with the gentleman from Massachusetts [Mr. MARKEY], and, as always, the gentleman from Virginia [Mr. BLILEY] and the gentleman from Texas [Mr. FIELDS] have been very helpful and cooperative on this effort.

Mr. Chairman and colleagues, the Internet is the shining star of the information age, and Government censors must not be allowed to spoil its promise. We are all against smut and pornography, and, as the parents of two small computer-literate children, my wife and I have seen our kids find their way into these chat rooms that make their middle-aged parents cringe. So let us all stipulate right at the outset the importance of protecting our kids and going to the issue of the best way to do it.

The gentleman from California [Mr. COX] and I are here to say that we believe that parents and families are better suited to guard the portals of cyberspace and protect our children than our Government bureaucrats. Parents can get relief now from the smut on the Internet by making a quick trip to the neighborhood computer store where they can purchase reasonably priced software that blocks out the pornography on the Internet. I brought some of this technology to the floor, a couple of the products that are reasonably priced and available, simply to make clear to our colleagues that it is possible for our parents now to childproof the family computer with these products available in the private sector.

Now what the gentleman from California [Mr. COX] and I have proposed does stand in sharp contrast to the work of the other body. They seek there to try to put in place the Government rather than the private sector about this task of trying to define indecent communications and protecting our kids. In my view that approach, the approach of the other body, will essentially involve the Federal Government spending vast sums of money trying to define elusive terms that are going to lead to a flood of legal challenges while our kids are unprotected. The fact of the matter is that the Internet operates worldwide, and not even a Federal Internet censorship army would give our Government the power to keep offensive material out of the hands of children who use the new interactive media, and I would say to my colleagues that, if there is this kind of Federal Internet censorship army that somehow the other body seems to favor, it is going to make the Keystone Cops look like crackerjack crime-fighter.

Mr. Chairman, the new media is simply different. We have the opportunity to build a 21st century policy for the Internet employing the technologies and the creativity designed by the private sector.

I hope my colleagues will support the amendment offered by gentleman from California [Mr. COX] and myself, and I reserve the balance of my time.

Mr. COX of California. Mr. Chairman, I yield 1 minute to the gentleman from Texas [Mr. BARTON].

(Mr. BARTON of Texas asked and was given permission to revise and extend his remarks.)

Mr. BARTON of Texas. Mr. Chairman, Members of the House, this is a very good amendment. There is no question that we are having an explosion of information on the emerging superhighway. Unfortunately part of that information is of a nature that we do not think would be suitable for our children to see on our PC screens in our homes.

Mr. Chairman, the gentleman from Oregon [Mr. WYDEN] and the gentleman from California [Mr. COX] have worked hard to put together a reasonable way to provide those providers of the information to help them self-regulate themselves without penalty of law. I think it is a much better approach than the approach that has been taken in the Senate by the Exon amendment. I would hope that we would support this version in our bill in the House and then try to get the House-Senate conference to adopt the Cox-Wyden language.

So, Mr. Chairman, it is a good piece of legislation, a good amendment, and I hope we can pass it unanimously in the body.

Mr. WYDEN. Mr. Chairman, I yield 1 minute to the gentlewoman from Missouri [Ms. DANNER] who has also worked hard in this area.

Ms. DANNER. Mr. Chairman, I wish to engage the gentleman from Oregon [Mr. WYDEN] in a brief colloquy.

Mr. Chairman, I strongly support the gentleman's efforts, as well as those of the gentleman from California [Mr. COX], to address the problem of children having untraceable access through on-line computer services to inappropriate and obscene pornographic materials available on the Internet.

Telephone companies must inform us as to whom our long distance calls are made. I believe that if computer online services were to include itemized billing, it would be a practical solution which would inform parents as to what materials their children are accessing on the Internet.

It is my hope and understanding that we can work together in pursuing technology based solutions to the problems we face in dealing with controlling the transfer of obscene materials in cyberspace.

Mr. WYDEN. Mr. Chairman, will the gentlewoman yield?

Ms. DANNER. I yield to the gentleman from Oregon.

Mr. WYDEN. Mr. Chairman, I thank my colleague for her comments, and we will certainly take this up with some of the private-sector firms that are working in this area.

Mr. COX of California. Mr. Chairman, I yield 1 minute to the gentleman from Washington [Mr. WHITE].

Mr. WHITE. Mr. Chairman, I would like to point out to the House that, as my colleagues know, this is a very important issue for me, not only because of our district, but because I have got four small children at home. I got them from age 3 to 11, and I can tell my colleagues I get E-mails on a regular basis from my 11-year-old, and my 9-year-old spends a lot of time surfing the Internet on America Online. This is an important issue to me. I want to be sure we can protect them from the wrong influences on the Internet.

But I have got to tell my colleagues, Mr. Chairman, the last person I want making that decision is the Federal Government. In my district right now there are people developing technology that will allow a parent to sit down and program the Internet to provide just the kind of materials that they want their child to see. That is where this responsibility should be, in the hands of the parent.

That is why I was proud to cosponsor this bill, that is what this bill does, and I urge my colleagues to pass it.

Mr. WYDEN. Mr. Chairman, I yield 1 minute to the gentlewoman from California [Ms. LOFGREN].

Ms. LOFGREN. Mr. Chairman, I will bet that there are not very many parts of the country where Senator EXON's amendment has been on the front page of the newspaper practically every day, but that is the case in Silicon Valley. I think that is because so many of us got on the Internet early and really understand the technology, and I surf the Net with my 10-year-old and 13-year-old, and I am also concerned about pornography. In fact, earlier this year I offered a life sentence for the creators of child pornography, but Senator EXON's approach is not the right way. Really it is like saying that the mailman is going to be liable when he delivers a plain brown envelope for what is inside it. It will not work. It is a misunderstanding of the technology. The private sector is out giving parents the tools that they have. I am so excited that there is more coming on. I very much endorse the Cox-Wyden amendment, and I would urge its approval so that we preserve the first amendment and open systems on the Net.

Mr. WYDEN. Mr. Chairman, I yield 1 minute to the gentleman from Virginia [Mr. GOODLATTE].

(Mr. GOODLATTE asked and was given permission to revise and extend his remarks.)

Mr. GOODLATTE. Mr. Chairman, I thank the gentleman from Oregon [Mr. WYDEN] for yielding this time to me, and I rise in strong support of the Cox-Wyden amendment. This will help to solve a very serious problem as we enter into the Internet age. We have the opportunity for every household in America, every family in America, soon to be able to have access to places like the Library of Congress, to have access to other major libraries of the world, universities, major publishers of information, news sources. There is no way that any of those entities, like Prodigy, can take the responsibility to edit out information that is going to be coming in to them from all manner of sources onto their bulletin board. We are talking about something that is far larger than our daily newspaper. We are talking about something that is going to be thousands of pages of information every day, and to have that imposition imposed on them is wrong. This will cure that problem, and I urge the Members to support the amendment.

□ 1030

Mr. WYDEN. Mr. Chairman, I yield 1 minute to the gentleman from Massachusetts [Mr. MARKEY], the ranking member of the subcommittee.

Mr. MARKEY. Mr. Chairman, I want to congratulate the gentleman from Oregon and the gentleman from California for their amendment. It is a significant improvement over the approach of the Senator from Nebraska, Senator EXON.

This deals with the reality that the Internet is international, it is computer-based, it has a completely different history and future than anything that we have known thus far, and I support the language. It deals with the content concerns which the gentlemen from Oregon and California have raised.

Mr. Chairman, the only reservation which I would have is that they add in not only content but also any other type of registration. I think in an era of convergence of technologies where telephone and cable may converge with the Internet at some point and some ways it is important for us to ensure that we will have an opportunity down the line to look at those issues, and my hope is that in the conference committee we will be able to sort those out.

Mr. WYDEN. Mr. Chairman, I yield 30 seconds to the gentleman from Texas [Mr. FIELDS].

Mr. FIELDS of Texas. Mr. Chairman, I just want to take the time to thank him and also the gentleman from California for this fine work. This is a very sensitive area, very complex area, but it is a very important area for the American public, and I just wanted to congratulate him and the gentleman from California on how they worked together in a bipartisan fashion.

Mr. WYDEN. Mr. Chairman, I yield myself such time as I may consume. I thank the gentleman for his kindness.

Mr. Chairman, in conclusion, let me say that the reason that this approach rather than the Senate approach is important is our plan allows us to help American families today.

Under our approach and the speed at which these technologies are advancing, the marketplace is going to give parents the tools they need while the Federal Communications Commission is out there cranking out rules about proposed rulemaking programs. Their approach is going to set back the effort to help our families. Our approach allows us to help American families today.

Mr. COX of California. Mr. Chairman, I yield myself such time as I may consume.

Mr. Chairman, I would just like to respond briefly to the important point in this bill that prohibits the FCC from regulating the Internet. Price regulation is at one with usage of the Internet.

We want to make sure that the complicated way that the Internet sends a document to your computer, splitting it up into packets, sending it through myriad computers around the world before it reaches your desk is eventually grasped by technology so that we can price it, and we can price ration usage on the Internet so more and more people can use it without overcrowding it.

If we regulate the Internet at the FCC, that will freeze or at least slow down technology. It will threaten the future of the Internet. That is why it is so important that we not have a Federal computer commission do that.

Mr. GOODLATTE. Mr. Chairman, Congress has a responsibility to help encourage the private sector to protect our children from being exposed to obscene and indecent material on the Internet. Most parents aren't around all day to monitor what their kids are pulling up on the net, and in fact, parents have a hard time keeping up with their kids' abilities to surf cyberspace. Parents need some help and the Cox-Wyden amendment provides it.

The Cox-Wyden amendment is a thoughtful approach to keep smut off the net without government censorship.

We have been told it is technologically impossible for interactive service providers to guarantee that no subscriber posts indecent material on their bulletin board services. But that doesn't mean that providers should not be given incentives to police the use of their systems. And software and other measures are available to help screen out this material.

Currently, however, there is a tremendous disincentive for online service providers to create family friendly services by detecting and removing objectionable content. These providers face the risk of increased liability where they take reasonable steps to police their systems. A New York judge recently sent the online services the message to stop policing by ruling that Prodigy was subject to a $200 million libel suit simply because it did exercise some control over profanity and indecent material.

The Cox-Wyden amendment removes the liability of providers such as Prodigy who currently make a good faith effort to edit the smut from their systems. It also encourages the on-line services industry to develop new technology, such as blocking software, to empower parents to monitor and control the information their kids can access. And, it is important to note that under this amendment existing laws prohibiting the transmission of child pornography and obscenity will continue to be enforced.

The Cox-Wyden amendment empowers parents without Federal regulation. It allows parents to make the important decisions with regard to what their children can access, not the government. It doesn't violate free speech or the right of adults to communicate with each other. That's the right approach and I urge my colleagues to support this amendment.

The Chairman. All time on this amendment has expired.

The question is on the amendment offered by the gentleman from California [Mr. COX].

The question was taken; and the Chairman announced that the ayes appeared to have it.

Mr. COX of California. Mr. Chairman, I demand a recorded vote.

The CHAIRMAN. Pursuant to the rule, further proceedings on the amendment offered by the gentleman from California [Mr. COX] will be postponed until after the vote on amendment 2 4 to be offered by the gentleman from Massachusetts [Mr. MARKEY].

It is now in order to consider amendment No. 2 4 printed in part 2 of House Report 104 223.

AMENDMENT NO. 2–4 OFFERED BY MR. MARKEY

Mr. MARKEY. Mr. Chairman, I offer an amendment, numbered 2 4.

The CHAIRMAN. The Clerk will designate the amendment.

The text of the amendment is as follows:

Amendment offered by Mr. MARKEY of Massachusetts: page 126, after line 16, insert the following new subsection (and redesignate the succeeding subsections and accordingly):

(f) STANDARD FOR UNREASONABLE RATES FOR CABLE PROGRAMMING SERVICES.—Section 623(c)(2) of the Act (47 U.S.C. 543(c)) is amended to read as follows:

''(2) STANDARD FOR UNREASONABLE RATES.—The Commission may only consider a rate for cable programming services to be unreasonable if such rate has increased since June 1, 1995, determined on a per-channel basis, by a percentage that exceeds the percentage increase in the Consumer Price Index for All Urban Consumers (as determined by the Department of Labor) since such date.''.

Page 127, line 4, strike ''or 5 percent'' and all that follows through ''greater,'' on line 6.

Page 129, strike lines 16 through 21 and insert the following:

''(d) UNIFORM RATE STRUCTURE.—A cable operator shall have a uniform rate structure throughout its franchise area for the provision of cable services.''.

Page 130, line 16, insert ''and'' after the semicolon, and strike line 20 and all that follows through line 2 on page 131 and insert the following:

''directly to subscribers in the franchise area and such franchise area is also served by an unaffiliated cable system.''.

Page 131, strike line 6 and all that follows through line 21, and insert the following:

''(m) SMALL CABLE SYSTEMS.—

''(1) SMALL CABLE SYSTEM RELIEF.—A small cable system shall not be subject to subsections (a), (b), (c), or (d) in any franchise area with respect to the provision of cable programming services, or a basic service tier where such tier was the only tier offered in such area on December 31, 1994.

''(2) DEFINITION OF SMALL CABLE SYSTEM.—For purposes of this subsection, 'small cable system' means a cable system that—

''(A) directly or through an affiliate, serves in the aggregate fewer than 250,000 cable subscribers in the United States; and

''(B) directly serves fewer than 10,000 cable subscribers in its franchise area.''.

The CHAIRMAN. Pursuant to the rule, the gentleman from Massachusetts [Mr. MARKEY] will be recognized for 15 minutes, and a Member opposed will be recognized for 15 minutes.

Does the gentleman from Virginia [Mr. BLILEY] seek the time in opposition?

Mr. BLILEY. Mr. Chairman, I do.

The CHAIRMAN. The gentleman from Virginia [Mr. BLILEY] will be recognized for 15 minutes.

The Chair recognizes the gentleman from Massachusetts [Mr. MARKEY].

Mr. MARKEY. Mr. Chairman, I yield myself at this point 3 minutes.

Mr. Chairman, the consumers of America should be placed upon red alert. We now reach an issue which I think every person in America can understand who has even held a remote control clicker in their hands.

The bill that we are now considering deregulates all cable rates over the next 15 months. But for rural America, rural America, the 30 percent of America that considers itself to the rural, their rates are deregulated upon enactment of this bill.

Now, the proponents are going to tell you, do not worry, there is going to be plenty of competition in cable. That will keep rates down. For those of you in rural America, ask yourself this question: In two months do you think there will be a second cable company in your town? Because if there is not a second cable company in your town, your rates are going up because your cable company, as a monopoly, will be able to go back to the same practices which they engaged in up to 1992 when finally we began to put controls on this rapid increase two and three and four times the rate of inflation of cable rates across this country.

The gentleman from Connecticut [Mr. SHAYS] and I have an amendment that is being considered right now on the floor of Congress which will give you your one shot at protecting our cable ratepayers against rate shock this year and next across this country, whether you be rural or urban or suburban.

We received a missive today from the Governor of New Jersey, Christine Whitman. She wants an aye vote on the Markey-Shays bill. Christine Whitman. She does not want her cable rates to go up because she knows, and she says it right here, there is no competition on the horizon for most of America.

So this amendment is the most important consumer protection vote which you will be taking in this bill and one of the two or three most important this year in the U.S. Congress.

Make no mistake about it. There will be no competition for most of America. There will be no control on rates going up, and you will have to explain why, as part of a telecommunications bill that was supposed to reduce rates, you allowed for monopolies, monopolies in 97 percent of the communities in America to once again go back to their old practices.

Mr. BLILEY. Mr. Chairman, I yield myself 1 minute.

The Markey amendment, Mr. Chairman, tracks the disastrous course of the 1992 cable law by requiring the cable companies to jump through regulatory hoops to escape the burdensome rules imposed on them after the law was enacted.

The Markey amendment fails to take into account the changing competitive video marketplace that has evolved in the last 2 years. Direct broadcast satellite has taken off, particularly in rural areas, and there will be nearly 5-million subscribers by the end of the year. With the equipment costs now being folded into the monthly charge for this service, this competitive technology will explode in the next few years.

The telephone industry will be permitted to offer cable on the date of enactment and will provide formidable competition immediately. There are numerous market and technical trials going on now to ramp up to that competition.

The Markey amendment turns back the clock. It seeks to continue the government regulation and micromanagement that has unfairly burdened the industry over the past several years.

Vote ''no'' on Markey and duplicate the Senate, they overwhelmingly voted it down over there.

Mr. MARKEY. Mr. Chairman, I yield 1 minute to the gentleman from Tennessee [Mr. CLEMENT].

Mr. CLEMENT. Mr. Chairman, it's Christmas in August in Washington. On the surface, the Communications Act of 1995 looks like a Christmas gift to the people and the communications industries. You've heard the buzz words: competition, lower rates, and more choices. But a closer look reveals another story.

While the cable provisions in the bill will give a sweet gift to the cable industry, the American consumer, and especially those in rural America, will wake up on Christmas morning to nothing more than less competition, higher cable rates, and less choice.

The bill as it stands immediately deregulates rate controls on small cable systems those which serve an average of almost 30 percent of cable subscribers in America and account for at least 70 percent of all cable systems. This bill discourages competition in these markets because it deregulates these cable companies regardless of whether they face substantial competition in the marketplace.

In some cases, the bill immediately removes cable rate controls for systems serving over 50 percent of subscribers. In my home State of Tennessee, cable systems reaching more than 30 percent of subscribers, or 348,027 subscribers, would see immediate deregulation, and these subscribers would see nothing but higher rates and no choice.

That's the reason I am proud to support the Markey-Shays cable amendment to the Communications Act of 1995. This amendment would protect consumers from cable price-gouging by keeping rate regulations on small cable companies until effective cable competition in the marketplace offers consumers a choice.

I urge my colleagues to support this amendment. Otherwise, Congress will give their constituents a Christmas gift they will not forget.

Mr. BLILEY. Mr. Chairman, I yield 1 minute to the gentleman from Texas [Mr. BARTON].

(Mr. BARTON of Texas asked and was given permission to revise and extend his remarks.)

Mr. BARTON of Texas. Mr. Chairman, I rise in strong opposition to this amendment. When we reregulated cable 3 years ago, I was absolutely opposed to that. I voted against it in subcommittee, I voted against it in full committee, and I voted against it on the floor, and I voted to sustain the President's veto when he tried to veto the legislation.

We do not need to be regulating cable rates. Cable is not a necessity. The Federal Government has absolutely no right to be setting prices for cable television. The amendment that is before us would do that.

We have wisely in the legislation deregulated 90 percent of the cable industry. We should keep the bill as it is, we should vote against the Markey amendment.

I would vote against it two times, three times, four times if I had the constitutional authority to do so, but I am going to vote against it once.

Mr. MARKEY. Mr. Chairman, I yield 2 minutes to the gentleman from Massachusetts [Mr. NEAL].

Mr. NEAL of Massachusetts. Mr. Chairman, I want to thank the gentleman from Massachusetts [Mr. MARKEY] for the good work that he has done on behalf of the consumers of America.

Mr. Chairman, I rise in support of the Markey-Shays amendment for the simple reason that I do not want to return to the days when the cable companies of this country were increasing their prices at three times the rate of inflation while dramatically reducing their services.

Since the passage of the 1992 Cable Act, the American consumer has finally seen relief in the form of significantly reduced cable rates. In my district alone, millions of dollars have been saved by cable subscribers. But the bill we are debating here this morning would severely threaten the consumer protection that was established by the 1992 act.

In its current form, H.R. 1555 would abolish FCC regulation of cable systems thereby allowing cable companies to once again raise rates arbitrarily. It would open a window of opportunity for cable owners to cash in one last time at the expense of the American consumer. We cannot allow this to happen.

The Markey-Shays amendment would continue FCC regulation of cable systems until effective competition is established. It is a proconsumer amendment that would protect millions of Americans from an unnecessary rate hike and I strongly urge its passage.

□ 1045

Mr. BLILEY. Mr. Chairman, I yield 1 minute to the gentleman from Georgia [Mr. NORWOOD].

Mr. NORWOOD. Mr. Chairman, I thank the distinguished chairman for yielding me this time.

Mr. Chairman, the Markey cable amendment embodies all that is wrong with Government regulation. It sets prices for a private industry, cable television. It lowers the threshold for price controls to systems with 10,000 or fewer subscribers. It lowers the complaint threshold from 5 percent of subscribers to 10 yes 10, individual subsbribers to which the FCC can respond with a rate review. Mr. Chairman, I have seen the amount of paperwork a cable operator can be asked to provide the FCC in response to a complaint. It is absolutely unbelievable. And this amendment would make it more likely that cable operators would have to fill out these massive forms for the FCC. H.R. 1555 promotes deregulation and competition in all telecommunications industries, including cable. Mr. Chairman, I strongly urge my colleagues to reject this effort at price control and regulation of the cable industry.

Mr. MARKEY. Mr. Chairman, I yield 1½ minutes to the gentlewoman from Connecticut [Ms. DELAURO].

Ms. DELAURO. Mr. Chairman, I rise in strong support of the Markey-Shays amendment to protect Americans from unaffordable cable rate increases.

Cable rates hit home with consumers in Connecticut and across the country. That is why the only bill Congress passed over President Bush's veto was the 1992 Cable Act to keep TV rates down. Now is not the time to backtrack on that progress.

We would all like to see competition pushing cable rates down, but the telecommunications bill before us will remove protections against price increases before there is any guarantee of competition. Under this bill, every time you hit the clicker, it might as well sound like a cash register recording the higher costs viewers will face. Consumer groups estimate that this bill will raise rates for popular channels such as CNN and ESPN by an average of $5 per month.

The Markey-Shays amendment will protect television viewers from unreasonable rate increases until there truly is competition in the cable TV market. The amendment will also retain important safeguard that protect the right of consumers to protest unreasonable rate hikes.

I urge my colleagues to support the Markey-Shays amendment so that hard-working Americans will not be priced out of the growing information age.

Mr. BLILEY. Mr. Chairman, I yield 2 minutes to the gentleman from Louisiana [Mr. TAUZIN], a member of the committee.

Mr. TAUZIN. Mr. Chairman, I thank the gentleman for yielding me time.

Mr. Chairman, I rise in opposition to the Markey amendment. In 1992 we fought a royal battle on the floor of this House, a battle designed clearly to begin the process of creating competition in the cable programming marketplace. The problem in 1992 was not the lack of Government regulation, although that contributed to the problem in 1992. The problem was that because cable monopoly companies vertically integrated, controlled by the programming and the distribution of cable programming, cable companies could decide not to let competition happen. They could refuse to sell to direct broadcast satellite, they could refuse to sell to microwave systems, they could refuse to sell to alternative cable systems. The result was competition was stifled. The demand rose in this House for reregulation.

The good news is that in 1992, despite a veto by the President, this House and the other body overrode that veto, adopted the Tauzin program access provision to the cable bill, and created, for the first time in this marketplace, real competition.

Mr. Chairman, are you not excited by those direct broadcast television ads you see on television, where you see a direct satellite now beaming to a dish no bigger than this to homes 150 channels with incredible programming? Are you not excited in rural America that you have an alternative to the cable, or, where you do not have a cable, you now have program access? Are you not excited when microwave systems are announced in your community and when you hear the telephone company will soon be in the cable business?

That is competition. Competition regulates the marketplace much better than the schemes of mice and men here in Washington, DC.

Consumers choosing between competitive offerings, consumers choosing the same products offered by different suppliers, in different stores, in the same town. Keep prices down, keep service up. Competition, yes; reregulation, no.

Mr. MARKEY. Mr. Chairman, I yield 3 minutes to the gentleman from Connecticut [Mr. SHAYS], the cosponsor of the amendment.

Mr. SHAYS. Mr. Chairman, competition, yes. Competition, yes. But now we do not have competition. Ninety-seven percent of all systems do not have competition. And this bill, unamended, allows for those companies, most of them, nearly 50 percent of them, to be deregulated.

We say yes, we are going to allow the small companies to be deregulated, the small ones, under 600,000 subscribers. Six hundred thousand subscribers is small? That system is worth $1.2 billion.

We do not have competition now. Deregulate when you have competition. There are 97 percent of the systems that do not have competition. The whole point here is to make sure that companies that are not competing, that have a monopoly, are not allowed to set monopolistic prices.

One of the reasons why we overrode the President's veto, 70 of us on the Republican side, we recognized that consumers were paying monopolistic prices. Deregulate when you have competition. The bill in 1992 said when you had competition, there would not be regulation. The reason why we have regulation is these are monopolies.

I know Members have not had a lot of sleep, but I hope the staff that is listening will tell their Members that we are going to deregulate these companies and they are going to set monopolistic prices, and they are going to come to their Congressman and say, ''Why did you vote to deregulate a monopoly?''

Mr. BLILEY. Mr. Chairman, I yield 2 minutes to the gentleman from New York [Mr. MANTON], a member of the committee.

Mr. MANTON. Mr. Chairman, I rise in opposition to the Markey amendment.

I thank the gentleman for yielding me this time and would like to take this opportunity to commend him for his fine work on this legislation.

Mr. Chairman, the cable television industry is poised to compete with local telephone companies in offering consumers advanced communications services. Yet to make that happen, we must relax burdensome and unwarranted regulations that are choking the ability of the cable industry to invest in the new technology and services that will allow them to compete.

The proponents of the Markey amendment said in 1992 that rate regulation was a placeholder until competition arrived in the video marketplace.

Well, that competition is here. Today, cable television is being challenged by an aggressive and burgeoning direct broadcast satellite industry and other wireless video services. And with the enactment of H.R. 1555, the Nation's telephone companies, will be permitted to offer video services directly to the consumer.

Mr. Chairman, it is also important for my colleagues to understand what H.R. 1555 does not do. It does not repeal the 1992 Cable Act. Cities will retain the authority to regulate rates for basic cable services and to impose stringent customer service standards. H.R. 1555 does not alter the program access, must carry or retransmission consent provisions of the 1992 Cable Act.

Quite modestly, H.R. 1555 will end rate regulation of expanded basic cable entertainment programming 15 months after the enactment of the legislation, plenty of time for the telcos to get into the video business.

Mr. Chairman, cable programming is an enormously popular and valuable service in the world of video entertainment. But just because it's good and people like it, doesn't mean the Federal Government should regulate it.

I urge my colleagues to reject the Markey amendment.

Mr. BLILEY. Mr. Chairman, I yield 2 minutes to the gentleman from Florida [Mr. DEUTSCH], a member of the committee.

Mr. DEUTSCH. Mr. Chairman, I would like to thank the chairman of the committee for yielding me this time.

Mr. Chairman, the crux of this issue is, is there competition in this industry at this time on the issues of this amendment? I think the answer to that is that there is.

Let us be very specific about what the amendment does. The amendment would keep regulation on nonbasic services. Basic service would continue regulation beyond the 15-month period. For nonbasic service, for HBO, Cinemax, and things like that.

There is competition today in just about any place in this country, and I know for a fact in my community you can buy a minisatellite dish. You can go to Blockbuster Video and rent a video. Many people choose that. Cable passes 97 percent of the homes in this country, yet only 60 percent of those homes choose to purchase cable systems.

What this bill does is it gives an opportunity for this country to enter a new age, an age for competition throughout our telecommunications. The major opportunity is there for the phone systems for competition through the cable system.

Again, in my own area of south Florida, cable systems are actively marketing competition in commercial lines, today, against phone systems. That is something they want to do in the short term, tomorrow.

If this bill has any chance of creating this synergism, the new technologies, the things that will be available that are beyond our imagination, the opportunity of cable systems to be part of that competition is a necessary component.

If we can think back 15 years ago when none of us could have imagined the change in the technologies that have evolved, this is a case of hope versus fear.

Mr. Chairman, I urge the defeat of the Markey amendment.

Mr. MARKEY. Mr. Chairman, I yield 1½ minutes to the gentlewoman from Texas [Ms. JACKSON-LEE].

(Ms. JACKSON-LEE asked and was given permission to revise and extend her remarks.)

Ms. JACKSON-LEE. Mr. Chairman, I thank the gentleman very much for yielding me time.

Mr. Chairman, I rise with great excitement about the technology that is offered through this cable miracle. I only hope that the consumers can be excited as well. I stand here before you as a former chairperson of a local municipality's cable-TV committee, and I realize that basic rates have been regulated. But maybe the reason why so many do not opt in for cable TV is because of the rates on the other services.

So I think the Markey-Shays amendment is right on the mark. It acknowledges the technology, but it also comes squarely down for competition, and it responds to the needs of consumers in keeping the lid on what is a privilege held by the cable companies. It is a privilege to be in the cable TV business. It is big business. It is going to be more big business in the 21st century, and I encourage that. But at the same time, I think it is very important to have a system that provides for the regulation of rates so that we can have greater access to cable by our schools, for our public institutions, and, yes, for our citizens in urban and rural America. The rates are already too high!

Mr. Chairman, this amendment also allows the subscriber to more easily make complaints to the FCC. The real issue is to come down on the side of the consumer and to come down on the side of viable competition. Support the Markey-Shays amendment.

Mr. Chairman, I rise in support of the Markey-Shays amendment to H.R. 1555 because it provides reasonable and structured plan for deregulating cable rates for an existing cable system until a telephone company is providing competing services in the area.

This amendment is critically important because in many areas of the country, one cable company already has a monopoly on cable services. I am sure that many of my colleagues can attest to the complaints by constituents with respect to high rates and inadequate service when no competition exists in the local cable market.

This amendment is also necessary because it would eliminate rate regulation for many small cable systems with less than 10,000 subscribers in a franchise area and less than 250,000 subscribers nationwide.

Finally, this amendment provides an opportunity for consumers to petition the FCC to review rates if 10 subscribers complain as opposed to the bill's requirement that 5 percent of the subscribers must complain in order to trigger a review by the FCC.

I urge my colleagues to support true competition in the cable market by voting in favor of the Markey-Shays amendment.

Mr. BLILEY. Mr. Chairman, I yield 1 minute to the gentleman from New Mexico [Mr. RICHARDSON].

(Mr. RICHARDSON asked and was given permission to revise and extend his remarks.)

Mr. RICHARDSON. Mr. Chairman, while I applaud the leadership of the gentleman from Massachusetts [Mr. MARKEY], incredible leadership on telecommunications issues, I must oppose this amendment, because Federal regulation of cable which began in 1993 has not worked. Regulation has resulted in the decline of cable television programming and hurt the industry's ability to invest in technology that is going to improve information services to all Americans.

□ 1100

Because cable companies have information lines in home, cable has the potential to offer our constituents a choice in how to receive information. Cable systems pass over 96 percent of American homes with cables that carry up to 900 times as much information as the local phone company's wires.

Exensive regulations prevent the cable industry from raising the capital needed to make the billion dollar investments needed to upgrade their systems. Cable's high capacity systems can ultimately deliver virtually every type of communications service conceivable, allow consumers to choose between competing providers, voice, video, and data services.

I urge a ''no'' vote on this amendment.

Mr. MARKEY. Mr. Chairman, I yield 1½ minutes to the gentleman from Michigan [Mr. DINGELL], the ranking member of the Committee on Commerce.

(Mr. DINGELL asked and was given permission to revise and extend his remarks.)

Mr. DINGELL. Mr. Chairman, I rise in support of the amendment.

While many of us differ about parts of the bill, one thing is clear. H.R. 1555 deregulates cable before consumers have a competitive authorization alternative. The provisions of the bill very simply see to it, first of all, that so-called small systems are deregulated immediately and define a small system as one which has 600,000 subscribers. That is a market the size of the city of Las Vegas. So there is nothing small about those who will be deregulated immediately.

Beyond this, the provision will deregulate cable rates for more than 16 million households, nearly 30 percent of the total cable households in America, and it will do so at the end of the time it takes the President to sign this.

The bill will deregulate all cable rates in Alaska immediately, and more than 61 percent of rates in Georgia, and the rates of better than half of the subscribers in Arkansas, Maine, North Dakota, South Dakota, Minnesota, Nevada, and other States.

But there is more. This bill will deregulate by the calendar. What happens is that at the end of 15 months, whether there is competition in place or not, deregulation occurs. At that point, what protection will exist for the consumers of cable services in this country who do not have competition?

This amendment returns us to the rather sensible approach which we had when we passed the Cable Regulation Act some 2 years ago. It provides protection for the consumers. I urge my colleagues to support the amendment.

Mr. BLILEY. Mr. Chairman, I yield 1 minute to the gentleman from Ohio [Mr. OXLEY], a member of the committee.

(Mr. OXLEY asked and was given permission to revise and extend his remarks.)

Mr. OXLEY. Mr. Chairman, since the passage of the 1992 Cable Act, the PCC staff has increased some 30 percent, making it one of the largest growing Federal bureaucracies in Washington. Most of the growth is due to the creation of the Cable Services Bureau.

Listen to this: When established, the Cable Service Bureau has a staff of 59. Since the passage of the Cable Act of 1992, it has increased and has quadrupled in size. The 1995 cable services budget stands at $186 million, a 35-percent increase from the Cable Act.

We do not need more bureaucrats telling the American public what they can and cannot pay for MTV and other cable services. It seems to me that the potential is clearly there for more and more competition. If we get bureaucracy in the way of competition, the bureaucracy always wins. It is important to understand the negative effects of the Cable Act of 1992. This amendment would exacerbate the terrible things that have happened since 1992.

Mr. MARKEY. Mr. Chairman, I yield 1 minute to the gentleman from Connecticut [Mr. SHAYS].

Mr. SHAYS. Mr. Chairman, we gave away cable franchises in the early 1970s and made millionaires out of cable franchise owners. In 1984, we deregulated and made billionaires out of these organizations.

The argument that since deregulation bad things have happened to cable is simply not true. Their revenues have grown from 17 billion in 1990 to 25 billion in 1995. Their subscribers have grown from 54 million to 61 million during that same time period. Cable companies are making money. They are presently without competition. We should deregulate when we have competition, not before. That is the crux of this argument.

Mr. BLILEY. Mr. Chairman, I yield 3½ minutes to the gentleman from Colorado [Mr. SCHAEFER].

(Mr. SCHAEFER asked and was given permission to revise and extend his remarks.)

Mr. SCHAEFER. Mr. Chairman, I rise in opposition to this amendment and in support of H.R. 1555.

In 1992, I voted against the cable act because it was unjustified and would slow the growth of a dynamic industry. In fact, the 1992 act stifled the cable industry's ability to upgrade its plants, deploy new technology and add new channels. It also put several program networks out of business and delayed the launch of many other networks in this country.

Without some changes to the cable act, Congress will delay the introduction of new technologies and services to the consumer and will jeopardize the growth of competition in the telecommunications industry.

The Markey-Shays amendment should be rejected for two reasons: First, it looks to the past; second, it is bad policy.

H.R. 1555 is looking to the future. It will establish new competition between multiple service providers offering consumers greater choices, better quality and fairer prices.

The Markey-Shays amendment is based on outdated market conditions from the 1980's, and it seeks to shackle an industry that promises to deliver every conceivable information age service as well as local phone service.

The proposed amendment represents a last ditch effort to keep in place a failed system of regulation that has no place in the marketplace today.

The gentleman from Massachusetts [Mr. MARKEY] and the gentleman from Connecticut [Mr. SHAYS] have argued that without their amendment cable prices would jump significantly and without justification. This simply is not true.

First, for most cable systems, the vast majority of cable subscribers rate regulations will remain in place for 15 months after 1,555 is enacted. This will provide ample time for more competition to develop. Competition, not extensive Federal regulation, is the best way to constrain prices that we have today.

Second, the sponsors of the pending cable rate amendment have overstated the history of cable prices after deregulation. For example, Mr. MARKEY has repeatedly cited a GAO statistic which suggests that cable rates tripled between deregulation in the mid 1980s and reregulation in 1992. What he ignores is that the number of channels offered by the cable system has also tripled.

As this chart very well explains it, back in the deregulation era, here we had between 1986, 58 cents per channel. And as you go to 11/91, 58 cents per channel. No changes.

The chart demonstrates the average cost of cable television. It remained constant over the particular time. And I would just say, by tying future cable rates to CPI, as the gentleman from Massachusetts [Mr. MARKEY] and the gentleman from Connecticut [Mr. SHAYS] are proposing, Congress will choke off the explosion of services and programs to our consumers. The time for total deregulation is there; 13 hundred pages of FCC regulations and 220 bureaucrats are running this system, the cable bureau in this country under FCC. It is harming consumers by delaying introduction of new technology and services. Such regulations will also impede the cable industry's ability to offer other consumer advantages in this market.

I would just say that if we really want cable to be a part of this whole information highway, defeat the Markey-Shays amendment.

Mr. MARKEY. Mr. Chairman, I yield myself the balance of my time.

Mr. Chairman, we are now 3 minutes from casting the one vote that every consumer in America is going to understand. They may appreciate that you are going to give them the ability to have one more long distance company out there, but they have already, in fact, enjoy dozens of long distance companies in America. But every cable consumer in America knows that in their hometown there is only one cable company, and the telephone company is not coming to town soon.

Under Shays-Markey, when the telephone company comes to town, no more regulation. What the bill says right now is, even if the telephone company does not come to town, the cable companies can tip you upside down and shake your money out of your pockets.

So you answer this question: When cable rates go from $25 a month to $35 a month, every month, are you going to be able to explain that there is competition arriving in 3 or 4 years?

Keep rate controls until the telephone company shows up in town, then complete deregulation. That is what this bill is all about, competition. When the telephone company begins to compete, if it ever does, no rate control. But until they get there, every community in America for all intents and purposes is a cable monopoly. They are going right back to the same practices once you pass this bill.

Support the Shays-Markey amendment. Protect cable consumers until competition arrives.

The CHAIRMAN. The gentleman from Virginia [Mr. BLILEY] has 1 half minute to close.

Mr. BLILEY. Mr. Chairman, I yield the balance of my time to the gentleman from Texas [Mr. FIELDS].

(Mr. FIELDS of Texas asked and was given permission to revise and extend his remarks.)

Mr. FIELDS of Texas. Mr. Chairman, this is a reregulatory dinosaur. Basic cable rates continue to be regulated under this bill.

We deregulate expanded basic in 15 months, when telephone will be competing with cable. But very importantly, in terms of competition with telephone companies, the only competitor in the residential marketplace will be the cable company. If you place regulations on cable, they will not be able to roll out the services so they can truly compete with telephone, which is what we want. It is a desired consumer benefit.

Mr. Chairman, I rise in opposition to the Markey cable re-regulation amendment. Today, we will hear from my friend from Massachusetts that there is not enough competition in the cable services arena and, therefore cable should not be deregulated. So one might ask, why would we want to limit one industry and place regulations which will prohibit cable from competing with the others?

The checklist in title 1 envisions a facilities-based competitor which will provide the consumer with an alternative in local phone service. The cable companies are ready to be that competitor; however, they cannot fully participate in the deployment of an alternative system if they must operate under the burdensome regulations imposed by the 1992 cable act. The truth is that cable companies are facing true competition. With the deployment of direct broadcast satellite systems and telephone entry into cable, the competitors have come.

H.R. 1555 takes a moderate approach toward deregulating cable. The basic tier remains regulated because that has become a lifeline service. The upper tiers, which are purely entertainment, are reregulated because consumers have a choice in that area.

We should not be picking favorites by keeping some sectors of the industry under regulations. It is time to allow everyone to compete fairly and without Government interference. I strongly urge my colleagues to oppose this amendment.

STATEMENT ON MUST CARRY/ADVANCED SPECTRUM

Section 336(b)(3) of the Communications Act, added by section 301 of the bill, makes clear that ancillary and supplemental services offered on designated frequencies are not entitled to must carry. It is not the intent of this provision to confer must carry status on advanced television or other video services offered on designated frequencies. Under the 1992 Cable Act, that issue is to be the subject of a Commission proceeding under section 614(b)(4)(B).

The CHAIRMAN. The question is on the amendment offered by the gentleman from Massachusetts [Mr. MARKEY].

The question was taken; and the Chairman announced that the noes appeared to have it.

RECORDED VOTE

Mr. MARKEY. Mr. Chairman, I demand a recorded vote.

A recorded vote was ordered.

The CHAIRMAN. Pursuant to the rule, the Chair announces that it will reduce to a minimum of 5 minutes the period of time within which a vote by electronic device will be taken on each amendment on which the Chair has postponed further proceedings. This is a 15-minute vote.

The vote was taken by electronic device, and there were ayes 148, noes 275, not voting 11, as follows:

[Roll No. 628]

AYES—148

Abercrombie
Baesler
Barcia
Barrett (WI)
Becerra
Beilenson
Bereuter
Bishop
Boehlert
Borski
Boucher
Brown (CA)
Brown (FL)
Brown (OH)
Bunning
Cardin
Clay
Clayton
Clement
Clyburn
Coleman
Collins (IL)
Collins (MI)
Conyers
Costello
Coyne
DeFazio
DeLauro
Dellums
Dingell
Doyle
Duncan
Durbin
Engel
Evans
Farr
Fattah
Fields (LA)
Filner
Foglietta
Ford
Frank (MA)
Franks (NJ)
Furse
Gejdenson
Gilman
Gonzalez
Gordon
Green
Gutierrez
Hastings (FL)
Hefner
Hilliard
Hinchey
Holden
Horn
Hyde
Jackson-Lee
Jacobs
Johnson (SD)
Johnson, E. B.
Johnston
Kanjorski
Kaptur
Kennedy (MA)
Kennedy (RI)
Kennelly
Kildee
Kleczka
Klink
LaFalce
Lantos
Leach
Levin
Lewis (GA)
Lipinski
Lowey
Luther
Maloney
Markey
Mascara
McCarthy
McDermott
McHugh
McKinney
McNulty
Meehan
Meek
Menendez
Mfume
Minge
Mink
Mollohan
Moran
Morella
Murtha
Nadler
Neal
Nussle
Oberstar
Obey
Olver
Owens
Pallone
Payne (NJ)
Pomeroy
Porter
Poshard
Rahall
Reed
Regula
Rivers
Roemer
Rogers
Roybal-Allard
Rush
Sabo
Sanders
Sawyer
Schumer
Scott
Serrano
Shays
Skelton
Slaughter
Stark
Stokes
Studds
Stupak
Tanner
Thompson
Torres
Torricelli
Tucker
Velazquez
Vento
Visclosky
Volkmer
Ward
Waters
Watt (NC)
Waxman
Weldon (PA)
Wise
Woolsey
Wyden
Wynn
Yates

NOES—275

Ackerman
Allard
Archer
Armey
Bachus
Baker (CA)
Baker (LA)
Baldacci
Ballenger
Barr
Barrett (NE)
Bartlett
Barton
Bass
Bentsen
Berman
Bevill
Bilbray
Bilirakis
Bliley
Blute
Boehner
Bonilla
Bonior
Bono
Brewster
Browder
Brownback
Bryant (TN)
Bryant (TX)
Bunn
Burr
Burton
Buyer
Callahan
Calvert
Camp
Canady
Castle
Chabot
Chambliss
Chapman
Chenoweth
Christensen
Chrysler
Clinger
Coble
Collins (GA)
Combest
Condit
Cooley
Cox
Cramer
Crane
Crapo
Cremeans
Cubin
Cunningham
Danner
Davis
de la Garza
Deal
DeLay
Deutsch
Diaz-Balart
Dickey
Dicks
Dixon
Doggett
Dooley
Doolittle
Dornan
Dreier
Dunn
Edwards
Ehlers
Ehrlich
Emerson
English
Ensign
Eshoo
Everett
Ewing
Fawell
Fazio
Fields (TX)
Flake
Flanagan
Foley
Forbes
Fowler
Fox
Franks (CT)
Frelinghuysen
Frisa
Frost
Funderburk
Gallegly
Ganske
Gekas
Gephardt
Geren
Gibbons
Gilchrest
Gillmor
Goodlatte
Goodling
Goss
Graham
Greenwood
Gunderson
Gutknecht
Hall (OH)
Hall (TX)
Hamilton
Hancock
Hansen
Harman
Hastert
Hastings (WA)
Hayes
Hayworth
Hefley
Heineman
Herger
Hilleary
Hobson
Hoekstra
Hoke
Hostettler
Houghton
Hoyer
Hunter
Inglis
Istook
Jefferson
Johnson (CT)
Johnson, Sam
Jones
Kasich
Kelly
Kim
King
Kingston
Klug
Knollenberg
Kolbe
LaHood
Largent
Latham
LaTourette
Laughlin
Lazio
Lewis (CA)
Lewis (KY)
Lightfoot
Lincoln
Linder
Livingston
LoBiondo
Lofgren
Longley
Lucas
Manton
Manzullo
Martinez
Martini
Matsui
McCollum
McCrery
McDade
McHale
McInnis
McIntosh

McKeon
Metcalf
Meyers
Mica
Miller (CA)
Miller (FL)
Mineta
Molinari
Montgomery
Moorhead
Myers
Myrick
Nethercutt
Neumann
Ney
Norwood
Orton
Oxley
Packard
Parker
Pastor
Paxon
Payne (VA)
Pelosi
Peterson (FL)
Peterson (MN)
Petri
Pickett
Pombo
Portman
Pryce
Quillen
Quinn
Radanovich
Ramstad
Rangel
Richardson
Riggs
Roberts
Rohrabacher
Ros-Lehtinen
Rose
Roth
Roukema
Royce
Salmon
Sanford
Saxton
Schaefer
Schiff
Schroeder
Seastrand
Sensenbrenner
Shadegg
Shaw
Shuster
Sisisky
Skaggs
Skeen
Smith (MI)
Smith (NJ)
Smith (TX)
Smith (WA)
Solomon
Souder
Spence
Spratt
Stearns
Stenholm
Stockman
Stump
Talent
Tate
Tauzin
Taylor (MS)
Taylor (NC)
Tejeda
Thomas
Thornberry
Thornton
Tiahrt
Torkildsen
Towns
Traficant
Upton
Vucanovich
Waldholtz
Walker
Walsh
Wamp
Watts (OK)
Weldon (FL)
Weller
White
Whitfield
Wicker
Wilson
Wolf
Young (FL)
Zeliff
Zimmer

NOT VOTING—11

Andrews
Bateman
Coburn
Hutchinson
Moakley
Ortiz
Reynolds
Scarborough
Thurman
Williams
Young (AK)

☐ 1133

Messrs. MONTGOMERY, MARTINEZ, PAYNE of New Jersey, and BEVILL changed their vote from ''aye'' to ''no.''

Mrs. MEEK of Florida and Mr. HASTINGS of Florida changed their vote from ''no'' to ''aye.''

So the amendment was rejected.

The result of the vote was announced as above recorded.

SEQUENTIAL VOTES POSTPONED IN COMMITTEE OF THE WHOLE

The CHAIRMAN. Pursuant to the rule, proceedings will now resume on those amendments on which further proceedings were postponed in the following order: Amendment No. 2 1 offered by the gentleman from Michigan [Mr. STUPAK], Amendment No. 2 2 as modified, offered by the gentleman from Michigan [Mr. CONYERS], and Amendment No. 2 3 offered by the gentleman from California [Mr. COX].

AMENDMENT NO. 2–1 OFFERED BY MR. STUPAK

The CHAIRMAN. The pending business is the demand for a recorded vote on the amendment offered by the gentleman from Michigan [Mr. STUPAK] on which further proceedings were postponed and on which the ayes prevailed by voice vote.

The Clerk will redesignate the amendment.

The Clerk redesignated the amendment.

RECORDED VOTE

The CHAIRMAN. A recorded vote has been demanded.

A recorded vote was ordered.

The CHAIRMAN. This is a 5-minute vote.

The vote was taken by electronic device, and there were ayes 338, noes 86, not voting 10, as follows:

[Roll No. 629]

AYES—338

Abercrombie
Ackerman
Armey
Baesler
Baker (LA)
Baldacci
Barcia
Barr
Barrett (WI)
Bartlett
Barton
Bass
Becerra
Beilenson
Bentsen
Bereuter
Berman
Bevill
Bilirakis
Bishop
Blute
Boehlert
Bonilla
Bonior
Borski
Brewster
Browder
Brown (CA)
Brown (FL)
Brown (OH)
Brownback
Bryant (TN)
Bryant (TX)
Burton
Calvert
Camp
Canady
Cardin
Chambliss
Chapman
Chrysler
Clay
Clayton
Clement
Clinger
Clyburn
Coble
Coburn
Collins (GA)
Collins (IL)
Collins (MI)
Condit
Conyers
Cooley
Costello
Coyne
Cramer
Crane
Cubin
Cunningham
Danner
Davis
de la Garza
DeFazio
DeLauro
Dellums
Diaz-Balart
Dicks
Dingell
Dixon
Doggett
Dooley
Doolittle
Dornan
Doyle
Dreier
Duncan
Dunn
Durbin
Edwards
Ehlers
Ehrlich
Emerson
Engel
English
Ensign
Eshoo
Evans
Everett
Farr
Fattah
Fawell
Fazio
Fields (LA)
Filner
Flake
Flanagan
Foglietta
Foley
Forbes
Ford
Fowler
Frank (MA)
Frelinghuysen
Frost
Funderburk
Furse
Gallegly
Gejdenson
Gekas
Gephardt
Geren
Gibbons
Gilchrest
Gilman
Gonzalez
Goodlatte
Goodling
Gordon
Goss
Graham
Green
Gutierrez
Hall (OH)
Hall (TX)
Hamilton
Harman
Hastings (FL)
Hastings (WA)
Hayes
Hayworth
Hefner
Heineman
Hilleary
Hilliard
Hinchey
Hobson
Hoekstra
Hoke
Holden
Horn
Hoyer
Hunter
Hyde
Istook
Jackson-Lee
Jacobs
Jefferson
Johnson (CT)
Johnson (SD)
Johnson, E.B.
Johnson, Sam
Johnston
Jones
Kanjorski
Kaptur
Kasich
Kelly
Kennedy (MA)
Kennedy (RI)
Kennelly
Kildee
Kim
Kingston
Kleczka
Klink
Klug
Knollenberg
LaFalce
LaHood
Lantos
LaTourette
Levin
Lewis (GA)
Lewis (KY)
Lightfoot
Lincoln
Linder
Lipinski
Lofgren
Lowey
Lucas
Luther
Maloney
Manton
Manzullo
Markey
Martinez
Martini
Mascara
Matsui
McCarthy
McCollum
McDade
McDermott
McHale
McHugh
McIntosh
McKeon
McKinney
McNulty
Meehan
Meek
Menendez
Meyers
Mfume
Miller (CA)
Miller (FL)
Mineta
Minge
Mink
Molinari
Mollohan
Montgomery
Moorhead
Moran
Morella
Murtha
Myers
Myrick
Nadler
Neal
Nethercutt
Neumann
Ney
Nussle
Oberstar
Obey
Olver
Orton
Owens
Pallone
Pastor
Payne (NJ)
Payne (VA)
Pelosi
Peterson (FL)
Peterson (MN)
Petri
Pickett
Pombo
Pomeroy
Porter
Portman
Poshard
Pryce
Quillen
Quinn
Radanovich
Rahall
Ramstad
Rangel
Reed
Regula
Richardson
Riggs
Rivers
Roberts
Roemer
Ros-Lehtinen
Rose
Roth
Roukema
Roybal-Allard
Rush
Sabo
Salmon
Sanders
Sanford
Sawyer
Saxton
Schiff
Schroeder
Schumer
Scott
Seastrand
Sensenbrenner
Serrano
Shaw
Shays
Shuster
Sisisky
Skaggs
Skelton
Slaughter
Smith (MI)
Smith (NJ)
Smith (TX)
Smith (WA)
Solomon
Spence
Spratt
Stark
Stearns
Stenholm
Stockman
Stokes
Studds
Stupak
Tanner
Tauzin
Taylor (MS)
Taylor (NC)
Tejeda
Thomas
Thompson
Thornton
Tiahrt
Torkildsen
Torres
Torricelli
Towns
Traficant
Tucker
Upton
Velazquez
Vento
Visclosky
Volkmer
Waldholtz
Walsh
Wamp
Ward
Waters
Watt (NC)
Watts (OK)
Waxman
Weldon (FL)
Weldon (PA)
Wilson
Wise
Wolf
Woolsey
Wyden
Wynn
Yates
Young (FL)
Zeliff

NOES—86

Allard
Archer
Bachus
Baker (CA)
Ballenger
Barrett (NE)
Bilbray
Bliley
Boehner
Bono
Boucher
Bunn
Bunning
Burr
Buyer
Callahan
Castle
Chabot
Chenoweth
Christensen
Coleman
Combest
Cox
Crapo
Cremeans
Deal
DeLay
Deutsch
Dickey
Ewing
Fields (TX)
Fox
Franks (CT)
Franks (NJ)
Frisa
Ganske
Gillmor
Greenwood
Gunderson
Gutknecht
Hancock
Hansen
Hastert
Hefley
Herger
Hostettler
Houghton
Inglis
King
Kolbe
Largent
Latham
Laughlin
Lazio
Leach
Lewis (CA)
Livingston
LoBiondo
Longley
McCrery
McInnis
Metcalf
Mica
Norwood
Oxley
Packard
Parker
Paxon
Rogers
Rohrabacher
Royce
Schaefer
Shadegg
Skeen
Souder
Stump
Talent
Tate
Thornberry
Vucanovich
Walker
Weller
White
Whitfield
Wicker
Zimmer

NOT VOTING—10

Andrews
Bateman
Hutchinson
Moakley
Ortiz
Reynolds
Scarborough
Thurman
Williams
Young (AK)

☐ 1142

Mr. FOX of Pennsylvania and Mr. SHADEGG changed their vote from ''aye'' to ''no.''

Messrs. ROBERTS, QUINN, and BILIRAKIS, and Mrs. SMITH of Washington changed their vote from ''no'' to ''aye.''

So the amendment was agreed to.

The result of the vote was announced as above recorded.

AMENDMENT NO. 2–2, AS MODIFIED, OFFERED BY MR. CONYERS

The CHAIRMAN. The pending business is the demand for a recorded vote on amendment 2 2. as modified, offered by the gentleman from Michigan [Mr. CONYERS] on which further proceedings were postponed and on which the ayes prevailed by voice vote.

The Clerk will designate the amendment.

The Clerk designated the amendment.

RECORDED VOTE

The CHAIRMAN. A recorded vote has been demanded.

A recorded vote was ordered.

The CHAIRMAN. This is a 5-minute vote.

The vote was taken by electronic device, and there were ayes 151, noes 271, not voting 12, as follows:

[Roll No. 630]

AYES—151

Abercrombie
Ackerman
Barcia
Barrett (WI)
Becerra
Beilenson
Bentsen
Bereuter
Berman
Bono
Borski
Brown (CA)
Bryant (TX)
Bunn
Canady
Cardin
Chabot
Chapman
Clyburn
Coleman
Collins (IL)
Collins (MI)
Conyers
Cooley
Costello
Coyne
Cremeans
Cunningham
Danner
DeFazio
DeLauro
Dellums
Dixon
Doggett
Durbin
Edwards
Evans
Farr
Fawell
Fazio
Filner
Flake
Foglietta
Ford
Frost
Furse
Gejdenson
Gekas
Gephardt
Gibbons
Gonzalez
Goss
Green
Gutierrez
Hall (OH)
Heineman
Hinchey
Hobson
Holden
Hostettler
Hoyer
Hyde
Jackson-Lee
Jacobs
Johnson (SD)
Johnson, E. B.
Johnston
Kanjorski
Kaptur
Kasich
Kildee
Kleczka
Klink
Knollenberg
LaFalce
Lantos
LaTourette
Leach
Levin
Lewis (KY)
Lipinski
Lofgren
Luther
Martinez
Matsui
McCarthy
McCollum
McDermott
McHale
Meyers
Mfume
Miller (CA)
Mineta
Mink
Myers
Nadler
Neumann
Norwood
Oberstar
Obey
Olver
Orton
Owens
Pastor
Payne (NJ)
Pomeroy
Poshard
Quillen
Ramstad
Rangel
Reed
Richardson
Rivers
Rogers
Rose
Roybal-Allard
Rush
Sabo
Sanders
Sawyer
Schiff
Schroeder
Schumer
Scott
Sensenbrenner
Serrano
Skelton
Slaughter
Smith (MI)
Spratt
Stark
Stenholm
Stokes
Studds
Stupak
Thomas
Thornton
Torres
Torricelli
Traficant
Tucker
Velazquez
Vento
Volkmer
Waters
Watt (NC)
Waxman
Whitfield
Woolsey
Wyden
Yates

NOES—271

Allard
Archer
Armey
Bachus
Baesler
Baker (CA)
Baker (LA)
Baldacci
Ballenger
Barr
Barrett (NE)
Bartlett
Barton
Bass
Bevill
Bilbray
Bilirakis
Bliley
Blute
Boehlert
Boehner
Bonilla
Bonior
Boucher
Brewster
Browder
Brown (FL)
Brown (OH)
Brownback
Bryant (TN)
Bunning
Burr
Burton
Buyer
Callahan
Calvert
Camp
Castle
Chambliss
Chenoweth
Christensen
Chrysler
Clay
Clayton
Clement
Clinger
Coble
Coburn
Collins (GA)
Combest
Condit
Cox
Cramer
Crane
Crapo
Cubin
Davis
de la Garza
Deal
DeLay
Deutsch
Diaz-Balart
Dickey
Dicks
Dingell
Dooley
Doolittle
Dornan
Doyle
Dreier
Duncan
Dunn
Ehlers
Ehrlich
Emerson
Engel
English
Ensign
Eshoo
Everett
Ewing
Fattah
Fields (LA)
Fields (TX)
Flanagan
Foley
Forbes
Fowler
Fox
Frank (MA)
Franks (CT)
Franks (NJ)
Frelinghuysen
Frisa
Funderburk
Gallegly
Ganske
Geren
Gilchrest
Gillmor
Gilman
Goodlatte
Goodling
Gordon
Graham
Greenwood
Gunderson
Gutknecht
Hall (TX)
Hamilton
Hancock
Hansen
Harman
Hastert
Hastings (FL)
Hastings (WA)
Hayes
Hayworth
Hefley
Hefner
Herger
Hilleary
Hilliard
Hoekstra
Hoke
Horn
Houghton
Hunter
Inglis
Istook
Jefferson
Johnson (CT)
Johnson, Sam
Jones
Kelly
Kennedy (MA)
Kennedy (RI)
Kennelly
Kim
King
Kingston
Klug
Kolbe
LaHood
Largent
Latham
Laughlin
Lazio
Lewis (CA)
Lewis (GA)
Lightfoot
Lincoln
Linder
Livingston
LoBiondo
Longley
Lowey
Lucas
Maloney
Manton
Manzullo
Markey
Martini
Mascara
McCrery
McDade
McInnis
McIntosh
McKeon
McKinney
McNulty
Meehan
Meek
Menendez
Metcalf
Mica
Miller (FL)
Minge
Molinari
Mollohan
Montgomery
Moorhead
Moran
Morella
Murtha
Myrick
Neal
Nethercutt
Ney
Nussle
Oxley
Packard
Pallone
Parker
Paxon
Payne (VA)
Pelosi
Peterson (FL)
Peterson (MN)
Petri
Pickett
Pombo
Porter
Portman
Pryce
Quinn
Radanovich
Rahall
Regula
Riggs
Roberts
Roemer
Rohrabacher
Ros-Lehtinen
Roth
Roukema
Royce
Salmon
Sanford
Saxton
Schaefer
Seastrand
Shadegg
Shaw
Shays
Shuster
Sisisky
Skaggs
Skeen
Smith (NJ)
Smith (TX)
Smith (WA)
Solomon
Souder
Spence
Stearns
Stockman
Stump
Talent
Tanner
Tate
Tauzin
Taylor (MS)
Taylor (NC)
Tejeda
Thompson
Thornberry
Tiahrt
Torkildsen
Towns
Upton
Visclosky
Vucanovich
Waldholtz
Walker
Walsh
Wamp
Ward
Watts (OK)
Weldon (FL)
Weldon (PA)
Weller
White
Wicker
Wilson
Wise
Wolf
Wynn
Young (FL)
Zeliff
Zimmer

NOT VOTING—12

Andrews
Bateman
Bishop
Hutchinson
McHugh
Moakley
Ortiz
Reynolds
Scarborough
Thurman
Williams
Young (AK)

□ 1150

So the amendment, as modified, was rejected.

The result of the vote was announced as above recorded.

AMENDMENT OFFERED BY MR. COX OF CALIFORNIA

The CHAIRMAN. The pending business is the demand for a recorded vote on the amendment offered by the gentleman from California [Mr. COX] on which further proceedings were postponed and on which the ayes prevailed by voice vote.

The Clerk will redesignate the amendment.

The Clerk redesignated the amendment.

RECORDED VOTE

The CHAIRMAN. A recorded vote has been demanded.

A recorded vote was ordered.

The vote was taken by electronic device, and there were ayes 420, noes 4, not voting 10, as follows:

[Roll No. 631]

AYES—420

Abercrombie
Ackerman
Allard
Archer
Armey
Bachus
Baesler
Baker (CA)
Baker (LA)
Baldacci
Ballenger
Barcia
Barr
Barrett (NE)
Barrett (WI)
Bartlett
Barton
Bass
Becerra
Beilenson
Bentsen
Bereuter
Berman
Bevill
Bilbray
Bilirakis
Bishop
Bliley
Blute
Boehlert
Boehner
Bonilla
Bonior
Bono
Borski
Boucher
Brewster
Browder
Brown (CA)
Brown (FL)
Brown (OH)
Brownback
Bryant (TN)
Bryant (TX)
Bunn
Bunning
Burr
Burton
Buyer
Callahan
Calvert
Camp
Canady
Cardin
Castle
Chabot
Chambliss
Chapman
Chenoweth
Christensen
Chrysler
Clay
Clayton
Clement
Clinger
Clyburn
Coble
Coburn
Coleman
Collins (GA)
Collins (IL)
Collins (MI)
Combest
Condit
Conyers
Cooley
Costello
Cox
Coyne
Cramer
Crane
Crapo
Cremeans
Cubin
Cunningham
Danner
Davis
de la Garza
Deal
DeFazio
DeLauro
DeLay
Dellums
Deutsch
Diaz-Balart
Dickey
Dicks
Dingell
Dixon
Doggett
Dooley
Doolittle
Dornan
Doyle
Dreier
Duncan
Dunn
Durbin
Edwards
Ehlers
Ehrlich
Emerson
Engel
English
Ensign
Eshoo
Evans
Everett
Ewing
Farr
Fattah
Fawell
Fazio
Fields (LA)
Fields (TX)
Filner
Flake
Flanagan
Foglietta
Foley
Forbes
Ford
Fowler
Fox
Frank (MA)
Franks (CT)
Franks (NJ)
Frelinghuysen
Frisa
Frost
Funderburk
Furse
Gallegly
Ganske
Gejdenson
Gekas
Gephardt
Geren
Gibbons
Gilchrest
Gillmor
Gilman
Gonzalez
Goodlatte
Goodling
Gordon
Goss
Graham
Green
Greenwood
Gunderson
Gutierrez
Gutknecht
Hall (OH)
Hall (TX)
Hamilton
Hancock
Hansen
Harman
Hastert
Hastings (FL)
Hastings (WA)
Hayes
Hayworth
Hefley
Hefner
Heineman
Herger
Hilleary
Hilliard
Hinchey
Hobson
Hoekstra
Hoke
Holden
Horn
Hostettler
Houghton
Hoyer
Hutchinson
Hyde
Inglis
Istook
Jackson-Lee
Jacobs
Jefferson
Johnson (CT)
Johnson (SD)
Johnson, E. B.
Johnson, Sam
Johnston
Jones
Kanjorski
Kaptur
Kasich
Kelly
Kennedy (MA)
Kennedy (RI)
Kennelly
Kildee
Kim
King
Kingston
Kleczka
Klink
Klug
Knollenberg
Kolbe
LaFalce
LaHood
Lantos
Largent
Latham
LaTourette
Laughlin
Lazio
Leach
Levin
Lewis (CA)
Lewis (GA)
Lewis (KY)
Lightfoot
Lincoln
Linder
Lipinski
Livingston
LoBiondo
Lofgren
Longley
Lowey
Lucas
Luther
Maloney
Manton
Manzullo
Markey
Martinez
Martini
Mascara
Matsui
McCarthy
McCollum
McCrery
McDade
McDermott
McHale
McHugh
McInnis
McIntosh
McKeon
McKinney
McNulty
Meehan
Meek
Menendez
Metcalf
Meyers
Mfume
Mica
Miller (CA)
Miller (FL)
Mineta
Minge
Mink
Molinari
Mollohan
Montgomery
Moorhead
Moran
Morella
Murtha
Myers
Myrick
Nadler
Neal
Neumann
Ney
Norwood
Nussle
Oberstar
Obey
Olver
Orton
Owens
Oxley
Packard
Pallone
Parker
Pastor
Paxon
Payne (NJ)
Payne (VA)
Pelosi
Peterson (FL)
Peterson (MN)
Petri
Pickett
Pombo
Pomeroy
Porter
Portman
Poshard
Pryce
Quillen
Quinn
Radanovich
Rahall
Ramstad
Rangel
Reed
Regula

Richardson	Skaggs	Towns
Riggs	Skeen	Traficant
Rivers	Skelton	Tucker
Roberts	Slaughter	Upton
Roemer	Smith (MI)	Velazquez
Rogers	Smith (TX)	Vento
Rohrabacher	Smith (WA)	Visclosky
Ros-Lehtinen	Solomon	Volkmer
Rose	Spence	Vucanovich
Roth	Spratt	Waldholtz
Roukema	Stark	Walker
Roybal-Allard	Stearns	Walsh
Royce	Stenholm	Wamp
Rush	Stockman	Ward
Sabo	Stokes	Waters
Salmon	Studds	Watt (NC)
Sanders	Stump	Watts (OK)
Sanford	Stupak	Waxman
Sawyer	Talent	Weldon (FL)
Saxton	Tanner	Weldon (PA)
Schaefer	Tate	Weller
Schiff	Tauzin	White
Schroeder	Taylor (MS)	Whitfield
Schumer	Taylor (NC)	Wicker
Scott	Tejeda	Wilson
Seastrand	Thomas	Wise
Sensenbrenner	Thompson	Woolsey
Serrano	Thornberry	Wyden
Shadegg	Thornton	Wynn
Shaw	Tiahrt	Yates
Shays	Torkildsen	Young (FL)
Shuster	Torres	Zeliff
Sisisky	Torricelli	Zimmer

NOES—4

Hunter	Souder
Smith (NJ)	Wolf

NOT VOTING—10

Andrews	Ortiz	Williams
Bateman	Reynolds	Young (AK)
Moakley	Scarborough	
Nethercutt	Thurman	

□ 1156

So the amendment was agreed to.

The result of the vote was announced as above recorded.

PERSONAL EXPLANATION

Mr. NETHERCUTT. Mr. Chairman, I was not recorded on rollcall vote No. 631. The RECORD should reflect that I would have voted ''aye.''

AMENDMENT OFFERED BY MR. MARKEY

Mr. MARKEY. Mr. Chairman, I offer an amendment.

The CHAIRMAN. The Clerk will designate the amendment.

The text of the amendment is as follows:

Amendment offered by Mr. MARKEY: Page 150, beginning on line 24, strike paragraph (1) through line 17 on page 151 and insert the following:

''(1) NATIONAL AUDIENCE REACH LIMITATIONS.—The Commission shall prohibit a person or entity from obtaining any license if such license would result in such person or entity directly or indirectly owning, operating, controlling, or having a cognizable interest in, television stations which have an aggregate national audience reach exceeding 35 percent. Within 3 years after such date of enactment, the Commission shall conduct a study on the operation of this paragraph and submit a report to the Congress on the development of competition in the television marketplace and the need for any revisions to or elimination of this paragraph.''

Page 150, line 4, strike ''(a) AMENDMENT.—''.

Page 150, line 9, after ''section,'' insert ''and consistent with section 613(a) of this Act,''.

Page 154, strike lines 9 and 10.

The CHAIRMAN. Under the rule, the gentleman from Massachusetts [Mr. MARKEY] will be recognized for 15 minutes, and a Member in opposition will be recognized for 15 minutes.

The Chair recognizes the gentleman from Massachusetts [Mr. MARKEY].

Mr. MARKEY. Mr. Chairman, I yield myself such time as I may consume.

Mr. Chairman, the amendment which we are now considering addresses one of the most fundamental changes which has ever been contemplated in the history of our country. The bill, as it is presented to the floor, repeals for all intents and purposes all the cross-ownership rules, all of the ownership limitation rules, which have existed since the 1970's, the 1960's, to protect against single companies being able to control all of the media in individual communities and across the country.

□ 1200

In this bill it is made permissible for one company in your hometown to own the only newspaper, to own the cable system, to own every AM station, to own every FM station, to own the biggest television station and to own the biggest independent station, all in one community. That is too much media concentration for any one company to have in any city in the United States.

This amendment deals with a slice of that. The amendment to deal with all of it was not put in order by the Committee on Rules when it was requested as an amendment, but it does deal with a part of it. It would put a limitation on how many television stations, CBS, ABC, NBC, and Fox could own across our country, how many local TV stations, and whether or not in partnership with cable companies individual TV stations being owned by cable companies at the local level could partner to create absolutely impossible obstacles for the other local television broadcasters to overcome.

Who do we have supporting our amendment? We have just about every local CBS, ABC, and NBC affiliate in the United States that supports this amendment. We do not have ABC, CBS, and NBC in New York because they want to gobble up all the rest of America. This would be unhealthy, it would run contrary to American traditons of localism and diversity that have many voices, especially those at the local level that can serve as well as a national voice but with a balance.

Vote for the Markey amendment to keep limits on whether or not the national networks can gobble up the whole rest of the country and whether or not in individual cities and towns cable companies can purchase the biggest TV station or the biggest TV station can purchase the cable company and create an absolute block on other stations having the same access to viewers, having the same ability to get their point of view out as does that cable broadcasting combination in your hometown.

Mr. Chairman, I reserve the balance of my time.

Mr. BLILEY. Mr. Chairman, I yield myself 2 minutes.

(Mr. BLILEY asked and was given permission to revise and extend his remarks.)

Mr. BLILEY. Mr. Chairman, I rise in opposition to the amendment of the gentleman from Massachusetts [Mr. MARKEY] restricting the national ownership limitations on television stations to 35 percent of an aggregate national audience reach.

The gentleman's amendment would limit the ability of broadcast stations to compete effectively in a multichannel environment. Indeed, the Federal Communications Commission on this issue in its further notice of proposed rulemaking issued this year, the FCC noted that group ownership does not, I repeat does not result in a decrease in viewpoint diversity. According to the FCC the evidence suggests the opposite.

Mr. Chairman, I ask the Members to look at their own broadcast situation. Who owns your local ABC, NBC, CBS affiliate? Is it local? I venture to say that 90 percent of us the answer is no, they are owned by somebody else out of town. So it is a nonissue.

As to what the gentleman says about cross ownership and saturation, I invite the Members to read page 153 of the bill. The commission may deny the application if the commission determines that the combination of such station and more than one other nonbroadcast media of mass communication and would result in a undue concentration of media voices in the respective local market. This amendment is not needed. Vote it down.

Mr. Chairman, I rise in opposition to Mr. MARKEY'S amendment restricting the national ownership limitations on telephone stations to 35 percent of an aggregate national audience reach. Mr. MARKEY'S amendment would limit the ability of broadcast stations to compete effectively in a multichannel environment. Mr. MARKKEY'S amendment would limit the ability of broadcast stations to compete effectively in the multichannel environment. Mr. MARKEY defends the retention of an arbitrary limitation in the name of localism and diversity. The evidence, however, does not support his claim.

I would simply refer Mr. MARKEY to the findings of the Federal Communications Commission on this issue in its further notice of proposed rulemaking issued this year. The FCC noted that group ownership does not result in a decrease in viewpoint diversity. According to the FCC, the evidence suggests the opposite, that group television station owners generally allow local managers to make editorial and reporting decisions autonomously. Contrary to Mr. MARKEY'S suggestion that relaxation of these limits are anticompetitive, the FCC has found that in today's markets, common ownership of larger numbers of broadcast stations nationwide, or of more than one station in the market, will permit exploitation of economies of scale and reduce costs and permit improved service.

Finally, I would note that in its notice of proposed rulemaking, the FCC questioned whether an increase in concentration nationally has any effect on diversity or the local market. Most local stations are not local at all, but are run from headquarters found outside the State in which the TV station is located. Moreover, many local stations are affiliated with networks. As a result, even though these stations are not commonly owned, they air the identical programming for a large portion of the broadcast day irrespective of the national ownership limits.

For these reasons, the amendment proposed by Mr. MARKEY is anticompetitive and I strongly urge my colleagues to oppose his amendment.

Mr. MARKEY. Mr. Chairman, I yield 1 minute to the gentleman from Maryland [Mr. WYNN].

Mr. WYNN. Mr. Chairman, it goes without saying that media is a major force in our society. Some people even blame our crime problems, our moral decay on the media. Now, I am not willing to go that far, but I am concerned about putting the control of our ideas and messages in the hands of fewer and fewer people in this country.

Right now the national audience capture is 25 percent. That seems appropriate to me in light of the fact that there is no network that reaches 25 percent, but certainly 35 percent is a reasonable compromise. There is no reason to double the concentration to 50 percent. I think 35 percent is certainly appropriate.

We talk about small business. Mr. Chairman, this bill goes in the exact opposite direction. Even big businesses may not be able to get into the market if we pass this legislation. It is clearly a barrier to market interests. In fact, 10 years ago if this bill had been in place Fox television probably could not have gotten started. It represents a threat to local broadcast decisions. Please vote with the Markey amendment.

Mr. FIELDS of Texas. Mr. Chairman, I yield 3 minutes to the gentleman from Florida [Mr. STEARNS].

(Mr. STEARNS asked and was given permission to revise and extend his remarks.)

Mr. STEARNS. Mr. Chairman, I rise in strong opposition to the Markey amendment.

The rules regulating broadcasters were written in the 1950's. but the world for which those broadcast provisions were necessary doesn't exist anymore. It's gone. Most of us have recognized that fact and bidden it a fond farewell.

But not the supporters of this amendment. They would take the U.S. broadcasting industry back to the days of the 1950's. This amendment would ensure that while every other industry in America surges ahead, U.S. broadcasters remain mired in rules written when the slide rule was still state-of-the-art technology.

We should be thankful that we didn't impose the same regulations on the computer industry as we have on the broadcast industry. If we had, we'd all still be using mechanical typewriters.

The Markey amendment is the equivalent of trying to stuff a full-grown man into boys clothes they simply won't fit anymore. The broadcast industry has outgrown the rules written for it when it was still a child.

If I could direct your attention to the graph, you will see that to reach that 50 percent limit, one would have to buy a station in more than each of the top 25 markets out of the 211 television markets. That in itself is no small feat. But keep in mind the result: Broadcasters would own a mere 30 stations out of the 1,500 TV stations nationwide. Who has this money, the financing, for that would be mind boggling.

On the question of localism it isn't lost. Networks and group-owned stations typically air more local coverage. Covering local news simply makes good business sense give viewers what they want or go out of business. Business succeed by making people satisfied.

Opponents will also tell you we will lose diversity in the local market with this bill. That is simply not true. Just keep in mind the following:

The FCC can deny any combination if it will harm the preservation of diversity in the local market; and under no circumstance will the FCC allow less than three voices in a market.

We must reject this backward-looking amendment. We must reject the advice of the Rip Van Winkles of broadcasting who went to sleep in the 1950's and think we are still there.

If the supporters of this amendment had their way, smoke signals would still be cutting-edge technology.

The dire predictions about the harm of lifting broadcast restrictions remind me of Chicken Little's warning that the sky is falling. Ladies and gentlemen, the sky is not falling. Freeing broadcasters from outdated ownership rules will do us no harm. If I can steal from Shakespeare, the Markey amendment is ''full of sound and fury, signifying nothing.''

Mr. MARKEY. Mr. Chairman, I yield 1½ minutes to the gentleman from Pittsburgh, PA [Mr. KLINK].

Mr. KLINK. Mr. Chairman, the Markey amendment is really very important to this bill. I will tell you that for us to have a free Nation, for people who are going to elect those of us who are their representatives in Government, they have to have different points of views.

I have had some experience in the broadcast industry for 24 years, and in fact I worked for Westinghouse, which is one of the companies who just this last week made national history in buying CBS, ABC is being bought by Disney.

I am talking to my colleagues in the business. They said, look, we are already merging news rooms. You have four or five different entities, radio and TV owned by Westinghouse and by CBS, we are merging news rooms, so before as a Member of Congress or as any public servant you may have three or four different people there gathering points of view you now have one.

So this is not a divergence of viewpoints. We are bringing all the viewpoints in there. We are creating information czars. We are creating a situation where a handful of people will in fact be able to control the opinions across this Nation, and what we are saying is, no, we do not want that, we want free broadcast, we want the broadcast signals which are owned by the people of this Nation, which are licensed by the FCC for these large corporations to broadcast on to continue.

I urge you to support the Markey amendment.

Mr. FIELDS of Texas. Mr. Chairman, I yield 1½ minutes to the gentleman from New York [Mr. PAXON].

Mr. PAXON. Mr. Chairman, one of the major fallacies of Mr. MARKEY's arguments is that the broadcast ownership reform provisions will harm local ownership of broadcast stations.

There is an unfounded fear that networks or broadcasting groups will buy up local stations and drop local programming in favor of network programs or a bland, national fare and that is just plain wrong.

First, under today's restrictive broadcast ownership provisions, 75 percent of television stations are owned by broadcast corporations, and of those companies, 90 percent are headquartered in States other than where their individual stations are located.

Second, networks cannot currently force an affiliate to air any specific network program. Local stations today enjoy the ''right of refusal'' which means they can air a local program instead of a network program. Nothing in H.R. 1555 will change this right of refusal.

Finally, and perhaps most important to broadcasters, is the fact that local programming is profitable. Good business sense dictates that broadcasters address the needs of the local community.

There will always be demand for local programming, especially local news, weather forecasts and traffic reports, since this is something that the networks just can't match.

In conclusion, we must also remember that H.R. 1555 does nothing to weaken existing antitrust laws regarding undue media concentration.

Mr. Chairman, I urge all of my colleagues to oppose the amendment by Mr. Markey.

The CHAIRMAN. The Committee will rise informally to receive a message.

MESSAGE FROM THE PRESIDENT

The SPEAKER pro tempore (Mr. WALKER) assumed the chair.

The SPEAKER pro tempore. The Chair will receive a message.

A message in writing from the President of the United States was communicated to the House by Mr. Edwin Thomas, one of his secretaries.

The SPEAKER pro tempore. The Committee will resume its sitting.

Appendix E:

H.R. Rep. 104-458 (Excerpts)

104TH CONGRESS
2d Session
HOUSE OF REPRESENTATIVES
REPORT
104–458

TELECOMMUNICATIONS ACT OF 1996

JANUARY 31, 1996. Ordered to be printed

Mr. BLILEY, from the committee of conference,
submitted the following

CONFERENCE REPORT

[To accompany S. 652]

The committee of conference on the disagreeing votes of the two Houses on the amendments of the House to the bill (S. 652), to provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition, and for other purposes, having met, after full and free conference, have agreed to recommend and do recommend to their respective Houses as follows:

That the Senate recede from its disagreement to the amendment of the House to the text of the bill and agree to the same with an amendment as follows:

In lieu of the matter proposed to be inserted by the House amendment, insert the following:

SECTION 1. SHORT TITLE; REFERENCES.

(a) SHORT TITLE.—This Act may be cited as the ''Telecommunications Act of 1996''.

(b) REFERENCES.—Except as otherwise expressly provided, whenever in this Act an amendment or repeal is expressed in terms of an amendment to, or repeal of, a section or other provision, the reference shall be considered to be made to a section or other provision of the Communications Act of 1934 (47 U.S.C. 151 et seq.).

SEC. 2. TABLE OF CONTENTS.

The table of contents for this Act is as follows:

22–327

House amendment

Section 104 of the House amendment protects from civil liability those providers and users of interactive computer services for actions to restrict or to enable restriction of access to objectionable online material.

Conference agreement

The conference agreement adopts the House provision with minor modifications as a new section 230 of the Communications Act. This section provides ''Good Samaritan'' protections from civil liability for providers or users of an interactive computer service for actions to restrict or to enable restriction of access to objectionable online material. One of the specific purposes of this section is to overrule *Stratton-Oakmont* v. *Prodigy* and any other similar decisions which have treated such providers and users as publishers or speakers of content that is not their own because they have restricted access to objectionable material. The conferees believe that such decisions create serious obstacles to the important federal policy of empowering parents to determine the content of communications their children receive through interactive computer services.

These protections apply to all interactive computer services, as defined in new subsection 230(e)(2), including non-subscriber systems such as those operated by many businesses for employee use. They also apply to all access software providers, as defined in new section 230(e)(5), including providers of proxy server software.

The conferees do not intend, however, that these protections from civil liability apply to so-called ''cancelbotting,'' in which recipients of a message respond by deleting the message from the computer systems of others without the consent of the originator or without having the right to do so.

SUBTITLE B—VIOLENCE

SECTION 551—PARENTAL CHOICE IN TELEVISION PROGRAMMING

Senate bill

Sections 501–505 of Senate bill gives the industry one year to voluntarily develop a ratings system for TV programs. If the industry fails to do so, a Federal TV Ratings Commission would set the ratings. The Commission would be appointed by the President, subject to confirmation by the Senate and would establish rules for rating the level of violence and other objectionable content in programs. The Board would also establish rules for TV broadcasters and cable systems to transmit the ratings to viewers. The Commission would be authorized funds necessary to carry out its duties. The Senate bill requires TV manufacturers to equip all 13 inch or greater TV sets with circuitry to block rated shows.

House amendment

Section 305 of the House amendment gives the cable and broadcast industries one year to develop voluntary ratings for video programming containing violence, sex and other indecent materials and to agree voluntarily to broadcast signals containing such ratings. If the industry fails to come up with an acceptance plan, the

LARRY PRESSLER,
TED STEVENS,
SLADE GORTON,
TRENT LOTT,
FRITZ HOLLINGS,
DANIEL K. INOUYE,
WENDELL FORD,
J.J. EXON,
JAY ROCKEFELLER,
Managers on the Part of the Senate.

○

Appendix F:

H.R. 1865 115th Cong. (1st Sess.)

I

115TH CONGRESS
1ST SESSION

H. R. 1865

To amend the Communications Act of 1934 to clarify that section 230 of such Act does not prohibit the enforcement against providers and users of interactive computer services of Federal and State criminal and civil law relating to sexual exploitation of children or sex trafficking, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

APRIL 3, 2017

Mrs. WAGNER (for herself, Mrs. BEATTY, Mr. SMITH of New Jersey, Ms. CLARKE of New York, Mr. POE of Texas, Mrs. CAROLYN B. MALONEY of New York, Mr. ROYCE of California, Mrs. ROBY, Mr. KINZINGER, and Ms. JENKINS of Kansas) introduced the following bill; which was referred to the Committee on the Judiciary, and in addition to the Committee on Energy and Commerce, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

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A BILL

To amend the Communications Act of 1934 to clarify that section 230 of such Act does not prohibit the enforcement against providers and users of interactive computer services of Federal and State criminal and civil law relating to sexual exploitation of children or sex trafficking, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Allow States and Victims to Fight Online Sex Trafficking Act of 2017".

SEC. 2. FINDINGS.

Congress finds the following:

(1) Section 230 of the Communications Act of 1934 (47 U.S.C. 230; commonly known as the "Communications Decency Act of 1996") was never intended to provide legal protection to websites that facilitate traffickers in advertising the sale of unlawful sex acts with sex trafficking victims.

(2) Clarification of such section is warranted to ensure that such section does not provide such protection to such websites.

SEC. 3. ENSURING ABILITY TO ENFORCE FEDERAL AND STATE CRIMINAL AND CIVIL LAW RELATING TO SEXUAL EXPLOITATION OF CHILDREN OR SEX TRAFFICKING.

(a) IN GENERAL.—Section 230 of the Communications Act of 1934 (47 U.S.C. 230) is amended—

(1) in subsection (b)—

(A) in paragraph (4), by striking "; and" and inserting a semicolon;

(B) in paragraph (5), by striking the period at the end and inserting "; and"; and

(C) by adding at the end the following:

"(6) to ensure vigorous enforcement against providers and users of interactive computer services of Federal and State criminal and civil law relating to sexual exploitation of children or sex trafficking, including through the availability of a civil remedy for victims of sex trafficking."; and

(2) in subsection (e)—

(A) in paragraph (1)—

(i) by inserting "section 1591 of such title (relating to sex trafficking)," after "title 18, United States Code,";

(ii) by striking "impair the enforcement of section" and inserting the following: "impair the enforcement of, or limit the availability of victim restitution under—

"(A) section"; and

(iii) by striking "statute." and inserting the following: "statute; or

"(B) any State criminal statute that prohibits—

"(i) sexual exploitation of children;

"(ii) sex trafficking of children; or

"(iii) sex trafficking by force, threats of force, fraud, or coercion.";

(B) in the second sentence of paragraph (3), by striking ''No cause of action'' and inserting ''Except as provided in paragraphs (1)(B) and (5)(B), no cause of action''; and

(C) by adding at the end the following:

''(5) NO EFFECT ON CIVIL LAW RELATING TO SEXUAL EXPLOITATION OF CHILDREN OR SEX TRAFFICKING.—Nothing in this section shall be construed to impair the enforcement or limit the application of—

''(A) section 1595 of title 18, United States Code; or

''(B) any other Federal or State law that provides causes of action, restitution, or other civil remedies to victims of—

''(i) sexual exploitation of children;

''(ii) sex trafficking of children; or

''(iii) sex trafficking by force, threats of force, fraud, or coercion.''.

(b) EFFECTIVE DATE.—The amendments made by this section shall take effect on the date of the enactment of this Act, and the amendment made by subsection (a)(2)(C) (and, to the extent it relates to such amendment, the amendment made by subsection (a)(2)(B)) shall apply regardless of whether the conduct alleged occurred, or is alleged to have occurred, before, on, or after such date of enactment.

SEC. 4. ENSURING FEDERAL LIABILITY FOR PUBLISHING INFORMATION DESIGNED TO FACILITATE SEX TRAFFICKING.

(a) IN GENERAL.—Section 1591 of title 18, United States Code, is amended—

(1) by redesignating subsection (e) as subsection (f);

(2) in subsection (f), as redesignated by paragraph (1), by adding at the end the following:

"(6) "The terms 'information content provider' and 'interactive computer service' have the meanings given those terms in section 230 of the Communications Act of 1934 (47 U.S.C. 230).

"(7) The term 'participation in a venture' includes knowing or reckless conduct by any person or entity and by any means that furthers or in anyway aids or abets the violation of subsection (a)(1)."; and

(3) by inserting after subsection (d) the following:

"(e)(1) Whoever, being a provider of an interactive computer service, publishes information provided by an information content provider, with reckless disregard that the information provided by the information content provider is in furtherance of an offense under subsection (a) or an attempt to commit such an offense, shall be fined in accordance with this title or imprisoned not more than 20 years, or both.

"(2) Nothing in paragraph (1) shall be construed to require the Federal Government in a prosecution, or a plaintiff in a civil action, to prove any intent on the part of the information content provider.".

(b) CLERICAL AMENDMENTS.—Such section is further amended by striking "subsection (e)(2)" each place it appears and inserting "subsection (f)(2)".

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Appendix G:

H.R. 1865 115th Cong. (2d Sess.)

IB

Union Calendar No. 432

115TH CONGRESS
2D SESSION

H. R. 1865

[Report No. 115–572, Part I]

To amend the Communications Act of 1934 to clarify that section 230 of such Act does not prohibit the enforcement against providers and users of interactive computer services of Federal and State criminal and civil law relating to sexual exploitation of children or sex trafficking, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

APRIL 3, 2017

Mrs. WAGNER (for herself, Mrs. BEATTY, Mr. SMITH of New Jersey, Ms. CLARKE of New York, Mr. POE of Texas, Mrs. CAROLYN B. MALONEY of New York, Mr. ROYCE of California, Mrs. ROBY, Mr. KINZINGER, and Ms. JENKINS of Kansas) introduced the following bill; which was referred to the Committee on the Judiciary, and in addition to the Committee on Energy and Commerce, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

FEBRUARY 20, 2018

Additional sponsors: Mr. SMUCKER, Mr. STIVERS, Mr. WEBER of Texas, Mr. FLEISCHMANN, Mr. LANCE, Ms. SEWELL of Alabama, Mr. ROSKAM, Mr. ROUZER, Ms. MOORE, Mr. SHIMKUS, Mr. VARGAS, Mr. TURNER, Ms. ROSEN, Mrs. HARTZLER, Mr. EVANS, Mr. GARRETT, Mr. KATKO, Ms. KELLY of Illinois, Ms. WILSON of Florida, Mr. LAHOOD, Mr. COFFMAN, Mr. LUETKEMEYER, Mr. BISHOP of Michigan, Ms. STEFANIK, Mr. CRIST, Mr. CARBAJAL, Mrs. COMSTOCK, Mr. RODNEY DAVIS of Illinois, Mr. THOMAS J. ROONEY of Florida, Mr. GRAVES of Missouri, Mr. SMITH of Missouri, Mr. ZELDIN, Mr. MACARTHUR, Mr. PITTENGER, Mr. CONAWAY, Mr. YOUNG of Iowa, Mr. WALKER, Mr. WALBERG, Mr. HARRIS, Mr. MESSER, Mr. SMITH of Texas, Mr. BRAT, Mr. POLIQUIN, Mr. VALADAO, Mrs. MIMI WALTERS of California, Mr. GIBBS, Ms. HERRERA BEUTLER, Mr. LONG, Mr. BUTTERFIELD, Mr. PAYNE, Ms. BASS, Ms. EDDIE BERNICE JOHNSON of Texas, Ms. HANABUSA, Ms. BLUNT ROCHESTER, Mrs. LAWRENCE, Ms. DELAURO, Ms. MICHELLE LUJAN GRISHAM of New Mexico, Mr. HASTINGS, Mr. RICHMOND, Mrs. LOVE, Mr. CLAY, Mr. KILDEE, Mr. BROWN of Maryland, Ms. PLASKETT, Ms. ADAMS, Mr. THOMPSON of Mississippi, Mr. CLEAVER, Mr. BOST, Ms. TENNEY, Mr. HUDSON, Mrs. HANDEL, Mr. CUELLAR, Mr. COLE, Mr. BILIRAKIS, Mrs. NOEM, Mrs. BROOKS of Indiana, Ms. ROS-LEHTINEN, Mr. ROSS, Mr. KELLY of Mississippi, Mr. DONOVAN, Ms. KUSTER of New Hampshire, Mr. BISHOP of Georgia, Mrs. WATSON COLEMAN, Mr. PALMER, Mr. DAVIDSON, Ms. FOXX, Mrs. BLACK, Mr. CONNOLLY, Mr. FASO, Mr. ROTHFUS, Mr. MCCAUL, Mr. FITZPATRICK, Mrs. WALORSKI, Mr. REED, Mr. JOYCE of Ohio, Mr. BRADY of Pennsylvania, Mr. STEWART, Mr. FRANKS of Arizona, Ms. SINEMA, Mr. RUSH, Mr. MEEKS, Mr. O'HALLERAN, Mr. JOHNSON of Louisiana, Mr. POSEY, Mr. JENKINS of West Virginia, Mr. GONZALEZ of Texas, Mr. DANNY K. DAVIS of Illinois, Mr. MCGOVERN, Mr. GENE GREEN of Texas, Mr. LEWIS of Georgia, Mr. ESPAILLAT, Mr. KEATING, Mr. NOLAN, Ms. TITUS, Mr. SEAN PATRICK MALONEY of New York, Mr. SERRANO, Mr. DESJARLAIS, Mr. CURBELO of Florida, Mr. ADERHOLT, Mr. HULTGREN, Mrs. BLACKBURN, Mr. FORTENBERRY, Mr. KELLY of Pennsylvania, Mr. KING of Iowa, Mr. LAMALFA, Mr. LAMBORN, Mr. OLSON, Mr. PEARCE, Mr. SESSIONS, Mr. WILSON of South Carolina, Mr. COHEN, Ms. NORTON, Mr. FRELINGHUYSEN, Mr. PAULSEN, Mr. REICHERT, Mr. ROE of Tennessee, Mr. BRADY of Texas, Mr. FLORES, Mr. SHUSTER, Mr. HOLLINGSWORTH, Mr. BYRNE, Mr. AUSTIN SCOTT of Georgia, Mr. LAWSON of Florida, Miss RICE of New York, Mr. MULLIN, Mr. GUTHRIE, Mr. TIBERI, Mr. GOHMERT, Mr. RICE of South Carolina, Mr. WILLIAMS, Mr. BARLETTA, Mr. SENSENBRENNER, Mr. MARSHALL, Mr. BURGESS, Mr. KNIGHT, Mr. KUSTOFF of Tennessee, Mr. LUCAS, Ms. VELÁZQUEZ, Mr. CAPUANO, Mr. CULBERSON, Mr. PERLMUTTER, Ms. WASSERMAN SCHULTZ, Mr. COSTA, Mr. CALVERT, and Mr. YOHO

Deleted sponsor: Mr. MCNERNEY (added September 13, 2017; deleted September 25, 2017)

FEBRUARY 20, 2018

Reported from the Committee on the Judiciary with an amendment

[Strike out all after the enacting clause and insert the part printed in italic]

FEBRUARY 20, 2018

The Committee on Energy and Commerce discharged; committed to the Committee of the Whole House on the State of the Union and ordered to be printed

[For text of introduced bill, see copy of bill as introduced on April 3, 2017]

A BILL

To amend the Communications Act of 1934 to clarify that section 230 of such Act does not prohibit the enforcement against providers and users of interactive computer services of Federal and State criminal and civil law relating to sexual exploitation of children or sex trafficking, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Allow States and Victims to Fight Online Sex Trafficking Act of 2017".

SEC. 2. SENSE OF CONGRESS.

It is the sense of Congress that—

(1) section 230 of the Communications Act of 1934 (47 U.S.C. 230; commonly known as the "Communications Decency Act of 1996") was never intended to provide legal protection to websites that unlawfully promote and facilitate prostitution and contribute to sex trafficking;

(2) websites that promote and facilitate prostitution have been reckless in allowing the sale of sex trafficking victims and have done nothing to prevent the trafficking of children and victims of force, fraud, and coercion; and

(3) clarification of such section is warranted to ensure that such section does not provide such protection to such websites.

SEC. 3. PROMOTION OF PROSTITUTION AND RECKLESS DISREGARD OF SEX TRAFFICKING.

(a) PROMOTION OF PROSTITUTION.—Chapter 117 of title 18, United States Code, is amended by inserting after section 2421 the following:

"§ 2421A. Promotion or facilitation of prostitution and reckless disregard of sex trafficking

"(a) IN GENERAL.—Whoever uses or operates a facility or means of interstate or foreign commerce or attempts to do so with the intent to promote or facilitate the prostitution of another person shall be fined under this title, imprisoned for not more than 10 years, or both.

"(b) AGGRAVATED VIOLATION.—Whoever uses or operates a facility or means of interstate or foreign commerce with the intent to promote or facilitate the prostitution of another person and—

"(1) promotes or facilitates the prostitution of 5 or more persons; or

"(2) acts in reckless disregard of the fact that such conduct contributed to sex trafficking, in violation of 1591(a),

shall be fined under this title, imprisoned for not more than 25 years, or both.

"(c) CIVIL RECOVERY.—Any person injured by reason of a violation of section 2421A(b) may recover damages and reasonable attorneys' fees in an action before any appro-

priate United States district court. Consistent with section 230 of the Communications Act of 1934 (47 U.S.C. 230), a defendant may be held liable, under this subsection, where promotion or facilitation of prostitution activity includes responsibility for the creation or development of all or part of the information or content provided through any interactive computer service.

"(d) MANDATORY RESTITUTION.—Notwithstanding sections 3663 or 3663A and in addition to any other civil or criminal penalties authorized by law, the court shall order restitution for any offense under this section.

"(e) AFFIRMATIVE DEFENSE.—It shall be an affirmative defense to a charge of violating subsection (a) where the defendant proves, by a preponderance of the evidence, that the promotion or facilitation of prostitution is legal in the jurisdiction where the promotion or facilitation was targeted.".

(b) TABLE OF CONTENTS.—The table of contents for such chapter is amended by inserting after the item relating to section 2421 the following:

"2421A. Promotion or facilitation of prostitution and reckless disregard of sex trafficking.".

SEC. 4. COMMUNICATIONS DECENCY ACT.

Section 230(e) of the Communications Act of 1934 (47 U.S.C. 230(e)) is amended by adding at the end the following:

"(5) NO EFFECT ON STATE LAWS CONFORMING TO 18 U.S.C. 1591(A) OR 2421A.—Nothing in this section shall be construed to impair or limit any charge in a criminal prosecution brought under State law—

"(A) if the conduct underlying the charge constitutes a violation of section 2421A of title 18, United States Code, and promotion or facilitation of prostitution is illegal in the jurisdiction where the defendant's promotion or facilitation of prostitution was targeted; or

"(B) if the conduct underlying the charge constitutes a violation of section 1591(a) of title 18, United States Code.".

SEC. 5. SAVINGS CLAUSE.

Nothing in this Act or the amendments made by this Act shall be construed to limit or preempt any civil action or criminal prosecution under Federal law or State law (including State statutory law and State common law) filed before or after the day before the date of enactment of this Act that was not limited or preempted by section 230 of the Communications Act of 1934 (47 U.S.C. 230), as such section was in effect on the day before the date of enactment of this Act.

Union Calendar No. 432

115TH CONGRESS
2D SESSION

H. R. 1865

[Report No. 115–572, Part I]

A BILL

To amend the Communications Act of 1934 to clarify that section 230 of such Act does not prohibit the enforcement against providers and users of interactive computer services of Federal and State criminal and civil law relating to sexual exploitation of children or sex trafficking, and for other purposes.

FEBRUARY 20, 2018

Reported from the Committee on the Judiciary with an amendment

FEBRUARY 20, 2018

The Committee on Energy and Commerce discharged; committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Appendix H:

H.R. 1865 115th Cong. (2d Sess.) (Enacted)

115TH CONGRESS
2D SESSION

H. R. 1865

AN ACT

To amend the Communications Act of 1934 to clarify that section 230 of such Act does not prohibit the enforcement against providers and users of interactive computer services of Federal and State criminal and civil law relating to sexual exploitation of children or sex trafficking, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the ‘‘Allow States and Victims to Fight Online Sex Trafficking Act of 2017’’.

SEC. 2. SENSE OF CONGRESS.

It is the sense of Congress that—

(1) section 230 of the Communications Act of 1934 (47 U.S.C. 230; commonly known as the ‘‘Communications Decency Act of 1996’’) was never intended to provide legal protection to websites that unlawfully promote and facilitate prostitution and websites that facilitate traffickers in advertising the sale of unlawful sex acts with sex trafficking victims;

(2) websites that promote and facilitate prostitution have been reckless in allowing the sale of sex trafficking victims and have done nothing to prevent the trafficking of children and victims of force, fraud, and coercion; and

(3) clarification of such section is warranted to ensure that such section does not provide such protection to such websites.

SEC. 3. PROMOTION OF PROSTITUTION AND RECKLESS DISREGARD OF SEX TRAFFICKING.

(a) PROMOTION OF PROSTITUTION.—Chapter 117 of title 18, United States Code, is amended by inserting after section 2421 the following:

"§ 2421A. Promotion or facilitation of prostitution and reckless disregard of sex trafficking

"(a) IN GENERAL.—Whoever, using a facility or means of interstate or foreign commerce or in or affecting interstate or foreign commerce, owns, manages, or operates an interactive computer service (as such term is defined in defined in section 230(f) the Communications Act of 1934 (47 U.S.C. 230(f))), or conspires or attempts to do so, with the intent to promote or facilitate the prostitution of another person shall be fined under this title, imprisoned for not more than 10 years, or both.

"(b) AGGRAVATED VIOLATION.—Whoever, using a facility or means of interstate or foreign commerce or in or affecting interstate or foreign commerce, owns, manages, or operates an interactive computer service (as such term is defined in defined in section 230(f) the Communications Act of 1934 (47 U.S.C. 230(f))), or conspires or attempts to do so, with the intent to promote or facilitate the prostitution of another person and—

"(1) promotes or facilitates the prostitution of 5 or more persons; or

"(2) acts in reckless disregard of the fact that such conduct contributed to sex trafficking, in violation of 1591(a),

shall be fined under this title, imprisoned for not more than 25 years, or both.

"(c) CIVIL RECOVERY.—Any person injured by reason of a violation of section 2421A(b) may recover damages and reasonable attorneys' fees in an action before any appropriate United States district court.

"(d) MANDATORY RESTITUTION.—Notwithstanding sections 3663 or 3663A and in addition to any other civil or criminal penalties authorized by law, the court shall order restitution for any violation of subsection (b)(2). The scope and nature of such restitution shall be consistent with section 2327(b).

"(e) AFFIRMATIVE DEFENSE.—It shall be an affirmative defense to a charge of violating subsection (a), or subsection (b)(1) where the defendant proves, by a preponderance of the evidence, that the promotion or facilitation of prostitution is legal in the jurisdiction where the promotion or facilitation was targeted.".

(b) TABLE OF CONTENTS.—The table of contents for such chapter is amended by inserting after the item relating to section 2421 the following:

"2421A. Promotion or facilitation of prostitution and reckless disregard of sex trafficking.".

SEC. 4. ENSURING ABILITY TO ENFORCE FEDERAL AND STATE CRIMINAL AND CIVIL LAW RELATING TO SEX TRAFFICKING.

(a) IN GENERAL.—Section 230(e) of the Communications Act of 1934 (47 U.S.C. 230(e)) is amended by adding at the end the following:

"(5) NO EFFECT ON SEX TRAFFICKING LAW.—Nothing in this section (other than subsection (c)(2)(A)) shall be construed to impair or limit—

"(A) any claim in a civil action brought under section 1595 of title 18, United States Code, if the conduct underlying the claim constitutes a violation of section 1591 of that title;

"(B) any charge in a criminal prosecution brought under State law if the conduct underlying the charge would constitute a violation of section 1591 of title 18, United States Code; or

"(C) any charge in a criminal prosecution brought under State law if the conduct underlying the charge would constitute a violation of section 2421A of title 18, United States Code, and promotion or facilitation of prostitution is illegal in the jurisdiction where the defendant's promotion or facilitation of prostitution was targeted.".

(b) EFFECTIVE DATE.—The amendments made by this section shall take effect on the date of the enactment of this Act, and the amendment made by subsection (a) shall apply regardless of whether the conduct alleged occurred, or is alleged to have occurred, before, on, or after such date of enactment.

SEC. 5. ENSURING FEDERAL LIABILITY FOR PUBLISHING INFORMATION DESIGNED TO FACILITATE SEX TRAFFICKING OR OTHERWISE FACILITATING SEX TRAFFICKING.

Section 1591(e) of title 18, United States Code, is amended—

(1) by redesignating paragraphs (4) and (5) as paragraphs (5) and (6), respectively; and

(2) by inserting after paragraph (3) the following:

"(4) The term 'participation in a venture' means knowingly assisting, supporting, or facilitating a violation of subsection (a)(1).".

SEC. 6. ACTIONS BY STATE ATTORNEYS GENERAL.

(a) IN GENERAL.—Section 1595 of title 18, United States Code, is amended by adding at the end the following:

"(d) In any case in which the attorney general of a State has reason to believe that an interest of the residents of that State has been or is threatened or adversely affected by any person who violates section 1591, the attorney general of the State, as parens patriae, may bring a civil action against such person on behalf of the residents of the State in an appropriate district court of the United States to obtain appropriate relief.''.

(b) TECHNICAL AND CONFORMING AMENDMENTS.—Section 1595 of title 18, United States Code, is amended—

(1) in subsection (b)(1), by striking ''this section'' and inserting ''subsection (a)''; and

(2) in subsection (c), in the matter preceding paragraph (1), by striking ''this section'' and inserting ''subsection (a)''.

SEC. 7. SAVINGS CLAUSE.

Nothing in this Act or the amendments made by this Act shall be construed to limit or preempt any civil action or criminal prosecution under Federal law or State law (including State statutory law and State common law) filed before or after the day before the date of enactment of this Act that was not limited or preempted by section 230 of the Communications Act of 1934 (47 U.S.C. 230), as such section was in effect on the day before the date of enactment of this Act.

SEC. 8. GAO STUDY.

On the date that is 3 years after the date of the enactment of this Act, the Comptroller General of the United States shall conduct a study and submit to the Committees on the Judiciary of the House of Representatives and of the Senate, the Committee on Homeland Security of the House of Representatives, and the Committee on Homeland Security and Governmental Affairs of the Senate, a report which includes the following:

(1) Information on each civil action brought pursuant to section 2421A(c) of title 18, United States Code, that resulted in an award of damages, including the amount claimed, the nature or description of the losses claimed to support the amount claimed, the losses proven, and the nature or description of the losses proven to support the amount awarded.

(2) Information on each civil action brought pursuant to section 2421A(c) of title 18, United States Code, that did not result in an award of damages, including—

(A) the amount claimed and the nature or description of the losses claimed to support the amount claimed; and

(B) whether the case was dismissed, and if the case was dismissed, information describing the reason for the dismissal.

(3) Information on each order of restitution entered pursuant to section 2421A(d) of title 18, United States Code, including—

(A) whether the defendant was a corporation or an individual;

(B) the amount requested by the Government and the justification for, and calculation of, the amount requested, if restitution was requested; and

(C) the amount ordered by the court and the justification for, and calculation of, the amount ordered.

(4) For each defendant convicted of violating section 2421A(b) of title 18, United States Code, that was not ordered to pay restitution—

(A) whether the defendant was a corporation or an individual;

(B) the amount requested by the Government, if restitution was requested; and

(C) information describing the reason that the court did not order restitution.

Passed the House of Representatives February 27, 2018.

Attest:

Clerk.

115TH CONGRESS
2D SESSION

H. R. 1865

AN ACT

To amend the Communications Act of 1934 to clarify that section 230 of such Act does not prohibit the enforcement against providers and users of interactive computer services of Federal and State criminal and civil law relating to sexual exploitation of children or sex trafficking, and for other purposes.

Appendix I:

FOSTA Committee Report

115TH CONGRESS 2d Session } HOUSE OF REPRESENTATIVES { REPT. 115–572 Part 1

ALLOW STATES AND VICTIMS TO FIGHT ONLINE SEX TRAFFICKING ACT OF 2017

FEBRUARY 20, 2018.—Committed to the Whole House on the State of the Union and ordered to be printed

Mr. GOODLATTE, from the Committee on the Judiciary, submitted the following

R E P O R T

[To accompany H.R. 1865]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 1865) to amend the Communications Act of 1934 to clarify that section 230 of such Act does not prohibit the enforcement against providers and users of interactive computer services of Federal and State criminal and civil law relating to sexual exploitation of children or sex trafficking, and for other purposes, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

CONTENTS

79–006

The Amendment

The amendment is as follows:

Strike all that follows after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Allow States and Victims to Fight Online Sex Trafficking Act of 2017".

SEC. 2. SENSE OF CONGRESS.

It is the sense of Congress that—

(1) section 230 of the Communications Act of 1934 (47 U.S.C. 230; commonly known as the "Communications Decency Act of 1996") was never intended to provide legal protection to websites that unlawfully promote and facilitate prostitution and contribute to sex trafficking;

(2) websites that promote and facilitate prostitution have been reckless in allowing the sale of sex trafficking victims and have done nothing to prevent the trafficking of children and victims of force, fraud, and coercion; and

(3) clarification of such section is warranted to ensure that such section does not provide such protection to such websites.

SEC. 3. PROMOTION OF PROSTITUTION AND RECKLESS DISREGARD OF SEX TRAFFICKING.

(a) PROMOTION OF PROSTITUTION.—Chapter 117 of title 18, United States Code, is amended by inserting after section 2421 the following:

"§ 2421A. Promotion or facilitation of prostitution and reckless disregard of sex trafficking

"(a) IN GENERAL.—Whoever uses or operates a facility or means of interstate or foreign commerce or attempts to do so with the intent to promote or facilitate the prostitution of another person shall be fined under this title, imprisoned for not more than 10 years, or both.

"(b) AGGRAVATED VIOLATION.—Whoever uses or operates a facility or means of interstate or foreign commerce with the intent to promote or facilitate the prostitution of another person and—

"(1) promotes or facilitates the prostitution of 5 or more persons; or

"(2) acts in reckless disregard of the fact that such conduct contributed to sex trafficking, in violation of 1591(a),

shall be fined under this title, imprisoned for not more than 25 years, or both.

"(c) CIVIL RECOVERY.—Any person injured by reason of a violation of section 2421A(b) may recover damages and reasonable attorneys' fees in an action before any appropriate United States district court. Consistent with section 230 of the Communications Act of 1934 (47 U.S.C. 230), a defendant may be held liable, under this subsection, where promotion or facilitation of prostitution activity includes responsibility for the creation or development of all or part of the information or content provided through any interactive computer service.

"(d) MANDATORY RESTITUTION.—Notwithstanding sections 3663 or 3663A and in addition to any other civil or criminal penalties authorized by law, the court shall order restitution for any offense under this section.

"(e) AFFIRMATIVE DEFENSE.—It shall be an affirmative defense to a charge of violating subsection (a) where the defendant proves, by a preponderance of the evidence, that the promotion or facilitation of prostitution is legal in the jurisdiction where the promotion or facilitation was targeted.".

(b) TABLE OF CONTENTS.—The table of contents for such chapter is amended by inserting after the item relating to section 2421 the following:

"2421A. Promotion or facilitation of prostitution and reckless disregard of sex trafficking.".

SEC. 4. COMMUNICATIONS DECENCY ACT.

Section 230(e) of the Communications Act of 1934 (47 U.S.C. 230(e)) is amended by adding at the end the following:

"(5) NO EFFECT ON STATE LAWS CONFORMING TO 18 U.S.C. 1591(A) OR 2421A.—Nothing in this section shall be construed to impair or limit any charge in a criminal prosecution brought under State law—

"(A) if the conduct underlying the charge constitutes a violation of section 2421A of title 18, United States Code, and promotion or facilitation of prostitution is illegal in the jurisdiction where the defendant's promotion or facilitation of prostitution was targeted; or

"(B) if the conduct underlying the charge constitutes a violation of section 1591(a) of title 18, United States Code.".

SEC. 5. SAVINGS CLAUSE.

Nothing in this Act or the amendments made by this Act shall be construed to limit or preempt any civil action or criminal prosecution under Federal law or State law (including State statutory law and State common law) filed before or after the day before the date of enactment of this Act that was not limited or preempted by section 230 of the Communications Act of 1934 (47 U.S.C. 230), as such section was in effect on the day before the date of enactment of this Act.

Purpose and Summary

H.R. 1865, the Allow States and Victims to Fight Online Sex Trafficking Act of 2017, is designed to combat online sex trafficking by providing new tools to law enforcement through a new federal criminal statute and by making it easier for states to prosecute criminal actor websites by amending section 230 of the Communications Decency Act, 47 U.S.C. § 230.

Background and Need for the Legislation

Since the expansion of the Internet, a number of classified advertising websites have developed and are now a popular and widely-used alternative to traditional print advertising in newspapers. Sites like Craigslist, Backpage.com, and eBay Classifieds provide users with a forum for buying and selling goods and services to a broader audience on the web. These websites group advertisements by location and category, similar to print advertisements. The use of these websites has grown exponentially as Internet use increases. Unfortunately these websites, including online classified sites like Backpage.com, Eros, Massage Troll, and cityxguide, have also become one of the primary channels of sex trafficking. This is in part due to technological advances on the Internet that make information easily accessible and provide a forum for anonymity, which allows traffickers to post advertisements of minors for a world of customers to see with ease and security. Some websites have gone beyond merely hosting advertisements, however, and have purposely created platforms designed to facilitate prostitution and sex trafficking.

Because of protections provided to "interactive computer services" by the Communications Decency Act (CDA), 47 U.S.C. § 230, it has been challenging to hold bad-actor websites accountable criminally (at the state level) and civilly. Congress passed the CDA in 1996, in an attempt to "remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material."[1] At the same time, Congress sought to "promote the continued development of the Internet and other interactive computer services and other interactive media."[2]

The CDA provides broad immunity for interactive computer services and states that no "provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."[3] An interactive computer service is "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service

[1] 47 U.S.C. § 230(b)(4).
[2] 47 U.S.C. § 230(b)(1).
[3] 47 U.S.C. § 230(c)(1).

or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions."[4] An information content provider is "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service."[5] Courts construing § 230(c)(1) frequently have employed a three-prong test that asks whether: (1) the online entity uses or provides an interactive computer service; (2) the entity is an information content provider with respect to the disputed activity or objectionable content; and (3) whether the plaintiff seeks to treat it as the "publisher or speaker" of information originating with a third party.[6] It has been uniformly held that Internet service providers are "interactive computer service" providers.[7] Courts have concluded that a Web site operator, search engine, or other entity was or was not a provider of an "interactive computer service" depending on whether there was a sufficient indication before the court that it "provided or enabled computer access by multiple users to a computer server" within the meaning of the definition found at § 230(f)(2).

The CDA further provides that:

> Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section. No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.

47 U.S.C. § 230(e)(3). It thus places limits on when states may enforce both criminal and civil laws. It only allows state laws to be enforced in cases in which they are deemed "consistent" with the CDA.

With respect to combatting websites promoting prostitution and facilitating sex trafficking, § 230 has complicated enforcement. In civil litigation, bad-actor websites have been able to successfully invoke this immunity provision despite engaging in actions that go far beyond publisher functions. In 2014, three minor Jane Does filed a civil suit in the U.S. District Court in Massachusetts under the Trafficking Victims Protection Reauthorization Act, alleging that that Backpage's platform, categories, and filters "assist[ed] in the crafting, placement, and promotion of illegal advertisements offering plaintiffs for sale." The District Court dismissed their Complaint, holding that § 230 of the CDA barred the lawsuit. The Second Circuit affirmed, concluding that although the plaintiffs "ha[d] made a persuasive case" that "Backpage has tailored its website to make sex trafficking easier," it nevertheless upheld the dismissal of the suit under § 230 on the grounds that it had not gone beyond being a publisher. Notably, the plaintiffs in this case chose only to argue Backpage was not a publisher; they did not argue that Backpage was an information content provider and would therefore not be entitled to immunity.

[4] 47 U.S.C. § 230(f)(2).

[5] 47 U.S.C. § 230(f)(3).

[6] *See* Ken S. Myers, *Wikimmunity: Fitting the Communications Decency Act to Wikipedia,* 20 Harvard Journal of Law & Technology 163 (2006).

[7] Noah v. AOL Time Warner, Inc., 261 F. Supp. 2d 532 (E.D. Va. 2003), *summarily aff'd,* 2004 WL 602711 (4th Cir. 2004).

Subsequently, the Senate Permanent Subcommittee on Investigations launched a 20-month investigation into Backpage. It found that Backpage had knowingly concealed evidence of criminality by systematically editing its "Adult" ads—that is, Backpage knew it facilitated prostitution and child sex trafficking—and that it had been sold to its CEO Carl Ferrer through foreign shell companies. Backpage would automatically delete incriminating words, such as "amber alert," from sex ads prior to publication, moderators then manually deleted incriminating language that filters missed, and the website coached its users on how to post "clean" ads to cover illegal transactions. Further, in July 2017, the *Washington Post* published a story revealing that a contractor for Backpage had been aggressively soliciting and creating sex-related ads, despite Backpage's repeated insistence that it had no role in the content of ads posted on its site. In sum, Backpage had engaged in a ruse, holding itself out to be a mere conduit, but in fact actively engaged in content creation and purposely concealing illegality in order to profit off of advertisements. There had been no criminal investigation up until the Senate investigation to uncover exactly what Backpage was doing, which is what this bill aims to remedy.

Further, courts have blocked states from enforcing state criminal laws on the grounds that the state laws were not consistent with the CDA. Backpage successfully invoked § 230 in federal-preemption challenges to state criminal laws in Washington, Tennessee, and New Jersey criminalizing the advertisement of minors for sex. A California state court also denied the government from proceeding against Backpage on pimping charges because it deemed the California statue "inconsistent" with the CDA.

Importantly, current federal criminal law, which is unaffected by the CDA, presently lacks proper prosecutorial tools to combat these websites. Though under 18 U.S.C. § 1591, a website may be held criminally liable for knowingly advertising sex trafficking, this knowledge standard is difficult to prove beyond a reasonable doubt. This is so because online advertisements rarely, if ever, indicate that sex trafficking is involved. The advertisements neither directly nor implicitly state that force, fraud, or coercion was used against the victim, nor do they say that the person depicted being prostituted is actually under the age of 18. Because these indicia of knowledge of criminality are typically lacking in the advertisements, federal prosecutors usually cannot demonstrate beyond a reasonable doubt that the website operators knew that the advertisements involved sex trafficking. Further, general knowledge that sex trafficking occurs on a website will not suffice as the knowledge element must be proven as to a specific victim. Moreover, sex trafficking cases are often difficult to prosecute because the victims are often uncooperative due to the traumatic effects of having been trafficked, may have issues with illegal substances, and may sometimes appear unsympathetic to juries. A new statute that instead targets promotion and facilitation of prostitution is far more useful to prosecutors. Prostitution and sex trafficking are inextricably linked, and where prostitution is legalized or tolerated, there is a greater demand for human trafficking victims and nearly always an increase in the number of women and children trafficked into commercial sex slavery.

H.R. 1865 will allow vigorous criminal enforcement against all bad-actor websites, not just Backpage.com, through the creation of a new federal law and by explicitly permitting states to enforce criminal laws that mirror this new federal law and current federal sex trafficking law. With this robust criminal enforcement, victims will have more opportunities to obtain restitution. Furthermore, this enforcement will also provide victims with information that will be sufficient to establish successful civil pleadings, by revealing the extent of content development in which these websites engage.

Hearings

The Committee on the Judiciary held a hearing on the intersection between the Communications Decency Act and online sex trafficking, the subject matter of H.R. 1865, on October 3, 2017. Testimony was received from the Honorable Chris Cox, Outside Counsel, NetChoice; Mr. Jeff Kosseff, Assistant Professor, United States Naval Academy; Ms. Mary Leary, Professor of Law, Catholic University Columbus School of Law; and, Mr. Evan Engstrom, Executive Director, Engine.

Committee Consideration

On December 12, 2017, the Committee met in open session and ordered the bill (H.R. 1865) favorably reported by voice vote, a quorum being present.

Committee Votes

In compliance with clause 3(b) of rule XIII of the Rules of the House of Representatives, the Committee advises that there were no recorded votes during the Committee's consideration of H.R. 1865.

Committee Oversight Findings

In compliance with clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee advises that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

New Budget Authority and Tax Expenditures

Clause 3(c)(2) of rule XIII of the Rules of the House of Representatives is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

Congressional Budget Office Cost Estimate

In compliance with clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, the Committee sets forth, with respect to the bill, H.R. 2228, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, February 7, 2018.

Hon. BOB GOODLATTE, CHAIRMAN,
Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 1865, the Allow States and Victims to Fight Online Sex Trafficking Act of 2017.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Mark Grabowicz, who can be reached at 226–2860.

Sincerely,

KEITH HALL.

Enclosure.
cc: Honorable Jerrold Nadler
Ranking Member

H.R. 1865—Allow States and Victims to Fight Online Sex Trafficking Act of 2017

As ordered reported by the House Committee on the Judiciary on December 12, 2017

H.R. 1865 would broaden the coverage of current laws against sex trafficking. As a result, the government might be able to pursue cases that it otherwise would not be able to prosecute. CBO expects that the bill would apply to a relatively small number of offenders, however, so any increase in costs for law enforcement, court proceedings, or prison operations would not be significant. Any such spending would be subject to the availability of appropriated funds.

Because those prosecuted and convicted under H.R. 1865 could be subject to criminal fines, the federal government might collect additional fines under the bill. Criminal fines are recorded as revenues, deposited in the Crime Victims Fund, and later spent without further appropriation action. CBO expects that any additional revenues and associated direct spending would not be significant because the bill would probably affect only a small number of cases.

Because enacting H.R. 1865 would affect direct spending and revenues, pay-as-you-go procedures apply. However, CBO estimates that any such effects would be insignificant in any year.

CBO estimates that enacting H.R. 1865 would not increase net direct spending or on-budget deficits in any of the four consecutive 10-year periods beginning in 2028.

H.R. 1865 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act.

On January 10, 2018, CBO transmitted a cost estimate for S. 1693, the Stop Enabling Sex Traffickers Act of 2017, as ordered reported by the Senate Committee on Commerce, Science, and Transportation on November 8, 2017. CBO's estimates of the budgetary effects of the two bills are identical.

The CBO staff contact for this estimate is Mark Grabowicz. The estimate was approved by H. Samuel Papenfuss, Deputy Assistant Director for Budget Analysis.

Duplication of Federal Programs

No provision of H.R. 1865 establishes or reauthorizes a program of the Federal government known to be duplicative of another Federal program, a program that was included in any report from the Government Accountability Office to Congress pursuant to section 21 of Public Law 111–139, or a program related to a program identified in the most recent Catalog of Federal Domestic Assistance.

Disclosure of Directed Rule Makings

The Committee finds that H.R. 1865 contains no directed rule making within the meaning of 5 U.S.C. § 551.

Performance Goals and Objectives

The Committee states that pursuant to clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, H.R. 1865 combats online sex trafficking by providing new tools to law enforcement through a new federal criminal statute and by making it easier for states to prosecute criminal actor websites by amending section 230 of the Communications Decency Act.

Advisory on Earmarks

In accordance with clause 9 of rule XXI of the Rules of the House of Representatives, H.R. 1865 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9(e), 9(f), or 9(g) of Rule XXI.

Section-by-Section Analysis

Section 1. Short title. Section 1 sets forth the short title of the bill as the "Allow States and Victims to Fight Online Sex Trafficking Act of 2017."

Sec. 2. Section 2 states that it is the sense of Congress that:

(1) Section 230 of the Communications Act of 1934 was never intended to provide legal protection to websites that unlawfully promote and facilitate prostitution and websites that facilitate traffickers in advertising the sale of unlawful sex acts with sex trafficking victims;

(2) websites that promote and facilitate prostitution have been reckless in allowing the sale of sex trafficking victims and have done nothing to prevent the trafficking of children and victims of force, fraud, and coercion; and

(3) Clarification is warranted to ensure Section 230 does not provide liability protection to such websites described in (2)

Sec. 3. Promotion of Prostitution and Reckless Disregard of Sex Trafficking

Adds a new statute within the Mann Act, 18 U.S.C. § 2421A, to create a statutory maximum of 10 years imprisonment for the use or operation of an interstate facility with the intent to promote or facilitate the prostitution of another person. This promotion or facilitation must be deliberate; thus, the operator of a facility or means of interstate or foreign commerce shall not be deemed to have the "intent to promote or facilitate the unlawful prostitution of another person," as that phrase is used in sections 2421A(a) and 2421A(b), based on the appearance of material promoting unlawful prostitution of another person, where the material appears despite the operator's good faith efforts to moderate, remove, or restrict such material from appearing on or through the facility.

Creates as an aggravating factor: (1) the intent to promote or facilitate the trafficking of five or more persons; or (2) acting in reckless disregard of the fact that the conduct of using or operating a commercial facility contributed to sex trafficking (a violation of 18 U.S.C. § 1591(a)).

- These aggravating circumstances carry a fine and/or statutory maximum sentence of 25 years imprisonment. A website that promotes or facilitates prostitution will be liable under subsection (b)(2) where it operates in reckless disregard of the fact that its promotion or facilitation of prostitution is a factor, even if not the primary cause, that plays a part in producing sex trafficking.
- Creates a civil recovery mechanism by which injured persons may recover damages if they were a victim of a violation of subsection (b)(2).
- Provides for mandatory restitution for an offense under this section.
- States that it is an affirmative defense to a prosecution under subsection (a) and (b)(1) for the defendant to prove, by a preponderance of the evidence, that the promotion or facilitation of prostitution is legal in the jurisdiction where the promotion or facilitation was targeted. Many websites promoting prostitution are targeted to specific geographic areas, though the website itself may be accessible nationwide. Mere accessibility to a website with targeted advertisements from another locality where promotion or facilitation of prostitution is illegal, alone, will not undermine a defendant's successfully established affirmative defense.

Sec. 4. Communications Decency Act

Amends § 230(e) of the Communications Decency Act (47 U.S.C. § 230(3)) to allow states to enforce certain criminal laws without litigating the application of § 230. States that nothing in this section shall be construed to impair or limit any charge in a criminal prosecution brought under state law if:

(1) The conduct underlying the charge violates 18 U.S.C. § 2421A and prostitution is illegal where the defendant's promotion or facilitation of prostitution was targeted; or

(2) The conduct underlying the charge violates 18 U.S.C. § 1591(a).

Under § 230, a state criminal law may be enforced against an interactive computer service (i.e., a website) as long as it is "consistent" with § 230. This provision, however, has been problematic in cases in which states have sought to enforce certain state criminal laws against websites. While the newly created law, and the federal sex trafficking law, should both be considered consistent with § 230, as applied to certain bad-actor websites, in order to allow immediate and unfettered use of this provision, included is an explicit carve out to permit state criminal prosecutions. The language used in the carve out is designed to ensure that interactive computer services are subject to one set of criminal laws, rather than a patchwork of various state laws. In order to qualify for this carve out, a state law's elements should mirror those in 2421A and 1591(a).

Sec. 5. Savings Clause

Clarifies that nothing in this Act shall be construed to limit or preempt any civil action or criminal prosecution under federal or state law that was not limited or preempted by § 230 of the Communications Decency Act.

Changes in Existing Law Made by the Bill, as Reported

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, and existing law in which no change is proposed is shown in roman):

TITLE 18, UNITED STATES CODE

* * * * * * *

PART I—CRIMES

* * * * * * *

CHAPTER 117—TRANSPORTATION FOR ILLEGAL SEXUAL ACTIVITY AND RELATED CRIMES

Sec.
2421. Transportation generally.
2421A. Promotion or facilitation of prostitution and reckless disregard of sex trafficking.

* * * * * * *

§ 2421A. Promotion or facilitation of prostitution and reckless disregard of sex trafficking

(a) In General.—Whoever uses or operates a facility or means of interstate or foreign commerce or attempts to do so with the intent to promote or facilitate the prostitution of another person shall be fined under this title, imprisoned for not more than 10 years, or both.

(b) Aggravated Violation.—Whoever uses or operates a facility or means of interstate or foreign commerce with the intent to promote or facilitate the prostitution of another person and—

(1) promotes or facilitates the prostitution of 5 or more persons; or

(2) acts in reckless disregard of the fact that such conduct contributed to sex trafficking, in violation of 1591(a),

shall be fined under this title, imprisoned for not more than 25 years, or both.

(c) Civil Recovery.—Any person injured by reason of a violation of section 2421A(b) may recover damages and reasonable attorneys' fees in an action before any appropriate United States district court.

Consistent with section 230 of the Communications Act of 1934 (47 U.S.C. 230), a defendant may be held liable, under this subsection, where promotion or facilitation of prostitution activity includes responsibility for the creation or development of all or part of the information or content provided through any interactive computer service.

(d) MANDATORY RESTITUTION.—Notwithstanding sections 3663 or 3663A and in addition to any other civil or criminal penalties authorized by law, the court shall order restitution for any offense under this section.

(e) AFFIRMATIVE DEFENSE.—It shall be an affirmative defense to a charge of violating subsection (a) where the defendant proves, by a preponderance of the evidence, that the promotion or facilitation of prostitution is legal in the jurisdiction where the promotion or facilitation was targeted.

* * * * * * *

COMMUNICATIONS ACT OF 1934

* * * * * * *

TITLE II—COMMON CARRIERS

PART I—COMMON CARRIER REGULATION

* * * * * * *

SEC. 230. PROTECTION FOR PRIVATE BLOCKING AND SCREENING OF OFFENSIVE MATERIAL.

(a) FINDINGS.—The Congress finds the following:

(1) The rapidly developing array of Internet and other interactive computer services available to individual Americans represent an extraordinary advance in the availability of educational and informational resources to our citizens.

(2) These services offer users a great degree of control over the information that they receive, as well as the potential for even greater control in the future as technology develops.

(3) The Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.

(4) The Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation.

(5) Increasingly Americans are relying on interactive media for a variety of political, educational, cultural, and entertainment services.

(b) POLICY.—It is the policy of the United States—

(1) to promote the continued development of the Internet and other interactive computer services and other interactive media;

(2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation;

(3) to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services;

(4) to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material; and

(5) to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.

(c) PROTECTION FOR "GOOD SAMARITAN" BLOCKING AND SCREENING OF OFFENSIVE MATERIAL.—

(1) TREATMENT OF PUBLISHER OR SPEAKER.—No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.

(2) CIVIL LIABILITY.—No provider or user of an interactive computer service shall be held liable on account of—

(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or

(B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).

(d) OBLIGATIONS OF INTERACTIVE COMPUTER SERVICE.—A provider of interactive computer service shall, at the time of entering an agreement with a customer for the provision of interactive computer service and in a manner deemed appropriate by the provider, notify such customer that parental control protections (such as computer hardware, software, or filtering services) are commercially available that may assist the customer in limiting access to material that is harmful to minors. Such notice shall identify, or provide the customer with access to information identifying, current providers of such protections.

(e) EFFECT ON OTHER LAWS.—

(1) NO EFFECT ON CRIMINAL LAW.—Nothing in this section shall be construed to impair the enforcement of section 223 or 231 of this Act, chapter 71 (relating to obscenity) or 110 (relating to sexual exploitation of children) of title 18, United States Code, or any other Federal criminal statute.

(2) NO EFFECT ON INTELLECTUAL PROPERTY LAW.—Nothing in this section shall be construed to limit or expand any law pertaining to intellectual property.

(3) STATE LAW.—Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section. No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.

(4) NO EFFECT ON COMMUNICATIONS PRIVACY LAW.—Nothing in this section shall be construed to limit the application of the

Electronic Communications Privacy Act of 1986 or any of the amendments made by such Act, or any similar State law.

(5) NO EFFECT ON STATE LAWS CONFORMING TO 18 U.S.C. 1591(A) OR 2421A.—Nothing in this section shall be construed to impair or limit any charge in a criminal prosecution brought under State law—

(A) if the conduct underlying the charge constitutes a violation of section 2421A of title 18, United States Code, and promotion or facilitation of prostitution is illegal in the jurisdiction where the defendant's promotion or facilitation of prostitution was targeted; or

(B) if the conduct underlying the charge constitutes a violation of section 1591(a) of title 18, United States Code.

(f) DEFINITIONS.—As used in this section:

(1) INTERNET.—The term "Internet" means the international computer network of both Federal and non-Federal interoperable packet switched data networks.

(2) INTERACTIVE COMPUTER SERVICE.—The term "interactive computer service" means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.

(3) INFORMATION CONTENT PROVIDER.—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 or any other interactive computer service.

(4) ACCESS SOFTWARE PROVIDER.—The term "access software provider" means a provider of software (including client or server software), or enabling tools that do any one or more of the following:

(A) filter, screen, allow, or disallow content;

(B) pick, choose, analyze, or digest content; or

(C) transmit, receive, display, forward, cache, search, subset, organize, reorganize, or translate content.

* * * * * * *

Committee Jurisdiction Letters

GREG WALDEN, OREGON
CHAIRMAN

FRANK PALLONE, JR., NEW JERSEY
RANKING MEMBER

ONE HUNDRED FIFTEENTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON ENERGY AND COMMERCE
2125 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515–6115
Majority (202) 225-2927
Minority (202) 225-3641

February 16, 2018

The Honorable Bob Goodlatte
Chairman
Committee on the Judiciary
2138 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Goodlatte:

I am writing to notify you that the Committee on Energy and Commerce will forgo action on H.R. 1865, Allow States and Victims to Fight Online Sex Trafficking Act of 2017, so that it may proceed expeditiously to the House floor for consideration. This is done with the understanding that the Committee's jurisdictional interests over this and similar legislation are in no way diminished or altered. In addition, the Committee reserves the right to seek conferees on H.R. 1865 and expects your support when such a request is made.

Please include a copy of this letter outlining our mutual understanding with respect to H.R. 1865 in the Congressional Record during consideration of the bill on the House floor.

Sincerely,

Greg Walden
Chairman

ONE HUNDRED FIFTEENTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON THE JUDICIARY

2138 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515–6216

(202) 225–3951
http://www.house.gov/judiciary

February 20, 2018

The Honorable Greg Walden
Chairman
Committee on Energy and Commerce
2125 Rayburn House Office Building
Washington, D.C. 20515

Dear Chairman Walden,

Thank you for consulting with the Committee on the Judiciary and agreeing to be discharged from further consideration of H.R. 1865, the "Allow States and Victims to Fight Online Sex Trafficking Act of 2017," so that the bill may proceed expeditiously to the House floor.

I agree that your foregoing further action on this measure does not in any way diminish or alter the jurisdiction of your committee or prejudice its jurisdictional prerogatives on this bill or similar legislation in the future. I would support your effort to seek appointment of an appropriate number of conferees from your committee to any House-Senate conference on this legislation.

I will seek to place our letters on H.R. 1865 into the *Congressional Record* during floor consideration of the bill. I appreciate your cooperation regarding this legislation and look forward to continuing to work together as this measure moves through the legislative process.

Sincerely,

Bob Goodlatte

Bob Goodlatte
Chairman

cc: The Honorable Jerrold Nadler
The Honorable Frank Pallone, Jr.
The Honorable Paul Ryan, Speaker
The Honorable Thomas Wickham, Jr., Parliamentarian

Appendix J:
S. Rep. 115-199

Calendar No. 292

115TH CONGRESS
2d Session

SENATE

REPORT
115–199

STOP ENABLING SEX TRAFFICKERS ACT OF 2017

R E P O R T

OF THE

COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION

ON

S. 1693

JANUARY 10, 2018.—Ordered to be printed

U.S. GOVERNMENT PUBLISHING OFFICE
79–010 WASHINGTON : 2018

SENATE COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION

ONE HUNDRED FIFTEENTH CONGRESS

SECOND SESSION

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Calendar No. 292

115TH CONGRESS
2d Session

SENATE

REPORT
115–199

STOP ENABLING SEX TRAFFICKERS ACT OF 2017

JANUARY 10, 2018.—Ordered to be printed

Mr. THUNE, from the Committee on Commerce, Science, and Transportation, submitted the following

R E P O R T

[To accompany S. 1693]

[Including Cost Estimate of the Congressional Budget Office]

The Committee on Commerce, Science, and Transportation, to which was referred the bill (S. 1693) to amend the Communications Act of 1934 to clarify that section 230 of that Act does not prohibit the enforcement against providers and users of interactive computer services of Federal and State criminal and civil law relating to sex trafficking, having considered the same, reports favorably thereon with an amendment (in the nature of a substitute) and recommends that the bill (as amended) do pass.

PURPOSE OF THE BILL

S. 1693 would amend Federal law to ensure that section 230 of the Communications Act of 1934[1] (section 230) does not prohibit the enforcement of Federal and State criminal and civil law relating to sex trafficking against providers and users of interactive computer services (ICSs).

BACKGROUND AND NEEDS

The Communications Decency Act of 1996 (CDA), enacted as part of the Telecommunications Act of 1996,[2] was the first bill signed into law seeking to regulate obscenity and indecency on the internet. It was an attempt to address, among other things, concerns about minors' access to pornography and other indecent material

[1] 47 U.S.C. § 230.
[2] Public Law 104–104, 110 Stat. 56, 133.

online. Section 230 (as added by the CDA), the section central to the discussion around S. 1693, states that "no provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."[3] This provision has had the practical effect of preventing ICSs from being held liable for the content that people who use their services create, unless a violation of Federal criminal law has occurred.

Over the years, much of the CDA as originally enacted has been struck down in court on freedom of speech grounds,[4] but section 230 and its liability protections remain. Many have argued that this section provides an essential underpinning of the modern internet and is critical to the explosive growth of websites that facilitate user-generated content.[5] At the same time, however, those protections have been held by courts to shield from civil liability and State criminal prosecution nefarious actors, such as the website BackPage.com, that are accused of knowingly facilitating sex trafficking.[6] S. 1693 would eliminate section 230 as a defense for websites that knowingly facilitate sex trafficking. It would also empower State law enforcement to enforce criminal statutes against websites, and introduce new civil liabilities for violations of Federal criminal laws relating to sex trafficking.

Legislative History

S. 1693 was introduced on August 1, 2017, by Senator Portman (for himself, Senator Blumenthal, and 23 other original cosponsors), and was referred to the Committee on Commerce, Science, and Transportation of the Senate. On September 19, 2017, the Committee held a legislative hearing on the bill. On November 8, 2017, the Committee met in open Executive Session and, by voice vote, ordered S. 1693 reported favorably with an amendment (in the nature of a substitute).

Estimated Costs

In accordance with paragraph 11(a) of rule XXVI of the Standing Rules of the Senate and section 403 of the Congressional Budget Act of 1974, the Committee provides the following cost estimate, prepared by the Congressional Budget Office:

S. 1693—Stop Enabling Sex Traffickers Act of 2017

S. 1693 would aim to eliminate legal obstacles to the successful prosecution of people or entities that violate federal laws against

[3] An "interactive computer service" is any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions. 47 U.S.C. § 230(f)(2). This term has been found to include, among other things, the following: websites (Carafano v. Metrosplash.com Inc., 207 F.Supp.2d 1055 (C.D. Cal. 2002), affirmed on other grounds, 339 F.3d 1119); website hosting services (Ricci v. Teamsters Union Local 456, 781 F.3d 25 (2d Cir. 2015)); search engines (Baldino's Lock & Key Service, Inc. v. Google, Inc., 88 F.Supp.3d 543 (E.D. Va. 2015), affirmed 624 Fed.Appx. 81, 2015 WL 7888322); and social networking sites (Klayman v. Zuckerberg, 753 F.3d 1354 (D.C. Cir. 2014), certiorari denied 135 S.Ct. 680).

[4] See, e.g., Reno v. American Civil Liberties Union, 521 U.S. 844 (1997).

[5] See, e.g., Letter from Faiz Shakir, National Political Director, American Civil Liberties Union, to Hon. John Thune, Chairman, United States Senate Committee on Commerce, Science, and Transportation, Nov. 7, 2017, available at https://www.aclu.org/letter/aclu-letter-opposing-sesta.

[6] See, e.g., Jane Doe No. 1 et al., v. BackPage.com, LLC, 817 F.3d 12 (1st Cir. 2016).

sex trafficking. As a result, the government might be able to pursue cases that it otherwise would not be able to prosecute. CBO expects that the bill would apply to a relatively small number of offenders, however, so any increase in costs for law enforcement, court proceedings, or prison operations would not be significant. Any such spending would be subject to the availability of appropriated funds.

Because those prosecuted and convicted under S. 1693 could be subject to criminal fines, the federal government might collect additional fines under the bill. Criminal fines are recorded as revenues, deposited in the Crime Victims Fund, and later spent without further appropriation action. CBO expects that any additional revenues and associated direct spending would not be significant because the legislation would probably affect only a small number of cases.

Because enacting the bill would affect direct spending and revenues, pay-as-you-go procedures apply. However, CBO estimates that any such effects would be insignificant in any year.

CBO estimates that enacting S. 1693 would not increase net direct spending or on-budget deficits in any of the four consecutive 10-year periods beginning in 2028.

S. 1693 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act.

The CBO staff contact for this estimate is Mark Grabowicz. The estimate was approved by H. Samuel Papenfuss, Deputy Assistant Director for Budget Analysis.

Regulatory Impact Statement

Because S. 1693 does not create any new programs, the legislation will have no additional regulatory impact, and will result in no additional reporting requirements. The legislation will have no further effect on the number or types of individuals and businesses regulated, the economic impact of such regulation, the personal privacy of affected individuals, or the paperwork required from such individuals and businesses.

Congressionally Directed Spending

In compliance with paragraph 4(b) of rule XLIV of the Standing Rules of the Senate, the Committee provides that no provisions contained in the bill, as reported, meet the definition of congressionally directed spending items under the rule.

Section-by-Section Analysis

Section. 1. Short title.

This section would provide that the bill may be cited as the “Stop Enabling Sex Traffickers Act of 2017.”

Section 2. Findings.

This section would find the following: that section 230 was never intended to provide legal protection to websites that facilitate traffickers in advertising the sale of unlawful sex acts with sex trafficking victims; and that clarification of section 230 is warranted to ensure that that section does not provide such protection to such websites.

Section 3. Ensuring ability to enforce Federal and State criminal and civil law relating to sex trafficking.

Section 3(a) would amend section 230(b) to declare that it is the policy of the United States to ensure vigorous enforcement of Federal criminal and civil law relating to sex trafficking.

Section 3(a) would further amend section 230(e) to clarify that nothing in the section should be construed to impair or limit: (1) any claim in a civil action brought under section 1595 of title 18, United States Code, if the conduct underlying the claim constitutes a violation of the Federal sex trafficking statute (18 U.S.C. 1591); or (2) any charge in a criminal prosecution brought under State law if the conduct underlying the charge constitutes a violation of the Federal sex trafficking statute.

The Committee notes that this Act would not abrogate section 230(c)(2)(A). This provision would ensure that ICSs cannot be held liable on account of actions taken in good faith to restrict access to objectionable material. With this provision preserved, an ICS should not be concerned that it will face liability for knowingly assisting, supporting, or facilitating sex trafficking based on its actions to restrict access to material that violates the Federal sex trafficking statute. As section 230(c)(2)(A) provides, an ICS would not have their good faith efforts to restrict access to objectionable content used against them.

If a plaintiff shows that an ICS is knowingly assisting, supporting, or facilitating sex trafficking, then the ICS cannot avoid liability by characterizing those actions as efforts to remove objectionable material. For example, if a website screens advertisements in an effort to remove objectionable material, but then merely edits illegal advertisements to make them more difficult for law enforcement to identify, or knowingly assists, supports, or facilitates sex trafficking, then even an ICS's efforts to remove objectionable content are no bar to liability. Section 230(c)(2)(A) was never intended to, and does not, pose a barrier to liability on these facts.

Section 3(b) would establish that the amendments made by this section would take effect on the date of enactment of this Act, and that the specific amendment to section 230 related to allowing State criminal prosecution or civil enforcement actions would apply regardless of when the alleged conduct occurred.

Section 4. Ensuring Federal liability for publishing information designed to facilitate sex trafficking or otherwise facilitating sex trafficking.

This section would amend the Federal sex trafficking statute to clarify that "participation in a venture" means "knowingly assisting, supporting, or facilitating a violation" of subsection (a)(1) of that statute.

Section 5. Actions by State Attorneys General.

This section would amend the Federal civil remedy statute for sex trafficking (18 U.S.C. 1595) to clarify that the attorney general of a State may, as parens patriae, bring a civil action against a violator of the Federal sex trafficking statute on behalf of the residents of that State in an appropriate district court of the United States.

Section 6. Savings clause.

This section would establish that nothing in this Act or the amendments made by this Act is intended to limit: (1) any claim or cause of action under Federal law that was filed, or could have been filed, before the date of enactment of this Act; or (2) any claim or cause of action under State law, including statutory and common law, that was filed or could have been filed before the date of enactment of this Act, and that was not preempted by section 230.

CHANGES IN EXISTING LAW

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new material is printed in italic, existing law in which no change is proposed is shown in roman):

TITLE 18. CRIMES AND CRIMINAL PROCEDURE

PART I. CRIMES

CHAPTER 77. PEONAGE, SLAVERY, AND TRAFFICKING IN PERSONS

§ 1591. Sex trafficking of children or by force, fraud, or coercion

(a) Whoever knowingly—

(1) in or affecting interstate or foreign commerce, or within the special maritime and territorial jurisdiction of the United States, recruits, entices, harbors, transports, provides, obtains, advertises, maintains, patronizes, or solicits by any means a person; or

(2) benefits, financially or by receiving anything of value, from participation in a venture which has engaged in an act described in violation of paragraph (1),

knowing, or, except where the act constituting the violation of paragraph (1) is advertising, in reckless disregard of the fact, that means of force, threats of force, fraud, coercion described in subsection (e)(2), or any combination of such means will be used to cause the person to engage in a commercial sex act, or that the person has not attained the age of 18 years and will be caused to engage in a commercial sex act, shall be punished as provided in subsection (b).

(b) The punishment for an offense under subsection (a) is—

(1) if the offense was effected by means of force, threats of force, fraud, or coercion described in subsection (e)(2), or by any combination of such means, or if the person recruited, enticed, harbored, transported, provided, obtained, advertised, patronized, or solicited had not attained the age of 14 years at the time of such offense, by a fine under this title and imprisonment for any term of years not less than 15 or for life; or

(2) if the offense was not so effected, and the person recruited, enticed, harbored, transported, provided, obtained, advertised, patronized, or solicited had attained the age of 14 years but had not attained the age of 18 years at the time of

such offense, by a fine under this title and imprisonment for not less than 10 years or for life.

(c) In a prosecution under subsection (a)(1) in which the defendant had a reasonable opportunity to observe the person so recruited, enticed, harbored, transported, provided, obtained, maintained, patronized, or solicited, the Government need not prove that the defendant knew, or recklessly disregarded the fact, that the person had not attained the age of 18 years.

(d) Whoever obstructs, attempts to obstruct, or in any way interferes with or prevents the enforcement of this section, shall be fined under this title, imprisoned for a term not to exceed 20 years, or both.

(e) In this section:

(1) The term "abuse or threatened abuse of law or legal process" means the use or threatened use of a law or legal process, whether administrative, civil, or criminal, in any manner or for any purpose for which the law was not designed, in order to exert pressure on another person to cause that person to take some action or refrain from taking some action.

(2) The term "coercion" means—

(A) threats of serious harm to or physical restraint against any person;

(B) any scheme, plan, or pattern intended to cause a person to believe that failure to perform an act would result in serious harm to or physical restraint against any person; or

(C) the abuse or threatened abuse of law or the legal process.

(3) The term "commercial sex act" means any sex act, on account of which anything of value is given to or received by any person.

(4) The term "participation in a venture" means knowingly assisting, supporting, or facilitating a violation of subsection (a)(1).

【(4)】*(5)* The term "serious harm" means any harm, whether physical or nonphysical, including psychological, financial, or reputational harm, that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to perform or to continue performing commercial sexual activity in order to avoid incurring that harm.

【(5)】*(6)* The term "venture" means any group of two or more individuals associated in fact, whether or not a legal entity.

§ 1595. Civil remedy

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

(b)

(1) Any civil action filed under 【this section】 *subsection (a)* shall be stayed during the pendency of any criminal action

arising out of the same occurrence in which the claimant is the victim.

(2) In this subsection, a "criminal action" includes investigation and prosecution and is pending until final adjudication in the trial court.

(c) No action may be maintained under [this section] *subsection (a)* unless it is commenced not later than the later of—

(1) 10 years after the cause of action arose; or

(2) 10 years after the victim reaches 18 years of age, if the victim was a minor at the time of the alleged offense.

(d) In any case in which the attorney general of a State has reason to believe that an interest of the residents of that State has been or is threatened or adversely affected by any person who violates section 1591, the attorney general of the State, as parens patriae, may bring a civil action against such person on behalf of the residents of the State in an appropriate district court of the United States to obtain appropriate relief.

COMMUNICATIONS ACT OF 1934

[47 U.S.C. 151 et seq.]

SEC. 230. PROTECTION FOR PRIVATE BLOCKING AND SCREENING OF OFFENSIVE MATERIAL.

[47 U.S.C. 230]

(a) FINDINGS.—The Congress finds the following:

(1) The rapidly developing array of Internet and other interactive computer services available to individual Americans represent an extraordinary advance in the availability of educational and informational resources to our citizens.

(2) These services offer users a great degree of control over the information that they receive, as well as the potential for even greater control in the future as technology develops.

(3) The Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.

(4) The Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation.

(5) Increasingly Americans are relying on interactive media for a variety of political, educational, cultural, and entertainment services.

(b) POLICY.—It is the policy of the United States—

(1) to promote the continued development of the Internet and other interactive computer services and other interactive media;

(2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation;

(3) to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services;

(4) to remove disincentives for the development and utilization of blocking and filtering technologies that empower par-

ents to restrict their children's access to objectionable or inappropriate online material; ⟦and⟧

(5) to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer⟦.⟧*; and*

(6) to ensure vigorous enforcement of Federal criminal and civil law relating to sex trafficking.

(c) PROTECTION FOR "GOOD SAMARITAN" BLOCKING AND SCREENING OF OFFENSIVE MATERIAL.—

(1) TREATMENT OF PUBLISHER OR SPEAKER.—No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.

(2) CIVIL LIABILITY.—No provider or user of an interactive computer service shall be held liable on account of—

(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or

(B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).

(d) OBLIGATIONS OF INTERACTIVE COMPUTER SERVICE.—A provider of interactive computer service shall, at the time of entering an agreement with a customer for the provision of interactive computer service and in a manner deemed appropriate by the provider, notify such customer that parental control protections (such as computer hardware, software, or filtering services) are commercially available that may assist the customer in limiting access to material that is harmful to minors. Such notice shall identify, or provide the customer with access to information identifying, current providers of such protections.

(e) EFFECT ON OTHER LAWS.—

(1) NO EFFECT ON CRIMINAL LAW.—Nothing in this section shall be construed to impair the enforcement of section 223 or 231 of this Act, chapter 71 (relating to obscenity) or 110 (relating to sexual exploitation of children) of title 18, United States Code, or any other Federal criminal statute.

(2) NO EFFECT ON INTELLECTUAL PROPERTY LAW.—Nothing in this section shall be construed to limit or expand any law pertaining to intellectual property.

(3) STATE LAW.—Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section. No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.

(4) NO EFFECT ON COMMUNICATIONS PRIVACY LAW.—Nothing in this section shall be construed to limit the application of the Electronic Communications Privacy Act of 1986 or any of the amendments made by such Act, or any similar State law.

(5) NO EFFECT ON SEX TRAFFICKING LAW.—Nothing in this section (other than subsection (c)(2)(A)) shall be construed to impair or limit—

(A) any claim in a civil action brought under section 1595 of title 18, United States Code, if the conduct underlying the claim constitutes a violation of section 1591 of that title; or

(B) any charge in a criminal prosecution brought under State law if the conduct underlying the charge constitutes a violation of section 1591 of title 18, United States Code.

(f) DEFINITIONS.—As used in this section:

(1) INTERNET.—The term "Internet" means the international computer network of both Federal and non-Federal interoperable packet switched data networks.

(2) INTERACTIVE COMPUTER SERVICE.—The term "interactive computer service" means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.

(3) INFORMATION CONTENT PROVIDER.—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 or any other interactive computer service.

(4) ACCESS SOFTWARE PROVIDER.—The term "access software provider" means a provider of software (including client or server software), or enabling tools that do any one or more of the following:

(A) filter, screen, allow, or disallow content;

(B) pick, choose, analyze, or digest content; or

(C) transmit, receive, display, forward, cache, search, subset, organize, reorganize, or translate content.

○

Appendix K:
TVPA (Excerpts)

PUBLIC LAW 106–386—OCT. 28, 2000

VICTIMS OF TRAFFICKING AND VIOLENCE PROTECTION ACT OF 2000

inadmissible under clause (i), has, within the previous 5 years, obtained any financial or other benefit from the illicit activity of that alien, and knew or reasonably should have known that the financial or other benefit was the product of such illicit activity, is inadmissible.

"(iii) EXCEPTION FOR CERTAIN SONS AND DAUGHTERS.—Clause (ii) shall not apply to a son or daughter who was a child at the time he or she received the benefit described in such clause.".

(e) IMPLEMENTATION.—

(1) DELEGATION OF AUTHORITY.—The President may delegate any authority granted by this section, including the authority to designate foreign persons under paragraphs (1)(B) and (1)(C) of subsection (a).

(2) PROMULGATION OF RULES AND REGULATIONS.—The head of any agency, including the Secretary of Treasury, is authorized to take such actions as may be necessary to carry out any authority delegated by the President pursuant to paragraph (1), including promulgating rules and regulations.

(3) OPPORTUNITY FOR REVIEW.—Such rules and regulations shall include procedures affording an opportunity for a person to be heard in an expeditious manner, either in person or through a representative, for the purpose of seeking changes to or termination of any determination, order, designation or other action associated with the exercise of the authority in subsection (a).

(f) DEFINITION OF FOREIGN PERSONS.—In this section, the term "foreign person" means any citizen or national of a foreign state or any entity not organized under the laws of the United States, including a foreign government official, but does not include a foreign state.

(g) CONSTRUCTION.—Nothing in this section shall be construed as precluding judicial review of the exercise of the authority described in subsection (a).

22 USC 7109.

SEC. 112. STRENGTHENING PROSECUTION AND PUNISHMENT OF TRAFFICKERS.

(a) TITLE 18 AMENDMENTS.—Chapter 77 of title 18, United States Code, is amended—

(1) in each of sections 1581(a), 1583, and 1584—

(A) by striking "10 years" and inserting "20 years"; and

(B) by adding at the end the following: "If death results from the violation of this section, or if the violation includes kidnapping or an attempt to kidnap, aggravated sexual abuse or the attempt to commit aggravated sexual abuse, or an attempt to kill, the defendant shall be fined under this title or imprisoned for any term of years or life, or both.";

(2) by inserting at the end the following:

"§ 1589. Forced labor

"Whoever knowingly provides or obtains the labor or services of a person—

"(1) by threats of serious harm to, or physical restraint against, that person or another person;

"(2) by means of any scheme, plan, or pattern intended to cause the person to believe that, if the person did not perform such labor or services, that person or another person would suffer serious harm or physical restraint; or

"(3) by means of the abuse or threatened abuse of law or the legal process,

shall be fined under this title or imprisoned not more than 20 years, or both. If death results from the violation of this section, or if the violation includes kidnapping or an attempt to kidnap, aggravated sexual abuse or the attempt to commit aggravated sexual abuse, or an attempt to kill, the defendant shall be fined under this title or imprisoned for any term of years or life, or both.

"§ 1590. Trafficking with respect to peonage, slavery, involuntary servitude, or forced labor

"Whoever knowingly recruits, harbors, transports, provides, or obtains by any means, any person for labor or services in violation of this chapter shall be fined under this title or imprisoned not more than 20 years, or both. If death results from the violation of this section, or if the violation includes kidnapping or an attempt to kidnap, aggravated sexual abuse, or the attempt to commit aggravated sexual abuse, or an attempt to kill, the defendant shall be fined under this title or imprisoned for any term of years or life, or both.

"§ 1591. Sex trafficking of children or by force, fraud or coercion

"(a) Whoever knowingly—

"(1) in or affecting interstate commerce, recruits, entices, harbors, transports, provides, or obtains by any means a person; or

"(2) benefits, financially or by receiving anything of value, from participation in a venture which has engaged in an act described in violation of paragraph (1),

knowing that force, fraud, or coercion described in subsection (c)(2) will be used to cause the person to engage in a commercial sex act, or that the person has not attained the age of 18 years and will be caused to engage in a commercial sex act, shall be punished as provided in subsection (b).

"(b) The punishment for an offense under subsection (a) is—

"(1) if the offense was effected by force, fraud, or coercion or if the person transported had not attained the age of 14 years at the time of such offense, by a fine under this title or imprisonment for any term of years or for life, or both; or

"(2) if the offense was not so effected, and the person transported had attained the age of 14 years but had not attained the age of 18 years at the time of such offense, by a fine under this title or imprisonment for not more than 20 years, or both.

"(c) In this section:

"(1) The term 'commercial sex act' means any sex act, on account of which anything of value is given to or received by any person.

"(2) The term 'coercion' means—

"(A) threats of serious harm to or physical restraint against any person;

"(B) any scheme, plan, or pattern intended to cause a person to believe that failure to perform an act would result in serious harm to or physical restraint against any person; or

"(C) the abuse or threatened abuse of law or the legal process.

"(3) The term 'venture' means any group of two or more individuals associated in fact, whether or not a legal entity.

"§ 1592. Unlawful conduct with respect to documents in furtherance of trafficking, peonage, slavery, involuntary servitude, or forced labor

"(a) Whoever knowingly destroys, conceals, removes, confiscates, or possesses any actual or purported passport or other immigration document, or any other actual or purported government identification document, of another person—

"(1) in the course of a violation of section 1581, 1583, 1584, 1589, 1590, 1591, or 1594(a);

"(2) with intent to violate section 1581, 1583, 1584, 1589, 1590, or 1591; or

"(3) to prevent or restrict or to attempt to prevent or restrict, without lawful authority, the person's liberty to move or travel, in order to maintain the labor or services of that person, when the person is or has been a victim of a severe form of trafficking in persons, as defined in section 103 of the Trafficking Victims Protection Act of 2000,

shall be fined under this title or imprisoned for not more than 5 years, or both.

"(b) Subsection (a) does not apply to the conduct of a person who is or has been a victim of a severe form of trafficking in persons, as defined in section 103 of the Trafficking Victims Protection Act of 2000, if that conduct is caused by, or incident to, that trafficking.

"§ 1593. Mandatory restitution

"(a) Notwithstanding section 3663 or 3663A, and in addition to any other civil or criminal penalties authorized by law, the court shall order restitution for any offense under this chapter.

"(b)(1) The order of restitution under this section shall direct the defendant to pay the victim (through the appropriate court mechanism) the full amount of the victim's losses, as determined by the court under paragraph (3) of this subsection.

"(2) An order of restitution under this section shall be issued and enforced in accordance with section 3664 in the same manner as an order under section 3663A.

"(3) As used in this subsection, the term 'full amount of the victim's losses' has the same meaning as provided in section 2259(b)(3) and shall in addition include the greater of the gross income or value to the defendant of the victim's services or labor or the value of the victim's labor as guaranteed under the minimum wage and overtime guarantees of the Fair Labor Standards Act (29 U.S.C. 201 et seq.).

"(c) As used in this section, the term 'victim' means the individual harmed as a result of a crime under this chapter, including, in the case of a victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardian of the victim or a representative of the victim's estate, or another family member, or any other person appointed as suitable by the court, but in no event shall the defendant be named such representative or guardian.

"§ 1594. General provisions

"(a) Whoever attempts to violate section 1581, 1583, 1584, 1589, 1590, or 1591 shall be punishable in the same manner as a completed violation of that section.

"(b) The court, in imposing sentence on any person convicted of a violation of this chapter, shall order, in addition to any other sentence imposed and irrespective of any provision of State law, that such person shall forfeit to the United States—

"(1) such person's interest in any property, real or personal, that was used or intended to be used to commit or to facilitate the commission of such violation; and

"(2) any property, real or personal, constituting or derived from, any proceeds that such person obtained, directly or indirectly, as a result of such violation.

"(c)(1) The following shall be subject to forfeiture to the United States and no property right shall exist in them:

"(A) Any property, real or personal, used or intended to be used to commit or to facilitate the commission of any violation of this chapter.

"(B) Any property, real or personal, which constitutes or is derived from proceeds traceable to any violation of this chapter.

"(2) The provisions of chapter 46 of this title relating to civil forfeitures shall extend to any seizure or civil forfeiture under this subsection.

"(d) WITNESS PROTECTION.—Any violation of this chapter shall be considered an organized criminal activity or other serious offense for the purposes of application of chapter 224 (relating to witness protection)."; and

(3) by amending the table of sections at the beginning of chapter 77 by adding at the end the following new items:

"1589. Forced labor.
"1590. Trafficking with respect to peonage, slavery, involuntary servitude, or forced labor.
"1591. Sex trafficking of children or by force, fraud, or coercion.
"1592. Unlawful conduct with respect to documents in furtherance of trafficking, peonage, slavery, involuntary servitude, or forced labor.
"1593. Mandatory restitution.
"1594. General provisions.".

(b) AMENDMENT TO THE SENTENCING GUIDELINES.—

(1) Pursuant to its authority under section 994 of title 28, United States Code, and in accordance with this section, the United States Sentencing Commission shall review and, if appropriate, amend the sentencing guidelines and policy statements applicable to persons convicted of offenses involving the trafficking of persons including component or related crimes of peonage, involuntary servitude, slave trade offenses, and possession, transfer or sale of false immigration documents in furtherance of trafficking, and the Fair Labor Standards Act and the Migrant and Seasonal Agricultural Worker Protection Act.

(2) In carrying out this subsection, the Sentencing Commission shall—

(A) take all appropriate measures to ensure that these sentencing guidelines and policy statements applicable to the offenses described in paragraph (1) of this subsection are sufficiently stringent to deter and adequately reflect the heinous nature of such offenses;

(B) consider conforming the sentencing guidelines applicable to offenses involving trafficking in persons to the guidelines applicable to peonage, involuntary servitude, and slave trade offenses; and

(C) consider providing sentencing enhancements for those convicted of the offenses described in paragraph (1) of this subsection that—

(i) involve a large number of victims;

(ii) involve a pattern of continued and flagrant violations;

(iii) involve the use or threatened use of a dangerous weapon; or

(iv) result in the death or bodily injury of any person.

(3) The Commission may promulgate the guidelines or amendments under this subsection in accordance with the procedures set forth in section 21(a) of the Sentencing Act of 1987, as though the authority under that Act had not expired.

22 USC 7110.

SEC. 113. AUTHORIZATIONS OF APPROPRIATIONS.

(a) AUTHORIZATION OF APPROPRIATIONS IN SUPPORT OF THE TASK FORCE.—To carry out the purposes of sections 104, 105, and 110, there are authorized to be appropriated to the Secretary of State $1,500,000 for fiscal year 2001 and $3,000,000 for fiscal year 2002.

(b) AUTHORIZATION OF APPROPRIATIONS TO THE SECRETARY OF HEALTH AND HUMAN SERVICES.—To carry out the purposes of section 107(b), there are authorized to be appropriated to the Secretary of Health and Human Services $5,000,000 for fiscal year 2001 and $10,000,000 for fiscal year 2002.

(c) AUTHORIZATION OF APPROPRIATIONS TO THE SECRETARY OF STATE.—

(1) ASSISTANCE FOR VICTIMS IN OTHER COUNTRIES.—To carry out the purposes of section 107(a), there are authorized to be appropriated to the Secretary of State $5,000,000 for fiscal year 2001 and $10,000,000 for fiscal year 2002.

(2) VOLUNTARY CONTRIBUTIONS TO OSCE.—To carry out the purposes of section 109, there are authorized to be appropriated to the Secretary of State $300,000 for voluntary contributions to advance projects aimed at preventing trafficking, promoting respect for human rights of trafficking victims, and assisting the Organization for Security and Cooperation in Europe participating states in related legal reform for fiscal year 2001.

(3) PREPARATION OF ANNUAL COUNTRY REPORTS ON HUMAN RIGHTS.—To carry out the purposes of section 104, there are authorized to be appropriated to the Secretary of State such sums as may be necessary to include the additional information required by that section in the annual Country Reports on Human Rights Practices, including the preparation and publication of the list described in subsection (a)(1) of that section.

"(1) IN GENERAL.—A remedy under this section is in addition to any other remedies provided by law.

"(2) STATE COURT PROCEEDINGS.—Nothing in this section may be construed to prohibit an authorized State official from proceeding in State court on the basis of an alleged violation of any State law.

27 USC 122b.

"SEC. 3. GENERAL PROVISIONS.

"(a) EFFECT ON INTERNET TAX FREEDOM ACT.—Nothing in this section may be construed to modify or supersede the operation of the Internet Tax Freedom Act (47 U.S.C. 151 note).

"(b) INAPPLICABILITY TO SERVICE PROVIDERS.—Nothing in this section may be construed to—

"(1) authorize any injunction against an interactive computer service (as defined in section 230(f) of the Communications Act of 1934 (47 U.S.C. 230(f)) used by another person to engage in any activity that is subject to this Act;

"(2) authorize any injunction against an electronic communication service (as defined in section 2510(15) of title 18, United States Code) used by another person to engage in any activity that is subject to this Act; or

"(3) authorize an injunction prohibiting the advertising or marketing of any intoxicating liquor by any person in any case in which such advertising or marketing is lawful in the jurisdiction from which the importation, transportation or other conduct to which this Act applies originates.".

27 USC 122a note.

(b) EFFECTIVE DATE.—This section and the amendments made by this section shall become effective 90 days after the date of the enactment of this Act.

Deadline. 27 USC 122a note.

(c) STUDY.—The Attorney General shall carry out the study to determine the impact of this section and shall submit the results of such study not later than 180 days after the enactment of this Act.

Approved October 28, 2000.

LEGISLATIVE HISTORY—H.R. 3244:

HOUSE REPORTS: Nos. 106–487, Pt. 1 (Comm. on International Relations) and Pt. 2 (Comm. on the Judiciary) and 106–939 (Comm. of Conference).

CONGRESSIONAL RECORD, Vol. 146 (2000):

May 9, considered and passed House.

July 27, considered and passed Senate, amended.

Oct. 6, House agreed to conference report.

Oct. 11, Senate agreed to conference report.

WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS, Vol. 36 (2000):

Oct. 28, Presidential statement.

Appendix L:
TVPRA

Public Law 108–193
108th Congress

An Act

To authorize appropriations for fiscal years 2004 and 2005 for the Trafficking Victims Protection Act of 2000, and for other purposes.

Dec. 19, 2003
[H.R. 2620]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Trafficking Victims Protection Reauthorization Act of 2003. 22 USC 7101 note.

SECTION 1. SHORT TITLE.

This Act may be cited as the "Trafficking Victims Protection Reauthorization Act of 2003".

22 USC 7101 note.

SEC. 2. FINDINGS.

Congress finds the following:

(1) Trafficking in persons continues to victimize countless men, women, and children in the United States and abroad.

(2) Since the enactment of the Trafficking Victims Protection Act of 2000 (division A of Public Law 106–386), the United States Government has made significant progress in investigating and prosecuting acts of trafficking and in responding to the needs of victims of trafficking in the United States and abroad.

(3) On the other hand, victims of trafficking have faced unintended obstacles in the process of securing needed assistance, including admission to the United States under section 101(a)(15)(T)(i) of the Immigration and Nationality Act.

(4) Additional research is needed to fully understand the phenomenon of trafficking in persons and to determine the most effective strategies for combating trafficking in persons.

(5) Corruption among foreign law enforcement authorities continues to undermine the efforts by governments to investigate, prosecute, and convict traffickers.

(6) International Law Enforcement Academies should be more fully utilized in the effort to train law enforcement authorities, prosecutors, and members of the judiciary to address trafficking in persons-related crimes.

SEC. 3. ENHANCING PREVENTION OF TRAFFICKING IN PERSONS.

President.

(a) BORDER INTERDICTION, PUBLIC INFORMATION PROGRAMS, AND COMBATING INTERNATIONAL SEX TOURISM.—Section 106 of the Trafficking Victims Protection Act of 2000 (22 U.S.C. 7104) is amended—

(1) by redesignating subsection (c) as subsection (f);

(2) by inserting after subsection (b) the following new subsections:

"(c) BORDER INTERDICTION.—The President shall establish and carry out programs of border interdiction outside the United States.

Such programs shall include providing grants to foreign nongovernmental organizations that provide for transit shelters operating at key border crossings and that help train survivors of trafficking in persons to educate and train border guards and officials, and other local law enforcement officials, to identify traffickers and victims of severe forms of trafficking, and the appropriate manner in which to treat such victims. Such programs shall also include, to the extent appropriate, monitoring by such survivors of trafficking in persons of the implementation of border interdiction programs, including helping in the identification of such victims to stop the cross-border transit of victims. The President shall ensure that any program established under this subsection provides the opportunity for any trafficking victim who is freed to return to his or her previous residence if the victim so chooses.

"(d) INTERNATIONAL MEDIA.—The President shall establish and carry out programs that support the production of television and radio programs, including documentaries, to inform vulnerable populations overseas of the dangers of trafficking, and to increase awareness of the public in countries of destination regarding the slave-like practices and other human rights abuses involved in trafficking, including fostering linkages between individuals working in the media in different countries to determine the best methods for informing such populations through such media.

"(e) COMBATING INTERNATIONAL SEX TOURISM.—

"(1) DEVELOPMENT AND DISSEMINATION OF MATERIALS.—The President, pursuant to such regulations as may be prescribed, shall ensure that materials are developed and disseminated to alert travelers that sex tourism (as described in subsections (b) through (f) of section 2423 of title 18, United States Code) is illegal, will be prosecuted, and presents dangers to those involved. Such materials shall be disseminated to individuals traveling to foreign destinations where the President determines that sex tourism is significant.

"(2) MONITORING OF COMPLIANCE.—The President shall monitor compliance with the requirements of paragraph (1).

Deadline.

"(3) FEASIBILITY REPORT.—Not later than 180 days after the date of the enactment of the Trafficking Victims Protection Reauthorization Act of 2003, the President shall transmit to the Committee on International Relations of the House of Representatives and the Committee on Foreign Affairs of the Senate a report that describes the feasibility of such United States Government materials being disseminated through public-private partnerships to individuals traveling to foreign destinations."; and

(3) in subsection (f) (as redesignated), by striking "initiatives described in subsections (a) and (b)" and inserting "initiatives and programs described in subsections (a) through (e)".

(b) TERMINATION OF CERTAIN GRANTS, CONTRACTS AND COOPERATIVE AGREEMENTS.—Section 106 of such Act (as amended by subsection (a)) is further amended by adding at the end the following new subsection:

"(g) TERMINATION OF CERTAIN GRANTS, CONTRACTS AND COOPERATIVE AGREEMENTS.—

"(1) TERMINATION.—The President shall ensure that any grant, contract, or cooperative agreement provided or entered into by a Federal department or agency under which funds described in paragraph (2) are to be provided to a private entity, in whole or in part, shall include a condition that authorizes the department or agency to terminate the grant, contract, or cooperative agreement, without penalty, if the grantee or any subgrantee, or the contractor or any subcontractor (i) engages in severe forms of trafficking in persons or has procured a commercial sex act during the period of time that the grant, contract, or cooperative agreement is in effect, or (ii) uses forced labor in the performance of the grant, contract, or cooperative agreement.

"(2) ASSISTANCE DESCRIBED.—Funds referred to in paragraph (1) are funds made available to carry out any program, project, or activity abroad funded under major functional budget category 150 (relating to international affairs).".

SEC. 4. ENHANCING PROTECTION FOR TRAFFICKING VICTIMS.

(a) AMENDMENTS TO TRAFFICKING VICTIMS PROTECTION ACT OF 2000.—

(1) COOPERATION BETWEEN FOREIGN GOVERNMENTS AND NONGOVERNMENTAL ORGANIZATIONS.—Section 107(a)(1)(B) of the Trafficking Victims Protection Act of 2000 (22 U.S.C. 7105(a)(1)(B)) is amended by adding at the end before the period the following: ", and by facilitating contact between relevant foreign government agencies and such nongovernmental organizations to facilitate cooperation between the foreign governments and such organizations".

(2) ASSISTANCE FOR FAMILY MEMBERS OF VICTIMS OF TRAFFICKING IN UNITED STATES.—Section 107(b)(1) of the Trafficking Victims Protection Act of 2000 (22 U.S.C. 7105(b)(1)) is amended—

(A) in subparagraph (A), by inserting ", or an alien classified as a nonimmigrant under section 101(a)(15)(T)(ii)," after "in persons"; and

(B) in subparagraph (B)—

(i) by inserting "and aliens classified as a nonimmigrant under section 101(a)(15)(T)(ii)," after "United States,"; and

(ii) by adding at the end the following new sentence: "In the case of nonentitlement programs funded by the Secretary of Health and Human Services, such benefits and services may include services to assist potential victims of trafficking in achieving certification and to assist minor dependent children of victims of severe forms of trafficking in persons or potential victims of trafficking.".

(3) CERTIFICATION OF VICTIMS OF A SEVERE FORM OF TRAFFICKING IN PERSONS.—Section 107(b)(1)(E) of the Trafficking Victims Protection Act of 2000 (22 U.S.C. 7105(b)(1)(E)) is amended by adding at the end the following new clause:

"(iv) ASSISTANCE TO INVESTIGATIONS.—In making the certification described in this subparagraph with respect to the assistance to investigation or prosecution described in clause (i)(I), the Secretary of Health and Human Services shall consider statements from State and local law enforcement officials that the person referred to in subparagraph (C)(ii)(II) has been willing to assist in every reasonable way with respect to the investigation and prosecution of State and local crimes such as kidnapping, rape, slavery, or other forced labor offenses, where severe forms of trafficking appear to have been involved.''.

(4) PRIVATE RIGHT OF ACTION.—

(A) IN GENERAL.—Chapter 77 of part I of title 18, United States Code, is amended by adding at the end the following new section:

''§ 1595. Civil remedy

''(a) An individual who is a victim of a violation of section 1589, 1590, or 1591 of this chapter may bring a civil action against the perpetrator in an appropriate district court of the United States and may recover damages and reasonable attorneys fees.

''(b)(1) Any civil action filed under this section shall be stayed during the pendency of any criminal action arising out of the same occurrence in which the claimant is the victim.

''(2) In this subsection, a 'criminal action' includes investigation and prosecution and is pending until final adjudication in the trial court.''.

(B) CONFORMING AMENDMENT.—The table of contents of chapter 77 of part I of title 18, United States Code, is amended by adding at the end the following new item:

''1595. Civil remedy.''.

(b) AMENDMENTS TO IMMIGRATION AND NATIONALITY ACT.—

(1) NONIMMIGRANT ALIEN CLASSES.—Section 101(a)(15)(T) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(15)(T)) is amended—

(A) in clause (i)(III)(bb), by striking ''15 years of age,'' and inserting ''18 years of age,''; and

(B) in clause (ii)(I), by inserting ''unmarried siblings under 18 years of age on the date on which such alien applied for status under such clause,'' before ''and parents''.

(2) ADMISSION OF NONIMMIGRANTS.—Section 214(n) of the Immigration and Nationality Act (8 U.S.C. 1184(n)) is amended—

(A) in paragraph (3), by inserting ''siblings,'' before ''or parents''; and

(B) by adding at the end the following:

''(4) An unmarried alien who seeks to accompany, or follow to join, a parent granted status under section 101(a)(15)(T)(i), and who was under 21 years of age on the date on which such parent applied for such status, shall continue to be classified as a child for purposes of section 101(a)(15)(T)(ii), if the alien attains 21 years of age after such parent's application was filed but while it was pending.

''(5) An alien described in clause (i) of section 101(a)(15)(T) shall continue to be treated as an alien described in clause (ii)(I) of such section if the alien attains 21 years of age after the alien's application for status under such clause (i) is filed but while it is pending.

''(6) In making a determination under section 101(a)(15)(T)(i)(III)(aa) with respect to an alien, statements from State and local law enforcement officials that the alien has complied with any reasonable request for assistance in the investigation or prosecution of crimes such as kidnapping, rape, slavery, or other forced labor offenses, where severe forms of trafficking in persons (as defined in section 103 of the Trafficking Victims Protection Act of 2000) appear to have been involved, shall be considered.”.

(3) ADJUSTMENT OF STATUS.—Section 245(l) of the Immigration and Nationality Act (8 U.S.C. 1255(l)) (as added by section 107(f) of Public Law 106–386) is amended—

(A) in paragraph (1)—

(i) by striking “admitted under that section” and inserting “admitted under section 101(a)(15)(T)(ii)”; and

(ii) by inserting “sibling,” after “parent,”; and

(B) in paragraph (3)(B), by inserting “siblings,” after “daughters,”.

(4) EXEMPTION FROM PUBLIC CHARGE GROUND FOR INADMISSIBILITY.—Section 212(d)(13) of the Immigration and Nationality Act (8 U.S.C. 1182(d)(13)), as added by section 107(e)(3) of the Trafficking Victims Protection Act of 2000 (22 U.S.C. 7105(e)(3)), is amended—

(A) in subparagraph (A), by striking the period at the end and adding the following:

“, except that the ground for inadmissibility described in subsection (a)(4) shall not apply with respect to such a nonimmigrant.”; and

(B) in subparagraph (B)—

(i) by amending clause (i) to read as follows:

“(i) subsection (a)(1); and”; and

(ii) in clause (ii)—

(I) by striking “such subsection” and inserting “subsection (a)”; and

(II) by inserting “(4),” after “(3),”.

(5) AGGRAVATED FELONY DEFINED.—Section 101(a)(43)(K)(iii) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(43)(K)(iii)) is amended to read as follows:

“(iii) is described in any of sections 1581–1585 or 1588–1591 of title 18, United States Code (relating to peonage, slavery, involuntary servitude, and trafficking in persons);”.

SEC. 5. ENHANCING PROSECUTIONS OF TRAFFICKERS.

(a) SEX TRAFFICKING OF CHILDREN OR BY FORCE, FRAUD, OR COERCION.—Section 1591 of title 18, United States Code, is amended—

(1) in the heading, by inserting a comma after “**FRAUD**”;

(2) in subsection (a)(1), by striking “in or affecting interstate commerce” and inserting “in or affecting interstate or foreign commerce, or within the special maritime and territorial jurisdiction of the United States”; and

(3) in subsection (b), by striking “the person transported” each place it appears and inserting “the person recruited, enticed, harbored, transported, provided, or obtained”.

(b) DEFINITION OF RACKETEERING ACTIVITY.—Section 1961(1)(A) of title 18, United States Code, is amended by striking “sections 1581–1588 (relating to peonage and slavery)” and inserting “sections 1581–1591 (relating to peonage, slavery, and trafficking in persons).”.

(c) CONFORMING AMENDMENTS.—(1) The heading for chapter 77 of part I of title 18, United States Code, is amended to read as follows:

“CHAPTER 77—PEONAGE, SLAVERY, AND TRAFFICKING IN PERSONS”.

(2) The table of contents for part I of title 18, United States Code, is amended in the item relating to chapter 77 to read as follows:

“77. Peonage, slavery, and trafficking in persons”.

SEC. 6. ENHANCING UNITED STATES EFFORTS TO COMBAT TRAFFICKING.

(a) REPORT.—

(1) IN GENERAL.—Section 105(d) of the Victims of Trafficking and Violence Protection Act of 2000 (22 U.S.C. 7103(d)) is amended by adding at the end the following new paragraph:

Deadline.

“(7) Not later than May 1, 2004, and annually thereafter, the Attorney General shall submit to the Committee on Ways and Means, the Committee on International Relations, and the Committee on the Judiciary of the House of Representatives and the Committee on Finance, the Committee on Foreign Relations, and the Committee on the Judiciary of the Senate, a report on Federal agencies that are implementing any provision of this division, or any amendment made by this division, which shall include, at a minimum, information on—

“(A) the number of persons who received benefits or other services under section 107(b) in connection with programs or activities funded or administered by the Secretary of Health and Human Services, the Secretary of Labor, the Board of Directors of the Legal Services Corporation, and other appropriate Federal agencies during the preceding fiscal year;

“(B) the number of persons who have been granted continued presence in the United States under section 107(c)(3) during the preceding fiscal year;

“(C) the number of persons who have applied for, been granted, or been denied a visa or otherwise provided status under section 101(a)(15)(T)(i) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(15)(T)(i)) during the preceding fiscal year;

“(D) the number of persons who have been charged or convicted under one or more of sections 1581, 1583, 1584, 1589, 1590, 1591, 1592, or 1594 of title 18, United States Code, during the preceding fiscal year and the sentences imposed against each such person;

“(E) the amount, recipient, and purpose of each grant issued by any Federal agency to carry out the purposes of sections 106 and 107 of this Act, or section 134 of the Foreign Assistance Act of 1961, during the preceding fiscal year;

“(F) the nature of training conducted pursuant to section 107(c)(4) during the preceding fiscal year; and

“(G) the activities undertaken by the Senior Policy Operating Group to carry out its responsibilities under section 105(f) of this division.”.

(2) CONFORMING AMENDMENT.—Section 107(b)(1) of the Victims of Trafficking and Violence Protection Act of 2000 (22 U.S.C. 7105(b)(1)) is amended by striking subparagraph (D).

(b) SUPPORT FOR THE TASK FORCE.—

(1) AMENDMENT.—The second sentence of section 105(e) of the Victims of Trafficking and Violence Protection Act of 2000 (22 U.S.C. 7103(e)) is amended by inserting at the end before the period the following: ", who shall be appointed by the President, by and with the advice and consent of the Senate, with the rank of Ambassador-at-Large". President.

(2) APPLICABILITY.—The individual who holds the position of Director of the Office to Monitor and Combat Trafficking of the Department of State may continue to hold such position notwithstanding the amendment made by paragraph (1). 22 USC 7103 note.

(c) SENIOR POLICY OPERATING GROUP.—

(1) AMENDMENT.—Section 105 of the Victims of Trafficking and Violence Protection Act of 2000 (22 U.S.C. 7103) is amended by adding at the end the following new subsection:

"(f) SENIOR POLICY OPERATING GROUP.—

"(1) ESTABLISHMENT.—There shall be established within the executive branch a Senior Policy Operating Group.

"(2) MEMBERSHIP; RELATED MATTERS.—

"(A) IN GENERAL.—The Operating Group shall consist of the senior officials designated as representatives of the appointed members of the Task Force (pursuant to Executive Order No. 13257 of February 13, 2002).

"(B) CHAIRPERSON.—The Operating Group shall be chaired by the Director of the Office to Monitor and Combat Trafficking of the Department of State.

"(C) MEETINGS.—The Operating Group shall meet on a regular basis at the call of the Chairperson.

"(3) DUTIES.—The Operating Group shall coordinate activities of Federal departments and agencies regarding policies (including grants and grant policies) involving the international trafficking in persons and the implementation of this division.

"(4) AVAILABILITY OF INFORMATION.—Each Federal department or agency represented on the Operating Group shall fully share all information with such Group regarding the department or agency's plans, before and after final agency decisions are made, on all matters relating to grants, grant policies, and other significant actions regarding the international trafficking in persons and the implementation of this division.

"(5) REGULATIONS.—Not later than 90 days after the date of the enactment of the Trafficking Victims Protection Reauthorization Act of 2003, the President shall promulgate regulations to implement this section, including regulations to carry out paragraph (4).". Deadline. President.

(2) CONFORMING AMENDMENT.—Section 406 of the Department of State and Related Agency Appropriations Act, 2003 (as contained in division B of Public Law 108–7) is hereby repealed. 22 USC 7103 note.

(d) MINIMUM STANDARDS FOR THE ELIMINATION OF TRAFFICKING.—Section 108(b) of the Victims of Trafficking and Violence Protection Act of 2000 (22 U.S.C. 7106(b)) is amended—

(1) in paragraph (1)—

(A) by striking "that take place wholly or partly within the territory of the country" and inserting ", and convicts and sentences persons responsible for such acts, that take place wholly or partly within the territory of the country"; and

(B) by adding at the end the following new sentences: "After reasonable requests from the Department of State for data regarding investigations, prosecutions, convictions, and sentences, a government which does not provide such data, consistent with the capacity of such government to obtain such data, shall be presumed not to have vigorously investigated, prosecuted, convicted or sentenced such acts. During the periods prior to the annual report submitted on June 1, 2004, and on June 1, 2005, and the periods afterwards until September 30 of each such year, the Secretary of State may disregard the presumption contained in the preceding sentence if the government has provided some data to the Department of State regarding such acts and the Secretary has determined that the government is making a good faith effort to collect such data.";

(2) in paragraph (7)—

(A) by striking "and prosecutes" and inserting ", prosecutes, convicts, and sentences"; and

(B) by adding at the end the following new sentence: "After reasonable requests from the Department of State for data regarding such investigations, prosecutions, convictions, and sentences, a government which does not provide such data consistent with its resources shall be presumed not to have vigorously investigated, prosecuted, convicted, or sentenced such acts. During the periods prior to the annual report submitted on June 1, 2004, and on June 1, 2005, and the periods afterwards until September 30 of each such year, the Secretary of State may disregard the presumption contained in the preceding sentence if the government has provided some data to the Department of State regarding such acts and the Secretary has determined that the government is making a good faith effort to collect such data.".

(3) by adding the following new paragraphs at the end:

"(8) Whether the percentage of victims of severe forms of trafficking in the country that are non-citizens of such countries is insignificant.

"(9) Whether the government of the country, consistent with the capacity of such government, systematically monitors its efforts to satisfy the criteria described in paragraphs (1) through (8) and makes available publicly a periodic assessment of such efforts.

"(10) Whether the government of the country achieves appreciable progress in eliminating severe forms of trafficking when compared to the assessment in the previous year.".

(e) SPECIAL WATCH LIST.—Section 110(b) of the Trafficking Victims Protection Act of 2000 (22 U.S.C. 7107(b)) is amended—

(1) by redesignating paragraph (3) as paragraph (4); and

(2) by inserting after paragraph (2) the following new paragraph:

"(3) SPECIAL WATCH LIST.—

"(A) SUBMISSION OF LIST.—Not later than the date on which the determinations described in subsections (c) and (d) are submitted to the appropriate congressional committees in accordance with such subsections, the Secretary of State shall submit to the appropriate congressional committees a list of countries that the Secretary determines requires special scrutiny during the following year. The list shall be composed of the following countries:

"(i) Countries that have been listed pursuant to paragraph (1)(A) in the current annual report and were listed pursuant to paragraph (1)(B) in the previous annual report.

"(ii) Countries that have been listed pursuant to paragraph (1)(B) pursuant to the current annual report and were listed pursuant to paragraph (1)(C) in the previous annual report.

"(iii) Countries that have been listed pursuant to paragraph (1)(B) pursuant to the current annual report, where—

"(I) the absolute number of victims of severe forms of trafficking is very significant or is significantly increasing;

"(II) there is a failure to provide evidence of increasing efforts to combat severe forms of trafficking in persons from the previous year, including increased investigations, prosecutions and convictions of trafficking crimes, increased assistance to victims, and decreasing evidence of complicity in severe forms of trafficking by government officials; or

"(III) the determination that a country is making significant efforts to bring themselves into compliance with minimum standards was based on commitments by the country to take additional future steps over the next year.

"(B) INTERIM ASSESSMENT.—Not later than February 1st of each year, the Secretary of State shall provide to the appropriate congressional committees an assessment of the progress that each country on the special watch list described in subparagraph (A) has made since the last annual report. Deadline.

"(C) RELATION OF SPECIAL WATCH LIST TO ANNUAL TRAFFICKING IN PERSONS REPORT.—A determination that a country shall not be placed on the special watch list described in subparagraph (A) shall not affect in any way the determination to be made in the following year as to whether a country is complying with the minimum standards for the elimination of trafficking or whether a country is making significant efforts to bring itself into compliance with such standards.".

(f) ENHANCING UNITED STATES ASSISTANCE.—Section 134(b) of the Foreign Assistance Act of 1961 (22 U.S.C. 2152d(b)) is amended by adding at the end the following new sentence: "Assistance may be provided under this section notwithstanding section 660 of this Act.".

(g) RESEARCH RELATING TO TRAFFICKING IN PERSONS.—

(1) IN GENERAL.—The Victims of Trafficking and Violence Protection Act of 2000 (22 U.S.C. 7101 et seq.) is amended by inserting after section 112 the following new section:

President.
22 USC 7109a.

“SEC. 112A. RESEARCH ON DOMESTIC AND INTERNATIONAL TRAFFICKING IN PERSONS.

“The President, acting through the Council of Economic Advisors, the National Research Council of the National Academies, the Secretary of Labor, the Secretary of Health and Human Services, the Attorney General, the Secretary of State, the Administrator of the United States Agency for International Development, and the Director of Central Intelligence, shall carry out research, including by providing grants to nongovernmental organizations, as well as relevant United States Government agencies and international organizations, which furthers the purposes of this division and provides data to address the problems identified in the findings of this division. Such research initiatives shall, to the maximum extent practicable, include, but not be limited to, the following:

“(1) The economic causes and consequences of trafficking in persons.

“(2) The effectiveness of programs and initiatives funded or administered by Federal agencies to prevent trafficking in persons and to protect and assist victims of trafficking.

“(3) The interrelationship between trafficking in persons and global health risks.”.

(2) CONFORMING AMENDMENT.—The table of contents of the Victims of Trafficking and Violence Protection Act of 2000 is amended by inserting after the item relating to section 112 the following new item:

“Sec. 112A. Research on domestic and international trafficking in persons.”.

(h) SANCTIONS AND WAIVERS.—Section 110(d) of the Trafficking Victims Protection Act of 2000 (22 U.S.C. 7107(d)) is amended—

(1) in paragraph (4), by inserting after “nonhumanitarian, nontrade-related foreign assistance” the following: “or funding for participation in educational and cultural exchange programs”; and

(2) in paragraph (5)(A)(i), by inserting after “foreign assistance” the following: “or funding for participation in educational and cultural exchange programs”.

(i) SUBSEQUENT WAIVER AUTHORITY.—Section 110 of the Trafficking Victims Protection Act of 2000 (22 U.S.C. 7107) is amended by adding at the end the following new subsection:

“(f) After the President has made a determination described in subsection (d)(1) with respect to the government of a country, the President may at any time make a determination described in paragraphs (4) and (5) of subsection (d) to waive, in whole or in part, the measures imposed against the country by the previous determination under subsection (d)(1).”.

SEC. 7. AUTHORIZATION OF APPROPRIATIONS; RELATED MATTERS.

Section 113 of the Trafficking Victims Protection Act of 2000 (22 U.S.C. 7110) is amended—

(1) in subsection (a)—

(A) by striking “105” and inserting “105(e), 105(f)”; and

(B) by striking “and $3,000,000 for each of the fiscal years 2002 and 2003” and inserting “, $3,000,000 for each of the fiscal years 2002 and 2003, and $5,000,000 for each of the fiscal years 2004 and 2005”;

(2) in subsection (b), by adding at the end before the period the following: "and $15,000,000 for each of the fiscal years 2004 and 2005";

(3) in subsection (c)—

(A) in paragraph (1) to read as follows:

"(1) BILATERAL ASSISTANCE TO COMBAT TRAFFICKING.—

"(A) PREVENTION.—To carry out the purposes of section 106, there are authorized to be appropriated to the Secretary of State $10,000,000 for each of the fiscal years 2004 and 2005.

"(B) PROTECTION.—To carry out the purposes of section 107(a), there are authorized to be appropriated to the Secretary of State $15,000,000 for fiscal year 2003 and $10,000,000 for each of the fiscal years 2004 and 2005.

"(C) PROSECUTION AND MEETING MINIMUM STANDARDS.—To carry out the purposes of section 134 of the Foreign Assistance Act of 1961, there are authorized to be appropriated $10,000,000 for each of the fiscal years 2004 and 2005 to assist in promoting prosecution of traffickers and otherwise to assist countries in meeting the minimum standards described in section 108 of this Act, including $250,000 for each such fiscal year to carry out training activities for law enforcement officers, prosecutors, and members of the judiciary with respect to trafficking in persons at the International Law Enforcement Academies."; and

(B) in paragraph (2), by striking "for each of the fiscal years 2001, 2002, and 2003" and inserting "for each of the fiscal years 2001 through 2005";

(4) in subsection (d)—

(A) by adding at the end before the period the following: "and $15,000,000 for each of the fiscal years 2004 and 2005"; and

(B) by adding at the end the following new sentence: "To carry out the purposes of section 134 of the Foreign Assistance Act of 1961 (as added by section 109), there are authorized to be appropriated to the President, acting through the Attorney General and the Secretary of State, $250,000 for each of fiscal years 2004 and 2005 to carry out training activities for law enforcement officers, prosecutors, and members of the judiciary with respect to trafficking in persons at the International Law Enforcement Academies.";

(5) in subsection (e)—

(A) in paragraphs (1) and (2), by striking "for fiscal year 2003" each place it appears and inserting "for each of the fiscal years 2003 through 2005"; and

(B) by adding at the end the following new paragraph:

"(3) RESEARCH.—To carry out the purposes of section 112A, there are authorized to be appropriated to the President $300,000 for fiscal year 2004 and $300,000 for fiscal year 2005.";

(6) in subsection (f), by adding at the end before the period the following: "and $10,000,000 for each of the fiscal years 2004 and 2005"; and

(7) by adding at the end the following new subsection:

"(g) LIMITATION ON USE OF FUNDS.—

"(1) RESTRICTION ON PROGRAMS.—No funds made available to carry out this division, or any amendment made by this division, may be used to promote, support, or advocate the legalization or practice of prostitution. Nothing in the preceding sentence shall be construed to preclude assistance designed to promote the purposes of this Act by ameliorating the suffering of, or health risks to, victims while they are being trafficked or after they are out of the situation that resulted from such victims being trafficked.

"(2) RESTRICTION ON ORGANIZATIONS.—No funds made available to carry out this division, or any amendment made by this division, may be used to implement any program that targets victims of severe forms of trafficking in persons described in section 103(8)(A) of this Act through any organization that has not stated in either a grant application, a grant agreement, or both, that it does not promote, support, or advocate the legalization or practice of prostitution. The preceding sentence shall not apply to organizations that provide services to individuals solely after they are no longer engaged in activities that resulted from such victims being trafficked.".

SEC. 8. TECHNICAL CORRECTIONS.

(a) IMMIGRATION AND NATIONALITY ACT.—

(1) CLASSES OF NONIMMIGRANT ALIENS.—Section 101(a)(15) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(15)) is amended—

(A) by moving the margins of subparagraphs (T) and (U) 2 ems to the left;

(B) in subparagraph (T), by striking "214(n)," and inserting "214(o),";

(C) in subparagraph (U), by striking "214(o)," and inserting "214(p),"; and

(D) in subparagraph (V), by striking "214(o)," and inserting "214(q),".

(2) CLASSES OF ALIENS INELIGIBLE FOR VISAS AND ADMISSION.—Section 212(d) of the Immigration and Nationality Act (8 U.S.C. 1182(d)) is amended by redesignating the paragraph (13) added by section 1513(e) of the Battered Immigrant Women Protection Act of 2000 (title V of division B of Public Law 106–386; 114 Stat. 1536) as paragraph (14).

(3) ADMISSION OF NONIMMIGRANTS.—Section 214 of the Immigration and Nationality Act (8 U.S.C. 1184) is amended by redesignating subsections (m) (as added by section 105 of Public Law 106–313), (n) (as added by section 107(e) of Public Law 106–386), (o) (as added by section 1513(c) of Public Law 106–386), (o) (as added by section 1102(b) of the Legal Immigration Family Equity Act), and (p) (as added by section 1503(b) of the Legal Immigration Family Equity Act) as subsections (n), (o), (p), (q), and (r), respectively.

(4) ADJUSTMENT OF STATUS OF NONIMMIGRANTS.—Section 245 of the Immigration and Nationality Act (8 U.S.C. 1255) is amended—

(A) in the subsection (l) added by section 107(f) of Public Law 106–386, by redesignating the second paragraph (2), and paragraphs (3) and (4), as paragraphs (3), (4), and (5), respectively; and

(B) by redesignating the subsection (l) added by section 1513(f) of Public Law 106–386 as subsection (m).

(b) TRAFFICKING VICTIMS PROTECTION ACT OF 2000.—(1) Section 103(7)(A)(i) of the Trafficking Victims Protection Act of 2000 (22 U.S.C. 7102(7)(A)(i)) is amended by inserting after "part II of that Act" the following: "in support of programs of nongovernmental organizations".

(2) Section 107(g) of the Trafficking Victims Protection Act of 2000 (22 U.S.C. 7105(g)) is amended by striking "214(n)(1)" and inserting "214(o)(2)".

Approved December 19, 2003.

LEGISLATIVE HISTORY—H.R. 2620:

HOUSE REPORTS: No. 108–264, Pt. 1 (Comm. on International Relations) and Pt. 2 (Comm. on the Judiciary).

CONGRESSIONAL RECORD, Vol. 149 (2003):

Nov. 4, 5, considered and passed House.

Dec. 9, considered and passed Senate.

NO. _____________

IN THE COURT OF APPEALS FOR THE
FIRST OR FOURTEENTH DISTRICT OF TEXAS

In re FACEBOOK, INC. AND FACEBOOK, INC. d/b/a INSTAGRAM

On Appeal from the 334TH District Court of
Harris County, Texas, Case Nos. 2018-69816 and 2018-82214

RECORD IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS

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EMF US 77068930v2

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Jane Doe 1 **(Cause No. 2018-69816)**

Respectfully submitted,

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ATTORNEYS FOR RELATOR FACEBOOK, INC.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was served on the following counsel of record for Real Parties in Interest, Jane Doe 1 and Jane Doe 2, via electronic transmission on October 24, 2019:

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Additionally, Respondent was served by hand delivery, at the following address:

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Harris County Civil Courthouse
201 Caroline, 14th Floor
Houston, TX 77002

/s/ Scott A. Brister
Scott A. Brister

VERIFICATION

STATE OF TEXAS §
§
COUNTY OF DALLAS §

BEFORE ME, the undersigned authority, on this day personally appeared Russell H. Falconer, a person whose identity is known to me, and after being duly sworn and upon oath stated as follows:

1. "My name is Russell H. Falconer. I am above the age of twenty-one (21) years, I am fully competent to testify to the matters stated herein, and I have personal knowledge of the facts stated herein. I am one of the counsel for Relator in the above-captioned cause.

2. The Relator's Record in Support of Petition for Writ of Mandamus has been prepared at my direction to accompany the Petition for Writ of Mandamus. The documents contained in the Mandamus Record are true and correct copies of the originals.

3. I have reviewed the Petition for Writ of Mandamus and confirm that every factual statement in the petition is supported by competent evidence in the Relator's Record and the Appendix attached to the Petition."

Further Affiant Sayeth Not.

SIGNED this the 18th day of October, 2019.

Russell H. Falconer

SWORN TO and SUBSCRIBED before me by Russell H. Falconer, this 18th day of October, 2019, to certify which witness my hand and seal of office.

Diana P. Thorn

Notary Public in and for
The State of Texas

DIANA P. THORN
My Notary ID # 128862578
Expires January 26, 2020

A

Cause No. 2018-69816

JANE DOE	In the District Court of
v.	
FACEBOOK, INC.; MICHAEL LACEY; JAMES LARKIN; JOHN BRUNST; AMERICA'S INNS, INC. d/b/a AMERICA'S INN 8201 SOUTHC EST FC Y, HOUSTON, TX 77074; and TEXAS PEARL, INC.	334th Judicial District
	Harris County, Texas

PLAINTIFF'S THIRD AMENDED PETITION

TO THE HONORABLE JUDGE OF SAID COURT:

Comes Now, JANE DOE Plaintiff in the above-styled and numbered cause, complaining of FACEBOOK, INC.; MICHAEL LACEY; JAMES LARKIN; JOHN BRUNST; AMERICA'S INNS, INC. d/b/a AMERICA'S INN 8201 SOUTHC EST FC Y, HOUSTON, TX 77074; and TEXAS PEARL, INC as Defendants, and respectfully shows the Court as follows:

SUMMARY OF CASE

1. Social media companies, websites, and the hotel industry should never place their quest for profits above the public good. Human trafficking has hit epidemic proportions in our communities, and it has had a devastating effect on the victims and a crushing financial effect on our world. Driven by profit, social media giants like Facebook and sex brokers like Backpage have treated children as a commodity.

2. The participants in this venture of abuse share a value—profit. And the bottom line comes before all else—including the safety of children in our community. Facebook's profit metric is "connections." Backpage charged fees to broker sex. And hotels, like the one in this lawsuit, look the other way while children, like Jane Doe, are abused, exploited, and made available for sex acts to multiple perpetrators.

3. While pimps and sex buyers are sometimes criminally prosecuted, the social media companies, hotel industry, and Backpage have been able to escape taking responsibility for the harms and losses they cause these victims and our community. For years, businesses have been providing predators unrestricted means to prey on victims. Not anymore.

Discovery Control Plan

4. Jane Doe intends to conduct discovery pursuant to Texas Rule of Civil Procedure 190.4 (Level 3).

Parties

A. Plaintiff

5. Jane Doe is and was at all relevant times a resident of Harris County, Texas.

6. Jane Doe is a trafficked person as defined by Texas Civil Practice & Remedies Code § 98.

7. Jane Doe is a minor sex trafficking victim as defined under Texas Civil Practice & Remedies Code § 16.0045 and therefore is entitled to a 15 year statute of limitations on all claims.

B. Facebook

8. Facebook is a foreign corporation, incorporated in Delaware and with its headquarters and principal place of business in California.

9. Facebook has conducted business in Texas.

10. Facebook maintains offices in Texas.

11. Facebook targets Texas as a marketplace for its business.

12. Facebook has made an appearance in this lawsuit.

C. The Backpage Defendants

13. Defendant Michael Lacey is a natural person.

14. At all relevant times, Lacey transacted business in Texas, including in Harris County, Texas.

15. Lacey may be served at **3300 E. Stella Lane, Paradise Valley, Arizona 85253**, or wherever he may be found.

16. Defendant James Larkin is a natural person.

17. At all relevant times, Larkin transacted business in Texas.

18. Larkin may be served at **5555 N. Casa Blanca Drive, Paradise Valley, Arizona 85253**, or wherever he may be found.

19. Defendant John Brunst is a natural person.

20. At all relevant times, Brunst transacted business in Texas, including in Harris County, Texas.

21. Brunst may be served at **5830 East Calle Del Medio Phoenix Arizona 85018**, or wherever he may be found.

22. Lacey, Larkin, and Brunst, are referred to jointly as "The Backpage Defendants."

C.1. Alter Ego

23. To the extent any of the Backpage Defendants assert that they are not liable for the claims of Jane Doe because of their status as a business entity, or because they were acting on behalf of another person or business entity, any such protections must be disregarded because the Backpage Defendants have intentionally tried to use those protections to avoid liability for their knowingly illegal conduct, including profiting from conduct that they knew was illegal. The only way to prevent an unjustified loss to Jane Doe is to hold each of the Backpage Defendants liable and to disregard any protections that might otherwise be available because of the effort by the Backpage Defendants to abuse those protections. This is particularly true where the Backpage Defendants have taken significant profits from conduct that they know is illegal, yet they would attempt to use those protections in order to avoid any liability or accountability for their knowingly illegal conduct, and for knowingly accepting illegal profits. It is black letter law that individuals and entities, including corporate officers and owners, may be held liable if they participate in wrongful conduct or have

knowledge of wrongful conduct and approve of the wrongful conduct. Each of the Backpage Defendants knew all of the facts that are alleged in this complaint, including the fact they were accepting significant profits from the illegal advertisements for sex on the Backpage website, including the advertisements for sex of Jane Doe, a minor.

24. To the extent any of the Backpage Defendants assert that they are not liable for the claims of the Backpage Defendants because of their status as a business entity, or because they were acting on behalf of another person or business entity, any such protections must be disregarded because the Backpage Defendants are the alter ego of one another. The Backpage Defendants tried to use a wide range of entities to deflect the fact that a few individuals and entities owned and controlled the Backpage website and took the profits from its illegal operations. There has been such unity of ownership and interest that the separateness of the corporation has ceased to exist.

D. THE HOTEL DEFENDANTS

25. Defendant America's Inns, Inc. d/b/a America's Inn 8201 Southwest Fwy, Houston, TX 77074 ("America's Inn") is a Delaware corporation.

26. America's Inn is authorized to do business in Texas and systematically conducts business in Texas and in Harris County, Texas.

27. America's Inn has been served and has made an appearance in this case.

28. Defendant Texas Pearl, Inc. ("Texas Pearl") is a Texas corporation, with its headquarters and principal place of business in Texas.

29. At all relevant times, Texas Pearl owned, operated, and controlled the America's Inn hotel at 8201 Southwest Fwy, Houston, Texas 77074.

30. Texas Pearl has been served and has made an appearance in this case.

31. America's Inns and Texas Pearl are referred to jointly as "The Hotel Defendants."

E. RATIFICATION/VICARIOUS LIABILITY

32. The use of Facebook and the Backpage website for the advertising, grooming and recruitment of minors for sex was so pervasive and known to Facebook and the Backpage Defendants that it cannot be said such conduct was so unforeseen as to prevent Facebook and the Backpage Defendants from being liable for such conduct. Rather, Facebook and the Backpage Defendants knowingly aided, facilitated and assisted sex traffickers, including the sex trafficker who recruited Jane Doe from Facebook and posted the advertisements of Jane Doe on the Backpage website. Facebook and the Backpage Defendants knowingly benefited from this illegal and immoral activity.

33. Facebook and the Backpage Defendants are therefore liable for the conduct of the sex traffickers on Facebook and the Backpage website, including the sex trafficker who posted advertisements of Jane Doe because they ratified this conduct and knowingly reaped the benefits. Facebook and the Backpage Defendants knew that the sex traffickers were sexually abusing and exploiting children, yet did nothing because of their financial motive. Given these circumstances, Facebook and the Backpage Defendants should be held vicariously liable for the actions of the sex traffickers, including the sex trafficker of Jane Doe.

VENUE & JURISDICTION

34. Venue is proper in Harris County, Texas pursuant to section 15.002(a)(1) of the Texas Civil Practice & Remedies Code, because a substantial part of the acts and omissions that gave rise to the sexual exploitation, human trafficking, and sexual assault of Jane Doe, a minor, occurred in Harris County, Texas.

35. Plaintiff further adopts and incorporates all other factual allegations contained elsewhere in this petition in support of its venue allegations.

36. Venue is proper as to all Defendants under Texas Civil Practice & Remedies Code § 15.005.

37. Jane Doe alleges damages in excess of $10,000, and jurisdiction is proper in this Court.

Jurisdictional Facts Regarding Facebook, Inc.

38. Facebook, Inc. (hereinafter referred to as "Facebook") provides social networking services to more Americans than any other social networking service;

39. Minors have been sexually exploited through Facebook on multiple occasions in Texas.

40. Facebook has reported instances of child abuse occurring in Texas to the National Center for Missing and Exploited Children (NCMEC).

41. Facebook has reported instances of sexual assault of a child occurring in Texas to the National Center for Missing and Exploited Children (NCMEC).

42. Facebook has reported instances of child human trafficking occurring in Texas to the National Center for Missing and Exploited Children (NCMEC).

43. Facebook has responded to Texas law enforcement subpoenas regarding the trafficking of minors in Texas.

44. Facebook has provided information to Texas law enforcement agencies regarding the trafficking of minors in Texas.

45. Facebook has monitored content on Facebook regarding the sexual exploitation of minors in Texas.

46. Facebook has monitored the content on Facebook regarding the human trafficking of minors in Texas.

47. Facebook has accessed user information of Texas residents.

48. Facebook has accessed user information of Texas residents and provided that information to third party marketing companies.

49. Facebook has responded to civil subpoenas from law firms in Texas regarding Facebook users in Texas.

50. Facebook has reviewed messages on Facebook of Texas based users.

51. Facebook has blocked Texas based users on Facebook for explicit content, including that involving the sexual exploitation of minors.

52. Child pornography has been exchanged via Facebook users in Texas.

53. Facebook has pulled down child pornography from Facebook users in Texas.

54. Facebook has investigated the sexual exploitation of minors in Texas on Facebook.

55. Facebook has investigated the human trafficking of minors in Texas on Facebook.

56. Facebook has sought protection from Texas Courts regarding responses to subpoenas issued in civil lawsuits involving Texas residents.

57. Facebook has sought protection from Texas Courts regarding responses to subpoenas issued in criminal proceedings in Texas.

58. Facebook has millions of users in Texas on the Facebook platform.

59. Facebook sells information collected by Texas residents to third party vendors.

60. Facebook targets customers in Texas.

61. Facebook targets businesses in Texas.

62. Facebook targets potential employees in Texas. These include, but are not limited to, managers, moderators, accountants, design specialist, IT support, lawyers, clerks, receptionists, financial advisors, insurance companies, sanitation engineers, purchasing agents, leasing agents, human resources specialists, and other employees who are integral to Facebook's operations throughout Texas and the United States.

63. Facebook hires employees from Texas who reside in Texas.

64. Facebook fires employees from Texas who reside in Texas.

65. Facebook targets investors in Texas.

66. Facebook has investors who live in Texas.

67. Facebook has retained attorneys who reside in Texas.

68. Facebook currently has employees who are from and reside in Texas.

69. Facebook signs contracts with Texas businesses.

70. Facebook sends advertisements to Texas customers and advertise its services to Texas Customers.

71. Facebook pays taxes in Texas.

72. Facebook derives substantial revenue from Texas.

73. Facebook has trademarks that it enforces in Texas.

74. Facebook has hired independent contractors in Texas.

75. Facebook has ultimate control over this website.

76. This website is accessible in Texas.

77. Facebook has assisted and facilitated the trafficking of Jane Doe and other minors on Facebook..

78. Facebook has received payment for goods and services from banks in Texas.

79. Facebook makes payments to banks in Texas.

80. Facebook does business in Texas;

81. Facebook generates revenue from its business in Texas;

82. Facebook is registered to do business in Texas;[1]

[1] Even if Facebook was not subject to specific personal jurisdiction in Texas (it is), Facebook consented to general jurisdiction when it registered to do business here. Facebook registered to do business in Texas. By registering to do business in Texas, Facebook purposefully availed itself of the rights and privileges of the State of Texas. Therefore, based on more-than-a-century-old precedent from the United States Supreme Court, Facebook has consented to and is thus subject to general jurisdiction in Texas. *Pennsylvania Fire Ins. Co. of Philadelphia v. Gold Issue Min. & Mill. Co.*, 243 U.S. 93, 96, 37 S. Ct. 344, 345, 61 L. Ed. 610 (1917)("[W]hen a power actually is conferred by a document, the party executing it takes the risk of the interpretation that may be put upon it by the courts. The execution was the defendant's voluntary act.").

83. Facebook has a registered agent for service in Texas;

84. Facebook's business in Texas is social networking;

85. Facebook has millions of users in Texas.

Facebook's Business Model Targets Texas, Including Minors in Texas

86. Facebook's social media website allows users to create personalized webpages that contain information about themselves, including identifying information, photographs, videos, interests, recent activities, and links to content from other websites;

87. Once a user joins Facebook, they can engage with other Facebook users in a number of ways, including by adding those users as "friends" and providing feedback to content provided by other users by "sharing," "liking" (i.e. applying a tag that is shared with other users), or commenting on that content;

88. Facebook users are able to view their contacts' activities on the website, including both information posted by those contacts as well as their contacts' interactions with other users and content;

89. Facebook users are also able to create "groups" with other users, which allows multiple users to join a shared website which has its own profile and information;

90. Members of a Facebook group can view, interact with, and share content posted in these group forums;

91. Facebook collects data as to its users' activities through the website, including but not limited to information regarding contacts and group associations, content that users post and interact with, and use of third party websites;

92. Using proprietary algorithms, Facebook generates targeted recommendations for each user, promoting content, websites, advertisements, users, groups, and events that may appeal to a user based on their usage history;

93. Each Facebook user has a personalized experience on Facebook;

94. No two Facebook users have the exact same experience on Facebook;

95. Facebook features (such as suggestions) allow users an option to opt-out if they don't want to use them;

96. If Facebook users do not opt-out, then they are automatically enrolled in Facebook's default programs;

97. Facebook has the ability to change its opt-out option to an opt-in option;

98. An opt-in option would require affirmative action on the part of a user before Facebook could enroll users in Facebook's programs;

99. Facebook made a conscious decision to use opt-out as opposed to opt-in for its programs and features;

100. Data gathered from Facebook's proprietary software allows Facebook to recommend content;

101. Data gathered from Facebook's proprietary software allows Facebook to recommend friends;

102. Data gathered from Facebook's proprietary software allows Facebook to recommend groups;

103. Data gathered from Facebook's proprietary software allows Facebook to recommend 3rd party apps;

104. Facebook allows advertisers to use data gathered from Facebook's proprietary software to target specific customers and demographics;

105. Facebook is aware that minors use its platform and advertise to minors using its platform;

106. One of the largest target segments for advertisers on facebook is children between 13 and 17.

107. Facebook profits off advertisements directed towards minors in Texas on its platform;

108. Facebook recognizes that minors face more foreseeable risk from misuse of Facebook than adult users;

109. Facebook has taken precautions specific to child users between the age of 13-17;

110. Facebook has taken precautions specific to child users between the age of 13-17 in the State of Texas;

111. Jane Doe has alleged she was a Facebook user between the age of 13-17 in Texas;

112. Facebook connects users with other individuals and groups based on projected common interests, activities, contacts, and patterns of usage;

113. Facebook connects minor users between the age of 13-17 with other users;

114. Facebook connects minor users between the age of 13-17 with users who over the age of 18;

115. Facebook connects minor users in Texas between the age of 13-17 with other users;

116. Facebook connects minor users in Texas between the age of 13-17 with users who over the age of 18;

117. Facebook presents users with content posted by other users, groups, and third parties (e.g., advertisers) that is likely to be of interest to them, again based on prior usage history;

118. Facebook measures use of its platforms based on the number of Daily Average Users (DAUs) of each of its platforms, including but not limited to Facebook;

119. Facebook measures use of its platforms based on the number of Monthly Average Users (MAUs) of each of its platforms, including but not limited to Facebook;

120. Facebook generates reports of its users' demographics;

121. Facebook generates reports of its DAUs that break down DAUs by demographics;

122. Facebook generates reports of its MAUs that break down MAUs by demographics;

123. Location of users by country is a demographic is a demographic tracked and used by Facebook;

124. Location of United States Facebook users by region (e.g., Northwest, Northeast, Southwest, etc.) is a demographic tracked and used by Facebook;

125. Location of United States Facebook users by State is a demographic tracked and used by Facebook;

126. Location of United States Facebook users by city is a demographic tracked and used by Facebook;

127. Location of United States Facebook users by zip code is a demographic tracked and used by Facebook;

128. Location of United States Facebook users by telephonic area codes is a demographic tracked and used by Facebook;

129. Facebook has the ability to identify a user's physical location through a user's IP address;

130. Facebook does not require a user to provide a physical address to open a Facebook account;

131. Facebook does not require a user to provide a home state location to open a Facebook account;

132. Facebook could require a user to provide a physical address to open a Facebook account;

133. Facebook could require a user to provide the state in which the user resides to open a Facebook account;

134. Facebook is available to people over the age of 13;

135. Facebook is aware that it has minor users;

136. Facebook is aware that it has minor users in Texas;

137. Facebook made a conscious decision to allow minor users, including in Texas;

138. Facebook targets customers/users in Texas;

139. Facebook targets minor users in Texas;

140. Facebook targets businesses in Texas;

141. Facebook generates revenue from its social networking business in Texas;

142. Facebook pays taxes to the State of Texas on the revenue generated by Facebook's social networking business in Texas;

143. Facebook has trademarks related to its social networking business that it enforces in Texas;

144. Facebook has hired independent contractors to work on its social networking business in Texas;

145. Facebook has provided information to Texas law enforcement agencies regarding the trafficking of minors in Texas.;

146. Facebook has monitored content on its platforms regarding the sexual exploitation of minors in Texas;

147. Facebook has monitored the content on its platforms regarding the human trafficking of minors in Texas;

148. Facebook has accessed user information, including but not limited to users who are below the age of majority, of Texas residents;

149. Facebook has accessed user information of Texas residents and provided that information to third party marketing companies;

150. Jane Doe has alleged that Facebook has assisted and facilitated the trafficking of Jane Doe and other minors in Texas;

151. Jane Doe has alleged that Facebook has permitted sex traffickers unfiltered access to the most vulnerable members of our society;

152. Jane Doe has alleged that Facebook has continually been used to facilitate human trafficking by allowing sex traffickers an unrestricted platform to stalk, exploit, recruit, groom, recruit, and extort children into the sex trade;

153. Jane Doe has alleged that Facebook is now the first point of contact between sex traffickers and child victims;

154. An article titled "Sex Traffickers Are Using Social Media to Target Children" contains the following quotes from Inspector Jim Klein, commander of the NYPD's Vice Enforcement Unit:

> "These predators are watching, and they're listening. They're friending. They're seeing, 'Oh, she's not happy with school,' 'Oh, he's upset against his parents,' 'Oh, he has issues with his sexuality,' or, 'She's having problems with her friends.'"
>
> "Next thing you know, these predators pick up on this, and they start becoming friendly to the point they're now separating these victims from everybody that's important to them."
>
> "We've had cases where our pimps are . . . friends with [their victims'] relatives, and they're posting about pimping out girls and making money[.]".

155. Mark Zuckerberg is the CEO of Facebook;

156. Mr. Zuckerberg provided testimony to Congress in his capacity as CEO; and

157. All of Mr. Zuckerberg's Congressional testimony was truthful.

158. Facebook publishes "Community Standards" for its platform.

159. Facebook's "Community Standards" are specifically designed to promote safety:

> The goal of our Community Standards is to encourage expression and create a safe environment. We base our policies on input from our community and from experts in fields such as technology and public safety. Our policies are also rooted in the following principles:
>
> 
>
> **Safety:** People need to feel safe in order to build community. We are committed to removing content that encourages real-world harm, including (but not limited to) physical, financial, and emotional injury.

160. Facebook's "Community Standards" specifically identify potential sources of harm as human trafficking and organized criminal activity:

> **2. Dangerous Individuals and Organizations**
>
> In an effort to prevent and disrupt real-world harm, we do not allow any organizations or individuals that proclaim a violent mission or are engaged in violence, from having a presence on Facebook. This includes organizations or individuals involved in the following:
>
> - Terrorist activity
> - Organized hate
> - Mass or serial murder
> - Human trafficking
> - Organized violence or criminal activity
>
> We also remove content that expresses support or praise for groups, leaders, or individuals involved in these activities.

161. Facebook's "Community Standards" specifically identify and recognize the sexual exploitation of minors.

> ### 7. Child Nudity and Sexual Exploitation of Children
>
> We do not allow content that sexually exploits or endangers children. When we become aware of apparent child exploitation, we report it to the National Center for Missing and Exploited Children (NCMEC), in compliance with applicable law. We know that sometimes people share nude images of their own children with good intentions; however, we generally remove these images because of the potential for abuse by others and to help avoid the possibility of other people reusing or misappropriating the images.
>
> We also work with external experts, including the Facebook Safety Advisory Board, to discuss and improve our policies and enforcement around online safety issues, especially with regard to children.

162. Facebook recognizes that sexual solicitation occurs on its platform and draws the line at content that "facilitates, encourages or coordinates sexual encounters between adults":

> ### 15. Sexual Solicitation
>
> As noted in Section 8 of our Community Standards (Sexual Exploitation of Adults), people use Facebook to discuss and draw attention to sexual violence and exploitation. We recognize the importance of and want to allow for this discussion. We draw the line, however, when content facilitates, encourages or coordinates sexual encounters between adults. We also restrict sexually explicit language that may lead to solicitation because some audiences within our global community may be sensitive to this type of content and it may impede the ability for people to connect with their friends and the broader community.

163. Facebook recognizes the risk to minor users and sexual exploitation, but Facebook does not "draw any lines" on content that "facilitates, encourages or coordinates sexual encounters" between adults and minor users.

164. Facebook can, and does, require photo identification for certain users, such as political advertisers:

What types of ID does Facebook accept?

Share Article

If you need to confirm your name on Facebook, or if you've lost access to your account, you may be asked to send us a copy of something with your name on it. You have several different options for this, including photo IDs issued by the government, IDs from non-government organizations, official certificates or licenses that include your name or other physical items like a magazine subscription or a piece of mail.

In a narrow set of abuse prevention scenarios, specific forms of government-issued ID may be required. For example, users that wish to run ads with political content must confirm their identity by providing specific government-issued ID.

Learn more about what happens to your ID after you send it to Facebook.

165. Facebook does not require photo identification for minor users.

166. Facebook does not require photo identification for adult users who friend minor users.

167. Based upon the facts above, as well as those in the facts section of this petition, this Court has specific personal jurisdiction over Facebook. Specific personal jurisdiction is proper over Facebook because Facebook marketed its platform in Texas and actively sought out Texas as a marketplace for its platform (i.e. product).[2] Moreover, the sexual exploitation and harm that came from the misuse of Facebook's platform that forms the basis of this suit occurred in Texas.[3]

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[2] "The stream-of-commerce cases relate to exercises of specific jurisdiction in products liability actions, in which a nonresident defendant, acting outside the forum, places in the stream of commerce a product that ultimately causes harm inside the forum. Many state long-arm statutes authorize courts to exercise specific jurisdiction over manufacturers when the events in suit, or some of them, occurred within the forum State. ... Flow of a manufacturer's products into the forum may bolster an affiliation germane to ***specific*** jurisdiction." *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2849 (2011) (citing *see, e.g., World–Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297, 100 S.Ct. 559, 62 L.Ed.2d 490).

[3] In order for a court to exercise specific jurisdiction over a claim, there must be **an** "affiliation between the forum and the underlying controversy, principally, **[an]** activity or an occurrence that takes place in the forum State." *Bristol-Myers Squibb Co.v. Superior Court of California,* 137 S. Ct. 1773, 1778, 198 L. Ed. 2d 395 (2017).

FACTUAL BACKGROUND

A. ALLEGATIONS REGARDING FACEBOOK

168. With each passing day, the gateway to our community's children is increasingly social media—and Facebook through its Facebook Platform in particular.

169. Facebook targets minors for its services. This includes allowing any child above the age of 13 full and complete access to Facebook while forbidding adult supervision.

170. People, including children, connecting with their friends, family, and communities are not the only ones passing through Facebook's gateway.

171. For years now, Facebook has permitted sex traffickers unfiltered access to the most vulnerable members of our society while actively blocking parental access to Facebook accounts.

172. It has continually been used to facilitate human trafficking by allowing sex traffickers an unrestricted platform to stalk, exploit, recruit, groom, and extort children into the sex trade.

173. Facebook is now the first point of contact between sex traffickers and these children.

174. Jim Klien, the commander of New York Police Department's Vice Enforcement Unit, explained how sex traffickers work on Facebook's platform:

> "These predators are watching and they're listening. They're friending. They're seeing 'oh she is upset at her parents' … next thing you know, these predators become friendly and separate the victims from everyone who is important to them."

175. Facebook not only provides an unrestricted platform for these sex traffickers to target children, but it also cloaks the traffickers with credibility.

176. Cathie Bledsoe, with the Indiana State Police Internet Crimes Against Children Task Force, detailed how traffickers "friend" a victim's real acquaintances, like people from the same middle and high schools, thereby providing credibility when approaching the victim through "shared" friends.

177. The FBI has joined New York and Indiana in shining a light on the dangers of social media by warning Americans that "online friendships on social networking can mean online peril" and in calling for safeguards for social media users.

178. The largest of the social media goliaths responsible for this danger is Facebook. Every day, over 1.4 billion people use Facebook—more than four times the population of the United States. Through this large sphere of influence, Facebook has accumulated a net worth of approximately $500 billion dollars.

179. Facebook has long viewed its company mission to connect people in order to create profit.

180. In his June 18, 2016, memo, Andrew Bosworth, a Facebook VP, laid out Facebook's "ugly truth:"

> So we connect … people.
>
> That can be bad if they make it negative. Maybe it costs a life by exposing someone to bullies. Maybe someone dies in a terrorist attack coordinated on our tools.
>
> And still we connect people….
>
> That isn't something we are doing for ourselves. Or for our stock price (ha!). It is literally just what we do. We connect people. Period.
>
> That's why all the work we do in growth is justified. All the questionable contact importing practices. All the subtle language that helps people stay searchable by friends. All of the work we do to bring more communication in…. All of it.

181. "Make no mistake," Bosworth added, "growth tactics are how we got here."

182. As Mark Zuckerberg testified before Congress, Facebook's single-minded focus on growth was a grave mistake: "The broadest mistake made was not taking a broad enough view of Facebook's responsibility to the community and content."

183. Zuckerberg continued, “it is not enough to just give people a voice. We [Facebook] need to make sure that people aren’t using it to harm other people or to spread misinformation. Across the board we have a responsibility to not just build tools, but to make sure they’re used for good.”[4]

184. Facebook knows it has a duty to warn its most vulnerable users about human trafficking. In a power point from its January 29, 2019 “Content Standards Forum,” Facebook noted that “[m]any experts believe that we have a responsibility to educate the public about the nature of human trafficking.”[5]

185. But recognizing its duty and failures has come too late. Facebook has long ignored and continues to ignore its obligation to its online community of the dangers of human trafficking on its website.

186. Facebook has the tools and resources to warn its most vulnerable users about the human trafficking. It obtains detailed information about its users through users’ use of its platforms and from detailed dossiers obtained from commercial data brokers about users’ offline lives. ProPublica explained:

> Every time a Facebook member likes a post, tags a photo, updates their favorite movies in their profile, posts a comment about a politician, or changes their relationship status, Facebook logs it. When they browse the Web, Facebook collects information about pages they visit that contain Facebook sharing buttons. When they use Facebook or WhatsApp on their phone, which are both owned by Facebook, they contribute more data to Facebook’s dossier.
>
> And in case that wasn’t enough, Facebook also buys data about its users’ mortgages, car ownership and shopping habits from some of the biggest commercial data brokers.

187. Facebook reports that it can target users “based on a variety of factors including age, gender, location, interests, and behaviors.”[6] To do so, Facebook classifies its users into over 1,300

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[4] Testimony of Mark Zuckerberg, Facebook Chairman and CEO, Hearing before the U.S. Senate Committees on the Judiciary and Commerce, Science and Transportation, April 10, 2018.

[5] https://fbnewsroomus.files.wordpress.com/2018/11/csf-final-deck_01.29.19.pdf

[6] https://www.sec.gov/Archives/edgar/data/1326801/000132680119000009/fb-12312018x10k.htm

categories. The categories are not just related to gender, age, or shopping habits but include categories such as "Away from Family."[7]

188. Facebook uses algorithms to categorize its users into tens of thousands of micro-targetable groups. Facebook can use its categories to micro-target groups "such as 40-year-old female motorcyclists in Nashville, Tennessee, (Facebook audience estimate: 1,300 people)."[8]

189. Facebook uses this information to sell ads that "enable marketers to reach people based on a variety of factors including age, gender, location, interests, and behaviors. Marketers purchase ads that can appear in multiple places including on Facebook, Facebook, Messenger, and third-party applications and websites."[9]

190. Facebook also uses the detailed information it collects and buys on its users to direct users to persons they likely want to meet. In doing so, Facebook facilitates human trafficking by identifying potential targets, like Jane Doe, and connecting traffickers with those individuals.

191. Although it knows its system facilitates human traffickers in identifying and cultivating victims, and it knows it has the capacity to target ads to specific groups, Facebook does not target warnings to its most vulnerable users.

192. Facebook did not exercise reasonable care when it made general statements about illegal or dangerous third-party content on its platform.

193. Facebook's system enabled Jane Doe's traffickers to target her. Facebook had extensive information about Jane Doe and knew she was a likely target for trafficking. Yet Facebook did not target warnings to Jane Doe about how its system helps traffickers find targets like her or

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[7] https://www.propublica.org/article/breaking-the-black-box-what-facebook-knows-about-you

[8] https://www.propublica.org/article/help-us-monitor-political-ads-online

[9] https://www.sec.gov/Archives/edgar/data/1326801/000132680119000009/fb-12312018x10k.htm at p. 5.

about how traffickers lure victims through its platforms. As a result, Facebook increased the risk of harm to Jane Doe.

194. Facebook's acts and omissions—and its morally bankrupt corporate culture—already facilitated the sexual exploitation of Jane Doe and countless others.

195. Facebook has an obligation to safeguard and to warn its users, both through its online platform and otherwise—of the dangers of human traffickers using Facebook as a tool to entrap and enslave children into sex trafficking.

196. Facebook knows it is used to identify, cultivate, and then exploit human trafficking victims.

197. As noted by the University of Toledo Human Trafficking and Social Justice Institute, Social Media is increasingly being exploited to contact, recruit, and sell children for sex.

198. This study, conducted at the request of the Ohio Attorney General reveals how quickly traffickers target and connect with vulnerable children, such as Jane Doe through the internet.

199. The in-depth 2018 report notes that this epidemic is so pervasive that in 42% of the cases studied, the human trafficking victim was trafficked without having to meet their trafficker in person.

200. This is a result of trafficking techniques used by predators on these platforms who are provided unrestricted access to minors. Typically, these predators will reach out to underage girls all day, looking for minors to prey on.

201. These traffickers, once they identified their target minors, then engage in the "grooming process". This process includes strategic responses to the minor in an attempt to gain their trust, including but not limited to:

- I understand you
- I love you

- I think you're beautiful, I'll encourage you to show your body. Use your body
- I'll make your life better.
- I'll encourage you to take risks, you're an adult.
- I'll protect you.
- I'll make you successful.

202. Each of these phrases in messages raise red flags of inappropriate and abusive conduct towards minor children on Facebook. Even outside of a trafficking context, common sense dictates that red flags are raised when an adult male in his thirties tells a minor below the age of consent, "I love you," or "I think you are beautiful".

203. But to date, Facebook has failed to take any reasonable steps to mitigate the use of Facebook by human traffickers who recruit and exploit children on its platform. This includes but is not limited to: (a) requiring verification of the identity of Facebook users, (b) requiring minors to link their account to a parent or guardian's account, (c) implement filters that prevent adults over the age of 18 from communicating with minors under the age of 18; and (d) flagging buzzwords from those over 18 to minors under 18 that indicate human trafficking and blocking all further communications to that user.

204. This technology is not new to Facebook. For example, Facebook requires photographs of Government Identifications to verify government employees running campaigns.

205. Facebook furthermore started as a website requiring a verification process for users. Initially, Facebook was only accessible to members of Harvard. In 2004, this expanded to users from Yale, Stanford, and Columbia. It was not until Facebook saw the profit motive behind numerous users that Facebook dropped all verification requirements for users, which has been continued on its Facebook platform.

206. Moreover, Facebook has the technology to flag buzzwords in private messages and had this technology in 2015, which would have been available on Facebook.[10]

207. For example, in response to evidence that Facebook advertisers were using Facebook to illegally discriminate, Facebook began "test[ing] new technology that leverages machine learning to help [it] identify ads that offer housing, employment or credit opportunities." And it claimed to implement the following policy:

> When an advertiser attempts to show an ad that we identify as offering a housing, employment or credit opportunity and uses any other audience segment on Facebook, we will show the advertiser information about our updated anti-discrimination policy. We will then require the advertiser to certify that it is complying with that policy and with applicable anti-discrimination laws.[11]

208. To date, Facebook has failed to take reasonable steps to appropriately warn minors of the risk of sex trafficking posed by its platform.

209. In fact, Facebook has taken the opposite approach on Facebook and prevented adults from (a) gaining access to their minor child's Facebook or (b) requiring a minor child to have parental authorization for having an Facebook.

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[10] For example: Techniques that are designed to help infer a social media user's personality are discussed within U.S. Patent No. 9740752, titled *Determining User Personality Characteristics From Social Networking System Communications and Characteristics*. Issued to Facebook last August, it discloses a computer-implemented method of extracting linguistic data from communication between users of a communication network; retrieving a characteristic of the user from the user's profile on the communication network; applying a statistical model to the linguistic data and retrieved characteristic, the statistical model being determined by personality characteristics of a training set of users based on responses to surveys from those users; selecting personality characteristics for the user based on the characteristic being associated with a threshold value from the statistical model; storing the personality characteristic in the user's profile; and presenting content to the user based on the selected personality characteristic. As the patent's description notes, this system could be used to identify personality characteristics such as extroversion, agreeableness, conscientiousness, emotional stability and openness. However, it's not difficult to see how such a system could be utilized to determine the political views of an individual Facebook users.

[11] https://newsroom.fb.com/news/2017/02/improving-enforcement-and-promoting-diversity-updates-to-ads-policies-and-tools/

210. Facebook has not taken these steps to warn of human trafficking or mitigate its occurrence on Facebook's website based upon profit motivations. Facebook obtains its profits through users. If additional restrictions were placed on user accounts and what was required to become a user, numbers would drop.

211. This drop in user numbers would lead to decreased profits.

212. Facebook also has a strong financial incentive not to warn its most vulnerable users about human trafficking. In its January 2019 Annual 10-K report, Facebook stated that its companies "generate substantially all of our revenue from selling advertising placements to marketers. It acknowledged that the "size of our user base and our users' level of engagement are critical to our success." Significant risk factors to Facebook's business included:

- decreases in the quality and frequency of content shared on our products and services
- decreases in user sentiment due to questions about the quality or usefulness of our products or our user data practices, or concerns related to privacy and sharing, safety, security, well-being, or other factors

This is because marketers pay for Facebook's ad products "based on the number of impressions delivered or the number of actions, such as clicks, taken by users." "Impressions are considered delivered when an ad is displayed to a user." It receives revenue from action-based ads when "user takes the action the marketer contracted for." Facebook, therefore, reported: "If we are unable to maintain or increase our user base and user engagement, our revenue and financial results may be adversely affected."[12]

213. Because its profits derive from users of its products, Facebook has no incentive to warn users to be cautious about engaging with some of its users.

[12] https://www.sec.gov/Archives/edgar/data/1326801/000132680119000009/fb-12312018x10k.htm.

214. Facebooks also faces negligible risk in not warning its most vulnerable users about human trafficking. Facebook knows the Communications Decency Act protects it from liability for most private law claims.[13]

215. As early as 2003, in *Doe v. GTE Corp.*, Judge David Easterbrook asked: "Why should a law designed to eliminate [internet service providers'] liability to the creators of offensive material end up defeating claims by the victims of tortious or criminal conduct?" 347 F.3d 655, 660 (7th Cir. 2003). As a result, those claiming to be "internet service providers", like Facebook, face virtually no civil liability despite making an enormous profit of the use of their products; the internet "lacks any kind of sensible allocation of risk."[14]

216. Due to the financial benefit and limited risk of not acting, Facebook is unlikely to actually change its conduct as it relates to its products. Even when Facebook has been exposed to risk for its conduct, it has not changed its behavior. On April 24, 2019, Facebook announced that it expected to be fined between three and five billion dollars for violating a privacy consent decree related to allowing third parties to harvest user data without users' consent.[15]

217. Facebook and other supposed "internet service providers" argue that they need to be protected from civil liability. History suggests otherwise. "When courts began recognizing claims under Title VII for sexually hostile work environments, employers argued that the cost of liability would force them to shutter, and if not, would ruin the camaraderie of workspaces."[16] Most would agree that did not happen.

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[13] *See* https://www.sec.gov/Archives/edgar/data/1326801/000132680119000009/fb-12312018x10k.htm

[14] Danielle Keats Citron & Benjamin Wittes, *The Internet Will Not Break: Denying Bad Samaritans § 230 Immunity*, 86 Fordham L. Rev. 401, 421 (2017) (quoting Benjamin Wittes and Gabriella Blum, The Future of Violence: Robots and Germans, Hackers and Drones at p. 216 (2015)).

[15] https://www.sec.gov/Archives/edgar/data/1326801/000132680119000037/fb-03312019x10q.htm at p. 21; https://www.nytimes.com/2019/04/24/technology/facebook-ftc-fine-privacy.html

[16] Danielle Keats Citron & Benjamin Wittes, *The Internet Will Not Break: Denying Bad Samaritans § 230 Immunity*, 86 Fordham L. Rev. 401, 421 (2017)

THE INTERNET HAS CHANGED SINCE 1996

218. The Communication Decency Act was enacted in 1996. At that time, commercial service providers had roughly twelve million subscribers.[17] Seventy-seven percent of online users sent or received an email "at least once every few weeks."[18] The first commercial spam message was sent only two years prior by two lawyers with the subject "Green Card Lottery -Final One?"

219. By 1999, only forty-one percent of Americans were using the internet and the most popular online news was the weather.

220. The cybermarket place we know today was unimaginable in 1996. Amazon launched the year before the CDA was enacted. But by 2000, still only forty-eight percent of internet users had purchased a product online.

221. Online social networking sites did not exist in 1996. MySpace and LinkedIn were launched in 2003. Facebook was created in 2004.

222. The cyberworld continued to expand. In 2005, YouTube was founded, Twitter was created in 2006, and Apple released the first iPhone in 2007.[19]

223. In 2008, when only ten percent of American's had social media profiles,[20] the Ninth Circuit declared:

> The Internet is no longer a fragile new means of communication that could easily be smothered in the cradle by overzealous enforcement of laws and regulations applicable to brick-and-mortar businesses. Rather, it has become a dominant—perhaps the preeminent—means through which commerce is conducted. And its vast reach into the lives of millions is exactly why we must be careful not to exceed the scope of the immunity provided by Congress and thus give online businesses an unfair advantage over their real-world counterparts, which must comply with laws of general applicability.[21]

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[17] *Id.* at 411.

[18] https://www.pewinternet.org/2014/03/11/world-wide-web-timeline/

[19] *Id.*

[20] https://www.statista.com/statistics/273476/percentage-of-us-population-with-a-social-network-profile/

[21] *Fair Hous. Council of San Fernando Valley v. Roommates.Com, LLC*, 521 F.3d 1157, 1164 n. 15 (9th Cir. 2008).

By 2016, two thirds of Americans had smart phones and one in five Americans reported being on line *almost constantly*.[22] Today, seventy-nine percent of American's have a social media profile and utlize these products in their daily life.[23]

Jane Doe's entrapment on Facebook.

224. Jane Doe was a Facebook user in 2012 while she was 15 years old.

225. Jane Doe was friended by another Facebook user with whom she had several common friends. This Facebook Friend messaged Jane Doe through Facebook's messaging systems.

226. This Facebook friend was well over the age of 18.

227. The Facebook Friend told Jane Doe she was "pretty enough to be a model." The Facebook Friend made false promises regarding financial security and a better life through modeling.

228. Each of these phrases are red flags as identified by several well-known human trafficking studies, including the Ohio Attorney General. Facebook was aware that these sorts of messages were precisely the ones it should be warning against.

229. After Jane Doe had an argument with her mother, Jane Doe confided in the Facebook Friend. The Facebook Friend then offered Jane Doe a job as a model.

230. This series of messages fits the grooming behaviors that Facebook should have implemented safeguards and warnings to prevent.

231. This series of messages raises another major red flag in which Facebook was aware and should have contacted the authorities.

232. The Facebook Friend said Jane Doe could make enough money to pay the rent on her own apartment. The Facebook friend offered to pick her up and console her about her disagreement with her mother.

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[22] https://www.propublica.org/article/breaking-the-black-box-what-facebook-knows-about-you

[23] https://www.statista.com/statistics/273476/percentage-of-us-population-with-a-social-network-profile/

233. This series of messages raised another red flag that Jane Doe's safety and wellbeing were at risk. Facebook was aware that Jane Doe was in danger and failed to take any action to contact the proper authorities.

234. Furthermore, the content of these messages is precisely the pattern commonly engaged in by sex traffickers; Facebook knew of the dangers and did nothing to warn Jane Doe—or children like her—about how to recognize them.

235. Within hours of meeting the Facebook Friend, photos were taken of Jane Doe and were posted on Backpage, and then she was raped, beaten, and forced into further sex trafficking.

236. Jane Doe had never been made aware of the dangers of sex traffickers on Facebook.

237. Jane Doe had never been made aware of the warning signs of sex traffickers on Facebook.

238. If Jane Doe had known of the dangers of sex trafficking perpetrated through Facebook, she would not have been put in a position to be raped, abused, and trafficked by a user.

239. If Jane Doe had known how to recognize the warning signs of sex traffickers on Facebook, she would not have been put in a position to be raped, abused, and trafficked by a user.

240. Jane Doe would have followed the warnings provided by Facebook, had Facebook provided proper warnings.

241. In this case, an adult user ("King") used a name other than his given name (Trevon)[24] and was able to friend a minor user despite being an adult. Moreover, King's Facebook account is plastered with photos of scantily-clad young women in sexual positions with money stuffed in their month (a clear sign of trafficking), piles of cash, and other deeply troubling content. To Facebook, these are warning signs of human trafficking. But Jane Doe could not recognize the hallmarks of

[24] King similarly used a fake name for his last name, but out of privacy concerns for Jane Doe, it is not being disclosed at this time.

trafficking because Facebook never warned her. Thus, despite all these warning signs that "King" was a human trafficker, King was able to friend Jane Doe. From there, the horror story began for Jane Doe and hasn't ended.

242. While Facebook talks a good game, it utterly failed to implement the most basic of safety features that it advertises and promotes as a feature of its social media platform. To date, Facebook has taken no reasonable steps to mitigate the use of Facebook by sex traffickers or exploiters using its platform.

243. Millions of minors like Jane Doe remain at risk every day when they simply log onto Facebook. This is evident from numerous other similar incidents regarding minors being trafficked through Facebook.

B. ALLEGATIONS REGARDING THE BACKPAGE DEFENDANTS

B.1. Sex trafficking of minors has exploded due to the marketplace of sexual exploitation created by the Backpage website.

244. According to the United States Department of Homeland Security, in 2016, human trafficking and the sexual exploitation of minors generates billions of dollars each year in illegal proceeds, making it more profitable than any transnational crime except drug trafficking.

245. While precise data concerning the black-market trade is scarce, estimates are there were as many as 27 million victims of human trafficking and the sexual exploitation of minors worldwide in 2013—including 4.5 million people trapped in sexual exploitation. Too often, the victims of sex trafficking, including Jane Doe, are minors caused by any means into prostitution.

246. The United States Department of Justice has reported that more than half of the sex-trafficking victims are 17 years old or younger. In 2014, the National Center for Missing and Exploited Children reported an 846% increase from 2010 to 2015 in reports of suspected child sex trafficking—an increase the organization found to be "directly correlated to the increased use of the internet to sell children for sex." With the help of online advertising, traffickers can maximize profits,

evade law enforcement detection, and maintain control of victims by transporting them quickly between locations.

247. Both Texas and Houston have not escaped this horrific trend. Recent media reports indicate that Texas has the second highest number of calls to the National Human Trafficking Resources Center in the Nation. Moreover, as recent as 2015, Houston was found to have the highest number of trafficking victims in the nation.

248. Online advertising has transformed the commercial sex trade, and in the process has contributed to the explosion of domestic sex trafficking. Sex trafficking previously took place (and continues to through the aid of online advertising) on the streets, casinos, truck stops, and in other physical locations. Now, most child sex trafficking, including the trafficking of Jane Doe, occurred online.

249. The Backpage website is the leading online marketplace for human trafficking and the sexual exploitation of minors and commercial sex, including human trafficking and the sexual exploitation of minors. According to the United States Senate Permanent Subcommittee on Homeland Security and Government Affairs, Backpage is involved in 73% of all child trafficking reports that the National Center for Missing and Exploited Children receives from the general public (excluding reports by Backpage itself). The National Association of Attorneys General has aptly described the Backpage website as a "hub" of "human trafficking, especially the trafficking of minors."

250. The Backpage Defendants do not deny their site is used for criminal activity, including the sale of children for sex. As found by the United States Subcommittee Report, internal company documents show that Backpage has long maintained a practice of altering ads before publication by deleting words, phrases, and images indicative of child sex trafficking, and other sex trafficking, as well as "educating" users how to make illegal ads for prostitution appear as legal ads for escorts.

251. For example, on July 28, 2011, Backpage co-founder Larkin cautioned Backpage CEO Ferrer against publicizing the Backpage Defendants' moderation practices, explaining that "we need to stay away from the very idea of editing the posts, as you know."

252. Backpage had good reason to conceal its editing practices: Those practices served to sanitize the content of innumerable advertisements for illegal transactions, including those prostituting out and trafficking Jane Doe—even as the Backpage Defendants represented to the public and the courts that it merely hosted content others had created.

B.2. The Backpage Defendants' ad sanitization process proves they knew of their involvement in sex trafficking.

253. This practice by the Backpage Defendants of systematically editing its adult ads to conceal child human trafficking and the sexual exploitation of minors has been in effect for almost a decade. As early as 2008, the Backpage Defendants and their executives began instructing staff responsible for screening ads (known as moderators) to edit the text of adult ads to conceal the true nature of the underlying transaction.

254. By October 2010, the Backpage Defendants and their executives formalized a process of both manual and automated deletion of incriminating words and phrases, primarily through a feature called the "Strip Term from Ad Filter."

255. At the direction of CEO Ferrer, the company programmed this electronic filter to "strip"—that is, to delete—hundreds of words indicative of sex trafficking the sex trafficking of minors and prostitution from ads before their publication.

256. The terms that the Backpage Defendants have automatically deleted from ads before publication include "Lolita," "teenager," "rape," "young," "amber alert," "little girl," "teen," "fresh," "innocent," and "school girl."

257. When the user (such as Jane Doe's trafficker) submitted an adult ad containing one of these "stripped" words, the Backpage Defendants' Strip Term from Ad Filter would automatically delete the discrete word and the remainder of the ad would be published.

258. While the Strip Term from Ad Filter changed nothing about the true nature of the advertised transaction or the real age of the person being sold for sex (such as Jane Doe, who was 15 years old) the filter would scrub the ads so they looked (but were not) "cleaner than ever."

259. Manual editing entailed the deletion of language similar to the words and phrases that the Strip Term from Ad Filter automatically deleted—including terms indicative of the sexual exploitation and proposed sexual assault of minors, including Jane Doe. By The Backpage Defendants' themselves estimated that by late 2010, they were editing "70 to 80% of ads" in the adult section, whether manually or automatically.

260. Along with its automatic Strip Term Filter and Manual Editing, The Backpage Defendants also reprogrammed their electronic filters to coach human traffickers looking to exploit minors using Backpage on how to post "clean" ads selling minors and other victims, including Jane Doe, to be sexually assaulted.

261. Initially, when a user attempted to post an ad with a forbidden word, the user would receive an error message identifying the problematic word choice to "help" the user, as Backpage CEO Ferrer puts it. For example, a user advertising sex with a "teen" would get the error message "sorry, teen is a banned term." By simply redrafting the ad, the user would be permitted to post a sanitized version.

262. Backpage employed a similarly helpful error message in its "age verification" process of adult ads. In October 2011, Ferrer directed his technology consultant to create an error message when a user supplied an age under 18 years. The message would appear informing the trafficker that "Oops! Sorry, the ad poster must be over 18 years of age." With a quick adjustment to the poster's

age, the ad would post despite the fact that the advertisement was still that for the sexual exploitation and sexual assault of a minor.

263. In November 2010, Ferrer, along with the Backpage Defendants, concluded that the error message method of sanitizing minor and other sex trafficking advertisements on Backpage was inefficient when the customer themselves was responsible for redrafting the ad after the error message. Therefore, instead of having the human trafficker or exploiter posting an advertisement edit the ad after submission, Ferrer ordered Backpage to implement a system to "strip out a term after the customer submits the ad and before the ad appears in the moderation queue." This meant that upon the submission of an advertisement containing one of the banned words related to human trafficking or the sexual exploitation of minors, the banned word would be **automatically deleted** from the advertisement instantaneously **before** any moderator screening. After the term was automatically deleted due to the Strip Term from Ad Filter, the moderator would then be sent the advertisement and given the ability to continue to fix any other signs indicative of the sexual of minors. The Strip Term from Ad Filter concealed the illegal nature of countless ads, including those used to victimize and traffic Jane Doe, and systematically deleted words indicative of child sex trafficking and the sexual exploitation of minors before the ads even reached moderators.

264. This sanitization process described above was purposeful on the part of the Backpage Defendants or was undertaken with the knowledge that its sanitization process was encouraging and assisting human traffickers and exploiters to exploit minors and other victims, including Jane Doe.

265. The Senate Subcommittee Report found the Backpage Defendants and Backpage employees knew the adult section ads were for prostitution and that the moderators' job was to sanitize them. The Backpage Defendants also knew that advertisers used its site extensively for child sex trafficking. Despite this knowledge, the Backpage Defendants refused to act in a reasonable and

responsible manner to these complaints—but instead used the sanitization process to avoid potential criminal investigations and enhance sex traffickers' ability to exploit minors while going undetected.

266. Moreover, the Backpage Defendants did not implement the sanitation process on an ad hoc basis, but in a systematic manner that demonstrated a clear company policy to help human traffickers avoid law enforcement detection and continue the victimization and sexual assault of minors, including Jane Doe, and other young women against their will.

267. In December 2009, The Backpage Defendants and their executives prepared a training session for their team of moderators on the sanitization process. The PowerPoint presentation prepared for the session instructed moderators to fully implement the Adult Moderation pre-posting review queue by January 1, 2010.

268. Most importantly, the presentation explained that "Terms and code words indicating illegal activities require removal of ad or **words**. Backpage executives kept their word and formalized and fully implemented the company-wide sanitation process in early 2010. In April 2010, Ferrer emailed a note to himself with the subject line "Adult clean up tasks," Ferrer confirmed that as of April 2010, staff were "moderating ads on a 24/7 basis." In a section of the note, Ferrer noted that "Ads with bad images or bad test [sic—text] will have the image removed or the offending text removed." In a section titled "Additional Steps," Ferrer said "text" could be cleaned up more as users become more creative.

269. Ferrer and the Backpage Defendants did not just discuss ways to make the sanitization process of human trafficking and sexual exploitation of minor advertisements more effective, but actively engaged in updating the word bank of terms to make the adult section appear "cleaner than ever." For example, in a December 1, 2010, email addressed to Backpage moderators and Ferrer, Padilla stated:

> Between everyone's manual moderations, both in the queue and on the site, and the Strip Term from Ad Filters, things are cleaner than ever

> in the Adult section.
>
> …
>
> In an effort to strengthen the filters even more and avoid the repetitive task of manually removing the same phrases every day, every moderator starts making a list of phrases you manually remove on a regular basis?
>
> …
>
> Included in your lists should be popular misspellings of previously banned terms that are still slipping by.
>
> …
>
> To avoid unnecessary duplicates, I'm attaching a spreadsheet with the most current list of coded terms set to be stripped out.

270. The spreadsheet attached to Padilla's email indicates that the following words (among others) were automatically deleted from adult ads by the Strip Term from Ad Filter before ads were published:

- Lolita (and its misspelled variant, lollita)
- Teenage
- Rape
- Young

271. Moreover, multiple documents and communications from the Backpage Defendants demonstrate the inclusion of these and other terms in the Strip Term from Ad Filter. Over the course of the next several months, Backpage added additional words to the Strip Term from Ad Filter, including:

- Amber alert
- Little girl
- Teen
- Fresh
- Innocent
- School Girl

272. When a user submitted an adult ad containing one of the above forbidden words, the Backpage Defendants' Strip Term from Ad Filter would immediately delete the discrete word and

the remainder of the ad would be published after moderator review. Of course, the Strip Term from Ad Filter changed nothing about the real age of the person being sold for sex or the real nature of the advertised transaction. Nor was Backpage Defendants' goal to fix these things.

273. By July 2010, The Backpage Defendants were praising moderation staff for their editing efforts. Ferrer circulated an agenda for a July 2010 meeting of The Backpage Defendants' Phoenix staff and applauded moderators for their work on "adult content" and encouraging Backpage staff to keep up the good work. Ferrer elaborated in an August 2010 email that Backpage currently had a staff of 20 moderators working 24/7 to remove any sex act pictures and other code words for sex for money.

B.3. The Backpage Defendants sanitized, instead of deleting, ads that sexually exploited minors.

274. For a brief period in 2010, the Backpage Defendants appeared to have second thoughts about facilitating and encouraging human trafficking and the sexual exploitation of minors through the sanitation of Adult Page advertisements. In September of 2010, in response to pressure from Village Voice executives to "get the site as clean as possible," Backpage "empower[ed]" Phoenix-based moderators "to start deleting ads when the violations are extreme and repeated offenses." On September 4, 2010, when Craigslist, the company's chief competitor, shut down its entire adult section, the Backpage Defendants recognized it was "an opportunity" and "[a]lso a time when we need to make sure our content is not illegal due to expected public scrutiny" (note: not moral obligation to sexually exploited minors such as Jane Doe). The Backpage Defendants initially responded by expanding the list of forbidden terms that could trigger the complete deletion of an entire ad—whether by operation of an automated filter or by moderators. Despite finally taking a step in the right direction, the Backpage Defendants soon began to recognize that the deletion of ads with illegal content was bad for business. Ferrer explained his rational that ads should be sanitized instead of deleted to the company's outside technology consultant, DesertNet:

> We are in the process of removing ads and pissing off a lot of users who will migrate elsewhere. I would like to go back to having our moderators remove bad content in a post and then locking the post from being edited.

275. This more "consumer friendly" approach chosen by Ferrer and the Backpage Defendants was done in order to ensure that posts were sanitized in a way that avoided law enforcement detection and was used to "teach" the human trafficker or exploiter what they did wrong. This methodical and calculated decision made by the Backpage Defendants to focus all of its efforts on sanitizing instead of removing advertisements of human trafficking and sexual exploitation of minors was done solely for the Backpage Defendants' own financial gain and with complete disregard for the safety of victims, including Jane Doe.

276. Backpage also programmed the Strip Term from Ad Filter to strip scores of words indicative of prostitution and the sexual exploitation of minors from ads before publication. For ads submitted to the section advertising escorts for hire, the filter deleted words describing every imaginable sex act as well as common terms of the trade such as "full service," "Pay 2 Play," and "no limits." In addition, the Backpage Defendants programmed the filter to edit obvious prostitution price lists by deleting any time increments less than an hour (e.g. $50 for 15 minutes) and to strip references to a website called "The Erotic Review" or "TER"—a prominent online review site for prostitution.

277. **The Backpage Defendants designed the Strip Term from Ad Filter to delete, without a trace, hundreds of words and phrases indicative of prostitution from ads before their publication—cloaking those advertisements with the appearance of legality while concealing their true intent.**

278. By February 2011, Ferrer was boasting that the strip out sanitization system "affects almost every adult ad" on Backpage. Ferrer continued to boast that it was "pretty cool" to see how aggressively Backpage was using the strip out function to conceal the advertisements true purpose—human trafficking and the sexual exploitation of minors. The Backpage Defendants and their

executives continually praised the results of this extensive content-editing effort: "[T]he consensus is that we took a big step in the right direction" (by editing instead of deleting illegal advertisements), Ferrer told Backpage executive Padilla, and that the "content looks great" and The Backpage Defendants should keep their goal to "tame the content down even further while keeping good content and users."

279. The Backpage Defendants' internal company communications demonstrate the Backpage Defendants and their executives' actual knowledge that the purpose of Backpage's systematic editing was to sanitize prostitution and sexual exploitation of minors advertisements to avoid State and Law Enforcement repercussions against Backpage for encouraging and promoting human trafficking as well as the sexual assault and sexual exploitation of minors. As explained in an October 10, 2010 Backpage internal email from Padilla to Backpage moderators regarding Backpage's sanitation of adult ads: "it's the language in the ads that is really killing us with the Attorneys General." Similarly, Ferrer explained the need for a special "Clean Up" of Backpage's adult section in advance of a day on which he expected the "Attorney General investigators to be browsing for escorts."

B.4. The Backpage Defendants approved Backpage's facilitation of the sex trafficking of minors, including Jane Doe.

280. Ferrer personally directed and approved the addition of new words to the Strip Term from Ad Filter related to the trafficking and prostitution of underage victims. For example, Ferrer told Padilla in a November 17, 2011 email that the word "lolita" is code for under aged girl [sic]. A similar understanding led Ferrer to add the words "daddy" and "little girl" to the Strip Term from Ad Filter. In February 2011, CNN ran a story about a 13-year-old girl named Selena who was sold for sex on Backpage. The report noted that "suspect ads with taglines such as 'Daddy's Little Girl' are common" on the Backpage website. Ferrer's remedy instead of removing this content from Backpage was to email the CNN story to Padilla and instruct him to add "daddy" and "little girl" to the strip out filter.

281. Similarly, in a June 7, 2011 email, Ferrer told a Texas law enforcement official that a word found in one Backpage ad amber alert is "either a horrible marketing ploy or **some kind of bizarre new code word for an under aged person**." Ferrer told the Texas official that he would forbid the phrase (not remove the advertisements)—without explaining that, inside the Backpage Defendants' operations, this meant the word would be automatically deleted from advertisements to conceal their true nature. Ferrer forwarded this email chain to Padilla and instructed Backpage employees to add "amber alert" to the automatic strip out filter. A June 11, 2012, version of the filter word list indicates that "amber alert" was indeed automatically deleted by the Strip Term from Ad Filter before the advertisement reached moderators. In short, Backpage and Ferrer added such terms to the Strip Term from Ad Filter with full awareness of their implications for child sexual exploitation.

282. These actions by Ferrer included personally ensuring that known sex traffickers' accounts were not blocked on Backpage and that sex traffickers could post on Backpage with impunity and without recourse from Backpage. For example, Backpage locked the account of "Urban Pimp" for posting numerous ads for sex. When his ads were temporarily blocked, Urban Pimp complained to the Backpage Defendants that his advertisements for sex were blocked and that he was trying to post advertisements for sex in 50 cities all across the United States. Rather than report Urban Pimp to law enforcement or ban Urban Pimp from Backpage, Ferrer advised Urban Pimp that he had unlocked his account and that if his account did not work "email me back direct."

283. As a matter of policy, the Backpage Defendants moreover chose to err against reporting potential child sexual exploitation in favor of retaining its customer base and avoiding law enforcement review of the Backpage Defendants' actions. For example, in June 2012, the Backpage Defendants instructed its outsourced third-party moderators only to delete suspected child-sex advertisements "**IF YOU REALLY VERY SURE THE PERSON IS UNDERAGE.**" In a similar email, a Backpage supervisor instructed internal moderation staff: **"Young ads do not get**

deleted unless they are clearly a child." Backpage supervisors not only encouraged non-deletion of ads involving the sexual exploitation of minors, but actively instructed moderators not to report advertisements exploiting children to the National Center for Missing and Exploited Children. For example, in an email exchange dated July 11, 2013, Vaught, a Backpage supervisor, instructed a moderator that she "probably would not have reported" the advertisement despite the fact that the woman in the ad looked drugged, underage, and had bruises. In chastising the moderator for her decision, Vaught noted that "these are the kind of reports the cops question us about" and that while she finds ads "like this" (with clear signs of abuse and trafficking) she does not typically send them to the National Center for Missing and Exploited Children.

B.5. The Backpage Defendants ordered employees not to delete ads that clearly exploited minor victims of human trafficking.

284. After an advertisement had already been through the Strip Term from Ad Filter and passed to moderators, the Backpage Defendants implicitly and explicitly prevented moderators to reject entire ads due to indications of prostitution, child prostitution, and human trafficking. Documents from the Backpage Defendants indicate that the company permitted moderators to delete only a *de minimis* share of adult ads in their entirety. In January 2011, Ferrer estimated that about five adult sex for money postings are removed out of every 1,000—which equates to only five percent of advertisements that promote prostitution as well as human trafficking and the sexual exploitation of minors being removed from Backpage by The Backpage Defendants. This low removal rate of advertisements promoting human trafficking and the sexual exploitation of minors was by design. For example, on October 24, 2010, Padilla emailed the supervisor of Backpage's contract moderators to inform her of the edit over delete policy. The email subject line read "your crew can edit" and went:

> [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.

285. In editing advertisements that clearly advertised the sexual exploitation of minors and human trafficking, moderators were instructed by the Backpage Defendants to systematically remove words indicative of criminality before publishing an ad (assuming that the ad still appeared criminal after making it through the Strip Word Filter). As stated by Backpage Employee A in the Senate Subcommittee Report who worked as a Backpage moderator from 2009 through 2015, the moderator's goal was to remove key phrases that made the ad sound like a prostitute ad rather than an escort ad, dancing around the legality of the ad. **Backpage Employee A explained the Backpage Defendants wanted everyone to use the term "escort," even though the individuals placing the ads were clearly prostitutes**. Therefore, the Backpage Defendants were systematically through both explicit and convert means helping its users turn an intended illegal advertisement for human trafficking or the sexual exploitation of a minor into a seemingly legal escort advertisement—all while concealing the users' true intent.

286. Testimony under oath by former Backpage moderator Adam Padilla, brother of Backpage executive Andrew Padilla, tracks Backpage Employee A's account. In an August 2, 2016 deposition, Adam Padilla testified that deleting ads for illegal conduct, rather than editing out the indicia of illegality to provide a façade of legality, would have cut into company profits:

> A: [M]y responsibility was to make the ads okay to run live on the site, because having to get rid of the ad altogether was bad for business. And so you would want to, you know, make it — take out any of the bad stuff in the ad so that it could still run....
>
> Q: When you say that you viewed your job responsibility to be to take out the bad stuff in ads, you're referring to what we discussed earlier with regard to images that suggested that the ad was advertising money for sex or content that suggested the ad was for an advertisement for money for sex, correct?
>
> A: That is exactly correct.[203]

287. Padilla further testified that moderators even edited live ads that were reported for "Inappropriate Content" by users. According to Padilla, if moderators saw an ad that had inappropriate content that suggested sex for money or images that suggested sex for money, they would remove the offending language and repost the ad. This was ordered by the Backpage Defendants despite it being "common knowledge" that removing sex for money language before posting does not change the illegal nature of the advertised transaction.

> A: [I]t would be pretty much common knowledge that it's still going to run. So a person is still going to ... do what they wanted to do, regardless.
>
> Q: And do you agree with me if you removed language from an ad that blatantly sells—or says that "I'm willing to have sex with you for money," and then you post the remainder, you know as the person who edited the ad, that the ad is someone who is trying to sell sex for money, correct?
>
> A: Yes.[205]

288. Not only did the Backpage Defendants prevent moderators from deleting advertisements, but the Backpage Defendants moderators themselves used Backpage for prostitution services. For example, Backpage Employee C explained that at least one of her coworkers contacted and visited prostitutes using Backpage ads and told his colleagues about the encounters. Similarly, Backpage Employee A related that some Backpage moderators visited massage parlors that advertised on Backpage. Given the clear company policy and corporate culture of Backpage, those employees who felt that the corporate policy to encourage and assist users to disguise their human trafficking and sexual exploitation of minor ads were wrong did not voice their concerns out of fear for retaliation.

289. Although the Backpage Defendants' role in facilitating human trafficking as well as the sexual exploitation of minors was apparent to its employees, company management reprimanded employees who memorialized this in writing. On October 8, 2010, Padilla and a Backpage moderator

made that point clear by ordering moderators not to leave notes in user accounts, even those who are long time term-of-use violators. Specifically, Padilla states in the October 8, 2010 email:

> Backpage and you in particular, cannot determine if any user on the site in [sic] involved with prostitution. Leaving notes on our site that imply that we're aware of prostitution, or in any position to define it, is enough to lose your job over. There was not one mention of prostitution in the power point presentation. That was a presentation designed to create a standard for what images are allowed and not allowed on the site. If you need a definition of "prostitution" get a dictionary. Backpage and you are in no position to re-define it.
>
> This isn't open for discussion. If you don't' agree with what I'm saying completely, you need to find another job.

290. In January 2013, a moderator copied similar notes into an email to a supervisor: "Could not delete ad. An escort ad suggested that they don't want a non GFE so I am assuming they are promote [sic] prostitution".

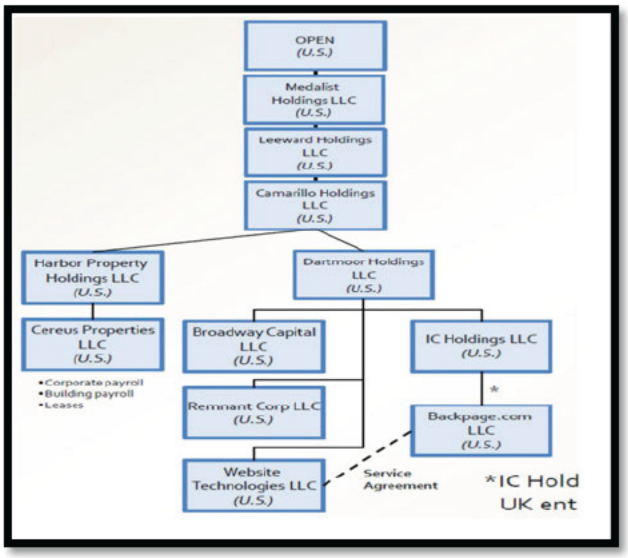
291. After an apparent telephone conversation, the moderator wrote the supervisor to "apologize" saying that she had to remove the offending picture and "didn't want to lose the notes." The supervisor suggested that the moderator communicate in Gchat while another supervisor stressed via email that the moderator follow the protocol and not go into detailed explanation. These practices have continued as recently as August 2016, when Backpage moderation supervisor Vaught requested that contract moderators not use the phrase promoting sex, but should instead say "adult ad."

292. Despite these admonitions to moderators by the Backpage Defendants, as well as their executives and supervisors, the language of adult ads (both edited and unedited) leave little doubt that the underlying transactions involve human trafficking as well as the sexual assault and sexual exploitation of minors. For example, in a March 2016 internal email, Backpage moderator supervisors were reminded that the following terms were being wrongfully removed from ads, including: PSE (Porn Star Experience), Porn Star, Full Pleasure, Full Satisfaction, Full Hour, Quickie (even with a price accompanying the term) and GFE—which stands for girlfriend experience—a code word for prostitution.

B.6. The Backpage Defendants' ownership structure is designed to hide the Backpage website's true ownership through the use of shell companies.

293. By 2012, Village Voice Media Holdings changed to Medalist Holdings, LLC, a privately held Delaware entity owned by Lacey, Larkin, Scott Spear, Brunst, and two of Larkin's children. A February 2015 Agreement and Plan of Recapitalization for Medalist stated that Larkin served as CEO of the company, and Larkin and Lacey retained 42.76% and 45.12% of Medalist shares, respectively. Brunst, who served as CFO, owned 5.67% of the company and Spears owned 4.09%.

294. At the time, Medalist was Backpage's ultimate corporate parent—five shell companies removed. Medalist owned Leeward Holdings, which owned Dartmoor Holdings, LLC, which owned IC Holdings, LLC, which owned Backpage. According to Backpage's tax accountant, Medalist and all its subsidiaries filed a single corporate tax return. In addition, Backpage had a service agreement with another of Medalist's ultimate subsidiaries, Website Technologies, LLC, under which Website Technologies preformed most of Backpage's outward-facing operations. Prior to its sale in 2014, below is a chart of Backpage's corporate structure.



295. On December 29, 2014, Medalist entered into a Letter of Intent for the sale of Backpage for $600 million to a Dutch corporation. The Backpage Defendants have long sought to obscure the identity of the purchaser. According to a contemporaneous report in the *Dallas Business*

MR045

Journal, the "purchasing company's name was not disclosed, pending regulatory filings in the European Union." When questioned about the sale in a June 19, 2015 interview, The Backpage Defendants' General Counsel, Elizabeth McDougall, claimed she had no information about the transaction except that Backpage had been sold to a Dutch entity. McDougall added that she did not even know the name of the new holding company.

296. In fact, the purchaser was McDougall's boss, CEO Ferrer. The December 2014 Letter of Intent listed the buyer as UGC Tech Group, a Dutch partnership headed by Ferrer. The seller was defendant Camarillo Holdings. The transaction was styled as a sale of the membership interest in Defendant Dartmoor Holdings, another shell limited liability corporation that owned Backpage, along with Website Technologies, LLC. The signatories on the Letter of Intent were Brunst, named as "CFO" of Camarillo Holdings, and Ferrer, acting as "Director" of UGC Tech Group The sale was to be financed with a five-year loan at 7% interest from Camarillo Holdings to UGC Tech Group for the full amount of the $600 million purchase price. A consulting firm engaged by Medalist concluded, however, that the sale was not an arms-length transaction and instead was infected by self-dealing. Rather than an arms-length sale, Lacey and Larkin loaned Ferrer, as Backpage CEO, hundreds of millions of dollars in an entirely seller-financed employee buyout. Under the Letter of Intent, moreover, Lacey and Larkin retained significant financial and operational control over Backpage. The pair, for example, are entitled to amortized loan repayments, earn-outs on future profits, and a 30% participation in any future sale of the company in excess of the purchase price. Moreover, Larkin and Lacey retained a security interest over all Backpage assets, all membership and stock interest in Backpage, and all Backpage bank accounts.

297. Furthermore, the Letter of Intent subjects Ferrer to significant restrictions on his management of the company until the loan is repaid. Ferrer cannot sell Backpage, assign the loan to another borrower, or even change accountants or outside counsel without approval from Lacey and

Larkin. The sale was conditional on Ferrer providing a "five-year business plan satisfactory to the Seller in its sole and absolute discretion." Ferrer, moreover, also committed to submit to Lacey and Larkin for approval an annual budget, monthly and quarterly balance sheets, and annual audited financial statements. Ferrer also made covenants to give Lacey and Larkin electronic access to The Backpage Defendant's bank accounts and full access to The Backpage Defendant's books and records. In addition, Ferrer could not, without approval, change the company's organizational structure, salaries, banking relationships, or place of domicile. Moreover, according to a loan agreement later executed in connection with the sale, Ferrer could not engage in any line of business other than the business engaged in on the date of the sale.

298. Recent reports confirm the significant level of operations control—as well as financial interest—Lacey and Larkin retain over Backpage. The declaration supporting the September 2016 California arrest warrants for Lacey, Larking, and Ferrer, for example, state that "while Ferrer currently runs the day to day operations for Backpage, he and other high-level personnel in Backpage's structure report regularly to Larkin and Lacey. According to the declaration, moreover, Lacey and Larking also "regularly receive bonuses from Backpage bank accounts. For instance, in September of 2014, Lacey and Larkin each received a $10 million bonus." Therefore, it is undeniable that Lacey and Larkin from 2014-2015 played a significant role in The Backpage Defendants actions and continue to have a significant stake in Backpage's operations.

B.7. Backpage is an alter ego of Ferrer, Lacey, and Larkin.

299. The sale contemplated in the December 29, 2014 Letter of Intent was executed in a series of transactions on April 22, 2015 for a total purchase price of $603 million. With the help of a consultant called the Corpag Group, a fiduciary and trust company based in Curacoa, Ferrer actually created two entities to serve as the direct buyers of Backpage domestic and foreign operations, respectively. Atlantische Bedrijven (a partnership that purchased Backpage's U.S. Operations) and UGC Tech Group (a partnership that purchased Backpage's foreign operations). Both of these

companies are owned, operated, controlled, and managed by Ferrer, through five Delaware-based limited liability companies—Defendants Amstel River Holdings, Lupine Holdings, Kickapoo River Investments, CF Holdings GP, and CF Acquisitions.

300. Atlantisch Bedrijven bought Backpage's domestic operations for $526 million by purchasing the assets of Dartmoor Holdings (one of Backpage's shell limited liability corporation parents) from Defendant Vermillion Holdings, LLC, which also loaned money to Atlantische Bedrijven for the purchase. As a consequence, Atlantische Bedrijven as of today owns Backpage and Website Technologies, among other entities. For the sale of Backpage's foreign operations, the parties executed a similar series of transactions, involving slightly different corporate entities on the buyer's side, for a purchase price of approximately $77 million. For the purposes of these transactions, the buyer and borrower was UGC Tech Group, whose sole general partner was CF Holdings, GP a Delaware-based limited liability corporation owned and operated by Ferrer, the managing member.

301. According to a tax partner at a consulting firm engaged on Backpage-related matters, this unusual structure—involving multiple layers of holding companies, both domestic and foreign—provide no tax benefit to The Backpage Defendants. In fact, all profits within the corporate structure flow up to the U.S. based Amstel River holdings (of which Ferrer is the only member) for tax purposes and all Dutch entities are ignored. Brunst confirmed in an email to the consulting firm, obtained by the United States Subcommittee investigating The Backpage Defendants' long history of human trafficking, that Atlantisch Bedrijven is subject to United State tax on its earnings and serves as nothing more than a "pass through" entity owned by Ferrer, a United States citizen.

C. ALLEGATIONS REGARDING THE HOTEL DEFENDANTS

C.1. Human trafficking and the sexual exploitation of minors is a rampant, well-known problem in the hotel industry.

302. According to the Polaris Project, one of the most commonly reported venues for sex trafficking to the National Human Trafficking Hotline is hotels and motels. It has long been

recognized that exploiters and traffickers use hotel and motel rooms when setting up "dates" between victims of sex trafficking and those individuals purchasing sex. Traffickers have long capitalized on the hotel industry's refusal to adopt companywide anti-trafficking policies, train staff on what to look for and how to respond, establish a safe and secure reporting mechanism, as well as the seclusion and privacy of hotel rooms. As aptly stated in a publication by Cornell University on the issue, "the hospitality industry is undoubtedly involved in the sex trafficking industry...and therefore have an inherent responsibility to deter the crime and can be liable for failing to do so." According to a 2012 BEST study, 63% of trafficking incidents happen in hotels, ranging from luxury to economy, with the majority of victims being children. The ease of access and anonymity of hotels coupled with the internet websites like Backpage has led to an explosion in child sexual exploitation nationwide and particularly in Houston.

303. In response to this horrific trend in the hotel industry, several industry leaders and municipalities, including the City of Baltimore and State of Connecticut, now require mandatory training on how to recognize and respond to the signs of human trafficking and the sexual exploitation of minors. In spotting signs of human trafficking and the sexual exploitation of minors, such as paying for a room with cash or a pre-paid credit card, another guest lingering outside the room for long periods of time, several guests coming and going from the hotel without checking into a room, and minor children paying for rooms, a responsible hotel is able to train staff that can mitigate and prevent human trafficking and the sexual exploitation of minors from occurring on their premise.

304. This sentiment is re-affirmed by the United States Department of Homeland Security's Blue Campaign to end human trafficking. In a recent Blue Campaign bulletin, the Department of Homeland Security outlines that traffickers have long used the hotel industry as a hotbed for human trafficking and has recommended policies and procedures that the industry can take to help prevent human trafficking and the sexual exploitation of minors.

C.2. Jane Doe was repeatedly exploited at the Hotel Defendants' properties.

305. During 2014, Jane Doe was repeatedly exploited at the Hotel Defendants' properties by her trafficker.

306. Jane Doe would be instructed by her trafficker to meet child molesters at their hotel located at 8201 Southwest Freeway in Houston, Texas.

307. Each of the Hotel Defendants refused to take any steps to alert the authorities, properly intervene in the situation, or take reasonable security steps to improve awareness of sex trafficking and/or prevent the sexual exploitation of minors at their properties.

308. This failure lead to Jane Doe's continued sexual exploitation and sexual assault while the Hotel Defendants turned a blind eye to the plague of human trafficking and the sexual exploitation of minors at their location.

309. Upon information and belief, this was done to maximize profits by:

> Reducing the cost of training employees and managers of how to spot the signs of human trafficking and the sexual exploitation of minors and what steps to take;
>
> Not refusing room rentals in order to fill vacant rooms, even if those rentals were to minors who were being exploited by human traffickers, including Jane Doe;
>
> Lowering security costs by not having proper security measures, including a CLEET certified security guard to help prevent human trafficking at the hotel location; and
>
> Cutting down on the cost of employing lawyers to properly respond to law enforcement subpoenas requesting security footage and other information to assist in the prosecution of human traffickers.

CAUSES OF ACTION AGAINST FACEBOOK

A. FIRST CAUSE OF ACTION—NEGLIGENCE

310. Jane Doe incorporates each foregoing allegation.

311. As a user on its website, Facebook owed a duty to Jane Doe to warn her of the known dangers of grooming and recruitment on Facebook by sex traffickers.

312. The danger sex traffickers posed to users such as Jane Doe was known to Facebook.

313. Facebook failed to exercise this duty and was negligent in one or more of the following, non-exclusive particulars:

a. Failure to warn of the dangers of grooming;

b. Failure to warn of the dangers of recruitment;

c. Failure to implement awareness campaigns or safeguards to ensure that users, including minors, were aware of sex traffickers using its website;

d. Failure to implement any other meaningful procedure to ensure its users were adequately warned of the dangers posed by sex traffickers;

e. Failure to verify the identity and/or age of users';

f. Failure to implement any safeguards to prevent adults from contacting minors on Facebook;

g. Failure to report suspicious messages between a minor and an adult user;

h. Failure to require accounts for minors to be linked to those of adults;

i. Failing to deprive known criminals from having accounts on Facebook;

j. Failure to exercise ordinary care as a reasonably prudent person would have done under the same or similar circumstances.

314. Facebook's failure to publish self-produced warnings about the occurrence of sex trafficking by its users directly harms people it has a duty to protect.

315. Facebook's failure to publish self-produced warnings about the signs, indicia, flags, or key phrases used in its users' sex trafficking trade directly harms children it has a duty to protect.

316. Facebook's duty could have been satisfied through warnings posted on users' feeds, e-mails to accounts run by users under the age of 18, and/or through informing authorities of what it knew about red-flag activities and messages between users.

317. Each of Facebook's negligent acts and omissions, singularly or collectively, constituted negligence and proximately caused legal injuries to Jane Doe.

B. SECOND CAUSE OF ACTION—GROSS NEGLIGENCE

318. Jane Doe incorporates each foregoing allegation.

319. Facebook's acts and omissions constitute gross negligence

320. Viewed objectively from the standpoint of Facebook at the time of the incident, Facebook's acts and omissions involved an extreme degree of risk, considering the probability and magnitude of the potential harm to Jane Doe.

321. As a result of Facebook's gross neglect, Jane Doe was exposed to and did sustain serious injury.

322. Facebook's gross negligence directly and proximately caused Jane Doe's injuries.

323. Exemplary damages are warranted for Facebook's gross negligence.

C. THIRD CAUSE OF ACTION—CPRC § 98.002

324. Jane Doe incorporates each foregoing allegation.

325. Each of Facebook's negligent acts and omissions, singularly or collectively, constituted negligence and proximately violate Texas Civil Practice and Remedies Code § 98.002.

326. Facebook had a duty not to knowingly benefit from trafficking of persons, including Jane Doe.

327. Facebook breached this duty by knowingly facilitating the sex trafficking of Jane Doe, including by:

a. Increasing profits by not using advertising space for public service announcements regarding the dangers of entrapment, grooming, and recruiting methods used by sex traffickers on Facebook;

b. Increasing profit margins due to lower operations cost of not implementing mandatory public service announcements for those who sign up for Facebook regarding the dangers of entrapment and grooming used by sex traffickers on Facebook;

c. Increasing profit margins due to lower operations cost by not having to hire human trafficking experts to coordinate Facebook's awareness campaign regarding the dangers of entrapment and grooming used by sex traffickers on Facebook;

d. Raising advertising fees by extending its "user base" to include sex traffickers by not engaging in a public service awareness campaign regarding the dangers of entrapment and grooming used by sex traffickers on Facebook;

e. Increasing profit margins due to lower operation cost by not implementing safeguards requiring verification of the identity of all users on Facebook;

f. Increasing profit margins as a result of continued customer loyalty and therefore increased "user" numbers used to extract higher advertiser fees by creating a breeding ground for sex traffickers to stalk and entrap victims.

g. The "per user" profit gained from King Kid, which is estimated yearly by Facebook as the financial value of each Facebook user.

328. Facebook has received financial benefits as a result of these acts and omissions by continuing to facilitate human trafficking and the sexual exploitation of minors. Each of Facebook's negligent acts and omissions, singularly or collectively, constituted violations of Texas Civil Practice and Remedies Code § 98.002.

D. FOURTH CAUSE OF ACTION—NEGLIGENT UNDERTAKING

329. Jane Doe incorporates each foregoing allegation.

330. Facebook undertook to warn users about and to screen for illegal conduct on its platforms because it knew or should have known such actions were necessary to protect Jane Doe and other vulnerable users.

331. Among other acts, Facebook failed to exercise reasonable care in warning Jane Doe about sex trafficking recruitment on its platforms, in screening and identifying sex traffickers on its Platforms, and in identifying and reporting Jane Doe's Facebook friend.

332. Jane Doe relied on Facebook to warn her about sex trafficking and to identify and report sex traffickers.

333. Facebook's negligent performance in warning Jane Doe and identifying sex traffickers increased Jane Doe's risk of harm.

334. Facebook's negligent undertaking proximately caused Jane Does harm.

E. FIFTH CAUSE OF ACTION—STRICT PRODUCTS LIABILITY WARNING/MARKETING DEFECTS

335. Jane Doe incorporates each foregoing allegation.

336. Facebook identifies Facebook as a product in its 10-K filings.

337. Facebook founder and CEO Mark Zuckerburg refers to Facebook as a product in congressional testimony.

338. As the design, formulator, constructor, rebuilder, and producer of Facebook, Facebook is a manufacturer of the Facebook product as defined in Texas Civil Practice and Remedies Code 82.003(4). As a manufacturer, Facebook is responsible for the defective and unreasonably characteristics in its Facebook product.

339. Facebook was marketed in a manner that renders Facebook unreasonably dangerous. Specifically, Facebook was marketed to children under the age of 18, without providing adequate warnings and/or instructions regarding the dangers of "grooming" and human trafficking on Facebook. These dangerous warning and marketing defects were both the direct and producing cause of Jane Doe's trafficking, her sexual exploitation, and Jane Doe's injuries and damages.

340. These defects existed at the time Jane Doe used Facebook's Facebook product and were not the result of any alteration by Jane Doe.

341. Facebook originally designed, manufactured, and placed into the stream of commerce its Facebook product. At the time Jane Doe used the Facebook product, Facebook was in the business of designing, manufacturing, and placing into the stream of commerce social media products, such as Facebook.

342. Government standards are inadequate given that Facebook misrepresented its products performance and/or safety to government officials and/or agencies.

Causes of Action Against The Backpage Defendants

A. First Cause of Action—TCPRC 98

343. Jane Doe incorporates each foregoing allegation.

344. The Backpage Defendants' acts, omissions, and commissions, taken separately and/or together outlined above constitute a violation of Texas Civil Practice and Remedies Code § 98.002. Specifically, The Backpage Defendants had a duty not to knowingly benefit from trafficking of persons, including Jane Doe.

345. At all relevant times, The Backpage Defendants breached this duty by knowingly participating in the facilitation of trafficking minors, including Jane Doe, by acts and omissions including, but not limited to:

a. Accepting advertising fees from the Backpage website from human traffickers, including Jane Doe's trafficker, despite actual and/or constructive knowledge that those advertisements were for illegal human trafficking, prostitution, and/or sexual exploitation of minors;

b. Designing and implementing the Strip Term from Ad Filter to automatically sanitize advertisements intended to promote human trafficking, prostitution, and/or the sexual exploitation of minors in an effort to maximize advertising revenue, customer satisfaction, and avoid law enforcement detection of illegal acts;

c. Designing and implementing, in order to maximize revenue, a manual moderation system intended to sanitize posted content advertising human trafficking, prostitution, and/or the sexual exploitation of minors to give those ads the appearance of promoting legal escort services as opposed to illegal services;

d. Implementing a corporate policy to maximize revenue of sanitizing advertisements promoting human trafficking, prostitution, and/or sexual exploitation of minors instead of removing those advertisements from the Backpage website or reporting those advertisements to the proper law enforcement officers;

e. Knowingly implementing a corporate policy in order to maximize profit from the adult section of the Backpage website that discouraged moderators and employees of Backpage from contacting the authorities and/or advocacy groups when advertisements on the Backpage website clearly promoted human trafficking, prostitution, and/or sexual exploitation of minors;

f. Knowingly refusing to pull down advertisements (after Backpage had internally sanitized the ad either manually or with the use of the Strip Term from Ad Filter) that clearly demonstrated minors were being exploited and trafficked for sex; and

g. Knowingly refusing to pull down advertisements after reports and/or complaints that the advertisement was being used to exploit a minor.

346. As described throughout this petition and above, the Backpage Defendants received substantial financial benefits as a result of these acts and/or omissions. Moreover, the Backpage Defendants received a direct financial benefit of the advertising fee paid by Jane Doe's trafficker on the Backpage website, sexually exploiting Jane Doe while she was a minor. These acts, omissions, and/or commissions were the producing, but for, and proximate cause of Jane Doe's injuries and damages. Therefore, the Backpage Defendants are in violation of Texas Civil Practice and Remedies Code § 98.002.

B. SECOND CAUSE OF ACTION—NEGLIGENCE

347. Jane Doe incorporates each foregoing allegation.

348. The Backpage Defendants had a duty of care to operate the Backpage website in a manner that did not sexually exploit minor children, including Jane Doe. Moreover, the Backpage Defendants had a duty of care to take reasonable steps to protect the foreseeable victims of the danger created by their acts and omissions, including the danger created by their online marketplace for sex trafficking and their actions in perpetuating that marketplace by helping sex traffickers sanitize ads to avoid law enforcement detection and post their ads.

349. The Backpage Defendants breached the foregoing duties because they knew, or should have known, that adults working as sex traffickers were using their website to post advertisements of minor children for sex, including such advertisements of Jane Doe. Despite this knowledge, the Backpage Defendants took no steps to protect those children, including Jane Doe.

350. As a direct and proximate result of the Backpage Defendants' wrongful acts and omissions, Jane Doe suffered, and continues to suffer, severe injuries and damages including, but not limited to:

a. Past and future conscious physical pain and mental anguish;

b. Past and future medical expenses, including the expenses that in reasonable probability will be incurred in the future; and

c. Past and future pain and suffering.

C. THIRD CAUSE OF ACTION—GROSS NEGLIGENCE

351. Jane Doe incorporates each foregoing allegation.

352. Jane Doe will show that the acts and/or omissions of the Backpage Defendants constitute gross negligence. The Backpage Defendants acted with willful, wanton disregard, both before and at the time of the incidents in question, given the extreme degree of risk of potential harm to Jane Doe and others, of which the Backpage Defendants were aware. Despite this knowledge, the Backpage Defendants proceeded with the acts and omissions described above with conscious indifference to the rights, safety, or welfare of others, including Jane Doe. Accordingly, Jane Doe seeks an award of exemplary damages against the Backpage Defendants.

D. FOURTH CAUSE OF ACTION—AIDING AND ABETTING

353. Jane Doe incorporates each foregoing allegation.

354. By the course of conduct, acts, and omissions alleged herein, the Backpage Defendants intentionally aided and abetted, by assisting and participating with, and by assisting or encouraging each other, as well as the other Defendants, to commit the tortious result—including, but not limited to, violation of Texas Civil Practice & Remedies Code § 98.002, negligence, outrage, and gross negligence.

355. By the course of conduct, acts, and omissions alleged herein, the Backpage Defendants also intentionally aided and abetted, by assisting and participating with and by assisting or

encouraging each other, as well as Jane Doe's trafficker, in the commitment of the tortious acts between themselves and along with each other Defendant.

356. With respect to assisting or encouraging, the Backpage Defendants' tortious acts, when viewed individually and separate apart from each other and the other Defendants and Jane Doe's trafficker, were a breach of duty to Jane Doe and a substantial factor in causing the tortious activity alleged herein.

357. Moreover, each of the Backpage Defendants (a) had knowledge that each member of the Backpage Defendants and Jane Doe's trafficker's conduct constituted a tort; (b) had the intent to assist the other Backpage Defendants and Jane Doe's trafficker in committing a tort; (c) gave the other Backpage Defendants and Jane Doe's trafficker assistance or encouragement; and (d) assistance by the Backpage Defendants and Jane Doe trafficker's torts were substantial factors in causing the tort.

358. With respect to assisting and participating, Jane Doe's trafficker's tortious result (a) the Backpage Defendants provided substantial assistance to Jane Doe's trafficker and the other Defendants in accomplishing the tortious result; (b) the Backpage Defendants' own conduct, separate from Jane Doe's trafficker and the other Defendants' conduct, was a breach of duty to Jane Doe; and (c) the Backpage Defendants' participation was a substantial factor in causing the tortious result.

359. Jane Doe, therefore, seeks damages and remedies against each of the Backpage Defendants individually for the aiding and abetting alleged herein. As aiders-and-abettors, all of the Backpage Defendants are jointly and severally responsible with one another for the injuries and damages suffered by Jane Doe.

E. FIFTH CAUSE OF ACTION—CIVIL CONSPIRACY

360. Jane Doe incorporates each foregoing allegation.

361. Each of the Backpage Defendants entered into a civil conspiracy with the other Defendants herein. The acts of this conspiracy clearly demonstrate that the result was to accomplish

an unlawful purpose by unlawful means, including, but not limited to, promoting and assisting human traffickers in promoting sexual exploitation of minors, including Jane Doe. The Backpage Defendants had a meeting of the minds on the object of the conspiracy and its course of action, and at least one or more of the Backpage Defendants, as alleged herein, committed at least one or more unlawful, over acts to further the object or course of action of the conspiracy.

362. Jane Doe suffered injury and damages as a direct and proximate result of the wrongful act. The civil conspiracy alleged herein, and the individual predicate misconduct, wrongful acts, and omissions alleged, were a direct, producing, and proximate cause of the injuries and damages to Jane Doe. The civil conspiracy alleged herein, and the individual predicate misconduct, wrongful acts, and omissions alleged, were moreover a substantial factor in bringing about the injury and damages to Jane Doe. Without such civil conspiracy alleged herein, and the individual predicate misconduct, wrongful acts, and omissions alleged, the injury and damages would not have occurred. Moreover, a person of ordinary intelligence in the Backpage Defendants' position would have foreseen that the damages alleged herein might result from the civil conspiracy alleged herein, and the individual predicate misconduct, wrongful acts, and omissions alleged.

363. The damages and remedies sought by Jane Doe for the civil conspiracy alleged herein, and the individual predicate misconduct, wrongful acts, and omissions alleged, include the following:

a. actual damages;

b. direct damages;

c. consequential damages;

d. exemplary damages;

e. that a constructive trust be placed upon proceeds, funds, property, or anything else of value obtained by, or as a result of, the civil conspiracy;

f. equitable remedy of disgorgement—that all profits of the Defendants from the misconduct be disgorged in favor of the Plaintiff;

g. that the Court grant a receivership and appoint a receiver to inventory all proceeds, funds, property, or anything else of value obtained by or as a result of the conspiracy, trace any funds, and administer a trust (constructive or otherwise) for the benefit of the Plaintiff;

h. reasonable and equitable attorneys' fees;

i. prejudgment and post-judgment interest;

j. court costs; and

k. that the Plaintiff be awarded and granted all other and further relief to which she may be justly entitled.

364. As co-conspirators, the Backpage Defendants are jointly and severally with one another responsible for the injuries and damages suffered by Jane Doe.

F. FIFTH CAUSE OF ACTION—FRAUD

365. Jane Doe incorporates each foregoing allegation.

366. The Backpage Defendants intentionally misrepresented to Texans, including Jane Doe, the general public, United States Senate, and law enforcement in Houston (1) its intent to work law enforcement in connection with the trafficking and sexual exploitation of minors, including Jane Doe, (2) the validity of the advertisements sanitized and then posted on the Backpage website as advertisements for escorts—when the advertisements were really those exploiting minors, (3) its intent and promise to the public, law enforcement, and organizations designed to combat the sexual exploitation and sexual assault of minors, including Jane Doe, to act as the "sheriff" of the internet and, (4) its intent to act only as a "poster" of content, instead of an active participant in manipulating ads through the Strip Term from Ad Filter and being a moderator to give advertisements exploiting minors the façade of lawfulness.

367. The Backpage Defendants were aware that the statements made to law enforcement in Houston, Texans, human trafficking organizations, and the United States Senate were false and/or intentionally omitted to disclose the fact that the Backpage Defendants were actively engaging in conduct to façade advertisements exploiting minors, including Jane Doe, as advertisements for escorts.

These representations include, but are not limited to, (a) the Backpage Defendants are merely "host" of third party content—not active participants in concealing the sexual exploitation of minors, including Jane Doe, (b) the Backpage Defendants intended to work with law enforcement, including the Houston police department and Harris County Sheriff's Office, to stop the sexual exploitation of minors, and (c) the Backpage Defendants did not intend to use the Backpage website as a marketplace to profit from the sexual exploitation and sexual assault of minors, including Jane Doe. Further and in the alternative, the Backpage Defendants made the misrepresentations and omissions recklessly, without any knowledge of the truth.

368. Law Enforcement in Harris County and the City of Houston reasonably relied upon the Backpage Defendants' representations to their detriment and therefore were prevented from identifying Jane Doe, and other minors, on the Backpage website as a minor being exploited for sex by her trafficker. Jane Doe has suffered severe damages and injuries as a result of the Backpage Defendants' fraud upon the public and law enforcement.

369. The Backpage Defendants' actions alleged herein, by and through the course of action, conduct, acts, and omissions alleged, were a direct, producing, and proximate cause of injury and damages to Jane Doe. Such breach was a substantial factor in bringing about injury and damages that would not have occurred. Moreover, a person of ordinary intelligence would have foreseen that the injury and damages alleged herein might result from the tortious interference alleged herein. Damages and remedies sought by Plaintiff for fraud committed by the trust include the following:

a. actual damages;

b. direct damages;

c. incidental and consequential damages;

d. unjust enrichment damages;

e. that a constructive trust be imposed on the Backpage Defendants and that the Court sequester hold any benefits or money wrongfully received by the Defendant for the benefit of the Plaintiff. Moreover, Plaintiff prays that any and all money the Backpage Defendants received in furtherance of this fraud be traced, and that all ill-gotten gains by the Backpage Defendants be placed in a constructive trust;

f. mental anguish and emotional distress damages;

g. reasonable and necessary attorneys' fees that are equitable and just;

h. prejudgment and post-judgment interest;

i. court costs; and

j. that Plaintiff be awarded and granted all other and further relief to which she may be justly entitled.

CAUSES OF ACTION AGAINST THE HOTEL DEFENDANTS

A. FIRST CAUSE OF ACTION—TCPRC § 98.002

370. Jane Doe incorporates each foregoing allegation.

371. The Hotel Defendants' acts, omissions, and commissions, taken separately and/or together, outlined above constitute a violation of Texas Civil Practice and Remedies Code § 98.002. Specifically, the Hotel Defendantshad a duty not to knowingly benefit from trafficking of persons, including Jane Doe. At all relevant times, the Hotel Defendantsbreached this duty by knowingly participating in the facilitation of trafficking minors, including Jane Doe, by acts and omissions, including, but not limited to:

a. Profit from renting rooms to those looking to sexually exploit Jane Doe and other minors;

b. Increased profit margins due to lower operation costs by refusing to implement proper training of the Hotel Defendants' employees and managers regarding the signs of human trafficking and the sexual exploitation of minors;

c. Increased profit margins due to lower operation costs by refusing to install proper security devices in the Hotel Defendants' lobby, hallways, and parking lots that would help (a) deter human trafficking and the sexual exploitation of minors and (b) be used to identify potential human trafficking and the sexual exploitation of minors and alert the proper authorities and/or intervene in an appropriate way;

d. Increased profit margins due to lower operation costs by refusing to install adequate lighting and security cameras to monitor ingress and egress of human traffickers and suspicious males looking to sexually exploit minors on the Hotel Defendants' property;

e. Increased profit margins due to lower operation costs by refusing to hire qualified security officers who would actively combat human trafficking and the sexual exploitation of minors;

f. Increased profit margins due to lower operation costs by refusing to implement proper security measures to prevent the sexual exploitation of minors at the Hotel Defendants' properties;

g. Increased profit margins as a result of continued customer loyalty by child molesters and johns who sought to sexually exploit minors, including Jane Doe, due to the Hotel Defendants' lack of measures against the sexual exploitation of minors and human trafficking. This customer loyalty lead to continued alcohol, food, and room sales;

h. Benefit of avoiding law enforcement officials and spending the time to address and properly solve human trafficking and the sexual exploitation of minors on the Hotel Defendants' premises. This prevented the Hotel Defendantsfrom having to spend time and money filling out all proper and necessary law enforcement reports and information, as well as responding to proper and necessary subpoena requests;

i. Benefit by avoiding criminal liability by corporations and/or employees who failed to report child abuse—which is a violation of the Texas Penal Code;

j. Increased profit margins as a result of presenting a more "marketable brand" to child molesters and johns looking to exploit minors by being known as hotels with "underage girls"—which in turn leads to higher alcohol, food, and room sales when these child molesters and johns visit the Hotel Defendants' properties; and

k. Increased profit margins by knowingly catering to the needs of a criminal sub-culture that is looking for locations that will not actively enforce laws against human trafficking and the sexual exploitation of minors or take active security measures to prevent human trafficking and the sexual exploitation of minors on their property.

372. The Hotel Defendants have received financial benefits as a result of these acts and/or omissions by continuing to turn a blind eye to human trafficking and the sexual exploitation of minors to keep security and operating costs low while maintaining the loyalty to the segment of their customer base that seek to exploit minors, including Jane Doe. Moreover, the Hotel Defendants directly benefited from the sexual exploitation and trafficking of Jane Doe on numerous occasions by

receiving payment for rooms Jane Doe was caused by any means to rent at the Hotel Defendants' properties. These acts, omissions, and/or commissions alleged in this pleading were the producing, but for, and proximate cause of Jane Doe's injuries and damages. Therefore, the Hotel Defendants are in violation of Texas Civil Practice and Remedies Code § 98.002.

B. SECOND CAUSE OF ACTION—NEGLIGENCE

373. Jane Doe incorporates each foregoing allegation.

374. The Hotel Defendants had a duty of care to operate each of their hotels in a manner that did not endanger minor children, including Jane Doe. Moreover, the Hotel Defendants had a duty of care to take reasonable steps to protect the foreseeable victims of the danger created by their acts and omissions, including the danger created by the Hotel Defendants of human trafficking and sexual exploitation of minors due to the Hotel Defendants' fostering an environment that encouraged this behavior.

375. The Hotel Defendants breached the foregoing duties because they knew, or should have known, that adults working as sex traffickers were causing by any means minors, including Jane Doe, to be sexually exploited and trafficked at the Hotel Defendants' properties on a repeated basis. Despite this knowledge, the Hotel Defendants accepted the unspoken financial benefit mentioned above by allowing human trafficking and the sexual exploitation of minors to occur at their hotels and failed to take reasonable steps to protect children being trafficked or exploited, including Jane Doe.

376. As a direct and proximate result of the Hotel Defendants' wrongful acts and omissions, Jane Doe suffered, and continues to suffer, severe injuries and damages, including, but not limited to:

a. Past and future conscious physical pain and mental anguish;

b. Past and future medical expenses, including the expenses that in reasonable probability will be incurred in the future; and

c. Past and future pain and suffering.

C. THIRD CAUSE OF ACTION—COMMON LAW AIDING AND ABETTING

377. Jane Doe incorporates each foregoing allegation.

378. By the course of conduct, acts, and omissions alleged herein, the Hotel Defendants intentionally aided and abetted, by assisting and participating with, and by assisting or encouraging each other, as well as the other Defendants, to commit the tortious result—including, but not limited to, violation of Texas Civil Practice & Remedies Code § 98.002, negligence, outrage, and gross negligence.

379. By the course of conduct, acts, and omissions alleged herein, the Hotel Defendants also intentionally aided and abetted by assisting and participating with and by assisting or encouraging each other, as well as Jane Doe's trafficker, in the commitment of the tortious acts between themselves and each other Defendant.

380. With respect to assisting or encouraging, the tortious acts of the Hotel Defendants, when viewed individually and separate apart from each other and the other Defendants, and Jane Doe's trafficker were a breach of duty to Jane Doe and a substantial factor in causing the tortious activity alleged herein.

381. Moreover, the Hotel Defendants(a) had knowledge that the actions of Jane Doe's trafficker and the johns who sexually assaulted Jane Doe at the Hotel Defendants' properties constituted a crime and a tort, (b) had the intent to assist the other Defendants and Jane Doe's trafficker in committing a tort by allowing such conduct to go unchecked at the Hotel Defendants' properties and intentionally creating an atmosphere conducive to sexual assault and sexual exploitation of Jane Doe and other minors, (c) gave the other Defendants and Jane Doe's trafficker assistance or encouragement, and (d) the assistance by the Hotel Defendants of Jane Doe trafficker's torts, as well as the other Defendants, was a substantial factor in causing the tort.

382. With respect to assisting and participating, Jane Doe's trafficker's, as well as the other Defendants', tortious result (a) the Hotel Defendants provided substantial assistance to Jane Doe's

trafficker and the other Defendants in accomplishing the tortious result, (b) the Hotel Defendants' own conduct, separate from Jane Doe's trafficker and the other Defendants' conduct, was a breach of duty to Jane Doe, and (c) the Hotel Defendants' participation was a substantial factor in causing the tortious result.

383. Jane Doe, therefore, seeks damages and remedies against each of the Hotel Defendants for the aiding and abetting alleged herein. As aiders-and-abettors, each of the Hotel Defendants are jointly and severally responsible with all other Defendants for the injuries and damages suffered by Jane Doe.

JOINT & SEVERAL LIABILITY

384. Each Defendant's conduct violated Texas Civil Practice & Remedies Code § 98.005. Therefore, each Defendant is jointly and severally liable for the entire amount of damages awarded by a jury in this case against any other Defendant under Texas Civil Practice & Remedies Code § 98.005.

STATEMENT OF DAMAGES

385. Jane Doe trusts the Court to evaluate the evidence and to properly assess the damages sustained.

386. Texas Rule of Civil Procedure 47(c) requires Jane Doe to set forth the level of damages sought. In compliance with this Rule, and only in compliance with this Rule, Jane Doe states she expects to seek monetary relief of $1,000,000 or more for the damages asserted.

387. Jane Doe reserves the right to increase or decrease the amount she seeks based on additional discovery, evidence presented at trial, and/or the verdict of the Court.

JURY DEMAND

388. Jane Doe demands a trial by jury.

REQUEST FOR DISCLOSURE

Pursuant to Texas Rule of Civil Procedure 194, each Defendant is requested to disclose the information or material described in Rule 194.2 within 50 days after service.

PRAYER

Wherefore, Jane Doe respectfully requests judgment against Defendants for actual damages in excess of the minimum jurisdictional limits of this Court, pre- and post-judgment interest as allowed by law, costs of suit, attorney fees, and all other relief, at law or in equity, to which she may be justly entitled.

Respectfully submitted,

ANNIE MCADAMS, PC

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CERTIFICATE OF SERVICE

I certify that on the 26th of April, 2019, a true and correct copy of the foregoing instrument was served on opposing parties.

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/s/ David E. Harris
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I, Marilyn Burgess, District Clerk of Harris County, Texas certify that this is a true and correct copy of the original record filed and or recorded in my office, electronically or hard copy, as it appears on this date.
Witness my official hand and seal of office this September 19, 2019

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Marilyn Burgess, DISTRICT CLERK
HARRIS COUNTY, TEXAS

In accordance with Texas Government Code 406.013 electronically transmitted authenticated documents are valid. If there is a question regarding the validity of this document and or seal please e-mail support@hcdistrictclerk.com

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CAUSE NO. 2018-69816

JANE DOE,	§	**IN THE DISTRICT COURT OF**
	§	
Plaintiff,	§	
	§	
vs.	§	**HARRIS COUNTY, TEXAS**
	§	
FACEBOOK, INC.; BACKPAGE.COM, LLC d/b/a BACKPAGE; CARL FERRER; MICHAEL LACEY; JAMES LARKIN; JOHN BRUNST; AMERICA'S INNS, INC. d/b/a AMERICA'S INN 8201 SOUTHWEST FWY, HOUSTON, TX 77074; and TEXAS PEARL., INC.,	§ § § § § § §	
	§	
Defendants.	§	**334th JUDICIAL DISTRICT**

AMENDED MOTION BY DEFENDANT FACEBOOK, INC. TO DISMISS THE SECOND AMENDED PETITION PURSUANT TO RULE 91A

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Subject to and without waiving its previously filed Special Appearance to Contest Personal Jurisdiction, Objection to Improper Venue and Motion to Dismiss for Improper Forum, and Answer ("Special Appearance"), Defendant Facebook, Inc. files this Amended Motion to Dismiss Plaintiff Jane Doe's claims against it under Texas Rule of Civil Procedure 91a.[1]

INTRODUCTION

Plaintiff Jane Doe alleges that, when she was a minor, she was a victim of rape and child trafficking at the hands of assailants who posted and advertised her on the website backpage.com, an on-line service that has been seized by the federal government in connection with its widely-reported use for child sex trafficking. Backpage.com LLC, along with several of its senior officers, are defendants in this lawsuit. Plaintiff also has sued Facebook, alleging that her initial assailant, with whom she had shared common friends on Facebook, became her "Facebook friend" and then communicated with her on Facebook's messengering service. She claims that, after initial communications designed to gain her trust, this person promised her a modeling job and offered to meet her and console her after she argued with her mother. During and after that off-line meeting, Plaintiff alleges, she was beaten, raped and posted as a child prostitute on backpage.com.

Plaintiff's claim against Facebook turns entirely on the initial communications she had with the "Facebook friend" after she apparently agreed to include him in her "friend" network on Facebook. Other than those communications, the Amended Petition does not allege any involvement by Facebook in the acts of violence that Plaintiff suffered. The communications all allegedly occurred on Facebook's "messenger" app, which works like texting (SMS) and other mobile messaging apps to allow Facebook users to communicate with their Facebook friends on their phones or other devices. Essentially, Plaintiff's claim is that Facebook failed to monitor, block, remove, or warn about the

[1] Facebook has not been provided either with Jane Doe's real identity or any information suggesting that she has access to funds. Accordingly, Facebook is willing to waive its right, should the Court grant this motion, to any award of its legal fees pursuant to Texas Rule of Civil Procedure 91a.7.

content transmitted by the "Facebook friend" or to alert her that this person might cause her harm.

There can be no doubt that human trafficking is an abhorrent practice, as is the use of on-line services to advertise children for sexual exploitation. Facebook employs and enforces community standards policies, and also uses sophisticated technology, to prevent its broadly available platform and messaging service from being used for this and other types of human harm. But just as with other communications services such as email or texting apps, there is no legal basis for holding a carrier or platform liable when the service is used by a third party to communicate harmful content—specifically, in this case, communications geared toward befriending Plaintiff and gaining her trust. Among multiple other reasons (including a lack of causation or a legal duty), such claims are legally barred by Section 230 of the federal Communications Decency Act ("CDA"), 47 U.S.C. § 230, which broadly protects online platforms such as Facebook, including associated messaging services, from liability for third party content or communications on the platform. As courts repeatedly have held, Section 230 bars claims, such as those alleged here, that on-line communications via a defendant's platform or messaging service led to some form of off-line harm. *See GoDaddy.com, LLC v. Toups*, 429 S.W.3d 752, 759 (Tex. App.—Beaumont 2014, pet. denied) (reversing trial court's denial of defendant's motion to dismiss under Rule 91a and holding that Section 230 barred plaintiffs' claims); *Doe v. MySpace, Inc.*, 528 F.3d 413, 418 (5th Cir. 2008) (affirming the trial court's grant of dismissal on the pleadings). Because Plaintiff's claims have no basis in law, the Court should dismiss them under Rule 91a.

BACKGROUND

Plaintiff Jane Doe has asserted claims against Backpage, four senior Backpage executives, the hotels at which she allegedly was victimized, and Facebook. As against Facebook, her Second Amended Petition ("SAP") alleges common law claims for negligence and gross negligence and a statutory claim under section 98.002 of the Civil Practice and Remedies Code. SAP at ¶¶ 291–309. This motion addresses only the claims against Facebook.

Plaintiff alleges that in 2012, when she was 15 years old (SAP ¶ 206), she was contacted on Facebook by another user who already was Facebook friends with some of her own Facebook friends. *Id.* at ¶¶ 206–207, 222. This user, an adult named Trevon, used the pseudonym "King" on Facebook. *Id.* at ¶ 222. Plaintiff alleges that she and Trevon engaged in on-line communications with Facebook's user-to-user messaging function. *Id.* 209–09. After allegedly gaining her confidence, including by telling her that she was "pretty enough to be a model" and making "false promises" of a "better life through modeling," he offered her a job as a model and suggested they meet in person. *Id.* at ¶ 214. Plaintiff alleges that "within hours" of that meeting, unnamed assailants raped and beat her and "forced [her] into further sex trafficking," facilitated by child prostitution advertisements posted on backpage.com. *Id.* at ¶¶ 217–111.

Plaintiff's claims against Facebook center upon Trevon's use of Facebook's messengering service to lure Plaintiff into the initial off-line meeting. She alleges that Facebook failed to implement certain "safeguard" measures to prevent her from communicating with potential traffickers, such as "verifying" users' identities, "requiring minors to link their account to a parent or guardian's account," "prevent[ing] adults . . . from communicating with minors," and "flagging" and "blocking" communications that "indicate human trafficking." *Id.* at ¶¶ 193, 200–04, 212, 223, 294, 308. She further asserts that Facebook should have warned her about the dangers of trafficking by individuals such as Trevon. *Id.* at ¶¶ 193, 203–04, 210, 212, 222, 292, 294, 308. Subject to its Special Appearance, Facebook has generally denied these allegations.

Plaintiff does not allege that Facebook had any advance knowledge that the "Facebook friend" presented a risk to Plaintiff or any other person; nor does she allege that Facebook had any involvement in the off-line harm that she suffered.

STANDARD FOR DISMISSAL UNDER RULE 91A

Under Rule 91a of the Texas Rules of Civil Procedure, "a party may move to dismiss a cause of action on the grounds that it has no basis in law or fact." Tex. R. Civ. P. 91a.1. "A cause of action has no basis in law if the allegations, taken as true, together with inferences reasonably drawn from them, do not entitle the claimant to the relief sought." *Id.* Texas courts "accept as true the factual allegations in the pleadings to determine whether the cause of action has a basis in law or fact." *Guzder v. Haynes & Boone, LLP*, 01-13-00985-CV, 2015 WL 3423731, at *3 (Tex. App.—Houston [1st Dist.] May 28, 2015, no pet.). A "cause of action has no basis in law under Rule 91a" where "the petition alleges … facts that, if true, bar recovery." *Guillory v. Seaton, LLC*, 470 S.W.3d 237, 240 (Tex. App—-Houston [1st Dist.] 2015, pet. denied). Dismissal under rule 91a is especially appropriate "when the plaintiff's own allegations, taken as true, trigger a clear legal bar to the plaintiff's claim." *Reaves v. City of Corpus Christi*, 518 S.W.3d 594, 608 (Tex. App.—Corpus Christi 2017, no pet.).

ARGUMENT AND AUTHORITIES

I. Section 230 of the Communications Decency Act bars all three of Plaintiff's claims against Facebook

Even accepting the allegations in the petition as true, Plaintiff's claims are barred as a matter of law by Section 230 of the CDA. As both the Beaumont Court of Appeals and the U.S. Court of Appeals for the Fifth Circuit have recognized, Section 230 applies—and early dismissal is appropriate—where the plaintiff seeks to impose liability on an internet platform or messaging service based on a third-party communication that occurred on that platform or service and allegedly led to some form of off-line harm to the plaintiff. *GoDaddy.com*, 429 S.W.3d at 759; *MySpace*, 528 F.3d at 418. The Court should follow these precedents and dismiss Plaintiff's claims against Facebook.

A. Section 230 immunizes interactive service providers from claims based on third-party content

Section 230 provides that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider," and "[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section." 47 U.S.C. § 230(c)(1), (e)(3). Section 230 applies "without regard to the nature of the content at issue,"[2] *GoDaddy.com*, 429 S.W.3d at 759, and extends "broad immunity … to Web-based service providers for *all* claims stemming from their publication of information created by third parties." *MySpace*, 528 F.3d at 418 (emphasis added). In particular, Section 230 immunizes internet messenger services such as the one involved here from liability for allegedly harmful third-party communications conveyed via those services. *Id.* at 417 (Section 230 barred claims based on allegation that MySpace failed to prevent predators from communicating with minors through, for example, "internal email and/or instant messaging on MySpace"); *Fields v. Twitter, Inc.*, 200 F. Supp. 3d 964, 975 (N.D. Cal. 2016) ("[T]he private nature of Direct Messaging does not remove the transmission of such messages from the scope of publishing activity under section 230(c)(1)."). Among other reasons, courts have recognized that the imposition of a duty to monitor customer posts and communications would have a crippling effect on internet platforms. *Zeran v. America Online, Inc.*, 129 F.3d 327, 333 (4th Cir. 1997).

Here, the sole alleged connection between Plaintiff's alleged injuries and Facebook is that Plaintiff's initial assailant—Trevon or "King"—gained her trust through communications on Facebook's messenger app and ultimately proposed an off-line meeting, after which she allegedly was assaulted, raped, and advertised as a child prostitute on backpage.com. SAP ¶¶ 207–217. It is settled law that "[a]llowing [Plaintiff] to assert *any* cause of action against [Facebook] for publishing content created by a third party, or for refusing to remove content created by a third party[,] would be squarely

[2] The statute currently contains a limited exception, not applicable here, for certain sex-trafficking claims brought under specific federal statutes. On April 11, 2018, the President signed into law the Allow States And Victims To Fight Online Sex Trafficking Act Of 2017 ("FOSTA"), Pub. L. 115-164, Apr. 11, 2018, 132 Stat. 1254. Among other reforms, FOSTA (1) created a new federal civil cause of action against operators of interactive computer services who intentionally "promote or facilitate the prostitution of another person", *id.* at § 6 (codified at 18 U.S.C. § 2421A), and (2) amended Section 230 to create a discrete exception for federal civil claims brought under 47 U.S.C. § 1591 and § 1595 (which together provide a federal civil cause of action against knowing and reckless participants in sex trafficking), *id.* at § 4 (codified at 47 U.S.C. § 230(e)(5)). In this case, Plaintiff has chosen not plead a claim under 18 U.S.C. § 2421(A), or 18 U.S.C. § 1595, or any other federal statute, presumably to avoid removal. SAP ¶¶ 291–309. Accordingly, the FOSTA amendments do not apply, and the normal Section 230 analysis applies to Plaintiff's claims against Facebook.

inconsistent with [S]ection 230." *GoDaddy.com*, 429 S.W.3d at 758 (emphasis added); *see also La'Tiejira v. Facebook, Inc.*, 272 F. Supp. 3d 981, 995 (S.D. Tex. 2017) (Facebook entitled to immunity under Section 230). In short, where the plaintiff's claim depends on the assertion that the online service was used as an "intermediar[y]" for "other parties' potentially injurious messages," Section 230 bars the claim. *Zeran*, 129 F.3d at 330–31. As shown below, Plaintiff's claims meet all the elements of Section 230 and accordingly are barred.

B. Plaintiff's three claims meet all of the elements for Section 230 immunity

Dismissal under Section 230 is warranted when (1) the defendant is a "provider … of an interactive computer service"; (2) the allegedly harmful content at issue was "provided by another information content provider"; and (3) the claim seeks to hold the defendant liable as a "publisher or speaker" of that content under a state-law cause of action. *Davis v. Motiva Enterprises, L.L.C.*, No. 09-14-00434-CV, 2015 WL 1535694, at *2 (Tex. App.—Beaumont Apr. 2, 2015, pet. denied) (quoting *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1100–01 (9th Cir. 2009)). Each element is met here.

First, Facebook is a "provider … of an interactive computer service." An "interactive computer service" means "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server." 47 U.S.C. § 230(f)(2). As numerous courts have recognized, Facebook meets this definition because its users access its servers to share information on its platform. *La'Tiejira*, 272 F. Supp. 3d at 993; *Cohen v. Facebook, Inc.*, 252 F. Supp. 3d 140, 156 n.10 (E.D.N.Y. 2017); *see also MySpace*, 528 F.3d at 420–22 ("social networking" site was an "interactive computer service[e]" under Section 230). Section 230 fully applies to internet services, such as email messaging services, where the interactive computer service serves as an intermediary for third party communications. *See generally Zeran*, 129 F.3d at 331 (immunity covers "any cause of action that would make service providers liable for information originating with a third-party user of the service"); *MySpace*, 528 F.3d at 420–22 ("interactive computer service" includes social networking site on which "any … user can contact any other … user through internal email and/or instant messaging"); *Fields*, 200 F. Supp. 3d at 975 ("private nature" of messaging app does not remove claim from Section 230(c)(1) immunity); *Beyond Sys., Inc. v. Keynetics, Inc.*, 422 F. Supp. 2d 523, 536 (D. Md. 2006) (Section 230 barred claims based on web company's transmission of "allegedly offensive e-mails"). Plaintiff does not allege that she had any contact with Facebook other than through Facebook's interactive computer service.

Second, the allegedly harmful content—consisting entirely of messages from the "Facebook friend"—was "provided by another information content provider." An "information content provider" is a person or entity "that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service." 47 U.S.C. § 230(f)(3). The term "development" "refer[s] not merely to augmenting the content generally, but to materially contributing to its alleged unlawfulness." *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1167–68 (9th Cir. 2008).

Accepting Plaintiff's allegations as true, the alleged harmful content consisted of messages that Trevon composed and sent to Plaintiff via Facebook's user-to-user messaging platform. SAP ¶¶ 291–309. Plaintiff does not (and could not) allege that Facebook created or developed any of Trevon's messages to Plaintiff or altered or contributed to those messages in any way, let alone in a way that "materially contribut[ed] to [their] alleged unlawfulness," *see Roommates.com*, 521 F.3d at 1167–68.

The fact that Facebook is a "for-profit" social media platform does not change the applicability of Section 230 because there is no "for-profit exception to § 230's broad grant of immunity." *M.A. ex rel. P.K. v. Village Voice Media Holdings, LLC*, 809 F. Supp. 2d 1041, 1050 (E.D. Mo. 2011); *accord Roommates.com*, 521 F.3d at 1161, 1174–75 (website's receipt of revenue from "advertisers and subscribers" did not affect immunity).[3]

[3] The petition points to Facebook's advertising practices and profit motive, ostensibly to suggest that Facebook was somehow complicit in "developing" the content that appears on its platform. *See, e.g.*, SAP

Nor does the use of "neutral tools"—such as those that filter or arrange third-party content—equate with "creat[ing]" or "develop[ing]" information posted by third parties. *Roommates.com*, 521 F.3d at 1171–72; *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1124 (9th Cir. 2003). In this regard, the allegations about Facebook starkly contrast with the allegations against the Backpage defendants, who are alleged to have actively curated, "manipulate[ed]," and "systematically edit[ed]" advertisements for child prostitutes posted on the Backpage.com site "to sanitize the content of innumerable advertisements for illegal transactions." *See* SAP ¶¶ 231–60, 266, 312. *See generally Roommates.com,* 521 F.3d at 1167–68 (defendant website "developed" illegal content and thus was not immune under Section 230 where the defendant "materially contribut[ed] to [the content's] alleged unlawfulness"). In addition, in contrast to the allegations that the backpage.com site was designed to facilitate criminal activity, Plaintiff does not dispute that Facebook's messenger service is broadly available for user-to-user communications by Facebook users, or that the overwhelming majority of communications on that service are uncontroversial.

Third, Plaintiff's claims seek to hold Facebook liable as a "publisher or speaker" of third-party content. Although the Second Amended Petition alleges hundreds of new "jurisdictional facts" about Facebook, the factual allegations about Facebook's alleged connection to this case are essentially unchanged. Facebook's only alleged connection to Plaintiff's injuries is the allegation that Trevon initially contacted her on the Facebook platform, became her "Facebook friend," and communicated with her via Facebook's messaging service. SAP ¶¶ 206–222, 291–309. These facts that Plaintiff asserts led to harm against her all involve communications by Trevon, not messages or content created by Facebook. And each of Plaintiff's claims seeks to hold Facebook liable for its alleged failure to

¶¶ 1–2, 31–32, 204–05, 308. Not only is this allegation far-fetched and unsupported—it is difficult to see how Facebook, a free service that makes money through advertising, would benefit from allowing its site to be used as a vehicle for child trafficking—but it does not support the conclusion that Facebook created or developed any of the harmful communications at issue here.

monitor, block, remove, or warn Plaintiff about the content Trevon created and posted to Facebook.

Under Section 230, Facebook cannot be liable on that basis, no matter under what legal theory the claims are pled. Because all of Plaintiff's claims against Facebook "stem from [Facebook's] publication of the contested content" and "its failure to remove the content," allowing Plaintiff "to assert any cause of action" against Facebook "would be squarely inconsistent with section 230." *See GoDaddy.com*, 429 S.W.3d at 758; *see also MySpace*, 528 F.3d at 420 ("Section 230 specifically proscribes liability in such circumstances" where a plaintiff "attempts to hold [a provider of an interactive computer service] liable for decisions relating to the monitoring, screening, and deletion of content from its network—actions quintessentially related to a publisher's role." (citations omitted)); *Roca Labs, Inc. v. Consumer Opinion Corp.*, 140 F. Supp. 3d 1311, 1324 (M.D. Fla. 2015) (liability based on "the effect of third parties' posts would run afoul of Section 230 of the CDA"). There is not, nor could there be, any allegation that Facebook had any knowledge of, or involvement in, the physical violence and criminal conduct that began with the subsequent off-line meeting between Plaintiff and Trevon. Because any theory of causation necessarily depends on Facebook's alleged publication of Trevon's content, CDA 230 precludes the claim. *See, e.g., Igbonwa v. Facebook, Inc.*, 3:18-cv-2027, 2018 WL 4907632, at *6 (N.D. Cal. Oct. 9, 2018) (CDA 230 "covers not only claims that are based on conduct that is directly related to the publication or removal or content but also claims where causation depends on the content itself."); *Gonzalez v. Google, Inc.*, 282 F. Supp. 3d 1150, 1165 (N.D. Cal. 2017) (where "Plaintiffs 'rely on content to establish causation,'" CDA 230 bars their claims (quoting *Cohen*, 252 F. Supp. 3d at 157)).

Nor can Plaintiff plead around Section 230 by recasting the claims against Facebook in "failure to warn," "failure to prevent," or "failure to safeguard" terminology. *See, e.g.,* SAP ¶¶ 193, 200–04, 210, 212, 222–23, 292, 294, 308. Courts consistently have unmasked and rejected such attempts to evade Section 230. "What matters" for Section 230 is not the "label[]" placed on the claim but "whether the cause of action inherently requires the court to treat the defendant as the 'publisher or speaker' of content provided by another." *Barnes*, 570 F.3d at 1101–03. If "the duty" allegedly violated "derives from the defendant's status or conduct as a 'publisher or speaker,'" that ends the analysis, and Section 230 "precludes liability." *Id.* at 1102; *see also GoDaddy.com*, 429 S.W.3d at 759 (plaintiffs may not "circumvent [Section 230] by couching their claims as state law intentional torts"); *MySpace*, 528 F.3d at 419–20 (liability for failing to screen potential users was no different from liability for publishing users' content).

For example, in *MySpace*, the Fifth Circuit held that "failure to warn" and "failure to safeguard" claims are barred by Section 230. The plaintiff there alleged that MySpace "failed to implement basic safety measures to prevent sexual predators from communicating with minors on its Web site," but the Court held that these allegations were "merely another way of claiming that MySpace was liable for publishing the communications," and that these allegations "sp[oke] to MySpace's role as a publisher of online third-party-generated content." 528 F.3d at 416–17, 420–21. The plaintiffs' claims were "barred by the CDA, notwithstanding their assertion that they only s[ought] to hold MySpace liable for its failure to implement measures that would have prevented Julie Doe from communicating with [the sexual predator]." *Id.* at 420; *see also Herrick v. Grindr, LLC*, 306 F. Supp. 3d 579, 591–92 (S.D.N.Y. 2018); *McDonald v. LG Electronics USA, Inc.*, 219 F. Supp. 3d 533, 539–40 (D. Md. 2016).

The approach in *MySpace* is consistent with how courts around the country have applied the CDA. For example, courts have dismissed under the CDA claims alleging that individuals or groups used Facebook, Twitter, and Google to communicate harmful messages that allegedly led to off-line harm such as terrorist attacks or other violent acts. *See, e.g.*, *Pennie v. Twitter, Inc.*, 281 F. Supp. 3d 874, 888–92 (N.D. Cal. 2017) (applying CDA 230 to dismiss claims alleging that use of online platforms led to Dallas police shootings); *Cohen*, 252 F. Supp. 3d at 157–58 (same for terrorist attacks); *accord Force v. Facebook, Inc.*, 304 F. Supp. 3d 315, 319–25 (E.D.N.Y. 2018), *appeal docketed*, No. 18-397 (2d

Cir. Feb. 9, 2018); *Klayman v. Zuckerberg*, 753 F.3d 1354, 1360 (D.C. Cir. 2014); *Gonzalez*, 282 F. Supp. 3d at 1153–56; *Fields v. Twitter, Inc.*, 217 F. Supp. 3d 1116, 1128–29 (N.D. Cal. 2016), *aff'd on other grounds*, 881 F.3d 739 (9th Cir. 2018); *Fields v. Twitter, Inc.*, 200 F. Supp. 3d at 975.

Section 230 bars Plaintiff's claims here for the same reason. Plaintiff's claim seeks to hold Facebook liable based on its alleged failure to "take any reasonable steps to mitigate the use of Facebook by human traffickers," SAP ¶ 200; its alleged failure to "warn[] against" certain third-party messages due to their content, *id.* ¶ 210; and its alleged failure to screen, "warn" about, "report," remove, or prevent certain users or messages due to their content, *id.* ¶ 294. But section 230 prohibits Facebook from being held "liable for its [alleged] failure to implement measures that would have prevented [Jane] Doe from communicating with" Trevon. *See MySpace*, 528 F.3d at 420. Because that is precisely what Plaintiff's claims seek to do, the claims have no basis in law, and they are subject to dismissal under Rule 91a. *See GoDaddy.com*, 429 S.W.3d at 762.[4]

II. The Court should dismiss Plaintiff's claims against Facebook with prejudice

The nature of Section 230 immunity means that defendants should not be subject to multiple rounds of litigation where it is clear that immunity would cover any new or alternative iteration of the underlying legal theories. This case presents the very danger that Congress sought to prevent in enacting Section 230: that platforms hosting immeasurable amounts of third-party content would face endless litigation based on that content—the "death by ten thousand duck-bites" about which the

[4] To the extent Plaintiff seeks to impose liability on the theory that Facebook should have prohibited teenagers from communicating with adults in the absence of parental consent, any such theory is also foreclosed by the First Amendment of the U.S. Constitution. *See Brown v. Entertainment Merchants Ass'n*, 564 U.S. 786, 795 n.3 (2011) (striking down state law prohibiting the sale or rental of violent video games to minors without parental consent). So long as the regulated speech is otherwise protected, minors enjoy full First Amendment rights. *Id.* at 794–95 & n.3. Accordingly, laws that would prohibit minors from engaging in or being exposed to protected speech without their parents' prior consent are "obviously an infringement" on the free speech rights of young people and, absent some justification satisfying strict scrutiny, "must be unconstitutional." *Id.* at 795 n.3. Plaintiff may not recover on a claim that would require this Court to "appl[y] a state rule of law" that would "impose invalid restrictions on [a litigant's] constitutional freedoms of speech and press. *See N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964).

Ninth Circuit warned in *Roommates.com*, 521 F.3d at 1174. Plaintiff's claims against Facebook should be dismissed with prejudice. *See GoDaddy.com*, 429 S.W.3d at 753, 761 (reversing denial of Rule 91a motion on interlocutory appeal and finding that futile amendment of petition "would be contrary to the policies set forth in the CDA").

CONCLUSION

Subject to its Special Appearance, Facebook asks the Court to dismiss all three of Plaintiff's causes of action against Facebook under Rule 91a.

Dated: March 27, 2019

Respectfully submitted,

/s/ Russ Falconer

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CERTIFICATE OF SERVICE

I hereby certify that on the 27th of March, 2019, the foregoing document was filed and served on all counsel of record by electronic case filing in accordance with the Texas Rules of Civil Procedure.

/s/ Russ Falconer
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Cause No. 2018-69816

JANE DOE	§	In the District Court of
	§	
v.	§	
	§	
FACEBOOK, INC.; MICHAEL LACEY;	§	334^{TH} Judicial District
JAMES LARKIN; JOHN BRUNST;	§	
AMERICA'S INNS, INC. D/B/A	§	
AMERICA'S INN 8201	§	
SOUTHWEST FREEWAY, HOUSTON,	§	
TX 77074; AND TEXAS PEARL, INC.	§	Harris County, Texas

PLAINTIFF'S RESPONSE TO RULE 91A MOTION TO DISMISS

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Introduction: Three Take-Aways

Facebook relies upon Section 230 of the federal Communications Decency Act of 1996 as the sole basis for its motion to dismiss Jane Doe's claims.[1] That motion should be denied for three overriding independent reasons:

The federal courts got this wrong. The majority of the federal courts, and subsequently the state courts, have ignored the plain meaning of Section 230's language, mistakenly interpreted Congress's intent when enacting the statute, and disregarded any plausible common-sense understanding of the objectives Congress sought to achieve. This Court is not required to follow these decisions, and it should not.

The 2018 amendments demonstrate that Congress does not want Section 230 to immunize internet service providers from claims such as those brought by Jane Doe. Section 230 was enacted in 1996, when the internet was in an embryonic state. Because the courts had misinterpreted Section 230, Congress was forced to pass an amendment to the section in 2018 to make it clear that the section did not apply to human trafficking claims. If there was any real doubt that the courts had gotten the

[1] A nearly identical copy of this response is being filed in a companion case, No. 2018-82214.

interpretation of Section 230 wrong in connection with human trafficking claims, the amendment has made Congress's intent unmistakable.

Without regard to the first two points, this Court is not obligated to follow the prior decisions broadly construing Section 230. The issue raised by Facebook's motion is, at its core, one of preemption. But Section 230 does not preempt Texas law with respect to human trafficking claims, so it does not require this Court to follow the decisions of the federal courts. There are only three Texas appellate opinions dealing with Section 230 in Texas—all three from the Beaumont court of appeals. Those decisions are not binding precedent on this court. There has been no guidance on the construction of Section 230 from any of this Court's superior courts. The Court will be writing on a blank slate.

The Court, however, would not be standing alone. Even before the 2018 amendments, a growing number of courts interpreted Section 230 based on the text, not outdated notions of Congress's policy goals for the internet. These courts have held that internet service providers were not immune from claims seeking to hold them liable for their own conduct, claims such as failure to warn and negligent undertaking. Jane Doe seeks to hold Facebook liable for its own conduct—for facilitating trafficking, failing to warn Jane

Doe about trafficking, and negligently undertaking to protect Jane Doe from harmful and abusive activity.

Standard of Review for 91a Motions

Rule 91a permits a party to "move to dismiss a cause of action on the grounds that it has no basis in law or fact." Tex. R. Civ. P. 91a.1. "A cause of action has no basis in law if the allegations, taken as true, together with inferences reasonably drawn from them, do not entitle the claimant to the relief sought." *Id.* In ruling on a motion to dismiss under 91a, the Court should take all the plaintiff's allegations as true and consider whether her petition contains "enough facts to state a claim to relief that is plausible on its face." *GoDaddy.com, LLC v. Toups*, 429 S.W.3d 752, 754 (Tex. App.—Beaumont 2014, pet. denied).

Facebook has moved to dismiss Jane Doe's claims on pure legal grounds. The sole question before the Court is whether Section 230 of the federal Communications Decency Act of 1996—as recently amended in 2018—completely immunizes internet service providers[2] against state statutory and common-law claims based on the providers' roles in facilitating human trafficking of minors.

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[2] Facebook contends it is an internet service provider. For the purposes of this response, we will assume that to be the case.

Argument and Authorities

I. The Historical Context Explains Why Facebook's Motion Should Be Denied

Reviewing the history of litigation against internet service providers shows why Facebook's motion should be denied. That history starts in 1996, when Congress, appalled by pornographic content on the internet, enacted the Communications Decency Act, including Section 230.

Shortly thereafter, the Fourth Circuit issued its opinion in *Zeran v. America Online, Inc.* 129 F.3d 327 (4th Cir. 1997), which was a defamation case against a service provider. *Zeran* held that Section 230 grants broad immunity to internet service providers from virtually all claims based on harmful online content or conduct. For years, the vast majority of courts followed *Zeran*'s approach. Plaintiffs who sued internet service providers almost always lost.

As time went on, some cracks in the service providers' armor began to emerge. Some courts—even some federal circuit courts—began to doubt the soundness of previous decisions. Commentators argued that *Zeran*'s progeny inexplicably ignored the statutory language and totally disregarded the legislative intent of Congress.

And the internet changed. Dramatically. By the time people realized that harmful online conduct could have widespread and serious consequences, the internet of the mid-90s had become a distant memory. But by then, the prevailing judicial interpretation of Section 230 was providing legal immunity for intentionally harmful, and frequently criminal, conduct.

In 2018, Congress amended Section 230, specifically exempting human trafficking cases from its purview. While claims against internet service providers premised on conduct other than human trafficking may still need to contend with the cases Facebook relies upon here, Congress has mandated that Jane Doe does not.

II. Congress Passed Section 230 to Shield Minors from Internet Pornography

A. The Congressional Intent Behind 230(c)(1)

In June 1995, two representatives introduced a bill that largely contained the language of what would become the Communications Decency Act: An Act to Encourage and Protect Private Sector Initiatives that Improve User Control Over Computer Information Services, H.R. 1978, 104th Cong. (1995). Discussing that bill, the Committee on Commerce, Science, and Technology noted that:

> The information superhighway should be safe for families and children. The Committee has been troubled by an increasing number of published reports of inappropriate uses of telecommunication technologies to transmit pornography, engage children in inappropriate adult contact, terrorize

computer network users through "electronic stalking" and seize personal information.

S. Rep. No. 104-23, at 59 (1995).

Thus, Congress wanted to incentivize internet service providers to create lock-out mechanisms: it sought to "encourage telecommunications and information service providers to deploy new technologies and policies which would allow users to control access to prohibited communications." *Id.* As the bill wound its way through the legislative process, a House Conference Report noted: "This section provides 'Good Samaritan' protections from civil liability for providers or users of an interactive computer service for actions to restrict or to enable restriction of access to objectionable online material." H.R. Rep. No. 104-458, at 194 (1996).

B. Congress Also Granted Internet Service Providers Immunity from Certain Defamation Claims

At the same time as Congress worried about pornography, it became concerned about defamation claims against internet service providers. Two courts in New York had reached opposite results in similar defamation cases. These two decisions set the stage for "publisher" protections ultimately adopted in the Communications Decency Act.

First, *Cubby, Inc. v. CompuServe, Inc.*, 776 F. Supp. 135 (S.D.N.Y. 1991), held that CompuServe was a distributor, rather than a publisher, of defamatory content posted by a customer in one of its forums. As a distributor, CompuServe could not be liable unless the plaintiff proved it had actual or constructive knowledge of the defamatory content. *Id.* at 139.

But a few years later, the court in *Stratton Oakmont, Inc. v. Prodigy Services Co.*, No. 31063/94, 1995 WL 323710, (N.Y. Sup. Ct. May 24, 1995), held that Prodigy was a *publisher* of defamatory statements posted by an unknown user on its online bulletin board. The court distinguished this case from *Cubby* because Prodigy had exercised editorial control over content by creating guidelines, automatically screening posts, monitoring the bulletin boards, and occasionally censoring content. *Id.* at *4. Thus, the court concluded that Prodigy was subject to publisher liability for defamatory content. *Id.* at *3.

C. Section 230(c)(1) Was Intended to Protect Internet Service Providers from Defamation Claims

The statutory language that ultimately made it into law provided:

> (c) Protection for "Good Samaritan" blocking and screening of offensive material.
>
> (1) Treatment of publisher or speaker
>
> No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information by another information content provider.

A House Conference report observed that "[o]ne of the specific purposes of this section is to overrule *Stratton-Oakmont v. Prodigy* and any other similar decisions which have treated such providers and users as publishers or speakers of content that is not their own because *they have restricted access to objectionable material.*" H.R. Rep. 104-458, at 194 (1996) (emphasis added). The report continued that the "conferees believe that such decisions create serious obstacles to the important federal policy of empowering parents to determine the content of communications their children receive through interactive computer services." *Id.*

III. Ignoring Congressional Intent, the Courts Expanded Section 230(c)(1) Into a Broad Immunity for Internet Service Providers

A. Federal Courts Began Interpreting Section 230(c)(1) As Providing Broad Immunity

1. *Zeran* Expansively Interpreted Section 230(c)(1) in Order to Protect "the New and Burgeoning Internet Medium"

The Fourth Circuit, in *Zeran v. America Online, Inc.*, 129 F.3d 327 (4th Cir. 1997), was the first circuit court to address Section 230(c)(1). *See Bennett v. Google, LLC*, 882 F.3d 1163, 1166 (D.C. Cir. 2018) (describing *Zeran* as the seminal case). Zeran was the victim of a hoax that attributed offensive ads posted on an AOL bulletin board to him. *Zeran*, 129 F.3d at 329. Zeran filed suit and asserted defamation and negligence claims. *Id.* at 330. He argued that because Section 230 was drafted to respond to *Stratton-*

Oakmont, Section 230 only precluded publisher liability and not distributor liability. *Id.* at 331.

The court identified broad policy reasons for immunizing internet service providers. It argued Congress thought tort-based lawsuits were a threat to "the new and burgeoning Internet medium." *Id.* at 330. So the court concluded that "to maintain the robust nature of Internet communication" while encouraging the self-regulation of offensive material, Congress enacted Section 230. *Id.* The court rejected Zeran's argument because it believed that subjecting internet service providers to distributor liability would defeat the purpose of Section 230. *Id.* at 333.

But while Congress was concerned with promoting the development of the internet, that was not its primary motive for Section 230—its intent was to encourage "blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material." 47 U.S.C. § 230(b)(4). As commentators have observed, the *Zeran* line of cases goes far beyond that: "Lawmakers thought they were devising a limited safe harbor from liability for online providers engaged in self-regulation." Danielle Keats Citron & Benjamin Wittes, *The Problem Isn't Just Backpage: Revising Section 230 Immunity*, 2 Geo. L. Tech. Rev. 453, 455

(2018). But after *Zeran*, most courts were not guided by what Congress intended.

2. Most Federal Courts Followed *Zeran* and Relied on Its Broad Policy Arguments to Support Their Expansive Application of Section 230(c)(1)

Most circuit courts have followed the *Zeran* court's lead. These courts rely on *Zeran*'s policy goals related to protecting the "new and burgeoning" internet to justify extending immunity under Section 230(c)(1). *See, e.g., Universal Commc'n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 419 (1st Cir. 2007) ("In light of these policy concerns, we too find that Section 230 immunity should be broadly construed."); *Green v. America Online*, 318 F.3d 465, 471 (3d Cir. 2003) (rejecting plaintiff's interpretation of "information" in Section 230(c)(1) because it "would run afoul of the intention of section 230"). In doing so, the courts expanded internet service providers' immunity under Section 230(c)(1) in two key respects.

First, courts determined that whenever third-party content was a but-for cause of plaintiff's injury, Section 230(c)(1) applies regardless of the cause of action asserted. *See, e.g., Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12, 19-20 (1st Cir. 2016) (plaintiffs' federal human trafficking claim treated defendant as a publisher because "there would be no harm to [plaintiffs] but for the content of the postings"); *Doe v. MySpace, Inc.*, 528 F.3d 413, 419-20

(5th Cir. 2008) (negligent failure to monitor claim treated defendant as a publisher because but-for plaintiff and third party communicating through internet service provider, plaintiff would not have been injured); *Johnson v. Arden*, 614 F.3d 785, 791 (8th Cir. 2010) (because none of the offensive information originated from internet service provider, it was not a publisher).

Second, the courts held that an internet service provider would be liable only when the provider directly and materially contributed to offensive content on its platform. This high standard was *not* satisfied even when the internet service provider designed and operated its website to facilitate and profit from illegal third-party content and conduct. *See e.g.*, *Backpage.com*, 817 F.3d at 21 (rejecting the argument that internet service provider was a content provider because it facilitated and benefited from the illegal conduct); *Jones v. Dirty World Entm't Recordings LLC*, 755 F.3d 398, 413, 415-16 (6th Cir. 2014) (holding internet service provider that solicited, selected, and commented on defamatory statements was immune under Section 230).

Thus, under the *Zeran* line of cases, Section 230 barred plaintiffs' claims regardless of the type of cause of action asserted unless the internet service provider participated directly and materially in creating the offensive content on its platform.

3. Many State Courts Have Blindly Followed the *Zeran* Line of Federal Decisions

Many state courts have also followed *Zeran*. Like their federal counterparts, these courts rely on broad policy statements to justify their expansive constructions of Section 230(c)(1). *See, e.g., Doe v. America Online, Inc.*, 718 So. 2d 385, 387-89 (Fla. 4th Dist. Ct. App. 1998), *approved*, 783 So. 2d 1010 (Fla. 2001) ("For the reasons expressed in *Zeran* as set forth in this opinion, we affirm the trial court's dismissal of Doe's complaint with prejudice.").

The three Texas state court opinions that address Section 230(c)(1) fall into this camp. In its first case, the court set the tenor for the cases that followed, citing *Zeran* for its conclusion that "[i]n section 230, Congress apparently made a choice 'not to deter harmful online speech through the separate route of imposing tort liability on companies that serve as intermediaries.'" *See Milo v. Martin*, 311 S.W.3d 210, 215 (Tex. App.—Beaumont 2010, no pet.) (quoting *Zeran*, 129 F.3d at 330).

The second case, *GoDaddy.com, LLC v. Toups*, 429 S.W.3d 752 (Tex. App.—Beaumont 2014, pet. denied), has been cited by scholars as one of the most flagrantly expansive applications of Section 230(c)(1). Danielle Keats

Citron & Benjamin Wittes, *The Internet Will Not Break: Denying Bad Samaritans §230 Immunity*, 86 Fordham L. Rev. 401, 408 (2017) ("the broad construction of the CDA's immunity provision adopted by the courts has produced an immunity from liability that is far more sweeping than anything the law's words, context, and history support."). The court argued that allowing liability related to any claim in which the plaintiffs' injury stems from third-party content would be contrary to Section 230 and "legislative intent." *GoDaddy.com*, 429 S.W.3d at 758, 758 n.3. The most recent Beaumont court opinion also concluded that Section 230 immunity applied because a cause of action would not otherwise have accrued but for the third-party content. *Davis v. Motiva Enterprises*, L.L.C., No. 09-14-00434-CV, 2015 WL 1535694, at *4 (Tex. App.—Beaumont Apr. 2, 2015, pet. denied) (plaintiff's negligent supervision and negligent entrustment claims treated defendant as a publisher because they related to harm caused by third-party content).

B. Some Courts Have Limited the Scope of Section 230(c)(1) Immunity

1. The Seventh Circuit Applies a Text-Based Analysis

The Seventh Circuit was the first circuit court to recognize the disconnect between *Zeran*'s application of Section 230 and the statutory language and history of Section 230. In *Doe v. GTE Corp.*, 347 F.3d 655, 660

(7th Cir. 2003), the court noted that Section 230 is titled "Protection for 'Good Samaritan' blocking and screening of offensive material" and asked: "Why should a law designed to eliminate ISPs' liability to the creators of offensive material end up defeating claims by the victims of tortious or criminal conduct?" *Id.*; *see also City of Chicago, Ill. v. StubHub!, Inc.*, 624 F.3d 363, 366 (7th Cir. 2010) ("subsection (c)(1) does not create an 'immunity' of any kind").

After analyzing the language of Section 230, the *GTE Corp.* court concluded Section 230 did not apply to the plaintiff's negligent entrustment claim because that claim did not seek to impose liability for a duty related to publisher or speaker conduct. *See GTE Corp.*, 347 F.3d at 660. Unlike the *Zeran* progeny, the Seventh Circuit evaluated whether the cause of action treated the internet service provider as a publisher or speaker. *Id.; see also Chicago Lawyers' Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666, 669-71 (7th Cir. 2008) (applying Section 230(c)(1) to statute that made publishing discriminatory advertisements illegal).

2. The Ninth Circuit Explicitly Limits Section 230(c)(1) to Claims Where the Duty Violated Involves Publication or Speech

Recognizing that the internet had "outgrown its swaddling clothes and no longer need[ed] to be so gently coddled," the Ninth Circuit followed the

Seventh Circuit's text-based analysis of Section 230. *See Fair Hous. Council of San Fernando Valley v. Roommates.Com, LLC*, 521 F.3d 1157, 1164-65, 1175 n. 39 (9th Cir. 2008) (en banc). The court expressly limited its prior decisions that followed *Zeran*. *See id.* at 1170-71; *see also Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1105 n.11 (9th Cir. 2009) (also acknowledging that its earlier decisions following *Zeran* had read Section 230 too broadly).

Most significantly, it articulated the test that the Seventh Circuit had implicitly applied to determine whether a claim treated the internet service provider as a publisher or speaker. The Ninth Circuit instructed that "courts must ask whether the duty that the plaintiff alleges the defendant violated derives from the defendant's status or conduct as a 'publisher or speaker.' If it does, Section 230(c)(1) precludes liability." *Barnes*, 570 F.3d at 1102. Applying the test in *Doe v. Internet Brands, Inc.*, 824 F.3d 846, 852 (9th Cir. 2016), the Ninth Circuit held that Section 230(c)(1) did not apply to the plaintiff's failure to warn claim because the claim had "nothing to do with Internet Brands' efforts, or lack thereof, to edit, monitor, or remove user generated content."

The Ninth Circuit also expressly rejected the broad "but-for" test, which had been expressly and tacitly applied by courts that followed *Zeran*, because such a test would result in general immunity against all claims derived from third-party content. *Id.* at 853. After all, "[p]ublishing activity is a but-for cause of just about everything" an internet service provider is involved in. *Id.*; *see also HomeAway.com, Inc. v. City of Santa Monica*, 918 F.3d 676, 682 (9th Cir. 2019) ("*Internet Brands* rejected use of a 'but-for' test that would provide immunity under the CDA solely because a cause of action would not otherwise have accrued but for the third-party content").

3. Other Courts and Members of Congress Have Also Repudiated *Zeran*'s Broad Immunity

The Seventh and Ninth Circuit Courts are not alone. Other courts have also interpreted Section 230(c)(1) as only granting limited immunity to internet service providers. For example:

- A Georgia court of appeals held that the plaintiff sought to hold internet service provider liable for its conduct, not for publishing or speaking, because she claimed the provider failed to warn that its "speed filter" caused reckless driving. *Maynard v. Snapchat, Inc.*, 816 S.E.2d 77, 79, 81 (Ga. Ct. App. 2018).

- Based on the statutory language of Section 230(c)(1) and the presumption against preemption, a Wisconsin court of appeals held "the Act does not protect a website operator from liability that arises from its own conduct in facilitating user activity." It concluded Section 230 did not apply to the plaintiffs' claim to hold the internet service provider liable for its own conduct in designing and operating the website, not for content published by a third party. *Daniel v. Armslist, LLC*, 913 N.W.2d 211, 214 (Wis. App. 2018) pet. granted, 918 N.W.2d 642 (Wis. 2018).

- One of the three Texas opinions applying Section 230 includes a concurrence arguing that *Zeran* "over-read Section 230(c)(1)" and applied publisher liability too broadly. *Milo v. Martin*, 311 S.W.3d

> 210, 220 n.1 (Tex. App.—Beaumont 2010, no pet.) (Gaultney, J. concurring).

The Seventh and Ninth Circuit's interpretation of Section 230 was also recently validated in an amicus brief from "current and past members of Congress" who participated "firsthand" in the development and enactment of Section 230 or the recent sex trafficking amendment. Brief of Members of U.S. Congress as Amici Curiae Supporting Respondents, *Daniel v. Armslist, LLC*, No. 2017AP344, 2019 WL 654471, at *1, 3-5 (Wis. Jan. 28, 2019). The legislators explained that Section 230 does not bar claims that seek to hold internet service providers liable for their own conduct, such as claims that the internet service provider "failed to warn of dangers of using its website or designed a website to facilitate wrongful conduct." *Id.* at *3-10. The *Zeran* line of cases that Facebook asks this Court to follow, therefore, "strayed from the text, upset the rule of law, and undermined the state courts' role as arbiters of private law." *Id.* at *8, 11.

C. The *Zeran* Line of Cases Immunized Bad Actors, Something that Cannot Have Been Intended by Congress

In a statement to Congress in 2017, Yiota Souras, Senior Vice President and General Counsel of the National Center for Missing and Exploited Children noted:

> The child sex trafficking victims who have been denied relief due to the [Communications Decency Act] include:

- A 14-year-old child who was trafficked online for two years and advertised with photos displaying her private body parts in sexually exploitive poses.

- A 15-year-old child who estimates she was raped over 1,000 times while trafficked on Backpage.com for a year and a half.

- A 15-year-old child who was trafficked for two years with ads posted on Backpage.com an average of six times a day with five to fifteen customers a day.

Stop Enabling Sex Traffickers Act of 2017: Hearing on S. 1693 Before the S. Comm. On Commerce, Sci. & Transp., 115th Cong. (2017) (Statement of Yiota Souras at 2). She continued: "NCMEC has managed tens of thousands of cases where children have been bought and sold by the commercialization of child sex trafficking online." *Id.*

So, at this point in the history, the question emerges: Can it really be the case that Congress intended to immunize internet service providers from intentional bad conduct that facilitated the commission of rape, human trafficking of minors, and terrorism?

As the Court will see in Section V below, the answer is "no." We know that is the answer because Congress specifically told the nation so when it was considering the 2018 amendments to Section 230.

IV. Meanwhile, the Internet Changes

A. Today's Internet Service Providers Do Not Need Protection from Us, We Need Protection from Them

Although the point is debatable, it may be that the fledgling internet needed some of the protection that the *Zeran* decision and its progeny bestowed upon it. But the internet of 1996 has mutated into something far more pervasive and dominant in our society.

First, it is ubiquitous. Information and communications technologies are more widespread than electricity, reaching over four billion people. Martin Hilbert, *Technological Information Inequality As an Incessantly Moving Target: The Redistribution of Information & Communication Capacities Between 1986 & 2010*, 65 J. of Ass'n for Info. Sci. & Tech. 821, 832 (2014); *Internet Usage Statistics—March 2019*, https://www.internetworldstats.com/stats.htm.

Second, it no longer exists to primarily sell internet services. It is not confined to generating profits through online advertising. Rather, it produces what technology philosopher and Harvard Business School professor Shoshana Zuboff labels "prediction products," harvesting information about us from our phones, fitbits, "smart" appliances and home devices, and marketing that information to "insurance, retail, finance, and an ever-widening range of goods and services companies." Shoshana Zuboff, *The Age of Surveillance Capitalism: The Fight for a Human Future at the New Frontier of Power* 10 (2019).

To the extent the *Zeran* line of cases had an underlying goal, it was to protect the internet service provider during the early days of the industry. The question is not now, and may never have been, whether internet service providers need to be protected from us; the question now is whether we can protect ourselves from them.

B. Today's Facebook Knows When It Is Being Used for Harmful Purposes

One of the concerns that runs through the *Zeran* line of cases was that the internet service provider could not monitor the material that was posted on its platform. When the Communications Decency Act was passed in 1996, that was almost certainly a valid concern. It no longer is.

Jane Doe has alleged and, at trial, will prove that Facebook can target users "based on a variety of factors including age, gender, location, interests, and behaviors." Third Amended Petition, ¶ 187. To do so, Facebook classifies its users into over 1,300 categories, including categories such as "Away from Family." *Id.* It uses this information and its algorithms to sell ads to micro-target groups such as the roughly 1,300 forty-year-old female motorcyclists in Nashville, Tennessee. *Id.* at ¶ 188.

Today, Facebook monitors not just its users' postings but also their "interests and behaviors," because it generates "substantially all" of its revenue from selling ads. *Id.* at ¶ 212. If it knows when a user is "Away from Family," Facebook knows when traffickers are targeting and grooming victims.

C. Today's Facebook Can Warn and Otherwise Protect Its Users

Facebook itself tells its community in the Terms of Service it attaches to the Rule 91a motion that "[w]e help you find and connect with people . . . that matter to you," by using "the data we have to make suggestions for you and others." Terms of Service, § 1.

And it explicitly tells its users that it employs "dedicated teams around the world" and develops "advanced technical systems to detect misuse of our Products, harmful conduct towards others, and situation where we may be able to help support or protect our community." *Id.* It claims it develops "automated systems to improve our ability to detect and remove abusive and dangerous activity that may harm our community and the integrity of our Products." *Id.* Finally, Facebook claims that it will act when it learns of harmful conduct on the platform by "offering help, removing content, blocking access to certain features, disabling an account, or contacting law enforcement." *Id.*

D. Today's Internet Facilitates the Trafficking of Minors

In 2017, the Senate Committee on Commerce, Science and Transportation heard Souras testify:

> Technology has fundamentally changed how children are victimized through sex trafficking in ways that would have been unimaginable just a few years ago. An adult can now shop from the privacy of his home or hotel room, often on a cell phone, to buy a child for rape. Traffickers lure and recruit children online. Websites can be used to create virtual marketplaces on which predatory offenders can peruse a variety of sexual experiences being offered for sale, including with children, and complete their purchase online.

Stop Enabling Sex Traffickers Act of 2017: Hearing on S. 1693 Before the S. Comm. On Commerce, Science & Transportation, 115th Cong. (2017) (Statement of Yiota Souras at 2). She continued: "Traffickers have learned that by leveraging the power of the internet, they can more easily recruit, control and sell children for sex." *Id.*

V. The 2018 Amendment to Section 230

A. The Amendment

The 2018 amendment added this language to Section 230(e)(5):

> No effect on sex trafficking law. Nothing in this section (other than subsection (c)(2)(A)) shall be construed to impair or limit—
>
> (A) any claim in a civil action brought under section 1595 of Title 15, if the conduct underlying the claim constitutes a violation of section 1591 of that title;

(B) any charge in a criminal prosecution brought under State law if the conduct underlying the charge would constitute a violation of section 1591 of Title 18; or

(C) any charge in a criminal prosecution brought under State law if the conduct underlying the charge would constitute a violation of section 2421A of Title 18, and promotion or facilitation of prostitution is illegal in the jurisdiction where the defendant's promotion or facilitation of prostitution was targeted.

Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. No. 115-164, sec. 4, § 230(e)(5), 132 Stat. 1253, 1254 (2018). As the Court will see in Section VI, below, when the amendment is considered in conjunction with Section 230(e)(3), which explains when Section 230 will preempt state law claims, it becomes clear that Section 230 does not apply to Jane Doe's state law claims.

But Congress' intent is even more clear when the legislative history of the amendment is examined.

B. In Passing the Amendment, Congress Recognized the Scope of the Human Trafficking Problem

Prior to passing the 2018 amendment, the Senate Subcommittee on Investigations of the Committee on Homeland Security conducted an extensive investigation of "how sex traffickers increasingly use the Internet to advance their trade and evade detection." *Human Trafficking Investigation*, 114th Cong. 39, at 1 (2015). During that hearing, Senator Portman observed "that technology has fundamentally changed the way children can be victimized through sex trafficking." *Id.* at 11. The Subcommittee heard evidence documenting an 846% increase in the number reports of suspected child sex trafficking. That increase was "directly correlated to the increased use of the Internet to sell children for sex." *Id.* at 2. The Subcommittee also heard testimony that the Communications Decency Act was being used as a shield against lawsuits and threats of prosecution. *Id.* at 20-21.

On the floor of the Senate, it was recognized that an estimated 100,000 children are victims of human trafficking per year in the United States. 161 Cong. Rec. S1617 (daily ed. March 18, 2015) (statement of Sen. Cornyn). Senator Feinstein commented that "[r]egardless of how children are first trafficked, one thing is almost universal—victims will be advertised on the internet." *Id.* at S1621 (statement of Sen. Feinstein). She concluded that "the Internet has made this industry what it is, the second largest criminal industry in the world." *Id.* at S1622.

C. Congress Made It Clear that the *Zeran* Line of Cases Were Wrongly Decided

In April 2018, Congress passed the amendment to Section 230. The caption of the amendment indicates that it is intended "to clarify that section 230 of [the] Act does not prohibit the enforcement against providers and users of interactive computer services of Federal and State criminal and civil law relating to sexual exploitation of children or sex trafficking." Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. No. 115-164, 132 Stat. 1253 (2018). Note that this statement of purpose makes no distinction between federal and state civil law claims.

Senator Portman, one of the sponsors of the amendment, made it clear that the motivation for the amendments was the court opinions that interpreted the Communications Decency Act as providing immunity to internet service providers: the Act "was never intended to protect those who knowingly facilitate the sex trafficking of vulnerable women and girls." 163 Cong. Record S3977 (daily ed. July 13, 2017) (statement of Sen. Portman). Congress stated the "sense of Congress" was that Section 230 "*was never intended to provide legal protection to . . . websites that facilitate traffickers in advertising the sale of unlawful sex acts with sex trafficking victims*." Pub. L. No. 115-164, sec. 2(1) 132 Stat. 1253 (emphasis added). Thus, the point of the amendment was "to ensure that such section does not provide such protection to such websites." *Id*. at sec. 2(3).

D. Facebook Does Not Acknowledge the Fatal Problem With Its Motion: The Cases It Relies Upon Do Not Apply to Human Trafficking Claims

Facebook's only comment concerning the 2018 amendments is that they "do not apply" because Jane Doe does not seek relief under Sections

2421(A) or 1595 of title 18. Motion, p. 5 n.4. But Facebook does not provide a basis for its position–there is no explanation why the amendments might only apply to those two statutes. As we will see in the preemption analysis below, neither the amendments nor the original statute actually prevented a Texas plaintiff from relying upon a state cause of action in a human trafficking case.

But more importantly, Facebook disregards what Congress stated in 2018 about its original intent in 1996 when it passed Section 230. *Congress has made clear that the courts have fundamentally misinterpreted that intent*. That, in turn, makes it clear that the array of cases Facebook relies upon to support its 91a motion should not be applied to human trafficking cases.

VI. Section 230 Does Not Preempt Jane Doe's State-Law Claims

A. The Standards for Finding Federal Preemption Are Narrow and Demanding

A federal law may expressly preempt state laws. *Moore v. Brunswick Bowling & Billiards Corp*., 889 S.W.2d 246, 247 (Tex. 1994); *Cipollone v. Liggett Group, Inc.,* 505 U.S. 504, 516 (1992). It may also impliedly preempt state laws if Congress has indicated its intent to exclusively occupy the entire field or if state law actually conflicts with the federal law. *Great Dane Trailers, Inc. v. Estate of Wells*, 52 S.W.3d 737, 743 (Tex. 2001); *Freightliner*

Corp. v. Myrick, 514 U.S. 280, 287 (1995). An actual conflict exists when (1) "it is impossible for a private party to comply with both state and federal requirements"; or (2) "state law obstructs accomplishing and executing Congress' full purposes and objectives." *Great Dane*, 52 S.W.3d at 743; *Freightliner*, 514 U.S. at 287.

As shown, Section 230 does not apply to Jane Doe's claims. Regardless, it cannot immunize Facebook from Jane Doe's state-law claims unless it was intended to preempt such claims. *See Kaufman v. Allied Pilots Ass'n*, 274 F.3d 197, 203 (5th Cir. 2001) (preemption doctrine immunizes defendants from claims under state law). There is always a presumption against preemption. *Great Dane*, 52 S.W.3d at 743; *Maryland v. Louisiana*, 451 U.S. 725, 728 (1981). That presumption is strongest when states exercise authority over matters involving public health and safety—matters over which states have historically exercised primary authority. *Hyundai Motor Co. v. Alvarado*, 974 S.W.2d 1, 4 (Tex. 1998); *Hillsborough County v. Automated Med. Labs., Inc.*, 471 U.S. 707, 718-19 (1985). Accordingly, courts must assume "that the historic police powers of the States were not to be superseded by the Federal Act unless that was the *clear and manifest purpose* of Congress." *Hyundai*, 974 S.W.2d at 5 (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 484 (1996)) (emphasis in original).

"The purpose of Congress is the ultimate touchstone in every preemption case." *MCI Sales & Serv., Inc. v. Hinton*, 329 S.W.3d 475, 482 (Tex. 2010); *Wyeth v. Levine*, 555 U.S. 555, 565 (2009). To determine that purpose, courts must examine the language, purpose, and history of the federal statute. *Moore*, 889 S.W.2d at 247; *Worthy v. Collagen Corp.*, 967 S.W.2d 360 (Tex. 1998); *Medtronic*, 518 U.S. at 486.,

B. Congress Has Clearly Stated that Section 230 Does *Not* Preempt Jane Doe's Claims

As always, the Court's analysis should begin with the language of the statute. Section 230(e)(3) contains an express preemption provision, while congressional intent is expressed throughout the remainder of the statute. Section 230(e)(3) begins by stating:

> Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section.

This sentence expresses Congress's clear intent to permit at least some state laws that would impose liability upon internet service providers. The provision continues:

> No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.

This sentence expresses Congress's intent to preempt only those state laws that actually conflict with the rest of Section 230.

As discussed above in Section II, the original purpose of Section 230, as expressed in subsections (b) and (c), was to promote the development of the internet by encouraging providers to restrict access to obscene materials and preventing the imposition of liability upon service providers for defamatory-type content.

The new amendments in subsection (e)(5) then clarify that Congress did not intend the protections afforded by Section 230 to have any effect on sex trafficking laws, whether state or federal, civil or criminal. Pub. L. No. 115-164, 132 Stat. 1253. Given Congress's stated intentions and the heightened presumption against preemption in matters concerning health and safety, Section 230 should not be interpreted as preempting state laws that provide civil remedies against online facilitators of human trafficking.

Texas's human trafficking statute—Chapter 98 of the Texas Civil Practice and Remedies Code—tracks the language of the federal human trafficking statutes—Sections 1591 and 1595 of Title 18—which are expressly exempted from Section 230 by the 2018 amendments. *See* 47 U.S.C. § 230(e)(5)(A). Chapter 98 imposes civil liability upon:

> A defendant who intentionally or knowingly benefits from participating in a venture that traffics another person.

Tex. Civ. Prac. & Rem. Code § 98.002(a) (West 2019) Similarly, the federal statute imposes civil liability upon:

> Whoever knowingly . . . benefits . . . from participation in a venture which has engaged in [human trafficking]. . . .

18 U.S.C. §§ 1591, 1595 (2018). Thus, both the Texas and federal statutes target those who knowingly benefit from human trafficking. Since Section 230 expressly excepts the federal human trafficking statutes, it cannot be inconsistent with the analogous Texas human trafficking statute.

The Texas Supreme Court has also repeatedly held that common-law actions based upon negligence involve the state's power to regulate health and safety matters and are therefore protected by the heightened presumption against federal preemption. *Great Dane*, 52 S.W.3d at 743; *Moore*, 889 S.W.2d at 249. It has further held that an express preemption clause that applies to state "law" generally must be narrowly construed so that it does not preempt state common-law claims. *See Moore*, 889 S.W.2d at 250. Jane Doe's negligence claims, therefore, is also not preempted by Section 230.

Finally, the significance of the state interest at issue permits federal preemption only where Congress has expressed that intent in "clear and certain terms." *Id.* at 251. Texas, like other states, has a "compelling interest in protecting children from sexual exploitation" and "in safeguarding the physical and psychological well-being of children." *Ex parte Ingram*, 533 S.W.3d 887, 904 (Tex. Crim. App. 2017); *Ex parte Fujisaka*, 472 S.W.3d 792, 801 (Tex. App.—Dallas 2015, pet. ref'd); *Fleming v. State*, 455 S.W.3d 577, 610 (Tex. Crim. App. 2014); *see also New York v. Ferber,* 458 U.S. 747, 757 (1982) (recognizing that "[t]he prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance"). Far from expressing an intention to usurp the states' power to protect these interests, Congress has clearly stated in the amendments to Section 230 that it never intended to do so.

Prayer

Facebook's Rule 91a motion should be denied. Jane Doe requests the fees and expenses she is entitled to if the motion is denied.

Respectfully submitted,

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CAUSE NO. 2018-69816

JANE DOE,	§	**IN THE DISTRICT COURT OF**
	§	
Plaintiff,	§	
	§	
vs.	§	**HARRIS COUNTY, TEXAS**
	§	
FACEBOOK, INC.; BACKPAGE.COM, LLC d/b/a BACKPAGE; CARL FERRER; MICHAEL LACEY; JAMES LARKIN; JOHN BRUNST; AMERICA'S INNS, INC. d/b/a AMERICA'S INN 8201 SOUTHWEST FWY, HOUSTON, TX 77074; and TEXAS PEARL., INC.,	§ § § § § § §	
	§	
Defendants.	§	**334th JUDICIAL DISTRICT**

CAUSE NO. 2018-82214

JANE DOE,	§	**IN THE DISTRICT COURT OF**
	§	
Plaintiff,	§	
	§	
vs.	§	**HARRIS COUNTY, TEXAS**
	§	
FACEBOOK, INC. d/b/a INSTAGRAM, INC.; BACKPAGE.COM, LLC d/b/a BACKPAGE; CARL FERRER; MICHAEL LACEY; JAMES LARKIN; JOHN BRUNST; and BABASAI INC., d/b/a SIESTA INN	§ § § § § §	
	§	
Defendants.	§	
	§	**334th JUDICIAL DISTRICT**

REPLY MEMORANDUM IN SUPPORT OF MOTION OF DEFENDANT FACEBOOK, INC. TO DISMISS PURSUANT TO RULE 91A

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INTRODUCTION

Plaintiffs' opposition brief[1] and subsequently filed Executive Summary effectively concede that, under decades of consistent federal and Texas precedents, Plaintiffs' claims against Facebook are barred by Section 230 of the Communications Decency Act because they necessarily turn on third-party content that allegedly was transmitted via Facebook's platform. Plaintiffs' lead argument is that this Court should disregard all of these prior cases—including three Texas Court of Appeals decisions—on the theory that (1) this consistent line of federal and state cases interpreting Section 230 to bar claims that depend on third-party content were all in error, and (2) Congress silently and impliedly repealed Section 230 to the extent that it applies to human trafficking claims. Neither of these contentions has merit. Rather, they show that the parties actually agree on the central point of Facebook's motion: As Section 230 is has been consistently interpreted by the courts, all of Plaintiffs' claims are barred, including the two new claims added by the recent amendments to the petitions. And the principal case that Plaintiffs cited for a contrary proposition—*Daniel v. Armslist, LLC*, 913 N.W.2d 211, 214 (Wis. App. 2018)—i.e., that Section 230 "does not protect a website operator from liability that arises from its own conduct in facilitating user activity" (Resp. at p. 16)—was expressly reversed by the Wisconsin Supreme Court this week. *See Daniel v. Armslist, LLC*, --- N.W.2d ---, 2019 WI 47 (Wisc. April 30, 2019) (Section 230 bars claims, "no matter how artfully pled," that an internet service provider "provided an online forum for third-party content and failed to adequately monitor that content").

For all of these reasons, the claims against Facebook have no basis in law, and Facebook asks the Court to dismiss these cases with prejudice pursuant to Rule 91a. Facebook moves for dismissal

[1] Facebook's motions to dismiss in Causes Nos. 2018-82214 and 2018-69816 are both set for a consolidated hearing on May 3, 3019. Accordingly, and because the two actions present substantially identical legal issues for purposes of Facebook's motions to dismiss, Facebook files this consolidated Reply in support of its motion to dismiss in each action.

subject to and without waiving its previously filed Special Appearance to Contest Personal Jurisdiction, Objection to Improper Venue and Motion to Dismiss for Improper Forum, and Answer ("Special Appearance"). *See* Tex. R. Civ. P. 91a.8 (defendant does not waive special appearance by seeking and obtaining a ruling on a Rule 91a motion to dismiss).

ARGUMENT AND AUTHORITIES

I. Texas and federal courts have consistently interpreted CDA 230 to bar claims such as Plaintiff's

Plaintiffs admit that courts around the country—including in three decisions from the Beaumont Court of Appeals and a published decision from the U.S. Court of Appeals for the Fifth Circuit—have held that CDA 230 bars claims like theirs. The response concedes that federal and state courts have "barred plaintiffs' claims regardless of the type of cause of action asserted unless the internet service provider participated directly and materially in creating the offensive content on its platform," (Resp. at 10–13), and Plaintiffs do not contend that Facebook directly and materially participated in creating any of the content involved in their claims.

Plaintiffs' response is for all intents and purposes a request that this Court decline to follow any of these consistent precedents, including Texas Court of Appeals decisions, that bar the claims against Facebook. Nothing in the response provides this Court with a warrant to do so, and it should decline Plaintiffs' invitation. Of course, Section 230 is binding on this court, particularly given that its preemption provision expressly bars state law claims that fall within its scope. "[T]he Supremacy Clause of the Constitution requires that a state court follow the laws passed by Congress when the Congress has expressed its intent to preempt state law." *Milo v. Martin*, 311 S.W.3d 210, 215 (Tex. App.-Beaumont 2010, no pet.). Section 230 is "a federal statute that 'overrides the traditional treatment of publishers, distributors, and speakers under statutory and common law.'" *Id.* And for good and sensible reasons, Texas courts generally will defer to federal decisions construing federal statutes. *See id.* (citing and following federal precedents regarding construction of Section 230).

The response contends that this long line of federal decisions is wrong, and that the Texas courts are wrong for following them, because, in Plaintiffs' view, Congress's sole intent in enacting Section 230 was "to encourage 'blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material'"—in other words, to encourage "Good Samaritan" engagement by platforms without penalizing them with liability for such efforts. Resp. at 9 (quoting 47 U.S.C. § 230(b)(4)). Even if Plaintiffs could show that was the only purpose of the statute—to protect "Good Samaritan" monitoring and blocking efforts—the law is clear that the meaning of a statute is not constrained by an underlying legislative purpose that is either narrower or broader than the enacted text. *See* Resp. at 10–13 (citing cases). Here, the actual text of Section 230 was written broadly, and reasonably so, as otherwise it could be too easily evaded. That is why, beginning with *Zeran* and continuing through the long line of federal and state (including Texas) cases that Plaintiff cites and challenges, Section 230 always has been read broadly. *See, e.g., Zeran v. America Online, Inc.*, 129 F.3d 327 (4th Cir. 1997) ("By its plain language, § 230 creates a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service."); *GoDaddy.com, LLC v. Toups*, 429 S.W.3d 752, 758 (Tex. App.—Beaumont 2014, pet. denied) ("the plain language of the statute contemplates application of immunity from civil suit under section 230 for interactive computer service providers").

For these reasons, Texas courts consistently and correctly have held that Section 230 preempts state causes of action that "stem" from a defendant's alleged "publication of … contested content, its failure to remove the content, or its alleged violation of the Texas Penal Code for the same conduct." *GoDaddy.com, LLC v. Toups*, 429 S.W.3d 752, 758 (Tex. App.—Beaumont 2014, pet. denied).

For the same reason, courts in Texas and across the country have uniformly held that where a critical part of the chain of causation in a plaintiff's theory of liability against a platform turns on third party content posted on the site, CDA 230 bars the claim. "Allowing plaintiffs to assert any cause of action … for publishing content created by a third party, or for refusing to remove content created by a third party would be squarely *inconsistent* with section 230." *GoDaddy.com, LLC v. Toups*, 429 S.W.3d 752, 758 (Tex. App.—Beaumont 2014, pet. denied) (citing *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096 (9th Cir. 2009) and *Zeran v. America Online, Inc.* 129 F.3d 327 (4th Cir. 1997)); *Davis v. Motiva Enterprises, L.L.C.*, No. 09-14-00434-CV, 2015 WL 1535694, at *4 (Tex. App.—Beaumont Apr. 2, 2015, pet. denied) (Section 230 barred plaintiff's negligence claims because the "theory of liability" was "based on [the defendant] allowing [a third party] access to the Internet … to publish fake Craig's List posts and failing to prevent those posts from being published"); *see also Milo v. Martin*, 311 S.W.3d 210, 215 (Tex. App.—Beaumont 2010, no pet.) (following *Zeran* and other federal cases that "applied section 230 broadly"); *Jones v. Dirty World*, 755 F.3d 398 (6th Cir. 2014); *Johnson v. Arden*, 614 F.3d 785, 791–92 (8th Cir. 2010); *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096 (9th Cir. 2009));[2] *Doe v. MySpace, Inc.*, 528 F.3d 413, 419–20 (5th Cir. 2008); *Universal Commc'n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 419 (1st Cir. 2007); *Green v. America Online*, 318 F.3d 465, 470–71 (3d Cir. 2003); *Herrick v. Grindr, LLC*, 306 F. Supp. 3d 579, 591–92 (S.D.N.Y. 2018); *Force v. Facebook, Inc.*, 304 F. Supp. 3d 315, 319–25 (E.D.N.Y. 2018); *Gonzalez v. Google, Inc.*, 282 F. Supp. 3d 1150, 1165 (N.D. Cal. 2017); *Pennie v. Twitter, Inc.*, 281 F. Supp. 3d 874, 888–92 (N.D. Cal. 2017); *Fields v. Twitter, Inc.*, 217 F. Supp. 3d 1116, 1128–29 (N.D.

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[2] Later Ninth Circuit cases do not change that court's holdings that claims alleging that a platform should have monitored, removed, or warned about third-party content are barred. In *Doe v. Internet Brands, Inc.*, the plaintiff, an aspiring model, posted a profile on a website called modelmayhem.com. 824 F.3d 846 (9th Cir. 2016). Two predators found the profile and contacted her, lured her into a fake modeling audition, drugged her, and raped her. *Id.* at 848–49. The Ninth Circuit held that the CDA did not bar the plaintiff's failure to warn claim because no part of the alleged duty arose from third-party content on the site. *Id.* at 851. The only content posted on the site was that of the plaintiff herself—there were no postings by the third party predators that Internet Brands allegedly should have prevented through monitoring or other publishing activity. *Id.* at 851. Nor was there any "allegation that Model Mayhem transmitted any potentially harmful messages between Jane Doe and [the predators]" or that the predators "posted their own profiles on the website." *Id.* at 852. The court held that the claim "d[id] not arise from an alleged failure to adequately regulate access to user content or to monitor internal communications that might send up red flags about sexual predators." *Id.* at 853. *HomeAway.com, Inc. v. City of Santa Monica* confirmed and followed this reading of *Internet Brands*. 918 F.3d 676, 682 (9th Cir. 2019) ("[W]here the website provider was alleged to have known *independently* of the ongoing scheme *beforehand*, the CDA did not bar an action under state law for failure to warn."). Where, as here, the duty "would necessarily require an internet company to monitor third-party content," the claim is barred. *Id.*

Cal. 2016), *aff'd on other grounds*, 881 F.3d 739 (9th Cir. 2018); *Igbonwa v. Facebook, Inc.*, 3:18-cv-2027, 2018 WL 4907632, at *6 (N.D. Cal. Oct. 9, 2018).

Under these cases and others like them, Plaintiffs' claims are barred by Section 230 because they necessarily depend on Facebook's not preventing, or allowing, third party communications on its internet platform—*i.e.* the communications that traffickers made to Plaintiffs over that platform. *GoDaddy.com*, 429 S.W.3d at 758.

None of the cases cited in the response is contrary or even inconsistent. Putting aside the concurring opinion and amicus brief cited by Plaintiff, *see* Resp. at 16–17, which have no precedential value, the cases cited by Plaintiff as "limit[ing]" or "repudiat[ing]" "broad immunity" merely apply the accepted principle that Section 230 does not apply to a defendant's active participation in developing the harmful content at issue.[3] *See Fair Hous. Council of San Fernando Valley v. Roommates.com*, LLC, 521 F.3d 1157, 1166–67 (9th Cir. 2008). For example, *Chicago Lawyers' Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, *affirmed* the district court's ruling that claims against Craigslist were barred because Craigslist was "not the author of the [allegedly harmful] ads and could not be treated as the 'speaker' of the posters' words." 519 F.3d 666, 671 (7th Cir. 2008); *accord Maynard v. Snapchat, Inc.*, 816 S.E.2d 77, 81 (Ga. Ct. App. 2018) (Section 230 did not apply "because there was no third-party user content published").

As Facebook argued in its motion, this distinction is crucial, as it serves to distinguish bad actors such as Backpage, who are alleged to have actively participated in creating illegal content, from neutral, "passive transmitters" (such as Facebook) who are generally immune. *See Roommates.com*, 521

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[3] Plaintiffs also cite dicta from two Seventh Circuit decisions: *Doe v. GTE Corp.*, which expressly declined to "decide which understanding of § 230 is superior" and affirmed dismissal on other grounds, 347 F.3d 655, 660–62 (7th Cir. 2003); and *City of Chicago, Ill. v. StubHub!, Inc.*, which briefly noted that Section 230 "limits who may be called the publisher of information that appears online" but was "irrelevant" to the City of Chicago's authority to tax the resale of event tickets sold online, 624 F.3d 363, 366 (7th Cir. 2010) ("Chicago's amusement tax does not depend on who 'publishes' any information or is a 'speaker.'").

F.3d at 1166–67 (Section 230 barred claims based on Roommates.com's publication, as written, of third parties' comments on their profile pages).

Significantly, one of the critical cases on which Plaintiffs rely for the proposition that Section 230 "'does not protect a website operator from liability that arises from its own conduct in facilitating user activity'" (Resp. at p. 16, quoting *Daniel v. Armslist*, LLC, 913 N.W.2d 211, 214 (Wis. Ct. App. 2018), was reversed just this week by the Wisconsin Supreme Court, *Daniel v. Armslist, LLC*, --- N.W.2d ---, 2019 WI 47 (Wisc. April 30, 2019). In *Armslist*, the Wisconsin Supreme Court held that, to prevent the "obvious chilling effect" on free speech of "impos[ing] [] tort liability for hosting third-party content," Section 230 "immuniz[es] interactive computer service providers from liability." *Id.* at *4. Section 230 "prevents the specter of tort liability from undermining an interactive computer service provider's willingness to host third-party content." *Id.* The Wisconsin Supreme Court adopted the "material contribution" test from *Roommates.com*, and so rejected the very theory pressed by Plaintiff here:

> Daniel's negligence claim is simply another way of claiming that Armslist is liable for publishing third-party firearm advertisements and for failing to properly screen who may access this content. The complaint alleges that Armslist breached its duty of care by designing a website that could be used to facilitate illegal sales, failing to provide proper legal guidance to users, and failing to adequately screen unlawful content. Restated, it alleges that Armslist provided an online forum for third-party content and failed to adequately monitor that content. The duty Armslist is alleged to have violated derives from its role as a publisher of firearm advertisements. This is precisely the type of claim that is prohibited by § 230(c)(1), no matter how artfully pled.

Id. at *10–*11 (citing *Barnes*, 570 F.3d at 1101–02, and *MySpace*, 528 F.3d at 416, 420). The Wisconsin Supreme Court's reversal of the one of Plaintiffs' leading appellate cases makes clear that, contrary to the central premise of Plaintiffs' argument, the overwhelming trend continues to be *toward* broad immunity, not away from it.

II. Courts have read and interpreted CDA 230 correctly.

Plaintiffs do not dispute that the courts' consistent reading of the law bars their claims—the response effectively admits that it does. Instead, the response argues that this court should not follow these cases. Resp. at 1 (asserting that "[t]he majority of the federal courts, and subsequently the state courts" are "wrong"). Plaintiffs' various arguments for why this Court should depart from consistent and overwhelming precedent are meritless.

A. Subsequent Technological and Social Changes Do Not Alter the Text or the Meaning of Section 230

The response first argues that this Court should disregard existing decisional law interpreting Section 230 because the internet has changed and grown dramatically since 1996, when Section was enacted. This argument is both legally and logically flawed. A court cannot change the text or meaning of a statute simply because surrounding circumstances have changed since the statute's enactment. Rather, "[i]n the absence of a specific amendment, a statute should be given the meaning which it had when enacted." *Chamul v. Amerisure Mut. Ins. Co.*, 486 S.W.3d 116, 125 (Tex. App.-Houston [1st Dist.] 2016, pet. denied) (quoting *Taylor v. Firemen's & Policemen's Civil Serv. Comm'n of City of Lubbock*, 616 S.W.2d 187, 189 (Tex. 1981)).

The meaning of a federal statute follows its text, and in construing that text, courts look to "the ordinary meaning of the term[s] … at the time Congress enacted the statute ." *Perrin v. U. S.*, 444 U.S. 37, 42 (1979). Although the purpose and context of the statute when enacted may bear upon how that text is interpreted, the meaning of the text does not change over time based on real-world changes. Where a statute is meant to change based on such changes in the real world, Congress can so indicate. *See Jam v. Int'l Fin. Corp.*, 139 S. Ct. 759, 769 (2019) (discussing interpretation of statutes that, unlike Section 230, expressly "refer[] to" and incorporate a subject that is subject to change). Otherwise, it is up to Congress to make such changes. *See New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 539 (2019). The reason is clear: "if judges could freely invest old statutory terms with new meanings, we would risk amending legislation outside the single, finely wrought and exhaustively considered, procedure the Constitution commands." *Id.* (internal quotation marks omitted). Put another way, "*stare decisis* carries enhanced force when a decision … interprets a statute because, unlike with a constitutional provision, any errors in the court's analysis can easily be corrected by Congress." *Kimble v. Marvel Entm't, LLC*, 135 S. Ct. 2401, 2409 (2015); *see also United States v. Wise*, 370 U.S. 405, 411 (1962) ("[S]tatutes are construed by the courts with reference to the circumstances existing at the time of the passage.").

Moreover, even if none of these principles applied, it is not at all clear that the changes in the internet would warrant *less* protection for platforms, given the greater volume of traffic on the internet and the degree to which our economy has come to depend on it. If platforms or other internet sites had to monitor any and all posts to ensure that no such posts could possibly do real-world harm, the crushing burden on platforms would be even greater now than it would have been in 1996 absent Section 230, given the much larger volume and complexity of internet communications today. But in any event, even if some such adjustments in the statutory scheme could possibly be warranted to account for technological advances, it is for Congress to make those adjustments—not this Court.

B. The Legislative History of the 2018 Amendment Does Not Exempt State Law Civil Actions from Section 230

The response's argument that this Court should depart from existing precedent in this case is rendered even more implausible by the 2018 amendments that Congress actually did make to Section 230—precisely to address the issue of child trafficking that is the centerpiece of Plaintiffs' entire argument. Specifically, Congress enacted the Allow States And Victims To Fight Online Sex Trafficking Act of 2017 ("FOSTA"), Pub. L. 115-164, Apr. 11, 2018, 132 Stat. 1254, in response to overwhelming information that advocacy groups and affected parties presented to Congress to document and highlight the growing problem of child trafficking. Presented with voluminous evidence regarding the proliferation of child trafficking on the internet—and specifically trafficking over sites like backpage.com that were knowingly used to buy and sell children for sex—Congress amended both the underlying federal substantive law and Section 230 to address the problem.

First, it created a new federal civil cause of action against operators of interactive computer services who intentionally "promote or facilitate the prostitution of another person." *Id.* at § 6 (codified at 18 U.S.C. § 2421A).

Second, it amended Section 230 to create a specific exception to Section 230 immunity for federal civil claims brought under 18 U.S.C. § 1591 and § 1595 (which together provide a federal civil cause of action against knowing and reckless participants in sex trafficking).[4] FOSTA, § 4 (codified at 47 U.S.C. § 230(e)(5)(A)).

Finally, it also exempted certain types of state criminal prosecutions. Notably, it did not exempt state civil actions at all. *See* 47 U.S.C. § 230(e)(5)(B)–(C).

The response contends that the legislative history of this amendment shows Congress's desire to allow any and all civil actions by victims of sex trafficking. *See* Resp. at 23–24. But that argument ignores what Congress actually wrote into law, as the text of FOSTA makes clear that state civil claims are not exempted from Section 230. The amendments to Section 230 expressly carve out the specific federal causes of action, and also expressly exempt state criminal prosecutions based on conduct that would violate 18 U.S.C. § 1591 or § 2421A, but they contain no provision exempting state *civil* claims from the reach of Section 230. *See* 47 U.S.C. § 230(e)(5). If Congress had intended to exempt state civil actions, it would have said so. *See*, *e.g.*, *Jennings v. Rodriguez*, 138 S. Ct. 830, 844 (2018) (applying the negative-implication canon); *Russello v. United States*, 464 U.S. 16, 23 (1983) (same). The fact that Congress exempted certain claims and not others, makes clear that it intended to limit the scope of the exemptions enacted through FOSTA. In carefully crafting specific exemptions to Section 230 to combat the scourge of child trafficking while retaining the important protections necessary for internet

[4] Notably, Section 1595 also permits state attorneys general to bring claims under the new federal cause of action as parens patriae. 18 U.S.C. § 1595(d).

service providers to continue operating their platforms in the face of otherwise potentially limitless liability, Congress chose not to exempt state civil claims from Section 230 immunity.

Contrary to Plaintiffs' argument, FOSTA's legislative history confirms that Congress sought to exempt only certain state *criminal* proceedings based on the exempted federal causes of action, a solution strong and precise yet carefully limited in scope. The House Judiciary Committee Report noted that FOSTA "is designed to combat online sex trafficking by providing new tools to law enforcement through a new federal criminal statute and by making it easier for *states to prosecute criminal actor websites* by amending section 230 of the Communications Decency Act, 47 U.S.C. S 230." H.R. REP. 115-572, 3, 2018 U.S.C.C.A.N. 73, 74 (emphasis added). The report continued, explaining that FOSTA "will allow vigorous criminal enforcement against all bad-actor websites, not just Backpage.com, through the creation of a new federal law and by explicitly permitting states to enforce criminal laws that mirror this new federal law and current federal sex trafficking law. With this robust criminal enforcement, victims will have more opportunities to obtain restitution." *Id.* at 73, 77. Nowhere does the Report mention abrogating Section 230 for state civil claims.

To the extent that Plaintiffs' argument is based on statements in the legislative history supposedly evincing a broader intent to address child trafficking, those statements are entirely consistent with the limited remedy that Congress enacted—and in any event, the legislative history cannot be use to extend the amendments to subjects not covered in the express text. *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005) ("[T]he authoritative statement is the statutory text, not the legislative history or any other extrinsic material. Extrinsic materials have a role in statutory interpretation only to the extent they shed a reliable light on the enacting Legislature's understanding of otherwise ambiguous terms."); *Presidio Indep. Sch. Dist. v. Scott*, 309 S.W.3d 927, 930 (Tex. 2010) (same); 47 U.S.C. § 230(e)(5); *accord* H.R. REP. 115-572, 3, 2018 U.S.C.C.A.N. 73, 74, 77.

C. A Statement of Purpose Does Not Change the Meaning of a Statute

Nor does the statement of purpose in FOSTA—which makes a general, imprecise reference to state and federal criminal and civil claims—mean that state civil claims are now exempted from Section 230. *See* Resp. at 24–25. The law is clear that this kind of prefatory language is not operative law and cannot change the operative statutory text. *Hawaii v. Office of Hawaiian Affairs*, 556 U.S. 163, 175 (2009). This type of uncodified statement of purpose "recite[s] facts which are supposed to represent the justification, in the minds of the legislature, for the provisions adopted in the ensuing enactment." *See* N. Singer & S. Singer, 1A SUTHERLAND: STATUTES AND STATUTORY CONSTRUCTION § 20:3 (7th ed. 2008); *accord* A. Scalia & B.A. Garner, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 219 (2012). ("[A]n expansive purpose in the preamble cannot add to the specific dispositions of the operative text. After all, no legislation or private disposition pursues its stated purposes at *all* costs. And there is no requirement that the limitations contained in the enactment must be recited in the prologue.").

Even if a statement of purpose is part of the legislation enacted by Congress, is not law unto itself and cannot "change the plain meaning of the operative clause" of the statute. *Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1978 (2016). When faced with a prefatory provision such as this, a court simply "has no license to make [the statute] do what it was not designed to do." *Hawaii*, 556 U.S. at 175 (quoting *District of Columbia v. Heller*, 554 U.S. 570, 578 n.3 (2008)); *see also Yazoo & Miss. Valley R. Co. v. Thomas*, 132 U.S. 174, 188 (1889) ("[A]s the preamble is no part of the act, and cannot enlarge or confer powers, nor control the words of the act, unless they are doubtful or ambiguous, the necessity of resorting to it to assist in ascertaining the true intent and meaning of the legislature is in itself fatal to the claim set up.").

That is especially true here. FOSTA created three discrete, narrowly tailored exemptions to Section 230, none of which covers state civil claims. Reading a state civil claim exemption into

FOSTA's prefatory language would improperly "change the plain meaning of [FOSTA's] operative clause," 47 U.S.C. § 230(e)(5). *Kingdomware Techs.*, 136 S. Ct. at 1978. As the Supreme Court has explained, it is "the job of Congress by legislation, not [courts] by supposition, both to write the laws and to repeal them." *Epic Sys.*, 138 S. Ct. at 1624.[5]

D. The Express Exemptions from Section 230 Make Clear That Other Categories of Human Trafficking Cases, Including State Law Civil Actions, Remain Preempted.

Finally, the response suggests that the express preemption clause in 47 U.S.C. § 230(e)(3) does not apply to state law causes of action that are "consistent" with Section 230. Resp. at 28. What the response fails to mention is that this language was in Section 230 from its inception, and courts have been aware of it even as they have interpreted Section 230 to provide broad immunity and bar state failure to warn and negligent undertaking claims. That this language was left untouched when Congress amended the statute (to add *limited* exceptions not relevant here) indicates an intent to *retain* this immunity, not to repeal it *sub silentio*. *See Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2520 (2015) ("'If a word or phrase has been … given a uniform interpretation by inferior courts …, a later version of that act perpetuating the wording is presumed to carry forward that interpretation.'" (quoting Scalia & Garner, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 322 (2012)); *Grimes Cty. Bail Bond Bd. v. Ellen*, 267 S.W.3d 310, 315

[5] Plaintiffs' argument that a statement in FOSTA's legislative history establishes that Section 230 was never intended to apply to state civil claims like hers (Resp. at 25–26) is even further afield. Unenacted speculation by the 2018 Congress about what the intentions of the 1996 Congress cannot alter the meaning of Section 230. A later Congress cannot change the meaning of a statute enacted by an earlier Congress simply by saying something on the record. *Bruesewitz v. Wyeth LLC*, 562 U.S. 223, 242 (2011) ("Post-enactment legislative history (a contradiction in terms) is not a legitimate tool of statutory interpretation."); *In re Doe*, 19 S.W.3d 346, 352 (Tex. 2000) ("[C]ourts construing statutory language should give little weight to post-enactment statements by legislators. Explanations produced, after the fact, by individual legislators are not statutory history, and can provide little guidance as to what the legislature collectively intended." (internal quotation omitted)). Congress has the power to amend the statute—as it has done—but in order to do so, it must amend the text. Broad policy statements, even if contained in legislative "findings," cannot effect an implied repeal of a prior statute—only actual enacted statutory text can do that. *O'Gilvie v. United States*, 519 U.S. 79, 90 (1996) ("[T]he view of a later Congress cannot control the interpretation of an earlier enacted statute."); *see also In re Doe*, 19 S.W.3d at 352.

(Tex. App.—Houston [14th Dist.] 2008); *Keene Corp. v. United States*, 508 U.S. 200, 212 (1993) (where Congress re-enacts language that has been subject to a settled judicial interpretation, the Supreme Court will "apply the presumption that Congress was aware of these earlier judicial interpretations and, in effect, adopted them"); *Lorillard v. Pons*, 434 U.S. 575, 581 (1978) ("Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute.").

FOSTA expressly carves out three specific exceptions to the broad preemptive effect of Section 230(e)(3): one for a newly created federal civil cause of action, and two for certain kinds of state criminal prosecutions. *See* 47 U.S.C. § 230(e)(5). Plaintiffs would have the Court create a fourth exception—for state civil causes of action addressing sex trafficking—on the theory that this fourth exception would be consistent with one of the exceptions that Congress actually created. But if Congress had intended to exempt state civil actions, it would have said so. *See Jennings*, 138 S. Ct. at 844; *Russello*, 464 U.S. at 23. Where, as here, a statute contains a "meticulous . . . enumeration of exemptions and exceptions . . . [,] courts are not authorized to create additional exceptions." *Law v. Siegel*, 571 U.S. 415, 424 (2014).

Plaintiffs' argument is, in effect, that FOSTA *impliedly* repealed Section 230 immunity as applied to state civil claims relating to sex trafficking. As the Supreme Court reaffirmed just last term, "[a] party seeking to suggest that two statutes cannot be harmonized, and that one displaces the other, bears the heavy burden of showing 'a clearly expressed congressional intention' that such a result should follow." *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1624 (2018) (quoting *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 533 (1995)). The intent must be "clear and manifest," as there is a "'stron[g] presum[ption]' that repeals by implication are 'disfavored' and that 'Congress will specifically address' preexisting law when it wishes to suspend its normal operation in a later statute."

Id. (quoting *Morton v. Mancari*, 417 U.S. 535, 551 (1974), and *United States v. Fausto*, 484 U.S. 439, 452, 453 (1988)).

Where it is argued that a later federal statute overrides an earlier provision, as the response does here, the court must determine whether there is a clear and irreconcilable conflict between the two provisions, meaning a later-enacted statute must "expressly contradict" an earlier statute or be so incompatible that inferring amendment or repeal "is absolutely necessary … in order that [the] words [of the later statute] shall have any meaning at all." *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 662 (2007); *see also Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 155 (1976) (statutes are in "irreconcilable conflict" when there is a "positive repugnancy between them or … they cannot mutually coexist"). Even where such a conflict is found, there must be a manifest expression of Congressional intent that the later enactment supersede or displace the earlier provision. *Branch v. Smith*, 538 U.S. 254, 273 (2003); *Morton*, 417 U.S. at 551; *Radzanower*, 426 U.S. at 153; *accord J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc.*, 534 U.S. 124, 142 (2001) ("The rarity with which [the Court has] discovered implied repeals is due to the relatively stringent standard for such findings, namely, that there be an irreconcilable conflict between the two federal statutes at issue.").

Section 230 and FOSTA express no such "irreconcilable conflict," because the two statutes comfortably coexist as written. FOSTA addresses the problem of child trafficking on the internet by creating a new federal cause of action and abrogating Section 230 immunity for specific federal causes of action and for certain state criminal prosecutions. FOSTA, §§ 4, 6; *accord* H.R. REP. 115-572, 3, 2018 U.S.C.C.A.N. 73, 74. That FOSTA did not go further to exempt state *civil* claims from Section 230 immunity does not create an "irreconcilable conflict." Rather, it reflects Congress's careful balancing between providing a response to child sex trafficking and permitting internet service providers to continue operating their platforms without fear of boundless liability. FOSTA's new federal cause of action and its exceptions for certain federal civil claims and certain state criminal prosecutions provide crucial tools in the fight against child sex trafficking, and their value exists apart from any exemption for state civil claims. As a result, this is not a case where inferring amendment or repeal "is absolutely necessary … in order that [the] words [of the later statute] shall have any meaning at all," *Nat'l Ass'n of Home Builders*, 551 U.S. at 662. Because the "two statutes are capable of co-existence, it is the duty of the courts … to regard each as effective." *Radzanower*, 426 U.S. at 155.

E. Plaintiffs' Counsel Made A Strategic Choice Not to Plead the Federal Claim Provided By Congress

The response suggests that, unless this court breaks from all relevant federal and Texas precedent and reads a new exception into CDA 230, victims will never recover for their injuries and bad actors will never be held accountable. But, as Facebook pointed out in its motion to dismiss, Congress has provided a federal cause of action specifically to address these concerns. It even went so far as to permit state attorneys general to bring claims under the new federal cause of action as *parens patriae*. 18 U.S.C. § 1595(d). Plaintiffs' counsel chose not to plead these cases under the new federal cause of action, which she certainly could have done against the Backpage defendants. Rather, Plaintiffs' counsel instead chose to plead state law claims against Facebook in state court. It is now quite clear why. First, Plaintiffs do not even arguably have a claim against Facebook under the federal causes of action, which require multiple elements that she cannot allege—including the intent requirement and the "venture" requirement. Second, Plaintiffs' counsel likely wanted to avoid removal because the federal courts have applied Section 230 to claims such as these, and they may have wished to argue to this Court that it should disregard the overwhelming body of precedent interpreting Section 230. So they chose to forego the federal cause of action expressly provided by Congress to pursue Plaintiffs' cases in state court, under state law, and now must accept the consequence that CDA 230 applies.

Accordingly, this case is not about whether sex trafficking victims *can* sue internet service providers—or even about whether criminals engaged in such trafficking can be prosecuted. Congress has ensured that victims will have a remedy against perpetrators—and websites that openly foster the sex trafficking trade—and that certain state criminal proceedings can also go forward. Rather, it is about whether Plaintiffs can deploy these limited amendments to evade the application of Section 230 in a state law action against an internet platform. Under the regime created by Congress pursuant to its power to regulate interstate commerce, they cannot do so.

III. The New Causes of Action in Plaintiff's Third Amended Petition Are Barred by Section 230

On the same day Plaintiffs filed their response, they also amended their petitions to add claims for negligent undertaking and strict products liability. These claims are barred for the same reasons as the original claims.

Notably, even the narrower "Good Samaritan" meaning of CDA 230 for which the response advocates applies fully to Plaintiffs' claims. An internet service provider "cannot be held liable for its good faith efforts to restrict access to or availability of certain [third-party] material." *Davis v. Motiva Enterprises, L.L.C.*, 09-14-00434-CV, 2015 WL 1535694, at *4 (Tex. App.—Beaumont Apr. 2, 2015, pet. denied). As the negligent undertaking claim makes explicit, Plaintiffs' claims seek to use against Facebook the fact that Facebook is and has been actively working to prevent its site from being used for harm, including harm to teenagers on its site.

As the response acknowledges, Facebook has always been dedicated to protecting against harmful uses of its site. Resp. at 21. The petitions expressly try to use Facebook's own Safety policies and procedures against Facebook—indeed, they now say that Facebook is liable for negligent undertaking, and should be "strictly liable" for any misuse of its site. Plaintiffs also say that Facebook should be liable not because it is not taking protective steps, but because it *is* taking such steps but, according to Plaintiffs, it should have taken different or better protective steps, and should be liable every time those steps fail to prevent some harm. *See* Resp. at 21 (noting that Facebook employs "advanced technical systems to detect misuse of [its] Products, harmful conduct towards others, and situation where we may be able to help support or protect our community."). This is precisely the type of liability for third-party content that CDA 230 was intended to prevent, even under the "narrow" interpretation for which the response advocates. *Davis v. Motiva Enterprises, L.L.C.*, 09-14-00434-CV, 2015 WL 1535694, at *4 (Tex. App.—Beaumont Apr. 2, 2015, pet. denied) (holding negligent undertaking claim against internet service provider was barred "[b]ecause § 230(c)(2) allows an interactive computer service provider to 'establish standards of decency without risking liability for doing so'"). Accordingly, all of Plaintiffs' claims against Facebook, including—especially—those added by the Third Amended Petition, are barred by Section 230.

CONCLUSION

Any further amendment would be futile. Federal and Texas courts consistently have held Plaintiffs' theory of liability is barred by Section 230. Each Plaintiff has already amended her petition multiple times, and has only added more barred causes of action. Accordingly, it is clear that further leave to amend would serve no purpose. *See GoDaddy.com, LLC v. Toups*, 429 S.W.3d 752, 753 (Tex. App.—Beaumont 2014, pet. denied) (reversing trial court and dismissing claims with prejudice); *Davis v. Motiva Enterprises*, L.L.C., No. 09-14-00434-CV, 2015 WL 1535694, at *4 (Tex. App.—Beaumont Apr. 2, 2015, pet. denied) (affirming dismissal with prejudice).

Subject to its Special Appearance, Facebook asks the Court to dismiss all of Plaintiffs' causes of action against Facebook with prejudice pursuant to Rule 91a.[6]

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[6] As stated in Facebook's Original and Amended Motions to Dismiss, Facebook is willing to waive its right, should the Court grant its motion, to any award of its legal fees pursuant to Texas Rule of Civil Procedure 91a.7.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 2nd of May, 2019, the foregoing document was filed and served on all counsel of record by electronic case filing in accordance with the Texas Rules of Civil Procedure.

/s/ Russ Falconer
Russell H. Falconer

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No. 2018-69816

Jane Doe	§	In the District Court of
	§	
v.	§	
	§	
Facebook, Inc.; Backpage.com, LLC	§	
d/b/a Backpage; Carl Ferrer;	§	Harris County, Texas
Michael Lacey; James Larkin;	§	
John Brunst; America's Inns,	§	
Inc. d/b/a America's Inn 8201	§	
Southwest Freeway, Houston,	§	
TX 77074; and Texas Pearl, Inc.	§	334th Judicial District

No. 2018-82214

Jane Doe	§	In the District Court of
	§	
v.	§	
	§	
Facebook, Inc. d/b/a Instagram, Inc.;	§	Harris County, Texas
Backpage.com, LLC d/b/a Backpage;	§	
Carl Ferrer; Michael Lacey;	§	
James Larkin; John Brunst; and	§	
Babasai, Inc. d/b/a Siesta Inn	§	334th Judicial District

Plaintiffs' Post-Hearing Brief on Rule 91a Motion to Dismiss

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Introduction

This post-hearing brief has three major sections. In the first, we discuss why Plaintiffs' claims do not treat Facebook as a publisher or speaker of third-party content. Preemption is the subject of the second section. In the final section, we take each of the Court's main questions from the hearing—we count fourteen of them—and briefly answer those questions.

Argument

I. Plaintiffs' Claims Do Not Treat Facebook As a Publisher or Speaker of Third-Party Content

A. Section 230 Does Not Apply Because Plaintiffs' Claims Are Based on Content Facebook Should Create or Actions It Should Take

A single sentence of Section 230 has been interpreted as providing broad immunity to internet service providers: "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1). The Court asked, "What is it Facebook does that . . . isn't a speaker and not a publisher?" Reporter's Record, Motion Hearing May 3, 2019, p. 49 (hereafter, "R.R. 49"). The answer is that Facebook may be a publisher in some scenarios, but Plaintiffs do not seek to impose liability on Facebook for publisher functions. Rather, Plaintiffs' claims are based on Facebook's failure to warn or act.

When a statute uses a word that it does not define, courts must determine the word's common, ordinary meaning by examining, among other things, the context in which it is used, the legislative history of the statute, dictionary definitions, treatises and commentaries, and judicial constructions of the word in other contexts. *Yates v. United States*, 135 S. Ct. 1074, 1082-85 (2015); *Jaster v. Comet II Constr., Inc.*, 438 SW.W.3d 556, 563 (Tex. 2014). With respect to Section 230, the word "publisher" must have a meaning relevant to legal causes of action based on publisher status.

Under the principle of *noscitur a sociis*, "a work is known by the company it keeps—to avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving unintended breath to the Acts of Congress." *Yates*, 135 S. Ct. at 1085. Thus, "publisher" should be construed consistently with the word that accompanies it, "speaker." Liability based on one's status as a publisher or speaker is encompassed by defamation law. The *Zeran* line of decisions and Facebook construe "publisher" in a way that stretches that word well beyond its common legal meaning and the meaning of the word "speaker" with which it is paired.

Black's defines "publish" as (1) "to distribute copies (of a work) to the public," (2) "[t]o communicate (defamatory words) to someone other than the person defamed," (3) "[t]o declare (a will) to be the true expression of one's testamentary intent," and (4) "[t]o make (evidence) available to a jury during trial." *Black's Law Dictionary* 1352 (9th ed.). The second definition, expressly related to defamation, is the only one that makes sense in the statutory context. And under the common law, publication occurs when "statements are communicated orally, in writing, or in print to some third person," i.e., libel or slander. *Exxon Mobil Corp. v. Rincones*, 520 S.W.3d 572, 579 (Tex. 2017).

Additionally, as discussed in Plaintiffs' Responses, the legislative history of Section 230 indicates that one of Congress's specific purposes was to overrule *Stratton-Oakmont v. Prodigy Services Co.*, No. 31063/94, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995). That opinion held Prodigy potentially liable as publisher of defamatory statements posted on its site by a user.

Nothing in the text or history of Section 230 indicates an intent to give the word "publisher" a broader meaning than it has in defamation law. Thus, in a plain language construction of Section 230, Facebook cannot be liable for a libel claim, which treats it as a publisher, based on defamatory statements written by a user on his Facebook page; nor can it be liable for a slander claim, which treats it as a speaker, based on defamatory statements made by a user in a video.

Here, Plaintiffs' claims are that Facebook knowingly facilitates and benefits from sex trafficking, is negligent, and has negligently undertaken actions to combat its problem with human trafficking. For each claim, Plaintiffs allege that Facebook should have created its own content—warnings. Additionally, for each claim, Plaintiffs allege Facebook should have taken affirmative steps to protect potential victims of sex trafficking such as the Plaintiffs.

For example, with respect to the Chapter 98 sex trafficking claim, Plaintiffs contend Facebook knowingly facilitated and benefited from sex trafficking by, *inter alia*, "not using advertising space for public service announcements regarding the dangers of entrapment, grooming, and recruiting methods used by sex traffickers."[1] That is, Facebook should have created content. Plaintiffs also contend Facebook negligently failed to discharge its duty to warn by failing to warn of the danger of "grooming" by sex traffickers.[2] Similarly, Plaintiffs allege Facebook negligently undertook

[1] For Jane Doe 1 (No. 2018-69816): Third Amended Petition, ¶ 327a; For Jane Doe 2 (No. 2018-82214): Second Amended Petition, ¶ 324.a.

[2] For Jane Doe 1: Third Amended Petition, ¶ 339; for Jane Doe 2: Second Amended Petition, ¶ 330.

to warn users and "failed to exercise reasonable care in warning Jane Doe about sex trafficking recruitment on its platforms."[3]

Because these claims assert Facebook should have created its own content, they do *not* treat Facebook as a publisher or speaker of third-party content. "[A]n alleged tort based on a duty that would require . . . a self-produced warning falls outside of section 230(c)(1)." *Doe v. Internet Brands, Inc.*, 824 F.3d 846, 851 (9th Cir. 2016); *see also Huon v. Denton*, 841 F.3d 733, 742-43 (7th Cir. 2016) (reversing dismissal where some of plaintiff's allegations did not fall within Section 230). Therefore, none of the claims or allegations should be dismissed.

B. Negligent Undertaking

With respect to Plaintiffs' negligent undertaking claims, the Court asked how the allegations squared with the provisions of Section 230. R.R. 44. Counsel, unfortunately, launched into a discussion of preemption and legislative history, which is certainly not the most direct way of dealing with the Court's question. *See* R.R. 45-49. The most direct answer is that the provisions of the statute do not concern the same type of content as would be involved in the undertaking allegations.

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[3] For Jane Doe 1: Third Amended Petition, ¶ 331; for Jane Doe 2: Second Amended Petition, ¶ 337.

In Texas, the elements of a negligent undertaking claim are (1) the defendant undertook to perform services that it knew or should have known were necessary for the plaintiff's protection, (2) the defendant failed to exercise reasonable care in performing those services, and either (3) the plaintiff relied upon the defendant's performance, or (4) defendant's performance increased the plaintiff's risk of harm. *Torrington Co. v. Stutzman*, 46 S.W.3d 829, 838 (Tex. 2000).

Plaintiffs have pled that Facebook:

- Undertook to warn users about and to screen for illegal conduct on its platforms because it knew or should have known such actions were necessary to protect Plaintiffs,[4]
- Failed to exercise reasonable care in warning Plaintiffs about sex trafficking recruitment on its platforms, in screening and identifying sex traffickers on its Platforms, and in identifying and reporting Plaintiffs' Facebook/Instagram friend,[5]
- Plaintiffs relied on these undertakings or Facebook's negligent performance increased the risk of harm to Plaintiffs,[6] and

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[4] For Jane Doe 1: Third Amended Petition, ¶ 330; for Jane Doe 2: Second Amended Petition, ¶ 336.

[5] For Jane Doe 1: Third Amended Petition ¶ 331; for Jane Doe 2: Second Amended Petition, ¶ 337.

[6] For Jane Doe 1: Third Amended Petition, ¶¶ 332-33; for Jane Doe 2: Second Amended Petition, ¶¶ 338-39.

- Facebook's negligent undertaking proximately caused Plaintiffs' harm.[7]

As explained in Section I(A) above, these allegations are not inconsistent with the provisions of subsection 230(c)(1) (treatment as a publisher/speaker) because the allegations relate to information provided by Facebook, but Section 230(1)(c)(1) only applies to information provided by a third party.

Additionally, the allegations do not conflict with subsections (c)(2)(A) or (B). Subsection (A) precludes liability for actions taken in good faith "to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable." 47 U.S.C. § 230(c)(2)(A). That subsection is obviously intended to protect internet service providers from liability connected with pornography, and the undertaking allegations do not relate to content that is objectionable from that standpoint. Similarly, subsection (B) prevents liability for "actions taken to enable or make available . . . the technical means to restrict access" to the same material, i.e., pornographic content. 47 U.S.C. § 230(c)(2)(B).

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[7] For Jane Doe 1: Third Amended Petition, ¶ 334; for Jane Doe 2: Second Amended Petition, ¶ 340.

It should be added that Plaintiffs do not know what Facebook has actually done with respect to the undertaking allegations, they only know what Facebook *says* it has done. Thus, even if Facebook's objections to the undertaking claims were potentially well-taken, they would pose an evidentiary issue that cannot be resolved by a motion to dismiss on the pleadings.

C. None of Facebook's Examples of Cases Where Section 230 Did Not Apply Followed Facebook's But-For Test

According to Facebook, Section 230 bars liability when "the cause of action depends *in any way* [on] the chain of causation on a third-party [content] that's posted on the site or shared on the site." R.R. 8 (emphasis added). In other words, Facebook asks the Court to apply a but-for test for determining whether Section 230(c) applies to Plaintiffs' claims. *See* R.R. 10.

In response to the Court's question about what kind of claims would not be barred by Section 230, Facebook described three cases from the Seventh and Ninth Circuits. R.R. 14-15. But Facebook ignored the fact that those courts rejected the but-for test. Rather, they recognized that "[t]o provide broad immunity 'every time a website uses data initially obtained from third parties would eviscerate [the CDA].'" *HomeAway.com, Inc. v. City of Santa Monica*, 918 F.3d 676, 682 (9th Cir. 2019) (citing *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1100 (9th Cir. 2009)).

Facebook first discussed *City of Chicago, Ill. v. StubHub!, Inc.*, 624 F.3d 363 (7th Cir. 2010), in which the defendant (like Facebook) asked the court to apply a but-for test. It argued Section 230 prevented Chicago from assessing taxes on sales conducted on its site because the tax statute sought to make "on-line sites liable for activities conducted on those sites by third parties." Brief for Appellee, *City of Chicago, Ill. v. StubHub!, Inc.*, No. 09-3432, 2010 WL 3950593 at *15 (7th Cir. Feb. 5, 2010). The Seventh Circuit disagreed, holding that "subsection (c)(1) does not create an 'immunity' of any kind." *StubHub!, Inc.*, 624 F.3d at 366. It noted that Section 230 matters "for defamation, obscenity, or copyright infringement" claims, but the tax did not depend on "who 'publishes' any information or is a 'speaker.'" *Id.*

Facebook also relied on *Doe v. Internet Brands, Inc.*, 824 F.3d 846 (9th Cir. 2016), which involved a failure to warn claim brought by a rape victim against a social networking site. In that opinion, the Ninth Circuit explained why the but-for test effectively deletes the phrase "treated as the publisher or speaker" from Section 230. It acknowledged that "Internet Brands acted as the 'publisher or speaker' of user content by hosting Jane Doe's user profile on the Model Mayhem website, and that action could be described as a 'but-for' cause of her injuries." *Id.* at 853. But "[p]ublishing activity is a but-for cause of just about everything [the defendant] is involved in" and "[w]ithout publishing user content, it would not exist." *Id.* at 853. The but-for test "stretch[es] the CDA beyond its narrow language and its purpose." *Id.* at 853.

And the Ninth Circuit reaffirmed its rejection of the but-for test in *HomeAway.com*, 918 F.3d at 682. It held Section 230 did not apply to a city ordinance prohibiting online rentals with unlicensed third parties merely because the ordinance would require the internet service provider to remove third-party content. *Id.* at 683.

In short, the instances in which courts do not bar claims under Section 230 do not apply Facebook's but-for test. Those courts concluded that the but-for test rewrote Section 230 by eliminating "treated as a publisher or speaker." *See Internet Brands, Inc.*, 824 F.3d at 853; *HomeAway.com, Inc.*, 918 F.3d at 684. Because the plain language of the Section 230 invalidates Facebook's but-for test, that test should not be applied to determine whether Section 230 bars Plaintiffs' claims.

D. *Internet Brands*, not *MySpace*, is Instructive

Facebook claims that the Fifth Circuit's opinion in *Doe v. MySpace, Inc.*, 528 F.3d 413 (5th Cir. 2008) is "very similar" to Plaintiffs' lawsuit. R.R. 58. But, of all the cases the parties discussed, *Internet Brands* is the most analogous.

Facebook incorrectly suggests that *MySpace* concerned a failure to warn claim. Rather, the plaintiffs only sought "to hold MySpace liable for its failure to implement measures that would have prevented Julie Doe from communicating with [her sex trafficker]." *MySpace, Inc.*, 528 F.3d at 420. The court, relying heavily on block quotes from the *Zeran* line of cases and the trial court's opinion, affirmed dismissal of the plaintiffs' claims. *Id.* at 419-20. It then proceeded to chastise plaintiffs' counsel for his oral arguments. *See id.* at 420-22.

The plaintiff in *Internet Brands* did assert a failure to warn claim. She was an aspiring model who posted a profile on the internet service provider's platform. After seeing her profile, two predators contacted her through the platform pretending to be talent scouts and lured her to a fake modeling audition where they drugged and raped her. 424 F.3d at 849, 851.

The plaintiff alleged that the internet service provider failed to warn its members that they were at risk of being victimized by predators. *Id.* at 849. The Ninth Circuit decided the claim did not treat the internet service provider as a publisher or speaker of third-party content because it was based on self-produced content. *Id.* at 852-54. As a result, the court reversed the dismissal of the plaintiff's claims. *Id.* at 854.

Likewise, Plaintiffs seek to hold Facebook liable for its own content and conduct. Under *Internet Brands*, Section 230 does not bar their claims.

II. Even if the *Zeran* Line of Cases Is Accepted, It Does Not Matter: Plaintiffs' Claims Are Not Preempted by Section 230

A. The *Medtronic* Presumption

At the hearing, we argued that the U.S. Supreme Court decision in *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996), established a presumption against federal preemption of state law in areas of traditional state concern, absent a "clear and manifest" expression of Congressional intent. Counsel for Ms. Linsley suggested that *Medtronic* has been essentially overruled by *Puerto Rico v. Franklin California Tax-Free Trust*, 136 S. Ct. 1938 (2016). R.R. 55-57. The Court should reject that suggestion.

The *Medtronic* decision arose out of negligence and strict-liability claims against the manufacturer of a heart pacemaker lead. *Medtronic*, 518 U.S. at 480-81. The manufacturer argued that the plaintiffs' state law claims were preempted by the provisions of the Medical Device Amendments of 1976, 90 Stat. 539. *Id.* at 481. Thus, *Medtronic* dealt with the same situation confronting the Court: a defendant claiming traditional state law theories were preempted by a federal statutory change.

The Supreme Court observed that "[i]n all pre-emption cases, and particularly in those in which Congress has 'legislated . . . in a field which the

States have traditionally occupied,' we 'start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" *Id.* at 485 (internal citations omitted).

In response, Facebook argued that *Puerto Rico*, which involved Puerto Rico's attempts to restructure some of the Commonwealth's massive debt, had impliedly overruled *Medtronic*. In *Puerto Rico*, the Court wrote: "because the statute 'contains an express pre-emption clause,' we do not invoke any presumption against pre-emption but instead focus on the plain wording of the clause." *Puerto Rico*, 136 S. Ct. at 1946 (quoting *Chamber of Commerce v. Whiting*, 563 U.S. 582, 594 (2011)).

First, the Court did not overrule or even mention the *Medtronic* decision in its *Puerto Rico* opinion.

Second, *Puerto Rico* dealt with federal bankruptcy laws, which are not an area of traditional state regulation or historic police powers. *Medtronic*, on the other hand, expressly dealt with "the historic police powers of the States" in the form of tort law. *Medtronic,* 518 U.S. at 485.

The federal courts have had an inconsistent reaction to *Puerto Rico*. The Third Circuit continues to apply the presumption against preemption of claims "historically regulated by states," because such claims were not implicated by *Puerto Rico*'s analysis of bankruptcy issues. *Lupian v. Joseph Cory Holdings*, 905 F.3d 127, 131 (3rd Cir. 2018). The Second and Ninth Circuits have continued to apply the presumption against preemption in cases involving historic state police powers without commenting on *Puerto Rico*. *See Marentette v. Abbott Labs, Inc.*, 886 F.3d 112, 117 (2nd Cir. 2018); *Lazar v. Kroncke*, 862 F.3d 1186, 1195 (9th Cir. 2017); *Depot, Inc. v. Caring for Montanans, Inc.*, 862 F.3d 1186, 1195 (9th Cir. 2017), *cert. denied*, 138 S. Ct. 2647 (2018).

The Fourth Circuit noted the Supreme Court's "somewhat varying pronouncements on presumptions in express preemption cases," and decided not to apply the presumption in a series of cases involving airline deregulation. *Air Evac EMS, Inc. v. Cheatham*, 910 F.3d 751, 762 (4th Cir. 2018). Other circuit courts have followed that approach. *See EagleMed LLC v. Cox*, 868 F.3d 893, 903 (10th Cir. 2017); *Watson v. Air Methods Corp.*, 870 F.3d 812, 817 (8th Cir. 2017). These decisions do not support Facebook's contention that *Puerto Rico* has impliedly overruled *Medtronic* because airline deregulation is not a traditional concern of the states.

Perhaps most significantly, two Texas courts of appeals have applied the presumption against preemption since *Puerto Rico*, and neither commented on the decision. One of those opinions—*In re Union Pac. R.R.*

Co., No. 14-18-01046-CV, 2018 WL 6836827, at *2 (Tex. App.—Houston [14th Dis.] Dec. 28, 2018, no pet.)— is binding on this Court. *See also Sunset Transp., Inc. v. Texas Dep't of Transp.*, 557 S.W.3d 50, 65 (Tex. App.—Austin 2017, no pet.).

In conclusion, there is no legal support for Facebook's assertion that *Medtronic* has been overruled or limited. That being so, the presumption against preemption should apply. There is no reasonable argument that any of the statutory language shows a "clear and manifest" Congressional intent. The Court should reject Facebook's position that the Communications Decency Act preempts Jane Doe's common-law and statutory claims under state law.

B. Facebook's Argument that "Congress Did Not Carve Out State Civil Actions in the 2018 Amendments" Should Be Rejected

The 2018 amendment, codified in Section 230(e)(5), states that nothing in the section should "be construed to impair or limit":

- Claims in civil actions brought under the federal human trafficking statute, Section 1595 of Title 18, based on conduct that violates the federal criminal statute, Section 1591;
- Criminal charges brought under state law based on conduct that violates Section 1591; or
- Criminal charges brought under state law in jurisdictions where prostitution is illegal based on conduct that violates Section

> 2421A, which criminalizes the promotion or facilitation of prostitution over the internet.

47 U.S.C. § 230(e)(5). Facebook argued that civil claims under state law are preempted because they are not expressly mentioned in this amendment. R.R. 18-28.

At the hearing, Facebook also argued that the amendment does not change the preemption analysis. R.R. 24. In other words, the amendment was promulgated and passed in order to solve the problems that Congress perceived that the *Zeran* line of cases had created with respect to human trafficking via the internet. But Facebook contends that background has no bearing on the scope of Section 230's preemptive effect.[8]

First. If the Court accepts the preemption argument advanced in Section II(A), that argument disposes of Facebook's contention. That is because Facebook argues for preemption by implication, i.e., because Section 230(e)(5) applies to three types of claims, it must mean that no other types of claims are allowed. But preemption by implication is not a "clear and manifest" expression of Congressional intent to preempt.

[8] Facebook also seemed to contend that Section 230(e)(3) only referred to Section 230 as it existed prior to the amendment. R.R. 24-26. But once the amendment was signed into law, it modified Section 230. At that point, Section 230(e)(3) applies to the modified Section 230.

Second. The act through which Congress amended Section 230—the Allow States and Victims to Fight Online Sex Trafficking Act (FOSTA)—clearly states what Congress was trying to do, and shows it was not trying to limit state civil law claims unless those claims were "inconsistent with" Section 230, as provided in the pre-existing preemption provision. 47 U.S.C. § 230(e)(3). Congressional intent can be seen in FOSTA's preamble: "To amend the Communications Act of 1934 to clarify that section 230 of such Act does not prohibit the enforcement against providers and users of interactive computer services of Federal and *State* criminal and *civil* law relating to sexual exploitation of children or sex trafficking, and for other purposes." Pub. L. No. 115-164, 132 Stat. 1253 (2018) (emphasis added).

FOSTA states that Section 230 "was never intended to provide legal protection to . . . websites that facilitate traffickers in advertising the sale of unlawful sex acts with sex trafficking victims" and that "clarification of such section is warranted to ensure that such section does not provide such protection to such websites." *Id.* at sec. 2, §§ (1), (3). Section 7 of FOSTA, the "Savings Clause," provides that "[n]othing in this Act or the amendments made by this Act shall be construed to limit or preempt any civil action or criminal prosecution under Federal law or State law (*including State statutory law and State common law*) . . . that was not limited or preempted by section 230 . . . as such section was in effect on the day before the date of enactment of this Act." *Id.* at 132 Stat. 1255 (emphasis added).

Facebook will argue, of course, that Section 230 had previously preempted all claims that could be based on third-party content, so nothing was preserved by the savings clause. But Congress said that was not its intent. And the fact that Congress specifically "saved" state statutory and state common law claims that might have made it through the gamut of pre-amendment decisions certainly shows that *Congress did not intend to preempt those types of claims*. The savings clause must also have some meaning, given the rule that statutes are to be construed "so that no part will be inoperative or superfluous, void or insignificant." *Corley v. United States*, 556 U.S. 303, 314 (2009) (quoting *Hibbs v. Winn,* 542 U.S. 88, 101 (2004)).

Third. FOSTA's legislative history shows Congress did not intend the types of claims listed in the amendment to be exclusive. It was attempting, in part, to make it easier for prosecutors to bring criminal charges against internet service providers that facilitate human trafficking. A congressional report discussed how, pre-amendment, a state criminal law could be enforced against an internet service provider "as long as it is 'consistent' with § 230." H.R. Rep. No. 115-572, at 9 (2018). However, that provision was "problematic" because the states were forced to litigate the application of

Section 230. *Id.* So Congress amended the section "to allow states to enforce certain criminal laws without litigating the application of § 230." *Id.*

Congress created "an explicit carve out to permit state criminal prosecutions." *Id.* "The language used in the carve-out is designed to ensure that [internet service providers] are subject to one set of criminal laws, rather than a patchwork of various state laws." *Id.* at 10. The carve-outs that were created by FOSTA are listed in Section 230(e)(5)(B) and (C) and are codified at 18 U.S.C. § 1591 and 18 U.S.C. § 2421A, which refer to sex trafficking of children and promotion of prostitution, respectively.

In the final version of the amendment, Congress added another carve-out to ensure that federal civil claims under 18 U.S.C. § 1595 would not be subject to analysis under Section 230. 47 U.S.C. §230(e)(5)(A). As we have argued before, Texas's civil human trafficking statute, Chapter 98, tracks the federal civil remedy almost exactly. Response, pp. 29-30. It is therefore consistent with Section 230 and is not preempted.

Facebook's argument at the hearing was that because the 2018 amendment did not carve out state civil actions, it preempted them—but that is not how express preemption works. Congress has to demonstrate "clear and manifest" intent to preempt. What Congress showed with respect to sections 230(e)(5)(A), 230(e)(5)(B), and 230(e)(5)(C) was an intent to (1) streamline and make uniform criminal proceedings involving human trafficking and prostitution and (2) to provide a federal civil remedy that did not previously exist.

This Court is in the same position as the Supreme Court was in *Medtronic*, when it observed that "[t]here is, to the best of our knowledge, nothing in the hearings, the Committee Reports, or the debates suggesting that any proponent of the legislation intended a sweeping pre-emption of traditional common-law remedies against manufacturers and distributors of defective devices." 518 U.S. at 491. The Court continued: "If Congress intended such a result, its failure even to hint at it is spectacularly odd, particularly since Members of both Houses were acutely aware of ongoing products liability litigation." *Id.* (footnote omitted).

Substitute "internet service providers" for "manufacturers and distributors of defective devices" and "ongoing human trafficking litigation" for "ongoing products liability litigation," and the conclusion is clear: Facebook has not shown an intent to preempt state law claims.

III. Plaintiffs' Answers to the Court's Questions

Questions to Ms. Lindsley

1. "Explain to me how a statute that's entitled "Protection for Private Blocking and Screening of Offensive Material" becomes this extreme bar to any claim against your client?" R.R. 11-12.

This is, of course, the overarching question: what is the proper interpretation of Section 230? Part of the answer to that question is that "the title of a statute and the heading of a section are tools available for the resolution of a doubt about the meaning of a statute." *Almendarez-Torres v. United States*, 523 U.S. 224, 234 (1998).

2. "The Fifth Circuit—did it [read Section 230 broadly] as well?" R.R. 12.

Section I(D) of this brief analyzes the *MySpace* opinion of the Fifth Circuit.

3. "So if the language was intended to be that broad, why are there also exemptions or protections from liability in [230(c)(2)], and in the Digital Millennium Copyright Act, why do we have separate protections for [Facebook] for other actions?"

The Court's question illustrates why the interpretation of Section 230 adhered to by the *Zeran* line of cases and by Facebook is wrong—it renders

230(c)(2) meaningless because 230(c)(2) does not add anything to the "broad immunity" they believe is conferred by 230(c)(1).

4. "So how does [(e)(5)] come into play, then?" . . . The sex trafficking law, no effect on sex trafficking." R.R. 18.

Section II(B) of this brief discusses this question.

5. "[T]alk to me about (e)(3) then." R.R. 22.

Section II deals with the preemption provision of Section 230 generally.

6. "[D]oes the addition of the sex trafficking piece in (5) change the [preemption] analysis?" R.R. 24.

See Section II(B).

7. "So how is her cause of action preempted under 230?" R.R. 27.

See Section II.

Questions to Plaintiffs' Counsel

8. "So let me just start with what is it Facebook is actually doing that you are seeking to hold them liable for?" R.R. 35.

This question is addressed in both Sections I(A) and I(B) of the brief.

9. "Why is Facebook not essentially a publisher?" R.R. 39.

Section I of the brief deals with this issue.

10. “Are you sure about [the 2018 amendment carving out ‘the entire area of sex trafficking, including state civil causes’]? Because I see what the purpose is, but the specifics they drafted was Section (e), which lists—doesn’t list state civil action.” R.R. 40.

See Section II(B).

11. “The negligent undertaking, meaning they’ve negligently failed to protect?” R.R. 44.

Section I(C) deals with negligent undertaking.

12. “So this language, ‘no cause of action may be brought and no liability may be imposed under any state or local law that is inconsistent with this section’ doesn’t include common law claims? . . . It had to say ‘common law claims?’” R.R. 45.

Yes; if Congress intended to preempt all common-law claims, it would have said so. *See Moore v. Brunswick Bowling & Billiards Corp.*, 889 S.W.2d 246, 250 (Tex. 1994) (“We conclude that the precepts that preemption clauses must be narrowly construed and that Congress’ intent to preempt must be ‘clear and manifest’ counsel us to decline to read ‘law or regulation’ so broadly as to include state common-law claims.”). The only clear and manifest intent expressed in Section 230 is to preempt defamation-type claims under the common law that rely on publisher or speaker liability.

13. “Was that a defamation claim? The *Prodigy* case was a defamation claim?” R.R. 48.

Yes. *See Stratton Oakmont, Inc. v. Prodigy Services Co.*, No. 31063/94, 1995 WL 323710, at *3 (N.Y. Sup. Ct. May 24, 1995) (“A finding that PRODIGY is a publisher is the first hurdle for plaintiffs to overcome in pursuit of their defamation claims.”).

14. “How does 98 fall—where does Chapter 98 fall within this federal statute, or does it?” R.R. 51.

Chapter 98 is a state law that is not preempted because it is not inconsistent with Section 230. It imposes liability on the same grounds as the federal statutes that are expressly exempted by the amendments in subsection (e)(5).

Prayer

The motions to dismiss should be denied and the Court should entertain a motion to establish the amount of Plaintiffs’ attorney’s fees and expenses.

Respectfully submitted,

/s/ Annie McAdams

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