

## **Response to Online Sex Trafficking and the Communications Decency Act: Hearing Before the Subcommittee on Crime, Terrorism, Homeland Security, and Investigations – October 3, 2017**

Shared Hope International, Exodus Cry, the National Center on Sexual Exploitation (NCOSE) and the Coalition Against Trafficking in Women (CATW) submit this statement in response to the October 3, 2017 hearing<sup>1</sup> on H.R. 1865, the Allow States and Victims to Fight Online Sex Trafficking Act (FOSTA),<sup>2</sup> to clarify the record with regard to testimony given by former Representative Chris Cox on behalf of NetChoice, and the Subcommittee's focus on technology industry perspectives that did not accurately represent the barriers in Section 230 to holding online entities that facilitate sex trafficking accountable for their role in this crime.

Notably absent from the hearing were the voices of survivors of trafficking—those who have experienced the devastating effects of commercial sexual exploitation as a result of being bought and sold on websites that prompted the introduction of H.R. 1865—and some of the undersigned organizations already protested this serious oversight by the Subcommittee<sup>3</sup> which convened the hearing in order to make critical decisions about a law that directly impacts sex trafficking survivors.

A similarly glaring omission was the failure to hear from sex trafficking victim advocacy organizations that have spent decades fighting to protect the rights of sex trafficking victims, or from law enforcement agencies that combat this crime and fight to protect victims every day.<sup>4</sup> During the hearing, Professor Mary Leary, who has substantial expertise in issues related to child protection and victims' access to justice, provided a critical window into the perspective of victim advocates and law enforcement, but she was repeatedly passed over by members in favor of hearing the concerns of former Congressman Chris Cox, who testified on behalf of NetChoice, a technology trade group that represents the interests of internet companies. While we do not dispute that the complex nature of this legislation requires a balancing of interests, the Subcommittee failed to strike that balance by **choosing instead to rely on technology industry advocates to advise the Subcommittee on how to combat sex trafficking**. NetChoice, for example, was allowed to present a self-described “novel legislative approach to addressing the problem of sex trafficking.”<sup>5</sup>

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<sup>1</sup> *Online Sex Trafficking and the Communications Decency Act: Hearing Before the Subcomm. on Crime, Terrorism, Homeland Security, and Investigations*, 115 Cong. (Oct. 3, 2017).

<sup>2</sup> H.R. 1865, the Allow States and Victims to Fight Online Sex Trafficking (FOSTA).

<sup>3</sup> Letter from Coalition Against Trafficking in Women (CATW), Exodus Cry, National Center On Commercial Sexual Exploitation (NCOSE), Shared Hope International, and Survivors for Solutions to Subcommittee on Crime, Terrorism, Homeland Security, and Investigations (Oct. 3, 2017).

<sup>4</sup> Notably, when the Senate Commerce Committee held a hearing on S. 1693, the *Stop Enabling Sex Traffickers Act of 2017* (SESTA), witnesses included the mother of a slain child sex trafficking victim who had been sold for sex on Backpage.com, and California Attorney General Xavier Becerra who is currently prosecuting Backpage executives and faced the dismissal of several state charges in that prosecution due to Section 230 immunity. *S.1693, The Stop Enabling Sex Traffickers Act of 2017: Hearing before the Senate Committee on Commerce, Science, and Transportation*, 115 Cong. (September 19, 2017).

<sup>5</sup> NetChoice Press Release, “NetChoice Calls On U.S. Congress To Leverage Fullest Extent of the Law to Pursue and Prosecute Online Sex Trafficking,” October 3, 2017.

The undersigned anti-trafficking organizations respectfully submit this joint statement for the purpose of correcting this imbalance. NetChoice’s testimony paints a picture of the statutory scheme Representative Cox may have envisioned when drafting the legislation in 1996, but NetChoice’s testimony misconstrues the actual caselaw interpreting Section 230 in the context of online facilitation of sex trafficking. Rather than the “clear fact-based test”<sup>6</sup> that NetChoice claims should be applied based on the “plain language of the statute,”<sup>7</sup> the way that courts have actually interpreted Section 230 with regard to online facilitation of sex trafficking has repeatedly undermined and essentially eviscerated the “clear test” that NetChoice states is enshrined in Section 230. We also disagree with NetChoice’s assertion that amending Section 230 will undermine the goal of having a national standard for applying the protections of Section 230; indeed, clarifying Section 230 in the context of online facilitation of sex trafficking will resolve the conflict in existing caselaw and clarify the intent of the drafters—both of whom have testified on the record about how they *intended* for the law to be applied<sup>8</sup>—to ensure that courts will truly have a clear standard for deciding these cases in the future.

#### The Need For Statutory Clarification of Section 230 to Address Online Facilitation of Sex Trafficking:

Despite the intended goals of Section 230, the problem of online facilitation of sex trafficking is real, and the need to amend Section 230 to clarify its application in these cases is equally real, and severely overdue. **The test that NetChoice claims is already codified in Section 230<sup>9</sup> and would allow for companies like Backpage.com to face criminal and civil liability<sup>10</sup> is not actually codified in Section 230.** Instead, this “test” for determining when an interactive computer service provider can be considered an information content provider and consequently lose the protection of Section 230 immunity derives from caselaw. Specifically, the test that NetChoice describes appears to derive from the decision in Fair Housing Council v. Roommates.com,<sup>11</sup> a case that has not been followed in any of the cases against Backpage.com,<sup>12</sup> except one civil case.<sup>13</sup>

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<sup>6</sup> Statement of Chris Cox to Subcommittee on Crime, Terrorism, Homeland Security, and Investigations (Oct. 3, 2017) p.7.

<sup>7</sup> *Id.* at ii.

<sup>8</sup> *Id.* at 1, 7; Testimony of Senator Ron Wyden, *S.1693, The Stop Enabling Sex Traffickers Act of 2017: Hearing before the Senate Committee on Commerce, Science, and Transportation*, 115 Cong. (September 19, 2017).

<sup>9</sup> Statement of Chris Cox to Subcommittee on Crime, Terrorism, Homeland Security, and Investigations (Oct. 3, 2017) p.7.

<sup>10</sup> *Id.* at 12-16.

<sup>11</sup> Fair Hous. Council of San Fernando Valley v. Roommates.Com, LLC, 521 F.3d 1157, 1166 (9th Cir. 2008).

<sup>12</sup> M.A. ex rel. P.K. v. Vill. Voice Media Holdings, LLC, 809 F. Supp. 2d 1041, 1052 (E.D. Mo. 2011); Doe ex rel. Roe v. Backpage.com, LLC, 104 F. Supp. 3d 149, 157 (D. Mass. 2015), *aff’d sub nom. Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12 (1st Cir. 2016), *cert. denied*, 137 S. Ct. 622, 196 L. Ed. 2d 579 (2017); People v. Ferrer, No. 16FE024013, Ruling on Defendant’s Motion to Dismiss (Aug. 23, 2017).

<sup>13</sup> J.S. v. Vill. Voice Media Holdings, L.L.C., 184 Wash. 2d 95, 103, 359 P.3d 714, 718 (2015) (“it is important to ascertain whether in fact Backpage designed its posting rules to induce sex trafficking to determine whether Backpage is subject to suit under the CDA because ‘a website helps to develop unlawful content, and thus falls within the exception to section 230, if it contributes materially to the alleged illegality of the conduct.’ Fact-finding on this issue is warranted.”) (*citing Fair Hous. Council of San Fernando Valley v. Roommates.Com, LLC*, 521 F.3d 1157, 1166 (9th Cir. 2008)).

As NetChoice accurately points out, Section 230 defines an “information content provider” to include “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.”<sup>14</sup> However, beyond providing this definition of a content creator, and providing immunity for interactive computer service providers by restricting liability to the information content provider as the creator of the content,<sup>15</sup> the statute itself does not set out a test for determining when an “interactive computer service” should be considered an “information content provider” and consequently lose the protection of Section 230 immunity. While development of content is referenced in the definition of a content creator, the statute does not define what it means to “develop” content,<sup>16</sup> and that is where the *caselaw* provides a patchwork approach, either employing a standard similar to the Roommates.com decision—as seen followed in defamation and business fraud cases<sup>17</sup>—or in the context of online facilitation of sex trafficking, employing standards that interpret development under Section 230 as extending broad immunity to interactive computer service providers despite evidence of the entity’s role in developing content, applying a definition of development that is so narrow that it would be virtually impossible to find that an online entity participated in the development of content if it did anything other than conceive, create and write the content itself.<sup>18</sup>

Considering this caselaw background, we must respectfully, but strongly disagree with NetChoice’s claim that Section 230 establishes a clear test for courts to decide if an interactive computer service provider has become an information content provider. NetChoice points to the First Circuit decision in Jane Doe No. 1 v. Backpage.com LLC<sup>19</sup> as an “apparent anomaly.”<sup>20</sup> This is simply inaccurate. It is precisely in the

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<sup>14</sup> 47 U.S.C. § 230(f)(3); Statement of Chris Cox to Subcommittee on Crime, Terrorism, Homeland Security, and Investigations (Oct. 3, 2017) p.7.

<sup>15</sup> 47 U.S.C. § 230(c)(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.”)

<sup>16</sup> FTC v. Accusearch, Inc., 570 F.3d 1187, 1197 (10<sup>th</sup> Cir. 2009) (“[Section 230] does not define the term development.”)

<sup>17</sup> NetChoice’s testimony claims that “it is well established in the case law that under Section 230, a website ‘can be both a service provider and a content provider...” Statement of Chris Cox to Subcommittee on Crime, Terrorism, Homeland Security, and Investigations (Oct. 3, 2017) p.15. However, this is far from established. While NetChoice notes six cases that have followed the Roommates standard, this sampling of cases does not include cases involving online facilitation of sex trafficking. With the exception of a state case involving child pornography, the cases cited by NetChoice are limited to defamation or unfair trade practices. See, e.g., FTC v. LeadClick Media LLC, 783 F.3d 158 (2d Cir. 2016) (unfair trade practice); Vision Sec., LLC v. Xcentric Ventures, LLC, No. 2:13-CV-00926, 2014 WL 582180, at \*1 (D. Utah Feb. 14, 2014) (online defamation and libel); F.T.C. v. Accusearch Inc., 570 F.3d 1187, 1190 (10th Cir. 2009) (illegal trade of confidential telephone records); eDrop-Off Chicago LLC v. Burke, No. CV 12-4095 GW (FMOX), 2012 WL 12882434, at \*1 (C.D. Cal. May 11, 2012) (online defamation and trade libel); Huon v. Denton, 841 F.3d 733 (7th Cir. 2016) (online defamation).

<sup>18</sup> See e.g., Jane Doe No. 1 v. Backpage.com, LLC, 817 F.3d 12, 20 (1st Cir. 2016), cert. denied, 137 S. Ct. 622, 196 L. Ed. 2d 579 (2017) (“[A]s long as ‘the cause of action is one that would treat the service provider as the publisher of a particular posting, immunity applies not only for the service provider’s decisions with respect to that posting, but also for its inherent decisions about how to treat postings generally.’” (quoting Universal Commc’n Sys., Inc. v. Lycos, Inc., 478 F.3d 413, 422 (1st Cir. 2007))).

<sup>19</sup> Jane Doe v. Backpage LLC, 817 F.3d 12 (1<sup>st</sup> Cir. 2016).

cases that have attempted to hold Backpage.com accountable for facilitating online sex trafficking that the courts have departed most dramatically from the development standard that NetChoice claims was intended to be applied. Not only have courts interpreted Section 230 as extending blanket immunity to Backpage.com—an online entity shown in a Senate Permanent Subcommittee on Investigations report to have knowingly facilitated child sex trafficking<sup>21</sup>—but these courts have specifically asked Congress to clarify Section 230 to avoid the unfair result that the courts say is dictated by the current statutory scheme.<sup>22</sup>

NetChoice’s testimony also suggests that the cases against Backpage would have reached a different result if the courts considering application of Section 230 immunity to Backpage had the evidence from the Senate investigation before them to consider in deciding Backpage’s role in developing content.<sup>23</sup> If the standard that NetChoice claims should have been applied was employed by these courts, any evidence that Backpage had a role in creating or developing content should have opened the door to a “fact-based inquiry”<sup>24</sup> to determine whether Backpage.com was a content creator. However, the lack of clarity in Section 230 regarding when an interactive computer service provider can be considered an information content provider prevented each of these cases from proceeding to the fact-finding stage. While the courts acknowledged the potential for Backpage to be liable if it is found to be a content creator,<sup>25</sup> the courts were unwilling to find that Backpage’s conduct as an interactive computer service provider could also constitute development of content and consequently remove it from CDA immunity. This confusion is probably most evident in the decision in People v. Ferrer where the court considered

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<sup>20</sup> Statement of Chris Cox to Subcommittee on Crime, Terrorism, Homeland Security, and Investigations (Oct. 3, 2017) p.15.

<sup>21</sup> Backpage.com’s Knowing Facilitation of Online Sex Trafficking, Senate Permanent Subcommittee on Investigations, Staff Report (January 10, 2017).

<sup>22</sup> Jane Doe v. Backpage, LLC, 817 F.3d 12, 29 (1st Cir. 2016) (“If the evils that the appellants have identified are deemed to outweigh the First Amendment values that drive the CDA, the remedy is through legislation, not through litigation.”); M.A. v. Village Voice Media Holdings, et al., 809 F.Supp. 2d 1041, 1058 (E.D. Mo. 2011) (“Congress has declared such websites to be immune from suits arising from such injuries. It is for Congress to change the policy that gave rise to such immunity.”); People of the State of California v. Carl Ferrer et al, No. 16FE024013, Ruling on Defendant’s Motion to Dismiss, p.18 (Aug. 23, 2017) (“[i]f and until Congress sees fit to amend the law, the broad reach of section 230 of the Communications Decency Act even applies to those alleged to support the exploitation of others by human trafficking.”).

<sup>23</sup> Statement of Chris Cox to Subcommittee on Crime, Terrorism, Homeland Security, and Investigations (Oct. 3, 2017) pgs.15-16, footnote 41.

<sup>24</sup> Id. at 7.

<sup>25</sup> Doe ex rel. Roe v. Backpage.com, LLC, 104 F. Supp. 3d 149, 157 (D. Mass. 2015), *aff’d sub nom. Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12 (1st Cir. 2016), *cert. denied*, 137 S. Ct. 622, 196 L. Ed. 2d 579 (2017) (“Backpage’s passivity and imperfect filtering system may be appropriate targets for criticism, but they do not transform Backpage into an information content provider.”), People v. Ferrer, No. 16FE024013, p.18 (2017) (“This Court rejected the People’s claim that Defendants actually created the content that led to their ability to live and derive support and maintenance from prostitution proceeds, when the face of the complaint demonstrated that Defendants engaged in protected publisher functions.”), M.A. ex rel. P.K. v. Village Voice Media Holdings, LLC, 809 F. Supp.2d 1041, 1044 (2011) (“M.A. describes Backpage as...[an] Information Content Provider within 47 U.S.C. 230 in that [Backpage] was responsible in part for the development and/or creation of information provided through the internet or other internet computer service in that...[Backpage] has posting rules and limitations which aid in the sight veiling of illegal sex services ads to create the veil of legality.”)

much of the same evidence provided in the Senate report<sup>26</sup> and still found that Section 230 immunity should be extended to Backpage, *even if it engaged in actual criminal conduct*.<sup>27</sup>

In *Jane Doe v. Backpage LLC*, the First Circuit interprets Section 230 as providing an “interactive computer service” an extremely broad veil of immunity for any conduct relating to content provided by another information content provider: “Though a website conceivably might display a degree of involvement sufficient to render its operator both a publisher and a participant in a sex trafficking venture (say, that the website operator helped to procure the underaged youths who were being trafficked), the facts pleaded in the second amended complaint do not appear to achieve this duality.” Contrary to NetChoice’s testimony which states that “the record before [the First Circuit] expressly *did not* allege that Backpage contributed to the development of the sex trafficking content, even in ‘part,’” the record reflects allegations that Backpage structured its website to facilitate sex trafficking which the court nevertheless found to be the actions of a mere publisher.<sup>28</sup> It was the court’s interpretation of the immunity provided to interactive computer service providers, rather than the lack of a specific allegation as to content creation, that led the court to extend broad immunity despite the “persuasive case” made by appellants and amici that “Backpage has tailored its website to make sex trafficking easier.”<sup>29</sup>

With regard to Section 230’s impact on state criminal prosecutions, one of the headings in NetChoice’s testimony is “Why Backpage cannot use Section 230 as a shield from state prosecution.” In addition to the inaccuracy of NetChoice’s testimony with regard to the cases attempting to hold Backpage civilly liable, three additional cases demonstrate how Section 230 directly blocks states’ efforts to hold Backpage, and similar entities, criminally liable under state law: *Backpage.com LLC v. Cooper*, *Backpage.com LLC v. Hoffman* and *Backpage.com LLC v. McKenna*.<sup>30</sup> In each of these cases, the state enacted a law that would have criminalized *knowingly* publishing, disseminating or displaying advertisements for commercial sex acts with minors<sup>31</sup>—conduct that is specifically criminalized under the federal sex trafficking law.<sup>32</sup> Almost immediately following enactment of each of these state criminal laws, Backpage.com and Internet Archive filed a lawsuit seeking to enjoin the statute based primarily on Section 230 immunity, and in each case, the court found the state statute inconsistent with Section 230,

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<sup>26</sup> *People v. Ferrer*, No. 16FE024013, Ruling on Defendant’s Motion to Dismiss, p.16 (Aug. 23, 2017) (“The People allege that Defendants ‘manipulated’ advertisements to evade law enforcement detection. The People state, ‘In this way, rather than prevent a child from being sold for sex, the Defendants would knowingly profit from the child’s commercial sexual exploitation and assist the trafficker to evade law enforcement.’”) (citing Amend. Comp. at 26).

<sup>27</sup> *Id.* at 18 (Aug. 23, 2017).

<sup>28</sup> *Doe v. Backpage.com* at 21. (“Although the appellants try to distinguish *Doe* by claiming Backpage’s decisions about what measures to implement deliberately attempt to make sex trafficking easier, this is a distinction without a difference. Whatever Backpage’s motivations, those motivations do not alter the fact that the complaint premises liability on the decisions that Backpage is making as a publisher with respect to third-party content.”)

<sup>29</sup> *Doe v. Backpage.com* at 29.

<sup>30</sup> *Backpage.com, LLC v. McKenna*, 881 F. Supp. 2d 1262 (W.D. Wash. 2012), *Backpage.com, LLC v. Cooper*, 939 F. Supp. 2d 805 (M.D. Tenn. 2013), *Backpage.com, LLC v. Hoffman*, No. 13-CV-03952 DMC JAD, 2013 WL 4502097, at \*1 (D.N.J. Aug. 20, 2013).

<sup>31</sup> *Id.*

<sup>32</sup> 18 U.S.C. § 1591(a)(1) (“whoever knowingly advertises...”); *Backpage.com, LLC v. Lynch*, 216 F. Supp. 3d 96, 104 (D.D.C. 2016) (finding that advertisement of sex trafficking is not protected speech under the First Amendment).

demonstrating the broad immunity that Section 230 provides in the context of online facilitation of sex trafficking.

NetChoice’s claim that “[a]ny state or local criminal prosecution, and any civil suit, may therefore be maintained so long as it does not seek to violate the uniform national policy that internet platforms shall not be held liable for third party content created and developed wholly by others,” belies the actual national policy established under Section 230, a policy that protects online entities from *any potential* liability, regardless of the facts. Just as the civil cases against Backpage have been almost uniformly dismissed without an opportunity to engage in the fact-based test that NetChoice claims is required under Section 230, Backpage.com successfully blocked states’ attempts to codify state criminal penalties for conduct criminalized under the federal sex trafficking law merely because the laws *potentially* apply to online entities. Backpage’s success in enjoining these state laws immediately following enactment demonstrates the flaw of relying on a Roommates’ development standard as the sole solution to addressing Section 230 immunity for bad actors engaged in online facilitation of sex trafficking. Despite the possible effectiveness of this standard in the context of fraud, defamation and the other handful of cases cited by NetChoice, this standard is clearly ineffective in addressing the conflict between Section 230 immunity and the ability of states and victims to fight online sex trafficking.

When cases like those brought against Backpage.com have presented a scenario where online entities are shaping and directing the development of content originally created by another “information content provider,” and the courts have had to decide whether an entity could be both an interactive computer service provider and an information content creator, there is a distinct difference in how this determination is made in the cases addressing online facilitation of sex trafficking. Roommates went one way—deciding that participating in the development of content was enough to consider an interactive computer service a content creator—and the cases deciding whether Backpage.com could be treated as a content creator went the other way—holding that if it facilitated illegal conduct or even if it directly engaged in criminal conduct,<sup>33</sup> it was immune. With this dramatic split in the caselaw, the issue that is “clear” is the need to amend Section 230 to clarify how Section 230 applies to online facilitation of sex trafficking.

Resolving this conflict in the caselaw through statutory clarification in the context of online facilitation of sex trafficking is the focus of the current legislation. FOSTA also does **not** do **more** than that. FOSTA does not create a sex trafficking “carve out,” suggesting that sex trafficking is to be treated differently than other cases. Instead, FOSTA clarifies that the common sense interpretation of Section 230 that was intended to be applied by its original drafters but has been repeatedly shunned by the courts in the context of online facilitation of sex trafficking, was indeed intended to be applied in these cases.

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<sup>33</sup> See M.A. ex rel. P.K. v. Vill. Voice Media Holdings, LLC, 809 F. Supp. 2d 1041, 1052 (E.D. Mo. 2011); Doe ex rel. Roe v. Backpage.com, LLC, 104 F. Supp. 3d 149, 157 (D. Mass. 2015), aff’d sub nom. Jane Doe No. 1 v. Backpage.com, LLC, 817 F.3d 12 (1st Cir. 2016), cert. denied, 137 S. Ct. 622, 196 L. Ed. 2d 579 (2017); People v. Ferrer, No. 16FE024013, Ruling on Defendant’s Motion to Dismiss, p.18 (Aug. 23, 2017).

### FOSTA Will Help Clarify the National Standard:

By focusing on the area of law where Section 230 has been most harmfully misinterpreted to provide immunity for facilitating illegal conduct,<sup>34</sup> and in the most recent decision, *immunity for directly engaging in illegal conduct*,<sup>35</sup> FOSTA provides a targeted response to the various courts that have called on Congress to clarify Section 230 immunity in the context of online facilitation of sex trafficking. In this way, by focusing on the specific issue that has created confusion in the courts and led to egregiously unfair results for sex trafficking victims, FOSTA avoids a larger overhaul of Section 230 immunity that would require speculating the various circumstances where a court's interpretation of Section 230 could depart from its intended application. Indeed, the legislative history established by this legislation will also help to guide courts back to a common sense interpretation of Section 230 as other criminal or civil contexts arise that require guidance. If Congress fails to act however, courts will continue to follow established precedent and allow online entities that facilitate online sex trafficking to continue profiting from the exploitation of victims with impunity, and as the caselaw develops in new areas, the Backpage.com standard will likely be interpreted as the standard to be applied to other criminal activity occurring online.

FOSTA also does not impose new or additional duties on online entities. Under the standard that NetChoice testified was intended to be applied under Section 230, any online entity that does "anything to develop the content created by another, even if only in part," would be "liable along with the content creator." The standard of knowing or reckless conduct<sup>36</sup> under FOSTA does nothing to expand the application of this standard, but since courts have not applied this standard in the context of online facilitation of sex trafficking, FOSTA clarifies that immunity can be denied to online entities acting in *bad* faith. Entities like Backpage.com that are designed to contribute to the illegality occurring online would not be able to assert immunity under Section 230 while entities acting in good faith that do not contribute to the illegality and/or make good faith efforts to filter or remove illegal content, will have immunity under Section 230.

Lastly, NetChoice's claim that "existing federal criminal law suffices to prosecute the offenses of which Backpage is allegedly guilty"<sup>37</sup> reflects a lack of expertise regarding the complexity of sex trafficking

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<sup>34</sup> As Prof. Mary Leary testified, this is "a new form of exploitation [that] has not only emerged on the internet, but is uniquely empowered by it." Statement of Professor Mary Leary to Subcommittee on Crime, Terrorism, Homeland Security, and Investigations (Oct. 3, 2017) p.8.

<sup>35</sup> *People v. Ferrer*, No. 16FE024013, Ruling on Defendant's Motion to Dismiss, p.18 (Aug. 23, 2017).

<sup>36</sup> Statement of Professor Mary Leary to Subcommittee on Crime, Terrorism, Homeland Security, and Investigations (Oct. 3, 2017) p.14 ("The standard of knowing or reckless conduct that furthers a sex trafficking offense is a clear one. Both are commonly understood concepts in criminal law and are challenging states of mind for an attorney to prove. Recklessness, for example, requires the prosecution to prove that the defendant 'consciously disregard[ed] a substantial and unjustifiable risk.' In assessing the risk courts are guided to consider the nature and circumstances known to the defendant. Finally, the defendant's disregard of the risk cannot be minor but must be of such a nature and degree that its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation. The standard of knowing is even higher in criminal law and requires proof that the defendant be practically certain his conduct will cause a venture of human trafficking.")

<sup>37</sup> Statement of Chris Cox to Subcommittee on Crime, Terrorism, Homeland Security, and Investigations (Oct. 3, 2017) p.11.

investigations and the impact of this crime on sex trafficking victims as well as local communities. Combatting sex trafficking is not merely a federal issue in need of political will. Sex trafficking is an insidious, growing crime that thrives when our attention is turned elsewhere, and requires a multi-pronged approach to impact its growth. Limiting the array of potential responses to sex trafficking to solely federal criminal prosecution allows this hidden crime to grow where it is not addressed by all of the pressure points that can be brought to bear; civil and criminal, federal and state enforcement are needed and creating gaps in this response leads to what we have seen happen with the explosion of sex trafficking on the internet. Relying solely on federal criminal law to address online facilitation of sex trafficking is simply unreasonable and unfair to victims of sex trafficking who will continue to be deprived of a day in court to hold the entities that profit from their exploitation accountable. Moreover, even if a federal prosecution is brought against Backpage, that alone would not change the business model that Backpage exemplifies, because relying on federal prosecutions alone is not adequate to flip the risk-reward equation that is such a critical component of combatting sex trafficking. States would still lack the ability to address online facilitation of sex trafficking by other unscrupulous companies that are already expanding into this lucrative, low-risk space.<sup>38</sup>

The obstructive litigation arising from Backpage.com's exploitation of the Section 230 immunity and the pervasive confusion in interpreting how this immunity should apply in the context of online facilitation of sex trafficking have allowed Backpage.com to perpetuate its business model and amass enormous profits while sex trafficking victims continue to be bought, sold and serially raped through online platforms that profit from their exploitation. While we do not disagree with NetChoice's testimony that Backpage.com is a content creator,<sup>39</sup> there is no factual basis for its statement that "[s]ome **mistakenly** claim that Section 230 prevents action against websites that knowingly engage in, solicit, or support sex trafficking."<sup>40</sup> As the caselaw resulting from attempts to hold such websites accountable demonstrates, this statement is simply inaccurate, and we must ask how NetChoice can make this statement in good faith knowing that Backpage.com has tied up state attorneys general and sex trafficking victims in litigation for years and years while it continued to profit from the exploitation of victims. Courts have made it clear that they need Congress to act in order to avoid the unfair results that we have seen in the cases against Backpage, and we cannot ask sex trafficking victims and states to wait several years longer to "let the courts get it right." As NetChoice testified, "Providing both criminal and civil law enforcement the tools they need to succeed in the courts is entirely consonant with maintaining the benefits of a vibrant internet." We could not agree more. It is time for Congress to act and passing FOSTA is the action that needs to be taken.

Respectfully submitted by the following organizations:

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<sup>38</sup> Rob Spectre, *I Support A Free And Open Internet. We're Making SESTA Harder Than It Needs To Be*, Hackernoon.com (Sept. 27, 2017) <https://hackernoon.com/i-support-a-free-and-open-internet-and-were-making-sesta-harder-than-it-needs-to-be-a687bbabe52e>.

<sup>39</sup> Statement of Chris Cox to Subcommittee on Crime, Terrorism, Homeland Security, and Investigations (Oct. 3, 2017) p.14.

<sup>40</sup> *Id.* at 10.

Shared Hope International, Former Congresswoman Linda Smith, President & Founder

Exodus Cry, Benjamin Nolot, CEO/Founder

National Center on Sexual Exploitation (NCOSE), Lisa L. Thompson, Vice President & Director of Education and Research

Coalition Against Trafficking in Women, Taina Bien-Aimé, Executive Director