



SHEA M. RHODES, ESQUIRE
DIRECTOR
CHARLES WIDGER SCHOOL of LAW
Institute to Address Commercial Sexual Exploitation

SESTA: A Narrow Exception to the CDA that Fulfills its Intended Purpose

On August 1, Senator Rob Portman introduced the Stop Enabling Trafficking Act of 2017 (“SESTA”), Senate Bill 1693, into the Senate Committee on Commerce, Science, and Technology.¹ If passed, SESTA will create a narrow exception the Communications Decency Act of 1996 (“CDA”), 47 U.S.C. § 230, which has been interpreted by the courts to grant immunity to internet service providers from user-generated content posted on their websites.²

To be clear, nothing in the CDA prevents litigation from going forward against service providers who have actually engaged in content-creation or content-development. The immunity applies only to service providers who offer only a platform or venue for third party content. SESTA would narrow this immunity only slightly, holding service providers who “*knowingly* . . . advertise[], or “*knowingly* . . . benefit[], financially . . . , from participation in a [sex trafficking] venture.”³ By providing an explicit reference to the federal sex trafficking statutes, SESTA merely does the same thing with human trafficking that the CDA already does with “obscenity, stalking, and harassment by means of a computer.”⁴ And yet, the introduction of this bill has generated intense debate about the importance of the CDA and its effects on the free flow of

¹ See “Stop Enabling Sex Trafficking Act of 2017,” S. 1693, 115th Cong. (2017) (“SESTA”). For an example of the courts’ broad interpretation of the immunity created by the CDA, see *Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12 (1st Cir. 2016) (dismissing trafficking victims’ claims against Backpage.com under § 230(c)(1) immunity provisions), *cert. denied*, 137 S. Ct. 622 (2017).

² See Communications Decency Act, 47 U.S.C. § 230 (1996).

³ See 18 U.S.C. § 1591(a) (2012).

⁴ 47 U.S.C. § 230(b)(5).

information on the internet, debate that mischaracterizes SESTA's effect and misconstrues the goals of the CDA.

I. THE COMMUNICATIONS DECENCY ACT: SHIELDING SERVICE PROVIDERS FROM LITIGATION SINCE 1996

During the early days of the internet, Congress passed the CDA to promote the promulgation of ideas on the internet. What the then-Congress could not have predicted, however, is that, over the next two decades, the CDA would be used to shield from all liability service providers who have committed crimes or have knowingly benefitted from the commission of crimes by others. These service providers, like Facebook and Backpage.com, host websites where individuals can post their own content.⁵ Users of these websites often take advantage of the platforms available to them, and often advertise prostituted and trafficked persons, many of whom are children.

A. The Communications Decency Act was Intended to Protect Children on the Internet.

The immunity provisions of the CDA were not intended to shield service providers from *all* criminal liability. As it currently exists, the CDA contains an exception that permits the prosecution of service providers for alleged violations of 47 U.S.C. §§ 223 (relating to obscene or harassing telephone calls),⁶ 231 (restricting access by minors to obscene internet material),⁷ and 18 U.S.C. chapters 71 (obscene material),⁸ and 110 (sexual exploitation and abuse of

⁵ Compare § 230(f)(2) (“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.”) with § 230(f)(3) (“The term ‘internet 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.”)

⁶ 47 U.S.C. § 223 (2012) (relating to “Obscene or Harassing Telephone Calls”).

⁷ *Id.* § 231 (2012) (restricting minors’ access to harmful content over the Internet).

⁸ 18 U.S.C. ch. 71 (2012) (relating to obscenity).

children),⁹ or “any other Federal criminal statute.”¹⁰ Despite the catchall provision, the CDA has been interpreted to shield inquiry into whether service providers have violated the federal trafficking statute. If SESTA is passed, it will update this provision to include criminal prosecutions and civil litigation premised on alleged violations of the federal sex trafficking statute, 18 U.S.C. § 1591.¹¹ The original drafters of the CDA could not have included § 1591 into the CDA because it was not passed until 2000; however, by amending the CDA to include § 1591, SESTA will add exceptions to immunity consistent with the existing exceptions, and will bring the CDA back in line with its drafters’ original intent—to protect children from the harms presented by the internet.¹²

The CDA was originally passed to protect children from harmful material on the internet, while also promoting the exchange of ideas.¹³ Furthermore, as Senator Portman noted in his remarks to the Senate, the goal of the immunity provisions in CDA was to “protect website operators acting in good faith, who lacked knowledge that third parties were posting harmful or illegal content on their sites.”¹⁴ Despite the legislative purpose of the CDA, however, courts

⁹ 18 U.S.C. ch. 110 (2012) (relating to sexual exploitation and child abuse).

¹⁰ § 230(e)(1).

¹¹ 18 U.S.C. § 1591 (2000). If SESTA is passed, §230(e)(1) will read:

“Nothing in this section shall be construed to impair:

- (A) The enforcement of section 223 or 231 of this title, chapter 71 (relating to obscenity) or 110 (relating to sexual exploitation of children) of Title 18, section 1591 (relating to sex trafficking) of that title, or any other Federal criminal statute; or
- (B) Any State criminal prosecution or criminal enforcement action targeting conduct that violates a Federal criminal law prohibiting—
 - i sex trafficking of children; or
 - ii sex trafficking by force, fraud, or coercion.”

¹² See 141 CONG. REC. 20, S 1953 (daily ed. Feb. 1, 1995) (statement of Sen. Exon). In his testimony before Congress, co-drafter of the CDA, Senator James Exon, stated, “[T]he information superhighway should not become a red light district . . . Once passed, our children and families will be better protected from those who would electronically cruise the digital world to engage children in inappropriate communications and introductions.” *Id.*

¹³ See *id.*

¹⁴ See *Combating Sex Trafficking: Hearing on S. 1693 Before the S. Com. Comm.*, 114th Cong. (statement of Sen. Rob Portman). The full Senate Hearing can be viewed here: <https://www.c-span.org/video/?434259-1/senate-committee-considers-sex-trafficking-crime-bill>.

have broadly interpreted § 230(c)(1)¹⁵ to immunize service providers from both criminal and civil liability, even where the service provider has become involved in content-creation and development.¹⁶ Based on these courts' interpretations, companies like Backpage.com have used § 230(c)(1) as a shield against any litigation brought against them.

B. Backpage.com Engaged in Content-Creation and Development; Thus, It Should Not be Protected by the CDA.

The CDA was intended to *prevent* the Internet from “becom[ing] a red-light district,” not to enable it to *become* one.¹⁷ However, the broad immunity granted by the CDA (at least as courts have interpreted it) has essentially created a completely unpoliced—and unpoliceable—arena for individuals and companies to profit off of the exploitation of other humans. SESTA aims to break into this arena by permitting criminal prosecution and pursuit of civil causes of action against service providers who *knowingly* “benefit” or engage in “*knowing* conduct . . . that assists, supports, or facilitates” a violation of § 1591(a)(1).¹⁸ As reported by the Senate Permanent Subcommittee on Investigations (“the Subcommittee”), Backpage.com falls into this category.¹⁹

As reported in the Subcommittee report (“the Report”), Backpage.com has “knowingly concealed evidence of criminality by systematically editing its ads.”²⁰ The Subcommittee found that Backpage.com involves itself in the creation and development of user-content by “altering

¹⁵ See § 230(c)(1) (“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.”).

¹⁶ See, e.g., *Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12 (1st Cir. 2016) (dismissing plaintiffs’ civil causes of action against Backpage.com under § 230(c)(1)); *People v. Ferrer, Lacey, & Larkin*, No. 16FE024013 (Cal. Super. Ct. Aug. 23, 2017) (dismissing criminal action against Backpage.com under § 230).

¹⁷ See *supra* note 10 for Senator Exon’s February 1, 1995 testimony to the Senate in support of the CDA.

¹⁸ See S. 1693, § 4.

¹⁹ See STAFF OF S. PERMANENT SUBCOMM. ON INVESTIGATIONS, COMM. HOMELAND SEC. & GOVERNMENTAL AFF., 114TH CONG., BACKPAGE.COM’S KNOWING FACILITATION OF ONLINE SEX TRAFFICKING (2017) (“the Report”).

²⁰ See *id.* at 16. The Subcommittee’s findings relating to this assertion can be found on pages 16-38 of the Report.

ads before publication by deleting words, phrases, and images indicative of an illegal transaction,” and by “sanitiz[ing] [‘sex for money’] ads to give them a veneer of lawfulness.”²¹ And to be clear, it is only a veneer—the message of sex for sale comes through loud and clear to the intended readers. The Report notes that although the editing and “sanitizing” process first occurred on an *ad hoc* basis, it soon developed into a company-wide policy.²² This policy, which resulted in the creation of what the Report calls a “Strip Term From Ad Filter,” led Backpage.com to create a list of terms that would be automatically removed from the posts, which would then be posted.²³ Terms included on the list that indicated the commercial sexual exploitation of children (i.e., “Lolita,” “rape,” “young,” “daddy,” etc.) and other terms signified prostitution (i.e., “PAY 2 PLAY”).²⁴ The Report also found that the head of the moderation department, Andrew Padilla, instructed these terms to be removed, by either the filter or by manual moderators, because “it’s the language in the ads that’s really killing us with the [state] Attorneys General.”²⁵

The Subcommittee also found that Backpage.com “coached its users on how to post ‘clean’ ads for illegal transactions.”²⁶ When a user submitted an advertisement containing any of the banned terms, an error message would pop up, instructing the user to remove that word before posting.²⁷ Furthermore, the Subcommittee recovered email conversations between Backpage.com CEO Carl Ferrer and users where Ferrer personally instructed the users on how to remove indicia of illegality from their advertisements.²⁸ Thus, through their internal monitoring

²¹ *Id.* at 18-19.

²² *See id.* at 19-20.

²³ *See id.* at 22-24.

²⁴ *See id.*

²⁵ *Id.* at 25-26 (quoting email from Andrew Padilla to moderators).

²⁶ *See id.* at 34 (title capitalization omitted).

²⁷ *See id.* at 34-35.

²⁸ *See id.* at 35 (discussing emails between Ferrer and users).

policies, the Strip Term From Ad Filter, and direct contact with users, Backpage.com actively concealed the illegal activity occurring on their website.²⁹

The Subcommittee found that Backpage.com chose to edit the ads, rather than refuse to post them, because “deleting ads for illegal conduct, rather than editing out indicia of illegality, would have cut into company profits[.]”³⁰ Thus, Backpage.com posted ads that they *knew* helped to facilitate commercial sexual exploitation because they derived a financial benefit from those ads, in a clear violation of § 1591(a)(2). Furthermore, Backpage.com *knowingly* advertised persons who were under the age of 18 for commercial sex, and *recklessly disregarded* the possibility that the adults sold on the website were done so through force, fraud, or coercion, a clear violation of § 1591(a)(1). Yet, due to the courts’ broad interpretations of the immunity provisions of the CDA, Backpage.com has never been held accountable for these criminal acts. SESTA seeks to limit this immunity and provide an avenue for victims of trafficking to seek long-denied justice against Backpage.com.

II. SESTA DOES NOT CHANGE THE COMMUNICATION DECENCY ACT’S “GOOD SAMARITAN” IMMUNITY PROVISION IN ANY WAY.

Opponents of SESTA claim that the bill signifies the end of free speech on the internet.³¹ However, SESTA leaves the CDA protections claimed as essential by supporters of the legislative status quo firmly in place. In particular, the § 230(c)(1) and § 230(c)(2) immunity provisions, collectively entitled “Protection for ‘*Good Samaritan*’ blocking and screening of offensive material”³² remain wholly untouched.³³ These provisions were enacted to ensure that

²⁹ See *id.* at 25 (noting that Backpage edited the “*vast majority* of ads in its adult section.” (emphasis added)).

³⁰ *Id.* at 31.

³¹ See Eric Goldman, *Congress is About to Eviscerate its Greatest Online Free Speech Achievement*, AM. CONST. SOC. BLOG (Sept. 11, 2017), <https://www.acslaw.org/acsblog/congress-is-about-to-eviscerate-its-greatest-online-free-speech-achievement> (“It’s hard to believe that Congress would ruin its free speech masterpiece, but that’s exactly what SESTA would do.”).

³² See § 230(c) (emphasis added).

service providers who chose *in good faith* to screen user-generated content would be immune from litigation.³⁴ These existing provisions, which SESTA does not affect, not only protect the flow of information on the internet, but also serve to protect service providers who are trying to do the right thing by filtering out ads promoting illegal conduct on their websites.

As stated, SESTA proposes no changes to the § 230(c) immunity provisions. Thus, as long as service providers can show that their screening procedures are undertaken *in good faith*, they will still be protected from litigation.³⁵ Although opponents of SESTA argue that the bill “curtail[s] Section 230 immunity,” and will cause “most providers [to] probably reduce their current suppression efforts,” this argument has no merit.³⁶ Because SESTA does not in any way lessen the Good Samaritan immunity, providers’ “suppression efforts” do not have to be foolproof or perfect: assuming they can show that the suppression efforts were undertaken in good faith, providers will be immune from suit alleging that ads promoting trafficking were still published. Proponents of SESTA do not expect service providers to be omniscient: they

³³ See *supra* note 13 for full text of § 230(c)(1); see also § 230(c)(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).”)

³⁴ While only § 230(c)(2) uses the phrase “in good faith,” at least one judge has argued that § 230(c)(1) must be read and interpreted in conjunction with (c)(2):

Backpage.com’s reading, adopted by the dissent, totally ignores subsection 230(c)(2); the dissent instead asserts that good faith is irrelevant to subsection 230(c)(1) . . . Whether or not that is correct, good faith is certainly relevant to subsection 230(c)(2), which expressly requires “good faith.” We cannot just ignore this subsection—we read statutes in context and consider the statute’s placement within the entire statutory scheme . . . Subsection 230(c)(2)(A) of the CDA protects providers from civil liability when they act in good faith to limit access to objectionable content, regardless of their status as a publisher or speaker.

J.S., S.L. & L.C. v. Village Voice Media Holdings et al., 359 P.3d 714, 720 (Wa. 2015) (Wiggins, J., concurring).

³⁵ See Mary Leary, Shea Rhodes, Chad Flanders, & Audrey Rogers, *Law Professors Weigh in on Amending the CDA – Part 2*, SHARED HOPE INT’L (Sept. 15, 2017) <https://sharedhope.org/2017/09/law-professors-weigh-amending-cda-part-2/> (“These legislative proposals are narrow. The Senate bill simply clarifies the CDA by including sex trafficking in the list of crimes Congress seeks to inhibit on the internet. All these proposals do will do is clarify and update the CDA but they do nothing to limit the Good Samaritan exemption. Good Samaritans will continue to be protected just as they are not. Bad Samaritans will not.”).

³⁶ See Goldman, *supra* note 24 (“In response to SESTA’s curtailed Section 230 immunity, many services probably will reduce their current suppression efforts to avoid having scienter that would create liability.”)

recognize that *any* good-faith screening mechanism, however flawed, will help the fight against trafficking.

Although Backpage.com engages in screening user-generated content before it is published online, Backpage.com does not engage in this screening in good faith. Instead, they as the Senate Subcommittee found during its investigation, Backpage.com does not screen to suppress ads promoting trafficking—they screen to protect their bottom line.³⁷ Thus, Backpage.com ought not to be protected by § 230(c) because it is not acting in good faith.

Backpage.com has been complicit in the sale of exploited persons on its website. The First Circuit, in *Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12 (1st Cir. 2016), recognized that Backpage.com engaged in a number of actions to facilitate sex trafficking on their website.³⁸ However, despite acknowledging that Backpage.com is a bad actor, the First Circuit believed it had to grant immunity to Backpage.com under the CDA.³⁹ *Jane Doe No. 1* presents a clear example of why SESTA must pass. The current, broad interpretation of the CDA prevents survivors of sex trafficking from being made whole, even when corporations like Backpage.com have *knowingly* violated the law.

III. THE INCLUSION OF A “KNOWING” STANDARD WILL PROTECT SERVICE PROVIDERS AGAINST FRIVOLOUS LAWSUITS AND MALICIOUS PROSECUTIONS.

If passed, SESTA will create two narrow exceptions to the CDA: (1) giving prosecutors the ability under § 230(e)(1) to bring charges against service providers who violate § 1591, and

³⁷ See *supra* note 26 and accompanying text for a discussion of Backpage.com’s focus on its profit motive.

³⁸ See *Jane Doe No. 1*, 817 F.3d at 29 (“The appellants’ core argument is that Backpage.com has tailored its website to make sex trafficking easier. Aided by the amici, appellants have made a persuasive case for that proposition . . . [s]howing that a website operates a meritorious business model is not enough to strip away [the § 230] protections.”).

³⁹ See *id.* (“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 litigation.”).

(2) allowing victims of trafficking to bring actions for civil remedies under § 1595.⁴⁰ Both of these statutes, which are already in place, contain a “knowingly” *mens rea* standard.

§ 1591 requires that the defendant “*knowingly* . . . recruits, entices, harbors, transports, provides, obtains, advertises, maintains, patronizes, or solicits by any means”⁴¹ or “*knowingly* . . . benefits, financially . . . , from participation in a venture”⁴² Furthermore, SESTA proposes to define “participation in a venture” as “*knowingly* assisting, supporting, or facilitating a violation”⁴³ Thus, under SESTA’s proposed amendments to both § 230 and § 1591, service providers are insulated by not one *mens rea* standard, but two. Prosecutors must show that not only did the service provider *know* that their actions “assist[ed], support[ed], or facilitat[ed]” a violation of § 1591, but must also know that the victims were “recruit[ed], entic[ed], harbor[ed], transport[ed], provid[ed], obtain[ed], advertis[ed], maintain[ed], patroniz[ed], or solicit[ed]” by means of “force, threats of force, fraud, or coercion” or were under the age of eighteen.⁴⁴ There are two exceptions to this rule: first, if the defendant is being charged for “advertising” under § 1591, the government must show that the defendant advertised either “knowing, or . . . in reckless disregard of the fact” that force, fraud, or coercion was used or that the person was under the age of 18.⁴⁵ Second, the government does not have to show that the defendant either knew or recklessly disregarded the fact that the victim is under the age of 18 if the defendant had a “reasonable opportunity to observe” the victim.⁴⁶ Regardless of these exceptions, the high

⁴⁰ See S. 1693 § 3.

⁴¹ See 18 U.S.C. § 1591(a)(1) (§ 1591(a) specifically lowers the *mens rea* standard for “advertises” to “in reckless disregard”; however, service providers who engage in good-faith monitoring are still protected because they have not recklessly disregarded the fact that these advertisements may involve sex trafficking).

⁴² See *id.* § 1591(a)(2).

⁴³ See S. 1693 § 4.

⁴⁴ 18 U.S.C. § 1591.

⁴⁵ See *id.*

⁴⁶ See *id.* § 1591(c).

standard imposed by § 1591 will prevent malicious or bad faith prosecutions against service providers.

Similarly, § 1595 provides a civil remedy for victims of trafficking against “the perpetrator (or whoever *knowingly* benefits . . . from participation in a venture which that person *knew* or *should have known* has engaged in a violation of this chapter)”⁴⁷ This remedy is inaccessible to victims until any criminal prosecution against the defendant for the same events is concluded.⁴⁸ Like the proposed amendments to § 230 and § 1591, here, service providers are significantly insulated from suit under this proposed amendment.

Opponents of SESTA argue that the “knowing” standard that the bill adds will push companies to abandon any screening mechanisms they already have to avoid gaining knowledge about the content of the user posts on their sites.⁴⁹ This argument, however, is flawed: even if a service provider’s monitoring system allows some ambiguous ads to be posted, as long as the provider is acting in good faith, no prosecutor or plaintiff will be able to show that the provider had the requisite *mens rea*. It will not be sufficient to show that the service provider knew that *some* user-generated posts may be related to trafficking, the plaintiff or prosecutor will have to show that the service provider knew that that *particular* post was related to trafficking and that the provider permitted it to be published on their website nonetheless.

Assuming, *arguendo*, that some service providers will choose to abandon their screening mechanisms, this is not a sufficient justification for Congress to reject SESTA and the accompanying House bill.⁵⁰ It is not the responsibility of the legislature to ensure that service providers act as “Good Samaritans.” Instead, it is the responsibility of the public to push our

⁴⁷ See 18 U.S.C. § 1595(a) (emphasis added).

⁴⁸ See *id.* § 1595(b)(1).

⁴⁹ See Eric Goldman, *Sex Trafficking Exceptions to Section 230* (Santa Clara U. Legal Studs. Res. Paper No. 13-71, Sept. 19, 2017).

⁵⁰ See H.R. 1865 (2017).

corporations to use ethical business practices. By publicly calling out as irresponsible corporate citizens the service providers who abandon their screening mechanisms and turn a blind eye to the trafficking that occurs on their sites, the United States citizenry can pressure service providers to act responsibly.

IV. CONCLUSION

SESTA does not eradicate all protections against interactive computer service providers. To the contrary, it provides limited civil and criminal remedies, based on laws *already in existence*, against service providers who *knowingly* facilitate or *knowingly* benefit from the violation of sex trafficking laws, and does so in a way consistent with existing exceptions.

The fears of SESTA's opponents are disproportionate to the alleged threat posed by the legislation. SESTA will not completely destroy free speech on the internet: it will only open up a narrow avenue of litigation against companies who are *already* breaking the law.

We, as a society, cannot ignore the harms caused by sex trafficking. Likewise, we cannot ignore that these harms are exponentially increased by websites like Backpage.com, which engage in conduct that clearly facilitates the purchase and sale of humans on the internet, and then, when sued by survivors of trafficking, claim immunity in the name of "Free Speech" and "Decency."