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BARELY LEGAL: Bringing Decency Back to the Communications Decency Act of 1996 to Protect the Victims of Child Sex Trafficking

MEAGHAN E. MIXON* **

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* J.D. Candidate, American University Washington College of Law, 2019; B.S., James Madison University, 2007. I would like to thank my son, Hassan Mohammed, for being such a trooper throughout law school. He has been and always will be my reason for pushing forward. I would also like to thank my family and friends for being so supportive throughout this process; Professor Michael Carroll for his guidance; and lastly my JGSPL colleagues who helped me all along the way.

** Author’s Note: In April 2018, Congress answered the long-denied plea of sexual assault survivors and passed the Allow States and Victims to Fight Online Sex Trafficking Act (FOSTA). The author began this piece in 2016 after the Supreme Court of the United States denied Plaintiffs’ Petition for Writ of Certiorari in *Doe v. Backpage*. And although the legal landscape has continuously morphed in those two years, this piece is a reminder of the struggles survivors overcame along the way and the hard-fought battle that finally led to *FOSTA*. As the path to holistic justice continues, it would serve us well to remember the battle so many fought along the way.

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INTRODUCTION

The sex trafficking industry, once driven by clandestine exchanges in dark alleys and along abandoned street curbs, has migrated to a range of more convenient and profitable platforms.¹ The introduction of classified sex advertisements to the internet transformed the sex trafficking industry.² Traffickers leverage the convenience and speed of the internet and mobile devices to not only recruit and market victims, but also to access a more diverse, wealthy, and widespread clientele.³ At the same time, rather than risk arrest, potential clients plan their surreptitious trysts using cell-phones and laptops from the perceived safety and convenience of their offices, cars, hotels, and homes—shielded by anonymity and

1 See MEREDITH DANK ET AL., ESTIMATING THE SIZE AND STRUCTURE OF THE UNDERGROUND COMMERCIAL SEX ECONOMY IN EIGHT MAJOR US CITIES 192 (2014), <https://www.urban.org/sites/default/files/alfresco/publication-pdfs/413047-Estimating-the-Size-and-Structure-of-the-Underground-Commercial-Sex-Economy-in-Eight-Major-US-Cities.pdf> (describing significant changes online advertisements caused in the underground sex industry).

2 See MARK LATONERO ET AL., USC ANNENBERG CTR. ON COMM'N LEADERSHIP & POL'Y, THE RISE OF MOBILE AND THE DIFFUSION OF TECHNOLOGY-FACILITATED TRAFFICKING 22 (2012), https://technologyandtrafficking.usc.edu/files/2012/11/HumanTrafficking2012_Nov12.pdf (explaining it is clear online classified ad sites facilitate sex trafficking).

3 See VANESSA BOUCHÉ, THORN: DIG. DEFS. OF CHILDREN, A REPORT ON THE USE OF TECHNOLOGY TO RECRUIT, GROOM AND SELL DOMESTIC MINOR SEX TRAFFICKING VICTIMS 10–11 (2015), https://2715111qnwey246mk-clvzqg0-wpengine.netdna-ssl.com/wp-content/uploads/2015/02/Survivor_Survey_r5.pdf (noting younger victims are more likely to develop relationships with their captors online).

emboldened by distance.⁴ Arranging sex for money is now as easy as scheduling in-store pickup at Starbucks or Target on your phone or laptop, and Backpage provides the platform to do so.⁵

Backpage is an internet service provider that hosts web-based advertisements for goods and services—including illegal advertisements for sex-trafficked minors.⁶ Backpage has systematically and manually edited content to conceal illegal transactions that the site facilitates.⁷ Yet Backpage leveraged immunity afforded by Section 230 of the Communications Decency Act to avoid liability.⁸

This Comment argues that the automatic and manual editing of illicit web-based classified advertisements to remove signs of illegal activity is not a traditional editorial practice that merits federally mandated immunity under Section 230.⁹ Part I discusses the progression of web-based classified sex advertisements, the dichotomy between print and web-based liability, and the First Circuit's flawed decision in *Doe v. Backpage* to explain the legal backdrop against which

4 See DOMINIQUE ROE-SEPOWITZ ET AL., ASU SCH. OF SOC. WORK OFFICE OF SEX TRAFFICKING INTERVENTION RESEARCH, *INVISIBLE OFFENDERS: A STUDY ESTIMATING ONLINE SEX CUSTOMERS* 3 (2013), https://traffickingresourcecenter.org/sites/default/files/Study%20Estimating%20Online%20Sex%20Customers%20-%20ASU_0.pdf (asserting customers are insulated by the internet's "relative anonymity" and "risk-mitigating factors").

5 See Nicholas Kristof, *Where Pimps Peddle Their Goods*, N.Y. TIMES: OPINION, Mar. 17, 2012, <http://www.nytimes.com/2012/03/18/opinion/sunday/kristof-where-pimps-peddle-their-goods.html> (explaining that a child can be purchased online via Backpage, but not in a store).

6 See Communications Decency Act of 1996, 47 U.S.C. § 230(f)(2) (2012) (defining an interactive computer service as "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"); see also *Noah v. AOL Time Warner, Inc.*, 261 F. Supp. 2d 532, 534, 538 (E.D. Va. 2003) (establishing that an internet service provider is an "interactive computer service provider," shortened to "internet service provider") (emphasis added). Cf. *Doe ex rel. Roe v. Backpage.com, LLC*, 104 F. Supp. 3d 149, 151–52, (D. Mass. 2015) (offering background describing Backpage's purpose).

7 See STAFF OF PERMANENT SUBCOMM. ON INVESTIGATIONS, 115TH CONGRESS, *BACKPAGE.COM'S KNOWING FACILITATION OF ONLINE SEX TRAFFICKING* 2 (2017) [hereinafter *SUBCOMM. ON INVESTIGATIONS*] (explaining that Backpage employed an automated "Strip Term From Ad Filter" that removed words indicative of illicit transactions (e.g. "rape," "young," "teen," "fresh," and "school girl") and immediately posted the redacted versions).

8 See *id.* (explaining Backpage's utilization of automated and manual editing processes to avoid liability).

9 47 U.S.C. § 230 (2012) (detailing Congress's intent to immunize certain acts by internet service providers).

Section 230 has been interpreted and developed.¹⁰ Part II argues that Backpage has unjustly utilized and benefited from the historically liberal interpretation of Section 230 and its grant of immunity.¹¹ Part II further contends that the Ninth Circuit's interpretation of Section 230 offers sufficiently compelling persuasive authority to elicit a different ruling in *Doe v. Backpage*.¹² Part III recommends that internet service providers that engage in editorial practices aimed at circumventing law enforcement efforts should be deemed content providers, and thereby subject to civil liability for the illegality of their edits.¹³ Part III concludes that permitting survivors of sex trafficking to pursue civil remedies better punishes culpable parties that proliferate child sex trafficking via internet-based classified advertisements, ultimately offering a more holistic form of justice.¹⁴ Part III further reviews recently proposed legislation and its potential to punish culpable parties and achieve holistic justice.¹⁵

I. BACKGROUND

A. *The Rise of the Internet Sex Industry and the Ensuing Success of Backpage*

Backpage has cornered the market for internet-based sex advertisements.¹⁶ Before closing its "Adult Section" in January 2017, the site was the largest classified sex advertising website service in the world, hosting upwards of one million advertisements a day.¹⁷ From January 2013 to March 2015, the internet magnate profited

¹⁰ See *infra* Part II.

¹¹ See *infra* Part III.

¹² See *infra* Part III.

¹³ See *infra* Part III.

¹⁴ See *infra* Part III.

¹⁵ See *infra* Part III.

¹⁶ See Dani Pinter, *Women and Children for Sale: Brought to You by Backpage.com*, NAT'L CTR. ON SEXUAL EXPLOITATION (Mar. 31, 2016), <http://endsexualexploitation.org/articles/women-children-sale-backpage-com> [https://perma.cc/4ZGK-HWDT] (explaining that Backpage controls 80 percent of the internet-based sex industry).

¹⁷ See Dawn Hawkins, *Statement: Backpage.com Blocks Prostitution Ads in U.S. Under Pressure for Sex Trafficking*, NAT'L CTR. ON SEXUAL EXPLOITATION (Jan. 10, 2017), <http://endsexualexploitation.org/articles/statement-backpage-com-blocks-prostitution-ads-u-s-pressure-sex-trafficking> [https://perma.cc/9EFS-QVZ2] (discussing the benefits of Backpage closing their adult section); see also *Washington D.C. massage*, BACKPAGE, <http://dc.backpage.com/therapeuticmassage> [https://perma.cc/T7WG-TAKR] (displaying advertisements for "YOUNG Asian Girls"); *Washington D.C. women seeking men*, BACKPAGE, <http://dc.backpage.com/womenseekmen> (last visited Oct. 14, 2017) (displaying advertisements for "baby" girl).

approximately \$16,500,000 per year from its classified sex advertisements in California alone.¹⁸

Following immense public pressure, the major credit card companies withdrew as payment options for Backpage's adult section advertisements in 2015.¹⁹ But this did little to slow the site's growth. Backpage responded by not only making basic advertisements free, but also accepting Bitcoin as payment for prime placement.²⁰ Bitcoin, the equally controversial internet-based currency, gained notoriety because it is untraceable, unregulated, and exchanged exclusively online between private parties.²¹ This shift had the unforeseen adverse effect of making it more difficult for law enforcement officials to apprehend internet-based sex traffickers.²² Backpage's adaptations dealt a huge blow to law enforcement officials' campaign against child sex trafficking because tracing electronic transactions was no longer as viable of an investigative technique.²³

B. *Backpage and the Communications Decency Act*

Despite a history of complicit behavior, Backpage long enjoyed the protections of Section 230 of the Communications

18 Kate Knibbs, *Digital Pimps or Fearless Publishers?*, THE RINGER (Dec. 2, 2016, 11:48 AM), <https://www.theringer.com/2016/12/2/16042908/backpage-pimping-lawsuit-c4577180c95e> [<https://perma.cc/9QXB-ZS36>] (stressing the profitability of providing traffickers internet-based marketing).

19 See Charlotte Alter, *Visa Nixes Cards as Payment Option for Online Sex Ads*, TIME (July 2, 2015, 10:43 AM), <http://time.com/3943109/backpage-online-sex-ads-visa-mastercard> (praising Cook County Sheriff Tom Dart's efforts to pressure credit card companies to withdraw their cards as payment options for Backpage sex service advertisements by sending letters to the companies' heads).

20 See Sasha Aslanian, *For Sex Industry, Bitcoin Steps in Where Credit Cards Fear to Tread*, NPR: ALL THINGS CONSIDERED (Dec. 15, 2015, 4:15 PM), <https://www.npr.org/sections/alltechconsidered/2015/12/15/456786212/for-sex-industry-bitcoin-steps-in-where-credit-cards-fear-to-tread> (examining tangential effects of credit card companies' decision to stop processing payment for Backpage because of public scrutiny).

21 See Tal Yellin, Dominic Aratari & Jose Pagliery, *What Is Bitcoin?*, CNN MONEY, <http://money.cnn.com/infographic/technology/what-is-bitcoin> [<https://perma.cc/ZW7T-HPRB>] (explaining that wallet IDs, not names, are used which are not easily traceable).

22 See Hilary Hanson, *Sex Workers Say Credit Card Bans on Online Ads Do More Harm than Good*, HUFFINGTON POST (Jul. 30, 2015), http://www.huffingtonpost.com/entry/backpage-credit-cards-sex_us_55b96ed3e4b0af35367a4530 [<https://perma.cc/H5VC-VYLJ>] (asserting that Bitcoin's untraceable qualities help sex traffickers avoid apprehension and prosecution).

23 See SUBCOMM. ON INVESTIGATIONS, *supra* note 7, at 1-3 (explaining that Backpage's practices hid criminal activity from detection).

Decency Act of 1996.²⁴ The Communications Decency Act of 1996 (CDA) was ratified by Congress in part to aid families in controlling children's exposure to objectionable material on the internet.²⁵ Although portions of the CDA have been struck down as unconstitutional, Section 230 remains valid.²⁶ Section 230's original intent was to allow internet service providers to "develop blocking and filtering technologies" that inhibited a child's access to sexually graphic material and to encourage the "vigorous" enforcement of federal laws intended to obstruct and penalize the use of the internet in furtherance of criminal behavior.²⁷ Legislators offered internet service providers immunity from state-level civil liability that challenged efforts to effectuate CDA goals to shield minors using the internet from sexually explicit content.²⁸

Ironically, in practice, this provision continuously protects internet service providers who host and profit from sex traffickers' web-based advertisements.²⁹ When determining Section 230's applicability, courts traditionally employ a three-pronged test examining whether: (1) a defendant's computer service was interactive; (2) a defendant was a content provider with respect to the content at issue; and (3) the plaintiff's allegations classify the defendant as a "publisher or speaker" of the third-party content in dispute.³⁰ The third prong has become the most difficult obstacle

24 *Cf. M.A. ex rel. P.K. v. Vill. Voice Media Holdings, LLC*, 809 F. Supp. 2d 1041, 1058–59 (E.D. Mo. 2015) (precluding liability despite Backpage's role in effectuating crimes perpetrated against M.A., a minor child). *Compare Backpage.com, LLC v. McKenna*, 881 F. Supp. 2d 1262, 1286–87 (W.D. Wash. 2012) (enjoining the enforcement of a state statute criminalizing web-based sex advertisements), *and Backpage.com, LLC v. Cooper*, 939 F. Supp. 2d 805, 813, 844 (M.D. Tenn. 2013) (striking down a state statute criminalizing the sale of web-based classified sex advertisements), *with Backpage.com, LLC v. Lynch*, 216 F. Supp. 3d 96, 110 (D.D.C. 2016) (dismissing Backpage's pre-enforcement challenge of the Stop Advertising Victims of Exploitation Act of 2015 (SAVE Act)).

25 47 U.S.C. § 230 (b)(4) (2000) (removing barriers to the development of technology to help parents restrict minors' access to objectionable material).

26 *See Reno v. ACLU*, 521 U.S. 844, 846, 870–72 (1997) (striking down statutory provisions of the Communications Decency Act (CDA) that criminalized the transmission of content deemed offensive, obscene, or indecent).

27 47 U.S.C. § 230(b)(4)–(5) (2000).

28 *Id.* at (c)(2) (extending immunity from civil liability for "Good Samaritan" blocking and screening of offensive material).

29 *See, e.g., Doe v. Backpage.com, LLC*, 817 F.3d 12, 22 (1st Cir. 2016) (concluding that claims relying on an internet publisher's status as a "publisher or speaker" are precluded pursuant to 47 U.S.C. § 230(c)(1)).

30 Claudia G. Catalano, Annotation, *Validity, Construction, and Application of Immunity Provisions of Communications Decency Act*, 47 U.S.C.A. § 230, 52 A.L.R. Fed. 2d 37, § 2 (2011) (outlining the common law three-part test

for plaintiffs because of courts' linchpin-like treatment of third-party involvement.³¹

C. *Section 230: Internet Service Providers and Third-Party Content*

Section 230 of the CDA presents an insurmountable barrier for survivors seeking civil remedies against internet service providers. Judicial interpretation has resulted in precedent that continuously expands on the already sweeping applicability of immunity.³² A plaintiff must show that an internet service provider created or edited content to a degree that it can be considered a "content provider" and thus responsible for the content.³³ This requirement necessitates a degree of deletion, substitution, or suggestion that is difficult for a plaintiff to prove.³⁴ There must then be enough editorial control and behavior to label an internet service provider a content provider.³⁵

Under Section 230, internet service providers are immune from liability for making good faith efforts to use or offer technology that restricts the accessibility or availability of objectionable content, regardless of its constitutionality.³⁶ But, subsequent case law rapidly expanded Section 230's breadth.³⁷

courts follow).

31 *See* *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997) (The court created a broad grant of immunity which is generally granted in tandem with the party's designation as a service provider. Given the ease of obtaining this designation, service providers frequently enjoy the benefits of immunity without an in-depth review of their practices).

32 *See* *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1123 (9th Cir. 2003) (explaining that courts generally concur that Section 230 provides broad immunity for third-party content).

33 *See id.* (noting that courts have adopted a "relatively expansive definition of 'interactive computer service'" and a "relatively restrictive definition of 'information content provider'"). *Accord* *Small Justice LLC v. Xcentric Ventures LLC*, 99 F. Supp. 3d 190, 199–200 (D. Mass. 2015) (explaining that Section 230 did not bar suit because it arose from respondent's own content—not third-party content submitted in response).

34 *See* *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1167–68 (9th Cir. 2008) (instructing that an internet service provider cannot be deemed a content provider simply by supplementing content without materially contributing to its alleged illegality).

35 *See id.* (explaining that a plaintiff must allege that an internet service provider made relevant and material alterations of third-party content such that they are a content provider within Section 230's definition).

36 *See* 47 U.S.C. § 230(c)(2)(A) (2012) (directing that no interactive computer service provider shall be held liable for actions to *restrict* access to material deemed obscene or otherwise objectionable).

37 *See* *Song fi Inc. v. Google, Inc.* 108 F. Supp. 3d 876, 882 (N.D. Cal. 2015)

Though the CDA was originally introduced to stifle the proliferation of obscene material, Section 230 has served as the source of authority to combat litigation seeking to remove allegedly obscene third-party content.³⁸ In *Zeran v. America Online, Inc.*, the Fourth Circuit indicated the strength of Section 230 immunity.³⁹ On April 25, 1995, less than one week after the Oklahoma City Bombings, an anonymous individual posted advertisements on a "Naughty Oklahoma T-Shirts" web-based bulletin board.⁴⁰ The post advertised shirts with slogans such as "Visit Oklahoma . . . It's a blast!!!," "Putting the kids to bed . . . Oklahoma 1995," and "McVeigh for President 1996."⁴¹ The post listed "Ken" as the point of contact to purchase the shirts.⁴² Zeran reported the post to America Online (AOL), which removed the ad the next day.⁴³ Following removal, a second post appeared the same day offering additional slogans like "Finally a day care center that keeps the kids quiet—Oklahoma 1995," again listing Zeran as the point of contact.⁴⁴ Similar posts appeared until May 1, 1995, and during this time Zeran received violent, abusive, and threatening phone calls in response to the notices.⁴⁵ At its worst, Zeran received calls every two minutes, and it was not until May 1995 that the calls subsided to roughly fifteen per day.⁴⁶ Though AOL removed the posts and terminated the account, the internet service provider refused to issue a retraction.⁴⁷ Zeran sued AOL alleging that the service provider's response was

(explaining Section 230's robustness and that "all doubts should be resolved in favor of immunity").

38 See *Reno v. ACLU*, 521 U.S. 844, 857–63 (1997) (examining the language, intent, and interpretation of the obscenity provisions provided in 47 U.S.C.A. § 223(a), (d) (Supp. 1997)).

39 See *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997) (explaining that a plain language interpretation of Section 230 creates a broad grant of federal immunity to internet service providers publishing third-party content).

40 *Id.* at 329 (describing the callousness of the third-party content at issue).

41 *Zeran v. Am. Online, Inc.*, 958 F. Supp. 1124, 1127 n.3 (E.D. Va. 1997).

42 *Zeran*, 129 F.3d at 329 (indicating that the anonymous poster listed Zeran's home phone number that he also used for business).

43 *Id.* (explaining that Zeran reported the issue to American Online (AOL) the same day, though the removal date of the original post was in dispute at the time of filing).

44 *Zeran*, 958 F. Supp. at 1127 n.5.

45 *Id.* at 1127 (describing the enduring nature of notices being posted and the harassment Zeran received as a result).

46 *Id.* at 1127–28 (illustrating the pervasive nature of the phone calls Zeran received following the notices).

47 *Id.*

negligent and inadequate because of their knowledge about the offensive posts.⁴⁸

The court examined Section 230 and determined that Congress's intent was to insulate internet service providers from litigation stemming from third-party content that they did not develop or create.⁴⁹ The court explained that Section 230 bars lawsuits that treat an internet service provider as a publisher.⁵⁰ It opined that distributor liability is merely a subset of publisher liability, each falling within the collection of claims Section 230 precludes.⁵¹

Similarly, in *Donato v. Moldow*, the New Jersey Supreme Court found that correcting, editing, or removing content were permissible editorial functions that did not transform a service provider into a content provider.⁵² Moldow maintained a site where he posted information about local government activities.⁵³ His site also permitted third-party users to anonymously post content in discussion forums.⁵⁴ Plaintiffs Vincent Donato and Gina Calogero brought suit against Moldow alleging that some of those anonymous posts constituted, *inter alia*, defamation and harassment.⁵⁵ The posts, from multiple anonymously-named users, falsely accused Donato and Calogero of being, amongst other things, mentally unstable, professionally corrupt, abusive of their power and authority, drug users, and generally untrustworthy.⁵⁶ Though the users themselves would be liable for their own content, plaintiffs argued that because Moldow employed a series of filtering protocols and engaged in conversations with the users, his role amounted to more

48 *Id.* at 1128. In a separate, but also unsuccessful suit, Zeran sued an Oklahoma City radio station that encouraged listeners to harass Zeran after learning about the posts. *See generally* *Zeran v. Diamond Broad., Inc.*, 203 F.3d 714 (10th Cir. 2000).

49 *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330–31 (4th Cir. 1997) (contemplating the legislative intent behind Section 230 and deciding that the fear of liability was what Congress primarily hoped to avoid because of the overwhelming amount of content submitted that would require filtering).

50 *Id.* at 332 (explaining that AOL was clearly protected by Section 230 as a publisher).

51 *Id.* (describing them as indistinguishable as it pertains to “garden variety defamation action[s]” when publication is an essential part of the claim).

52 *Donato v. Moldow*, 865 A.2d 711, 718, 726–27 (N.J. 2005) (holding Moldow immune for his efforts to maintain his website according to his own “standards of decency” in a manner the court considered consistent with what Congress intended).

53 *Id.* at 713.

54 *Id.*

55 *Id.*

56 *Id.* at 713–14.

than that of a passive publisher.⁵⁷ However, the court disagreed and found that Moldow's actions did not rise to a level of development or creation that made him liable.⁵⁸ The court further found that dual status as a service provider *and* content provider is irrelevant to immunity regarding third-party content, which ultimately hinged on that specific content's development.⁵⁹

In *Fair Housing Council of San Fernando Valley v. Roommates.com*, the Ninth Circuit found that Section 230 did not apply if an internet service provider's drop-down menus compelled users to input prohibited information.⁶⁰ The Roommates.com website prompted users to give prohibited criteria including sexual orientation, gender, familial status, and race to build their profiles.⁶¹ The internet service provider also formatted the site to limit searches according to said prohibited criteria.⁶² The court found that the service provider engaged in conduct that prompted users to create prohibited content and implemented tools that filtered in a proscribed manner.⁶³ Consequently, even as an internet service provider, Roommates.com lost Section 230's protections because it played a material role in creating content.⁶⁴

The Ninth Circuit distinguished between immunizable and actionable content.⁶⁵ In the same decision, it held Roommates.com not liable for third-party content published in its original unedited state—the comments section of the page which permitted the immediate posting of content in its unedited and unfiltered form.⁶⁶ It was not actionable because Roommates.com had no role in

57 *Id.* at 716 (alleging that defendant's selectivity in "editing, deletion, and re-writing" developed content by shaping the conversation).

58 *Id.* at 720, 724–25 (explaining further that Moldow's participation in the discussion, which included the subject messages, still limited his status as a content provider to only his statements but not to the others).

59 *Id.* at 720.

60 *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1169–72 (9th Cir. 2008) (offering distinguishing examples to demonstrate the continuum of creation and development that determines liability).

61 *Id.* at 1161–62 (describing the process of building a profile on Roommates.com as well as what information appeared in the resulting profiles).

62 *Id.* at 1169–70.

63 *See id.* at 1169 (designating the service provider's connection to the content's illegality as "direct and palpable").

64 *See id.* at 1167 (explaining that tools are not neutral if reliant upon proscribed information).

65 *See id.* at 1174 (declaring immunity inapplicable when it is clear that a site participated in developing the illegality).

66 *Id.* at 1175–76 (concluding that Section 230 was not applicable to all content of the website).

its development or creation as opposed to its direct control over content created by way of drop-down menus that restricted the content's final form.⁶⁷

Courts grappled with the ramifications of the CDA's broad grant of immunity when the content at issue shifted from defamatory to horrific.⁶⁸ In *M.A. v. Village Voice Media Holdings, LLC*, a child sex trafficking victim brought suit in the Eastern District of Missouri pursuant to, *inter alia*, 18 U.S.C. § 1595 and 18 U.S.C. § 2255.⁶⁹ Latasha Jewell McFarland advertised the then-fourteen year old M.A. on Backpage.com as an escort for sex.⁷⁰ McFarland paid Backpage to post advertisements that included pictures of M.A.'s "private body parts in sexual pornographic poses."⁷¹ In her complaint, M.A. contended that Backpage was an information content provider under Section 230 because it was partially responsible for "the development and/or creation of information provided through the internet or other internet computer service."⁷² M.A. cited multiple examples of Backpage's promotional activity targeted at site users, the most salient being their offering of "knowledge regarding how to post ads and pay anonymously" and implementation of rules that "aid in the sight veiling of illegal sex services ads to create the veil of legality."⁷³ M.A. avoided alleging that Backpage was more substantively responsible for the content of subject advertisements and argued instead that it built its success by catering to such illicit advertisements to maximize profits.⁷⁴ However, as the court explained, the advertisements' content was vital to its analysis

67 *Id.* at 1173 (explaining that the content did indeed have illegal elements but those were not attributable in any way to Roommates because the content is published "as written").

68 *See, e.g., Doe v. Backpage.com, LLC*, 817 F.3d 12, 15 (1st Cir. 2016) (describing the palpable sense of conflict in reaching their decision because of the enraging victimization of Doe); *M.A. ex rel. P.K. v. Vill. Voice Media Holdings, LLC*, 809 F. Supp. 2d 1041, 1043, 1052 (E.D. Mo. 2011) (describing the victimization of M.A. giving rise to the suit as "horrific").

69 *See M.A.*, 809 F. Supp. 2d at 1043 (explaining that M.A. argued that Section 230 should be defeated by the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution, and Child Pornography).

70 *Id.* at 1043–45 (explaining the underlying facts of the case).

71 *Id.* at 1043–44.

72 *Id.* at 1044.

73 *Id.* (suggesting that plaintiff suspected Backpage's efforts were to hide sex trafficking but made no reference to materially editing advertisements to do so).

74 *Id.* at 1046 (discussing M.A.'s strategy to avoid Section 230 foreclosing her suit by alleging liability should instead stem from Backpage's profit-seeking motives).

because the content was the basis for establishing M.A.'s standing to prove a causal connection to the injuries suffered.⁷⁵ The court justified the grant of immunity to Backpage despite the immense profits Backpage received from said advertisements because the "mere operation of a website, without more, does not defeat [Section] 230 immunity."⁷⁶ The court further noted that doing so would create a for-profit exception to Section 230, allowing liability to attach based on an internet service provider's profit-seeking strategies, be they morally acceptable or not, rather than their actual relationship to the illicit content.⁷⁷

D. *Congress's Response to Public Policy Values*

Because of Section 230's historically broad interpretation, courts have issued decisions that conflict with core public policy values, but nonetheless align with precedent.⁷⁸ Indeed, courts have often referred to Congress as the appropriate source of resolution for this tension.⁷⁹ In January 2017, Congress released a scathing report entitled "Backpage.com's Knowing Facilitation of Online Sex Trafficking."⁸⁰ In its report, the Committee on Homeland Security and Governmental Affairs noted that Backpage has "invoked Section 230 . . . to avoid criminal or civil responsibility for activities on the site."⁸¹ The committee's use of the word "responsibility" rather than a term that suggests a more neutral view of the site's liability was notable because it alludes to Congress's true intent for Section 230 immunity.⁸²

As its name indicates, Congress passed the Stop Advertising Victims of Exploitation Act of 2015 (SAVE Act) to combat

75 *Id.* at 1046–47 (confirming that the contents of the advertisements were not irrelevant to the question of Section 230 immunity despite M.A.'s characterization of the allegations).

76 *Id.* at 1049 (affirming that without showing Backpage substantively contributed, at least in part, to the creation or development of the content, Section 230 remains applicable).

77 *Id.* at 1050.

78 *See Doe v. Backpage.com, LLC*, 817 F.3d 12, 29 (1st Cir. 2016) (explaining that its understanding of Section 230 precedent required that the court refuse remedy for injuries that "evoke outrage").

79 *See, e.g., id.* (concluding that only legislation can resolve the public policy tension that the CDA creates). *Cf. M.A.*, 809 F. Supp. 2d at 1053, 1058 (declaring modification of Section 230 to be Congress's responsibility).

80 SUBCOMM. ON INVESTIGATIONS, *supra* note 7, at 1–3. The Subcommittee's investigation lasted twenty months and referenced documents from more than seven years prior.

81 *Id.* at 9.

82 *See id.*

the increasing presence of trafficked children on the internet.⁸³ The SAVE Act's legislative history is rife with evidence of how the advent of web-based advertisements cultivated the domestic sex trafficking industry, especially as it pertains to children.⁸⁴ With this history in mind, Congress took painstaking efforts to strike a blow at domestic sex trafficking without impeding First Amendment rights.⁸⁵ Going too far would lead the SAVE Act down the same path as overturned portions of the CDA.⁸⁶ Instead, Congress carefully tailored the SAVE Act to only go as far as is necessary to eradicate illegal sex trafficking advertisements, so as not to erode constitutional protections or Section 230 immunity.⁸⁷

II. ANALYSIS

A. *An Interpretation of Section 230 that Conflicts with, or Is Preemptive of, Title 18 Chapter 110 or the SAVE Act, and the Attendant Civil Remedies, Requires a Reading that Is Inconsistent with the Plain Text of Section 230, and Thus Should Not Stand*

Misguided interpretations of Section 230 and the resulting common law principles have led to the unjust expansion of its power. The plain meaning of Section 230(e)(1) sets out a clear and unambiguous exception to immunity in that it specifically instructs that “[n]othing in this section shall be construed to impair the

83 Pub. L. 114–22, § 118(b)(1), 129 Stat. 227 (codified as amended at 18 U.S.C.A. § 1591(a) (2015) (adding advertising as a named criminalized activity). *Accord* 160 CONG. REC. H4521 (daily ed. May 20, 2014) (averring a goal to stop sites that advertise trafficked children and deem it a federal crime for companies to knowingly post such content).

84 *See, e.g.*, 160 CONG. REC. H4521 (daily ed. May 20, 2014) (statement of Rep. Herrera Beutler) (citing Backpage as a resource that facilitates the sexual exploitation of minors necessitating Congressional action to stop its furtherance).

85 *See id.* at H4515 (observing that advertisements for illegal activity are not protected by the First Amendment).

86 *See Reno v. ACLU*, 521 U.S. 844, 846, 870–72 (1997) (finding portions of the CDA that criminalized transmission of obscene material over the internet unconstitutional because they were vague and infringed upon the First Amendment's free speech protections); 160 CONG. REC. H4515 (daily ed. May 20, 2014) (statement of Rep. Goodlatte) (noting that the SAVE Act “does nothing to disrupt or modify the immunity already provided by [S]ection 230”).

87 *See Backpage.com, LLC v. Lynch*, 216 F. Supp. 3d 96, 106 (D.D.C. 2016) (finding Backpage could not successfully maintain a pre-enforcement challenge to the SAVE Act because it was unable to show that it swept broadly enough to eliminate either their intended or constitutionally protected speech—including advertisements for “legal adult sexual services”—unless they intended to host illegal sex trafficking advertisements).

enforcement of . . . section . . . 110 (relating to sexual exploitation of children) of Title 18, or any other Federal criminal statute.”⁸⁸ Additionally, 18 U.S.C. § 2255, included in its entirety within Chapter 110, provides a private right of action for victims of offenders who violate, *inter alia*, 18 U.S.C. § 1591.⁸⁹ The SAVE Act has since amended 18 U.S.C. § 1591 to add advertising trafficked victims for commercial sex acts as criminally sanctionable.⁹⁰ This additional language was specifically inserted to criminalize the web-based classified advertisements of sex-trafficked children.⁹¹ Moreover, 18 U.S.C. § 1595 states in relevant part that victims of a violation of the same 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*).”⁹² Importantly, the relevant sections are included amongst the federal criminal statutes, intended to enforce or enhance federal criminal statutes, and relate to combatting the sexual exploitation of children—each falling within the listed standards for an exception to immunity.⁹³ Thus, the perceived conflict between Section 230 and civil liability stemming from these or similar federal criminal statutes is nonexistent.

Turning first to the plain text of the statutes, Congress chose to apply civil liability against the perpetrator *or* anyone who knowingly benefits financially or otherwise.⁹⁴ Additionally, in light of Section 230’s explicit exception for enforcing federal criminal statutes, the chapter referenced in the text of 18 U.S.C. § 1595 includes Section 1591 of Title 18 of the United States Code.⁹⁵ Each of these

88 47 U.S.C. § 230(e)(1) (2012).

89 *See* 18 U.S.C. § 2255(a) (2012) (providing for civil remedies such that any victim of an offender who violates Section 1591 may sue that offender in district court for actual damages and is deemed to have sustained at least \$150,000).

90 SAVE Act of 2015, Pub. L. 114–22, § 118(b)(1), 129 Stat. 227.

91 *See* 160 CONG. REC. H4516–17 (daily ed. May 20, 2014) (statement of Rep. Wagner) (detailing the purpose of the act as criminalizing websites’ behavior that garners profit from the sexual exploitation of children).

92 18 U.S.C. § 1595(a) (2012) (emphasis added).

93 *See, e.g.*, 18 U.S.C. § 1591 (2012); 18 U.S.C. § 1595 (2012); 18 U.S.C. § 2255 (2012); 47 U.S.C. § 230(e)(1) (2012).

94 *See, e.g.*, 18 U.S.C. § 1591 (2012); 18 U.S.C. § 1595 (2012); 18 U.S.C. § 2255 (2012); 47 U.S.C. § 230(e)(1) (2012) (including parties who may not be directly associated with the advertisement but who knowingly benefited from its successful attraction of illicit clientele or exploitation of children).

95 *See, e.g.*, 18 U.S.C. § 1591 (2012), 18 U.S.C. § 1595 (2012); 18 U.S.C. § 2255 (2012); 47 U.S.C. § 230(e)(1) (2012) (limiting civil remedy to actions committed in violation of its encompassing chapter).

is a criminal statute within the plain meaning of the language Congress included in Section 230, and thus should not be precluded from enforcement by Section 230 per the plain language of the statute.⁹⁶

The U.S. Supreme Court has instructed that when interpreting a statute, courts presume the words of a statute serve a purpose and Congress did not include superfluous language.⁹⁷ To maintain the textual integrity of Section 230 itself, it must be read as a whole because not doing so necessitates a presumption of textual superfluity.⁹⁸ Therefore, liability imposed to enforce these federal criminal statutes, especially those statutes relating to the sexual exploitation of children, should not be precluded by Section 230 because this interpretation is in clear conflict with the text, as the text directly references the criminal statutes.⁹⁹

The attendant civil remedies, which create the federal private right of action for victims, were presumably added by Congress for a salient and meaningful purpose.¹⁰⁰ It is logical and reasonable to infer that that purpose is primarily, if not entirely, devoted to the enforcement of the federal criminal statutes with which they are surrounded and clearly associated.¹⁰¹ Congress's decision to include them within Title 18, devoted to crimes and criminal procedure, supports this inference.¹⁰² An overly broad interpretation of Section 230 to limit these civil remedies undermines their integrity and enforcement as part of the criminal code.¹⁰³ Such an interpre-

96 See 47 U.S.C. § 230(e)(1) (2012) (defining the extent of Section 230's effect on state or criminal law without further distinguishing or excluding language signifying their ascription to the plain and common understanding of what a criminal statute is).

97 See *Moskal v. United States*, 498 U.S. 103, 114 (1990) (determining the true meaning of a federal criminal statute by relying on the plain meaning of its words and its legislative purpose).

98 See *Abramski v. United States*, 134 S. Ct. 2259, 2267 (2014) (instructing that the language of a statute should not be considered in a "vacuum" but with consideration for "statutory context, 'structure, history, and purpose'" (internal citations omitted)).

99 See 47 U.S.C. § 230(e)(1) (2012) (emphasizing the statute's intent to except from immunity conduct that frustrates laws relating to the sexual exploitation of children).

100 See *Hibbs v. Winn*, 542 U.S. 88, 89, 101 (2004) (acknowledging that superfluity is avoided when interpreting statutes).

101 See *Turner v. Glickman*, 207 F.3d 419, 428 (7th Cir. 2000) (agreeing with plaintiffs' assertions that placement of a statutory provision in the criminal code tends to suggest intent to have it enforced as a criminal reprimand (citing *Kansas v. Hendricks*, 521 U.S. 346, 361 (1997))).

102 See *id.* (agreeing that intent can be inferred from the nature of the surrounding provisions as well as placement to determine legislative intent).

103 See 47 U.S.C. § 230(e)(1) (2012) (instructing, unambiguously, that § 230 shall not impair enforcement of both specifically named criminal statutes

tation undermines their specific fundamental policy and purpose as well, which is wholly consistent with the expressed exceptions to Section 230 immunity.¹⁰⁴ An interpretation that limits civil remedy is untenable, as it goes against the plain language of Section 230 and frustrates the enforcement of federal criminal statutes specifically intended to prevent the sexual exploitation of children.¹⁰⁵ Accordingly, the line of cases, including *Doe v. Backpage*, interpreting Section 230 as precluding civil liability for advertising sexually exploited children is inconsistent with the statute's plain meaning.¹⁰⁶

Moreover, these cases were decided before Congress's Committee Report was published in January 2017, and therefore, each case was decided without knowledge of Backpage's editing or development practices.¹⁰⁷ The litigants could not show that the respective defendant service providers had been convicted pursuant to one of the subject criminal statutes.¹⁰⁸ Each litigant concedes that the illegality of the advertisements is based on content provided by a third party.¹⁰⁹ That third party is completely susceptible to

or any other federal criminal statute).

104 Compare 47 U.S.C. § 230(b)(5) (2012) (declaring that laws be vigorously enforced to deter and punish those using computers to engage in the trafficking of, *inter alia*, obscenity) and 47 U.S.C. § 230(e)(1) (2012) (listing laws relating to the sexual exploitation of children, more specifically, those in Chapter 110 of Title 18, as excepted from § 230 immunity), with 18 U.S.C. § 2255(a) (2012) (instructing that victims of offenders who violate 18 U.S.C. § 1591 may bring suit against that offender).

105 See *Levin v. United States*, 568 U.S. 503, 511–14 (2013) (relying on the similarities of the plain language in two statutes to reject an interpretation of the earlier enacted statute that would render enforcement of the latter inoperable).

106 Cf. *Consol. Rail Corp. v. Gottshall*, 512 U.S. 532, 543–44 (1994) (instructing that common-law principles are to be followed and given deference when the statute is silent, but remain subject to the text of the statute as authorized by Congress). Section 230 explicitly states that its grant of immunity is not intended to interfere with the enforcement of federal criminal statutes, especially those pertaining to the sexual exploitation of children. Thus, the statute is not silent as to its applicability in cases where federal criminal statutes criminalize the sexual exploitation of children.

107 Compare *Doe v. Backpage.com, LLC*, 817 F.3d 12, 16 (1st Cir. 2016) (recounting the absence of editing allegations) and *M.A. ex rel. P.K. v. Vill. Voice Media Holdings, LLC*, 809 F. Supp. 2d 1041, 1053 (E.D. Mo. 2011) (underlining the dearth of allegations holding Backpage responsible for content development), with SUBCOMM. ON INVESTIGATIONS, *supra* note 7, at 2 (describing Backpage's automated and manual editing processes employed at the time of Doe and M.A.'s victimization).

108 See *Doe ex rel. Roe v. Backpage.com, LLC*, 104 F. Supp. 3d 149, 152 (D. Mass. 2015) (listing plaintiffs' allegations with a notable absence of conduct that amounts to a clear violation of the chapter encompassing 18 U.S.C. § 1595).

109 See *id.* at 157 (explaining that the plaintiffs "recognize" that Backpage

the unfettered enforcement of each statute under which they are convicted.¹¹⁰

An adjudicated violation is a crucial element to proving standing because, to properly bring suit, a plaintiff must be a victim of a violation perpetrated by the internet service provider as an illicit advertiser.¹¹¹ Essentially, then, the internet service provider must become a content provider.¹¹² This designation should already place them outside the protection of Section 230 immunity.¹¹³ However, as an advertiser of sex-trafficked children, Backpage should be susceptible to the enforcement of said statutes and their attendant civil remedies which, by their plain language, prohibit the precise behavior referenced as a reason to except them from Section 230 immunity.¹¹⁴ The First Circuit's interpretation of Section 230 would preclude enforcement of the civil remedies in the criminal code meant to enhance punishment as part of their enforcement.¹¹⁵ This is true despite the fact that liability would only attach following a criminal conviction based on the elevated burden of proof, beyond

did not author the illicit content arguably because a comprehensive knowledge of Backpage's editing practices were still unknown to the court and plaintiffs).

110 *See M.A.*, 809 F. Supp. 2d at 1055 (rationalizing that, despite the court's decision in favor of Backpage, plaintiff may pursue a remedy against her trafficker).

111 *See* 18 U.S.C. § 1595(a) (2012) (limiting class of defendants to actual perpetrators or those who have knowingly benefited from their participation).

112 *See* 18 U.S.C. § 1591(a) (2012) (limiting class of defendants to those who knowingly advertise sex trafficked minors).

113 *See* *Jones v. Dirty World Entm't.*, 755 F.3d 398, 408–09 (6th Cir. 2014) (insisting that Section 230 immunity is not limitless and does not extend to internet service providers that are also content providers).

114 *Compare* 47 U.S.C. § 230(e)(1) (2012) (defining the limitations of Section 230 immunity such that it may not interfere with Title 18 Chapter 110 statutes, relating to sexual exploitation of children “or any other Federal criminal statute”), *with* 18 U.S.C. § 1591(a), (d) (2012) (proscribing the sexual exploitation of children through advertising) *and* 18 U.S.C. § 1595 (2012) (offering a civil remedy against those who sexually exploit children through advertising in violation of 18 U.S.C. § 1591 (2012)); *see also* 18 U.S.C. § 2255(a) (2012) (offering civil remedies for personal injuries against those who sexually exploit children in violation of 18 U.S.C. § 1591).

115 *Compare* 18 U.S.C. § 1591(a) (2012) (requiring a defendant act “knowingly” as to advertising for an alleged violation of the statute to stand) *and* 18 U.S.C. § 1595(b)(1) (2012) (staying the pursuit of civil remedy until the completion of criminal proceedings), *with* *Doe v. Backpage.com, LLC*, 817 F.3d 12, 23 (1st Cir. 2016) (misapplying the Section 230 exception for criminal federal laws that relate to proscribing the sexual exploitation of children by finding the attendant and consequently triggered statutes are inapplicable because they provide for civil remedy).

a reasonable doubt, and an elevated *mens rea* standard, knowledge, but still be precluded from enforcement.¹¹⁶

Consequently, the line of cases which interpret Section 230 as offering immunity to civil liability for manually editing and posting illegal advertisements for sex trafficked children are untenable.¹¹⁷ Each court relied upon a reading of Section 230 that is inconsistent with the plain meaning of its limitations.¹¹⁸ They frustrate the enforcement of Title 18 Chapter 110, expressly listed as an area of law with which Section 230 should not interfere, by preventing suit under 18 U.S.C. § 2255.¹¹⁹ These cases also rely upon an interpretation that frustrates the enforcement of 18 U.S.C. § 1595, which is directly related to the sexual exploitation of children, as its viability as a remedy depends on a conviction for activity involving the exploitation of children.¹²⁰ Preventing the sexual exploitation of children is a purpose specifically conveyed by Congress in the plain language of Section 230.¹²¹ Thus, courts should not follow the line of cases which rely upon an interpretation of Section 230 that goes against its plain language.¹²²

116 Compare 18 U.S.C. § 1595 (2012) (relying on a violation of a criminal statute for remedy) and 18 U.S.C. § 1591 (2012) (relying on a violation of a criminal statute for remedy), with *Doe*, 817 F.3d at 23 (mistaking the applicable standard of proof that would give rise to civil remedy because it is dependent upon a finding of guilt pursuant to a criminal statute). Because civil liability only attaches once a criminal case is successfully prosecuted, plaintiffs carry a higher burden in their claims for relief. Thus, the rush of lawsuits often fabled by Section 230 supporters are actually less likely to occur than they have suggested.

117 Cf. *Consol. Rail Corp. v. Gottshall*, 512 U.S. 532, 543 (1994) (instructing that common-law principles are superseded by the text of the applicable statute).

118 See, e.g., *United States v. Raynor*, 302 U.S. 540, 547 (1938) (declaring that an interpretation inconsistent with the plain words should be avoided in exchange for a more reasonable interpretation).

119 See 47 U.S.C. § 230(e)(1) (2012) (declaring that immunity shall not impair enforcement of specified laws). Cf. *Raynor*, 302 U.S. at 547 (asserting that reasonable interpretation of a statute's plain language is paramount).

120 See *Watt v. Alaska*, 451 U.S. 259, 266–67 (1980) (acknowledging that when statutes stand in conflict it is generally accepted that the more recent statute controls, but whenever possible the courts should rely on the intent of Congress and seek interpretation that allows both to function as intended).

121 See 47 U.S.C. § 230(e)(1) (2012) (declaring immunity shall not impair enforcement of Title 18 § 110, relating to the sexual exploitation of children, or any other federal criminal statute).

122 Cf. *Gotshall*, 512 U.S. at 543 (determining that common-law rules are given great weight to the extent that they do not conflict with the text of the statute and, when they do, they are superseded by the text of the statute); *Moskal v. United States*, 498 U.S. 103, 114 (1990) (relying on plain meaning of words within a statute to ascertain its true meaning).

The SAVE Act's implementation was a clear demonstration of Congress's attempt to hold internet service providers liable when they advertise or garner profits from advertisements that feature sexually exploited children.¹²³ Congress was readily aware of Section 230 and its precedent when they implemented the SAVE Act.¹²⁴ Notably, Congress decided not to include language in the SAVE Act that precluded immunity under Section 230, as they conspicuously included language in Section 230 that precluded interference with federal criminal statutes.¹²⁵ Presuming that the presence or absence of language within a statute is purposeful, it is significant that Section 230 lacks language instructing that the statute precludes the enforcement of a federal criminal statute's attendant civil remedies.¹²⁶ Had Congress intended for internet service providers to be immune from the SAVE Act's concomitant penalties, they presumably would have stated this intention, just as they stated that internet service providers be immune from state-level civil liability in the text of Section 230.¹²⁷

B. *Editing for the Purpose of Circumventing Police Detection is a Form of Development That Validates an Internet Service Provider's Status as a Content Provider and Should Preclude Immunity*

The automatic and manual editing that Backpage conducted was not a traditional editing function as defined by Section 230 or its attendant common law definitions.¹²⁸ Traditional editing functions

123 See 160 CONG. REC. H4516 (daily ed. May 20, 2014) (statement of Rep. Wagner) (asserting that websites profit immensely from sex trafficking victims and this is the primary evil that the SAVE Act seeks to criminalize).

124 See *id.* at 4515 (statement of Rep. Goodlatte) (declaring Section 230 immunity, for internet service providers that *publish* third-party advertisements, would be undisturbed by the SAVE Act's implementation).

125 Compare SAVE Act of 2015, Pub. L. 114-22, § 118(b)(1), 129 Stat. 227 (implementing without language of acquiescence to Section 230 for civil immunity), with 47 U.S.C. § 230(e)(1) (2012) (stating explicitly that the statute shall not impede enforcement of laws relating to the sexual exploitation of children).

126 See *Russello v. United States*, 464 U.S. 16, 23 (1983) (asserting that when Congress has included language in a statute, but excluded it elsewhere in an encompassing act, it is presumed that the presence and absence of language is intentional) (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972)). Cf. 18 U.S.C.A. § 3014(a)(3) (West 2015) (limiting financial penalties against indigent offenders convicted of offenses within Chapter 110 relating the sexual exploitation of children).

127 Compare 18 U.S.C. § 1591 (2012) (detailing potential defendants with a notable absence of language regarding internet service providers to preclude them from enforcement), with 47 U.S.C. § 230(e)(3) (2012) (declaring that state law imposing liability that is inconsistent with the statute shall be precluded).

128 See *id.* at (c)(1) (providing that no publisher or speaker shall be held

are indeed immunized by Section 230.¹²⁹ Minimal or inconsequential alteration of third-party content is permissible without losing the protection of Section 230 immunity.¹³⁰ It would be unreasonable to attach liability to all degrees of editing.¹³¹ Provided an internet service provider limits its manipulation of third-party content to neutral categories or purposes of editing, like correcting grammar and spelling, or deleting obscenities and profanity, they will and should retain the protection of Section 230 immunity.¹³² By limiting their manipulation in this manner, they maintain their relative status as a neutral conduit for third-party content.¹³³ Once an internet service provider's editing is meant to or does materially alter the content at issue, Section 230 immunity becomes inappropriate.¹³⁴ Consider, for example, the following circumstances. A third party submits the following advertisement for publication on an internet service provider's website: "Mary is seling cocaine for 20." As an entirely neutral conduit, the internet service provider should publish the content just as it was submitted, spelling error included, and easily retain the protections of Section 230.¹³⁵ This is similar to the immunity afforded to those who host third-party content via message boards or comment sections.¹³⁶

liable as a content provider). *Accord* Carafano v. Metrosplash.com, Inc., 339 F.3d 1119, 1123 (9th Cir. 2003) (noting that an internet service provider enjoys immunity so long as it not also a content provider for the illicit content).

129 *See* Zeran v. Am. Online, Inc., 129 F.3d 327, 330 (4th Cir. 1997).

130 *See id.* (providing the following list of acceptable editorial functions: deciding whether to publish, withdraw, postpone, or alter content).

131 *See* Stratton Oakmont, Inc. v. Prodigy Servs. Co., No. 031063/94, 1995 WL323710, at *3 (N.Y. Sup. Ct. May 24, 1995) (acknowledging that the magnitude of submissions would make certain editorial practices unreasonable and inevitably lead to liability).

132 *See* Fair Housing Council of San Fernando Valley v. Roommates.com, LLC, 489 F.3d 921, 925 (9th Cir. 2007), *vacated*, 521 F.3d 1157 (reasoning that Section 230 immunity is applicable so long as an internet service provider does not become a content provider and only "passively publishes information provided by others").

133 *Id.* at 926 (declaring that a service provider cannot be deemed a content provider unless it is at least partially responsible for the development of the content).

134 *Id.* at 928–29 (distinguishing *Carafano v. Metrosplash.com* by explaining that the third-party's content was published as submitted and unaltered by the internet service provider—maintaining their Section 230 immunity—and later noting that defendants in the subject case could not enjoy the same because of the "added layer of information" it created or developed).

135 *Id.* at 925 (instructing that a website operator who passively displays content retains the safe harbor of Section 230 immunity).

136 *Id.* at 929 (explaining that defendants retain immunity for content posted in an "Additional Comments" section that were published in their

Suppose the internet service provider alters the content to promote readability and ultimately decides to post: “Mary is selling cocaine for \$20.” The internet service provider will likely retain Section 230 immunity.¹³⁷ This is because the service provider has not materially altered the submitted content from its original state.¹³⁸ More importantly, the editing does not modify or veil the advertisement’s purpose.¹³⁹ The service provider has merely engaged in an arguably traditional editorial function meant to promote readability and clarity.¹⁴⁰

But, if the internet service provider changes the post as follows, the editorial functions have moved past the precipice of neutrality: “Mary is selling _____ for \$20.,” or “Mary is selling packs of hot cocoa for \$20.”¹⁴¹ This editing materially alters the content such that what was once illicit is now falsely presented as innocuous to circumvent law enforcement detection, yet still capable of achieving the ultimate illegal goal of facilitating the intended unlawful transaction.¹⁴²

The manual editing that Backpage engaged in is analogous to the last example in that it meant to, and did, materially alter the content of the subject advertisements.¹⁴³ Backpage did not disinterestedly edit the content submitted for publication; rather, they

original, unaltered form).

137 See *Batzel v. Smith*, 333 F.3d 1018, 1022 (9th Cir. 2003) (finding internet service provider immune despite changes to wording and adding commentary).

138 See *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1170 (9th Cir. 2008) (explaining precedent that holds that “minor changes to the spelling, grammar and length” do not preclude Section 230 immunity).

139 See *id.* (noting that changes which do not contribute to the illegality of the content did not add up to development as the court interpreted the term).

140 See, e.g., *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997) (listing examples of a publisher’s traditional editorial functions that Section 230 immunizes).

141 See *Roommates.com*, 521 F.3d at 1169 (noting that the removal or addition of pivotal phrases may materially contribute to the content’s alleged illegality).

142 See 18 U.S.C. § 1591(a), (d) (2012) (criminalizing the knowing advertisement of sex trafficked minors and the obstruction or attempted obstruction of law enforcement); *Roommates.com*, 521 F.3d at 1167–68 (declaring that materially altering content to achieve the unlawful ends is conduct that is not immunized).

143 Compare *supra* text accompanying notes 141–42 (offering an example of editing that altered content in a manner to conceal illegality before publication), with SUBCOMM. ON INVESTIGATIONS, *supra* note 7, at 26 (asserting that Backpage designed its editing to conceal illegality before publication).

carefully selected words and phrases to subvert law enforcement investigations.¹⁴⁴ The edits did not merely remove obscenities, make minor corrections to word choice, or promote clarity, readability, or palatability—they removed evidence.¹⁴⁵

Backpage's editing practices differ from these acceptable forms of editing because they serve an arguably illegal purpose—obstructing police detection of illicit behavior.¹⁴⁶ Unlike other acceptable forms, this is not neutral manipulation of the content to facilitate publication.¹⁴⁷ Once an internet service provider engages in editing for a purpose aside from those traditionally associated with the dissemination of material to the general public, its involvement with the development and production of that content rises to that of a content provider.¹⁴⁸ This juncture is pivotal in determining whether an internet service provider has effectively transformed into a content provider and shed the attendant shield of Section 230 immunity.¹⁴⁹ Here, Backpage's behavior materially alters the content in that it veils the illicit intent of the content.¹⁵⁰ Development or substantive manipulation of the subject content, whether meant to conceal illegality or not, is not behavior that falls within the scope of Section 230 immunity.¹⁵¹

This method of editing is not the mere removal of language purely to ensure compliance with Backpage's guidelines, as this

144 *See id.* at 18 (claiming Backpage edited content to hide the illegal nature of advertised transactions).

145 *See id.* at 31–32 (arguing that Backpage executives consciously elected to remove language, signifying that illegality was more profitable than deleting the advertisements to stop the illegal transaction).

146 *See id.* at 19 (revealing Backpage executives' intent to have the website avoid detection by South Carolina authorities investigating sex trafficking).

147 *See Roommates.com*, 521 F.3d at 1166 (finding internet service provider was not entitled to immunity as its actions amounted to more than a “passive transmitter” of information).

148 *See id.* at 1170–72 (refining reasoning in *Carafano* to clarify that immunity was applicable because content was untouched, thus reaffirming their declaration of defendants as a “passive conduit”). *Accord Huon v. Denton*, 841 F.3d 733, 742–45 (7th Cir. 2016) (finding an internet service provider was not entitled to Section 230 immunity when its employees anonymously created and developed defamatory comments on a message board).

149 *See Roommates.com*, 521 F.3d at 1172 (contrasting *Roommates* and *Carafano* to show defendants in *Roommates* go beyond simply offering a framework utilized for myriad unchecked purposes).

150 *See id.* at 1167 (assessing impermissible and permissible design and conduct by internet service providers and pointing out that permissibility relies in part on whether or not conduct is intended to achieve illegal ends).

151 *See id.* at 1164 (barring Section 230 immunity for illegal content, partially developed by *Roommates*, posted on its website that violated the Federal Housing Act).

would again constitute a permissible editorial function.¹⁵² The paradigmatic illegal language showing the actual nature of the transaction to law enforcement is intentionally shorn.¹⁵³ Moderators, Backpage employees responsible for reviewing ads, were instructed to remove words or phrases indicative of illegality.¹⁵⁴ Words like “lolita,” “teenage,” “amber alert,” and “little girl” would be filtered out, either manually by a moderator or automatically by Backpage’s Strip Term From Ad filter software, and the ad would be posted in its redacted form.¹⁵⁵

This alteration materially contributes to the development of the content, specifically illegal content, because it creates the appearance of legality, once absent from the content, and ensures the illegal operation moves forward.¹⁵⁶ Thus, the alteration contributes a characteristic that the content would not otherwise have, but for the editing of Backpage.¹⁵⁷

Backpage has similarly materially edited third-party content by veiling the indicia of illegality and thus ostensibly cleansing the content of its illegality.¹⁵⁸ Just as editing to create or develop illegal content, such as adding characteristics or words that contribute to

152 See *id.* at 1171 (reviewing *Carafano* to highlight that editing for compliance with a website’s express policies is the activity Congress intended to immunize).

153 See *id.* at 1168 (declaring that Section 230 immunity is inapplicable if an internet service provider materially contributed to the alleged illegality of the conduct).

154 See SUBCOMM. ON INVESTIGATIONS, *supra* note 7, at 2, 18–21 (detailing the progression of Backpage’s editing practices). Backpage originally instructed moderators to edit on an *ad hoc* basis freely using their own discretion. Moderators were tasked with removing sexually explicit words or phrases, and in instances where the language or illegal nature of the ad was particularly egregious they had the discretion to remove the entire ad. However, once Backpage executives realized that removing entire ads angered users and cost money, moderators were again instructed to return to their original practice of removing words or phrases and moving forward with posting the ads.

155 See *id.* at 21–23.

156 See *Roommates.com*, 521 F.3d at 1184 (McKeown, J., dissenting) (arguing that development is more substantial than merely editing portions and selecting material but stopping short of offering a definitive description (citing *Batzel v. Smith*, 333 F.3d 1018, 1031 (9th Cir. 2003))).

157 See *id.* at 1167–68 (affirming that merely augmenting the content generally is not sufficient to constitute “development” but “materially contributing to its alleged unlawfulness” shall preclude Section 230 immunity).

158 See 18 U.S.C. § 1519 (2012) (criminalizing the knowing deletion, alteration, or concealment of items understood to be pertinent to a federal investigation such that it impedes or obstructs federal investigation); *Roommates.com*, 521 F.3d at 1168 (denying immunity for efforts to effectuate an illegal result); see also *supra* notes 142–43 and accompanying text (offering examples of edits Backpage moderators made to conceal solicitation advertisements).

the content's illegality, would transform an internet service provider into an information content provider and vitiate immunity, so too should development by way of veiling illegality.¹⁵⁹ The internet service provider's understanding of the illicit nature of the content is what prompts the deletion, not a desire to further an acceptable publication goal.¹⁶⁰

This purpose and degree of editing amounts to more than that of a passive intermediary since it is directly connected and driven by the intent to veil the content's illegality.¹⁶¹ Backpage executives' instructions to employees to remove evidence of the illicit transactions so that advertisements appear innocuous to law enforcement despite their meretricious roots are indeed illegal.¹⁶² Congress's explicitly stated intent to shield internet service providers from civil liability for good faith editing practices could not reasonably have been meant to include the this conduct.¹⁶³ Congress intended to immunize good faith editing practices from civil liability, especially those designed to filter out obscene or illegal material.¹⁶⁴ Congress also intended to immunize the inverse—editing or filtering practices that failed to filter obscene or illegal material.¹⁶⁵ To posit that Congress intended for immunity to extend to practices that intentionally frustrated the enforcement of federal criminal statutes is unacceptable because it requires the absurd result that Congress intended to immunize illegal behavior that it deemed actionable within the same statute.¹⁶⁶

159 See *Roommates.com*, 521 F.3d at 1168–69 (explaining that Section 230 immunity is maintained so long as edits are unrelated to illegality).

160 See *id.* at 1167–68 (refining the definition of development to exclude general augmentation but include conduct that contributes to the content's illegality).

161 See *id.* at 1166 (reiterating that passivity is marked by the absence of partial creation or development of content).

162 Cf. *Arthur Andersen LLP v. U.S.*, 544 U.S. 696, 704–08 (2005) (finding that an accounting firm may be criminally guilty of obstruction of justice if it knowingly and corruptly instructed employees to destroy evidence of company's wrongdoing).

163 See *Haggar Co. v. Helvering*, 308 U.S. 389, 339–40 (1940) (avowing that literal readings of a statute's plain language that would lead to absurd results should yield to a more reasonable application that is harmonious with the legislative purpose of the statute).

164 See 47 U.S.C. § 230(c) (2012) (adding protection for “Good Samaritan” efforts to filter distribution of offensive content).

165 See *id.* at (c)(2)(A) (providing civil immunity for voluntarily acting to restrict the proliferation of even constitutionally protected objectionable material).

166 See *U.S. v. Kirby*, 74 U.S. 482, 485–86 (1868) (establishing the legal constraint that interpretation of terms within a statute should be limited so as not to bring about a result that is unjust, oppressive, or absurd). *Accord*

C. *The First Circuit's Decision is Untenable Given the Revelation of New, Material Facts that Make Backpage a Content Provider, Within the Section 230 Definition*

The reasoning relied upon by the First Circuit in *Doe v. Backpage* is inapplicable given the introduction of new evidence that Backpage used editorial practices which materially contributed to concealing the submitted content's illegality.¹⁶⁷ Limited to their minimal knowledge of Backpage's editing practices, plaintiffs conceded the first two prongs of Section 230's three-part test, seeking only to challenge Section 230 immunity by attacking its third prong.¹⁶⁸ However, the second prong mandates immunity if plaintiffs base their suit on content provided by a third-party content provider.¹⁶⁹ In light of the new evidence revealing material information about Backpage's editorial practices, the second prong justifying immunity is unfulfilled.¹⁷⁰ Thus, Backpage is a content provider within Section 230's definition of the term.¹⁷¹

Under Section 230, a party may be deemed an information content provider for even contributing to the development of content "in part."¹⁷² The purpose and degree of manual editing, including the deliberate removal of key child sex trafficking terms to avoid law enforcement detection, defeats this limitation.¹⁷³ Backpage's role in the sex trafficking enterprise is like an intermediary that receives a message or directive from a pimp or trafficker and,

Roommates.com, 521 F.3d at 1164 (asserting that the CDA was not intended to create a "lawless no-man's-land on the Internet").

¹⁶⁷ *Compare Doe v. Backpage.com, LLC*, 817 F.3d 12, 20–21 (1st Cir. 2016) (granting immunity for editorial practices alleged by plaintiff that did not include detail regarding Backpage's editing practices), with *Roommates.com*, 521 F.3d. at 1167–68 (declaring immunity improper for editorial practices that contribute illegality).

¹⁶⁸ *See Doe*, 817 F.3d at 19 (recognizing that plaintiffs conceded the first two prongs of the three-part test in their complaint).

¹⁶⁹ *See id.* (explaining each prong of the test for immunity while listing the second prong as inquiring whether the defendant is a content provider as to the illicit content).

¹⁷⁰ *See id.* (finding Backpage is shielded from liability because appellants' claims were mistakenly based on content found to be the creation of third parties).

¹⁷¹ *See* 47 U.S.C. § 230(f)(3) (2012) (defining an information content provider as one who is "responsible, in whole or in part, for the creation or development of information provided").

¹⁷² *See id.* (including language which effectively expands the class of possible defendants).

¹⁷³ *See* SUBCOMM. ON INVESTIGATIONS, *supra* note 7, at 7–9 (distinguishing the fact that notably neutral behavior shall not vitiate immunity, but contributing to the illegality will render immunity unenforceable).

unbeknownst to said pimp or trafficker, changes the language to avoid using actionable language while the ultimate goal remains intact.¹⁷⁴ Backpage's development of the content is similarly essential to serve its purpose as the impetus for an illegal transaction.¹⁷⁵ But for the deletion of language indicative of the illegal intent, the content would be subject to potentially immobilizing scrutiny.¹⁷⁶ The editing decisions were initiated and completely controlled by Backpage.¹⁷⁷ Consequently, the published content at issue is in part developed by Backpage.¹⁷⁸

An argument that Backpage's editing practices were part and parcel of the construction and operation of its own website are flawed at best.¹⁷⁹ Backpage's editing practices were not implemented to prevent the presence of those specific words throughout the site as though they are categorically offensive or obscene.¹⁸⁰ The presence of words and phrases that were filtered out of the adult section in advertisements hosted in the other sections of Backpage's website validates this assertion.¹⁸¹ Unlike previously-recognized, traditional editing practices implemented to prevent the presence of obscene or offensive content on the internet, these editing practices were employed to avoid law enforcement detection by removing cryptic yet detectable signs of child sex trafficking and exploitation.¹⁸² These concerted efforts were made to facilitate

174 *See id.* at 26 (detailing practices that destroyed original content once Backpage removed illicit language, blocked original content providers, and posted edited versions).

175 *See id.* at 32 (offering testimony by Backpage executive who admitted that illegal transactions moved forward, despite editing to "sanitize" content for posting).

176 *See id.* at 18–19 (describing Backpage's efforts to "scrub" content before a criminal investigation).

177 *See id.* at 30 (illustrating Backpage's "edit lock out" procedures that prevent original posters from editing content once moderators edited content).

178 *See id.* at 30–31 (explaining that Backpage instructed moderators make ads appear as lawful escort ads).

179 *Compare Doe v. Backpage.com, LLC*, 817 F.3d 12, 21 (1st Cir. 2016) (listing acceptable content neutral editorial practices that assist with efficiency or manageability of the website), *with* SUBCOMM. ON INVESTIGATIONS, *supra* note 7, at 28 (criticizing Backpage's editorial goal to "edit out the evidence of illegality").

180 *See* SUBCOMM. ON INVESTIGATIONS, *supra* note 7, at 18–27 (observing Backpage's limitation of filtering to the adult section).

181 *See e.g.* Site Query of "young"; BACKPAGE, [<https://perma.cc/2799-88AZ>] (returning one page of advertisements); Site Query of "girl"; BACKPAGE, [<https://perma.cc/4S8Q-6UN2>] (returning two pages); Site Query of "fresh"; BACKPAGE, [<https://perma.cc/86SX-JGCD>] (returning one page).

182 *Compare* Fair Housing Council of San Fernando Valley v. Roommates.com, LLC, 521 F.3d 1157, 1173 n.36, 1184 (9th Cir. 2008) (describing

the surreptitious posting of sex trafficking advertisements—not to filter or passively permit their publication with minimally obscene or offensive language.¹⁸³ Filtering or passively permitting publication would merit immunity.¹⁸⁴ To the contrary, Backpage specifically sought to post illegal content in a manner it thought would best avoid law enforcement detection.¹⁸⁵ Avoiding law enforcement detection while engaging in illegal activity is not a purpose for website construction or operation that is statutorily immunizable.¹⁸⁶ Despite Section 230's broad application, immunity explicitly stops short of protecting illegal activity.¹⁸⁷

In deciding *Doe v. Backpage*, the First Circuit relied in large part upon *Universal Communication Systems, Inc. v. Lycos*,¹⁸⁸ which was their first experience construing Section 230 immunity.¹⁸⁹ However, defendants in *Lycos* were not alleged to have materially altered the actual content at issue.¹⁹⁰ Plaintiffs alleged that the defendants facilitated the proliferation of the illicit content at issue via their website's policies and construction because they permitted the creation of multiple accounts and free posting.¹⁹¹ The alleged conduct at issue is fundamentally distinguishable from the behavior Back-

traditional editorial functions and explaining that filtering for obscene material still would not vitiate immunity), with SUBCOMM. ON INVESTIGATIONS, *supra* note 7, at 19 (describing instructions to “clean” content for fear that the attorney general would be scrutinizing the site's content).

183 See SUBCOMM. ON INVESTIGATIONS, *supra* note 7, at 32 (quoting a Backpage executive's testimony that the goal was to make illicit content appear acceptable to avoid a negative impact on business).

184 See 47 U.S.C. § 230(c) (2012) (protecting internet service providers for blocking or screening offensive material). *Accord Zeran v. Am. Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997) (stressing the importance of Section 230's intended purpose to encourage self-regulation to filter offensive material).

185 See SUBCOMM. ON INVESTIGATIONS, *supra* note 7, at 19, 26 (relaying Backpage's use of editorial practices based on potential law enforcement attention).

186 See *Roommates.com*, 521 F.3d at 1167 (distinguishing between acceptable and unacceptable constructs of an otherwise neutral tool as dependent upon its contribution to illegality).

187 See *id.* at 1167–68 (explicating the appropriate scope of Section 230 liability and immunity to resolve the inherent tension, settling on precluding immunity for conduct that materially contributes or develops illegal material while permitting immunity that merely facilitates illegal activity but does not do so actively or materially).

188 *Universal Commc'n Sys. Inc. v. Lycos Inc.*, 478 F.3d 413 (1st Cir. 2007).

189 See *Doe v. Backpage.com, LLC*, 817 F.3d 12, 20 (1st Cir. 2016) (analogying the subject case at length with *Lycos*).

190 See *Lycos*, 478 F.3d at 415–16 (alleging that the website posting policy permitted the proliferation of erroneous and defamatory content).

191 *Id.*

page engaged in: the obviously targeted and systematic removal of language indicative of illegal behavior to avoid law enforcement.¹⁹² This type of editorial behavior is analogous to the development of illegal content as sanctioned in *Roommates.com* because Backpage has materially contributed to the illegality of the content by making edits as they deem necessary to avoid law enforcement detection.¹⁹³

In this case, the trial court was mistaken in its assertion that Backpage's actions were merely that of a passive or imperfect "filtering system," as was the plaintiff in conceding the second prong of the three-part test.¹⁹⁴ Had the plaintiffs known of Backpage's editorial practices, they would have been able to assert more credibly that Backpage was responsible for generating content.¹⁹⁵ Contrary to the court's assertion, Backpage's practices are "affirmative participation" by way of "active web content creation" in that the illegality is purposefully secreted from law enforcement because Backpage has deemed it necessary to do so.¹⁹⁶ Furthermore, the content is not a mere excerpt from the original content submitted by the third party, as the court asserted.¹⁹⁷ Instead, it is the content that Backpage developed per its standards and preferences.¹⁹⁸

192 *Compare Lycos*, 478 F.3d at 420–21 (rejecting an assertion that merely providing a neutral tool for posting or publishing content does not make a provider liable for its resulting improper use (citing *Carafano v. Metrosplash.com, Inc.*, 339 F.3d, 1119, 1124–25 (9th Cir. 2003)), *with Roommates.com*, 521 F.3d at 1169 (precluding immunity when criteria within a tool was by definition prohibited), *and* SUBCOMM. ON INVESTIGATIONS, *supra* note 7, at 19 (detailing explicit instructions to remove words indicative of an illicit transaction).

193 *Cf. Roommates.com*, 521 F.3d at 1169 (explaining that merely providing tools or implementing policies that are abused or disregarded to carry out unlawful actions shall not abrogate immunity, whereas the material development or contribution of content shall).

194 *See id.* at 16–17 (describing, insufficiently, the functionality of the content filtering system and later rejecting plaintiff's assertion that it materially contributes to development of illicit advertisements).

195 *See id.* at 19 (ignoring a potential claim that Backpage's actions amounted to that of a content provider).

196 *Compare Doe ex rel. Roe v. Backpage.com, LLC*, 104 F. Supp. 3d 149, 157 (D. Mass. 2015) (characterizing Backpage's conduct and the resulting content as mere reflections of the illegality created by the original content provider), *with* SUBCOMM. ON INVESTIGATIONS, *supra* note 7, at 2 (describing editorial conduct that is purposefully implemented as necessary to undermine law enforcement efforts).

197 *Compare Doe*, 104 F. Supp. 3d at 157 (asserting that the illegality of subject content is completely attributable to the original poster), *with* SUBCOMM. ON INVESTIGATIONS, *supra* note 7, at 17 (explaining that the express purpose of editing was to sanitize prostitution advertisements so they could be posted and prevent editing by the original drafter).

198 *See* SUBCOMM. ON INVESTIGATIONS, *supra* note 7, at 27, 31 (explaining that it was the policy that the multitude of individual moderators had

Because it is illegal, the edited content that Backpage posts is not language protected by the First Amendment.¹⁹⁹ The panoply of recognized content shielded by the First Amendment protections includes a vast array of speech, literature, art, film, and music.²⁰⁰ Indeed, some of the sexually explicit content within the adult classified sections is constitutionally protected by the First Amendment.²⁰¹ Advertisements that Backpage hosts for consensual sexual activities between individuals who have reached the age of majority are protected by the First Amendment.²⁰² However, similar advertisements for the same manner behavior with minors or trafficked victims are not.²⁰³ Advertisements of this nature do not fall within the penumbra of the First Amendment as protected speech.²⁰⁴

An actor, musician, or playwright may, without foregoing their First Amendment protections, publish content that is criminally suggestive.²⁰⁵ Moreover, consenting adults may publish content seeking to arrange consensual sexual meetings.²⁰⁶ Each of these is legally permissible and protected by the First Amendment.²⁰⁷ How-

discretion to edit content as necessary to diminish the underlying illicitness of the transaction).

199 *See* *Backpage.com, LLC v. Lynch*, 216 F. Supp. 3d 96, 103–04 (D.D.C. 2016) (instructing that sex trafficking advertisements are not protected by the First Amendment since they are indeed illegal).

200 *See* *Roth v. U.S.*, 354 U.S. 476, 484 (1957) (instructing that ideas with only slight redeeming social importance are still fully protected by the First Amendment).

201 *See id.* at 485 (noting that only “narrowly limited classes of speech” are not protected by the First Amendment).

202 *Compare* *Reno v. ACLU*, 521 U.S. 844, 871–72 (1997) (abrogating parts of the CDA as overly broad), *with Lynch*, 216 F. Supp. 3d at 103 (D.D.C. 2016) (declaring that advertisements for adult-oriented escort services are permissible), *and* *Backpage.com, LLC v. Cooper*, 939 F. Supp. 2d 805, 814, 844 (M.D. Tenn. 2013) (finding that adult advertisements hosted by Backpage.com could not be proscribed by state legislation).

203 *See Lynch*, 216 F. Supp. 3d at 103 (explaining that the SAVE Act prohibits “advertisements of illegal sex trafficking of a minor” which are protected by the First Amendment). *Accord* *U.S. v. Williams*, 553 U.S. 285, 297 (2008) (instructing that illegal transactions are “categorically” precluded from First Amendment protection).

204 *See Lynch*, 216 F. Supp. 3d at 103 (declaring that trafficking ads would not be protected).

205 *Compare* *Free Speech Coalition v. Reno*, 198 F.3d 1083, 1095–96 (9th Cir. 1999) (striking down the Child Pornography Prevention Act of 1996, in part, because it was overly broad and proscribed speech that merely appeared to be child pornography), *with New York v. Ferber*, 458 U.S. 747, 759 (1982) (prohibiting First Amendment protection of speech that is “intrinsically related” to the sexual abuse of children).

206 *Lynch*, 216 F. Supp. 3d at 103.

207 *See id.* (distinguishing the various forms of commercial speech that

ever, each of these is materially different from content that solicits buyers for sex-trafficked minors.²⁰⁸ This type of content is, by definition, illegal.²⁰⁹ Publication of this illegal content, and editorial functions used to facilitate its undetected proliferation, are protected neither by the First Amendment nor Section 230.²¹⁰

Because neither the content at issue nor the editorial practices are constitutionally protected or immunizable under Section 230, Backpage should be liable for the illicit content it edited and subsequently published.²¹¹ It is evident, based on Backpage's imposition of its editorial preferences for the individual ads, that they are a content provider.²¹² Since the First Circuit and the plaintiffs were limited in their knowledge of Backpage's editorial practices, the court's decision was appropriate only to the extent that they reached it based on a materially incomplete record that did not consider the extensive amount of manual editing that occurred.²¹³

D. *The Ninth Circuit's Interpretation of Section 230 Should be Adopted Because It Is More Consistent with Modern Internet Use*

The Ninth Circuit's breadth of experience offers the most developed and thorough examinations of Section 230.²¹⁴ The Ninth Circuit's narrower interpretation of Section 230 is pragmatic and

are protected from those that are not).

208 See, e.g., *id.* (insisting that illegal advertisements that sex trafficked minors are not protected speech).

209 See, e.g., 18 U.S.C. § 1591(a) (2012) (criminalizing the act of commercially advertising sex trafficked minors).

210 See 47 U.S.C. § 230(e) (2012) (limiting the statutory immunity such that it does not conflict with criminal law as it relates to sexual exploitation of children). *Accord Lynch*, 216 F. Supp. 3d at 104 (reaffirming the understanding that illegal commercial speech is not constitutionally protected).

211 See *Lynch*, 216 F. Supp. 3d 96, at 104 (explaining that illegal commercial advertisements do not enjoy First Amendment protection); *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1174 (9th Cir. 2008) (explaining that conduct that encourages illegality or materially develops illegal content is not immunizable).

212 See SUBCOMM. ON INVESTIGATIONS, *supra* note 7, at 33 (describing Backpage's decision to leave editorial judgment with moderators to cleanse ads as necessary to avoid law enforcement detection).

213 See *Doe v. Backpage.com, LLC*, 817 F.3d 12, (1st Cir. 2016) (justifying the court's decision, based on allegations that overlooked editorial practices, as harmonious with precedent).

214 Claudia G. Catalano, Annotation, *Validity, Construction, and Application of Immunity Provisions of Communications Decency Act*, 47 U.S.C.A. § 230, 52 A.L.R. Fed. 2d 37 (2011) (listing only four individual matters pertaining to the CDA as having been heard in the First Circuit compared to the Ninth Circuit's forty or more matters).

applicable to current legal issues that are dependent upon its interpretation.²¹⁵ In *Roommates.com*, the Ninth Circuit opined that liability need not have its genesis in the original text, but can develop from materially contributing a characteristic to the content.²¹⁶ Conversely, an originalist interpretation of Section 230 is wholly inappropriate because it must be based upon legislative goals and societal circumstances in existence at the time of implementation that, at least with respect to Section 230 and the internet, have since become outdated.²¹⁷ The vital goal of protecting the then-fledgling internet is no longer valid, as its novel and disparate characteristics have since dissipated.²¹⁸ The internet is now a fully-developed component of society.²¹⁹ Thus, this aspect of the CDA's original purpose is not as pertinent as it was when Section 230 was implemented.²²⁰

III. POLICY RECOMMENDATION

Congress should amend Section 230 to rectify the conflict and ambiguity surrounding its applicability.²²¹ The plain text of Section 230 shows that Congress did not intend for it to impair the enforcement of statutes preventing the sexual exploitation of children or any other federal criminal statute.²²² Civil remedies under § 1595 meet both of these expressed exceptions because they are materially associated with the enforcement of federal criminal statutes

215 See, e.g., *Roommates.com*, 521 F.3d at 1164 n.15 (explaining that the internet's fragility has subsided such that enforcing the elevated laws is reasonable, but its integral role in society necessitates caution when expanding the scope of the immunity).

216 See, e.g., *id.* at 1167–68, 72 (explaining service providers may be liable for content originating from a third party when the service provider contributes to the content's illegality).

217 Cf. *United States v. Microsoft Corp.*, 165 F.3d 952, 958 (D.C. Cir. 1999) (professing that outdated statutes are appropriately remedied through legislative action). *Accord* *Taber v. Maine*, 45 F.3d 598, 607 (2d Cir. 1995) (expressing that it is occasionally appropriate for the judiciary to urge legislators to remedy outdated statutes).

218 See *Roommates.com*, 521 F.3d at 1164 (opposing the view that the internet could realistically be substantively repressed by increased government involvement).

219 See *id.* (contrasting the fledgling internet to its current inescapable presence).

220 See *id.* (doubting that enforcement could necessitate the protection legislation originally felt appropriate).

221 See 18 U.S.C. § 1595(b)(1) (2012) (declaring that civil actions pursuant to § 1595 will be held in abeyance, while criminal proceedings resulting from the same offense are pending).

222 See 47 U.S.C. § 230(e)(1) (2012) (limiting the effect that immunity had on criminal law).

that seek to prevent the sexual exploitation of children.²²³ Furthermore, viability of suit is reliant upon an adjudication of guilt in a trial court and is stayed until such time.²²⁴ The section applicable to internet service providers, § 1591, requires proof of the highest level of intent: knowingly. This *mens rea* standard is sufficiently elevated such that upon a finding of guilt it is reasonable and just that a claim should lie against the perpetrator.²²⁵ The requirement that civil action necessitates a finding of guilt prevents the inundation of civil suits Congress wanted to avoid.²²⁶

Which factors contribute to a determination of intent must be clear to ensure that fluctuating interpretations of editorial functions remain consistent. Because criminal law necessitates strict and uniform interpretations, internet service providers will be provided clear notice as to what functions may lead to a finding of guilt. This will help internet service providers construct filtering technology and programs that better ensure their compliance with the law. Consequently, such an amendment avoids a chilling effect because internet service providers will have clear knowledge of what actions trigger liability and what actions will remain protected by Section 230.

Also, a limited amendment to the CDA will not infringe upon the First Amendment rights of consenting adults to post web-based advertisements or on internet service providers' right to host their advertisements.²²⁷ A limited and properly tailored exception that is triggered upon criminal conviction is not only necessary, but the most appropriate course of action. By limiting liability, criminal or civil, to advertisements that are fundamentally illegal, and thus not protected, the First Amendment privileges of parties engaging in permissible exchanges will remain untouched.²²⁸ Meanwhile,

223 See 18 U.S.C. § 1595 (2012) (creating a private right of action for victims of 18 U.S.C. § 1591 offenders).

224 18 U.S.C. § 1595(a) (2012).

225 See 47 U.S.C. § 230(b)(5), (e)(1) (2012) (stating unequivocally that the statute shall not impede or interfere with the vigorous enforcement of criminal law); *Roommates.com*, 521 F.3d at 1168 (noting that engaging in criminal behavior falls within the exception to Section 230 immunity).

226 Cf. *Doe v. Backpage.com, LLC*, 817 F.3d 21, 18–19 (1st Cir. 2016) (indicating that because internet service providers are tasked with filtering an enormous amount of content, it subjects them to an insurmountable level a liability).

227 Cf. *Backpage.com, LLC v. Lynch* 216 F. Supp. 3d 96, 103 (D.D.C. 2016) (explaining that First Amendment protections extend to commercial content facilitating consensual sexual dates between adults).

228 Cf. *id.* at 103–104 (reiterating that commercial content advertising “legal ‘adult services’” are protected by the First Amendment, yet service providers intending to host commercial content that promotes illegal activity “are

offenders responsible for the creation or development of illegal advertisements would be fully susceptible to the civil and criminal penalties specifically implemented to combat that behavior.

A. *Current Section 230 Policy*

As written, Section 230 already permits criminal prosecution and civil action against Backpage.²²⁹ This is primarily because the illegality of Backpage's editorial practices was so systemic and egregious.²³⁰ Yet, it is still unclear *when* their actions crossed the precipice of legality because the interconnection between the two relevant pieces of legislation is not clear.²³¹ In light of the U.S. Senate's recommendation that the Department of Justice pursue criminal charges, judicial officers will likely soon have the opportunity to not only clarify but limit the circumstances of when Sections 1591 and 1595 yield to Section 230. Still, despite having the power it needs to punish Backpage, the confusion and controversy surrounding Section 230 calls for clarifying legislation.²³²

The spectrum of actionable behavior is currently unclear because current legislation does not clearly define the interconnection between Section 230 and Sections 1591 and 1595.²³³ Backpage's editorial practices were egregious, marking the far end of a theoretical tripartite spectrum. For ease of differentiation, that third can be considered clearly culpable conduct. This would include conduct that undoubtedly vitiates Section 230 immunity—substantive

not afforded First Amendment protection[.]”) (citing *U.S. v. Williams*, 553 U.S. 285, 297 (2008)).

229 See 47 U.S.C. § 230 (b)(5) (2012) (calling for the “vigorous enforcement” of laws deterring or punishing obscenity by means of the computer); see also Letter from Senators Rob Portman, Tom Carper, and Claire McCaskill to Jeff Sessions, Attorney Gen., U.S. Dep't of Justice (Jul. 13, 2017), https://www.portman.senate.gov/public/index.cfm/files/serve?File_id=C1D45A54-86C1-4F3A-AE7F-044B709A8634 [<https://perma.cc/F7ME-U5AE>] (calling on the Department of Justice to pursue criminal action against Backpage).

230 See SUBCOMM. ON INVESTIGATIONS, *supra* note 7, at 2, 26 (describing the extensive nature of Backpage's editorial practices to circumvent law enforcement detection, all the while knowing that such advertisements likely had illegal origins and intent).

231 See SUBCOMM. ON INVESTIGATIONS, *supra* note 7 (urging the Department of Justice to further investigate the activity uncovered during the investigation and development of their report).

232 See Aaron Mackey, *Stop SESTA: Congress Doesn't Understand How Section 230 Works*, ELECTRONIC FRONTIER FOUNDATION, <https://www EFF.ORG/deeplinks/2017/09/stop-sesta-congress-doesnt-understand-how-section-230-works> [<https://perma.cc/4MWA-7R83>] (explaining that courts have been confused by how Section 230 is appropriately applied).

233 See *id.* (offering an interpretation of how Section 230 provisions are intended to work).

editing, purposeful concealment of criminal activity, or other similarly subversive actions.²³⁴ At the complete opposite end of that spectrum is clearly inculpable conduct, namely conduct that is completely aligned with Section 230 requirements and the law generally.²³⁵ Making up the largest portion of this spectrum is the conduct that does not clearly fall in either of those two described groups. This will undoubtedly be the conduct that develops the nuances of Section 230's common law doctrine as it pertains to Sections 1591 and 1595.²³⁶ But, judicial precedent must grow from lucid legislation that clearly defines the interconnection between them, as well as their boundaries, power, and scope.²³⁷

To effectively address the problematic lack of clarity, new legislation must clarify (1) when Section 230 yields to federal criminal *and* civil law, especially Sections 1591 and 1595; (2) what conduct, be it an action or inaction, constitutes an actionable violation of 18 U.S.C. § 1591; (3) what Good Samaritan blocking and screening efforts will not expose service providers to liability; (4) what level of scienter dissolves Section 230 immunity; and (5) what acceptable forms of state-level legislation will overcome Section 230. Clarity regarding each of these points is necessary to strike a balance between supporting free speech and innovation on the internet, and preventing the proliferation of illicit content.

B. *Congress's 2017 Proposed Legislation*

In 2017, Congress made three attempts to strike this balance with three pieces of legislation specifically geared at preventing websites that facilitate sex trafficking from leveraging Section 230 immunity to avoid civil and criminal liability.²³⁸ Each piece of leg-

234 See 18 U.S.C. 1591(a) (2012) (listing the breadth of criminally culpable behavior that constitutes a punishable offense); 47 U.S.C. 230(e)(1) (2012) (explaining that the subject statute has no effect on criminal law).

235 See generally 47 U.S.C. 230(c) (2012) (ensuring that “‘Good Samaritan’ blocking and screening” would avoid civil liability, but presumably also behavior that does not violate federal criminal or civil law).

236 See THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, THE ROBBINS RELIGIOUS AND CIVIL LAW COLLECTION, SCHOOL OF LAW (BOALT HALL), UNIVERSITY OF CALIFORNIA AT BERKELEY *The Common Law and Civil Law Traditions 2–4* <https://www.law.berkeley.edu/library/robbins/pdf/CommonLawCivilLawTraditions.pdf> [<https://perma.cc/D3EM-E4BA>] (explaining that the development of common law over the years had its roots in equity and seeking to achieve a just outcome where the rigidity of the law did not adequately achieve justice).

237 See *id.*

238 See Allow States and Victims to Fight Online Sex Trafficking Act of 2017, H.R. 1865, 115th Cong. (1st Sess. 2017); Stop Enabling Sex Traffickers Act of 2017, S. 1693, 115th Cong. (1st Sess. 2017). Senator Thune presented an amended version of S. 1693 on November 8, 2017. Sen. John Thune, S. 1693

isolation begins by explicitly clarifying that Section 230 was never meant to shield service providers from legal liability when they engage in conduct that facilitates sex trafficking.²³⁹ Each one also proposes amendments to Section 230 and 18 U.S.C. § 1591 to clarify what constitutes violative conduct for service providers.²⁴⁰ More specifically, the proposed language defines “participation in a venture,” arguably the most pivotal phrase between both pieces of legislation for service providers.²⁴¹ It is pivotal primarily because it serves as the basis for determining what degree of tangential involvement triggers culpability. Currently it is unclear, but the purpose of the proposed language is to clarify what actions or connections cross the threshold into liability.

In April, House Representative Ann Wagner introduced the Allow States and Victims to Fight Online Sex Trafficking Act of 2017 (House Bill 1865).²⁴² Congresswoman Wagner’s proposed changes to Section 230 ensure the availability of a civil remedy and victim restitution, and create a broad exception for any state-level criminal or civil statutes targeted at sex trafficking or the sexual exploitation of children.²⁴³ House Bill 1865 also waives the prosecutor’s and plaintiff’s burden of proving intent in any criminal or civil action.²⁴⁴ However, the crux of its ambiguity is in the bill’s sweeping characterization of culpable conduct.²⁴⁵ House Bill 1865 proposes changes to § 1591 that create publisher liability for service providers that host content with “reckless disregard” for that content’s innate goal of facilitating a § 1591(a) violation.²⁴⁶ The bill also significantly broadens the definition of the key term “participation in a venture.”²⁴⁷ Representative Wagner proposes it is the “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).”²⁴⁸

Manager’s Amendment (Nov. 3, 2017), <https://www.eff.org/files/2017/11/03/thune-sesta-substitute.pdf> [<https://perma.cc/N3NQ-H93P>]. Senator Thune’s version was accepted on January 10, 2018 and his proposed amendments were accepted. The bill now appears with the language from Senator Portman’s version struck through.

239 See H.R. 1865 § 2(1)-(2); S. 1693 § 2(1)-(2).

240 See H.R. 1865; S. 1693.

241 H.R. 1865 § 4(a)(2); S. 1693 § 4(2).

242 H.R. 1865.

243 H.R. 1865 § 3(a)(2)(A)-(B).

244 H.R. 1865 § 4(a)(3)

245 See H.R. 1865 § 3-4.

246 H.R. 1865 § 4(a)(3).

247 H.R. 1865 § 4(a)(2).

248 *Id.* (emphasis added).

While certainly laudable in its intent, House Bill 1865 goes too far. Though it clarifies how the pieces of legislation are inter-related, the pendulum of favor swings too far from center, making the threshold of scienter too low.²⁴⁹ In House Bill 1865's version, if a service provider has even the slightest knowledge that their website is being abused they can be deemed as having participated in a venture.²⁵⁰ The language is so sweeping in its characterization of culpable conduct that there's no predictability in its application. Predictability is a fundamental characteristic of the justice system that every piece of legislation should have, both for the benefit of the aggrieved and the accused.²⁵¹ Service providers must be able to develop internal screening, editorial, and publishing policies to avoid criminal or civil liability. Under House Bill 1865's definition, the safest approach for a service provider with any knowledge that their website has been used for an illegal venture is to shut it down, since only knowledge and not intent is necessary to sustain a prosecution or civil action. The ripple effect would undoubtedly have a chilling effect on the internet beyond reason.

In August 2017, Senator Rob Portman put forth the Stop Enabling Sex Traffickers Act (SESTA).²⁵² SESTA better clarifies and balances the relationships between Section 230's breadth, the CDA's original intent, and the SAVE Act.²⁵³ SESTA excludes state-level criminal and civil statutes targeting sex trafficking from Section 230 immunity, and explicitly declares that Section 230 shall have no effect on the civil remedies 18 U.S.C. § 1595 permits.²⁵⁴ But, similar to House Bill 1865, SESTA does not offer enough limiting or guiding language regarding the substance of newly excluded state laws.²⁵⁵ While it does exclude state law targeting sex trafficking, it does not limit the scope of culpable behavior that may be

249 See *id.* § 3(a)(1), § 4(a)(3).

250 See *id.* § 4(a)(2).

251 See generally Stefanie A. Lindquist, Frank C. Cross, *Stability, Predictability and the Rule of Law: Stare Decisis as Reciprocity Norm*, <https://law.utexas.edu/conferences/measuring/The%20Papers/Rule%20of%20Law%20Conference.crosslindquist.pdf> (offering an in-depth examination of the importance and influence of predictability in the justice system, especially given that the foundational principle of *stare decisis* centers on predictability).

252 S. 1693, 115th Cong. (1st Sess. 2017).

253 Compare H.R. 1865 (proposing broad and sweeping definitions and inclusions for culpable conduct), with S. 1693 (designating narrower definitions or descriptions of culpable conduct).

254 See S. 1693 § 3(a)(2)(B).

255 Compare H.R. 1865 § 3 (proposing a blanket exclusion from immunity for any state-level statutes related to sex trafficking or sexual exploitation), with S. 1693 § 3(a)(2) (creating a narrow exception from immunity for state-level statutes aligned with federal criminal law).

criminalized or to what degree they must be related to sex trafficking.²⁵⁶ Thus, culpable behavior can be redefined and vastly different from state to state, yet convictions or civil actions pursuant to each excluded from Section 230 immunity.²⁵⁷

SESTA also has a better definition of the pivotal phrase “participation in a venture.”²⁵⁸ SESTA’s definition hammers down the definition of culpable conduct with a greater degree of specificity than House Bill 1865.²⁵⁹ SESTA describes what would lead to criminal or civil liability as “knowing conduct by an individual or entity, by any means, that assists, supports, or facilitates a violation of subsection (a)(1).”²⁶⁰ As compared to House Bill 1865, this puts forth a narrower scope of conduct that is centered on a service provider’s knowledge of illicit behavior.²⁶¹ Although SESTA narrows and specifies the exceptions to Section 230, it leaves a wide range of internet service providers susceptible to liability for actions not clearly intended to facilitate, or recklessly disregard, illicit activities taking place via their website.²⁶² It remains unclear what degree of knowledge would trigger liability.²⁶³ Moreover, granting exceptions for state-level legislation exposes service providers to inconsistencies and unpredictability in liability from state to state. Consequently, service providers cannot reasonably prepare and employ responsible screening and editorial methods to avoid liability.

256 See S. 1693 § 3(a)(2).

257 See *id.* Without limitations or guidelines for culpable behavior states are free to craft their legislation to sweep as broadly or as narrowly as possible. An example of this would be if State A crafts legislation that includes passive hosting of illegal third-party content, while State B limits culpability to conduct that adds text to third-party content, and State C limits culpable conduct to that barred only by federal statute. A service provider present in each state would be subject to liability for vastly different levels of development as it pertains to third-party content. Given the expansiveness of the internet and the breadth of material transmitted it would be impossible for an internet service provider to cater to each state’s varying legislation without prompting extreme, if not complete, censorship.

258 See S. 1693 § 4(2).

259 Compare H.R. 1865 § 4(a)(2) (defining “participation in a venture” using language to make it as expansive as possible), with S. 1693 § 4(2) (defining the same term with targeted and specific language).

260 S. 1693 § 4(2).

261 Compare H.R. 1865 § 4(a)(2)–(3) (proposing an inclusive definition, but removing the requirement of intent for prosecutors and plaintiffs), with S. 1693 § 4(2) (maintaining a requirement that they engaged in “knowing conduct”).

262 See S. 1693 § 4(2) (indicating that service providers must engage in “knowing conduct” that “assists, supports, or facilitates” but without describing the degree of knowledge that fulfills this element).

263 See *id.*

In November 2017, Senator John Thune introduced an amended version of SESTA that lessened the breadth of exceptions to Section 230 immunity and earned the Internet Association's support.²⁶⁴ Senator Thune's proposed amendments to Section 230 and Sections 1591 and 1595 that offered greater specificity and tailoring than Congresswoman Wagner's and Senator Portman's proposals.²⁶⁵ Senator Thune's version similarly defines "participation in a venture" as "knowingly assisting, supporting, or facilitating a violation of subsection (a)(1)."²⁶⁶ But more importantly, it narrows actionable claims to those brought pursuant to 18 U.S.C. § 1595 for actions that violate 18 U.S.C. § 1591, eliminating the unpredictability of state level litigation that Congresswoman Wagner's and Senator Portman's proposals would allow.²⁶⁷

Another key part of Senator Thune's amended version of SESTA provides limiting guidance for state-level actions that Congresswoman Wagner and Senator Portman's versions lack.²⁶⁸ Thune's amended version of SESTA declares that a state-level criminal prosecution must be based on conduct that "constitutes a violation of [18 U.S.C. § 1595]."²⁶⁹ This draws a clear boundary on actionable state-level legislation. With this limitation, states will not have the freedom to impose laws that criminalize behavior beyond what 18 U.S.C. § 1595 criminalizes.

Senator Thune's version further proposes that 18 U.S.C. § 1595 be amended to permit state attorney generals, acting as *patris*, to sue individuals who violate 18 U.S.C. § 1591 on behalf of the state's residents.²⁷⁰ Indeed, a state may recover damages or other such relief for its affected citizens. This is key in that it would eliminate several "frivolous" law suits that many of SESTA's critics frequently cite as a primary reason to oppose any change to Section 230.²⁷¹

264 Thune, *supra* note 238. See Statement from Michael Beckerman, President & CEO, Internet Ass'n (Nov. 3, 2017), <https://internetassociation.org/statement-in-support-of-the-bipartisan-compromise-to-stop-enabling-sex-trafficking-act-sesta> [<https://perma.cc/S5YY-RZM7>] (explaining the Internet Association's stance regarding the amended version of SESTA as compared to the original version and their continuing efforts to battle sex trafficking).

265 Thune, *supra* note 238 (proposing amendments to the original S. 1693 that offer narrower definitions and descriptions).

266 See *id.* § 4(2).

267 See *id.* § 3(a)(2); § 4; see also *supra* note 257.

268 Compare *id.* § 3, with H.R. 1865 and S. 1693.

269 Thune, *supra* note 238.

270 See *id.* § 5(a).

271 But see Alan Rozenshtein, *It's the Beginning of the End of the Internet's Legal Immunity*, FOREIGNPOLICY (Nov. 13, 2017, 9:44 AM), <http://foreignpolicy.com>.

C. *Proposed Amendments*

While each version adds a level of specificity about actionable behavior, none of the proposed legislation makes it sufficiently clear what conduct is actionable, what degree of scienter vitiates immunity in civil actions, and lastly what types of Good Samaritan blocking will not expose service providers to liability. In each version, the vagueness of proposed definitions for “participation in a venture” leaves too much room for confusion and misapplication. The bills do not give adequate notice of what would vitiate a service provider’s immunity. The phrases, whether used in conjunction or independently, are too vague. On the other hand, making the legislation overly specific would make it so narrow that it would essentially have no force and effect. Effective legislation must strike the balance between specificity and generality. Senator Thune’s version does this best primarily because it offers the most salient basis from which service providers can craft practices. Still, the law’s nuances must be borne out in practice and fine-tuned over time. Essentially, there must be a post-SESTA *Zeran* before Section 230’s new breadth of applicability becomes clear.²⁷²

While each version clarifies that Section 230 yields to Sections 1591 and 1595, and that state-level legislation is excepted from Section 230 immunity, Section 230 should further specify its limits. While Senator Thune’s version of SESTA has garnered the support of major tech industry members, specificity would better serve its goal.²⁷³ The following suggested edits are a better situated starting point for legislators, survivors, and service providers to reach satisfactory common ground and develop mutually agreeable solutions. A sixth section should be added to 47 U.S.C. § 230(b) stating: to ensure vigorous enforcement of federal criminal and civil law directly relating to sex trafficking facilitated by means of any web-based platform. Next, 47 U.S.C. § 230(c)(1) should be amended as follows: 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 *unless: (1) that information has been substantively modified by that interactive computer service provider or user or (2) that provider or user has intentionally*

com/2017/11/13/its-the-beginning-of-the-end-of-the-internets-legal-immunity (explaining why SESTA will prove ruinous to freedom of speech and likely spur lawsuits not originally intended to receive the SESTA’s protection).

²⁷² See *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997) (establishing the foundation for Section 230’s progeny and precedent setting decision making, elevating its status as a watershed case for service providers’ immunity).

²⁷³ See Beckerman, *supra* note 264.

concealed, censored, or obscured illegal information in a manner that prevents detection or otherwise obstructs justice in any way. A third section should be added to 47 U.S.C. § 230(c)(2) that states: any significant and meaningful action taken in good faith to stop the proliferation of illicit content, especially advertisements for sex trafficked individuals.

With this suggested language, Senator Thune's definition of "participation in a venture" rises from palatable to practicable. Section 230, and Sections 1591 and 1595 can easily work in tandem, rather than at odds. While the definition of "participation in a venture" sweeps broader than courts' previous interpretations, Section 230 would be sufficiently specific and targeted to prevent Sections 1591 and 1595's arbitrary enforcement against service providers.²⁷⁴ However, limiting guidance for the definition will prevent prohibitive censoring or a mass exodus of service providers seeking to avoid the risk of liability. This would be best served by the addition of brief but illustrative safe harbor and unsafe harbor provisions. While the safe harbor provision should be specific and detailed in what is included, the unsafe harbor should be explicit in indicating that the described conduct is merely illustrative and not exhaustive.

CONCLUSION

Section 230 of the Communications Decency Act has experienced an unjust expansion to protect untenable behavior. Since its implementation, its breadth of influence and governance has continuously grown. Now, the immunity originally intended to foster technological growth while shielding children has morphed into a disturbing and bizarre version of itself. Congress's hesitance to reign in its breadth has led to a public policy tension that requires resolution. Seeking to avoid the undesired result of chilling and censoring the internet, Congress has relied on minimalist, piecemeal approaches to create some semblance of connectivity and complement.

Doe v. Backpage is evidence of the lapse in Congress's efforts.²⁷⁵ The SAVE Act clearly criminalizes the knowing advertisement of sex trafficked minors and serves as the necessary

²⁷⁴ See, e.g., *Doe v. Backpage*, 817 F.3d 12, 20–21 (1st Cir. 2016) (noting that the pivotal phrase "participation in a venture" had yet to be explicitly interpreted, however, precedent established the narrow interpretation this Court relied upon to rule in favor of defendants. By contrast, proposed definitions present a broader interpretation of the term which includes conduct beyond the "publisher or speaker" designation).

²⁷⁵ See *id.* at 15 (admitting that the case reflects the tension between Congress's efforts with Section 230 and 18 U.S.C. §§ 1591, 1595).

catalytic groundwork for certain federally mandated private rights of action.²⁷⁶ Despite compelling evidence to the contrary, this right of action was proscribed by the First Circuit.²⁷⁷ However, the current legislative milieu is marked by a developing congressional interest in crippling internet service providers that brazenly aid the sexual exploitation of children, while feigning concern about its proliferation. Given the discovery of vitally germane evidence of editing practices, it is now more appropriate than ever to respond by criminalizing such behavior. It must be made clear that Section 230 is not, and more importantly never was, intended to shield such practices from criminal or civil liability. This will establish the most appropriate and impactful form of justice that trafficking survivors deserve.

276 See 160 CONG. REC. H4515 (daily ed. May 20, 2014) (statement of Rep. Goodlatte) (explaining the purpose for the SAVE Act as providing a penalty for “knowingly selling advertising” of victims of sexual exploitation).

277 See *Doe*, 817 F.3d at 29 (acknowledging that the arguments in favor of holding Backpage liable for its role in furthering sex trafficking were persuasive but did not overcome the CDA immunity).