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SUPREME COURT OF TEXAS
BLAKE A. HAWTHORNE, CLERK

No. 20-0434

In the Supreme Court of Texas

IN RE FACEBOOK, INC. AND FACEBOOK, INC. D/B/A INSTAGRAM,

Relators.

REAL PARTIES IN INTEREST BRIEF ON THE MERITS

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STATEMENT OF THE CASE

Nature of the Case:	Three Jane Doe plaintiffs brought suit against Facebook after they became victims of sex trafficking through their use of Facebook and Instagram. MR1-44, 444-516, 847-93. Plaintiffs brought suit against Facebook for knowingly benefiting from the facilitation of human trafficking in violation of Chapter 98 of the Texas Civil Practice and Remedies Code, negligent and grossly negligent failure to warn, negligent undertaking, and strict products liability. MR32-36, 499-503, 882-87.
Trial Courts:	Hon. Steven Kirkland, 334th District Court, Harris County (Cause Nos. 2018-69816 & 2018-82214). Hon. Mike Engelhart, 151st District Court, Harris County (Cause No. 2019-16262).
Trial Courts' Disposition:	Facebook moved to dismiss the Jane Doe plaintiffs' claims under TEX. R. CIV. P. 91a on the basis that they are preempted by Section 230 of the Communications Decency Act, 47 U.S.C. § 230. MR177-94, 584-601, 965-96. The trial courts denied Facebook's motions to dismiss the Chapter 98, negligence and gross negligence, negligent undertaking, and products liability claims. Pet.App.A-C. The products liability claims are not before this Court.
Court of Appeals:	Fourteenth Court of Appeals. Per curiam opinion by Justices Spain and Poissant. Dissent by Justice Christopher.
Court of Appeals' Disposition:	The court of appeals denied Facebook's petition for writ of mandamus. *See* Pet.App.D; *In re Facebook, Inc.*, No. 14-19-00845-CV, 2020 WL 2037193 (Tex. App.—Houston [14th Dist.] Apr. 28, 2020, orig. proceeding).

ISSUE PRESENTED

Three Jane Doe plaintiffs brought claims against Facebook for violating Texas statutory and common law by knowingly benefiting from facilitating their victimization by sex traffickers and failing to warn them of the dangers of sex trafficking on Facebook's products. Did the trial courts clearly abuse their discretion in denying Facebook's motion to dismiss and rejecting Facebook's argument that the Jane Doe plaintiffs' claims were preempted by Section 230 of the Communications Decency Act?

INTRODUCTION

Facebook claims that Section 230 of the Communications Decency Act (CDA) affords it immunity from suit arising out of the sex trafficking of three children that its products enabled. This position finds no support in the statutory text or legislative history. The CDA was enacted in 1996 to protect minors from obscene materials on the internet. The CDA had nothing to say about internet-facilitated human trafficking—a concept unheard of at the time.

When courts later expanded Section 230's reach to shield companies like Facebook from human trafficking claims, Congress amended Section 230 to clarify that it had *no effect* on sex trafficking law and was *never* intended to protect websites that facilitate sex trafficking. Nonetheless, Facebook contends that Section 230 immunizes it from such claims—a position that turns the CDA on its head. The CDA was enacted to *protect* minors. Yet Facebook attempts to use the CDA to prevent minors who are victims of sex trafficking from bringing claims for injuries that occurred because Facebook failed to implement proper safeguards and warnings to protect them. Congress never intended such a perverse result and, like the courts below, this Court should reject it.

STATEMENT OF FACTS

I. Human Trafficking Is A Public Health Crisis In Texas.

Human trafficking is a modern epidemic with a devastating impact on both individual survivors and communities at large. MR444. The number of human

trafficking victims in Texas has grown exponentially in recent years. Tex. H.R. Con. Res. 35, 86th Leg. R.S. (Appendix F). The proliferation of human trafficking caused Governor Abbott to formally declare human trafficking to be a public health crisis in the state. *Id.* The overwhelming majority of human trafficking in Texas involves the sexual exploitation of women and children. *Id.* Human trafficking costs the state billions of dollars in physical and mental health care and social services. *Id.*

The dangers of human trafficking are amplified by the internet, which provides traffickers with easy access to vulnerable children. MR468. Social media has been increasingly used to contact, recruit, and sell children for sex. MR468.

II. Facebook And Human Trafficking.

A. Facebook profits by connecting people—including minors and sex traffickers.

Facebook views "its company mission to connect people in order to create profit." MR465. Facebook collects and sells user data to enable marketers to reach targeted groups of potential customers and it sells ads that appear on Facebook, Instagram, and other products. MR451, 467.

Facebook's desire to "create profit" by connecting people has no discernable limit, including when those people are sex traffickers and their victims. Facebook profits through advertising heavily to minors—indeed, children between 13 and 17 are one of the largest target segments for Facebook's advertisers. MR454. Facebook provides sex traffickers with unrestricted access to minor users. MR464. Those

traffickers use Facebook's products to "stalk, exploit, recruit, groom, and extort children into the sex trade." MR464. Traffickers can, for example, identify minors who post information about themselves that makes clear they are vulnerable targets for trafficking. MR458, 464. It is frequently the first point of contact between sex traffickers and their victims. MR464. Traffickers "friend" a victim's acquaintances—classmates, for instance—and use them as a bridge to victims "through 'shared' friends." MR464. The trafficker then recruits or grooms a target by gaining her trust. MR468-69.

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

- "I love you,"
- "I think you're beautiful, I'll encourage you to show your body,"
- "I'll make your life better,"
- "I'll encourage you to take risks, you're an adult,"
- "I'll protect you," or
- "I'll make you successful."

MR468-69. These are widely-recognized law enforcement "red flag" messages that Facebook could identify when they occur in contexts that indicate human trafficking, particularly where the messages are sent between minors and significantly older adults. MR469. The technology to detect these messages has existed for years.

MR470. Facebook does not flag these messages or warn its users about them because it generates its revenue from advertising, and its ability to profit depends on maximizing both the number of users and their level of engagement with each other on Facebook's products. MR471-72.

B. Facebook knows that human traffickers use its products to target victims like the Jane Doe plaintiffs.

Facebook knows and acknowledges that human traffickers use its products "to identify, cultivate, and then exploit human trafficking victims." MR468. The characteristic internet interactions between predators and their victims, and the increasing use of social media as a channel for sex trafficking, has been well-known in law enforcement, academic, and social services communities for some time. *See, e.g.*, MR464 (NYPD Vice Enforcement Unit); MR464 (Indiana State Police Internet Crimes Against Children Task Force); MR468 (University of Toledo Human Trafficking and Social Justice Institute).

Facebook has the tools and resources to warn potential human trafficking victims of the danger posed by its products. MR466. Indeed, it has recognized that "[m]any experts believe that [it] has a *responsibility* to educate the public about the nature of human trafficking." MR466 (emphasis added). Facebook collects data on every action users take on its products and purchases detailed dossiers on users from commercial data brokers. MR466. Facebook boasts that it can target users by "age, gender, locations, interest, and behaviors." MR466. In fact, it can identify and target

extremely narrow categories of users. MR467 (Facebook can micro-target groups as small as 1,300 people). Facebook uses this technology for profit to sell advertisements that enable marketers to reach their target audiences. MR467. But Facebook does not provide adequate warnings to potential victims of human trafficking or to their parents: "Although it knows that its system facilitates human traffickers in identifying and cultivating victims, and it knows it has the capacity to target ads to specific groups, Facebook does not target warnings to its most vulnerable users." MR467. Facebook has made the situation even worse by not requiring parental authorization to open an account and not simplifying parental controls in a manner consistent with industry standards. MR463-64, 471.

III. Sex Traffickers Used Facebook's Products To Victimize The Jane Doe Plaintiffs.

This case involves three Jane Doe plaintiffs who became victims of sex trafficking through Facebook's facilitating products.

A. Jane Doe in Cause No. 2019-16262.

Jane Doe was a 14-year-old Instagram user who became a sex trafficking victim. MR848, 877. She was "friended" through Instagram by a male user who was more than twice her age and who Instagram allowed to operate an account with fraudulent information. MR877-78. Nothing on Instagram prevented this man from contacting this child without parental consent, and Instagram did not require Jane Doe's account to be in any way connected with her parents, as other platforms

require. MR877. Nor did Instagram take any steps to verify the identity of the man who was openly communicating with children. MR877. Over the course of the next two years, he utilized the Facebook product to manipulate and groom Jane Doe. MR878. The messages he sent to Jane Doe were easily identifiable red flags of human trafficking, especially considering this 30-year-old man had no rational relationship to Jane Doe. MR878. In 2018, he convinced Jane Doe to leave her home with him. MR878. She was taken to a Motel 6 in Houston, posted on Backpage.com by the male user within hours, and repeatedly raped by men who responded to the advertisement. MR878-79. Backpage.com was the leading online marketplace for human trafficking and sexual exploitation of minors until it was seized and shut down by the FBI. MR475-76. Facebook provided no warnings to Jane Doe or her parents, even though it was well aware of the dangers of human trafficking on its products and even though it could have thereby prevented Jane Doe's victimization. MR878-79.

B. Jane Doe in Cause No. 2018-82214.

Jane Doe was a 14-year old Facebook and Instagram user who became a sex trafficking victim. MR474. Facebook did not provide Jane Doe or her parents with any warnings regarding how its system helps traffickers target vulnerable persons like her or how traffickers lure victims through its products. MR476-68.

Jane Doe was "friended" through Instagram by another user, an adult "well over the age of 18." MR474. This Instagram friend told Jane Doe he loved her and promised her a better future. MR474. Facebook knew that "these sorts of messages were precisely the ones it should be warning against" and were red flags of human trafficking when sent between a minor and an adult. MR474-75. If Facebook had warned Jane Doe or her parents about the dangers of human trafficking on its products, she would not have developed a relationship with this Instagram "friend." MR474.

Jane Doe was both recruited through and trafficked on Instagram. MR474-75. Her traffickers used Instagram to sell Jane Doe to men looking for sex with minors. MR475. Those encounters were arranged by posting partially nude photographs of her on Instagram. MR475. She was repeatedly trafficked and raped while a minor. MR475. Even after Jane Doe was rescued from sex trafficking, the traffickers continued to use her profile. MR475. Jane Doe's mother reported this to Facebook and requested help through multiple channels because traffickers were using her daughter's account to lure other children into human trafficking. MR445. Facebook never responded. MR445, 475.

C. Jane Doe in Cause No. 2018-69816.

Jane Doe was 15 years old when she was sex trafficked through Facebook. MR2, 27-30. Her trafficker was another Facebook user "well over the age of 18"

who operated under a false name and friended her through Facebook. MR27-30. Through Facebook Messenger, the trafficker privately communicated with Jane Doe to gain her trust. MR28-29. He told her she was "pretty enough to be a model" and that a modeling career would bring her a better life. MR28.

As Facebook knew, studies and law enforcement have identified these kinds of messages as red flags of human trafficking. MR28. Further, the trafficker's account was littered with photos and other content that were clear signs of human trafficking to Facebook, but that would not have been recognizable as signs of human trafficking to Jane Doe or her parents without proper warnings. MR29. The trafficker's messages to Jane Doe and the content on his Facebook page could easily have been identified as indicators of human trafficking if Facebook had employed even simple, widely used artificial intelligence technology to protect its minor users from sex traffickers. MR22-24, 28-29.

After Jane Doe had an argument with her mother, the trafficker told her she could make enough money as a model to rent an apartment of her own. MR28. He convinced her to let him pick her up and console her about her disagreement with her mother. MR28-29. Within hours, Jane Doe was raped, beaten, photographed for Backpage.com, and forced into sex trafficking. MR29. Jane Doe had never been made aware of the dangers of sex trafficking on Facebook and would not have been

in a position to be trafficked if she had known of the obvious warning signs of trafficking in her communications with the trafficker. MR29-30.

IV. The Jane Doe Plaintiffs' Liability Allegations Against Facebook.

Facebook enabled the traffickers to find and groom the Jane Doe plaintiffs. MR464. Facebook has a duty to warn of the known dangers of sex traffickers using its products, but Facebook did not target warnings to the Jane Doe plaintiffs or their parents. MR466-67. The Jane Doe plaintiffs did not know about these sophisticated dangers. MR474-75.

There was much more that Facebook could easily have done. Artificial intelligence and automated methods of textual analysis allow platforms to flag harmful content without the need to manually review each individual post. *See* MR 468-70. Facebook has and uses these tools, but does not employ them to protect children from sex traffickers. *See* MR468-70. Facebook could have conducted awareness campaigns to ensure users knew that sex traffickers utilized the website to target minors. MR469-72, 499-500. It could have implemented safeguards to prevent adults from connecting with minors they did not know, or verified users' identity and age to prevent unauthorized adults from contacting minors. MR469. It could have reported suspicious messages between minors and adults, flagged buzzwords or images indicative of human trafficking between minors and adults,

required that minor accounts be linked to those of an adult, or prevented known sex traffickers from having an account on Facebook. MR469.

Facebook's failure to warn its users is motivated by profit. MR471. Facebook generates substantially all of its revenue from selling advertising placements to marketers. MR471. Any restrictions placed on user accounts, or limitations on who may become a user, would decrease the size of its user base and would lead to decreased profits. MR471. Indeed, Facebook's customers pay for Facebook advertising products based on the number of impressions delivered or the actions taken by users, so maintaining and increasing the size of its user base is critical to its continued financial success. MR471-72.

Based on Facebook's failure to implement any measures to protect them or warn them of the dangers posed by its products, the Jane Doe plaintiffs filed suit and asserted claims against Facebook. MR499-503. Plaintiffs pleaded a violation of the Texas anti-trafficking statute based on Facebook knowingly benefiting from the facilitation of sex trafficking. MR499-500. Facebook increased its profit margins by not using advertising space or implementing public service announcements to provide warnings regarding the dangers of entrapment, grooming, and recruiting methods used by sex traffickers on its products. MR499-500. Facebook further increased profits through not implementing safeguards like identity verification for its users. MR499-500. Facebook profited from higher advertising fees gained from

expanding its user base to include sex traffickers and maintaining those users by allowing its product to serve as a breeding ground for sex traffickers. MR500. Thus, Facebook obtained a variety of financial benefits from ignoring sex trafficking occurring on its products. MR499-500. Texas law does not permit Facebook to facilitate sex traffickers' ability to traffic victims through its products and retain the profits. Rather, the Texas anti-trafficking statute ensures that such ill-gotten profits are returned to the victims of trafficking. MR499-500.

Plaintiffs also raised claims for negligence based on Facebook failing to warn users of the dangers of sex trafficking on its products even though Facebook was well aware of that danger. MR500. Facebook failed to warn its users, in particular its minor users, that its products could be used for grooming and recruitment by sex traffickers. MR500-01. Facebook did not implement awareness campaigns or any other meaningful procedure that would warn users of the dangers posed by sex traffickers through its products. MR500-01. Facebook could have but did not warn its users about red flags that were indicative of sex trafficking. MR501. Facebook failed to verify the identity or age of its users, and failed to require that minors' accounts be linked to an account of an adult. MR501. Facebook did not report suspicious messaging occurring between minors and adults, even though it had the technology to do so. MR470, 501. And Facebook knowingly allowed criminals to have accounts on its products. MR501. All of these actions violated Facebook's

duty of care under Texas law and give rise to liability for negligence. MR500-01. Plaintiffs also pleaded related claims for negligent undertaking and gross negligence. MR501-03.[1]

V. The Trial Courts Deny Facebook's Motion To Dismiss On Preemption, And The Court Of Appeals Denies Mandamus Relief.

Facebook moved to dismiss the Jane Doe plaintiffs' claims under Rule 91a, contending that they were preempted under Section 230 of the CDA and Facebook was immune from liability. MR177-94, 584-601, 965-96. The trial courts denied Facebook's motions to dismiss the failure-to-warn, negligent-undertaking, and facilitation-of-human-trafficking claims. Pet.App.A-C. In Cause No. 2019-16262, the trial court granted Facebook's motion as to the products liability cause of action on other grounds. Pet.App.C. In Cause Nos. 2018-82214 and 2018-69816, Facebook did not challenge Jane Doe's products liability claim, so it was not ruled upon by the trial court. MR177-94, 584-601. Accordingly, the Jane Doe plaintiffs' products liability claims are not before this Court.

The court of appeals denied Facebook's request for mandamus relief. Pet.App.D.

[1] Plaintiffs raised strict products liability claims, MR502-03, but those claims are not at issue here.

SUMMARY OF THE ARGUMENT

Facebook asks this Court to read Section 230 of the CDA as a broad immunity provision that entirely shields it from the claims of children who were sex trafficked through its products. In interpreting a preemption provision, however, this Court's primary focus must be on enforcing the intent of Congress. There is no indication that Congress intended the result Facebook seeks here. The CDA was enacted to protect children from exposure to pornography on the internet. It did so by preventing websites that screened offensive third-party content from being treated as "publisher[s]" or "speaker[s]" for purposes of defamation liability. Even so, Section 230 contained a savings clause making clear that state law claims that were "consistent" with that restriction were unaffected. Concomitantly, it limited the scope of CDA preemption to state law claims that are "inconsistent" with Section 230, a limitation that Facebook studiously avoids.

Despite this limited purpose, courts proceeded to take an expansive view of Section 230 that provided internet companies with immunity from sex trafficking claims. Recognizing that this was never the intent behind the CDA, Congress responded with the 2018 Allow States and Victims to Fight Online Sex Trafficking Act (FOSTA). Congress stated that its purpose for amending Section 230 was to clarify that it "does not prohibit the enforcement against providers and users of interactive computer services of Federal and State criminal and civil law relating to

sexual exploitation of children or sex trafficking…." The "sense of Congress" was that Section 230 was never intended to provide legal protection for facilitating trafficking. Put simply, the FOSTA amendment demonstrates that the sex-trafficking claims brought by the Jane Doe plaintiffs here are unaffected by Section 230.

Because the Jane Doe plaintiffs' claims are not inconsistent with Section 230, they are not preempted. Nor do the Jane Doe plaintiffs seek to impose defamation liability on Facebook as a "publisher" or speaker," as prohibited by Section 230. They do not seek to hold Facebook liable for exercising any sort of editorial function over its users' communications. Instead, they seek to hold Facebook liable for its conduct in failing to properly warn its minor users of the dangers of sex trafficking that Facebook's products enabled and for knowingly benefiting from the facilitation of sex trafficking. Congress did not intend to prevent sex-trafficking victims from bringing these types of claims. To the extent there is any ambiguity as to Congress's intent to preempt these claims, the law requires this Court to presume that no preemption was intended. The trial court did not clearly abuse its discretion by enforcing the plain language and intent of the CDA. Facebook's petition should be denied.

ARGUMENT

I. Mandamus Is An Extraordinary Remedy Available Only To Correct A Clear Abuse Of Discretion.

Mandamus is "an extraordinary remedy, available only in limited circumstances." *Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992). To obtain relief, Facebook has the burden to show that it lacks an adequate remedy at law and that the trial court clearly abused its discretion. *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 135-36 (Tex. 2004). Facebook seeks mandamus relief from the denial of a motion to dismiss under Texas Rule of Civil Procedure 91a based on federal preemption. A motion to dismiss under Rule 91a is proper where the plaintiff's cause of action "has no basis in law or fact." TEX. R. CIV. P. 91a.1. "A cause of action has no basis in law if the allegations, taken as true, together with inferences reasonably drawn from them, do not entitle the claimant to the relief sought." *Id.* Here, the ultimate question is "whether the pleadings, liberally construed according to the pleader's intent, allege facts that trigger federal preemption." *In re Union Pac. R.R.*, 582 S.W.3d 548, 550-51 (Tex. App.—Houston [14th Dist.] 2018, orig. proceeding).

II. Section 230 Of The CDA Does Not Preempt The Jane Doe Plaintiffs' Claims.

A. Historical background of the Communications Decency Act.

Facebook claims that Section 230 of the CDA immunizes it from liability for the harm arising out of the sex trafficking of the Jane Doe plaintiffs that Facebook's

products enabled. Section 230 was adopted as an amendment to the Telecommunications Act of 1996. Pub. L. 104-104, § 509, 110 Stat. 56, 137-39. The internet was a small part of the Telecommunications Act. *See Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 847 (1997). The CDA was primarily concerned with preventing minors from accessing pornography and other obscene materials on the internet. 110 Stat. at 133-39. Section 230 sought to achieve this goal by empowering parents to determine the content of communications their children receive through interactive computer services. *See* 47 U.S.C. § 230(b)(3)-(4).

Section 230(c)(1) was specifically proposed and adopted to overrule *Stratton Oakmont, Inc. v. Prodigy Services Co.*, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995). *See* 141 Cong. Rec. H8469-72 (Appendix C). In *Stratton Oakmont*, Prodigy had exercised editorial control akin to a publisher by promulgating content guidelines and using screening software, which subjected it to defamation liability despite its lack of knowledge of the content. 1995 WL 323710, at *3-4. Congress responded with Section 230 to protect interactive computer services providers from liability for restricting access to objectionable material. *See* 141 Cong. Rec. H8471-72 (Section 230 "removes the liability of providers such as Prodigy who currently make a good faith effort to edit the smut from their systems."); H.R. Rep. No. 104-458, at 194 (1996) (Appendix D) (Section 230 protects "from civil liability … an interactive computer service for actions to restrict or to enable restriction of access

to objectionable online material"). Section 230 was intended to *encourage* interactive computer services providers to screen offensive material from their products. The notion that Section 230 provides broad *immunity* to interactive computer services providers for any claims related to content on their products turns this Congressional intent on its head, effectively removing any motivation for those companies to police the content on their products.[2]

B. Section 230 was never meant to preempt state civil claims for human trafficking.

1. *The relevant statutory language.*

There are three provisions of the CDA that are critical to the preemption analysis. First, Section 230(c)(1) states:

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

47 U.S.C. § 230(c)(1). Facebook contends this provision grants "immunity" to interactive computer services from any claim for content generated or communicated by third parties. Br.xii, 3. Such an expansive construction effectively immunizes

[2] The assumptions of early Section 230 opinions are outdated. At the time the CDA was enacted, Congress was concerned with the burden internet providers would face if, in order to avoid the specter of defamation liability, they had to manually review every user's individual post. For some time, however, artificial intelligence has allowed platforms to readily flag harmful content without individual manual review. *See* MR468-70. Facebook simply chooses not to employ these tools to protect children from sex traffickers.

internet and technology companies from *any liability* for statutory violations or torts committed, regardless of the company's level of knowledge or involvement. The plain statutory language, construed in light of its history and context, does not support such an all-encompassing construction. *See infra* Part II.B-C.

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

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

47 U.S.C. § 230(e)(3). Facebook only cites the preemption clause. Br.4. By choosing to preempt only "inconsistent" state law, Congress made clear that it intended to preempt only a subset of state law, not the entire field of state law generally. As Texas courts have explained, "the CDA is clearly not intended to completely preempt state law in any given area because § 230(e)(3) is *narrowly tailored* to allow state and local laws within the same field, so long as they are consistent." *Cisneros v. Sanchez*, 403 F. Supp. 2d 588, 592 (S.D. Tex. 2005) (emphasis added); *see also A.R.K. v. La Petite Acad.*, No. SA-18-CV-294-XR, 2018 WL 2059531, at *2-3 (W.D. Tex. May 2, 2018) (collecting authorities that the CDA preempts only *conflicting* state law). Both clauses make clear that any state law that

is not inconsistent with Section 230 is not preempted.[3] Therefore, Congress deliberately chose a narrow preemptive scope for Section 230 by expressly allowing for the operation of consistent state law.

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

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

- Civil claims under the federal sex trafficking act, 18 U.S.C. § 1595, for facilitating sex trafficking if the underlying conduct violates 18 U.S.C. § 1591;

[3] Even though the savings clause refers to "any State," no authority suggests this was intended only to preserve enforcement actions by the state itself. In any case, the preemption clause makes clear that the *only* state laws that are preempted are state laws that are "inconsistent" with Section 230—the rest are preserved. Thus, regardless of whether the Court focuses on the first or second clause of Section 230(e)(3), the result is that state law claims that are not inconsistent with Section 230 are preserved.

- Criminal prosecutions under state law for conduct that violates the federal sex trafficking statute, 18 U.S.C. § 1591; or
- Criminal prosecutions under the federal statute criminalizing the facilitation of online prostitution, 18 U.S.C. § 2421A.

47 U.S.C. § 230(e)(5).

Relying on Section 230(c)(1), Facebook argues that internet companies have a broad "immunity" from any suit that arises from content generated by third parties. Many courts have recognized, however, that the word "immunity" appears nowhere in 47 U.S.C. § 230(c)(1). *See City of Chi., Ill. v. StubHub!, Inc.*, 624 F.3d 363, 366 (7th Cir. 2010) (Section 230(c)(1) does not create immunity, but limits who may be called a publisher); *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1100 (9th Cir. 2009) (Section 230(c)(1) "precludes liability only by means of a definition"); *Doe v. GTE Corp.*, 347 F.3d 655, 660 (7th Cir. 2003) (Section 230(c)(1) should be read as a definitional clause rather than as an immunity from liability). That word originates with the Fourth Circuit's decision in *Zeran v. America Online, Inc*., 129 F.3d 327, 330 (4th Cir. 1997). Unfortunately, courts parroted *Zeran*'s language, expanding a narrow protection into broad immunity. But some courts declined to read so much into Congress's words. The Seventh Circuit, for example, held that "subsection (c)(1) does not create an 'immunity' of any kind," but "limits who may be called the publisher of information that appears online." *StubHub!*, 624 F.3d at 366. Providing immunity every time a website uses information from a third party would eviscerate

the statute. *Barnes*, 570 F.3d at 1100 (citing *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1171 (9th Cir. 2008) (en banc)). Rather than superimpose broad immunity concepts, courts should rely on careful interpretation of the statutory language. *Id.*

2. *The Jane Doe plaintiffs' claims are not inconsistent with the federal sex trafficking statute.*

Any analysis of Section 230's preemptive scope must consider the import of the 2018 FOSTA amendments in Section 230(e)(5). *See Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 520-21 (1992) (statute had different preemptive scope after amendment). Facebook purports to rely on "hundreds of decisions" in support of its interpretation of the CDA, and admonishes the Court to "restore uniformity" to Texas law on the issue. Br.1-2. But nearly all of the case law Facebook cites, including *Doe v. MySpace, Inc.*, 528 F.3d 413 (5th Cir. 2008), on which it so heavily relies, predates the FOSTA amendment and accordingly has limited application.[4]

[4] A federal court in California recently did address the interaction between sex trafficking claims and FOSTA, and concluded that the plaintiff's state civil law claims in that case were barred by Section 230. *J.B. v. G6 Hosp., LLC*, No. 19-cv-07848-HSG, 2020 WL 4901196, at *3-7 (N.D. Cal. Aug. 20, 2020). In that case, however, the court did not consider or rule on the Jane Doe plaintiffs' argument here that their state law claims are exempt from preemption because they are consistent with the exemption in FOSTA for federal claims under Section 1595. *See infra* at 22-23. Thus, in addition to being non-binding, that opinion does not resolve a central issue presented in this case.

The FOSTA amendment explicitly exempted claims under the federal sex trafficking statute, 18 U.S.C. § 1595, from Section 230's preemptive scope. 47 U.S.C. § 230(e)(5). And only state law "that is inconsistent" with Section 230 is preempted. 47 U.S.C. § 230(e)(3); *see also Cipollone*, 505 U.S. at 522 ("state law" includes common law, statutes, and regulations). Thus, state laws that are not inconsistent with the Section 230(e)(5) exemptions, such as the exemption for claims under Section 1595, are not preempted. Plaintiffs' claims under Chapter 98 of the Texas Civil Practice and Remedies Code are fully consistent with the analogous federal provision in Section 1595.

Section 1595 imposes civil liability on "whoever knowingly benefits . . . from participation in a venture which that person knew or should have known has engaged in [sex trafficking]." 18 U.S.C. § 1595(a). The Jane Doe plaintiffs allege that Facebook knowingly benefited from facilitating sex trafficking in violation of the parallel Texas statute to Section 1595, Chapter 98 of the Texas Civil Practices and Remedies Code. MR34-35, 499-500, 884-85. Much like Section 1595, Section 98.002 provides that "[a] defendant who engages in the trafficking of persons or who intentionally or knowingly benefits from participating in a venture that traffics another person is liable to the person trafficked." TEX. CIV. PRAC. & REM. CODE ANN. § 98.002(a). The duty imposed by Texas law in Chapter 98 is effectively identical to the duty imposed by federal law in Section 1595. Both Congress and the

Texas Legislature recognized that private rights of action are an essential part of an anti-sex trafficking enforcement scheme and therefore created essentially the same private right to recovery for sex trafficking victims. Federal law and Texas law both refuse to allow companies to profit from facilitating sex trafficking while attempting to distance themselves from the devastating results of their conduct on trafficking victims. *See supra* at 10-11 (discussing Facebook's profit motive in permitting sex trafficking to occur on its products unabated). Thus, the Jane Doe plaintiffs' claims under Chapter 98 are fully consistent with Section 1595.[5] Because there is no inconsistency between plaintiffs' state law claims and the Section 1595 claims that Congress protected against preemption in Section 230(e)(5), plaintiffs' claims cannot be preempted.

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

FOSTA's express language repeatedly confirms that Congress intended to remove *all* obstacles in the CDA to fighting human trafficking, including those that prevented victims from asserting civil claims under state law.

First, Congress clearly stated its purpose for amending Section 230 in FOSTA's enacting clause: to clarify that section 230 does not prohibit the

[5] Plaintiffs also allege common-law tort claims against Facebook that seek to hold Facebook liable for the same underlying conduct and that are therefore equally consistent with Section 1595. MR24, 29, 32-33, 470-72, 474-75, 500, 873-74, 878, 883.

enforcement of "Federal and *State* criminal and *civil* law relating to sexual exploitation of children or sex trafficking."[6] FOSTA, Pub. L. No. 115-164, 132 Stat. 1253, 1253 (2018) (Appendix B) (emphasis added). A statutory preamble or statement of purpose is a valid means of supporting a narrow scope of preemption. *See Medtronic, Inc. v. Lohr*, 518 U.S. 470, 474, 487, 490 (1996).

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

Second, state civil law is expressly included in the title of the FOSTA section amending Section 230 and is tied directly to the amendments. As explained below, Facebook argues that the language in FOSTA cannot create an exemption for civil

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[6] Congress's full statement of its purpose for amending Section 230 reads:

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

FOSTA, Pub. L. No. 115-164, 132 Stat. 1253, 1253 (2018) (emphasis added) (Appendix B).

state law claims because Congress considered and removed an exemption for state law claims that appeared in an earlier version of the bill that became FOSTA. Br.30-32; *see infra* at 29-30 & n.9. But when Congress changed the language of the proposed addition to Section 230 (Section 230(e)(5)) in the drafting process, it amended the title to FOSTA Section 4 to delete the reference to "Sexual Exploitation of Children," but *left in* the reference to "State…Civil Law":

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

Sec. 4, 132 Stat. at 1254 (Appendix B); *see also infra* n.10 (full text of proposed addition to Section 230). So it is clear that even after Congress removed the proposed exemption for "any…State law," Congress still recognized there would be *some* exemption for civil state law claims because it kept the reference to "State…Civil Law" in the title. It is settled law that "statutory titles and section headings are tools available for the resolution of a doubt about the meaning of a statute." *Fla. Dep't of Revenue v. Piccadilly Cafeterias, Inc.*, 554 U.S. 33, 47 (2008).

FOSTA also contains its own savings clause in Section 7 which makes clear that nothing in FOSTA preempts any claim that was not already preempted under Section 230.[7] Sec. 7, 132 Stat. at 1255 (Appendix B). Importantly, the language

[7] The full savings clause reads:

> Nothing in this Act or the amendments made by this Act shall be construed to limit or preempt any civil action or criminal

Congress used confirms that there are civil actions under state law that are not preempted. *Id*. ("Nothing in this Act or the amendments made by this Act shall be construed to limit or preempt any *civil action* or criminal prosecution under Federal law or *State law* (including *State statutory law and State common law*….")) (emphasis added).

Third, FOSTA's legislative history reinforces the lack of preemption.[8] Courts must interpret the statutory text "against the backdrop of regulatory activity undertaken by state legislatures and [the] federal [government]." *Cipollone*, 505 U.S. at 519. When Congress passed Section 230 in 1996, human trafficking was not a recognized legal concept. By the time FOSTA was introduced in early 2017,

> prosecution under Federal law or State law (including State statutory law and State common law) filed before or after the day before the date of enactment of this Act that was not limited or preempted by section 230 of the Communications Act of 1934 (47 U.S.C. 230), as such section was in effect on the day before the date of enactment of this Act.

Sec. 7, 132 Stat. at 1255 (Appendix B).

[8] Facebook criticizes plaintiffs for citing legislative history, yet uses House committee testimony as a basis for speculating why Congress changed language in the originally proposed FOSTA bill. Br.6, 31. Further, the Kosseff testimony is not about concerns of civil liability, but refers to the danger of inconsistent application of technology protocols and specifically attempting to instruct technology companies on how they should moderate communications. H.R. Rep. Serial No. 115-43 at 9; *see also* Jeff Kosseff, *The Twenty-Six Words That Created the Internet* 267 (2019) (discussing platforms being required to comply with a patchwork of blocking methodologies).

however, every state had enacted criminal laws prohibiting human trafficking and nearly three-quarters had enacted civil remedies. Congress also knew that websites had "become one of the primary channels of sex trafficking." FOSTA Committee Report, H.R. Rep. No. 115-572, at 3 (2018) (Appendix E). Congress knew that technology companies had been improperly shielded from liability by the CDA. *Id.* at 4.

Facebook argues that the Jane Doe plaintiffs' position that their claims are the same sort exempted from preemption by FOSTA creates "surplusage." Facebook argues that "[a]pplying plaintiffs' same-sort-of-claims logic, state prosecutions for conduct that also violated federal criminal law never would have been precluded by section 230 in the first place, which would in turn render FOSTA's express preemption of those prosecutions unnecessary and redundant." Br.32-33. But under a correct reading of Section 230, state criminal claims *never* were precluded, and FOSTA makes that clear. FOSTA served merely to reemphasize the *original* intent behind the CDA, rejecting erroneous case law in which courts had held that Section 230 prevented the enforcement of certain state laws. Congress therefore explained that Section 230, properly applied, *already* was inapplicable to state criminal law consistent with Section 230, and the FOSTA amendments were intended to make that clear:

> Under § 230, a state criminal law may be enforced against an interactive computer service (i.e., a website) as long as it is "consistent" with § 230. This provision, however, has been problematic in cases in which states have sought to enforce certain state criminal laws against websites. While the newly created law, and the federal sex trafficking law, should both be considered consistent with § 230, as applied to certain bad-actor websites, in order to allow immediate and unfettered use of this provision, included is an explicit carve out to permit state criminal prosecutions. The language used in the carve out is designed to ensure that interactive computer services are subject to one set of criminal laws, rather than a patchwork of various state laws. In order to qualify for this carve out, a state law's elements should mirror those in 2421A and 1591(a).

H.R. Rep. No. 115-572, at 9-10 (Appendix E).

The requirement in 47 U.S.C. § 230(e)(5)(B) that "the conduct underlying the charge [] constitute a violation of section 1591" ensures that any criminal state law violation will not interfere with the uniform national policy. The same is true of civil law violations of Section 1595. 47 U.S.C. § 230(e)(5)(A) (requirement that "the conduct underlying the claim constitutes a violation of section 1591").

Facebook also argues that whether a claim is "consistent with this section" does not mean whether it is consistent with the exceptions in Section 230(e)(5) or Section 230 generally, but only whether it is consistent with section 230(c)(1). Br.34-35. Facebook's conveniently narrow focus, however, ignores the language of the preemption clause itself (Section 230(e)(3)), which is controlling. Section 230(e)(3) nowhere indicates that it is applicable only to Section 230(c)(1). Further, the FOSTA Committee Report uses "consistent with" in the same manner as the Jane

Doe plaintiffs. H.R. Rep. No. 115-572, at 9 (Appendix E) ("Under § 230, a state criminal law may be enforced against an interactive computer service (i.e., a website) as long as it is 'consistent' with § 230."). Therefore, Facebook's attempt to tether the "inconsistency" requirement to Section 230(c)(1)—and ignore Congress's deliberate choice to exempt categories of claims from preemption in Section 230(e)(5)—finds no support in the statutory text.

To support its position, Facebook relies heavily on the fact that, in the drafting process, Congress deleted an initial proposal that, *inter alia*, exempted state civil claims from preemption. Br.35. But examining what was left on the cutting-room floor as an aid to interpret the text that was actually adopted is a disfavored means of discerning legislative intent.[9] And for good reason. Here, the proposal that was discarded would have gone beyond sex trafficking to cover *any* sexual exploitation

[9] There are many reasons why a statute may not be passed as originally proposed and no inference can be drawn from that. *See District of Columbia v. Heller*, 554 U.S. 570, 590 (2008) ("It is always perilous to derive the meaning of an adopted provision from another provision deleted in the drafting process."). Therefore, failure to pass particular legislation is not a reliable tool for establishing legislative intent. *See Entergy Gulf States, Inc. v. Summers*, 282 S.W.3d 433, 442-43 (Tex. 2009) ("[W]e attach no controlling significance to the Legislature's failure to enact [legislation]…." (quoting *Tex. Emp. Comm'n v. Holberg*, 440 S.W.2d 38, 42 (Tex. 1969))).

of children.[10] H.R. 1865, 115th Cong. § 3(a)(2)(C) (as introduced in House, Apr. 3, 2017). This would have been a sweeping change far broader than the criminal law sex trafficking exemptions that were ultimately added. As for the proposal's reference to state civil law claims, the CDA already preserved "any State or local law that is not inconsistent [with Section 230]," the FOSTA amendment's title referenced "STATE CRIMINAL AND CIVIL LAW RELATING TO SEX TRAFFICKING," and the "sense of Congress" not to protect websites that facilitate trafficking was clearly expressed. *See supra* at 23-27. The fact that Congress failed to adopt H.R. 1865, 115th Cong. § 3(a)(2)(C) (as introduced in House, Apr. 3, 2017) is of no legal import whatsoever, and has nothing to do with the intent to preserve consistent state law civil claims that was expressed in the legislation that was actually enacted.

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[10] The full text of the initial proposal for Section 230(e)(5) read as follows:

> (5) NO EFFECT ON CIVIL LAW RELATING TO SEXUAL EXPLOITATION OF CHILDREN OR SEX TRAFFICKING.—Nothing in this section shall be construed to impair the enforcement or limit the application of—
> (A) section 1595 of title 18, United States Code; or
> (B) *any other* Federal or *State law that provides causes of action, restitution, or other civil remedies to victims* of—
> (i) sexual exploitation of children;
> (ii) sex trafficking of children; or
> (iii) sex trafficking by force, threats of force, fraud, or coercion.

H.R. 1865, 115th Cong. § 3(a)(2)(C) (as introduced in House, Apr. 3, 2017) (emphasis added).

C. The sex trafficking claims do not treat Facebook as a publisher or speaker.

Claims that are not inconsistent with those found in Section 230(e)(5) are not preempted regardless of whether they treat an internet company as the publisher of third-party content. *See supra* Part II.B.2. As a result of FOSTA, the inquiry should end here. But even if that provision did not apply, the Jane Doe plaintiffs' claims would still not be preempted because they do not treat Facebook as the publisher of third-party content under a proper construction of Section 230(c)(1).

1. *There is a split of authority as to the meaning of the term "publisher" in Section 230(c)(1).*

There is a split among the circuits regarding what types of activities by an internet computer service provider make it a "publisher." Some circuits, like those cited by Facebook, broadly apply preemption to any activity in which a firm in the publishing business may engage. Br.18-20. Other circuits disagree, holding that only core editorial functions, like deciding what content to accept or whether to publish the content, would be entitled to immunity. *See Johnson v. Arden*, 614 F.3d 785, 792 (8th Cir. 2010); *Ben Ezra, Weinstein & Co. v. Am. Online, Inc.*, 206 F.3d 980, 986 (10th Cir. 2000); *Jones v. Dirty World Entm't Recordings LLC*, 755 F.3d 398, 416 (6th Cir. 2014).

There is an obvious difference between preempting traditional editorial functions, such as deciding whether to accept or remove a third-party submission,

and granting blanket immunity to any activity that could fall within the business of publication. The narrow interpretation of Section 230(c)(1) limits publisher immunity to decisions to publish, withdraw, postpone, or alter content. The law requires this Court to prefer this narrow interpretation of Section 230's preemptive scope. *See infra* Part III. Under the proper interpretation of "publisher," therefore, plaintiffs' claims are not preempted. Their claims are not based on Facebook's decision to publish or alter certain content, but are instead based on Facebook knowingly benefiting from the facilitation of sex trafficking and failing to provide adequate warnings to its users about the dangers of sex trafficking. *See Doe v. Internet Brands, Inc.*, 824 F.3d 846, 851-53 (9th Cir. 2016) (failure to warn claim was not preempted by Section 230 because, although website's business necessarily involved internet publishing, the claim had "nothing to do with [defendant's] efforts, or lack thereof, to edit, monitor, or remove user generated content").

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

The CDA does not define "publisher" or "speaker," so the words must be given their ordinary meaning by examining the context, legislative history, and judicial constructions of the words in other contexts. *See Yates v. United States*, 135 S. Ct. 1074, 1081-85 (2015). Properly construed, this is the language of defamation

law.[11] The context in which the words are used concerns liability for information provided online by third parties. And the statute's legislative history shows the kind of liability Congress had in mind. *See supra* Part II.A (Section 230 was adopted to overrule *Stratton Oakmont*, where an internet company was held liable for defamation for attempting to screen objectionable content).

In this context, to treat an internet company as a "publisher or speaker" is to impose liability on it (1) for defamatory content provided by a third party (2) of which it had no knowledge (3) because it acted as a "Good Samaritan" by trying to screen objectionable material. The Jane Doe plaintiffs' claims do not allege or implicate defamation. They are distinctly based on Facebook's facilitation of sex trafficking in violation of Texas's anti-trafficking statute and the failure of Facebook to warn plaintiffs of the known dangers posed by sex traffickers on its products.

Even if the protections afforded by Section 230(c)(1) are broader than Congress expressed, nothing indicates an intent to give the word "publisher" a broader meaning than it has in defamation law. Section 230 does not convey a "clear

[11] Courts used the unclear language in Section 230 to expand it far beyond its original purpose. These decisions stemming from interpretations of "publisher" or "speaker" are overly broad and often have nothing to do with the issue Section 230 was meant to address, *i.e.*, relieving platforms of the burden of reading messages to screen for defamation. By expanding protections beyond defamation, these courts extend to platforms a privilege to ignore laws that every other communications business must follow and that are no more costly or difficult for internet platforms to follow than other businesses.

and manifest purpose" by Congress to preempt anything other than defamation and similar claims for which publication is an essential element. *Medtronic*, 518 U.S. at 485; *see Doe*, 347 F.3d at 660 ("Why should a law designed to eliminate [an internet company's] liability to the creators of offensive material end up defeating claims by the victims of tortious or criminal conduct?"); *see also StubHub!*, 624 F.3d at 366 (obscenity and copyright infringement might also be covered). Therefore, the Jane Doe plaintiffs' claims are not preempted regardless of FOSTA's effect on the statute.

III. Facebook Bears The Heavy Burden Of Establishing That Congress Intended To Preempt State Law In An Area Of Traditional State Regulation.

A. There is a strong presumption against preemption unless preemption is the clear and manifest intent of Congress.

The Supremacy Clause invalidates state laws that are "contrary" to federal law. U.S. CONST. art. VI, cl. 2. In determining whether federal law preempts state law, the "ultimate touchstone" of the analysis is Congressional intent. *Cipollone*, 505 U.S. at 516. Congressional intent is primarily discerned from the statutory language and framework. *Medtronic*, 518 U.S. at 486. Courts also consider "the structure and purpose of the statute as a whole…as revealed not only in the text, but through the reviewing court's reasoned understanding of the way in which Congress intended the statute and its surrounding regulatory scheme to affect business, consumers, and the law." *Id.*

"The exercise of federal supremacy is not lightly to be presumed." *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 522 (1981). To the contrary, there is a strong presumption against preemption, particularly in fields which the states have traditionally occupied. *Medtronic*, 518 U.S. at 485. The law regarding tort remedies for personal injuries—the field at issue here—is one such area of traditional state regulation. *Ramsey v. Lucky Stores, Inc.*, 853 S.W.2d 623, 637 n.20 (Tex. App.—Houston [1st Dist.] 1993, writ denied).

Thus, the preemption analysis "start[s] with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). The presumption against preemption applies to both the initial question of whether Congress preempted state law and, when Congress intended preemption, to "the *scope* of its intended invalidation of state law." *Medtronic*, 518 U.S. at 485. "If the extent of Congress's preemptive intent is unclear, the presumption favors a finding of limited preemption." *Barnes ex rel. Estate of Barnes v. Koppers, Inc.*, 534 F.3d 357, 363 (5th Cir. 2008); *see also In re Union Pac. R.R.*, 582 S.W.3d at 551 ("[C]ourts ordinarily accept a plausible reading of an express preemption provision that disfavors preemption….").

B. The presumption against preemption applies even when an express preemption provision is at issue.

Facebook argues that the presumption against preemption is inapplicable because this case involves an express preemption provision. Br.23-24. This position cannot be squared with longstanding Supreme Court precedent. The Court in *Medtronic* interpreted an express preemption provision and noted that, while the express pre-emptive language "means that we need not go beyond that language to determine whether Congress intended…to pre-empt at least some state law," the Court "must nonetheless 'identify the domain expressly pre-empted' by that language." 518 U.S. at 484. The Court explicitly noted that its analysis was informed by the presumption against preemption. *Id.* at 485. The Court has elsewhere applied the presumption against preemption in cases involving express preemption provisions. *See, e.g.*, *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005); *Rice*, 331 U.S. at 230-38.

Facebook's efforts to avoid the presumption against presumption rely almost entirely on the Supreme Court's opinion in *Puerto Rico v. Franklin California Tax-Free Trust*, 136 S. Ct. 1938 (2016). *See* Br.23-24. There, the Court stated that "because the statute 'contains an express pre-emption clause,' we do not invoke any presumption against pre-emption but instead 'focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent." 136 S. Ct. at 1946. But that case involved application of the Bankruptcy

Code—an area that is traditionally governed by federal law. In light of that context, the *Puerto Rico* case has little if anything to say about the applicability of the presumption against preemption to areas of the law traditionally occupied by the states. *See Lupian v. Joseph Cory Holdings LLC*, 905 F.3d 127, 131 n.5 (3d Cir. 2018) (rejecting argument that the Supreme Court no longer applies a presumption against preemption in express preemption cases in light of *Puerto Rico*, and explaining that "we have determined that, because that decision, dealing with a Bankruptcy Code provision, did not address claims involving areas historically regulated by states, we would continue to apply the presumption against preemption to express preemption claims"). Indeed, conspicuously absent from the Court's opinion in *Puerto Rico* is any mention that it was overruling longstanding precedent in cases like *Medtronic* that applied the presumption against preemption to its interpretation of express preemption provisions. The presumption against preemption is well established in Supreme Court precedent—particularly in cases such as this one where areas of traditional state regulation are at issue—and must inform this Court's analysis here. *See Medtronic*, 518 U.S. at 485.

C. The presumption against preemption requires that Facebook's construction be rejected.

Even if Facebook's construction of Section 230 were plausibly supported by the statutory text—"indeed, even if its alternative were just as plausible as [the Jane Doe plaintiffs'] reading of that text—[the Court] would nevertheless have a duty to

accept the reading that disfavors pre-emption." *Bates*, 544 U.S. at 449. When multiple interpretations of an express preemption provision are possible, the presumption against preemption supports "the appropriateness of a narrow reading" of the provision. *Cipollone*, 505 U.S. at 518. As explained above, the CDA was enacted for the primary purpose of protecting minors from obscene materials on the internet. *See supra* Part II.A. The CDA was decidedly not enacted for the purpose of curbing liability for internet companies arising out of human trafficking enabled by their websites—a problem that Congress could not have contemplated at the time of the CDA's enactment in 1996. FOSTA made clear that Section 230 was never intended to protect websites that facilitate sex trafficking or to have any effect on claims designed to combat sex trafficking. *See supra* Part II.B.3.

At minimum, the legislative history of the CDA and FOSTA raise significant questions as to whether Congress intended to prevent sex trafficking victims from pursuing non-defamation claims against internet companies whose services facilitated their victimization. Thus, to the extent this Court finds there is any ambiguity with respect to Congress's preemptive intent, the presumption against preemption requires this Court to favor a finding of "limited preemption" that counsels against a finding that any of plaintiffs' claims are preempted here. *Barnes*, 534 F.3d at 363.

* * *

Section 230 of the CDA was never intended to provide blanket immunity from liability for those who facilitate sex trafficking and profit from doing so. Courts interpreted the protection provided by Section 230 expansively, stretching it far beyond its intended purpose to encourage websites to screen offensive material without risk of defamation liability. FOSTA clarified what was obvious—that Section 230 had no effect on sex trafficking law. FOSTA explicitly exempted claims under the federal sex trafficking statute from preemption. Plaintiffs' claims in this lawsuit—seeking to impose liability on Facebook for facilitation of sex trafficking under Texas's parallel sex trafficking statute and under Texas common law—are likewise saved from preemption because they are not inconsistent with the exempt claims under Section 1595. Neither the law nor any conceivable public policy supports permitting Facebook to facilitate sex trafficking through its products and reap the profits with no regard for the devastating consequences on sex trafficking victims and the community. To the contrary, Texas's Chapter 98 recognizes that companies like Facebook cannot retain these ill-gotten profits and instead must compensate the victims of their misconduct. Plaintiffs' claims are not preempted, and the lower courts correctly permitted them to proceed.

PRAYER

For these reasons, Real Parties In Interest request that this Court deny Relator's petition for writ of mandamus.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with TEX. R. APP. P. 9.4(i)(2)(B) because it consists of 9,283 words, excluding the parts of the brief exempted by TEX. R. APP. P. 9.4(i)(1).

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CERTIFICATE OF SERVICE

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APPENDIX

Tab

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APPENDIX A

PUBLIC LAW 104–104—FEB. 8, 1996

TELECOMMUNICATIONS ACT OF 1996

Public Law 104–104
104th Congress

An Act

Feb. 8, 1996
[S. 652]

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

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

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

SECTION 1. SHORT TITLE; REFERENCES.

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

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

SEC. 2. TABLE OF CONTENTS.

The table of contents for this Act is as follows:

TITLE V—OBSCENITY AND VIOLENCE

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

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

SEC. 501. SHORT TITLE.

47 USC 609 note.

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

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

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

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

"(a) Whoever—

"(1) in interstate or foreign communications—

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

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

"(ii) initiates the transmission of,

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

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

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

"(ii) initiates the transmission of,

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

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

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

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

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

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

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

"(d) Whoever—

"(1) in interstate or foreign communications knowingly—

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

"(B) uses any interactive computer service to display in a manner available to a person under 18 years of age, any comment, request, suggestion, proposal, image, or other communication that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs, regardless of whether the user of such service placed the call or initiated the communication; or

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

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

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

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

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

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

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

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

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

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

"(6) The Commission may describe measures which are reasonable, effective, and appropriate to restrict access to prohibited communications under subsection (d). Nothing in

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

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

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

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

"(h) For purposes of this section—

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

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

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

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

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

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

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

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

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

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

SEC. 503. OBSCENE PROGRAMMING ON CABLE TELEVISION.

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

SEC. 504. SCRAMBLING OF CABLE CHANNELS FOR NONSUBSCRIBERS.

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

47 USC 560.

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

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

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

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

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

47 USC 561.

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

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

Children and youth.

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

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

47 USC 561 note.

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

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

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

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

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

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

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

(2) in the second undesignated paragraph—

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

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

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

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

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

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

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

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

SEC. 508. COERCION AND ENTICEMENT OF MINORS.

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

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

(2) by adding at the end the following:

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

SEC. 509. ONLINE FAMILY EMPOWERMENT.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

"(d) EFFECT ON OTHER LAWS.—

"(1) NO EFFECT ON CRIMINAL LAW.—Nothing in this section shall be construed to impair the enforcement of section 223 of this Act, chapter 71 (relating to obscenity) or 110 (relating

to sexual exploitation of children) of title 18, United States Code, or any other Federal criminal statute.

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

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

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

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

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

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

"(3) INFORMATION CONTENT PROVIDER.—The term 'information content provider' means any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.

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

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

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

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

Subtitle B—Violence

SEC. 551. PARENTAL CHOICE IN TELEVISION PROGRAMMING.

47 USC 303 note.

(a) FINDINGS.—The Congress makes the following findings:

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

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

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

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

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

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

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

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

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

(b) ESTABLISHMENT OF TELEVISION RATING CODE.—

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

"(w) Prescribe—

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

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

47 USC 303 note.

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

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

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

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

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

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

(d) SHIPPING OF TELEVISIONS THAT BLOCK PROGRAMS.—

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

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

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

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

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

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

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

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

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

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

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

section or the alternative blocking technology described in this paragraph.".

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

47 USC 330.

47 USC 303 note.

(e) APPLICABILITY AND EFFECTIVE DATES.—

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

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

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

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

47 USC 303 note.

SEC. 552. TECHNOLOGY FUND.

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

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

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

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

Subtitle C—Judicial Review

47 USC 223 note.

SEC. 561. EXPEDITED REVIEW.

(a) THREE-JUDGE DISTRICT COURT HEARING.—Notwithstanding any other provision of law, any civil action challenging the constitutionality, on its face, of this title or any amendment made by this title, or any provision thereof, shall be heard by a district

for the performance of activities described in section 9(a) of the Communications Act of 1934.

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

Approved February 8, 1996.

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

HOUSE REPORTS: No. 104–204, Pt. 1 accompanying H.R. 1555 (Comm. on Commerce).

SENATE REPORTS: Nos. 104–23 (Comm. on Commerce, Science, and Transportation) and 104–230 (Comm. of Conference).

CONGRESSIONAL RECORD:

Vol. 141 (1995): June 7, 8, 12–15, considered and passed Senate.
Aug. 2, 4, H.R. 1555 considered and passed House.
Oct. 12, S. 652 considered and passed House, amended, in lieu of H.R. 1555.

Vol. 142 (1996): Feb. 1, House and Senate agreed to conference report.

WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS, Vol. 32 (1996):

Feb. 8, Presidential remarks and statement.

○

APPENDIX B

Public Law 115–164
115th Congress

An Act

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

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

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

SECTION 1. SHORT TITLE.

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

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

SEC. 2. SENSE OF CONGRESS.

47 USC 230 note.

It is the sense of Congress that—

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

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

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

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

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

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

18 USC 2421A.

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

"(b) AGGRAVATED VIOLATION.—Whoever, using a facility or means of interstate or foreign commerce or in or affecting interstate

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

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

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

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

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

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

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

18 USC prec. 2421.

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

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

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

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

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

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

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

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

Applicability. 47 USC 230 note.

(b) EFFECTIVE DATE.—The amendments made by this section shall take effect on the date of the enactment of this Act, and the amendment made by subsection (a) shall apply regardless of

whether the conduct alleged occurred, or is alleged to have occurred, before, on, or after such date of enactment.

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

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

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

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

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

SEC. 6. ACTIONS BY STATE ATTORNEYS GENERAL.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Approved April 11, 2018.

LEGISLATIVE HISTORY—H.R. 1865:

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

○

APPENDIX C

business on certain occasions and say, 'It's not just about competition, it's about the public interest.'"—Reed Hundt, Federal Communications Commission Chair as quoted in The New Yorker

Mr. CONYERS. Mr. Chairman, I yield such time as she may consume to the gentlewoman from Michigan [Miss COLLINS].

(Miss COLLINS of Michigan asked and was given permission to revise and extend her remarks.)

Miss COLLINS of Michigan. Mr. Chairman, I rise in strong support of the Conyers amendment and urge my colleagues to adopt it.

Many have argued during this debate that we must deregulate the telecommunications industry, and by eliminating any role for the Department of Justice in determining Regional Bell operating company entry into long distance, we are working toward and goal. Well I think you are making a terrible mistake if you confuse forbidding the proper anti-trust role of the Department of Justice with deregulation.

The Republicans in this body should recall it was under the Reagan administration that the Department of Justice broke up the Bell system over a decade ago. That decision has been an undisputed success. Without the role played by the Department of Justice, consumers would still be renting large rotary black phones and paying too much for long distance services. The Department of Justice actions promoted competition, not regulation.

Without the Department of Justice role, we can expect those communication's attorneys to be in court, fighting endless anti-trust battles. The role we give the Department of Justice in this amendment will make it less likely that we will end up back in court, and the Department will ensure that anti-trust violations would be minimal, prior to the decision granting a Bell operating company the ability to offer long distance service.

Calling this amendment regulatory, is doing a disservice to the potential for true deregulation—which is full competition in all markets. The structure provided by the Department of Justice ensures that the markets will develop quickly, and with less litigation.

Mr. Chairman, I urge my colleagues to support this amendment. I yield back the balance of my time.

Mr. CONYERS. Mr. Chairman, I yield 30 seconds to the gentleman from New York [Mr. HINCHEY].

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

Mr. HINCHEY. Mr. Chairman, this bill has been described as a clash between the super rich and the super wealthy. That Is unquestionably true, but in the clash of these titans, the question is, who stands for the American public?

The answer to that question is, without the Conyers amendment, no one. The American people stand naked before the potential excesses of these giants unless we have some protection from them offered by the Justice Department.

There is an incredibly high standard in this bill, Mr. Chairman. There must be a dangerous probability of substantially impeding justice before the Justice Department comes in. Let us pass the Conyers amendment and protect the American people.

Mr. CONYERS. Mr. Chairman, I yield 30 seconds to the gentleman from Pennsylvania [Mr. KLINK].

Mr. KLINK. Mr. Chairman, I thank the gentleman from Michigan [Mr. CONYERS] for yielding the time.

The FCC is essentially the agency that would be able to consult with the Department of Justice under the manager's mark that we passed this morning. But when we talk about going from a monopoly industry, which telecom was after 1934, to a competition-based industry, the competition agency, those who keep the rule, those who decide if there is a dangerous probability, if those gigantic billionaires players are being fair, is the Department of Justice.

Mr. Chairman, I simply say that the Conyers amendment makes sure that fairness is done, that the referee is in place. I urge my colleagues to support the Conyers amendment.

Mr. BLILEY. Mr. Chairman, I yield 2½ minutes to the gentleman from Ohio [Mr. OXLEY] for purposes of closing the debate on our side.

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

Mr. OXLEY. Mr. Chairman, I rise in opposition to the Conyers amendment. This bill in all of its forms does not repeal the Sherman Act. We have had the Sherman Act for over 100 years.

It does not repeal the Clayton Act passed in 1914. Anticompetitive behavior will be reviewed by the Justice Department, whether it is the telecommunications industry or whether it is the trucking industry or any other kind of industry that we are talking about. The Justice Department is not going away.

What we are trying to do, Mr. Chairman, or what the Conyers amendment seeks to do, is basically replace one court with another, except a different standard.

This amendment guts the underlying concept of this bill, which is pure competition, and the idea to get Congress back into the decisionmaking process. How long do we have to have telecommunications policy made by an unelected Federal judge who has no accountability to anyone; when are we going to get back to providing the kind of responsible decisionmaking that we are elected to do?

Mr. Chairman, I suggest to my colleagues that the underlying bill provides that kind of ability and accountability for the duly elected representatives of the people.

This amendment creates needless bureaucracy by having not one, but two Federal agencies review the issue of Bell Co. entry into long distance. The purpose of this legislation is to create conditions for a competitive market and get the heavy hand of Government regulation out of the way. This Conyers amendment is inconsistent with that purpose.

Mr. Chairman, this is a huge opportunity to provide competitive forces in the marketplace away from Government. If we believe that competition and not bureaucracy is the answer to modernizing our telecommunications policy, to providing more choice in the marketplace, to providing lower prices, to making America the most competitive telecommunications industry in the entire world, we will vote against the Conyers amendment and support the underlying bill.

Mr. Chairman, I ask my colleagues to join me in opposition to the Conyers amendment.

The CHAIRMAN. All time on this amendment has expired.

The question is on the amendment offered by the gentleman from Michigan [Mr. CONYERS], as modified.

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

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

The CHAIRMAN. Pursuant to the rule, further proceedings on the amendment offered by the gentleman from Michigan [Mr. CONYERS], as modified, will be postponed until after the vote on amendment 2–4 to be offered by the gentleman from Massachusetts [Mr. MARKEY].

It is now in order to consider the amendment, No. 2–3, printed in part 2 of House Report 104–223.

AMENDMENT OFFERED BY MR. COX OF CALIFORNIA

Mr. COX of California. Mr. Chairman, I offer an amendment numbered 2–3.

The CHAIRMAN. The Clerk will designate the amendment.

The text of the amendment is as follows:

Amendment number 2–3 offered by Mr. COX of California:'

Page 78, before line 18, insert the following new section (and redesignate the succeeding sections and conform the table of contents accordingly):

SEC. 104. ONLINE FAMILY EMPOWERMENT.

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

"SEC. PROTECTION FOR PRIVATE BLOCKING AND SCREENING OF OFFENSIVE MATERIAL; FCC REGULATION OF COMPUTER SERVICES PROHIBITED.

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

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

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

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

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

''(5) Increasingly Americans are relying on interactive media for a variety of political,

educational, cultural, and entertainment services.

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

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

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

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

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

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

''(c) PROTECTION FOR 'GOOD SAMARITAN' BLOCKING AND SCREENING OF OFFENSIVE MATERIAL.—No provider or user of interactive computer services shall be treated as the publisher or speaker of any information provided by an information content provider. No provider or user of interactive computer services shall be held liable on account of—

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

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

''(d) FCC REGULATION OF THE INTERNET AND OTHER INTERACTIVE COMPUTER SERVICES PROHIBITED.—Nothing in this Act shall be construed to grant any jurisdiction or authority to the Commission with respect to content or any other regulation of the Internet or other interactive computer services.

''(e) EFFECT ON OTHER LAWS.—

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

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

''(3) IN GENERAL.—Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section.

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

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

''(2) INTERACTIVE COMPUTER SERVICE.—The term 'interactive computer service' means any information service that provides computer access to multiple users via modem to a remote computer server, including specifically a service that provides access to the Internet.

''(3) INFORMATION CONTENT PROVIDER.—The term 'information content provider' means any person or entity that is responsible, in whole or in part, for the creation or development of information provided by the Internet or any other interactive computer service, including any person or entity that creates or develops blocking or screening software or other techniques to permit user control over offensive material.

''(4) INFORMATION SERVICE.—The term 'information service' means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.''.

The CHAIRMAN. Pursuant to the rule, the gentleman from California [Mr. COX] will be recognized for 10 minutes, and a Member opposed will be recognized for 10 minutes. Who seeks time in opposition?

PARLIAMENTARY INQUIRY

Mr. COX of California. Mr. Chairman, I have a parliamentary inquiry.

The CHAIRMAN. The gentleman will state it.

Mr. COX of California. Mr. Chairman, given that no Member has risen in opposition, would the Chair entertain a unanimous-consent request?

The CHAIRMAN. If no Members seeks time in opposition, by unanimous consent another Member may be recognized for the other 10 minutes, or the gentleman may have the other 10 minutes.

Let me put the question again: Is there any Member in the Chamber who wishes to claim the time in opposition?

If not, is there a unanimous-consent request for the other 10 minutes?

Mr. WYDEN. There is, Mr. Chairman. Although I am not in opposition to this amendment, I would ask unanimous consent to have the extra time because of the many Members who would like to speak on it.

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

There was no objection.

The CHAIRMAN. The gentleman from California [Mr. COX] will be recognized for 10 minutes, and the gentleman from Oregon [Mr. WYDEN] will be recognized for 10 minutes.

The Chair recognizes the gentleman from California [Mr. COX].

Mr. COX of California. Mr. Chairman, I wish to begin by thanking my colleague, the gentleman from Oregon [Mr. WYDEN], who has worked so hard and so diligently on this effort with all of our colleagues.

We are talking about the Internet now, not about telephones, not about television or radios, not about cable TV, not about broadcasting, but in technological terms and historical terms, an absolutely brand-new technology.

The Internet is a fascinating place and many of us have recently become acquainted with all that it holds for us in terms of education and political discourse.

We want to make sure that everyone in America has an open invitation and feels welcome to participate in the Internet. But as you know, there is some reason for people to be wary because, as a Time Magazine cover story recently highlighted, there is in this vast world of computer information, a literal computer library, some offensive material, some things in the bookstore, if you will, that our children ought not to see.

As the parent of two, I want to make sure that my children have access to this future and that I do not have to worry about what they might be running into on line. I would like to keep that out of my house and off of my computer. How should we do this?

Some have suggested, Mr. Chairman, that we take the Federal Communications Commission and turn it into the Federal Computer Commission, that we hire even more bureaucrats and more regulators who will attempt, either civilly or criminally, to punish people by catching them in the act of putting something into cyberspace.

Frankly, there is just too much going on on the Internet for that to be effective. No matter how big the army of bureaucrats, it is not going to protect my kids because I do not think the Federal Government will get there in time. Certainly, criminal enforcement of our obscenity laws as an adjunct is a useful way of punishing the truly guilty.

Mr. Chairman, what we want are results. We want to make sure we do something that actually works. Ironically, the existing legal system provides a massive disincentive for the people who might best help us control the Internet to do so.

I will give you two quick examples: A Federal court in New York, in a case involving CompuServe, one of our online service providers, held that CompuServe would not be liable in a defamation case because it was not the publisher or editor of the material. It just let everything come onto your computer without, in any way, trying to screen it or control it.

But another New York court, the New York Supreme Court, held that Prodigy, CompuServe's competitor, could be held liable in a $200 million defamation case because someone had posted on one of their bulletin boards, a financial bulletin board, some remarks that apparently were untrue about an investment bank, that the investment bank would go out of business and was run by crooks.

Prodigy said, ''No, no; just like CompuServe, we did not control or edit that information, nor could we, frankly. We have over 60,000 of these messages each day, we have over 2 million subscribers, and so you cannot proceed with this kind of a case against us.''

The court said, ''No, no, no, no, you are different; you are different than CompuServe because you are a family-friendly network. You advertise yourself as such. You employ screening and blocking software that keeps obscenity off of your network. You have people who are hired to exercise an emergency delete function to keep that kind of

material away from your subscribers. You don't permit nudity on your system. You have content guidelines. You, therefore, are going to face higher, stricker liability because you tried to exercise some control over offensive material.''

□ 1015

Mr. Chairman, that is backward. We want to encourage people like Prodigy, like CompuServe, like America Online, like the new Microsoft network, to do everything possible for us, the customer, to help us control, at the portals of our computer, at the front door of our house, what comes in and what our children see. This technology is very quickly becoming available, and in fact every one of us will be able to tailor what we see to our own tastes.

We can go much further, Mr. Chairman, than blocking obscenity or indecency, whatever that means in its loose interpretations. We can keep away from our children things not only prohibited by law, but prohibited by parents. That is where we should be headed, and that is what the gentleman from Oregon [Mr. WYDEN] and I are doing.

Mr. Chairman, our amendment will do two basic things: First, it will protect computer Good Samaritans, online service providers, anyone who provides a front end to the Internet, let us say, who takes steps to screen indecency and offensive material for their customers. It will protect them from taking on liability such as occurred in the Prodigy case in New York that they should not face for helping us and for helping us solve this problem. Second, it will establish as the policy of the United States that we do not wish to have content regulation by the Federal Government of what is on the Internet, that we do not wish to have a Federal Computer Commission with an army of bureaucrats regulating the Internet because frankly the Internet has grown up to be what it is without that kind of help from the Government. In this fashion we can encourage what is right now the most energetic technological revolution that any of us has ever witnessed. We can make it better. We can make sure that it operates more quickly to solve our problem of keeping pornography away from our kids, keeping offensive material away from our kids, and I am very excited about it.

There are other ways to address this problem, some of which run head-on into our approach. About those let me simply say that there is a well-known road paved with good intentions. We all know where it leads. The message today should be from this Congress we embrace this new technology, we welcome the opportunity for education and political discourse that it offers for all of us. We want to help it along this time by saying Government is going to get out of the way and let parents and individuals control it rather than Government doing that job for us.

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

Mr. WYDEN. Mr. Chairman, I rise to speak on behalf of the Cox-Wyden amendment. In beginning, I want to thank the gentleman from California [Mr. COX] for the chance to work with him. I think we all come here because we are most interested in policy issues, and the opportunity I have had to work with the gentleman from California has really been a special pleasure, and I want to thank him for it. I also want to thank the gentleman from Michigan [Mr. DINGELL], our ranking minority member, for the many courtesies he has shown, along with the gentleman from Massachusetts [Mr. MARKEY], and, as always, the gentleman from Virginia [Mr. BLILEY] and the gentleman from Texas [Mr. FIELDS] have been very helpful and cooperative on this effort.

Mr. Chairman and colleagues, the Internet is the shining star of the information age, and Government censors must not be allowed to spoil its promise. We are all against smut and pornography, and, as the parents of two small computer-literate children, my wife and I have seen our kids find their way into these chat rooms that make their middle-aged parents cringe. So let us all stipulate right at the outset the importance of protecting our kids and going to the issue of the best way to do it.

The gentleman from California [Mr. COX] and I are here to say that we believe that parents and families are better suited to guard the portals of cyberspace and protect our children than our Government bureaucrats. Parents can get relief now from the smut on the Internet by making a quick trip to the neighborhood computer store where they can purchase reasonably priced software that blocks out the pornography on the Internet. I brought some of this technology to the floor, a couple of the products that are reasonably priced and available, simply to make clear to our colleagues that it is possible for our parents now to childproof the family computer with these products available in the private sector.

Now what the gentleman from California [Mr. COX] and I have proposed does stand in sharp contrast to the work of the other body. They seek there to try to put in place the Government rather than the private sector about this task of trying to define indecent communications and protecting our kids. In my view that approach, the approach of the other body, will essentially involve the Federal Government spending vast sums of money trying to define elusive terms that are going to lead to a flood of legal challenges while our kids are unprotected. The fact of the matter is that the Internet operates worldwide, and not even a Federal Internet censorship army would give our Government the power to keep offensive material out of the hands of children who use the new interactive media, and I would say to my colleagues that, if there is this kind of Federal Internet censorship army that somehow the other body seems to favor, it is going to make the Keystone Cops look like crackerjack crime-fighter.

Mr. Chairman, the new media is simply different. We have the opportunity to build a 21st century policy for the Internet employing the technologies and the creativity designed by the private sector.

I hope my colleagues will support the amendment offered by gentleman from California [Mr. COX] and myself, and I reserve the balance of my time.

Mr. COX of California. Mr. Chairman, I yield 1 minute to the gentleman from Texas [Mr. BARTON].

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

Mr. BARTON of Texas. Mr. Chairman, Members of the House, this is a very good amendment. There is no question that we are having an explosion of information on the emerging superhighway. Unfortunately part of that information is of a nature that we do not think would be suitable for our children to see on our PC screens in our homes.

Mr. Chairman, the gentleman from Oregon [Mr. WYDEN] and the gentleman from California [Mr. COX] have worked hard to put together a reasonable way to provide those providers of the information to help them self-regulate themselves without penalty of law. I think it is a much better approach than the approach that has been taken in the Senate by the Exon amendment. I would hope that we would support this version in our bill in the House and then try to get the House-Senate conference to adopt the Cox-Wyden language.

So, Mr. Chairman, it is a good piece of legislation, a good amendment, and I hope we can pass it unanimously in the body.

Mr. WYDEN. Mr. Chairman, I yield 1 minute to the gentlewoman from Missouri [Ms. DANNER] who has also worked hard in this area.

Ms. DANNER. Mr. Chairman, I wish to engage the gentleman from Oregon [Mr. WYDEN] in a brief colloquy.

Mr. Chairman, I strongly support the gentleman's efforts, as well as those of the gentleman from California [Mr. COX], to address the problem of children having untraceable access through on-line computer services to inappropriate and obscene pornographic materials available on the Internet.

Telephone companies must inform us as to whom our long distance calls are made. I believe that if computer on-line services were to include itemized billing, it would be a practical solution which would inform parents as to what materials their children are accessing on the Internet.

It is my hope and understanding that we can work together in pursuing technology based solutions to the problems

we face in dealing with controlling the transfer of obscene materials in cyberspace.

Mr. WYDEN. Mr. Chairman, will the gentlewoman yield?

Ms. DANNER. I yield to the gentleman from Oregon.

Mr. WYDEN. Mr. Chairman, I thank my colleague for her comments, and we will certainly take this up with some of the private-sector firms that are working in this area.

Mr. COX of California. Mr. Chairman, I yield 1 minute to the gentleman from Washington [Mr. WHITE].

Mr. WHITE. Mr. Chairman, I would like to point out to the House that, as my colleagues know, this is a very important issue for me, not only because of our district, but because I have got four small children at home. I got them from age 3 to 11, and I can tell my colleagues I get E-mails on a regular basis from my 11-year-old, and my 9-year-old spends a lot of time surfing the Internet on America Online. This is an important issue to me. I want to be sure we can protect them from the wrong influences on the Internet.

But I have got to tell my colleagues, Mr. Chairman, the last person I want making that decision is the Federal Government. In my district right now there are people developing technology that will allow a parent to sit down and program the Internet to provide just the kind of materials that they want their child to see. That is where this responsibility should be, in the hands of the parent.

That is why I was proud to cosponsor this bill, that is what this bill does, and I urge my colleagues to pass it.

Mr. WYDEN. Mr. Chairman, I yield 1 minute to the gentlewoman from California [Ms. LOFGREN].

Ms. LOFGREN. Mr. Chairman, I will bet that there are not very many parts of the country where Senator EXON's amendment has been on the front page of the newspaper practically every day, but that is the case in Silicon Valley. I think that is because so many of us got on the Internet early and really understand the technology, and I surf the Net with my 10-year-old and 13-year-old, and I am also concerned about pornography. In fact, earlier this year I offered a life sentence for the creators of child pornography, but Senator EXON's approach is not the right way. Really it is like saying that the mailman is going to be liable when he delivers a plain brown envelope for what is inside it. It will not work. It is a misunderstanding of the technology. The private sector is out giving parents the tools that they have. I am so excited that there is more coming on. I very much endorse the Cox-Wyden amendment, and I would urge its approval so that we preserve the first amendment and open systems on the Net.

Mr. WYDEN. Mr. Chairman, I yield 1 minute to the gentleman from Virginia [Mr. GOODLATTE].

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

Mr. GOODLATTE. Mr. Chairman, I thank the gentleman from Oregon [Mr. WYDEN] for yielding this time to me, and I rise in strong support of the Cox-Wyden amendment. This will help to solve a very serious problem as we enter into the Internet age. We have the opportunity for every household in America, every family in America, soon to be able to have access to places like the Library of Congress, to have access to other major libraries of the world, universities, major publishers of information, news sources. There is no way that any of those entities, like Prodigy, can take the responsibility to edit out information that is going to be coming in to them from all manner of sources onto their bulletin board. We are talking about something that is far larger than our daily newspaper. We are talking about something that is going to be thousands of pages of information every day, and to have that imposition imposed on them is wrong. This will cure that problem, and I urge the Members to support the amendment.

□ 1030

Mr. WYDEN. Mr. Chairman, I yield 1 minute to the gentleman from Massachusetts [Mr. MARKEY], the ranking member of the subcommittee.

Mr. MARKEY. Mr. Chairman, I want to congratulate the gentleman from Oregon and the gentleman from California for their amendment. It is a significant improvement over the approach of the Senator from Nebraska, Senator EXON.

This deals with the reality that the Internet is international, it is computer-based, it has a completely different history and future than anything that we have known thus far, and I support the language. It deals with the content concerns which the gentlemen from Oregon and California have raised.

Mr. Chairman, the only reservation which I would have is that they add in not only content but also any other type of registration. I think in an era of convergence of technologies where telephone and cable may converge with the Internet at some point and some ways it is important for us to ensure that we will have an opportunity down the line to look at those issues, and my hope is that in the conference committee we will be able to sort those out.

Mr. WYDEN. Mr. Chairman, I yield 30 seconds to the gentleman from Texas [Mr. FIELDS].

Mr. FIELDS of Texas. Mr. Chairman, I just want to take the time to thank him and also the gentleman from California for this fine work. This is a very sensitive area, very complex area, but it is a very important area for the American public, and I just wanted to congratulate him and the gentleman from California on how they worked together in a bipartisan fashion.

Mr. WYDEN. Mr. Chairman, I yield myself such time as I may consume. I thank the gentleman for his kindness.

Mr. Chairman, in conclusion, let me say that the reason that this approach rather than the Senate approach is important is our plan allows us to help American families today.

Under our approach and the speed at which these technologies are advancing, the marketplace is going to give parents the tools they need while the Federal Communications Commission is out there cranking out rules about proposed rulemaking programs. Their approach is going to set back the effort to help our families. Our approach allows us to help American families today.

Mr. COX of California. Mr. Chairman, I yield myself such time as I may consume.

Mr. Chairman, I would just like to respond briefly to the important point in this bill that prohibits the FCC from regulating the Internet. Price regulation is at one with usage of the Internet.

We want to make sure that the complicated way that the Internet sends a document to your computer, splitting it up into packets, sending it through myriad computers around the world before it reaches your desk is eventually grasped by technology so that we can price it, and we can price ration usage on the Internet so more and more people can use it without overcrowding it.

If we regulate the Internet at the FCC, that will freeze or at least slow down technology. It will threaten the future of the Internet. That is why it is so important that we not have a Federal computer commission do that.

Mr. GOODLATTE. Mr. Chairman, Congress has a responsibility to help encourage the private sector to protect our children from being exposed to obscene and indecent material on the Internet. Most parents aren't around all day to monitor what their kids are pulling up on the net, and in fact, parents have a hard time keeping up with their kids' abilities to surf cyberspace. Parents need some help and the Cox-Wyden amendment provides it.

The Cox-Wyden amendment is a thoughtful approach to keep smut off the net without government censorship.

We have been told it is technologically impossible for interactive service providers to guarantee that no subscriber posts indecent material on their bulletin board services. But that doesn't mean that providers should not be given incentives to police the use of their systems. And software and other measures are available to help screen out this material.

Currently, however, there is a tremendous disincentive for online service providers to create family friendly services by detecting and removing objectionable content. These providers face the risk of increased liability where they take reasonable steps to police their systems. A New York judge recently sent the online services the message to stop policing by ruling that Prodigy was subject to a $200 million libel suit simply because it did exercise some control over profanity and indecent material.

The Cox-Wyden amendment removes the liability of providers such as Prodigy who currently make a good faith effort to edit the smut

from their systems. It also encourages the online services industry to develop new technology, such as blocking software, to empower parents to monitor and control the information their kids can access. And, it is important to note that under this amendment existing laws prohibiting the transmission of child pornography and obscenity will continue to be enforced.

The Cox-Wyden amendment empowers parents without Federal regulation. It allows parents to make the important decisions with regard to what their children can access, not the government. It doesn't violate free speech or the right of adults to communicate with each other. That's the right approach and I urge my colleagues to support this amendment.

The Chairman. All time on this amendment has expired.

The question is on the amendment offered by the gentleman from California [Mr. COX].

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

Mr. COX of California. Mr. Chairman, I demand a recorded vote.

The CHAIRMAN. Pursuant to the rule, further proceedings on the amendment offered by the gentleman from California [Mr. COX] will be postponed until after the vote on amendment 2–4 to be offered by the gentleman from Massachusetts [Mr. MARKEY].

It is now in order to consider amendment No. 2–4 printed in part 2 of House Report 104–223.

AMENDMENT NO. 2–4 OFFERED BY MR. MARKEY

Mr. MARKEY. Mr. Chairman, I offer an amendment, numbered 2–4.

The CHAIRMAN. The Clerk will designate the amendment.

The text of the amendment is as follows:

Amendment offered by Mr. MARKEY of Massachusetts: page 126, after line 16, insert the following new subsection (and redesignate the succeeding subsections and accordingly):

(f) STANDARD FOR UNREASONABLE RATES FOR CABLE PROGRAMMING SERVICES.—Section 623(c)(2) of the Act (47 U.S.C. 543(c)) is amended to read as follows:

''(2) STANDARD FOR UNREASONABLE RATES.—The Commission may only consider a rate for cable programming services to be unreasonable if such rate has increased since June 1, 1995, determined on a per-channel basis, by a percentage that exceeds the percentage increase in the Consumer Price Index for All Urban Consumers (as determined by the Department of Labor) since such date.''.

Page 127, line 4, strike ''or 5 percent'' and all that follows through ''greater,'' on line 6.

Page 129, strike lines 16 through 21 and insert the following:

''(d) UNIFORM RATE STRUCTURE.—A cable operator shall have a uniform rate structure throughout its franchise area for the provision of cable services.''.

Page 130, line 16, insert ''and'' after the semicolon, and strike line 20 and all that follows through line 2 on page 131 and insert the following:

''directly to subscribers in the franchise area and such franchise area is also served by an unaffiliated cable system.''.

Page 131, strike line 6 and all that follows through line 21, and insert the following:

''(m) SMALL CABLE SYSTEMS.—

''(1) SMALL CABLE SYSTEM RELIEF.—A small cable system shall not be subject to subsections (a), (b), (c), or (d) in any franchise area with respect to the provision of cable programming services, or a basic service tier where such tier was the only tier offered in such area on December 31, 1994.

''(2) DEFINITION OF SMALL CABLE SYSTEM.—For purposes of this subsection, 'small cable system' means a cable system that—

''(A) directly or through an affiliate, serves in the aggregate fewer than 250,000 cable subscribers in the United States; and

''(B) directly serves fewer than 10,000 cable subscribers in its franchise area.''.

The CHAIRMAN. Pursuant to the rule, the gentleman from Massachusetts [Mr. MARKEY] will be recognized for 15 minutes, and a Member opposed will be recognized for 15 minutes.

Does the gentleman from Virginia [Mr. BLILEY] seek the time in opposition?

Mr. BLILEY. Mr. Chairman, I do.

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

The Chair recognizes the gentleman from Massachusetts [Mr. MARKEY].

Mr. MARKEY. Mr. Chairman, I yield myself at this point 3 minutes.

Mr. Chairman, the consumers of America should be placed upon red alert. We now reach an issue which I think every person in America can understand who has even held a remote control clicker in their hands.

The bill that we are now considering deregulates all cable rates over the next 15 months. But for rural America, rural America, the 30 percent of America that considers itself to the rural, their rates are deregulated upon enactment of this bill.

Now, the proponents are going to tell you, do not worry, there is going to be plenty of competition in cable. That will keep rates down. For those of you in rural America, ask yourself this question: In two months do you think there will be a second cable company in your town? Because if there is not a second cable company in your town, your rates are going up because your cable company, as a monopoly, will be able to go back to the same practices which they engaged in up to 1992 when finally we began to put controls on this rapid increase two and three and four times the rate of inflation of cable rates across this country.

The gentleman from Connecticut [Mr. SHAYS] and I have an amendment that is being considered right now on the floor of Congress which will give you your one shot at protecting our cable ratepayers against rate shock this year and next across this country, whether you be rural or urban or suburban.

We received a missive today from the Governor of New Jersey, Christine Whitman. She wants an aye vote on the Markey-Shays bill. Christine Whitman. She does not want her cable rates to go up because she knows, and she says it right here, there is no competition on the horizon for most of America.

So this amendment is the most important consumer protection vote which you will be taking in this bill and one of the two or three most important this year in the U.S. Congress.

Make no mistake about it. There will be no competition for most of America. There will be no control on rates going up, and you will have to explain why, as part of a telecommunications bill that was supposed to reduce rates, you allowed for monopolies, monopolies in 97 percent of the communities in America to once again go back to their old practices.

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

The Markey amendment, Mr. Chairman, tracks the disastrous course of the 1992 cable law by requiring the cable companies to jump through regulatory hoops to escape the burdensome rules imposed on them after the law was enacted.

The Markey amendment fails to take into account the changing competitive video marketplace that has evolved in the last 2 years. Direct broadcast satellite has taken off, particularly in rural areas, and there will be nearly 5-million subscribers by the end of the year. With the equipment costs now being folded into the monthly charge for this service, this competitive technology will explode in the next few years.

The telephone industry will be permitted to offer cable on the date of enactment and will provide formidable competition immediately. There are numerous market and technical trials going on now to ramp up to that competition.

The Markey amendment turns back the clock. It seeks to continue the government regulation and micromanagement that has unfairly burdened the industry over the past several years.

Vote ''no'' on Markey and duplicate the Senate, they overwhelmingly voted it down over there.

Mr. MARKEY. Mr. Chairman, I yield 1 minute to the gentleman from Tennessee [Mr. CLEMENT].

Mr. CLEMENT. Mr. Chairman, it's Christmas in August in Washington. On the surface, the Communications Act of 1995 looks like a Christmas gift to the people and the communications industries. You've heard the buzz words: competition, lower rates, and more choices. But a closer look reveals another story.

While the cable provisions in the bill will give a sweet gift to the cable industry, the American consumer, and especially those in rural America, will wake up on Christmas morning to nothing more than less competition, higher cable rates, and less choice.

The bill as it stands immediately deregulates rate controls on small cable systems—those which serve an average of almost 30 percent of cable subscribers in America and account for at least 70 percent of all cable systems. This bill discourages competition in these markets because it deregulates these cable companies regardless of

APPENDIX D

104TH CONGRESS
2d Session
HOUSE OF REPRESENTATIVES
REPORT
104–458

TELECOMMUNICATIONS ACT OF 1996

JANUARY 31, 1996. Ordered to be printed

Mr. BLILEY, from the committee of conference, submitted the following

CONFERENCE REPORT

[To accompany S. 652]

The committee of conference on the disagreeing votes of the two Houses on the amendments of the House to the bill (S. 652), to provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition, and for other purposes, having met, after full and free conference, have agreed to recommend and do recommend to their respective Houses as follows:

That the Senate recede from its disagreement to the amendment of the House to the text of the bill and agree to the same with an amendment as follows:

In lieu of the matter proposed to be inserted by the House amendment, insert the following:

SECTION 1. SHORT TITLE; REFERENCES.

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

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

SEC. 2. TABLE OF CONTENTS.

The table of contents for this Act is as follows:

House amendment

Section 104 of the House amendment protects from civil liability those providers and users of interactive computer services for actions to restrict or to enable restriction of access to objectionable online material.

Conference agreement

The conference agreement adopts the House provision with minor modifications as a new section 230 of the Communications Act. This section provides "Good Samaritan" protections from civil liability for providers or users of an interactive computer service for actions to restrict or to enable restriction of access to objectionable online material. One of the specific purposes of this section is to overrule *Stratton-Oakmont* v. *Prodigy* and any other similar decisions which have treated such providers and users as publishers or speakers of content that is not their own because they have restricted access to objectionable material. The conferees believe that such decisions create serious obstacles to the important federal policy of empowering parents to determine the content of communications their children receive through interactive computer services.

These protections apply to all interactive computer services, as defined in new subsection 230(e)(2), including non-subscriber systems such as those operated by many businesses for employee use. They also apply to all access software providers, as defined in new section 230(e)(5), including providers of proxy server software.

The conferees do not intend, however, that these protections from civil liability apply to so-called "cancelbotting," in which recipients of a message respond by deleting the message from the computer systems of others without the consent of the originator or without having the right to do so.

SUBTITLE B—VIOLENCE

SECTION 551—PARENTAL CHOICE IN TELEVISION PROGRAMMING

Senate bill

Sections 501–505 of Senate bill gives the industry one year to voluntarily develop a ratings system for TV programs. If the industry fails to do so, a Federal TV Ratings Commission would set the ratings. The Commission would be appointed by the President, subject to confirmation by the Senate and would establish rules for rating the level of violence and other objectionable content in programs. The Board would also establish rules for TV broadcasters and cable systems to transmit the ratings to viewers. The Commission would be authorized funds necessary to carry out its duties. The Senate bill requires TV manufacturers to equip all 13 inch or greater TV sets with circuitry to block rated shows.

House amendment

Section 305 of the House amendment gives the cable and broadcast industries one year to develop voluntary ratings for video programming containing violence, sex and other indecent materials and to agree voluntarily to broadcast signals containing such ratings. If the industry fails to come up with an acceptance plan, the

LARRY PRESSLER,
TED STEVENS,
SLADE GORTON,
TRENT LOTT,
FRITZ HOLLINGS,
DANIEL K. INOUYE,
WENDELL FORD,
J.J. EXON,
JAY ROCKEFELLER,
Managers on the Part of the Senate.

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APPENDIX E

115TH CONGRESS
2d Session
HOUSE OF REPRESENTATIVES
REPT. 115–572
Part 1

ALLOW STATES AND VICTIMS TO FIGHT ONLINE SEX TRAFFICKING ACT OF 2017

FEBRUARY 20, 2018.—Committed to the Whole House on the State of the Union and ordered to be printed

Mr. GOODLATTE, from the Committee on the Judiciary, submitted the following

R E P O R T

[To accompany H.R. 1865]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 1865) to amend the Communications Act of 1934 to clarify that section 230 of such Act does not prohibit the enforcement against providers and users of interactive computer services of Federal and State criminal and civil law relating to sexual exploitation of children or sex trafficking, and for other purposes, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

CONTENTS

The Amendment

The amendment is as follows:

Strike all that follows after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

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

SEC. 2. SENSE OF CONGRESS.

It is the sense of Congress that—

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

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

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

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

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

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

"(a) IN GENERAL.—Whoever uses or operates a facility or means of interstate or foreign commerce or attempts to do so with the intent to promote or facilitate the prostitution of another person shall be fined under this title, imprisoned for not more than 10 years, or both.

"(b) AGGRAVATED VIOLATION.—Whoever uses or operates a facility or means of interstate or foreign commerce with the intent to promote or facilitate the prostitution of another person and—

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

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

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

"(c) CIVIL RECOVERY.—Any person injured by reason of a violation of section 2421A(b) may recover damages and reasonable attorneys' fees in an action before any appropriate United States district court. Consistent with section 230 of the Communications Act of 1934 (47 U.S.C. 230), a defendant may be held liable, under this subsection, where promotion or facilitation of prostitution activity includes responsibility for the creation or development of all or part of the information or content provided through any interactive computer service.

"(d) MANDATORY RESTITUTION.—Notwithstanding sections 3663 or 3663A and in addition to any other civil or criminal penalties authorized by law, the court shall order restitution for any offense under this section.

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

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

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

SEC. 4. COMMUNICATIONS DECENCY ACT.

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

"(5) NO EFFECT ON STATE LAWS CONFORMING TO 18 U.S.C. 1591(A) OR 2421A.—Nothing in this section shall be construed to impair or limit any charge in a criminal prosecution brought under State law—

"(A) if the conduct underlying the charge constitutes a violation of section 2421A of title 18, United States Code, and promotion or facilitation of prostitution is illegal in the jurisdiction where the defendant's promotion or facilitation of prostitution was targeted; or

"(B) if the conduct underlying the charge constitutes a violation of section 1591(a) of title 18, United States Code.".

SEC. 5. SAVINGS CLAUSE.

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

Purpose and Summary

H.R. 1865, the Allow States and Victims to Fight Online Sex Trafficking Act of 2017, is designed to combat online sex trafficking by providing new tools to law enforcement through a new federal criminal statute and by making it easier for states to prosecute criminal actor websites by amending section 230 of the Communications Decency Act, 47 U.S.C. § 230.

Background and Need for the Legislation

Since the expansion of the Internet, a number of classified advertising websites have developed and are now a popular and widely-used alternative to traditional print advertising in newspapers. Sites like Craigslist, Backpage.com, and eBay Classifieds provide users with a forum for buying and selling goods and services to a broader audience on the web. These websites group advertisements by location and category, similar to print advertisements. The use of these websites has grown exponentially as Internet use increases. Unfortunately these websites, including online classified sites like Backpage.com, Eros, Massage Troll, and cityxguide, have also become one of the primary channels of sex trafficking. This is in part due to technological advances on the Internet that make information easily accessible and provide a forum for anonymity, which allows traffickers to post advertisements of minors for a world of customers to see with ease and security. Some websites have gone beyond merely hosting advertisements, however, and have purposely created platforms designed to facilitate prostitution and sex trafficking.

Because of protections provided to "interactive computer services" by the Communications Decency Act (CDA), 47 U.S.C. § 230, it has been challenging to hold bad-actor websites accountable criminally (at the state level) and civilly. Congress passed the CDA in 1996, in an attempt to "remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material."[1] At the same time, Congress sought to "promote the continued development of the Internet and other interactive computer services and other interactive media."[2]

The CDA provides broad immunity for interactive computer services and states that no "provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."[3] An interactive computer service is "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service

[1] 47 U.S.C. § 230(b)(4).
[2] 47 U.S.C. § 230(b)(1).
[3] 47 U.S.C. § 230(c)(1).

or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions."[4] An information content provider is "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service."[5] Courts construing § 230(c)(1) frequently have employed a three-prong test that asks whether: (1) the online entity uses or provides an interactive computer service; (2) the entity is an information content provider with respect to the disputed activity or objectionable content; and (3) whether the plaintiff seeks to treat it as the "publisher or speaker" of information originating with a third party.[6] It has been uniformly held that Internet service providers are "interactive computer service" providers.[7] Courts have concluded that a Web site operator, search engine, or other entity was or was not a provider of an "interactive computer service" depending on whether there was a sufficient indication before the court that it "provided or enabled computer access by multiple users to a computer server" within the meaning of the definition found at § 230(f)(2).

The CDA further provides that:

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

47 U.S.C. § 230(e)(3). It thus places limits on when states may enforce both criminal and civil laws. It only allows state laws to be enforced in cases in which they are deemed "consistent" with the CDA.

With respect to combatting websites promoting prostitution and facilitating sex trafficking, § 230 has complicated enforcement. In civil litigation, bad-actor websites have been able to successfully invoke this immunity provision despite engaging in actions that go far beyond publisher functions. In 2014, three minor Jane Does filed a civil suit in the U.S. District Court in Massachusetts under the Trafficking Victims Protection Reauthorization Act, alleging that that Backpage's platform, categories, and filters "assist[ed] in the crafting, placement, and promotion of illegal advertisements offering plaintiffs for sale." The District Court dismissed their Complaint, holding that § 230 of the CDA barred the lawsuit. The Second Circuit affirmed, concluding that although the plaintiffs "ha[d] made a persuasive case" that "Backpage has tailored its website to make sex trafficking easier," it nevertheless upheld the dismissal of the suit under § 230 on the grounds that it had not gone beyond being a publisher. Notably, the plaintiffs in this case chose only to argue Backpage was not a publisher; they did not argue that Backpage was an information content provider and would therefore not be entitled to immunity.

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[4] 47 U.S.C. § 230(f)(2).
[5] 47 U.S.C. § 230(f)(3).
[6] *See* Ken S. Myers, *Wikimmunity: Fitting the Communications Decency Act to Wikipedia,* 20 Harvard Journal of Law & Technology 163 (2006).
[7] Noah v. AOL Time Warner, Inc., 261 F. Supp. 2d 532 (E.D. Va. 2003), *summarily aff'd,* 2004 WL 602711 (4th Cir. 2004).

Subsequently, the Senate Permanent Subcommittee on Investigations launched a 20-month investigation into Backpage. It found that Backpage had knowingly concealed evidence of criminality by systematically editing its "Adult" ads—that is, Backpage knew it facilitated prostitution and child sex trafficking—and that it had been sold to its CEO Carl Ferrer through foreign shell companies. Backpage would automatically delete incriminating words, such as "amber alert," from sex ads prior to publication, moderators then manually deleted incriminating language that filters missed, and the website coached its users on how to post "clean" ads to cover illegal transactions. Further, in July 2017, the *Washington Post* published a story revealing that a contractor for Backpage had been aggressively soliciting and creating sex-related ads, despite Backpage's repeated insistence that it had no role in the content of ads posted on its site. In sum, Backpage had engaged in a ruse, holding itself out to be a mere conduit, but in fact actively engaged in content creation and purposely concealing illegality in order to profit off of advertisements. There had been no criminal investigation up until the Senate investigation to uncover exactly what Backpage was doing, which is what this bill aims to remedy.

Further, courts have blocked states from enforcing state criminal laws on the grounds that the state laws were not consistent with the CDA. Backpage successfully invoked § 230 in federal-preemption challenges to state criminal laws in Washington, Tennessee, and New Jersey criminalizing the advertisement of minors for sex. A California state court also denied the government from proceeding against Backpage on pimping charges because it deemed the California statue "inconsistent" with the CDA.

Importantly, current federal criminal law, which is unaffected by the CDA, presently lacks proper prosecutorial tools to combat these websites. Though under 18 U.S.C. § 1591, a website may be held criminally liable for knowingly advertising sex trafficking, this knowledge standard is difficult to prove beyond a reasonable doubt. This is so because online advertisements rarely, if ever, indicate that sex trafficking is involved. The advertisements neither directly nor implicitly state that force, fraud, or coercion was used against the victim, nor do they say that the person depicted being prostituted is actually under the age of 18. Because these indicia of knowledge of criminality are typically lacking in the advertisements, federal prosecutors usually cannot demonstrate beyond a reasonable doubt that the website operators knew that the advertisements involved sex trafficking. Further, general knowledge that sex trafficking occurs on a website will not suffice as the knowledge element must be proven as to a specific victim. Moreover, sex trafficking cases are often difficult to prosecute because the victims are often uncooperative due to the traumatic effects of having been trafficked, may have issues with illegal substances, and may sometimes appear unsympathetic to juries. A new statute that instead targets promotion and facilitation of prostitution is far more useful to prosecutors. Prostitution and sex trafficking are inextricably linked, and where prostitution is legalized or tolerated, there is a greater demand for human trafficking victims and nearly always an increase in the number of women and children trafficked into commercial sex slavery.

H.R. 1865 will allow vigorous criminal enforcement against all bad-actor websites, not just Backpage.com, through the creation of a new federal law and by explicitly permitting states to enforce criminal laws that mirror this new federal law and current federal sex trafficking law. With this robust criminal enforcement, victims will have more opportunities to obtain restitution. Furthermore, this enforcement will also provide victims with information that will be sufficient to establish successful civil pleadings, by revealing the extent of content development in which these websites engage.

Hearings

The Committee on the Judiciary held a hearing on the intersection between the Communications Decency Act and online sex trafficking, the subject matter of H.R. 1865, on October 3, 2017. Testimony was received from the Honorable Chris Cox, Outside Counsel, NetChoice; Mr. Jeff Kosseff, Assistant Professor, United States Naval Academy; Ms. Mary Leary, Professor of Law, Catholic University Columbus School of Law; and, Mr. Evan Engstrom, Executive Director, Engine.

Committee Consideration

On December 12, 2017, the Committee met in open session and ordered the bill (H.R. 1865) favorably reported by voice vote, a quorum being present.

Committee Votes

In compliance with clause 3(b) of rule XIII of the Rules of the House of Representatives, the Committee advises that there were no recorded votes during the Committee's consideration of H.R. 1865.

Committee Oversight Findings

In compliance with clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee advises that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

New Budget Authority and Tax Expenditures

Clause 3(c)(2) of rule XIII of the Rules of the House of Representatives is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

Congressional Budget Office Cost Estimate

In compliance with clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, the Committee sets forth, with respect to the bill, H.R. 2228, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, February 7, 2018.

Hon. BOB GOODLATTE, CHAIRMAN,
Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 1865, the Allow States and Victims to Fight Online Sex Trafficking Act of 2017.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Mark Grabowicz, who can be reached at 226–2860.

Sincerely,

KEITH HALL.

Enclosure.

cc: Honorable Jerrold Nadler
Ranking Member

H.R. 1865—Allow States and Victims to Fight Online Sex Trafficking Act of 2017

As ordered reported by the House Committee on the Judiciary on December 12, 2017

H.R. 1865 would broaden the coverage of current laws against sex trafficking. As a result, the government might be able to pursue cases that it otherwise would not be able to prosecute. CBO expects that the bill would apply to a relatively small number of offenders, however, so any increase in costs for law enforcement, court proceedings, or prison operations would not be significant. Any such spending would be subject to the availability of appropriated funds.

Because those prosecuted and convicted under H.R. 1865 could be subject to criminal fines, the federal government might collect additional fines under the bill. Criminal fines are recorded as revenues, deposited in the Crime Victims Fund, and later spent without further appropriation action. CBO expects that any additional revenues and associated direct spending would not be significant because the bill would probably affect only a small number of cases.

Because enacting H.R. 1865 would affect direct spending and revenues, pay-as-you-go procedures apply. However, CBO estimates that any such effects would be insignificant in any year.

CBO estimates that enacting H.R. 1865 would not increase net direct spending or on-budget deficits in any of the four consecutive 10-year periods beginning in 2028.

H.R. 1865 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act.

On January 10, 2018, CBO transmitted a cost estimate for S. 1693, the Stop Enabling Sex Traffickers Act of 2017, as ordered reported by the Senate Committee on Commerce, Science, and Transportation on November 8, 2017. CBO's estimates of the budgetary effects of the two bills are identical.

The CBO staff contact for this estimate is Mark Grabowicz. The estimate was approved by H. Samuel Papenfuss, Deputy Assistant Director for Budget Analysis.

Duplication of Federal Programs

No provision of H.R. 1865 establishes or reauthorizes a program of the Federal government known to be duplicative of another Federal program, a program that was included in any report from the Government Accountability Office to Congress pursuant to section 21 of Public Law 111–139, or a program related to a program identified in the most recent Catalog of Federal Domestic Assistance.

Disclosure of Directed Rule Makings

The Committee finds that H.R. 1865 contains no directed rule making within the meaning of 5 U.S.C. § 551.

Performance Goals and Objectives

The Committee states that pursuant to clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, H.R. 1865 combats online sex trafficking by providing new tools to law enforcement through a new federal criminal statute and by making it easier for states to prosecute criminal actor websites by amending section 230 of the Communications Decency Act.

Advisory on Earmarks

In accordance with clause 9 of rule XXI of the Rules of the House of Representatives, H.R. 1865 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9(e), 9(f), or 9(g) of Rule XXI.

Section-by-Section Analysis

Section 1. Short title. Section 1 sets forth the short title of the bill as the "Allow States and Victims to Fight Online Sex Trafficking Act of 2017."

Sec. 2. Section 2 states that it is the sense of Congress that:

(1) Section 230 of the Communications Act of 1934 was never intended to provide legal protection to websites that unlawfully promote and facilitate prostitution and websites that facilitate traffickers in advertising the sale of unlawful sex acts with sex trafficking victims;

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

(3) Clarification is warranted to ensure Section 230 does not provide liability protection to such websites described in (2)

Sec. 3. Promotion of Prostitution and Reckless Disregard of Sex Trafficking

Adds a new statute within the Mann Act, 18 U.S.C. § 2421A, to create a statutory maximum of 10 years imprisonment for the use or operation of an interstate facility with the intent to promote or facilitate the prostitution of another person. This promotion or facilitation must be deliberate; thus, the operator of a facility or

means of interstate or foreign commerce shall not be deemed to have the "intent to promote or facilitate the unlawful prostitution of another person," as that phrase is used in sections 2421A(a) and 2421A(b), based on the appearance of material promoting unlawful prostitution of another person, where the material appears despite the operator's good faith efforts to moderate, remove, or restrict such material from appearing on or through the facility.

Creates as an aggravating factor: (1) the intent to promote or facilitate the trafficking of five or more persons; or (2) acting in reckless disregard of the fact that the conduct of using or operating a commercial facility contributed to sex trafficking (a violation of 18 U.S.C. § 1591(a)).

- These aggravating circumstances carry a fine and/or statutory maximum sentence of 25 years imprisonment. A website that promotes or facilitates prostitution will be liable under subsection (b)(2) where it operates in reckless disregard of the fact that its promotion or facilitation of prostitution is a factor, even if not the primary cause, that plays a part in producing sex trafficking.
- Creates a civil recovery mechanism by which injured persons may recover damages if they were a victim of a violation of subsection (b)(2).
- Provides for mandatory restitution for an offense under this section.
- States that it is an affirmative defense to a prosecution under subsection (a) and (b)(1) for the defendant to prove, by a preponderance of the evidence, that the promotion or facilitation of prostitution is legal in the jurisdiction where the promotion or facilitation was targeted. Many websites promoting prostitution are targeted to specific geographic areas, though the website itself may be accessible nationwide. Mere accessibility to a website with targeted advertisements from another locality where promotion or facilitation of prostitution is illegal, alone, will not undermine a defendant's successfully established affirmative defense.

Sec. 4. Communications Decency Act

Amends § 230(e) of the Communications Decency Act (47 U.S.C. § 230(3)) to allow states to enforce certain criminal laws without litigating the application of § 230. States that nothing in this section shall be construed to impair or limit any charge in a criminal prosecution brought under state law if:

(1) The conduct underlying the charge violates 18 U.S.C. § 2421A and prostitution is illegal where the defendant's promotion or facilitation of prostitution was targeted; or

(2) The conduct underlying the charge violates 18 U.S.C. § 1591(a).

Under § 230, a state criminal law may be enforced against an interactive computer service (i.e., a website) as long as it is "consistent" with § 230. This provision, however, has been problematic in cases in which states have sought to enforce certain state criminal laws against websites. While the newly created law, and the federal sex trafficking law, should both be considered consistent with § 230, as applied to certain bad-actor websites, in order to allow immediate and unfettered use of this provision, included is an explicit carve out to permit state criminal prosecutions. The lan-

guage used in the carve out is designed to ensure that interactive computer services are subject to one set of criminal laws, rather than a patchwork of various state laws. In order to qualify for this carve out, a state law's elements should mirror those in 2421A and 1591(a).

Sec. 5. Savings Clause

Clarifies that nothing in this Act shall be construed to limit or preempt any civil action or criminal prosecution under federal or state law that was not limited or preempted by § 230 of the Communications Decency Act.

Changes in Existing Law Made by the Bill, as Reported

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, and existing law in which no change is proposed is shown in roman):

TITLE 18, UNITED STATES CODE

* * * * * * *

PART I—CRIMES

* * * * * * *

CHAPTER 117—TRANSPORTATION FOR ILLEGAL SEXUAL ACTIVITY AND RELATED CRIMES

* * * * * * *

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

(a) IN GENERAL.—Whoever uses or operates a facility or means of interstate or foreign commerce or attempts to do so with the intent to promote or facilitate the prostitution of another person shall be fined under this title, imprisoned for not more than 10 years, or both.

(b) AGGRAVATED VIOLATION.—Whoever uses or operates a facility or means of interstate or foreign commerce with the intent to promote or facilitate the prostitution of another person and—

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

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

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

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

Consistent with section 230 of the Communications Act of 1934 (47 U.S.C. 230), a defendant may be held liable, under this subsection, where promotion or facilitation of prostitution activity includes responsibility for the creation or development of all or part of the information or content provided through any interactive computer service.

(d) MANDATORY RESTITUTION.—Notwithstanding sections 3663 or 3663A and in addition to any other civil or criminal penalties authorized by law, the court shall order restitution for any offense under this section.

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

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COMMUNICATIONS ACT OF 1934

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TITLE II—COMMON CARRIERS

PART I—COMMON CARRIER REGULATION

* * * * * * *

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(e) EFFECT ON OTHER LAWS.—

(1) NO EFFECT ON CRIMINAL LAW.—Nothing in this section shall be construed to impair the enforcement of section 223 or 231 of this Act, chapter 71 (relating to obscenity) or 110 (relating to sexual exploitation of children) of title 18, United States Code, or any other Federal criminal statute.

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

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

(4) NO EFFECT ON COMMUNICATIONS PRIVACY LAW.—Nothing in this section shall be construed to limit the application of the

Electronic Communications Privacy Act of 1986 or any of the amendments made by such Act, or any similar State law.

(5) NO EFFECT ON STATE LAWS CONFORMING TO 18 U.S.C. 1591(A) OR 2421A.—Nothing in this section shall be construed to impair or limit any charge in a criminal prosecution brought under State law—

(A) if the conduct underlying the charge constitutes a violation of section 2421A of title 18, United States Code, and promotion or facilitation of prostitution is illegal in the jurisdiction where the defendant's promotion or facilitation of prostitution was targeted; or

(B) if the conduct underlying the charge constitutes a violation of section 1591(a) of title 18, United States Code.

(f) DEFINITIONS.—As used in this section:

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

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

(3) INFORMATION CONTENT PROVIDER.—The term "information content provider" means any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.

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

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

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

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

* * * * * * *

APPENDIX F

H.C.R. No. 35

HOUSE CONCURRENT RESOLUTION

WHEREAS, Human trafficking is a serious and escalating public health issue in the United States, particularly in Texas; and

WHEREAS, It is estimated that there are more than 300,000 victims of human trafficking in the State of Texas, and nearly 80,000 of those are identified as minors; and

WHEREAS, The number of cases reported rose 82 percent from 2015 to 2017, giving Texas the second-highest number of human trafficking reports in the country, with explosive growth occurring across all segments of our society in every ethnicity, gender, and age, regardless of immigration, socioeconomic, or family status; and

WHEREAS, Victims of human trafficking experience a severe and complex trauma that is recognized by the medical community as one of the most challenging to effectively treat; it requires long-term counseling, therapy, and often inpatient treatment, which is complicated by the fact that relatively few facilities in Texas are trained in trauma-informed care; and

WHEREAS, The health problems engendered by human trafficking are a crisis that impacts a substantial number of Texans in communities across the state; sexual exploitation of women and children account for 84 percent of cases and cost the state an estimated $6.6 billion in additional physical and mental health care and social services; this also creates additional strain on our health care and law enforcement systems; and

WHEREAS, Gangs and cartels have combined drug and human trafficking operations to become a primary controlling influence in both, with the traffickers involved proving to be some of the most dangerous and violent criminals to whom thousands more innocent victims fall prey each year; and

WHEREAS, All forms of human trafficking are criminal acts, and it is imperative that this issue be appropriately addressed so that we may bring an end to this atrocious crime and help survivors to move forward with their lives; now, therefore, be it

RESOLVED, That the 86th Legislature of the State of Texas hereby recognize human trafficking as a public health issue.

Miller
Shaheen
Anderson

President of the Senate

Speaker of the House

I certify that H.C.R. No. 35 was adopted by the House on April 26, 2019, by the following vote: Yeas 139, Nays 0, 2 present, not voting.

Chief Clerk of the House

I certify that H.C.R. No. 35 was adopted by the Senate on May 21, 2019, by the following vote: Yeas 31, Nays 0.

Secretary of the Senate

APPROVED: _____

Date

_____

Governor

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Associated Case Party: Facebook, Inc.

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