

**ONLINE SEX TRAFFICKING AND THE
COMMUNICATIONS DECENCY ACT**

HEARING
BEFORE THE
SUBCOMMITTEE ON CRIME, TERRORISM,
HOMELAND SECURITY, AND INVESTIGATIONS
OF THE
COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES
ONE HUNDRED FIFTEENTH CONGRESS
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ONLINE SEX TRAFFICKING AND THE COMMUNICATIONS DECENCY ACT

TUESDAY, OCTOBER 3, 2017

HOUSE OF REPRESENTATIVES
SUBCOMMITTEE ON CRIME, TERRORISM, HOMELAND SECURITY,
AND INVESTIGATIONS
COMMITTEE ON THE JUDICIARY
Washington, DC.

The subcommittee met, pursuant to call, at 10:04 a.m., in Room 2141, Rayburn House Office Building, Hon. Steve Chabot presiding.

Present: Representatives Chabot, Poe, Roby, Johnson of Louisiana, Rutherford, Jackson Lee, Conyers, Deutch, Bass, Jeffries, Lieu, and Raskin.

Staff Present: Margaret Barr, Counsel; Scott Johnson, Professional Staff Member; Mauri Gray, Minority Detailee to the Subcommittee on Crime, Terrorism, Homeland Security, and Investigations; Joe Graupensperger, Minority Chief Counsel, Subcommittee on Crime, Terrorism, Homeland Security, and Investigations; Monalisa Dugue, Minority Deputy Chief Counsel, Subcommittee on Crime, Terrorism, Homeland Security, and Investigations; and Veronica Eligan, Minority Professional Staff Member.

Mr. CHABOT. Good morning. The Subcommittee on Crime, Terrorism, Homeland Security, and Investigations will come to order.

I'm, by the way, not Congressman Sensenbrenner. I'm Steve Chabot. Mr. Sensenbrenner was unable to be here with us this morning, so I'm filling in for at least the early part of this hearing, and then I have another obligation I have to meet.

And, without objection, the chair is authorized to declare recesses of the subcommittee at any time.

We welcome everyone to today's hearing on the "Online Sex Trafficking and the Communications Decency Act." And I now recognize myself for an opening statement.

The internet has been one of the greatest innovations in history. It has brought tremendous economic and social benefits to humankind. Nearly any transaction we once had to do in a brick-and-mortar setting we can now accomplish with a few clicks of a mouse in the comfort of our own homes. It is undeniable that for all of us it has made life easier.

Unfortunately, the internet has also become a stomping ground for criminals, who can use the anonymity of the web to mask their illicit activities and avoid detection by law enforcement. It has

made their lives easier as well. This is especially true in the realm of sex trafficking, one of the most horrific, insidious crimes you can imagine.

Thanks to a group of committed, passionate professionals and brave victims, the problem of sex trafficking on the internet is now receiving the attention it merits. We are all now well aware of the reprehensible and blatantly criminal conduct of the executives at Backpage.com. Because young victims have come forward to share their stories, we are aware of the harm caused by these types of websites, which are not only a venue for sex traffickers to sell young women but also materially contribute to this illicit conduct.

Backpage.com's conduct also shed light on websites that are using the Communications Decency Act to shield themselves from liability for their illegal activities, something Congress never intended. Because of their aggressive litigation tactics, Congress must now revisit the Communications Decency Act to determine whether courts are interpreting the language of the statute as intended and whether amendments are necessary to hold accountable these websites that have allowed with impunity young people to be sold online.

That is why we are here today. Questions have emerged from cases at both the State and Federal level involving a variety of factual circumstances and varying interpretations by courts considering the breadth of the Communications Decency immunity provision. It appears Backpage.com was able to use the provision not only as a shield in avoiding civil liability but also as a sword in challenging State laws seeking to pass laws to stop Backpage from facilitating human trafficking.

Today, we welcome a panel that is well versed in the case law surrounding the interpretation of CDA 230 by both State and Federal courts. We look forward to hearing their thoughts on this subject and their ideas to ensure these websites are held accountable.

I would now like to yield to the ranking member for the purpose of her opening statement.

Ms. JACKSON LEE. Mr. Chairman, thank you so very much. And I am very grateful for the opportunity for this very important hearing with the very important guests that we have and wish to acknowledge the author of this legislation, Congresswoman Wagner.

Before I start with my brief statement, I would like to in this Judiciary Committee make mention of the tragedy and travesty and horror of terrorism, domestic terrorism, of the incident in Las Vegas and offer my prayers and my support for those wounded and my prayers for the families of those who have lost their lives and believe that this committee is one of the most important committees in the wheel of justice and would hope, before a short order, legislation of Mr. Thompson, Mr. King of New York will be put forward and that we recognize that weapons of war must be regulated. That is what we're here to talk about today, maybe in another forum. And so I am hoping that the consciousness of bipartisanship, the removal of one's clutch in the hands of special interests, that we may come together in order to save lives.

So I thank you, Mr. Chairman. As a senior member of the Judiciary Committee and a lifelong advocate of the First Amendment and a strong leader in the fight to eradicate the vile act of human traf-

ficking, I welcome this hearing to discuss this very important issue of “Online Sex Trafficking and the Communications Decency Act.”

This hearing extends far beyond any proposed legislation because we hope to address the pervasive physical and psychological damage of sex trafficking more broadly and how best to navigate the online space for accountability while ensuring that we do not employ—and undermine justice for all.

As a member of the Homeland Security Committee, I was the first member of that committee and maybe the first Member to hold a human trafficking hearing in her own district. Houston is the epicenter for sex trafficking, human trafficking in all forms. And we listened to those women who years ago were called prostitutes, who have been victims of sex trafficking and human trafficking. We did it in my home territory, and Members of Congress, both bipartisan, were there to hear and to discuss ways of moving forward.

Trafficking in persons is an inconceivable, callous, brutal crime that unquestionably deserves the Nation’s utmost attention. It is particularly difficult to see the victimization of the very young who are sold or tricked into becoming victims of human trafficking.

Sex trafficking, whether online or not, is an abhorrent and inhumane poison that has seeped its claws into the fabric of our society and one we must eradicate. It is a modern-day slavery that exists throughout the United States and globally, and I am committed to ensuring that vicious perpetrators are brought to justice.

I have spent a great deal of my time as ranking member of the Crime Subcommittee working and advocating on behalf of victims, all of whom I see as survivors. I understand deeply the profound harm caused by crime, whether it is domestic violence, child labor, sex exploitation. I continue to speak the truth in this space and seek however I can to find ways that will provide safety, healing, and justice in order for our survivors to take charge of their lives moving forward.

Survivors, I hear you. J.S., M.A., and all the young women and young men labeled as Jane and John Doe sold into the criminal and financial enterprise of sex exploitation, I see you and heard your stories loud and clear, and we will all say, “We are Jane Doe.”

Nacole, Kubiiki, and others and all of the parents and families of those survivors, I feel your pain and heard your cries. I heard what it was like, not knowing where they were or whether they were alive.

Nacole, you said you will never be the same family again.

Kubiiki, you asked, if it was our daughters, what would we do.

We all hear you and will continue to listen to you as long as we can look for solutions to this devastating problem.

Your fight is not futile, as exhibited on September 23rd, 2015, in Washington State Supreme Court’s decision to move forward with your case against Backpage. Statistics indicates that the majority of our young children that are trafficked online were done so on Backpage, which is now facing pending litigation.

When this sort of crime is committed against one child, it is committed against all of our children. And we are Members of Congress, and we must move forward in helping. As ranking member of the Crime Subcommittee, I’m infuriated and, thus, committed to

finding ways to collaboratively work with the chairman, my colleagues, and experts to address the problem.

As someone who strongly believes in the First Amendment, I am also committed to addressing this problem in a prudent and constitutional manner. That's why I've successfully amended H.R. 4660, the Commerce, Justice, and Science Appropriations, providing \$500,000 to strengthen the ability of State and local law enforcement to identify, apprehend, and prosecute domestic child traffickers, while requiring the Attorney General to make available training and education that will empower them to gain the cooperation and active assistance of victims of human trafficking who would otherwise refuse to cooperate.

Again, I submit an amendment in the H.R. 4800, Agriculture Appropriations, which makes clear that the Secretary of Agriculture and other Federal agency heads may provide assistance and benefits to victims of trafficking as permitted under 22 U.S.C. 7105, of the Victims of Trafficking and Violence Prevention Act of 2000.

Germane to this discussion is what we do at the onset when we rescue our innocent children lost in their web of sex exploitation. I've responded by introducing H.R. 5238, the Securing the Assistance of Victims of Exploitation, which makes clear that benefits should not be denied even if a person is not documented.

During the internet's infancy, Congress thought it necessary to enact legislation to protect its ability to function. This legislation—I hope that we will be able to ask the tough questions and we'll get good, tough answers in this hearing. Given the internet's significant role in recruitment of victims and facilitation of sex trafficking, the dialogue must also seek to clarify Congress' intent with respect to section 230.

The next question is, how do we hold accountable the true bad actors? And that is what we should be addressing today. And how do we continue to enhance our ability to communicate?

So I look forward to the witnesses' testimony.

Mr. Chairman, I would like to offer into the record a story—a movie about online sex trafficking might actually get laws changed—"I am Jane Doe." I'd like to submit that into the record, with unanimous consent.

Mr. CHABOT. Without objection, so ordered.

Ms. JACKSON LEE. And as I conclude, Mr. Chairman, let me indicate to the witnesses, I will look forward to hearing your testimony. My city is devastated by Hurricane Harvey, and if I have to leave, it will be going to a meeting dealing with the recovery of my constituents. And I thank you all so very much.

I do want to welcome my dear friend, former Member and former chairman of the Homeland Security Committee, the Honorable Chris Cox. It good to see you again, along with all of the other witnesses.

I yield back, Mr. Chairman.

Mr. CHABOT. The gentlelady yields back.

Without objection, other members' opening statements will be made part of the record.

We have a very distinguished panel today. I'll begin by swearing in our witnesses before introducing them.

So if you would all please stand for a moment.

Do you swear that the testimony you are about to give before this committee is the truth, the whole truth, and nothing but the truth, so help you God?

For the record, let it reflect that the witnesses responded in the affirmative.

And you can now please be seated.

And I would like to introduce the panel.

Our first witness will be Mr. Chris Cox. Mr. Cox served for 17 years as a Member of the House of Representatives and has had a distinguished career in public service. In addition to his tenure here in Congress, Mr. Cox has served as Senior Associate Counsel to President Reagan and as the Chairman of the Securities and Exchange Commission.

We welcome you this morning, Chris.

Our second witness is Professor Jeff Kosseff. Professor Kosseff is an assistant professor at the United States Naval Academy's Cyber Science Department. His research focuses on cybersecurity evidentiary issues, public-private cybersecurity partnerships, cybercrime, cyber warfare law, and the intersection of cybersecurity and free speech.

And we welcome you here, Professor.

Our third witness is Professor Mary Leary of Catholic University's Columbus School of Law. Ms. Leary is a former prosecutor and attorney in the nonprofit sector, focusing on crimes against women and children, a former policy consultant and deputy director for the Office of Legal Counsel at the National Center for Missing and Exploited Children, and the former director of the National Center for Prosecution of Child Abuse.

And we welcome you here, Professor.

And our fourth witness is Mr. Evan Engstrom. Mr. Engstrom is the executive director of Engine, the policy advocacy group and research foundation focused on tech entrepreneurship. Prior to joining Engine, Mr. Engstrom worked as a copyright and intellectual property attorney. He is a graduate of the University of Wisconsin, Madison, and Harvard Law School.

And we welcome you here as well, Mr. Engstrom.

Each of the witnesses' written statements will be entered into the record in its entirety, and I would ask that each witness summarize his or her testimony in 5 minutes or less.

To help you stay within that, we have a lighting system. The green light will remain on for 4 minutes. The yellow light will come on for a minute. And then the red will come on, and that is letting you know that it is time to wrap up. And we will hold ourselves within the same 5-minute rule that we hold you to.

And if there is no further business, we will hear from our first witness.

Mr. Cox, you're recognized for 5 minutes.

TESTIMONY OF THE HONORABLE CHRIS COX, OUTSIDE COUNSEL, NETCHOICE; JEFF KOSSEFF, ASSISTANT PROFESSOR, UNITED STATES NAVAL ACADEMY; MARY G. LEARY, PROFESSOR OF LAW, CATHOLIC UNIVERSITY COLUMBUS SCHOOL OF LAW; AND EVAN ENGSTROM, EXECUTIVE DIRECTOR, ENGINE

TESTIMONY OF THE HONORABLE CHRIS COX

Mr. COX. Thank you very much. I very much appreciate the kind introduction. And I want to apologize at the outset for those of you who perhaps were familiar with my old voice. I now have paralyzed vocal cords. So you've heard about the sound of one hand clapping; this is the sound of one vocal cord vibrating. Thank you for the opportunity to testify on behalf of NetChoice.

Those of us who were here in 1995 and 1996 well remember the debate over pornography on the internet that gave rise to the Communications Decency Act. At the time, wayward court decisions threatened the future of the internet. A web portal had done the good deed of screening some of its user-generated content, and it was held responsible for screening all of it. Under that unfortunate rule, the good deed of at least trying to keep the internet free from objectionable material would've been punished.

The bill that I wrote to eliminate this perverse incentive was co-sponsored by our colleague Ron Wyden, and it eventually became section 230 of the CDA in 1996.

Looking across the intervening two decades of judicial interpretations of section 230, we can see that the law has contributed to the successful development of the internet by providing the legal foundation for user-generated content that today is shared not just among millions, as was the case at the time, but billions of people.

The remarkable accomplishments of Wikipedia, to take one example, which has long since outstripped even the Encyclopedia Britannica for the depth and the breadth of its coverage, is just one marvel of the 21st century that we daily take for granted as we use it without charge.

Wikimedia, the Wikimedia Foundation that operates Wikipedia, is a very small organization, and it relies on voluntary contributions. If it were subject to lawsuits for the contributions and comments of its volunteers and its users, it couldn't sustain itself, and it would cease to exist as a valuable, free resource for every American.

The fundamental objective of section 230 has always been to incentivize website operators to keep the internet free of objectionable material. The law achieves this by protecting them when in good faith they become involved in content creation for the purpose of keeping objectionable material off of their sites or editing content created by others or taking it down altogether in order to remove offensive material. To this extent, the law says they will not be treated as publishers.

At the same time, section 230 makes clear that becoming involved in content creation for any other purpose eliminates any protection from suit. And that's true even if the involvement and content creation is only partial. And it is true even if the internet platform itself does not create the content but only develops it. And

it is true even when the platform is only partially responsible for the development. It still loses section 230 protection.

The inclusion of this clear language in section 230 was deliberate. It was intended to ensure that both criminal and civil statutes would continue to be vigorously enforced. And that's why section 230 expressly states that Federal criminal law is entirely unaffected by its provisions and that neither is there any effect on the enforcement of State law, whether civil or criminal, provided the State laws are enforced consistently with the uniform national policy expressed in section 230.

The uniform national policy applies equally to all civil and criminal cases. It's important that there be a uniform national policy because the internet is the quintessential vehicle of interstate commerce. Its packet-switched architecture makes it uniquely susceptible to multiple sources of conflicting State and local regulation. Even an email from this hearing room to the Capitol can be broken up into pieces and routed through servers in different States.

If every State were free to adopt its own policy governing when an internet platform will be liable for criminal or tortious conduct—that is to say, for the criminal and tortious conduct of another—not only would compliance become oppressive, but the Federal policy itself would quickly become undone.

Nonetheless, there is a move afoot to amend section 230 in ways that could sow chaos. In the bills that have been offered to amend section 230, the uniform national policy would be abandoned in favor of a new rule within section 230 itself for sex trafficking. For the tens of thousands of other State and Federal crimes, no compatible modification would be made. It goes without saying that many of these crimes are just as heinous, just as horrible as sex trafficking. Many of these crimes, such as murder for hire or terrorism, are often accomplished using the internet, just as sex trafficking is.

A judge confronting the anomaly of a new standard in section 230 that applies uniquely to sex trafficking would be forced to conclude that Congress intended to make it easier to prosecute this one offense, but this would necessarily mean it would correlatively be more difficult to prosecute all the other offenses.

The result would be to strengthen the precedential force of those court decisions most hostile to the prosecution of internet crime. That is not likely the intention of most of those who are sponsoring bills to change section 230. It's an undesirable result that could easily be avoided through better legal craftsmanship.

One focus——

Mr. CHABOT. Excuse me.

Mr. COX [continuing]. In the current discussion of——

Mr. CHABOT. If you could kind of wrap up, we're——

Mr. COX. Yes, of course.

Mr. CHABOT. Thank you very much.

Mr. COX. One focus in the current discussion of how to combat internet sex trafficking is the report of Senator Portman's investigative subcommittee laying out extensive factual allegations demonstrating that Backpage.com was directly involved in creating content and editing it. Assuming these facts are true, they will

amply support both Federal and State prosecutions without any interference from section 230.

I have laid out in my written testimony six suggestions for this committee with its special jurisdiction and focus on crime and for Congress as a whole that include the enactment of strengthening provisions to existing criminal law in 18 U.S.C. section 1952. That draft legislation is attached to my testimony.

I look forward, Mr. Chairman, to further questions.

Mr. CHABOT. Thank you very much.

Professor Kosseff, you are recognized for 5 minutes.

TESTIMONY OF JEFF KOSSEFF

Mr. KOSSEFF. Congressman Chabot, Ranking Member Jackson Lee, and members of the subcommittee, thank you very much for the opportunity to testify about section 230.

My name is Jeff Kosseff, and I'm an assistant professor at the U.S. Naval Academy Cyber Science Department. The views that I express today are only my own and do not represent those of the Naval Academy, Department of Navy, Department of Defense, or any other party.

I commend the subcommittee for taking a close and serious look at section 230. No other section of the United States Code has had a greater impact on the development of the internet. Because of section 230, the internet and the United States is the epitome of everything that we love and that we hate about unconstrained free speech.

Both the House and the Senate are considering proposals to amend 230 to address online sex trafficking. I'm not here to support or oppose any particular bill; rather, I hope to provide you with information that I've gathered and conclusions that I've drawn after spending more than a year researching and writing a book about the history of section 230.

Our legal system must have strong criminal penalties and civil remedies to deter not only the act of sex trafficking but also the knowing advertisement of sex trafficking by online platforms, period. I hope that Congress agrees on a solution that imposes severe penalties on bad actors—and we need to be very clear, there are some very bad actors—without chilling legal online speech. And I think this is something we can do.

Understanding 230's history is critical, and my written testimony more fully explains the mechanics and origins of the law.

Congress passed section 230 in 1996 because the legal precedents in early cases against online platforms created a bizarre rule that online services might actually increase their liability by moderating content. Congress also wanted to limit government regulations of the emerging internet. By passing 230, Congress allowed companies to create business models around user content. It is simply not a coincidence that many of the most successful internet platforms in the world are based in the United States.

Initially, my book was titled "The 26 Words That Changed the Internet." After spending months immersed in section 230's history, I decided that did not capture the full impact of the statute. The book is now titled "The 26 Words That Created the Internet."

In its current form, section 230 does not provide absolute immunity to online platforms. All Federal criminal laws are explicitly exempt from 230, and platforms are not immune from civil actions or State criminal prosecutions that arise from content that the platforms created. Indeed, if the Senate report and Washington Post coverage about Backpage is true, I believe that the site never should have been immune under existing section 230.

If Congress decides to amend section 230 to address online sex trafficking, it should do so in a manner that severely punished bad actors while minimizing broader harms to legal online speech. A section 230 exception should target platforms that knowingly advertise sex trafficking. Now, defining “knowingly” will be important, and it also will be difficult, as there is not very much precedent in this context, primarily because we’ve had 230 on the books for 20 years. Imposing liability on reckless or negligent conduct could raise concerns about burdens on speech, so we need to strike the proper balance there.

Also, States should not subject platforms to a patchwork of 50 different laws. Rather, if Congress creates a section 230 exception, it should craft a national standard providing companies with clear and certain rules for compliance.

Addressing the liability of public-facing platforms is one component of a much broader problem. Sex trafficking, like other online crimes, often occurs on the dark web, out of the reach of law enforcement. So, in addition to focusing on 230, I hope that Congress continues to examine crimes in these dark corners of the internet. I also hope the technology sector, nonprofits, and law enforcement work together to fight online sex trafficking, as they successfully have done for child pornography.

To be clear, this debate does not present us with a binary choice. Changing section 230 would not cause the internet to disappear, but the magnitude of any harm to online speech could vary tremendously depending on the precise wording of any exceptions.

Now, I’ve long been an enthusiastic supporter of section 230’s free speech protections. I’m a former journalist who’s faced down defamation threats from executives and politicians. And as a lawyer before I joined the Naval Academy, I advised media companies on user content liability. I remain convinced that the statute is essential to preserving the open internet that Americans know today.

But after spending a year researching a book about 230, my support for the statute is tempered by the very real and tragic harms suffered by some victims who cannot get their day in court. The challenge for all of us will be to combat these terrible acts, such as online sex trafficking, while preserving the free internet that section 230 has made possible. And I believe we can do that.

Thank you.

Mr. CHABOT. Thank you very much.

Professor Leary, you are recognized for 5 minutes.

TESTIMONY OF MARY G. LEARY

Ms. LEARY. Thank you, Congressman Chabot, Ranking Member Jackson Lee, and members of the committee, for convening this hearing to address online sex trafficking and the challenges to com-

bating it posed by the current interpretation of the Communications Decency Act. It's an honor to be with you today.

Starting in the year 2000, the United States became a leader when it passed the Trafficking Victims Protection Act and its subsequent five reauthorizations. It was with this legislation that this Congress identified the crime of sex trafficking and understood it to be a vast and complex criminal activity.

And Congress designed a comprehensive, multidisciplinary approach to combat it on all fronts, for Congress understood then, as it understands now, that human trafficking crosses all boundaries, preys on thousands of our most vulnerable citizens—children and vulnerable adults—and that such an epidemic victimization must be met by an equally comprehensive response that disrupts the business model, deters the traffickers and those who partner with them, and makes it a form of victimization not tolerated in our society.

The legislation from 2000 and the reauthorizations have many components but three main ones at issue today. First, it obviously requires strong criminal laws. Secondly, however, it also has civil liability components which allow victims and survivors to hold their traffickers accountable in civil courts and give them access to justice. And, third, it recognizes the essential role of State and local law enforcement and prosecutors in early identification and prosecution of sex trafficking.

Yet, despite this comprehensive and forward-looking approach, today sex trafficking is on the rise. And one of the main reasons is the misinterpretation of the well-intended section 230. This act was designed to provide limited immunity for the good samaritans Mr. Cox referenced. It's been turned on its head, as Mr. Chabot has pointed out, because of aggressive litigation tactics. And courts now have interpreted it, even if we all feel differently, they've interpreted it as de facto absolute immunity.

As a result of that, sex trafficking has flourished on the unregulated internet, with the lure of low-cost, high-profit, no-risk has brought traffickers to the web. And they have flocked there to find unscrupulous service companies, not just Backpage but many others, who are more than willing to facilitate the sale of people in the public square. And why wouldn't they, because they can do so with impunity when we look at how this has played out in the courts.

The results? Well, the numbers are really staggering, and they are in my written testimony. Let me just draw your attention to a few of them.

From 2010 and 2015, the National Center for Missing and Exploited Children experienced an 846-percent increase in reports of child sex trafficking. Other research has found that 63 percent of human trafficking victims interviewed in that study were advertised online. Just 2 weeks ago, former Member and California Attorney General Becerra testified that in his office almost every sex-trafficking case involved online marketing.

And it's unfortunate that today we don't have a survivor on this panel who could share with you, beyond the numbers, the impact of what he or she has experienced. And while I can't do that, let me share with you an observation made by Erik Bauer, who is an attorney for one of these cases, in fact, the only case that has sur-

vived CDA immunity, and that is a civil claim in Washington State.

He talked about one image that he deals with in his litigation. And I ask the committee to please forgive any language, but it's important that we're clear. He talks about the ad, and it says—the text of the ad is, quote, “Ass up, face down. Come see Sheila. \$80 special.” And then Mr. Bauer notes that Sheila is in seventh grade.

More recently, courts have joined people like Mr. Bauer, survivors of sex trafficking, and attorneys general in the chorus that asks Congress to please amend section 230. One court said, just this summer, after it dismissed a similar case to the one I just described, “If and until Congress seeks to amend the immunity law, the broad range of section 230 even applies to those alleged to support exploitation from human trafficking.”

The solution to this problem is to listen to the survivors, to the victims, to the States' attorneys general, all 50 of them, who are seeking justice and amend the Communications Decency Act. And this pending legislation before the House is a narrowly drafted legislation that succeeds in doing so and underscores the civil rights action, the important role of local States' attorneys general and prosecutors, as well as strong criminal penalties.

I look forward to the questions from the committee.

Mr. CHABOT. Thank you very much.

Mr. Engstrom, you're recognized for 5 minutes.

TESTIMONY OF EVAN ENGSTROM

Mr. ENGSTROM. Chairman Chabot, Ranking Member Jackson Lee, and members of the committee, thank you for inviting me to testify. My name is Evan Engstrom. I'm the executive director of Engine, a nonprofit advocacy and research organization that works with government and a community of startups throughout the country to develop public policies that foster innovation, entrepreneurship, and job creation.

I'm grateful for the opportunity to testify on such an important and difficult topic, and I appreciate the hard work that Congress is doing to fight sex trafficking. I cannot claim to be an expert on combating trafficking, and I certainly cannot ever comprehend the horrors that trafficking victims have endured. We must hold those who facilitate these crimes, like Backpage.com, fully responsible. Trafficking victims and survivors deserve justice.

In my capacity as an advocate for innovators and entrepreneurs, the most important thing I can say at the outset of this hearing is that the community of startups we work with is fully committed to finding solutions to end online sex trafficking through a combination of industry initiatives and government action.

We have concerns about the unforeseen consequences of recent legislative efforts to address this critical issue. Nonetheless, we are eager to work with this committee to craft policies that will help identify and prosecute sex traffickers. And we have been actively involved, working with Members of Congress on specific legislative language to accomplish this goal.

Today, I would like to address three key messages.

First, as you have heard countless times, we simply would not have the internet or startup community we have today without sec-

tion 230 of the Communications Decency Act. Section 230 guarantees that a user-generated content website will not face company-ending liability whenever a bad actor says something illegal on its platform. This protection is what drives innovation in this area.

For startups, there are three things that section 230 does particularly well. 230 establishes a uniform regulatory regime rather than a 50-State patchwork. 230 provides a check on abusive litigation. And perhaps most importantly, 230 empowers platforms to proactively monitor for objectionable content.

It's also worth reiterating what section 230 does not do. 230 does not give platforms immunity for evaluations of Federal criminal law, and 230 does not protect a platform from liability if it develops illegal content.

Section 230 is as valuable today as it was when it was enacted in 1996. In just the past 5 years, we have seen startups reinvent the way we share memories, raise funds, find a spouse, buy a home, and so much more. All of these companies rely on user-generated content, and section 230 has facilitated their growth in multiple ways.

Second, tech companies large and small have frequently partnered with law enforcement, the National Center for Missing and Exploited Children, and anti-trafficking groups to develop a range of technologies that help combat trafficking and support victims. Industry has worked to come up with best practices for finding trafficking content and has well-established policies for directing personnel to promptly investigate and disable access to such content. We intend to continue this necessary work.

However, it is not possible for a platform that hosts a significant amount of user-generated content to fully remediate all illegal content on its site or know with certainty whether it is being used for trafficking activity. Proposals to address online trafficking should consider these realities and not impose ruinous burdens on well-intentioned startups. Critically, we do not want to discourage platforms from voluntarily taking on the task of policing their sites for trafficking content.

Third, we have concerns that recent proposals to change existing law in order to combat online sex trafficking may have unintended and unnecessary negative consequences for honest platforms. While we share the underlying goal of combating trafficking, our written testimony details our concerns with the Fight Online Sex Trafficking Act and the Stop Enabling Sex Traffickers Act and offers suggestions about how to make these bills function more effectively. We are happy to discuss details with any Member who is interested.

In conclusion, section 230's protections are critical, because, despite the best efforts of honest, law-abiding startups, it is not possible to fully stop bad actors from doing bad things online. But that doesn't mean we shouldn't try. This is, after all, what startups do: fix what needs fixing and find new solutions to difficult problems.

Changes to existing law should be carefully tailored to address the problem of sex trafficking in the most effective manner possible while minimizing the negative impact on the broader internet ecosystem of law-abiding startups and users. We believe this is an

achievable goal, and we hope to work together to combat trafficking and provide justice for the victims of this terrible crime.

Thank you.

Mr. CHABOT. Thank you very much.

We'll now proceed to the members' time to ask questions.

And, Mr. Cox, I'll begin with you, if I can, here.

It's my understanding States have been impeded from pursuing criminal charges against Backpage. And there seems to be this belief that CDA 230 fully preempts State criminal laws. But that very obviously goes against the plain language of the statute.

Could you explain why States haven't been able to reach Backpage on trafficking charges? Have they been able to prosecute under any other charges? Or any comments that you could—that you could shed some light on that?

Mr. COX. Certainly.

First of all, as you point out, the statute's pretty clear. And the cases that—and this is not, I don't think, dominant in the case law, but the cases that I object to is when the authors of the statute and, I think, most of Congress is befuddled by, because this was something that everyone in Congress more or less supported. These cases that are in the minority overlook the fact that, to use Backpage as an example, that Backpage is alleged to have participated in the creation of content.

In the Senate report, in the Senate investigative report that Chairman Portman was responsible for producing, there is lurid evidence laid out of how extensively Backpage was, in fact, involved in the creation of advertising, in the editing of advertising. Even the purpose of the edits was to masquerade it so that it would be shielded from law enforcement.

This amply goes beyond what the statute says is necessary to be involved in content creation. The definition of a content creator in the law makes it plain that, if you participate only in part—you don't need to be the content creator, but if you in part develop the content that somebody else created, that's enough, and you lose your section 230 protection.

So why didn't this work in the most recent case that we're all aware of in the First Circuit? And the reason it didn't is laid out in the opinion. The judge says that not only were these allegations not made in the district court and on appeal but that the litigants foreswore this theory of the case. And the same was true in a recent California case decided in August.

So I would like to be personally of assistance to attorneys general in pleading their cases, and I think this Congress could as well. Because if you base the case on the fact that these people are really—I mean, these websites, some of them are ongoing criminal enterprises. They're in the business of this. And it should be a relatively straightforward matter to make allegations that, not only do they know what they're doing, but what they are doing is directly what the statute says vitiates any protection from liability.

Mr. CHABOT. Thanks very much.

And I've been advised that our timing devices have gone down, so I have a minute and 48 seconds left in my 5 minutes.

So, Professor Kosseff, I'll go to you next. Do you think prosecutors will be able to gather the quantum of evidence they have on

Backpage for the websites that continue in this business, with respect to the knowledge element? Could they hold them accountable under the RICO liability, for instance, promoting prostitution? If you could comment on that, it'd be appreciated.

Mr. KOSSEFF. I do think that is a possibility. My experience is more on the civil law side, but I do think that there are other avenues. But, I mean, I will say that particularly the Sacramento court decision did give me pause. They did not have the full record before them that was from the Senate report and the Washington Post reporting, and I think that may have altered the outcome.

Mr. CHABOT. Thank you very much.

Professor Leary, I'll go to you next. How does H.R. 1865 clarify the rights of local prosecutors to prosecute sex-trafficking cases? Do you think there's a risk of a patchwork of State policies? What are your thoughts there?

Ms. LEARY. Thank you, Congressman Chabot.

The bill itself very clearly just exempts from immunity State criminal prosecutions. Again, a request made by all 50 United States attorneys—excuse me, all 50 attorneys general from every State, both now and several years ago.

And we don't have a patchwork, because, as it's defined in the legislation, it mirrors the Federal definition of sex trafficking and child exploitation. As such, it has narrowed it to not be inclusive of other regulations that wouldn't fit under that definition.

And, as this body well knows, this is a common technique that we see in child pornography legislation, as well as our trafficking legislation, to narrow State powers. I mean, Attorney General Becerra, to speak to your earlier question, Congressman, said his hands are tied.

And if I could just make one other point to my able colleague to the right, Mr. Cox, make no mistake about it, this isn't a minority of cases. When we look at just sex-trafficking cases in a CDA defense, the defense has always won, and it has always won except in one State-level civil case.

Mr. CHABOT. Thank you very much.

My time has expired. The ranking member, the gentlelady from Texas, Ms. Jackson Lee, is recognized for 5 minutes.

Ms. JACKSON LEE. Thank you very much.

And I want to take my 5 minutes to get to all of you, so I appreciate your brevity in your answers.

Congressman Cox, you worked with now-Senator Wyden on the 230 in the Communications Decency Act, I would say without any humor, in the early stages of the internet. I think you'll smile on that. You have history that is important.

But could you just explain—I'm sure there was a sense of the potential of bad actors and acts occurring. Could you explain how you tried to strike the balance?

Mr. COX. Yes. The simple approach of 230 is to protect the innocent and punish the guilty. So there is absolutely no effect whatsoever, for starters, on Federal criminal law.

And this is important because the SAVE Act, which this Congress, you know, very recently enacted and was signed by President Obama, gives new sex-trafficking prosecutorial tools to the Department of Justice that are in no way affected by section 230,

by the words of section 230, has no impact on it whatsoever, and yet not a single prosecution has been brought under this new law.

Ms. JACKSON LEE. Thank you.

Professor Kosseff and maybe Professor Leary at the same time, Backpage really smeared the value of the internet and what it does and, as well, damaged and threatened lives, in terms of fostering some of these very bad acts.

I think the glaring horror of their acts was to teach how to block law enforcement, whether it was Federal or whether it was State. Tell me how we pierce that.

And I think, Professor Kosseff, you came to this with a balance—and Professor Leary—for the value of the internet of saving lives. These are young girls, boys, LGBTQ persons that are victimized, and we don't know who has lost their life in the context of this.

Can you pierce that veil, Professor Kosseff?

Mr. KOSSEFF. Yes, absolutely. I think—and, again, I had mentioned the Senate report and the Washington Post article. And, again, assuming that all of the facts are true, it leaves no doubt in my mind that this was not just publishing third-party content as a conduit in any way that would fall under section 230 as intended or under the 20 years of case law that we have right now.

So I think there are two ways. First, you could just try to clarify the purpose of 230. That might not work. And I think the problem with all of the civil cases—again, I will limit it to the civil cases—is, frankly, both the pleading requirements under Iqbal and Twombly as well as the lack of discovery on these issues that are relevant to 230.

So that's why, I mean, a reasonable, narrowly tailored exception might be necessary. Because I think it's very hard for us to—even if you have a company like Backpage, to be able to overcome these general pleading standards that plaintiffs in all sorts of cases really very much dislike.

Ms. JACKSON LEE. Just very quickly to you, do you think the civil case was decided correctly in Backpage? And the criminal case—the civil case, was that decided correctly on Backpage?

Mr. KOSSEFF. Based on the information we know now, no.

Ms. JACKSON LEE. The criminal case, which is—

Mr. KOSSEFF. No.

Mr. JACKSON LEE. Thank you.

Professor Leary, if you want to, how do we pierce that veil?

Ms. LEARY. Well, two comments.

If I could pick up on your last question first, Congressman Jackson Lee, it's important that we now have all this information, thanks to The Washington Post and a 20-month Senate investigation, which was actively thwarted by Backpage. But let's keep in mind what we're talking about: an immunity provision. Immunity is not an affirmative defense. Immunity stops State prosecutors, it stops victims and survivors at the courthouse door. They cannot even get into the courthouse.

So that's the first veil that needs to be pierced, is they would never be able to engage in discovery to get this kind of information. They don't have at their disposal a 20-month investigation with subpoena power, et cetera, from the United States Senate.

Secondly, how do we pierce this veil? My colleague Mr. Cox is absolutely correct, and this Congress has created some really terrific laws, and many States have copied them. All 50 States have trafficking laws. We can't get to those excellent laws if we can't get through the CDA. This body of law that has been created is the obstacle between litigants and prosecutors and those excellent laws. So we have to resolve that problem.

Ms. JACKSON LEE. Let me quickly go to you, Mr. Engstrom, the last person here. There is a question about patchwork—there's a question about the patchwork of different laws. And there's a question about, as I said, saving lives and also what stands out as the First Amendment. You work on this all the time. And so, crafting a response, you would see it in what form?

Mr. ENGSTROM. Well, as far as the patchwork issue is concerned, I think we can clarify the language to address that concern. Professor Leary mentioned that, you know, in the bill, it is meant to mirror the Federal standard to ensure that States can't pass a variety of laws that have different rules, have different penalties, that may or may not be practical. If it does indeed mirror the Federal law, that obviates that problem. We don't read the statute that way, and I think that's a real concern.

Secondly, how do we address the problem? We want to make sure that the law doesn't disincentivize platforms from doing the right thing by having an ambiguous knowledge provision that might hold them responsible if they, you know, are proactively looking for content, find something, maybe they don't know what it is, and now they're in a position to say, "Well, if I'm going to be held liable for this, then maybe we shouldn't do this type of policing." I think we can craft the language in a way that obviates that concern, and we're happy to work on it.

Ms. JACKSON LEE. Thank you.

I just want to acknowledge that Mr. Raskin, Mr. Lieu, Ms. Bass, Mr. Deutch, and Mr. Conyers were present at the hearing today. And thank you.

With that, I thank the witnesses. And this is a tough issue that we're all going to work on.

And I yield back. Thank you.

Mr. JOHNSON of Louisiana [presiding]. Thank you.

The gentlelady yields back. I will recognize myself for 5 minutes.

Mr. Cox, a question for you. Are we missing the forest for the trees here? Why not focus on prosecuting the websites that can be considered content providers for knowing facilitation of prostitution, which seems to be more readily provable as an offense, and why not increase criminal exposure there? Do you have any thoughts on that?

Mr. COX. I think you're absolutely right, that, first of all, we can use the Federal tools that Congress recently provided—as I mentioned, the SAVE Act. You know, there is a great deal of emotion that's brought to this. There's a lot of energy. You know, the country is ready to move on this. And yet here is the Federal Government, with all these tools, and not one single prosecution has been brought by the Department of Justice anywhere in the United States on sex trafficking using the SAVE Act, which was recently signed into law.

I've proposed additional legislation that's attached to my testimony. In the Kennedy administration, the Attorney General, Bobby Kennedy, decided that State governments and State attorneys general needed help in going after organized crime that crossed State borders and so on, and we got the Travel Act. And the Travel Act expressly covers prostitution. What it doesn't expressly cover is sex trafficking. But prostitution and sex trafficking are obviously closely related.

By amending the Travel Act in ways that I have proposed and by including penalties in there that can go up to life in prison, I think we can make it pretty clear that we're serious about this, and we can bring prosecutions that are, once completed, for victims to get restitution so that they don't have to file their own civil suits.

I've attached, as I say, a proposed draft of such legislation as an exhibit to my testimony.

Mr. JOHNSON of Louisiana. Thank you for that.

Mr. KOSSEFF, do you agree with Mr. Cox that there may be potential adverse effects of putting carve-outs into the CDA 230? And could a carve-out be preferable in some ways?

Mr. KOSSEFF. I do. I've thought a lot about what the carve-outs would look like and not just for sex trafficking but for other emerging threats that are very serious, such as terrorists' use of social media. And who knows what the next threat will be 5 years down the road.

So I think that's why we have to be very careful about how we view these carve-outs. That's not to say we can't do it, but I think that it does set a precedent. And, very well, it might be necessary, but we just do have to be aware of that risk.

Mr. JOHNSON of Louisiana. Mr. Engstrom, what kinds of changes would you suggest to any pending legislation to assure startup companies are sufficiently protected and allowed to grow?

Mr. ENGSTROM. So I think the first one we talked about a little bit before. And I thank you for the question. It's clarifying what types of laws State authorities can bring. We want to ensure that there aren't conflicting standards. We want to make sure that laws that are passed don't create impossible burdens or disrupt how the internet functions.

It's not a hypothetical threat. We've seen in, I think, two dozen States proposals to have mandated anti-pornography filters on devices. It doesn't exist. It can't work. That bill was designed to prevent human trafficking, so it could potentially fit under a reading of the statute. I think we can clarify that.

The second piece is how we define "knowledge." We don't want to sweep in people that don't actually know of what's happening on their sites. And we want to encourage them to take the positive, proactive steps of identifying and remediating this type of content.

So I think you need to clarify to make sure it's going after the bad actors who have awareness of this activity but aren't responding to it, as opposed to those startups that, you know, are doing the right thing, trying to do the right thing, but by virtue, you know, of how this content looks online, maybe not, you know, visibly, immediately recognizable as such, it puts them in a position where they don't know how to act.

Mr. JOHNSON of Louisiana. Is there a template or a model already in Federal statutes on that “knowledge” aspect?

Mr. ENGSTROM. Yeah, so you can look at mirrors in other types of the law. So, for example, in, like, the copyright context, the DMCA, you have a notice-and-takedown provision, where there’s a clear way to provide a platform with knowledge and clear guidelines on how they’re meant to respond. In the child exploitation context, you have very clear guidelines on who you’re supposed to notify.

I think, you know, these laws have language, particularly in copyright content, that has been the source of considerable litigation over what “knowledge” means. So I think we need to take those lessons and apply them here and make sure we’re crafting “knowledge” in a very clear way that gets at bad actors and not honest startups.

Mr. JOHNSON of Louisiana. Thank you for that.

I’m out of time. I recognize Congresswoman Bass for 5 minutes.

I’m sorry. She’s not here. Who’s next?

Mr. Raskin for 5 minutes.

Oh, Conyers—

Mr. RASKIN. Mr. Chair, thank you very much.

Mr. JOHNSON of Louisiana. I’m sorry. You’ve got to yield to Mr. Conyers. Of course.

Mr. RASKIN. I will happily yield to the ranking member.

Mr. JOHNSON of Louisiana. I’m sorry.

Mr. CONYERS. Thank you, Mr. Chairman and my friend.

Chris Cox, good to see you again. What do you believe will happen if we enact legislation that allows States to prosecute online facilitators of online sex trafficking using different standards?

Mr. COX. I think it depends entirely on how it’s accomplished. I think it’s a good idea to continue adding prosecutorial tools. I’ve suggested one incremental way to do it in my own testimony. There are other suggestions, as well.

But, as Professor Kosseff has just noted, it’s not just that we have a uniform national policy for the reasons that the internet is uniquely susceptible to multiple and conflicting regulations; it’s also because it applies section 230 to all civil and criminal offenses in the United States, Federal and State.

And so, if we start to have within section 230 itself substantive standards that are different for one crime versus another, it’s going to beg for relief for other crimes one at a time. And there are necessarily going to be—until we get to over 4,000 Federal crimes, there are necessarily going to be different standards. And that’s going to cause judges great distress in trying to figure out what in the hell Congress meant by saying there’s a different standard now for one crime than another.

There’s one standard in section 230 that applies to all offenses, and it’s really important that it be a clear standard. The standard is that, if you participate in the creation of content or the development of content and if you do it only in part, then you lose any of the protections of section 230. And that’s how we parse the guilty and the innocent.

I can’t think of a better rule. I can think of some better court decisions than a couple that I’ve read. But courts don’t all have this

wrong, by any means. And I think what we need to do is recognize that the standard in the law in 230 is the right standard and then use all of our tools, including hortatory tools such as amicus curiae briefs and concurrent resolutions from Congress restating the intent of this law, to make sure that we help the courts to get it right.

Mr. CONYERS. Mr. Engstrom, I'm sure you—well, what do you believe—or do you believe that either of the proposed bills will help fight sex trafficking online?

Mr. ENGSTROM. Thank you for the question, Congressman. I think you get at a great point.

I think, yes, they will address—they will devote more resources to online trafficking. With that said, I think we can craft those bills in a way that they are just as effective at addressing online trafficking but don't implicate these unintended consequences.

And we proposed language that would help narrow that and provide a clearer pathway for honest, law-abiding startups to know what their obligations are. So, yes, we are, you know, fully open to working with this committee, with other Members of Congress on how to make that more effective.

Mr. CONYERS. Thank you.

Do you believe a national standard for criminal prosecutions of online sex-trafficking facilitators like Backpage.com is necessary?

Mr. ENGSTROM. I think having a national standard is necessary. Again, it ensures compliance. It makes it easier for startups to know their obligations. It prevents conflicting laws.

I think the existing standard can and should be used to go after bad actors like Backpage. So, yes, I think, you know, an important priority for us in any change is ensuring uniformity and ensuring clarity. And, again, I think the national standard is a great way to accomplish that.

Mr. CONYERS. Thank you.

Professor Kosseff, could you describe the harm to online speech that you expect to see if either H.R. 1865 or SESTA become law?

Mr. KOSSEFF. So what I'd like to do is talk about not just one specific bill but just any bill that would have any carve-outs for sex trafficking rather than supporting or opposing a particular bill.

What I'll say is it really comes down to both, as was mentioned, having some sort of national standard so that websites and other platforms don't have to look at 50 different State laws to make sure they're compliant but also whether it is, as was discussed, a "knowingly" standard, a "reckless" standard, "negligent" standard.

My real concern here is we do not have case law adequate in the user-generated context, because for 20 years we haven't had to look at this. So if I were a lawyer representing a website and there was a very low standard for what would trigger liability, I would probably tell them, don't allow user-generated content even if they have nothing to do with sex trafficking, unless they're able to monitor.

So I think we just need to be precise and go after the bad actors. And I think it's possible; you just have to craft it really carefully.

Mr. CONYERS. Thank you so much.

I yield back.

Mr. JOHNSON of Louisiana. Thank you.

The gentleman yields back. And I recognize Judge Poe for 5 minutes.

Mr. POE. Thank you, Chairman.

Thank you all for being here.

Sex trafficking, to me, is the national problem dealing with crime. We should focus this—this issue, I think, is so big that we should spend a lot of time going after these bad guys, and then they should do a lot of time in the do-right hotel, as I called it as a judge.

I have no sympathy and I am sure most people have no sympathy for these slave owners and slave traders and especially the slave buyers, the customers. And I think we're all here today to try to fix this problem the best we can. We don't want to make it worse or encourage it; we want to try to fix it.

We have a standard for taking down child pornography websites, and I think it's working. It seems to me, why can't we apply that protocol that is used to take down sites that deal with human sex trafficking? Is that not realistic?

I'll ask Chris—Mr. Cox.

Is that not a realistic idea?

Mr. COX. It's a splendid idea. And it's consistent with not only Federal but all 50 State laws, I am certain.

As you describe it, a website that is focused on this activity is manifestly in the business of doing these things. And so there is no question that it's involved in the creation of the content, and, thus, it has no protection under section 230 and ought not to have any.

But, you know, we need to go back and read the statute, because the statute is very, very clear in this respect. I'm here as one of the coauthors of the legislation, but, honestly, you don't need to listen to me about the legislative history. You know, some judges don't like legislative history. It's too abstruse. They want to stick to the black letter of the statute. Well, then read the damn statute, because it is so clear. And if we enforce the statute the way it's written, we wouldn't be having this discussion.

Mr. POE. Do you want to comment, Mr. Engstrom?

Mr. ENGSTROM. Yes. Thank you so much for the question. You raise an important point. And I think I want to raise sort of a technical distinction or at least a clarification that I think is relevant.

In the context of child exploitation images, it's very easy to say, this is always illegal. If you have possession of that image, there's no context in which that's legal. And so startups and larger platforms do employ tools—there's a popular one that Microsoft has, PhotoDNA, that matches against an existing database of these images, so they know, if I see this, I can remove it.

In the context of other types of speech, it's a little more difficult because—

Mr. POE. Because they talk in code.

Mr. ENGSTROM. They talk in code. There's no backlog of posts that you can compare this stuff to. Now, we're making progress, as I understand it, but there's more work to be done, and it's not as easy—

Mr. POE. So what's the answer? What is the answer to get these websites off the internet?

Mr. ENGSTROM. I think the answer—

Mr. POE. I mean, Mrs. Wagner's got her solution, and, you know, there's over 140, 150 Members on her bill.

What do you think the answer is to doing this?

Mr. ENGSTROM. So I think the answer for taking down webpages like Backpage is to devote as many resources as we possibly can, criminal law enforcement resources, to taking them down. And I think we have tools in the law to do it. I think we need to make sure we have the gumption and the funding and the interest necessary to get that done.

The ancillary question is, what do we do about platforms that aren't trying to facilitate that? If it pops up on their website and they're unaware of it, or it's a tiny fraction of their user base that this happens to. I think what we want to do is empower them to take action in a way that doesn't implicate liability that could discourage them from doing that.

Mr. POE. Professor Leary, you used to be a prosecutor, didn't you?

Ms. LEARY. Yes, sir. I did.

Thank you for the question. And I think the analogy to child pornography is a very apt one, in this regard: We have made progress with regard to child pornography and child sexual exploitation primarily because we have not tied the hands of local prosecutors. So it is a full-court press on child sexual exploitation images. State prosecutors, attorneys general, local law enforcement are all empowered. Victims are allowed to sue in Federal and State court. And multiple pressure points have yielded some results. The same thing should be true here in child sexual exploitation.

If I could just comment on one other point, this idea that there's somehow a confusing standard or the unwitting internet provider would get caught. Let's be clear: If you are criminally charged or if you are sued, the party has to have standing or there has to be a specific case. So a general—none of the proposed legislation has a general knowledge that trafficking takes place on your platform would implicate you. It is knowledge as to the specific act alleged.

And the terms "knowledge" and "reckless," which are part of the House bill, those are clearly defined in the criminal law. There is not an ambiguity as to what they mean. And certainly we could wordsmith about the actual statutes, but there's not an ambiguity.

Thank you.

Mr. POE. Thank you, Mr. Chairman.

Mr. JOHNSON of Louisiana. Thank you.

The chair recognizes Mr. Deutch of Florida for 5 minutes.

Mr. DEUTCH. Thank you, Mr. Chairman.

Mr. Chairman, this is a—it's a really important topic, and I appreciate the hearing today. I've been working on sex-trafficking and human-trafficking issues with my colleagues, Representatives Smith and Trott and Frankel on Foreign Affairs, and others. But what makes this so important is that it's a bipartisan issue.

But I can't engage in a conversation about this bipartisan issue in the absence of any sort of conversation on the bipartisan issue that we need to be having about gun violence.

And, Mr. Chairman, I—we all were sickened when close to 60 people were slaughtered in Las Vegas and more than 10 times as

many were injured. And this is the Crime Subcommittee. This is not just the Crime Subcommittee. It is the Subcommittee on Crime, Terrorism, and Homeland Security. This is the place where these discussions should start—reasonable discussions, the kind of discussion that we’re having today about sex trafficking.

But, unfortunately, not only have we not scheduled any hearings, we took an affirmative step, not the ranking member and I, but the chairman took the affirmative step of actually waiving the jurisdiction of this subcommittee with respect to a piece of legislation that would only make things worse.

And so I ask the question: What is it about the dangerous gun agenda that the leadership continues to push forward that prevents us from being able to have a serious discussion about how to curb gun violence?

Let me just be clear. The bill that this subcommittee waived jurisdiction on, the Crime Subcommittee, is H.R. 3668. That’s a bill that does at least three things. It’s the silencer deregulation act, which deregulates silencers, makes it easier to sell silencers across State line to more people and without background checks. Anyone who watched the horrific video out of Las Vegas could only imagine what the case would’ve been if every one of those guns that that shooter had had a silencer on it.

But that’s not all that this committee choose not even to hold a hearing on. The bill also contains the armor-piercing bullets deregulation act, legislation that would make it easier to manufacturer, import, and sell armor-piercing bullets that can be used in a handgun, armor-piercing bullets that at another time we regularly referred to as “cop killers.”

And, finally, the piece of legislation that this Crime Subcommittee chose to waive jurisdiction on was what I would refer to as the easy gun trafficking act, which makes it more difficult to prosecute gun traffickers by giving them defenses when they are caught.

All of them in H.R. 3668. All of them waived so that we could get that bill to the House floor as quickly as possible.

I don’t understand this gun agenda. This is not about the Second Amendment. Those three efforts are not about the Second Amendment. I don’t know whose gun agenda it is. I think we should probably be clear about one thing, that I’m not sure who it is in leadership who is most committed to this effort, but I can only imagine the pressure that was felt when, as I read just on my way in here, the House leadership chose to show a modicum of decency and not move forward on these bills this week or next week in light of the tragic shooting, I can only imagine the pressure that those who made that decision felt by outside groups, by the NRA and others whose agenda this is the fundamental part of.

And so I hope that we have the opportunity to move forward with a meaningful discussion. I hope we can acknowledge—I hope we have a chance to have a hearing. And at that hearing on that bill, we can bring in sheriffs and police chiefs from small towns and counties across the country, from Portland, Maine, to Dallas; Rocky Mount, North Carolina, to Vallejo, California; Glenwood, Minnesota, to Lagrange, Georgia. The International Association of Chiefs of Police, the Major Cities Chiefs Association, all of whom

have come out opposed to that, and the Crime Subcommittee would not even give them a voice.

We've blocked reasonable debate for too long. After tragedies like Las Vegas, I just think that we ought to be able to find ways to come together in this bipartisan way. I know that a lot of my colleagues will not share the same views I have on how we prevent gun violence, but if we can't all commit to work together to try to eradicate gun violence, then we're not doing our jobs.

And I yield back.

Mr. JOHNSON of Louisiana. The gentleman yields back.

The chair recognizes Mr. Rutherford for 5 minutes.

Mr. RUTHERFORD. Thank you, Mr. Chairman.

First of all, thank you, committee, for being here this morning.

Mr. Cox, let me ask, in your opinion, have any of the courts gotten this right, in that the way that they have interpreted CDA 230, is that consistent with the congressional intent of the statute?

Mr. COX. Yes, I think that many of the courts have gotten it right, and they have done so repeatedly. And in my written testimony, I have laid out many of these cases, which I think more or less represent the center of gravity in the case law.

But it's important to recognize that the case law is still developing, and there is, you know, scant case law with respect to sex trafficking specifically. The standards that are being used have been developed in any number of contexts, and they are—in the First Circuit case that was recently decided, a sex-trafficking case, the precedents that are cited are developed in non-sex-trafficking contexts.

So what are the courts that have gotten this right saying? They're saying that, when we find that a web platform has been involved somehow in influencing the content that shows up on that website, that they don't have section 230 protection.

There's a case that is quite well-known and has been quite foundational in the jurisprudence, decided en banc, in the Ninth Circuit Court of Appeals. Roommates.com was the party in that case that had been accused of violating essentially civil rights laws because they told people that they could find roommates. They didn't tell them exactly what content to supply, but if you wanted to say, I want my roommate to be a certain race, you could exclude some people and include others and so on. And this was facilitated by the design of the website. So the content was provided by users. They're the ones that said, oh, I want a roommate of a certain race. But the design that elicited that content was the responsibility of the website.

So there's kind of a hard case. The Ninth Circuit decided it correctly. They said, section 230 offers no protection for this website. That had been a foundational case that has been cited repeatedly in subsequent cases and in subsequent contexts.

The rule is pretty clearly expressed in the law itself. And there have been some anomalous decisions where the language is more or less dicta but where they say such things as, you know, merely editing it doesn't matter. Well, hell, if you edit it, you've read it.

The paradigm for this law was that there's so much content going through these portals that no one could really be expected to read it. But if someone has actually read it and they've actually

edited it, well, then that paradigm doesn't apply, and that's not what this law is about.

And the cases that have repeatedly gotten this correct are, in my view, the throw weight of the case law.

Mr. RUTHERFORD. Thank you.

Ms. Leary, would you like to comment on that?

Ms. LEARY. Yes, I would like to comment on the Roommates case. If we were to go through the pleadings in all of these sex-trafficking cases, I can tell you, in numerous cases of these, the parties have cited to Roommates, and that has been rejected in the sex-trafficking context.

So, while I appreciate the fact that there may be some agreement that Roommates is a good standard or something, the fact of the matter is that in litigation on the ground the courts have rejected this.

And I would just like to point out, the CDA was created in response to what was perceived by Congress as a bad case, the Prodigy case. And the internet companies and the startups came to Congress and said, "Please fix this." We are in a—

Mr. COX. If I may interject, I just need to pierce that bubble, because that's not how it happened. Literally, no company talked to Ron or me or anybody in Congress. We did this on our—this was a congressional initiative. I just mention it because it's an urban legend.

Mr. RUTHERFORD. Okay. Well, let Ms. Leary—

Ms. LEARY. I'm happy to hear that. I can only refer to the—well, I'm happy to hear that.

What I would say is that, today, we have a similar situation with victims, States' attorneys general, and advocates saying, "These cases are getting it wrong. Congress, please fix it." And we should do so.

Mr. RUTHERFORD. Thank you.

And let me close by just saying that, you know, having arrested individuals who used this platform to further their criminal enterprise and go meet young children in homes and other places throughout our community, I can tell you, when I read, you know, H.R. 1865 and it shifts to, you know, knowingly or recklessly publishing that information—look, I'm not concerned about the incidental—something that pops up on a provider's site that they know nothing about. But places like Backpage and others, they know exactly what's going on, and there is no doubt in anyone's mind. And it's got to stop.

Thank you. I yield back.

Mr. Johnson of Louisiana. Thank you.

The gentleman yields back. The chair recognizes Mr. Jeffries for 5 minutes.

Mr. JEFFRIES. I thank the chair for yielding and for your leadership, as well as the distinguished witnesses for your presence here today.

I think we can all agree on two things: one, that the internet has been a tremendous vehicle for growth, innovation, entrepreneurship, providing information to the American people in ways that weren't previously accessible. That is a good thing that should continue to be nurtured and supported.

I think we can also agree that the problem of online sex trafficking is a tremendous stain on our society and one that is a scourge that should be addressed by any means necessary in order to eradicate it, in the context of Backpage.com and beyond.

And so striking the right balance, it seems to me, is going to be the approach that's necessary here. And we appreciate your thoughts in that regard.

Let me start with Congressman Cox.

In the context of the Communications Decency Act, in particular, section 230, when it was initially enacted, that was at the infancy of the internet, correct?

Mr. COX. Yes, that is correct.

Mr. JEFFRIES. And, sort of, at that moment in time, you know, there were a lot of unanswered questions as to where, you know, this new internet phenomenon was going to take us in society but a desire on behalf of Congress to allow it to grow and to flourish.

And I think even in the legislation, the stated policy in section 230 was to promote the continued development of the internet. Is that right?

Mr. COX. Yes. That's from the statute.

Mr. JEFFRIES. And so that was in 1996. Now we're 20-plus years later. And, you know, there's sort of a body of practicality in terms of what the internet is and all of its glorious strengths as well as the downside to how it can be abused by others, in this case in the context of sex trafficking.

And so I'm just wondering your thoughts, and then I want to ask Professor Leary to respond as well. You know, how do we strike that right balance 20-plus years removed from when it was understandable to take a hands-off approach to the extent necessary to allow the internet to really grow and develop and expand, but now in the context where we clearly have bad actors who are abusing the internet, where we don't want to allow their conduct to be shielded, how do we strike that right balance at this moment, given the uncertainty and the concerns that we're not where we should be?

Mr. COX. That's really an excellent question because, you know, 20 years is an eternity in the world of technology, and things have really changed. And the biggest thing that's changed since we wrote this law is that, in 1995, when we first thought of it, there were 20 million, roughly, people with access to the internet and now it's billions. And so, now, the issues that we saw that made the internet unique back in the nineties are, you know, as big as the broad side of a barn.

What we noticed in 1995 was the difference between these Usenet groups on the internet, as they were called—and there were things like CompuServe back then, which were mostly for computer-type people and so on. And then along came AOL. But the big difference was that—between, say, a newspaper, where people, you know, curate the content and they decide what to publish and they read it and edit and write headlines for it and so on, on the one hand, and what was going on the internet, on the other, was that the internet was putting people together, and people were talking directly to each other without intermediation. It was just

instant communication by users. And there were literally, at the time, millions of such people.

So we thought, well, you know, this design that they had in the CDA, where the FBI is going to look at all these websites and decide, you know, up front what's good and what isn't and we'll take care of it that way, that that was just implausible, that there were too many communications for any set of human beings to monitor in that way.

And so we came up with a rule that said, all right, then the people that wrote the communications have to have that liability, and the people who are trying to monitor it need some protection for at least the attempt, because we know they can't get to it all. That was the basis for 230.

What we now have, of course, is the situation of the 1990s, you know, writ large, because now the volume of traffic is even much, much greater, and so the need for section 230 is, likewise, much greater.

But there's something else that's changed, and that's the proliferation of websites and the proliferation of what, at the time, were just a handful of people, like AOL and so on. I mean, back then, you actually got your internet access through these portals. Now you've got websites that are themselves, according to court decision, getting the protection of section 230. And that's something that was not in focus clearly in the 1990s.

So what the law needs to do—and this is something that courts have to do, because it is so fact-dependent. But what the law has to do a good job of is notice that all these websites aren't the same. Some of them are, you know, single-purpose things that do just one thing, like sex trafficking. And, on the other hand, some of them are, you know, conduits, they're passthroughs that just have user-generated content that could be on any topic or what have you and where the website itself is not participating in that content creation.

So there is always going to be the need for judicial interpretation. What we have to ask ourselves is, what's the right rule that we want these courts to apply? And I think we need to double down, because we know what the right rule is. We need to make sure the courts get it right.

Mr. JEFFRIES. Thank you. My time unfortunately has expired.

Mr. JOHNSON of Louisiana. Thank you.

The gentleman yields back, and the chair recognizes Mrs. Roby for 5 minutes.

Mrs. ROBY. Thank you.

Thank you all for being here. One of the reasons I wanted to be on this committee was to be able to work on this issue. And I think we're all here for the right reasons today.

At least 37 human-trafficking cases have been reported in my home State of Alabama in 2017, according to the National Human Trafficking Hotline. I'm briefly going to touch on a human-trafficking case, sex-trafficking case, that occurred in my district in southeast Alabama. And of note, based on the reporting at this time and information from the Alabama Attorney General's office, this was the first conviction of a human-trafficking/sex-trafficking case that went to trial.

An underage minor was first picked up in Mississippi and then brought to Tennessee and then eventually taken to Alabama. It was revealed that this individual had had her picture taken against her will. It was placed on online websites to set up arrangements with strangers. The victim told the police that she had been held against her will, forced to take drugs and forced to prostitute herself. She was a victim of abuse.

During the trial of this case, the victim said, "I was made to prostitute myself," was the quote, "and if I didn't, it was war."

It was war. It is war. These are the words of a young victim, a child, having to fight to survive to overcome these horrendous circumstances. So I think it's important to go back to who we're here for, and it's to be the voice for the victims who can't fight this war on their own. And we all have a responsibility in this and want to get it right.

Professor Leary, I want to go back to the conversation that you were having with my colleague, Judge Poe, about the child pornography cases and how that works. And why you said that it was working was because States were in a position where they can prosecute.

The Ann Wagner bill allows for that. And I think what I'm trying to wrap my mind around, as I sit here and listen to you—and there are many different views or concerns being expressed here today. But I think my colleague asked the right question: If not the Wagner legislation, then what? What are the other options we have?

And, Chris, I hear what you're saying, is there is a law in place right now. I think what some of us are grappling with is that, if an individual or a group of individuals are using user-content websites—and forgive me if I'm not saying the techie words right, but—if they're using that, then what is the answer, if we can't go down this road?

And so I want Professor Leary to maybe dive a little bit deeper as it relates to how it is working with child pornography and then allow for some of you others to tell me, if there's a different solution, what is it.

And maybe help me understand. I've heard by sitting here listening that you talk about there's so much information, there's so much data. I wouldn't claim to be able to really appreciate that, in terms of what that looks like in real application. But it seems to me that, in some of these instances, it's quite glaring. So if you could just expound on that, that would be helpful.

Ms. LEARY. Thank you for the question.

And let me be clear. I don't want to paint a picture that child pornography is not a problem in this country. It clearly is a significant problem. I was simply pointing to it as an analogy of a situation where we have a crime that affects the whole country and we recognize it's on the local, Federal, State level, it crosses all borders. So what have we done? We've attacked it on all pressure points—State, local, civil, federally, criminally, all those ways—and that has been effective.

Mrs. ROBY. So why can't we do that with sex and human trafficking? That's what I'm trying to understand.

Ms. LEARY. And I'm not sure, to answer your question. I think, back when 230 was created, there was this concern that the cost

would be too much. But there also was not the Trafficking Victims Protection Act. In fact, trafficking wasn't even recognized as a crime at that time. So I think that the problem we have is a law crafted in 1996 dealing with 2017 problems is creating a struggle.

So I think revisiting it—and the Wagner bill, for example, does try to strike that balance. It doesn't touch the immunity provision for good actors. It defines a term that has previously not been defined in Federal criminal law, the benefits provision, by attaching a “knowing and reckless” standard. And it gives effect to what Congress has been trying to do in the Trafficking Victims Protection Act, which, again, didn't exist in 1996.

Mrs. ROBY. My time has expired, but if I get another 5 minutes, I'll circle back and let others weigh in. We all want to get to the right solution here.

Mr. JOHNSON of Louisiana. Thank you.

The gentlelady yields back.

The chair recognizes Mr. Raskin for 5 minutes.

Mr. RASKIN. Mr. Chairman, thank you very much.

I want to quickly associate myself with the remarks of Mr. Deutch. I concur that, the day after the worst mass shooting, one of the worst acts of terror we've ever seen in the streets of America, that we should be having a hearing about what we can be doing in a bipartisan fashion to deal with the continuing epidemic of gun violence across the country.

But, to the matter at hand, which is also extremely important, it seems to me that there are several different issues that are implicated in the various bills before us. One of them, of course, is the question of what is the legal standard embodied in the current law, in 230. And Mr. Cox testifies that that standard is clear, that it's one of knowledge. That is, if an internet provider or user knows that content that it's posting—

Mr. COX. If I may interject, that's not the standard.

Mr. RASKIN. Oh, it's not?

Mr. COX. It's not a knowledge standard.

Mr. RASKIN. Well, what is the standard?

Mr. COX. It's an objective standard. If the website or the web platform or, as the statute describes it, the interactive service is involved, if it is a content creator, if it is involved, in part, in the development of that content, then that person loses the protection. If it is not—that is to say, if the content is created wholly by somebody else—then they are protected.

Mr. RASKIN. But so—OK. Then we're getting someplace here. You're telling me that, if the website owner is fully aware that content is being placed on there that promotes sex—

Mr. COX. No. No.

Mr. RASKIN. No?

Mr. COX. No, no, no. So there's no “knowledge” standard in the law. What the law says simply is that—so, in other words, if you have evidence that the web platform was involved in creating content, if there is an email from John to Mary and it says, “Change this,” or what have you, that's the sort of thing that takes away section 230—

Mr. RASKIN. OK. So—all right. Your reading of 230 is that there's absolute immunity that attaches unless it can be shown

that the particular website provider or user itself created the content.

Mr. COX. That's one way that you lose the protection. But another way is that, in part, you were responsible for that. Somebody else created the content, but you got yourself involved. And a third way is that—

Mr. RASKIN. You mean you participate in the creation of the content.

Mr. COX. You participate in the creation of it or—there's another alternative in the statute—you participate in the development of it. And then, you know, between creation and development, there are also two other qualifiers. Even if you only did it in part and somebody else did the majority of it, that, too, vitiates the protection.

And so, in that Roommates case that I mentioned, you know, other people were wholly responsible for creating the content, but the influence on the content that the web platform was able to have by virtue of its design was enough to vitiate the protections of 230.

Mr. RASKIN. OK. Well, which is really akin to your second point, that that's a form of participation in the content—

Mr. COX. Right.

Mr. RASKIN [continuing]. Is structuring it or guiding it—

Mr. COX. Exactly.

Mr. RASKIN [continuing]. In a particular way.

Mr. COX. Exactly.

Mr. RASKIN. Well, let me just start with you, then. Why shouldn't knowledge be enough to withdraw the statutory immunity that's conferred by 230? In other words, if someone has a website and they're perfectly cognizant of the fact that someone is posting content for the purposes of enabling sex trafficking, why shouldn't it be enough, at that point, to allow for exposure, whether it's from a Federal or a State criminal or civil source? Why shouldn't knowledge be enough?

Mr. COX. Well, in any action, knowledge is a subjective and fact-based test. So you'd have to litigate—

Mr. RASKIN. It's objective and fact-based in the law, right? In other words, we believe that we can come to a real conclusion—

Mr. COX. Yes, there's a—

Mr. RASKIN [continuing]. As a matter of fact.

Mr. COX [continuing]. Result. Of course, there's a result at the end.

Mr. RASKIN. Yeah.

Mr. COX. The idea is to have a presumption in the law that if you involve yourself in some aspect of cleaning up the content on your website that you will be protected to that extent and that if you involve yourself for any other reason that you will not be. So that's how we—

Mr. RASKIN. Okay. Let me—

Mr. COX [continuing]. Separate it.

Mr. RASKIN [continuing]. Come to—Professor, if I could ask you this question: Why should—Professor Leary—why should sex trafficking be treated differently from other extreme and heinous crimes, like murder for hire or terrorism or going online in order to, for example, commit gun violence or a gun massacre? Shouldn't

we have one general standard of culpability that applies, whether it's one of deliberate involvement, which I think Mr. Cox is suggesting, or one of simple knowledge?

Ms. LEARY. Thank you for the question, Congressman Raskin.

That's a real problem. I'll candidly say that to you. But I think that the situation with sex trafficking is so egregious, with—that's the body of cases that we really went into—to the trouble, and that is a particular crime that has been exploding on the internet. In fact—

Mr. RASKIN. But aren't terrorists using the internet also?

Ms. LEARY. Oh, they absolutely are, and I'm in no way suggesting that they aren't. What I'm saying, though, is we have it documented through the cases that began since 2010, and this immunity keeps coming up and blocking them. And through the statistics that are tied—the National Center for Missing and Exploited Children talks about how that explosion in statistics is tied to the online trafficking. We have a unique problem here.

And while I appreciate the concern articulated by you, I think it's an example of don't throw out the good for the perfect. If we were going back 10 years and we wanted to rethink the CDA, I think that would make some sense. But where we are today, statistically, every time one of these folks is trafficked, on average, they are raped 10 to 20 times a night. So the delay here has real human cost. And so covering it outright here for right now makes some sense.

Mr. RASKIN. Do you favor a "knowledge" or a "recklessness" standard for the—oh, forgive me.

Mr. RUTHERFORD [presiding]. The gentleman's time has expired.

Mr. RASKIN. I yield back.

Mr. RUTHERFORD. Thank you.

However, we will be—with the committee's approval, we're going to have a second round of questions, if you don't mind. And I will begin.

And I'd like to ask Professor Kosseff, could H.R. 1865, as written, have the unintended consequence such as disincentivizing websites to screen objectionable material to begin with so that they don't have that "knowledge" and "reckless"—

Mr. KOSSEFF. Well, again, not speaking about any specific legislation but just anyability—or any legislation that aims at the very real issue of sex trafficking, I think that it depends on how it's crafted.

So if you do have a "knowledge" standard—and, I mean, frankly, what I would really like to have a lot of discussion with law enforcement about is, what happens when a platform gets knowledge of a specific act? What can they do? What are the steps? Should it be taking it down first, then contacting law enforcement? Contacting law enforcement and then taking it down? So I think those are the specific discussions.

I think that it really could be incredibly effective. I just think we need to really get into the particulars of what actually works. And Professor Leary might have some thoughts, just based on her time in—

Mr. RUTHERFORD. And I'd like to hear that, Professor Leary.

But I can tell you, coming from a background of law enforcement, I would like to see—you know, knowingly, they need to be notified. And law enforcement is very aware of these things. We can officially document their occurrence, put the provider on notice that that content is on their site. And then we can, within the courts, hold them accountable for that “knowing” element.

Ms. Leary.

Ms. LEARY. Thank you, Congressman Rutherford.

One comment on that—and I agree, the “knowing” or the “standard accomplish that. Somebody who is unaware of—and it’s not a “should’ve been aware of” standard. They have to have actual knowledge of the image or actual knowledge of the risk that this is trafficking in this context.

And let’s not divorce ourselves—it’s not just the mens rea sitting out there, “knowing” or “reckless.” It’s “knowing” or “reckless” conduct. And I think that’s important.

I think, to answer your question, Congressman, we can look at other industries where they’ve never had immunity. Let’s take the hotel industry. There is an industry that, unfortunately, by nature of what their business is, there’s going to be trafficking occurring there. So they’ve never had immunity, and we haven’t had a slew of lawsuits, we haven’t had a slew of cases.

They have developed best practices to respond to these scenarios when things come to their attention. In fact, they’ve been leaders, in some ways, in training all their employees to avoid the risk, because they know that if they become aware of this they could be held liable.

I think we would expect to see the same thing in companies that are not brick-and-mortar.

Mr. RUTHERFORD. And as a follow-up to some earlier comments about the problem of sex trafficking for minors, 9,000 to 10,000 cases a year, do you believe that H.R. 1865 will actually result in fewer of those cases?

Ms. LEARY. I think it will result in fewer cases. At least, that is my hope. And I think it will because it gets at the companies that, right now, are functioning with de facto immunity.

And why wouldn’t you engage in this behavior? What do criminals want? They want low risk, they want high profit, and they want not to get caught. Right now, the way things are set up, that is the ecosystem for them. I think this increases risk and, therefore, hopefully, will deter some from engaging in these kind of joint ventures.

Mr. RUTHERFORD. Thank you very much.

The chair will yield back.

Mr. Raskin, would you like to—

Mr. RASKIN. Please. Thank you, Mr. Chair.

Mr. RUTHERFORD. You’re recognized for 5 minutes.

Mr. RASKIN. I appreciate it.

So, back to the question of what should the standard of culpability be for the providers or users if we want to revoke their immunity. And I think everybody should agree that the immunity generally has been a positive thing in terms of the development of the internet and the ability of new businesses to grow. And we’re

talking about the dark side of that; you know, what has that meant.

So why not follow what the Supreme Court did in *New York Times v. Sullivan* with respect to defamatory speech, saying that if—there, remember, *The New York Times* printed ads which had some minor errors in them and then were sued by, you know, some of the sheriffs down south, who alleged that they'd been defamed.

And the Court said that *The New York Times*, as the publisher of the information, could only be held liable if they knew that the content was, itself, defamatory or they were reckless as to the existence of the defamatory speech, meaning that they were aware that there was a gross risk, an extreme risk that what they were about to publish wasn't true.

What would be wrong with using that as the right standard?

And I don't know, Mr. Cox, whether you want to take the first shot at that.

Mr. COX. Well, I think, as every Member of Congress knows, the *New York Times v. Sullivan* standard is essentially an outcome-determinative standard. It's extremely difficult to satisfy that standard. And I think that the responsibility standard that's in section 230 is a much lighter touch. That is to say, it's much easier to pierce the—

Mr. RASKIN. You think it's easier.

Mr. COX. Yes, much easier than the *New York Times* against *Sullivan* standard, because if you take a look at—again, back to the *Roommates* case, if you take a look at what went on there, the *Roommates.com* website credibly said, "Look, we didn't tell people what roommates they should have. This is all their doing." And yet, because of the design of the website, it was held that they were responsible, in part, for the creation or development of that content.

I think there's a standard there that the courts have found, you know, very suitable to, you know, pinning the tail on the responsible party—

Mr. RASKIN. Uh-huh. But would you agree that what you're describing as a design standard would correspond in the criminal law field to one of deliberate action? There's negligence, recklessness, knowledge—

Mr. COX. Well, let me give you another example from other cases.

Mr. RASKIN. Yeah.

Mr. COX. Other cases have said that where the website, you know, encouraged the tortious conduct or encouraged the bad conduct that that was enough.

Mr. RASKIN. Sure. And that goes way beyond knowledge to deliberate participation.

Mr. COX. But, also, those are cases where, you know, the defendant would say, "Look, I didn't write it. I didn't do it." So, you know, in the newspaper context, you know, using *New York Times* against *Sullivan* again, I mean, imagine if the newspaper didn't even write the article, you know? I mean—

Mr. RASKIN. Yeah.

OK. Let me just change the subject quickly, because I just have a couple minutes left here.

I am troubled also about this question of Federal or State. And I'm just wondering if any of the panelists have a thought about—

I mean, we could alter the standard in some way but still confine it to Federal enforcement, or we could maintain the standard but allow the States and local Governments to get into it.

And what is the reality of how we're actually going to deal with the problem of trafficking? Do we need to nationalize this in this way, by delegating it to thousands of potential law enforcement entities across the country?

And so, I don't know, Mr. Kosseff?

Mr. KOSSEFF. So I believe that there's a very strong role that States can play in addition to the Federal Government, both on the—particularly on the criminal side—or on the civil side.

But I think what's necessary for both the State criminal and civil enforcement, even if they have their own laws, is to have parameters. And we've had this before, for example, for ERISA employment discrimination claims, where the State laws are not preempted if they meet certain elements.

Because that provides some certainty, and, frankly, I think it makes enforcement more effective than possibly having a bunch of different requirements, which we've seen in other areas of technology law that, frankly, just don't accomplish the ultimate goal as much as having these common elements.

Mr. RASKIN. Great.

I think I'm out of time here. I thank you, Mr. Chairman.

Mr. RUTHERFORD. The gentleman yields back.

The chair will now recognize Mrs. Roby of Alabama.

Mrs. ROBY. We'll just pick up where we left off. So the question was, after talking to Professor Leary about the Wagner bill—and so I guess the question to the rest of the panel is, if that's not the answer, then what is?

In any order.

Go ahead.

Mr. ENGSTROM. Sure. So I have thoughts on this.

First, I think it's heartening that I don't think there's a lot of a gap between what we think a responsible approach to this is and what some other folks think. So I think there are things we agree on.

Any State's enforcement of trafficking law should be, basically, the Federal law.

We don't want to condition a platform's liability or limit their liability protections based upon any content moderation practices. Let's maintain the immunity and make sure that that's clear.

Let's ensure that it's actual knowledge of specific conduct so you're not holding good actors in a position where, you know, they don't know when they're liable. I thought the Congressman's position on, you know, law enforcement putting the provider on notice—that takes away that concern about when I have knowledge.

I also want to, you know, be cautious about how much we want to rely on technology to solve the problem. It's a way you can identify the range of activities going on on your platform, but it's far from perfect and it's often, you know, very difficult to parse.

So, yes, there's a huge volume of data out there, and I just want to make sure that, you know, however we craft this proposal—and I think it can be done through, you know, specific, very narrow fixes—takes that reality into account and, again, doesn't, you know,

condition or limit 230's protections based upon, you know, deploying particular technologies, because I think that could be very counterproductive.

Mr. KOSSEFF. So I agree with much of what both Mr. Engstrom and Professor Leary had to say. And I really am heartened that I think there is a lot of common ground to work from here. This debate has gotten very heated, and I think that we can sort of focus on the details of how to sort this out.

A few additional things, not to repeat what they've said.

This whole idea of the technology and how technology could screen for sex-trafficking ads, I have heard—and I'm not a technologist, by any means; I'm a lawyer. But I have heard from both sides about how effective or ineffective technology to identify sex-trafficking ads could be compared to things like PhotoDNA for child pornography. I'd like to have a much more substantive discussion and study on that, and—

Mrs. ROBY. You and me both.

Mr. KOSSEFF. Yes.

Mrs. ROBY. I want to understand that, because I think that's part of what may be a hindrance right now, is not being able to understand why one is so different from the other.

And so, of course, I'll work with staff here on this committee but would love any additional information outside of the testimony you've already provided that could help us with that and wrap our minds around how that works. Because I, like you, am a lawyer, not—don't have a deep understanding of the technology.

Mr. KOSSEFF. Yeah. So I think that's an important aspect to figure out.

And I think there are privacy-related concerns that go along, things like whether ECPA would be triggered if there were this scanning for certain content. So we'd have to have a broader discussion about how other statutes interplay with that.

But, again, I just think more discussions. I think today has been a great starting point. And also looking at whether we could get some degree of uniformity. Because, again, I mean, in the other areas of technology law that I've practiced and written about, when you have conflicting requirements, that makes enforcement difficult. And I want enforcement to be as strong against these culpable sites as possible, and I don't want any red tape holding it up. So that's really what it comes down to for me.

Mr. COX. I just want to pick up on that last point. Right now, section 230 is a uniform standard. It applies across all criminal law and all civil law, for torts as well as crimes. If we go in and we amend section 230 and come up with substantive standards that relate to the underlying criminal offense and stick it in that statute, then we've got now the beginnings of divergent 230 case law.

What you really want to do is the same thing, only do it in Title 18, where it belongs. And so put a sex-trafficking-specific tool into Title 18 that accomplishes essentially the objectives that we're all talking about here. I've attached language to my testimony that does this. And the vehicle for it would be 18 U.S.C. section 1952, the Travel Act, which covers prostitution but doesn't specifically cover sex trafficking. Amend it to do that, provide for enhanced penalties all the way up to life in prison, put victim restitution

right in there, and give this, the same Federal tool, then, to the States, which you can do easily by putting together a joint Federal-State task force.

All the AGs want to get involved in this. You saw 50 AGs signed a letter saying that they want to become involved in this. Put them together in a task force so we get the same result we've had in child pornography.

I hasten to point out that in child pornography there's not a carve-out for section 230. So if we're making progress there, why aren't we making it in sex trafficking? It's because we haven't had any Federal prosecutions under the SAVE Act. And it's also because the State prosecutors are running up against some of these, you know, anomalous barriers where they either haven't been able to plead or didn't plead the facts properly and got a bad result. That's been a handful of cases, and there's clearly a right way to do it.

In this task force, the Department of Justice can make all the AGs special attorneys general and give them the full power of the Federal Government to implement Federal statutes. And that can include not just Title 18; it can be—in fact, they can do section 5 of the FTC Act on their own even without being so designated.

When they do this, when they go into court as special attorneys general appointed under a statute, existing power that DOJ has to implement both State and Federal law in their prosecutions, they just zip right through the issues with respect to section 230, if there are any, because section 230, on its face, says it has no application to Federal law.

Mrs. ROBY. I'm way over my time. Thank you for your generosity.

Again, just thank you each for being here and your commitment to wanting to get this right. So thank you.

Mr. RUTHERFORD. Thank you.

And, seeing no further questions, I want to thank the committee very much for your testimony here today and for enlightening us.

Without objection, all members will have 5 legislative days to submit additional written questions for the witnesses or additional materials for the record.

This hearing is adjourned.

[Whereupon, at 11:57 a.m., the subcommittee was adjourned.]