

Calendar No. 292

115TH CONGRESS }
2d Session }

SENATE

{ REPORT
115-199

STOP ENABLING SEX TRAFFICKERS ACT OF
2017

R E P O R T

OF THE

COMMITTEE ON COMMERCE, SCIENCE, AND
TRANSPORTATION

ON

S. 1693



JANUARY 10, 2018.—Ordered to be printed

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SENATE COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION

ONE HUNDRED FIFTEENTH CONGRESS

SECOND SESSION

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Mr. THUNE, from the Committee on Commerce, Science, and
Transportation, submitted the following

R E P O R T

[To accompany S. 1693]

[Including Cost Estimate of the Congressional Budget Office]

The Committee on Commerce, Science, and Transportation, to which was referred the bill (S. 1693) to amend the Communications Act of 1934 to clarify that section 230 of that Act does not prohibit the enforcement against providers and users of interactive computer services of Federal and State criminal and civil law relating to sex trafficking, having considered the same, reports favorably thereon with an amendment (in the nature of a substitute) and recommends that the bill (as amended) do pass.

PURPOSE OF THE BILL

S. 1693 would amend Federal law to ensure that section 230 of the Communications Act of 1934¹ (section 230) does not prohibit the enforcement of Federal and State criminal and civil law relating to sex trafficking against providers and users of interactive computer services (ICSs).

BACKGROUND AND NEEDS

The Communications Decency Act of 1996 (CDA), enacted as part of the Telecommunications Act of 1996,² was the first bill signed into law seeking to regulate obscenity and indecency on the internet. It was an attempt to address, among other things, concerns about minors' access to pornography and other indecent material

¹47 U.S.C. § 230.

²Public Law 104-104, 110 Stat. 56, 133.

online. Section 230 (as added by the CDA), the section central to the discussion around S. 1693, states that “no provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”³ This provision has had the practical effect of preventing ICSs from being held liable for the content that people who use their services create, unless a violation of Federal criminal law has occurred.

Over the years, much of the CDA as originally enacted has been struck down in court on freedom of speech grounds,⁴ but section 230 and its liability protections remain. Many have argued that this section provides an essential underpinning of the modern internet and is critical to the explosive growth of websites that facilitate user-generated content.⁵ At the same time, however, those protections have been held by courts to shield from civil liability and State criminal prosecution nefarious actors, such as the website BackPage.com, that are accused of knowingly facilitating sex trafficking.⁶ S. 1693 would eliminate section 230 as a defense for websites that knowingly facilitate sex trafficking. It would also empower State law enforcement to enforce criminal statutes against websites, and introduce new civil liabilities for violations of Federal criminal laws relating to sex trafficking.

LEGISLATIVE HISTORY

S. 1693 was introduced on August 1, 2017, by Senator Portman (for himself, Senator Blumenthal, and 23 other original cosponsors), and was referred to the Committee on Commerce, Science, and Transportation of the Senate. On September 19, 2017, the Committee held a legislative hearing on the bill. On November 8, 2017, the Committee met in open Executive Session and, by voice vote, ordered S. 1693 reported favorably with an amendment (in the nature of a substitute).

ESTIMATED COSTS

In accordance with paragraph 11(a) of rule XXVI of the Standing Rules of the Senate and section 403 of the Congressional Budget Act of 1974, the Committee provides the following cost estimate, prepared by the Congressional Budget Office:

S. 1693—Stop Enabling Sex Traffickers Act of 2017

S. 1693 would aim to eliminate legal obstacles to the successful prosecution of people or entities that violate federal laws against

³An “interactive computer service” is any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions. 47 U.S.C. §230(f)(2). This term has been found to include, among other things, the following: websites (*Carafano v. Metrosplash.com Inc.*, 207 F.Supp.2d 1055 (C.D. Cal. 2002), affirmed on other grounds, 339 F.3d 1119); website hosting services (*Ricci v. Teamsters Union Local 456*, 781 F.3d 25 (2d Cir. 2015)); search engines (*Baldino’s Lock & Key Service, Inc. v. Google, Inc.*, 88 F.Supp.3d 543 (E.D. Va. 2015), affirmed 624 Fed.Appx. 81, 2015 WL 7888322); and social networking sites (*Klayman v. Zuckerberg*, 753 F.3d 1354 (D.C. Cir. 2014), certiorari denied 135 S.Ct. 680).

⁴See, e.g., *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997).

⁵See, e.g., Letter from Faiz Shakir, National Political Director, American Civil Liberties Union, to Hon. John Thune, Chairman, United States Senate Committee on Commerce, Science, and Transportation, Nov. 7, 2017, available at <https://www.aclu.org/letter/aclu-letter-opposing-sesta>.

⁶See, e.g., *Jane Doe No. 1 et al., v. BackPage.com, LLC*, 817 F.3d 12 (1st Cir. 2016).

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

Because those prosecuted and convicted under S. 1693 could be subject to criminal fines, the federal government might collect additional fines under the bill. Criminal fines are recorded as revenues, deposited in the Crime Victims Fund, and later spent without further appropriation action. CBO expects that any additional revenues and associated direct spending would not be significant because the legislation would probably affect only a small number of cases.

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

CBO estimates that enacting S. 1693 would not increase net direct spending or on-budget deficits in any of the four consecutive 10-year periods beginning in 2028.

S. 1693 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act.

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

REGULATORY IMPACT STATEMENT

Because S. 1693 does not create any new programs, the legislation will have no additional regulatory impact, and will result in no additional reporting requirements. The legislation will have no further effect on the number or types of individuals and businesses regulated, the economic impact of such regulation, the personal privacy of affected individuals, or the paperwork required from such individuals and businesses.

CONGRESSIONALLY DIRECTED SPENDING

In compliance with paragraph 4(b) of rule XLIV of the Standing Rules of the Senate, the Committee provides that no provisions contained in the bill, as reported, meet the definition of congressionally directed spending items under the rule.

SECTION-BY-SECTION ANALYSIS

Section 1. Short title.

This section would provide that the bill may be cited as the “Stop Enabling Sex Traffickers Act of 2017.”

Section 2. Findings.

This section would find the following: that section 230 was never intended to provide legal protection to websites that facilitate traffickers in advertising the sale of unlawful sex acts with sex trafficking victims; and that clarification of section 230 is warranted to

ensure that that section does not provide such protection to such websites.

Section 3. Ensuring ability to enforce Federal and State criminal and civil law relating to sex trafficking.

Section 3(a) would amend section 230(b) to declare that it is the policy of the United States to ensure vigorous enforcement of Federal criminal and civil law relating to sex trafficking.

Section 3(a) would further amend section 230(e) to clarify that nothing in the section should be construed to impair or limit: (1) any claim in a civil action brought under section 1595 of title 18, United States Code, if the conduct underlying the claim constitutes a violation of the Federal sex trafficking statute (18 U.S.C. 1591); or (2) any charge in a criminal prosecution brought under State law if the conduct underlying the charge constitutes a violation of the Federal sex trafficking statute.

The Committee notes that this Act would not abrogate section 230(c)(2)(A). This provision would ensure that ICSs cannot be held liable on account of actions taken in good faith to restrict access to objectionable material. With this provision preserved, an ICS should not be concerned that it will face liability for knowingly assisting, supporting, or facilitating sex trafficking based on its actions to restrict access to material that violates the Federal sex trafficking statute. As section 230(c)(2)(A) provides, an ICS would not have their good faith efforts to restrict access to objectionable content used against them.

If a plaintiff shows that an ICS is knowingly assisting, supporting, or facilitating sex trafficking, then the ICS cannot avoid liability by characterizing those actions as efforts to remove objectionable material. For example, if a website screens advertisements in an effort to remove objectionable material, but then merely edits illegal advertisements to make them more difficult for law enforcement to identify, or knowingly assists, supports, or facilitates sex trafficking, then even an ICS's efforts to remove objectionable content are no bar to liability. Section 230(c)(2)(A) was never intended to, and does not, pose a barrier to liability on these facts.

Section 3(b) would establish that the amendments made by this section would take effect on the date of enactment of this Act, and that the specific amendment to section 230 related to allowing State criminal prosecution or civil enforcement actions would apply regardless of when the alleged conduct occurred.

Section 4. Ensuring Federal liability for publishing information designed to facilitate sex trafficking or otherwise facilitating sex trafficking.

This section would amend the Federal sex trafficking statute to clarify that "participation in a venture" means "knowingly assisting, supporting, or facilitating a violation" of subsection (a)(1) of that statute.

Section 5. Actions by State Attorneys General.

This section would amend the Federal civil remedy statute for sex trafficking (18 U.S.C. 1595) to clarify that the attorney general of a State may, as *parens patriae*, bring a civil action against a violator of the Federal sex trafficking statute on behalf of the resi-

dents of that State in an appropriate district court of the United States.

Section 6. Savings clause.

This section would establish that nothing in this Act or the amendments made by this Act is intended to limit: (1) any claim or cause of action under Federal law that was filed, or could have been filed, before the date of enactment of this Act; or (2) any claim or cause of action under State law, including statutory and common law, that was filed or could have been filed before the date of enactment of this Act, and that was not preempted by section 230.

CHANGES IN EXISTING LAW

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new material is printed in italic, existing law in which no change is proposed is shown in roman):

TITLE 18. CRIMES AND CRIMINAL PROCEDURE

PART I. CRIMES

CHAPTER 77. PEONAGE, SLAVERY, AND TRAFFICKING IN PERSONS

§ 1591. Sex trafficking of children or by force, fraud, or coercion

(a) Whoever knowingly—

(1) in or affecting interstate or foreign commerce, or within the special maritime and territorial jurisdiction of the United States, recruits, entices, harbors, transports, provides, obtains, advertises, maintains, patronizes, or solicits by any means a person; or

(2) benefits, financially or by receiving anything of value, from participation in a venture which has engaged in an act described in violation of paragraph (1), knowing, or, except where the act constituting the violation of paragraph (1) is advertising, in reckless disregard of the fact, that means of force, threats of force, fraud, coercion described in subsection (e)(2), or any combination of such means will be used to cause the person to engage in a commercial sex act, or that the person has not attained the age of 18 years and will be caused to engage in a commercial sex act, shall be punished as provided in subsection (b).

(b) The punishment for an offense under subsection (a) is—

(1) if the offense was effected by means of force, threats of force, fraud, or coercion described in subsection (e)(2), or by any combination of such means, or if the person recruited, enticed, harbored, transported, provided, obtained, advertised, patronized, or solicited had not attained the age of 14 years at the time of such offense, by a fine under this title and imprisonment for any term of years not less than 15 or for life; or

(2) if the offense was not so effected, and the person recruited, enticed, harbored, transported, provided, obtained, advertised, patronized, or solicited had attained the age of 14 years but had not attained the age of 18 years at the time of

such offense, by a fine under this title and imprisonment for not less than 10 years or for life.

(c) In a prosecution under subsection (a)(1) in which the defendant had a reasonable opportunity to observe the person so recruited, enticed, harbored, transported, provided, obtained, maintained, patronized, or solicited, the Government need not prove that the defendant knew, or recklessly disregarded the fact, that the person had not attained the age of 18 years.

(d) Whoever obstructs, attempts to obstruct, or in any way interferes with or prevents the enforcement of this section, shall be fined under this title, imprisoned for a term not to exceed 20 years, or both.

(e) In this section:

(1) The term “abuse or threatened abuse of law or legal process” means the use or threatened use of a law or legal process, whether administrative, civil, or criminal, in any manner or for any purpose for which the law was not designed, in order to exert pressure on another person to cause that person to take some action or refrain from taking some action.

(2) The term “coercion” means—

(A) threats of serious harm to or physical restraint against any person;

(B) any scheme, plan, or pattern intended to cause a person to believe that failure to perform an act would result in serious harm to or physical restraint against any person; or

(C) the abuse or threatened abuse of law or the legal process.

(3) The term “commercial sex act” means any sex act, on account of which anything of value is given to or received by any person.

(4) *The term “participation in a venture” means knowingly assisting, supporting, or facilitating a violation of subsection (a)(1).*

[(4)](5) The term “serious harm” means any harm, whether physical or nonphysical, including psychological, financial, or reputational harm, that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to perform or to continue performing commercial sexual activity in order to avoid incurring that harm.

[(5)](6) The term “venture” means any group of two or more individuals associated in fact, whether or not a legal entity.

§ 1595. Civil remedy

(a) An individual who is a victim of a violation of this chapter may bring a civil action against the perpetrator (or whoever knowingly benefits, financially or by receiving anything of value from participation in a venture which that person knew or should have known has engaged in an act in violation of this chapter) in an appropriate district court of the United States and may recover damages and reasonable attorneys fees.

(b)

(1) Any civil action filed under [this section] *subsection (a)* shall be stayed during the pendency of any criminal action

arising out of the same occurrence in which the claimant is the victim.

(2) In this subsection, a “criminal action” includes investigation and prosecution and is pending until final adjudication in the trial court.

(c) No action may be maintained under [this section] subsection (a) unless it is commenced not later than the later of—

(1) 10 years after the cause of action arose; or

(2) 10 years after the victim reaches 18 years of age, if the victim was a minor at the time of the alleged offense.

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

COMMUNICATIONS ACT OF 1934

[47 U.S.C. 151 et seq.]

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

[47 U.S.C. 230]

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

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

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

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

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

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

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

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

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

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

(4) to remove disincentives for the development and utilization of blocking and filtering technologies that empower par-

ents to restrict their children’s access to objectionable or inappropriate online material; **[and]**

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

(6) *to ensure vigorous enforcement of Federal criminal and civil law relating to sex trafficking.*

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

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

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

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

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

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

(e) EFFECT ON OTHER LAWS.—

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

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

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

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

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

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

(B) any charge in a criminal prosecution brought under State law if the conduct underlying the charge constitutes a violation of section 1591 of title 18, United States Code.

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

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

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

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

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

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

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

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