September 11, 2017

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Hon. Mitch McConnell
Majority Leader
U.S. Senate
317 Russell Senate Office Building
Washington, DC 20510

Hon. Charles Schumer
Minority Leader
U.S. Senate
322 Hart Senate Office Building
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Dear Leader McConnell and Leader Schumer:

We write to urge the Senate not to rush consideration of the Stop Enabling Sex Traffickers Act of 2017 (S.1693). Any amendment to Section 230 of the Communications Decency Act of 1996 deserves the most careful deliberation, for it will have lasting repercussions — not only for lawful Internet sites and their users, but for the victims of sex trafficking, too. SESTA's vague standards would, perversely, make website operators *less* willing to police user content.

Section 230 is the law that made today's Internet possible. Given the stakes, any legislation should be grounded in a full and public examination of how Section 230 works today. Attaching SESTA to non-germane, "must-pass" legislation, such as the National Defense Authorization Act, would be a mistake of historic proportions.

We do not treat Section 230 as sacrosanct. We are open to a careful reassessment of the statute. But the rush to pass legislation as far-reaching as SESTA without a clear record of (a) how the bill would work or (b) what state prosecutions and civil suits are possible under current 230 case law understandably stokes the worst fears of Section 230 absolutists: that *any* amendment of the statute will wreak havoc on the Internet.

The attached appendix lays out our concerns about SESTA and our analysis of how Section 230 currently works. As we note, **Section 230 already excludes *all* federal criminal laws**, so the fact that Backpage has not yet been federally prosecuted has nothing to do with Section 230, and no amendment to the law will accelerate federal prosecution.

Further, the stated justifications for SESTA — allowing state criminal prosecutions and civil lawsuits — are already possible under Section 230 as it exists today, if it can be established that a site is responsible, at least "in part," for the "development" of third party content. **The Washington**

Supreme Court has already denied Backpage's motion to dismiss on these grounds, allowing a civil suit against Backpage to proceed. That case is set to go to trial on October 9.

The Ninth Circuit's *Roommates.com* decision is the lead case on "development." Chief Judge Alex Kozinski, even while finding that the website had lost its immunity, identified the twin perils of this issue — the Scylla and Charybdis between which courts and Congress must, like Ulysses, chart their course with the greatest of care. On the one hand, "[t]he Communications Decency Act was not meant to create a lawless noman's-land on the Internet."[i] Yet, on the other:

> Websites are complicated enterprises, and there will always be close cases where a clever lawyer could argue that something the website operator did encouraged the illegality. Such **close cases, we believe, must be resolved in favor of immunity**, lest we cut the heart out of section 230 by forcing websites to face death by ten thousand duck-bites, fighting off claims that they promoted or encouraged — or at least tacitly assented to — the illegality of third parties.[ii]

Rep. Chris Cox, the principal architect of Section 230, put it best when he said, recently, the two most important words in the statute are "in part."[iii] Everything turns how that term is interpreted, most critically at the motion to dismiss stage — because that is where sites face the "ten thousand duck-bites."

The most prudent path forward for Congress would be to build on the decision of the trial court in the Washington case — and what additional evidence is revealed in the apparently imminent federal prosecution of Backpage. We may well be standing at a turning point in the litigation against Backpage that could largely, if not entirely, moot the need for legislation: not merely because Backpage has already been deemed subject to civil suit and state prosecution, but because the law on "development" could become significantly more clear, allowing civil plaintiffs and state prosecutors to survive a motion to dismiss filed by sites like Backpage, and potentially meaning that these sites will, in fact, lose their Section 230 immunity.

Whatever path Congress takes in re-examining Section 230, legislation should be based upon a thorough hearings regarding the state of the law today. Our concerns with SESTA go to the heart of the bill's structure; we doubt the bill's unintended consequences can be avoided, while also satisfying the objectives of the bill's proponents (most notably for allowing civil lawsuits) with merely surgical edits. Yet **we share fundamental goals of the bill: Backpage, and sites like it, should be brought to justice** — not only by federal law enforcement, but state prosecutors and civil plaintiffs.

Section 230 already has a mechanism for ensuring that this can happen: the "development" standard. We urge lawmakers to begin there in understanding how to more effectively combat sex

[i] *Fair Hous. Council v. Roommates.com, LLC*, 521 F.3d 1157, 1164 (9th Cir. 2008).
[ii] *Roommates.com,* 521 F.3d at 1174.
[iii] Armchair discussion with Former Congressman Cox, Back to the Future of Tech Policy, YouTube (August 10, 2017), https://www.youtube.com/watch?time_continue=248&v=iBEWXIn0JUY.

trafficking without gutting the law that has allowed the Internet to flourish. We stand ready to advise lawmakers in this vital matter but will vigorously oppose any attempt to advance SESTA.

Sincerely,

Berin Szóka
President, TechFreedom

CC:

Hon. John Thune
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Appendix: Legal Analysis of SESTA & Section 230

Backpage Can Already Be Prosecuted under Section 230

We commend the Permanent Subcommittee on Investigations of the Committee on Homeland Security and Governmental Affairs for the work that went into the report it published in January: "Backpage.com's Knowing Facilitation of Online Sex Trafficking."[1] The report makes a damning case against Backpage, most notably exposing the site's intentional and long-standing campaign of identifying sex-trafficking ads then selectively editing them (both manually and algorithmically) to conceal their illegality *without* undermining their effectiveness — instead of removing them and reporting the posters to law enforcement.[2]

We expect that the report is currently being used to build a federal criminal prosecution against Backpage. Federal prosecutors have already convened a grand jury in Arizona. Lawyers for Backpage's founders have noted in sworn court filings that "indictments may issue anytime" against their clients.[3] The Senate report will doubtless aid DOJ in that prosecution, and is already being integrated by state attorneys general in their efforts to bring Backpage to justice.[4]

SESTA's proponents have argued that DOJ has under-prioritized such prosecutions. It is possible that such a prosecution could have happened earlier. But it may simply be that DOJ has been diligently building its case, and is being criticized prematurely. It is too early to say. But any discussion of this issue should begin with the question: Why has the federal criminal prosecution of Backpage taken so long? The answer turns on how DOJ works and the details of federal criminal law — *not* on Section 230, because **the statute's immunity completely excludes *all* federal criminal law**.

SESTA's proponents argue that state prosecutors need to be further empowered to bring sites like Backpage to justice. If DOJ's problem is a lack of manpower, state prosecutors could be deputized to enforce federal criminal laws against sex trafficking. But this could happen without any legislation: federal law already allows the deputization of state, local or tribal prosecutors as "special

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[1] Permanent Subcomm. on Investigations, U.S. Senate Comm. on Homeland Sec. & Gov't Affairs, Backpage.com's Knowing Facilitation of Online Sex Trafficking (2017), https://goo.gl/7tpTZw.

[2] Id. at 17.

[3] Def's Joint Motion on Continuance of Trial Date and All Other Relevant Deadlines, 12-2-11362-4 February 28, 2017, ECF 134545769.2 (on file with TechFreedom) ¶ 4.

[4] See, e.g., Def's Motion to Dismiss, *Backpage.com v. Joshua D. Hawley,* No. 4:17-cv-01951-PLC, 2017 U.S. Dist. (E.D. Mo. Aug. 1, 2017) at 16-20 (summarizing "four primary bases supported by substantial evidence for concluding that Backpage does not enjoy CDA protection for the content under investigation"), available at https://www.courthousenews.com/wp-content/uploads/2017/08/Backpage-Motion-to-Dismiss.pdf.

attorneys" empowered to prosecute federal law. But DOJ has yet to take advantage of this existing power.[5]

Problems Created by SESTA

We have three principal concerns with SESTA:

1. SESTA's "knowing conduct" standard is so vague and broad, that the threat of sweeping liability will impose a chilling effect on Good Samaritan self-policing by website operators;
2. SESTA does not specify the standard of proof for establishing whether conduct "violates a Federal criminal law;" and
3. SESTA bypasses the current "development" test for overcoming liability, forcing websites to defend themselves against a wide range of state prosecutions and civil suits.

The first two are essentially questions of more careful legislative drafting. The third is the most fundamental question of how to approach this issue: whether to create an issue-specific exception to Section 230 or to work within the current structure of the law. The default assumption in any legislation in this area should be to maintain as much consistency with Section 230 as possible. That means, absent a compelling reason to the contrary *and* well-tailored legislative language, the first hurdle to overcoming a website's immunity should remain the "development" test.

(1) Vague, Expensive "Knowing Conduct" Standard Will Discourage Good Samaritan Self-Policing

The bill would add the term "knowing conduct" to the definition of "participation in a venture" in 18 U.S.C. § 1591(e). SESTA's proponents claim this is a "robust" knowledge requirement. In fact, SESTA would likely be read to require only that a site intend to do the conduct at issue — *e.g.*, building a feature which could be lawful in nearly all circumstances — *not* that it intend the particular result at issue: "assist[ing], support[ing], or facilitat[ing]" violation of the sex trafficking laws. This statutory language creates a paralyzing uncertainty on what technical measures for website moderation may constitute "knowing conduct" by the operator. This uncharted liability may create a perverse incentive for risk-averse site operators (especially startups) to refrain from monitoring their sites. This would result in less vigilant detection methods for illegal user-generated content and less cooperation with law enforcement.

(2) SESTA Leaves Ambiguous the Standard of Proof for the Violation of Federal Law

SESTA enables "criminal prosecution or civil enforcement action targeting conduct that violates a Federal criminal law prohibiting [sex trafficking]," without resolving the critical question of the

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[5] 28 U.S.C. § 543(a) ("The Attorney General may appoint attorneys to assist United States attorneys when the public interest so requires").

standard by which, in a civil enforcement action, the state or civil plaintiff[6] must establish the underlying violation of federal criminal law — whether through civil or criminal evidentiary standards.

Tying both state prosecutions or civil actions to a *conviction* under federal criminal law would certainly address our concerns — but would not satisfy those convinced that DOJ is simply not doing its job. Allowing states to directly enforce federal law, but tying civil suits to a conviction under federal criminal law, whether by federal or state law enforcement, is one possible compromise.

(3) Section 230's "Development" Test is a Necessary Check for Intermediary Liability

Finally, as the Ninth Circuit noted in its landmark *Roommates.com* decision, "section 230 must be interpreted to protect Web sites not merely from ultimate liability, but from having to fight costly and protracted legal battles."[7] Section 230 thus offers two distinct protections. Perhaps even more important than the three immunities in Subsection (c) is that state prosecutors and civil plaintiffs (but, again, not federal prosecutors) bear the burden of showing that a site has crossed the line from being an "interactive computer service"covered by the statute and an "information content provider" not covered by the statute. This distinction turns on whether a site is "responsible, in whole or in part, for the creation or development of information." As former Rep. Chris Cox, the original drafter of Section 230, has said, **the words "in part" are the two most important words in the statute**.[8] However, SESTA would bypass this "development" test completely, opening the door to any state criminal prosecution or civil suits "targeted" at violations of federal sex trafficking laws.

Today, websites must defend themselves on the merits from federal criminal prosecutions, but otherwise do not bear the burden of showing that they are *not* "responsible" for "development" of third party content. Even courts that *have* set aside the immunity have been careful to emphasize why the initial burden for doing so lies with civil plaintiffs and state prosecutors:

> Websites are complicated enterprises, and there will always be close cases where a clever lawyer could argue that something the website operator did encouraged the illegality. Such **close cases, we believe, must be resolved in favor of immunity**, lest we cut the heart out of section 230 by forcing websites to face death by ten thousand duck-bites, fighting off claims that they promoted or encouraged — or at least tacitly assented to — the illegality of third parties.[9]

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[6] SESTA allows "any State criminal prosecution or civil enforcement action targeting conduct that violates a Federal [sex trafficking laws]." This wording leaves it unclear whether SESTA authorizes civil plaintiffs to bring such suits or only civil actions by states. Here, we assume the latter, as courts probably will do.

[7] *Fair Hous. Council v. Roommates.com, LLC*, 521 F.3d 1157, 1175 (9th Cir. 2008).

[8] Armchair discussion with Former Congressman Cox, Back to the Future of Tech Policy, YouTube (August 10, 2017), https://www.youtube.com/watch?time_continue=248&v=iBEWXIn0JUY.

[9] *Roommates.com,* 521 F.3d at 1174.

Congress made "development" the threshold question for this exact reason: a website's motion to dismiss a complaint is the mechanism that fends off the "ten thousand duck-bites." Bypassing this test would upset the balance courts have attempted to strike to meet the competing goals of Congress. SESTA would shift the burden of proof to websites, which would "hav[e] to fight costly and protracted legal battles" beyond anything they face today — not merely because those suits might be brought by state rather than federal prosecutors or by civil plaintiffs, but because they will have to defend themselves on the merits, under the lower evidentiary standards of civil law, and from a plethora of existing and new state laws.

How SESTA would work in practice remains poorly understood. But so, too, is the more fundamental question of how Section 230 works today, particularly at the motion to dismiss stage of litigation. This is the third question that should be studied in committee — and the most critical question to answer prior to legislating. **The bill's sponsors insist that state prosecutors and civil plaintiffs must be able to bring suit against Backpage and sites like it. We agree. But Section 230 already allows this** — if a site can be shown to be "responsible, in whole or in part, for the creation or development of information" such as criminal sex trafficking ads. This is, and should be, a fact-dependent inquiry — one that requires plaintiffs to make a compelling showing in their pleadings to survive a motion to dismiss.

Litigation Against Backpage Is Proceeding Despite Section 230

SESTA's sponsors assert that Backpage's immunity is well settled. They cite the First Circuit's decision last year, blocking a civil suit because Backpage not responsible for developing sex trafficking ads.[10] In fact, the decision dealt with only a part of the case against Backpage:

> Without exception, the appellants' well-pleaded claims address the structure and operation of the Backpage website, that is, Backpage's decisions about how to treat postings. Those claims challenge features that are part and parcel of the overall design and operation of the website (such as the lack of phone number verification, the rules about whether a person may post after attempting to enter a forbidden term, and the procedure for uploading photographs). Features such as these, which reflect choices about what content can appear on the website and in what form, are editorial choices that fall within the purview of traditional publisher functions.[11]

This civil complaint, filed in 2014 predates not only the Senate Report (and its extensive documentation of extensive concealment of criminal activity) but also an exposé by *The Washington Post* this past July, based on documents disclosed in litigation involving a Avion, Philippines-based contractor for Backpage.[12] Working on Backpage's behalf, Avion (1) actively solicited illegal content by scouring other sites for sex trafficking ads and calling the posters to solicit them to post on Backpage, and (2) helped those sex traffickers craft ads on Backpage by sending them suggested

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[10] *Jane Doe No. 1 v. Backpage.com*, LLC, 817 F.3d 12 (2016).
[11] *Id*. at 21.
[12] Tom Jackman & Jonathan O'Connell, *Backpage has always claimed it doesn't control sex-related ads. New documents show otherwise*, Wash. Post, July 11, 2017, https://goo.gl/K6TeKM.

language or even pre-loading ads for them. A filing made by the Missouri Attorney General on August 1, 2017, (in litigation over Backpage's claims that the AG's investigation was in "bad faith") cites the Senate report and the *Post* exposé as two independent bases for overcoming Section 230 liability.[13] The First Circuit decision addressed neither. The most remarkable thing about the First Circuit decision (besides the fact that it predated the Senate report) is that it did not engage at all with the *Roommates* decision, the lead decision on the "development" standard.

SESTA's advocates haven't addressed or engaged with the Washington State Supreme Court's 2015 decision to allow a civil suit against Backpage to proceed because — *even without the benefit of the Senate Report or Post exposé* — "the plaintiffs have alleged sufficient facts that, if proved, would show that the defendants helped to produce the illegal content and therefore are subject to liability under state law."[14] That court took a different view of the same conduct that the First Circuit litigation said was a core publisher function protected by Section 230, concluding that "Backpage.com has developed content requirements that it knows will allow pimps and prostitutes to evade law enforcement."[15] The court also identified a separate basis for overcoming the immunity (not discussed by the First Circuit) that essentially presaged the Senate Report: "Backpage.com knows that the foregoing content requirements are a fraud and a ruse that is aimed at helping pimps, prostitutes, and Backpage.com evade law enforcement by giving the [false] appearance that Backpage.com does not allow sex trafficking on its website."[16] Thus, it is possible that intentional concealment of criminal activity may already be excluded from Section 230's immunity today.

The Washington case will go to trial October 9.[17] **How this litigation proceeds will give us a far better sense of the limits on Section 230's immunity and clarify the need for Congressional action**. Even if the Washington trial court upholds Section 230 immunity for crafting publication rules on the site (agreeing with the First Circuit's approach) Backpage could still be found responsible for the "development" of sex trafficking ads on other grounds: solicitation, actually drafting ad content, and intentional concealment. Even a partial win against Backpage could open the courthouse doors to state prosecutors and civil plaintiffs well beyond the Backpage case by clarifying the test Congress wrote into the statute.

Admittedly, even if the trial court issues a decision quickly, it could take much longer for the case to work its way up to the Washington State Supreme Court or to the Ninth Circuit for a more definitive interpretation of Section 230. If Congress insists on moving forward with amendments to Section 230 now, it should begin a considered process for understanding (1) how SESTA would work, (2) the current state of the case law on "development" and (3) possible clarifications to that approach as an alternative to SESTA.

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[13] *Id*. at 16-18.
[14] *J.S. v. Village Voice Media Holdings*, 359 P.3d 714 (Sept. 3, 2015).
[15] *Id*. 359 P.3d at 717.
[16] *Id*.
[17] Pierce County Superior Court Civil Case 12-2-11362-4, available at https://perma.cc/7ND8-GUZH

State of the Law on the "Development" Standard

The courts have struggled with how to apply Section 230's "development" standard — as courts inevitably do when left to interpret such terse but important language. The leading decision is that by the Ninth Circuit in 2008 in *FAIR v. Roommates.com*. The website played matchmaker between would-be renters and those looking to rent rooms. Each new user was required to answer basic demographic questions about their race, gender and sexuality and their roommate preferences — questions that were potentially illegal even to ask under the federal Fair Housing Act.[18] The court held that the site was "undoubtedly the 'information content provider' as to the questions and can claim no immunity for posting them on its website, or for forcing subscribers to answer them as a condition of using its services."[19] In addition, the court found the site "responsible" for the development of profiles based on this information, and of search tools based upon this information.

The language used in reaching these latter two holdings (and in finding Roommates *was* immune for content entered by users into a free-form "Additional Comments" field) has raised a slew of hard questions: What does it mean to "encourage" unlawful content? Just how strong must the encouragement be?[20] What does it mean for a website "not merely to augment[]the content generally, but to materially contribut[e] to its alleged unlawfulness?"[21] Is this a separate basis (from "encouragement") for losing immunity? What are the "neutral tools" protected by Section 230 and when does a tool cease to be neutral?[22] And perhaps most importantly, which side bears what burden at the motion to dismiss stage of litigation?

Subsequent courts have struggled with these questions, with most courts upholding immunity but several decisions finding websites "responsible… in part" for third party content.[23] Rather than surveying the entire field of post-*Roommates* "development" cases here, we can say the following. While case law remains confused, unclear and inconsistent among the federal circuits, the general thrust is clear: **Section 230 does not protect making third party content more illegal.** We are open to considered discussion about how this standard currently operates and whether Congress needs to clarify it. The current standard is potentially both over- and under-inclusive, potentially

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[18] Ultimately, the Ninth Circuit decided that applying the Fair Housing Act to roommate rentals would raise serious constitutional concerns. *Fair Hous. Council v. Roommate.com, LLC*, 666 F.3d 1216, 1223 (9th Cir. 2012).

[19] *Roommates.com,* 521 F.3d at 1164.

[20] *Cf.* id at 1174 ("Roommate encourages other discriminatory preferences when it gives subscribers a chance to describe themselves. But the encouragement that bleeds over from one part of the registration process to another is extremely weak, if it exists at all. Such weak encouragement cannot strip a website of its section 230 immunity, lest that immunity be rendered meaningless as a practical matter.").

[21] *Id*. at 1182.

[22] *Id*. at 1175 ("When Congress passed section 230 it didn't intend to prevent the enforcement of all laws online; rather, it sought to encourage interactive computer services that provide users neutral tools to post content online to police that content without fear that through their "good Samaritan . . . screening of offensive material," 47 U.S.C. § 230(c), they would become liable for every single message posted by third parties on their website.").

[23] *See F.T.C. v. Accusearch Inc.*, 570 F.3d 1187, 1199 (10th Cir. 2009); *Chi. Lawyers' Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666 (7th Cir. 2008); *M.A. v. Vill. Voice Media Holdings*, 809 F. Supp. 2d 1041 (E.D. Mo. 2011); *MCW, Inc. v. Badbusinessbureau.com, L.L.C.*, No. 3:02-CV-2727-G, 2004 U.S. Dist. LEXIS 6678 (N.D. Tex. Apr. 19, 2004).

exposing sites to liability they should *not* face as well as potentially blocking state prosecutions and civil suits that *should* proceed.

The harder legal question is whether Section 230 currently protects sites that make content *look* less illegal by selectively editing it in order to help conceal it from law enforcement, thus perpetuating that illegality and continuing to benefit from it. Again, the Washington Supreme Court decision held that this is *not* protected by Section 230, but does not really explain why.[24] Even under the "materially contributing to … alleged unlawfulness" language of *Roommates*, one could argue that such concealment does not make content any *more* unlawful. In principle, we would support an amendment to Section 230 to clarify that such concealment should cause a site to lose its immunity, but only if it were drafted with the utmost care. At a minimum, a state prosecutor or civil plaintiff should have to establish:

1. That a website operator had actual knowledge that the content at issue violated federal criminal law; and
2. That the edits to that content were made with the intention to conceal the criminality of that content from law enforcement and thus continue to benefit from it.

The second requirement is crucial to avoid discouraging Good Samaritan policing — the chief aim of the statute. If sites risk losing their immunity merely because they are alleged to have knowledge of unlawful conduct, they will have a perverse incentive *not* to police their sites at all. Understanding how, precisely this or any other standard would play out in the earliest stages of litigation is crucial to understanding real-world consequences. Specifically, whether a website can prevail on a motion to dismiss will determine whether sites will "face death by ten thousand duck-bites, fighting off claims that they promoted or encouraged — or at least tacitly assented to — the illegality of third parties."[25]

Congress Should Begin with Section 230's "Development" Standard

If Section 230 is to be amended, we believe that clarifying the "development" standard may be the best course, or at least the best starting place, for three principal reasons:

[24] The Missouri Attorney general cites two cases on this point:

> Chicago Lawyers' Committee for Civil Rights Under Law, Inc. v. Craigslist, Inc., 519 F.3d 666, 670 (7th Cir. 2008) (explaining that § 230 does not apply where the ICP's "system is designed to help people" engage in unlawful activity); Johnson v. Arden, 614 F.3d 785, 792 (8th Cir. 2010) (noting that, under Craigslist, § 230(c) does not apply to "ISPs that intentionally designed their systems to facilitate illegal acts," and finding that the CDA applied only because there was "no evidence that InMotion designed its website to be a portal for defamatory material or do anything to induce defamatory postings").

Def's Mot. to Dismiss, *Backpage.com v. Joshua D. Hawley,* (E.D. Mo. Aug. 1, 2017) at 18. However, both of these cases involve alleged copyright infringement and the doctrine of contributory liability, which appears to have no bearing upon the Backpage case.

[25] *Roommates.com,* 521 F.3d at 1174.

1. Backpage's conduct is so egregious that, if it is not deemed "responsible" for developing user content, **even a slight relaxation of the current standard should be sufficient to allow state prosecutors and civil plaintiffs to overcome Backpage's immunity**. This could be done even while tightening the *Roommates* standard overall — for example, by requiring that the site not only encourage unlawful content, but do so with the specific intention of "materially contributing to" its unlawfulness. This knowledge requirement is implied in the current case law but it is not clear, which leaves sites vulnerable to "having to fight costly and protracted legal battles" they should not have to fight. An explicit exclusion for concealment could, likewise, be written narrowly enough to apply to *Backpage* (and other sites that also make money by actively and deliberately helping their users violate federal criminal law) but be carefully circumscribed so that it does not more broadly shift the burden of invoking the immunity to websites or a greater perverse incentive against policing content (lest operators acquire "knowledge" of unlawful content).
2. This will not be the last time Congress faces calls to exclude a certain issue from Section 230. The same arguments being made today will likely be made for addressing violent extremism and algorithmic discrimination, just to take two examples, in the near future. **Making an issue-specific "tweak" to Section 230 today could lead to a series of such tweaks, issue by issue**, with Congress risking making the same drafting mistakes each time. It would be better to clarify the generally applicable standard by which courts decide whether a site has lost its immunity, depending on the facts of each case, regardless of the issue.
3. **Working within the "development" structure would preserve the current approach of Section 230 litigation**: a state prosecutor or civil plaintiff would bear the initial burden of establishing that a site was "responsible" for content. As long as the knowledge standard properly worded, websites should remain free from having to defend themselves from costly and potentially legally questionable lawsuits. This would minimize the *in terrorem* effect of legal grandstanding — of the sort that attorneys general, as elected politicians, or future politicians are wont to engage in.

This approach would, however, require the same careful consideration as any discussion of SESTA. Modifying the "development" standard could prove even more harmful than SESTA if the bar for overcoming Section 230's protections is set even slightly too low — especially because the "development" standard would affect cases far beyond sex trafficking. Everything depends on details of the litigation process — in particular, who bears what burdens at the motion to dismiss phase.