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## History Repeats Itself: Some New Faces Behind Sex Trafficking Are More Familiar Than You Think

Mary Graw Leary

*The Catholic University of America, Columbus School of Law*

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# HISTORY REPEATS ITSELF: SOME NEW FACES BEHIND SEX TRAFFICKING ARE MORE FAMILIAR THAN YOU THINK

Mary Graw Leary\*

## INTRODUCTION

*“Don’t Be Evil”*

—Google’s Former Motto<sup>1</sup>

*“Sex traffickers in America have the police and prosecutors pursuing them, but they do have one crucial (if secret) ally: Google.”*

—Nicholas Kristof<sup>2</sup>

### A. *Trafficking, Slavery, and a History of Complicity*

As the legislative fight against human trafficking approaches its twentieth anniversary, much has changed in the legal and social landscape.<sup>3</sup> Like the domestic violence movement before it, the human trafficking movement has led to a paradigm shift of society’s contemporary understanding of human trafficking generally and sex trafficking in particular. This shift includes a significant reeducation regarding the actualities of human trafficking and what it means to be a survivor or perpetrator of sex trafficking. In large part, this reframing represents a positive development in that it reflects the reality of the human trafficking industry, not the myths. This shift is most exemplified in the

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<sup>1</sup> Kate Conger, *Google Removes ‘Don’t Be Evil’ Clause from Its Code of Conduct*, GIZMODO (May 18, 2018, 5:31 PM), <https://gizmodo.com/google-removes-nearly-all-mentions-of-dont-be-evil-from-1826153393> (noting “Don’t Be Evil” was a central component of Google’s Code of Conduct since 2000, but was quietly removed in 2018).

<sup>2</sup> Nicholas Kristof, *Opinion, Google and Sex Traffickers Like Backpage.com*, N.Y. TIMES (Sept. 7, 2017), <https://www.nytimes.com/2017/09/07/opinion/google-backpagecom-sex-traffickers.html>.

<sup>3</sup> Congress passed the Victims of Trafficking and Violence Protection Act in 2000, Pub. L. No. 106-386, 114 Stat. 1464 (2000) (codified as amended in scattered sections of 8, 18, and 22 U.S.C.). It has been reauthorized several times. Trafficking Victims Protection Act of 2017, Pub. L. No. 115-393, 132 Stat. 5265 (2018); Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22, 129 Stat. 227 (2015); Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat. 54 (2013); William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044 (2008); Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. No. 109-164, 119 Stat. 3558 (2006); Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, 117 Stat. 2875 (2003).

understanding of human trafficking as a form of modern-day slavery.<sup>4</sup>

Many different aspects of human trafficking policy demonstrate this understanding of sex trafficking as modern-day slavery. For example, the contemporary understanding of trafficked people has transformed over the last few decades—once derogatorily referred to as “prostitutes,” these trafficked people are now understood to be victims and survivors of sex trafficking.<sup>5</sup> Similarly, federal law unequivocally recognizes those who knowingly purchase sex trafficking victims as not simply “clients” or “johns,” but as sex traffickers.<sup>6</sup> This societal and cultural movement also includes consumers rethinking the role they play in demand for goods produced by slave labor.<sup>7</sup> Most relevantly here, Congress amended federal law to explicitly recognize that those who knowingly benefit from human trafficking are actually considered human traffickers themselves.<sup>8</sup>

Yet resistance to some legal changes and efforts to ensure accountability persists in the fight against human trafficking. As collective knowledge increases about the nature of trafficking, protections are slowly peeled away

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<sup>4</sup> For a comprehensive discussion of the acceptance of the term modern-day slavery, see Mary Graw Leary, “*Modern Day Slavery*”—*Implications of a Label*, 60 ST. LOUIS U. L.J. 115 (2015). This term has been accepted and utilized by the last three presidents. Proclamation No. 9074, 3 C.F.R. § 9074 (2014) (Proclamation by President Obama regarding National Slavery and Human Trafficking Prevention Month); Press Release, President Donald J. Trump, President Donald J. Trump Is Taking Action to End Human Trafficking (Oct. 11, 2018), <https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-taking-action-end-human-trafficking/>; President Barack Obama, Remarks by the President to the Clinton Global Initiative (Sept. 25, 2012), <https://www.whitehouse.gov/the-press-office/2012/09/25/remarks-president-clinton-global-initiative> [<https://perma.cc/KE95-A8RP>]; President George W. Bush, Statement by His Excellency Mr. George W. Bush, President of the United States of America: Address to the United Nations General Assembly (Sept. 23, 2003), <http://www.un.org/webcast/ga/58/statements/usaeng030923.htm> [<http://perma.cc/6PU8-7BQ7>].

<sup>5</sup> Malika Saada Saar, *There Is No Such Thing as a Child Prostitute*, WASH. POST (Feb. 17, 2014), [https://www.washingtonpost.com/opinions/there-is-no-such-thing-as-a-child-prostitute/2014/02/14/631ebd26-8ec7-11e3-b227-12a45d109e03\\_story.html](https://www.washingtonpost.com/opinions/there-is-no-such-thing-as-a-child-prostitute/2014/02/14/631ebd26-8ec7-11e3-b227-12a45d109e03_story.html); Yasmin Vafa, *There Is No Such Thing as a ‘Child Prostitute’*, NAT’L COUNCIL JUV. & FAM. CT. JUDGES, <http://www.ncjfcj.org/there-no-such-thing-child-prostitute> (last visited May 4, 2019). Trafficked people are referred to as both victims and survivors of human trafficking. *Compare Human Trafficking Task Force E-Guide*, OFF. FOR VICTIMS CRIME TRAINING & TECHNICAL ASSISTANCE CTR., <https://www.ovcttac.gov/taskforceguide/eguide/> (last visited May 4, 2019), with *Survivor Stories*, POLARIS, <https://polarisproject.org/blog/survivor-stories> (last visited May 4, 2019). There is increasing consensus that people who have survived human trafficking should be referenced as “survivors,” not “victims.” However, people currently subjected to human trafficking are victims of exploitation. Because this Essay refers to people currently and formerly trafficked, it will use both terms. The Author agrees that all people victimized in this way are more than their victimization and are survivors.

<sup>6</sup> 18 U.S.C. § 1591 (2018). For a comprehensive discussion of the recognition of purchasers as sex traffickers, see Mary Graw Leary, *Dear John, You Are a Sex Trafficker*, 68 S.C. L. REV. 415 (2017).

<sup>7</sup> INTER-AGENCY COORDINATION GROUP AGAINST TRAFFICKING IN PERSONS, PREVENTING TRAFFICKING IN PERSONS BY ADDRESSING DEMAND (2014).

<sup>8</sup> 18 U.S.C. § 1591(a)(2), (e)(4).

from traffickers. Society learns more about those who benefit from the largely unregulated industry of human trafficking. Consequently, the face of the human trafficker or those who benefit from this enterprise comes more into focus. It no longer is exclusively defined as the “pimp” on the corner selling women’s bodies to sex purchasers. Rather, as recent hearings in the Senate demonstrate, the face of human trafficking can include corporate America.<sup>9</sup>

It comes as no surprise that big business, intentionally or not, benefits from human trafficking, just as certain industries in the eighteenth and nineteenth centuries benefited from slavery. Human trafficking is an economic, as well as criminal, endeavor. Low labor costs in both legitimate and illegitimate businesses provide a competitive advantage to businesses and thus present a temptation to them.<sup>10</sup> Similarly, some businesses indirectly benefit from the success of illicit businesses that exploit others. Legal distinctions exist between entities that unwittingly benefit from human trafficking and entities that more directly engage in forced labor and sex trafficking. Consequently, those who indirectly, but knowingly, benefit are increasingly being exposed.<sup>11</sup> As more is learned of the breadth of human trafficking, a brighter light is shining on commercial activity around human trafficking and that light exposes more businesses engaging in an aggressive pursuit of economic interests at the cost of marginalized people swept up in modern-day slavery.

This Essay examines an example of such a pursuit. It argues that the historical pattern of businesses that benefit directly or indirectly from the slave trade opposing efforts to end that sale of human beings is repeating itself today. Some tech companies and other members of the digital economy face a perverse motivation: they profit indirectly from online sex trafficking and risk decreased profits from a more regulated Internet. As such, they take on the same role of the cotton and textile merchants of the nineteenth century, arguing for legislative action that will continue to enable the trade and exploitation of human beings, thereby allowing them to retain their uncompromised massive corporate profits. This Essay explores this historical pattern by examining how some actors in the tech industry in general have embarked on a campaign to protect an unregulated

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<sup>9</sup> See generally STAFF OF S. PERMANENT SUBCOMM. ON INVESTIGATIONS, 115TH CONG., BACKPAGE.COM’S KNOWING FACILITATION OF ONLINE SEX TRAFFICKING (2017) [hereinafter SENATE REPORT].

<sup>10</sup> Marley S. Weiss, *Human Trafficking and Forced Labor: A Primer*, 31 A.B.A. J. LAB. & EMP. L. 1, 3 (2015).

<sup>11</sup> See, e.g., *Kocher ex rel. v. Hilton Worldwide Holdings, Inc.*, No. 3:18-cv-00449-SB, 2018 WL 6735086 (D. Or. Nov. 9, 2018); see also POLARIS, HIDDEN IN PLAIN SIGHT: HOW CORPORATE SECRECY FACILITATES HUMAN TRAFFICKING IN ILLICIT MASSAGE PARLORS (2018). See generally Complaint, *Doe v. Backpage.com, LLC*, No. 38-CV-2017-900041.00 (Al. Cir. Ct. Jan. 25, 2017); Plaintiff’s Third Amended Petition, *Jane Doe v. Facebook, Inc.*, No. 2018-69816 (Tex. Dist. Ct. Apr. 26, 2019).

Internet at all costs, even the cost of children sold into sex trafficking. By focusing on recent developments regarding government efforts to disrupt online sex trafficking, this Essay demonstrates that these companies have combatted efforts to impede online sex trafficking before all three branches of government. Their methods include direct opposition to legal reforms and creating surrogates to advocate for their positions in courts by supporting companies engaged in sex trafficking. They also utilize their lobbying efforts in Congress and in the Executive Branch to advance an unregulated Internet agenda. The result of these efforts has been to stymy progress in combatting sex trafficking in the name of maintaining market dominance.

Part I of this Essay briefly reviews the history of the response of businesses that benefited from slavery to the abolitionist movement and examines parallel arguments made today by the business community and its surrogates to slow, if not cease, efforts to end exploitation. Part II examines how such business entities create a cadre of surrogates to advance arguments opposing regulation of the Internet—which are primarily rooted in benefits to their economic interests, and that ignore the cost of exploiting others. It then examines how these entities have directly, or through surrogates, opposed not only Internet regulation, but anti-trafficking policies more generally in the name of economic advancement. This Part next focuses specifically on litigation surrounding the tech industry’s support of Craigslist and Backpage, some of the largest online sex trafficking figures—one of whom the Senate labeled as a company that knowingly facilitated child sex trafficking<sup>12</sup> and whose CEO has pleaded guilty to sex trafficking.<sup>13</sup> Finally, Part II examines how these companies directly lobby or utilize other entities to lobby the Legislature and Executive to obtain laws favorable to their business interests at a cost to sex trafficking victims.

### *B. A Case Study on Recent Legislation Regarding Online Sex Trafficking*

This Essay will use as a vehicle for discussion recent efforts to impede online sex trafficking and commercial resistance to it.<sup>14</sup> As a threshold matter, a brief description of this legislation is in order.

As the Internet developed, it became a growing market for business—both

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<sup>12</sup> See SENATE REPORT, *supra* note 9, at 36–40.

<sup>13</sup> Tom Jackman, *Backpage CEO Carl Ferrer Pleads Guilty in Three States, Agrees to Testify Against Other Website Officials*, WASH. POST. (Apr. 13, 2018), [https://www.washingtonpost.com/news/true-crime/wp/2018/04/13/backpage-ceo-carl-ferrer-pleads-guilty-in-three-states-agrees-to-testify-against-other-website-officials/?utm\\_term=.f65585dc4cf8](https://www.washingtonpost.com/news/true-crime/wp/2018/04/13/backpage-ceo-carl-ferrer-pleads-guilty-in-three-states-agrees-to-testify-against-other-website-officials/?utm_term=.f65585dc4cf8).

<sup>14</sup> For a full discussion of the history of this legislation, see Mary Graw Leary, *The Indecency and Injustice of Section 230 of the Communications Decency Act*, 41 HARV. J.L. & PUB. POL’Y 553 (2018).

legitimate and illegitimate. In some ways the Internet has proven to be the perfect platform for criminal activity because of the abuse of Section 230 of the Communications Decency Act, which provides limited immunity from civil suit in some instances.<sup>15</sup> Sex trafficking is the most egregious example of the perversion of Section 230 to create a regime of de facto absolute immunity for online entities.<sup>16</sup> The suitability of the Internet to sell human beings, and the abuse of Section 230 to provide immunity for doing so, led to an explosion of online sex trafficking. This resulted in websites creating a massive sex trafficking marketplace with impunity.

Congress did not intend for this. It designed Section 230 of the Communications Decency Act to accomplish the dual goals of facilitating a robust Internet and shielding families from explicit content.<sup>17</sup> Therefore, it provided limited immunity for Internet service providers who acted as good Samaritans and attempted to shield users from explicit content.<sup>18</sup> It also directed that Internet service providers should not be treated as publishers of content created by third parties and placed on their platforms.<sup>19</sup> It never intended to shield such providers from liability for knowingly engaging in criminal activity in general—and certainly not for knowingly engaging in sexual exploitation of trafficking victims.<sup>20</sup>

However, as sex trafficking increased on the Internet, law enforcement, sex trafficking survivors, and the estates of victims who did not survive attempted to hold these platforms responsible for their participation in selling trafficking victims—even children—online for sex. They did so by utilizing the private

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<sup>15</sup> 47 U.S.C. § 230 (2012).

<sup>16</sup> See generally Leary, *supra* note 14.

<sup>17</sup> 47 U.S.C. § 230(a)–(b); see also S. REP. NO. 104-23, at 59 (1995) (“The information superhighway should be safe for families and children. . . . The decency provisions increase the penalties for obscene, indecent, harassing or other wrongful uses of telecommunications facilities; protect privacy; protect families from uninvited or unwanted cable programming which is unsuitable for children and give cable operators authority to refuse to transmit programs or portions of programs on public or leased access channels which contain obscenity, indecency, or nudity.”).

<sup>18</sup> 47 U.S.C. § 230(c); see also KATHLEEN ANN RUANE, CONG. RESEARCH SERV., LSB10082, HOW BROAD A SHIELD? A BRIEF OVERVIEW OF SECTION 230 OF THE COMMUNICATIONS DECENCY ACT (2018).

<sup>19</sup> 47 U.S.C. § 230(c)(1) (“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.”).

<sup>20</sup> Alina Selyukh, *Section 230: A Key Legal Shield for Facebook, Google Is About to Change*, NPR (Mar. 21, 2018, 5:11 AM), <https://www.npr.org/sections/alltechconsidered/2018/03/21/591622450/section-230-a-key-legal-shield-for-facebook-google-is-about-to-change> (“Section 230 is also tied to some of the worst stuff on the Internet, protecting sites when they host revenge porn, extremely gruesome videos or violent death threats. The broad leeway given to Internet companies represents power without responsibility,” that “[t]he original purpose of this law was to help clean up the Internet, not to facilitate people doing bad things on the Internet[,]” and “[t]he original purpose hasn’t always prevailed in court.”).

right of action Congress created,<sup>21</sup> as well as by pursuing other avenues for relief, including state-level trafficking laws. Many of these efforts, however, were met with the defendants claiming that Section 230 granted them immunity from liability even for such potentially criminal behavior.<sup>22</sup> Several courts using cases predating the enactment of the Trafficking Victims Protection Act agreed.<sup>23</sup> Prosecutors, survivors, and deceased victims' families were left outside the courthouse door.

In 2017, after a two-year investigation into online sex trafficking, Congress sought to clarify Section 230 and return it to its original intent—limited immunity for good Samaritans, not de facto absolute immunity for criminal behavior. Subsequently, the House began consideration of the Allow States to Fight Online Sex Trafficking Act (FOSTA) and the Senate advanced the Stop Enabling Sex Traffickers Act (SESTA).<sup>24</sup> Ultimately, Congress passed what this Essay refers to as “FOSTA–SESTA” due to the many machinations of both bills. The end result was, *inter alia*, the minor clarification that Section 230 “was never intended to provide legal protection to websites that unlawfully promote and facilitate prostitution and websites that facilitate traffickers in advertising the sale of unlawful sex acts with sex trafficking victims.”<sup>25</sup> Consequently, Section 230 was clarified to exclude from immunity certain civil actions and state criminal actions regarding sex trafficking.<sup>26</sup>

## I. A BRIEF HISTORY OF THE COMPLEX RELATIONSHIP BETWEEN BUSINESS INTERESTS AND SLAVERY

Many parallels exist between human trafficking in the twenty-first century and slavery in the eighteenth and nineteenth centuries. This Essay in no way equates contemporary human trafficking with the horrors of state-sanctioned slavery, which forcibly brought millions to the Western world through the trans-Atlantic slave trade. While the two practices are distinct, with one being explicitly state-sanctioned and socially accepted, parallels nonetheless exist. One specific parallel this Essay explores is that of the role of business

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<sup>21</sup> 18 U.S.C. § 2255 (2012).

<sup>22</sup> *E.g.*, *Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12 (1st Cir. 2016); *M.A. ex rel. P.K. v. Village Voice Media Holdings, LLC*, 809 F. Supp. 2d 1041, 1043 (E.D. Mo. 2011).

<sup>23</sup> *Jane Doe No. 1*, 817 F.3d 12; *M.A. ex rel. P.K.*, 809 F. Supp. 2d at 1043.

<sup>24</sup> *See* Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. No. 115-164, 132 Stat. 1253 (2018); Stop Enabling Sex Traffickers Act of 2017, S. 1693, 115th Cong. (2017). *See generally* H.R. REP. 115-572 (2018); S. REP. 115-199 (2018).

<sup>25</sup> Allow States and Victims to Fight Online Sex Trafficking Act of 2017, at § 2(1).

<sup>26</sup> 47 U.S.C. 230(e) (2018).

community in perpetuating such exploitation, placing profit before victims, and their efforts to impede forces working to end human trafficking.

In addition to being morally repugnant and an affront to human dignity, antebellum slavery was an economic system whose beneficiaries were not only the slave traders, but the slave owners, manufacturers of textiles and other products, and consumers of these items. As a result, when the abolitionist movement began to take hold, some business entities, perhaps acknowledging moral reservations regarding slavery, offered reasons why slavery itself should continue.<sup>27</sup> These businesses essentially treated slavery as an acceptable price to pay for lower priced goods and increased profits. That is to say, they justified the exploitation of the vulnerable by pointing to the money saved or made from their exploitation. This Part will outline some common arguments justifying the continued use of the trans-Atlantic slave trade in the nineteenth century. A comparison of those arguments with arguments made today by businesses who benefit from human trafficking or an unregulated Internet demonstrates their striking similarities.

#### A. *Historical Arguments Justifying Acceptance of Slavery*

Many businesses profited from slavery, not just plantation owners, but those collateral to slavery, like financial and transportation businesses.<sup>28</sup> They, like their contemporary counterparts, offered a variety of arguments to rationalize the perpetuation of slavery. This Essay focuses on three. These include an argument that if slavery ended, the entire economic system would collapse.<sup>29</sup> Given the amount of money made by various businesses collateral to slavery, they argued it should continue to avoid catastrophic economic costs. Businesses also asserted a second argument, that if they did not do business with slave traders, other, less savory, characters would do so.<sup>30</sup> Therefore, it was better if they did business in the open, rather than in the shadows. Finally, the claim persisted that slavery was, in fact, not as bad as the media claimed it to be and instead characterized some elements of slavery as a choice made by those

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<sup>27</sup> E.g., LARRY E. TISE, *PROSLAVERY: A HISTORY OF THE DEFENSE OF SLAVERY IN AMERICA, 1701–1840*, at 21, 257 (1987); Dina Gerdeman, *The Clear Connection Between Slavery and American Capitalism*, FORBES (May 3, 2017, 12:47 PM), <https://www.forbes.com/sites/hbsworkingknowledge/2017/05/03/the-clear-connection-between-slavery-and-american-capitalism/#5cfe8a2f7bd3>.

<sup>28</sup> C.W. & A.J.K.D., *Did Slavery Make Economic Sense?*, ECONOMIST (Sept. 27, 2013), <https://www.economist.com/free-exchange/2013/09/27/did-slavery-make-economic-sense>.

<sup>29</sup> Robert Higgs, *Ten Reasons Not to Abolish Slavery*, FOUND. FOR ECON. EDUC. (Nov. 18, 2009), <https://fee.org/articles/ten-reasons-not-to-abolish-slavery/>.

<sup>30</sup> *Arguments and Justifications*, ABOLITION PROJECT, [http://abolition.e2bn.org/slavery\\_112.html](http://abolition.e2bn.org/slavery_112.html) (last visited May 4, 2019).

exploited.<sup>31</sup> A similar argument asserted that although slavery was not ideal, it was better than the alternatives, which would lead to even more suffering by the victims.<sup>32</sup> These arguments may differ in their degree of acknowledgement that slavery has a social cost. However, they share the same central reasoning that, no matter how bad slavery may have been, it was justified because of the money generated.

*B. Contemporary Businesses Which Enable Online Trafficking Benefit Directly or Indirectly from an Unregulated Internet*

Just as legitimate businesses once profited from slavery, some businesses today profit from illegal activity, including human trafficking. For example, *Forbes* magazine reported that Ben Edelman, a Harvard Business School professor, estimated that Google earned millions of dollars (and approximately 2% of its revenue) from unlawful content.<sup>33</sup> This included \$500 million dollars Google forfeited relating to its role in illegal pharmaceutical sales alone.<sup>34</sup> This is true for online sex trafficking as well—many in the tech industry directly or indirectly benefit from it. “Among Google’s worst infractions are advertising revenues from what [Professor] Edelman alleges are other kinds of unlawful material—such as child sex trafficking—that Google allows or fails to block.”<sup>35</sup> Similarly, a 2013 consumer advocacy report alleged that Google and YouTube profited from videos that sexually exploited children.<sup>36</sup> The report asserted that YouTube *directly* profited from the videos that exploited underage girls by running advertisements to those videos.<sup>37</sup> While Google claimed to scrub its site of such videos, eighth months later researchers reported many of them were still available.<sup>38</sup>

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<sup>31</sup> See Kenneth S. Greenberg, *Revolutionary Ideology and the Proslavery Argument: The Abolition of Slavery in Antebellum South Carolina*, 42 J.S. HIST. 365, 380–81 (1976).

<sup>32</sup> See generally Higgs, *supra* note 29.

<sup>33</sup> Peter Cohan, *Harvard Professor Sees Google’s Illegal Revenue of \$1 Billion*, FORBES (Nov. 8, 2013, 10:13 AM), <https://www.forbes.com/sites/petercohan/2013/11/08/harvard-professor-sees-googles-illegal-revenue-over-1-billion/#5488d1225f01>; see Peter Voskamp, *Bitter Pill: Google Forfeits \$500M Generated by Online Canadian Pharmacies*, REUTERS (Aug. 24, 2011, 7:47 PM), <https://www.reuters.com/article/idUS262257505720110824>; see also Press Release, U.S. Dep’t of Justice, *Google Forfeits \$500 Million Generated by Online Ads & Prescription Drug Sales by Canadian Online Pharmacies* (Aug. 24, 2011).

<sup>34</sup> See Cohan, *supra* note 33.

<sup>35</sup> See *id.*

<sup>36</sup> DIG. CITIZENS ALL., *GOOGLE & YOUTUBE AND EVIL DOERS: TOO CLOSE FOR COMFORT: A REPORT ON HOW GOOGLE AND YOUTUBE STAND TO BENEFIT WHEN BAD ACTORS EXPLOIT THE INTERNET* 11, 15 (2013), [https://www.digitalcitizensalliance.org/clientuploads/directory/Reports/dca\\_googleireport.pdf](https://www.digitalcitizensalliance.org/clientuploads/directory/Reports/dca_googleireport.pdf).

<sup>37</sup> See generally *id.*

<sup>38</sup> DIG. CITIZENS ALL., *DIGITAL WEEDS: HOW GOOGLE CONTINUES TO ALLOW BAD ACTORS TO FLOURISH ON YOUTUBE* 1, 10 (2014), <https://www.digitalcitizensalliance.org/clientuploads/directory/Reports/digital->

Similarly, some hosts of sex-trafficking advertisements, such as Craigslist and Backpage, profited from these advertisements. They initially resisted any efforts to clean their platforms from sex trafficking advertisements.<sup>39</sup> While Craigslist eventually stopped its domestic online adult services advertisements after significant pressure from many of the country's state attorneys general, Backpage picked up the mantle.<sup>40</sup> Unlike Craigslist, Backpage's business model was entirely based on adult services advertisements.<sup>41</sup> As the Internet contains the largest open market for sex trafficking, other large platforms have also been accused of profiting from advertising revenue from prostitution and sex trafficking.<sup>42</sup>

When it comes to online sex trafficking, these companies also profit indirectly from an unregulated Internet. The Internet has been largely unregulated since its inception.<sup>43</sup> Indeed, Internet platforms have enjoyed a de facto immunity from criminal prosecution due to this incorrect interpretation of Section 230 of the Communications Decency Act.<sup>44</sup> Congress initially enacted Section 230 when the Internet was in its infancy to shield users from objectionable content and protect "good Samaritan" companies from liability for filtering such content.<sup>45</sup> However, until the recent amendment to Section 230, tech platforms used it to partner with sex traffickers, profit from online advertising, and claim immunity for doing so.<sup>46</sup> An unintended de facto

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weeds.pdf.

<sup>39</sup> Abigail Kuzman, *A Letter to Congress: The Communications Decency Act Promotes Human Trafficking*, 34 CHILD. LEGAL RTS. J. 23, 28–31 (2013).

<sup>40</sup> *Id.* at 31–32; SENATE REPORT, *supra* note 9, at 20–21.

<sup>41</sup> Kuzman, *supra* note 39, at 31–32; Letter from Nat'l Ass'n of Att'ys Gen. to Cong. (Aug. 16, 2017), <https://www.naag.org/assets/redesign/files/sign-on-letter/CDA%20Final%20Letter.pdf>; Letter from Nat'l Ass'n of Att'ys Gen. to Cong. (July 23, 2013), <https://www.naag.org/assets/files/pdf/signons/Final%20CDA%20Sign%20On%20Letter.pdf>.

<sup>42</sup> *E.g.*, Ian Drury, *Internet Giants Are 'Profiting from Pop-Up Brothels': Firms such as Facebook and Google Are 'Enabling' Smuggling Gangs to Pimp Out Their Victims*, DAILY MAIL, <https://www.dailymail.co.uk/news/article-5461513/Internet-giants-profiting-pop-brothels.html> (last updated Mar. 8, 2018, 12:51 PM); Simon Rushton, *Facebook and Google Accused of Raking in Prostitution Profits at Pop-Up Brothels*, INT'L BUS. TIMES (Mar. 4, 2018, 9:28 PM), <https://www.ibtimes.co.uk/facebook-google-accused-raking-prostitution-profits-pop-brothels-1665083>.

<sup>43</sup> Mary Mazzio, *Anti-Online Sex Trafficking Bill Gets Crushed Under Big Tech's Lobbying*, HILL (Dec. 17, 2017, 6:00 AM), <https://thehill.com/opinion/civil-rights/365295-anti-online-sex-trafficking-bill-gets-crushed-under-big-techs-lobbying>.

<sup>44</sup> Danielle Keats Citron & Benjamin Wittes, *The Internet Will Not Break: Denying Bad Samaritans § 230 Immunity*, 86 FORDHAM L. REV. 401, 404, 408 (2017) ("The broad construction of the CDA's immunity provision adopted by the courts have produced an immunity from liability that is far more sweeping than anything the law's words, context and history support."); *see* Leary, *supra* note 14, at 573.

<sup>45</sup> 47 U.S.C. § 230(b) (2012); Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC, 521 F.3d 1157, 1163 (9th Cir. 2008).

<sup>46</sup> *See, e.g.*, Leary, *supra* note 14, at 571–72.

immunity emerged, allowing such platforms to exist in the open and operate with impunity.<sup>47</sup>

This broad de facto immunity is central to an unregulated Internet and is valued by big tech platforms like Google and Facebook. These platforms initially opposed closing this unintended loophole because they oppose *any* form of amendment to Section 230 that could *in any way* decrease their de facto absolute immunity. This immunity gives online entities an extreme competitive advantage over other non-digital competitors.<sup>48</sup>

Google, Facebook, and its digital rights advocates like the Electronic Frontier Foundation (EFF) objected so strongly to th[e] effort [to close the Section 230 loophole] because they *rely on [it]* to make these companies unlike any companies that have ever existed before: media companies in every way, but unaccountable as media companies always have been.<sup>49</sup>

### C. *Contemporary Businesses Make Parallel Arguments Against Anti-Exploitation Policies*

Just as many industries that benefited from antebellum slavery opposed ending it because of their economic interests, today, many of the industries that enjoy the business advantage of immunity also oppose legislative changes to that immunity. These entities have articulated numerous arguments defending Section 230 as written,<sup>50</sup> while simultaneously recognizing the harm that their interpretation caused children and vulnerable women sold online by human traffickers. In so doing, they made very similar arguments to those made by nineteenth-century slavery advocates and apologists.

First, big tech and their surrogates advance a modern-day version of the economic collapse argument, arguing that amending Section 230 to protect victims from sex trafficking would “spell disaster for innovation”<sup>51</sup> and that the

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<sup>47</sup> See, e.g., *id.* at 573.

<sup>48</sup> For a comprehensive discussion of the de facto immunity Section 230 provides, see Leary, *supra* note 14, at 573–94.

<sup>49</sup> Daniel Oberhaus, *Major Tech Companies Have Stopped Fighting an Internet Sex Trafficking Bill*, MOTHERBOARD (Nov. 9, 2017, 3:46 PM), [https://motherboard.vice.com/en\\_us/article/qv3xnm/sesta-google-facebook-sex-trafficking-censorship](https://motherboard.vice.com/en_us/article/qv3xnm/sesta-google-facebook-sex-trafficking-censorship) (emphasis added).

<sup>50</sup> Nancy Scola, *Kamala Harris’ Crusade Against ‘Revenge Porn’*, POLITICO MAG. (Feb. 1, 2019), <https://www.politico.com/magazine/story/2019/02/01/kamala-harris-porn-california-attorney-general-facebook-twitter-silicon-valley-224534> (noting Google called amending Section 230 a “disaster”); *infra* notes 51–53.

<sup>51</sup> E.g., David Greene, *EFF Sues to Invalidate FOSTA, an Unconstitutional Internet Censorship Law*, ELECTRONIC FRONTIER FOUND. (June 28, 2018), <https://www.eff.org/deeplinks/2018/06/eff-sues-invalidate->

modern Internet is “*only* possible” with an untouched and strong Section 230.<sup>52</sup> Google’s chief lobbyist, former congresswoman Susan Molinari, claimed that even a minor statutory clarification would “be a disaster” for the Internet.<sup>53</sup> This position mirrors the commercial interests during antebellum slavery, which argued that although slavery was bad, the economic effect of ending slavery was worse.<sup>54</sup> Despite these dour predictions, Congress provided a minor statutory clarification of Section 230 through FOSTA–SESTA.<sup>55</sup> Fortunately, just as the economy did not fall apart when slavery ended following the Civil War and Reconstruction, the minor clarification of Section 230 did not end the Internet. As predicted by Professor Danielle Citron and Benjamin Wittes, the Internet “did not break” when Congress clarified Section 230 to return it to its original purpose—to provide limited protection for good Samaritans.<sup>56</sup> But the argument nevertheless persisted.<sup>57</sup>

Second, these entities and their surrogates also mirrored the argument that if they do not do business with traffickers, then other, less responsible actors will. It is true that many legitimate businesses contribute a great deal to thwart trafficking through their philanthropic efforts, partnering with civil society, and complying with the law that mandates them to report exploitative content.<sup>58</sup> However, compliance with the law is a necessary part of corporate citizenship,

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fosta-unconstitutional-internet-censorship-law.

<sup>52</sup> E.g., Elliot Harmon, *FOSTA Would Be a Disaster for Online Communities*, ELECTRONIC FRONTIER FOUND. (Feb. 22, 2018) <https://www.eff.org/deeplinks/2018/02/fosta-would-be-disaster-online-communities>.

<sup>53</sup> Susan Molinari, *Google’s Fight Against Human Trafficking*, GOOGLE (Sept. 7, 2017), <https://www.blog.google/outreach-initiatives/public-policy/googles-fight-against-human-trafficking/>.

<sup>54</sup> See, e.g., Higgs, *supra* note 29.

<sup>55</sup> See *supra* notes 24–26 and accompanying text.

<sup>56</sup> Citron & Wittes, *supra* note 44, at 404.

<sup>57</sup> Even after the passage of FOSTA–SESTA, big tech and its surrogates argued it was the end of the Internet. E.g., Aja Romano, *A New Law Intended to Curb Sex Trafficking Threatens the Future of the Internet as We Know It*, VOX, <https://www.vox.com/culture/2018/4/13/17172762/fosta-sesta-backpage-230-internet-freedom> (last updated July 2, 2018, 1:08 PM). Big tech also challenged the Act in court. See *Woodhull Freedom Found. v. United States*, 334 F. Supp. 3d 185, 198–200 (D.D.C.), *appeal docketed*, No. 18-5298 (D.C. Cir. Oct. 12, 2018).

<sup>58</sup> See 18 U.S.C. 2258A (2012); see, e.g., Catherine Cheney, *How Technology Is Taking Down Human Trafficking*, DEVEX (Feb. 7, 2016), <https://www.devex.com/news/how-technology-is-taking-down-human-trafficking-87658>; Megan Rose Dickey, *Why Google Engineers Worked Full-Time to Combat Sex Trafficking*, TECHCRUNCH (Jan. 15, 2019), <https://techcrunch.com/2019/01/15/why-google-engineers-worked-full-time-to-combat-sex-trafficking/>; Leo Kelion, *Apple Stores to Employ Human Trafficking Victims*, BBC (Nov. 14, 2018), <https://www.bbc.com/news/technology-46206622>; Cristina Maza, *How Technology Is Turning the Tables on Human Traffickers*, MIC (Dec. 25, 2013), <https://mic.com/articles/77303/how-technology-is-turning-the-tables-on-human-traffickers#.m76VkJewZP>; Rebecca J. Rosen, *Google Gives \$3 Million to Fight Human Trafficking*, ATLANTIC (Apr. 9, 2013), <https://www.theatlantic.com/technology/archive/2013/04/google-gives-3-million-to-fight-human-trafficking/274834/>; *Tech Against Trafficking*, BSR, <https://www.bsr.org/en/collaboration/groups/tech-against-trafficking> (last visited May 4, 2019).

not a reason for de facto immunity.

During the debate around Backpage's value and its role in sex trafficking, the argument that worse actors exist emerged. This is one of the main arguments made by members of the tech industry. Many in the tech industry recognized the open market of human beings, but claimed that if Backpage was shut down or exposed to liability when it knowingly partnered with sex traffickers, these human traffickers would then migrate to less savory platforms or to the "dark web" where they will exist beyond the reach of law enforcement.<sup>59</sup> Relatedly, they also claimed that such a change in their immunity would cause other entities to overregulate and perhaps impact business freedoms.<sup>60</sup> This argument, which justifies immunity for those engaging in criminal activity by pointing out that worse actors will also engage in this highly profitable form of exploitation, is misplaced. It ignores one of the many purposes of anti-trafficking legislation.

Indeed, just as it was important to end publicly sanctioned slavery, one goal of the legislation seeking to close this loophole (through FOSTA–SESTA) was to disrupt the market of sex trafficking and remove it from occurring out in the open with impunity. Though no one piece of legislation could end sex trafficking, Congress understood that sex trafficking was an economic enterprise that, if made too difficult to efficiently operate, would eventually decline. It is true that, even after the closing of the loophole, sex trafficking continues, but has been substantially disrupted.<sup>61</sup> Fortunately, the passage of FOSTA–SESTA, as well as the indictment of Backpage and seizure of its assets, effectively ended an open and mainstream marketplace for the sale of trafficking victims.<sup>62</sup> Though many in the anti-sex trafficking movement argue for bold and far-reaching change, incremental actions like this, which have the effect of substantially disrupting the industry, are essential to disrupting this criminal enterprise.

Just as the proponents of slavery argued that slavery was not as terrible as

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<sup>59</sup> Tom Jackman, *Trump Signs 'FOSTA' Bill Targeting Online Sex Trafficking, Enables States and Victims to Pursue Websites*, WASH. POST (Apr. 11, 2018), [https://www.washingtonpost.com/news/true-crime/wp/2018/04/11/trump-signs-fosta-bill-targeting-online-sex-trafficking-enables-states-and-victims-to-pursue-websites/?utm\\_term=.e72fdaddbbcc](https://www.washingtonpost.com/news/true-crime/wp/2018/04/11/trump-signs-fosta-bill-targeting-online-sex-trafficking-enables-states-and-victims-to-pursue-websites/?utm_term=.e72fdaddbbcc).

<sup>60</sup> *Id.*

<sup>61</sup> Press Release, Joint Statement in Response to Tech Industry Obstruction of Section 230 Legislation (2018), <https://sharedhope.org/wp-content/uploads/2017/08/Joint-Statement-in-Response-to-Tech-Industry-Obstruction-of-Section-230-Legislation-1.pdf> [hereinafter Joint Statement].

<sup>62</sup> Press Release, U.S. Dep't of Justice, Justice Department Leads Effort to Seize Backpage.Com, the Internet's Leading Forum for Prostitution Ads, and Obtains 93-Count Federal Indictment (Apr. 9, 2018), <https://www.justice.gov/opa/pr/justice-department-leads-effort-seize-backpagecom-internet-s-leading-forum-prostitution-ads>.

the abolitionists suggested, the companies and their surrogates similarly minimize the horrors of sex trafficking. More precisely, they now try to present, and superficially embrace, the arguments of “sex workers,” positing that sexual exploitation is often a choice.<sup>63</sup> In so doing so, they embrace the organizations who promote the legalization of prostitution— not survivors of sex trafficking who overwhelmingly opposed their arguments.<sup>64</sup> This is akin to the historical argument that slavery is not really as bad as the media makes it out to be and that many people choose this way of life.<sup>65</sup> The reality is that sex trafficking perpetuates extreme victimization and abuse, which is why the final version of FOSTA–SESTA was supported by every major victim and survivor organization in the country.<sup>66</sup>

## II. METHODS OF ADVANCING POSITIONS THAT HURT THE ANTI-TRAFFICKING EFFORTS

History often repeats itself. The scope of corporate influence on sex trafficking and the deliberate nature of its efforts echo the actions of pro-slavery entities from two centuries ago. This section addresses the contemporary efforts taken by some tech interests that benefit from sex trafficking or an unregulated Internet today. Such efforts mirror their pro-slavery predecessors in antebellum America who benefited from slavery.

### A. *Cultivating Surrogates*

The face of antebellum slavery was not only plantation owners and slave traders—it also included corollary businesses that benefited from the institution. Those actors attempted to justify the exploitation with arguments grounded in economics and maintaining their profits. Today, the same can be said for some tech companies and organizations that incorporate similar logic. They do so

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<sup>63</sup> E.g., Dia Kayyali, *Protecting Your Anonymity and Privacy: A How-to for Sex Workers*, ELECTRONIC FRONTIER FOUND.: DEEPLINKS BLOG (July 1, 2014); Aaron Mackey & Elliot Harmon, *Congress Censors the Internet, but EFF Continues to Fight FOSTA: 2018 in Review*, ELECTRONIC FRONTIER FOUND.: DEEPLINKS BLOG (Dec. 29, 2018).

<sup>64</sup> E.g., Kat Banyard, *The Dangers of Rebranding Prostitution as ‘Sex Work’*, GUARDIAN (June 7, 2016, 4:07 PM), <https://www.theguardian.com/lifeandstyle/2016/jun/06/prostitution-sex-work-pimp-state-kat-banyard-decriminalisation>; Meghan Murphy, *Prostitution by Any Other Name Is Still Exploitation*, VICE (Dec. 12, 2013, 6:02 PM), [https://www.vice.com/en\\_us/article/kwp83z/decriminalizing-prostitution-may-not-be-the-answer](https://www.vice.com/en_us/article/kwp83z/decriminalizing-prostitution-may-not-be-the-answer); Anne K. Ream, *Free Speech? Or Freedom to Exploit?*, WORLD WITHOUT EXPLOITATION (Nov. 13, 2017), <https://medium.com/world-without-exploitation/free-speech-or-freedom-to-exploit-f6fb6f6c876d>.

<sup>65</sup> *Arguments and Justifications*, *supra* note 30; *Attempts to Justify Slavery*, BBC, [www.bbc.co.uk/ethics/slavery/ethics/justifications.shtml](http://www.bbc.co.uk/ethics/slavery/ethics/justifications.shtml) (last visited May 4, 2019).

<sup>66</sup> Joint Statement, *supra* note 61.

utilizing a variety of methods.

Some tech companies advance their positions using diverse mechanisms. At times, they publicly and directly take positions that potentially benefit sex traffickers, such as opposing any limits to Section 230 immunity. However, a company exposes itself to risk by publicly taking positions that are perceived to be antithetical to American or consumer values. When pressure mounts against these distasteful positions, these businesses are nonetheless able to advance their positions by furtively cultivating a group of surrogates in the form of ostensibly “independent” nonprofit organizations and other entities. The *Washington Post* tracked Google’s efforts in this regard: it referred to Google as a “master of Washington influence” after detailing its creation of support of surrogates.<sup>67</sup> In 2014, Google donated to over 130 trade associations, advocacy groups, and think tanks, twice the number it did in 2010.<sup>68</sup> The Director Emeritus of USC’s Annenberg Innovation Lab noted in the *New York Times* that Google also funded academics and think tanks and paid for over 100 research papers that promoted their interests.<sup>69</sup> These papers were then utilized by Google and its surrogates to influence the congressional committees and federal agencies charged with overseeing Google’s business interests.<sup>70</sup> Although corporate philanthropy to nonprofit organizations can be an indication of good corporate citizenship, using philanthropy to advance business positions is not an exercise in conscientious corporate citizenship.

Amici in a pending Supreme Court case documented this practice within the context of *cy pres* awards.<sup>71</sup> They asserted that

Google seeds and funds some of its most loyal academic and nonprofit allies by payments through *cy pres* awards in class action cases. Those recipients, in turn, have formally and informally supported or taken up Google’s causes in cases and controversies unrelated to the class action case that awarded *cy pres* funds.<sup>72</sup>

Amici noted that this relationship between Google and some of these

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<sup>67</sup> Tom Hamburger & Matea Gold, *Google, Once Disdainful of Lobbying, Now a Master of Washington Influence*, WASH. POST (Apr. 12, 2014), [https://www.washingtonpost.com/politics/how-google-is-transforming-power-and-politicsgoogle-once-disdainful-of-lobbying-now-a-master-of-washington-influence/2014/04/12/51648b92-b4d3-11e3-8cb6-284052554d74\\_story.html](https://www.washingtonpost.com/politics/how-google-is-transforming-power-and-politicsgoogle-once-disdainful-of-lobbying-now-a-master-of-washington-influence/2014/04/12/51648b92-b4d3-11e3-8cb6-284052554d74_story.html).

<sup>68</sup> *Id.*

<sup>69</sup> Jonathan Taplin, Opinion, *Google’s Disturbing Influence Over Think Tanks*, N.Y. TIMES (Aug. 30, 2017), <https://www.nytimes.com/2017/08/30/opinion/google-influence-think-tanks.html>.

<sup>70</sup> *Id.*

<sup>71</sup> Brief of David Lowrey et al. as Amici Curiae in Support of Petitioners at 4–5, *Frank v. Gaos*, 138 S. Ct. 1697 (2018) (No. 17-961).

<sup>72</sup> *Id.* at 5.

organizations is so close that at least one trial court ordered Google to disclose its financial support to organizations like the Berkman Center, the EFF, and Public Knowledge to assess its efforts to influence public opinion.<sup>73</sup>

With regard to sex trafficking, Google has seemingly employed similar efforts. As discussed previously, Backpage was a major platform for sex trafficking. Congress, concerned with the growth of sex trafficking, took up the SAVE Act, which prohibited certain advertising of sex trafficking.<sup>74</sup> In response, a group of organizations, representing themselves as committed to Internet freedom, signed a letter opposing the SAVE Act—many of them were directly funded by Google.<sup>75</sup> This coalition successfully lobbied to remove provisions that would have held Backpage and others liable for recklessly disregarding the child sex trafficking occurring on its site.<sup>76</sup>

This continued years later when big tech deployed these same groups to try to defeat FOSTA and SESTA. Several groups that received Google funding opposed SESTA and published dozens of opinion pieces, blog posts, and letters in opposition to the law.<sup>77</sup> Many of the policy groups that adopted a public stance

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<sup>73</sup> Oracle Am. Inc., v. Google Inc., No. C 10-03561 WHA, 2012 WL 3561366, at \*1 (N.D. Cal. Aug. 20, 2012); Brief of David Lowrey et al., *supra* note 71, at 7.

<sup>74</sup> SAVE Act of 2015, H.R. 285, 114th Cong. (2015); *see also* Press Release, Rep. Ann Wagner, Rep. Wagner's Statement on the Senate Passage of the SAVE Act (Apr. 22, 2015), <https://wagner.house.gov/media-center/press-releases/rep-wagners-statement-on-the-senate-passage-of-the-save-act>.

<sup>75</sup> *In re Google Buzz Privacy Litig.*, No. C 10-00672 JW, 2011 WL 7460099, at \*6 (N.D. Cal. June 2, 2011); Letter from Human Rights Org. & Trade Associations to the U.S. Senate (Nov. 12, 2014), <https://cdt.org/files/2014/11/coalition-letter-opposing-Senate-SAVE-Act.pdf>; GOOGLE: U.S. PUB. POL'Y, *Transparency*, <https://www.google.com/publicpolicy/transparency.html> (last visited May 4, 2019).

<sup>76</sup> Consumer Watchdog, a consumer advocacy group, reviewed Google's tax records and concluded that these records demonstrate that "Google has financed and supported a broad array of groups and individuals who have fought aggressively to thwart legal challenges to Backpage's business interests." CONSUMER WATCHDOG, HOW GOOGLE'S BACKING OF BACKPAGE PROTECTS CHILD SEX TRAFFICKING: A NEW REPORT 3 (2017), <https://www.consumerwatchdog.org/sites/default/files/2017-09/backpagereport.pdf>.

<sup>77</sup> Elliot Harmon, *How Congress Censored the Internet*, ELECTRONIC FRONTIER FOUND.: DEEPLINKS BLOG (Mar. 21, 2018), <https://www.eff.org/deeplinks/2018/03/how-congress-censored-internet>; Elliot Harmon, *Internet Censorship Bill Would Spell Disaster for Speech and Innovation*, ELECTRONIC FRONTIER FOUND.: DEEPLINKS BLOG (Aug. 2, 2017), <https://www.eff.org/deeplinks/2017/08/internet-censorship-bill-would-spell-disaster-speech-and-innovation>; Emma Llansó, *SESTA Would Undermine Free Speech Online*, CTR. FOR DEMOCRACY & TECH. BLOG (Aug. 1, 2017), <https://cdt.org/blog/sesta-would-undermine-free-speech-online/>; *see* Letter from Access Now et al. to Mitch McConnell, Senate Majority Leader, & Chuck Schumer, Senate Minority Leader (Aug. 4, 2017), <https://cdt.org/files/2017/08/free-speech-orgs-opposition-letter-re-S1693.pdf>; Letter from TechFreedom, Engine et al. to Mitch McConnell, Senate Majority Leader, & Chuck Schumer, Senate Minority Leader (Feb. 23, 2018), <https://www.rstreet.org/2018/02/23/coalition-letter-on-fosta-sesta/>. Many of the signatories to this letter are funded by tech giants like Google. PUBLIC CITIZEN, MISSION CREEP-Y: GOOGLE IS QUIETLY BECOMING ONE OF THE NATION'S MOST POWERFUL POLITICAL FORCES WHILE EXPANDING ITS INFORMATION-COLLECTION EMPIRE 68 (2014), <https://www.citizen.org/sites/default/files/google-political-spending-mission-creepy.pdf>.

against the bill received support from Google.<sup>78</sup>

Of course, hundreds of organizations receive support from big tech and these organizations are certainly free to oppose any legislation they find objectionable. It is not unusual that the views of groups who receive corporate support overlap those of their corporate benefactors. However, a focus on a few examples underscores the familiar historical narrative of attempting to mainstream arguments that justify an acceptance of exploitation and the resulting need for transparency. The largest trade association for Internet companies is the Internet Association, whose members include Google, Amazon, eBay, and Facebook.<sup>79</sup> It initially opposed both FOSTA and SESTA until SESTA was significantly narrowed in its favor.<sup>80</sup> Even then, its support was offered only after two days of hearings where Congress inflicted on Google, Facebook, and Twitter withering criticism for their failure to self-regulate in the area of national security and hate speech.<sup>81</sup> While the Internet Association ultimately put out a brief statement in support of SESTA, the level of its support is questionable.<sup>82</sup>

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In the leadup to Congress passing FOSTA–SESTA, considerable media coverage was dedicated to “sex workers” who opposed the legislation. *E.g.*, Tina Horn, *How a New Senate Bill Will Screw over Sex Workers*, ROLLING STONE (Mar. 23, 2018, 9:33 PM), <https://www.rollingstone.com/politics/politics-features/how-a-new-senate-bill-will-screw-over-sex-workers-205311/>. However, this coverage was roundly criticized by survivors of sex trafficking; Autumn Burris & Marian Hatcher, *Rolling Stone Article Evokes Response from Two Exited Survivors*, WORLD WITHOUT EXPLOITATION (Apr. 17, 2018), <https://medium.com/world-without-exploitation/rolling-stone-article-evokes-response-from-two-exited-survivors-c0be88e1f8a7>; *see also* *Infographic: The Truth About FOSTA–SESTA*, COALITION AGAINST TRAFFICKING WOMEN (June 26, 2018), <http://www.catwinternational.org/Home/Article/740-infographic-the-truth-about-fostasesta>. The vast majority of survivors of sex trafficking supported the legislation. *See generally Effective Lobbying Starts with Listening: How Survivor Voices Drove the Fight for Passage of FOSTA–SESTA*, WORLD WITHOUT EXPLOITATION (May 3, 2018), <https://medium.com/world-without-exploitation/effective-lobbying-starts-with-listening-ec0b3abc3cc1>.

<sup>78</sup> *In re Google Buzz Privacy Litig.*, 2011 WL 7460099, at \*6; Google’s Response to Order to Supplement at 7–9, *Oracle Am., Inc. v. Google Inc.*, No. 3:10-CV-03561-WHA (N.D. Cal. Oct. 16, 2011) (discussing Google’s contributions to organizations such as the EFF and Public Knowledge); GOOGLE: U.S. PUB. POL’Y, *supra* note 75.

<sup>79</sup> *Our Members*, INTERNET ASS’N, <https://internetassociation.org/our-members/> (last visited May 4, 2019).

<sup>80</sup> Press Release, Internet Ass’n, Statement in Support of the Bipartisan Compromise to the Stop Enabling Sex Traffickers Act (Nov. 3, 2017), <https://internetassociation.org/statement-in-support-of-the-bipartisan-compromise-to-stop-enabling-sex-trafficking-act-sesta/>.

<sup>81</sup> *See Extremist Content and Russian Disinformation Online: Working with Tech to Find Solutions: Hearing Before the Subcomm. on Crime & Terrorism of the S. Comm. on the Judiciary*, 115th Cong. (2017) (statements of Sen. Klobuchar, Member, S. Comm. on the Judiciary, on pending legislation and need for an ‘outside enforcer’ and Sen. Graham, Member, S. Comm. on the Judiciary, contrasting regulation in broadcast media and the lack of regulation in social media).

<sup>82</sup> Nitasha Tiku, *Are Tech Companies Trying to Derail the Sex-Trafficking Bill?*, WIRED (Dec. 12, 2017, 8:00 AM), <https://www.wired.com/story/are-tech-companies-tryingto-derail-sex-trafficking-bill/>. Indeed, following these events, not only did a new tech-written bill emerge from the House, Craigslist “hired prominent Washington D.C. law firm Sidley Austin to advocate on Capitol Hill against” SESTA. Jon Gingerich, *Craigslist Calls on Lobbying Support to Fight Sex Trafficking Bill*, O’DWYER’S (Dec. 18, 2017), <https://www.odwyerpr.com>.

For example, NetChoice and the Internet Association share many members,<sup>83</sup> including Facebook, Google, AOL, Airbnb, eBay, Expedia, and Lyft.<sup>84</sup> NetChoice proposed a substitute proposal for FOSTA, which was widely opposed by survivor and victim groups.<sup>85</sup> While its effort may have appeared supportive of legislation inhibiting sex trafficking, it was not. It contained new potential criminal charges but did not limit Section 230 immunity.<sup>86</sup> Moreover, legislatively, if two different bills emerged from each chamber, they likely would die in committee, thus effectively killing the effort to return Section 230 immunity to its original form of limited immunity.<sup>87</sup> Therefore, while the Internet Association publicly supported a narrow bill, its members, through surrogates such as NetChoice, took actions that indicated otherwise.

Further, groups like the Center for Democracy and Technology (CDT) and the EFF have opposed FOSTA–SESTA, and both have received funding from, and maintain significant connections to, Google and Facebook. It is alleged that the EFF, for example, received \$1 million from Google in 2011,<sup>88</sup> and its board currently consists of many members with close ties to Google.<sup>89</sup> Similarly,

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com/story/public/9917/2017-12-18/craigslist-calls-lobbying-support-fight-sex-trafficking-bill.html.

<sup>83</sup> The Association’s members, who are also members of NetChoice, include Facebook, Google, AOL, Airbnb, eBay, Expedia, and Lyft. *Compare Our Members*, *supra* note 79, with *Members*, NETCHOICE, <https://netchoice.org/> (last visited May 4, 2019).

<sup>84</sup> Press Release, Internet Ass’n, *supra* note 80.

<sup>85</sup> *Online Sex Trafficking and the Communications Decency Act: Hearing Before the Subcomm. on Crime, Terrorism, Homeland Security, & Investigations of the H. Comm. of the Judiciary*, 115 Cong. (2017) (statement of Chris Cox, Outside Counsel, NetChoice) [hereinafter *Online Sex Trafficking Hearing*]; *see also* Tiku, *supra* note 82.

<sup>86</sup> *Online Sex Trafficking Hearing*, *supra* note 85.

<sup>87</sup> *See* Press Release, U.S. House Comm. on the Judiciary, Statement of Ranking Member Jerrold Nadler During Markup of H.R. 1865, The “Allow States and Victims to Fight Online Sex Trafficking Act” (Dec. 12, 2017), <https://judiciary.house.gov/news/press-releases/statement-ranking-member-jerrold-nadler-during-markup-hr-1865-allow-states-and>. For a discussion about how the NetChoice proposal became the new House bill, *see* Leary, *supra* note 14, at 608.

<sup>88</sup> *In re Google Buzz Privacy Litig.*, No. C 10-00672 JW, 2011 WL 7460099, at \*6 (N.D. Cal. June 2, 2011).

<sup>89</sup> *See Advisory Board*, ELECTRONIC FRONTIER FOUND., <https://www.eff.org/about/advisoryboard> (last visited May 4, 2019); *EFF’s Board of Directors*, ELECTRONIC FRONTIER FOUND., <https://www.eff.org/about/board> (last visited May 4, 2019). Many members of the Electronic Frontier Foundation’s Board of Directors and Advisory Board—including Dan Auerbach, Joseph Bonneau, Joe Gratz, Gwen Hinze, James Kasten, Joe Kraus, Mark Lemley, Marcel Leonardi, Deirdre Mulligan, Kurt Opshal, Chris Palmer, Erica Portnoy, Bruce Schneier, Derek Slater, Brad Templeton, Jakub Warmuz, Jonathan Zittrain, and Ethan Zuckerman—either have direct work experience with Google or work for organizations that have represented or received funding from Google. *See generally id.*; Jeff John Roberts, *As Trump Presidency Looms, Digital Activists Brace for a Fight for the Internet*, FORTUNE (Dec. 13, 2016), <http://fortune.com/2016/12/13/eff-trump-cindy-cohn/> (“The EFF does, however, have ties to Google. It employs former Google staffers and once held a mixer at the company’s office, but at the same time has publicly criticized the search giant for gobbling up data about its users.”).

evidence exists that the CDT received \$2.5 million from Google from 2010 through 2014,<sup>90</sup> and \$500,000 from Facebook in 2013 alone.<sup>91</sup> For the CDT, these Google “donations amounted to more than double the amount contributed by any other company during the same period.”<sup>92</sup> Furthermore, the CDT represents itself as a powerful consumer advocate and the EFF an advocate of digital privacy. Yet both were criticized for their conspicuous silence on the significant issue of Facebook’s data collection policies.<sup>93</sup>

The EFF has a tacit willingness to advance the causes of tech giants against victims of trafficking, is demonstrated in its central role supporting Backpage, the CEO of which pleaded guilty to sex trafficking.<sup>94</sup> Both the CDT and EFF worked for years to support Backpage’s public defense<sup>95</sup>—a defense which Backpage’s CEO later admitted was false.<sup>96</sup> They also led the charge opposing SESTA.<sup>97</sup>

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<sup>90</sup> Paul Bedard, *Rigged? Google, Facebook Fund Group Working ‘Do Not Track’ Rules*, WASH. EXAMINER (Jan. 19, 2015, 12:25 PM), <https://www.washingtonexaminer.com/rigged-google-facebook-fund-group-working-do-not-track-rules>; Melissa Daniels, *Google’s \$5.5M Privacy Deal Draws Ire of Class Advocate*, LAW360 (Dec. 22, 2016, 8:41 PM), <https://www.law360.com/articles/875645/google-s-5-5m-privacy-deal-draws-ire-of-class-advocate>; Roberts, *supra* note 89.

<sup>91</sup> Brief of David Lowrey et al., *supra* note 71, at 9 n.4.

<sup>92</sup> Alana Goodman, *Consumer Watchdog Took Millions from Google, Quiet on Privacy Concerns*, WASH. FREE BEACON (May 3, 2016, 5:00 AM), <https://freebeacon.com/issues/consumer-watchdog-took-millions-google-quiet-privacy-concerns/>.

<sup>93</sup> April Glaser, *The Watchdogs that Didn’t Bark*, SLATE (Apr. 19, 2018, 9:33 PM), <https://slate.com/technology/2018/04/why-arent-privacy-groups-fighting-to-regulate-facebook.html> (noting that the most digital privacy advocate groups, such as CDT, have done is “write blog posts and started initial conversations,” but are ultimately missing from the conversation).

<sup>94</sup> *Backpage.com Succumbing to Government Is Blow to Free Speech Online*, CTR. FOR DEMOCRACY & TECH. (Jan. 10, 2017), <https://cdt.org/press/backpage-com-succumbing-to-government-is-blow-to-free-speech-online/>; Sophia Cope, *Government Pressure Shuttters Backpage’s Adult Services Section*, ELECTRONIC FRONTIER FOUND. (Jan. 12, 2017), <https://www.eff.org/deeplinks/2017/01/government-pressure-censors-backpagecom>; Elliot Harmon, *Internet Censorship Bills Wouldn’t Help Catch Sex Traffickers*, ELECTRONIC FRONTIER FOUND. (Dec. 5, 2017), <https://www.eff.org/deeplinks/2017/12/internet-censorship-bills-wouldnt-help-catch-sex-traffickers>; Jackman, *supra* note 13.

<sup>95</sup> Backpage has repeatedly claimed that it is merely a host of content created by others and not involved in facilitating prostitution. SENATE REPORT, *supra* note 9, at 1. The Senate Subcommittee on Investigations found that “internal company documents . . . conclusively show that Backpage’s public defense is a fiction.” *Id.*

<sup>96</sup> See generally Amici Curiae Brief of Electronic Frontier Foundation et al., *Doe ex rel. Roe v. Backpage.com, LLC*, 104 F. Supp. 3d 149 (D. Mass. 2015) (No. 14-13870-RGS); CONSUMER WATCHDOG, *supra* note 76, at 5; John M. Simpson, *Report Shows How Google Funded Defense of Child Sex Trafficking Hub*, CONSUMER WATCHDOG, <https://www.consumerwatchdog.org/newsrelease/report-shows-how-google-funded-defense-child-sex-trafficking-hub> (last visited May 4, 2019). Backpage made numerous contentions in its many defenses that included that it was not guilty of prostitution or sex trafficking related allegations. Since then the former CEO has pleaded guilty to numerous charges in three states and confessed he was aware of the nature of Backpage’s business. Jackman, *supra* note 13. Two remaining defendants deny the charges. *Id.*

<sup>97</sup> E.g., Elliot Harmon, *Stop SESTA/FOSTA: Don’t Let Congress Censor the Internet*, ELECTRONIC FRONTIER FOUND. (Mar. 8, 2018), <https://www.eff.org/deeplinks/2018/03/stop-sestafosta-dont-let-congress->

## B. Taking Litigation Positions that Collaterally Facilitate Human Trafficking

The activity of those surrogates was not merely limited to position papers. By the early 2000s, the dominant player in online sex trafficking was Craigslist, and as the decade proceeded, Backpage came to embrace that role.<sup>98</sup> The National Center for Missing and Exploited Children reported that 73% of the public tips received for suspected online child sex trafficking related to Backpage.<sup>99</sup> Consequently, several victims of trafficking—and families of those killed after being trafficked online—attempted to sue Backpage under the private right of action within the Trafficking Victims Protection Act and its amendments.<sup>100</sup> Similarly, some state prosecutors and local law enforcement officials attempted to pursue state-level criminal charges, relying on anti-sex trafficking laws and other charges.<sup>101</sup> Craigslist and Backpage aggressively fought these charges in court, asserting that they were immune from liability under Section 230,<sup>102</sup> even though this legal position had little resemblance to the original purpose of the law.<sup>103</sup> Furthermore, Backpage was widely seen as enabling sex trafficking of women and minors. Yet they were assisted by big tech and its surrogates in their aggressive litigation stance to expand Section 230 well beyond its intended goal.

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ensor-internet; Llansó, *supra* note 77; *Stop SESTA*, ELECTRONIC FRONTIER FOUND., <https://www EFF.org/document/stop-sesta> (last visited May 4, 2019); Liz Woolery, *It's All Downsides: Hybrid FOSTA/SESTA Hinders Law Enforcement, Hurts Victims and Speakers*, CTR. FOR DEMOCRACY & TECH. (Mar. 8, 2018), <https://cdt.org/blog/its-all-downsides-hybrid-fosta-sesta-hinders-law-enforcement-hurts-victims-and-speakers/>; see Letter from Access Now et al., *supra* note 77.

<sup>98</sup> SENATE REPORT, *supra* note 9, at 20, 43.

<sup>99</sup> See *Stop Enabling Sex Traffickers Act of 2017: Hearing on S. 1693 Before the S. Comm. on Commerce, Sci. & Transp.*, 115th Cong. (2017) (statement of Yiota G. Souras, Senior Vice President and General Counsel, The National Center for Missing and Exploited Children); see also CONSUMER WATCHDOG, *supra* note 76, at 9.

<sup>100</sup> 18 U.S.C. § 1595 (2012).

<sup>101</sup> E.g., *Dart v. Craigslist, Inc.*, 665 F. Supp. 2d 961, 967–68 (N.D. Ill. 2009); *People v. Ferrer*, No. 16FE019224, 2016 WL7237305 (Cal. Super. Ct. Dec. 9, 2016); Suzanne Choney, *Classified Ad Site Backpage in Crosshairs over Child Sex Ads*, NBC NEWS (July 29, 2013, 8:52 PM), <https://www.nbcnews.com/technology/classified-ad-site-backpage-crosshairs-over-child-sex-ads-6C10789250>; William Saletan, *Craigslist Shuts Its "Adult" Section. Where Will Sex Ads Go Now?*, SLATE (Sept. 7, 2010, 8:39 AM), <https://slate.com/news-and-politics/2010/09/craigslist-shuts-its-adult-section-where-will-sex-ads-go-now.html>; *State AGs Ask Craigslist to Drop Adult Services Ads*, NPR (Aug. 25, 2010, 3:00 PM), <https://www.npr.org/templates/story/story.php?storyId=129431217>; Matt Zimmerman, *AGs v. Craigslist: Putting the Bully Back into Bully Pulpit*, ELECTRONIC FRONTIER FOUND. (May 6, 2009), <https://www EFF.org/deepinks/2009/05/ags-v-craigslist-put>.

<sup>102</sup> Kristina Cooke & Dan Levine, *Child Sex Trafficking Victims Sue Backpage.com in Four States*, REUTERS (Jan. 25, 2017, 3:09 PM), <https://www.reuters.com/article/us-usa-internet-sexcrimes/child-sex-trafficking-victims-sue-backpage-com-in-four-states-idUSKBN1592MK>; Paul Demko, *The Sex Trafficking Case Testing the Limits of the First Amendment*, POLITICO (July 29, 2018), <https://www.politico.com/magazine/story/2018/07/29/first-amendment-limits-backpage-escort-ads-219034>.

<sup>103</sup> See generally Leary, *supra* note 14.

Nicholas Kristof, a *New York Times* columnist who has covered human trafficking domestically and internationally, noted that organizations that Google founded have “for years been quietly helping Backpage.com, the website where most American victims of human trafficking are sold, to battle lawsuits from children sold there for sex.”<sup>104</sup> It did so by funding many groups who supported Backpage’s claim. “Backpage’s active supporters have included EFF, CDT[,] and more than two dozen legal experts, lobbying firms and interest groups—all quietly supported behind the scenes by Alphabet Inc.’s key unit, Google.”<sup>105</sup> The CDT and EFF worked at the center of this effort.<sup>106</sup> Anti-sex trafficking organizations have argued that they helped support Backpage’s legal claims by financing these seemingly independent digital rights organizations to advance the same arguments.<sup>107</sup> For example, the EFF and CDT filed an amicus brief in support of Backpage in a Massachusetts civil lawsuit brought by three girls sold into sex trafficking on Backpage.<sup>108</sup>

Backpage’s aggressive litigation stance appears quite intentional. By asserting immunity, it precluded the cases from reaching the discovery phase and thereby prevented the world from accessing the internal documents displaying its connection to sex trafficking along the lines of those discovered by the Senate investigation. Since the time of these lawsuits, the U.S. Attorney for the District of Arizona has indicted Backpage—and its corporate leaders—on numerous counts relating to sex trafficking and other related offenses, and shut down the site.<sup>109</sup> This has been followed by several guilty pleas of some Backpage officers that revealed to the public a clearer picture of how Backpage conspired with sex traffickers. Backpage’s CEO Carl Ferrer pleaded guilty in Arizona federal court to conspiracy to facilitate prostitution in violation of the

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<sup>104</sup> Kristof, *supra* note 2.

<sup>105</sup> CONSUMER WATCHDOG, *supra* note 76, at 7. *See generally In re Google Buzz Privacy Litig.*, No. C 10-00672 JW, 2011 WL 7460099, at \*6 (N.D. Cal. June 2, 2011); Google’s Response to Order to Supplement, *supra* note 78; GOOGLE: U.S. PUB. POL’Y, *supra* note 75.

<sup>106</sup> *See generally* Amici Curiae Brief of the Electronic Frontier Foundation & the Center for Democracy & Technology in Support of Appellants, *J.S. v. Vill. Voice Media Holdings, LLC*, 359 P.3d 714 (Wash. 2015) (en banc) (No. 90510-0); Amici Curiae Brief of Electronic Frontier Foundation et al., *supra* note 96.

<sup>107</sup> *See* Margo Davison & Lisa Thompson, *Google Lobbies in Support of Backpage.com, a Known Facilitator of Sex Trafficking*, END SEXUAL EXPLOITATION (May 23, 2017), <https://endsexualexploitation.org/articles/google-sex-trafficking-backpage/>.

<sup>108</sup> *Id.*

<sup>109</sup> Richard Ruelas & Megan Cassidy, *Indictments Revealed in Human-Trafficking Case Against Backpage Founders*, ARIZ. REPUBLIC, <https://www.azcentral.com/story/news/local/arizona-investigations/2018/04/09/indictments-revealed-human-trafficking-case-against-backpage-founders-michael-lacey-jim-larkin/496580002/> (last updated Apr. 12, 2018, 12:08 PM); Del Quentin Wilber & Lalita Clozel, *U.S. Shuts Down Backpage, a Classified-Ad Website, Indicts Co-Founders*, WALL STREET J. (Apr. 9, 2018, 5:48 PM), <https://www.wsj.com/articles/u-s-shuts-down-backpage-a-classified-ad-website-indicts-co-founders-1523310499>.

Travel Act and acknowledged he conspired with other Backpage principals to knowingly facilitate prostitution and launder its proceeds.<sup>110</sup> He also pleaded guilty, on behalf of Backpage, to a money-laundering conspiracy in which he acknowledged a company-wide culture of concealing and refusing to acknowledge the true prostitution nature of Backpage's advertisements.<sup>111</sup> Additionally, Ferrer pleaded guilty to conspiracy charges in California.<sup>112</sup> Significantly, he also pleaded guilty on behalf of Backpage to human trafficking and money laundering charges in Texas.<sup>113</sup> Backpage's sales director, Dan Hyer, also pleaded guilty to conspiring to facilitate prostitution with the other principals.<sup>114</sup> The other principals of Backpage have pleaded not guilty.<sup>115</sup>

These pleas paint a profoundly disturbing picture of mainstream business entities and their surrogates supporting an entity in court which engaged in sex trafficking. The only reason to do so was to seek to continue de facto absolute immunity under Section 230. Like the sectors of the antebellum American economy that resisted an end to slavery, these commercial sectors would rather see online sex trafficking continue to exist, regardless of the irreparable harm to its survivors, rather than risk losing economic advantages provided by Section 230. Like their nineteenth-century counterparts, they are accepting unimaginable human suffering of the marginalized as a cost of doing business.

Some big tech actors and its surrogates have continued their court battles even after the passage of FOSTA. The EFF has facilitated a failed constitutional challenge to FOSTA in federal court.<sup>116</sup> Although the lawsuit purportedly is on behalf of a number of groups, such as those advocating for legalized prostitution and a massage parlor owner, the EFF has called this “*our* lawsuit.”<sup>117</sup> It even utilized a longtime Backpage attorney, Robert Corn-Revere, in this effort.<sup>118</sup> The

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<sup>110</sup> Jackman, *supra* note 13.

<sup>111</sup> Josh Gerstein, *Backpage.com CEO Admits Guilt in Plea Deal with Feds, States*, POLITICO (Apr. 12, 2018, 11:11 PM), <https://www.politico.com/story/2018/04/12/backpage-ceo-pleads-guilty-carl-ferrer-522022>.

<sup>112</sup> Maggie Astor, *Backpage Chief Pleads Guilty to Conspiracy and Money Laundering*, N.Y. TIMES (Apr. 12, 2018), <https://www.nytimes.com/2018/04/12/us/backpage-plea-deal-ferrer.html>.

<sup>113</sup> Press Release, Ken Paxton, Att’y Gen. of Tex., *Backpage.com Pleads Guilty to Human Trafficking in Texas* (Apr. 12, 2018), <https://www.texasattorneygeneral.gov/news/releases/backpagecom-pleads-guilty-human-trafficking-texas>; *see, e.g., 2020 Trial for Backpage.com Founders in Case over Sex Ads*, AP NEWS (Apr. 30, 2018), <https://www.apnews.com/b4480bf57f254dcfa6fce4219b2051d2>.

<sup>114</sup> Jacques Billeaud, *Sales Director for Backpage.com Pleads Guilty to Conspiracy*, AP NEWS (Aug. 17, 2018), <https://www.apnews.com/b9d1ab33ef8d4d34957fb7cc51f6c33d>.

<sup>115</sup> Jackman, *supra* note 13.

<sup>116</sup> *See generally* Woodhull Freedom Found. v. United States, 334 F. Supp. 3d 185 (D.D.C. 2018), *appeal docketed*, No. 18-5298 (D.C. Cir. Oct. 12, 2018).

<sup>117</sup> Greene, *supra* note 51 (emphasis added).

<sup>118</sup> *See* Woodhull Freedom Found., 334 F. Supp. 3d at 189; Anna Schecter & Dennis Romero, *FOSTA Sex Trafficking Law Becomes Center of Debate About Tech Responsibility*, NBC NEWS (July 19, 2018, 3:33 PM),

D.C. District Court dismissed the lawsuit due to lack of standing and a lack of case and controversy. In so doing, the court noted that the EFF's expansive interpretation of FOSTA—which claimed the statute would hurt child speech—hurt advocates, and hurt legitimate business was too extreme a claim, unconvincing, and “flawed.”<sup>119</sup>

### *C. Lobbying Legislatures with Positions that Extend Exploitation*

Big tech has not limited its outsized influence to the courts, where legal decisions regarding Section 230 directly impact it. It has also greatly expanded its influence through direct lobbying and through utilizing its surrogates to influence lawmakers with positions that would be unpopular with the general public, like opposition to regulation of online sex traffickers.

Consider the growth of lobbying efforts by Google and its parent company, Alphabet Inc. In 2002, Google spent approximately \$50,000 on direct lobbying; a little over one decade later it has been reported it was spending over \$18 million.<sup>120</sup> According to the Center for Responsive Politics, Alphabet spent more money on lobbying than any other company in 2017,<sup>121</sup> and Google was in the top fifteen, surpassing AT&T and Boeing.<sup>122</sup> Public Citizen described Google and Alphabet's lobbying team as “skeletal” in 2004, but by 2014 it spent \$1 million more than the biggest pharmaceutical companies.<sup>123</sup> While they did not have a political action committee in 2004, by 2010 it controlled a PAC that Public Citizen described as “goliath.”<sup>124</sup>

Obviously, major corporations such as Google and Facebook would expect to increase their lobbying presence as more of their work is exposed to the effects of government regulation. This is not necessarily nefarious and reflects an expected practice. However,

Google is not politically neutral. . . . [I]t is at heart a libertarian firm[,] which believes above all that corporations should not be regulated by

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<https://www.nbcnews.com/tech/tech-news/sex-trafficking-bill-becomes-center-debate-about-tech-responsibility-n892876>.

<sup>119</sup> *Woodhull Freedom Found.*, 334 F. Supp. 3d at 198–200.

<sup>120</sup> Jonathan Taplin, *Why Is Google Spending Record Sums on Lobbying Washington?*, *GUARDIAN* (July 30, 2017, 7:00 PM), <https://www.theguardian.com/technology/2017/jul/30/google-silicon-valley-corporate-lobbying-washington-dc-politics>.

<sup>121</sup> *Id.*

<sup>122</sup> Melanie Ehrenkranz, *Google's Parent Company Spent More on Lobbying than AT&T or Boeing Last Year*, *GIZMODO* (Jan. 24, 2018, 7:07 PM), <https://gizmodo.com/googles-parent-company-spent-more-on-lobbying-than-at-t-1822394224>.

<sup>123</sup> PUBLIC CITIZEN, *supra* note 77, at 6.

<sup>124</sup> *Id.* at 31, 59.

the government. Just as extreme lobbying by the bank industry led to a loosening of regulations, which then resulted in the great mortgage scam of 2008, Google's efforts to keep the government out of its business may have deep implications for the next 10 years.<sup>125</sup>

Of relevance here is the amount of money Google and Alphabet spent on issues solely regulating online sex trafficking. Of that \$18 million, estimates range in the millions of dollars regarding how much was spent to combat FOSTA and other sex trafficking initiatives, like regulation to determine the age of those appearing in online advertisements for sex.<sup>126</sup> Ironically, Google and Alphabet argued that one of the reasons it opposed FOSTA–SESTA was that it violated privacy.<sup>127</sup> Yet, Google and Facebook have been at the center of scandal involving their own routine data breaches and violations privacy rights.<sup>128</sup>

Significantly, estimates of the cost of Google's lobbying efforts do not—and cannot—include efforts on lobbying spent by the organizations heavily funded by big tech. A major example of this is Engine. Google publicly opposed FOSTA,<sup>129</sup> and after Google was criticized for that position, its public opposition to the bill became more quiet.<sup>130</sup> In its place, Engine emerged as one of the main public figures opposed to the bill—of the \$120,000 that Engine spent on lobbying in 2017, about half of it was alleged to be dedicated toward fighting the sex trafficking legislation.<sup>131</sup> Google then pointed to the statement made by Engine officials as reason not to support the bills,<sup>132</sup> despite the fact that Google acknowledged funding Engine.<sup>133</sup>

<sup>125</sup> Taplin, *supra* note 120.

<sup>126</sup> PUBLIC CITIZEN, *supra* note 77, at 6; *Google Inc.*, OPENSECRETS.ORG, <https://www.opensecrets.org/lobby/firmbills.php?id=D000022008&year=2018> (last visited May 4, 2019).

<sup>127</sup> See PUBLIC CITIZEN, *supra* note 77, at 50; *Google Inc.*, *supra* note 126.

<sup>128</sup> Michelle Bowman, *Google Pays \$22.5 million for Violating Users' Privacy*, BUS. INSIDER (Nov. 28, 2012, 9:52 AM), <https://www.businessinsider.com/google-pays-225-million-for-violating-users-privacy-2012-11>; Richard Nieva, *Unreported Google Data Exposure Affects Hundreds of Thousands: Report*, CBS NEWS (Oct. 8, 2018, 3:30 PM), <https://www.cbsnews.com/news/google-data-exposure-unreported-affects-hundreds-of-thousands-2018-10-08-live-updates/> (reporting that one reason Google did not reveal the data breach was because of fear of increased government regulation).

<sup>129</sup> Molinari, *supra* note 53.

<sup>130</sup> See, e.g., Kieren McCarthy, *Google Lobbies Hard to Derail New U.S. Privacy Laws – Using Dodgy Stats*, REGISTER (Mar. 26, 2018, 8:52 PM), [https://www.theregister.co.uk/2018/03/26/as\\_tech\\_criticism\\_grows\\_google\\_lobbies\\_to\\_undercut\\_new\\_privacy\\_laws/](https://www.theregister.co.uk/2018/03/26/as_tech_criticism_grows_google_lobbies_to_undercut_new_privacy_laws/).

<sup>131</sup> See *Engine*, OPENSECRETS.ORG, <https://www.opensecrets.org/lobby/clientbills.php?id=D000067281&year=2017> (last visited May 4, 2019); GOOGLE: U.S. PUB. POL'Y, *supra* note 75.

<sup>132</sup> Letter from Stewart Jeffries, Google Lobbyist, to Cong. Staffers (Aug. 3, 2017), <https://endsexualexploitation.org/wp-content/uploads/Google-Lobbyist-Writing-Congressional-Staffers.pdf>.

<sup>133</sup> David Dayen, *An Advocacy Group for Startups Is Funded by Google and Run By Ex-Googlers*, INTERCEPT (May 30, 2013, 1:38 PM), <https://theintercept.com/2018/05/30/google-engine-advocacy-tech-startups/>.

Many other big tech funded organizations worked against FOSTA–SESTA. The EFF strongly opposed the legislation throughout the legislative process. Big tech has long funded the Internet Association to advance its agenda.<sup>134</sup> The Internet Association also testified against regulation.<sup>135</sup> While it claimed to be a good actor in this space, assisting law enforcement and non-governmental organizations, the Internet Association argued that Section 230 was a “key tool that allows internet companies to make good Samaritan efforts to fight against trafficking and other forms of abuse *without facing broader legal risk* for doing so.”<sup>136</sup> Moreover, Consumer Watchdog has also found links between Google and several lobbying firms who registered several meetings on Capitol Hill to stop FOSTA–SESTA.<sup>137</sup> Therefore, both directly and indirectly some in big tech facilitate lobbying Congress against any Internet regulation, even if it protects children and the marginalized.

#### *D. Lobbying the Executive Branch*

It is an open question as to whether big tech succeeded in its lobbying efforts on Capitol Hill. Although Congress clarified the outdated Section 230 for the first time in the thirty years since its enactment, the amendment was very narrow. It only disposed of immunity if a website *knowingly* participated in a sex trafficking venture, rather than if it *recklessly* did so—which was part of the original legislative proposal of FOSTA.<sup>138</sup> That being said, big tech and its surrogates did not miss a beat in advancing their agenda of an unregulated Internet to another forum.

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<sup>134</sup> *Our Members*, *supra* note 79.

<sup>135</sup> Chuck Raasch, *Internet Association Changes Course, Supports Bipartisan Legislation Aimed at Online Sex Trafficking*, ST. LOUIS POST-DISPATCH (Nov. 3, 2017), [https://www.stltoday.com/news/local/govt-and-politics/internet-association-changes-course-supports-bipartisan-legislation-aimed-at-online/article\\_c06467f6-cede-5ea9-b97b-292a1af84c22.html](https://www.stltoday.com/news/local/govt-and-politics/internet-association-changes-course-supports-bipartisan-legislation-aimed-at-online/article_c06467f6-cede-5ea9-b97b-292a1af84c22.html); Emily Stewart, *The Next Big Battle over Internet Freedom Is Here*, VOX (Apr. 23, 2018, 12:20 PM), <https://www.vox.com/policy-and-politics/2018/4/23/17237640/fosta-sesta-section-230-internet-freedom>.

<sup>136</sup> Press Release, Internet Ass’n, Statement on the Senate Passage of FOSTA (Mar. 21, 2018), [https://internetassociation.org/fosta\\_senate\\_passage/](https://internetassociation.org/fosta_senate_passage/) (emphasis added).

<sup>137</sup> See CONSUMER WATCHDOG, *supra* note 76, at 46–47; Kelly Couturier, *How Europe Is Going After Apple, Google and Other U.S. Tech Giants*, N.Y. TIMES, <https://www.nytimes.com/interactive/2015/04/13/technology/how-europe-is-going-after-us-tech-giants.html> (last updated Dec. 20, 2016); Jeff John Roberts, *Why Google, Facebook, and Amazon Should Worry About Europe*, FORTUNE (July 20, 2017), <http://fortune.com/2017/07/20/google-facebook-apple-europe-regulations/>.

<sup>138</sup> Tom Jackman, *House Committee Targets Online Sex Trafficking by Amending Mann Act, Puzzling Advocates*, WASH. POST (Dec. 12, 2017), [https://www.washingtonpost.com/news/true-crime/wp/2017/12/12/house-committee-targets-online-sex-trafficking-by-amending-mann-act-puzzling-advocates/?utm\\_term=.9030b9932158](https://www.washingtonpost.com/news/true-crime/wp/2017/12/12/house-committee-targets-online-sex-trafficking-by-amending-mann-act-puzzling-advocates/?utm_term=.9030b9932158); Arthur Rizer, *A Prosecutor’s Case for FOSTA*, HUFFINGTON POST (Jan. 11, 2018, 11:11 PM), [https://www.huffingtonpost.com/entry/a-prosecutors-case-for-fosta\\_us\\_5a5833abe4b0d3efcf69572e](https://www.huffingtonpost.com/entry/a-prosecutors-case-for-fosta_us_5a5833abe4b0d3efcf69572e).

Big tech has been trying for years to have immunity protection for digital intermediaries exported from the United States throughout the world. They have been unsuccessful, as much of the rest of the world protects individual privacy much more vigorously.<sup>139</sup> Consequently, companies like Google and Facebook have faced significant opposition in Europe and elsewhere.<sup>140</sup> However, in 2017, the Internet Association published a white paper, *Modernizing NAFTA*, that sought to include Section 230-like immunity provision in the United States–Mexico–Canada Trade Agreement (USMCA), which is intended to replace NAFTA.<sup>141</sup> Later in 2017, while publicly opposing FOSTA–SESTA, Google’s lobbyist was lobbying the U.S. Trade Representative to include this provision in the USMCA.<sup>142</sup> In 2018, this language was successfully inserted into the Agreement due in part to a former attorney for the Internet Association working as a White House adviser on technology.<sup>143</sup> This provision was widely opposed by victims and survivors of sex trafficking.<sup>144</sup> The Section 230 immunity was placed in Article 19 of the new agreement. However, a compromise was reached for Annex 19-A, in which a specific reference to FOSTA–SESTA was included to not provide immunity for knowingly facilitating sex trafficking or prostitution.<sup>145</sup> While that addition may appear to be harmless, it means that big

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<sup>139</sup> See, e.g., Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data, and Repealing Directive 95/46/EC (General Data Protection Regulation), 2016 O.J. (L 119/1).

<sup>140</sup> See, e.g., Mathieu Rosemain, *France Fines Google \$57 million for European Privacy Rule Breach*, REUTERS (Jan. 21, 2019, 1:31 PM), <https://www.reuters.com/article/us-google-privacy-france/france-fines-google-57-million-for-european-privacy-rule-breach-idUSKCN1PF208>; Sam Schechner, *Facebook Faces Potential \$1.63 Billion Fine in Europe over Data Breach*, WALL STREET J. (Sept. 30, 2018, 2:08 PM), <https://www.wsj.com/articles/facebook-faces-potential-1-63-billion-fine-in-europe-over-data-breach-1538330906>.

<sup>141</sup> INTERNET ASS’N, *MODERNIZING NAFTA FOR TODAY’S ECONOMY* (2017), <https://internetassociation.org/wp-content/uploads/2017/06/Modernizing-NAFTA-White-Paper.pdf>.

<sup>142</sup> See, e.g., Johannes Munter, *Big Tech Sneaks Broad Immunities into the NAFTA Agreement*, NEWS MEDIA ALLIANCE (Sept. 10, 2018), <https://www.newsmediaalliance.org/big-tech-nafta/>.

<sup>143</sup> Alexis Kramer, *U.S.–Canada–Mexico Pact Includes Website Liability Shield*, BLOOMBERG LAW (Oct. 1, 2018), <https://www.bna.com/new-nafta-pact-n73014482904/>; Harper Neidig, *Top Tech Group Exec Joining White House as Trump Adviser*, HILL (Feb. 15, 2018, 5:08 PM), <https://thehill.com/policy/technology/374128-top-tech-group-official-joining-white-house-as-trump-adviser>; *United States–Mexico–Canada Trade Fact Sheet: Modernizing NAFTA into a 21st Century Trade Agreement*, OFF. U.S. TRADE REP. (2018), <https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2018/october/united-states-mexico-canada-trade-fa-1>.

<sup>144</sup> See, e.g., Letter from Yvonne Ambrose et al. to Members of Congress (Sept. 13, 2018), [https://endsexualexploitation.org/wp-content/uploads/Letter-to-Congress\\_NAFTA-CDA-230-FOSTA-SESTA\\_FINAL\\_9-13-18.pdf](https://endsexualexploitation.org/wp-content/uploads/Letter-to-Congress_NAFTA-CDA-230-FOSTA-SESTA_FINAL_9-13-18.pdf); Lisa L. Thompson, *NAFTA Negotiations Could Make Sexual Violence America’s Top Export*, HILL (Sept. 19, 2018, 2:00 PM), <https://thehill.com/opinion/civil-rights/407412-nafta-negotiations-could-make-sexual-violence-americas-top-export>.

<sup>145</sup> Agreement Between the United States of America, the United Mexican States, and Canada art. 19, annex 19-A, Nov. 30, 2018.

tech has successfully changed the landscape of the international arena. Now countries may become obligated to change their laws to reflect the terms of the USMCA. With future trade agreements a focus of the current Administration,<sup>146</sup> big tech appears to have successfully circumvented the law at the cost of sex trafficking victims. As such, the USMCA was considered a “big win” for tech.<sup>147</sup> In the end, big tech has taken steps to demand influence in all branches of government.

### CONCLUSION

The existence of slavery in the United States is a dark stain on American history. How a civilized society could tolerate such exploitation seems inexplicable by contemporary standards. But a review of the relevant history reveals one reason why antebellum slavery continued as long as it did: the support it received from economic interests that benefited directly and indirectly from the exploitation. Sadly, that reality is once again apparent today as modern forms of exploitation continue. Human trafficking thrives in the world in part because it is profitable to the traffickers. It is so profitable that legitimate businesses that benefit from it—or from the structures that allow it to thrive—are willing to tolerate it. More insidiously, however, they are willing to actively thwart efforts to end human trafficking if such efforts will negatively affect their bottom line. This is particularly problematic when such actors have millions of dollars at their disposal to support traffickers in court and influence legislators and administrations. The first step to ending human trafficking is to know who supports the traffickers, and it is clear we know some mainstream businesses do. Human trafficking cannot be defeated until such entities are willing to place human beings above profits.

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<sup>146</sup> OFFICE OF THE U.S. TRADE REP., THE PRESIDENT’S 2019 TRADE POLICY AGENDA (2019), [https://ustr.gov/sites/default/files/2019\\_Trade\\_Policy\\_Agenda\\_and\\_2018\\_Annual\\_Report.pdf](https://ustr.gov/sites/default/files/2019_Trade_Policy_Agenda_and_2018_Annual_Report.pdf).

<sup>147</sup> Heather Timmons & Hanna Kozłowska, *Facebook, Google, and Amazon Are Big Winners in the New NAFTA Deal*, QUARTZ (Oct. 2, 2018), <https://qz.com/1410473/facebook-fb-google-goog-and-amazon-amzn-are-big-winners-in-the-new-nafta-deal/>.