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Elizabeth Carney

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PROTECTING INTERNET FREEDOM AT THE EXPENSE OF FACILITATING ONLINE CHILD SEX TRAFFICKING? AN EXPLANATION AS TO WHY CDA'S SECTION 230 HAS NO PLACE IN A NEW NAFTA

Elizabeth Carney⁺

“Exotic Young and Inexperienced I dont know no better Soo i might just do it - 18 you didn't get to see HERE'S YOUR CHANCE. REAL PIC. NO RUSH PLUS I LIKE WHAT I DO EVEN THOUGH I JUST STARTED”¹ This is just one example of a classified advertisement selling a child for sex posted on Backpage.com (Backpage).² Today, buying a child for sex is as easy as ordering a pizza online. The explosive growth of the internet has “fundamentally changed how children are victimized through sex trafficking,” providing a new and easily accessible channel of advertising.³ Between 2010–2015, the National Center for Missing and Exploited Children (NCMEC) saw an 846 percent increase in reports of suspected child sex trafficking, which it found directly correlated to an increase in trafficking children online for commercial sex.⁴ These child rapists know that Backpage has created a forum allowing them to exploit innocent children, all at the click of a button.⁵ Of the reports NCMEC receives from the public for suspected child sex trafficking, 73 percent are on Backpage.⁶ To add insult to injury, victims of these atrocious

⁺ J.D. Candidate, May 2019, The Catholic University of America, Columbus School of Law; B.A. 2012, Union College. The author wishes to thank the professors of the Catholic University, especially Professor Mary G. Leary, who provided their support and guidance. The author also wishes to thank the *Catholic University Law Review* staff members and editors for their hard work during the editing of this Comment.

1. Brief of Amicus Curiae the National Center for Missing and Exploited Children Supporting Appellants and Reversal at 4, *Doe v. Backpage.com, LLC*, 817 F.3d 12 (1st Cir. 2016) (No. 15-1724), 2015 WL 8031476.

2. *Id.*

3. *Id.* at 4.

4. STAFF OF S. PERMANENT SUBCOMMITTEE ON INVESTIGATIONS, 114TH CONG., BACKPAGE.COM'S KNOWING FACILITATION OF ONLINE SEX TRAFFICKING 4 (Comm. Print 2017) [hereinafter PSI Staff Report].

5. *See id.* at 5 (“These [web]sites facilitate the sex trade by providing an easily accessible forum that matches buyers of sex with traffickers selling minors and adults.”).

6. *Id.* at 6 (“[T]he vast majority of prosecutions for sex trafficking now involve online advertising, and most of those advertisements appear on Backpage.” (quoting Brief of Amicus Curiae Commonwealth of Massachusetts in Support of Plaintiffs-Appellants and Reversal at 10, *Doe ex rel. Roe v. Backpage.com, LLC*, 104 F. Supp. 3d 149 (D. Mass. 2015) (No. 15-1724))). *See also* Matt Ramos, *Why Is It So Hard to Fight Child Sex Trafficking on Backpage.com?*, BROADLY (July 25, 2016), https://broadly.vice.com/en_us/article/paeybg/why-is-it-so-hard-to-fight-child-

crimes have not been able to hold sites like Backpage liable because of the precedential legal landscape protecting the internet industry.⁷

Notwithstanding the documented growth of online advertising for child sex trafficking on Backpage, the site's owners and operators utilize the law to shield themselves from criminal charges and civil suits. Asserting that it is not responsible for what people post on the website, Backpage has repeatedly been able to claim immunity under § 230 of the Communications Decency Act (CDA).⁸ Passed in 1996 as part of the Telecommunications Act, § 230's purpose was to protect the development of a nascent internet as a medium and a marketplace.⁹ Its text provides that internet service providers (ISPs) cannot be held liable for content posted by third parties.¹⁰ Congress wanted to "permit the continued development of the internet . . ." and encourage websites to screen their content for harmful material "without fear of liability."¹¹

Although § 230 has contributed to internet growth and enabled innovation, its implementation has also had detrimental effects.¹² For example, a revenge porn site operator¹³ and a gossip site that encouraged users to submit "dirt" on other people were able to successfully claim immunity under § 230.¹⁴ As described

sex-trafficking-on-backpage.com (describing numerous stories of girls, some as young as thirteen, who were trafficked for sex on Backpage).

7. It is important to note that when this Comment was initially drafted, there were two proposed bills in Congress to reform the law protecting the internet. Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. No. 115-164, 132 Stat. 1253, 1253 (2018); COMM. ON COMMERCE, SCL., AND TRANSP., STOP ENABLING SEX TRAFFICKERS ACT OF 2017, S. REP. NO. 115-199, at 2-4 (2d. Sess. 2018). The bills have now been passed into law. *Id.*

8. *Key Statutes and Legal Decisions in the Jane Doe Cases*, I AM JANE DOE, <https://www.iamjanedofilm.com/resources/> (last visited Nov. 10, 2018); see also PSI Staff Report, *supra* note 4, at 6-10.

9. Stephanie Silvano, Note, *Fighting a Losing Battle to Win the War: Can States Combat Domestic Minor Sex Trafficking Despite CDA Preemption?*, 83 FORDHAM L. REV. 375, 384-85 (2014).

10. 47 U.S.C. § 230(c)(1) (2000).

11. *Doe v. Backpage.com, LLC*, 817 F.3d 12, 19 (1st Cir. 2016) (noting that screening material from third party users would be difficult and would have a chilling effect if websites were liable for third party content).

12. Danielle Keats Citron & Benjamin Wittes, *The Internet Will Not Break: Denying Bad Samaritans § 230 Immunity*, 86 FORDHAM L. REV. 401, 423 (2017). The authors critique § 230, stating:

Although § 230 has secured breathing space for the development of online services and countless opportunities to work, speak, and engage with others, it has also produced unjust results. An overbroad reading of the CDA has given online platforms a free pass to ignore illegal activities, to deliberately repost illegal material, and to solicit unlawful activities while ensuring that abusers cannot be identified.

Id. at 413.

13. *Id.* at 414 n.94 (discussing the advocacy group Cyber Civil Rights Initiative, which has shown that "there are countless sites whose raison d'être is the peddling of nonconsensual pornography").

14. *Jones v. Dirty World Entm't Recordings LLC*, 755 F.3d 398, 416 (6th Cir. 2014) (recognizing that a professional cheerleader was prevented from successfully bringing a defamation

in the documentary film *I am Jane Doe* (illustrating the legal battle fought by mothers of young girls trafficked on Backpage), § 230 has been “interpreted so broadly as to defy common sense.”¹⁵ Consequently, sex trafficking survivors have been left with no legal remedy against those internet platforms that facilitated the crimes committed against them, even when there was evidence the harmful content was encouraged or deliberately hosted by the ISP.¹⁶ There is a significant body of law that suggests § 230 provides blanket immunity to ISPs¹⁷ and that courts’ “hands are tied” until legislative changes are made.¹⁸ Today, many have concluded § 230’s broad immunity is no longer needed to protect free speech on the internet and call for it to be amended.¹⁹

On one hand, there have been recent positive developments: Congress has listened after its long refusal to act, and efforts have been made to amend § 230 with regard to those sites that “*knowingly* facilitate, support or assist online sex trafficking.”²⁰ On the other hand, technology companies are also encouraging the Trump Administration to include § 230 language in the new North American Free Trade Agreement (NAFTA).²¹ Why would the United States want to extend such statutory protections that have allowed sites to escape civil liability and prevented victims from receiving the justice they deserve, to all of North

claim against operators of a user generated, online tabloid because the court found they did not materially contribute to the defamatory content of the statements).

15. *I AM JANE DOE* (50 Eggs 2017).

16. *Key Statutes and Legal Decisions in the Jane Doe Case*, *supra* note 8; see also Citron & Wittes, *supra* note 12, at 413 (describing how websites “have no duty of care to respond to users or larger societal goals. They have no accountability for destructive uses of their services, even when they encourage those uses”). In *Backpage.com*, the court determined that the website was still only a mere “publisher” despite having actively edited its sexual service advertisements. *Backpage.com*, 817 F.3d at 21.

17. *Backpage.com*, 817 F.3d at 21; *Backpage.com, LLC v. Dart*, 807 F.3d 229, 231 (7th Cir. 2015); *People v. Ferrer*, No. 16FE024013, slip. op. at 18 (Cal. App. Dep’t Super. Ct. 2017); see also John Cotton Richmond, *Federal Human Trafficking Review: An Analysis & Recommendations from the 2016 Legal Developments*, 52 WAKE FOREST L. REV. 293, 349 n.528 (2017) (citations omitted) (finding similar cases which held § 230 preempted various state legislatures’ attempts to criminalize Backpage’s adult advertising section).

18. Rob Portman, *History Will Judge Those Who Don’t Stop Sex Trafficking*, THE GUARDIAN (Sep. 19, 2017), <https://www.theguardian.com/commentisfree/2017/sep/19/stop-sex-trafficking-bill-rob-porter>; see also *Backpage.com*, 817 F.3d at 21.

19. See Citron & Wittes, *supra* note 12, at 404; Jamie Court, *Will Google and Big Tech End Child Sex Trafficking Or Keep Fighting for Their Legal Shield?*, HUFFINGTON POST (May 25, 2017), https://www.huffingtonpost.com/entry/will-google-and-big-tech-support-an-to-child-sex-trafficking_us_5926486ee4b0aa7207986adb.

20. Portman, *supra* note 18.

21. *Consumer Watchdog Warns Big Tech Is Trying to Pull End Run Around New Bipartisan Congressional Efforts to Hold Backpage.com Accountable; Industry Pressing Trump Administration for New NAFTA Internet Deal That Could Protect Child Sex-trafficking*, PR NEWSWIRE (Aug. 1, 2017), <https://www.prnewswire.com/news-releases/consumer-watchdog-warns-big-tech-is-trying-to-pull-end-run-around-new-bipartisan-congressional-efforts-to-hold-backpagecom-accountable-industry-pressing-trump-administration-for-new-nafta-internet-deal-that-could-protect-child-s-300497661.html> [hereinafter *Consumer Watchdog Warns Big Tech*].

America? Given the recent legal battle in Congress over amending § 230, the original justification for § 230 no longer exists, and § 230 has effectively promoted online abuse with no effective recourse.²²

This Comment argues that § 230, which has inadvertently stripped women and children of their most basic human rights, has no place in an international trade agreement. Part I discusses § 230 in depth by analyzing the intent, legislative history, and accomplishments of the legislation. It also illustrates how § 230 has been broadly interpreted and applied by courts in cases dealing with human trafficking. Part II looks at the two statutes recently passed into law, discussing the arguments made by both opponents and supporters of each bill. Part III provides a brief background of NAFTA, analyzes why it needs to be updated, and illustrates how certain tech companies and associations are trying to include § 230 language in the new agreement. Part IV first argues that § 230 should not be included in a new NAFTA by using Backpage as an example of how the statute has negatively impacted this nation's justice system. This section discusses how Backpage is not the only website engaged in this activity and analyzes the recent bills' legislative impact on these types of platforms. Part IV also demonstrates why the internet no longer needs the same protections afforded by § 230 and that it is time to start regulating it. This section concludes by discussing recent concessions made by tech companies admitting that § 230 must be amended.

I. THE CDA: DETRIMENTAL IMPACT DESPITE GOOD INTENTIONS

A. Origin of § 230

To understand the recent Congressional debate over § 230, we must first look at its origin, interpretation in the courts, and its legal impact. Section 230 came in the wake of a New York case that held that an online service provider was liable for the defamatory comments posted by a third party user.²³ In *Stratton Oakmont v. Prodigy Services Co.*, the court held that the website was a publisher and not just a distributor when it publicly stated that it controlled what was posted on its bulletin boards and used a screening software to filter offensive material.²⁴ Ironically, Prodigy lost its immunity as a distributor and became liable as a publisher by trying to keep offensive material off of its bulletin boards.²⁵

“The . . . decision caught the attention of lawmakers who wanted” to make the internet safer for children by enabling parents to filter objectionable content.²⁶

22. See Citron & Wittes, *supra* note 12, at 421.

23. *Stratton Oakmont v. Prodigy Servs. Co.*, No. 31063/94, 1995 WL 323710, at *1–3 (N.Y. App. Div. May 24, 1995).

24. *Id.* at *2.

25. Citron & Wittes, *supra* note 12, at 422–23.

26. *Id.* at 405.

Lawmakers were concerned that *Prodigy's* holding created a disincentive for websites to filter indecent material because Prodigy had done just that but was still held liable.²⁷ Drafters argued that holding these ISPs liable for imperfect screening would result in websites choosing not to take any preventative screening measures; they could avoid liability by acting as mere distributors.²⁸ Lawmakers therefore introduced an amendment to the CDA that would provide immunity to online service providers that restricted access to obscene material.²⁹ The goal of the legislation was to protect ISPs from liability when they acted as Good Samaritans by trying to restrict access to objectionable material.³⁰

The final version of § 230 of the CDA reflects this broad policy objective.³¹ The statute's text also exemplifies the other primary purpose of the CDA and § 230, which was to remove disincentives to develop and implement technology that blocked harmful content in order to protect children.³² Today, the main impact of § 230 stems largely from subsection (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."³³ These seemingly harmless words have severely impacted the internet's legal landscape. As described below, U.S. courts' interpretation of § 230 has created de facto immunity for websites and ISPs that cannot be held liable for lawsuits resulting from user-provided content.³⁴

27. 141 CONG. REC. H8471 (daily ed. Aug. 4, 1995). As Representative Bob Goodlatte explained: "Currently, however, there is tremendous disincentive for online service providers to create family friendly services by detecting and removing objectionable content. These providers face the risk of increased liability where they take reasonable steps to police their systems." *Id.*

28. *Id.*

29. *Id.* at H8471–72.

30. H.R. REP. NO. 104-223, at 14–15 (1995). The House Rules Committee described the legislation as "protecting from liability those providers and users seeking to clean up the Internet." *Id.* at 3. "No provider or user of interactive computer services shall be held liable on account of . . . any action voluntarily taken in good faith to restrict access to material that the provider or user considers to be obscene . . . whether or not such material is constitutionally protected." *Id.* at 14.

31. 47 U.S.C. § 230(c)(2) (2000). See also Jeff Kosseff, *The Gradual Erosion of the Law that Shaped the Internet: Section 230's Evolution over Two Decades*, 18 COLUM. SCI. & TECH. L. REV. 1, 9 (2016).

This subsection emphasizes that operators of interactive computer services do not lose their immunity when they make a good faith effort to edit or delete content that the provider deems objectionable. [It] allows websites . . . to set and enforce user-generated content standards without being held responsible for the user content that they allow on their services. This prevents a repeat of the [*Prodigy*] decision, in which the service provider lost its immunity because it enforced content standards.

Id.

32. 47 U.S.C. § 230(b)(4)–(5); see also Silvano, *supra* note 9, at 385.

33. 47 U.S.C. § 230(c)(1).

34. See Jeff Kosseff, *Testimony of Jeff Kosseff*, U.S. HOUSE OF REPRESENTATIVES 2 (Oct. 3, 2017), <https://judiciary.house.gov/wp-content/uploads/2017/09/Jeff-Kosseff-Written-Testimony-10.3.2017.pdf>.

B. Broad Immunity

A year after the CDA was passed, the courts began to interpret § 230 as providing broad immunity.³⁵ In *Zeran v. America Online, Inc.*, the Fourth Circuit held that “§ 230 creates a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service.”³⁶ It further concluded that Congress had granted statutory immunity in recognition that tort based suits posed a threat to freedom of speech on the internet: “[L]awsuits seeking to hold a service provider liable for its exercise of a publisher’s traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content—are barred.”³⁷ The court held that deciding whether to include or remove information constituted publication and that only providers of content could be held liable under § 230.³⁸ This broad immunity has largely been upheld by the courts, protecting websites from liability for illegal activity that occurs on their platforms.³⁹ This immunity has been extended not only to those sites that are passive participants in what is published, but to those that take active steps in deciding what content is made available on their services.⁴⁰

C. Accomplishments of the CDA

Despite the negative consequences of § 230 (as discussed in the following section), many credit it with facilitating the development of the modern internet.⁴¹ Many claim that without § 230, sites such as Facebook, Yelp, and Twitter would not have been created in the U.S.⁴² Section 230 has allowed people to freely speak to one another and created the “vibrant culture of freedom of expression we have on the Internet today.”⁴³ In protecting websites from

35. *Id.* at 2–3.

36. 129 F.3d 327, 330 (4th Cir. 1997).

37. *Id.*

38. *Id.* at 332. There was no dispute that whoever posted the defamatory remarks about the plaintiff would be considered a content provider. *Id.* at 330 n.2.

39. See *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1121 (9th Cir. 2003) (finding for defendant Matchmaker.com even though the website had provided the questionnaire that allowed the anonymous user to provide sexually explicit and threatening messages); *Blumenthal v. Drudge*, 992 F. Supp. 44, 53–54 (D.D.C. 1998) (holding the plaintiff could not sue AOL for defamation resulting from comments accusing him of abuse contained in a Drudge Report posted by AOL). *But see* Koseff, *supra* note 34, at 5 (arguing that § 230 immunity is no longer as definite as it once was and has eroded in recent years).

40. *Batzel v. Smith*, 333 F.3d 1018, 1031 (9th Cir. 2003) (finding for the defendant website operator who had himself reviewed, edited, and decided to publish a letter containing defamatory remarks about the plaintiff).

41. Koseff, *supra* note 34, at 6.

42. *Id.*

43. Jack M. Balkin, *Free Speech and Press in the Digital Age: The Future of Free Expression in a Digital Age*, 36 PEPP. L. REV. 427, 434 (2009) (emphasis omitted). As described by First Amendment Scholar Jack Balkin,

lawsuits every time offensive material is anonymously posted, the statute created a way for websites and freedom of speech on the internet to flourish.⁴⁴ Additionally, in the absence of § 230, interactive websites that involve user-generated content would not exist.⁴⁵

D. Shortcomings of § 230

One harmful activity taking place on the internet and whose growth is attributed to the internet is the sexual exploitation of vulnerable people and children.⁴⁶ The International Labour Organization reported that in 2016, an estimated 40.3 million people were victims of modern slavery, 24.9 million of whom were forced into labor (including the sex industry); 99 percent of those forced to work in the commercial sex industry were women and girls, and 21 percent were children.⁴⁷ A large contributor to the increase in sex trafficking is the unregulated growth and utilization of the internet, which has become a blessing for traffickers.⁴⁸ Online classified ads present the perfect medium for

[w]ithout something like the section 230 immunity, it would be very risky to create social software that allows others to blog or publish, much less create a social networking site The wide range of participatory media and applications that characterize the Internet today would be at continuous risk of lawsuits. As a result, much of the Internet's freedom and many of its manifold possibilities for communication and association would be chilled.

Id. at 436.

44. Christopher Zara, *The Most Important Law in Tech Has a Problem*, WIRED (Jan. 3, 2017), <https://www.wired.com/2017/01/the-most-important-law-in-tech-has-a-problem/>. Section 230

established the regulatory certainty that has allowed today's biggest internet companies to flourish. Without Section 230—the popular theory goes—there could be no Facebook, Amazon, or Twitter. Yelp's one-star reviews would have rendered it helpless against litigation from angry business owners In a nutshell, Section 230 is the statutory glue behind everything you love and hate about the internet.

Id. *But see* Citron & Wittes, *supra* note 12, at 420 (arguing that § 230, in granting unlimited free speech to every internet user, has in fact deterred people from speaking on the internet because of cyber bullying, which can lead people to shut down their blogs and sites to stop their attackers).

45. Chris Cox, *Testimony of Chris Cox*, U.S. HOUSE OF REPRESENTATIVES 8 (Oct. 3, 2017), <https://judiciary.house.gov/wp-content/uploads/2017/09/Testimony-of-Chris-Cox-NetChoice.pdf>.

Without Section 230, small social media platforms would be exposed to lawsuits for everything from users' product reviews to book reviews Any service that connects buyers and sellers, workers and employers, content creators and a platform, victims and victims' rights groups, or provides any other interactive engagement opportunity we can imagine, could not continue to function on the internet displaying user-generated content.

Id.

46. Mary Leary, *Testimony of Mary Graw Leary*, UNITED STATES HOUSE OF REPRESENTATIVES 12–13 (Oct. 3, 2017), <https://judiciary.house.gov/wp-content/uploads/2017/09/Leary-Testimony-Final.pdf>.

47. *Global Estimates of Modern Slavery: Forced Labour and Forced Marriage*, INT'L LABOR ORG. 9–10 (2017), http://www.ilo.org/wcmsp5/groups/public/—dgreports/—dcomm/documents/publication/wcms_575479.pdf.

48. Leary, *supra* note 46, at 5.

selling human beings, including children, for sexual exploitation. Pimps can make a big profit off of one victim while limiting their own exposure.⁴⁹ Human traffickers have been reported to make up to \$33,000 a week.⁵⁰ One survivor who was sold on Backpage for sex as a fifteen year old described how she worked all day, every day and would earn as much as \$4,000 a weekend for her pimp, who explained to her that Backpage was “safer” and made it “easier ‘not to get caught.’”⁵¹

When victims of these heinous crimes tried to hold responsible the websites on which they were sold for sex, the courts have largely dismissed their cases because of the CDA’s § 230.⁵² In *Doe v. Myspace, Inc.*, the mother of a minor who had lied about her age on her profile and was then sexually assaulted by a man she met on Myspace sued the social networking site.⁵³ The plaintiff argued that Myspace had partially created content and that its search features made it an information content provider, eliminating § 230 immunity.⁵⁴ The Fifth Circuit held that the CDA barred the action because the claims were actually alleging that Myspace should be held liable for publishing content created by a third party.⁵⁵ In *Doe v. Backpage.com*, three young women who had been trafficked for sex as minors on the site sued Backpage under anti-human trafficking laws.⁵⁶ The plaintiffs claimed that the classified advertisement site’s activities were not the functions of a traditional publisher and therefore were not afforded CDA protection.⁵⁷ The First Circuit concluded the opposite, and held that Backpage’s decisions about how to treat postings and generally operate its website made it a publisher and speaker of third party content; the CDA therefore preempted the plaintiffs’ claims.⁵⁸ The court did not come to this decision without first

49. *Id.* (“The ability to legally operate online advertising platforms to sell victims allows traffickers to exponentially expand their exploitation by providing a forum where they can access countless purchasers, sell victims to an even greater number of purchasers who will rape them repeatedly, while limiting their public exposure.”); *see also* Amber Lyon & Steve Turnham, *Underage Sex Trade Still Flourishing Online*, CNN (Feb. 5, 2011), <http://www.cnn.com/2011/CRIME/01/20/siu.selling.girl.next.door.backpage/> (“She told us she was seeing four or five men a day, at the standard rate of \$300 for an hour, \$150 for a half.”).

50. 161 CONG. REC. S1596, S1621 (daily ed. Mar. 18, 2015) (statement of Sen. Dianne Feinstein).

51. Gloria Riviera, Jackie Jesko, & Sally Hawkins, *Daughters for Sale: How Young American Girls Are Being Sold Online*, ABC NEWS (May 25, 2016), <http://abcnews.go.com/US/daughters-sale-young-american-girls-sold-online/story?id=39350838>.

52. *See Doe v. Backpage.com, LLC*, 817 F.3d 12, 29 (1st Cir. 2016); *Doe v. MySpace, Inc.*, 528 F.3d 413, 422 (5th Cir. 2008).

53. 528 F.3d 413, 416 (5th Cir. 2008).

54. *Id.* at 420.

55. *Id.* at 422.

56. 817 F.3d 12, 17 (1st Cir. 2016).

57. *Id.* at 20.

58. *Id.* at 21. It is also important to mention *J.S. v. Vill. Voice Media Holdings, LLC*, a similar case of three minors who sued the operator of Backpage after they were trafficked on the site for sex. 359 P.3d 714, 715 (Wash. 2015). The plaintiffs’ suit survived a motion to dismiss because it

recognizing “[t]his is a hard case . . . in the sense that the law requires that we, like the court below, deny relief to plaintiffs whose circumstances evoke outrage. The result we must reach is rooted in positive law.”⁵⁹ Courts have acknowledged that until Congress decides to amend the law, the CDA will continue to provide protection to those websites that allegedly facilitate the exploitation of others through human trafficking.⁶⁰ The unintended consequence of providing immunity to sites that facilitate the sexual exploitation of children is even more egregious given its disconnect with § 230’s purpose of protecting children from obscene material.⁶¹

II. RECENT REFORM: ISPs THAT KNOWINGLY FACILITATE SEX TRAFFICKING IN THE HOT SEAT

The Senate Subcommittee’s report (discussed in Part IV), requests by law enforcement officials, and general outrage by anti-trafficking groups have led to the introduction of new legislation in both the House and the Senate.⁶² The two bills introduced in 2017 were Senator Portman’s *Stop Enabling Sex Traffickers Act of 2017* (SESTA) and Congresswoman Wagner’s *Allow States and Victims to Fight Online Sex Trafficking Act of 2017* (FOSTA).⁶³

alleged that Backpage’s posting rules had done more than maintain a neutral policy to prohibit content. *Id.* The site’s policies had created a way for pimps to sell people online for sex, making Backpage a creator of the content and not just a publisher. *Id.* at 717–18. After seven years of litigation, the case settled in early 2017. *Key Statutes and Legal Decisions in the Jane Doe Cases*, *supra* note 8. It is hard to understand the different results of *Backpage.com, LLC* and *J.S.* despite the similarity in facts and plaintiffs’ claims. However, this difficulty represents how courts are trying to deal with the horrific circumstances endured by the plaintiffs within the confines of CDA’s broad immunity. *See* Kosseff, *supra* note 31, at 34–35.

59. *Backpage.com, LLC*, 817 F.3d at 15.

60. *People v. Ferrer*, No. 16FE024013, slip. op. at 18 (Cal. App. Dep’t Super. Ct. 2017) (“If and until Congress sees fit to amend the immunity law, the broad reach of section 230 of the Communications Decency Act even applies to those alleged to support the exploitation of others by human trafficking.”); *see also Backpage.com, LLC*, 817 F.3d at 29 (“If the evils that the appellants have identified are deemed to outweigh the *First Amendment* values that drive the CDA, the remedy is through legislation, not through litigation.”).

61. Letter from Nat’l Ass’n of Att’ys Gen. to Roger Wicker, Brian Schatz, Marsha Blackburn, & Michael Doyle, (August 16, 2017), <http://2hsvz0l74ah31vgcm16peuy12tz.wpengine.netdna-cdn.com/wp-content/uploads/2017/08/CDA-Final-Letter.pdf>.

62. Press Release, Rob Portman, Senators Introduce Bipartisan Legislation to Hold Backpage Accountable, Ensure Justice for Victims of Sex Trafficking (Aug. 1, 2017), <https://www.portman.senate.gov/public/index.cfm?p=press-releases&id=1FF6DB17-B7A2-4E70-B901-CA07E43065CB>.

63. S. 1693, 115th Cong. (2017–2018); H.R. 1865, 115th Cong. (2017–2018).

A. SESTA

In its original form, SESTA clarified § 230 to ensure that websites that knowingly facilitate sex trafficking could be held liable.⁶⁴ The bipartisan bill allowed victims of sex trafficking to seek justice against websites that knowingly or recklessly facilitated the crimes committed against them; “[e]liminate[d] federal liability protections for websites that assist[ed], support[ed], or facilitate[d] a violation of federal sex trafficking laws; and [e]nabled state law enforcement officials, not just the federal Department of Justice, to take action against individuals or businesses that violated federal sex trafficking laws.”⁶⁵ On Senator Portman’s website it explains that SESTA was necessary because “Backpage has evaded responsibility by saying that it doesn’t *write* ads for sex—it just publishes them Because judicial interpretations of Section 230 have deviated further away from its statutory text and purpose, it is imperative for Congress to craft a narrow legislative solution.”⁶⁶ It further explains that SESTA would continue to protect internet freedom because it targeted only those websites that facilitated, supported, and profited from sex trafficking. The legislation was a necessary tool to prosecute those who committed these crimes and would not result in an overregulation of the internet, as many opponents at the time argued.⁶⁷

Proponents of SESTA argued that it was necessary to protect children and help eradicate sex trafficking.⁶⁸ Those who perpetuate human trafficking have come up with more sophisticated ways to grow their enterprises, requiring a sophisticated response from law enforcement.⁶⁹ In his testimony at a Senate hearing regarding SESTA, California Attorney General Xavier Becerra described how the internet was not the same when the CDA was passed in 1996 and its explosive growth in today’s world has created a “virtual brothel” to traffic children for sex.⁷⁰ He argued that we can no longer “turn a blind eye to the biggest beneficiaries of sex trafficking because they [are] owners of a website instead of pimps on a street corner.”⁷¹ According to Yiota Souras, General Counsel at the National Center for Missing and Exploited Children (NCMEC), in her testimony supporting SESTA, the judicial system is aware that children are unprotected and prosecutors are unable to do their jobs when children are

64. *Stop Enabling Sex Traffickers Act of 2017*, PORTMAN SENATE 2, https://www.portman.senate.gov/public/index.cfm/files/serve?File_id=A04A55C5-F455-4CA9-8EE9-7C13DD91F1FC (last visited Nov. 10, 2018).

65. *Id.*

66. *Id.*

67. *Id.* at 2–3.

68. *Id.* at 3.

69. *Stop Enabling Sex Traffickers Act of 2017: Hearing on S. 1693 Before the S. Comm. on Com., Sci., and Transp.*, 115th Cong. 2 (2017) (statement of the Honorable Xavier Becerra, Attorney General, State of Cal.).

70. *Id.* at 3.

71. *Id.* at 6.

trafficked through a website.⁷² She also argued that the proposed legislation struck “an important balance between providing sex trafficking victims the opportunity to hold everyone actively participating in their victimization accountable with the need to continue encouraging innovations of technology on the internet.”⁷³ Oracle, a computer technology association that supports the bill, stated it most clearly: “If enacted, [SESTA] will establish some measure of accountability for those that cynically sell advertising but are unprepared to help curtail sex trafficking.”⁷⁴ The Internet Association, a key tech trade group, also now supports SESTA after initially opposing it.⁷⁵

Opponents of Senator Portman’s bill argued that SESTA would lead ISPs to either completely stop or limit their current moderation efforts, leading to an increase in harmful content online.⁷⁶ Professor Eric Goldman argued that SESTA is not necessary to combat human trafficking because the CDA does not apply to federal criminal prosecutions and that the legislation would destroy § 230’s “[o]nline [f]ree [s]peech [m]asterpiece.”⁷⁷ In her testimony at the Senate hearing on SESTA, Abigail Slater, General Counsel of the Internet Association, stated that SESTA is too broad and increases the risk that innocent website platforms would be prosecuted, resulting in frivolous lawsuits.⁷⁸

72. *Stop Enabling Sex Traffickers Act of 2017: Hearing on S. 1693 Before the S. Comm. on Com., Sci., and Trans.*, 115th Cong. 4 (2017) (statement of Yiota G. Souras, Senior Vice President and Gen. Counsel, The Nat’l Center for Missing and Exploited Children).

73. *Id.* at 5. Ms. Souras also articulated how the bill clarifies “that immunity under the CDA is not extended to actual criminal conduct—the *knowing* facilitation, assistance or support of trafficking—while maintaining the CDA’s core publisher protections for the mere publication of third party content or the good faith removal of objectionable online material.” *Id.* at 5–6.

74. Letter from Kenneth Gleuck, Senior Vice President, Oracle, to Senator Rob Portman & Senator Richard Blumenthal (Sept. 5, 2017), https://www.portman.senate.gov/public/index.cfm/files/serve?File_id=B580205B-C674-4CA5-B889-230320F23A67.

75. Tom Jackman, *Internet Companies Drop Opposition to Bill Targeting Online Sex Trafficking*, WASH. POST (Nov. 7, 2017), https://www.washingtonpost.com/news/true-crime/wp/2017/11/07/internet-companies-drop-opposition-to-bill-targeting-online-sex-trafficking/?utm_term=.7a7055af05ba.

76. *Stop Enabling Sex Traffickers Act of 2017: Hearing on S. 1693 Before the S. Comm. on Com., Sci., and Transp.*, 115th Cong. 2 (2017) (statement of Eric Goldman, Professor, Santa Clara Univ. Sch. of Law).

77. *Id.* at 3.

Section 230 is a premier example of speech-enhancing legislation that enriches the free speech rights of speakers and their publishers. Undoubtedly, Section 230 has done more to advance free speech than anything else Congress has done in the past quarter-century; and Section 230 may be Congress’ greatest pro-free-speech achievement ever. It’s hard to believe that Congress would ruin its free speech masterpiece, but that’s exactly what SESTA would do.

Id. at 6. Professor Goldman also attributes the flourishing growth of internet services and the U.S.’s global competitive advantage with online services to § 230. *Id.* at 3.

78. *Stop Enabling Sex Traffickers Act of 2017: Hearing on S. 1693 Before the S. Comm. on Com., Sci., and Trans.*, 115th Cong. (2017) (statement of Abigail Slater, General Counsel, Internet Assoc.).

B. FOSTA

The original proposed version of FOSTA held websites criminally liable for publishing information provided by a third party with reckless disregard that the information was in furtherance of sex trafficking.⁷⁹ The original version also amended the Communications Act of 1934 to grant victims of sexual exploitation a civil remedy and amended the federal criminal code by clarifying that “participation in a venture” included knowing or reckless conduct in furtherance of human trafficking.⁸⁰ The above language was erased from the bill in December 2017, leading some to criticize it as a far departure from the original FOSTA.⁸¹ The amended bill only criminalized websites that intended to promote or facilitate online prostitution, a narrower standard than the knowing or reckless standard in the original version.⁸² Perhaps most striking is that the bill upheld § 230’s civil immunity for websites and failed to mention civil suits in state court.⁸³ The language also incorporated suggestions made by former Representative Chris Cox, a lobbyist and outside counsel at NetChoice (an advocacy group representing internet groups), when he testified against the original FOSTA.⁸⁴ Thirty victims and advocacy groups wrote a letter to the House Committee opposing the amendments and explaining that the new bill was a failure because it prevented a private right of action.⁸⁵ Some Senate sponsors of the original bill also did not support the amendments because there were “concern[s] it [was] actually worse for victims than current law.”⁸⁶ Some of those who were initially opposed also then supported the amended bill.⁸⁷ Due

SESTA would introduce new legal risk not just for internet services that do not knowingly and intentionally facilitate illegal conduct, but also create risk for an incredibly broad number of innocent businesses by expanding the notion of contributory liability. SESTA would hold potentially liable any entity that can be said to benefit from its role in facilitating a sex trafficking violation, even if it has no knowledge that it is doing so or no practical way of terminating such assistance.

Id.

79. H.R. 1865, 115th Congress (2017–2018).

80. *Id.*

81. 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=.201b2f991c3f.

82. *Id.*

83. *Id.*

84. Nitasha Tiku, *Are Tech Companies Trying To Derail The Sex-Trafficking Bill?*, WIRED (Dec. 12, 2017), <https://www.wired.com/story/are-tech-companies-trying-to-derail-sex-trafficking-bill/>. This article also discusses how the amendments to FOSTA were due in large part to influences from tech-industry lobbyists. *Id.*

85. Jackman, *supra* note 81.

86. Tiku, *supra* note 84.

87. Jackman, *supra* note 75; Jack Corrigan, *House Panel Passes Revamped Anti-Sex Trafficking Bill*, NEXTGOV (Dec. 12, 2017), <http://www.nextgov.com/policy/2017/12/house-panel-passes-revamped-anti-sex-trafficking-bill/144495/>. This switch from opposition to support

to these negative reactions, Senator Wagner amended FOSTA again in February 2017 to reinstate victim-centered provisions from the original bill and incorporate language from SESTA.⁸⁸ Known as the Walters Amendment, it was then clear that under FOSTA, § 230 cannot prohibit survivors from bringing private action against the websites that sold them.⁸⁹

C. FOSTA-SESTA Package

Both FOSTA and SESTA were signed into one law on April 11, 2018 by President Trump.⁹⁰ Known as the FOSTA-SESTA package, the combined law clarifies that § 230 will not stand in the way of civil and criminal action against those sites that violate federal sex trafficking laws.⁹¹ The law also redefines “participation in a venture” under federal sex trafficking laws as anyone who “knowingly assist[s], support[s], or facilitat[es] a violation”⁹² Additionally, the law authorizes civil suits brought by states’ Attorneys General in federal court.⁹³ What does this mean for victims of online sex trafficking? Websites can now be held accountable when they knowingly facilitate sex trafficking on their platforms⁹⁴ and victims can sue the ISPs for damages.⁹⁵ Applauded by victims’ advocates for finally giving survivors of online sex trafficking their day in court, the new law has been deemed a “definitive turning point for the internet and holds platforms accountable in an unprecedented way.”⁹⁶

included Engine, a non-profit based on government innovation, and Chris Cox, an internet group lobbyist. Corrigan, *supra* note 87; *see* Tiku, *supra* note 84.

88. Press Release, Ann Wagner et al., Trafficking Bill Headed to House Floor (Feb. 21, 2018), <https://wagner.house.gov/media-center/press-releases/wagner-trafficking-bill-headed-to-house-floor>.

89. *Id.*

90. Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. No. 115-164, 132 Stat. 1253 (2018); Anna Schechter & Dennis Romero, *FOSTA Sex Trafficking Law Becomes Center Of Debate About Tech Responsibility*, NBC NEWS (Jul. 19, 2018), <https://www.nbcnews.com/tech/tech-news/sex-trafficking-bill-becomes-center-debate-about-tech-responsibility-n892876>.

91. Allow States and Victims to Fight Online Sex Trafficking Act § 2.

92. *Id.* § 5.

93. *Id.* § 6.

94. Schechter & Romero, *supra* note 91.

95. Cecelia Kang & Cheryl Gay Stolberg, *Sex Trafficking Bill Heads to Trump, Over Silicon Valley Concerns*, N.Y. TIMES (Mar. 21, 2018), <https://www.nytimes.com/2018/03/21/business/sex-trafficking-bill-senate.html>.

96. Schechter & Romero, *supra* note 91. The law has already received pushback from sex workers’ advocates, who argue that without websites such as Backpage, sex workers are pushed onto the streets where they are at greater risk of encountering violence. Emily Witt, *After The Closure of Backpage, Increasingly Vulnerable Sex Workers Are Demanding their Rights*, NEW YORKER (June 8, 2018), <https://www.newyorker.com/news/dispatch/after-the-closure-of-backpage-increasingly-vulnerable-sex-workers-are-demanding-their-rights>.

III. CONSIDERING A NEW NAFTA RAISES THE STAKES

A. Purpose and Impact of NAFTA

The significance of this recent legislative debate is imperative given the Trump Administration's NAFTA agenda. The original NAFTA took effect on January 1, 1994 after roughly four years of difficult negotiations and a battle over ratification in the House of Representatives.⁹⁷ The purpose of NAFTA was to stimulate economic growth and facilitate free trade between the U.S., Canada, and Mexico.⁹⁸ It would accomplish this goal by establishing rules for international trade and investments that would ease the transfer of goods and services between the three countries.⁹⁹ The agreement was significant in that it removed trade barriers between the three countries by eliminating tariffs on trade, increased investment opportunities, and "create[d] an integrated market for goods and services composed of the United States, Canada, and Mexico, without creating any new trade barriers with third countries."¹⁰⁰ A major objective of the agreement was to liberalize "trade in agriculture, textiles, and automobile manufacturing."¹⁰¹

Many of NAFTA's provisions have been celebrated for their economic benefits, as illustrated by evidence that trade in North America has tripled and the value of American agricultural exports has increased by 65 percent since the agreement's implementation.¹⁰² Critics of the deal argue that it caused the loss of up to 600,000 U.S. manufacturing jobs to Mexico where labor is cheaper and the production costs are lower.¹⁰³

97. EXECUTIVE LEGAL SUMMARY 280, THE NORTH AMERICAN FREE TRADE AGREEMENT (NAFTA) (2018).

98. *Id.*

99. Andrea Ford, *A Brief History of NAFTA*, TIME (Dec. 30, 2008), <http://content.time.com/time/nation/article/0,8599,1868997,00.html>.

100. Ann K. Wooster & Jason Binimow, Annotation, *Validity, Construction, and Application of North American Free Trade Agreement and Implementing Statutes and Regulations—Cases and Materials from Canada, Mexico, and the United States*, 6 A.L.R. FED. 2D 1, 2 (2018).

101. James McBride & Mohammed Aly Sergie, *NAFTA's Economic Impact*, COUNCIL ON FOREIGN RELS. (Oct. 4, 2017), <https://www.cfr.org/background/naftas-economic-impact>.

102. Ford, *supra* note 99.

Economists largely agree that NAFTA has provided benefits to the North American economies. Regional trade increased sharply . . . over the treaty's first two decades, from roughly \$290 billion in 1993 to more than \$1.1 trillion in 2016. Cross-border investment has also surged, with U.S. foreign direct investment (FDI) stock in Mexico increasing in that period from \$15 billion to more than \$100 billion.

McBride & Sergie, *supra* note 101.

103. *Id.*

B. A Call to Change

Although NAFTA's impact on the United States is still widely debated, many agree that the original agreement needs to be amended because it is outdated.¹⁰⁴ In May 2017, President Trump informed Congress that talks with Canada and Mexico would officially be reopened, fulfilling his campaign promise to renegotiate NAFTA.¹⁰⁵ The Trump administration's goals include "reducing the U.S.-Mexico trade deficit, tightening rules-of-origin requirements, reforming the investor-state dispute resolution mechanism, and updating the pact to include digital services and intellectual property."¹⁰⁶

A main reason proponents of reform seek to update and improve NAFTA is that the economy was much simpler in 1993.¹⁰⁷ At the time NAFTA was originally negotiated, the digital economy was virtually non-existent.¹⁰⁸ This is an important aspect of the global economy today and should therefore be incorporated into NAFTA to maintain North America's competitive edge in the global market.¹⁰⁹ As stated by Senator Rob Portman (a former United States Trade Representative and author of SESTA), NAFTA must be updated with regard to e-commerce because "it's important that we export our ideas as well as our goods and services."¹¹⁰ Although arguing that free markets and transparency should be an important aspect of an updated NAFTA, Senator Portman also warned that the country needs to be careful not to inadvertently export its "bad ideas."¹¹¹ By this he meant CDA's § 230 because it provides immunity to internet providers that facilitate online human sex trafficking.¹¹²

In a letter written to U.S. Trade Representative Robert Lighthizer, Consumer Watchdog warned that the tech industry is trying to press the Trump Administration to include § 230 language in the new NAFTA.¹¹³ The letter acknowledged that although the CDA had good intentions of promoting freedom of speech on the internet, "[i]nternet freedom must not come at the expense of children who are sex-trafficked."¹¹⁴ In response to requests for comments on

104. *See id.* The agreement was a target of debate in both the 2008 and 2016 Presidential elections, in which candidates criticized the deal for driving jobs out of the U.S. and into Mexico. *Id.*

105. *Id.*

106. *Id.*

107. George P. Shultz & Pedro Aspe, *NAFTA Needs an Update, Not Repeal*, N.Y. TIMES (Oct. 15, 2017), <https://www.nytimes.com/2017/10/15/opinion/nafta-united-states-mexico.html>.

108. *Id.*

109. *Id.*

110. Press Release, Rob Portman, Portman Discusses Jobs, Trade & the Future of NAFTA at Center for Strategic & International Studies (Sept. 12, 2017), <https://www.portman.senate.gov/public/index.cfm/2017/9/portman-discusses-jobs-trade-the-future-of-nafta-at-center-for-strategic-international-studies>.

111. *Id.*

112. *Id.*

113. *Consumer Watchdog Warns Big Tech*, *supra* note 21.

114. *Id.*

modernizing NAFTA by the Office of the U.S. Trade Representative (USTR) in June 2017, four major tech associations submitted letters calling for the inclusion of § 230 language in the new agreement.¹¹⁵ Each organization claimed § 230 language should be included to protect free speech and internet freedom.¹¹⁶ For example, the Internet Association, representing 40 technology firms (including Amazon, Google, Facebook, and Netflix), claimed that because Mexico and Canada lack the same guidelines as § 230, U.S. service exporters are more at risk and unable to operate as open platforms of trade and communication.¹¹⁷ The letter further stated that § 230 is fundamental for internet growth because it “enable[s] the development of digital platforms and the free flow of information that powers the U.S. economy.”¹¹⁸ Other tech companies reiterated similar sentiments, emphasizing the important role § 230 immunity has played in developing digital trade and powering U.S. economic growth.¹¹⁹ They believe that this protection against liability is absolutely necessary for growing the digital economy and protecting American jobs that rely on the internet industry.¹²⁰

IV. DANGEROUS LANGUAGE DOES NOT BELONG IN A TRADE AGREEMENT

That a child cannot hold liable the websites that facilitated and profited from their online sexual exploitation illustrates why CDA § 230 immunity should not be extended to Canada and Mexico. As described by law professor Danielle Citron, “[s]omething is out of whack—and requires rethinking—when such activities are categorically immunized from liability merely because they happen online.”¹²¹ More importantly, the way courts have decided these cases illustrates their failure to reconcile the different Congressional intentions of the CDA with

115. *Id.*

116. *Id.*

117. *Comment from Ari Giovenco, Internet Association*, REGULATIONS.GOV 1, 4 (Jun. 17, 2017), <https://www.regulations.gov/document?D=USTR-2017-0006-1324> [hereinafter *Comment from Ari Giovenco*].

118. *Id.* at 3.

119. *See Comment from Matthew Schruers, Computer & Communications Industry Association*, REGULATIONS.GOV 5 (June 12, 2017), <https://www.regulations.gov/document?D=USTR-2017-0006-1121> (“Unpredictable liability rules for online intermediaries represent a considerable barrier to international internet commerce, and . . . protecti[ng] . . . [i]nternet services from liability for third party content is critical to promoting U.S. digital trade exports. A revised NAFTA should include liability protections for online intermediaries consistent with existing U.S. law.”).

120. *Comment from Douglas K. Johnson and Sage Chandler, Computer Technology Association*, REGULATIONS.GOV 4 (Jun 12, 2017), <https://www.regulations.gov/document?D=USTR-2017-0006-1230>.

121. Citron & Wittes, *supra* note 12, at 403; *see also* Kosseff, *supra* note 34, at 7 (“A truth about Section 230: the statute’s free speech protections often prevent sympathetic victims from recovering damages from online platforms . . . [T]here is an understandable unfairness in any statutory preemption of a civil claim, particularly when the plaintiff has faced devastating harms.”).

the Trafficking Victims Reauthorization Protection Act (TVRPA) of 2000.¹²² Many courts of appeals that have heard cases dealing with § 230 agree that its language grants immunity that far exceeds reasonable public policy.¹²³ The Backpage website is the clearest example of why CDA § 230 has no place in a new NAFTA.¹²⁴ To grasp why sites like Backpage should be held accountable, it is important to understand how their business models created platforms designed to promote the illegal activity of online child sex trafficking.

A. Backpage.com: A Poster Child For All that is Wrong with § 230

Backpage is an online classified website similar to Craigslist, on which people can buy and sell everyday items and services.¹²⁵ However, what started as an online advertising business has turned into one of the “world’s largest prostitution hubs.”¹²⁶ The investigation conducted by the 2016 Senate Permanent Subcommittee on Investigations into Backpage revealed that the website is involved in 73 percent of all child trafficking reports; in 2013, 80 percent of its revenue was generated from online commercial sex advertising in

122. Souras, *supra* note 72, at 3. The purpose of the TVPA was to establish[] human trafficking as a federal crime and recognize the unique vulnerability of children to trafficking by imposing severe penalties on anyone who knowingly recruits, harbors, transports, provides, advertises or obtains a child for a commercial sex act or who benefits financially from such an act However, these laws have proven inadequate when a website participates in a venture to traffic children due to the Communications Decency Act (“CDA”), a law that predates the TVPRA.

Id.

123. Kosseff, *supra* note 34, at 7–8 (footnote omitted) (“Section 230 has ‘been transformed from an appropriate shield into a sword of harm and extreme danger which places technology buzz words and economic considerations above the safety and general welfare of our people.’”).

124. See Peter Mackay, *New NAFTA Must Not Provide Immunity For Sex Traffickers: Mackay*, STAR (Nov. 2, 2017), <http://www.thestar.com/opinion/commentary/2017/11/02/new-nafta-must-not-provide-immunity-for-sex-traffickers-mackay.html>. Former Attorney General of Canada Peter Mackay explained:

Most believe that internet freedom should be protected and encouraged, yet there must be reasonable limits placed upon it that maintain our society’s core values, most importantly protecting our children. This insidious, life-altering challenge of child exploitation, including online, requires immediate and special attention. The saga of Backpage.com provides the clearest example of why the CDA immunity protections must never be extended to Canada Backpage.com’s alleged involvement in exploitative criminal activity and the often futile efforts by victims and their lawyers to hold it accountable . . . [demonstrate why] Canada must resist any attempt to include similar protections in a renegotiated NAFTA without, at the very least, explicitly eliminating any immunity provided for websites that knowingly or recklessly facilitate sex trafficking.

Id.

125. PSI Staff Report, *supra* note 4, at 5–6.

126. Annie Kelly, *Small Ads Sex Trafficking: The Battle Against Backpage*, GUARDIAN (Jul. 2, 2017), <https://www.theguardian.com/global-development/2017/jul/02/fight-for-my-daughter-battle-against-backpage-child-sex-trafficking>.

the United States.¹²⁷ Backpage includes an “Adult Entertainment” section, the only category for which Backpage charges as much as \$17 for posting an advertisement.¹²⁸ As a market leader in online commercial sex advertising, many have claimed it facilitates prostitution and child sex trafficking.¹²⁹ However, Backpage has always touted itself as a “mere host of content” generated by other parties, allowing it to hide behind the cloak of § 230 immunity.¹³⁰ Backpage executives have also always contended that they implement effective screening measures and take down illegal ads to prevent criminal activity from occurring on their site.¹³¹

Only after a year and a half long battle of refusing to answer subpoenas and the Subcommittee’s authorization to bring a civil action to enforce the subpoena requests did Backpage produce documents.¹³² Contrary to the site’s claims that it effectively screens illegal ads, the investigation revealed that “Backpage’s public defense is a fiction.”¹³³ In reality, the documents demonstrated that Backpage in fact edits its adult ads to conceal their true nature.¹³⁴ Beginning in 2006, staff were instructed to edit the actual language of advertisements by deleting words, phrases, or pictures (to conceal the advertisements’ illegal nature) and then publish the sanitized versions.¹³⁵ However, once Backpage executives recognized this practice was bad for business, they instituted the

127. PSI Staff Report, *supra* note 4, at 6. It is also important to note that Craigslist succumbed to pressure from state attorneys general to get rid of its adult services section. Silvano, *supra* note 9, at 381. “In the month following [this] decision, Backpage.com saw its revenue increase 15.3 percent due to the migration of adult advertisements [off of Craigslist] to new channels. *Id.* at 382.

128. Complaint at 5, *Doe v. Backpage.com, LLC*, No. 17-11069-LTS, 2018 WL 1542056 (D. Mass. Mar. 29, 2018) (No. 1:17-cv-11069). The complaint also acknowledges that although Backpage took down its “Adult Entertainment” section, the ads for illegal commercial sex just moved to the Dating section. *Id.* at 5 n.1.

129. See Letter from Nat’l Ass’n of Att’ys Gen. to Samuel Fifer, Esq., Counsel, Backpage.com LLC (Aug. 31, 2011), http://www.ct.gov/ag/lib/ag/press_releases/2011/083111backpageletter.pdf. The National Associations of Attorneys General refers to Backpage as a “hub” for trafficking of minors and alleges that the website’s claimed efforts to limit such advertisements are not only false, but ineffective. *Id.*; see also 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://www.washingtonpost.com/local/public-safety/backpage-has-always-claimed-it-doesnt-control-sex-related-ads-new-documents-show-otherwise/2017/07/10/b3158ef6-553c-11e7-b38e-35fd8e0c288f_story.html?utm_term=.1d53617c1706 (“For years, Backpage executives have adamantly denied claims made by members of Congress, state attorneys general, law enforcement and sex-abuse victims that the site has facilitated prostitution and child sex trafficking.”).

130. PSI Staff Report, *supra* note 4, at 1.

131. *Id.*

132. *Id.* at 10–14. As of January 10, 2017, Backpage executives each invoked the Fifth Amendment in refusing to answer questions from the Senate Subcommittee about the website’s business model regarding advertisements on the Dating section. Complaint, *supra* note 128, at 8.

133. PSI Staff Report, *supra* note 4, at 1.

134. *Id.* at 2.

135. *Id.* at 17.

“Strip Term From Ad” function to its automatic filter.¹³⁶ This new system deleted words that previously required the ad to be taken down before it was published.¹³⁷ The Committee reported that the “filter concealed the illegal nature of countless ads and systematically deleted words indicative of criminality, including child sex trafficking and prostitution of minors.”¹³⁸ At the directive of its CEO, Backpage took this even further by instructing its users on how to post “cleaner” advertisements. If someone attempted to post an ad containing prohibited words, an error message would pop up explaining that the words were banned; once the ad was adjusted, however, it would be reposted.¹³⁹ These cleaner ads would appear on their face to be legal despite their true illegal content.¹⁴⁰

Another essential finding of the Committee was that Backpage is aware that it facilitates prostitution and child sex trafficking.¹⁴¹ Documents revealed that Backpage employees are well aware that most of the ads they had “screened” were for prostitution; many did not speak up in fear of losing their jobs.¹⁴² Although Backpage reports suspected cases of child exploitation to NCMEC, it is also aware of its inability to fully detect the extent to which children are sexually exploited on its site.¹⁴³ Emails indicate that Backpage had chosen to err against reporting incidents of child exploitation, resulting in underreporting to NCMEC.¹⁴⁴ Perhaps even worse, there is also evidence that Backpage limits the number of reports it sends to NCMEC even when it knows an advertisement contains child exploitation.¹⁴⁵ NCMEC also believes that Backpage used its collaborative relationship with the center as a PR stunt to improve its image with the public and create the illusion that it worked to prevent child sex trafficking; however, the reality is that Backpage failed to implement the measures NCMEC

136. *Id.* at 21.

137. *Id.*

138. *Id.* at 22. Emails between Backpage executives included spreadsheets of words that were automatically stripped with the new filter system. *Id.* These words included: “Lolita,” “rape,” “school girl,” “innocent,” “fresh,” and “little girl.” *Id.* at 22–23.

139. *Id.* at 3.

140. *Id.* at 2.

141. *Id.* at 36.

142. *Id.* at 37. In an email to a Backpage ad moderator who had left a note on the account of a user indicating she was a prostitute, Andrew Padilla (Backpage’s Operations and Abuse Manager) rebuked the employee, writing that “[l]eaving notes on our site that *imply that we’re aware of prostitution*, or in any position to define it, *is enough to lose your job over.*” *Id.* (emphasis in original).

143. *Id.* at 39. For example, in an experiment when NCMEC paid Backpage \$3,000 to post eight advertisements containing underage girls, Ferrer admitted that Backpage’s screening mechanism was unable to find all of the adds to take them down. *Id.*

144. *Id.* at 40.

145. *Id.* at 42. An internal email stated “if we don’t want to blow past 500 [reports] this month, we shouldn’t be doing more than 16 a day. [W]e can’t ignore the ones that seem like trouble but if we start counting now it might help us on the ones where we’re being liberal with moderator reports.” *Id.* (footnote omitted).

believed were necessary to protect vulnerable children from human traffickers.¹⁴⁶

B. This is Not Just a Backpage Problem

Some argue that Backpage has been “vilified” and that shutting it down would only displace the sex ads to other websites with similar platforms.¹⁴⁷ After facing increasing pressure from the media, attorneys general from multiple states, and non-profits, Craigslist shut down its adult services section in September 2010.¹⁴⁸ Some researchers allege that the adult services ads did not disappear but only migrated to websites such as Eros.com, CityVibe.com, and Escorts.com.¹⁴⁹ Research has shown “how easily sex ads proliferate online, even in ‘legitimate’ online venues. Keeping these ads from popping up online is like trying to keep frogs in a bucket.”¹⁵⁰ According to Senator Diane Feinstein’s Senate testimony in support of the Justice for Victims Trafficking Act of 2015, there were at least 19 websites that accepted advertisements relating to trafficking minors.¹⁵¹ This proliferation of sex ads through many classified websites demonstrates why shutting down Backpage will not end the problem of children being trafficked online for sex.

Backpage is the most frequently reported platform used,¹⁵² but its dominance in the marketplace will only be replaced by other websites if it were taken down.¹⁵³ For example, EvilEmpire.com (EvilEmpire) and BigCity.com (BigCity) are two other websites created by Backpage executives.¹⁵⁴ EvilEmpire creates web pages listed by traffickers and is organized by their phone numbers; each person controlled by the trafficker is listed and clicking on the advertisement redirects the purchaser to the original Backpage

146. Kelly, *supra* note 126.

147. Tom Jackman, *Under Attack, Backpage.com Has Its Supporters As Anti-trafficking Tool. But Many Differ.*, WASH. POST (Jul. 18, 2017), https://www.washingtonpost.com/news/true-crime/wp/2017/07/18/under-attack-backpage-com-has-its-supporters-as-anti-trafficking-tool-but-many-differ/?utm_term=.b07e67608e81.

148. Ryan Dalton, *Abolishing Child Sex Trafficking on the Internet: Imposing Criminal Culpability on Digital Facilitators*, 43 U. MEM. L. REV. 1097, 1109 (2013).

149. *Id.* “The AIM Group, a leading independent consultancy group in interactive media and classified advertising, alleged an estimated 35.9% increase on Eros.com, 17.5% at CityVibe.com, 16% on MyRedBook.com, 17.5% on Backpage.com, and an astonishing 70% increase on Escorts.com.” *Id.* at 1109–10.

150. Tracy Clark-Flory, *Sex Ads: It Isn’t Just Backpage.com*, SALON (May 24, 2012), https://www.salon.com/2012/05/24/sex_ads_it_isnt_just_backpage_com/.

151. 161 CONG. REC. S1596, S1621 (daily ed. Mar. 18, 2015) (statement of Sen. Feinstein).

152. *Survivor Insights: The Role of Technology in Domestic Minor Sex Trafficking*, THORN 7 (Jan. 2018), https://2715111qnwey246mkclvzqg0-wpengine.netdna-ssl.com/wp-content/uploads/2018/01/Thorn_Survivor_Insights_012918.pdf.

153. Souras, *supra* note 72, at 5.

154. Complaint at 18, *Doe v. Backpage.com, LLC*, No. 17-11069-LTS, 2018 WL 1542056 (D. Mass. Mar. 29, 2018) (No. 1:17-cv-11069).

advertisement.¹⁵⁵ BigCity is organized in a similar fashion, except each page is organized by the person being trafficked.¹⁵⁶ The owners “provide all of the content hosted, published, and featured on EvilEmpire and almost all of the content on BigCity.”¹⁵⁷ These websites illustrate why narrow legislation like FOSTA-SESTA, seeking to protect society’s most vulnerable, will not be extended to platforms that knowingly facilitate sex trafficking.¹⁵⁸

C. Legislative Impact: Where We are Today and Hopes for the Future

Including § 230 language in the new NAFTA could make it impossible to hold websites such as Backpage liable. According to Lori Wallach, director of global trade watch at the consumer advocacy organization Public Citizen, if third party liability protections find their way into a trade agreement, then legislation aimed at companies like Backpage will be undermined by the international agreement.¹⁵⁹ SESTA and FOSTA would violate the trade agreement, which would prevent Congress from changing the existing laws.¹⁶⁰ Congressional representatives also sent a letter to U.S. Trade Representative Robert Lighthizer raising concerns over the possibility of including the current version of § 230 in a new NAFTA.¹⁶¹ They explained how doing so “would undermine our legislative work to combat sex trafficking in the United States and undermine our ability to hold accountable marketplaces that facilitate this crime for financial gain.”¹⁶² The letter characterized the inclusion of § 230 language in an international trade agreement as “circumvent[ing] our nation’s elected representatives.”¹⁶³ As discussed in Part II above, if the U.S. wants to take more affirmative steps in preventing children from being trafficked online, the new FOSTA-SESTA bill is an absolute necessity and should not be preempted by NAFTA.

Given the implication of including § 230 language in a new NAFTA, it is important to understand how FOSTA-SESTA can strengthen the fight to combat human sex trafficking online. The new bill ensures that websites that promote or facilitate sex trafficking online will not receive blanket immunity.¹⁶⁴

155. *Id.* at 19.

156. *Id.*

157. *Id.* at 18.

158. Souras, *supra* note 72, at 5.

159. Chuck Raasch, *War Over Backpage Moves To A New Battlefield*, ST LOUIS POST-DISPATCH (Aug. 24, 2017), http://www.stltoday.com/news/local/govt-and-politics/war-over-backpage-moves-to-a-new-battlefield/article_c8465cba-84c9-57a2-bb8b-b1044532cc41.html.

160. *Id.*

161. Press Release, Ann Wagner et al., Wagner, Colleagues Call on USTR To Protect Sex Trafficking Victims in NAFTA Negotiations (Oct. 12, 2017), <https://wagner.house.gov/media-center/press-releases/wagner-colleagues-call-on-ustr-to-protect-sex-trafficking-victims-in>.

162. *Id.*

163. *Id.*

164. Schecter & Romero, *supra* note 90.

The findings of the Senate investigation discussed earlier provide clear evidence that “Backpage is acutely aware that its website facilitates prostitution and child sex trafficking” through its screening process, user instructions, and employee culture.¹⁶⁵ For example, in utilizing the “‘Strip Term From Ad’ filter,” instructing moderators to remove explicit references to illegal activity, and directly communicating with customers by phone and email about how to create advertisements that conform to the website’s model, Backpage transformed “advertisement[s] that originally proposed to sell a child for sex . . . into an advertisement that purported to merely advertise an adult seeking legal companionship.”¹⁶⁶ Additionally, Backpage helped human traffickers evade law enforcement by: creating an interactive platform that taught its advertisers to use substitute language;¹⁶⁷ making it impossible to track photographs;¹⁶⁸ and allowing users to spell out the digits of their phone numbers.¹⁶⁹ Backpage’s actions would violate the human trafficking laws as redefined by FOSTA-SESTA and no longer be protected by § 230.

In fact, as of April 6, 2018, Backpage had been seized and shut down by the FBI, while its founder was charged with 93 counts in a sealed indictment.¹⁷⁰ Just three months after FOSTA-SESTA was passed, online ads selling women and children were reduced by 60 to 80 percent; many sites have also already shut down.¹⁷¹ Most importantly, NCMEC said the new bill makes it “much harder to purchase a child online.”¹⁷²

165. PSI Staff Report, *supra* note 4, at 36 (“Employee C, a former moderator, told Subcommittee staff that all employees involved in adult moderation knew that the ads they reviewed offered sex for money.”). Also,

[t]he evidence revealed by the Senate Report confirms that Backpage is a criminal enterprise whose entire business model fosters and depends upon the advertising and sale of human beings for illegal commercial sex. The structure of the website and the efforts of its employees are devoted to attracting advertisements for illegal commercial sex and participating in various ways with the advertisers to facilitate the successful completion of the illegal transactions, including those involving paid sex with children.

Complaint at 8, *Doe v. Backpage.com, LLC*, No. 17-11069-LTS, 2018 WL 1542056 (D. Mass. Mar. 29, 2018) (No. 1:17-cv-11069).

166. *Id.* at 11–15.

167. *Id.* at 16.

168. *Id.* at 17 (stating Backpage erased the identifying metadata information embedded within each photo posted, impeding law enforcement efforts to identify trafficked children).

169. *Id.* (“This format makes it nearly impossible for law enforcement to scan posts for numbers, identify trackers, and conduct sting operations to rescue children.”).

170. Tom Porter, *Backpage Website Shutdown, Founder Charged with 93 Counts by FBI in Sealed Indictment*, NEWSWEEK (Apr. 7, 2018), <https://www.newsweek.com/sex-ads-website-backpagecom-co-founder-charged-after-fbi-raid-876333>.

171. Press Release, Rob Portman, Portman on the Senate Floor: SESTA Already Making A Significant Difference in Combating Online Sex Trafficking (Jul. 19, 2018), <https://www.portman.senate.gov/public/index.cfm/press-releases?ID=AFAA3262-5398-447A-B9C7-6E89085B574A>.

172. *Id.*

D. The Internet is a Grownup that No Longer Needs § 230's Parental Controls

An important aspect of why the blanket immunity provided by § 230 is unnecessary, and therefore should not be included in a new NAFTA, is that the internet no longer needs the same protections today. Twenty years ago, the commercial internet was just beginning and had 12 million users.¹⁷³ At the time the CDA was passed, the drafters could not have anticipated the way in which the internet is used by millions of people every day today.¹⁷⁴ The “technological capabilities that are available today are light years away from those that existed in 1996, . . .” when internet start ups’ monitoring capabilities were severely limited.¹⁷⁵ Today, websites have access to low cost computing power and advanced filtering systems.¹⁷⁶ The internet business has succeeded on its ability to analyze and directly target its platforms and applications, not host content which it has no control over.¹⁷⁷ As stated by Ninth Circuit Judge Alex Kozinski, “the Internet has outgrown its swaddling clothes and no longer needs to be so gently coddled.”¹⁷⁸

Some argue that the internet, now a mature industry, does not need the same protections that were once essential in its early life. This is reflected in the history of industry regulation in the U.S.¹⁷⁹ Advances in technology create new businesses and industries, which can also create new types of harm warranting compensation.¹⁸⁰ The law then assigns liability to bring relief to those injured, but in doing so does not recognize the benefit.¹⁸¹ Additionally, once the law begins to recognize the benefits of new technology, it then sees the previous liability imposed as a hindrance to progress and implements a broad sweeping protection against liability (reflected in the CDA’s enactment).¹⁸² When the technology becomes more established, the law is then able to recognize and distinguish between shields of liability necessary for progress and those that

173. Citron & Wittes, *supra* note 12, at 411.

174. *Id.*

175. Gleuck, *supra* note 74.

176. *Id.*

177. *Id.*

Any start-up has access to low cost and virtually unlimited computing power and to advanced analytics, artificial intelligence and filtering software The business success of Internet and mobile computing platforms depends on their ability to precisely analyze, arrange and segment applications, data and content, to accurately target them at their most relevant audiences—along with advertising, of course—not to blindly run platforms with no control of the content.

Id.; see also Winnie Hung, *Limiting Initial Interest Confusion Claims in Keyword Advertising*, 27 BERKELEY TECH. L.J. 647, 647–48 (2012) (explaining that targeted ads such as keyword advertising has been beneficial to businesses even in a stagnant economy).

178. *Fair Hous. Council v. Roomates.com, LLC*, 521 F.3d 1157, 1175 n.39 (9th Cir. 2008).

179. Citron & Wittes, *supra* note 12, at 422.

180. *Id.*

181. *Id.*

182. *Id.*

should be limited for causing harm.¹⁸³ This is what happened with the automobile industry, which initially had blanket protection from tort liability claims and even for defects for which the manufacturers were responsible for.¹⁸⁴ “As the industry matured, the liability protection weakened, and cars became ‘dramatically safer.’”¹⁸⁵

With regard to online content providers, the law is currently in the midst of transitioning from providing absolute immunity to recognizing the need for certain limits.¹⁸⁶ Extending the blanket immunity to all of North America through NAFTA would revert the internet industry back two steps in the regulatory pattern discussed above. It is time to regulate the internet, which should be subject to the same legalities as every other industry, in a way that prevents the harm it has created, specifically with regard to human trafficking.¹⁸⁷ This is especially true when such regulations can be implemented through modest changes to the CDA while still protecting free speech on the internet.¹⁸⁸

E. Recent Concessions

Recently, some robust supporters of the CDA and § 230 have expressed support of SESTA.¹⁸⁹ For example, the Internet Association released a statement in early November 2017 declaring its support for the bill.¹⁹⁰ This came after some changes were made to the original SESTA clarifying that it was only aimed at websites that knowingly facilitate sex trafficking.¹⁹¹ This is the same

183. *Id.* (“As the new technology becomes more familiar, law refines the distinction between acceptable and unacceptable harms, at times setting liability rules to drive the development of less destructive means of carrying out the necessary functions.”).

184. *Id.*

185. *Id.*

186. *Id.*

187. Professor Citron proposes amending § 230 so that sites which are used for or encourage abuse online are no longer protected from liability. *Id.* at 419. Citron argues that her proposal “opposes holding ISPs liable merely because of their deep pockets and inevitable proximity to harm.” *Id.* at 423. On the other hand, it equally “opposes ‘blanket grants of immunity’ that leave innocent victims of cyber mobs, sex traffickers, terrorist violence, and other forms of abuse without effective recourse even where they can show that intermediaries encouraged the *bad* actors who injured them.” *Id.*

188. Professor Citron argues that her “proposal seeks to establish a reasonable standard of care that *will* reduce opportunities for abuses without interfering with the further development of a vibrant *internet* or unintentionally turning innocent platforms into involuntary insurers for those injured through their sites.” *Id.* (emphasis added).

189. *E.g.*, Ted Johnson, *Internet Firms Throw Support Behind Sex Trafficking Legislation*, VARIETY (Nov. 3, 2017), <http://variety.com/2017/politics/news/internet-association-backs-sex-trafficking-bill-1202606894/>.

190. *Id.*

191. *Id.*

Michael Beckerman, president of the Internet Association, which counts Google, Twitter and Microsoft among its members, said in a statement that “Important changes made to SESTA will grant victims the ability to secure the justice they deserve, allow internet

trade group that sent a letter to the USTR supporting § 230 language in a new NAFTA and testified against SESTA at the Senate hearing.¹⁹² Susan Molinari, a former Congresswoman and current Vice President of Public Policy at Google, stated in a blog post about SESTA that Google “and many others—stand ready to work with Congress on changes to the bill.”¹⁹³ Although not supporting the Senate bill, her statements suggest that amending the CDA is something Google and other tech companies are willing to do.

After the Internet Association came out in support of the original SESTA, Google also assured Senate offices that it would stop its lobbying efforts to prevent passage of the bill as well.¹⁹⁴ Sheryl Sandberg, the COO of Facebook, posted a blog stating that Facebook is committed to fighting online sex trafficking, is thankful for the efforts in Congress, and supports SESTA.¹⁹⁵ If these large tech giants and representatives are willing to concede that § 230 can be amended to combat human trafficking, then why would we want to include the original language in a new NAFTA? It would be absurd to export this deeply flawed legislation to the rest of North America when it has recently been amended and tech companies have gone so far as to support such changes. In fact, a letter from several members of Congress encouraged the United States Trade Representative to protect sex trafficking victims, and stated, “The United States is a leader in the fight against modern-day slavery, and it would be devastating to set such a harmful example by including Section 230 in NAFTA in its [original] form.”¹⁹⁶

V. CONCLUSION

The explosive growth of the internet in recent years has led to an increase in online human trafficking, described as “a polite term for being repeatedly raped,”¹⁹⁷ which is a growing problem in the U.S. that must be addressed. The reality that people can go online and buy a woman or child for sex the same way they would buy any product on the internet is a stain on our national character. These victims deserve justice for the horrific crimes committed against them,

platforms to continue their work combating human trafficking, and protect good actors in the ecosystem.”

Jackman, *supra* note 75.

192. *Comment from Ari Giovenco, supra* note 117, at 3; Slater, *supra* note 78.

193. Susan Molinari, *Google's Fight Against Human Trafficking*, KEYWORD (Sept. 7, 2017), <https://www.blog.google/topics/public-policy/googles-fight-against-human-trafficking/>.

194. Tiku, *supra* note 84.

195. Sheryl Sandberg, FACEBOOK (Nov. 7, 2017), <https://www.facebook.com/sheryl/posts/10159461384670177> (“As this moves through the Senate and the House, we’re here to support it—and to make sure that the internet becomes a safer place for all vulnerable girls, children, women, and men who deserve to be protected.”). It is also important to note that these concessions may also be due in large part to the criticism the tech industry faced over enabling Russian interference in the 2016 Presidential election. Tiku, *supra* note 84.

196. Wagner, *supra* note 161.

197. I AM JANE DOE, *supra* note 15.

including the websites that advertised them for prostitution. The unfortunate reality is that they have been consistently denied their day in court because of CDA's § 230.

The broad immunity granted to ISPs by § 230 has allowed websites that knowingly enable criminal activity to escape civil liability. Thankfully, Congress has finally taken away that protection from sites that provide these purchasers access to children for sexual exploitation. With the passage of FOSTA-SESTA, victims will finally be able to hold these websites accountable. Despite these positive efforts taking place on Capitol Hill, tech associations are also currently lobbying the Trump Administration to include § 230 in a new NAFTA.¹⁹⁸ Given § 230's negative impact on our justice system, the recent amendments to § 230, and since the internet's original need for its protection no longer exists, there is no logical reason to expand such protections to Mexico and Canada. Legislation that was "intended to protect children from indecent material on the internet, [which] is now used as a shield by those who profit from prostitution and crimes against children[.]" should not be extended through a new NAFTA to all of North America.¹⁹⁹

198. Letter from Eric Goldman, Professor, Santa Clara Univ. Sch. of L., to Ambassador Lighthizer, Sec'y Guajardo, & Minister Freeland (Jan. 21, 2018), <http://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=2651&context=historical>. This letter is from internet law scholars and advocates urging NAFTA to include § 230 protections, arguing it will advance commerce and trade. *Id.*

199. Letter from Nat'l Ass'n of Att'ys Gen., *supra* note 61 (footnote omitted). It is also important to note that at the time this Comment was ready for publication, a new NAFTA known as the United States-Mexico-Canada Agreement (USMCA) was passed in November 2018. Although the USMCA includes the original § 230 language that grants broad immunity to internet providers, it also allows for the member countries to enact "measures necessary to protect public morals . . . [including] measures necessary to protect against online sex trafficking, sexual exploitation of children, and prostitution, such as [FOSTA-SESTA]." Agreement Between the United State of America, the United Mexican States, and Canada Text, art. 19-A-1, Nov. 30, 2018, USTR.gov.