



March 12, 2018

The Honorable Mitch McConnell  
Majority Leader  
United States Senate  
Washington, DC 20510

The Honorable Chuck Schumer  
Minority Leader  
United States Senate  
Washington, DC 20510

**RE: Oppose H. R. 1865 – The “Allow States and Victims to Fight Online Sex Trafficking Act”**

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Dear Senators:

The American Civil Liberties Union (ACLU) writes to express its opposition to H. R. 1865, the “Allow States and Victims to Fight Online Sex Trafficking Act,” also referred to as FOSTA, which passed the House on February 27 and may be considered by the full Senate in the coming days or weeks. The bill is a serious, yet unsuccessful, attempt to stop the use of the Internet for sex trafficking without hindering online freedom of expression and artistic innovation. Tech experts say that a thriving Internet requires retaining certain liability protections for online platform providers. Victims’ rights advocates, on the other hand, say the sex trafficking problem requires narrowing those protections. The bill misses the achievable legislative opportunity to do both, and in particular leaves the Internet exposed to the uncertain impact of changed protocols on the part of platform providers.

For nearly 100 years, the ACLU has been our nation’s guardian of liberty, working in courts, legislatures, and communities to defend and preserve the individual rights and liberties that the Constitution and the laws of the United States. With more than 2 million members, activists, and supporters, the ACLU is a nationwide organization that fights tirelessly in all 50 states, Puerto Rico, and Washington, D.C. for the principle that every individual’s rights must be protected equally under the law, regardless of race, religion, gender, sexual orientation, disability, or national origin.

The risks to the Internet as the world’s most significant marketplace of ideas outweigh the uncertain benefit of the bill to the fight against sex trafficking. Accordingly, ACLU opposes the bill. While the language of H. R. 1865 has been improved to address some of the ambiguities creating the most significant risks, ACLU remains concerned that the bill, if enacted, will foster an atmosphere of uncertainty among online platform providers. This uncertainty

will inhibit the continued growth of the Internet as a place of creativity and innovation.

The ACLU has long supported maintaining the statutory immunity provisions of section 230 of the Communications Act of 1934 in order to promote freedom of speech and expression. Section 230 became one of the key factors enabling the robust expansion of Internet-based speech, communications, and commerce. It is a critical factor in maintaining the Internet's diverse ecosystem of speech and art and advancing economic and political dialogue. The rationale for liability protections for online providers is that they should not suffer criminal or civil liability merely for creating online fora to which others may post content, even when some of those communications turn out to be offensive or even unlawful. Any liability should be on those who create and post that content.

We opposed FOSTA's predecessor bill, an onerous bill that would have drastically curtailed protections for online publishers. FOSTA was revised in the House through the efforts of a broad cross-section of victim advocates, law enforcement, and tech experts. The current version creates a new federal facilitation of prostitution crime, but would still impact liability protections for online providers. As finally approved, it also incorporated key aspects of the Senate version of the bill.<sup>1</sup>

ACLU opposed the Senate version of the bill, the "Stop Enabling Sex Traffickers Act" (S. 1693, SESTA), but also acknowledged improvements incorporated prior to final committee approval. In particular, the modified version of SESTA heightened the intent standard needed to establish a criminal violation – a key distinction separating a typical online platform provider from one that might inject itself into the online content being posted to its platform. Also, in authorizing state prosecutions notwithstanding the federal liability protections for online platforms, the bill would limit state prosecutions to those where the behavior violated the federal law.

The changes to both the House FOSTA bill and the Senate SESTA bill were the result of concerted advocacy efforts by Internet and other tech experts who testified about the critical importance played by section 230 protections. In the days before the section 230 protections were adopted over two decades ago, online providers were subject to lawsuits for allowing the posting of content. The threats were so financially significant that providers would simply bar the posting of third party content, knowing they could never fully insulate themselves from liability except by blocking all content that might be offensive to some. Since the adoption of section 230, online providers have been free to curate their sites' content without fearing liability for what others post.

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<sup>1</sup> See Amendment No. 2 offered by Rep. Mimi Walters at H1302 (*available at <https://www.congress.gov/crec/2018/02/27/CREC-2018-02-27-pt1-PgH1290-2.pdf>*).

Even with the improvements in both bills, ACLU continued to oppose both measures because the risks to the vibrancy of the Internet as a driver of political, artistic, and commercial communication is real and significant. Moreover, there is little to suggest that current law could not be used to find and punish the bad actors who are truly facilitating online sex traffickers. In fact there is at least one pending federal court case that makes this very argument.<sup>2</sup> There are a host of state laws outlawing such behaviors and current liability protections are intended to protect only those who are simply providing a channel for others to use, not those who are determining what is posted and who have a malicious intent to do harm to others. Finally, ACLU is concerned that the scope of the bill's language will encompass the actions of sex workers who have no connection to trafficking whatsoever within its enforcement, including effective harm reduction and anti-violence tactics.<sup>3</sup> Such an outcome is directly contrary to the aims of bipartisan criminal justice reformers who seek to limit the over-federalization of crime where such crimes already exist at the state level.

For the foregoing reasons, the ACLU opposes H.R. 1865 as approved by the House of Representatives. It poses a risk to freedom of speech on the Internet as we have come to know it while purporting to solve a problem that could be addressed in other ways.

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If you have questions or comments about ACLU's position on this legislation, please contact First Amendment advisor Michael Macleod-Ball at [macleod@627consulting.com](mailto:macleod@627consulting.com), phone: 202.253.7589.

Sincerely,



Faiz Shakir  
National Political Director

cc: Members of the U. S. Senate

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<sup>2</sup> Doe No. 1, et al. v Backpage, LLC et al., No. 1:2017cv11069 (D.Mass. filed June 12, 2017).

<sup>3</sup> See, e.g., House Overwhelmingly Passes a Bill that Conflates Sex Work and Sex Trafficking, (THINK PROGRESS, Feb. 27, 2018) (available at <https://thinkprogress.org/house-bill-endangers-sex-workers-advocates-say-7a47ce9b2b4f/>).