



ELECTRONIC FRONTIER FOUNDATION

Protecting Rights and Promoting Freedom on the Electronic Frontier

March 12, 2018

The Honorable Mitch McConnell
Majority Leader, U.S. Senate
317 Russell Senate Office Building
Washington, DC 20515

The Honorable Charlies E. Schumer
Democratic Leader, U.S. Senate
322 Hart Senate Office Building
Washington, DC 20515

Dear Leaders McConnell and Schumer,

The Electronic Frontier Foundation (EFF) is a member-supported, nonprofit civil liberties organization that works to protect free speech and privacy rights in the digital world. EFF was founded in 1990, is headquartered in San Francisco, and has over 43,000 members.

We write to you to express our opposition to the Allow States and Victims to Fight Online Sex Trafficking Act (FOSTA, [H.R. 1865](#)) as well as the Stop Enabling Sex Traffickers Act (SESTA, S. 1693). We are concerned that the U.S. Senate appears to be rushing to pass a seriously flawed bill without considering the impact it will have on Internet users and free speech.

The titles of both SESTA and FOSTA might sound noble, but instead of focusing on prosecuting bad actors, these bills would force online platforms to police their users' speech, almost certainly silencing legitimate voices in the process.

Websites and apps we all use every day – from WhatsApp and Instagram to Yelp and Wikipedia, even blogs and news websites with comment sections – rely on Section 230 (47 U.S.C § 230). Under Section 230, users are generally liable for the content they post, not the platforms. This bill would change that by expanding a platform's liability beyond its own actions – if this bill passes, online platforms would be responsible for their users' speech and behavior in addition to their own.

Current law, including Section 230, does not prevent federal prosecutors from going after online platforms that knowingly advertise sex trafficking. Additionally, courts have allowed civil claims against online platforms when a platform was shown to have a direct hand in creating the illegal content. New authorities are simply not needed to bring bad platforms or the pimps and "johns" who directly harmed victims to justice.

Section 230 can be credited with creating today's Internet. Congress made the deliberate choice to protect online free speech and innovation, while providing discrete tools to go after culpable platforms. Section 230 provided the legal buffer entrepreneurs needed to experiment with new ways to connect people online and is just as critical for today's startups as it was for today's popular platforms when they launched.

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FOSTA would destroy the careful policy balance struck in Section 230. By opening platforms to increased criminal and civil liability at both the federal and state levels for user-generated content, the bill would incentivize those platforms to over-censor their users. Since it would be difficult if not impossible for platforms, both large and small, to review every post individually for sex trafficking content (or to definitively know whether a piece of online content reflects a sex trafficking situation in the offline world), platforms would have little choice but to adopt overly restrictive content moderation practices—silencing legitimate voices in the process. Trafficking victims themselves would likely be the first to be censored under FOSTA.

In addition to opening platforms to increased liability under civil law and state criminal law, FOSTA would also create new federal crimes designed to target online platforms. The expanded federal sex trafficking crimes would not require a platform owner to have knowledge that people are using the platform for sex trafficking—but only have “reckless disregard” of this fact. The Department of Justice already has a powerful legal tool to prosecute culpable online platforms: the SAVE Act of 2015 made it a crime under 18 U.S.C. § 1591 to advertise sexual services with knowledge that trafficking is taking place.

Finally, we share the Department of Justice’s [concerns](#) about the new exceptions to Section 230 immunity that apply retroactively: allowing a platform to be prosecuted or sued for failing to comply with the law before it was even passed raises significant constitutional concerns.

In short, this bill threatens the open Internet. It would incentivize platforms to act as gatekeepers or over-censor what their users post, including victims of sex trafficking. Internet speech is more important, not less, than it was when Section 230 was originally enacted. We urge the Senate not to pass this bill.

If you have questions or comments about EFF’s position on this legislation, please contact India McKinney at india@eff.org.

Sincerely,

The Electronic Frontier Foundation