

ANY SAFE HARBOR IN A STORM: SESTA-FOSTA AND THE FUTURE OF § 230 OF THE COMMUNICATIONS DECENCY ACT

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ABSTRACT

Section 230 of the Communications Decency Act not only allows the internet to flourish by shielding web platforms from liability for user-created content but also lets these companies off the hook for facilitating crime. SESTA-FOSTA, designed by legislators to target internet sex traffickers, attempts to chip away at this liability shield in order to maintain some form of accountability. This Note discusses this law, its motivations, and its implications for freedom of speech on the internet.

I. INTRODUCTION

In 2018, President Trump signed into law a pair of bills that promised to dramatically change parts of the internet. The bills, the Stop Enabling Sex Traffickers Act and the Fight Online Sex Trafficking Act (“SESTA-FOSTA”), were designed to cut down on illegal sex trafficking online.¹ The resultant law was hailed by some and criticized by others for the ways it would impact sex trafficking and the online marketplace for sex workers.

One feature of the new law modified a longstanding rule that helps safeguard free expression on the modern internet. This rule is known as the safe harbor provision of the 1996 Communications Decency Act (“CDA”).² Congress passed the CDA to deal with the problems arising from tortious and obscene speech on the internet.³ Although many parts of it were modified or struck down by courts, one of the most important sections, § 230, remained standing.⁴ Section 230 grants immunity from liability to internet service providers (“ISPs”) for

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¹ Aja Romano, *A New Law Intended to Curb Sex Trafficking Threatens the Future of the Internet As We Know It*, VOX (July 2, 2018), <https://www.vox.com/culture/2018/4/13/17172762/fosta-sesta-backpage-230-internet-freedom>.

² 47 U.S.C. § 230 (2012).

³ Paul Ehrlich, *Communications Decency Act § 230*, 17 BERKELEY TECH. L.J. 401, 401 (2002).

⁴ *Id.*

content originating with third parties, stating that “[n]o 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.”⁵

The safe harbor provision has helped the internet to flourish as a space for free speech by allowing ISPs to provide platforms for users to generate content without subjecting ISPs to civil liability for said content.⁶ Because of this provision, when someone posts something damaging another person’s reputation on a social media platform, the injured party has no legal recourse (such as a libel suit) against the social media platform.⁷ This is an essential safeguard for any company whose business model revolves around content-creators posting or uploading media in a public forum. Without § 230, Facebook, for example, could potentially be exposed to liability every time someone’s enemies post something nasty about them for the world to see.

SESTA-FOSTA created a significant exception to § 230, by making web platforms responsible for third parties posting advertisements for prostitution on their websites.⁸ This development opened these publishers to, among other things, criminal liability for facilitating prostitution and sex trafficking. Even before the law was enacted, its ripple effects could be observed across the internet. Platforms began to scramble to shutdown forums and even whole webpages that might be used to advertise sex work.⁹ For example, Craigslist took down its personal ads section out of fear that people would use it to coordinate prostitution,¹⁰ Google began reviewing and

⁵ 47 U.S.C. § 230(c)(1).

⁶ Romano, *supra* note 1.

⁷ See Patricia Spiccia, *The Best Things in Life Are Not Free: Why Immunity Under Section 230 of the Communications Decency Act Should Be Earned and Not Freely Given*, 48 VAL. U. L. REV. 369, 370–71 (2013) (describing a hypothetical situation in which a college student is left without remedy after discovering that anonymous social media user had posted something libelous about her on a social media platform).

⁸ Romano, *supra* note 1. For example, the law penalizes sites that “promote or facilitate prostitution,” and allows authorities to pursue websites for “knowingly assisting, facilitating, or supporting sex trafficking.” *Id.*

⁹ Samantha Cole, *Trump Just Signed SESTA/FOSTA, a Law Sex Workers Say Will Literally Kill Them*, VICE (Apr. 11, 2018), https://motherboard.vice.com/en_us/article/qvxeyq/trump-signed-fosta-sesta-into-law-sex-work.

¹⁰ FOSTA STATEMENT, <https://www.craigslist.org/about/FOSTA> (last visited Oct. 24, 2019); Samantha Cole, *Craigslist Just Nuked Its Personal Ads Section Because of a Sex Trafficking Bill*, VICE (Mar. 23, 2018),

deleting content from the Drive accounts of some of its users,¹¹ and Microsoft began policing Skype and its cloud service products to remove any content that might run afoul of the law.¹²

The bill was, in large part, meant to address problems the federal authorities had with websites like Backpage, which had been long used by sex workers for advertisements.¹³ Law enforcement had repeatedly arrested people for using the site to pay for sex and had launched targeted investigations into particular ads that frequently turned out to be for child trafficking. In January 2017, an investigation by a Senate subcommittee found that Backpage was not only aware that ads for child trafficking were posted to the site but also that the site was actively editing these ads to erase words that would indicate underage trafficking to the users.¹⁴ The subcommittee even found that Backpage commanded more than 80 percent of online sex ad revenues.¹⁵

The problem of Backpage facilitating sex trafficking had already long held the interest of prosecutors. In December 2013, 47 state attorneys general sent a letter to Congress requesting that it revise § 230 to permit prosecutions of internet platforms and their administrators for prostitution and sex trafficking.¹⁶ In 2016, the State of California brought charges against three Backpage executives for pimping based on

https://motherboard.vice.com/en_us/article/wj75ab/craigslislist-personal-ads-sesta-fosta.

¹¹ Cole, *supra* note 9.

¹² Romano, *supra* note 1.

¹³ *Id.*

¹⁴ Gloria Riviera, Jackie Jesko, Sally Hawkins & Jenna Millman, *Emotional Senate Hearing Finds Backpage.com Complicit in Underage Sex Trafficking as Victim's Families Testify*, ABC NEWS (Jan. 13, 2017), <https://abcnews.go.com/US/emotional-senate-hearing-finds-backpage-complicit-underage-sex/story?id=44762342>. It is not clear from context whether this practice was designed to keep potential sex traffickers in the dark about whether or not an ad involved a child, whether Backpage was trying to keep innocent site users ignorant of the posts, or both.

¹⁵ *Id.*

¹⁶ Matt Zimmerman, *State AGs Ask Congress to Gut Critical CDA 230 Online Speech Protections*, ELECTRONIC FRONTIER FOUND. (July 24, 2013), <https://www EFF.org/deeplinks/2013/07/state-ags-threaten-gut-cda-230-speech-protections>. The article notes that these AGs, in their letter, cite a misleading account of legislative history so as to suggest that the CDA's primary purpose was to protect children on the internet from offensive content, and glosses over the logical implication that passing a revision to the CDA could open up every platform, from Facebook to a solo blogger, to liability if they fail to enforce state and local criminal law against people who comment or post on their platform.

ads for prostitution on the site.¹⁷ In December of that year, the judge dismissed the suit, noting that § 230 of the CDA protects the website from liability.¹⁸

Around the same time as the Senate investigation, online sex trafficking was raising eyebrows outside the halls of legislatures and DA offices. In January 2017, documentary filmmaker Mary Mazzio released a film in which she interviewed three girls who had been trafficked as children on Backpage.¹⁹ The film specifically targets § 230 of the CDA as a source of the problem. One review of the movie characterizes the film as documenting “a quest for a hero: which crusading lawyer or outraged politician will pierce Backpage’s legal shield?”²⁰ Against this backdrop of an alarmed public searching for an answer to online sex trafficking, SESTA-FOSTA emerged.

II. IMPACT OF § 230 BEFORE SESTA-FOSTA

Even before its passage, SESTA-FOSTA attracted scrutiny from internet free speech advocates. Professor Eric Goldman warned shortly after the draft version of the bill was passed that it “would expose Internet entrepreneurs to additional unclear criminal risk, and that would chill socially beneficial entrepreneurship well outside the bill’s target zone.”²¹

FOSTA originated in the House with fairly narrow language designed to specifically target websites like Backpage (i.e., sites that are designed to give space to sex workers).²² The language in SESTA, the Senate version of the bill, was broader, designed to target all websites.

¹⁷ Eric Goldman, *Backpage Executives Defeat Pimping Charges Per Section 230—People v. Ferrer*, TECH. & MARKETING L. BLOG (Dec. 15, 2016), <https://blog.ericgoldman.org/archives/2016/12/backpage-executives-defeat-pimping-charges-per-section-230-people-v-ferrer.htm>.

¹⁸ *People v. Ferrer*, No. 16FE019224, 2016 WL 7237305, at *11 (Cal. Super. Ct. Dec. 9, 2016).

¹⁹ Tad Friend, “*I Am Jane Doe*” Takes on Backpage, NEW YORKER (Jan. 8, 2017), <https://www.newyorker.com/magazine/2017/01/16/i-am-jane-doe-takes-on-backpage>.

²⁰ *Id.*

²¹ Eric Goldman, *WARNING: Draft “No Immunity for Sex Traffickers Online Act” Bill Poses a Major Threat to Section 230*, TECH. & MARKETING L. BLOG (Mar. 23, 2017), <https://blog.ericgoldman.org/archives/2017/03/warning-draft-no-immunity-for-sex-traffickers-online-act-bill-poses-major-threat-to-section-230.htm>. Professor Goldman found the language in this draft bill so troubling for its implications on § 230 and free speech on the internet that he said the bill warranted the “Drudge Siren.”

²² Romano, *supra* note 1.

The final bill included provisions requiring that platforms take down posts that could be “knowingly assisting, facilitating, or supporting sex trafficking,”²³ regardless of whether any signs that children or coercion are involved.²⁴ It also prohibited using the internet to facilitate or promote sex work.²⁵ Advocates in the sex work community pointed out that this provision would prohibit common safety practices for sex workers, such as providing health information or sharing lists of dangerous clients.²⁶

Even the Department of Justice (“DOJ”), the agency whose efforts against Backpage were bedeviled by § 230 for so long, warned Congress against passing the bill in its final form.²⁷ The DOJ opined that the language in the bill was “broader than necessary” and would extend to situations where there is “minimal federal interest.”²⁸ As an example, the Assistant Attorney General said that the bill would extend liability to an “individual person using a cell phone to manage local commercial sex transactions between consenting adults.”²⁹

Even with § 230’s liability shield, state and federal law enforcement officials still managed to successfully pursue Backpage for facilitating sex trafficking. In January 2017, months before members of Congress released their various versions of the bill, Backpage shut down all of its online prostitution ads despite the immunity the site still enjoyed under § 230.³⁰ State attorneys general pursued criminal cases against Backpage and its executives and, in April 2018, the company’s chief executive pleaded guilty to money laundering in California and human trafficking in Texas.³¹ That same month, before SESTA-FOSTA went

²³ 18 U.S.C. § 1591(e)(4) (Supp. 2019).

²⁴ Elliott Harmon, *How Congress Censored the Internet*, ELECTRONIC FRONTIER FOUND. (Mar. 21, 2018), <https://www.eff.org/deeplinks/2018/03/how-congress-censored-internet>.

²⁵ *Id.*

²⁶ *Id.*

²⁷ Stephen E. Boyd, Assistant Attorney Gen., Dept. of Justice Letter to House Rep. Bob Goodlatte on Sex Trafficking Legislative Efforts (Feb. 27, 2018) (on file with Electronic Frontier Foundation), <https://www.eff.org/files/2018/03/19/doj-sesta.pdf>.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ Associated Press, *Backpage.com and its CEO Plead Guilty in California and Texas*, L.A. TIMES (Apr. 12, 2018), <https://www.latimes.com/business/la-fi-backpage-ceo-plea-20180412-story.html>. Backpage was accused of laundering money through shell companies to get around banks’ refusals to process their

into effect, the FBI, Postal Inspection Service, and IRS jointly raided Backpage's offices and seized the site.³² These successful law enforcement actions suggest that SESTA-FOSTA's elimination of the § 230 safe harbor for sex trafficking may have been unnecessary.³³

III. THE INTERNET, SEX WORK, AND THE CONSEQUENCES OF SESTA-FOSTA

The advocates of SESTA-FOSTA pointed to the reduced liability shield as an important new tool in the battle against child trafficking. Some of its most vocal opponents, however, have been sex workers and their advocates, who regard the law as counterproductive and actively harmful to their material wellbeing. Sex worker advocates say that websites like Backpage and Craigslist are important parts of the sex work economy.³⁴ One community organizer said that

I know so many people who were able to start working indoors or leave their exploitative situations because of Backpage and Craigslist They were able to screen for clients and keep themselves safe and save up money to leave the people exploiting them. And now that those sites are down, people are going back to pimps. Pimps are texting providers every day saying "the game's changed. You need me."³⁵

Critics of SESTA-FOSTA argue that the law pushes sex workers out of their own homes, where they are able to exercise more control over whom they work with, and into the streets. Consequently, these critics argue, sex workers will no longer be able to effectively screen predators.³⁶ One study found that working through a safe electronic

transactions. The judge in the California case threw out the pimping conspiracy and other state criminal charges because of § 230. *Id.*

³² Daniel Oberhaus, *The FBI Just Seized Backpage.com*, VICE (Apr. 11, 2018), https://motherboard.vice.com/en_us/article/j5avp3/fbi-seized-backpage-sex-trafficking.

³³ It should be noted, of course, that the grounds on which the prosecutions were brought were not vicarious liability created by actions of third-party users of the platform. Section 230 forecloses this particular cause of action and forces prosecutors to find another theory on which to bring the case. This limits the tools available to the prosecution in adjudicating these cases and may eliminate the simplest means by which to stop trafficking on these platforms.

³⁴ Cole, *supra* note 9.

³⁵ *Id.* (quoting Lola, a community organizer involved with the advocacy group Survivors Against SESTA).

³⁶ Romano, *supra* note 1.

clearinghouse³⁷ helped lower the female homicide rate to the same level that would be achieved through the hiring of more than 100,000 police officers.³⁸ In addition to being cheaper than hiring 100,000 police officers, allowing sex workers to transact business through an electronic clearinghouse also produced more efficient commerce between sex workers and their clients.³⁹

Of course, SESTA-FOSTA does not literally push sex workers off internet platforms. Instead, it incentivizes platforms to forbid sex workers from using the platform for their work. Intimidated by the threat of criminal liability, cautious web platforms and ISPs have eliminated forums that could be used to advertise or facilitate sex work.⁴⁰ Indeed, Craigslist shut down its personals section not because the law forced it to, but because it wanted to avoid risk of criminal liability from operating a board that could foreseeably be used for sex work.

The bill's limitation on the § 230 safe harbor does nothing to distinguish between legal sex work and the illegal trafficking that many of its proponents aim to eliminate.⁴¹ One sex worker in Nevada, in parts of which prostitution is legal, expressed concern that removal from internet clearinghouses and forums would deprive her of an important business tool.⁴²

The net impact of the internet on prosecutors' ability to pursue sex traffickers has been unclear, and the available data does not separate out prosecution efforts that involve the internet and those that do not. According to a State Department report, the number of identified victims

³⁷ "Clearinghouse" here is used in the non-financial sense, to refer to a centralized system by which providers advertise for a particular service, customers search for providers, and providers screen customers.

³⁸ Scott Cunningham, Gregory DeAngelo & John Tripp, *Craigslist Reduced Violence Against Women 26* (Feb. 2019) (unpublished manuscript) (on file with Scott Cunningham), <http://scunning.com/craigslist110.pdf>.

³⁹ *Id.*

⁴⁰ *See supra* notes 10–12 and accompanying text (discussing Craigslist, Microsoft, and Google).

⁴¹ Before SESTA's passage in the Senate, several celebrities like Amy Schumer and Seth Meyers filmed a public service announcement promoting it as a tool to fight sex trafficking. Disney and 20th Century Fox also sent letters to lawmakers supporting the bill as a way to fight sex trafficking. Romano, *supra* note 1.

⁴² Jon Brodtkin, *Trump Signs Bill to Shut Down Websites that Facilitate Prostitution*, *ARS TECHNICA* (Apr. 11, 2018), <https://arstechnica.com/tech-policy/2018/04/trump-signs-bill-to-shut-down-websites-that-facilitate-prostitution/>.

of sex trafficking increased by more than 40,000 between 2008 and 2015.⁴³ The report noted that, while the U.S. was making progress in combatting human trafficking and was meeting the minimum standards⁴⁴ for the elimination of trafficking, prosecutions for human trafficking increased from 2014 to 2015.⁴⁵ It is unclear whether this increase in prosecution actually reflects more effective efforts by prosecutors to combat these crimes, more human trafficking, or both. Furthermore, not every state and local jurisdiction chose to participate in the Uniform Crime Reporting Program (the program the federal government used to compile these numbers).⁴⁶ Ambiguities and information gaps make it difficult to draw conclusions about the impact of the internet on sex trafficking in the United States or about whether the government has improved in its effort to combat it over time.

The lack of clarity about trends in sex trafficking and its prosecution, coupled with SESTA-FOSTA's indiscriminate targeting of all sex work internet advertisements, suggests that the elimination of the § 230 safe harbor may not be completely informed by all the factual information available.

IV. ROLE OF CDA § 230 IN THE EXPANSION OF THE INTERNET

Section 230's immunity shield undergirds the structure of social media sites, internet forums, and comment sections. If platforms were at risk of being sued every time a third party posted something on their site and were intent on avoiding liability, they would have to choose between devoting significant resources to moderating, policing, and reviewing all speech on their websites, or simply shutting down their sites or making them unavailable for posting by third-party users.⁴⁷

The first option could be expensive. For many platforms, training and employing moderators and reviewers could effectively price out all but the largest companies from operating a platform on which

⁴³ TRAFFICKING IN PERSONS REPORT 2016, U.S. DEPT. OF STATE 40 (2016); *see* Romano, *supra* note 1.

⁴⁴ These minimum standards are set by the Trafficking Victims Protection Act of 2000 and lay out indicia of serious and sustained efforts to eliminate severe forms of trafficking. TRAFFICKING IN PERSONS REPORT 2016, U.S. DEPT. OF STATE 46–47 (2016).

⁴⁵ *Id.* at 388–89.

⁴⁶ *Id.* at 389.

⁴⁷ Another possible strategy would be for the platform to publish every single piece of information posted or uploaded without exercising any kind of editorial judgment. The analysis in this Part presumes that the platform wants to retain editorial control over the content posted.

third parties would be free to post.⁴⁸ Even if a company did take this route, any failure to effectively police the platform (such as human error or software mistake failing to catch a libelous comment) could expose it to millions of dollars in litigation costs. This risk exacerbates another issue in the technology industry: the problem of big oligopolies' increasing influence and market dominance.⁴⁹ Only the companies with the resources to run up massive legal and compliance costs would be able to absorb the expensive new infrastructure and flurry of lawsuits that would certainly ensue. Eliminating the safe harbor could dissuade new entrants from joining the marketplace. The alternative, equally damning possible outcome is the sale of smaller platforms to big technology industry incumbents to avoid major lawsuits that they cannot afford to fight. These phenomena may explain why the biggest technology companies ultimately supported SESTA-FOSTA in the months immediately preceding the law's passage.⁵⁰

Another option—shutting down—may be feasible for some sites whose continued relevance does not hinge on allowing third parties to post their own content. But for others, eliminating user interactions would obviate the need for the site to exist. None of the websites that made their names providing communication or commerce services (Twitter, Facebook, Craigslist, etc.) would be able to operate in their current form if they decided not to host most third-party content.⁵¹

The CDA continues to allow the internet to flourish as a place for third-party speech on internationally used platforms. For example, there have been multiple suits against platforms like Twitter and Facebook filed in an attempt to hold them liable under the Anti-Terrorism Act.⁵² One such case is *Klayman v. Zuckerberg*,⁵³ in which a plaintiff alleged intentional assault and tort liability against Facebook for

⁴⁸ Romano, *supra* note 1.

⁴⁹ Mike Godwin, *Why Internet Advocates are Against the Anti-Sex Trafficking Bill*, SLATE (Mar. 14, 2018), <https://slate.com/technology/2018/03/the-antisex-trafficking-bill-sesta-fosta-will-hurt-the-internet.html>.

⁵⁰ Russell Brandom, *Tech Companies are Cheering on a Bill That Guts Internet Protections*, VERGE (Nov. 10, 2017), <https://www.theverge.com/2017/11/10/16633054/sesta-facebook-google-sex-trafficking-section-230>.

⁵¹ See Godwin, *supra* note 49 (discussing a variety of sites whose services centered around connecting two people in a way that could be used for escort services; eventually, many of these sites simply shut down rather than try to manage the headache of their new liability).

⁵² See Steven Beale, *Online Terrorist Speech, Direct Government Regulation, and the Communications Decency Act*, 16 DUKE L. & TECH. REV. 333 (2018) (describing some of the recent cases).

⁵³ 753 F.3d 1354 (2014).

hosting a page calling for Muslims to harm Jews in an uprising against Israel.⁵⁴ The D.C. Circuit rejected an interpretation that would make Facebook responsible for the language used, instead interpreting § 230 of the CDA to shield the company from liability.⁵⁵ The outcome of this case demonstrates why § 230 is so attractive for internet platforms: users can log on to the platform and say anything they want, including inflammatory or offensive comments, without the platform incurring any kind of liability.

Freedom of speech is an essential element of the internet that brings the good with the bad. Hate groups can create websites where users who otherwise would be geographically dispersed⁵⁶ (and thus perhaps less likely to find a community supportive of their beliefs) come together to share in each other's hatred and perhaps even push members toward radicalization.⁵⁷ As previously mentioned, free speech protections also preclude prosecutors from holding web platforms accountable when their administrators take no steps to prevent the sites from being used to facilitate child trafficking.⁵⁸ However, as former Justice Anthony Kennedy noted, it is this freedom of speech that has allowed the internet to become a modern public square.⁵⁹ It is a place where one can both access vast realms of human thought and knowledge and make one's voice heard in a way that "resonat[es] farther than it could from any soapbox."⁶⁰

If any more changes are to be made to the § 230 safe harbor, policymakers should be sure they address the targeted problems without undermining the features that make the internet such a useful and essential tool for modern speech.

⁵⁴ *Id.* at 1356–57.

⁵⁵ *Id.* at 1357–60.

⁵⁶ *See, e.g.*, HATE MAP, S. POVERTY LAW CTR., <https://www.splcenter.org/hate-map> (last visited Oct. 22, 2019) (demonstrating hate group presence across the United States).

⁵⁷ *See* Rachel Hatzipanagos, *How Online Hate Turns Into Real Life Violence*, WASH. POST (Nov. 30, 2018), https://www.washingtonpost.com/nation/2018/11/30/how-online-hate-speech-is-fueling-real-life-violence/?utm_term=.f47b4dd6290f (describing the process by which white nationalists can radicalize each other online).

⁵⁸ *See supra* notes 16–20 and 31–33 and accompanying text (discussing Backpage prosecution efforts).

⁵⁹ *Packingham v. North Carolina*, 137 S.Ct. 1730, 1737 (2017).

⁶⁰ *Id.* (citing *Reno v. ACLU*, 521 U.S. 844, 870 (1997)).

V. FURTHER CUTBACKS ON CDA § 230 IN THE JUDICIARY

In recent years, § 230 has come under attack by parties beyond the coalition of anti-sex trafficking activists and policymakers described above. Some members of the judiciary are growing increasingly skeptical of the CDA's protections. In one such instance, a federal judge in California narrowly construed § 230 to allow San Francisco to regulate Airbnb, an online room rental service.⁶¹ The city attempted to levy a license and tax requirement on Airbnb, calling for it to validate its vendors' rental licenses upon posting rooms for rent. The judge considered this to be acceptable, since the city is regulating Airbnb as a booking service (defined as taking a portion of the reservation fee for unlicensed services).⁶² While Airbnb was still free to run its site as a platform for advertising rental rooms, once it attempted to close a rental, it was operating a "booking service," which does not receive all the broad protections of § 230.⁶³ This case is notable for opening up an internet service like Airbnb to regulatory efforts by county and municipal governments and imposing legal responsibility on an internet company to validate whether third-party posters had received a license. This may be a one-time instance of a court creating a limiting principle to § 230 immunity or it may represent part of a broader erosion of internet speech protections.

In a Ninth Circuit case called *Doe v. Internet Brands*,⁶⁴ the platform involved was a site that matches models with jobs. One of its users claimed that the site was being used by sexual predators, that the website administrators knew of the risk, and they should have an obligation to warn the prospective models.⁶⁵ The court held that making platforms liable for failure to post warnings was not barred by § 230 because posting a warning "would not require Internet Brands to remove any user content or otherwise affect how it publishes or monitors such content. . . . Therefore, an alleged tort based on a duty that would require such a self-produced warning falls outside of section 230(c)(1)."⁶⁶ This court, like the one in *Airbnb*, narrowly read § 230 to allow a cause of action against a platform that fails to respond to user conduct. However,

⁶¹ *Airbnb v. City and Cty. of S.F.*, 217 F.Supp.3d 1066 (N.D. Cal. 2016).

⁶² *Id.* at 1071.

⁶³ Eric Goldman, *Section 230 Ruling Against Airbnb Puts All Online Marketplaces at Risk*, TECH. & MARKETING L. BLOG (Nov. 14, 2016), <https://blog.ericgoldman.org/archives/2016/11/section-230-ruling-against-airbnb-puts-all-online-marketplaces-at-risk-airbnb-v-san-francisco.htm>.

⁶⁴ 824 F.3d 846 (2016).

⁶⁵ *Id.* at 848–49.

⁶⁶ *Id.* at 851.

a later 9th Circuit ruling declined to extend *Internet Brands*, holding that the court should “look instead to what the duty at issue actually requires: specifically, whether the duty would necessarily require an internet company to monitor third-party content.”⁶⁷ The *Internet Brands* case is significant for demonstrating an appellate court’s reluctance to read § 230 as broadly as it might. Like *Airbnb*, it may represent a court simply being responsive to the needs of users when the internet is used to coordinate conduct in the real world or it might presage more aggressive curtailing of the liability shield by the judiciary.

In a Wisconsin state court case, *Daniel v. Armslist, LLC*,⁶⁸ a man identified a gun seller through an online firearm advertisement service, purchased guns and ammo from the seller, and then used them in a shooting.⁶⁹ Federal and Wisconsin law prohibit the sale of firearms to certain people, including those with a domestic abuse injunction entered against them.⁷⁰ The plaintiff sued under a theory of negligence, alleging that Armslist’s website, which facilitated the purchase of guns, “encouraged” transactions in which the purchaser was prohibited from purchasing such weapons because of a domestic abuse injunction.⁷¹ The intermediate appellate court held that, although the CDA has a preemption provision (allowing § 230 and its protections to preempt state like claims, like the tort claim in this case), Wisconsin has a presumption against such preemption.⁷² Under this presumption, the court found that § 230’s liability shield did not protect Armslist from the negligence claim.⁷³ The court ultimately rejected Armslist’s argument that the plaintiff’s injury was caused by third-party content, which normally would have immunized Armslist from liability under § 230.⁷⁴ Instead the court held that the design and operation features of the website⁷⁵ were at fault, and thus a negligence claim against the company was allowed to

⁶⁷ *HomeAway.com, Inc. v. City of Santa Monica*, 918 F.3d 676, 682 (9th Cir. 2019).

⁶⁸ 913 N.W.2d 211 (Wis. Ct. App. 2018).

⁶⁹ *Id.* at 213–14.

⁷⁰ *Id.* at 215.

⁷¹ *Id.*

⁷² *Id.* at 220.

⁷³ *Id.* at 224.

⁷⁴ *Id.* at 222.

⁷⁵ These design features that were allegedly faulty included, among other things, that the website made private gun sales easy, that it did not flag illegal or criminal content, and that it did not provide guidance to users about what to do when encountering illegal content. *Id.* at 216.

proceed.⁷⁶ The court adopted the theory that the design and operational features of the website may encourage illegal gun purchases and that these features are distinct from the content generated by third parties that falls within the liability shield intended by Congress.⁷⁷ The Wisconsin Supreme Court eventually reversed this decision on the ground that the CDA protected the defendant from being treated as the publisher of information posted by a third party on its website.⁷⁸ However, the intermediate court's narrow reading of § 230 may be indicative of an appetite to chip away at the safe harbor provision by judges who are skeptical of the way platforms use it to skirt liability.⁷⁹

VI. ATTACKS ON CDA § 230 FROM THE POLITICAL BRANCHES

The judiciary is not the only branch of government offering new hostility to § 230. While the passage of SESTA-FOSTA reflected political frustration with § 230 as it pertains to sex trafficking,⁸⁰ politicians have voiced their dissatisfaction with the safe harbor as it pertains to other areas, as well. Texas Senator Ted Cruz expressed that “[t]he predicate for Section 230 immunity under the CDA is that you’re a neutral public forum.”⁸¹ Sen. Cruz later opined that § 230 should be repealed because he believes technology companies’ censorship practices reflect a political bias:⁸² “[t]here’s no reason big tech deserves a special immunity from liability that nobody else gets if they are going to be partisan political players and speakers expressing their own views.”⁸³

Several conservative members of Congress have taken up the crusade of defending internet posters who feel their content is censored. In 2018, Florida Rep. Matt Gaetz questioned whether technology

⁷⁶ *Id.* at 222. Section 230 holds harmless internet providers for content created by third-parties published on their platform, not for negligent design and operation of the platform.

⁷⁷ *Id.*

⁷⁸ Daniel v. Armslist, LLC., 926 N.W.2d 710, 722 (Wis. 2019).

⁷⁹ See Eric Goldman, *Wisconsin Appeals Court Blows Open Big Holes in Section 230*, TECH. & MARKETING L. BLOG (Apr. 25, 2018), <https://blog.ericgoldman.org/archives/2018/04/wisconsin-appeals-court-blows-open-big-holes-in-section-230-daniel-v-armslist.htm>.

⁸⁰ See *supra* Part I (discussing the passage of SESTA-FOSTA).

⁸¹ Joshua A. Geltzer, *The President and Congress are Thinking of Changing This Important Internet Law*, SLATE (Feb. 25, 2019), <https://slate.com/technology/2019/02/cda-section-230-trump-congress.html>.

⁸² Emily Birnbaum, *Conservative Groups Defend Tech from GOP Crackdown*, HILL (Apr. 13, 2019), <https://thehill.com/policy/technology/438717-conservative-groups-defend-tech-from-gop-crackdown>.

⁸³ *Id.*

platforms can restrict third-party content and still claim the protections of § 230: “[w]hen you avail yourself to the protections of Section 230, do you necessarily surrender your rights to be a publisher or speaker? . . . The way I read that statute now, it’s pretty binary. It says you have to be one or the other.”⁸⁴ Some Republicans have even introduced legislation that would suspend the protections of § 230 unless the Federal Trade Commission certifies “that the company does not moderate information provided by other information content providers in a manner that is biased against a political party, political candidate, or political viewpoint.”⁸⁵

This hostility toward the provision may be rooted in the popular belief that technology companies are biased against conservative points of view. One poll revealed that most registered voters (58%) and an overwhelming majority of Republicans (83%) think that technology companies are biased against conservatives.⁸⁶ President Donald Trump himself has threatened Google, accusing the company of skewing search results about him to be more negative than they would otherwise be.⁸⁷

The conclusion asserted by Republicans—that the tradeoff implicit in § 230 is that platforms will be effectively neutral in exchange for a shield from liability—is questionable. Enforcing a neutrality standard would be exceedingly difficult because it would require that regulators develop some workable definition of what is considered neutral. Two different administrators could make totally different decisions about whether media posted to a website is political. Alternatively, instead of providing any kind of editorial quality control and risking losing their liability shield, technology companies could simply allow users to see all content posted to the site. Such a tactic would entail providing little to no scrutiny of what gets posted beyond,

⁸⁴ Issie Lapowsky, *Lawmakers Don’t Grasp the Sacred Tech Law They Want to Gut*, WIRED (July 17, 2018), <https://www.wired.com/story/lawmakers-dont-grasp-section-230/>.

⁸⁵ Matt Laslo, *The Fight Over Section 230—and the Internet as We Know It*, WIRED (Aug. 13, 2019), <https://www.wired.com/story/fight-over-section-230-internet-as-we-know-it/>. This legislation was introduced by Senator Josh Hawley, Republican of Missouri, in the Senate, and Representative Paul Gosar, Republican of Arizona, followed up by introducing similar legislation in the House shortly thereafter. *Id.*

⁸⁶ Matthew Sheffield, *Majority Think That Tech Giants are Biased Against Conservatives, Poll Shows*, HILL (Dec. 31, 2018), <https://thehill.com/hilltv/what-americas-thinking/421238-poll-majority-of-americans-think-social-media-companies-are>.

⁸⁷ *Id.*

perhaps, credible threats to someone's safety. However, exercising no editorial control of the content posted to a platform would overlook the vast amount of disinformation and conspiracy-mongering characteristic of social media platforms.⁸⁸ If disinformation or threats to someone's safety are overrepresented within posts by members of a particular political faction, even an even-handed regulator would be perceived as being biased against that group. When do angry, misinformed (or flatly incorrect) political diatribes posted by users stop being acceptable to leave up and start being the kind of thing a responsible, neutral arbiter would take down?

Democrats have also expressed skepticism about whether web publishers are wisely using the protection afforded to them by § 230. House Speaker Nancy Pelosi recently said that the law "is a gift" to technology platforms, and that she does not think that they "are treating it with the respect that they should."⁸⁹ Although she did not provide specific context for what prompted this comment, presumably it is motivated by concerns about the political content published on social media platforms.⁹⁰ Until she provides a more detailed explanation of her objections to the CDA, however, it is premature to offer any analysis.

Although some of the comments from legislators seem to misunderstand the significance and meaning of § 230, this method of revising the law is superior to having judges chip away at it in court cases. Elected legislators helming revisions would ensure that the changes have the stamp of democratic legitimacy, and legislatures are better suited to deeply considering the impacts of revisions on different interest groups. Congress can ensure that any changes reflect a unitary vision of what the policy should be, whereas judges are limited to ruling

⁸⁸ See Davey Alba & Adam Satariano, *At Least 70 Countries Have Had Disinformation Campaigns, Study Finds*, N.Y. TIMES (Sept. 26, 2019), <https://www.nytimes.com/2019/09/26/technology/government-disinformation-cyber-troops.html?auth=login-email&login=email> (discussing a study that found social media platforms, and Facebook in particular, were popular targets for disinformation campaigns mounted by governments and political parties).

⁸⁹ Taylor Hatmaker, *Nancy Pelosi Warns Tech Companies that Section 230 is 'In Jeopardy,'* TECHCRUNCH (Apr. 12, 2019), <https://techcrunch.com/2019/04/12/nancy-pelosi-section-230/>.

⁹⁰ See Tim Mak, *Senate Report: Russians Used Social Media Mostly to Target Race in 2016*, NPR (Oct. 8, 2019), <https://www.npr.org/2019/10/08/768319934/senate-report-russians-used-used-social-media-mostly-to-target-race-in-2016> (discussing Senate findings about foreign interference using social media in the U.S.'s 2016 election).

on cases that come before them which can lead to a difficult network of carve outs and exceptions.

VII. CONCLUSION

Beset upon by enemies at all sides, could it be the end for § 230, the technology industry's all-important shield? The movement of the legislature and judiciary against the safe harbor provision suggests that its days may be numbered. However, they would be ill-advised to abandon the doctrine without closely examining the implications on the way people use the internet.

As the mess created by SESTA-FOSTA shows, haphazardly repealing parts of the CDA could yield harmful implications for groups whose interests are not considered during legislative deliberations (e.g., consensual sex workers, people seeking their services, people looking to use the dating sites taken down in the wake of the law). However, given the difficulties in prosecuting Backpage for its complicity in sex trafficking, the liability shield can also be attractive to technology companies looking to abuse it.

Future revisions to the liability shield should come from the legislature, not the judiciary, since doing so provides the stamp of democratic legitimacy. Allowing federal judges to create carve-outs to the safe harbor on whim presents the risk of creating a legal morass—an tangled set of exceptions to a general rule that once allowed the internet to thrive.

Still, Congress should be wary of the implications wholesale repeal would have on the free flow of ideas on the internet. Doing so would further concentrate the internet into the hands of a small group of giant technology oligopolies that already dominate much of public life. It would also discourage the development of start-ups and other entrepreneurial ventures, who would have neither the benefit of § 230 nor the massive legal and compliance departments necessary to avoid liability in a post-§ 230 world.

The internet's role as a modern public square has allowed a sea of services and communities to exist in a way that would have been unimaginable a generation ago. We should think carefully before modifying the legal framework that allowed it to thrive.