

**Statement by
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**“Latest Developments in Combating Online Sex Trafficking”
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**Subcommittee on Communications and Technology
Committee on Energy and Commerce
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Chairman Blackburn, Ranking Member Doyle, and Members of the Committee, I am honored to be here today on behalf of The National Center for Missing and Exploited Children (NCMEC) and to join this discussion regarding how we can best ensure that our nation’s most vulnerable victims – children trafficked online for rape and sexual abuse – are provided with adequate legal protections and opportunities for legal recourse. We are deeply appreciative of the intense legislative activity undertaken this past year to consider how best to combat child sex trafficking, a devastating crime that continues to expand tremendously as a viable online business model.

Today, we are at a crossroads on how best to proceed with legislative remedies to combat this heinous crime of online sex trafficking. We have learned an enormous amount over the past few years about the complexity, ruthlessness, profitability, and massive scale of the sale of children for sex online. At the same time, we have witnessed courts struggle, and fail, to provide child sex trafficking victims with effective legal redress or to hold online entities legally responsible for facilitating sex trafficking. Courts have been unable to find their way around the barriers created by an overly broad application of the Communications Decency Act (CDA), a statute that is over two decades old and has created virtually absolute immunity for online entities, even those actively engaged in trafficking children for sex.

Today, state Attorneys General cannot prosecute websites that facilitate the sex trafficking of children in their own state. And child victims cannot use the private right of action specifically granted to them by Congress to seek their own civil remedies against an online entity that participated in their sex trafficking.

Over the past few months, the House of Representatives and the Senate have worked on parallel tracks to address these judicial outcomes and to reconcile the CDA with the protections Congress granted sex trafficking victims under the Trafficking Victims Protection Reauthorization Act (TVPPRA).

Here in the House of Representatives, Congresswoman Ann Wagner of Missouri has continued her longstanding dedication to protecting the rights of child sex trafficking victims by introducing her landmark bill, the Allow States and Victims to Fight Online Sex Trafficking Act of 2017 (FOSTA) (H.R. 1865) which currently has 171 cosponsors and support from numerous law enforcement and advocacy groups. NCMEC joins the dozens of survivors, their families, and other child advocates who applaud her tireless work to create meaningful change for online trafficking victims.

In the Senate, Senator Rob Portman, building off his leadership on the groundbreaking investigation of online sex trafficking by the Senate Permanent Subcommittee on Investigations, introduced the Stop Enabling Sex Traffickers Act of 2017 (SESTA) (S. 1693), which NCMEC has endorsed. SESTA passed unanimously out of the Senate Commerce Committee earlier this month, and now more than half the Senate has cosponsored the bill. NCMEC is especially pleased that its valued partners from the technology industry, including the Internet Association and Facebook, have joined NCMEC, other advocacy groups, and several Fortune 500 companies to endorse SESTA, which is now poised for a vote on the Senate floor.

By focusing on the specific legal barriers facing child sex trafficking victims, the efforts of both the House and the Senate have coalesced in consensus around three broad legislative initiatives:

First, ensuring that state Attorneys General are empowered to protect their most vulnerable citizens by granting them the authority to bring criminal and civil actions against online entities that assist, support or facilitate human sex trafficking;

Second, clarifying that sex trafficking victims can utilize the private right of action granted to them by Congress to pursue civil remedies against everyone who participates in their trafficking, including websites and other online entities; and

Third, defining participation in a trafficking venture under the federal criminal statute as assisting, supporting or facilitating human sex trafficking.

These core legislative solutions specifically address the legal impediments that currently foreclose access to justice for child victims and permit online entities to facilitate the trafficking of children for sex on the internet with impunity. NCMEC has been encouraged by the commitment from House and Senate members, law enforcement, advocacy organizations, and the tech community to prioritize protecting our children with their support of these core legislative solutions.

NCMEC History

NCMEC was created in 1984 by John and Revé Walsh and other child advocates as a private, non-profit organization. NCMEC serves to provide a coordinated, national response to missing and exploited children and works with families, victims, private industry, law enforcement, and the

public to help prevent child abductions, recover missing children, and provide services to deter and combat child sexual exploitation.

More specifically to today's hearing, NCMEC serves as a national clearinghouse for reports relating to child sex trafficking, making NCMEC uniquely situated to assist law enforcement, first responders, and victim specialists on the identification, location, recovery, and support of child victims. NCMEC has provided support to tens of thousands of identified child victims and their families through reports from parents, law enforcement, technology companies, and the general public to our CyberTipline and 24-hour hotline (1-800-THE-LOST).

Online Child Sex Trafficking

Child sex trafficking is a pervasive and underreported crime. Every year, thousands of children from across the United States are trafficked, sold for sex, repeatedly raped, and suffer traumatic physical, sexual, and emotional abuse. NCMEC has worked on child sex trafficking cases in every state in the country.

Child sex trafficking involves the rape or sexual abuse of a child in exchange for something of value. There is no legal protection for selling, facilitating the sale of, or benefiting financially from the sale of a child for rape or sexual abuse. There is no situation in which child sex trafficking could be considered legal or consenting sexual activity between adults.

Technology has fundamentally changed how children are victimized through sex trafficking in ways that would have been unimaginable just a few years ago. An adult can now shop from the privacy of his home, office or hotel room, often on a cell phone, to buy a child for rape. Traffickers lure and recruit children online. Websites can create virtual marketplaces on which predatory offenders can peruse a variety of sexual experiences being offered for sale, including with children, and complete their purchase online.

NCMEC operates the CyberTipline to provide the public and electronic service providers with an efficient means of reporting incidents of suspected child sexual exploitation, including child sex trafficking. Over the past five years, NCMEC has received an average of 9,800 reports relating to child sex trafficking every year. We believe the reports made to NCMEC reflect only a small fraction of the much larger number of children trafficked online each year. There is no mandatory requirement to report instances of child sex trafficking to NCMEC. In addition, not all children who are trafficked are reported missing. Some have been forced out of their homes. Some are not missing at all – children can be trafficked while still living at home, with the Internet providing an easy and highly accessible platform for potential predators to find and exploit them.

The crime of child sex trafficking has increasingly expanded to the internet. Traffickers have learned that by leveraging the power of the internet, they can more easily recruit, control, and sell children for sex. Some website operators have also recognized the enormous profitability of creating online platforms to facilitate the sale of adults and children for sex.

Over the past five years, **88%** of NCMEC's reports regarding child sex trafficking relate to the trafficking of a child online. Further, more than **74%** of reports relating to child sex trafficking made by members of the public to NCMEC concern an advertisement on Backpage. This trend will continue so long as online classified advertising websites are able to facilitate and support the sex trafficking and commercial sale of children for sex to a range of online customers.

At NCMEC, we are confronted daily with the reality that children are sold for sex online. Under current law, these crimes can be committed with virtual impunity by websites that facilitate the sex trafficking of a child. In case after case, child sex trafficking victims are unable to have their voices heard and are deprived of their day in court against online entities that supported their trafficking.

The legislative solution needed at this time is a narrow clarification to existing laws that will enable courts to find their way around current judicial barriers and ensure that child victims have full rights to seek redress for their harm. Multifaceted legal resources also must be brought to bear against online facilitators of sex trafficking. While federal prosecution of online trafficking facilitators is not barred, state Attorneys General and private attorneys must be part of the legislative solution moving forward to ensure child victims have adequate legal routes to seek redress and federal prosecutors have adequate support to combat the growing volume of online sex trafficking crimes.

The Experiences of Child Sex Trafficking Victims Highlight the Need for Action on Current Legislative Solutions

Over the past seven years, over 20 legal cases have been filed involving Backpage, many brought by children seeking justice against Backpage for facilitating their sex trafficking online. Time and time again in these cases, courts have acknowledged the horror of the allegations made regarding the child victims' trafficking, but held themselves powerless to act under the CDA.

The child sex trafficking victims who have been denied justice by courts due to the CDA include:

- A 14-year old girl trafficked online for two years and advertised in sexually exploitive poses with photos of her private body parts.
- A 15-year old girl raped over 1,000 times while trafficked on Backpage for just over a year.
- A 15-year old girl trafficked for two years on Backpage with an average of five to fifteen customers a day.

Unfortunately, these victims are not unique. NCMEC has managed tens of thousands of cases of children bought and sold for sex through online advertisements. The prevalence and lurid horror of these advertisements cannot be underestimated. It is essential to understand that the current debate regarding legislative options emerges from the horrific experiences suffered by children who are defenseless against predators who seek to commercialize them for sex online.

Two cases reported to NCMEC earlier this year underscore the helplessness and sheer brutality suffered by children who are trafficked for sex:

1. A child went missing from the custody of social services in Arkansas and was reported to NCMEC. A few months after the child went missing, she was able to text her sister to say that she was being held by men with guns in a house that had bars on the windows. She told her sister she was scared. After five months, the child was recovered – she had been brutally beaten, sexually trafficked on Backpage across three states, and tested positive for multiple sexually transmitted diseases.

After she was recovered, the child, who was 14 years old, reported that she had run away because she was “looking for someone to care about her.”

2. A 15-year-old child went missing from the custody of social services in Illinois and was reported to NCMEC. The child was lured to a house by a 25-year-old man who forced her to take cocaine and meth, raped her, and then trafficked her for sex to several different men. The child was recovered four days later after a member of the public alerted law enforcement to seeing the child on the train tracks talking to herself.

After being recovered, the child reported that after escaping from her trafficker she had gone to the train tracks to commit suicide by getting hit by a train.

These cases remind us of the ongoing suffering by child sex trafficking victims that the current legislative initiatives are designed to address and underscore the urgency of moving forward.

The Courts’ Struggles to Reconcile Federal Trafficking Law and the CDA

Congress has protected children from being trafficked for sex by enacting the TVPRA. The TVPRA establishes human trafficking as a federal crime and recognizes 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 activity. Every state has an equivalent statute that state prosecutors can use against those who traffic children for sex. These laws have been used effectively to prosecute traffickers who conduct their business on the streets, in hotels, casinos or at truck stops. Brick and mortar businesses, such as hotels, that have facilitated child sex trafficking are also not immune from similar criminal prosecution. However, these laws have proven futile to protect children against websites that participate in ventures to sell children for sex due to the courts’ interpretation of the CDA.

The CDA was enacted by Congress in 1996 to protect online companies from liability when they host third party content or engage in good faith efforts to regulate harmful material on their platforms. Unfortunately, courts have proven unable to reconcile the purpose of the immunity provided by the CDA with the mission of the TVPRA to criminalize the sex trafficking of children.

This legal conflict has been building for years. The most frequent result is that children who have suffered undeniable and unimaginable harm, are completely barred from seeking judicial relief against online entities that facilitated their trafficking. As a further complication, courts have been uncertain on what it means to benefit from participating in a trafficking venture under the TVPRA, which is a crucial element to proving a trafficking claim against a website.

For years, Backpage has been one of the largest facilitators of online sex trafficking ads, and as a result it has been the focus of civil, criminal, and legislative efforts to curtail online sex trafficking. Backpage has shown that children can be trafficked for sex online through a functionally simple and wildly lucrative website, while courts have demonstrated that a legal loophole exists enabling this type of website to be immune from liability under the CDA.

NCMEC is aware that children are trafficked for sex on many websites in addition to Backpage. If Backpage ultimately is shut down due to the pending legal actions, another website or multiple other websites will surely fill the marketplace that Backpage currently dominates. The narrow legislative goals currently under discussion are intended to make certain that the next generation of online platforms that assist, support, or facilitate child sex trafficking will not receive the blanket protection of the CDA's immunity.

NCMEC is fundamentally aware that combatting child sex trafficking is a multi-faceted problem, and the legislative initiatives presented by FOSTA and SESTA will not end online child sex trafficking. No single solution can accomplish this. But this legislation will provide essential tools to guarantee legal rights to child sex trafficking victims and ensure that websites that participate in the trafficking of a child are not legally immune for their crimes.

Courts Call on Congress to Clarify the CDA's Impact in Child Sex Trafficking Cases

Courts have become increasingly aware that children are without legal recourse, and state prosecutors foreclosed, when an online website, rather than a brick-and-mortar operation, facilitates a trafficking venture. Both criminal and civil courts have consistently called on Congress to clarify that there is no legal protection for those who facilitate the online sex trafficking of children.

Last year, the Sacramento Superior Court dismissed criminal pimping charges against Backpage, while recognizing the vital issues at stake:

[T]he Court understands the importance and urgency in waging war against sexual exploitation. Regardless of the grave potential for harm that may result in the exercise of this article of faith, Congress has precluded liability for online publishers for the action of publishing third party speech and thus provided for both a foreclosure from prosecution and an affirmative defense at trial. **Congress has spoken on this matter and it is for Congress, not this Court, to revisit.**

Also last year, the First Circuit Court of Appeals dismissed trafficking charges in a civil case against Backpage after recognizing the failure of the statutes to provide an adequate means to protect children and hold online sex traffickers liable because of the CDA:

This is a hard case – hard not in the sense that the legal issues defy resolution, but hard in the sense that the law requires that we, like the court below, deny relief to plaintiffs whose circumstances evoke outrage. . . The appellants’ core argument is that Backpage has tailored its website to make sex trafficking easier. Aided by the amici, the appellants have made a persuasive case for that proposition. But Congress did not sound an uncertain trumpet when it enacted the CDA, and it chose to grant broad protections to internet publishers. Showing that a website operates through a meretricious business model is not enough to strip away those protections. 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 values that drive the CDA, the remedy is through legislation, not through litigation.

Earlier this year, the Sacramento Superior Court again dismissed criminal pimping charges against Backpage and bluntly assessed its view of the current state of the law to immunize a website from online sex trafficking:

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.

NCMEC Supports Legislative Options that Resolve Current Barriers to Adequate Legal Remedies for Child Sex Trafficking Victims

NCMEC has worked closely with children victimized by online sex trafficking, their families and private attorneys, and prosecutors in many of the cases where child sex trafficking claims have been dismissed under the courts’ interpretation of the CDA. Through our work, we have witnessed the anguish of their recovery and the long-lasting trauma their families suffer. We also have heard their hopelessness when their legal efforts to hold responsible websites that facilitated the crimes against them are dismissed by the court.

Congress has now heard these children’s voices as well and is moving forward with parallel proposals in the House and Senate to address specific impediments raised by recent court cases. As outlined above, courts have uniformly recognized that the CDA lacks clarity when applied to modern crimes of online sex trafficking and the pernicious monetization of children trafficked for sex on websites, such as Backpage.

The goals of the proposed legislation by Congresswoman Wagner, Senator Portman and their many cosponsors are sufficiently narrow to help ensure justice for child sex trafficking victims and clarify that civil attorneys and state Attorneys General can actively help victims seek legal

recourse against online entities that participate in their trafficking. The three core legislative solutions are directly responsive both to extensive congressional findings regarding Backpage's facilitation of online child sex trafficking and the repeated failure of courts to allow state prosecutors and child victims to have their day in court.

After a multi-year investigation into Backpage and its principals, the California Attorney General's Office twice filed charges of pimping a minor against the owners of Backpage. Attorneys for Backpage asserted that the CDA barred the pimping charges. The Sacramento Superior Court agreed and dismissed the pimping charges in both cases holding the charges were barred because Backpage was immune under the CDA.¹ The Missouri Attorney General's office also has attempted to use its state law to investigate sex trafficking on Backpage's website by recently serving a civil investigative demand for information from Backpage. Backpage promptly sought injunctive relief to block the investigation, claiming that the CDA protects all websites from state civil or criminal claims.

The first legislative solution presented by FOSTA and SESTA addresses these legal outcomes by ensuring that state Attorneys General are empowered to bring criminal and civil actions against online entities that assist, support or facilitate sex trafficking. This is an essential legislative remedy that would enable state Attorneys General to prosecute websites that traffic children in their state² and also would provide much needed resources to assist federal prosecutors in handling the tremendous volume of online sex trafficking crimes.

A recent First Circuit appellate decision held that even a website tailored to facilitate child sex trafficking through a "meretricious business model" is immunized from liability for its criminal sex trafficking activity due to the CDA.³ The court in this case held that Congress did not "sound an uncertain trumpet when it enacted the CDA," and the law sided with online entities and publishers over child sex trafficking victims. In dismissing the victims' case, the court effectively nullified the statutory right Congress granted to sex trafficking victims to pursue civil cases against their traffickers.⁴

The second legislative solution presented by FOSTA and SESTA restores the statutory private right of action to child sex trafficking victims by clarifying that they can pursue civil remedies against everyone who participates in their trafficking, including websites and online entities.

¹ People of the State of California v. Carl Ferrer et al., Court's Final Ruling on Demurrer (Cal. Sup. Ct. Dec. 9, 2016); People of the State of California v. Carl Ferrer, et al., Ruling on Defendants' Motion to Dismiss (Cal. Sup. Ct. Aug. 23, 2017).

² California Attorney General Becerra testified before the Senate Commerce Committee that almost every sex trafficking case in his office involves online sex trafficking. (Statement of Attorney General Xavier Becerra to Senate Committee on Commerce, Science, and Transportation) (Sept. 19, 2017).

³ Doe v. Backpage.com LLC, 817 F.3d 12 (1st Cir. 2016).

⁴ Id. (effectively nullifying remedy under 18 U.S.C. § 1595).

The First Circuit appellate decision also rejected the child victims' claims that Backpage had violated the federal criminal trafficking statute by benefiting financially from its "participation in a venture" relating to their trafficking. The court expressed uncertainty regarding how to evaluate whether a website had participated in a venture through online activity. Because a website's activity relating to trafficking most often will arise from participation in a venture, rather than the direct transportation, provision, or solicitation of a person for trafficking, clearly defining this term for courts is essential to provide a viable judicial remedy to victims.

The third legislative proposal presented by FOSTA and SESTA defines "participation in a venture" as assisting, supporting, or facilitating human sex trafficking. This clear definition would provide the courts with a firm standard by which to judge the actions of a website when sex trafficking civil claims or criminal charges are asserted.

Conclusion

I would like to thank you for the opportunity to provide the Committee with an overview of NCMEC's work in combating online child sex trafficking. As the nation's clearinghouse on missing and exploited children issues, our priority is to protect the interests of children victimized by sexual exploitation. We believe legislation that addresses the three core legislative solutions as outlined in my testimony would provide powerful tools to protect and expand the rights of child victims consistent with NCMEC's mission while protecting the current law that encourages a healthy and robust internet.

We have been very encouraged by the Senate's legislative process on SESTA as they have worked to engage with all involved parties, including survivors, advocates, and the technology community. Each party came to the table after voicing its views and reached a compromise enabling an amended version of SESTA to move unanimously out of the Senate Commerce Committee.

We are hopeful that under your leadership a similar path forward can be accomplished here in the House of Representatives. We stand ready to assist the Committee as you continue to consider proposals to combat this heinous crime so that at the end of the day, a bill can move expeditiously to the President's desk for enactment into law. We look forward to continuing to work with you on these very important issues.