



November 7, 2017

The Honorable John Thune
Chairman
United States Senate
Committee on Commerce,
Science, & Transportation
Washington, D.C. 20510

The Honorable Bill Nelson
Ranking Member
United States Senate
Committee on Commerce,
Science, & Transportation
Washington, D.C. 20510

RE: ACLU Opposes S. 1693, Stop Enabling Sex Traffickers Act of 2017 (“SESTA”)

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TREASURER

The American Civil Liberties Union (“ACLU”) writes to restate our opposition to S. 1693 in advance of the mark-up of the bill before this Committee on November 8, 2017. Notwithstanding the meaningful improvements likely to be incorporated into the bill in the form of the Manager’s Amendment currently in circulation, we remain concerned about the uncertain nature and potentially significant impact on how the drivers of online political, artistic, and commercial expression will react to such legislation. Accordingly, even while we favor adoption of the Manager’s Amendment, the ACLU will continue our opposition to the bill in the absence of further clarifying amendments.

The ACLU has long supported maintaining the statutory immunity provisions of section 230 of the Communications Act of 1934. As originally devised, section 230 became one of the key factors behind the explosion of Internet-based commerce and speech. Efforts to narrow the immunity provisions will have a detrimental impact on American and, indeed, global commerce and speech. As a strong proponent of the principle that an antidote to bad speech is more speech, we favor facilitating the digital marketplace of ideas. That marketplace encourages a rich array of views and expressions of those views. Section 230 is critical to maintaining the Internet’s diverse ecosystem of speech and advancing our economic and political dialogue.

The ACLU previously voiced its opposition to SESTA.¹ We are concerned that the bill would significantly chill the explosion of online political, artistic, and commercial speech without improving the plight of sex trafficking victims. While it doesn’t ultimately address those concerns, the Manager’s Amendment makes important improvements to the bill.

¹ ACLU formally stated its opposition to the original bill in August. See Coalition Letter to Sens. McConnell and Schumer (Aug. 4, 2017) available at <https://cdt.org/insight/joint-letter-on-free-speech-concerns-with-s-1693-sesta/>. S. 1693 was the subject of a Senate Commerce Committee hearing on September 19. We are also aware of H. R. 1865 offered by Rep. Wagner (R-MO). Both bills would significantly narrow the immunity provision set forth in section 230.

- Section 4 – intent standard: The Manager’s Amendment would modify the language describing the standard of intent necessary to find a violation of law. The original bill required a finding of ‘knowing conduct . . . that assists, supports, or facilitates’, whereas the modified bill would require a finding of ‘knowingly assisting, supporting, or facilitating’. Such a change would impose a stricter knowledge requirement upon those attempting to prove that a violation has occurred. Unfortunately, there exists a morass of intent standards in federal and state law, and there is little consistency or reliability in how courts interpret such standards in any particular circumstance. This language should be made even clearer to ensure that those found in violation have the requisite knowledge that rises to the level of criminal intent. Because of the uncertainty – both in the law generally and with this provision in particular, we are concerned that online providers will overreact out of fear of liability, resulting in the takedown of materials that have nothing whatsoever to do with sex trafficking. In the absence of clear direction – either in statute or even in the legislative record explaining the drafter’s intent - courts will continue their inconsistent interpretation of *mens rea* standards for different civil and criminal violations. It is important to note that the drafters were aware of – and tried to fix – this problem. We appreciate the effort, but we remain concerned that the uncertainty over intent standards will have a profound and outsized impact in the behavior of online providers and that those primarily impacted will be those who are not the legitimate targets of this bill.
- Section 3 - state prosecutions: Under the Manager’s Amendment, the benefit of the law would only extend to state prosecutions that would comprise a violation of section 1591 of the federal criminal code which prohibits sex trafficking of children. States have adopted a wide variety of statutes attempting to address sex trafficking, with varying degrees of constitutional compliance. By narrowing the immunity exemption to circumstances where the state law comprises a violation of the relevant federal statute, the bill as amended imposes a kind of ‘quality control’ over those state prosecutions. This is a significant improvement to the bill.

Notwithstanding these changes, the bill itself remains fundamentally flawed. Online providers cannot and should not be subjected to criminal liability merely for facilitating the speech of others – even if elements of those communications are distasteful or even unlawful. To do so will discourage online hosts from making responsible efforts to police their sites, and that in turn will make it more difficult to expose those actually engaged in criminal behavior. Accordingly, we encourage the drafters to remove the concept of speech facilitation from the proscribed activities.

Just as Internet commerce and speech would not have grown exponentially without the protections of section 230, so penalizing service providers now will discourage online entrepreneurs from moving Internet communications to the next impactful level.² We favor

² The number of Internet users has exploded – from 36 million and 0.9% of the world’s population in December 1996 to nearly 3.9 billion users and over half the world’s population as of June 2017. See Internet World Stats, Usage and Population Statistics (updated Sept. 7, 2017) available at www.internetworldstats.com/emarketing.htm. E-commerce sales exceeded \$1 trillion in 2012 according to the Pew Research Center and in the prior year, over 3/5

adoption of the Manager's Amendment because it will ameliorate some of the unfairness present in the original bill. But the ACLU continues to oppose the bill, even as amended, in the absence of significant additional changes to protect online political, artistic, and commercial expression.

Please contact ACLU First Amendment consultant Michael Macleod-Ball at 202-253-7589 if you have questions or comments about this statement.

Sincerely,



Faiz Shakir
National Political Director

CC: Members of the Committee

of Americans said the Internet had a major impact on the ability to draw attention to an issue. See [World Wide Web Timeline](#) (Pew Research Center, Mar. 11, 2014) available at www.pewinternet.org/2014/03/11/world-wide-web-timeline/; Lee Rainie et al. [The Social Side of the Internet](#) (Pew Research Center, Jan. 18, 2011) available at www.pewinternet.org/2011/01/18/the-social-side-of-the-internet/.