BAD ACTORS AND THE COMMUNICATIONS DECENCY ACT OF 1996: LESSONS LEARNED FROM OUR NATION'S BATTLE WITH ONLINE HUMAN TRAFFICKING♦

INTRODUCTION

Despite the comprehensive legislative framework and strong policing initiatives attempting to combat human trafficking in the United States of America,[1] such endeavors remain deficient. Sex

[1] *See Global Report on Trafficking in Persons*, U.N. OFF. ON DRUGS & CRIME (Feb. 2009), http://www.unodc.org/documents/Global_Report_on_TIP.pdf (elucidating on the Trafficking

trafficking is a noticeable sore blighting America's international appearance.[2] While there are no reliable figures on the number of child sex trafficking victims in the United States, the horrific crime has an upward trajectory.[3] Nonetheless, Congress has determined that the advent of the Internet and its resulting third party Internet Service Providers ("ISPs")[4] have facilitated the growing sex trafficking target on children's backs, bringing sex trafficking forums from the dark shadows of America's seedy alleyways to the more easily accessible backdrop of the Internet.[5] Research indicates that underage victims are increasingly likely to find their traffickers online; worse, a majority of victims have been trafficked through the Internet.[6]

However, holding ISPs accountable for—at a minimum—socially intolerable behavior by tacitly, and even in some instances, actively helping enable traffickers, has been a dismally unsuccessful endeavor

Victims Protection Act, the leading "legislative framework criminalizing trafficking in persons in the USA," and the several federal agencies responsible for combating human trafficking and "enforcing some of the most comprehensive labour [sic] laws."); *see also 2016 Hotline Statistics*, POLARIS (Jan. 2017), https://polarisproject.org/resources/2016-hotline-statistics.

[2] *Cf.* Leif Coorlim & Dana Ford, *Sex Trafficking: The New American Slavery*, CNN (Mar. 14, 2017, 2:14 P.M.), http://www.cnn.com/2015/07/20/us/sex-trafficking/index.html. (explaining how Atlanta has become a hub for sex trafficking and how its airports are being used as concentrated ports for human traffickers); Nicholas Kristof, *When Backpage.com Peddles Schoolgirls for Sex*, N.Y. TIMES (Jan. 12, 2017), https://www.nytimes.com/2017/01/12/opinion/when-backpagecom-peddles-schoolgirls-for-sex.html (discussing the testimony of a victim's mother at the Senate hearings on Backpage, a website dominating the online sex trade, where she asked how "such a horrific, morally bankrupt business model" was capable of "find[ing] success in America?") (internal quotations omitted).

[3] Ann Wagner & Rachel Wagley McCann, *Policy Essay: Prostitutes or Prey? The Evolution of Congressional Intent in Combating Sex Trafficking*, 54 HARV. J. ON LEGIS. 701, 706 (2017) (stating that "a lack of an accurate estimate of the number of trafficking victims in the United States poses a perennial obstacle to legislators. Domestic trafficking figures are unavailable due to the complexity of the crime and difficulty in identifying victims . . . .").

[4] Alternatively, for the purposes of this Note, "websites."

[5] *See* Stephanie Silvano, *Fighting a Losing Battle To Win the War: Can States Combat Domestic Minor Sex Trafficking Despite CDA Preemption?*, 83 FORDHAM L. REV. 375, 380 (2014) ("Websites . . . in part due to technological advances on the internet . . . allow[] traffickers to post advertisements of minors for a world of customers to see with ease and security."); A. F. Levy, *The Virtues of Unvirtuous Spaces*, 52 WAKE FOREST L. REV. 403, 409 n.38 (2017) (quoting Meredith Dank, et al., *Estimating the Size and Structure of the Underground Commercial Sex Economy in Eight Major US Cities* 235–37, URBAN INST. (Mar. 12, 2014), https://www.urban.org/research/publication/estimating-size-and-structure-underground-commercial-sex-economy-eight-major-us-cities/view/full_report ("The results presented here corroborate . . . findings that the use of the internet . . . is likely helping to expand the underground commercial sex market.")); *see also* STAFF OF S. COMM. ON HOMELAND SECURITY, 114TH CONG., REP. ON BACKPAGE.COM'S KNOWING FACILITATION OF ONLINE SEX TRAFFICKING [hereinafter SENATE BACKPAGE HEARING] 4 (Comm. Print 2017) ("Last year, NCMEC [National Center for Missing and Exploited Children] reported an 846% increase from 2010 to 2015 in reports of suspected child sex trafficking—an increase the organization has found to be directly correlated to the increased use of the Internet to sell children for sex.") (internal quotations omitted).

[6] Wagner & McCann, *supra* note 3, at 24.

due to the effective legal immunization of cyber entities[7] such as Backpage and Craigslist.[8] Zealously cloaking themselves within Section 230 of the Communications Decency Act of 1996 (CDA)[9] and brandishing treasured First Amendment[10] rights,[11] these ISPs claim expansive statutory immunity from liability.[12] A lot of this confusion stems from an influential and erroneous Fourth Circuit decision, one of the first to tackle the CDA's text, in *Zeran v. America Online, Inc.*, which interpreted the statute's immunizing scope as essentially unqualified.[13] This reading—especially in regard to sex trafficking—has culminated in hotly debated, high profile pieces of legislation. For example, the Stop Enabling Sex Traffickers Act of 2017 (SESTA),[14] introduced to the Senate floor on August 1, 2017,[15] amends these broad legal immunities that ISPs currently enjoy in relation to their involvement with sex trafficking.[16] The legislative effort finally bore fruit, and on April 11, 2018, the Allow States and Victims to Fight Online Sex Trafficking Act (FOSTA) became law.[17] It effectively cabined ISPs putative immunity in matters concerning sex trafficking after about two decades of contrary jurisprudence and mortally punctured the heart of *Zeran*'s interpretation, which has permeated the capillaries of many subsequent decisions.[18]

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[7] *See generally* Silvano, *supra* note 5, at 380–81 (historicizing that online classifieds have transitioned from newspapers to the Internet. ISPs like Craigslist and Backpage manifested this transition in part, providing an online forum for these advertisements, including amongst their many innocuous sales forums an adult services section. Traffickers have taken advantage of these forums).

[8] *See* Anna Makatche, *The Commercial Sexual Exploitation of Minors, the First Amendment, and Freedom: Why Backpage.com Should Be Prevented From Selling America's Children for Sex*, 41 FORDHAM URB. L.J. 227, 230 (2013) ("Pimps use the freedom of speech to steal American children for sex through Backpage.com (Backpage)."); John E. D. Larkin, *Criminal and Civil Liability for User Generated Content: Craigslist, A Case Study*, 15 J. TECH. L. & POL'Y 85 (2010) (discussing Craigslist's legal battles against liability); Levy, *supra* note 5, at 408–09 (listing Backpage and Craigslist as prime forums that have facilitated this activity).

[9] *See*, 47 U.S.C.A. § 230 (West 2018); *see* discussion *infra* Part II.

[10] U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . . .").

[11] Makatche, *supra* note 8, at 229 ("A booming industry in the United States is the oppressor, shielded by the freedom of speech . . . ."); *see also* Levy, *supra* note 5, at 404.

[12] *See* Levy, *supra* note 5, at 410 ("holding Internet platforms legally accountable for content they display (but do not create) is all but impossible thanks to the Communications Decency Act of 1996").

[13] *See* Zeran v. Am. Online, Inc., 129 F.3d 327 (4th Cir. 1997).

[14] *See* Emily Cochrane, *Senate Crackdown on Online Sex Trafficking Hits Opposition*, N.Y. TIMES (Aug. 2, 2017), https://www.nytimes.com/2017/08/02/us/politics/senate-online-sex-trafficking.html; Harper Neidig, *Senators Hear Emotional Testimony on Controversial Sex-trafficking Bill*, THE HILL (Sept. 19, 2017), http://thehill.com/policy/technology/351364-senate-panel-takes-up-sex-trafficking-bill-opposed-by-silicon-valley.

[15] Stop Enabling Sex Trafficking Act of 2017, S. 1693, 115th Cong. (2017).

[16] Neidig, *supra* note 14.

[17] Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. No. 115-164, 132 Stat. 1253 (2018).

[18] *See* Barrett v. Rosenthal, 5 Cal. Rptr. 3d 416, 429 (Cal. App. 1st Dist. 2003).

This Note contains four parts attempting to comprehensively explain the CDA, its foundations, resulting effects, and how to carry forward, with a specific emphasis on examining legislative intent with the existing CDA. Part I explores the formation of the CDA and the catalysts of its various provisions. Part II relays how the courts and Congress have engaged with the perplexing legislation and its ensuing battle with society's essential interest in safeguarding children and purging the facilitation of crime. Part III critically examines some courts' analyses and whether the CDA has been successfully implemented according to Congress's original vision. Part III also advances a vision for progress and potential strategies against bad actors like Backpage, despite a congressional and judicial impasse. This Note ultimately concludes that the *Zeran* court erred in its reading and only by analyzing the entirety of the CDA—without the *Zeran* decision's influence—can a correct interpretation of Section 230 be rendered.

I. CDA: HOW DID WE GET HERE?

A. *Considerations Overarching the CDA's Enactment*

The libel case of *Stratton Oakmont v. Prodigy Serv. Co.* of 1995[19] sets the stage for the eventual framework of the CDA and its treatment of ISPs.[20] Stratton Oakmont, Inc., a securities investment banking firm,[21] sued Prodigy Services Company, a computer network of over two million subscribers,[22] for fraudulent statements posted by third parties on a bulletin board hosted by the ISP.[23] The court ultimately found that because Prodigy reserved itself "the ability to continually monitor incoming transmissions and in fact do spend time censoring notes," it opened itself to potential civil liability, specifically defamation.[24] Congress vocally contested the court's holding defining the contours of an ISP's liability and later sought to make its wishes unmistakably known: Congress explicitly overruled the court when drafting legislation concerning such liability.[25]

[19] Stratton Oakmont, Inc. v. Prodigy Servs. Co., No. 31063/94, 1995 WL 323710, at *1 (N.Y. Sup. Ct. May 24, 1995).

[20] *See* H.R. REP. NO. 104-458, at 194 (1996) (Conf. Rep.) ("One of the specific purposes of [Section 230 of the CDA] is to overrule *Stratton-Oakmont v. Prodigy* and any other similar decisions which have treated such providers and users as publishers or speakers of content that is not their own because they have restricted access to objectionable material.").

[21] *Stratton Oakmont*, 1995 WL 323710 at *1–2.

[22] *Id.* at *3.

[23] *Id.*

[24] *Id.* at *15–18 ("It is PRODIGY'S own policies, technology and staffing decisions which have altered the scenario and mandated the finding that it is a publisher.").

[25] *See* H.R. REP. NO. 104–458, at 194 (1996) (Conf. Rep.); Larkin, *supra* note 8, at 95–100 ("These provisions [of the CDA] overrule Stratton Oakmont, and depart sharply from the jurisprudence of defamation at common law (in which liability for third party-content is determined by the level of control exercised by the publisher of distributor).").

When tackling cyberspace regulation later that year, the Senate held a hearing—notably, the first of its kind[26]—discussing in great detail the various issues that it was grappling with when drafting laws regulating ISPs.[27] The impending legislation intended to regulate the fledgling Internet as a new medium of communication, since regulation beforehand was minimal.[28] Concerned about the Internet and its effect on children,[29] the Senate discussed the ramifications of passing the Exon-Coats Amendment.[30] The Amendment would impose civil and criminal sanctions on a telecommunications facility that "knowingly" permitted its services be utilized to advance an obscene transmission of a communication involving a minor.[31] Significantly, the Amendment included a provision that provided immunizing defenses for ISPs that actively engage in good faith efforts to prevent their website's usage for harmful content related to minors.[32] It was designed to focus on online criminal actors with knowledge of wrongdoing while safeguarding those that lacked knowledge of the obscenity or were the equivalent of common carriers.[33] Upon reviewing the corpus of Supreme Court decisions on the First Amendment to ascertain the Amendment's constitutionality, Congress noted that jurisprudence and case law frowns upon such speech regulation, but continued by qualifying that if children are involved, society's interest is sufficiently compelling to pass a constitutional threshold.[34] Ultimately, the Amendment *almost*

[26] *See Cyberporn and Children: The Scope of the Problem, the State of the Technology, and the Need for Congressional Action Before the S. Comm. on the Judiciary*, 104th Cong. 7 (1995) [hereinafter *Senate Tech Hearing*] (statement of Sen. Leahy) ("Mr. Chairman, interestingly enough, this is, as you already said, the first congressional hearing held on the issue of regulating indecent and obscene material on the Internet.").

[27] *Id.* at 8 ("[T]hese issues of child pornography are valid issues and ought to be talked about, and you are to be commended for having the hearing because of that . . . We have all these issues interconnected here: the future of the Internet, the best way for parents to control their children's access to the Internet and to protect against inappropriate and offensive materials; and the appropriate role of law enforcement.").

[28] Silvano, *supra* note 5, at 383.

[29] *Senate Tech Hearing*, *supra* note 26, at 1 (statement of Sen. Grassley) ("Fundamentally, the controversy this committee faces today is about how much protection we are willing to extend to children. . . . [E]nter the Internet and other computer networks. Suddenly, now not even the home is safe.")

[30] Exon Amendment No. 1268, 141 CONG. REC. S8120-01 (daily ed. June 9, 1995) (codified amending 47 U.S.C. § 223).

[31] *See* 47 U.S.C. § 223 (2013).

[32] *Id.* §§ 223(e)(5)(A)–(B).

[33] H.R. REP. NO. 104-458, at 187–88 (1996) (Conf. Rep.) ("New defenses are provided to assure that the mere provision of access to an interactive computer service does not create liability. The access providers provision is not available to one who provides access to a system with which they conspire or own or control. . . . Defenses to violations of the new sections assure that attention is focused on bad actors and not those who lack knowledge of a violation or whose actions are equivalent to those of common carriers.").

[34] *See, e.g.*, *id.* at 10 ("These cases clearly establish the principle that the federal government has a compelling interest in shielding minors from indecency. Moreover, these cases firmly establish the principle that the indecency standard is fully consistent with the Constitution"); *Senate Tech*

unanimously passed the Senate when put to a vote.[35]

But the final text of the CDA did not pass without compromise.[36] Because the principal focus of the CDA was who bore the onus—parents or ISPs—in screening materials on the Web that would be considered inappropriate for children's engagement, some thought that this legislative approach was too heavy-handed and an inappropriate delegation of liability.[37]

> Any legislative approach has to take into consideration online users' privacy and free speech interests. If we grant too much power to online providers to screen for indecent material, then public discourse and online content in cyberspace would be controlled by the providers and not by users. We want our laws to encourage and not discourage online providers from creating a safe environment for children, but we do not want to say "do not let the children on the Internet altogether." If they are liable for any exposure of indecent material to children, people under the age of 18 are just going to be shut out of technology, relegated by the Government to sanitized "kids-only" services that contain only a fraction of the entire Internet.[38]

This fear of overregulation echoed throughout the testimony of major spokespeople for major modern ISPs who were invited to deliver testimony, including America Online, Inc., Apple, and the Microsoft Network.[39] The seminal case upholding free speech, *New York Times v. Sullivan*,[40] was conspicuously raised and its concerns cited. The

Hearing, *supra* note 26, at 4 (statement of Sen. Grassley) ("Generally [the First Amendment] prohibits government restrictions on speech that deny adults access to material that is unfit only for children . . . This, the compelling government interest in the morals and upbringing of youth justifies a ban on indecent broadcasting, at least when children are the likely audience."); *id.* at 37 (statement of Sen. Hatch) ("The bill does not violate any First Amendment protections. Our courts have long held that the government has a legitimate and compelling interest in limiting the access of children to indecent material.").

35 141 CONG. REC. S8347 (daily ed. June 14, 1995).

36 *See generally* Robert Cannon, *The Legislative History of Senator Exon's Communications Decency Act: Regulating Barbarians on the Information Superhighway*, 49 FED. COMM. L.J. 51, 65–70 (1996).

37 *See Senate Tech Hearing*, *supra* note 26, at 10 (statement of Sen. Leahy) ("Imposing the same government regulation applied to broadcasters to the Internet, I think it is inappropriate."); *id.* at 25–26 (statement by The Cato Institute) ("Both the Exon and Grassley bills would violate the First Amendment. . . . The chilling effect on speech would be immense because of the difficulty of defining 'indecent' speech.").

38 *Id.* at 10 (statement of Sen. Leahy).

39 *Id.* at 71–80.

40 N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964) (warning against threats against the First Amendment and declaring that "If individual citizens may be held liable in damages for strong words, which a jury finds false and maliciously motivated, there can be little doubt that public debate and advocacy will be constrained. And if newspapers, publishing advertisements dealing with public issues, thereby risk liability, there can also be little doubt that the ability of minority groups to secure publication of their views on public affairs and to seek support for their causes will be greatly diminished. The opinion of the Court conclusively demonstrates the *chilling effect*

spokespeople warned how the First Amendment guarantees the strength of national debate, and how this law could create a chilling effect on the cyber industry's speech as a whole.[41] These companies instead proposed that Congress encourage the development of protective tools rather than fashion further regulation.[42]

B. *The Passing of Today's CDA: "Online Family Empowerment"*

Thus, the strong lobbying efforts bore fruit and eventually Congress yielded to the good will and word of America's tech companies. An amendment drafted by House Representatives Christopher Cox and Ron Wyden, which ultimately became the statute at issue,[43] conferred very broad immunity upon ISPs even without good faith efforts to actively curate materials on their sites.[44] This approach, at first glance, was decidedly different than the approach to ISP liability postured by the Exon Amendment that the Senate had passed.[45] According to its conference report, the Cox-Wyden Amendment sought to protect providers and users of "interactive computer services" from civil liability for blocking or restricting objectionable content, such as in the case of *Stratton Oakmont*.[46]

Canonized in the Telecommunications Act of 1996, Section 230 of the CDA, entitled "Online Family Empowerment,"[47] effectively foreclosed ISPs of all liability, both civil and criminal, with the exception of causes pursuant to federal criminal and intellectual property law.[48] It expressly advances the interest of a free and competitive cyber market, "unfettered by Federal or State regulation,"[49] thereby encouraging the development of technologies against harmful

. . . .) (emphasis added) (citation omitted).

41 *Senate Tech Hearing*, *supra* note 26, at 73.

42 *Id*. at 74 (adjuring Congress: "As a matter of public policy, Congress should rely on the entrepreneurial spirit of the interactive services industry to build parental empowerment tools and encourage the industry to work together to ensure that such solutions are widely available.").

43 Telecommunications Act of 1996, H.R. 1978, 104th Cong. (1995).

44 *See* Ryan J. P. Dryer, *The Communication Decency Act Gone Wild: A Case for Renewing the Presumption Against Preemption*, 37 SEATTLE U. L. REV. 837, 842 (2014).

45 *See* Felix T. Wu, *Collateral Censorship and the Limits of Intermediary Immunity*, 87 NOTRE DAME L. REV. 293, 316 (2011) (enlightening that "[s]ection 230 began as the 'Online Family Empowerment' amendment to the Telecommunications Act of 1996. Introduced by Representatives Cox and Wyden, the amendment was intended to be an alternative to the provisions that the senate had passed [Exon-Coats Amendment] criminalizing the transmission of indecent material to minors.").

46 H.R. REP. NO. 104-458, at 194-95 (1996) (Conf. Rep.) (protecting "from civil liability those providers and users of interactive computer services for actions to restrict or to enable restriction of access to objectionable online material.").

47 47 U.S.C. § 230 (2013).

48 *See Senate Backpage Hearing*, *supra* note 5, at 7; *see also* Blumenthal v. Drudge, 992 F. Supp 44, 49 (D.D.C. 1998) ("Whether wisely or not, [Congress] made the legislative judgment to effectively immunize providers of interactive computer services from civil liability in tort with respect to material disseminated by them but created by others.").

49 47 U.S.C. § 230(b)(2).

sections of the Internet.[50] In possible contradiction, the CDA also provides "vigorous enforcement of Federal criminal laws to deter *and punish trafficking in obscenity*, stalking, and harassment by means of computer"[51] as a major policy.

Expounding rather confusingly on an ISP's civil liability[52]—or lack thereof—under a section titled "Protection for 'Good Samaritan' blocking and screening of offensive material," Congress negates certain ISPs' liability by boldly stating:

> (1) Treatment of publisher or speaker
>
> No 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.
>
> (2) Civil liability— No provider or user of an interactive computer service shall be held liable on account of—
>
> (A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or
>
> (B) any action taken to enable or make available to information content
>
> providers or others the technical means to restrict access to material described in paragraph (1).[53]

Conspicuously absent within the text is any reference to immunity or a synonym of the like.[54] Trying to understand the defining boundaries of Section 230 and "interactive computer services," the scope of limited liability in relation to ISPs, and the definitions that shape it, have perplexed courts until today.[55]

The actors that take shape in Section 230's definitions are the (1)

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[50] *Id.* § 230(b)(4).

[51] *Id.* § 230(b)(5) (emphasis added).

[52] *See* Wu, *supra* note 45, at 317 (discussing the House Committee report, "no one in the House made an explicit statement about the generally appropriate level of liability to impose on Internet intermediaries, or about whether or why such intermediaries should be entirely immune from certain kinds of claims. The final bill was even more confused on this point.") (internal citations omitted).

[53] 47 U.S.C. § 230(c) (emphasis in original).

[54] *Accord.* Chi. Lawyers' Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc., 519 F.3d 666, 669 (7th Cir. 2008) (adjuring "[s]ubsection (c)(1) does not mention "immunity" or any synonym. Our opinion . . . explains why § 230(c) as a whole cannot be understood as a general prohibition of civil liability for web-site operators and other online content hosts.").

[55] *See* Wu, *supra* note 45, at 318–19 ("[W]hile courts quickly settled on how to apply § 230 to core cases, such as message boards and the like, courts have continued to struggle over what types of cases fit within the language and rationale of the statute.").

interactive computer service ("ICS"), (2) Internet content provider ("ICP"), and (3) access software provider ("ASP").[56] Critical to ascribing liability, the ISP must remain within the statutorily defined bounds of an ICS or ASP rather than an ICP, or face litigation.[57] The defining features of both ICS and ASP are, admittedly, very general. The statute defines an ASP as software that includes capabilities such as filtering, screening, picking, analyzing, and transmitting content.[58] An information system that provides "access to the Internet" is an ICS.[59] However, if the entity in question rests solely within the bounds of an ICP, or "is responsible, in whole or in part, for the creation or development of information,"[60] the entity can no longer benefit from the immunization of the CDA.

Courts have generally cast a far-reaching net[61] on the many types of ISPs eligible to benefit from statutory immunity.[62] In response, concerns have arisen in the legal community as to the unseemly large scope of this net. Many legal scholars question, consequently, whether the judiciary has ventured beyond the congressional intent,[63] thereby throwing a defective net of judicial devise that its mesh strings entangle in unduly restrictive knots of decisions.

II. THE EVOLUTION OF THE CDA'S JUDICIAL AND LEGISLATIVE TREATMENT

A. *Before Courts Even Touched Section 230*

Reno v. American Civil Liberties Union[64] paints the background for the CDA's first adjudication in case law.[65] Plaintiffs' raised

[56] 47 U.S.C. § 230(f).

[57] *See* H.R. REP. NO. 104–458, at 194–95 (1996) (Conf. Rep.) (listing protections for all interactive computer services as well as all access software providers).

[58] 47 U.S.C. § 230(f)(4).

[59] *Id.* § 230(f)(2).

[60] *Id.* § 230(f)(3).

[61] *See* Doe v. GTE Corp., 347 F.3d 655, 659 (7th Cir. 2003) (explaining that Section 230 does not mandate liability with a sword, but rather immunizes ISPs with a safety net).

[62] *See* Dryer, *supra* note 44, at 841; *see also* Chi. Lawyers' Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc., 519 F.3d 666, 669 (7th Cir. 2008) ("§ 230(c)(1) provides 'broad immunity from liability for unlawful third-party content.' That view has support in other circuits.").

[63] *See* Silvano, *supra* note 5, at 399 (2014) ("Although the majority of courts have interpreted CDA immunity broadly, some courts and legal scholars are beginning to argue for a narrower interpretation in light of the growth and changes of the internet since the enactment of the CDA."); *see also* Dryer, *supra* note 44, at 842 ("Although unapparent at first, [the] over-expansive reading of section 230(c) laid the groundwork for broad applications of immunity by future courts in contexts blatantly incommensurate with the statutes [sic] intended scope and effect."); Wagner & McCann, *supra* note 3, at 19 ("Congress has repeatedly—and wrongly—allowed federal courts and agencies to misinterpret or ignore congressional intent in implementing sex trafficking laws.").

[64] Reno v. Am. Civil Liberties Union, 521 U.S. 844 (1997).

[65] Cannon, *supra* note 36, at 93 n.193 (surprisingly, "[t]he telecommunications bill provided for expedited judicial review of constitutional challenges. Preparations for this battle started long

challenges regarding the facial constitutionality of the Exon Amendment,[66] 47 U.S.C. § 223, which imparted liability through knowingly partaking in the transmission of obscene messages involving a minor.[67] Before even delving into the case's reasoning, it is worth highlighting Justice Stevens' characterization of the Internet's sheer novelty at the time—even a year after the CDA's enactment.

> The Internet is "a unique and wholly new medium of worldwide human connection." The Internet has experienced "extraordinary growth." The number of "host" computers—those that store information and relay communications—increased from about 300 in 1981 to approximately 9,400,000 by the time of the trial in 1996. Roughly 60% of these hosts are located in the United States. About 40 million people used the Internet at the time of trial, a number that is expected to mushroom to 200 million by 1999.[68]

Justice Stevens went on to explain by virtue of the CDA's content-based, rather than specific secondary effect, restriction on speech, it therefore could not be analyzed as a "form of time, place, and manner regulation."[69] He also made clear that speech regulation, in general, must be analyzed according to its respective obstacles and should not be analogized to case law involving another form of communication.[70] With respect to the Internet, the Court analogized its forum to both "a vast library" and "a sprawling mall."[71]

Turning to the constitutionality of Section 223, Justice Stevens detailed how it was rife with uncertainty and vagueness, thus eliciting a chilling effect on free speech within society, as well as potentially fraught with discriminatory enforcement concerns.[72] The statutes vague use of "obscenity" and the uncertainty of what behavior falls within the statute's scope elicited the Court's disapproval.[73] However, the Court especially took issue with Section 223(e)(5),[74] which presents "good

before the legislation [for § 223] was ever signed.").

66 *See* discussion *supra* Part I.

67 Exon Amendment No. 1268, 141 CONG. REC. S8120-01 (daily ed. June 9, 1995) (codified amending 47 U.S.C. § 223).

68 *Reno*, 521 U.S. at 850.

69 *Id.* at 868.

70 *Id.*

71 *Id.* at 853.

72 *Id.* at 872.

73 *Id.* at 870–71.

74 The full text of 47 U.S.C. § 223(e)(5) states,

> It is a defense to a prosecution under subsection (a)(1)(B) or (d), or under subsection (a)(2) with respect to the use of a facility for an activity under subsection (a)(1)(B) that a person—
>
> (A) has taken, in good faith, reasonable, effective, and appropriate actions under the circumstances to restrict or prevent access by minors to a communication specified in such subsections, which may involve any appropriate measures to restrict minors from such communications, including any method which is feasible under available

faith defenses" to prosecution under the statute.

The defenses, through taking steps to restrict obscene material to minors by requiring credit card verification or screening software, allow telecommunications facilities to escape liability when taking such measures in good faith.[75] However, the Court maintained that, as of that time, there was no way to insure any modicum of efficacy, thereby making the defenses legally vacuous.[76] "Ironically, this defense may significantly protect commercial purveyors of obscene postings while providing little (or no) benefit for transmitters . . . that have significant social or artistic value."[77] The Court surmised that the defenses, therefore, did not help dilute the strong speech impositions forced by Section 223.[78]

Concluding the opinion, the Court established that if a statute regulates speech, it can arguably maintain its legality but for the possibility of another more precise legislative iteration.[79] The Court found the defenses insufficiently tailored and unhelpfully open-ended to meet this precision requirement.[80] It ended that the breadth of Section 223's restrictions forced a heavy burden upon which the government failed to sustain as opposed to enacting a replacement statute.[81] The Court found that congressional intent was unclear and inconsistent and could not practically identify any clear interpretive lines or scopes.[82] The Court ultimately affirmed the lower court's injunction against sections 223(a)(1) and 223(d) of the CDA, leaving the rest, including Section 230, intact.[83]

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technology; or

(B) has restricted access to such communication by requiring use of a verified credit card, debit account, adult access code, or adult personal identification number.

47 U.S.C. § 223(e)(5) (2013).

[75] *Id*. § 223(e)(5)(A)–(B).

[76] *See Reno*, 521 U.S. at 870–71 (declaring that § 230(e)(5)'s "requirement that the good-faith action must be 'effective' [] makes this defense illusory. The Government recognizes that its proposed screening software does not currently exist. Even if it did, there is no way to know whether a potential recipient will actually block the encoded material."); *see also* Am. Civil Liberties Union v. Reno, 929 F. Supp. 824, 849 (E.D. Penn. 1996), *aff'd*, Reno v. Am. Civil Liberties Union, 521 U.S. 844 (1997) (finding that "[t]he CDA's defenses—credit card verification, adult access codes, and adult personal identification numbers—are effectively unavailable for non-commercial, not-for-profit entities."),

[77] *See Reno*, 521 U.S. at 881 n.47.

[78] *See id.* at 881–83.

[79] *See id.* at 874 ("[t]he CDA's burden on protected speech cannot be justified if it could be avoided by a more carefully drafted statute. We are persuaded that the CDA [section 223] lacks the precision that the First Amendment requires when a statute regulates the content of speech.").

[80] *See id.* at 882–84.

[81] *See id.* at 879 ("[t]he breadth of [section 223 of the CDA's] content-based restriction of speech imposes an especially heavy burden on the Government to explain why a less restrictive provision would not be as effective as the CDA. It has not done so.").

[82] *See id.* at 884–85 (reprimanding "[t]he open-ended character of the CDA [section 223] provid[ing] no guidance what ever [sic] for limiting its coverage.").

[83] *See id.* at 885.

B. Zeran: *Courts' Distorted Lodestar Interpreting Section 230*

Fueled by the Supreme Court's recent strong stance on speech protections in *Reno*[84] less than a year beforehand, the Fourth Circuit in *Zeran v. America Online, Inc.* constructed the foundational decision acting as other courts' lodestar in analyzing Section 230 of the CDA and an ISP's culpability.[85] Similar to the facts in *Stratton*, Plaintiff sued America Online ("AOL"), claiming damages from defamatory statements on the service provider's website by third party providers.[86] AOL successfully parried with a Section 230 immunity defense.[87]

The court, applying a dismally sparse statutory reading, stated that the plain language of Section 230(c)(1)[88] alone "creates a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service."[89] Notably, the court did nothing to address glaring factual and logical inconsistencies, like the fact that 230(c)(1) never explicitly confers immunity,[90] let alone the leap that it immunizes ISPs from any cause of action based on the origination of a third party's information. Furthermore, it never sought to reconcile the "Good Samaritan" heading under which 230(c)(1) immediately lies below.[91] Citing both *Reno* and *Stratton*, the court elucidated on a tripartite congressional intent: minimum governmental intervention, the chilling effect prescribing liabilities on ISPs would have on free speech, and the need to encourage ISPs to self-regulate, rejecting the notion of conferring liability upon an ISP.[92]

Concerned about imposing inordinate economic costs on ISPs, the court remarked, "[e]ach notification would require a careful yet rapid investigation of the circumstances surrounding the posted information, a legal judgment concerning the information's defamatory character, and an on-the-spot editorial decision whether to risk liability by allowing the continued publication of that information."[93] Courts today continue to reiterate this concern.[94] Especially problematic in the decision is that the

[84] See Zeran v. Am. Online, Inc., 129 F.3d 327, 330 (4th Cir. 1997) (explicitly citing *Reno*, 521 U.S. 844, in its decision).
[85] *Accord.* Larkin, *supra* note 8, at 95 ("The strength of Section 230 as a shield against website liability is borne out by Zeran's progeny."). *See also* Silvano, *supra* note 5, at 399–400; Dryer, *supra* note 44, at 841–44.
[86] *See Zeran*, 129 F.3d at 328–30.
[87] *See id.* at 330.
[88] *See supra* text accompanying note 80.
[89] *See Zeran*, 129 F.3d at 330.
[90] *See* Doe v. GTE Corp., 347 F.3d 655, 660 (7th Cir. 2003).
[91] *Cf. GTE Corp.*, 347 F.3d at 660.
[92] *See Zeran*, 129 F.3d at 330–31.
[93] *See id.* at 333.
[94] *See* Larkin, *supra* note 8, at 96 ("[E]very court which has granted immunity under Section 230 has noted the impossibility of manually reviewing each post for potential liability.").

court established precedent that even if plaintiffs could prove with a high degree of certainty an ISP was aware of probable illicit activities transpiring through the usage of its website and failed to take any necessary action, that plaintiff would still be denied relief.[95] Such an expansive reading conferring virtually unassailable legal immunity does not seem logical or equitable.[96]

Today, courts have largely followed the formula developed by the *Zeran* court two decades ago, broadly applying immunity.[97] As a general pattern, courts often: (1) introduce Section 230's broad immunization of ISPs; (2) address Congress's intent in immunization, including unfettered free speech and promoting ISPs' development of self-regulating mechanisms; (3) discuss the dangers of finding otherwise, including stating the potential of a "chilling effect"; and (4) reach a decision granting immunity.[98] According to one court, "there have been approximately 300 reported decisions addressing immunity claims advanced under 47 U.S.C. § 230 in the lower federal and state courts. All but a handful of these decisions find that the [ISP] is entitled to immunity from liability."[99]

C. *The "Anti-*Zeran*" Cases*

One of these first and only cases, *Fair Housing Council of San Fernando Valley v. Roomates.com*, uniquely found an ISP culpable even when simultaneously characterizing the website as a publisher.[100] The ISP in that case required subscribers to answer questions regarding gender, sexual orientation, and parental status, raising the issue of

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[95] *See Zeran*, 129 F.3d at 333 ("[B]ecause the probable effects of distributor liability on the vigor of Internet speech and on service provider self-regulation are directly contrary to § 230's statutory purposes, we will not assume that Congress intended to leave liability upon notice intact."); *see also* Universal Commc'n Sys., Inc. v. Lycos, Inc., 478 F.3d at 420 ("it is by now, well established that notice of the unlawful nature of the information provided is not enough to make it the service provider's own speech."); *cf.* Gregerson v. Vilana Fin., Inc., No. 06–1164 ADM/AJB, 2008 WL 451060, at *9 n.3 (D. Minn. Feb. 15, 2008) (immunization even when ISP under notice); Goddard v. Google, Inc., No. C 08-2738 JF (PVT), 2008 WL 5245490, at *3 (N.D. Ca. Dec. 17, 2008) (immunization even when ISP knows of third parties' illegal content posting).

[96] *See GTE Corp.*, 347 F.3d at 660 (disbelieving "[w]hy should a law designed to eliminate ISPs' liability to the creators of offensive material end up defeating claims by the victims of tortuous or criminal conduct?"); *see also* Chi. Lawyers' Committee for Civil Rights Under Law, Inc. v. Craigslist, Inc., 519 F.3d 666, 670 (7th Cir. 2008) (rationalizing, "[t]o appreciate the limited role of § 230(c)(1), remember that 'information content providers' may be liable for contributory infringement if their system is designed to help people steal music or other material in copyright.").

[97] *See* Dryer, *supra* note 44, 843 ("*Zeran* established the precedent for broad grants of immunity under section 230(c), a standard currently followed by a majority of both federal and state courts.").

[98] *See* Silvano, *supra* note 5, at 401.

[99] Hill v. StubHub, Inc., 727 S.E.2d 550, 558 (N.C. Ct. App. 2012).

[100] Fair Hous. Council of San Fernando Valley v. Roomates.com, 521 F.3d 1157, 1171 (9th Cir. 2008) (en banc) ("even if the data are supplied by third parties, a website operator may still contribute to the content's illegality and thus be liable as a developer.").

whether it was illegally facilitating discriminatory behavior.[101] A major focus of the court's decision was interpreting the word "develop" and whether the ISP did in fact engage in that activity within the scope of an ICP.[102] It concluded that "develop" encompassed "not merely to augmenting the content generally, but materially contributing to its alleged unlawfulness"[103] through the predictable consequences of its actions.[104]

Applied to Roomates.com, the court refused to grant immunity, finding that the ISP's actions—conditioning service upon answering pre-populated responses—became "much more than a passive transmitter of information provided by others[,]" consequently satisfying the definition of "develop" and classifying it as an ICP open to liability.[105] In dicta, the court rationalized that if Congress prohibited such behavior over the phone, it is reasonable to assume such prohibitions should be enforced online.[106] Opening up the gates of liability, the court directly addressed ISPs: "If you don't encourage illegal content, or design your website to require users to input illegal content, you will be immune."[107] Courts have applied the *Roomates.com* encouragement test in the contexts of an ISP soliciting requests for legally protected confidential information,[108] illegal football ticket resales,[109] and requests for obscene and particularized third party

101 *See id.* at 1165–66.

102 *Id.*

103 *Id.* at 1167–68. *But see* Ascentive, LLC v. Op. Corp., 842 F. Supp. 2d 450, 476 (E.D.N.Y. 2011) ("[T]here is simply 'no authority for the proposition that [encouraging the publication of defamatory content] makes the website operator responsible, in whole or in part, for the "creation or development" of every post on the site [sic] . . . Unless Congress amends the [CDA], it is legally (although perhaps not ethically) beside the point whether defendants refuse to remove the material, or how they might use it to their advantage.'") (citation omitted).

104 *See Fair Hous. Council*, 521 F.3d at 1170.

105 *Id.*

106 *Id. But see* Doe v. GTE Corp., 347 F.3d 655, 661 (7th Cir. 2003) ("Yet an ISP, like a phone company, sells a communications service; it enabled [the third party violator ("violator")] to post a web site and conduct whatever business [violator] chose. That [the ISP] supplied some inputs (server space, bandwidth, and technical assistance) into [the violator's] business does not distinguish it from the lessor of [the violator's] office space . . . .").

107 *Fair Hous. Council*, 521 F.3d at 1175. *But see* Blumenthal v. Drudge, 992 F. Supp. 44, 52 (D.D.C. 1998) ("But Congress has made a different policy choice by providing immunity even where the interactive service provider has an active, even aggressive role in making available content prepared by others . . . even where the self policing is unsuccessful or not even attempted."); Zeran v. Am. Online, Inc., 129 F.3d 327, 331 (4th Cir. 1997) ("Congress considered the weight of the speech interests implicated and chose to immunize service providers to avoid any such restrictive effect."); *cf.* Universal Commc'n Sys., Inc. v. Lycos, Inc., 478 F.3d 413, 423 (1st Cir. 2007) ("[B]ecause of the serious First Amendment issues that would be raised by allowing [such a] claim here, the claim would not survive, *even in the absence* of Section 230.") (emphasis added).

108 *See* Fed. Trade Comm'n. v. Accusearch Inc., 570 F.3d 1187, 1200 (10th Cir. 2009) (citing to *Fair Hous. Council* with approval).

109 *See* NPS LLC v. StubHub, Inc., 06-4874-BLS1, 2009 WL 995483, at *13 (Mass. Super. Ct. Jan. 26, 2009).

defamatory posts.[110] That being said, an ISP like Backpage never seemed to properly fit within these exceptions.

D. *Enter Backpage*

Since Craigslist exited the marketplace in 2010, Backpage entered as a leader in sex ads until January 2017,[111] when it shut down its adult ad space due to a scathing Senate Subcommittee report finding the website knowingly facilitated sex trafficking.[112] Many litigants, including those trafficked through certain ISPs, have tried to hold Backpage and similar outlets liable for its part in sex trafficking endeavors, but to no avail.[113] Backpage successfully sought shelter by invoking the protections of the CDA on motions to dismiss.[114] Courts have chosen to punt the ultimate determination surrounding liability and responsibility to rectify the effective immunization onto Congress.[115] In one extreme case, a court found congressional intent to prioritize First Amendment concerns over interests stopping sex trafficking.[116] Notwithstanding these outcomes, the alarming fact is that sex trafficking victims are disproportionately likely to report being advertised on Backpage.[117] Only one court, in *J.S. v. Village Voice Media Holdings, L.LC.*, broke with its sister courts' decisions regarding Backpage.[118]

In that case, three survivors of sex trafficking sought to hold Backpage responsible for "developing" content that ultimately led to

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110 *See* Jones v. Dirty World Entmt. Recordings, LLC, 840 F. Supp. 2d 1008, 1010 (E.D. Ky. 2012).

111 *See* Levy, *supra* note 5, at 413.

112 *See* Derek Hawkins, *Backpage.com Shuts Down Adult Services Ads After Relentless Pressure from Authorities*, WASH. POST (Jan. 10, 2017), https://www.washingtonpost.com/news/morning-mix/wp/2017/01/10/backpage-com-shuts-down-adult-services-ads-after-relentless-pressure-from-authorities/; *see also infra* Part II.E.

113 *See, e.g.*, M.A. *ex. rel.* v. Vill. Voice Media Holdings, LLC, 809 F. Supp. 2d 1041 (E.D. Mo. 2011); Doe *ex rel.* Roe v. Backpage.com, LLC, 104 F. Supp. 3d 149 (D. Mass. 2015); Jane Doe No. 1 v. Backpage.com, LLC, 817 F.3d 12 (1st Cir. 2016), *cert. denied*, 137 S. Ct. 622 (2017).

114 See Levy, *supra* note 5, at 410.

115 *See, e.g.*, *Vill. Voice Media Holdings, LLC*, 809 F. Supp. 2d at 1053 ("[R]egardless . . . of the policy choice denying § 230 immunity in such circumstances as alleged as 'clear,' it nonetheless is a matter Congress has spoken on and is for Congress, not this Court, to revisit."); *Jane Doe No. 1*, LLC, 817 F.3d at 29 ("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 litigation.").

116 *See Doe* ex rel. *Roe*, 104 F. Supp. 3d at 165 ("Congress has made the determination that the balance between suppression of trafficking and freedom of expression should be struck in favor of the latter in so far as the Internet is concerned.") (citation omitted).

117 *See* Brief for the National Center for Missing and Exploited Children as Amici Curiae Supporting Respondents at 5–6, J.S. v. Vill. Voice Media Holdings, LLC, 359 P.3d 714 (Wash. 2015) (No. 90510-0), 2014 WL 4913544 [hereinafter "NCMEC Brief"]; *cf.* Brief for the Cato Institute, Reason Foundation, and DKT Liberty Project as Amicus Curiae Supporting Plaintiff-Appellant and Reversal at 3, Backpage.com, LLC v. Dart, 807 F.3d 229 (7th Cir. 2015) (No. 15-3047) (contending sex trafficking numbers have actually trended downward in the 2000s).

118 *See* Levy, *supra* note 5, at 420.

others committing criminal acts upon them.[119] The survivors claimed that Backpage "intentionally developed its website to require information that allows and encourages [] illegal trade to occur through its website, including the illegal trafficking of underage girls[.]"[120] Influenced by *Fair Housing Council*,[121] the Supreme Court of Washington, utilizing a broader definition of "developing," found that ascertaining whether Backpage materially contributed to illegal conduct, as Plaintiffs alleged, sufficiently defeated the ISP's motion to dismiss and allowed for discovery.[122] However, this sole triumph against Backpage should be characterized as a small oasis marred by a panorama of lasting legal carnage leveled by the ISP over the past decade.

Besides for using Section 230 as a means to thwart civil litigation by victims of sex trafficking,[123] Backpage has used it to defeat state legislation.[124] Washington, Tennessee, and New Jersey attempted to criminalize the direct or indirect dissemination of obscene material involving a minor.[125] Nevertheless, Backpage.com sought injunctive relief against the state statutes in federal courts and won.[126] Arguing states were preempted by the CDA in fashioning these types of statutes, Backpage insisted that state legislation conflicted with the contents of Section 230. It also argued 230(e)(3) specifically[127]—eliminating causes of action inconsistent with Section 230—explicitly barred allowing such state legislation.[128]

One judge found that state supervision of ISPs would disincentive such entities from self-regulating, causing "precisely the situation that the CDA was enacted to remedy."[129] The district court in New Jersey

119 J.S. v. Vill. Voice Media Holdings, L.L.C., 359 P.3d 714, 715–16 (Wash. 2015) (en banc).
120 *See id.* at 102.
121 *See supra* discussion in Part II.A.
122 *See J.S.*, 359 P.3d at 717–18.
123 *See* Levy, *supra* note 5, at 413–15.
124 *See* Silvano, *supra* note 5, at 390–92.
125 *See generally* Makatche, *supra* note 8, at 248–251 (detailing how "Backpage sued three states (Washington, Tennessee, and New Jersey), and won a preliminary injunction preventing enforcement in all three states of their respective statutes aimed at holding online service providers accountable for facilitating the sex trafficking of children.").
126 *See* Backpage.com v. Hoffman, No. 13–cv–03952 (DMC)(JAD), 2013 WL 4502097, at *5 (D.N.J. Aug. 20, 2013) (finding that Backpage has demonstrated "a likelihood of success on the merits, especially when taking into account the findings of both the Washington and Tennessee Courts. Plaintiffs have also adequately satisfied the remaining elements require to secure a preliminary injunction.").
127 The full text of § 230(e)(3) states, "[n]othing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section. No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section." 47 U.S.C. § 230(e)(3) (2018).
128 *See Hoffman*, 2013 WL 4502097, at *6. Parenthetically, the opinion does not reference 47 U.S.C. § 223.
129 *Id.* at *7 (internal quotations omitted).

concluded that even absent express preemption, legitimizing state legislation would frustrate congressional intent underlying the CDA's passage, lending merit to Backpage's claim.[130] Despite the attempt to curb the facilitation of sex trafficking through malicious ISPs, Backpage successfully subverted meaningful state legislation trying to pick up where federal law left off.[131] This happened despite virtually all Attorneys General sending Backpage a letter in August 2012, adjuring substantive action in self-policing efforts concerning sex-trafficking on the website.[132]

E. *Senate Investigation and Legislative Intervention*

Around 2015, the Senate's Committee on Homeland Security and Governmental Affairs began investigating Backpage and its activities, particularly the website's involvement in sex trafficking ads.[133] On July 7, 2015, the Committee subpoenaed Backpage and requested information regarding its corporate structure, advertisements, and data retention policy.[134] Backpage responded by denying all requests.[135] On October 21, 2015, the Committee withdrew its original subpoena and replaced it with a more detailed iteration, which Backpage ultimately refused to answer by citing First Amendment concerns.[136] Finally, the website's Chief Executive Officer, Carl Ferrer, failed to comply with a subpoena to appear in front of the Committee, resulting in a resolution by the Senate Legal Counsel authorizing civil action under 28 U.S.C. § 1365.[137] This litigation bore fruit and the Committee obtained the requisite documentation to complete the investigation by the end of 2016.[138]

The Committee made two major findings concerning Backpage and its advertising enterprise. First, Backpage was knowingly concealing and facilitating sex trafficking acts through its advertisements.[139] Second, management knew of these activities.[140] Moderators on the website were instructed to sanitize the content to

130 *See id. But see* 47 U.S.C. § 223(d)(2) (ascribing liability for knowingly permitting any telecommunications facility to be used for sending or displaying offensive materials in a manner available to a minor); *id.* § 223(f)(2) (permitting "State or local government [in] enacting and enforcing complementary oversight, liability, and regulatory systems . . . so long as such systems . . . govern only intrastate services and do not result in the imposition of inconsistent rights").

131 *See* Makatche, *supra* note 8, at 250–51.

132 *Id.*

133 *See* Levy, *supra* note 5, at 415. *See generally* SENATE BACKPAGE HEARING, *supra* note 5.

134 SENATE BACKPAGE HEARING, *supra* note 5, at 10.

135 *Id.*

136 *Id.* at 11.

137 *Id.* at 12.

138 *Id.* at 16.

139 *Id.*

140 *Id.* at 16–17.

make the advertisements legally palatable.[141] Backpage eventually engaged in automatic filtering.[142] For example, the platform would systemically review and edit advertisements to eliminate the words "lolita" and "rape" to make a specific advertisement more legally acceptable.[143] This automatic sanitization process was even given a name: "Strip Term From Ad."[144] Backpage further "coached its users on how to post 'clean' ads for illegal transactions," according to the report.[145] Unsurprisingly, the Committee cited Section 230 as a factor contributing towards this grotesque behavior. "Backpage and its officers have successfully invoked Section 230 . . . . to avoid criminal or civil responsibility for activities on the site.[146]

Attempting to respond to these findings, Congress introduced legislation like the SESTA and FOSTA.[147] Introduced on August 1, 2017 to the Senate floor, SESTA would have amended the CDA and explicitly enabled the Attorney General, as *parens patriae* of a victim of sex trafficking, to bring a civil suit against an offending advertisement platform that "knowingly assists[], supports[], or facilitates[]" sex trafficking activities.[148] FOSTA, introduced April 3, 2017 in the House of Representatives, goes even further, attempting to ensure federal liability and up to twenty years of jail time for this specific type of behavior by an ICS.[149] Upon receiving the reluctant blessing of the Internet Association—a lobbying group comprising of Google, Facebook, and Microsoft—for legislative reform,[150] FOSTA became law as of April 11, 2018,[151] seismically shifting the landscape of ISP liability to dramatically new levels. Technological behemoths have yet

141 *Id.* at 17–21.
142 *Id.* at 21–27.
143 *Id.* at 22.
144 *Id.* at 21.
145 *Id.* at 34–36.
146 *Id.* at 9.
147 *See* Arthur Rizer, *A Prosecutor's Case for FOSTA*, HUFFINGTON POST (Jan. 11, 2018, 11:11 P.M.), https://www.huffingtonpost.com/entry/a-prosecutors-case-for-fosta_us_5a5833abe4b0d3efcf69572e; John Shinal, *Two Bills in Congress Could Impact Google and Facebook Ad Sales*, CNBC (Nov. 17, 2017, 3:14 P.M.), https://www.cnbc.com/2017/11/17/congress-weighing-two-bills-that-could-crimp-growth-at-google-facebook.html.
148 Stop Enabling Sex Traffickers Act of 2017, S. 1693, 115th Cong. (2017).
149 Allow States and Victims to Fight Online Sex Trafficking Act of 2017, H.R. 1865, 115th Cong. (2017) ("Whoever, being a provider of an interactive computer service, publishes information provided by an information content provider, with reckless disregard that the information provided by the information content provider is in furtherance of an offense under subsection (a) or an attempt to commit such an offense, shall be fined in accordance with this title or imprisoned not more than 20 years, or both.").
150 Russell Brandom, *Tech Companies are Cheering on a Bill that Guts Internet Protections*, THE VERGE (Nov. 10, 2017, 9:38 A.M.), https://www.theverge.com/2017/11/10/16633054/sesta-facebook-google-sex-trafficking -section-230.
151 Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. No. 115-164, 132 Stat. 1253 (2018).

to accept the new rules of engagement; as recently as July of 2018, a prominent tech industry non-profit tried to challenge the law as unconstitutionally infringing on the First Amendment.[152]

F. *What Is FOSTA?*

A revolutionary law, FOSTA sets ISPs' legal third-party complacency in the face of tortious behavior ablaze by providing a couple of avenues to remedy harm when human trafficking is at issue. First and foremost, civil recovery by victims of human trafficking from ISPs is no longer effectively shielded by the CDA.[153] Furthermore, imprisonment of up to twenty-five years and fines can now be levied against a website that "acts in reckless disregard of the fact that such conduct contribute[s] to sex trafficking."[154] Interestingly, an affirmative defense is delineated for certain acts involving legal prostitution; however, such a defense is specifically unavailable for ISPs acting with reckless disregard to human trafficking.[155]

Crucially, the law made Congress's dismay concerning the years of faulty jurisprudence that enabled malicious ISPs to manipulate the CDA and circumvent human trafficking liability ostensibly clear. The law begins by Congress clarifying—*in its own words*—its original intent when drafting the CDA: "[S]ection 230 of the Communications Act . . . was never intended to provide legal protection to websites that unlawfully . . . facilitate traffickers in advertising the sale of unlawful sex acts with sex trafficking victims."[156] Albeit implicitly, these words knock a proverbial wrecking ball in the logical foundations underlying the *Zeran* court's decision—the decision serving as a lodestar to other subsequent courts—namely, that the CDA effectively immunizes ISP from *any* type of action.[157] In light of FOSTA's passage and Congress's clear repudiation, it is certainly clear that *Zeran's* understanding of intermediary liability can no longer pass muster. Congress essentially declared that *Zeran* got it wrong.

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152 Anna Schecter & Dennis Romero, *FOSTA Sex Trafficking Law Becomes Center of Debate About Tech Responsibility*, NBCNEWS (July 19, 2018, 3:33 P.M.), https://www.nbcnews.com/tech/tech-news/sex-trafficking-bill-becomes-center-debate-about-tech-responsibility-n892876.

153 Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. No. 115-164, 132 Stat. 1253 (2018) (codified as 18 U.S.C. § 2421A(c)).

154 *Id.* (codified as 18 U.S.C. § 2421A(b)(2)).

155 *Id.* (codified as 18 U.S.C. § 2421A(e)) ("It shall be an affirmative defense to a charge of violating subsection (a), or subsection (b)(1) where the defendant proves, by a preponderance of the evidence, that the promotion or facilitation of prostitution is legal in the jurisdiction where the promotion or facilitation was targeted.").

156 *Id.* (codified as note (1) in 47 U.S.C. § 230).

157 *See supra* Part II.B.

III. ANALYZING AND REFORMING THE CURRENT LEGAL LANDSCAPE'S SECTION 230 CONCEPTION

The perversion of the CDA by Backpage and others as a potent statutory defensive mechanism, quashing potential legislation and litigation brought by trafficking victims, activists, law enforcement, legislators, and others against the ISP,[158] has forced the nation to grapple with Section 230 and understand its passage in Congress and evolution in case law.[159] This Note now turns to address the problematic and limited understanding of the CDA initiated by the *Zeran* court and seeks to refute its interpretation as unsound. It then attempts to level Backpage's defensive uses of Section 230 to show how the statutory scheme, even before FOSTA's passage, cannot be understood as shielding generally bad-acting ISPs from culpability.

A. *A Note on Interpreting the CDA*

"If a statute is to make sense, it must be read in the light of some assumed purpose."[160] The CDA is no exception. Congress passed the Telecommunications Act of 1996, a large piece of legislation containing seven titles, including its fifth—the Communications Decency Act—under the guiding contextual policy of encouraging the use of new technology and promoting competition.[161] The contextual uniformity of the Telecommunications Act is further bolstered by the fact that many definitions are supposed to remain consistent throughout the act, including that of an "information service," a term central to Section 230.[162] The Supreme Court has remarked, "[t]he rule of *in pari materia*—like any canon of statutory construction—is a reflection of practical experience in the interpretation of statutes: a legislative body generally uses a particular word with a consistent meaning in a given context," especially when contemporaneous. Therefore, the texts should be generally read "as one law."[163] "The proper comprehensive analysis thus reads the parts of a statutory scheme together, bearing in mind the congressional intent underlying the whole scheme."[164] The canon "is . . .

158 *See supra* Part II.B–E.

159 *See supra* Part II.E.

160 Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 400 (1950).

161 *See* Reno v. Am. Civil Liberties Union, 521 U.S. 844, 856–59 (1997).

162 *Cf.* 47 U.S.C. § 153 (2010) (outlining the definitions of pertinent words for the chapter involving the entirety of the Telecommunications Act). Significantly, the definition of an information service is included in Section 153(24), strengthening the notion that Section 230 should be read consistent with other sections.

163 Erlenbaugh v. United States, 409 U.S. 239, 243 (1977); *see also* Karl N. Llewellyn, 3 VAND. L. REV. at 402 ("Statutes *in pari material* must be construed together."); Wachovia Bank v. Schmidt, 546 U.S. 303, 315 (2006).

164 Linquist v. Bowen, 813 F.2d 884, 889 (8th Cir. 1987).

entitled to great weight in resolving any ambiguities and doubts."[165] The Supreme Court has declared the Telecommunications Act, and therefore by extension the CDA embedded within, as a complex statutory scheme.[166] Hence, when reading Section 230, it is imperative to read it "as one" amongst its sibling sections of the act that were passed simultaneously, rather than isolating a reading the section, in order to reconcile any potential ambiguities within the statutory text.

Other tools are at the jurist's disposal in interpreting the CDA. "Whenever . . . perform[ing a] gap-filling task, it is appropriate not only to study the text and structure of the statutory scheme, but also to examine its legislative history."[167] "When Congress passes a law, it can be said to incorporate the materials that it . . . deem[s] useful in interpreting the law. . . . Communications from such members [creating a law] as to the meaning of proposed statutes can provide reliable signals to the whole chamber."[168] In creating the CDA, Congress left behind a plethora of legislative history, including committee hearings[169] and accompanying conference reports[170] that were overwhelmingly approved by members of both chambers.[171] It would be tantamount to legal malfeasance if the CDA were read without these tools.

B. *Debunking* Zeran *and Its Progeny*

The *Zeran* court's decision has had long lasting effects on the interpretation of Section 230 and websites like Backpage escaping accountability.[172] Arguably the most penetrative line in Section 230's case law, the court introduces the idea of immunity for ISPs: "By its plain language, § 230 creates a federal *immunity* to *any* cause of action that would make service providers liable for information originating with a third-party user of the service."[173] In order to substantiate this

165 *Erlenbaugh*, 409 U.S. at 243.

166 *See* City of Rancho Palos Verdes, Cal. v. Abrams, 544 U.S. 113, 123 (2005). *Accord* Williams v. Pa. Human Relations Comm'n, 870 F.3d 294, 299 (3d Cir. 2017); MCI Telecomm. Corp. v. Ill. Commerce Comm'n, 168 F3d 315, 317 (7th Cir. 1999), *vacated* June 25, 1999, *op amended on reh*, 183 F.3d 558 (7th Cir. 1999), *and on reh sub nom.* MCI Telecomm. Corp. v Ill. Bell Tel. Co., 222 F.3d 323 (7th Cir. 2000). *See also* Opperman v. Path, Inc., 87 F. Supp. 3d 1018, 1042 (N.D. Cal. 2014) (describing the CDA itself as a statutory scheme).

167 *See City of Rancho Palos Verdes, Cal.*, 544 U.S. at 129 (addressing specific ambiguities in the Telecommunications Act of 1996).

168 ROBERT A. KATZMANN, JUDGING STATUTES 48 (2014). *But see id.* at 51 (relating how Justice Scalia and Professor Garner "view as false the notion that committee reports and floor speeches are worthwhile aids in statutory construction.").

169 *See generally Senate Tech Hearing*, *supra* note 26.

170 *See generally* H.R. REP. NO. 104-458 (1996) (Conf. Rep.).

171 142 CONG. REC. S720 (daily ed. Feb. 1, 1996) (approving the conference report by ninety-one affirmative votes in the Senate); 142 CONG. REC. H1179 (daily ed. Feb. 1, 1996) (approving the conference report with 414 yeses, sixteen noes, and four abstentions in the House).

172 *See supra* Part II.B.

173 Zeran v. Am. Online, Inc., 129 F.3d 327, 330 (4th Cir. 1997) (emphasis added).

contention, the court cites the text within 230(c)(1).[174] But such a reading forces much unnecessary interpolation into Section 230.

Section 230's text never mentions the idea of "immunity" regarding an ISP.[175] Instead, it states that an ISP cannot be treated as a publisher or speaker for any information from another party,[176] which is Congress simply categorizing an ISP as a different entity rather than delineating bounds for liability. The language used for such categorization, like "publisher" or "speaker," is reminiscent of language used within defamation law.[177] Constraining the statute's relevance to defamation law would be sensible, especially because the section was meant to overturn the libel case of *Stratton Oakmont*, which held an ISP culpable for a third-party's libelous statements.[178] The Conference Committee Report lends further credence, explaining, "[o]ne of the specific purposes of this section is to overrule *Stratton-Oakmont v. Prodigy* and any other similar decisions which have treated such providers and users as publishers or speakers of content that is not their own because they have restricted access to objectionable material."[179] Reading the statute within the prism of the *Stratton Oakmont* case makes Section 230's language a lot more comprehensible; the alternative, that Congress just gave an uncategorical carte blanche to ISPs for litigation involving other people's material, is an impractical contention. If they did, it would make sense for Congress to include such an explanation for a bold law in the Committee Report, but such explanation does not exist.

Looking at other sections of the Telecommunications Act further reinforces this interpretation of relegating Section 230(c)(1) to a libel context. Sections 230(e) and (f) state that their application should not have an effect on federal criminal, intellectual property, state, and communications privacy law, as well as the effect on governmental institutions.[180] The Telecommunication Act's section relating

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[174] *Id.* (quoting 47 U.S.C. § 230(c)(1)) ("No 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.") (emphasis added).

[175] *Accord* Chi. Lawyers' Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc., 519 F.3d 666, 669 (7th Cir. 2008) (adjuring "[s]ubsection (c)(1) does not mention "immunity" or any synonym. Our opinion . . . explains why § 230(c) as a whole cannot be understood as a general prohibition of civil liability for web-site operators and other online content hosts.").

[176] *Cf.* 47 U.S.C. § 230 (2018).

[177] *See* Doe v. GTE Corp., 347 F.3d 655, 660 (7th Cir. 2003) ("There is yet another possibility: perhaps § 230(c)(1) forecloses any liability that depends on deeming the ISP a 'publisher'—defamation law would be a good example of such liability—while permitting the states to regulate ISPs in their capacity as intermediaries.").

[178] *See* Cannon, *supra* note 36, at 68 ("The only thing that the amendment in fact did was to overrule *Stratton* by protecting from liability on-line services that make a good faith effort to restrict access to offensive material.").

[179] H.R. REP. NO. 104-458, at 194–95 (1996) (Conf. Rep.).

[180] 47 U.S.C. § 230(e), (f).

exceptions to the applicability of cable regulations, Section 558, is structured similarly to Section 230,[181] thereby allowing for an analysis of the two statutes *in pari materia*.[182] Section 558's exceptions relate the (lack of) effect upon laws involving federal or state law, privacy, or governmental use of the medium, and particularly for "Federal, State, or local law of libel [and] slander."[183] Such a glaring exception is conspicuously absent from Section 230.[184]

A well-known canon of construction is "where Congress includes particular language in one section of a statute, but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion";[185] Congress acts deliberately when crafting statutes.[186] The fact that both statutes are similar in all but one exception, which Section 230 lacks, lends credence to the fact that libel and slander laws are being directly implicated by Section 230's statutory text. Hence, using Section 558's exceptions lends credence to the idea that Section 230's operative text is discussing libel law and augmenting its liability.

Even more problematic was the *Zeran* court's immunization of any type of behavior by ISPs even upon notice and knowledge of the dubious activity. The court reasoned, "Because the probable effects of distributor liability on the vigor of Internet speech and on service provider self-regulation are directly contrary to § 230's statutory purposes, we will not assume that Congress intended to leave liability upon notice intact."[187] However, the *Zeran* court's citation to Section 230's policy section, which specifically states, "[i]t is the policy of the United States," not law,[188] does not address a remaining blatant statutory quandary: Section 230(c)'s title provides "Protection for

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[181] *See* 47 U.S.C. § 558.

> Nothing in this subchapter shall be deemed to affect the criminal or civil liability of cable programmers or cable operators pursuant to the Federal, State, or local law of libel, slander, obscenity, incitement, invasions of privacy, false or misleading advertising, or other similar laws, except that cable operators shall not incur any such liability for any program carried on any channel designated for public, educational, governmental use or on any other channel obtained under section 532 of this title or under similar arrangements unless the program involves obscene material.

Id.

[182] *See supra* Part III.A, discussing statutes being read *in pari material.*

[183] *See* 47 U.S.C. § 558.

[184] *See generally* 47 U.S.C. § 230.

[185] Bates v. United States, 522 U.S. 23, 29–30 (1997).

[186] *Cf.* KATZMANN, *supra* note 168, at 50; Llewellyn, *supra* note 160, at 404.

[187] Zeran v. Am. Online, Inc., 129 F.3d 327, 330 (4th Cir. 1997).

[188] 47 U.S.C. § 230(b); Cannon, *supra* note 36, at n.84 ("Although the language of the amendment itself promised that it would prohibit any interference of the Internet by bureaucrats, it did not. The amendment stated that it would be the *policy* of the federal government to 'preserve the vibrant competitive free market that presently exists for the Internet . . .' Policy is not the same as law.").

'Good Samaritan' Blocking and Screening of Offensive Material."[189] If an ISP is granted immunity regardless of its steps taken (or lack thereof), the *Zeran* court relinquished meaning and incentive from this "Good Samaritan" clause. One court admonished, "the title . . . [is] hardly an apt description if its principal effect is to induce ISPs to do nothing about the distribution of indecent and offensive materials via their services."[190]

Instead of critically analyzing the statutory text and scheme, many courts, even when not bound by precedent, have robotically resigned to the *Zeran* court's construction of broad immunity—despite the fact that most scholars agree that the *Zeran* court's interpretation is wrong.[191] At least three courts have used the following formulation:

> Although this court has not previously interpreted [47 U.S.C. §] 230, we do not write on a blank slate. The other courts [like *Zeran*] that have addressed these issues have generally interpreted Section 230 immunity broadly, so as to effectuate Congress's "policy choice . . . not to deter harmful online speech through the . . . route of imposing tort liability on companies that serve as intermediaries for other parties' potentially injurious messages." . . . In light of these policy concerns, we too find that Section 230 immunity should be broadly construed.[192]

Zeran's interpretation of Section 230 and its progeny has muddied the waters of jurisprudence, stopping courts from embarking on their own analyses, fearing to fall out of line with their sister circuits. Additionally, despite FOSTA's implicit repudiation of the *Zeran* court's reading of congressional intent concerning the CDA,[193] opinions proceeding the legislation do not shirk from citing to the decision,[194] notwithstanding its now potentially questionable authority. Because *Zeran's* interpretation has tainted Section 230's interpretation, it would be interesting—indeed prudent—to investigate how courts would

189 47 U.S.C. § 230(c).

190 Doe v. GTE Corp., 347 F.3d 655, 660 (7th Cir. 2003).

191 *See* Barrett v. Rosenthal, 5 Cal. Rptr. 3d 416, 429 (Cal. App. 1st Dist. 2003) ("The view of most scholars who have addressed the issue is that Zeran's analysis of section 230 is flawed, in that the court ascribed to Congress an intent to create a far broader immunity than that body actually had in mind or is necessary to achieve its purposes.").

192 Hill v. Stubhub, Inc., 727 S.E.2d 550, 555 (N.C. Ct. App. 2012) (quoting Universal Communication v. Lycos, Inc., 478 F.3d 413 418–19 (1st Cir. 2007)); *see also* Blumenthal v. Drudge, 992 F. Supp. 44, 51 (D.D.C. 1998) (sadly conceding that "[i]f it were writing on a clean slate, this Court would agree with plaintiffs."); Ricci v. Teamsters Union Loc. 456, 781 F.3d 25, 28 (2d Cir. 2015) ("We have never construed the immunity provisions of the Communications Decency Act, but other courts have applied the statute to a growing list of internet-based service providers. . . . We join this consensus.").

193 See *supra* Part II.F.

194 *Cf.* Davison v. Randall, 912 F.3d 666, 682 (4th Cir. 2019); Bollaert v. Gore, No. 17-2022, 2018 WL 5785275, at *4 (S.D.Cal., 2018); Bryant v. FCC, No. 218-2467, 2018 WL 5258809, at *4 (Dist. S.C. 2018).

interpret the statute if *Zeran's* initial construction did not present a precedential impairment. Ultimately, such an analysis would find strong evidence that bad acting ISPs, outside of the libel context, should not be presumed immunized from tort liability.

C. *Argument #1—Reading Section 230 with Section 223*

Section 230 explicitly references other sections within its text: "[n]othing in this section shall be construed to impair the enforcement of section 223 or 231 of this title."[195] As described supra, Section 223 was the Exon-Coats Amendment.[196] Passed contemporaneously with and catalyzing the legislation of Section 230, Section 223 prohibits "knowingly permit[ting] any telecommunications facility under such person's control to be used for" sending a communication "that is obscene or child pornography" to a person under eighteen.[197] Just like Section 230, Section 223 contains defenses that are astonishingly similar to Section 230, if not described with more particularity.[198] Adding to the similarities, Section 223(f)(1) states that no cause of action may be brought in court against an individual attempting "in good faith" to implement restrictions of communications that are described in Section 223,[199] similar to Section 230(d)(3).[200] When reading the Conference Committee Report on Section 223, it is the only time any of the Conference Committee Report sections mention Section 230(c)'s Good Samaritan clause—outside of its own section.[201] Bolstering the interplay, the Report advises, "subsection 223(f)(1) supplements, without in any way limiting, the 'Good Samaritan' liability protections of new section 230."[202] Further potently weaving both of the statutes together is Section 223's derivation of its definition of an interactive computer service (ICS) from Section 230.[203] Undoubtedly, the authors of Section 230 were acutely aware of Section 223 and intended its contours to be supplemented and limited by the other statute in a statutory scheme, especially in light of the limiting directive that Section 230 be preempted by Section 223.[204] Hence, Section 223 must necessarily be read together with Section 230 under

195 47 U.S.C. § 230(e)(1) (2018).
196 *See supra* Part I.A, discussing the passage of the Exon-Coats Amendment.
197 47 U.S.C. § 223(d)(1), (2).
198 *See* supra note 71 and accompanying text. *Compare* 47 U.S.C. § 230(c)(2), *with* 47 U.S.C. § 223(e)(5).
199 47 U.S.C. § 223(f)(1).
200 47 U.S.C. § 230(d)(3) ("No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.").
201 *Cf.* H.R REP. NO. 104-458, at 189 (1996) (Conf. Rep.).
202 *Id.*
203 47 U.S.C. § 223(h)(2) ("The term 'interactive computer service' has the meaning provided in section 230(f)(2) of this title.").
204 47 U.S.C. § 230(e)(1).

the canon of *in pari materia* in order to truly dispel ambiguity.

Although unhelpful when discussing Section 230, the Conference Committee Report on Section 223 sheds light on the ambiguous culpabilities involving ISPs. "New subsection 223(d)(2) sets forth the standard of liability for facilities providers who intentionally permit their facilities to be used for an activity prohibited by new subsection 223(d)(1)."[205] According to the Report, defenses are only supposed to apply to facilities maintaining "related capabilities incidental to providing access" absent illicit content creation.[206] The Report—unequivocally—asserts that defenses are inapplicable to "entities that conspire with" actively engaging entities or "who advertise that they offer access to prohibited content."[207] Hence, an ISP contributing a "platform, categories, and filters 'assist[ing] in the crafting, placement, and promotion of illegal advertisements offering plaintiffs for sale,"[208] like Backpage, would fall squarely outside the protective forces of Section 223's defenses; since Section 230's application cannot diminish Section 223's enforcement,[209] a bad-acting ISP would not be able to escape civil liability.[210] Clearing any remaining doubt, the Committee illuminates, "Defenses [like Section 230] to violations of the new sections assure that attention is focused on bad actors and not those who lack knowledge of a violation or whose actions are equivalent to common carriers,"[211] piercing the speculative and incorrect conclusions of *Zeran* and its progeny as to Congress's motives.[212]

Confirming such an understanding of the CDA's statutory scheme, this very journal published a contemporaneous article in 1997 discussing Section 230's defensive limitations.[213] In the article, Diane Roberts writes, "[t]he Telecommunications Act explicitly relieves on-line service providers from liability for the use of obscene language, *except when the provider knowingly permits obscene communications*."[214] This dialectic between the parameters of Section 223 liability and Section 230 immunity was also captured by the district court preceding the Supreme Court's *Reno v. ACLU* decision. The

205 H. REP. NO. 104-458, at 188 (1996) (Conf. Rep.).
206 *Id.*
207 *Id.*
208 SENATE BACKPAGE HEARING, *supra* note 5, at 8.
209 47 U.S.C. § 230(e)(1).
210 *Cf.* 47 U.S.C. § 207 (1934) (enabling private litigants claiming to be damaged by violations of provisions of this chapter to bring suit in federal court or make a complaint to the FCC), *contra* DiMeo v. Max, 433 F. Supp. 2d 523, 531 (2006) (ignoring 47 U.S.C. § 207 and stating "[a]t the threshold, DiMeo [Plaintiff] bases Count Two on a *criminal* statute, and he does not even try to show that § 223(a)(1)(3) provides a private right of action.").
211 H.R. REP. NO. 104-458, at 185 (1996).
212 *See supra* Part II.B.
213 Diane Roberts, *On the Plurality of Ratings*, 15 CARDOZO ARTS & ENT. L.J. 105, 124 (1997).
214 *Id*. (emphasis added).

district court tangentially observed:

> The resolution of the tension between the scope of "telecommunications device" and the scope of "interactive computer service" as defined in . . . §230(a)(2) . . . must await another day. It is sufficient for us to conclude that the exclusion of §223(h)(1)(B) [an interactive computer service] is probably a narrow one . . . insulating an interactive computer service from criminal liability under the CDA but not insulating users who traffic in indecent and patently offensive materials on the Internet through those services.[215]

Hence, before the advent of *Zeran*, the idea that Section 230 clearly dictated an ISP's unbounded immunity, regardless of the material within a communication or level of notice to the ISP, would have been "difficult to discern."[216]

Strengthening the case against an entity like Backpage are the initial reasons behind Section 223's legislation, which ultimately catalyzed the writing of Section 230: the protection of children.[217] It is quite astounding that a bill that was initially drafted in order to protect children from obscenity and indecency online[218] is now being used against the very class the statute intended to protect.[219] This is a complete subversion of the original congressional intent.

This inconsistency in the history and application of the law forces the inquiry as to why Section 230 has seemingly never been read in tandem with Section 223 by courts. A possible answer is that Section 223's constitutionality has come into question multiple times. *Reno v. ACLU* challenged and invalidated Section 223(a)(1) and Section 223(d) of the CDA.[220] "In response to the Court's decision in *Reno*, Congress passed COPA," the Child Online Protection Act,[221] as an attempt to amend Section 223.[222] The Supreme Court affirmed an order granting a

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215 Am. Civil Liberties Union v. Reno, 929 F. Supp. 824, 861 n. 5 (1996), *aff'd*, 521 U.S. 844 (1997).

216 Zeran v. Am. Online, Inc., 129 F.3d 327, 330 (4th Cir. 1997) (stating that "[t]he purpose of [Section 230's] statutory immunity is not difficult to discern.").

217 *See supra* Part I.A.

218 *See Reno*, 521 U.S. at 886 (O'Connor, J. concurring) (explaining that "the undeniable purpose of the CDA is to segregate indecent material on the Internet into certain areas that minors cannot access"); *Senate Tech Hearing*, *supra* note 26, at 1 (statement of Sen. Grassley) ("Fundamentally, the controversy this committee faces today is about how much protection we are willing to extend to children. . . . But enter the Internet and other computer networks. Suddenly, now not even the home is safe"); 142 CONG. REC. S707 (daily ed. Feb. 1, 1996) (statement of Sen. Coats) ("Childhood must be defended by parents and society as a safe harbor of innocence. . . . But this foul material on the internet invades that place and destroys that innocence.").

219 SENATE BACKPAGE HEARING, *supra* note 5, at 7–10.

220 *See supra* Part II.A, discussing Reno v. ACLU.

221 Ashcroft v. Am. Civil Liberties Union, 542 U.S. 656, 661 (2004).

222 *See* H.R. REP NO. 105-775, at 1 (1998) (Conf. Rep.) (amending "section 223 of the Communications Act of 1934 to require persons who are engaged in the business of selling or transferring, by means of the World Wide Web, material that is harmful to minors to restrict

preliminary injunction against the enforcement of COPA, or 47 U.S.C. § 231.[223] Consequently, Section 223's tenuous validity might have forced the legal community to shy away from the statute's similarity and relevance with Section 230. Nonetheless, such problems have no bearing on the validity of such a statutory construction. "A statute need not be valid and existing to be construed *in pari materia* with ambiguous legislation. Questions relating to a statute's meaning are independent from issues concerning its validity"; even unconstitutional legislation may be used in order to ascertain legislative intent.[224]

It is undoubtedly certain that Congress intended Section 230's scope to be limited when reading Sections 223 and 230 together or, at the very least, not broad enough to encompass the activities of a bad actor like Backpage. Otherwise, portions of Section 223 would be rendered superfluous,[225] which is a highly unlikely prospect. Therefore, Section 223's ambiguously passed text and legislative history can—and should—be utilized to discern the confines of Section 230's immunizing reach. Incontrovertibly, Section 223 establishes that Congress intended Section 230's immunity for ISPs to end where Section 223's liability for conspiring entities—like Backpage—begins. Only then does Section 230(c)'s Good Samaritan provision make sense. In addition, the joint reading illuminates the reason why Congress included in Section 230 a policy goal like "to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity,"[226] something more reminiscent of Section 223's "Obscene or Harassing Use of Telecommunications Facilities" text.[227] Both sections are part of an overall statutory scheme, requiring a supplemental reading in order to fully harmonize the text.

D. *Argument #2—Backpage Peddles in Non-Information*

Even without Section 223, another assault may be leveled against bad-acting ISPs by focusing on the nature of the material published. For Section 230's lack of publisher or speaker status to statutorily launch, "information" must be exchanged.[228] Courts have mostly ignored

access to such material by minors").

223 *Ashcroft v. Am. Civil Liberties Union*, 542 U.S. at 673.

224 2B SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 51:4 (7th ed. 2007).

225 *Cf.* 47 U.S.C. 223(d)(2) (2013) (prohibiting a "telecommunications facility" from facilitating sexual acts online against minors would be rendered entirely superfluous through § 230 immunity). "It is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." Duncan v. Walker, 533 U.S. 167, 174 (2001) (internal quotations omitted).

226 47 U.S.C. § 230(b)(5).

227 47 U.S.C. § 223.

228 *See* 47 U.S.C. § 230(c)(1) ("No provider or user of an interactive computer service shall be treated as the publisher or speaker of any *information* provided by another information content

analyzing this term within a CDA analysis, opting to usually focus on the term "provide," despite the ambiguity surrounding whether information is being used in a technical (i.e., "data") or general (i.e., "knowledge") sense within the statute.[229] Nevertheless, this term is not defined within the section and material must technically belong within the purview of "information" as understood by Section 230 in order for a litigant to take shelter under the statute's immunization. Therefore, if Backpage's advertisement were found to be outside the statutorily defined parameters of "information," the website would not escape liability so easily.

Following a popular canon of construction, a good starting point to understand "information" in Section 230's context is to look for clues within the statute's definitions section: Section 230(f).[230] Although it does not reference solely information, the statute defines an interactive computer service as "any *information service*, system, or access software provider."[231] The term "information service" is referenced in the definitions section of the Telecommunications Act, Section 153, which "[f]or the purposes of this chapter" should be used "unless the context otherwise requires,"[232] and includes "electronic publishing,"[233] a term including online publishing.[234] When cross-referencing "electronic publishing" with its definition within 47 U.S.C. § 274, the word "information" is distilled amongst other subclasses, describing the dissemination of:

> news (including sports); entertainment (other than interactive games); business, financial, legal, consumer, or credit materials; editorials, columns, or features; advertising; photos or images; archival or research material; legal notices or public records;

provider") (emphasis added).

229 Wu, *supra* note 45, at 334 ("The key statutory term, largely ignored by courts and commentators up to now, is 'information.'").

230 *See* CPSC v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980) (dictating "the familiar canon of statutory construction that the starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive."); 47 U.S.C. § 230(f).

231 47 U.S.C. § 230(f)(2) (emphasis added).

232 47 U.S.C. § 153; *see also* In the Matter of Fed.-State Jt. Bd. on Universal Serv., 13 F.C.C. Rcd. 11501 (F.C.C. 1998) ("All of the specific mandates of the 1996 Act depend on application of the statutory categories established in the definitions section. The 1996 Act added or modified several of the definitions found in the Communications Act of 1934, including . . . 'information service'").

233 47 U.S.C. § 153(24).

234 *See* Shawn G. Pearson, *Hype or Hypertext? A Plan for the Law Review to Move into the Twenty-First Century*, 1997 UTAH L. REV. 765, 776 (1997) ("Electronic publishing is the concept of disseminating scholarly writing over the Internet. The advent of the World Wide Web has made this idea a reality."); Richard J. Zecchino, *Could the Framers Ever Have Imagined? A Discussion on the First Amendment and the Internet*, 1999 L. REV. MICH. ST. U. DET. C.L. 981, 989 (1999) (explaining that "maintaining a web page can be regarded as a type of electronic publishing").

> scientific, educational, instructional, technical, professional, trade, or other literary materials; or other . . . *similar information*.[235]

Following a useful canon, "when a list of two or more descriptors is followed by more general descriptors, the otherwise wide meaning of the general descriptors must be restricted to the same class, if any, of the specific words that precede them."[236] Hence, when endeavoring to ascertain how "information" is being used specifically within Section 274(h) and the Telecommunications Act context, it necessarily involves finding a common thread between the more specific genres preceding its use, like research materials, legal notices, and business or financial features. The terms seem to manifest a common denominator implying a purposive, utilitarian, and socially valuable commonality for the overall genre.

This construction is reinforced when referring to the exceptions section of what constitutes "electronic publishing," Section 274(h)(2), which indirectly references a famous antitrust case, *U.S. v. AT&T*,[237] a foundational opinion ultimately serving as a catalyst and first draft for the Telecommunications Act.[238] The *AT&T* Court touches upon the (then) infancy status of electronic publishing, and its competition with other sources of information, such as "traditional print, television, and radio media; indeed, it has the potential, in time, for actually replacing some of these methods of disseminating information."[239] The Court proceeds to explicitly define information access, information service, and finally, information. "'Information' means *knowledge or intelligence* represented by any form of writing, signs, signals, pictures,

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235 47 U.S.C. § 274(h)(1).

236 ROBERT KATZMANN, *supra* note 168, at 50.

237 47 U.S.C. 274(h)(2)(A) accepts "information access," as defined by the "AT&T Consent Decree." 47 U.S.C. § 153(4) elaborates, "[t]he term 'AT&T Consent Decree' means the order entered August 24, 1982, in the antitrust action styled United States v. Western Electric, Civil Action No. 82–0192, in the United States District Court for the District of Columbia, and includes any judgment or order with respect to such action entered on or after August 24, 1982." The case referenced above was previously named United States v. Am. Tel. and Tel. Co., 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom.* Maryland v. United States, 460 U.S. 1001 (1983), and *amended sub nom.* United States v. W. Elec. Co., Inc., 714 F. Supp. 1 (D.D.C. 1988), *aff'd in part, rev'd in part sub nom.* United States v. W. Elec. Co., 900 F.2d 283 (D.C. Cir. 1990), and *modified sub nom.* United States v. W. Elec. Co., Inc., 890 F. Supp. 1 (D.D.C. 1995), *vacated*, 84 F.3d 1452 (D.C. Cir. 1996).

238 *See generally* SBC Commun., Inc. v. FCC, 154 F.3d 226, 230–31 (5th Cir. 1998) ("AT&T ultimately conceded . . . eventually settl[ing] with the government in what became known as the AT&T Consent Decree or Modified Final Judgment ('MFJ'). Under the MFJ, AT&T was required to divest itself of its twenty-two local exchange subsidiaries, which became known as the Bell Operating Companies or 'BOCs.' . . . Congress soon became skeptical of this unusual title of judicial nobility, and ultimately spent many long and contentious years in drafting a system of comprehensive telecommunications regulation to replace and supplement the MFJ. On February 8, 1996, President Clinton executed these legislative labors into law as the Telecommunications Act of 1996 (the 'Act').").

239 *Am. Tel. & Tel. Co*., 552 F. Supp. at 223.

sounds, or other symbols."[240] Classifying a more instructive and narrow view[241] through its contextual use of and comparison between electronic publishing and media outlets and its later explicated definition, the *AT&T* court's definition resolves any lingering ambiguities. Information, as understood by the CDA, must add intellectual value.

Moreover, such a reading makes sense in light of how Congress fashioned the CDA and its speech regulation: acutely aware of Supreme Court precedent regarding the First Amendment,[242] which, in the Court's words, "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public"[243] and ensures the paramount public interest of free flow of such information.[244] "[I]t is the conveying of *information* that renders [an item] 'speech' for purposes of the First Amendment."[245] There are certain select categories that are outside the protective ambit of the First Amendment—such as obscenity[246]—because they present negligible social value and are outweighed by society's strong interest in maintaining morality.[247] More specifically, obscenity is "not in any proper sense communication of information or opinion," thereby undeserving of the First Amendment's immunization,[248] including certain species of sexual pandering

> [w]here an exploitation of interests in titillation by pornography is shown with respect to material lending itself to such exploitation through pervasive treatment or description of sexual matters, such evidence may support the determination that the material is obscene

240 *Id.* at 229.

241 *Cf. id.* at 223, 229. *But see* Wu, *supra* note 45, at 335 ("The relevant meaning of 'information' is thus not 'facts' or 'data,' but rather 'message' or 'communication.' What we want to know is not whether these are someone else's facts, but whether this is someone else's message."); Green v. Am. Online, Inc., 318 F.3d 465, 471 (3d Cir. 2003) (rejecting the "use of the term 'information' [as] restricted to 'communication or reception of knowledge or intelligence, and not an unseen signal that halts someone's computer,' and that Congress would have defined the term more technically if it had intended anything beyond the word's most common meaning.").

242 *Cf.* H. REP. NO. 104-458, at 188 (1996) (Conf. Rep.) (referencing e.g. Sable Commc'ns of Cal., Inc. v. FCC, 492 U.S. 115 (1989) (maintaining government has a compelling interest to shield minors from inappropriate material in spite of First Amendment); FCC v. Pacifica Found., 438 U.S. 729 (1978) (introducing indecency test)).

243 Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241, 252 (1974).

244 Pell v. Procunier, 417 U.S. 817, 832 (1974); *Miami Herald*, 418 U.S. at 245.

245 Universal City Studios, Inc. v. Corley, 273 F.3d 429, 447 (2d Cir. 2001) (emphasis added).

246 *See* Chaplinsky v. State of New Hampshire, 315 U.S. 568, 572 (1942) ("These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace."); Ashcroft v. Free Speech Coalition, 535 U.S. 234, 246 (2002) ("The freedom of speech has its limits; it does not embrace certain categories' of speech, including defamation, incitement, obscenity, and pornography produced with real children.").

247 *Chaplinsky*, 315 U.S. at 572.

248 *Id.* (quoting Cantwell v. Connecticut, 310 U.S. 296, 309 (1940)).

> even though in other contexts the material would escape such condemnation.[249]

Notably, the Court describes the object of obscenity as "material" rather than "information" or "informational material"—consistent with Congress's decades-old classification,[250] consequently implying that material attempting to sexually pander is *per se* not information.[251] Applying such an interpretation, Backpage's sexually rife advertisements fall squarely outside of this definition.

E. *The Thorny Context of the CDA's Hurried Passing*

As briefly discussed above,[252] the CDA became law when the Internet was a sapling. According to one senator's testimony at the time of the CDA's passing, most senators did not know exactly how to access the Internet[253] or what an "internet chat room" referenced.[254] Much of the Internet's potential, at the time, was unknown and dormant.

The state of the Internet has dramatically changed between then and 2019. In today's technologically inundated age, about 3.58 billion

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249 Ginzburg v. United States, 383 U.S. 463, 476 (1966).

250 *See* 18 U.S.C. § 1461 (1994) (making a distinction between "information" and "obscene material" and prohibiting the use of the mail service to send every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance, and every written or printed card, letter, circular, book, pamphlet, advertisement, or *notice of any kind giving information*, directly or indirectly, where, or how, or from whom, or by what means any of such mentioned matters, articles, or things may be obtained or made, or where or by whom any act or operation of any kind for the procuring or producing of abortion will be done or performed). The word "information" is absent for the prohibition discussed in 47 U.S.C. § 223. This is also in line with the Berman Amendment, a piece of legislation, passed two years before the CDA, which checked presidential power to prohibit "informational material" from being transacted through enemy countries in order to preserve the First Amendment. *See* Kalantari v. NITV, Inc., 352 F.3d 1202, 1205–07 (9th Cir. 2003); H.R. REP. NO. 103-482, at 97 (1994) (Conf. Rep.) ("It is the sense of the Congress that the President should not restrict travel or exchanges for informational, educational, religious, cultural, or humanitarian purposes or for public performances or exhibitions, between the United States and any other country.").

251 The Supreme Court of Nevada, in *Princess Sea Industries. v. State, Clark County*, had to decide whether regulating advertisements concerning escort services violated First Amendment protections. Answering negatively, one Justice clearly delineated such sexual advertisements as outside the bounds of information: "The speech at hand is due little, if any protection. *It involves entertainment, not information* or ideas." Princess Sea Indus. v. State, Clark Cty., 97 Nev. 534, 543 (Nev. 1981) (Manoukian, J. concurring); *see also* United States v. Playboy Entm't Group, Inc., 529 U.S. 803, 831 (2000) ("We have recognized that commercial entities which engage in 'the sordid business of pandering' by 'deliberately emphasiz[ing] the sexually provocative aspects of [their nonobscene products], in order to catch the salaciously disposed,' engage in constitutionally unprotected behavior.").

252 *See supra* Part II.A, quoting Justice Stevens' description of the fledgling Internet.

253 *See Senate Tech Hearing*, *supra* note 26, at 8 (statement of Sen. Leahy) ("[M]ost of the Senators who voted [for Exon-Coats] would not have the foggiest idea how to get on the Internet in the first place. They do not use it. They do not have any idea of how to get on it. They would have to have their staffs show them how to do it.").

254 *See id.* at 99 (statement of Mr. Burrington) (explaining Internet chat rooms to the Committee on the Judiciary at the hearing).

people use the Internet worldwide,[255] mushrooming the *Reno v. ACLU* court's description of the Internet in 1996.[256] About 75% of the United States currently consumes Internet-based material.[257] By and large, American society today is immersed with the Internet and rudimentarily understands its utility and hazards through firsthand use. The Internet is a ubiquitous staple of today's society. This cannot, by comparison, be said of the Congress that passed the CDA; they certainly were not surrounded by the advanced online technology that pervades American society today. It is therefore fair to argue, at least on a familiarity standpoint, that the CDA's legislators were ill equipped to handle such indelible and penetrative law—at least relative to a later Congress—especially when tackling an ever-advancing entity like the Internet.

Exacerbating this already subpar drafting milieu was the apparent haste to pass the Telecommunications Act. These sentiments were reiterated by a handful of members of the House before the bill's passage.[258] One member went so far as to say that "[m]ost Members of the House ha[d] not had the opportunity to study this bill."[259] Strongly substantiating the notion, another member wrongly lamented the absence of the Cox-Wyden Amendment within the Telecommunications Act[260]—despite the Amendment's glaring presence and passage in 1996, eventually becoming the topic of this Note's discussion. The CDA, consequently, entered into the legal landscape in a haphazard, forced, and even arguably comical fashion.

Such a comical passage of legislation regulating speech is

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255 *Number of Internet Users Worldwide 2005-2017*, STATISTA, https://www.statista.com/statistics/273018/number-of-internet-users-worldwide (last visited Jan. 16, 2019).

256 *See supra* Part II.A.

257 *Internet Usage in the United States*, STATISTA, https://www.statista.com/topics/2237/internet-usage-in-the-united-states (last visited Jan. 16, 2018).

258 *See* 142 CONG. REC. H1148 (daily ed. Feb. 1, 1996) (statement of Rep. Schroeder) ("I was on the conference committee and at 7:40am this morning [the day of the bill's passage] was the first time I got the full bill . . . I mean, I figure I am getting my pay, and I am getting paid to be here, and to be here and study this, and I would hope that we know what is in it before we vote for it. . . . What we are going to do is put on a high-technology gag rule with criminal penalties. Have a nice day."); *id.* (statement of Rep. Slaughter) (specifically referencing Section 223 and cautioning, "we are not sure what we are unleashing here."); *id.* (statement of Rep. Jackson-Lee) ("The conference committee members have not had an opportunity to adequately review these technical changes and the report language. This bill will revolutionize the telephone, long-distance, cable, and broadcast industries and have a far-reaching economic impact upon our country.").

259 *Id.* (statement of Rep. Jackson-Lee).

260 *Cf. Id.* (statement of Rep. Woolsey) ("I do not believe that government regulation of the information superhighway is the best way to solve the problem. That is why I voted for an amendment to the House-passed bill that would have allowed computer users and computer network providers to police the Internet, rather than the Federal government [the Cox-Wyden Amendment]. This amendment *would have* . . . I sincerely hope that Congress *will consider* legislation later this year to institute this more reasonable approach to protecting children from indecent material.") (emphasis added).

problematic. The Supreme Court has unambiguously stated that inherent with regulating sexually explicit content are hazards to First Amendment guaranties, especially when the legislation is drafted ambiguously and hastily.[261] The drafting process that Congress undertakes has been repeatedly analyzed when ascertaining the validity and care of crafting a statute regulating speech.[262] The Supreme Court has taken note of the inadequacy of the legislative drafting of the CDA: "[P]articularly in the light of the absence of any detailed findings by the Congress, or even hearings addressing the special problems of the CDA, we are persuaded that the CDA is not narrowly tailored if that requirement has any meaning at all."[263]

This lack of narrow tailoring led the Court to conclude that Section 223's regulation of speech is unconstitutional, launching the statute's ensuing severability. Such a severability analysis is applicable in light of Section 230's ambiguity with Section 223's passage and the overall nature of the CDA's scheme in attempting to protect children from inappropriate material. "In choosing between alternatives, a court should attempt to accommodate as fully as possible the policies and judgments expressed in the statutory scheme *as a whole*. . . . It should not use its remedial powers to circumvent the intent of the legislature."[264] The question is one of legislative intent: "Would Congress still 'have passed' § [230] 'had it known' that the remaining 'provision[s were] invalid'?"[265] Congress could not have intended for Section 230 to function independently of the other child protections provided by the CDA,[266] and therefore should not operate as a valid part of law—or at the very least, be reconciled with other parts of the CDA.

CONCLUSION

Notwithstanding the passage of twenty years, the problems that the *Zeran* court created have persisted. The court's broad immunizing

261 *See* Manual Enters., Inc. v. Day, 370 U.S. 478, 500 (1962) (Brennan, J. concurring) ("The area of obscenity is honeycombed with hazards for First American guaranties, and the grave constitutional questions which would be raised by the grant of such a power should not be decided when the relevant materials are so ambiguous as to whether any such grant exists."); Sable Commc'n. of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989) ("It is not enough to show that the Government's ends are compelling; the means must be carefully tailored to achieve those ends.").

262 *See, e.g.*, United States v. Playboy Entm't Group, Inc., 529 U.S. 803, 822 (2000); Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180, 198 (1997); *Sable Commc'n. of Cal.*, 492 U.S. at 129.

263 Reno v. Am. Civil Liberties Union, 521 U.S. 884, 879 (1997).

264 Califano v. Westcott, 443 U.S. 76, 94 (1979).

265 Denver Area Educ. Telecomm. Consortium, Inc. v. FCC, 518 U.S. 727, 767 (1996).

266 *Reno*, 521 U.S. at 894 (O'Connor, J. concurring) ("There is *no question* that Congress intended to prohibit certain communications between one adult and one or more minors. . . . There is also *no question* that Congress would have enacted a narrower version of these provisions had it known a broader version would be declared unconstitutional.") (emphasis added).

interpretation is as relevant today as it was during the Dot Com Era. As of this writing, technology companies are attempting to incorporate Section 230 into the North American Free Trade Agreement's official terms, expanding the immunity that tech companies possess beyond the United States' borders.[267] Tech behemoths like Facebook, Google, and Twitter are taking refuge in the statute despite their alleged involvement in Russian meddling during the 2016 U.S. presidential election.[268] With Congress slowly acting to legislate, these problems will unnecessarily continue, unless Section 230 is finally read within its proper context. Congressional intent undeniably shows that the statute's scope must be cabined in light of properly reading Section 230 with its accompanying statutes and legislative history, clearly denying any sort of protections for bad actors.

Peter Polack

[267] Kevin Madigan, *NAFTA Shouldn't Include Outdated Internet Safe Harbors*, THE HILL (Jan. 27, 2018, 12:30 P.M.), http://thehill.com/opinion/technology/370956-nafta-shouldnt-include-outdated-internet-safe-harbors ("In advance of the latest round of negotiations, a group of organizations including the Electronic Frontier Foundation and Public Knowledge joined several professors in a letter urging the NAFTA delegation to adopt the protections afforded to internet platforms and intermediaries found in Section 230 of the Communications Decency Act.").

[268] Li Zhou, Nancy Scola & Ashley Gold, *Senators to Facebook, Google, Twitter: Wake up to Russian Threat*, POLITICO (Nov. 1, 2017, 10:08 A.M.) https://www.politico.com/story/2017/11/01/google-facebook-twitter-russia-meddling-244412 (reprimanding their response to the Russian meddling, Sen. Wyden described the three companies' behavior "especially troubling, because the same federal law that allowed your companies to grow and thrive, the Section 230 law, gives you absolute legal protection to take action against those who abused your platform and damaged our democracy.").