HOLDING INTERNET ADVERTISING PROVIDERS ACCOUNTABLE FOR SEX TRAFFICKING: IMPEDIMENTS TO CRIMINAL PROSECUTION AND A PROPOSED RESPONSE

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> [T]here is nothing inevitable about trafficking in human beings. That conviction is where the process of change really begins—with the realization that just because a certain abuse has taken place in the past doesn't mean that we have to tolerate that abuse in the future.
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> John F. Kerry, Secretary of State[1]

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[1] U.S. Department of State, *Trafficking in Persons Report.* A/GIS/GPS, 2016

I. INTRODUCTION

Online advertising for escort and adult services has become the new marketplace for sex trafficking, providing a convenient and inexpensive forum for sex traffickers to connect with customers and evade law enforcement.[2] This venue has expanded the market for traffickers and made it easier for transactions to go unnoticed.[3] Human sex trafficking is a hidden crime and victims are often hard to identify.[4] The ability to advertise and make appointments online further isolates victims, keeps transactions off the street and out of sight, and makes it much easier for pimps to connect with customers.[5] Providers of internet advertising services like www.Backpage.com (Backpage) are benefiting from sex trafficking, including trafficking of minors.[6]

State and federal attempts to address the expanding use of the internet for advertising victims of sex trafficking have had minimal impact. State statutes attempting to criminalize the advertising of minors for sex have

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[2] STAFF OF S. COMM. ON HOMELAND SEC. AND GOV. AFFAIRS, PERMANENT SUBCOMM. ON INVESTIGATIONS, 115TH CONG., REP. ON BACKPAGE.COM'S KNOWING FACILITATION OF ONLINE SEX TRAFFICKING 4-5 (2017) (citing URBAN INSTITUTE, ESTIMATING THE SIZE AND STRUCTURE OF THE UNDERGROUND COMMERCIAL SEX ECONOMY IN EIGHT MAJOR US CITIES 234 (2014), https://www.urban.org/research/publication/estimating-size-and-structure-underground-commercial-sex-economy-eight-major-us-cities/view/full_report) [hereinafter S. COMM. ON HOMELAND SEC. AND GOV. AFFAIRS REPORT].

[3] SHARED HOPE INTERNATIONAL, WHITE PAPER: ONLINE FACILITATION OF DOMESTIC MINOR SEX TRAFFICKING 4,1 (August 2016), http://sharedhope.org/wp-content/uploads/2014/09/Online-Faciliator-White-Paper-August-2014.pdf.

[4] U.S. Department of Justice, *Child Exploitation and Obscenity Section, Sex Trafficking*, U.S. DEP'T OF JUSTICE, http://www.justice.gov/criminal/ceos/subjectareas/prostitution.html (last visited Aug. 25, 2017).

[5] Megan Annitto, *Consent, Coercion, and Compassion: Crafting a Commonsense Approach to Commercial Sexual Exploitation of Minors,* 30 YALE L. & POL'Y REV. 1, 16 (2011); U.S. Department of Justice, *supra* note 4; *see also* S. COMM. ON HOMELAND SEC. AND GOV. AFFAIRS REPORT, *supra* note 2.

[6] S. COMM. ON HOMELAND SEC. AND GOV. AFFAIRS REPORT, *supra* note 2; SHARED HOPE INTERNATIONAL, *supra* note 3, at 1.

been successfully blocked by constitutional challenges based on the Supremacy Clause,[7] the First Amendment,[8] and the Commerce Clause.[9] Recent federal legislation aimed at criminal prosecution of advertisers of sex trafficking may not be effective to address victims' needs or the growing use of the internet to facilitate trafficking, and will likely be challenged on constitutional grounds.[10]

This paper summarizes the difficulties with current legal approaches to combatting sex trafficking on the internet and recommends the additional strategy of employing civil litigation. Part I of this article will provide background on the use of the internet to advertise victims of sex trafficking, the statutory framework in place, and current efforts to hold providers of internet advertising services accountable. Part II will explore potential limitations of the new federal Stop Advertising Victims of Exploitation Act of 2015 (SAVE Act).[11] Part III will propose an alternative to state and federal criminal prosecution by amending Section 230 of the Communications Decency Act (CDA)[12] to allow trafficking victims to pursue federal civil suits against internet advertising providers.[13]

PART II

A. *Internet Advertising and Sex Trafficking*

The use of the internet for advertising sex trafficking victims has become increasingly prevalent in recent years. The National Center for Missing and Exploited Children attributes increased sex trafficking of minors directly to the increase in internet advertising.[14] According to a recent survey of sex

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[7] U.S. CONST. art. VI, cl. 2; *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, 389 (2014).

[8] U.S. CONST. amend. I.

[9] U.S. CONST. art. I, § 8, cl. 3. This paper will not address the issue of the dormant Commerce Clause. *See* Ryan Dalton, *Abolishing Child Sex Trafficking on the Internet: Imposing Criminal Culpability on Digital Facilitators,* 43 U. MEM. L. REV. 1097, 1136-40 (2013) for discussion of Commerce Clause concerns.

[10] Stop Advertising Victims of Exploitation Act of 2015, Pub. L. No. 114-22, §118 (b)(1) (2015) (amending 18 U.S.C. § 1591 (2015)); *see infra* notes 67-141, 211-13 and accompanying text.

[11] Stop Advertising Victims of Exploitation Act of 2015, Pub. L. No. 114-22, §118 (b)(1) (2015) (amending 18 U.S.C. § 1591 (2015)); *see infra* notes 59-141 and accompanying text.

[12] 47 U.S.C. § 230 (1998).

[13] 18 U.S.C. § 1595 (2015).

[14] S. COMM. ON HOMELAND SEC. AND GOV. AFFAIRS REPORT, *supra* note 2, at 4 (citing Testimony of Yiota G. Souras, Senior Vice President & General Counsel, National Center for

trafficking survivors conducted by the Thorn organization, 63% of survivors surveyed reported being advertised on the internet.[15] Multiple websites were mentioned, with Backpage being the most popular website.[16] The more recently victims were recruited into the sex trade, the more prevalent the use of the internet was in facilitating the transactions.[17] Recent attention has been focused on shutting down the adult section of Backpage, as it was the largest source of online advertising of victims of sex trafficking.[18] As a result of increasing pressure, including a Senate investigation, Backpage removed the adult section of its site from the United States market in January 2017, claiming censorship.[19] However, shutting down advertising sites one by one may not be the most efficient or effective strategy. Backpage customers are already adapting to the elimination of the adult section by posting ads in other sections, such as dating and massage.[20] In addition, traffickers can easily move to other classified advertising sites,[21] and online advertising for sex has already migrated to chat rooms like USA Sex Guide and other more general websites such as Facebook.[22] It has been difficult to hold providers of internet advertising services accountable for the trafficking that occurs on these sites due to the current framework of federal law, which insulates

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Missing & Exploited Children, before Permanent Subcommittee on Investigations, at 2 (Nov. 19, 2015)); Silvano, *supra* note 7, at 382-83.

[15] THORN & VANESSA BOUCHE, A REPORT ON THE USE OF TECHNOLOGY TO RECRUIT, GROOM, AND SELL DOMESTIC MINOR SEX TRAFFICKING VICTIMS 18-19 (2015), https://27l5111qnwey246mkc1vzqg0-wpengine.netdna-ssl.com/wp-content/uploads/2015/02/Survivor_Survey_r5.pdf.

[16] *Id.* (sites included sugardaddy.com, cityvibe.com, erosguide.com, modelmayhem.com, bangbros.com, mofos.com, fabscout.com, friendsfinder.com, myredbook.com, usasexguide.com, tna.com, backpage.com, facebook.com, and craigslist.com); *see also* SHARED HOPE INTERNATIONAL, *supra* note 3.

[17] THORN, *supra* note 15, at 19.

[18] *See* Backpage.com v. Dart, 807 F.3d 229, 231 (7th Cir. 2015) (issuing injunction against Sheriff Dart on First Amendment grounds from threatening credit card companies who provide services to Backpage); Dune Lawrence, *Fighting for the Right to Run Sex Ads,* BLOOMBERG BUSINESS WEEK (Sept. 29, 2016), https://www.bloomberg.com/news/articles/2016-09-29/fighting-for-the-right-to-run-sex-ads; S. COMM. ON HOMELAND SEC. AND GOV. AFFAIRS REPORT, *supra* note 2, at 4.

[19] Dune Lawrence, *Backpage.com Responds to Senate Report by Labeling Adult Ads 'Censored'*, BLOOMBERG BUSINESS WEEK (Jan. 10, 2017), https://www.bloomberg.com/news/articles/2017-01-10/backpage-com-responds-to-senate-report-by-labeling-adult-ads-censored.

[20] Timothy Williams, *Backpage's Sex Ads Are Gone. Child trafficking? Hardly.*, N.Y. TIMES (March 11, 2017), https://www.nytimes.com/2017/03/11/us/backpage-ads-sex-trafficking.html.

[21] Dalton, *supra* note 9, at 1109-10.

[22] THORN, *supra* note 15.

interactive computer service providers from liability for third party content.[23] As the court stated in *Jane Doe No. 1 v. Backpage.com,*

> Congress addressed the right to publish the speech of others in the Information Age when it enacted the Communications Decency Act of 1996 . . . . Congress later addressed the need to guard against the evils of sex trafficking when it enacted the Trafficking Victims Protection Reauthorization Act of 2008 . . . . These laudable legislative efforts do not fit together seamlessly . . . .[24]

B. *Federal Sex Trafficking Legislation*

The Trafficking Victims Protection Act of 2000 and subsequent reauthorizations (TVPRA) represent an effort to provide a comprehensive federal statutory response to the problem of human trafficking.[25] The TVPRA is codified in various sections of the United States Code, and provides for many forms of relief and benefits for trafficking victims, as well as criminal and civil penalties for traffickers.[26] "Sex trafficking of children or by force, fraud, or coercion" is a federal crime, pursuant to Section 1591 of Title 18 (Section 1591), the TVPRA criminal sex trafficking provision.[27] Section 1591 provides,

> (a) Whoever knowingly-
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> 1) in or affecting interstate or foreign commerce, . . . recruits, entices, harbors, transports, provides, obtains, advertises, maintains, patronizes, or solicits by any means a person; or
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> 2) benefits, financially or by receiving anything of value, from participation in a venture which has engaged in an act described in violation of paragraph (1), knowing, or, except where the act constituting the violation of paragraph (1) is advertising, in reckless disregard of the fact, that means of force, threats of force, fraud, coercion described in subsection (e)(2), or any combination of such means will be used to cause the person to engage in a commercial sex act, or that the person has not attained the age of 18 years and will be caused to engage in a commercial sex act, shall be

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[23] 47 U.S.C. § 230 (1998); *see infra* notes 35-47, 145-47 and accompanying text.

[24] 817 F.3d 12, 15 (1st Cir. 2016) (citations omitted).

[25] Trafficking Victims Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (codified as amended in scattered sections of 18 U.S.C. and 22 U.S.C.).

[26] *Id.*

[27] 18 U.S.C. § 1591 (2015).

punished as provided in subsection (b).[28]

Sex trafficking does not require transporting the victim from another country or even across state lines, and there is no requirement of force, fraud or coercion when the victim is a minor.[29] The SAVE Act recently amended Section 1591 to include advertising to the acts that can be prosecuted as sex trafficking.[30] This legislation was a response to the inability of similar state statutes, which restricted online advertising of minor sex trafficking victims, to overcome federal preemption[31] and other constitutional challenges.[32]

The TVPRA also includes Section 1595 of Title 18 (Section 1595), a civil remedy for victims of trafficking,

> (a) An individual who is a victim of a violation of this chapter may bring a civil action against the perpetrator (or whoever knowingly benefits, financially or by receiving anything of value from participation in a venture which that person knew or should have known has engaged in an act in violation of this chapter) in an appropriate district court of the United States and may recover damages and reasonable attorneys fees.[33]

Providers of internet advertising services have avoided liability under Section 1595 by application of Section 230 of the Communications Decency Act (CDA), which protects "interactive computer service" providers from liability for content posted by third parties.[34]

C. *State Criminal Statutes*

States have also had difficulty holding providers of internet advertising services accountable for their participation in sex trafficking due, in part, to federal preemption by the CDA.[35] The federal government has the power

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[28] *Id.*

[29] *Id.*

[30] Stop Advertising Victims of Exploitation Act of 2015, Pub. No. 114-22, §118 (b)(1) (2015) (amending 18 U.S.C. § 1591).

[31] *See infra* notes 35-49 and accompanying text.

[32] *See infra* notes 50-57 and accompanying text; *see also* Backpage.com v. McKenna, 881 F.Supp.2d 1262, 1269 (W.D. Wash. 2012), Backpage.com v. Cooper, 939 F.Supp.2d 805, 818 (M.D. Tenn. 2013), *and* Backpage.com v. Hoffman, No. 13-cv-03952, 2013 WL 4502097, at *7 (D.N.J. 2013).

[33] 18 U.S.C. § 1595 (2015).

[34] 47 U.S.C. § 230 (1998) ("[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."); *see infra* notes 145-47 and accompanying text.

[35] 47 U.S.C. § 230 (1998); *see infra* notes 145-47 and accompanying text.

to preempt state law due to the Supremacy Clause, which states that federal law "shall be the supreme law of the land."[36] Section 230 of the CDA (Section 230) provides that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."[37] The purpose of Section 230 is to promote free speech on the internet by insulating "interactive computer service" (ICS)[38] providers from liability for information posted by a third party "information content provider" (ICP).[39] Section 230 also encourages ICS providers to take voluntary action to control or filter objectionable content without liability for the content allowed or the imperfect effort to filter content.[40] The preemption challenge arises when state law conflicts with Section 230 by attempting to hold providers of internet advertising services liable for content provided by third parties.

District courts in Washington, Tennessee, and New Jersey have addressed the tension between Section 230 and state statutes that criminalize the advertising of sex with minors.[41] In each of the cases (*Backpage.com v. McKenna, Backpage.com v. Cooper,* and *Backpage.com v. Hoffman),* Backpage, the internet advertising provider, successfully challenged new state statutes on preemption grounds and sought injunctive

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[36] U.S. CONST. art. VI, cl. 2; *see* Silvano, *supra* note 7, at 393-96 (discussion of the arguments for and against preemption).

[37] 47 U.S.C. § 230.

[38] *Id.* ("The term 'interactive computer service' means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.")

[39] *Id.* ("The term 'information content provider' means any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service."); *see* Backpage.com v. McKenna, 881 F.Supp.2d at 1271 (citing Batzel v. Smith, 33 F.3d 1018,1029 (9th Cir. 2003)).

[40] *Id.* ("No Provider . . . 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. . .").

[41] WASH. REV. CODE § 9.68A.104 (repealed 2013) ("A person commits the offense of advertising commercial sexual abuse of a minor if he or she knowingly publishes, disseminates, or displays, or causes directly or indirectly, to be published, disseminated, or displayed, any advertisement for a commercial sex act, which is to take place in the state of Washington and that includes the depiction of a minor."); TENN. CODE ANN. § 39-13-315 (2012); N.J. STAT. ANN. § 2C:13-10 (2013).

relief against enforcement by the Attorney General of each state.[42] To grant injunctive relief, the court must find that the plaintiff is likely to succeed on the merits of the claim.[43] Each court found that the statutes in question were in conflict with Section 230 because, when applied to ICS providers such as Backpage, the ICS provider would be treated as "the publisher or speaker" of content provided by third party ICPs.[44] Thus, the state statutes were likely preempted both expressly and impliedly because they were in conflict with the federal statute.[45] The courts in these cases were not ruling directly on the merits of the preemption claim, because Backpage was seeking a preliminary injunction prior to the enforcement of the statutes.[46] Even so, each of the states declined to further enforce or defend the laws in deference to the courts' opinions that the statutes were likely preempted by the CDA.[47]

Attorneys General of forty-nine states have acknowledged the problem of online advertising for sex with minors and the difficulty of prosecuting ICS providers due to Section 230 of the CDA.[48] These Attorneys General requested Congress to amend Section 230 to exclude state criminal statutes from Section 230 immunity, thus allowing state criminal prosecutions to proceed against ICS providers.[49] However, even if the requested amendment were made, it is still unlikely that the state statutes in *McKenna*, *Cooper*, and *Hoffman* would survive because each court also found that the state statutes in question were likely to violate both the Commerce Clause[50] and the First Amendment.[51] The courts found that the particular state

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[42] Backpage.com v. McKenna, 881 F.Supp.2d at 1286-87; Backpage.com v. Cooper, 939 F.Supp.2d 805, 844-45 (M.D. Tenn. 2013); Backpage.com v. Hoffman, No. 13-cv-03952, 2013 WL 4502097, at *12 (D.N.J. 2013).

[43] *McKenna,* 881 F.Supp. 2d at 1269 ("A plaintiff seeking preliminary injunction must establish: (1) that he is likely to succeed on the merits; (2) that he is likely to suffer irreparable harm in the absence of preliminary relief; (3) that the balance of equities tips in his favor; and (4) that an injunction is in the public interest.").

[44] *Id.* at 1271, 1286-87; *Cooper*, 939 F. Supp. 2d at 818, 844-45; *Hoffman*, 2013 WL 4502097, at *12.

[45] *McKenna*, 881 F. Supp.2d at 1271, 1286-87; *Cooper*, 939 F. Supp. 2d at 818, 844-45; *Hoffman*, 2013 WL 4502097, at *12.

[46] *McKenna*, 881 F. Supp.2d at 1271, 1286-87; *Cooper*, 939 F. Supp. 2d at 818, 844-45; *Hoffman*, 2013 WL 4502097, at *12.

[47] *McKenna*, 881 F. Supp.2d at 1271, 1286-87; *Cooper*, 939 F. Supp. 2d at 818, 844-45; *Hoffman*, 2013 WL 4502097, at *12; Backpage.com v. Cooper, No. 3:12-cv-00654, 2013 WL 1249063, at *1-2 (M.D. Tenn. 2013); *see also* Silvano, *supra* note 7, at 377-78, 389.

[48] Letter from State Attorneys Gen. to Members of Congress (July 23, 2013), http://www.ag.state.il.us/ pressroom/2013_07/CDA_Sign_On_Letter.pdf.

[49] *Id.*

[50] *See* Dalton, *supra* note 9, at 1136-40.

[51] *McKenna*, 881 F.Supp.2d at 1275-83; *Cooper*, 939 F. Supp. 2d at 830-40; *Hoffman*,

statutes criminalizing the advertising of minors for sex would likely violate protections afforded by the First Amendment[52] for numerous reasons, including the lack of a sufficient scienter requirement,[53] vagueness,[54] over-breadth,[55] under-inclusiveness,[56] and imposing a content-based restriction on speech without passing a strict scrutiny test.[57] An amendment to Section 230 to allow state criminal prosecution of ICS providers, as proposed by the Attorneys General,[58] would not address these difficult First Amendment problems and would promote inconsistency among the states with respect to laws governing internet advertising.

PART III

A. *The SAVE Act*

The SAVE Act[59] amended Section 1591 of Title 18, the sex trafficking criminal provision of the TVPRA,[60] by adding advertising to the list of

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2013 WL 4502097, at *7-8, *9-12.

[52] *McKenna*, 881 F. Supp.2d at 1275-84; *Cooper*, 939 F. Supp. 2d at 830-40; *Hoffman*, 2013 WL 4502097, at *7-8, *9-12. The First Amendment is applicable to state statutes by virtue of the Fourteenth Amendment, U.S. CONST. amend. XIV, §1 ("No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.")

[53] *McKenna*, 881 F. Supp.2d at 1278 ("knowing" that the person depicted as minor was in fact minor was not required by the statute creating strict liability for this element).

[54] *McKenna*, 881 F.Supp.2d at 1278-80; *Cooper*, 939 F.Supp.2d at 833-36; *Hoffman*, 2013 WL 4502097, at *9-11 (finding that several key terms were not defined such that people could be unsure what is proscribed).

[55] *McKenna*, 881 F.Supp.2d at 1280-84; *Cooper*, 939 F.Supp.2d at 831-33; *Hoffman*, 2013 WL 4502097, at *9-11 (holding that legal as well as illegal ads could be covered by statute).

[56] *Cooper*, 939 F.Supp.2d at 838 ("[t]his Court finds the statute is likely underinclusive because it restricts lawful speech in an effort to address only one narrow aspect of child sex trafficking and, in doing so, singles out purveyors of paid advertisement space only, while leaving providers of free advertisements to escape liability even for ads patently advertising child prostitution").

[57] *McKenna*, 881 F.Supp.2d at 1283 ("A content-based limitation on speech will be upheld only where the state demonstrates that the limitation 'is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.'" (quoting Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983))).

[58] Letter from State Attorneys Gen. to Members of Congress (July 23, 2013), http://www.ag.state.il.us/ pressroom/2013_07/CDA_Sign_On_Letter.pdf.

[59] Stop Advertising Victims of Exploitation Act of 2015, Pub. No. 114-22, §118 (b)(1) (2015) (amending 18 U.S.C. § 1591 (2015)).

[60] Trafficking Victims Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (codified as amended in scattered sections of 18 U.S.C. and 22 U.S.C.).

proscribed acts that can be considered a sex trafficking offense.[61] The purpose of this amendment was to allow federal sex trafficking prosecution of advertisers and those who benefit from advertising trafficking victims, including ICS providers, such as advertising website operators.[62] Section 230 provides an exception to immunity of ICS providers for the enforcement of federal criminal laws.[63] Thus the SAVE Act, a federal criminal statute, is not barred by Section 230[64] and does not generate Commerce Clause concerns.[65] However, the statute must still survive constitutional scrutiny and may be challenging to enforce against ICS providers due to the strict knowledge requirement.[66]

B. *First Amendment*

Although the SAVE Act has not been evaluated on the merits against a First Amendment challenge, the statute did withstand scrutiny in *Backpage v. Lynch*, in which the court considered whether Backpage had standing to satisfy federal subject matter jurisdiction.[67] In *Lynch*, as in *McKenna*, *Cooper* and *Hoffman* (the State Cases), Backpage sought a preliminary injunction to prevent the enforcement of the SAVE Act.[68] The court in *Lynch* granted the government's motion to dismiss, asserting that Backpage lacked standing to bring the suit and therefore did not satisfy federal subject matter jurisdiction.[69] To determine standing, the court discussed whether Backpage suffered an injury-in-fact.[70] "[A] plaintiff satisfies the injury-in-fact requirement where [it] alleges 'an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a

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[61] Stop Advertising Victims of Exploitation Act of 2015, Pub. No. 114-22, §118 (b)(1) (2015) (amending 18 U.S.C. § 1591 (2015)).

[62] H.R. REP. NO. 113-451, at 3-4 (2014).

[63] 47 U.S.C. § 230 (e)(1) (1998) ("Nothing in this section shall be construed to impair the enforcement of any . . . [other] Federal criminal statute.").

[64] 18 U.S.C. § 1591; *see* notes 27-30, 148 and accompanying text.

[65] *See* Dalton, *supra* note 9, at 1136-40.

[66] *See infra* notes 81-139 and accompanying text.

[67] Backpage.com v. Lynch, 216 F.Supp.3d 96, 101 (D.D.C. 2016) ("Article III of the Constitution limits the jurisdiction of federal courts to 'Cases' and 'Controversies.'" (quoting Susan B. Anthony List v. Driehaus, 134 S.Ct. 2334, 2341 (2014), quoting U.S. CONST., art. III, § 2.).

[68] *Lynch*, 216 F.Supp.3d at 98; Backpage.com v. McKenna, 881 F.Supp.2d 1262, 1265 (W.D. Wash. 2012); Backpage.com v. Cooper, 939 F. Supp. 2d 805, 812 (M.D. Tenn. 2013); Backpage.com v. Hoffman, No. 13-cv-03952, 2013 WL 4502097, at *1 (D.N.J. 2013).

[69] *Lynch*, 216 F.Supp.3d at 110.

[70] *Id.* at 102 ("The irreducible constitutional minimum of standing contains three elements: (1) injury in fact; (2) causation; and (3) the possibility of redress by a favorable decision." (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992))).

statute, and there exists a credible threat of prosecution thereunder.'"[71] The court found no injury-in-fact because the activity Backpage intended to engage in, legal advertising for adult or escort services, was not proscribed by the SAVE Act, and the activity prohibited by the act was not constitutionally protected.[72] "The SAVE Act explicitly prohibits advertisements of illegal sex trafficking of a minor or a victim of force, fraud, or coercion... [a]nd there is no doubt that advertisements that promote these types of conduct are not afforded First Amendment protection."[73]

The court distinguished the State Cases and granted the government's motion to dismiss.[74] The court found the SAVE Act different from the state statutes in question because the Save Act only prohibits advertising for illegal activity that has no First Amendment protection, whereas the state statutes arguably covered constitutionally protected content.[75] In addition, the SAVE Act requires a higher level of scienter – actual knowledge that the subject of the advertisement in question is a minor or a victim of force, fraud or coercion.[76] Although the *Lynch* decision found that Backpage's intended legal conduct would not likely fall under the net of the Save Act and that illegal conduct does not receive First Amendment protection, the court was not addressing the merits of a constitutional challenge, as the case was decided on jurisdictional grounds.[77] In addition, the court did not discuss possible constitutional challenges to the SAVE Act that have been successfully raised against state statutes attempting to hold ICS providers accountable for online trafficking.[78] In anticipation of future First Amendment challenges to the SAVE Act, the following analysis considers how a court may treat the SAVE Act differently than the state statutes reviewed in *McKenna*, *Cooper* and *Hoffman*.[79] As forecast by the court in *Lynch*, this paper concludes the SAVE Act is likely to be upheld.[80]

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[71] *Id.* (quoting Susan B. Anthony List v. Driehaus, 134 S.Ct. 2334, 2341 (2014))

[72] *Id.* at 103.

[73] *Id.* (citation omitted).

[74] *Id.* at 105-110.

[75] *Id.*; Backpage.com v. McKenna, 881 F.Supp.2d 1262, 1275 (W.D. Wash. 2012); Backpage.com v. Cooper, 939 F.Supp.2d 805, 828-830 (M.D. Tenn. 2013); Backpage.com v. Hoffman, No. 13-cv-03952, 2013 WL 4502097, at *7-8. (D.N.J. 2013).

[76] *Lynch*, 216 F.Supp.3d at 103, 110 ("where the act constituting a violation of the statute is advertising, a conviction under § 1591(a) requires a "knowing" mens rea standard.").

[77] *Id.* at 100, 102.

[78] *Id.* at 100; *see supra* notes 50-57 and accompanying text.

[79] *See infra* app. 1 (State Statutes "Advertising Commercial Sexual Abuse of a Minor").

[80] *Lynch*, 216 F.Supp.3d at 110.

C. *Content-based Restriction*

The SAVE Act is likely to be challenged as a content-based restriction on speech. "A restriction on speech is content-based if it is not "justified without reference to the content of the regulated speech."[81] The Court in *Cooper* found "the statute at issue here is a clear-cut example of a content-based restriction on speech, as it imposes liability for advertisements solely on the basis that they contain certain proscribed content."[82] Content-based restrictions require the highest level of constitutional scrutiny to overcome a First Amendment challenge because they have the potential to suppress freedom of speech and ideas, especially when they carry heavy criminal penalties.[83] To avoid constitutional infirmity, a content-based restriction must pass the strict scrutiny test, which requires a "compelling state interest" for the restriction and a showing that the statute in question is "narrowly tailored" to protect that interest.[84] In each of the State Cases the courts found that although protecting minors from sexual exploitation was a compelling state interest, the statutes were not the least restrictive method of addressing the problem.[85] The court in *Cooper* was not persuaded to use a less restrictive test for commercial speech, explaining that the statute was not limited to commercial speech, and also suggested that the statute would not likely survive even this lower burden.[86]

The court in *Backpage v. Lynch* did not address the issue of whether the SAVE Act is a content restriction on speech requiring strict scrutiny review.[87] However, this argument is unlikely to succeed because the language of the SAVE Act appears to fall squarely within a category of speech that receives no First Amendment protection – "offers to engage in

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[81] Backpage.com v. Cooper, 939 F.Supp.2d 805, 836 (M.D. Tenn. 2013) (quoting Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984)).

[82] *Id.* at 836.

[83] *Id.* at 836-37.

[84] Backpage.com v. Hoffman, No. 13-cv-03952, 2013 WL 4502097, at *8 (D.N.J. 2013) (quoting Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983)).

[85] Backpage.com v. McKenna, 881 F.Supp.2d 1262,1284; *Cooper*, 939 F.Supp. 2d at 839; *Hoffman*, 2013
WL 4502097, at *9.

[86] *Cooper*, 939 F.Supp.2d at 839 ("Although this Court has concluded that section 39-13-315 regulates both commercial and noncommercial speech—and therefore a content-based standard should apply—the Court finds that even under a commercial speech standard Defendants would not meet their burden to establish the law is adequately tailored to achieve its ends.").

[87] Backpage v. Lynch, 216 F.Supp.3d 96, 110 (D.D.C. 2016) ("[t]his Court lacks the requisite subject matter jurisdiction to consider the merits of Backpage.com's constitutional challenge claims.").

illegal transactions."[88] The *Lynch* court relied on the Supreme Court's decision in *United States v. Williams*, holding provisions of the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today (PROTECT Act) constitutional.[89] In *Williams*, the Court considered language in the PROTECT Act criminalizing pandering and solicitation of child pornography.[90] The lower 11th Circuit court had concluded that the PROTECT Act's pandering language was a content-based restriction requiring strict scrutiny review because it could be applied to both commercial and non-commercial speech.[91] The Supreme Court, in *Williams*, clarified that the illegal transaction exception to First Amendment protection applies to both commercial and non-commercial speech,[92] analogizing criminal laws which prohibit speech "that is intended to induce or commence illegal activities."[93] The Court drew a distinction between the transactional nature of the PROTECT Act prohibition on "pandering" child pornography (which included advertising) versus advocacy of child pornography which was not prohibited by the Act.[94] The SAVE Act only prohibits advertising for commercial sex acts with minors or by force, fraud or coercion, acts which are illegal under the TVPRA.[95] Thus, the SAVE Act will likely fall within the *Williams* interpretation of a constitutional prohibition on speech offering illegal transactions. This argument was unsuccessful when used to support the state statutes at issue in the State Cases because the courts found that the statutes in question were broad enough to encompass speech that is legal, such as posts on dating sites or advertisements for adult escort services.[96] Since these statutes arguably

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[88] *Id.* at 103 (quoting United States v. Williams, 553 U.S. 285, 297 (2008)).

[89] *Id.*; *see* 18 U.S.C. § 2252A (2012).

[90] 553 U.S. 285, 288 (2008); 18 U.S.C. § 2252A ("(a) Any person who . . . (3) knowingly . . . (B) advertises, promotes, presents, distributes, or solicits through the mails, or in interstate or foreign commerce by any means, including by computer, any material or purported material in a manner that reflects the belief, or that is intended to cause another to believe, that the material or purported material is, or contains—(i) an obscene visual depiction of a minor engaging in sexually explicit conduct; or (ii) a visual depiction of an actual minor engaging in sexually explicit conduct, . . . shall be punished as provided in subsection (b).")

[91] United States v. Williams, 553 U.S. 285, 297-98 (2008).

[92] *Id.* at 298 (explaining that the illegal transactions exclusion is categorical, "based not on the less privileged First Amendment status of commercial speech. . . but on the principle that offers to give or receive what it is unlawful to possess have no social value and thus, like obscenity, enjoy no First Amendment protectionFalse") (citations omitted).

[93] *Id.* at 298.

[94] *Id.* at 298-99.

[95] 18 U.S.C. § 1591 (2015).

[96] Backpage.com v. McKenna, 881 F.Supp.2d 1262,1280-81 (W.D. Wash. 2012); Backpage.com v.

covered both legal and illegal speech, they did not fall into the illegal transaction exception.[97] The SAVE Act prohibits a much narrower category of speech and would likely be treated like the PROTECT Act in *Williams*, rather than the statutes reviewed in the State Cases.[98]

D. *Over-breadth*

In the context of a First Amendment challenge, the concept of over-breadth refers to a statute that prohibits an unreasonable amount of protected speech in addition to unprotected speech.[99] An overly broad prohibition can have the effect of "chilling" protected speech and thus violating the First Amendment.[100] The court in *Cooper* found that the Tennessee statute could cover ads that did not reference a minor or a "paid-for sexual act."[101] The statutes involved in the State Cases were determined to be over-broad because they arguably covered protected speech, such as lawful escort ads and online dating profiles.[102]

Both the *McKenna* and *Cooper* courts also took issue with the phrase "something of value" in exchange for sex acts to define prohibited offers, explaining that offers for legal activity could be included.[103] The Tennessee statute definition of "commercial sex act" that was reviewed in *Cooper*[104] was almost identical to the definition used in the TVPRA.[105] However, due to differences in the statutes, the definition as used in SAVE Act is not likely to be viewed as over-broad. The SAVE Act is limited to

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Cooper, 939 F.Supp.2d 805, 833 (M.D. Tenn. 2013); Backpage.com v. Hoffman, No. 13-cv-03952, 2013 WL 4502097, at *10 (D.N.J. 2013).

[97] *Id.*

[98] *See infra* app. 1 (State Statutes "Advertising Commercial Sexual Abuse of a Minor").

[99] *Cooper*, 939 F. Supp. 2d at 831 ("A law is overbroad under the First Amendment if it 'reaches a substantial number of impermissible applications' relative to the law's legitimate sweep." (quoting Deja Vu of Nashville, Inc. v. Metro Gov't of Nashville & Davidson Cnty., 274 F.3d 377, 387 (6th Cir 2001)).

[100] *Id.* at 832.

[101] *Id.* at 831 ("Under the law, a person risks incurring criminal penalties for selling, or offering to sell, notices or announcements 'that would appear to a reasonable person to be for the purpose of engaging in what would be a commercial sex act . . . with a minor.' Tenn. Code Ann. § 39-13-315(a)").

[102] *McKenna*, 881 F.Supp.2d at 1281; *Cooper*, 939 F.Supp.2d at 831; *Hoffman*, 2013 WL 4502097, at *25.

[103] *McKenna*, 881 F. Supp.2d at 1280-81; *Cooper*, 939 F. Supp. 2d at 832.

[104] TENN. CODE ANN. § 39-13-301 (2012) (current version at TENN. CODE ANN. § 39-13-301 (2014) (amending definition of "commercial sex act")).

[105] 18 U.S.C. § 1591(e)(3) (2015) ("The term "commercial sex act" means any sex act, on account of which anything of value is given to or received by any person.").

knowing advertisers and those who benefit from "participation in a venture" that advertised sex trafficking victims, knowing the victim is a minor or will be caused by force, fraud, or coercion to commit a "commercial sex act."[106] Prosecution under the SAVE Act requires advertising of an actual victim and does not include "offers" to advertise.[107] Thus, the SAVE Act prohibitions on advertising are much narrower in scope than the state statute prohibitions. Furthermore, the SAVE Act includes a strong scienter requirement of "actual knowledge," which was absent in the state statutes.[108]

The District Court in *Lynch* distinguished *McKenna* and *Cooper*, finding that the SAVE Act proscribed only advertising of illegal sex trafficking which has no First Amendment protection.[109] The Court continued that the plaintiff, Backpage, had not alleged that it intended to engage in advertising for these illegal transactions or that it "would be forced 'to take significant and costly compliance measures' to comply with the SAVE Act 'or otherwise risk criminal prosecution.'"[110] Courts that may consider the constitutionality of the SAVE Act are likely to agree with the interpretation of the *Lynch* court due to the narrow language of the statute, the strong scienter requirement, and the illegal transactions exception to First Amendment protection.

E. *Vagueness*

A statute is void for vagueness violating the Fifth and Fourteenth Amendments[111] when it fails "to provide fair warning of proscribed criminal conduct, and to provide explicit standards to prevent arbitrary and discriminatory enforcement of the law."[112] In the context of First Amendment protection of speech, a vague statute may "chill" speech by failing to provide "objective criteria" to define what is prohibited, and this concern is greater with regard to statutes imposing criminal sanctions.[113]

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[106] 18 U.S.C. § 1591 (2015).

[107] *Id.* Prosecution under Section 1591 does not, however, require the consummation of a commercial sex act. *See* United States v. Mozie, 752 F. 3d 1271 (11th Cir. 2014); United States v. Wearing, 865 F. 3d 553 (7th Cir. 2017).

[108] *McKenna*, 881 F.Supp.2d at 1278; *Cooper*, 939 F.Supp.2d at 830; Backpage.com v. Hoffman, No. 13-cv-03952, 2013 WL 4502097, at *20 (D.N.J. 2013); *see infra* notes 128-39 and accompanying text.

[109] Backpage v. Lynch, 216 F.Supp.3d 96, 107 (D.D.C. 2016).

[110] *Id.* at 102 (quoting Virginia v. Am. Booksellers Ass'n. Inc. 484 U.S. 383, 392 (1988)).

[111] U.S. CONST. amend. V; U.S. CONST. amend. XIV.

[112] *Cooper*, 939 F.Supp.2d at 833 (citing Ass'n of Cleveland Fire Fighters v. City of Cleveland, 502 F.3d 545, 551 (6th Cir.2007)).

[113] *Cooper*, 939 F.Supp.2d at 833-34 (citing Grayned v. City of Rockford, 408 U.S.

The courts in the State Cases found numerous undefined terms in the respective state statutes to be impermissibly vague.[114] For the most part, these terms are not relevant to the SAVE Act. However, the term "commercial sex act" used in the Tennessee statute that was reviewed in *Cooper* is of particular concern because, at the time of the case, the Tennessee statute definition was very similar to that of the SAVE Act.[115] The SAVE Act defines "commercial sex act" as "any sex act, on account of which anything of value is given to or received by any person."[116] The court in *Cooper*, considering the Tennessee statute, found the terms "sexual act" and "something of value" to be unconstitutionally vague, in the context of the Tennessee statute, which also included other vague terms like "offer."[117] Although at first blush the SAVE Act appears vulnerable to a similar challenge, it differs in important respects from the legislation at issue in *Cooper*. First, the SAVE Act requires a strict scienter standard of "actual knowledge" of the victim's age, or the use of force, fraud, or coercion to cause a commercial sex act.[118] This was absent in the Tennessee statute.[119] An appropriate *mens rea* standard can mitigate vagueness by ensuring a defendant knows what they are doing.[120] Second, the SAVE Act does not contain other vague terms found in the Tennessee statute, as well as the Washington statute.[121] Finally, the TVPRA definition of "commercial sex act," which applies to the SAVE Act, has been upheld by two courts when challenged by defendants facing sex trafficking charges based on activity that did not include advertising.[122] The *Cooper* court did

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104, 108 (1972), Reno v. Am. Civil Liberties Union, 521 U.S. 844, 871-72 (1997), and Miller v. City of Cincinnati, 622 F.3d 524, 539 (6th Cir. 2010)).

[114] Backpage.com v. McKenna, 881 F.Supp.2d 1262,1279 (W.D. Wash. 2012) ("Among the terms that the Washington legislature has neglected to define are 'know,' 'indirect,' 'direct,' 'implicit' and 'offer.' The Court finds that Plaintiffs are likely to succeed in showing that such terms render the statute unconstitutionally vague."); *see also* Cooper, 939 F.Supp.2d at 836.

[115] *See* TENN. CODE ANN. § 39-13-301 (2012) (current version at TENN. CODE ANN. § 39-13-301 (2014) (amending definition of "commercial sex act")); 18 U.S.C. § 1591 (2015).

[116] 18 U.S.C. § 1591 (2015).

[117] *Cooper*, 939 F.Supp.2d at 836 ("For instance, the Court finds the term 'offer' is likely unconstitutionally vague because the statute fails to provide any criteria for law enforcement to determine when an offer to sell an advertisement has been made.").

[118] *See infra* notes 128-39 and accompanying text.

[119] *Cooper*, 939 F.Supp.2d at 829-30.

[120] *See infra* note 134 and accompanying text.

[121] *See supra* notes 106, 114 and accompanying text. The text of the Tennessee statute "mirrors" that of Washington statute. Cooper, 939 F.Supp.2d at 17.

[122] United States v. Paris, No. 03:06-CR-64, 2007 WL 3124724, at *13 (D.Conn. 2007); United States. v. Wilson, No. 10-60102-CR, 2010 WL 2991561, at *9 (S.D. Fla. 2010).

not find these two decisions persuasive when applied to advertising prohibited under the state statute because, at the time, the federal offense did not include advertising[123] as a predicate act for federal criminal sex trafficking.[124] The court in *Cooper* explained, "there is a critical difference between the federal and state laws: the federal offense does not touch on First Amendment freedoms, as it does not regulate expression and advertisements potentially unrelated to sex trafficking, but is limited to actual acts to recruit, entice, transport, and harbor victims of sex trafficking or otherwise participate in sex trafficking."[125] However, the SAVE Act does limit regulation only to advertisements for sex trafficking[126] and the Supreme Court has noted that "perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity."[127] The argument that the definition of "commercial sex act" is unconstitutionally vague when applied to advertising is likely to be advanced. However, the high *mens rea* requirement, more precise language, and limited scope of the SAVE Act supports the argument that, in this context, the definition is constitutional.

F. *Scienter*

The statutes reviewed in the State Cases arguably ran afoul of the First Amendment by applying strict liability with respect to the age of victims.[128] "The Constitution prohibits the "imposition of criminal sanctions on the basis of strict liability where doing so would seriously chill protected speech."[129] The State Cases discussed the scienter, or knowledge,

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[123] *Cooper*, 939 F.Supp.2d at 835. *See Paris*, 2007 WL 3124724, at 13 ("[i]n the absence of first amendment considerations, vagueness challenges must be evaluated based on the particular application of the statute and not on the ground that the statute may conceivably be applied unconstitutionally to others in situations not before the Court." (quoting United States v. Coonan, 938 F.2d 1553, 1561–62 (2d Cir. 1991)).

[124] 18 U.S.C. § 1591 (2015); *see* supra note 30-32 and accompanying text.

[125] *Cooper*, 939 F.Supp.2d at 835.

[126] 18 U.S.C. § 1591 (Section 1591 violation requires that advertiser knows "that means of force, threats of force, fraud, coercion . . . or any combination of such means will be used to cause the person to engage in a commercial sex act, or that the person has not attained the age of 18 years and will be caused to engage in a commercial sex act").

[127] United States v. Williams, 553 U.S. 285, 304 (2008) (quoting Ward v. Rock Against Racism, 491 U.S. 781, 794 (1989)).

[128] Backpage.com v. McKenna, 881 F.Supp.2d 1262,1278 (W.D. Wash. 2012); *Cooper*, 939 F. Supp. 2d at 830; Backpage.com v. Hoffman, No. 13-cv-03952, 2013 WL 4502097, at *20 (D.N.J. 2013).

[129] *McKenna*, 881 F.Supp.2d at 1275 (quoting United States *v.* U.S. Dist. Court, 858 F.2d 534, 540 (9th Cir. 1988)).

requirement and found each statute likely deficient.[130] The court in *McKenna* referred to *Smith v. California*,[131] requiring knowledge of the obscene content of a book to hold a bookseller liable for possession of the book, although obscene material does not receive constitutional protection.[132] Holding a bookseller liable for the obscene content of books the seller has no knowledge of would influence the seller to limit the availability of books to only those the seller has reviewed, thus infringing on protected speech.[133] The court in *Cooper* also explained that actual knowledge of the age of the person in an advertisement is likely required to overcome ambiguity in the statute, as is required in obscenity cases to overcome ambiguity in the definition of obscenity.[134] The court also discussed *United States v. X-Citement Video*, which found that a federal law prohibiting distribution and reproduction of child pornography required actual knowledge of the age of the performers of sex acts.[135] In *X-Citement Video*, the age of the victim was an element of the crime prohibited by the federal statute.[136] Showing either that the victim was under 18, or showing that the use of force, fraud or coercion will be used to induce a commercial sex act is also an element of sex trafficking prohibited by the SAVE Act.[137] Based on the plain reading of the statute, the court in *Lynch* interpreted the SAVE Act to require actual knowledge of the age of the victim, or the use of force, fraud, or coercion to cause a person to engage in a commercial sex act, when the underlying trafficking charge is based on advertising.[138] The legislative history of the SAVE ACT supports the Court's conclusion.[139]

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[130] *McKenna*, 881 F.Supp.2d at 1275-78; Cooper, 939 F. Supp. 2d at 829-30; *Hoffman*, 2013 WL 4502097, at *20. *See also* Smith v. California, 361 U.S. 147, 154 (1960); United States v. X-Citement Video, Inc., 513 U.S. 64, 78 (1994).

[131] 361 U.S. at 161 (1960).

[132] *McKenna*, 881 F.Supp.2d at 1278.

[133] *Id.*

[134] *Cooper*, 939 F. Supp.2d at 829 ("[t]he Constitution requires proof of scienter to avoid the hazard of self-censorship of constitutionally protected material and to compensate for the ambiguities inherent in the definition of obscenity." (quoting Mishkin v. State of New York, 383 U.S. 502, 511 (1966))).

[135] *Id.* at 829-30. *See* United States v. X-Citement Video, Inc., 513 U.S. 64, 77-78 (1994).

[136] *X-Citement Video*, 513 U.S. at 78.

[137] 18 U.S.C. § 1591 (2015).

[138] Backpage v. Lynch, 216 F.Supp.3d 96, 109 (D.D.C. 2016).

[139] H.R. REP. NO. 113-451 (2014) ("This provision requires the government to prove that defendants accused of benefitting financially through the sale of such advertising knew that the victim was a minor or a victim of force, fraud, or coercionFalse H.R. 4225 as reported requires the government to prove beyond a reasonable doubt that a defendant who benefits from the advertising of a trafficking victim under 18 U.S.C. § 1591(a)(2) knew that the advertising involved a victim, who the defendant knew was a minor or a victim of force,

This reading of the SAVE Act is likely to be upheld by other courts, thus satisfying the scienter requirement and mitigating ambiguity that may be created by undefined terms in the Act.

Although the scienter requirement of actual knowledge bolsters the constitutionality of the SAVE Act, more research is needed to consider facts likely to establish ICS provider knowledge of the age of a victim featured in objectionable advertisements, or that force, fraud, or coercion would be used to cause the advertised victim to engage in a commercial sex act. The SAVE Act does not require ICS providers to verify age or screen for trafficking victims[140] and it is unclear how knowledge of the use of force, fraud or coercion on an advertised victim would be established. The knowledge requirement incorporated into the SAVE Act may actually reduce voluntary screening, as a provider may try to avoid evidence that they have knowledge of the age of the individual featured in the posting[141] which could create an obstacle to enforcement.

PART IV

A. *Amend the Communications Decency Act (CDA) to Allow TVPRA Civil Action*

Considering the constitutional concerns and obstacles to enforcement of state and federal criminal laws prohibiting advertising of sex trafficking victims, this paper proposes as a more effective strategy, utilizing federal civil remedies against ICS providers. The TVPRA civil remedy, Section 1595 of Title 18[142] (Section 1595) allows victims of trafficking to pursue a private cause of action for money damages, including punitive damages,[143] against their traffickers or those who "knowingly benefit" from "participation in a venture" they "knew or should have known" was engaged in trafficking.[144] However, Section 230[145] has been a major

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fraud, or coercion.").

[140] 18 U.S.C. § 1591.

[141] *See* John E. D. Larkin, *Criminal and Civil Liability for User Generated Content: Craigslist, a Case Study*, 15 J. TECH. L. & POL'Y 85 (2010) for discussion of corporate criminal liability and knowledge of ICS providers prior to the enactment of the SAVE Act.

[142] 18 U.S.C. § 1595 (2015).

[143] Ditullio v. Boehm, 662 F.3d 1091, 1094 (9th Cir. 2011).

[144] 18 U.S.C. § 1595 (2015) ("(a) An individual who is a victim of a violation of this chapter may bring a civil action against the perpetrator (or whoever knowingly benefits, financially or by receiving anything of value from participation in a venture which that person knew or should have known has engaged in an act in violation of this chapter) in an appropriate district court of the United States and may recover damages and reasonable attorneys fees.")

[145] 47 U.S.C. § 230 (1998) ("[n]o provider or user of an interactive computer service

hurdle for victims attempting to hold ICS providers accountable for involvement in trafficking. In *Jane Doe No. 1 v. Backpage*, the First Circuit held that Section 230 bars civil actions against ICS providers if based on "traditional publisher functions."[146] The Court held "that claims that a website facilitates illegal conduct though its posting rules necessarily treat the website as a publisher or speaker of content provided by third parties and, thus are precluded by Section 230 False"[147] Section 230 should be amended to allow sex trafficking victims to bring federal civil actions against ICS providers. Allowing civil suits against ICS providers that facilitate sex trafficking would provide a beneficial tool to discourage this activity on the internet. Section 230, by express provision, is not a bar to certain specified federal statutes and all federal criminal statutes.[148] Section 1595 of the TVPRA should be included in this carve-out to allow victims of sex trafficking to pursue this civil remedy. The Amendment should clarify that "traditional publisher functions" can be used to establish that an ICS provider is participating in a sex trafficking venture.[149] The amendment should also maintain current protection for voluntary screening, and establish that good faith screening and cooperation with law enforcement can be used as a defense.[150]

B. *House Bill H.R. 1865*

There is already congressional support for amending the CDA to allow civil suits by sex trafficking victims. House Bill 1865 (H.R.1865), which was recently introduced, would amend Section 230 to allow federal and state civil and criminal laws "relating to sexual exploitation of children or sex trafficking to be enforced against against ICS providers."[151] In its

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shall be treated as the publisher or speaker of any information provided by another information content provider.").

[146] Jane Doe No. 1 v. Backpage, 817 F.3d 12, 21-22 (1st Cir. 2016) (*cert. denied* 137 S. Ct.622 (2017)).

[147] *Id.* at 22; *see supra* note 145.

[148] 47 U.S.C. § 230 (1998) ("Nothing in this section shall be construed to impair the enforcement of section 223 or 231 of this title, chapter 71 (relating to obscenity) or 110 (relating to sexual exploitation of children) of Title 18, or any other Federal criminal statute.").

[149] *See infra* note 181 and accompanying text.

[150] 47 U.S.C § 230 (1998) ("**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").

[151] H.R. 1865, 115th Cong. (1st Sess. 2017) ("To amend the Communications Act of 1934 to clarify that section 230 of such Act does not prohibit the enforcement against

current version, however, the bill also contains provisions that could be the subject of future legal challenges. In particular, the bill includes an amendment to Section 1591 of Title 18 (Section 1591), the TVPRA's criminal sex trafficking provision, to include a broad definition of "participation in a venture."[152] This amendment would presumably allow a finding of participation merely by a showing of "reckless conduct . . . that furthers" violation of Section 1591.[153] In addition, the bill explicitly adds publisher liability[154] to Section 1591, allowing an ICS provider publishing third party content to be prosecuted without actual knowledge that the advertisement is for sex trafficking.[155] This provision adds Section 1591 liability for ICS providers directly, without showing that they are benefiting from and participating in a trafficking venture, if they publish an ad "with reckless disregard" that it "is in furtherance of [a trafficking] offense."[156] If H.R. 1865 is passed, plaintiffs in a Section 1595 civil suit could benefit from the broader scope of Section 1591 ICS liability because an ICS provider could be a perpetrator of a Section 1591 violation by virtue of the publisher liability provision, rather than a benefiter under Section 1595, making it unnecessary to show participation in the sex trafficking venture for purposes of Section 1595 liability.[157] However, it is not clear whether placing criminal liability on ICS providers for trafficking based only on reckless conduct or publisher activities would satisfy First Amendment

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providers and users of interactive computer services of Federal and State criminal and civil law relating to sexual exploitation of children or sex trafficking, and for other purposes.").

[152] H.R. 1865, 115th Cong. (1st Sess. 2017) ("The term 'participation in a venture' includes knowing or reckless conduct by any person or entity and by any means that furthers or in anyway aids or abets the violation of subsection (a)(1)").

[153] *Id.*

[154] Publisher liability has been used to hold media outlets liable for publishing defamatory or obscene statements under certain conditions. *See* Stratten Oakmont, Inc. v. Prodigy Serv. Co., 1995 WL 323710, at *5, *7 (N.Y.Sup.Ct.1995) (*superseded by statute*, 47 U.S.C. § 230 (1998), *as recognized in* Shiamili v. Real Estate Group of New York, Inc., 952 N.E.2d 1011 (2011)).

[155] H.R. 1865, 115th Cong. (1st Sess. 2017) ("(e)(1) 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.").

[156] *Id.*

[157] 18 U.S.C. 1595 ("An individual who is a victim of a violation of this chapter may bring a civil action against the perpetrator (or whoever knowingly benefits, financially or by receiving anything of value from participation in a venture which that person knew or should have known has engaged in an act in violation of this chapter).").

scienter requirements.[158] Further research is necessary to predict how H.R. 1865 would interact with Section 1595, and whether the "participation in a venture" definition and the publisher liability provision would survive a First Amendment challenge. The following section discusses establishing "participation in a venture" for purposes of the civil remedy provided in Section 1595 of the TVPRA, without the benefit H.R. 1865.[159]

C. *Participation in a Venture*

To date, participation for purposes of Section 1595 civil liability has not been defined by case law.[160] Cases attempting to hold ICS providers accountable for involvement with trafficking have largely been decided on CDA immunity grounds, thus not reaching the element of participation.[161] The court in *Jane Doe No. 1 v. Backpage* noted the difficulty in pleading facts that would raise the level of involvement by an ICS provider to "participation in a [sex trafficking] venture."[162] The recent SAVE Act addition of advertising to the predicate sex trafficking acts in Section 1591 could make it easier for plaintiffs to establish "participation in a venture" by an ICS provider for purposes of the Section 1595 civil remedy. The term "venture" is defined in Section 1591 as "any group of two or more individuals associated in fact, whether or not a legal entity."[163] In layman's terms, participation is defined as "the action of taking part in something."[164] By virtue of accepting, posting, and receiving benefit from an ad, an ICS provider is arguably "participating in a venture" with the

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[158] *See supra* notes 128-39 and accompanying text.

[159] Although H.R. 1865 proposes amendment to Section 1591 of Title 18, regarding the criminal provisions of the TVPRA, the addition of a definition of "participation in a venture" would likely be applied to Section 1595 of Title 18, the civil remedy, in absence of another definition in that section, since both sections are part of the comprehensive TVPRA. *See* Star Athletica v. Varsity Brands, 137 S. Ct. 1002, 1010 (2017) ("'[I]nterpretation of a phrase of uncertain reach is not confined to a single sentence when the text of the whole statute gives instruction as to its meaningFalse' We thus 'look to the provisions of the whole law' to determine [§ 101's] meaningFalse") (citations omitted).

[160] Jane Doe No. 1 v. Backpage, 817 F.3d 12, 21 (1st Cir. 2016) (*cert. denied* 137 S. Ct.622 (2017)).

[161] Backpage.com v. McKenna, 881 F.Supp.2d 1262, 1275 (W.D. Wash. 2012); Backpage.com v. Cooper, 939 F.Supp.2d 805, 824-45 (M.D. Tenn. 2013); Backpage.com v. Hoffman, No. 13-cv-03952, 2013 WL 4502097, at *6 (D.N.J. 2013); Jane Doe No. 1, 817 F.3d at 29. *But see* J. S. v. Village Voice Media Holdings, 359 P.3d 714, 718 (2015).

[162] *Jane Doe No. 1*, 817 F.3d at 19-21.

[163] 18 U.S.C. § 1591 (2015).

[164] *Participation*, OXFORD U. PRESS, https://en.oxforddictionaries.com/definition/participation (last visited Oct. 25, 2017); *see supra* note 161 and accompanying text.

trafficker who is posting the ad.[165] Legislative history strongly supports the intention of Congress to apply the SAVE Act to ICS providers.[166] Pursuant to the SAVE Act, an ICS provider could be in violation of Section 1591 if they (1) knowingly advertise a sex trafficking victim, or (2) knowingly benefit from participation in a venture that has engaged in advertising a sex trafficking victim.[167] Both charges based on advertising require actual knowledge of the age of the victim, or knowledge of the use of force, fraud, or coercion on the victim.[168] A pimp with the requisite knowledge who posted an ad for trafficking victims would presumably be advertising in violation of Section 1591 by virtue of the posting.[169] Pursuing civil remedies under section 1595 is not dependent on a criminal prosecution.[170] Therefore, for purposes of the Section 1595 civil provision, it would not be necessary to take the next step of proving that the ICS provider had the requisite knowledge to be prosecuted for benefiting from participation in the venture under Section 1591. In order to pursue a Section 1595 civil remedy, a plaintiff must show that they are the victim of a trafficking violation.[171] For example, a plaintiff could show that an ad was placed in violation of the SAVE Act in Section 1591. Once this is established, the victim can recover damages from the perpetrator, the pimp that placed the ad, "or whoever knowingly benefits, financially or by receiving anything of value from participation in a venture which that person knew or should

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[165] Star Athletica v. Varsity Brands, 137 S. Ct. 1002, 1010 (2017) ("We thus begin and end our inquiry with the text, giving each word its 'ordinary, contemporary, common meaningFalse'") (citation omitted).

[166] H.R. REP. NO. 113-451, at 3-4 (2014) ("H.R. 4225 clarifies that the existing Federal sex trafficking statute, 18 U.S.C. Sec. 1591, extends to traffickers who knowingly sell sex with minors and victims of force, fraud, or coercion through advertising, as well as people or entities that knowingly benefit from such advertising."); *see also* 161 CONG. REC. S1621-22 (daily ed. March 18, 2015) (statement of Sen. Feinstein) ("Simply put, there are Internet companies that are profiting off the rape and abuse of children. This must stop. One way we can combat sex trafficking over the Internet is to make it a crime for a person such as the owner of a Web site to knowingly advertise a commercial sex act with a minor.").

[167] 18 U.S.C. § 1591.

[168] *Id. See supra* notes 138-39 and accompanying text.

[169] 18 U.S.C. § 1591.

[170] DANIEL WERNER & KATHLEEN KIM, CIVIL LITIGATION ON BEHALF OF VICTIMS OF HUMAN TRAFFICKING 9, 129 (Immigrant Justice Project, Southern Poverty Law Center, 3d ed. 2008) (2005).

[171] 18 U.S.C. § 1595 ("An individual who is a victim of a violation of this chapter may bring a civil action against the perpetrator (or whoever knowingly benefits, financially or by receiving anything of value from participation in a venture which that person knew or should have known has engaged in an act in violation of this chapter)").

have known has engaged in an act in violation of [this Section]."[172] In this example, assuming the ICS provider received benefit from the advertising[173] which was in violation of Section 1591, the ICS provider could be liable under Section 1595 for taking part in the advertising by hosting the ad if they "should have known" the advertisement was for trafficking.[174] The lower knowledge standard, discussed infra,[175] combined with the ability to tie "participation in a venture" to the act of advertising, makes the civil remedy a more accessible option for holding ICS providers accountable for the trafficking that is perpetuated on classified advertising sites.

Even if the SAVE Act were found to violate the First Amendment, a victim pursuing a Section 1595 civil remedy could still proceed against an ICS provider benefiting from trafficking that was established by violation of another proscribed act.[176] When the underlying act of sex trafficking is not advertising, establishing that the ICS provider participated in the trafficking venture would be more challenging but still possible. The court in *Jane Doe No. 1* acknowledged that participation in a venture might be shown by publisher activities but found that Section 230 precluded a finding of participation on this basis.[177] Amending Section 230 to allow TVPRA civil claims, should also allow victims to premise participation in a venture on traditional publisher activities. If Section 230 is amended as recommended, a trafficking victim could show that the ICS provider participated in the trafficking venture on a case-by-case factual basis, including evidence that the ICS provider had participated in the venture by facilitating trafficking through its website design, posting policies, and screening/filtering practices, even if those activities could be considered publisher functions.[178] It is important to note that in this analysis of an ICS provider's actions, although considering traditional editorial functions, a plaintiff victim would be attempting to show participation and not traditional publisher liability, as in a defamation suit.[179]

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[172] *Id.*

[173] *See supra* note 6 and accompanying text.

[174] 18 U.S.C. § 1595.

[175] *See infra* notes 193-200 and accompanying text.

[176] 18 U.S.C. § 1591 ("Whoever knowingly- (1) in or affecting interstate or foreign commerce... recruits, entices, harbors, transports, provides, obtains, advertises, maintains, patronizes, or solicits by any means a person; or (2) benefits, financially or by receiving anything of value, from participation in a venture which has engaged in an act described in violation of paragraph (1)...").

[177] Jane Doe No. 1 v. Backpage, 817 F.3d 12, 21 (1st Cir. 2016).

[178] *See supra* notes 142-51 and accompanying text.

[179] *See* Stratten Oakmont, Inc. v. Prodigy Serv. Co., 1995 WL 323710, at *3 (N.Y.Sup.Ct.1995) (*superseded by statute*, 47 U.S.C. § 230 (1998), *as recognized in*

The Washington State Supreme Court's decision in *J.S. v. Village Voice Media* contrasts sharply with the *Jane Doe No. 1* decision discussed above,[180] and provides support for the proposition that an ICS provider could be a participant in a trafficking venture.[181] In that case, the plaintiffs, trafficking victims, survived a motion to dismiss based on facts very similar to those in *Jane Doe No. 1*.[182] In *Village Voice Media*, the court allowed a suit to proceed, finding that an ICS provider might be subject to liability for state tort claims, Section 230 notwithstanding.[183] The court held that facts could be established that Village Voice Media, doing business as Backpage, was a *developer* of content based on its posting rules and was, in effect, promoting prostitution by guiding pimps on how to post ads that would appear legal.[184] Although this case did not involve a TVPRA Section 1595 civil claim, it supports the premise that an ICS provider could be shown to be participating in a trafficking venture without the criminalization of the advertising itself.[185]

Additional support that an ICS provider could be participating in a trafficking venture can be found in a recent U.S. Senate report.[186] The U.S. Senate Permanent Subcommittee on Investigations for the Committee on Homeland Security and Governmental Affairs conducted an in-depth investigation on internet trafficking focusing on the website management practices of Backpage.com.[187] Based on its investigation, the Subcommittee found that (1) "Backpage has knowingly concealed evidence of criminality by systematically editing its 'adult' ads" and (2) "Backpage knows that it facilitates prostitution and child sex trafficking."[188] The Senate report did not discuss the application of its findings to liability under Section 1591 or Section 1595 of the TVPRA, but did discuss how Backpage had successfully avoided civil liability by application of Section 230 of the CDA.[189] The report also discussed how an ICS provider may lose Section

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Shiamili v. Real Estate Group of New York, Inc., 952 N.E.2d 1011 (2011)).

[180] *See supra* notes 161-63, 179 and accompanying text.

[181] J. S. v. Village Voice Media Holdings, 359 P.3d 714, 718 (2015) (Minor plaintiffs brought various state law claims against an ICS provider based on advertisements posted on the classified ads website.).

[182] *Id.*

[183] *Id.*

[184] *Id.* at 722 ("[P]laintiffs have alleged . . . that Backpage.com guided pimps to craft invitations to prostitution that appear neutral and legal so that the pimps could advertise prostitution and share their ill- gotten gains with Backpage.com.").

[185] *Id.*

[186] *See also* S. COMM. ON HOMELAND SEC. AND GOV. AFFAIRS REPORT, *supra* note 2.

[187] *Id.*

[188] *Id.* at 2, 3.

[189] *Id.* at 7-10.

230 immunity if it "edits in a manner that contributes to the alleged illegality."[190] Thus, although the SAVE Act's inclusion of advertising as a predicate act for a sex trafficking charge under Section 1591 is helpful for the civil remedy, it is likely a victim could establish participation even if the SAVE Act were found to be unconstitutional.

D. *Knowledge*

Section 1595 of the TVPRA,[191] which provides the civil remedy to victims of trafficking, contains a different knowledge standard than the criminal provision, Section 1591.[192] Section 1591 requires a defendant benefiting from participation in a venture that has engaged in advertising a sex trafficking victim to know that the venture will cause a minor to engage in a commercial sex act or that a victim will be caused to to commit a commercial sex act through force, fraud or coercion.[193] In contrast, Section 1595 requires "knowing" benefit from participation in a venture that the "person knew or should have known" was sex trafficking, with no distinction for an advertising offense.[194] Thus, the knowledge requirement in Section 1595 is lower. The difference in language supports Congressional intent that Section 1595 was intended to include more defendants.[195] Only advertising benefiters that know a venture is engaged in sex trafficking can be prosecuted as traffickers under Section 1591.[196] Under Section 1595, however, advertising benefiters that "should have known" the venture engaged in trafficking can be held liable for damages.[197] If Section 230 of the CDA is amended to allow Section 1595 civil suits, victims can use this remedy to hold ICS providers liable for their part in trafficking even if the provider is unlikely to be convicted under Section 1591.[198]

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[190] *Id.* at 8 (quoting Fair Housing Council of San Fernando Valley v. Roommates.com, 521 F.3d 1157, 1169 (2008)).

[191] 18 U.S.C. § 1595 (2015).

[192] 18 U.S.C. § 1591 (2015).

[193] *Id.*

[194] 18 U.S.C. § 1595.

[195] Russello v. United States, 462 U.S. 16, 23 (1983) ("'[W]here 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 exclusionFalse'") (citations omitted).

[196] 18 U.S.C. § 1591 (2015); *see supra* note 138-39 and accompanying text.

[197] *See* Charisa Smith, *No Quick Fix: the Failure of Criminal Law and the Promise of Civil Law Remedies for Domestic Child Sex Trafficking,* 71 U. MIAMI L. REV. 1, 73 (2016).

[198] *See supra* note 172 and accompanying text.

E. *Judicial Response to Section 230 in Sex Trafficking Cases*

Section 230 of the CDA has been interpreted broadly to protect internet providers.[199] The court in *McKenna* stressed the congressional intent behind Section 230 of the CDA, noting that "'Congress wanted to encourage the unfettered and unregulated development of free speech on the Internet, and to promote the development of e-commerce.'"[200] It has been suggested that this interpretation should be narrowed when considering sex trafficking cases.[201] However, the *Village Voice Media* case, which allowed an action to proceed against an ICS provider,[202] has been criticized for eroding the protection provided to ICS providers by Section 230.[203] A narrow reading of Section 230, in the context of sex trafficking cases, could have the unintended consequence of undermining protection for ICS providers more generally if this precedent is expanded to factual situations that do not involve sex trafficking. An amendment to the CDA, as proposed, would clarify ICS provider liability in sex trafficking cases and prevent the development of precedent that could undermine the important protection and predictability Section 230 provides to ICS providers.[204] Although the majority view is that Section 230 creates broad protection for ICS providers,[205] circuit courts have treated Section 230 inconsistently.[206] Federal law should be changed legislatively to provide consistency and prevent Section 230 from being narrowly interpreted across the board in an effort to combat the problem of sex trafficking. As the court explained in *Jane Doe No. 1*, "[i]f 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."[207] Amending Section 230 to allow civil claims pursuant to the TVPRA would not apply to internet providers that are not involved in trafficking, so it would not undermine congressional intent to promote free speech on the internet generally.[208]

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[199] *See, e.g.*, Jane Doe No. 1 v. Backpage, 817 F.3d 12 (1st Cir. 2016).

[200] Backpage.com v. McKenna, 881 F.Supp.2d 1262,1272 (W.D. Wash. 2012) (quoting Batzel v. Smith, 333 F.3d 1018,1027-1028 (9th Cir. 2003)).

[201] *See* Silvano, *supra* note 7, at 378-79.

[202] *See supra* notes 182-87 and accompanying text.

[203] Cynthia Lee, *Subverting the Communications Decency Act: J.S. v. Village Voice Media Holdings,* 7 CAL. L. REV. CIRCUIT 11, 12 (2016).

[204] See *id.*

[205] Jane Doe No. 1 v. Backpage, 817 F.3d 12,18 (1st Cir. 2016).

[206] *See* Silvano, *supra* note 7, at 399.

[207] *Jane Doe No. 1,* 817 F.3d at 29.

[208] *See supra* notes 142-151, 202 and accompanying text; H.R. 1865, 115th Cong. (1st Sess. 2017) ("Congress finds the following: (1) Section 230 of the Communications Act of 1934 (47 U.S.C. 230; commonly known as the "Communications Decency Act of 1996")

F. *Victim Benefits*

Civil litigation for compensation and damages can be more beneficial to a survivor's recovery than criminal prosecution of traffickers.[209] Victims have more control over the strategy, testimony and timing of a civil suit, giving them more autonomy and personal agency in the process.[210] In addition, the goals of a civil suit are restitution and victim compensation and punitive damages against the trafficker versus conviction in a criminal prosecution.[211] Therefore, the civil suit is focused on the needs of the victim rather than the needs of the prosecutor to convict a trafficker.[212] Furthermore, a civil remedy under the TVPRA is not dependent on a criminal prosecution, so a victim, rather than a prosecutor, can choose whether to pursue this remedy.[213] The burden of proof is also lower for a civil suit than a criminal prosecution, so the survivor will have a better chance of success on the merits of the case.[214]

Allowing civil action against ICS providers increases the defendant pool and resources available for recovery. In addition, ICS providers may provide a more reliable income source and realistic collection opportunity than the pimps and others involved in the trafficking operation since the ICS providers are, in many cases, ongoing business concerns with a presence in a state that can be identified, and assets that can be tracked.[215] In addition, the companies providing internet advertising forums are likely to maintain more assets available to provide money for victims' recovery and may be more willing to settle a case to avoid negative publicity.[216] More attorneys may also be available to take on these cases if there is a greater likelihood of a collectable judgement.

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was never intended to provide legal protection to websites that facilitate traffickers in advertising the sale of unlawful sex acts with sex trafficking victims.").

[209] *See* Smith, *supra* note 199, at 71. ("Civil law remedies also provide systematic solutions that enlarge the scope of a survivor's autonomy, alter systematized oppression, enable survivors to assert their own rights against exploiters, and help youth reclaim the profits of their exploitation for their own benefit.").

[210] *See* Kathleen Kim & Kusia Hreshchyshyn, *Human Trafficking Private Right of Action: Civil Rights for Trafficked Persons in the United States*, 16 HASTINGS WOMAN'S L.J. 1, 16-18 (2004).

[211] *Id.*

[212] *Id.*

[213] WERNER & KIM, *supra* note 170, at 129.

[214] *See* Smith, *supra* note 197, at 75.

[215] Kim & Hreshchyshyn, *supra* note 210, at 16-17

[216] *See* Smith, *supra* note 197, at 73-75.

G. *Enforcement and Outreach*

In addition to promoting free speech on the internet, Section 230 was also intended to encourage self-policing by ICS providers.[217] Allowing civil suits against ICS providers while maintaining a good faith screening defense would foster this goal. Good faith screening and collaboration with law enforcement and anti-trafficking organizations could be effective as a defense to a civil claim that website operators are participating in a trafficking venture by encouraging sex trafficking, or looking the other way while trafficking activity is promoted on the site.[218] The possibility of civil liability may also promote genuine cooperation between ICS providers and law enforcement. Faced with costly civil liability and negative publicity, ICS providers may be incentivized to work with law enforcement to keep these ads off their websites rather than to exclude the adult services section completely, foregoing that revenue source.[219] Following this model rather than attempting to shut down websites, law enforcement could gain valuable information from these sites that could be used to identify more victims and convict more traffickers.[220] Private civil suits also takes some burden off law enforcement.

This approach could also co-exist with other online outreach and identification efforts of anti-trafficking organizations. If the goal is shifted from eliminating forums, which may cut off a valuable avenue to connect with victims, to holding ICS providers more accountable for what is posted, adult services listings may be used to provide information on services and support to those seeking to escape the trafficking situation.[221] Cooperation by ICS providers in these efforts could also show good faith. As the problem of sex trafficking persists, it should be confronted on numerous fronts. Allowing civil remedies could be compatible with using internet advertising as a method to gain information, communicate positive messages, and help disseminate service information to victims, as they often have access to the internet.[222]

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[217] Backpage.com v. McKenna, 881 F.Supp.2d 1262,1271 (W.D. Wash. 2012) ("Congress wanted to 'encourage interactive computer services and users of such services to self-police the Internet for obscenity and other offensive material.'" (quoting Batzel v. Smith, 333 F.3d 1018,1027-1028 (9th Cir. 2003)).

[218] *See supra* note 151 and accompanying text.

[219] *See supra* note 6 and accompanying text.

[220] *See Thorn 2016 Impact Statement: Building Hope*, THORN (2017), https://www.wearethorn.org/impact-report-2016/.

[221] *See* THORN, supra note 15, at 38-89.

[222] *Id.* at 17 (42% surveyed had access to internet, some without monitoring).

V. CONCLUSION

Combatting sex trafficking on the internet is a tenacious problem demanding creative, multifaceted solutions. Allowing survivors to directly confront ICS providers who are benefiting from trafficking promotes both victim recovery and provides deterrence against internet trafficking.[223] Placing some responsibility on ICS providers to monitor postings would also reduce the burden on law enforcement and encourage genuine cooperation between ICS providers and law enforcement to uncover and prosecute pimps and others engaged in sex trafficking.[224]

Amending Section 230 to allow Section 1595 civil claims against ICS providers would also coordinate the goals of Congress in enacting both the CDA and the TVPRA.[225] This would not only help reduce sex trafficking, but would also provide a more practical, victim-focused solution to controlling internet advertising, rather than criminal prosecution of ICS providers.[226] There is strong support among State Attorneys General and Congress to find solutions to this problem.[227] They could support a narrow amendment to Section 230, to allow civil suits against ICS providers based on trafficking allegations, without broadening definitions that could create First Amendment issues.[228] In addition, allowing sex trafficking survivors to pursue federal civil remedies against ICS providers would be a more practical and effective alternative to allowing state criminal prosecution, which has been problematic in numerous ways, in addition to the CDA bar.[229] More research is needed to determine, as a policy matter, whether removing advertising from the internet would decrease the demand for sex trafficking victims or decrease access to valuable information that could be used in enforcement. Furthermore, efforts should be made to collaborate with ICS providers to use adult services advertising websites to publicize resources and support available to help sex trafficking victims.

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223 *See supra* notes 211-22 and accompanying text.

224 *See supra* notes 221-22 and accompanying text.

225 *See supra* note 24 and accompanying text.

226 *See supra* notes 211-22 and accompanying text.

227 *See supra* notes 48-49 and 152 and accompanying text.

228 *See supra* notes 152-59 and accompanying text.

229 *See supra* notes 50-7 and accompanying text.

APPENDIX 1: STATE STATUTES "ADVERTISING COMMERCIAL SEXUAL ABUSE OF A MINOR"

Washington
Wash. Rev. Code § 9.68A.104 (repealed 2013).

"Advertising commercial sexual abuse of a minor—Penalty

(1) A person commits the offense of advertising commercial sexual abuse of a minor if he or she knowingly publishes, disseminates, or displays, or causes directly or indirectly, to be published, disseminated, or displayed, any advertisement for a commercial sex act, which is to take place in the state of Washington and that includes the depiction of a minor.
    (a) "Advertisement for a commercial sex act" means any advertisement or offer in electronic or print media, which includes either an explicit or implicit offer for a commercial sex act to occur in Washington.
    (b) "Commercial sex act" means any act of sexual contact or sexual intercourse, both as defined in chapter 9A.44 RCW, for which something of value is given or received by any person.
    (c) "Depiction" as used in this section means any photograph or visual or printed matter as defined in RCW 9.68A.011 (2) and (3).
(2) In a prosecution under this statute it is not a defense that the defendant did not know the age of the minor depicted in the advertisement. It is a defense, which the defendant must prove by a preponderance of the evidence, that the defendant made a reasonable bona fide attempt to ascertain the true age of the minor depicted in the advertisement.

by requiring, prior to publication, dissemination, or display of the advertisement, production of a driver's license, marriage license, birth certificate, or other governmental or educational identification card or paper of the minor depicted in the advertisement and did not rely solely on oral or written representations of the minor's age, or the apparent age of the minor as depicted. In order to invoke the defense, the defendant must produce for inspection by law enforcement a record of the identification used to verify the age of the person depicted in the advertisement.

Advertising commercial sexual abuse of a minor is a class C felony."

Tennessee

T. C. A. § 39-13-315 (2012).

"Advertising commercial sexual abuse of a minor

(a) A person commits the offense of advertising commercial sexual abuse of a minor if the person knowingly sells or offers to sell an advertisement that would appear to a reasonable person to be for the purpose of engaging in what would be a commercial sex act, as defined in § 39-13-301, with a minor.

(b) (1) Advertising commercial sexual abuse of a minor is a Class C felony.

(2) In addition to any authorized period of incarceration, advertising commercial sexual abuse of a minor is punishable by a minimum fine of ten thousand dollars ($10,000).

In a prosecution under this section, it is not a defense that the defendant did not know the age of the minor depicted in the advertisement. It is a defense, which the defendant must prove by a preponderance of the evidence, that at the time of the offense, the defendant made a reasonable bona fide attempt to ascertain the true age of the minor appearing in the advertisement by requiring, prior to publication of the advertisement, production of a driver license, marriage license, birth certificate, or other governmental or educational identification card or paper of the minor depicted in the advertisement and did not rely solely on oral or written allegations of the minor's age or the apparent age of the minor."

New Jersey
N.J.S.A. 2C:13-10 (2013).

"Legislative findings and declarations; human trafficking victims; advertising commercial sexual abuse of a minor as a crime; level of offense; definitions; defenses; proof

a) The Legislature finds and declares that:

(1) There reportedly are more than 12 million victims of human trafficking and it is estimated that this figure could actually be as high as 27 million;

(2) According to the National Center for Missing and Exploited Children, at least 100,000 human trafficking victims are American children who are an average age of 13 years old;

(3) Advertisements for selling the services of girls as escorts on Internet websites falsely claim that these girls are 18 years of age or older, when the girls actually are minors;

(4) The advertising of these escort services includes minors who are being sold for sex, which constitutes sex trafficking and commercial sexual abuse of minors;

(5) Responding to political and public outcry, the Internet website craigslist.com removed its escort section, but another website

with an escort section, backpage.com, has to date refused to do so;

(6) The states of Washington and Connecticut recently enacted laws to require Internet websites, such as backpage.com, and the patrons who advertise on websites, to maintain documentation that they have proved the age of the escorts presented in the advertisements;

(7) The State of New Jersey criminalized human trafficking in 2005; and

(8) Sex trafficking of minors should be eliminated in conformity with federal laws prohibiting the sexual exploitation of children.

b) A person commits the offense of advertising commercial sexual abuse of a minor if:

(1) the person knowingly publishes, disseminates, or displays, or causes directly or indirectly, to be published, disseminated, or displayed, any advertisement for a commercial sex act, which is to take place in this State and which includes the depiction of a minor; or

(2) the person knowingly purchases advertising in this State for a commercial sex act which includes the depiction of a minor.

c) A person who commits the offense of advertising commercial sexual abuse of a minor as established in subsection b. of this section is guilty of a crime of the first degree. Notwithstanding the provisions of N.J.S.2C:43-3, the fine imposed for an offense under this section shall be a fine of at least $25,000, which shall be collected as provided for the collection of fines and restitutions in section 3 of P.L.1979, c. 396 (C.2C:46-4) and
forwarded to the Department of the Treasury to be deposited in the "Human Trafficking Survivor's Assistance Fund" established by section 2 of P.L.2013, c. 51 (C.52:17B-238).

d) Nothing in this section shall preclude an indictment and conviction for any other offense defined by the laws of this State.

e) For the purposes of this section:

(1) "Advertisement for a commercial sex act" means any advertisement or offer in electronic or print media, including the Internet, which includes either an explicit or implicit offer for a commercial sex act to occur in this State.

(2) "Commercial sex act" means any act of sexual contact or sexual penetration, as defined in N.J.S.2C:14-1, or any prohibited sexual act, as defined in N.J.S.2C:24-4, for which something of value is given or received by any person.

(3) "Depiction" means any photograph or material containing a photograph or reproduction of a photograph.

(4) "Minor" means a person who is under 18 years of age.
(5) "Photograph" means a print, negative, slide, digital image, motion picture, or videotape, and includes anything tangible or intangible produced by photographing.

f) It shall not be a defense to a violation of this section that the defendant:
(1) did not know the age of the minor depicted in the advertisement; or
(2) claims to know the age of the person depicted, unless there is appropriate proof of age obtained and produced in accordance with subsections g. and h. of this section.

g) It shall be a defense to a violation of this section that the defendant made a reasonable, bona fide attempt to ascertain the true age of the minor depicted in the advertisement by requiring, prior to publication, dissemination, or display of the advertisement, production of a driver's license, marriage license, birth certificate, or other governmental or educational identification card or paper of the minor depicted in the advertisement and did not rely solely on oral or written representations of the minor's age, or the apparent age of the minor as depicted. The defendant shall prove the defense established in this subsection by a preponderance of the evidence.

h) The defendant shall maintain and, upon request, produce a record of the identification used to verify the age of the person depicted in the advertisement."