October 30, 2017

The Honorable Kevin McCarthy
Majority Leader
U.S. House of Representatives
Washington, DC 20515

The Honorable Nancy Pelosi
Minority Leader
U.S. House of Representatives
Washington, DC 20515

The Honorable Mitch McConnell
Majority Leader
United States Senate
Washington, DC 20510

The Honorable Chuck Schumer
Minority Leader
United States Senate
Washington, DC 20510

RE: H.R. 1865, Allow States and Victims to Fight Online Sex Trafficking Act of 2017, and S. 1693, Stop Enabling Sex Traffickers Act of 2017

Dear Members of Congress:

The undersigned organizations write to raise concerns regarding H.R. 1865, Allow States and Victims to Fight Online Sex Trafficking Act of 2017, and S. 1693, Stop Enabling Sex Traffickers Act of 2017. These bills impose criminal liability, with corresponding mandatory minimum prison terms, for internet service providers and their employees whose services, even unwittingly, have been exploited by others to facilitate sex offenses. These bills serve no legitimate law-enforcement purpose because existing laws can, and do, severely punish people who engage in sex trafficking. Instead, these laws inappropriately criminalize service providers and their employees for not stopping the crimes of others. This has the capacity to send innocent people to prison while doing nothing to promote public safety.

There is no justification for the sexual abuse and exploitation of others. But importantly, existing federal criminal laws *already* severely punish anyone who facilitates sex trafficking over the internet (or in any other context). Notably, 18 U.S.C. § 1591 punishes any individual or organization who, among other things, "benefits, financially or by receiving anything of value, from participation in a venture," which has facilitated certain sex offenses. Under this statute, the government must prove that a defendant knowingly received a benefit from a criminal venture, acted with reckless disregard for the fact that the venture had in the past or would in the future facilitate a "commercial sex act," and acted with reckless disregard of the fact that the sex act would involve either an underage victim or force or coercion against the victim.[1] Violations of

[1] See, e.g., United States v. Phea, 755 F.3d 255, 260 (5th Cir. 2014) (discussing elements of the offense).

this statute are punished by either a 10 or 15-year mandatory minimum prison term, depending on the age of the victim and the use of force, and a fine of up to $250,000 for individuals and $500,000 for organizations.

Currently, this law is routinely used to punish the use of internet advertisements facilitating sex crimes, and *can* be used to criminally prosecute internet service providers.[2] Despite assertions that websites like Backpage that knowingly run ads selling underage girls have escaped responsibility because of immunity from the Communications Decency Act, in reality, that law does not prevent enforcement of any federal criminal law.[3] The Communications Decency Act creates a so-called "safe harbor" for internet service providers against *civil* liability for user-generated content, and pre-empts state criminal law only to the extent it conflicts with federal criminal provisions.[4] Critically, this statute explicitly states that it has no effect on the criminal enforcement of Section 1591, or, for that matter, any other federal criminal statute.[5]

Despite the current availability of criminal enforcement under Section 1591—a criminal law that currently carries serious mandatory minimum sentences for those who actually participate in sex crimes—both chambers have proposed new criminal legislation aimed at the same harm. The new bills, which are not even necessary to prevent the harms that supporters are concerned with, unfortunately expand criminal liability, along with severe mandatory minimum sentences, to service providers and their employees without meaningful criminal intent requirements.

Specifically, the House bill, H.R. 1865, would enact several significant changes to Section 1591.[6] First, it would add a provision to define "'participation in a venture' [to] include[] knowing or reckless conduct by any person or entity and by any means that furthers or in any way aids or abets" a violation of Section 1591. This language appears to substitute and remove the existing requirements that 1.) participants in the ventures have "reckless disregard" for the fact that the venture will be used to facilitate a commercial sex act and 2.) that the sex act involves coercion or an underage victim, for the singular requirement that the participant knowingly or recklessly *participated in the venture* that was used to further a sex crime. This new formulation of the law does not appear to require the participant realize, or even suspect, that a crime has occurred or will occur. Instead, it would mandate a 10 or 15-year federal prison sentence for individuals who unwittingly allowed a sex offense to occur.

This bill would also create new criminal liability for any service provider who "publishes information provided by" any user, "with reckless disregard that the information provided … is

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[2] See, e.g., United States v. Todd, 627 F.3d 329, 331-32 (9th Cir. 2010) (affirming conviction and 26-year prison sentence for placing advertisements on the internet for commercial sex acts); Richard Ruelas, Emails Reveal How Backpage Edited Sex Ads. Will That be its Undoing?, The Arizona Republic, April 14, 2017, http://www.azcentral.com/story/news/local/phoenix/2017/04/15/emails-reveal-how-backpage-edited-sex-ads-will-it-be-its-undoing/100436762/ ("A federal grand jury has convened in Arizona to hear evidence against Backpage" for federal criminal investigation.).

[3] Indeed, far from escaping liability for criminal conduct, Backpage is currently the target of a federal grand jury, and may well be criminally prosecuted. See note 2, supra.

[4] 47 U.S.C. § 230(c).

[5] 47 U.S.C. § 230(e).

[6] H.R. 1865, 115th Cong. (2017), available at https://www.congress.gov/bill/115th-congress/house-bill/1865/text.

in furtherance" of certain covered offenses, even if the user who provided the information lacked "any intent" to commit a crime, and even if no crime ever actually occurred. A service provider would therefore commit a federal felony if it recklessly allowed its users to attempt to commit sex offenses by publishing content, regardless of the provider's actual knowledge of any such illicit behavior. This would therefore require the service provider to guarantee that its users could never facilitate a sex crime, lest it face punishment of up to 20 years in prison or fines of up to $500,000 for organizations, or both.

The Senate version, S. 1693, is similar to Section 1591, in that it creates a new criminal offense for participation in certain "venture[s]."[7] Like the House version, this provision would impose felony criminal liability for any person who "benefits, financially or by receiving anything of value, from participation in a venture" that "by any means" "assists supports, or facilitates" certain sex offenses. The bill would require proof only of "knowing conduct by an individual or entity" regarding "participation in the venture," but the law would not require that the defendant must also have *any* awareness that the venture had engaged in any criminal act. Like the House version, even though the statute reaches "knowing conduct," this phrase appears to apply only to the act of receiving a benefit from a venture, *not* the underlying criminal conduct at issue. This means anyone who received a benefit from a provider, such as an employee's salary or even a stock dividend, could be subject to a *mandatory* prison sentence of no less than 15 years if an internet provider's user facilitated certain sex crimes using the service, whether or not the provider knew or even suspected that the crime had happened.

As an initial matter, the undersigned organizations are deeply concerned that these bills undermine meaningful criminal intent requirements in existing law, and could impose criminal responsibility on persons who are not deserving of jail time. All these bills require is that a person knowingly participated in a venture, such as knowingly providing internet services, without any actual criminal intent. This would punish those who unwittingly allowed others to commit crimes by providing services that were in turn exploited by criminals. Importantly, it would even punish those who diligently tried, but failed, to prevent illicit use. Not only does this offend fundamental notions of fairness and justice by punishing those who never meant to do anything wrong, it would do nothing to deter the underlying harmful conduct of egregious sex crimes.

Further, the undersigned are deeply troubled by the application of severe mandatory minimum prison sentences for unwitting conduct. Punishment should correspond to the harm done. But these bills would impose 10 and 15-year mandatory prison terms on anyone convicted, no matter the level of that person's involvement and no matter their criminal intent. They treat an unwitting employee of an internet service provider that was exploited by criminals the same as the person forcing minors to participate in commercial sex acts, and judges would have no choice but to impose these mandatory sentences no matter the factual circumstances of the case. Such devastating and disproportionate consequences hardly fit the conduct these bills would encompass.

[7] S. 1693, 115th Cong. (2017) available at https://www.congress.gov/bill/115th-congress/senate-bill/1693/text.

For all the reasons listed herein, the undersigned urge you to not support such flawed criminal law-making.

Respectfully,

Families Against Mandatory Minimums (FAMM)
Federal Public and Community Defenders
FreedomWorks
The National Association of Criminal Defense Lawyers (NACDL)