



**Answers to Questions for the Record
Regarding S. 1693, the Stop Enabling Sex Traffickers Act of 2017**

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I am responding to the following questions from Sen. Cortez Masto:

Do you interpret the current provisions in SESTA as wiping out Good Samaritan protections? If so, how can we amend the legislation to ensure the proposed changes to the CDA do not override Section 230 (c)(2)(A) protections?

I appreciate the opportunity to explain Section 230's Good Samaritan mechanisms and how SESTA undermines them. The Manager's Amendment dated November 3, 2017 attempted to address this issue, but I don't think it accomplished its goal.

How Section 230 Currently Protects Good Samaritan Efforts

I believe Congress wants online services to voluntarily undertake efforts to block or remove third party promotions for sex trafficking and other illegal or objectionable third party content. I'll call these efforts "content moderation."

Content moderation takes a nearly infinite variety of forms. Content moderation includes initial decisions to publish or not, as well as post-publication decisions to remove or not remove the content. Content moderation can be manual or automated, and post-publication decisions may be prompted by third party notifications (such as takedown requests) or the online service's own diligence or monitoring efforts.

47 U.S.C. § 230(c) is captioned "Protection for 'Good Samaritan' blocking and screening of offensive material." Both parts of Section 230(c) support this goal. Section 230(c)(1) provides an immunity for publishing third party content, including both its initial decision to publish and any subsequent decision not to remove content. I'll call these "Publication" decisions. Section 230(c)(2) provides a safe harbor for refusing to publish third party content or subsequently removing third party content. I'll call these "Removal" decisions. Between the two subsections, Section 230(c) currently protects the full range of content moderation efforts.

How SESTA Undermines Section 230's Good Samaritan Protection

SESTA enables online services to be sued or prosecuted for sex trafficking promotions that third parties publish through their service. Online services will be reluctant to undertake content moderation efforts if they face liability for any sex trafficking promotions that slip through, i.e., if they miss a promotion, review a promotion but make a mistake, or take too long to find or remove a promotion.

The Manager's Amendment preserves Section 230(c)(2)'s protection for Removal decisions. However, this won't encourage Good Samaritan efforts because: (1) online services don't fear being sued or prosecuted for what they remove (and such risks usually can be ameliorated by the online service's contract with the third party users-publishers); (2) Section 230(c)(2)'s "good faith" requirement undercuts the safe harbor's availability, and it substantially increases defense costs because judges may enable wide-ranging discovery into defendants' "good faith"; and (3) online services may abandon their content moderation efforts entirely rather than risk being charged with knowledge of content they didn't catch.

Instead, SESTA effectively exposes online services to liability only for third party content that they publish online or don't remove quickly enough. This means online services principally need immunity for their Publication decisions, not their Removal decisions. Section 230(c)(1)—not (c)(2)—provides the applicable immunity for content Publication. Thus, by curtailing Section 230(c)(1), SESTA removes the primary protection that online services rely upon when doing Good Samaritan content moderation against sex trafficking promotions (and all other objectionable content).

Proposed Language to Incorporate Good Samaritan Protections into SESTA

If Congress wants to ensure that online services continue to combat sex trafficking promotions, I recommend saying so explicitly. To do this, I propose SESTA add a new Section 230(g) to make it clear that Good Samaritan efforts should not be punished:

The fact that a provider or user of an interactive computer service has undertaken any efforts (including monitoring and filtering) to identify, restrict access to, or remove, material it considers objectionable shall not be considered in determining its liability for any material that it has not removed or restricted access to.

Alternatively, with some wording changes, this language could be incorporated into Section 230(c)(2)(A).