February 26, 2018

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 undersigned organizations write to raise concerns regarding H.R. 1865, Allow States and Victims to Fight Online Sex Trafficking Act of 2017. This bill creates new and extraordinarily broad federal crimes that could result in decades-long federal prison sentences for conduct that does not meet the normal understanding of sex trafficking. At the same time, the conduct that this bill claims to target – "sex trafficking" over the internet – is already prohibited by existing federal law. Further, an amendment also being offered to this bill imposes 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. 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 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.

Despite perception by some, 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] Notwithstanding assertions that websites like Backpage that knowingly run ads

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

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 to the extent it conflicts with federal criminal provisions.[4] Critically, this statute has no "effect" on "the 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 carries serious mandatory minimum sentences for those who actually participate in sex crimes—the House has proposed new criminal legislation aimed at the same harm. The new bill, however, would threaten decades-long federal prison sentences for conduct that is far less significant than what the legislation purports to target.

H.R. 1865 would create an entirely new federal crime for use of a facility of interstate commerce to facilitate prostitution. In particular, it would be a new crime, punishable by up to 10 years in prison, to "use or operate[]," or "attempt[] to do so," any "facility, or means of interstate or foreign commerce" "with the intent to promote or facilitate the prostitution of another person." If that offense either in fact "promotes or facilitates the prostitution of 5 or more persons," or the defendant acted with "reckless disregard" of the fact that the conduct "contributed" in any way to a violation of an existing federal crime (18 U.S.C. § 1591(a)), then the offense would be an "aggravated violation" punishable by up to 25 years in prison.

While this bill has addressed some of the concerns raised in previous communications over inadequate mens rea requirements in prior versions, the bill is still overbroad and punishes conduct much less serious than what is ordinarily viewed as "sex trafficking." Even though the bill is targeted at "bad-actor websites" who "have purposely created platforms designed to facilitate prostitution and sex trafficking,"[6] the statutory language actually encompasses conduct that has no relationship to the internet or sex trafficking. In addition to targeting internet service providers, the language also encompasses the "use," or attempted use, of any "facility, or means of interstate or foreign commerce," which includes not only the internet, but also telephones, ATMs, or even a personal automobile.[7] At the same time, the statute does not just punish "sex trafficking," but encompasses any act that merely "facilitates" "prostitution," even between adult participants and even absent any element of coercion. This means that a person who answered an advertisement posted online, or used a telephone to speak to another person, or even used his

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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. Rep. No. 115-572 Pt. 1, at 3, 6 (2018).

[7] See United States v. Mandel, 647 F.3d 710, 720-21 (7th Cir. 2011) (identical language in murder for hire statute encompassed intrastate use of a personal automobile); United States v. Nader, 542 F.3d 713, 718-19 (9th Cir. 2008) (identical language in the Travel Act applied to, among other things, any use of telephones, ATMs, or the mail)

own vehicle to travel, would be guilty of this federal crime if he did so with the ultimate goal of facilitating another person's act of prostitution. While such conduct may legitimately be prohibited, there is no reason to create a new *federal* crime, punishable with extremely long prison sentences, for, among other things, patronizing or soliciting prostitution. After all, not all states consider such conduct criminal, and many jurisdictions classify such crimes as misdemeanors.[8]

The "aggravated violation" provision would also apply in a significant number of cases that would not warrant a prison term of up to 25 years. For example, any service provider who allowed an advertisement to be placed online, which in fact facilitated the prostitution of five persons, would be guilty of the aggravated offense. Likely this would apply in every situation where a website allowed advertising for the purposes of prostitution, even if all participants were adults and even in the absence of coercion or other aggravating factors. Imposing harsh 25-year prison terms for such conduct does not serve the public interest.

The undersigned also wish to raise grave concerns over a proposed amendment to H.R. 1865, which has been offered by Representative Mimi Walters. This amendment would create a new provision in Section 1591, which would punish internet service providers whose services were used, even unwittingly, to promote illicit conduct. This amendment would add a section to define "'participation in a venture'" to mean "knowingly assisting supporting, or facilitating a violation of" Section 1591. This language appears to substitute the existing requirements that (1) participants in the venture had "reckless disregard" for the fact that the venture would be used to facilitate a commercial sex act and (2) the sex act involves coercion or an underage victim, for the singular requirement that the participant knowingly *performed an act* that, in fact, facilitated a 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.

The undersigned organizations are deeply concerned that this provision undermines meaningful criminal intent requirements in existing law, and could impose criminal responsibility on persons who are not deserving of jail time. All this bill requires is that a person knowingly participated in a venture, such as knowingly providing internet services, without any additional 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 troubled by the application of severe mandatory minimum prison sentences for unwitting conduct. Punishment should correspond to the harm done. But the amendment 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. The amended bill would 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 circumstances.

[8] See Danielle Augustson, Alyssa George, Prostitution and Sex Work, 16 Geo. J. Gender & L. 229, 238 (2015).

Such devastating and disproportionate consequences hardly fit the conduct this amendment would encompass.

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

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