FOSTA IN LEGAL CONTEXT

By Kendra Albert, Emily Armbruster, Elizabeth Brundige, Elizabeth Denning, Kimberly Kim, Lorelei Lee, Lindsey Ruff, Korica Simon, and Yueyu Yang*

Abstract:

In the spring of 2018, Congress passed the Allow States and Victims to Fight Online Trafficking Act of 2017 (FOSTA), which made changes to three federal statutory schemes: the Communications Decency Act, the Trafficking Victims Protection Act, and the Mann Act. Congressmembers claimed FOSTA would fix loopholes in those statutory schemes through which they believed websites such as Backpage.com had avoided liability for sex trafficking.

More than two years after its passage, only one prosecution has been brought under the new criminal provision, and FOSTA's 230 exemptions have received very limited use. These provisions have, however, had widespread effects on internet companies. In this article, we put FOSTA into its legal context, exploring how its provisions relate to existing federal anti-prostitution and anti-trafficking laws. We highlight how the impact of FOSTA has been disconnected from the actual content of the legal changes, how statutory language creates broad areas of uncertainty, and how the law may be interpreted to reduce harm to sex working peoples.

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EXECUTIVE SUMMARY

In the spring of 2018, Congress passed the Allow States and Victims to Fight Online Trafficking Act of 2017 (FOSTA), which combined a House bill of the same name with provisions from a Senate bill, the Stop Enabling Sex Traffickers Act (SESTA).[1] FOSTA as passed makes changes to three federal statutory schemes: the Communications Decency Act, the Trafficking Victims Protection Act, and the Mann Act. Congressmembers claimed FOSTA would fix loopholes in those statutory schemes through which they believed websites such as Backpage.com had avoided liability for sex trafficking.

More than two years after its passage, only one prosecution has been brought under the new criminal provision, and FOSTA's 230 exemptions have received very limited use. These provisions have, however, had widespread effects on internet companies. Websites formerly used by people in the sex trades to advertise, screen clients, and share information about workplace health and safety have closed down altogether. Social media, video messaging, and other online communication platforms have changed their terms of service, categorically excluding people in the sex trades and people profiled as being in the sex trades. Although these actions by internet companies

[1] For the sake of simplicity, we refer to the combined bill as FOSTA.

may be more restrictive than is necessary to avoid liability under the new law, much remains unclear because of the lack of judicial interpretation. What is clear is that these changes have and will continue to make working in the sex trades more dangerous, reducing workers' access to harm reduction methods and safety information, causing more workers to work outdoors, increasing stigma, and decreasing workers' access to online spaces that enabled organizing and self-advocating.

A. Part I: The Communications Decency Act § 230

Section 230 of the Communications Decency Act, passed in 1996, provides immunity from civil and state-level criminal liability for websites acting as publishers of content developed entirely by third parties. Section 230 was passed in part to incentivize website owners to moderate such content without exposing themselves to liability. Toward that purpose, § 230 provides immunity such that site owners cannot be held liable for the contents of speech on their platforms. Section 230 has thus shaped the internet as we know it, allowing for a balance between wide public access to internet platforms and website owners' moderation of those platforms.

FOSTA limits § 230 immunity in three ways. First, FOSTA removes § 230 immunity for websites facing civil claims brought under 18 U.S.C. § 1595 of the federal anti-trafficking statute, the Trafficking Victim's Protection Act (TVPA). Second, FOSTA removes § 230 immunity for websites facing state-level criminal charges for conduct that would violate 18 U.S.C. § 1591, the criminal provision of the TVPA. Third, FOSTA removes § 230 immunity for websites facing state-level criminal charges for conduct that would constitute a violation of 18 U.S.C. § 2421A (FOSTA's newly created federal crime targeting online "promotion or facilitation" of "prostitution"[2]). While

[2] Many people who trade sex find the term "prostitution" to be pejorative. This report's authors find the term both ambiguous and pejorative as a descriptor of transactional sex but will use it throughout this report as necessary to reflect its use

media reports have erroneously tied several state-level civil sex trafficking claims to FOSTA, FOSTA makes no explicit changes to state-level civil liability. FOSTA's changes to § 230 have not yet been interpreted by courts, but internet companies have reacted dramatically, as though the changes create broad new liability.

In congressional hearings on FOSTA, lawmakers emphasized the utility of the Act to state and local law enforcement, saying that FOSTA would provide new tools that could be used to fight sex trafficking at the state level. However, it is not clear that the removal of § 230 immunity for a small set of state-level trafficking and prostitution charges will bring the promised changes. One study suggests that impediments to state and local enforcement of sex trafficking laws are largely unrelated to § 230, and a report from Villanova Law School says that FOSTA will not be of use to state-level law enforcement unless state-level anti-trafficking laws are amended. Finally, the way that internet companies have responded to the law suggests the effects of FOSTA may in fact inhibit enforcement of state-level anti-trafficking laws. Website owners responded to FOSTA's limitation of § 230 immunity by taking down sites on which sex workers previously advertised and screened clients. Such sites were previously also used by law enforcement to identify and recover trafficking victims, and police have noted that their jobs are more difficult without those sites.

B. Part II: The Trafficking Victims Protection Act § 1591 and § 1595

18 U.S.C. § 1591 is the federal statute criminalizing sex trafficking. Passed in 2000 as part of the Trafficking Victims Protection Act, § 1591 creates criminal liability for both primary actors who engage in sex trafficking and for anyone who benefits from "participating in a venture" that engages in sex trafficking. Section 1591 defines sex trafficking as engaging in certain conduct (such as

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in statutory text as well as by lawmakers and legal bodies.

"advertising") while (1) knowingly causing a person to engage in a commercial sex act through force, fraud, or coercion, or (2) knowingly causing a person to engage in a commercial sex act while under the age of eighteen.

FOSTA amends § 1591 to define "participation in a venture" as "knowingly assisting, supporting, or facilitating" sex trafficking. This new definition raises questions as to what mental states prosecutors must show for which conduct in order to prove a "participation in a venture" violation. That is, how much must a website owner know about their site's involvement in trafficking in order to be prosecuted under this new definition of "participation in a venture?" While Congress seemingly meant to broaden § 1591, a plain language reading of the amendment could be seen as narrowing the scope of the law.

Congress claimed that this amendment was necessary because courts lacked clarity in applying the "participation in a venture" provision and suggested that the new definition would make it easier to prosecute owners of websites that facilitate sex trafficking. The Department of Justice (DOJ), however, wrote a letter to Congress prior to FOSTA's passage warning that this amendment would actually make prosecutions more difficult by adding new elements that would have to be proved at trial. How courts will interpret the amendment remains to be seen.

In addition to the criminal § 1591, the TVPA contains a civil provision, 18 U.S.C. § 1595, which allows victims of violations of § 1591 to sue their traffickers or anyone who participated in a venture through which they were trafficked. FOSTA amends § 1595 by adding a new *parens patriae* civil right of action so that states' attorneys general may also bring lawsuits for violations of § 1591 on behalf of victims.

The *parens patriae* cause of action allows states' attorneys general to sue a person who violates § 1591 if "the attorney general of a

state has reason to believe that an interest of the residents of that state has been threatened or adversely affected" by the violation. *Parens patriae* suits will be limited by Article III standing requirements; that is, attorneys general will have to show that state residents experienced actual harm that is both caused by a specific act of trafficking and able to be redressed by a court. Questions remain as to how such harm and causality can be shown. For example, must the harm claimed in a *parens patriae* suit be limited to that defined in § 1591 (i.e. force, fraud, or coercion of state residents) or could a harm such as lowered property values give rise to a *parens patriae* claim? This and other questions make the breadth of the *parens patriae* provision unclear.

C. Part III: The Mann Act § 2421A

FOSTA amends the Mann Act to create a new federal crime, 18 U.S.C. § 2421A, prohibiting the owning, operating or managing of an interactive computer service, such as a website, with the intent to promote or facilitate the prostitution of another person. Section 2421A(b) defines two aggravated violations providing higher penalties for conduct that violates 2421A(a) while also (1) promoting or facilitating the prostitution of five people or more, or (2) recklessly disregarding that such conduct contributed to sex trafficking in violation of § 1591. Section 2421A(c) provides a civil right of action allowing any person injured by an aggravated violation to sue the website owner, manager, or operator who committed that violation.

The terms "promote," "facilitate," and "prostitution" are undefined in the statute, and sex workers' rights organizations have expressed fear that this provision might criminalize the sharing of harm reduction materials, client blacklists, and other health and safety information. One district court, in the case *Woodhull vs. United States*, interpreted the provision narrowly, stating that § 2421A does not cover online sharing of harm reduction information. This decision was reversed by the D.C. Court of Appeals, however, which

stated that owning a website on which sex workers did not advertise but shared sex work-related information might be proscribed by § 2421A.

To date, the Travel Act, not the Mann Act, has been the law most frequently used to federally prosecute the owners and managers of websites that advertise adult services. Arguments made by the DOJ in its prosecution of Backpage imply that it believes violations of § 2421A might be more difficult to prove than violations of the Travel Act. If so, it is likely that the DOJ will continue to favor the Travel Act over § 2421A, limiting the impact of this FOSTA provision.

D. Part IV: Significance of FOSTA's GAO Reporting Requirement

In addition to the statutory changes, FOSTA contains a U.S. Government Accountability Office (GAO) reporting requirement that will track the amount and nature of damages awarded under 2421A(c), and the amount of mandatory restitution that is awarded to victims of violations of § 2421A. According to one Congress member, this report will provide an assessment of FOSTA's efficacy. To the date of this writing, the damages in civil claims and mandatory restitution awarded under FOSTA by courts remains zero.

E. Part V: The Ex Post Facto Clause

Finally, as written, FOSTA applies to conduct committed before its enactment. The DOJ and others have suggested that this may violate the Constitution's *ex post facto* clause. The *Woodhull* case brings a pre-enforcement challenge to FOSTA, making *ex post facto* and other constitutional claims. None of those claims have yet been analyzed by either the district court opinion or the D.C. Circuit court opinion, which only assess whether the plaintiffs have standing to bring the claims.

INTRODUCTION

The Allow States and Victims to Fight Online Trafficking Act of 2017 (FOSTA) was passed with the intent to reduce rates of trafficking through increased regulation and penalization of websites. FOSTA materially limits the scope of the Communications Decency Act (CDA) for the first time since the CDA's enactment over two decades ago. Propelled by a growing public concern with sex trafficking, FOSTA also amends the Trafficking Victims Protection Act (TVPA) and creates a new federal crime under the Mann Act. Walking through the provisions of FOSTA one by one, we show that despite Congressional intent to reduce trafficking through seemingly seismic changes and significant reactions from digital platforms, the actual legal effect of FOSTAs 230 changes remains unclear and may even be insubstantial.

While the full legal effect of FOSTA is unclear, the Act has already had dangerous practical consequences for people in the sex trades through its impact on website owners. Prior to FOSTA's passage, critics of the legislation reasonably feared that websites would interpret the relevant civil and criminal statutes broadly and err on the side of censorship in order to protect themselves from liability. This is precisely what happened, with websites like Craigslist shutting down their adult entertainment sections altogether.[3] Other sites, including Google Drive, have removed content, blocked users, and closed forums that were used by sex workers to exchange warnings about dangerous clients. Notably, when this happens, website users have little legal recourse. Companies like Google and Craigslist are private actors, and their removal of user content usually does not constitute a First Amendment violation.[4]

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[3] *See Documenting Tech Actions*, SURVIVORS AGAINST SESTA, https://survivorsagainstsesta.org/documentation/ (last visited Apr. 29, 2019).

[4] A private entity may be treated as a state actor and thus bound by the First Amendment only if that private entity's actions fall under one of four tests articulated by the Supreme Court. *See* Prager Univ. v. Google LLC, 951 F.3d 991, 997

The result is that people in the sex trades, who work in legal, semi-legal, and criminalized industries, have been forced into dangerous and potentially life-threatening scenarios. Many no longer have access to affordable ways to advertise[5] and have returned to outdoor work or to in-person client-seeking in bars and clubs, where screening is necessarily more rushed than it is online,[6] and where workers are more vulnerable to both clients and law enforcement.[7] These effects have been most impactful on sex workers facing multiple forms of marginalization, including Black, brown and indigenous workers, trans workers, and workers from lower socio-economic classes who are prohibited from or unable to access more expensive advertising sites that may not be as impacted by FOSTA. For workers who were unable to access pricier sites, Backpage provided an avenue for them to receive the same safeguards others had through online advertising.

Loss of access to online platforms has also meant losing access to information-sharing networks used to discuss safer working methods and to create blacklists of bad clients.[8] Third-party managers, some of whom are dangerous or exploitative, have seen the present circumstances as an opportunity to regain control over sex workers whose capacity to find clients independently has decreased.[9] Similarly, previously blacklisted clients, believing sex workers to be

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(9th Cir. 2020); s*ee also* Knight First Amendment Inst. at Columbia Univ. v. Trump, 928 F.3d 226 (2nd Cir. 2019) (finding that First Amendment "public forum" protections govern accounts on private platforms used by elected officials in their official capacity).

[5] *See* Caty Simon, *On Backpage*, TITS & SASS (Apr. 25, 2018), http://titsandsass.com/on-the-death-of-backpage/.

[6] *See* Lorelei Lee, *Cash/Consent, the War on Sex Work*, N+1, https://nplusonemag.com/issue-35/essays/cashconsent/ (last visited Feb. 8, 2020).

[7] *See* Caty Simon, supra note 5; *see also* Samantha Cole, *'Sex Trafficking' Bill Will Take Away Online Spaces Sex Workers Need to Survive*, VICE (Mar. 12, 2018, 1:11 PM), https://www.vice.com/en_us/article/neqxaw/sex-trafficking-bill-sesta-fosta-vote.

[8] *Id.*

[9] *Id.*

vulnerable and desperate for work because of the loss of these platforms, have begun harassing these workers.[10] These represent only a handful of ways in which the FOSTA amendments have already made sex work more dangerous: the full scope of the repercussions remains unknown.

We analyze the amendments FOSTA makes to other civil and criminal statutes, predicting the likely legal effect and assessing the practical impact of each provision. Part I assesses the FOSTA amendments to § 230 of the Communications Decency Act in light of the history of the CDA and explains the impact of these amendments to state level civil and criminal liability. Part II turns to FOSTA amendments to § 1591 and § 1595 of the Trafficking Victims Protection Act, specifically addressing the changes to the definition of "participation in a venture" and the creation of a *parens patriae* cause of action. Part III breaks down the new federal crime created at § 2421(A) of the Mann Act. Part IV explains the significance of the GAO reporting requirements of FOSTA, and Section V looks to additional relevant and potentially problematic provisions of FOSTA, such as the ex post facto clause.

Ultimately, we conclude that, though FOSTA makes significant changes to each of these statutes, the actual legal effect of those changes may not be as monumental as advocates presumed. Despite this, the practical impact of FOSTA has been to create more dangerous working conditions for people in the sex trade. Furthermore, though the stated purpose of FOSTA was to reduce trafficking, the legal effects do not in fact contribute to a reduction in trafficking and may even make it more difficult to identify traffickers and find trafficking survivors.

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[10] *See, e.g.*, Zia Moon, *As A Sex Worker with A Chronic Illness, FOSTA Means Losing My Medical Care*, VICE (Jun 18, 2018, 9:50 AM), https://www.vice.com/en_us/article/xwm5pd/sex-work-chronic-illness-disability-fosta-v25n2.

PART I: THE COMMUNICATIONS DECENCY ACT § 230

FOSTA amends § 230 of the CDA for the stated Congressional purpose of making it easier for prosecutors and others to hold websites criminally and civilly liable when those websites are used to facilitate prostitution[11] or sex trafficking. The significance of these changes to § 230 are best understood within the context of the history and purpose of the CDA broadly, and of § 230 specifically. Since its enactment, § 230 has been considered an important safeguard for free speech online and has arguably shaped the development of the internet as it exists today. Accordingly, it has rarely been subject to change or limitation, making FOSTA's wide reaching amendments unprecedented.

The CDA, enacted as a subset of the Telecommunications Act of 1996, emerged as a Congressional response to courts' attempts at navigating the new internet era. A few years prior to the CDA's enactment, two pivotal cases had addressed the role of websites in hosting third-party content containing illegal material. Their outcomes disincentivized websites from moderating any such content. First, in the 1991 case *Cubby, Inc. v. CompuServe, Inc.*, the U.S. District Court for the Southern District of New York found that a website database owner was not liable for comments containing illegal content that were posted on his website because he did not review or know about the content.[12] Extending this reasoning, a New York state trial court, in *Stratton Oakmont, Inc. v. Prodigy Servs. Co.,* found that a website owner was liable for comments posted to his site because he had previously moderated and removed other offensive content from the site.[13] The court distinguished Prodigy from CompuServe on the

[11] As flagged above, this report's authors find the term "prostitution" both ambiguous and pejorative as a descriptor of transactional sex but will use it throughout this report as necessary to reflect its use in statutory text as well as by lawmakers and legal bodies.

[12] Cubby, Inc. v. CompuServe, Inc., 776 F. Supp. 135, 141 (S.D.N.Y. 1991).

[13] Stratton Oakmont. Inc. v. Prodigy Servs. Co., No. 31063/94, 1995 WL 323710, at *4 (N.Y. Sup. Ct. May 24, 1995).

basis of Prodigy's involvement in reviewing and removing content. Following these cases, a website owner that actively moderated a website could be exposed to liability for any third-party illegal content posted therein.[14] In order to avoid liability, website owners ceased editing user-generated content altogether.

> The purported effect of this legal rule was an increase in "indecent" or "patently offensive" content online. Of particular concern to Congress was the supposed increase in minors' exposure to such content.[15] In response, Congress passed the CDA with provisions aimed at both curtailing and protecting minors from "offensive" online content and encouraging self-regulation by website owners toward this end. Most of the CDA's provisions were struck down by the Supreme Court in *Reno v. ACLU* as unconstitutional violations of the First Amendment.[16] However, § 230, the provision intended to rectify the *Cubby* and *Prodigy* holdings, was not at issue in the case and so remained law.

Of particular relevance to FOSTA is § 230(c) providing protection for "Good Samaritan Blocking and Screening of Offensive Material."[17] Section 230(c)(1) states in pertinent part that: "[n]o provider or user of an interactive computer service [ICS][18] shall be

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[14] *Id.*

[15] Eric Goldman, *An Overview of the United States' Section 230 Internet Immunity*, *in* THE OXFORD HANDBOOK OF ONLINE INTERMEDIARY LIABILITY (Giancarlo Frosio, ed., forthcoming) (paper at 2–3), *available at* https://ssrn.com/abstract=3306737.

[16] In the 1997 case *Reno v. American Civil Liberties Union*, 521 U.S. 844, 871–72 (1997), the Supreme Court invalidated two provisions of the CDA (contained in § 233) on First Amendment grounds, holding that the provisions were vague, content-based regulations that created an "obvious chilling effect on free speech" and were facially overbroad.

[17] 47 U.S.C. § 230(c).

[18] An "interactive computer service" is defined as "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." *Id.* § 230 (f)(2).

treated as the publisher or speaker of any information provided by another information content provider [ICP][19]."[20] In other words, § 230(c)(1) provides immunity to a defendant when "(1) the defendant is a 'provider or user of an interactive computer service'; (2) the claim is based on 'information provided by another information content provider'; and (3) the claim would treat [the defendant] 'as the publisher or speaker' of that information."[21] Thus, the §230 immunity could be defeated by proving either that the defendant is an ICP with regard to the content at issue, or that the defendant is not treated as the publisher or speaker of that content.

Section 230(c)(2) further specifies that providers and users are protected from civil liability for self-regulation or making "good faith" efforts[22] 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."[23] Even prior to FOSTA's passage, the immunity under § 230(c)(2) explicitly did not extend to violations of federal criminal law.[24]

Section 230 was designed to balance the government's interests in (1) promoting free speech, particularly on online forums, (2) encouraging self-regulation among interactive computer services by enabling them to monitor their sites without fear of liability, and (3)

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[19] "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." *Id.* § (f)(3).
[20] *Id.* § 230(c)(1).
[21] Jane Doe No. 1 v. Backpage.com, LLC, 817 F.3d 12, 19 (1st Cir. 2016), *cert. denied*, 137 S. Ct. 622, (2017).
[22] Eric Goldman, *The Complicated Story of FOSTA and Section 230*, 17 FIRST AMEND. L. REV. 279, 285 (2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3362975 . Professor Goldman stated further: "Defendants could try to argue that Section 230(c)(2) protects them from FOSTA liability for items they missed so long as they made good faith efforts to remove problematic content, but this argument is untested." *Id.*
[23] 47 U.S.C. § 230(c)(2).
[24] *Id.* §§ 230(e)(1), (3), and (5).

fostering economic growth online. Court interpretations applying § 230's protective provisions have been pivotal in shaping the development of the internet as it exists today, and subsequent limitations on scope imposed by FOSTA are likely to further change the internet and shape it going forward. In fact, we have already seen some of these effects.

A. Application of § 230 Pre-FOSTA

Courts have generally interpreted § 230(c) as creating broad immunity from civil liability for third-party postings (what § 230 calls "information provided by another information content provider").[25] In an early case, *Zeran v. America Online, Inc.*, the Fourth Circuit found AOL exempt from civil liability for defamatory content on its site—even after AOL was given notice of the defamatory content.[26] The court held that § 230 "creates a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service,"[27] and reasoned that liability triggered by receipt of notice (or "knowledge" of the illegal content) would disincentive websites from monitoring their content, undermining one of the purposes of § 230.[28] Courts subsequently extended *Zeran* to immunize website owners who interact in varying degrees with the content on their sites.[29] In fact, there have been over 300 cases interpreting § 230, and so far, all "but a handful . . . find that

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[25] *Id.* § 230 (c)(1).

[26] *See* Zeran v. America Online, Inc., 129 F.3d 327, 328–29 (4th Cir. 1997). Upon receiving notice from plaintiff that the defamatory content had been posted to its online bulletin board, AOL did remove the content, however the content was continuously reposted over the course of the next five days. One part of the reasoning in *Zeran* is based on this ability by users to continuously repost, distinguishing them from a traditional publisher. *See id.* at 329, 333.

[27] *Id.* at 330.

[28] *Id.* at 333.

[29] *See, e.g.*, *Batzel v. Smith*, 333 F. 3d 1018, 1031 (9th Cir. 2003) (applying § 230 to a mailing list operator who edited and forwarded emails to the list); *Doe v. MySpace, Inc.*, 528 F.3d 413, 415 (5th Cir. 2008) (applying § 230 to claims for negligence); *Blumenthal v. Drudge*, 992 F. Supp 44, 51–52 (D.D.C. 1998) (applying § 230 even when the service paid contributors).

a website is entitled to immunity from liability."[30]

Nonetheless, a series of cases have restricted the otherwise expansive scope of § 230.[31] One of the most impactful, *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC.*, placed a critical limitation on § 230 by distinguishing between content a website passively displays and content a website creates, in whole or in part.[32] The defendant in the case was Roommates.com—a website that matched individuals searching for and offering spare room rentals. The suit alleged that the site violated fair housing codes by publishing its users' discriminatory preferences.[33]

In distinguishing between Roommates' conduct protected by § 230 and conduct outside § 230's scope, the court looked to whether or not the site had played a part in "developing" the allegedly discriminatory content. It held that, "[b]y requiring subscribers to provide the [discriminatory] information as a condition of accessing its service, and by providing a limited set of pre-populated answers, Roommate [became] much more than a passive transmitter of information provided by others; it [became] the developer, at least in part, of that information."[34] As such, Roommates *was not* entitled to § 230 immunity related to that content. In contrast, Roommates played no part in the development of content that was placed in an "additional comments" section on their site, but merely published

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

[31] *See generally* Eric Goldman, *The Ten Most Important Section 230 Rulings*, 20 TUL. J, TECH. & INTELL. PROP. 1 (2017), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3025943 (summarizing cases such as F.T.C. v. Accusearch, 570 F.3d 1187 (10th Cir. 2009), which declined to apply § 230 to defendants who ran a website that sold illegally-acquired phone records; Perfect 10 v. ccBill, 488 F.3d 1102 (9th Cir., 2007), which declined to apply § 230 to federal intellectual property claims; and Doe v. Internet Brands, Inc., 824 F.3d 846 (9th Cir., 2016), which declined to apply § 230 to a "failure to warn" claim against a website where one user was subsequently raped by two other users).

[32] *Fair Housing Council of San Fernando Valley v. Roommates.Com*, LLC, 521 F.3d 1157, 1162–63 (9th Cir. 2008).

[33] *Id.* at 1163.

[34] *Id*. at 1166.

what was generated by third parties; for this content, then, Roommates *was* entitled to § 230 immunity.[35]

After *Roommates*, the scope of § 230 immunity[36] turns on whether an ICS engages in the "creation or development" of content on their site and whether the ICS "contributes materially to the alleged illegality of the conduct."[37] If so, the ICS becomes an ICP and is exempt from § 230 immunity.[38] If, however, the ICS's actions do *not* constitute "creation or development" they will be granted § 230 immunity.[39] Notably, "[a] website operator can be both a service

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[35] *Id.* at 1173–74.

[36] This scope is limited to cases that do not fall within the explicit carveout for federal crimes or, more recently, within FOSTA's new carveouts for federal civil and state criminal liability under certain prostitution and trafficking laws

[37] *Id.* at 1167–68; *see also F.T.C. v. Accusearch Inc.*, 570 F.3d 1187, 1200 (10th Cir. 2009) (finding that Accusearch was an information content provider because it actively solicited offensive postings, contributing even more to the illegality of the conduct than Roommates did with the questionnaire).

[38] Notably, the court still places limitations on what it means to "develop" content so that every action does not become "development" and the immunity isn't effectively erased. For example, the court distinguishes regular search engines from the engine in Roommates, which provided the discriminatory search terms. *Roommates.Com*, 521 F.3d at 1169. Similarly, in *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1125 (9th Cir. 2003), the Ninth Circuit held that a website was immunized from liability under § 230 because it was merely a passive conduit for unlawful content; the allegedly libelous content at issue in that case was created and developed entirely by a malevolent user, without prompting or help from the website operator. Although the website provided neutral tools, the website did nothing to encourage the posting of defamatory content—rather, the defamatory posting was contrary to the website's express policies.

[39] Circumstances in which a website's actions do not constitute creation or development include: (1) providing a platform or neutral tools that a third party uses unlawfully or illicitly; Barnes v. Yahoo!, Inc., 570 F.3d 1096, 1101 (9th Cir. 2009); Roommates.Com, 521 F.3d at 1169; Fields v. Twitter, Inc., 217 F. Supp. 3d 1116, 1127 (N.D. Cal. 2016); (2) removing or refusing to remove third-party content, or policing accounts and policing content; Barnes, 570 F.3d at 1103; Cohen v. Facebook, Inc., 252 F. Supp. 3d 140, 157 (E.D.N.Y. 2017); (3) permitting complaints and notice from users of unlawful nature of third-party content; Barrett v. Rosenthal, 146 P.3d 510, 522, 525 (Cal. 2006); Universal Comm. Sys. v. Lycos, Inc., 478 F.3d 413, 420 (5th Cir. 2007); Gibson v. Craigslist, Inc., No. 08 Civ. 7735(RMB), 2009 WL 53246, at *4 (S.D.N.Y. June 15, 2009); (4) products liability, negligent design and failure to warn based on server-side software; Herrick v. Grindr, LLC, 306 F. Supp. 3d 579, 589–90 (S.D.N.Y. 2018), *aff'd,* 765 Fed. Appx. 5786 (2d Cir. 2019) (summary order); (5) "[t]he interactive

provider [ICS] and a content provider [ICP]. . . . Thus, a website may be immune from liability for some of the content it displays to the public but be subject to liability for other content."[40]

The expansive scope of § 230 has been critical to the development of the internet. Protecting websites from civil liability for third-party content the sites had no role in developing has enabled those with fewer resources to participate in the expanding online world without moderating every post. Section 230 has also been lauded for its protection of free speech, and for fostering both forums for open discussion and free markets.[41] Consequently, § 230 has deterred websites from participating in the development of illegal content themselves while not deterring them from attempting to moderate the content they host. This has contributed toward the goal that the internet remain a platform for public information-sharing and uninhibited discussion.

Despite (or perhaps because of) the decisive role § 230 has played in shaping the internet, it has regularly been subject to criticism. In particular, concerns that courts have interpreted § 230 to grant broad immunity to websites involved in sexual exploitation[42]

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service provider [having] an active, even aggressive role in making available content prepared by others"; Blumenthal v. Drudge, 992 F. Supp. 44, 52 (D.D.C. 1998); (6) sexual predator relying on platform to assault minors, not based on sex trafficking; Julie Doe II v. MySpace Inc., 96 Cal. Rptr. 3d 148, 150, 564 (Cal. Ct. App. 2009); Doe v. MySpace Inc., 528 F.3d 413, 415 (5th Cir. 2008); (7) website's software programming facilitating the creation of third-party content; Black v. Google Inc., No. 10-02381 CW, 2010 WL 3222147 at *3 (N.D. Cal. Aug. 13, 2010); (8) using questionnaire with multiple choice answers on a dating website to generate content; Carafano v. Metrosplash.com. Inc., 339 F.3d 1119, 1124 (9th Cir. 2003); and (9) archiving, cacheing, and providing access to third-party content. Parker v. Google, Inc., 422 F. Supp. 2d 492, 501 (E.D. Pa. 2006).

[40] *Roommates.Com*, 521 F.3d at 1162–63.

[41] *See* Lura Chamberlain, *FOSTA: A Hostile Law with A Human Cost*, 87 FORDHAM L. REV. 2171, 2185 (2019)

[42] *See, e.g.*, *Doe v. Bates*, No. 5:05-CV-91-DF-CMC, 2006 WL 3813758, at *5 (E.D. Tex., Dec. 27, 2006) (finding § 230 grants immunity to websites when third-party posts contain child pornography); *Doe v. MySpace, Inc.*, 474 F. Supp. 2d 843, 851 (W.D. Tex. 2007) (finding MySpace immune to liability under § 230 when adult user

were a driving force in the passage of FOSTA. Most influential was the case *Jane Doe No. 1 v. Backpage.com, LLC*., in which three women brought claims under 18 U.S.C. § 1595[43] that they had been sex trafficked on Backpage as minors.[44] There the U.S. Court of Appeals for the First Circuit held that § 230 protected Backpage from civil liability because the underlying allegations treated the website as the "publisher or speaker" of third-party content.[45]

Plaintiff-appellants in the case argued that Backpage was not acting as a passive publisher of third-party content.[46] Specifically, appellants alleged that Backpage was liable not solely for hosting advertisements of the minors, but for its own actions which made it easier to advertise trafficked persons. These actions, appellants suggested, fell outside a publisher's purview and constituted "participation in a venture which that person knew or should have known has engaged in an act"[47] of sex trafficking, in violation of the Trafficking Victims Protection Act (TVPA). The court disagreed, finding that Backpage's conduct was typical of a publisher, and so § 230 immunity applied.[48] Notably, the plaintiff-appellants argued only

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contacted, lured, and sexually assaulted a minor user); *Dart v. Craigslist, Inc*., 665 F. Supp. 2d 961, 969 (N.D. Ill. Oct. 20, 2009) (finding Craigslist immune to liability under § 230 for creating classified services alleged to facilitate prostitution and constitute public nuisance).

[43] Section 1595 provides a civil right of action to victims of violations of § 1591, the criminal provision in TVPA. The scope of § 1595 and § 1591 are discussed in detail in Part II.

[44] Jane Doe No. 1 v. Backpage.com, LLC, 817 F.3d 12, 17 (1st Cir. 2016), *cert. denied*, 137 S. Ct. 622 (2017).

[45] *Id.* at 18, 24.

[46] *Id.* at 19 n.4 (finding that, though this argument was raised by amici, it is not relevant because it was not proposed in the complaint). *See also* H.R. COMM. ON THE JUDICIARY, ALLOW STATES AND VICTIMS TO FIGHT ONLINE SEX TRAFFICKING ACT OF 2017, H.R. REP. NO. 115-572, at 4, https://www.congress.gov/115/crpt/hrpt572/CRPT-115hrpt572.pdf.

1. [47] 18 U.S.C. § 1595(a).

[48] *Backpage.com, LLC*, 817 F.3d, at 22 ("We hold that claims that a website facilitates illegal conduct through 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(c)(1). This holding is consistent with, and reaffirms, the principle that a website operator's decisions in structuring its website and posting requirements are

that Backpage was not a publisher, they did not argue that Backpage had played a role in developing the ads in question, which would have precluded § 230 immunity under existing case-law.[49] After the First Circuit ruling, but prior to FOSTA's enactment, two federal district courts found that Backpage's actions did constitute "development," making Backpage an ICP. The courts subsequently denied Backpage's motions to dismiss under § 230.[50]

Although *Jane Doe v. Backpage* was characterized by advocates of FOSTA as epitomizing the consequences of the broad scope of § 230 immunity,[51] the actions actually immunized by § 230 before FOSTA's amendments were not particularly expansive in this context. *Jane Doe* did hold that Backpage was immune from the civil provisions of the TVPA, but even before FOSTA, Backpage would not have been granted immunity for any federal criminal violations of the TVPA, which fall outside § 230 protection. [52] Furthermore, had Backpage been found to have "developed," in part or in whole, any of the trafficked women's advertisements, as new evidence in subsequent cases suggests,[53] their conduct would have been equally outside § 230 protection. Finally, the traffickers who themselves developed and

publisher functions entitled to section 230(c)(1) protection").

[49] *Id.* at 19 n. 4 (finding that, though this argument was raised by amici, it is not relevant because it was not proposed in the complaint). *See also* H.R. COMM. ON THE JUDICIARY, ALLOW STATES AND VICTIMS TO FIGHT ONLINE SEX TRAFFICKING ACT OF 2017, H.R. REP. NO. 115-572, at House Judiciary Committee Report page 4, https://www.congress.gov/115/crpt/hrpt572/CRPT-115hrpt572.pdf.

[50] *See* Eric Goldman *supra* note 22, at 287–288.

[51] This was emphasized in particular through the film *I Am Jane Doe* which documented the plaintiffs' stories and highlighted the effect of § 230 in their cases. The film was released in February 2017 and screened for Congress. FOSTA was drafted that same year.

[52] 18 U.S.C. § 1593; Notably, the criminal provisions of the TVPA have a mandatory restitution provision that should, in theory, provide survivors with monetary relief.

[53] After FOSTA had been passed but before it was signed into law, two federal district courts denied Backpage's motions to dismiss on § 230 grounds because of evidence Backpage had contributed to the development of the illegal content. *See* Doe No. 1 v. Backpage.com, LLC, 2018 WL 1542056, *2 (D. Mass. Mar. 29, 2018); Florida Abolitionist v. Backpage.com, LLC, 2018 WL 1587477, *4–5 (M.D. Fla. Mar. 31, 2018); *see also* Goldman, *supra* note 22, at 287–288.

posted the advertisements would still have been liable under both the criminal and civil provisions of the TVPA. Nonetheless, criticism interpreting § 230 caselaw as having granted broad immunity for Backpage was a primary instigator of the FOSTA amendments.[54]

B. FOSTA's Amendments to § 230

In response to growing public condemnation of § 230 following *Jane Doe*, in April 2018 Congress amended the CDA by the legislative package H.R. 1865,[55] or FOSTA. The stated purpose of the amendments was to further restrict the scope of § 230 immunity for website providers that published content promoting or facilitating prostitution and sex trafficking. Congress hoped to clarify that § 230, "does not prohibit the enforcement of State and Federal criminal and civil law related to sexual exploitation of children or sex trafficking . . . ."[56]

To that end, FOSTA amends § 230[57] such that immunity will not be provided for (1) a federal civil claim brought under TVPA § 1595, (2) a state criminal charge for conduct that would constitute a violation of TVPA § 1591, or (3) a state criminal charge for conduct that would constitute a violation of § 2421A.[58] In other words, if an ICS's conduct constitutes a violation of one of the aforementioned laws, § 230 will not shield it from liability, even if the ICS merely

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[54] Though Backpage was the most widely touted case, there were others. *See supra* note 41 and accompanying text; see also Doe ex rel. Roe v. Backpage.com, LLC, 104 F. Supp. 3d 149 (D. Mass., 2015) (applying § 230 to Backpage.com).

[55] Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. No. 1115-164, 132 Stat. 1253 (2018).

[56] *Id*.

[57] Note that FOSTA leaves § 230(c)(2)(A) untouched—the "good faith content removal" immunity still applies to 18 U.S.C. §§ 1591, 1595, 2421A. 47 U.S.C. § 230(e)(5). *See supra* note 23 and accompanying text for a description of "good faith" in § 230(c)(2)(A).

[58] *See* Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. No. 1115-164, § 4, 132 Stat. 1253 (2018). The meaning and scope of these laws (i.e., 18 U.S.C. §§ 1591, 1595, 2421A) are discussed in *infra* Part II: The Trafficking Victims Protection Act § 1591 and § 1595 & Part III: The Mann Act § 2421A respectively.

allows the publication of third-party content it did not itself help "develop."

By exposing ICSs to liability for third-party content, FOSTA represents a significant shift in the law. This will undoubtedly have a lasting impact on the future development of the internet. Where § 230 immunity protected free speech, encouraged open dialogue in online forums, and made the internet generally accessible while still disincentivizing illegal conduct by website providers, the amendments will disrupt this careful balance. Congress chose in § 230 to immunize civil but not criminal violations because "the distinctions between civil and criminal actions—including the disparities in the standard of proof and the availability of prosecutorial discretion—reflect a legislative judgment that it is best to avoid the potential chilling effects that private civil actions might have on internet free speech."[59] The risk of being held liable for third-party content following FOSTA will result in exactly this chilling effect § 230 was meant to prevent. In fact, as websites have shut down out of fear of liability, sex workers have lost affordable advertising spaces and access to platforms to share safety information. As a result, many sex workers have been forced into dangerous circumstances, as described in the introduction.[60]

Despite the numerous and extensive consequences of FOSTA's § 230 amendments to free speech on the internet and consequently to the safety of sex workers, the changes will not necessarily further the stated purpose of the legislation. FOSTA was passed in response to concerns about the proliferation of sex trafficking and sexual exploitation: to that end, the amendments do very little to prevent trafficking and may, in fact, impede efforts to identify and aid survivors. Though traffickers have lost platforms from which to advertise, trafficking itself has not decreased, but has been pushed

[59] Jane Doe No. 1 v. Backpage.com, LLC, 817 F.3d 12, 23 (1st Cir. 2016).
[60] *See* Introduction.

back underground.[61] As such, law enforcement officers have stated that they can no longer use these sites to find missing sex trafficking victims.[62]

FOSTA is not only an ineffective tool in protecting survivors of sex trafficking, it does very little to change trafficking law.[63] Thus, the substantial changes made to § 230, that drastically harm free speech on the internet are not justified by the unrealized benefits.

C. State-Level Criminal Liability

The FOSTA amendments to CDA § 230 limit immunity provided to ICSs for hosting content that violates state-level anti-trafficking and prostitution laws.[64] Following FOSTA, ICSs will not receive § 230 immunity from state-level criminal liability for conduct that would also violate the federal anti-trafficking statutes 18 U.S.C. § 1591 or § 2421A.[65] While federal criminal liability was already excluded from immunity under § 230(e)(1), immunity had still attached to state criminal liability prior to FOSTA's passage. Nonetheless, numerous impediments to state-level anti-trafficking prosecutions make a significant post-FOSTA increase in state-level

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[61] Eric Goldman, *supra* note 21, at 290. ("If FOSTA succeeds in shutting down high-traffic, high-visibility websites, it will suppress a key means of detecting and reporting sex trafficking, thus decreasing trafficking victims' chances of being recovered.")(quoting Declaration of Alexandra Frell Levy, Woodhull Freedom Found. v. U.S., No. 1:18-cv-01552, 2–3 (D.D.C. June 28, 2018), https://www.eff.org/files/2018/06/28/alex_levy_declaration_filed.pdf.).

[62] Lynn Casey, *Police Look for More Ways to Investigate Trafficking without Backpage*, FOX23 NEWS, (May 4, 2018, 10:32 PM), https://www.fox23.com/news/police-look-for-more-ways-to-investigate-trafficking-without-backpagecom/744121407.

[63] Even before FOSTA was passed, the SAVE Act had amended § 1591 to reach websites like Backpage. *See* Stop Advertising Victims of Exploitation Act of 2015, H.R. 285, 114th Cong. (1st Sess. 2015).

[64] *See supra* notes 56–59 and accompanying text.

[65] 47 U.S.C. § 230 (e)(5). 18 U.S.C. § 2421A is a federal crime create by FOSTA that prohibits owning, managing, or operating an ICS with the intent to promote or facilitate the prostitution of another person. See *infra* Part III: The Mann Act § 2421A of this document for a detailed analysis of this new federal crime.

criminal prosecutions of the owners, managers, or operators of interactive computer services seem unlikely. [66]

1. Pre-FOSTA Immunity for State-Level Criminal Violations

Prior to the FOSTA amendments, ICS owners, managers, and operators were afforded § 230 immunity for hosting content that violated state-level criminal laws, consistent with the limitations previously discussed. Thus, though a number of states' laws provide for third-party liability for businesses that knowingly benefit from or facilitate sex-trafficking,[67] websites that merely hosted adult advertisements were effectively protected from prosecution by § 230 immunity. Following existing § 230 case law, websites that could be shown to have in any way "developed" or created the offending content were still excluded from immunity.

At least one court has reasoned that because § 230 immunity lessened the potential impact of state criminal laws, new state legislation relating to online facilitation of trafficking and prostitution was unenforceable. In 2012, the District Court for the Western District of Washington granted an injunction to Backpage.com against the enforcement of Washington State Senate Bill 6251 (SB 6251), which would have made it a felony to knowingly publish, disseminate, or display, or to "directly or indirectly" cause content to be published, disseminated, or displayed, if it contains "a depiction of a minor" and any "explicit or implicit offer" of sex for "something of value."[68] The injunction was granted partly on the grounds that SB 6251 conflicted with, and was therefore preempted by, CDA § 230.[69]

The impact of § 230 immunity on the potential effectiveness of state criminal law was at the forefront of legislative debates and

[66] For a discussion of these impediments see pages 20-22.
[67] *See*, *e.g.*, 18 Pa. Cons. Stat. § 3011(a)(2).
[68] Backpage.com, LLC v. McKenna, 881 F. Supp. 2d 1262, 1268 (W.D. Wash. 2012).
[69] *Id.* at 1272–73.

remarks leading up to FOSTA's passage. Members of the House and Senate emphasized the need for the law to stop what they viewed as federal impediments on local law enforcement actions. For example, former state attorney general and co-sponsor of FOSTA Senator Richard Blumenthal, in urging the passage of FOSTA, said, "As a state prosecutor, I was told that I could not pursue actions against Craigslist or other sites nearly a decade ago because of [CDA § 230] and the interpretation. Clearly, the websites that facilitate this, knowingly encouraging and profiting from sex trafficking, must face repercussions in the courtroom."[70] Co-sponsor Senator Claire McCaskill said, "[T]he most important part of this bill . . . is the tool it gives our frontline of law enforcement in this country . . . . [N]ot the FBI . . . . [T]he local police . . . . This is a new tool in the toolbox of the frontline of criminal prosecutions in this country."[71] Numerous other legislators, many of whom have previous prosecutorial or law-enforcement experience, made similar arguments.

2. How FOSTA Changes State-Level Criminal Liability

In part as a response to these concerns, FOSTA was passed with two amendments to CDA § 230 directly targeted at state-level liability for websites. Section 230 now excludes from immunity:

> (B) any charge in a criminal prosecution brought under State law if the conduct underlying the charge would constitute a violation of section 1591 of title 18, United States Code; or
>
> (C) any charge in a criminal prosecution brought under State law if the conduct underlying the charge would constitute a violation of section 2421A of title 18, United States Code, and

[70] 164 CONG. REC. S1851 (daily ed. March 21, 2018) (statement of Sen. Blumenthal).

> promotion or facilitation of prostitution is illegal in the jurisdiction where the defendant's promotion or facilitation of prostitution was targeted.[72]

Just as in FOSTA's other provisions, however, there is a tremendous amount of ambiguity in this statutory text. Without more, it is unclear what exactly must be proven to establish that conduct underlying a state charge would violate the corresponding federal statutes.

An initial ambiguity arises from the state laws themselves. In 2003, Washington became the first state to criminalize human trafficking at the state level. Within only ten years, all fifty states had passed criminal trafficking laws.[73] Many of these laws create criminal liability for third parties who benefit from or facilitate trafficking or for anyone who "knowingly profits" from a trafficking venture. However, these state laws vary widely as to who is defined as a trafficker, what *mens rea* and *actus reus* are required, and whether they include third-party liability. Determining the elements of a violation following FOSTA therefore requires differentiating between the various elements and standards utilized at the state level.

Additionally, while some state anti-trafficking laws are modeled after 18 U.S.C. § 1591, they may be sufficiently dissimilar that their primary utility may be in prosecuting conduct that would not violate their federal corollary.[74] A related open question remains: if a

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[71] 164 CONG. REC. S1854 (daily ed. March 21, 2018) (statement of Sen. McCaskill).
[72] Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. No. 1115-164, § 4(b)–(c), 132 Stat. 1253 (2018).
[73] *See Wyoming Becomes 50th State to Outlaw Human Trafficking*, POLARIS (Feb. 27, 2013), https://polarisproject.org/news/press-releases/wyoming-becomes-50th-state-outlaw-human-trafficking.
[74] *See* AMY FARRELL ET AL., IDENTIFYING CHALLENGES TO IMPROVE THE INVESTIGATION AND PROSECUTION OF STATE AND LOCAL HUMAN TRAFFICKING CASES 145–52 (2012), https://www.urban.org/sites/default/files/publication/25526/412593-Identifying-Challenges-to-Improve-the-Investigation-and-Prosecution-of-State-and-Local-

state law is modeled after § 1591 or § 2421A, but has some differences, to what extent must a prosecutor show that the conduct underlying the state charge would also violate the federal law?[75] Although this language may have been included to guard online platforms against the application of a patchwork of state laws, it is likely that, post-FOSTA, state prosecutors seeking trafficking convictions of website owners must prove that the website owners' conduct violates *both* the state law and at least one of the two correlating federal laws. This is a potentially high bar considering the ambiguities in those federal laws, described in Part II.

3. Likely Impact of FOSTA's Changes to State Level Criminal Liability

Despite the emphasis during legislative debates on the chilling effect of § 230 immunity to state criminal charges, it is not clear that the resultant amendments will facilitate state-level trafficking prosecutions.[76] Scholars at the Villanova Law School's Institute to Address Commercial Sexual Exploitation have said that as Pennsylvania state law stands, the FOSTA amendment to the CDA had "no effect in the Commonwealth."[77] They argue that amendments to Pennsylvania's anti-trafficking statute adding "advertises" to its trafficking definition are necessary so that "state prosecutions against website owners" can go forward. This suggest the current language of the Pennsylvania anti-trafficking statute which provides for third party criminal liability for any "business entity who knowingly aids or

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Human-Trafficking-Cases.PDF.

[75] Determining how one would prove that "conduct underlying the charge would constitute violation" of another law is difficult because it is novel language that lacks clear corollaries in any particular body of law. Analogies could be made to double jeopardy, U.S. v. Lynn, 636 F.3d 1127 (9th Cir. 2011), or plea agreements with sentences based on dismissed charges, U.S. v. Pearson, No. 09–4083, 2011 WL 2745795 at *3 (6th Cir., July 14, 2011), but neither usage lines up precisely with Congress's use in FOSTA.

[76] In fact, some experts suggest that the removal of sites like Backpage make it more difficult to find and prosecute violators.

[77] VILLANOVA UNIV. CHARLES WIDGER SCH. OF LAW, REPORT ON COMMERCIAL SEXUAL EXPLOITATION IN PENNSYLVANIA 22 (2018), https://cseinstitute.org/wp-

participates in" trafficking[78] does not already cover ICSs. Thus, despite the passage of FOSTA, state prosecutors in Pennsylvania may still be unable to use Pennsylvania's anti-trafficking statute to prosecute website owners.

In addition, the FOSTA amendments may not engender change in state-level prosecutions because they don't address numerous other factors preventing state-level prosecutions from going forward. Prior to FOSTA, trafficking charges were rarely brought in state-level trafficking investigations. A 2012 study from Northeastern University found that of all state-level trafficking investigations reviewed, only 17% went forward with a trafficking charge. The most common state-level charges resulting from these investigations were compelling or promoting prostitution.[79] However, it is not clear that the potential for § 230 immunity was the driving factor in this low rate of trafficking prosecutions. Rather, the Northeastern study identified the following as factors preventing these charges: the fact that people identified by law enforcement as trafficking victims do not self-identify as victims, distrust law enforcement, and refuse to provide police statements or otherwise cooperate in investigations; law enforcement perceptions that trafficking victims "lack[] credibility;" lack of precedent under state trafficking statutes; lack of knowledge of state trafficking statutes by local prosecutors; lack of guidance for state-level prosecutors in how to conduct a trafficking prosecution; fear of losing and damage to prosecutors' reputations; and reluctance by victims to testify or cooperate at the point of trial.[80] Further, many local law enforcement officials surveyed said they believed that trafficking prosecutions were better handled by the federal government.[81] It is worth noting that federal-level trafficking investigations follow a similar pattern to state-level investigations; the primary charges resulting from federal

content/uploads/2019/06/Spring-2019-Report-6.21.19-pdf.pdf.
[78] 18 PA. CONS. STAT. § 3011.
[79] AMY FARRELL ET AL., *supra* note 73, at 61.
[80] *Id.* at 106–31, 144–45.
[81] *Id.* at 153.

trafficking investigations—despite the fact that § 230 has never provided immunity against federal criminal charges—are for transporting persons across state lines for the purposes of prostitution.[82] All of this suggests that historically § 230 immunity has not affected the rate at which trafficking prosecutions are brought at the state level, making it unlikely that FOSTA will result in a meaningful uptick of trafficking prosecutions.

FOSTA's limited potential for real impact is evidenced by recent California Attorney General prosecutions against Backpage. The first prosecution was initiated in 2016, prior to the passage of FOSTA, and was premised primarily on "pimping" charges.[83] That case was dismissed under § 230.[84] Subsequently, in 2017, still prior to FOSTA, new charges were filed based primarily on pimping, money laundering resulting from pimping, and general money laundering. In that case, though the pimping-related charges were dismissed on the basis of § 230 immunity, the other money laundering charges were allowed to proceed.[85] Thus, though some charges were dismissed, § 230 immunity did not fully preclude state prosecution of sites like Backpage.

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[82] *Id.* at 61. These kinds of federal charges are brought under 18 U.S.C. § 2421, "the Mann Act," discussed in Part III: The Mann Act § 2421A below.

[83] Criminal Complaint, People v. Ferrer, 2016 WL 7237305 (Cal. Super. Dec. 9, 2016) (No. 16FE019224), *available at* https://oag.ca.gov/system/files/attachments/press_releases/File%20endorsed%20Criminal%20Complaint%20tjy_Redacted.pdf

[84] *See* Ferrer, 2016 WL 7237305 (Cal. Super. Dec. 9, 2016). For an analysis of the case, see Eric Goldman, *Backpage Executives Defeat Pimping Charges Per Section 230–*People v. Ferrer, TECH & MARKETING L. BLOG (Dec. 15, 2016), https://blog.ericgoldman.org/archives/2016/12/backpage-executives-defeat-pimping-charges-per-section-230-people-v-ferrer.htm.

[85] *See* Press Release, Xavier Becerra, Attorney General Becerra: Court Allows Prosecution in Sex Trafficking Backpage.com Case to Proceed (Aug. 23, 2017), https://oag.ca.gov/news/press-releases/attorney-general-becerra-court-allows-prosecution-sex-trafficking-backpagecom; *See also* Eric Goldman, *Backpage Executives Must Face Money Laundering Charges Despite Section 230–*People v. Ferrer, TECH & MARKETING L. BLOG (Aug. 24, 2017), https://blog.ericgoldman.org/archives/2017/08/backpage-executives-must-face-money-laundering-charges-despite-section-230-people-v-ferrer.htm.

Given these circumstances, FOSTA does not to appear to be the strong tool for increasing local level enforcement that legislators described in Congressional discussion of the bill. In fact, to our knowledge, state-level law enforcement has not yet utilized the new provisions. Nonetheless, anti-trafficking initiatives have historically garnered wide public support, and more recently have attracted federal funding.[86] As a result, though the trend so far has been a continuation of pre-FOSTA low rates of state prosecution, it is possible that local officials may focus on passing new state laws or on increasing state-level prosecution of ICSs.[87]

The true impact of FOSTA on state criminal liability, though one of the driving factors in passing the legislation, is currently uncertain. Conceivable outcomes include any of the following: an increase in state-level criminal prosecutions under existing state-level anti-trafficking laws; passage of new state-level anti-trafficking laws; reliance primarily on *parens patriae* federal civil suits by states' attorneys general rather than state-level criminal prosecutions;[88] or (in line with the trend during the two years since FOSTA became law) continued prosecution of ICSs primarily at the federal level and primarily using criminal laws not specific to trafficking, such as money laundering, promotion of prostitution, and other prostitution-related charges.

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[86] "Approximately $73 million has been devoted to supporting state law enforcement's anti-trafficking efforts. This figure was calculated based on data reported in the FY 2002 to 2009 U.S. Attorney General's Report to Congress and Assessment of U.S. Activities to Combat Trafficking in Persons, released annually by the U.S. Attorney General's Office." FARRELL *supra* note 73, at 3 n.2.

[87] *See, e.g.*, Dana Kozlov, *Cook County Sheriff Working to Shut Down Sex Trafficking Websites*, CBS CHICAGO (Oct. 2, 2018 10:11 PM), https://chicago.cbslocal.com/2018/10/02/cook-county-sheriff-working-to-shut-down-sex-trafficking-websites/ (describing Cook County Sheriff Tom Dart's efforts to target post-FOSTA websites that host ads posted by people in the sex trades).

[88] *Parens patriae* suits under § 1595 as amended by FOSTA allow state attorneys general to bring civil lawsuits on behalf of state residents for conduct that would violate the criminal provision § 1591. *See infra* note 178 and accompanying text.

D. State-Level Civil Liability

FOSTA makes no changes to ICSs' state level civil liability for trafficking or prostitution-related claims. Proliferation during the past year of civil suits under state-level anti-trafficking law has led to media claims that these suits are the result of FOSTA's passage. The more likely truth, however, is that FOSTA's passage was one piece of a nationwide trend in pursuing civil litigation of websites and other third-party businesses for facilitation of sex trafficking. This was a trend that preceded FOSTA, that developed out of intentional strategies of anti-trafficking non-profit organizations, and that was part of the campaign for FOSTA's passage.

1. CDA § 230 and a Rise in State-level Civil Actions

The FOSTA amendments to CDA § 230 targeted only federal civil violations and state criminal violations. This means that § 230 immunity is still provided to ICSs against state-level civil actions for trafficking.[89] In accordance with case-law, in order for a website to be held liable in these actions, a plaintiff must show either that the ICS is not being treated by the plaintiff as a publisher or speaker, or that the ICS "developed," at least in part, the violating content.[90]

Though FOSTA did not change the scope of § 230 immunity for state civil liability, there has been a rise in state-level civil actions related to trafficking and prostitution. Before 2018, relatively few civil actions had been brought under state human trafficking laws, much less against third-party businesses such as owners and managers of ICSs. This is not for a lack of state legislation. At least forty states and the District of Columbia have passed laws providing a state-level civil

[89] *See* Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. No. 1115-164, § 4(a), 132 Stat. 1253 (2018).
[90] *See supra* note 35–39 and accompanying text.

right of action against people who violate human trafficking law.[91] A number of these rights of action also create civil liability for third parties who knowingly profit from either sex trafficking or prostitution.[92] And yet, with a few exceptions, these laws were mostly unused prior to 2018. Rather, the handful of civil claims alleging sex trafficking had primarily been brought at the federal level.[93]

This trend seems to be rapidly changing. A January 2019 complaint brought against Backpage by Medalist Holdings (the Delaware Corporation of which Backpage was previously a subsidiary) lists 24 currently pending state-level civil actions against Backpage and dozens of third-party facilitator co-defendants. These were brought in 10 states under various state laws, including state trafficking laws.[94]

This rapid change has contributed to the public belief that FOSTA caused or enabled state-level civil claims. However, many of the new state-level claims are not being brought under anti-trafficking laws, and when they are, concurrent claims are brought under tort laws such as negligence and conspiracy. What is more likely is that both FOSTA and the recent proliferation of state-level suits are part of a trend in targeting third parties under anti-trafficking law and longstanding state-level tort laws, a strategy developed by organizations such as the Polaris Project and Shared Hope

[91] POLARIS, HUMAN TRAFFICKING ISSUE BRIEF: CIVIL REMEDY (2015).
[92] *See*, *e.g.*, 18 PA. CONS. STAT. § 3051.
[93] A noteworthy early case under state-level civil trafficking law was *J.S. v. Vill. Voice Media Holdings*. In that case, three minor girls brought claims under numerous state laws, including Washington's state trafficking law, Wash. Rev. Code. § 9A.40.100, against Backpage.com's parent company. In keeping with precedent, the court determined that the website would have § 230 immunity against the claim if they had merely hosted the advertisements featuring the girls, but not if they had even partially developed the content of those advertisements. Notably, despite CDA § 230 the allegations survived a motion to dismiss because the girls had alleged sufficient facts to show that Backpage may have partially developed the content. *J.S. v. Vill. Voice Media Holdings, LLC*, 359 P.3d. 714 (Wash. 2015) (en banc).
[94] Verified Amended Complaint at 37–50, Camarillo Holdings LLC v. Amstel River Holdings LLC, 2018 WL 5268124 (Del. Ch. Jan. 2, 2019) (No. 2018-0606-SG).

International.[95] Nonetheless, it is likely that, just as state prosecutors are hesitant to use untested state criminal anti-trafficking laws, personal injury attorneys will be hesitant to pursue civil anti-trafficking claims not previously utilized. Instead, they will likely continue to bring claims under tort laws with clear and robustly developed case law with which those attorneys have familiarity and under which outcomes are more predictable.

2. Misleading Statements in the Legislative Record and in the Media

Despite the fact that FOSTA makes no changes to state civil liability, in the past year reporters and at least one attorney have erroneously connected the rise in state-level civil actions to the FOSTA amendments, perpetuating the misnomer that FOSTA enabled such claims. For example, in a 2018 complaint, a Texas attorney cited FOSTA's changes to § 230 as paving the way for state-law tort claims filed against Backpage, Facebook, and Instagram on behalf of a Jane Doe.[96] The attorney in that case was a partner at Texas law firm Annie McAdams, which began to bring lawsuits against third-parties under Texas anti-trafficking law in early 2018, before FOSTA was enacted.[97] Though in fact unconnected, the attorney garnered media attention

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[95] *See Human Trafficking And Hotels & Motels*, POLARIS, https://polarisproject.org/initiatives/hotels (last visited Feb. 9, 2020); *see also* SHEA M. RHODES, SEX TRAFFICKING AND THE HOTEL INDUSTRY: CRIMINAL AND CIVIL LIABILITY FOR HOTELS AND THEIR EMPLOYEES (2015), https://cseinstitute.org/wp-content/uploads/2015/06/Hotel_Policy_Paper-1.pdf ; SHARED HOPE INT'L, WHITE PAPER: ONLINE FACILITATION OF DOMESTIC MINOR SEX TRAFFICKING (2014), http://sharedhope.org/wp-content/uploads/2014/09/Online-Faciliator-White-Paper-August-2014.pdf; *Protected Innocence Challenge Issue Briefs* § 4, SHARED HOPE INT'L, https://sharedhope.org/what-we-do/bring-justice/reportcards/protected-innocence-challenge-issue-briefs/#section4 (last visited Feb. 9, 2020).

[96] Jane Doe's First Amended Petition at 14–15, Jane Doe v. Facebook, No. 2018-69816 (Harris Cty. Civ. Dist. Ct. Nov. 14, 2018).

[97] Alvaro Ortiz, *Pioneering Lawsuit About Human Trafficking and Sexual Exploitation Filed in Houston*, HOUSTON PUBLIC MEDIA, (Jan. 24, 2018, 5:21 PM) https://www.houstonpublicmedia.org/articles/news/2018/01/24/263612/pioneering-lawsuit-about-human-trafficking-and-sexual-exploitation-filed-in-houston/.

by alleging a link between the pre-FOSTA suits and FOSTA.[98] Reports about the case continue to suggest that the FOSTA amendments facilitated the claims when, in fact, the claims survived a motion to dismiss based on § 230 immunity without any change in the law. In another prominent example, a California class action lawsuit brought by Annie McAdams against San Francisco-based tech company Salesforce has been falsely reported as being the result of FOSTA.[99] Reporters have thus perpetuated the inaccurate claim that FOSTA opens new avenues for state-level civil prosecutions.

Statements by Senators during legislative debate on FOSTA may also have contributed to the belief that FOSTA would impact state-level civil actions. For example, Senator Rob Portman said FOSTA "allows for our State and local prosecutors, who are going to take many of these cases, to be able to sue these websites that are selling people online using the current shield in Federal legislation."[100] These statements were either inaccurate or misleading, perhaps referring only to the *parens patriae* federal civil right of action FOSTA creates in § 1595, which would allow suits to be brought by a states' attorney general.[101]

3. State Liability in Sum:

Congress enacted FOSTA for the purpose of making it easier to

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[98] *See*, *e.g.*, Associated Press, *Lawsuit Accused Facebook of Enabling Human Traffickers*, TEXARKANA GAZETTE, (Oct. 6, 2018, 4:01 AM) http://www.texarkanagazette.com/news/texas/story/2018/oct/06/lawsuit-accused-facebook-enabling-human-traffickers/746578/.

[99] *See* Elizabeth Nolan Brown, *FOSTA's First Test Targets Cloud Company Used by Backpage: Reason Roundup*, Reason (March 28, 2019 9:30 AM), https://reason.com/2019/03/28/fostas-first-test-targets-cloud-company/.

[100] 164 CONG. REC. S1850 (daily ed. March 21, 2018) (statement of Sen. Portman).

[101] *See infra* note 178 and accompanying text. Note that FOSTA is implicated in newly brought federal civil claims that have yet to be decided. *See e.g.* Alex Yelderman, *New FOSTA Lawsuits Push Expansive Legal Theories Against Unexpected Defendants*, TECH. & MARKETING L. BLOG (Jan. 2, 2020), https://blog.ericgoldman.org/archives/2020/01/new-civil-fosta-lawsuits-push-expansive-legal-theories-against-unexpected-defendants-guest-blog-post.htm.

hold third parties accountable for violations of trafficking law, and greatly emphasized civil remedies as a method toward that end. During the last several years, we have seen attorneys bring a proliferation of civil claims against third party companies who have allegedly facilitated trafficking; however, the vast majority of these claims have been brought under state laws, which FOSTA does not affect. In other words, the only change in legal actions we've seen in the year since FOSTA passed has been an increase in legal claims that are not impacted by FOSTA itself, notwithstanding contradictory claims by the media, congresspersons, and attorneys.

PART II: THE TRAFFICKING VICTIMS PROTECTION ACT § 1591 AND § 1595

In addition to narrowing the scope of § 230 immunity to exclude claims under § 1591, FOSTA amends 18 U.S.C. § 1591, the criminal provision of the Trafficking Victims Protection Act (TVPA), by adding a definition of "participation in a venture" to the statute. Congress added this definition intending to make it easier in both criminal and civil cases to find websites liable for "benefit[ting] . . . from participation in a venture which has engaged in [sex trafficking]".[102] The meaning of the language added, however, is ambiguous, and critics believe the amendment may have actually made it more difficult for the government to prove liability under this provision.

A. § 1591 and § 1595 Background

The TVPA was passed in 2000[103] as a response to U.S. concerns that domestic human trafficking had increased as the result of

[102] 18 U.S.C. § 1591 (a)(2).

[103] The TVPA was influenced by the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, which also passed in 2000. *See International and Domestic Law*, U.S. DEP'T OF STATE OFFICE TO MONITOR AND COMBAT TRAFFICKING IN PERSONS, https://www.state.gov/international-and-domestic-law/ (last visited Feb. 9, 2020).

international organized crime.[104] The statute has been reauthorized and amended numerous times since its passage;[105] a 2015 amendment specifically targeted websites that advertise commercial sexual services.[106]

18 U.S.C. § 1591 criminalizes "severe forms" of sex trafficking, defined by the statute as "sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age."[107] A "commercial sex act" under the TVPA is "any sex act on account of which anything of value is given to or received by any person."[108] Although "sex act" is not specifically defined in the statute, courts have stated that sexual intercourse is conduct which falls "within the heartland of the term sex act."[109]

18 U.S.C. § 1595 creates a civil right of action for individuals who are victims of a violation of § 1591 as well as a *parens patriae* civil right of action for state attorneys general who have reason to believe that the interests of that state's residents are threatened or adversely affected by a person who violates § 1591.[110] Thus, civil liability will attach to any conduct that is made criminally liable by § 1591, and any amendments to § 1591 will also amend § 1595.

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[104] *See* DESTEFANO, THE WAR ON HUMAN TRAFFICKING at 32-33 (2007).
[105] *See International and Domestic Law*, *supra* note 101.
[106] *See* Goldman, *supra* note 22, at 282.
[107] Victims of Trafficking and Violence Protection Act of 2000 § 103, 22 U.S.C. § 7102 (2000).
[108] *Id.*
[109] *See, e.g.*, United States. v. Paris, No. 03:06-CR-64(CFD), 2007 WL 3124724 at *13 (D. Conn. Oct. 24, 2007) (rejecting defendant's argument that the term "sex act" is broad enough to cover actions like "legitimate modeling or acting in a romantic movie" and finding defendant guilty for knowingly having the victims provide oral, vaginal, or anal sex on his behalf).
[110] *See* 18 U.S.C. §§ 1595 (a), (d). See *infra* note 176–194 and accompanying text for more details on the *parens patriae* right of action (which was created by FOSTA).

1. Conduct

To establish a violation of 18 U.S.C. § 1591, the government must prove several elements. First, the defendant must have engaged in prohibited conduct, either as a primary actor or as a third-party actor. Section 1591(a)(1) creates liability for primary actors who engage in sex trafficking by recruiting, enticing, harboring, transporting, providing, obtaining, advertising, maintaining, patronizing, or soliciting by any means; and § 1591(a)(2) creates liability for third-party actors who knowingly benefit from participation in a venture with primary actors while knowing that those primary actors have violated the statute. Section 1591 defines coercion,[111] and various courts have provided definitions for "force,"[112] and "fraud."[113] The Office on Trafficking in Persons (OTIP) also provides guidance as to interpreting these terms,[114] but the definitions are contentious, and do not necessarily match definitions employed by state-level anti-trafficking laws, by researchers, or by service

[111] 18 U.S.C. § 1591(e)(2) (2012) ("The term 'coercion' means—(A) threats of serious harm to or physical restraint against any person; (B) any scheme, plan, or pattern intended to cause a person to believe that failure to perform an act would result in serious harm to or physical restraint against any person; or (C) the abuse or threatened abuse of law or the legal process.").

[112] *See, e.g.*, *United States v. Webster*, Nos. 08-30311, 09-30182, 2011 WL 8478276, at *1 (9th Cir. Nov. 28, 2011) (defining "force" as "any form of violence, compulsion or constraint exercised upon or against a person").

[113] *See United States v. Paris*, No. 03:06-CR-64(CFD), 2007 WL 3124724, at *14 (D. Conn. Oct. 24, 2007) (defining "fraud" as a "deliberate act of deception, trickery, or misrepresentation").

[114] OFFICE ON TRAFFICKING IN PERSONS, FACT SHEET: HUMAN TRAFFICKING (2017), https://www.acf.hhs.gov/otip/resource/fshumantrafficking ("**Force** includes physical restraint, physical harm, sexual assault, and beatings. Monitoring and confinement is often used to control victims, especially during early stages of victimization to break down the victim's resistance. **Fraud** includes false promises regarding employment, wages, working conditions, love, marriage, or better life. Over time, there may be unexpected changes in work conditions, compensation or debt agreements, or nature of relationship. **Coercion** includes threats of serious harm to or physical restraint against any person, psychological manipulation, document confiscation, and shame and fear-inducing threats to share information or pictures with others or report to authorities.").

providers.[115]

2. Mental State

The second element the government must prove is the *mens rea*, or mental state, of the defendant. This requirement differs based on the age of the alleged victim. If an alleged victim of severe forms of sex trafficking is under the age of eighteen, no force, fraud or coercion need to be shown. In such a case, a prosecutor must instead show that the defendant knew the victim's age, had a "reckless disregard of the fact" that the victim was under eighteen,[116] or, under § 1591(c), had a "reasonable opportunity to observe" the victim.[117] Courts have found that this provision imposes strict liability with regard to the defendant's awareness of the victim's age in any cases where the defendant had a reasonable opportunity to observe the alleged victim, for example, by living with them or being informed that they were under 18.[118]

In a prosecution for trafficking in which the alleged victim is over the age of eighteen, the prosecutor must prove one of the following elements: (1) for all defendants, inclusive of advertisers, knowledge that force, threat of force, fraud, or coercion were used; or (2) for all defendants *except* advertisers, reckless disregard of the fact that force, threat of force, fraud, or coercion were used.[119] The "advertising" provision in § 1591(a)(1) attaches to "someone who

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[115] *See* NATIONAL INSTITUTE OF JUSTICE, EXPERT WORKING GROUP ON TRAFFICKING IN PERSONS RESEARCH MEETING 7–8 (2014), https://www.ncjrs.gov/pdffiles1/nij/249914.pdf.

[116] 18 U.S.C. § 1591(a)(2) (2012).

[117] *Id.* ("In a prosecution under subsection (a)(1) in which the defendant had a reasonable opportunity to observe the person so recruited, enticed, harbored, transported, provided, obtained, maintained, patronized, or solicited, the Government need not prove that the defendant knew, or recklessly disregarded the fact, that the person had not attained the age of 18 years.").

[118] *See* United States v. Robinson, 702 F.3d 22, 26, 30–31 (2d Cir. 2012); United States v. Copeland, 820 F.3d 809, 813–14 (5th Cir. 2016) (clarifying that the strict liability *mens rea* applies only to knowledge of the victim's age).

[119] *See* 18 U.S.C. § 1591(a)(2) (2012); *see also* Backpage.com, LLC v. Lynch, 216 F. Supp. 3d 96, 109 (D.D.C. 2016).

'advertises,' [and] . . . someone who 'benefits . . . from participating in a venture which has engaged in [advertising]."[120]

When the victim is over the age of eighteen, prosecutors are not required to prove that any "alleged coercion was the but-for cause of the victim's commercial sex acts."[121] In other words, the prosecution must prove that the defendant knew that there would be force, threat of force, fraud, or coercion in order to sustain a conviction, but not that it led to the sex act.[122] In fact, no sex act actually needs to have occurred to find a defendant liable under the statute.[123]

3. In or Affecting Interstate Commerce

Congress, in passing the TVPA, specifically found that sex trafficking primarily "target[s] women and girls, who are disproportionately affected by poverty, the lack of access to education, chronic unemployment, discrimination, and the lack of economic opportunities" and could thus be "lur[ed] . . . through false promises of decent working conditions at relatively good pay."[124] Congress further found that "these widespread activities 'substantially affect[] interstate and foreign commerce.'"[125] Use of a cellular phone[126] (and presumably any other networked device), hotels that serve interstate travelers, or

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[120] *Id.*
[121] United States v. Backman, 817 F.3d 662, 666 (9th Cir. 2016); *see also* United States v. Alvarez, 601 Fed. Appx. 16, 18 (2d Cir. 2015).
[122] *See generally* John Cotton Richmond, *Federal Human Trafficking Review: An Analysis and Recommendations from the 2016 Legal Developments*, 52 WAKE FOREST L. REV. 293, 311 (2017).
[123] *Backman,* 817 F.3d at 666 ("'Case law makes clear that commission of a sex act or sexual contact is not an element of a conviction under 18 U.S.C. § 1591.' . . . 'What the statute requires is that the defendant know in the sense of being aware of an established modus operandi that will in the future coerce a prostitute to engage in prostitution'") *(*citing United States v. Hornbuckle, 784 F. 3d 549, 553 (9th Cir. 2015) and United States v. Brooks, 610 F. 3d 1186, 1197 n.4 (9th Cir. 2010)).
[124] United States v. Tutstone, 525 Fed. Appx. 298, 302 (6th Cir. 2013) (quoting 22 U.S.C. § 7101(b)(4)).
[125] *Id.* (quoting 22 U.S.C. § 7101(b)(12)).
[126] *See id.* at 303.

condoms that travelled in interstate commerce,[127] is sufficient to satisfy the statute's requirement that trafficking conduct occur "in or affecting interstate commerce."

B. FOSTA's amendment to § 1591

FOSTA amends 18 U.S.C. § 1591 (and thus also amends the scope of civil liability under § 1595) by adding language that purports to define "participation in a venture"[128] The exact language is as follows: "The term 'participation in a venture' means knowingly assisting, supporting, or facilitating a violation of (a)(1)."[129] This new definition does not change liability for primary actors but affects the liability of third-party defendants accused of "benefit[ing] . . . from participation in a venture" which has engaged severe forms of trafficking.

> Section 1591(a) provides as follows:
>
> **(a)**Whoever knowingly—
>
> **(1)** in or affecting interstate or foreign commerce, or within the special maritime and territorial jurisdiction of the United States, 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),
>
> 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,

[127] United States v. Evans, 476 F.3d, 1179–80 (11th Cir. 2007).
[128] H.R. 1865, 115th Cong. § 5 (2018) (enacted).
[129] *See id.*

> 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 punished as provided in subsection (b). [130]

Putting the post-FOSTA definition of "participation in a venture" into the above language, the statute now creates third-party liability for "knowingly assisting, supporting, or facilitating" the knowing "recruit[ment], entice[ment], harbor[ing], transport[ing], provid[ing], obtain[ing], advertis[ing], maintain[ing], patronize[ing], or solicit[ing] by any means a person . . . knowing, or, [for all defendants except advertisers] in reckless disregard of the fact, that means of force, threats of force, fraud, or coercion 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."[131]

One writer has suggested that enumerating the exact definition of "participation in a venture" in § 1591 is "pivotal . . . because it serves as the basis for determining what degree of tangential involvement [with sex trafficking] triggers culpability."[132] However, whether FOSTA's definition provides clarity or greater confusion remains undetermined. The biggest question raised by the new definition is exactly *what* a third-party participant in a venture must know in order to be held civilly or criminally liable.

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[130] 18 U.S.C. § 1591(a) (2012).
[131] *See* 18 U.S.C. § 1591 (a).
[132] *See* Meaghan E. Mixon, *Barely Legal: Bringing Decency Back to the Communications Decency Act of 1996 to Protect the Victims of Child Sex Trafficking*, 25 UCLA WOMEN'S L.J. 45, 79 (2018) (stating further that "Currently [what degree of tangential involvement triggers culpability] is unclear, but the purpose of the proposed language is to clarify what actions or connections cross the threshold into liability.").

1. History of "Participation in a Venture"

Prior to FOSTA's enactment, § 1591 did not enumerate a definition of "participation in a venture," but did define "venture" as "any group of two or more individuals associated in fact, whether or not a legal entity."[133] In a 2016 decision, *United States v. Afyare*, the Sixth Circuit understood this enumerated definition—within the context of the rest of the statute and considering the statutory purpose—to mean that a defendant could be found to have benefitted from participation in a venture if that defendant was one of "two or more people who engage in sex trafficking together," but not if the defendant did not actually act in furtherance of trafficking, even if that defendant had associated with a person engaged in trafficking and had benefitted from the trafficking.[134] The court said that the statute "did not criminalize a defendant's 'mere negative acquiescence,'" and to do so would create "a vehicle to ensnare conduct that the statute never contemplated."[135] The court further reasoned that "criminal statutes are to be strictly construed against the government."[136]

Less than two weeks after the Sixth Circuit opinion was filed, the First Circuit—in *Jane Doe No. 1 v. Backpage*, the civil case that would become a public flashpoint and the impetus behind FOSTA—stated that "'participation in a sex trafficking venture' [is] a phrase that no published opinion has yet interpreted."[137] The Court did not itself interpret this phrase, finding that even if Backpage's relevant actions in running the website had constituted participation in a sex trafficking venture, these actions were conducted "as a publisher with respect to third-party content," and thus the company was shielded

[133] 18 U.S.C. § 1591(e)(6).
[134] *See* United States v. Afyare, 632 Fed. Appx. 272, 286 (6th Cir. 2016).
[135] *Id.*
[136] *Id.*
[137] *See* Jane Doe No. 1 v. Backpage.com, LLC, 817 F.3d 12, 21 (1st Circ. 2016).

from civil liability by CDA § 230.[138]

Thus, under *United States v. Afyare*, for a secondary actor to be criminally liable under § 1591 for participation in a venture, the actor must have been one of two or more people engaged in sex trafficking together, and the actor must have participated in a way that furthered the trafficking. This participation must have gone beyond "mere negative acquiescence." Moreover, under *Doe v. Backpage*, if the participatory conduct was that of a publisher of third-party content, the secondary actor was shielded from civil liability under § 1595 by CDA §230.

Congressmembers acknowledged that CDA § 230 was not a barrier to federal criminal enforcement of § 1591, because § 230(e)(1) explicitly excludes criminal violations of § 1591 from § 230 immunity.[139] However, a House Judiciary Committee report on FOSTA claimed that § 1591, as written, was insufficient to hold website operators criminally liable for sex trafficking because the "knowledge standard [for § 1591] [was] difficult to prove beyond a reasonable doubt . . ." because "online advertisements rarely, if ever, indicate that sex trafficking is involved."[140] The report further noted that "general knowledge that sex trafficking occurs on a website will not suffice as knowledge must be proven as to a specific victim."[141] This proved to be a problem, the report stated, because "the victims are often uncooperative . . . ."[142] Referring to 2124A, the report concluded that "a

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[138] The First Circuit further found that civil enforcement of the TVPA through § 1595 (or of any criminal law) did not fall within CDA § 230(e)(1), which states that § 230 should not be construed to impair the enforcement of any Federal criminal statute. *See id.* at 23; *see also supra* note 24 and accompanying text.

[139] **"NO EFFECT ON CRIMINAL LAW;** 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." 47 U.S.C. § 230 (e)(1).

[140] H.R. COMM. ON THE JUDICIARY, ALLOW STATES AND VICTIMS TO FIGHT ONLINE SEX TRAFFICKING ACT OF 2017, H.R. REP. NO. 115-572, at 5 (2018).

[141] *Id.*

[142] *Id.*

new statute that instead targets promotion and facilitation of prostitution is far more useful to prosecutors."[143]

Sen. Wagner's version of FOSTA as originally introduced in the House in 2017 also responded to the concern discussed in the Judiciary Committee report by broadening the definition of "participation in a venture," defining it as "knowing *or* reckless conduct by any person *or* entity and by any means that furthers or in any way aids or abets the violation of subsection (a)(1) . . ." of 18 U.S.C. § 1591.[144] Under this version of "participation in a venture," liability would attach to any entity that "acted 'recklessly' in publishing user content, even if the [website was] unaware of any underlying crime."[145] A website operator could thus be liable if the operator recklessly published user content furthering or aiding and abetting a violation of § 1591(a)(1), even if those users did not intend to violate § 1591 or if the coerced sex act never actually occurred.[146]

SESTA as originally introduced in the Senate adopted a similarly broad definition of "participation in a venture," defining it as "knowing conduct by any individual or entity, by any means, that assists, supports, or facilitates a violation of subsection (a)(1)."[147] Both the original House and Senate bills thus would have defined "participation in a venture" such that a *mens rea* standard would need to be proved as to a defendant's conduct, but not as to the underlying § 1591 violation by the primary actor. Both chambers subsequently confronted, as one writer states it, "the obvious potential for these provisions to send innocent publishers to prison for the conduct of

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[143] *Id.*
[144] Allow States and Victims to Fight Online Sex Trafficking Act of 2017, H.R. 1865, 115th Cong. § 4 (2017) (as introduced).
[145] *See* Caleb Kruckenberg, *Defending Internet Service Providers After the 'End of the Web as We've Known It'*, 42 CHAMPION 26, 27 (2018), https://www.nacdl.org/Article/March2018-DefendingInternetServiceProvid.
[146] *See id.* at 30.
[147] S. 1693, 115th Cong. § 4 (2017) (as introduced).

their users."[148]

In Senate committee hearings regarding competing definitions of "participation in a venture," Internet Association General Counsel Abigail Slater raised concerns that the broad language of SESTA would lead to prosecution of innocent businesses that had neither knowledge nor practicable means of stopping their unintentional assistance in § 1591 violations.[149] California Attorney General, Xavier Becerra, replied that such prosecution would go "beyond the intent of the legislation," and agreed with Slater's suggestion that Congress should amend the language to include a knowledge standard with regards to the violation to prevent prosecution of innocent and unwitting actors.[150]

In response to these committee hearings, the Senate amended SESTA by redefining "participation in a venture" as "knowingly assisting, supporting, or facilitating a violation of subsection (a)(1)" of 18 U.S.C. § 1591.[151] Practically, this changed the bill from creating an effect standard (knowingly engaging in conduct, the effect of which was to assist in a violation) to an intent standard (knowingly engaging in conduct while knowing that the conduct will assist in a violation). An amendment proposed by Rep. Mimi Walters incorporated SESTA into FOSTA.[152] A letter sent to the House Judiciary Committee from the Department of Justice on the day of the House vote on FOSTA, warned that the SESTA definition of "participation in a venture" would hinder prosecutions by "effectively creating additional elements" that would need to be proved at trial.[153] Nonetheless, the Walters Amendment passed, and the SESTA definition was incorporated into FOSTA.

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[148] Kruckenberg, *supra* note 143, at 28.
[149] *See id.*
[150] *See id.*
[151] *See* H.R. 1865, 115th Cong. § 5 (2018) (enacted).
[152] *See* 18 U.S.C. § 1591(a)(2).

It's clear from modifications of the original bills' "participation in a venture" definitions that Congress did not intend to impose liability on actors who had knowledge of their own conduct, but no knowledge of a violation of § 1591 that was assisted, supported, or facilitated by that conduct. Still unclear, however, is how much of the underlying violation of § 1591 a defendant must know about to be found criminally or civilly liable for "benefit[ting] from . . . participation in a venture which has engaged in [trafficking]."

C. "Participation in a Venture" Mens Rea *after FOSTA*

We can ascertain from the legislative history that in passing FOSTA, Congress intended to (1) more easily enable prosecutions and convictions under § 1591's "participation in a venture" prong, and (2) exclude from those prosecutions and convictions actors who had knowledge of their own assistance, support, or facilitation of a venture, but no knowledge of that venture's engagement in sex trafficking. Whether these goals have been realized by the new definition of "participation in a venture" is not clear.

After FOSTA, there are several possibilities for interpreting the *mens rea* requirements for the charge of "benefitting from participation in a venture that has engaged in [sex trafficking]." The way the statute is worded stacks multiple *mens rea* requirements on top of each other, making it difficult to parse what standard applies to each section.

Absent the "participation in a venture" language, there are three elements of a § 1591(a) charge the knowledge requirement could attach to: (1) the defendant's own conduct; (2) the conduct of "recruit[ing], . . . or solicit[ing] by any means a person;"[154] and/or (3) "the fact, that means of force, threats of force, fraud, [and/or] coercion . . . will be used to cause the person to engage in a commercial sex act,

[153] 164 CONG. REC. H1296 (daily ed. Feb. 21, 2018) (statement of Rep. Lofgren).

or that the person has not attained the age of 18 years and will be caused to engage in a commercial sex act."[155]

But the new definition of "participation in a venture" comes with its own mens rea requirement, although it is unclear what it applies to.

The first potential interpretation is that the knowledge requirement only attaches to the defendant's own conduct, i.e., that "knowingly"[156] modifies "assisting, supporting, or facilitating," but not "a violation of subsection (a)(1)." This interpretation is the most straightforward, but is contravened by Congress's clear intent not to create culpability for unwitting actor. This interpretation would require the government to prove that the defendant had knowledge of that defendant's own conduct, but not of the violation affected by that conduct. While it's possible to read the statute this way, it seems unlikely that courts will do so, particularly in a criminal case because of the rule of lenity.

Alternately, "knowingly" in "knowingly assisting, supporting, or facilitating a violation of subsection (a)(1)"[157] could be read to modify both "assisting, supporting, or facilitating" and "a violation of subsection (a)(1)." If so, then "knowingly" means not merely knowing about one's own conduct but also knowing about the violation of subsection (a)(1) that one's conduct facilitated.

A "violation" of subsection (a)(1) has two elements—a primary actor must (1) "knowingly . . . recruit[], . . . or solicit[] by any means a person," *while also* (2) "knowing or . . . in reckless disregard [except for advertisers, who must have knowledge] of the fact, that means of force, threats of force, fraud, [and/or] coercion . . . will be used to cause the person to engage in a commercial sex act, or that the person

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[154] *Id.* § 1591(a)(1).
[155] *Id.*
[156] Again, this is the full language of the FOSTA amendment to § 1591. 18 U.S.C. § 1591(e)(4).
[157] Again, this is the full language of the FOSTA amendment to § 1591. 18 U.S.C. §

has not attained the age of 18 years and will be caused to engage in a commercial sex act."[158] If "participation in a venture" means "knowingly assisting, supporting, or facilitating a violation of subsection (a)(1)," and if "knowingly" modifies "a violation," then most logically, knowing of a violation means knowing of both elements of that violation. If one knows of only one of those elements, one does not know of a violation, because the violation doesn't exist unless both elements exist.[159]

Under this theory, in order to successfully prosecute a third-party defendant for "participation in a venture," the government would have to show that the defendant knew that (1) the defendant had benefitted, from (2) assisting, supporting, or facilitating,[160] (3) the recruitment, enticement, harbor, transport, provision, obtaining, advertising, maintaining, patronizing, or soliciting of a person, and that (4) force, threats of force, fraud, or coercion would 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.[161] This interpretation would effectively raise the *mens rea* requirement (though only for conduct other than advertising) by reading the new definition of "participation in a venture" (i.e. "knowingly assisting, supporting, or facilitating a violation of subsection (a)(1)) as overwriting the "reckless disregard"

1591(e)(4).

[158] *See supra* note 113–121 and accompanying text.

[159] This would create a standard where a defendant prosecuted for "benefitting from participation in a venture" (what we have described as a third-party defendant) would have to have knowledge of both elements by which that venture violated § 1591, while a defendant actually prosecuted for trafficking (we we have described as a primary actor) (who is not an advertiser) would only have to have knowledge of one element of the violation (recruiting, etc.) and reckless disregard for the second element (force, etc.). While this seems illogical in regards to what we expect each party to actually know, this construction makes more sense if one understands it as making it easier to convict a primary actor (who we might think of as more culpable) than a third-party actor (potentially less culpable).

[160] See *infra* notes 242–254 for a detailed discussion on the legal definition of "facilitating" under § 2421A.

[161] *See supra* notes 119–121 and accompanying text.

standard[162] for third-party defendants (but not for primary actors).

This interpretation is not necessarily supported by the Congressional intent of making it easier to prosecute third-party actors for "benefitting from participation in a venture." However, it is clear from the legislative history that Congress did *not* intend to create a standard wherein defendants could be convicted for knowing only about their own conduct and not about the effects of that conduct (i.e. the violation of subsection (a)(1)). FOSTA was written with online advertisers in mind,[163] and the *mens rea* of "reckless disregard" never applied to advertisers to begin with. This interpretation of the knowledge standard would not change the *mens rea* requirement for advertisers but could potentially raise the *mens* rea requirement for non-advertiser third parties.

1. "Participation in a Venture" Actus Reus

Regardless of which *mens rea* interpretation is adopted by courts, it is clear is that the new definition of participation in a venture has added specific conduct ("assisting, supporting, or facilitating") that triggers culpability for third-party defendants. While this new language may or may not be more specific than the previously-undefined "participation," any degree of potential specificity added does not necessarily make the statute easier to apply. It is instead possible that this specific conduct now constitutes an additional element that must be proved at trial—an outcome the DOJ

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[162] *See* 18 U.S.C. § 1591(a)(1) (". . . knowing, or, except where the act constituting the violation of paragraph (1) is advertising, **in reckless disregard** of the fact . . . .") (emphasis added).

[163] *See, e.g.,* 164 CONG. REC. H1291 (daily ed. Feb. 27, 2018) (statement of Rep. Lee) (referring to a letter from National Association of Attorneys General, which claimed that "certain Federal courts have broadly interpreted the [CDA], which has left victims and State and local law enforcement agencies and prosecutors . . . feeling powerless against online ad services . . . that facilitate or allow sex trafficking.); 164 CONG. REC. S1853 (daily ed. March 21, 2018) (Statement of Sen. Heitkamp) ("In many instances, websites help traffickers skirt law enforcement through online advertising . . . .").

warned against prior to FOSTA's passage.[164]

D.

E. FOSTA's amendment to § 1595

18 U.S.C. § 1595, the civil provision of the TVPA, creates a private, civil right of action for violations of the criminal counterpart, § 1591, enabling victims of trafficking to sue their traffickers in a U.S. District Court.[165] In order to facilitate a rise in civil claims brought under 18 U.S.C. § 1595, FOSTA implements two changes: (1) it amends CDA § 230 to preclude § 1595 claims from immunity[166] and (2) it amends § 1595 to allow state attorneys general to bring *parens patriae* civil lawsuits on behalf of state residents. Though these mark substantial changes in the law, as with other FOSTA provisions, the amendments will likely have minimal practical impact on the number of trafficking lawsuits.

1. The common law *Parens Patriae* doctrine

FOSTA amends § 1595 by creating an additional avenue for civil actions: the *parens patriae* suit. This new provision allows state

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[164] "The Department believes that any revision to 18 U.S.C. § 1591 to define 'participation in a venture' is unnecessary. Section 1591 already sets an appropriately high burden of proof, particularly in cases involving advertising. Under current law, prosecutors must prove that the defendant knowingly benefitted from participation in a sex trafficking venture, knew that the advertisement related to commercial sex, and knew that the advertisement involved a minor or the use of force, fraud, or coercion. *See Backpage.com, LLC v. D.D.C.*, Civil Action No. 15-2155, Docket 16 (Oct. 24, 2016). While well intentioned, this new language would impact prosecutions by effectively creating additional elements that prosecutors must prove at trial. In the context of the bill, which also permits states to bring actions for conduct equivalent to Section 1591, we are also mindful that this language could have unintended consequences as applied by the states."
Letter from Stephen E. Boyd, Assistant Attorney Gen., to the Hon. Robert W. Goodlatte, Chairman, Comm. on the Judiciary U.S. House of Representatives (Feb. 27, 2018), https://www.documentcloud.org/documents/4390045-DOJ-FOSTA-Letter.html.

[165] *See* Jennifer S. Nam, Note, *The Case of the Missing Case: Examining the Civil Right of Action for Human Trafficking Victims*, 107 COLUM. L. REV. 1655, 1655 (2007).

[166] *See supra* Part I.

attorneys general to bring civil lawsuits on behalf of state residents for conduct that would violate the criminal provision, § 1591.[167]

The common law *parens patriae* doctrine grants standing to states, allowing them to sue on behalf of their citizens.[168] However, "[i]n order to maintain [a *parens patriae*] action, the State must articulate an interest apart from the interests of particular private parties, i.e., the State must be more than a nominal party [and also] express a quasi-sovereign interest."[169] There is no exhaustive list of what constitutes a qualifying interest,[170] but the Court has noted that, generally, qualifying interests will fall into one of two categories: "in the health and well-being—both physical and economic—of its residents in general . . . [and] in not being discriminatorily denied its rightful status within the federal system."[171] It is likely that state attorneys general filing *parens patriae* claims pursuant to the FOSTA amendments will be able to establish a "health and well-being" interest to satisfy this requirement.

Although the U.S. Supreme Court has given "special solicitude" to a State in a *parens patriae* action due to the State's "quasi-sovereign interest," the Court has still applied Article III injury requirements independently and in addition to the injury requirement of *parens patriae* standing"[172] Thus, after establishing a credible interest with which to bring a claim, the state attorneys general must still satisfy the additional elements of Article III standing. Standing under Article III requires showing that: (1) a plaintiff suffered a concrete, non-hypothetical injury-in-fact, (2) there is a causal connection between the injury and the defendant's actions, and (3) the court may redress

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[167] *See* H.R. 1865, [11]5th Cong. § 6 (2018) (enacted).
2. [168] *See* Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez, 458 U.S. 592, 600 (1982).
[169] *See id.* at 607.
[170] *Id.* at 593.
[171] *Id.*
[172] *See Massachusetts v. E.P.A.*, 549 U.S. 497, 517-519 (2007).

the plaintiff's grievances.[173] Only after each of these have also been satisfied will a federal court hear the claim.

2. Impact of parens patriae suits under § 1595

The FOSTA amendment to § 1595 states that *parens patriae* actions may be brought "[i]n any case in which the attorney general of a State has reason to believe that an interest of the residents of that State has been or is threatened or adversely affected by any person who violates section 1591."[174] Though the language of this provision may be read to imply that the power of the attorneys general reaches very broadly,[175] the actual impact of this new provision is ambiguous.

First, it is not clear that attorneys general will be able to satisfy each element of Article III standing. States necessarily have interests that are more broad than those of individual citizens, and "[o]ne helpful indication in determining whether an alleged injury to the health and welfare of its citizens gives the State standing to sue *parens patriae* is whether the injury is one that the State, if it could, would likely attempt to address through its sovereign lawmaking powers."[176] This would seem to suggest that "injury-in-fact" requirement can be met by a showing of something other than the harm defined in § 1591—such as a showing of property value decline as a result of prostitution, or state expenditures on support services for trafficking victims.[177] It is possible, however, that courts will find these harms insufficiently causally connected to the conduct violating § 1591. Without this, the claim may fail to meet the causality requirement of

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[173] *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).
[174] *See* H.R. 1865, 5th Cong. § 6 (2018) (enacted).
[175] For example, a plain reading of the statute does not seem to imply that bringing a *parens patriae* suit requires any criminal charge or conviction.
[176] *Massachusetts v. E.P.A. supra* note 172 at 519.
[177] In a 2018 case, a United States District Court found that an anti-human-trafficking organization diverting its expenditures on treatment of victims was a sufficient showing of injury to support its standing on a § 1595 claim. Florida Abolitionist v. Backpage.com LLC, No. 6:17–cv–218–Orl–28TBS, 2018 WL 1587477, at *3 (M.D. Fla. Mar. 31, 2018).

Article III standing.

Second, even looking to a comparable *parens patriae* provision in another Act does not clarify how the FOSTA provision will be implemented. The language of the *parens patriae* provision of FOSTA is very similar to the Consumer Review Fairness Act's (CRFA) state enforcement provision.[178] However, the CRFA's *parens patriae* section has not been challenged in court, so it is difficult to draw insight form this provision into how the FOSTA provision will be construed.

Third, though § 1595 was enacted in 2003 as a way for trafficking victims to obtain a civil remedy against their traffickers, it has rarely been used.[179] It is unclear whether the new provision will change the frequency or quantity of civil lawsuits brought for violations of § 1591.[180]

Finally, FOSTA amendments to CDA § 230 may affect what impact the new *parens patriae* provision has. As described above,[181] FOSTA amends CDA § 230 such that ICS defendants to lawsuits brought pursuant to § 1595 will no longer be afforded immunity.[182] Because FOSTA amends the CDA by adding language that "nothing in [§ 230] shall be construed to impair or limit" civil claims brought

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[178] *See* 15 U.S.C. § I(e)(1) (2012) ("in any case in which the attorney general of a State has reason to believe that an interest of the residents of the State has been or is threatened or adversely affected by the engagement of any person . . . in a practice that violates such subsection, the attorney general of the State may, as *parens patriae*, bring a civil action on behalf of the residents of the State in an appropriate district court of the United States to obtain appropriate relief . . . . ").

[179] From 2004–2008, not a single civil lawsuit pursuant to 18 U.S.C. §1595 had been filed on the basis of an alleged violation of 18 U.S.C. § 1591. *See* ALEXANDRA F. LEVY, FEDERAL HUMAN TRAFFICKING CIVIL LITIGATION: 15 YEARS OF THE PRIVATE RIGHT OF ACTION 11 (2018), https://www.htlegalcenter.org/wp-content/uploads/Federal-Human-Trafficking-Civil-Litigation-1.pdf. Between 2009 and 2017, 25 civil lawsuits pursuant to 18 U.S.C. § 1595 based on § 1591 violations were filed. *See id.* at 15.

[180] No comparable data is currently available to show how the addition of the similar *parens patriae* civil lawsuit provision for the Consumer Review Fairness Act has affected the incidence of civil litigation since its enactment in 2017.

[181] *See supra* notes 55-57 and accompanying text.

under § 1595, future claims brought by plaintiffs under § 1595 against websites may be more successful.[183] On the other hand, very few lawsuits have been brought under § 1595, and of those only one was dismissed on the basis of § 230 immunity prior to FOSTA's enactment.[184] Eliminating this immunity, therefore, may not make any practical change.

Though the *parens patriae* provision creates a new cause of action and seems to provide state attorneys general broad power, it is not clear that this will engender real change. *Parens patriae* is a doctrine of standing and will still require the attorneys general to meet the other requirements of Article III standing. It is unclear how difficult this will be. That § 1595 has rarely been used and, when used, has rarely been subject to § 230 immunity, and that *parens patriae* provisions in parallel statutes have also been rarely used, suggests that the true impact of the FOSTA amendments may be limited.

PART III: THE MANN ACT § 2421A

18 U.S.C. § 2421A, "Promotion or Facilitation of Prostitution and Reckless Disregard for Sex Trafficking" is a section created by FOSTA that contains a new federal crime (§ 2421A(a) and (b)) and a civil right of action (§ 2421A(c)). To our knowledge, only one criminal defendant has been indicted for charges under § 2421A. Given this lack of case law, we use external sources may help determine how this statute will be interpreted: the Travel Act, the Mann Act, FOSTA's

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[182] *See* H.R. 1865, 115th Cong. § 4 (2018) (enacted).
[183] *Id.*
[184] The House Judiciary Committee report on FOSTA, in detailing the need for the law, describes a dismissal by a Massachusetts District Court that the "Second Circuit affirmed;" however the District Court of Massachusetts is in the First Circuit, and the subsequent quote used in the report is from the First Circuit opinion in *Jane Doe No. 1 v. Backpage*, leading us to conclude that the Judiciary Committee erroneously attributed the ruling to the Second Circuit. *See* H.R. COMM. ON THE JUDICIARY, ALLOW STATES AND VICTIMS TO FIGHT ONLINE SEX TRAFFICKING ACT OF 2017, H.R. REP. NO. 115-572, at 4 (2018); *Jane Doe No. 1 v. Backpage.com,* LLC, 817 F.3d 12, 17 (1st Cir. 2016), *cert. denied*, 137 S. Ct. 622 (2017).

legislative history, and the D.C. District and Circuit Court opinions in *Woodhull Freedom Found. v. United States*.[185]

First, looking to interpretations of the Travel Act may be useful, as § 2421A uses similar text to that of the Travel Act. To this end, the D.C. District and Circuit court have already looked to Travel Act prosecutions for guidance in interpreting § 2421A in their respective *Woodhull* decisions. The *Woodhull* case is a pre-enforcement challenge to FOSTA's constitutionality on first amendment, due process, and *ex post facto* grounds. Looking to these decisions will thus also provide useful aid in understanding the implications of § 2421A.

The Travel Act may also be useful because, as of the date of this writing, the Mann Act and the Travel Act are the laws that the Department of Justice (DOJ) has most frequently used to prosecute websites that host ads for commercial sexual services.[186] Section 2421A amends the Mann Act. Therefore, the law and pattern of prosecutions brought under the Mann Act and the Travel Act, together with the legislative history of FOSTA, may help predict how § 2421A may yet be

[185] The D.C. District and Circuit Court opinions in *Woodhull v. United States* are the only court opinions at the date of this writing to interpret FOSTA's statutory language. *See* Woodhull Freedom Found. v. United States, 334 F. Supp. 3d 185 (D.D.C. 2018); Woodhull Freedom Found. v. United States, 2020 U.S. App. LEXIS 2217 (D.C. Cir. 2020).

[186] In the time since FOSTA's passage, the DOJ has continued to use the Travel Act and the Mann Act to take down such websites. *See, e.g.*, United States v. Hurant, 2017 U.S. Dist. LEXIS 121006 at *1 (E.D.N.Y. Aug. 1, 2017) (owner of Rentboy.com charged with promoting prostitution under the Travel Act and money laundering under 18 U.S.C. § 1956); Sealed Complaint at 1, United States v. Martin, No. cr-00240-VSB (S.D.N.Y. Jul 20, 2018) (owners of Flawlessescorts.com charged with money laundering under 18 U.S.C. § 1956); United States' Response to Defendants' Motion to Dismiss Indictment at 13–14, 37, United States v. Lacey, No. CR-18-422-PHX-SMB (D. Ariz. June 21, 2019) (owners of Backpage charged with facilitating prostitution under the Travel Act) (noting that 18 U.S.C. 2421A, the new federal crime created by FOSTA contains "textual indications"—"prostitution of another person" –- not contained in the Travel Act, the implication being that, under the Travel Act, unlike under FOSTA, the government does not have to prove intent as to facilitating specific acts of prostitution.

used by prosecutors and interpreted by courts.

A. ***Overview of 2421A***

In § 2421A FOSTA creates the new federal crime of owning, managing, or operating a website or other ICS with the intent to promote or facilitate the prostitution of another person, and creates two aggravated versions of that crime: one for the added element of promotion of the prostitution of five or more people and one for the added element of reckless disregard of sex trafficking. The law further creates a (1) civil right of action that applies only to the aggravated versions of the crime, (2) a requirement of mandatory restitution that applies only to convictions that include reckless disregard for trafficking, and (3) an affirmative defense if the defendant can show that prostitution is legal in the jurisdiction to which the online promotion was targeted.

Section 2421A applies only to individuals who "own[], manage[], or operate[] an interactive computer service." 47 U.S.C. § 230(f)(2) defines an ICS as "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." "Interactive computer services" is, by the plain language of the definition, a broad category, including commercial internet providers,[187] websites,[188] and even a private employer and government entities.[189] While § 2421A(a) requires that there be an interstate or foreign effect while utilizing such interactive computer services, it is highly likely that operating or utilizing an interactive computer service itself possesses an inherent quality of affecting interstate or

[187] *See* Ben Ezra, Weinstein, and Co., Inc. v. America Online, Inc., 206 F.3d 980, 985 (10th Cir. 2000).
[188] *See* Zeran v. America Online, Inc., 129 F.3d 327, 330–32 (4th Cir. 1997).
[189] Claudia G. Catalano, *Validity, Construction, and Application of Immunity Provisions of Communications Decency Act, 47 U.S.C.A. § 230*, 52 A.L.R. Fed. 2d 37 at

foreign commerce.[190]

The term "operates" in § 2421A has some ambiguity, and it is unclear whether the law creates liability for website users. One attorney from the National Association of Criminal Defense Attorneys has argued that a website user answering an online advertisement promoting prostitution may face liability under § 2421A.[191] If this is true, it would broaden federal criminalization of purchasers of commercial sex, who were first held to federal criminal liability when added to § 1591 as part of the Justice for Victims of Trafficking Act of 2015.[192] Some support for the contention that website users may be included in § 2421A can be found in the remarks of Congressmember

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2 (2011).

[190] The Department of Justice's Computer Crime and Intellectual Property Section Criminal Division's guidelines help navigate the Computer Fraud and Abuse Act ("CFAA") in its manual of prosecuting computer crimes. There, the government states that a "protected computer" includes "computers used in or affecting interstate or foreign commerce and computers used by the federal government and financial institutions." H. MARSHALL JARRETT, PROSECUTING COMPUTER CRIMES 10 (2010), https://www.justice.gov/sites/default/files/criminal-ccips/legacy/2015/01/14/ccmanual.pdf. The manual states that it is "enough that the computer is connected to the Internet." *Compare* United States v. Trotter, 478 F.3d 918, ^{92}1 (8th Cir. 2007) (affirming defendant's conviction of intentionally causing damage to a protected computer reasoning that the computer was connected to the internet) and United States v. Walters, 182 Fed. Appx. 944, 9^{45} (11th Cir. 2006) ("the internet is an instrumentality of interstate commerce"), *with* United States v. Kane, No. 2:11-cr-00022-MMD-GWF (D. Nev. Oct. 15, 2012) (holding the exploitation of a software bug in a video poker machine did not constitute a CFAA breach because the machine was not connected to the internet). .

[191] *See* Kruckenberg, *supra* note 143 at 27. Kruckenberg, however seems to refer here to the text, "Whoever, using a facility or means of interstate commerce" in H.R. 1865 § (3)(a), while failing to recognize how the term "using" is narrowed by the subsequent text, ". . .owns, manages or operates an interactive computer service." It is thus likely that Kruckenberg's assertion that FOSTA "creates a new federal felony offense for solicitation of prostitution" is based in a misreading of the statutory text.

[192] "(4) section 108 of this title amends section 1591 of title 18, United States Code, to add the words ``solicits or patr"izes'' to the sex trafficking statute making absolutely clear for judges, juries, prosecutors, and law enforcement officials that criminals who purchase sexual acts from human trafficking victims may be arrested, prosecuted, and convicted as sex trafficking offenders when this is merited by the facts of a particular case." Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22, § 109(4), 129 Stat. 227 (2015).

Jackson Lee, who twice described FOSTA during House debates as "creat[ing] a new . . . offense of intentional promotion or facilitation of prostitution while *using* or operating . . . the internet."[193] It remains unclear, however, how courts will eventually interpret the term "operates."

B. History of the Mann Act

Section 2421A is an amendment to the statutory scheme known as the Mann Act.[194] The Mann Act was originally passed in 1910.[195] In the early 1900s, public concerns and media attention around the force or coercion of women and girls into the sex trades in the United States mirrored public concerns and media attention preceding the passage of FOSTA.[196] The Mann Act, however, was explicitly focused on the rescue of white women and girls, and was titled the "White Slave Traffic Act," until 1986.[197] The original text of the Mann Act made it a

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[193] 164 CONG. REC. H1291, 1292 (daily ed. Feb. 27, 2018) (Statements of Sen. Lee) (emphasis added).

[194] 18 U.S.C. §§ 2421–2424.

[195] White-Slave Traffic Act of 1910, ch. 395, §2, 36 Stat. 825, 825 (1910).

[196] *Compare* 164 CONG. REC. S1857, 49 (daily ed. March 21, 2018) (statement of Sen. Bill Nelson) ("Women and children are being forced into sex slavery in modern-day America. It could very well happen to someone you know . . . We have heard, over and over, the untold stories of the inhumanity of stacking people body-to-body in the holds of these slave ships. It finally took a civil war to settle the issue. That was slavery. That was slavery we opposed and now all of our laws try to protect against, but here in modern-day America, the same thing is happening."), *with* 45 CONG. REC. H1037 (Jan. 26, 1910) (statement of Rep. Saunders) ("This power is now called into exercise in an effort to break up a villainous interstate, and international traffic in innocent girls, and women, who are in many cases induced to leave home under specious promises of steady employment at remunerative wages, only to find themselves in the result, deprived of their liberties, and compelled to lead vicious and immoral lives under conditions of restraint and compulsion, which have been aptly, and universally styled, 'white slavery' . . . Governmental investigations . . . disclose the startling fact that the importation of foreign girls, and women, and the transfer of native girls between the States, has been systematic, and continuous.").

[197] The fear that white women were being "lured," "seduced," or forced into prostitution was an intensely reported-on concern of Progressive Era politicians and of feminist and religious activists. Early laws addressing this fear focused on limiting migration into the United States. The Mann Act supplemented those laws by creating limits on domestic travel. *See Congress Passes Mann Act*, HISTORY: THIS

felony to knowingly transport a woman or girl in interstate or foreign commerce "for the purpose of prostitution or debauchery, or for any other immoral purpose."[198] This language, codified at 18 U.S.C. § 2421, was amended in 1986 to prohibit knowingly transporting "an individual in interstate or foreign commerce, with intent that such individual engage in prostitution, or in any sexual activity for which any person can be charged with a criminal offense."[199] Thus, like FOSTA, the Mann Act used Congress' Commerce Clause power to federally criminalize prostitution (regardless of the consent of the person engaging in prostitution), with the expressed aim of targeting forced sex work (what the law now calls sex trafficking).

Congresswoman Ann Wagner, FOSTA's original sponsor, has written that the legal definition of sex trafficking "has its roots in the Mann Act of 1910."[200] Over several decades after the Mann Act's passage, courts interpreted the Act broadly, using it to prosecute adultery and other crimes not within the statute's original purview.[201]

DAY IN HISTORY (last updated June 27, 2019), https://www.history.com/this-day-in-history/congress-passes-mann-act. For broader discussions of the historical and cultural influences on the enactment of the White-Slave Traffic Act, see JESSICA PLILEY, POLICING SEXUALITY: THE MANN ACT AND THE MAKING OF THE FBI (2014); see also GRETCHEN SODERLUND, SEX TRAFFICKING, SCANDAL, AND THE TRANSFORMATION OF JOURNALISM 1885–1917 (2013).

[198] White-Slave Traffic Act of 1910, ch. 395, §2, 36 Stat. 825, 825 (1910).

[199] *See* Michael Conant, *Federalism, The Mann Act, and the Imperative to Decriminalize Prostitution*, 5 CORNELL L. REV. 99, 99 (1996); *see also* Child Sexual Abuse and Pornography Act of 1986, Pub. L. No. 99-628, 100 Stat. 3511-2 (1986).

[200] Anne Wagner & Rachel Wagley McCann, *Policy Essay: Prostitutes or Prey? The Evolution of Congressional Intent in Combating Sex Trafficking*, 54 HARV. J. ON LEGIS. 701, 704 (2017).

[201] *See, e.g.*, Caminetti v. United States, 242 U.S. 470, 489–90 (1917) (Mann Act prohibits transporting a woman across state lines for the purpose of adultery); Athanasaw v. United States, 227 U.S. 326, 333 (1913) (Mann Act prohibits transporting a woman across state lines for the purpose of making her a "chorus girl" under conditions that "would necessarily and naturally lead to a life of debauchery of a carnal nature relating to sexual intercourse between man and woman."); Cleveland v. United States, 329 U.S. 14, 19 (1946) (Mann Act prohibits the transportation of a plural wife for the purpose of cohabitating with her, regardless of that cohabitation being based in a religious belief, and regardless of regulation of marriage being a state matter).

Wagner suggests that the Mann Act was intended to target sex trafficking and that the breadth of convictions under the act was a misinterpretation of Congressional intent by courts. This led to a "lack of a proper legal framework to address sex trafficking" and the need for Congress to pass additional, clarifying laws like FOSTA.[202] The risk, of course, is that this new legislation will also be interpreted as a "catch-all" for any conduct sought to be criminalized. As a piece of legislation meant to clarify the Mann Act's legal framework, FOSTA may be subject to these same pitfalls.

C. The Travel Act

The text of § 2421A(a) and (b)(1) mimics section (a)(3) of the Travel Act, and so interpretations of that Act may be useful in understanding § 2421A. The Travel Act criminalizes unlawful activity that occurs across state lines or borders. Under § (a)(3), it applies to: "[w]hoever travels in interstate or foreign commerce or uses the mail or any facility in interstate or foreign commerce, with intent to—otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity."[203] The Travel Act therefore makes it a federal crime to use a facility of interstate commerce, such as a website, with intent to violate state-level prostitution laws.

The Travel Act has been the primary law used in federal shutdowns of websites on which sexual services were advertised.[204] However, it applies to the use of facilities of interstate or foreign commerce broadly, so it has been used not only to prosecute websites, but also to prosecute defendants who simply use a cell phone to "facilitate the carrying on" of commercial sex acts in violation of state-level prostitution laws.[205] Thus, the commercial sexual activity

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[202] Anne Wagner & Rachel Wagley McCann, *supra* note 201, at 713.
[203] 18 U.S.C. § 1952(a)(3) (1961).
[204] *See supra* note 186.
[205] United States v. Judkins, 428 F.2d 333, 335 (6th Cir. 1970) (reversing judgement of conviction because evidence of telephone conversation was insufficient to prove

criminalized by § 2421A(a) may simply be a subset of the commercial sexual activity already made criminal by the Travel Act. Whether this is true or not depends largely on how courts will determine the meanings of "intent," "promote," "facilitate," and "prostitution" in § 2421A, and whether those interpretations align with the interpretations by courts of those same terms in the Travel Act.[206]

D. Mental State required for a violation of § 2421A(a)

A successful prosecution or civil action under § 2421A requires that a person *knowingly* own, manage, or operate an interactive computer service (ICS) with the *intent* to promote or facilitate the prostitution of another person. A conviction under § 2421A(a) thus requires proving two mental states: A person must have (1) *known* (or a reasonable person would have been aware of the fact) that they were engaged in ownership, management, or operation of an ICS and (2) *intended* (or acted with the purpose of causing the result) to promote or facilitate the prostitution of another person.

The federal government's ability to regulate a crime like prostitution, which would ordinarily fall within the province of a state's police powers,[207] is contingent on the crime's ability to

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"facilitat[ing], or carry[ing] on the prostitution business"). Interestingly, this ("using a cell phone to manage local commercial sex transactions involving consenting adults") is precisely the kind of transaction that the DOJ warned Congress could be captured by a previous version of § 2421A, and in which the DOJ said that there was "a minimal federal interest." *See* Letter from Stephen E. Boyd, *supra* note 64, at 2.

[206] *Compare* Woodhull Freedom Found. v. United States, 334 F. Supp. 3d 185 (D.D.C. 2018) *with* Woodhull Freedom Found. v. United States, 2020 U.S. App. LEXIS 2217 (D.C. Cir. 2020).

[207] *See* United States v. Wolf, 787 F.2d 1094, 1097 (7th Cir. 1986) ("The primary responsibility for policing
sexual misconduct lies with the states rather than the federal government."); *see also* Joseph L. Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 36 n.6 (1964) (describing regulation of prostitution as one of police power's "best known and most traditional uses").

affect interstate commerce.[208] Thus, to violate federal laws that regulate prostitution like FOSTA, the Mann Act, or the Travel Act, a person must knowingly use a facility of interstate commerce. That knowledge requirement has been easily met, however, if prosecutors simply show that the conduct violating the statute involved some element of interstate commerce (i.e. hotels, condoms, websites, cell phones, banking services),[209] regardless of whether the defendant had actual knowledge that interstate commerce was involved.

FOSTA's intent element ("intent to promote or facilitate the prostitution of another person"[210]) is textually similar to both the Mann Act's intent element ("intent that such individual engage in prostitution, or in any sexual activity for which any person can be charged with a criminal offense"[211]) and the Travel Act's intent element (intent to "promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on of any . . . prostitution offenses in violation of the laws of the State in which they are committed or of the United States."[212]). Because they regulate similar conduct, the Mann Act and the Travel Act have been interpreted by reference to each other.[213]

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[208] *See* United States v. Morrison, 529 U.S. 598, 609 (2000) ("Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained.").

[209] *See* Cleveland v. United States, 329 U.S. 14, 18 ("[W]hile the Mann Act primarily aimed at the use of interstate commerce for the purposes of commercialized sex, is not restricted to that end"); United States v. Evans, 476 F.3d at 1179 ("…[U]se of hotels that served interstate travelers and distribution of condoms that traveled in interstate commerce are further evidence that Evans's conduct substantially affected interstate commerce."); United States v. Pipkins, 378 F.3d 1281, 1295 ("…the pimps furnished their prostitutes with condoms manufactured out of state, purchased from Atlanta gas stations. This evidence undoubtedly supports a finding that the enterprise was engaged in interstate commerce.").

[210] 18 U.S.C. § 2421A (a) (2018).

[211] 18 U.S.C. § 2421 (a) (2015).

[212] 18 U.S.C. § 1952 (1961).

[213] *See, e.g.*, United States v. Langley, 919 F.2d 926 (5th Cir. 1990); Pandelli v. United

Similarly, the district court in *Woodhull v. United States* looked to the Travel Act to interpret FOSTA.[214]

Under the Mann Act, courts have interpreted the "intent" in "intent that such individual engage in prostitution" narrowly. [215] For a Mann Act violation to be shown, the intent that an individual engage in prostitution must be a "dominant motive" of the defendant. It does not, however, have to be the *only* dominant motive, nor the but-for motive;[216] "[t]he illicit purpose denounced by the Act may have coexisted with other purpose or purposes."[217] The motive in question is not necessarily the motive behind crossing state lines, but the

States, 635 F.2d 533 (6th Cir. 1980).

[214] *See* Woodhull v. United States, 334 F. Supp. 3d 185 (D.D.C. 2018). The *Woodhull* case is a pre-enforcement challenge to FOSTA's constitutionality on First Amendment, due process, and *ex post facto* grounds. The *Woodhull* trial court dismissed the challenge for lack of standing, stating that the plaintiffs – an educational non-profit, an online archive, a non-sex worker massage therapist, a harm reduction organization for sex workers, and a human rights organization that advocates for decriminalization of sex work - were not the targets of the law and thus could not show likely injury. The trial court's opinion was reversed and remanded on appeal, with the appeals court stating that several of the *Woodhull* plaintiffs may be targeted by FOSTA and have standing to bring a pre-enforcement challenge. The *Woodhull* decisions are the only court decision to interpret FOSTA thus far and has only done so in the specific context of addressing the standing of these specific plaintiffs, so we look to that court's interpretations with an understanding that their application is likely limited.

[215] For example, if a person engages in prostitution as his profession and another person takes him across state lines on vacation, then drives him home again where he returns to work, the driver did not have the requisite "intent" under the Mann Act even if the driver knew that the individual would engage in prostitution upon his return home. *See* United States v. Mortenson, 322 U.S. 369, 375 (1944).

[216] *See* United States v. Campbell, 49 F.3d 1079, 1083 (5th Cir. 1995) (citing *Forrest*, 363 F.3d 363, 375 (5th Cir. 1966) (in determining "dominant purpose," court asks whether the illicit behavior is "one of the efficient and compelling purposes of the travel); United States v. Mortenson, 322 U.S. 369, 375 (1944) (no violation because sole purpose of the trip was innocent holiday); United States v. Hon, 306 F.2d 52, 55 (7th Cir 1962) (no violation because prostitution was not a purpose of the trip, but incidental result); Smart v. United States, 202 F.2d 874, 875 (5th Cir. 1953) (no violation because sole purpose of trip was to take care of legal matters in another state).

[217] United States v. Campbell, 49 F.3d 1079, 1082 (5th Cir. 1995).

motive behind taking another individual on across state lines.[218] Such motive may be inferred from the defendant's conduct.[219] No dominant motive exists where the purpose to engage in prostitution was nonexistent or incidental.[220] However, "[d]espite the contrary implication suggested by the word dominant," where multiple motives exist, the motive that an individual engage in prostitution need not be the most important of the defendant's motives.[221]

It is not yet clear whether intent in § 2421A(a) (FOSTA) will be interpreted in line with § 2421 (the Mann Act). As of the date of this writing, the only court decisions to interpret "intent" in § 2421A(a) are the *Woodhull* decisions, both of which only made that interpretation for the purposes of determining whether plaintiffs were sufficiently targeted by the law to have standing to bring a pre-enforcement challenge. The trial court in *Woodhull* looked not to the Mann Act, but to the Travel Act for guidance.[222]

In relevant part, the Travel Act requires a showing of intent to "promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on of any . . . prostitution offenses in violation of the laws of the State in which they are committed or of the United States."[223] In *United States v. Jones*, Justice Ruth Bader Ginsburg, writing for the D.C. Circuit Court, interpreted how "intent" applied to the conduct of "facilitating" prostitution under the Travel Act.[224] The *Jones* court overturned the conviction of an

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[218] United States v. Snow, 507 F.2d 22, 24 (7th Cir. 1974).
[219] *Id.* at 25.
[220] *Id.* at 1083.
[221] *Snow*, 507 F.2d at 24.
[222] *See* Woodhull Freedom Found. v. United States, 334 F. Supp. 3d 185, 199–200 (D.D.C. 2018). The trial court in *Woodhull* dismissed the challenge for lack of standing, stating that the plaintiffs—an educational non-profit, an online archive, a non-sex worker massage therapist, a harm reduction organization for sex workers, and a human rights organization that advocates for decriminalization of sex work—were not the targets of the law and thus could not show likely injury. *See id.*
[223] 18 U.S.C. § 1952 (1961).
[224] United States v. Jones, 909 F.2d 533 (D.C. Cir. 1990).

escort company's male telephone dispatcher, stating that the jury had not found intent to violate a specific state law as required to show a violation of the Travel Act.[225] The lower court had given instructions to the jury, allowing them to find a Travel Act violation without finding that the telephone dispatcher had intent to violate the specific state-level prostitution laws where the acts took place.[226] These instructions had allowed the jury to convict the defendant if he acted with the intent to promote a violation only of some vaguely conceived notion of prostitution, as opposed to the actual acts made unlawful by the state statutes.[227] The *Jones* court found that in order for a defendant to be found guilty under the Travel Act, a jury must find that the defendant acted with the intent to "promote [et cetera] an activity that involves all of the elements of the relevant state offense;" in other words, they must have intended to violate the specific anti-prostitution law rather than a general conception of "prostitution."[228]

The *Jones* court further made clear that while a violation of the Travel Act requires an intent to facilitate specific unlawful acts, *those acts do not have to be completed* for a defendant to have violated the Act.[229] Thus under the Travel Act, no actual act of prostitution has to have happened for a person to be found guilty of an "intent" to "facilitate" prostitution. It is highly likely that the same is true of

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[225] *Id.* at 535, 539. For the offense of violating the Mann Act § 2421, The government also sought to show that the male telephone dispatcher "cause[d] the transportation" of the escorts under the Mann Act by "providing the names and addresses of customers and the financial incentive to travel interstate. *Id.* at 536. The court, however, found that the escorts made their own travel arrangements and transported themselves interstate by car or subway. *Id.* While noting that under § 2421, one does not have to physically carry or accompany a person to "transport" her, still held that the male dispatcher did not violate § 2421. However, the court also implied that the government would have succeeded the Mann Act charge had it indicted the dispatcher under § 2422 that penalizes one who "knowingly persuades, induces, entices, or coerces any individual to travel interstate . . . commerce . . . to engage in prostitution, or in any sexual activity for which any person can be charged with a criminal offense." *Id.* at 540.

[226] *Id.* at 538.

[227] *Id.*

[228] *Id.*

violations under § 2421A.

The *Woodhull* trial court, looking to the Travel Act for guidance in interpreting FOSTA, found that using a website with the intent to promote or facilitate "prostitution" generally would not violate § 2421A. Instead, the *Woodhull* trial court—without actually defining "prostitution" under FOSTA—said that a violation of § 2421A would require showing intent to promote or facilitate a *specific act* of prostitution rather than a vague or general notion of prostitution.[230] The *Woodhull* trial court noted the similarities in statutory language between § 2421A and the Travel Act, and further noted that there had been no prosecutions under the Travel Act for more general prostitution charges. Thus, the court concluded, there were unlikely to be any such prosecutions under FOSTA.[231] Under this interpretation, sharing educational or harm reduction information on sex work would not constitute a specific act of prostitution, and would not violate § 2421A.

The court of appeals in *Woodhull*, however, overturned the trial court's ruling. Instead, it found that it is possible to interpret § 2421A as proscribing not only acting with the intent to promote a specific unlawful act of prostitution, but also acting with the intent to "facilitate prostitution by providing sex workers and others with tools to ensure the receipt of payment for sexual services." The "tools" the court refers to are online discussion forums, owned by the plaintiff, in which sex workers share information about health, safety, access to social services, and use of payment processors. The court reasoned that even if the plaintiff's "intended conduct is unlike the intentional measures taken by Backpage to help online sex traffickers avoid

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[229] *Id. at*538 (emphasis added).
[230] *Woodhull Freedom Found. v. United States*, 334 F. Supp. 3d 185, 199, 201 (D.D.C. 2018) ("Section § 2421A will require the Government to show not simply that the defendant was aware of a potential result of the criminal offense, but instead that the defendant intended to 'explicitly further[ ]' a specified unlawful act." (quoting United States v. Brown, 186 F. 3d. 661, 670 (5th Cir. 1999)).
[231] *Id.* at 200

detection by law enforcement," such conduct could still be covered by FOSTA because "FOSTA's text does not limit its scope to 'bad-actor websites' or even to classified advertising websites."[232]

This interpretation relies on key textual differences between the Travel Act and § 2421A. First, the Travel Act prohibits "prostitution offenses in violation of the laws of the State in which they are committed or of the United States,"[233] while § 2421A more vaguely prohibits acting with intent to promote or facilitate "prostitution of another person."[234] The Travel Act thus explicitly tells which definition of "prostitution" should apply, while § 2421A does not.

Under the DOJ's own interpretation of this textual difference, however, the § 2421A provision may be narrower than the Travel Act. The DOJ has argued that "prostitution of another person" in § 2421A is distinct from "prostitution offenses" in the Travel Act. The DOJ argues that the words "of another person" denote a requirement of showing intent to facilitate a specific act, while the words "prostitution offenses" likely denote no such requirement.[235] If the DOJ is correct, FOSTA has created a new federal crime that may be more difficult to prosecute than the federal crimes currently used against websites that host ads for commercial sexual services.

Yet another interpretation of this language comes from intellectual property and internet law litigator Ian C. Ballon. Ballon has interpreted the intent requirement under § 2421A to mean that ICSs acting in good faith[236] will be shielded from prosecution (although his construction of "knowing" is not rooted in the original

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[232] Woodhull Freedom Foundation v. United States, No. 18-52982020, WL 398625 at *5 (D.C. Cir., Jan. 24, 2020).
[233] 18 U.S.C. § 1952(b) (2014).
[234] 18 U.S.C. § 2421A(a) (2018).
[235] *See* United States' Response to Defendants' Motion to Dismiss Indictment, United States v. Lacey, No. CR-18-422-PHX-SMB (Dist. Ariz. June 21, 2019)
[236] *See supra* notes 21-22 for a description of "good faith" in § 230(c)(2).

section).[237] Ballon's interpretation that the ICS must possess wrongful intent suggests that the provider will not be penalized for content promoting or facilitating prostitution that the site's users post as long as the provider did not intend to host that content. Further, moderating a site to remove or modify such content may be used to show lack of intent rather than—as § 230(c)(2) attempts to protect against—culpable knowledge of such content. Mike Masnick, editor of the technology blog Techdirt, agrees with Ballon's interpretation by noting the change from requiring "knowledge" or "knowing conduct," present in previous bills, to the higher mental state of "intent" in § 2421A.[238] Describing the aggravated offense (discussed in further detail below), Masnick says the "crime can be 'enhanced' if the party engages in 'acts of reckless disregard of the fact that such conduct contributed to sex trafficking violation[s]' but that's only once the intent is already shown."[239]

E. Conduct in violation of 2421A: "Promote or Facilitate"

There is little case law that interprets what it means to "promote or facilitate prostitution" under any federal law, and most past cases addressing similar language in comparable statutes litigate acts rather than speech (such as actually transporting someone across the border or driving a person across state lines with the intent that the person engage in prostitution). Nonetheless, the *Woodhull* court of appeals stated that "[t]he terms 'promote' and 'facilitate,' when considered in isolation 'are susceptible of multiple and wide-ranging meanings.' Because the verbs 'promote' and 'facilitate' are disjunctive, FOSTA arguably proscribes conduct that facilitates prostitution. The common meaning of facilitate is 'to make easier or less difficult, or to

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[237] 4 IAN C. BALLON, E-COMMERCE AND INTERNET LAW § 37.05[5][C] (2d ed. 2019).
[238] Mike Masnick, *Congress Fixes More Problems with FOSTA Bill . . . But It Still Needs Work*, TECH DIRT (Dec. 11, 2017), https://www.techdirt.com/articles/20171211/11572838785/congress-fixes-more-problems-with-fosta-bill-it-still-needs-work.shtml.
[239] *Id.*

assist or aid.'"[240]

Several Travel Act cases have similarly interpreted the word "facilitate" to mean "to make easy or less difficult" any unlawful activity."[241] The Seventh Circuit has said that conduct does not have to be essential to the state law violation in order to facilitate it.[242] The Tenth Circuit has said, in a passage partially adopted and applied to a Travel Act case on appeal from the Eastern District of Pennsylvania:[243]

> The word 'facilitate' is one of common use in business and transactions between ordinary persons. It is a term of everyday use, with a well understood and accepted meaning. Webster defines 'facilitate' as meaning: 'To make easy or less difficult; to free from difficulty or impediment; as to facilitate the execution of a task. (2) To lessen the labor of; to assist; . . . '. Funk & Wagnall's New Standard Dictionary defines 'facilitate' as follows: 'To make more or less difficult; free more or less completely from obstruction or hindrance; lessen the labor of.' The word 'facilitate' appears in many federal statutes. In none of them is it defined, but the presumption is that when Congress used this word, it ascribed to it its ordinary and accepted meaning.[244]

Travel Act cases have required there to be a close, causal connection between the conduct the government identifies as culpable and the making easier of the unlawful activity. For example, the Fourth Circuit found that where a defendant made plans to

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[240] Woodhull Freedom Foundation v. United States, No. 18-52982020, WL 398625, at *5 (D.C. Cir., Jan. 24, 2020) (internal quotation marks omitted).
[241] United States v. Judkins, 428 F.2d 333, 335 (6th Cir. 1970) (citing United States v. Miller, 379 F.2d 483, 486 (7th Cir. 1967); United States v. Barrow, 212 F. Supp. 837, 840 (E.D. Pa. 1962)).
[242] *See* United States v. Miller, 379 F.2d 483, 486 (7th Cir. 1967).
[243] United States v. Barrow, 212 F. Supp. 837, 840 (E.D. Penn. 1962).
[244] Platt v. United States, 163 F.2d 165, 166–67 (10th Cir. 1947)

operate a gambling establishment in violation of state law and later moved his family across state lines to the location where he planned to operate the gambling establishment, the move across state lines had too tenuous a connection to the state law violation to constitute "facilitating," or "promoting" within the meaning of the Travel Act.

The Sixth Circuit has similarly found that a defendant who was in a romantic relationship with a woman working in a "house of prostitution" in violation of state law, and who called her across state lines to tell her he loved her, had not "facilitated" the woman's violation of state law; the court found that the defendant's having made the woman "happy" was too tenuously connected to making her work easier to constitute "facilitation" within the meaning of the law.[245]

The *Woodhull* trial court, looking to the Travel Act, implied that FOSTA requires a similar close, causal connection.[246] Some minimal support for the *Woodhull* trial court's more-narrow interpretation can be found in FOSTA's legislative history. Senator Blumenthal remarked to the Senate "[FOSTA] was not designed to target websites that spread harm reduction information, and the language of the bill makes that clear."[247] His remarks, however, were in contrast to a letter to Congress from the ACLU, submitted into the Congressional Record by Senator Wyden, stating the "ACLU is concerned that the scope of the bill's language will encompass the actions of sex workers who have no connection to trafficking whatsoever within its enforcement, including effective harm reduction and anti-violence tactics."[248]

The *Woodhull* court of appeals stated that "'facilitate' could be

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[245] *See Judkins*, 428 F.2d 333 at 335.
[246] Woodhull Freedom Foundation v. United States, 334 F.Supp.3d 185, 200 (D.D.C. 2018).
[247] 164 CONG. Rec. S1852 (daily ed. March 21, 2018) (statement of Sen. Blumenthal).
[248] *Id.* at S1867 (statement of Sen. Wyden)

interpreted as a synonym for terms like 'aid,' 'abet,' and 'assist,' in which case the term's meaning would be limited be the background law of aiding and abetting.[249] Even if this interpretation is the correct one, however, the *Woodhull* appellate court found that the intention to run a website on which sex workers share information could fall within this more-narrow meaning of the term.[250]

How "facilitate" or "promote" in § 2421A will ultimately be interpreted remains to be seen. Emma Llanso, director of the Center of Democracy and Technology's Free Expression Project, states the question surrounding the ambiguity of § 2421A as follows:

> Would a blog post advocating for decriminalization of consensual commercial sex be considered "promotion of the prostitution of another person"? What about online reviews of a strip club where some employees have also engaged in unlawful commercial sex acts, or linking to the social media profiles of specific performers? If the answer to any of these questions is "yes," then the authors of that content could face criminal charges under the new law. And website operators will likely respond to this uncertainty by considering such content too risky to handle.[251]

Regardless of what the courts will say, cautious website owners have already taken measures of their own to avoid liability, and, as a result, sex workers have lost access to online spaces used to share harm reduction information and blacklists of dangerous clients.[252]

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[249] Woodhull Freedom Foundation v. United States, No. 18-52982020, WL 398625, at *5 (D.C. Cir., Jan. 24, 2020).
[250] *Id.* at *5–6.
[251] Emma Llanso, *Goodlatte's Online Trafficking Bill Makes Key Improvements, But Risks to Free Speech Persist*, CDT (Dec. 11, 2017), https://cdt.org/blog/goodlattes-online-trafficking-bill-makes-key-improvements-but-risks-to-free-speech-persist/.
[252] *See* Survivors Against SESTA, *Documenting Tech Actions*, SURVIVORS AGAINST SESTA, https://survivorsagainstsesta.org/documentation/ (last visited June 19, 2019).

F. Section 2421A(b): Aggravated Violation

Section 2421A(b) incorporates the language of subsection (a) and adds two offenses that would "aggravate" an ICS's act of promoting or facilitating prostitution of another person. In order to prosecute someone under subsection (b), the government must show a defendant's intent to promote or facilitate prostitution in addition to (1) promotion or facilitation of the prostitution of 5 or more persons; or (2) acting in reckless disregard of the fact that the intent to promote or facilitate the prostitution of another person contributed to sex trafficking in violation of § 1591(a).

Sections 2421A(b)(1) and (b)(2) have different mental state requirements. The plain text of subsection (b)(1) includes no additional mental state other than intent to promote or facilitate the prostitution of another person as required by section (a). Thus, for example, an ICS operator who intentionally hosts an advertisement facilitating prostitution of at least one other person, which advertisement then actually promotes or facilitates the prostitution of five or more persons, would likely be liable for the aggravated offense under § 2421A(b)(1). Subsection 2421A(b)(1) likely creates liability for almost any ICS owner, manager, or operator who intentionally allows third parties to advertise for the purposes of prostitution on that ICS. In this case, it would make no difference whether all participants were over 18 years old or whether there was coercion or other aggravating factors.

Subsection (b)(2), by contrast, contains an additional mental state requirement of "reckless disregard," or a conscious disregard for substantial and unjustifiable risks. Making out a violation of subsection (b)(2) then would require a showing of three mental states; an ICS owner, for example, must *knowingly* operate a website with the *intent* to facilitate the prostitution of another person while *recklessly disregarding* the fact that that facilitation contributed to trafficking in

violation of § 1591(a).

Noteworthy here is that § 1591(a) explicitly states that "knowledge" is required for a violation of that statute when the act in question is advertising. The mental state requirement under § 2421A(b)(2) is thus lower than the mental state requirement for "participation in a venture" in violation of § 1591(a). The layering of multiple mental state requirements in § 2421A creates some ambiguities. It would seem, however, that an ICS owner who intentionally allows advertising for prostitution on their website does not need to know that such advertisements contributed to trafficking in order to be liable under § 2421A(b)(2). By contrast, a website owner who intentionally allows advertising for prostitution on their website must have knowledge that such advertising contributed to trafficking in order to be found liable for "benefitting from participation in a venture" under § 1591(a)(2). After FOSTA, then, Congress has created two different statutes, with two different requirements for liability, which target the same conduct—namely: online facilitation of trafficking.

Santa Clara Law School Professor Eric Goldman suggested amending the language of § 2421A(b)(1) when he was called at the Senate hearings on FOSTA as an expert witness. His recommendations included changing the section to make clear that it only applies if an ICS owner, manager, or operator, "promotes or facilitates the prostitution of 5 or more persons himself or herself (not considering the acts or content of any third parties.)."[253] Because FOSTA explicitly targeted Backpage and other websites hosting third party ads, however, it's most likely that Congress intended it to create liability for user-content for ICS owners, managers, and operators.

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[253] Eric Goldman, *New House Bill (Substitute FOSTA) Has More Promising Approach to Regulating Online Sex Trafficking*, TECH. & MARKETING L. BLOG (Dec. 11, 2017), https://blog.ericgoldman.org/archives/2017/12/new-house-bill-substitute-fosta-has-more-promising-approach-to-regulating-online-sex-trafficking.htm.

G. What is "prostitution" under FOSTA?

One of the ambiguities in § 2421A is how "prostitution" will be defined in the new law. Prior to FOSTA's enactment, other federal criminal laws that addressed prostitution did so in the context of trafficking,[254] immigration,[255] or acts on federal property like military bases.[256] "Prostitution" is not defined in federal law, and the few cases arising under the Mann Act that attempt to define the term do not provide much clarity.

In *United States v. Marks*, the Seventh Circuit defined prostitution as "[t]he offering of the body to indiscriminate lewdness for hire."[257] The Supreme Court in *Cleveland v. United States* also defined the term vaguely, stating "…[p]rostitution, to be sure, normally suggests sexual relations for hire."[258] Black's Law Dictionary describes prostitution somewhat more concretely as "the practice or an instance of engaging in sexual activity for money or its equivalent."[259] These definitions, of course, do little to describe the practices of people in the sex trades, or to make clear which of these practices FOSTA may capture.

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[254] *See, e.g.*, 18 U.S.C. § 2421(a) (2015) ("Whoever knowingly transports any individual in interstate or foreign commerce, or in any Territory or Possession of the United States, with intent that such individual engage in prostitution, or in any sexual activity for which any person can be charged with a criminal offense, or attempts to do so, shall be fined under this title or imprisoned not more than 10 years, or both.")

[255] *See, e.g.*, The Page Act of 1875 (Immigration Act), Pub. L. No. 43–141, § 3, 18 Stat. 477 (1875) ("That the importation into the United States of women for the purposes of prostitution is hereby forbidden . . . .").

[256] *See, e.g.*, 18 U.S.C. § 1384 (1994) (". . . whoever engages in prostitution or aids or abets prostitution or procures or solicits for purposes of prostitution, or keeps or sets up a house of ill fame, brothel, or bawdy house, or receives any person for purposes of lewdness, assignation, or prostitution into any vehicle, conveyance, place, structure, or building, or permits any person to remain for the purpose of lewdness, assignation, or prostitution in any vehicle, conveyance, place, structure, or building or leases or rents or contracts to lease or rent any vehicle, conveyance, place, structure or building, or part thereof. . . .").

[257] United States v. Marks, 274 F.2d 15, 18 (7th Cir. 1959).

[258] Cleveland v. United States, 329 U.S. 14, 18, n.3 (1946).

[259] *Prostitution*, BLACK'S LAW DICTIONARY (11th Edition, 2019).

After the 1986 amendment to the Mann Act, a prosecutor bringing a charge under § 2421 would not have had to show that a person's act was "prostitution" (or "debauchery") under federal law, only that the person engaged in "sexual activity" for which they could have been charged with a criminal offense.[260] The 1986 amendment thus made "prostitution" in the Mann Act more like "prostitution" in Travel Act, specifying that a court could look to another criminal law to determine what kind of act might constitute a violation. FOSTA, by contrast, requires that courts once again determine what "prostitution" means under federal law, rather than, for example, under the law of the state in which the act occurred.

Another issue of interpretation relates to whose conduct is targeted under the statute. Both §§ 2421A(a) and (b) require "intent to promote or facilitate the prostitution *of another person*." A plain language reading of this requirement would indicate that a worker operating a website on which they advertise for their own services is not liable under these subsections. However, many believed that the language of the Mann Act as passed, prohibiting "knowing . . . transport[ation of] . . . any woman or girl," would only apply to someone transporting another person, not themselves. This belief was proven wrong when the Supreme Court ruled in 1915 that the law could be used to prosecute a woman for transporting herself.[261] Perhaps "the prostitution of another person" language in § 2421A is clearer than the language of the Mann Act. While FOSTA is ostensibly not intended to further criminalize sex workers themselves,[262] it almost certainly creates liability for sex workers who

[260] *See* Conant *supra* note 200 at 116-117.
[261] *See* United States v. Holte, 236 U.S. 140, 144 (1915)(such a ruling was necessary, the Court said, lest the penal code "not be as broad as the mischief").
[262] 164 CONG. REC. S1852 (daily ed. March 21, 2018) (statement of Sen. Blumenthal) ("[FOSTA] was not designed to target websites that spread harm reduction information, and the language of the bill makes that clear. The purpose of this bill is much more narrowly focused: A website user or operator must intend to facilitate prostitution.")

own or operate their own websites if these workers also use their websites to host or link to their friends' ads, or if they themselves advertise, as is common practice among independent workers, the provision of their own services alongside the services of another worker. Independent sex workers who operate their own websites were not mentioned in Congressional remarks on FOSTA.

It is currently unclear whether Congress will further define "prostitution" through legislation or whether courts will create their own definitions of prostitution as the *Marks* and *Cleveland* courts did. Without further federal guidance, courts may exercise wide discretion in determining what constitutes prostitution for the purposes of federal law. Another possibility is that courts will rely on state laws' definitions of prostitution as they are required to do under the Travel Act. However, state laws vary widely, so if courts use state law as their guide there may be numerous, case-specific definitions adopted in the application of § 2421A.

H. § 2421A(c), New Federal Civil Liability

In addition to creating a new federal crime, FOSTA created a new federal civil right of action, codified as an amendment to the Mann Act. As noted above, 18 U.S.C. § 2421A(c) states: "Any person injured by reason of a violation of § 2421A(b) may recover damages and reasonable attorney's fees in an action before any appropriate United States district court."[263]

Thus, this new civil right of action can be used to target conduct that is an alleged violation of § 2421A(b), the "aggravated violation" of FOSTA's federal criminal provision. As described above, § 2421A(b) creates liability for the owner, manager or operator of an ICS[264] or anyone who conspires to own, manage, or operate an ICS

[263] 18 U.S.C. § 2421A(c).
[264] See Part I above for a detailed description of the definition of an ICS.

with the intent to promote or facilitate the prostitution of another person and (1) promotes or facilitates the prostitution of five or more persons; or (2) acts in reckless disregard of the fact that such conduct contributed to sex trafficking, in violation of § 1591(a).[265] As in a criminal charge under § 2421A(b), several mental states would need to be shown to find a defendant civilly liable under § 2421A(c).

As Eric Goldman has noted, despite clearly carving out an exception to § 230 for civil claims brought under § 1595, FOSTA leaves the civil immunity provided by § 230 for violations of § 2421A in place.[266] It is unclear why Congress would leave § 230 untouched with respect to § 2421A(c) as it seems in opposition to Congress's stated intention to remove § 230 as a shield against civil trafficking claims. Goldman suggests that this is an "artifact" of the merging of SESTA, which amended § 230 and § 1591, with FOSTA, which created § 2421A.[267]

1. "Violation" of a Criminal Statute for a Civil Action: Burden of Proof

It is highly likely that a civil action can be brought under § 2421A(c) regardless of whether a defendant has faced a criminal charge or conviction under § 2421A(b). In *Sedima v. Imrex Co.*,[268] the Supreme Court addressed the question of what burden of proof is required to show a defendant's violation of a criminal statute for the purposes of bringing a civil claim under the same statute. In that case, the Second Circuit had previously ruled that a criminal conviction of the defendant for a RICO violation was required before a plaintiff could bring a civil claim regarding that same violation.[269] The Supreme Court reversed, explaining that "the term 'violation' does not imply a criminal conviction," but instead "refers only to a failure to

[265] 18 U.S.C. § 2421A(b).
[266] Eric Goldman, *supra* note 22, at 284.
[267] *Id.*
[268] Sedima v. Imrex Co., 473 U.S. 479 (1985).
[269] *See id.* at 481.

adhere to legal requirements."[270] The Court based this determination in part on the statute's plain language and in part on the RICO Act's similarity to the Clayton Act, "under which private and government actions are entirely distinct."[271] The Court went on to note that "in a number of settings, conduct that can be punished as criminal only upon proof beyond a reasonable doubt will support civil sanctions under a preponderance standard," citing several cases where defendants had been acquitted of criminal charges but still subject to civil sanctions for the same conduct.[272] Similarly, numerous civil cases have gone forward under 18 U.S.C. § 1595, based on an alleged violation of the criminal statute 18 U.S.C. § 1591, despite no criminal charges being pursued in the same case.[273]

Thus, plaintiffs bringing claims under § 2421A(c) will likely only have to prove the violation occurred using a preponderance of the evidence standard. Plaintiffs will, however, face the challenge of overcoming website's § 230 immunity, which does not apply to criminal charges under § 2421A(a) and (b), but does still apply to § 2421A(c). As detailed above,[274] to overcome a website's § 230 immunity defense, plaintiffs under § 2421A (c) will need to show that the site participated in the development or creation of the content that contributed to the "prostitution of five or more people" or to "sex trafficking," and were thus internet content providers with respect to the culpable content.

All of the questions regarding the definitions of the text of §§

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[270] *Id.* at 489.
[271] *Id.* at 490. Congress has since amended RICO to require a criminal conviction before bringing actions for securities fraud, but the RICO Act still does not require a prior conviction in order to bring a civil action where the violation in question is racketeering or organized crime. *See* Abene v. Jaybar, LLC, 802 F. Supp. 2d 716, 721 (E.D. La 2011).
[272] *Sedima*, 473 U.S. at 491.
[273] *See, e.g.*, Noble v. Weinstein, 335 F. Supp. 3d 504 (S.D.N.Y. 2018); Geiss v. Weinstein Co. Holdings LLC, 383 F. Supp. 3d 156 (S.D.N.Y. 2019); Roe v. Howard, 917 F.3d 229 (4th Cir. 2018).
[274] *See supra* notes 52–55 and accompanying text.

2421A(a) and (b), of course, also apply to § 2421A(c), which—much like the civil provision in the TVPA described above[275]—cannot be applied without an interpretation of all of the elements of the violation. While, during the last two decades, lawyers have demonstrated a reticence to bring civil claims under new, unproven, and un-interpreted anti-trafficking laws,[276] there has been a recent trend in increased trafficking claims against third parties using pre-FOSTA, state-level tort laws.[277] Considering the enthusiasm of some private-injury attorneys for this new area of the law[278] as well as the media attention that civil claims against well-known corporations garner,[279] civil trafficking claims against third parties may continue to proliferate in the coming decade. This does not, however, necessarily mean that they will proliferate under FOSTA-related claims. It is just as likely that tort lawyers will continue to bring claims under other, proven tort laws.

One outcome of FOSTA as a whole that we have already seen, however, of which some causal part can almost certainly be attributed to § 2421A(c), is pre-emptive action by third-party companies who wish to avoid civil liability. FOSTA is just one part of a larger shift toward the creation of civil liability for third parties as an attempt to remedy trafficking violations.[280] Pre-emptive actions to avoid such liability are already ubiquitously taken by hotels, ride-share companies, online platforms, and financial services, which frequently train their employees to "identify" or profile people in the sex trades,[281] and exclude those people from their services.

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[275] *See supra* Part II: The Trafficking Victims Protection Act § 1591 and § 1595.
[276] *See* Alex F. Levy *supra* note 197 at 10-11.
[277] *See supra* note 95 and accompanying text.
[278] *See*, *e.g.*, *supra* note 97 and accompanying text..
[279] *See, e.g.*, Elizabeth Nolan Brown, *FOSTA's First Test Targets Cloud Company Used by Backpage: Reason Roundup*, REASON (March 28, 2019 9:30 AM), https://reason.com/2019/03/28/fostas-first-test-targets-cloud-company/.
[280] *See supra* note 96 and accompanying text.
[281] The phrase "people in the sex trades" is used here to include all people doing sex work whether by consent, coercion, or circumstance, and to acknowledge that "sex workers" and "trafficking victims" are not discrete groups.

2. § 2421A in Practice, The CityXGuide Prosecution

As we were finalizing this document, the United States Department of Justice brought the first prosecution under §2421A, against Wilham Martono, the alleged owner cityxguide.[282] Although Martono is alleged to have expanded its services after Backpage's takedown, cityxguide was actually named as one of the targeted sites necessitating the passage of FOSTA in the House Judiciary Committee's report.[283] Martono was charged with violations of § 2421A in addition to conspiracy to violate the Travel Act, violations of the Travel Act, and money laundering.

The language alleging violations of § 2421A, at least as present in the indictment, does not focus on the trafficking claims that were theoretically at the heart of the passage of FOSTA. Although the indictment does state that Martono promoted and facilitated prostitution "in reckless disregard for the fact that such conduct contributed to sex trafficking," and that there was a person who was trafficked through cityxguide, the District Attorney did not press trafficking charges.

PART IV: SIGNIFICANCE OF FOSTA'S GAO REPORTING REQUIREMENT

FOSTA's Government Accountability Office (GAO) reporting requires the U.S. Comptroller General to "conduct a study and submit [a report] to the Committees on the Judiciary of the House of Representatives and of the Senate, the Committee on Homeland Security of the House of Representatives, and the Committee on Homeland Security and Governmental Affairs of the Senate."[284] The report will include the following: (1) an assessment of the amount and

[282] United States v. Wilham Martono, 3-20-CR-0274-N (N.D. Tex. June 2, 2020).
[283] H.R. COMM. ON THE JUDICIARY, ALLOW STATES AND VICTIMS TO FIGHT ONLINE SEX TRAFFICKING ACT OF 2017, H.R. REP. NO. 115-572, at 3 (2018).
[284] Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. No. 1115-164, § 8, 132 Stat. 1253 (2018).

nature of damages awarded under § 2421A(c); (2) any civil actions brought under § 2421A(c) that did not result in a damage award and why; (3) information on each order of restitution entered pursuant to § 2421A(d); (4) and information on each defendant who was convicted of violating § 2421A(b) but not ordered to pay restitution.[285] In other words, the report will be an assessment of financial liability provided by FOSTA's creation of § 2421A. As of the date of this writing, that number would be zero.

The GAO reporting requirement was added as an amendment by Congresswoman Jackson Lee, who said that the GAO report "leads to be able to help understand what the level of recovery is and the mandatory restitution. It will tell the story. It will provide the GAO study to find out how this legislation is positively impacting, who is receiving the dollars, are they receiving the dollars."[286]

"Victims of sex trafficking," Rep. Jackson Lee said "require a multifaceted response to rebuild their life. That includes housing; counseling; job training; and, in many cases, drug treatment and rehabilitation. We as Members of Congress need to be able to know if it works."[287] The GAO report, she implied, would tell Congress whether FOSTA was working. Nothing in FOSTA, however, provides trafficking victims with access to services. The GAO report will tell Congress whether § 2421A is a path for any victims to receive monetary relief, but not whether that monetary relief actually enables access to housing, counseling, job training, or other services.

This focus on financial liability seems to directly respond to the concerns of media, lobbyists, and activists who spurred FOSTA's passage instead of assessing the potentially wide-reaching impact of FOSTA's changes to state-level criminal liability or to third-party liability under the amended § 1591 and § 1595. As with previous sex-

[285] *Id.*
[286] 164 CONG. REC. H1291 (Feb. 27, 2018) (Statement of Rep. Lee).
[287] *Id.* at H1304.

trafficking-related GAO reports, there will be no assessment of how many federally-funded trafficking investigations led to actual trafficking charges, of the fiscal impact or efficacy of such investigations, or of how many newly passed trafficking laws duplicate, confuse, or complicate previously passed trafficking laws. Further, this report will tell Congress nothing about negative consequences of third-party liability, as described above, including the profiling and exclusion by private companies of people in the sex trades—profiling and exclusion which can actually make accessing the housing and services described by Rep. Jackson Lee more difficult.[288]

PART V: THE *EX POST FACTO* CLAUSE

FOSTA Section 4 (b) prescribes that subsection 4 (a), which amends § 230 (e),[289] applies to activities which occurred on, before, or after its enactment. Its retrospective effect (which applies only to FOSTA's amendments to § 230) raises potential *ex post facto* concerns. The DOJ pointed out these concerns to Congress in a letter sent prior to FOSTA's passage.[290]

The Constitution provides that neither Congress nor any state shall pass any *ex post facto* law.[291] A law violates the Constitution's *ex post facto* clause if it "makes more burdensome the punishment for a crime, after its commission, or . . . deprives one charged with crime of any defense available according to law at the time when the act was committed."[292] The prohibition applies to laws "which make innocent acts criminal, alter the nature of the offense, or increase the

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[288] For more on the impact of discrimination by private companies against people in the sex trades *see*

[289] FOSTA Section 4(a) amends § 230(e) by adding a section (5). The new section § 230 (e)(5)(A) precludes from § 230 immunity (A) any civil action brought under 18 U.S.C. § 1595, when the underlying conduct violates § 1591. Sections (B) & (C) changes state level criminal liability, as described in *supra* note 72 and accompanying text.

[290] https://www.justice.gov/ola/page/file/1042721/download.

[291] U.S. CONST. art. I, § 9, cl. 3; U.S. CONST. art. I, § 10, cl. 1.

[292] *See* Beazell v. Ohio, 269 U.S. 167, 169 (1925).

punishment."[293] There are generally four categories of *ex post facto* law: (1) those "declar[ing] acts to be treason, which were not treason, when committed;" (2) those "inflict[ing] punishments, where the party was not, by law, liable to any punishment;" (3) those "inflict[ing] greater punishment, than the law annexed to the offence;" and (4) those "violat[ing] the rules of evidence (to supply a deficiency of legal proof) . . . ."[294]

The *ex post facto* clause ordinarily does not apply to retroactive statutes concerning civil remedies, and thus § 230 (e)(5)(A) likely does not violate the *ex post facto* clause.[295] The following subparts analyze the potential *ex post facto* issues of §§ 230 (e)(5)(B)[296] and (C),[297] as amended by FOSTA Section 4(a).

A. Section 230 (e)(5)(B)

Prior to FOSTA, § 230 provided immunity to website owners from state prosecutions for certain conduct even when that conduct was not immune to federal prosecution. Section 230(e)(5)(B) removes this immunity and allows states to prosecute crimes if the underlying conduct also violates federal criminal laws 18 U.S.C. § 2421A or 18 U.S.C. § 1591. Whether or not this subsection violates the *ex post* facto

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[293] *See* Collins v. Youngblood, 497 U.S. 37, 46 (1990).

[294] Stogner v. California, 539 U.S. 607, 611 (2003) (quoting 3 Dall., at 389, 1 L. Ed. 648) (emphasis deleted).

[295] *See* Harisiades v. Shaughnessy, 342 U.S. 580, 594 (1952) (holding that the *ex post facto* clause forbids penal legislation which imposes or increases criminal punishment for conduct lawful previous to its enactment but does not apply to legislation imposing civil liability). However, the *ex post facto* effect of a law cannot be evaded by giving a civil form to that which is essentially criminal, *Burgess v. Salmon*, 97 U.S. 381, 385 (1878), which does not appear to be the case here.

[296] "Nothing in this section . . . shall be construed to impair or limit . . . any charge in a criminal prosecution brought under state law if the conduct underlying the charge would constitute a violation of section 1591 of title 18." 47 U.S.C. § 230 (e)(5)(B).

[297] "Nothing in this section . . . shall be construed to impair or limit . . . any charge in a criminal prosecution brought under state law if the conduct underlying the charge would constitute a violation of section 2421A of title 18, and promotion or facilitation of prostitution is illegal in the jurisdiction where the defendant's promotion or facilitation of prostitution was targeted." 47 U.S.C. § 230 (e)(5)(C).

clause depends on the level of penalties imposed by specific state criminal statutes.

Since § 230 never immunized websites from prosecution under federal criminal law, conduct that violates § 1591 was already subject to penalty prior to FOSTA. If penalties for violating already-existing federal crimes are higher than penalties for violating the newly authorized state crimes, authorizing state prosecutions for that same conduct would not violate the *ex post facto* clause.[298]

If, however, the newly authorized state crimes impose higher penalties on website owners than penalties previously imposed for violations of § 1591,[299] retroactive enforcement would constitute a violation of the *ex post facto* clause. In *Peugh v. United States*, the Supreme Court held that there was an *ex post facto* violation when a defendant was sentenced under a harsher sentencing guideline promulgated after the defendant committed the criminal act.[300] Specifically, the Court found that the higher sentence guideline "changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed,"[301] thus falling into the third category of *ex post facto* violations. Here, likewise, § 230 (e)(5)(B) may cause defendants to face harsher sentencing and penalties for underlying actions that were committed before (5)(B)'s promulgation.[302]

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[298] *See* Dorsey v. United States, 567 U.S. 260, 275 (2012) ("Although the Constitution's Ex Post Facto Clause, Art. I, § 9, cl. 3, prohibits applying a new Act's higher penalties to pre-Act conduct, it does not prohibit applying lower penalties.").

[299] Those situations are not hypothetical, but more than real. *See, e.g.*, Alex Levy, *More on the Unconstitutional Retroactivity of Worst of Both Worlds FOSTA,* Technology & Marketing Law Blog (March 29, 2018) ("For example, while a violation of the Federal sex trafficking statute calls for a sentence of 10 years to life, Florida's mirroring statute imposes a mandatory life sentence.").

[300] Peugh v. United States, 569 U.S. 530, 532–33 (2003).

[301] *Id.*

[302] In a Congressional Research Service report responding to Ann Wagner's request for an analysis of FOSTA's *ex post facto* imlications, the author defended § 230 (e)(5)(B) by analogizing it with *Dobbert v. Florida*, 432 U.S. 282 (1977) while differentiating it from *Stogner*, 539 U.S. 607. CHARLES DOYLE, CONG. RESEARCH SERV.,

B. Section 230 (e)(5)(C)

Section 230 (e)(5)(C) removes previously available § 230 immunity from state level prosecution for conduct that also violates 18 U.S.C. § 2421A, a new federal crime that was nonexistent before FOSTA. In other words, a defendant who committed certain acts[303] prior to FOSTA would not be subject to any criminal liability before FOSTA but would be subject to retroactive state-level criminal liability after the promulgation of FOSTA.

The situation under § 230 (e)(5)(C) is thus analogous to that analyzed in *Stogner v. United States*.[304] In *Stogner*, the Supreme Court held that a California statute was *ex post facto* where the statute extended the statute of limitations on certain crimes, thus permitting previously time-barred criminal prosecutions.[305] The Court found the California statute fell squarely in category (2) of *ex post facto* law,[306] reasoning that:

7-6968, EX POST FACTO IMPLICATIONS OF THE ALLOW STATES AND VICTIMS TO FIGHT ONLINE SEX TRAFFICKING ACT OF 2017 (H.R. 1865), AS PASSED BY THE HOUSE OF REPRESENTATIVES. The author claimed that in *Stogner*, "defendant could not be prosecuted until the impediment was removed," which is not the case here (since the federal crime is already there). The author, however, overlooked the fact that *Stogner* was in violation of categories (2) & (4) of *ex post facto* law, i.e., law that "inflict[s] punishments, where the party was not, by law, liable to any punishment" and that "diminishes the quantum of evidence to convict." *Stogner*, 539 U.S. at 615. Section 230 (e)(5)(B) belongs to category (3), as cited in note 294 and illustrated by *Peugh*. The author then characterized the similarity between (5)(B) and *Dobbert* as the fact that "the defendant knew beforehand that government authorities considered the underlying conduct criminal and warranting punishment under the law." *Id.* at 4. This is arguably an incorrect capture of *Dobbert*, since its holding hinges instead on whether the change is procedural or substantive. *Dobbert*, 432 U.S. at 293, 300 (recognizing that an *ex post facto* violation may arise "where under the new law a defendant must receive a sentence which was under the old law only the maximum in a discretionary spectrum of length").

[303] The acts refer to those violate both the new § 2421A and the ever-existing state criminal law but were within pre-FOSTA § 230 immunity.

[304] 539 U.S. 607.

[305] *Id.* at 611.

[306] *See supra* note 294.

> After (but not before) *the original statute of limitations had expired*, a party . . . was not "liable to any punishment." *California's new statute* therefore "aggravated" [the party's] alleged crime, or made it "greater than it was, when committed," in the sense that, and to the extent that, it "inflicted punishment" for past criminal conduct that (prior to the new statute's enactment) did not trigger any such liability.[307]

Here, if we change the italicized part into "the original § 230 immunity was applied to the state criminal statute" and "FOSTA" respectively, the reasoning remains true and accurate. Therefore, following *Stogner*, § 230 (e)(5)(C) is even a more egregious violation of the *ex post facto* clause than (5)(B).

CONCLUSION

The full scope of the FOSTA amendments will remain ambiguous until courts interpret this new legislation. Nonetheless, though the exact legal applicability of FOSTA is speculative, it has already had a wide-reaching practical impact; it is clear that even the threat of an expansive reading of these amendments has had a chilling effect on free speech, has created dangerous working conditions for sex-workers, and has made it more difficult for police to find trafficked individuals. Due to these harmful repercussions, sex workers rights activists urge courts and websites to interpret the relevant civil and criminal laws narrowly in order to limit the kinds of content and conduct that come within the laws' purview.

To that end, we recommend that advocates interpret FOSTA as follows:

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[307] *Stogner*, 539 U.S. 615.

1. Preclude § 230 immunity only where ICSs have played an extensive role in creating third-party postings or have made the post with criminal intent. Adopting the narrowest interpretation of the FOSTA amendments to § 230 will serve to counter the chilling effect the legislation has already had on internet free speech.

2. Adopt the plain language reading of the § 1591 amendment to "participation in a venture" such that the amendment narrows, rather than expands the scope of the law. Under this interpretation, so that activities such as hosting third-party posts, listings, and advertisements related to sex work would not constitute illegally promoting and facilitating prostitution.

3. Limit the harm claimed in in a *parens patriae* suit to that defined in § 1591. This will prevent harms lacking a strong causal connection to the § 1591 violation from creating potentially limitless civil liability.

4. Interpret the new §2421A claims provisions narrowly such that criminal liability will not attach to the important safety precaution of sharing harm-reduction materials or providing other general work-related information between sex-workers.

By adopting these recommendations, the harmful impact of FOSTA may be mitigated. But only repeal, combined with efforts like decriminalization, will begin to undo the harm it has done.