

FOSTA IN LEGAL CONTEXT

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ABSTRACT

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 (Section 230), the Trafficking Victims Protection Act (TVPA), 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.

This Article analyzes the legal reality of FOSTA, fully exploring its changes to the Mann Act and the TVPA in context along with the more broadly discussed changes to Section 230. When contextualized, the changes to 230 are far less broad than initially reported, with a strict textual reading of the amendments resulting in relatively little change to immunity in most circumstances. The new criminal provisions, on the other hand, have the potential to criminalize vast amounts of speech and advocacy. This Article is the first piece to comprehensively analyze the scope of all of these various components of the law.

* Author names are alphabetical. Kendra Albert, Elizabeth Brundige, and Lorelei Lee served as the primary authors. This guide was originally produced for Hacking//Hustling, a sex worker-led collective. Substantial support was provided by Danielle Blunt and Kate D'Adamo, and other members of the Hacking//Hustling Team. Thank you to Daphne Keller, Kate D'Adamo, and Eric Goldman for their helpful comments.

1. Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. No. 1115-164, 132 Stat. 1253 (codified as amended in scattered sections of 18 and 47 U.S.C.) (2018). For the sake of simplicity, this Article refers to the combined bill as FOSTA.

What it finds is that the legal effects of FOSTA have been far outstripped by its policy outcomes. More than two years after its passage, only one prosecution has been brought under the new criminal provision, and very few lawsuits have been brought against online platforms for sex trafficking, despite a lack the lack of immunity. However, FOSTA has had widespread effects on internet companies. 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. Though these actions by internet companies may be more restrictive than is necessary to avoid liability under the new law, much remains unclear because of the lack of judicial interpretation and the law's lack of clarity. 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-advocacy.

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INTRODUCTION

The Allow States and Victims to Fight Online Trafficking Act of 2017 (FOSTA) was passed with the intent to reduce rates of sex trafficking through increased regulation and penalization of websites.² FOSTA materially limits the scope of the Communications Decency Act (CDA) for the first time since the latter's enactment over two decades ago.³ 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.⁴ Walking through the provisions of FOSTA one by one, this Article shows that despite congressional intent to reduce trafficking through seemingly seismic changes and significant reactions from digital platforms, the actual legal effect of FOSTA's changes to section 230 of the CDA 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 because of steps taken by website owners.⁵ Prior to FOSTA's passage, critics of the

2. Allow States and Victims to Fight Online Sex Trafficking Act of 2017 (FOSTA), Pub. L. No. 1115-164, 132 Stat. 1253 (codified as amended in scattered sections of 18 and 47 U.S.C.) (2018); 164 CONG. RECORD H1, 290-91 (daily ed. Feb. 27, 2018) (statement of Rep. Martha Roby) (arguing that the legislation "will finally hold bad actor websites accountable . . . [by] provid[ing] increased criminal liability and, thus, deter[ing] websites and individuals from selling human beings online. Websites will no longer be able to turn a blind eye . . .").

3. Telecommunications Act of 1996 § 230, Pub. L. 104-104, 110 Stat. 137 (1996).

4. Allow States and Victims to Fight Online Sex Trafficking Act of 2017, § 3(a), 18 U.S.C. 2421A.

5. "People in the sex trades" is a catchall term that can refer to what the law might call "sex trafficking," "prostitution," or both. Many people who trade sex find the term "prostitution" to be pejorative. The 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 in statutory text as well as by lawmakers and legal bodies. For a discussion of the importance of language used to discuss sex work, see Chris Brucket et al., *Language Matters: Talking About Sex Work*, STELLA (2013), <https://www.nswp.org/sites/nswp.org/files/StellaInfoSheetLanguageMatters.pdf> [<https://perma.cc/5P4S-S9U9>]; see also Aja Romano, *A New Law Intended to Curb Sex Trafficking Threatens the Future of the Internet as We Know It*, VOX (July 2, 2018), <https://www.vox.com/culture/2018/4/13/17172762/fosta-sesta-backpage-230-internet-freedom> (on file with the *Columbia Human Rights Law Review*) (noting that after SESTA/FOSTA, "numerous websites took action to censor or ban parts of their platforms in response—not because those parts of the sites actually *were* promoting ads for prostitutes, but because policing them against the outside possibility that they *might* was just too hard").

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.⁶ This is precisely what happened, with websites like Craigslist shutting down their adult entertainment sections altogether.⁷ Other sites, including Google Drive, have removed content, blocked users, and closed forums that sex workers relied on to exchange warnings about dangerous clients.⁸ Notably, when this happens, website users have little legal recourse. Companies like Google and Craigslist are private actors, and their removal of user content on these sites does not typically give rise to a First Amendment violation.⁹

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 methods of advertising¹⁰ and have returned to outdoor work or to in-person client-seeking in bars and clubs, where screening of the type that occurs online is impossible,¹¹ and where workers are more vulnerable to

6. Tom Jackman, *Trump Signs 'FOSTA' Bill Targeting Online Sex Trafficking, Enables States and Victims to Pursue Websites*, WASH. POST (Apr. 11, 2018), <https://www.washingtonpost.com/news/true-crime/wp/2018/04/11/trump-signs-fosta-bill-targeting-online-sex-trafficking-enables-states-and-victims-to-pursue-websites/> (on file with the *Columbia Human Rights Law Review*) (noting critique that FOSTA “creat[ed] new liability for websites . . . previously . . . protected by the [CDA] for content posted by third parties” and adding that “[Rep.] Wagner said online sex-related advertising revenue had declined 87 percent in the past 60 days, roughly when her bill passed the House”).

7. See *Documenting Tech Actions*, SURVIVORS AGAINST SESTA, <https://survivorsagainstsesta.org/documentation/> [<https://perma.cc/4AGB-6BKH>].

8. Jessie Sage, *The Impact of FOSTA/SESTA on Online Sex Work Communities*, SOC’Y PAGES (Apr. 2, 2018), <https://thesocietypages.org/cyborgology/2018/04/02/the-impact-of-fosta-sesta-on-online-sex-work-communities/> [<https://perma.cc/GDP2-VQLU>].

9. 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 (9th Cir. 2020); see also *Knight First Amend. Inst. at Colum. Univ. v. Trump*, 928 F.3d 226, 237 (2d Cir. 2019) (finding that First Amendment “public forum” protections govern accounts on private platforms used by elected officials in their official capacity).

10. See Katy Simon, *On Backpage*, TITS & SASS (Apr. 25, 2018), <http://titsandsass.com/on-the-death-of-backpage/> [<https://perma.cc/B9GG-YNBJ>].

11. See Lorelei Lee, *Cash/Consent, the War on Sex Work*, N+1 35 (2019), <https://nplusonemag.com/issue-35/essays/cashconsent/> [<https://perma.cc/348Q-5WFM>]; Michael Nedelman, *After Craigslist Personals Go Dark, Sex Workers Fear What’s Next*, CNN (Apr. 11, 2018), <https://edition.cnn.com/2018/04/10/health/sex-workers->

both clients and law enforcement.¹² 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.¹³ For workers who were unable to access pricier sites, Backpage provided an avenue to receive the same safeguards others had through online advertising.¹⁴

Loss of access to online platforms has also meant losing access to information-sharing networks—networks used to discuss safer working methods and to help create blacklists of bad clients.¹⁵ Third-party managers, some of whom are dangerous or exploitative, have taken advantage of the present circumstances to regain control over sex workers whose capacity to find clients independently has decreased.¹⁶ Similarly, previously blacklisted clients, believing sex workers to be vulnerable and desperate for work

craigslist-personals-trafficking-bill/index.html [https://perma.cc/JKU5-WV95] (reporting that “[m]any sex workers . . . communicate through online forums and check ‘bad date lists,’ which sex workers create to warn others about hostile clients” and further noting that sex workers “learn[] ways to stay safe and grow [their] business[es] from other sex workers online, some of whom keep blogs”).

12. See Simon, *supra* note 10; see also Samantha Cole, ‘Sex Trafficking’ Bill Will Take Away Online Spaces Sex Workers Need to Survive, VICE (Mar. 12, 2018), https://www.vice.com/en_us/article/neqxaw/sex-trafficking-bill-sesta-fosta-vote [https://perma.cc/Q5UR-CGGA] (discussing FOSTA/SESTA’s impact on more vulnerable sex workers).

13. DANIELLE BLUNT & ARIEL WOLF, HACKING//HUSTLING, ERASED: THE IMPACT OF FOSTA-SESTA AND THE REMOVAL OF BACKPAGE 18 (2020), available at <https://hackinghustling.org/erased-the-impact-of-fosta-sesta-2020/> [https://perma.cc/88HT-7J92]; see also Lura Chamberlain, FOSTA: A Hostile Law with a Human Cost, 87 FORDHAM L. REV. 2171, 2205 (2019) (noting that “the workers most endangered by street-based sex work tend to be from marginalized communities . . . Women of color are disproportionately arrested . . . for prostitution-related offenses, [FOSTA] forcing sex work into the street will only increase these arrests.”).

14. See Simon, *supra* note 10 (noting that Backpage was “low-barrier and accessible” because “anyone regardless of identity . . . could put up a Backpage ad . . . there were no lengthy application processes. . . [h]andily for undocumented migrants or poor workers who’d lost their documentation, there were no ID checks.”).

15. *Id.* (arguing that Backpage provided sex workers with “transparency, record keeping, and safeguards” and that its removal will intensify the “rape, pimping, and neighborhood ire street workers draw already” (internal citation omitted)).

16. *Id.* (discussing pimps’ attempts to “capitalize” on sex workers’ “desperate need to find alternative ways to reach clients” after the loss of Backpage).

because of the loss of these platforms, have begun harassing workers.¹⁷ 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.

This Article analyzes 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 Telecommunications Act, originally passed as part of the CDA, 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 in § 2421(A) of the Mann Act. Part IV explains the significance of the Government Accountability Office (GAO) reporting requirements of FOSTA, and Part 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 more dangerous working conditions for people in the sex trade.¹⁸ 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.

I. § 230 OF THE TELECOMMUNICATIONS ACT

FOSTA amends § 230 of the Telecommunications Act for the stated Congressional purpose of making it easier for prosecutors and others to hold

17. See, e.g., Zia Moon, *As A Sex Worker with A Chronic Illness, FOSTA Means Losing My Medical Care*, VICE (June 18, 2018), https://www.vice.com/en_us/article/xwm5pd/sex-work-chronic-illness-disability-fosta-v25n2 [https://perma.cc/3D9R-CAVU] (discussing blacklisted clients contacting a sex worker for services).

18. See BLUNT & WOLF, *supra* note 13, at 21–22 (“[People in the sex trade] use the Internet as a harm reduction working tool by...screening for potentially violent clients...FOSTA-SESTA, the removal of Backpage’s adult services sections, and an environment of Internet censorship threaten the protective elements offered by an [Internet-based] model of sex work...”).

website owners and operators criminally and civilly liable when websites are used to facilitate prostitution 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.¹⁹ 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, was Congress's response to judicial 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.²⁰ Extending this reasoning, a New York state trial court found in *Stratton Oakmont, Inc. v. Prodigy Servs. Co.* 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.²¹ The court distinguished *Prodigy* from *CompuServe* on the basis of the former defendant's involvement in reviewing and removing content.²² Following these cases, a website owner that actively moderated a website could be exposed to liability for any third-party illegal content posted therein.²³ In order to avoid liability, website owners were disincentivized from editing user-generated content altogether.²⁴

19. See Adi Kamdar, *Infographic: Why CDA 230 Is So Important*, ELEC. FRONTIER FOUND. (Aug. 24, 2012), <https://www.eff.org/issues/cda230/infographic> [<https://perma.cc/GFH7-VQZW>].

20. *Cubby, Inc. v. CompuServe, Inc.*, 776 F. Supp. 135, 141 (S.D.N.Y. 1991).

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

22. *Id.* at 9–11.

23. *Id.*

24. *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997) (noting that *Stratton Oakmont* created “disincentives to self[-]regulation”); Note, *Section 230 as First Amendment Rule*, 131 HARV. L. REV. 2027, 2029 (2018) (noting that the court's decision in *Stratton Oakmont* “posed a troubling choice for websites. If they took a hands-off approach to moderation, they received significant protection from liability. However, if they sought

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.²⁵ 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.²⁶ Most of the CDA’s provisions were struck down by the Supreme Court in *Reno v. American Civil Liberties Union* as unconstitutional violations of the First Amendment.²⁷ 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)’s provision providing protection for “Good Samaritan Blocking and Screening of Offensive Material.”²⁸ Section 230(c)(1) states in pertinent part that: “[n]o provider or user of an interactive computer service [ICS]²⁹ shall be treated as the publisher or speaker of any information provided by another information content provider [ICP]³⁰.”³¹ In other words, § 230(c)(1) provides immunity to a defendant when the defendant “(1) ‘is a “provider or user of an interactive computer service”’; (2) the claim is based on ‘information

to proactively regulate content on their websites, they might face liability. This dilemma ‘created a minor sensation.’” (internal citations omitted)).

25. Eric Goldman, *An Overview of the United States’ Section 230 Internet Immunity*, in *THE OXFORD HANDBOOK OF ONLINE INTERMEDIARY LIABILITY* (Giancarlo Frosio, ed., forthcoming) (manuscript at 2–3) (on file with the *Columbia Human Rights Law Review*).

26. *Id.* at 2–3 (“In 1995, the United States experienced a techno-panic about children’s access to online pornography” and arguing that Section 230 was intended to overrule *Straton Oakmont* ‘and any other similar decisions which have treated providers and users as publishers or speakers of content that is not their own because they have restricted access to objectionable material.’” (quoting H.R. 104-458 (1996))).

27. In the 1997 case *Reno v. ACLU*, 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. 521 U.S. 844, 845, 871–72 (1997).

28. 47 U.S.C. § 230(c).

29. 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).

30. “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.* § 230(f)(3).

31. *Id.* § 230(c)(1).

provided by another information content provider'; and (3) the claim would treat [the defendant] 'as the publisher or speaker' of that information."³² 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" efforts³³ 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."³⁴ Even prior to FOSTA's passage, the immunity under § 230(c)(2) explicitly did not extend to violations of federal criminal law.³⁵

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) fostering economic growth online.³⁶ 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. Part I discusses the background of § 230, changes under FOSTA, and how those changes likely create very limited additional liability from state law.

32. Jane Doe No. 1 v. Backpage.com, LLC, 817 F.3d 12, 19 (1st Cir. 2016), *cert. denied*, 137 S. Ct. 622 (2017).

33. Eric Goldman, *The Complicated Story of FOSTA and Section 230*, 17 FIRST AMEND. L. REV. 279, 285 (2019). Goldman stated further, "[d]efendants 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.*

34. 47 U.S.C. § 230(c)(2).

35. *Id.* §§ 230(e)(1), (3), and (5).

36. Eric Goldman, *The Third Wave of Internet Exceptionalism*, in THE NEXT DIGITAL DECADE: ESSAYS ON THE FUTURE OF THE INTERNET 165, 165 (Berin Szoka & Adam Marcus eds., 2010); *Section 230 as First Amendment Rule*, *supra* note 24, at 2027–30 (discussing the purposes of Section 230).

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”).³⁷ 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.³⁸ 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,”³⁹ 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 § 230.⁴⁰ Courts subsequently extended *Zeran* to immunize website owners who interact in varying degrees with the content on their sites.⁴¹ In fact, there have been over three hundred cases interpreting § 230, and so far, “[a]ll but a handful . . . find that a website is entitled to immunity from liability.”⁴²

Nonetheless, a series of cases have restricted the otherwise expansive scope of § 230.⁴³ 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

37. 47 U.S.C. § 230(c)(1).

38. See *Zeran v. Am. 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.

39. *Id.* at 330.

40. *Id.* at 333.

41. See, e.g., *Doe v. MySpace, Inc.*, 528 F.3d 413, 415 (5th Cir. 2008) (applying § 230 to claims for negligence); *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); *Blumenthal v. Drudge*, 992 F. Supp. 44, 51–52 (D.D.C. 1998) (applying § 230 even when the service paid contributors).

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

43. See generally Eric Goldman, *The Ten Most Important Section 230 Rulings*, 20 TUL. J. TECH. & INTELL. PROP. 1 (2017) (summarizing cases where the court declined to apply § 230, such as *F.T.C. v. Accusearch, Inc.*, 570 F.3d 1187 (10th Cir. 2009); *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102 (9th Cir. 2007); and *Doe v. Internet Brands, Inc.*, 824 F.3d 846 (9th Cir. 2016)).

content a website creates, in whole or in part.⁴⁴ 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.⁴⁵

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."⁴⁶ 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 what was generated by third parties; for this content, then, Roommates was entitled to § 230 immunity.⁴⁷

After *Roommates.com*, the scope of § 230 immunity⁴⁸ turned 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."⁴⁹ If so, the ICS becomes an ICP and is exempt from § 230 immunity.⁵⁰ If, however, the ICS's actions do *not* constitute "creation or

44. Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC, 521 F.3d 1157, 1162–63 (9th Cir. 2008).

45. *Id.* at 1163.

46. *Id.* at 1166.

47. *Id.* at 1173–74.

48. 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.

49. *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).

50. Notably, the Ninth Circuit still places limitations on what it means to "develop" content so that every action does not become "development" and the immunity is not 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. Metroplash.com, Inc.*, 339 F.3d 1119, 1125 (9th Cir. 2003), the Ninth Circuit held that a website was immunized from liability under § 230

development,” they will be granted § 230 immunity.⁵¹ Notably, “[a] website operator can be both a service 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.”⁵²

The expansive scope of § 230 has been critical to the development of the internet. Protecting websites from civil liability for third-party content they had no role in developing has enabled those with fewer resources to participate in the expanding online world without moderating every post.⁵³ Section 230 has also been lauded for protecting free speech and fostering forums for both open discussion and free markets.⁵⁴ Consequently, § 230 has

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. *Id.* at 1124–25.

51. Circumstances under 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 1704355, 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); (5) “[t]he interactive 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. Apr. 22, 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 (Cal. Ct. App. June 30, 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*, 339 F.3d at 1124; 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).

52. *Roommates.com*, 521 F.3d at 1162–63.

53. See Chamberlain, *supra* note 13, at 2184–85 (noting that “[§ 230] immunity made it possible for smaller [ICSs]—those that lacked the capital to aggressively police third-party content or defend against lawsuits—to proliferate”).

54. *Id.*

deterred websites from participating in the development of illegal content themselves while not deterring them from attempting to moderate the content they host. This dynamic has contributed to the goal that the internet remains 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 exploitation⁵⁵ 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. § 1595⁵⁶ alleging that they had been sex trafficked on Backpage as minors.⁵⁷ 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.⁵⁸

The plaintiff-appellants in *Jane Doe No. 1* argued that Backpage was not acting as a passive publisher of third-party content.⁵⁹ 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”⁶⁰ of sex trafficking, in violation of the Trafficking Victims Protection Act (TVPA). The

55. See, e.g., *Dart v. Craigslist, Inc.*, 665 F. Supp. 2d 961, 969 (N.D. Ill. 2009) (finding Craigslist immune to liability under § 230 for creating classified services alleged to facilitate prostitution and constitute public nuisance); *Doe v. MySpace, Inc.*, 474 F. Supp. 2d 843, 851 (W.D. Tex. 2007) (finding MySpace immune to liability under § 230 when an adult user contacted, lured, and sexually assaulted a minor user); *Doe v. Bates*, No. 5:05-CV-91-DF-CMC, 2006 WL 3813758, at *20 (E.D. Tex. Dec. 27, 2006) (finding that § 230 grants immunity to websites when third-party posts contain child pornography).

56. 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.

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

58. *Id.* at 18, 24.

59. *Id.* at 19 n.4 (finding that, though the argument that Backpage was not acting as a passive publisher was raised by amici, it is not relevant because it was not proposed in the complaint); see also H.R. REP. NO. 115-572, pt. 1, at 4 (2018) (reviewing the case).

60. Trafficking Victims Protection Act, 18 U.S.C. § 1595(a).

court disagreed, finding that Backpage's conduct was typical of a publisher, and so § 230 immunity applied.⁶¹ Notably, the plaintiff-appellants argued only 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 caselaw.⁶² 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.⁶³ The courts subsequently denied Backpage's motions to dismiss under § 230.⁶⁴

Although *Jane Doe No. 1 v. Backpage.com* was characterized by advocates of FOSTA as epitomizing the consequences of the broad scope of § 230 immunity,⁶⁵ 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.⁶⁶ 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,⁶⁷ their conduct would have been equally beyond

61. *Backpage.com, LLC*, 817 F.3d at 22 ("[C]laims that a website facilitates illegal conduct through its posting rules necessarily treat the website as a publisher or speaker . . . and, thus, are precluded by section 230(c)(1) . . . a website operator's decisions in structuring its website and posting requirements are publisher functions entitled to section 230(c)(1) protection.").

62. *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. REP. NO. 115-572, pt. 1, at 4 (2018) (same).

63. *Doe No. 1 v. Backpage.com, LLC*, 2018 WL 1542056, at *2 (D. Mass. Mar. 29, 2018); *Fla. Abolitionist v. Backpage.com, LLC*, 2018 WL 1587477, at *4-5 (M.D. Fla. Mar. 31, 2018).

64. *See* Goldman, *supra* note 33, at 287-88.

65. 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. *I AM JANE DOE* (50 Eggs Films 2017).

66. 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.

67. After FOSTA was 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*, 2018 WL 1542056, at *2; *Fla. Abolitionist, LLC*, 2018 WL 1587477, at *4-5; *see also* Goldman, *supra* note 33, at 287-88 (discussing the 2018 district court rulings denying Backpage's motions to dismiss, and noting that "[w]hile these rulings do not guarantee financial

§ 230's protection. Finally, the traffickers who themselves developed and 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.⁶⁸

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. 1865,⁶⁹ 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.⁷⁰ Congress hoped to clarify that § 230, "does not prohibit the enforcement . . . of Federal and State criminal and civil law relating to sexual exploitation of children or sex trafficking . . ."⁷¹

To that end, FOSTA amends § 230 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,

payouts to the victims, they proved—before FOSTA became law—that Section 230 did not prevent civil lawsuits against Backpage").

68. Alina Selyukh, *Section 230: A Key Legal Shield for Facebook, Google Is About to Change*, NPR (Mar. 21, 2018), <https://www.npr.org/sections/alltechconsidered/2018/03/21/591622450/section-230-a-key-legal-shield-for-facebook-google-is-about-to-change> [<https://perma.cc/WQ9D-CKRG>]; Sen. Rob Portman, *It's Incredible that Online Sex Traffickers Still Get Legal Protection As They Commit Crimes*, FOX NEWS (Sept. 7, 2019), <https://www.foxnews.com/opinion/sen-rob-portman-its-incredible-that-online-sex-traffickers-still-get-legal-protection-as-they-commit-crimes> [<https://perma.cc/6GLH-XFWE>] (arguing that Backpage's "escape from liability" under the CDA spurred the Senate's investigation into Backpage and resulting SESTA legislation, which "will finally force corporate sex traffickers like Backpage to answer for their crimes."). Though Backpage was the most widely touted case, there were others. *See supra* note 9 and accompanying text; *Doe ex rel. Roe v. Backpage.com, LLC*, 104 F. Supp. 3d 149, 165 (D. Mass. 2015) (applying § 230 to Backpage.com).

69. Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. No. 1115-164, 132 Stat. 1253 (codified as amended in scattered sections of 18 and 47 U.S.C.) (2018).

70. Portman, *supra* note 68 (discussing FOSTA's objective was to hold websites that promote sex trafficking accountable).

71. Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. No. 1115-164, 132 Stat. 1253.

or (3) a state criminal charge for conduct that would constitute a violation of § 2421A.⁷² 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 allows the publication of third-party content it did not itself help “develop.”⁷³

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,⁷⁴ 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.”⁷⁵ The risk of liability for third-party content following FOSTA will result in exactly the 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.⁷⁶ As

72. See *id.* § 4. The meaning and scope of these laws (i.e., 18 U.S.C. §§ 1591, 1595, 2421A) are discussed in Part II, *infra*.

73. Allow States and Victims to Fight Online Sex Trafficking Act of 2017, § 4, 47 U.S.C. 230(e)(5).

74. See *Section 230 as First Amendment Rule*, *supra* note 24, at 2027 (quoting *CDA 230: The Most Important Law Protecting Internet Speech*, ELEC. FRONTIER FOUND., <https://www.eff.org/issues/cda230> [<https://perma.cc/53A5-G6ZD>]) (designating Section 230 as “the most important law protecting Internet speech” and “perhaps the most influential law to protect the kind of innovation that has allowed the Internet to thrive”); see also Daisy Soderberg-Rivkin, *The Lessons of FOSTA-SESTA from a Former Content Moderator*, R ST. (Apr. 8, 2020), <https://www.rstreet.org/2020/04/08/the-lessons-of-fosta-sesta-from-a-former-content-moderator/> [<https://perma.cc/7EAR-ZTBF>] (detailing the negative consequences of FOSTA).

75. *Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12, 23 (1st Cir. 2016).

76. Simon, *supra* note 10 (discussing Backpage's removal and its impact on low-income sex workers); Blunt & Wolf, *supra* note 13 at 43 (stating that online platforms operate “as a harm reduction working tool by negotiating and screening for potentially violent clients on their own terms”); Soderberg-Rivkin, *supra* note 74 (recounting that websites pre-FOSTA provided “a haven . . . Sex workers were using the platforms to protect their health, safety, and independence by building communities . . . screening

a result, many sex workers have been forced into dangerous circumstances, as described in the Introduction.⁷⁷

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; however, the amendments do very little to prevent trafficking and may, in fact, impede efforts to identify and aid survivors.⁷⁸ Though traffickers have lost platforms from which to advertise, there is no evidence that trafficking itself has decreased.⁷⁹ As such, law enforcement officers have stated that they can no longer use these sites to find missing sex trafficking victims.⁸⁰

FOSTA is not only an ineffective tool for protecting survivors of sex trafficking, it does very little to change trafficking law.⁸¹ Thus, the substantial

potential clients . . . Without access to those platforms, information-sharing among sex workers would be . . . dangerous”).

77. See *supra* Section I.A.

78. Chamberlain, *supra* note 13, at 2202 (lamenting FOSTA's impact and noting that “[f]or law enforcement, there is a documented ease to tracking and locating traffickers online . . . [and in] identifying and aiding specific victims . . . These advertisements may constitute crucial digital evidence in eventual legal proceedings against perpetrators . . .”).

79. Goldman, *supra* note 33, 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 at 2–3, *Woodhull Freedom Found. v. United States*, No. 1:18-cv-01552 (D.D.C. June 28, 2018))); Jennifer Musto et al., *Anti-Trafficking in the Time of FOSTA/SESTA: Networked Moral Gentrification and Sexual Humanitarian Creep*, 10 Soc. Sci. 1, 2 (2021) (“FOSTA/SESTA hurts sex workers by taking away the ability to screen clients, it forces people back to the streets and into more dangerous situations, it heightens risk of arrest, and it contributes to sex workers’ vulnerability to third-party market facilitators (e.g., traffickers or pimps) among other harms.”).

80. Lynn Casey, *Police Look for More Ways to Investigate Trafficking Without Backpage*, FOX23 NEWS (May 4, 2018), <https://www.fox23.com/news/police-look-for-more-ways-to-investigate-trafficking-without-backpagecom/744121407> [<https://perma.cc/D666-PDSE>].

81. 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. (2015); Chamberlain, *supra* note 13, at 2208–09 (arguing Congress should repeal FOSTA, noting that while FOSTA “does not, in any discernable way, increase the risk involved in being a sex trafficker. Nor does it address any number of socioeconomic or

changes made to § 230 that drastically harm free speech on the internet are not justified by these 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.⁸² 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.⁸³ 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 criminal prosecutions of the owners, managers, or operators of interactive computer services seem unlikely.⁸⁴

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,⁸⁵ websites that merely hosted adult advertisements were effectively protected from prosecution by § 230 immunity. Following existing § 230 caselaw, websites that could be shown to have in any way

environmental factors that advocates for sex-trafficking survivors have identified as concrete ways to curtail such trafficking.”).

82. See *supra* notes 29–33 and accompanying text.

83. 47 U.S.C. § 230(e)(5). 18 U.S.C. § 2421A is a federal crime created 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 for a detailed analysis of this new federal crime.

84. For a discussion of these impediments, see *infra* notes 128–131 and accompanying text.

85. See, e.g., 18 PA. CONS. STAT. § 3011(a)(2) (2020) (stating that a person commits a felony “of the first degree if the person knowingly benefits financially or receives anything of value from any act that facilitates any activity described in paragraph (1)”).

“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, 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.”⁸⁶ The injunction was granted partly on the grounds that SB 6251 conflicted with, and was therefore preempted by, CDA § 230.⁸⁷

The impact of § 230 immunity on the potential effectiveness of state criminal law was at the forefront of legislative debates and 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.”⁸⁸ Other legislators, many of whom have previous prosecutorial or law-enforcement experience, made similar arguments.⁸⁹

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:

86. *Backpage.com, LLC v. McKenna*, 881 F. Supp. 2d 1262, 1268 (W.D. Wash. 2012); WASH. REV. CODE § 9.68A.104 (2012) (repealed 2013).

87. *McKenna*, 881 F. Supp. 2d at 1272–73.

88. 164 CONG. REC. S1851 (daily ed. Mar. 21, 2018) (statement of Sen. Blumenthal).

89. *See, e.g.*, 164 CONG. REC. S1854 (daily ed. Mar. 21, 2018) (statement of co-sponsor Sen. McCaskill) (“[T]he most important part of this bill . . . is the tool it gives our frontline of law enforcement in this country . . . This is a new tool . . . [on] the frontline of criminal prosecutions . . .”).

(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 promotion or facilitation of prostitution is illegal in the jurisdiction where the defendant's promotion or facilitation of prostitution was targeted.⁹⁰

Just as in FOSTA's other provisions, however, there is a tremendous amount of ambiguity in this statutory text. Without more textual specificity, 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.⁹¹ Within only ten years, all fifty states had passed criminal trafficking laws.⁹² Many of these laws created criminal liability for third parties who benefit from or facilitate trafficking or for anyone who "knowingly profits" from a trafficking venture.⁹³ However, the definition of "trafficker" varies widely in state laws, and there is also variety in what *mens rea* and *actus reus* are required.⁹⁴ Determining the elements of a violation

90. Allow States and Victims to Fight Online Sex Trafficking Act of 2017, 47 U.S.C. 230(e)(5) (2018).

91. Sara Lerner, *Human Trafficking Part 1: Our Legislative History*, NPR (Nov. 30, 1999), <https://www.npr.org/templates/story/story.php?storyId=125127066> [<https://perma.cc/58JA-6D8S>] (noting that "Washington took its place at the forefront of the modern anti-slavery fight in 2003 when the state became the first in the nation to criminalize human trafficking on the state level").

92. Press Release, Polaris, Wyoming Becomes 50th State to Outlaw Human Trafficking (Feb. 27, 2013), <https://polarisproject.org/news/press-releases/wyoming-becomes-50th-state-outlaw-human-trafficking> [<https://perma.cc/P45Q-WX3L>].

93. Anne Teigen, *Prosecuting Human Traffickers: Recent Legislative Enactments*, NAT. CONF. STATE LEGIS. 4 (2018), https://www.ncsl.org/Portals/1/HTML_LargeReports/Prosecuting_Traffickers_091818_32767.pdf [<https://perma.cc/MZQ6-FTHD>].

94. *Id.* at 2 (noting that the state laws "vary in several ways, including who is defined as a "trafficker," the statutory elements required to prove guilt to obtain a conviction and the seriousness of the criminal and financial penalties those convicted will face.").

following FOSTA therefore requires differentiating among 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 lies in prosecuting conduct that would not violate their federal corollary.⁹⁵ A related open question remains: if a 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?⁹⁶ Although the amendments' 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, as 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.⁹⁷ Scholars at

95. See AMY FARRELL ET AL., IDENTIFYING CHALLENGES TO IMPROVE THE INVESTIGATION AND PROSECUTION OF STATE AND LOCAL HUMAN TRAFFICKING CASES 145–52 (2012), available at <https://www.urban.org/sites/default/files/publication/25526/412593-Identifying-Challenges-to-Improve-the-Investigation-and-Prosecution-of-State-and-Local-Human-Trafficking-Cases.pdf> (on file with the *Columbia Human Rights Law Review*).

96. Determining how one would prove that “conduct underlying the charge would constitute violation” of another law is difficult because FOSTA uses novel language that lacks clear corollaries in any particular body of law. Analogies could be made to double jeopardy, *United States v. Lynn*, 636 F.3d 1127, 1129–30 (9th Cir. 2011), or plea agreements with sentences based on dismissed charges, *United States 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.

97. In fact, some experts suggest that the removal of sites like Backpage makes it more difficult to find and prosecute violators. Jackman, *supra* note 6 (noting the concern that FOSTA may “remov[e] a tool for law enforcement to track pimps, locate missing children and build criminal cases”); see also Note, Caitlyn Burnitis, *Facing the Future with FOSTA: Examining the Allow States and Victims to Fight Online Sex Trafficking Act of 2017*, U. MIA. RACE & SOC. JUST. L. REV. 139, 159–60 (2020) (discussing how FOSTA may make it

the Villanova Law School's Institute to Address Commercial Sexual Exploitation have said that as Pennsylvania state law stands, the FOSTA amendment to § 230 had "no effect in the Commonwealth."⁹⁸ 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.⁹⁹ This suggests that the current language of the Pennsylvania anti-trafficking statute, which provides for third party criminal liability for any "business entity who knowingly aids or participates in" trafficking,¹⁰⁰ 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 do not address numerous other barriers to state-level prosecutions. 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.¹⁰¹ The most common state-level charges resulting from these investigations were charges of compelling or promoting prostitution.¹⁰² 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 by local prosecutors of state

more difficult for prosecutors and local law enforcement agencies to gather evidence and bring trafficking prosecutions).

98. 18 PA. CONS. STAT. § 3011; VILLANOVA UNIV. CHARLES WIDGER SCH. OF LAW INST. TO ADDRESS COM. SEXUAL EXPLOITATION, REPORT ON COMMERCIAL SEXUAL EXPLOITATION IN PENNSYLVANIA 22 (2018), available at <https://cseinstitute.org/wp-content/uploads/2019/06/Spring-2019-Report-6.21.19-pdf.pdf> [<https://perma.cc/H4G3-3JSV>], at 22.

99. VILLANOVA UNIV. CHARLES WIDGER SCH. OF LAW INST. TO ADDRESS COM. SEXUAL EXPLOITATION, REPORT ON COMMERCIAL SEXUAL EXPLOITATION IN PENNSYLVANIA 22 (2018), available at <https://cseinstitute.org/wp-content/uploads/2019/06/Spring-2019-Report-6.21.19-pdf.pdf> [<https://perma.cc/H4G3-3JSV>].

100. 18 PA. CONS. STAT. § 3011.

101. AMY FARRELL ET AL., *supra* note 95, at 61.

102. *Id.*

trafficking statutes; 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.¹⁰³ Further, many local law enforcement officials surveyed said they believed that trafficking prosecutions were better handled by the federal government.¹⁰⁴ It is worth noting that federal-level trafficking investigations follow a similar pattern to state-level investigations; the primary charges resulting from federal trafficking investigations are for transporting persons across state lines for the purposes of prostitution, despite the fact that § 230 has never provided immunity against federal criminal charges.¹⁰⁵ 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.

Some state lawsuits against Backpage proceeded before FOSTA's passage, by focusing on legal claims not precluded by § 230. The first prosecution was initiated in 2016, prior to the passage of FOSTA, and was premised primarily on "pimping" charges.¹⁰⁶ That case was dismissed under § 230.¹⁰⁷ Subsequently, in 2017, still prior to FOSTA, the Attorney General's Office filed new charges based primarily on pimping, money laundering resulting from pimping, and general money laundering.¹⁰⁸ 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.¹⁰⁹

103. *Id.* at 106–31, 144–45.

104. *Id.* at 153.

105. *Id.* at 61. These kinds of federal charges are brought under 18 U.S.C. § 2421, the Mann Act, discussed in Part III, *infra*.

106. Crim. Compl. at 4–8 (No. 16FE019224), available at https://oag.ca.gov/system/files/attachments/press_releases/File%20endorsed%20Criminal%20Complaint%20tj_Redacted.pdf [<https://perma.cc/VQ6G-H48C>].

107. *See Ferrer*, 2016 WL 7237305, at *3. For an analysis of *Ferrer*, see Eric Goldman, *Backpage Executives Defeat Pimping Charges Per Section 230: People v. Ferrer*, TECH & MKTG. L. BLOG (Dec. 15, 2016), <https://blog.ericgoldman.org/archives/2016/12/backpage-executives-defeat-pimping-charges-per-section-230-people-v-ferrer.htm> [<https://perma.cc/NC3X-PZJG>].

108. *See* Press Release, Off. of the Att'y Gen., Cal. Dep't of Just., Attorney General Becerra: Court Allows Prosecution in Sex Trafficking Backpage.com Case to Proceed (Aug. 23, 2017), available at <https://oag.ca.gov/news/press-releases/attorney-general-becerra-court-allows-prosecution-sex-trafficking-backpagecom> [<https://perma.cc/D2YE-HV4P>].

109. *Id.*; *see also* Goldman, *supra* note 107 (discussing the outcome in *Ferrer* and next steps for California Attorney General Xavier Becerra).

Thus, though some charges were dismissed, § 230 immunity did not fully preclude state prosecution of sites like Backpage.

Given these circumstances, FOSTA does not appear to be the strong tool for increasing local level enforcement that legislators described in Congressional discussion of the bill. In fact, to the Authors' 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.¹¹⁰ As a result, though the trend so far has been a continuation of pre-FOSTA's 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.¹¹¹

The true impact of FOSTA on state criminal liability, though one of the driving factors in passing the legislation, remains 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;¹¹² 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.

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

110. FARRELL ET AL., *supra* note 95, at 3 n.2 (calculating, from data reported in annual releases of the *U.S. Attorney General's Report to Congress and Assessment of U.S. Activities to Combat Trafficking in Persons* for FY 2002 to 2009, that "[a]pproximately \$73 million has been devoted to supporting state law enforcement's anti-trafficking efforts").

111. *See, e.g.*, Dana Kozlov, *Cook County Sheriff Working to Shut Down Sex Trafficking Websites*, CBS CHIC. (Oct. 2, 2018), <https://chicago.cbslocal.com/2018/10/02/cook-county-sheriff-working-to-shut-down-sex-trafficking-websites/> (on file with the *Columbia Human Rights Law Review*) (describing the Cook County Sheriff's efforts to target post-FOSTA websites that host ads posted by people in the sex trades).

112. *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 163 and accompanying text.

of civil suits under state-level anti-trafficking laws has led to media claims that these suits are the result of FOSTA's passage.¹¹³ 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 predated FOSTA, that developed out of intentional strategies of anti-trafficking non-profit organizations, and that was part of the campaign for FOSTA's passage.¹¹⁴

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.¹¹⁵ In accordance with caselaw, in order for a website to be held liable in these actions, a plaintiff must show either that the plaintiff is not treating ICS as a publisher or speaker, or that the ICS "developed," at least in part, the violating content.¹¹⁶

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.¹¹⁷ Before 2018, relatively few civil actions were brought under state human trafficking laws, much less against third-party

113. Teigen, *supra* note 93, at 7 (discussing a rise in state-level civil lawsuits against alleged traffickers, noting that "[p]rosecutors around the country are using existing civil law to pursue businesses complicit in human trafficking."); *see also* Cameron Langford, *Texas Court Refuses to Toss Sex-Trafficking Claims Against Facebook*, COURTHOUSE NEWS SERV. (Apr. 28, 2020), <https://www.courthousenews.com/texas-court-refuses-to-toss-sex-trafficking-claims-against-facebook/> [<https://perma.cc/5ZPT-SHBA>] (connecting a state lawsuit alleging violations of Texas trafficking law, which authorizes damages from persons who engaged in trafficking or benefit from trafficking, to FOSTA's passage).

114. *See infra* note 125 and accompanying text.

115. *See* Allow States and Victims to Fight Online Sex Trafficking Act of 2017, 47 U.S.C. 230(e)(5) (2018).

116. *See supra* notes 46–52 and accompanying text.

117. *See, e.g., In re Facebook, Inc.*, 607 S.W.3d 839, 839 (Tex. App. 14th 2020) (allowing a claim against Facebook to continue despite § 230 immunity); Plaintiff's Original Petition at 2, *Jane Doe No. 1 v. Backpage.com, LLC*, No. 2018–04501 (Tex. Dist. Ct. 270th Jan. 23, 2018) (bringing civil claim against Backpage and other defendants for profiting from trafficking).

businesses such as owners and managers of ICSS.¹¹⁸ This is not for a lack of state legislation. At least forty states and the District of Columbia have laws providing a state-level civil right of action against people who violate human trafficking law.¹¹⁹ A number of these rights of action also create civil liability for third parties who knowingly profit from either sex trafficking or prostitution.¹²⁰ And yet, with a few exceptions, these laws were mostly unused prior to 2018. Rather, the handful of civil claims alleging sex trafficking were primarily brought at the federal level.¹²¹

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 twenty-four currently pending state-level civil actions against Backpage and dozens of third-party facilitator co-defendants.¹²² These actions were brought in ten states under various state laws, including state trafficking laws.¹²³

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.¹²⁴ What is more likely is that both FOSTA and the recent

118. Jackman, *supra* note 6 (noting that, before FOSTA, “[c]riminal cases in California and civil cases in many states were dismissed by judges who said the intent of the act was to protect the website hosts, and they invited Congress to change the law”).

119. POLARIS PROJECT, HUMAN TRAFFICKING ISSUE BRIEF: CIVIL REMEDY 1 (2015).

120. *See, e.g.*, 18 PA. CONS. STAT. § 3051 (creating third party liability for a person that profits from the victim in a “sex act”).

121. 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 (2017), against Backpage.com’s parent company. In keeping with precedent, the Washington Supreme Court determined that the website would have § 230 immunity from the claim had it had merely hosted the advertisements featuring the girls, but not if it had even partially developed the content of those advertisements. Notably, despite § 230’s immunity provision, the allegations survived a motion to dismiss because the claimants had alleged sufficient facts to show that Backpage may have partially developed the content. *J.S. v. Vill. Voice Media Holdings*, 359 P.3d 714, 715 (Wash. 2015) (en banc).

122. Verified Am. Compl. paras. 37–50, *Camarillo Holdings v. Amstel River Holdings*, 2018 WL 5268124 (Del. Ch. Jan. 2, 2019) (No. 2018-0606-SG).

123. *Id.* para. 154.

124. *See, e.g., In re Facebook, Inc.*, 607 S.W.3d 839, 840 (Tex. App. 14th 2020) (raising the question of whether CDA § 230 immunity applied in state civil actions where

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 International.¹²⁵ 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, plaintiffs' attorneys will likely continue to bring claims under tort laws with clear and robustly developed caselaw with which they 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 primarily made changes to federal-level civil liability, reporters and at least one law firm have erroneously connected the rise in state-level civil actions brought by private actors to the FOSTA amendments, perpetuating the misconception that FOSTA enabled such claims. For example, in a 2018 complaint, a Texas attorney incorrectly cited FOSTA's changes to § 230 as paving the way for state-law tort claims filed

plaintiffs' claims against Facebook for facilitating their victimization by sex traffickers were not FOSTA-based).

125. See POLARIS, ON-RAMPS, INTERSECTIONS, AND EXIT ROUTES: A ROADMAP FOR SYSTEMS AND INDUSTRIES TO PREVENT AND DISRUPT HUMAN TRAFFICKING 15–36 (2018), available at <https://polarisproject.org/wp-content/uploads/2018/08/A-Roadmap-for-Systems-and-Industries-to-Prevent-and-Disrupt-Human-Trafficking.pdf> [<https://perma.cc/A9ZD-F5A5>]; SHEA M. RHODES, SEX TRAFFICKING AND THE HOTEL INDUSTRY: CRIMINAL AND CIVIL LIABILITY FOR HOTELS AND THEIR EMPLOYEES 7–10 (2015), available at https://cseinstitute.org/wp-content/uploads/2015/06/Hotel_Policy_Paper-1.pdf [<https://perma.cc/KJ75-LMCT>] (examining both federal and Pennsylvania state law that may result in civil liability for third parties whose businesses or employees are involved in sex trafficking); SHARED HOPE INT'L, WHITE PAPER: ONLINE FACILITATION OF DOMESTIC MINOR SEX TRAFFICKING 3 (2014), available at <http://sharedhope.org/wp-content/uploads/2014/09/Online-Faciliator-White-Paper-August-2014.pdf> [<https://perma.cc/52KD-TS7Q>] (discussing how the CDA limits civil liability, and detailing that current strategy at the state level advocates for changes to “state law and that would help ensure victims are able to access justice”); *Protected Innocence Challenge Issue Briefs*, SHARED HOPE INT'L § 4, <https://sharedhope.org/what-we-do/bring-justice/reportcards/protected-innocence-challenge-issue-briefs/#section4> [<https://perma.cc/A9ZD-F5A5>] (outlining advocacy objectives regarding criminal provisions for “facilitators” of trafficking).

against Backpage, Facebook, and Instagram on behalf of a Jane Doe.¹²⁶ Though the pre-FOSTA suits and FOSTA are in fact unconnected, the attorney garnered media attention by alleging a link between them.¹²⁷ Reports about the case continue to suggest that 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.¹²⁸ Reporters have thus perpetuated the inaccurate claim that FOSTA opens new avenues for state-level civil prosecutions. Statements by U.S. Senators during legislative debate on FOSTA may also have contributed to the belief that FOSTA would impact state-level civil actions.¹²⁹

126. Jane Doe's First Amended Petition at 14–15, *Jane Doe v. Facebook, Inc.*, 2018 WL 5994328 (Harris Cty. Civ. Dist. Ct. Nov. 14, 2018) (No. 2018-69816). The attorney in the 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. Alvaro Ortiz, *Pioneering Lawsuit About Human Trafficking and Sexual Exploitation Filed in Houston*, HOUS. PUB. MEDIA (Jan. 24, 2018), <https://www.houstonpublicmedia.org/articles/news/2018/01/24/263612/pioneering-lawsuit-about-human-trafficking-and-sexual-exploitation-filed-in-houston> [<https://perma.cc/VTV5-ASSK>].

127. See, e.g., *Lawsuit Accused Facebook of Enabling Human Traffickers*, TEXARKANA GAZETTE (Oct. 6, 2018), <http://www.texarkanagazette.com/news/texas/story/2018/oct/06/lawsuit-accused-facebook-enabling-human-traffickers/746578> [<https://perma.cc/W6CP-NWVE>] (indirectly attributing the lawsuit to the passage of the federal anti-trafficking law).

128. See Elizabeth Nolan Brown, *FOSTA's First Test Targets Cloud Company Used by Backpage: Reason Roundup*, REASON (Mar. 28, 2019), <https://reason.com/2019/03/28/fostas-first-test-targets-cloud-company> [<https://perma.cc/58ZH-H8WB>].

129. 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.” 164 CONG. REC. S1850 (daily ed. Mar. 21, 2018) (statement of Sen. Portman). These statements were either inaccurate or misleading, perhaps referring only to the *parens patriae* federal civil right of action FOSTA creates in § 1595, which allows suits to be brought by a state's attorney general. See *infra* note 163 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. & MKTG. 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> [<https://perma.cc/VQ5T-NCAV>] (remarking on how FOSTA might relate to three cases involving claims under state trafficking, common-law tort, and state statutory laws).

3. State Liability in Sum

Congress enacted FOSTA for the purpose of making it easier to hold third parties accountable for violations of trafficking law, and greatly emphasized civil remedies as a method toward that end.¹³⁰ During the last several years, attorneys have brought 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,¹³¹ which FOSTA does not affect. In other words, the only change in legal actions observed in the year since FOSTA's passage has been an increase in legal claims that are not impacted by FOSTA itself, notwithstanding contradictory claims by the media, congresspersons, and attorneys.

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 to make it easier in both criminal and civil cases to find websites liable for "benefit[ing] . . . from participation in a venture which has engaged in [sex trafficking]."¹³² 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 the amended provision.¹³³ This Part discusses the relationship between § 1591 and § 1595, case law construing their meaning prior to FOSTA, and how FOSTA, including the potential for *parens patriae* suits might change the scope of claims brought under these provisions.

130. See, e.g., Press Release, H. Comm. on the Judiciary, Goodlatte Statement on FOSTA Passage (Feb. 27, 2018), available at <https://republicans-judiciary.house.gov/press-release/goodlatte-statement-fosta-passage> [<https://perma.cc/Y5N2-65RP>] (noting that Congress has "explored changes to the criminal code that would disincentivize websites from knowingly promoting or facilitating illegal prostitution. . . . FOSTA . . . will make the internet safer and give victims the criminal and civil means to punish wrongdoers and move forward with their lives").

131. Yelderman, *supra* note 129 ("Confusingly, in the aftermath of FOSTA's passage, plaintiffs filed a rash of trafficking suits against websites under state law that didn't take advantage of FOSTA.").

132. 18 U.S.C. § 1591(a)(2).

133. See *infra* notes 235–244 and accompanying text.

A. § 1591 and § 1595 Background

The TVPA was passed in 2000¹³⁴ as a response to U.S. concerns that domestic human trafficking had increased as a result of international organized crime.¹³⁵ The statute has been reauthorized and amended numerous times since its passage;¹³⁶ a 2015 amendment specifically targeted websites that advertise commercial sexual services.¹³⁷

Section 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.”¹³⁸ 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.”¹³⁹ 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.”¹⁴⁰

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 § 1591.¹⁴¹ Thus, civil liability will attach to any conduct that is made criminally liable by § 1591, and any amendments to § 1591 will also amend § 1595.

134. The TVPA was influenced by the U.N. 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 OFF. TO MONITOR AND COMBAT TRAFFICKING IN PERSONS, <https://www.state.gov/international-and-domestic-law> [<https://perma.cc/L9VA-9L7K>].

135. See ANTHONY M. DESTEFANO, *THE WAR ON HUMAN TRAFFICKING: U.S. POLICY ASSESSED* 32–33 (2007).

136. See *International and Domestic Law*, *supra* note 134.

137. See Goldman, *supra* note 33, at 282.

138. 22 U.S.C. § 7102.

139. *Id.*

140. 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 void for vagueness because it 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).

141. See 18 U.S.C. §§ 1595(a), (d). See *infra* notes 207–225 and accompanying text for more details on the *parens patriae* right of action 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 as “(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.”¹⁴² Additionally, various courts have provided definitions for “force”¹⁴³ and “fraud.”¹⁴⁴ The Office on Trafficking in Persons (OTIP) also provides guidance as to interpreting these terms:

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

142. 18 U.S.C. § 1591(e)(2).

143. *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”).

144. *See, e.g.*, *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”).

threats to share information or pictures with others or report to authorities.¹⁴⁵

However, these definitions are contentious, and do not necessarily match definitions employed by state-level anti-trafficking laws, researchers, and service providers.¹⁴⁶

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 needs 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,¹⁴⁷ or, under § 1591(c), had a "reasonable opportunity to observe" the victim.¹⁴⁸ 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 eighteen.¹⁴⁹

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

145. OFF. ON TRAFFICKING PERS., ADMIN. FOR CHILD. & FAMS., DEP'T HEALTH & HUM. SERVS., OTIP-FS-18-01, *FACT SHEET: Human Trafficking 2* (Nov. 21, 2017), available at https://www.acf.hhs.gov/sites/default/files/documents/otip/fact_sheet_human_trafficking_fy18.pdf [<https://perma.cc/3P5B-CJ9N>] (emphasis in original omitted).

146. See NAT'L INST. JUST., NJC 249914, *Expert Working Group on Trafficking in Persons Research Meeting April 24–25, 2014*, at 7–8, <https://www.ncjrs.gov/pdffiles1/nij/249914.pdf> [<https://perma.cc/U6FZ-ELJG>] (contemplating alternate ways to define these terms).

147. 18 U.S.C. § 1591(a)(2) (2012).

148. § 1591(c) ("[U]nder 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 . . . that the person had not attained the age of 18 years.").

149. See *United States v. Robinson*, 702 F.3d 22, 26, 30–31 (2d Cir. 2012) (construing § 1591(c) as such); *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).

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.¹⁵⁰

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.”¹⁵¹ 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.¹⁵² In fact, no sex act actually needs to have occurred to find a defendant liable under the statute.¹⁵³

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.”¹⁵⁴

150. See § 1591(a)(2) (setting forth these two *mens rea* standards); see also *Backpage.com, LLC v. Lynch*, 216 F. Supp. 3d 96, 109 (D.D.C. 2016) (agreeing with the Government’s interpretation that the “advertising” provision in § 1591(a)(1) attaches to “someone who ‘advertises,’ [and] . . . someone who ‘benefits . . . from participation in a venture which has engaged in [advertising].” (alteration in original) (internal citations omitted)).

151. *United States v. Backman*, 817 F.3d 662, 666 (9th Cir. 2016); see also *United States v. Alvarez*, 601 F. App’x 16, 18 (2d Cir. 2015) (finding that the coercion-to-travel statute contained no word suggesting causation).

152. See John Cotton Richmond, *Federal Human Trafficking Review: An Analysis and Recommendations from the 2016 Legal Developments*, 52 WAKE FOREST L. REV. 293, 311–13 (2017) (explaining that no “but-for” causation test exists).

153. *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.’” (first quoting *United States v. Hornbuckle*, 784 F.3d 549, 553 (9th Cir. 2015); then quoting *United States v. Brooks*, 610 F.3d 1186, 1197 n.4 (9th Cir. 2010))).

154. *United States v. Tutstone*, 525 F. App’x 298, 302 (6th Cir. 2013) (quoting 22 U.S.C. § 7101(b)(4)).

Congress further “found that “these widespread activities ‘substantially affect[] interstate and foreign commerce.’”¹⁵⁵ Use of a cellular phone¹⁵⁶ (and presumably any other networked device), use of hotels that serve interstate travelers, or use of condoms that travelled via interstate commerce,¹⁵⁷ are each 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 by adding language that purports to define “participation in a venture:”¹⁵⁸ “[t]he term ‘participation in a venture’ means knowingly assisting, supporting, or facilitating a violation of (a)(1).”¹⁵⁹ 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”¹⁶⁰ that has facilitated severe forms of trafficking.

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:

[R]ecruit[ment], entice[ment], harbor[ing], transport[ing], provid[ing], obtain[ing], advertis[ing], maintain[ing], patroniz[ing], or solicit[ing] . . . 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.¹⁶¹

One writer has suggested that enumerating the exact definition of “participation in a venture” in § 1591 is “pivotal . . . because it serves as the

155. *Id.* (quoting 22 U.S.C. § 7101(b)(12)).

156. *See id.* at 303 (affirming the trial court’s determination that the cell phone calls made by the defendant “for the purpose of committing commercial sex acts were in or affecting interstate commerce, as required by § 1591” (internal citations omitted)).

157. *United States v. Evans*, 476 F.3d 1176, 1179–80 (11th Cir. 2007).

158. Allow States and Victims to Fight Online Sex Trafficking Act of 2017 § 5, 18 U.S.C. § 1591(e).

159. *Id.*

160. *Id.*

161. 18 U.S.C. § 1591(a).

basis for determining what degree of tangential involvement [with sex trafficking] triggers culpability.”¹⁶² 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.

1. History of “Participation in a Venture”

Prior to FOSTA’s enactment, § 1591 did not enumerate a definition of “participation in a venture,” but it did define “venture” as “any group of two or more individuals associated in fact, whether or not a legal entity.”¹⁶³ 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.”¹⁶⁴ However, a defendant could not be said to have “participat[ed] in a venture” 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.¹⁶⁵ The court said that the statute “did not criminalize a defendant’s ‘mere negative acquiescence,’” and that to do so would create “a vehicle to ensnare conduct that the statute never contemplated.”¹⁶⁶ The court further reasoned that “criminal statutes are to be strictly construed against the government.”¹⁶⁷

Less than two weeks after the Sixth Circuit opinion was filed, the First Circuit—in *Jane Doe No. 1 v. Backpage.com*, the civil case that would become the impetus behind FOSTA—stated that “‘participation in a sex trafficking venture’ [is] a phrase that no published opinion has yet

162. 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 “[c]urrently [the degree of tangential involvement that triggers culpability] is unclear, but the purpose of the proposed language is to clarify what actions or connections cross the threshold into liability”).

163. 18 U.S.C. § 1591(e)(6).

164. *United States v. Afyare*, 632 F. App’x 272, 286 (6th Cir. 2016).

165. *Id.*

166. *Id.*

167. *Id.*

interpreted.”¹⁶⁸ 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,”¹⁶⁹ and thus the company was shielded from civil liability by CDA § 230.¹⁷⁰

Thus, under *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.”¹⁷¹ Moreover, under *Doe v. Backpage.com*, if the participatory conduct was that of a publisher of third-party content, the secondary actor was shielded from civil liability under § 1595 by § 230.¹⁷²

Congressmembers acknowledged that § 230 was not a barrier to federal criminal enforcement of § 1591 because § 230(e)(1) explicitly excludes criminal violations of § 1591 from § 230 immunity.¹⁷³ However, a House Judiciary Committee report on FOSTA claimed that § 1591, as written, was insufficient to hold website operators criminally liable for sex trafficking, claiming that the “knowledge standard [for § 1591] [was] difficult to prove beyond a reasonable doubt” because “online advertisements rarely,

168. *Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12, 21 (1st Cir. 2016).

169. *Id.* at 23.

170. The First Circuit further found that civil enforcement of the TVPA through § 1595 (or any other 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 Woodhull Freedom Found.*, 334 F. Supp. 3d at 185 (denying plaintiffs’ motion for preliminary injunction and granting defendant’s motion to dismiss upon finding that plaintiffs lacked Article III standing); *Woodhull Freedom Found. v. United States*, 948 F.3d 363, 373 (D.C. Cir. 2020) (reversing and remanding the district court’s order granting defendant’s motion to dismiss, finding that at least two of the plaintiffs did in fact have standing).

171. *United States v. Afyare*, 632 F. App’x 272, 286 (6th Cir. 2016) (“The district court warned 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.” (internal citations and quotation marks omitted)).

172. *See supra* notes 169–170 and accompanying text.

173. *See* 47 U.S.C. § 230 (e)(1) (“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.”).

if ever, indicate that sex trafficking is involved.”¹⁷⁴ 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.”¹⁷⁵ This proved to be a problem, the report stated, because “the victims are often uncooperative.”¹⁷⁶ Referring to § 2124A, the report concluded that “a new statute that instead targets promotion and facilitation of prostitution is far more useful to prosecutors.”¹⁷⁷

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. § 1591.¹⁷⁸ 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.”¹⁷⁹ 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.¹⁸⁰

As originally introduced in the Senate, SESTA 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).”¹⁸¹ Both the original House and Senate bills thus would have defined “participation in a venture” so 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

174. H.R. REP. NO. 115-572, at 5 (2018).

175. *Id.*

176. *Id.*

177. *Id.*

178. Allow States and Victims to Fight Online Sex Trafficking Act of 2017, H.R. 1865, 115th Cong. § 4, 47 U.S.C. 230(e)(5) (2017) (as introduced) (emphasis added).

179. See Caleb Kruckenberg, *Defending Internet Service Providers After the ‘End of the Web As We’ve Known It’*, CHAMPION (Mar. 2018), <https://www.nacdl.org/Article/March2018-DefendingInternetServiceProvid> (on file with the *Columbia Human Rights Law Review*).

180. *See id.*

181. S. 1693, 115th Cong. § 4 (2017) (as introduced).

potential for these provisions to send innocent publishers to prison for the conduct of their users.”¹⁸²

In Senate committee hearings regarding competing definitions of “participation in a venture,” advocates 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.¹⁸³ According to the author of an article on FOSTA prosecutions, California Attorney General Xavier Becerra seemed to believe that such prosecution would go “beyond the intent of the legislation” and agreed that Congress should amend the language to include a knowledge standard with regard to the violation to prevent prosecution of innocent and unwitting actors.¹⁸⁴

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. § 1591.¹⁸⁵ 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 Representative Mimi Walters incorporated SESTA into FOSTA.¹⁸⁶ A letter sent by the Department of Justice to the House Judiciary Committee 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.¹⁸⁷ Nonetheless, the Walters Amendment passed, and the SESTA definition was incorporated into FOSTA.¹⁸⁸

It is 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

182. Kruckenberg, *supra* note 179.

183. *See id.* (noting the statement of Internet Ass’n Gen. Couns. Abigail Slater).

184. *See id.*

185. *See* H.R. 1865, 115th Cong. § 5 (2018) (enacted).

186. *See* 18 U.S.C. § 1591(a)(2).

187. 164 CONG. REC. H1296 (daily ed. Feb. 21, 2018) (statement of Rep. Zoe Lofgren).

188. H.R. REP. NO. 115-583, at 2-4 (2018)

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[ing] 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.¹⁸⁹ Whether these goals have been realized by the new definition of “participation in a venture” is not clear.

After FOSTA, there are several possible interpretations of the *mens rea* requirements for the charge of “benefitting from participation in a venture that has engaged in [sex trafficking].” The statute’s wording 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;”¹⁹⁰ 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, or that the person has not attained the age of 18 years and will be caused to engage in a commercial sex act.”¹⁹¹ But the new definition of “participation in a venture” comes with its own *mens rea* requirement, and it is similarly 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”¹⁹²

189. Allow Victims and States to Fight Online Sex Trafficking Act of 2017, H.R. 1865, 115th Cong. (as introduced, Apr. 3, 2017); *Backpage.com’s Knowing Facilitation of Online Sex Trafficking: Hearing Before the Permanent Subcomm. on Investigations of the Comm. on Homeland Sec. and Gov’tal Affairs*, 115th Cong. 1 (2017).

190. 18 U.S.C. § 1591(a)(1).

191. *Id.*

192. Again, this is the full language of the FOSTA amendment to § 1591. 18 U.S.C. § 1591(e)(4).

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 actors. This interpretation would require the government to prove that the defendant had knowledge of their own conduct, but not of the violation affected by that conduct. While it is 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.¹⁹³

Alternately, “knowingly” in “knowingly assisting, supporting, or facilitating a violation of subsection (a)(1)”¹⁹⁴ 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 has not attained the age of 18 years and will be caused to engage in a commercial sex act.”¹⁹⁵ 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 does not exist unless both elements exist.¹⁹⁶

193. Shon Hopwood, *Restoring the Historical Rule of Lenity as a Canon*, 95 N.Y.U. L. REV. 918, 918 (2020) (describing the rule of lenity as an interpretive canon dictating that “[w]here criminal statutes are ambiguous, the rule of lenity generally posits that courts should interpret them narrowly, in favor of the defendant”).

194. *Id.*

195. *See supra* notes 142–146 and accompanying text.

196. This would create a standard where a defendant prosecuted for “benefitting from participation in a venture” (what this Article describes 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 (what 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

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,¹⁹⁷ (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.¹⁹⁸ 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” standard¹⁹⁹ for third-party defendants (but not for primary actors).

This interpretation runs counter to the expressed intent of sponsors to make it easier to prosecute third-party actors who allegedly “benefit from sex trafficking.”²⁰⁰ 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,²⁰¹ and the *mens rea* of “reckless

this seems illogical in regard to what one expects 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).

197. See *infra* notes 250–253 for a detailed discussion on the legal definition of “facilitating” under § 2421A.

198. See *supra* notes 142–146 and accompanying text.

199. 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)).

200. See, e.g., Press Release, Wagner Trafficking Bill Headed to House Floor (Feb. 21, 2018), available at <https://wagner.house.gov/media-center/press-releases/wagner-trafficking-bill-headed-to-house-floor> [<https://perma.cc/L86W-HRGG>] (outlining Rep. Wagner’s push for “the strongest, most effective criminal and civil tools possible to confront the horrific abuses of online sex trafficking”).

201. See, e.g., 164 CONG. REC. H1291 (daily ed. Feb. 27, 2018) (statement of Rep. Lee) (referring to a letter from the 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.

disregard” never applied to advertisers to begin with.²⁰² 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 warned against prior to FOSTA’s passage.²⁰³

D. 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.²⁰⁴ 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 immunity²⁰⁵ and (2) it amends § 1595 to allow

REC. S1853 (daily ed. Mar. 21, 2018) (statement of Sen. Heitkamp) (“In many instances, websites help traffickers skirt law enforcement through online advertising. . .”).

202. 18 U.S.C. § 1591(a).

203. Letter from Stephen E. Boyd, Assistant Att’y Gen., Dep’t of Just., to Rep. Robert W. Goodlatte, Chairman, Comm. on the Judiciary (Feb. 27, 2018), *as reprinted in* 164 CONG. REC. H1297 (daily ed. Feb. 27, 2018) (statement of Rep. Goodlatte) (stating DOJ’s position that “any revision to 18 U.S.C. § 1591 to define ‘participation in a venture’ is unnecessary” because the current law “already sets an appropriately high burden of proof” as prosecutors must prove that the defendant “knowingly benefitted from participation in a sex trafficking venture”). The Department opined that the new language, while “well intentioned,” would “effectively creat[e] additional elements that prosecutors must prove at trial . . . this language could have unintended consequences as applied by the states.” *Id.*

204. 18 U.S.C. § 1595(a); *see also* Jennifer S. Nam, *The Case of the Missing Case: Examining the Civil Right of Action for Human Trafficking Victims*, 107 COLUM. L. REV. 1655, 1655 (2007) (summarizing the goals and uses of § 1595).

205. *See supra* Section I.B.

state attorneys general to bring *parens patriae* civil lawsuits on behalf of state residents.²⁰⁶ 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 attorneys general to bring civil lawsuits on behalf of state residents for conduct that would violate the criminal provision, § 1591.²⁰⁷

The common law *parens patriae* doctrine grants standing to states, which they might otherwise lack, allowing them to sue on behalf of their citizens.²⁰⁸ 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.”²⁰⁹ There is no exhaustive list of what constitutes a qualifying interest,²¹⁰ but the Supreme 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.”²¹¹ 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.²¹² Thus, after establishing a credible interest with which to bring a claim, the state attorneys general must still satisfy each of the additional elements of Article

206. 18 U.S.C. § 1595(d); *supra* Section I.B.

207. See Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. No. 115-164, § 6, 18 U.S.C. § 1595(d) (2018).

208. See Alfred L. Snapp & Son, Inc. v. Puerto Rico *ex rel.* Barez, 458 U.S. 592, 600 (1982).

209. *Id.* at 607.

210. *Id.*

211. *Id.*

212. See *Mass. v. EPA*, 549 U.S. 497, 517–20 (2007).

III standing for a federal court to hear the claim.²¹³ 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 the plaintiff's grievances.²¹⁴

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.”²¹⁵ Though the language of this provision may be read to imply that the power of the attorneys general reaches very broadly,²¹⁶ 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 broader than those of individual citizens, and “[o]ne helpful indication in determining whether an alleged injury to the health and welfare of its citizens suffices to give 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.”²¹⁷ This would seem to suggest that the “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.²¹⁸ It is possible, however, that courts will find these harms insufficiently causally connected to the conduct violating § 1591.

213. See *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992).

214. *Id.* at 560.

215. Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. No. 115-164, § 6, 18 U.S.C. § 1595(d) (2018).

216. 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.

217. *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 607 (1982).

218. 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. *Fla. Abolitionist v. Backpage.com, LLC*, No. 6:17-cv-218-Orl-28TBS, 2018 WL 1587477, at *3-6 (M.D. Fla. Mar. 31, 2018).

Without this connection, the claim may fail to meet the causality requirement of 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.²¹⁹ However, the CRFA's *parens patriae* section has not been challenged in court, so it is difficult to draw insight from 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.²²⁰ It is unclear whether the new provision will change the frequency or quantity of civil lawsuits brought for violations of § 1591.²²¹

Finally, FOSTA amendments to CDA § 230 may affect the impact of the new *parens patriae* provision. As described above,²²² FOSTA amends CDA § 230 such that ICS defendants in lawsuits brought pursuant to § 1595 will no longer be afforded immunity.²²³ Because FOSTA amends the CDA by adding language that “[n]othing in [§ 230] shall be construed to impair or limit” civil claims brought under § 1595, future claims brought by plaintiffs under § 1595 against websites may be more successful.²²⁴ On the other hand, very few lawsuits have been brought under § 1595, and of those, only one

219. See 15 U.S.C. § 45b(e)(1) (2012) (“[I]n 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 . . . adversely affected by the engagement of any person . . . in a practice that violates such subsection, the attorney general . . . may, as *parens patriae*, bring a civil action . . . in an appropriate district court of the United States to obtain appropriate relief . . .”).

220. From 2004 to 2008, not a single civil lawsuit pursuant to 18 U.S.C. § 1595 was filed on the basis of an alleged violation of 18 U.S.C. § 1591. See ALEXANDRA F. LEVY, HUM. TRAFFICKING LEGAL CTR., FEDERAL HUMAN TRAFFICKING CIVIL LITIGATION: 15 YEARS OF THE PRIVATE RIGHT OF ACTION 11 (2018), available at <https://www.htlegalcenter.org/wp-content/uploads/Federal-Human-Trafficking-Civil-Litigation-1.pdf> [<https://perma.cc/WBR4-96M3>]. Between 2009 and 2017, 25 such civil lawsuits were filed. See *id.* at 15.

221. 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 under the Act since its enactment in 2017.

222. See *supra* notes 69–73 and accompanying text.

223. See H.R. 1865, 115th Cong. § 4 (2018) (enacted).

224. *Id.*

was dismissed on the basis of § 230 immunity prior to FOSTA's enactment.²²⁵ 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.

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 the authors' knowledge, only one criminal defendant has been indicted for charges under § 2421A.²²⁶ Given the lack of caselaw, this Article uses external sources to determine how this statute will be interpreted: the Travel Act, the Mann Act, FOSTA's legislative history, and the

225. See Staff of Permanent Subcomm. on Investigations, S. Comm. on Homeland Sec. & Gov't Affs., 114TH CONG., *Backpage.com's Knowing Facilitation of Online Sex Trafficking* 7 n.31 (2017) (“According to our research, there have been approximately 300 reported decisions addressing immunity claims advanced under 47 U.S.C. § 230 in the lower federal and state courts. All but a handful of these decisions find that the website is entitled to immunity from liability.” (quoting *Hill v. Stubhub, Inc.*, 727 S.E.2d 550, 558 (N.C. Ct. App. 2012)); 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 (2018) (discussing *Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12, 17 (1st Cir. 2016), *cert. denied*, 137 S. Ct. 622 (2017) as evidence that “§ 230 has complicated [sex trafficking] enforcement. In civil litigation, bad-actor websites have been able to successfully invoke this immunity provision despite engaging in actions that go far beyond publisher functions.”). 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.com, LLC*, 817 F.3d 12, 17 (1st Cir. 2016), *cert. denied*, 137 S. Ct. 622 (2017), leading us to conclude that the Judiciary Committee erroneously attributed the ruling to the Second Circuit.

226. *United States v. Martono*, No. 3:20-CR-00274-N-1, 2021 U.S. Dist. LEXIS 1340, at *2 (N.D. Tex. Jan. 5, 2021).

D.C. District and Circuit Court opinions in *Woodhull Freedom Foundation v. United States*.²²⁷ This Part provides an overview of § 2421A, discusses how it fits into the historical uses of the Mann and Travel Acts, and then discusses how § 2421A may have a higher intent requirement than the Mann Act while still including a broader array of behavior.

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.²²⁸ The law further creates (1) a 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.²²⁹

Section 2421A applies only to individuals who “own[], manage[], or operate[] an interactive computer service.”²³⁰ Section 230 of the CDA defines

227. The D.C. District and Circuit Court opinions in *Woodhull Freedom Found. 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), *rev’d*, 948 F.3d 363 (D.C. Cir. 2020); *Woodhull Freedom Found. v. United States*, 948 F.3d 363 (D.C. Cir. 2020). *Woodhull* is a pre-enforcement challenge to FOSTA’s constitutionality on First Amendment, due process, and *ex post facto* grounds. The decisions are useful for understanding the implications of § 2421A. Looking to interpretations of the Travel Act may also be useful, as § 2421A uses similar text to that of the Travel Act. In fact, both the D.C. District Court and the D.C. Circuit Court looked to Travel Act prosecutions for guidance in interpreting § 2421A in their respective *Woodhull* decisions. *Id.* at 200. The Travel Act may also be helpful because, as of the date of this writing, the Mann Act and the Travel Act are the laws that the Department of Justice has most frequently used to prosecute websites that host ads for commercial sexual services. *Id.* at 199–200. Section 2421A amends the Mann Act. *Id.* at 191. 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 used by prosecutors and interpreted by courts.

228. 18 U.S.C. §§ 2421A(b)(1)–(2).

229. 18 U.S.C. §§ 2421A(c)–(e).

230. 18 U.S.C. § 2421A(a).

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.”²³¹ “Interactive computer services” is, by the plain language of § 230’s definition, a broad category that includes commercial internet providers,²³² websites,²³³ and even private employers and government entities.²³⁴ 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 foreign commerce.²³⁵

The term “operates” in § 2421A has some ambiguity, making it unclear whether the law creates liability for website users. At least one defense attorney has argued that a website user answering an online

231. 47 U.S.C. § 230(f)(2).

232. See Ben Ezra, Weinstein, & Co. v. Am. Online, Inc., 206 F.3d 980, 985 (10th Cir. 2000).

233. See Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC, 521 F.3d 1157, 1162–63 (9th Cir. 2008) (discussing when a website may be immune from liability); Zeran v. Am. Online, Inc., 129 F.3d 327, 330–32 (4th Cir. 1997) (websites are included under § 230).

234. Claudia G. Catalano, Annotation, *Validity, Construction, and Application of Immunity Provisions of Communications Decency Act*, 47 U.S.C.A. § 230, 52 A.L.R. Fed. 2d 37, §§ 12–13 (2011).

235. The DOJ’s Computer Crime and Intellectual Property Section, which sits within the Criminal Division, provides guidelines for navigating 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 ET AL., PROSECUTING COMPUTER CRIMES 4 (2010), available at <https://www.justice.gov/sites/default/files/criminal-ccips/legacy/2015/01/14/ccmanual.pdf> [<https://perma.cc/6MAH-UMBT>]. The DOJ Manual states that “it is enough that the computer is connected to the Internet.” *Id. Compare* United States v. Trotter, 478 F.3d 918, 921 (8th Cir. 2007) (affirming defendant’s conviction of intentionally causing damage to a “protected computer” because the computers in question were connected to the internet) *and* United States v. Walters, 182 F. App’x 944, 945 (11th Cir. 2006) (recognizing that “the internet is an instrumentality of interstate commerce”), *with* United States v. Kane, No. 2:11-cr-00022-MMD-GWF, slip op. at 6 (D. Nev. Oct. 15, 2012) (holding that 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).

advertisement promoting prostitution may face liability under § 2421A.²³⁶ 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 2015.²³⁷ Some support for the contention that website users may be included in § 2421A can be found in the remarks of Congressman Jackson Lee, who twice described FOSTA during House debates as “creat[ing] the new offense of intentional promotion or facilitation of prostitution while *using* or operating . . . the internet.”²³⁸ It remains unclear, however, how courts will eventually interpret the term “operates.”

B. History of the Mann Act

In order to appreciate how 2421A fits into the broader picture of sex work criminalization, it is helpful to understand the history of the statute that it amends. Section 2421A is an amendment to the statutory scheme known as the Mann Act.²³⁹ The Mann Act was originally passed in 1910.²⁴⁰ The public concerns and media attention preceding the passage of FOSTA mirrored the public concerns and media attention around the force or coercion of women and girls into the sex trade in the United States in the early 1900s.²⁴¹ The Mann Act, however, was explicitly focused on the rescue

236. See Kruckenberg, *supra* note 179. Kruckenberg, however, seems to refer to the text of H.R. 1865, 115th Cong. § (3)(a) (2018) (enacted)—namely, “[w]hoever, using a facility or means of interstate or foreign commerce”—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 on a misreading of the statutory text.

237. The Justice for Victims of Trafficking Act of 2015 “mak[es] 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.” Pub. L. No. 114-22, § 109(4), 129 Stat. 227, 239 (2015).

238. 164 CONG. REC. H1291, H1292 (daily ed. Feb. 27, 2018) (statement of Rep. Jackson Lee) (emphasis added).

239. White-Slave Traffic (Mann) Act, ch. 395, 18 U.S.C. §§ 2421–2424 (1910).

240. *Id.*

241. Compare 164 CONG. REC. S1857 (daily ed. Mar. 21, 2018) (statement of Sen. Bill Nelson) (“Women and children are being forced into sex slavery in modern-day America We have heard, over and over, the untold stories of the inhumanity . . . here in modern-day America, the same thing is happening”), with 45 CONG. REC. 1037 (1910) (statement of Rep. Edward Saunders) (“ . . . in an effort to break up a villainous interstate,

of white women and girls, and was titled “White-Slave Traffic Act” until 1986.²⁴² The original text of the Mann Act made it a 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.”²⁴³ This language 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.”²⁴⁴ 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.”²⁴⁵ During several decades after the Mann Act’s passage, courts interpreted the Act broadly, using it to prosecute adultery and other crimes

and international traffic in innocent girls, and women, who are . . . cases induced to leave home under specious promises of steady employment at remunerative wages, only to find themselves . . . compelled to lead vicious and immoral lives under conditions of restraint, and compulsion . . . universally styled, ‘white slavery.’”).

242. The fear that white women were being “lured,” “seduced,” or forced into prostitution was an intensely reported 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, Aimed at Curbing Sex Trafficking*, HISTORY (June 23, 2020), <https://www.history.com/this-day-in-history/congress-passes-mann-act> [<https://perma.cc/HYG4-BV4J>]. 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 67–74* (2014); GRETCHEN SODERLUND, *SEX TRAFFICKING, SCANDAL, AND THE TRANSFORMATION OF JOURNALISM, 1885–1917*, 5–6 (2013) (discussing, inter alia, the rise of “white slavery” narratives in the press).

243. Mann Act § 2.

244. Child Sexual Abuse and Pornography Act of 1986, Pub. L. No. 99-628, § 5, 18 U.S.C. §§ 2421–2423 (1986); see also Michael Conant, *Federalism, the Mann Act, and the Imperative to Decriminalize Prostitution*, 5 CORNELL L. REV. 99, 99 (1996) (describing how the “1986 amendment deleted ‘debauchery’ and ‘immoral purpose’ and substituted ‘any sexual activity for which any person can be charged with a criminal offense’”).

245. 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).

not within the statute's original purview.²⁴⁶ 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 "[l]ack of a proper legal framework to address sex trafficking" and the need for Congress to pass additional, clarifying laws like FOSTA.²⁴⁷ 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

Because 2421A's statutory text is not a model of clarity, understanding its scope and likely effects requires turning to law beyond the Mann Act. The text of sections 2421A(a) and (b)(1) mimic subsection (a)(3) of the Travel Act, so interpretations of that Act may be useful in understanding § 2421A.²⁴⁸ The Travel Act criminalizes unlawful activity that occurs across state lines or borders. Under subsection (a)(3), it applies to: "Whoever 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 . . ." ²⁴⁹ 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.

246. See, e.g., *Caminetti v. United States*, 242 U.S. 470, 489–90 (1917) (holding that the Mann Act prohibits transporting a woman across state lines for the purpose of adultery); *Athanasaw v. United States*, 227 U.S. 326, 328, 333 (1913) (holding that the 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) (holding that the Mann Act prohibits the transportation of one of "plural wives" for the purpose of cohabitating with them, regardless of that cohabitation being based in a religious belief, and regardless of regulation of marriage being a state matter).

247. Wagner & McCann, *supra* note 245, at 713.

248. *Woodhull Freedom Found. v. United States*, 334 F. Supp. 3d 185, 199 (D.D.C. 2018) (noting how "Section 2421A mirrors an existing federal criminal law, the 'Travel Act'"); see also *supra* note 227 and accompanying text (describing further reasons for comparing the two laws).

249. Travel Act of 1961, 18 U.S.C. § 1952(a)(3) (1961).

The Travel Act has been the primary law used in federal shutdowns of websites on which sexual services were advertised.²⁵⁰ 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.²⁵¹ Thus, the commercial sexual activity criminalized by § 2421A(a) may simply be a subset of the commercial sexual activity already criminalized by the Travel Act. Whether this is true largely hinges 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.²⁵²

D. Mental State Required for a Violation of § 2421A(a)

Because of the breadth of the activities that might be covered by § 2421A’s text, the scope of conduct that will actually be criminalized likely depends primarily on the mental state required for prosecution. This Section, unfortunately, finds that the text of 2421(a) as written is so unclear as to make a prediction of the mental state requirement impossible – the language could be interpreted as similar to the Travel Act (as the *Woodhull* trial court did), as a having a lower standard than the Travel Act (as the *Woodhull*

250. See *supra* note 227 and accompanying text (describing how the DOJ most frequently uses the Mann Act and Travel Act to prosecute websites that host ads for commercial sexual services and other reasons to analyze both legislations together).

251. *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 “facilitat[ing], or carry[ing] on the [sex work] business”). Interestingly, the conduct at issue in *Judkins*—“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.” Letter from Stephen E. Boyd to Robert W. Goodlatte, *supra* note 203, at 2.

252. 18 U.S.C. § 2421A (2018); compare *Woodhull Freedom Found. v. United States*, 334 F. Supp. 3d 185, 200 (D.D.C. 2018) (construing these terms to mean that the statute is narrowly “calculated to ensnare only specific unlawful acts with respect to a particular individual, not the broad subject-matter of prostitution”), with *Woodhull Freedom Found. v. United States*, 948 F.3d 363, 372 (D.C. Cir. 2020) (interpreting “promote” and “facilitate” to instead cover a broader range of “conduct that facilitates” sex work).

appellate court did, however, in the context of standing), or as having a higher standard than the Travel Act (as the DOJ has suggested).

What is clear is that 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.²⁵³ A conviction under § 2421A(a) thus requires proving two mental states: a person must (1) have *known* (or reasonably have been aware of the fact) that they were engaged in ownership, management, or operation of an ICS, and (2) have *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 crimes like prostitution, which would ordinarily fall within the province of a state's police powers,²⁵⁴ is contingent on the crime's ability to affect interstate commerce.²⁵⁵ 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 is 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),²⁵⁶ regardless of whether the defendant had actual knowledge that interstate commerce was involved.

253. 18 U.S.C. § 2421A.

254. 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 "restrictions on prostitution" as one of the police power's "best known and most traditional uses").

255. 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." (quoting *United States v. Lopez*, 514 U.S. 549, 560 (1995))).

256. See *Cleveland v. United States*, 329 U.S. 14, 18 (1946) ("[W]hile [the Mann Act is] primarily aimed at the use of interstate commerce for the purposes of commercialized sex, [it] is not restricted to that end."); *United States v. Evans*, 476 F.3d 1176, 1179 (11th Cir. 2007) ("[U]se of hotels that served interstate travelers and distribution of condoms that traveled in interstate commerce are further evidence that [the defendant's] conduct substantially affected interstate commerce."); *United States v. Pipkins*, 378 F.3d 1281, 1295 (11th Cir. 2004) ("[T]he 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.").

FOSTA's intent element ("intent to promote or facilitate the prostitution of another person"²⁵⁷) 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"²⁵⁸) 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"²⁵⁹). Because they regulate similar conduct, the Mann Act and the Travel Act have been interpreted by reference to each other.²⁶⁰ Similarly, district courts have looked to the Travel Act to interpret FOSTA.²⁶¹

Under the Mann Act, courts have interpreted the "intent" in "intent that such individual engage in prostitution" narrowly.²⁶² For a Mann Act violation to be shown, the intent that an individual engage in prostitution must be a "dominant motive" of the defendant.²⁶³ It does not, however, have to be the *only* dominant motive, nor does it have to be the but-for motive;²⁶⁴

257. 18 U.S.C. § 2421A(a).

258. *Id.*

259. 18 U.S.C. § 1952.

260. *See, e.g.,* United States v. Langley, 919 F.2d 926, 930–32 (5th Cir. 1990) (applying the Mann Act to sentence a defendant convicted of violating the Travel Act); Pandelli v. United States, 635 F.2d 533, 539 (6th Cir. 1980) (holding that an offense under the Travel Act and an offense under the Mann Act merged for double jeopardy purposes).

261. *See* Woodhull Freedom Found. v. United States, 334 F. Supp. 3d 185, 199–200 (D.D.C. 2018); *supra* note 227 and accompanying text.

262. For example, if a person engages in prostitution as their profession and another person takes the person engaging in prostitution on vacation across state lines, and then drives them home again, after which the person returns to their prostitution 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 their return home. *See* United States v. Mortensen, 322 U.S. 369, 375 (1944).

263. *See* United States v. Campbell, 49 F.3d 1079, 1083 (5th Cir. 1995) (citing *Forrest v. United States*, 363 F.3d 363, 375 (5th Cir. 1966)) (asking whether the illicit behavior is "one of the efficient and compelling purposes" of the travel in determining its "dominant" purpose).

264. *Id.* at 1083; *see also* *Mortensen*, 322 U.S. at 375 (holding that defendants had not violated the Mann Act because the sole purpose of the trip was an innocent holiday); *United States v. Hon*, 306 F.2d 52, 55 (7th Cir. 1962) (holding that defendant had not violated the Mann Act because prostitution was not a purpose of the trip, but an incidental result); *Smart v. United States*, 202 F.2d 874, 875 (5th Cir. 1953) (holding that defendant had not violated the Mann Act because the sole purpose of the trip was to take care of legal matters in another state).

“[t]he illicit purpose denounced by the Act may have coexisted with other purpose or purposes.”²⁶⁵ The motive in question is not necessarily the motive behind crossing state lines, but the motive behind taking another individual across state lines.²⁶⁶ Such motive may be inferred from the defendant’s conduct.²⁶⁷ No dominant motive exists where the purpose to engage in prostitution was nonexistent or incidental.²⁶⁸ 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.²⁶⁹

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.²⁷⁰

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.”²⁷¹ In *United States v. Jones*, then-Judge Ruth Bader Ginsburg, writing for the D.C. Circuit Court, interpreted how “intent” applied to the conduct of facilitating prostitution under the Travel Act.²⁷² The *Jones* court overturned the conviction of an 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.²⁷³ The lower court had given

265. *Campbell*, 49 F.3d at 1082.

266. *United States v. Snow*, 507 F.2d 22, 24 (7th Cir. 1974).

267. *Id.* at 25.

268. *Campbell*, 49 F.3d at 1083.

269. *Snow*, 507 F.2d at 24.

270. *See Woodhull Freedom Found. v. United States*, 334 F. Supp. 3d 185, 199–200 (D.D.C. 2018).

271. 18 U.S.C. § 1952.

272. *United States v. Jones*, 909 F.2d 533, 539 (D.C. Cir. 1990).

273. *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

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.²⁷⁴ 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.²⁷⁵ 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.”²⁷⁶

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.²⁷⁷ 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 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 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.²⁷⁸ The court noted the similarities in statutory language

interstate by car or subway. *Id.* at 540. While noting that under § 2421, one does not have to physically carry or accompany a person to “transport” her, the court still held that the male dispatcher did not violate § 2421. However, the court also implied that the government would have succeeded on the Mann Act charge had it indicted the dispatcher under § 2422, which 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.*

274. *Id.* at 538.

275. *Id.*

276. *Id.* at 539.

277. *Id.* at 538 (emphasis added).

278. *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

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.²⁷⁹ 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."²⁸⁰ 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.²⁸¹ 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 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."²⁸²

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,"²⁸³ while § 2421A more vaguely prohibits acting with intent to promote or facilitate "prostitution of another person."²⁸⁴ 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

defendant intended to 'explicitly further[]' a specified unlawful act." (quoting *United States v. Brown*, 186 F. 3d. 661, 670 (5th Cir. 1999)).

279. *Id.* at 200.

280. *Woodhull Freedom Found.*, 948 F.3d at 372.

281. *Id.* at 372.

282. *Id.* at 373.

283. 18 U.S.C. § 1952(b) (2014).

284. 18 U.S.C. § 2421A(a) (2018).

“of another person” denote a requirement of showing intent to facilitate a specific act, while the words “prostitution offenses” likely denote no such requirement.²⁸⁵ 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. Although Ballon’s construction of “knowing” is not rooted in the original section, Ballon has interpreted the intent requirement under § 2421A to mean that ICSs acting in good faith²⁸⁶ will be shielded from prosecution.²⁸⁷ 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.

E. Conduct in Violation of § 2421A: “Promote or Facilitate”

Section 2421A criminalizes the promotion or facilitation of prostitution via an online computing service, but it is unclear what that actually means. This Section analyzes FOSTA’s unclear “promotion or facilitation” provision in light of interpretations in the Travel Act cases and other similar statutes. However, 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

285. See United States’ Response to Defendants’ Motion to Dismiss Indictment at 37, *United States v. Lacey*, 423 F. Supp. 3d 748 (D. Ariz. 2019) (No. 18-CR-422).

286. For a description of “good faith” in § 230(c)(2), see *supra* note 33.

287. IAN C. BALLON, *E-COMMERCE AND INTERNET LAW* § 37.05[5][C] (2d ed. 2019). 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. 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.” 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> [<https://perma.cc/PV56-TH4J>].

lines with the intent that the person engage in prostitution).²⁸⁸ Nonetheless, the court of appeals in *Woodhull* stated that “[t]he terms ‘promote’ and ‘facilitate,’ when considered in isolation ‘are susceptible of multiple and wide-ranging meanings.’²⁸⁹ 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 assist or aid.’”²⁹⁰

Several Travel Act cases have similarly interpreted the word “facilitate” to mean “to make easy or less difficult” any unlawful activity.²⁹¹ The Seventh Circuit has said that conduct does not have to be essential to the state law violation in order to facilitate it.²⁹² The Tenth Circuit has said, in a passage partially adopted and applied to a Travel Act case on appeal:

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

288. *Doe v. GTE Corp.*, 347 F.3d 655, 659 (7th Cir. 2003) (interpreting the Electronic Privacy Communications Act to not criminalize intermediaries when their customers commit unlawful acts); *In re Aimster Copyright Litig.*, 334 F.3d 643, 651 (7th Cir. 2003) (contrasting secondary liability under copyright law with aiding and abetting); *Dart v. Craigslist*, 665 F. Supp. 2d 961, 967 (N.D. Ill. 2009) (noting difference between “facilitating prostitution” and Craigslist’s speech); *Woodhull Freedom Found. v. United States*, 334 F. Supp. 3d 185, 198-99 (D.D.C. 2018) (dismissing overbreadth concerns regarding “Section 2421A’s use of the terms ‘promoting’ and ‘facilitating.’ . . . [P]laintiffs believe that they could sweep broadly . . . [so as to criminalize] any activity that arguably ‘make[s] prostitution easier’ . . . Woodhull’s construction of 2421A is flawed . . .” (internal citations omitted)).

289. *Woodhull Freedom Found. v. United States*, 948 F.3d 363, 372 (D.C. Cir. 2020) (“FOSTA does not define ‘promote’ or ‘facilitate,’ . . . Nor are these terms limited by a string of adjacent verbs (such as advertises, distributes, or solicits) that would convey ‘a transactional connotation’ that might narrow the statute . . . Because the verbs ‘promote’ and ‘facilitate’ are disjunctive, FOSTA arguably proscribes conduct that facilitates prostitution.” (internal citations omitted)).

290. *Id.* at 372.

291. *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)).

292. *See United States v. Miller*, 379 F.2d 483, 486 (7th Cir. 1967).

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.²⁹³

Moreover, 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 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.²⁹⁴

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.²⁹⁵

The *Woodhull* trial court, looking to the Travel Act, implied that FOSTA requires a similar close, causal connection.²⁹⁶ 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.”²⁹⁷ 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

293. *Platt v. United States*, 163 F.2d 165, 166–67 (10th Cir. 1947).

294. *United States v. Hawthorne*, 356 F.2d 740, 740 (4th Cir. 1966), *cert. denied*, 384 U.S. 908 (1966) (overturning a Travel Act conviction for a trip by defendant to move his family from Indiana to West Virginia, where he intended to open a gambling operation).

295. *See Judkins*, 428 F.2d 333 at 335.

296. *Woodhull Freedom Found. v. United States*, 334 F. Supp. 3d 185, 200 (D.D.C. 2018).

297. 164 CONG. Rec. S1852 (daily ed. Mar. 21, 2018) (statement of Sen. Blumenthal).

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."²⁹⁸

The *Woodhull* court of appeals stated that "'facilitate' could be interpreted as a synonym for terms like 'aid,' 'abet,' and 'assist,' in which case the term's meaning would be limited to the background law of aiding and abetting."²⁹⁹ 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.³⁰⁰

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 . . . ? 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.³⁰¹

Regardless of what the courts will say, cautious website owners have already taken measures of their own to avoid liability.³⁰² As a result, sex workers have lost access to online spaces they used to share harm reduction information and blacklists of dangerous clients.³⁰³

298. *Id.* at S1867 (statement of Sen. Wyden).

299. *Woodhull Freedom Found. v. United States*, 948 F.3d 363, 372 (D.C. Cir. 2020).

300. *Id.* at 372–73.

301. 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/> [<https://perma.cc/4STK-9T5Q>].

302. See *Documenting Tech Actions*, SURVIVORS AGAINST SESTA, <https://survivorsagainstsesta.org/documentation/> [<https://perma.cc/7Z3L-67LS>].

303. *Id.*

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).³⁰⁴

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 eighteen 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.³⁰⁵ 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

304. 18 U.S.C. § 2421A(b); 18 U.S.C. § 1591(a).

305. 18 U.S.C. § 2421A(b)(2).

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.

G. What Is “Prostitution” Under FOSTA?

A final defining characteristic of the scope of § 2421A, and thus the impact of FOSTA, is what counts as prostitution. 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,³⁰⁶ immigration,³⁰⁷ or acts on federal property like military bases.³⁰⁸ This Section outlines how “prostitution” is not defined in federal law, and how the few cases arising under the Mann Act that attempt to define the term fail to 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.”³⁰⁹ 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.”³¹⁰ Black’s Law Dictionary describes prostitution somewhat more concretely as “the practice or an instance of engaging in sexual activity for

306. See, e.g., 18 U.S.C. § 2421(a) (2015) (“Whoever knowingly transports any 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, or attempts to do so, shall be fined [or imprisoned] . . .”).

307. 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 . . .”).

308. See, e.g., 18 U.S.C. § 1384 (1994) (“[W]hoever 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 . . . or receives any person for purposes of lewdness . . . or permits any person to remain for the purpose of lewdness, assignation, or prostitution in any vehicle . . . or building or . . . vehicle, conveyance, place, structure. . .”).

309. *United States v. Marks*, 274 F.2d 15, 18 (7th Cir. 1959).

310. *Cleveland v. United States*, 329 U.S. 14, 17, n.3 (1946).

money or its equivalent.”³¹¹ 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.

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.³¹² The 1986 amendment thus made “prostitution” in the Mann Act more like “prostitution” in the 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 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.³¹³

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,³¹⁴ 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 were still subject to civil sanctions for

311. *Prostitution*, BLACK’S LAW DICTIONARY (11th ed., 2019).

312. *See* Conant, *supra* note 244, at 116–17.

313. *See* United States v. Holte, 236 U.S. 140, 144 (1915) (stating that such a ruling was necessary, lest the penal code “not be as broad as the mischief”).

314. 164 CONG. REC. S1852 (daily ed. Mar. 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.”).

the same conduct.³¹⁵ 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.³¹⁶

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 a 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,³¹⁷ 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 §§ 2421A(a) and (b), of course, also apply to § 2421A(c), which—much like the civil provision in the TVPA described above³¹⁸—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 uninterpreted anti-trafficking laws,³¹⁹ there has been a recent trend in increased trafficking claims against third

315. *Sedima S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 491 (1985) (citing *United States v. One Assortment of 89 Firearms*, 465 U.S. 354 (1984); *One Lot Emerald Cut Stones v. United States*, 409 U.S. 232, 235 (1972); *Helvering v. Mitchell*, 303 U.S. 391, 397 (1938); *United States v. Regan*, 232 U.S. 37, 47–49 (1914)).

316. *See, e.g., Noble v. Weinstein*, 335 F. Supp. 3d 504, 510 (S.D.N.Y. 2018); *Geiss v. Weinstein Co. Holdings*, 383 F. Supp. 3d 156, 168 (S.D.N.Y. 2019) (denying defendant's motion to dismiss despite lack of related criminal charges stemming from the same conduct, and holding that the "TVPA extends to enticement of victims by means of fraudulent promises of career advancement, for the purpose of engaging them in consensual or, as alleged here, non-consensual sexual activity"); *Roe v. Howard*, 917 F.3d 229, 233, 247 (4th Cir. 2018) (civil claims moving forward despite criminal charges being dropped or not pursued).

317. *See supra* notes 46–52 and accompanying text.

318. *See supra* Part II.

319. *See LEVY, supra* note 220, at 10–11 (finding that "zero civil cases have been filed in each of the following states and territories: Delaware, Iowa, Maine, Montana, Nebraska, Nevada, New Hampshire, New Mexico, Puerto Rico, Vermont, the Virgin Islands, and West Virginia").

parties using pre-FOSTA, state-level tort laws.³²⁰ Considering the enthusiasm some private-injury attorneys share for this new area of the law,³²¹ as well as the media attention that civil claims against well-known corporations garner,³²² 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.³²³ Preemptive 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,³²⁴ and exclude those people from their services.

1. § 2421A in Practice, The cityxguide Prosecution

In June 2020, the Department of Justice brought the first prosecution under § 2421A, against Wilham Martono, the alleged owner of cityxguide.³²⁵ Although Martono is alleged to have expanded the site’s 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

320. See *supra* notes 122–125 and accompanying text.

321. See, e.g., *supra* note 125 and accompanying text.

322. See, e.g., Elizabeth Nolan Brown, *FOSTA’s First Test Targets Cloud Company Used by Backpage: Reason Roundup*, REASON (Mar. 28, 2019), <https://reason.com/2019/03/28/fostas-first-test-targets-cloud-company/> [<https://perma.cc/58ZH-H8WB>] (covering a lawsuit against Salesforce).

323. See *supra* note 125 and accompanying text.

324. 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. Violet Blue, *PayPal, Square and Big Banking’s War on the Sex Industry*, ENGADGET (Dec. 2, 2015), <https://www.engadget.com/2015-12-02-paypal-square-and-big-bankings-war-on-the-sex-industry.html> [<https://perma.cc/67XJ-9D94>].

325. *United States v. Martono*, Crim. Action No. 3:20-CR-00274-N-, 2021 WL 39584 (N.D. Tex. Jan. 5, 2021) (denying motion to dismiss).

report.³²⁶ Martono was charged with violations of § 2421A in addition to conspiracy to violate the Travel Act, violations of the Travel Act, and money laundering.³²⁷

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.³²⁸

IV. SIGNIFICANCE OF FOSTA’S GAO REPORTING REQUIREMENT

FOSTA’s 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.”³²⁹ The report will include the following: (1) an assessment of the amount and 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.³³⁰ In other words, the report will be an assessment of financial liability provided by FOSTA’s creation of § 2421A.³³¹ As of the date of this writing, those numbers would be zero.

326. 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).

327. United States v. Martono, No. 3:20-CR-00274-N-1, 2021 U.S. Dist. LEXIS 1340, at *2 (N.D. Tex. Jan. 5, 2021).

328. *Id.* (discussing the charges and grand jury indictment).

329. Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. No. 1115-164, § 8, 132 Stat. 1253 (2018).

330. *Id.*

331. 164 CONG. REC. H1291 (daily ed. Feb. 27, 2018) (statement of Rep. Jackson Lee). 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.” *Id.*

“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.”³³² The GAO report, she implied, would tell Congress whether FOSTA was working.³³³ 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-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.³³⁴

V. THE *EX POST FACTO* CLAUSE

FOSTA Section 4(b) prescribes that subsection 4(a), which amends § 230(e),³³⁵ applies to activities which occurred on, before, or after its

332. *Id.* at H1304.

333. *Id.* (“My legislation is very simple: Does this bill work? What more can we do? I am asking for a study where the GAO would be instructed to assess the damages awarded to victims and restitution amounts imposed against defendants as a result of this bill.”).

334. For more on the impact of discrimination by private companies against people in the sex trades, see *supra* note 324.

335. 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 90 and accompanying text.

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.³³⁶

The Constitution provides that neither Congress nor any state shall pass any *ex post facto* law.³³⁷ 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."³³⁸ The prohibition applies to laws "which make innocent acts criminal, alter the nature of the offense, or increase the punishment."³³⁹

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.³⁴⁰ The following subparts analyze the potential *ex post facto* issues of §§ 230(e)(5)(B)³⁴¹ and (C),³⁴² as amended by FOSTA Section 4(a).

336. Letter from Stephen E. Boyd to Robert W. Goodlatte, *supra* note 203, at 2.

337. U.S. CONST. art. I, § 9, cl. 3; U.S. CONST. art. I, § 10, cl. 1.

338. See *Beazell v. Ohio*, 269 U.S. 167, 169 (1925).

339. See *Collins v. Youngblood*, 497 U.S. 37, 46 (1990) (citing *Beazell*, 269 U.S. at 170). There are generally four categories of *ex post facto* laws: (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)." *Stogner v. California*, 539 U.S. 607, 612 (2003) (emphasis omitted) (quoting *Calder v. Bull*, 3 U.S. 386, 389 (1798)).

340. 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, which does not appear to be the case here. See *Burgess v. Salmon*, 97 U.S. 381, 385 (1878).

341. "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).

342. "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).

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* 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.³⁴³

If, however, the newly authorized state crimes impose higher penalties on website owners than penalties previously imposed for violations of § 1591,³⁴⁴ retroactive enforcement would constitute a violation of the *ex post facto* clause. In *Peugh v. United States*, for example, 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.³⁴⁵ 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,”³⁴⁶ 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

343. 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.” (internal citations omitted)).

344. Those situations are not hypothetical, but are actually real. See, e.g., Alex F. Levy, *More on the Unconstitutional Retroactivity of ‘Worst of Both Worlds FOSTA’*, TECH. & MKTG. L. BLOG (Mar. 29, 2018), <https://blog.ericgoldman.org/archives/2018/03/more-on-the-unconstitutional-retroactivity-of-worst-of-both-worlds-fosta-guest-blog-post.htm> [<https://perma.cc/J9VD-HFAP>] (“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.”).

345. *Peugh v. United States*, 569 U.S. 530, 531–33 (2003).

346. *Id.* at 532–33 (citation omitted).

penalties for underlying actions that were committed before (5)(B)'s promulgation.³⁴⁷

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 acts³⁴⁸ 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*.³⁴⁹ 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.³⁵⁰ The Court found the California statute fell squarely in category (2) of *ex post facto* law,³⁵¹ reasoning that:

347. In a Congressional Research Service report responding to Rep. Ann Wagner's request for an analysis of FOSTA's *ex post facto* implications, the author defended § 230(e)(5)(B) by analogizing the provision to *Dobbert v. Florida*, 432 U.S. 282 (1977), while differentiating it from *Stogner v. California*, 539 U.S. 607 (2003). CHARLES DOYLE, CONG. RSCH. SERV., ANALYSIS OF THE EX POST FACTO IMPLICATIONS OF THE ALLOW STATES AND VICTIMS TO FIGHT ONLINE SEX TRAFFICKING ACT OF 2017 (FOSTA) (H.R. 1865) 3–4 (2018). 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). *Id.* at 4. 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 339 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.” Doyle, *supra*, at 4. This is arguably an incorrect reading 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”).

348. The acts referred to violate both the new § 2421A and state criminal law, but were within pre-FOSTA § 230 immunity.

349. 539 U.S. 607 (2003).

350. *Id.* at 611.

351. *Id.* at 612.

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 (when the new law was enacted) did not trigger any such liability.³⁵²

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. However, as our contextual analysis of FOSTA shows, the textual scope of the 230 changes are, at this time, restricted almost entirely to claims under 1595 that can be brought by individual litigants or state AGs using the *parens patriae* provisions. It is unlikely that the removal of immunity for state criminal laws will have significant effect, because very few (perhaps no) state laws mirror the federal law precisely enough. As discussed, FOSTA does not remove immunity for state civil claims.

Section 2421A, the new criminal provision, has the potential to have more significant impacts, although its mental state provisions may in fact require proof of a higher mens rea than other existing federal criminal provisions. At this time, the conflicting court opinions on its reach and vagueness make it hard to determine whether it will survive constitutional challenges.

Yet 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.³⁵³ Due to these harmful repercussions, sex workers’ rights activists continue to urge courts

352. *Id.* at 613 (emphasis added).

353. *See supra* Section I.A.

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, the authors recommend that advocates push for the following interpretations of FOSTA:

- 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.
- 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, activities such as hosting third-party posts, listings, and advertisements related to sex work would not constitute illegally promoting and facilitating prostitution.
- 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.
- 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.