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## FOSTA: A Hostile Law with a Human Cost

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# FOSTA: A HOSTILE LAW WITH A HUMAN COST

Lura Chamberlain\*

*The Allow States and Victims to Fight Online Sex Trafficking Act of 2017 (“FOSTA”) rescinded legal immunity for websites that intentionally host user-generated advertisements for sex trafficking. However, Congress’s mechanism of choice to protect sex-trafficking victims has faced critique and backlash from advocates for those involved in commercial sex, who argue that FOSTA’s broad legislative language does far more to harm sex workers—a group distinct from sex-trafficking victims—than it does to end sex trafficking, chilling significant protected speech in the process. These critics posit that FOSTA’s results toward eradicating sex trafficking have been negligible and that its chief outcome has been to eliminate digital screening and security protections that consensual sex workers rely upon, thereby forcing the industry back into a far more dangerous street-based model. By eliminating protections for consensual sex workers, however, FOSTA endangers trafficking victims as well, and without online advertisements serving as a “smoking gun,” law enforcement has struggled to find trafficked individuals.*

*This Note explores FOSTA’s effects on consensual sex workers in the United States from two angles. First, it analyzes how FOSTA’s chill on speech that advocates for sex workers’ health, safety, and right to work in their industry contributes to the law’s unconstitutional overbreadth. Second, it compares FOSTA’s practical effects that are in line with its stated goals with the harmful consequences the law has inflicted upon the sex work community and beyond. While this Note proposes amended language to improve FOSTA, it ultimately advocates for FOSTA’s repeal and suggests that if sex work were decriminalized and more pragmatic legislation were implemented to better inculcate traffickers, mitigate harm to trafficking survivors, and reduce future victimization, FOSTA’s stated goals could be realized.*

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#### INTRODUCTION

A woman sent Phoenix Calida photographs of her tattoos so that if someone killed her at work, Calida could identify her body.<sup>1</sup> After being

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1. Siouxsie Q, *Anti-Sex-Trafficking Advocates Say New Law Cripples Efforts to Save Victims*, ROLLING STONE (May 25, 2018, 7:01 PM), <https://www.rollingstone.com/culture/>

raped and assaulted, TS Sonja now carries a concealed handgun to work because she has lost access to screening tools that kept dangerous people away from her.<sup>2</sup> Vanity, a young transgender woman, took her own life because she could no longer make ends meet in her increasingly dangerous and uncertain industry.<sup>3</sup>

According to the 485 members of Congress who supported the law<sup>4</sup> and the numerous celebrities who appeared in public service announcements evangelizing it,<sup>5</sup> the Allow States and Victims to Fight Online Sex Trafficking Act of 2017<sup>6</sup> (“FOSTA”) was going to save people.<sup>7</sup> FOSTA enjoyed a glowing narrative as a panacea for sexual corruption in the United States: it would reduce deaths, prevent rapes, and gut the marketplace for abusive sexual activity.<sup>8</sup> Pimps<sup>9</sup> would no longer be able to so readily sell a

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culture-features/anti-sex-trafficking-advocates-say-new-law-cripples-efforts-to-save-victims-629081/ [https://perma.cc/ZT7D-ZP7W].

2. Shawn Setaro, *Is the War on Sex Work the New War on Drugs?*, COMPLEX (July 24, 2018), <https://www.complex.com/life/2018/07/war-on-sex-work-new-war-on-drugs/> [https://perma.cc/FVP6-64WG].

3. Gaby Del Valle, *Why Decriminalizing Sex Work Is a Life or Death Issue*, NYLON (Sept. 13, 2018), <https://nylon.com/articles/sex-work-activism-sesta-fosta-life-death-issue> [https://perma.cc/GBY9-GUBL].

4. 164 CONG. REC. S1872 (daily ed. Mar. 21, 2018) (indicating that the Senate voted to enact FOSTA 97 to 2, with 1 abstention); 164 CONG. REC. H1319 (daily ed. Feb. 27, 2018) (indicating that the House voted to enact FOSTA 388 to 25, with 17 abstentions).

5. *In Haunting PSA, Celebrities Rally Support for Anti-Sex Trafficking Bill*, WOMEN WORLD (Jan. 23, 2018), <https://womenintheworld.com/2018/01/23/in-haunting-psa-celebrities-rally-support-for-anti-sex-trafficking-bill/> [https://perma.cc/2CNP-8TDJ].

6. Pub. L. No. 115-164, 132 Stat. 1253 (2018) (codified as amended at 18 U.S.C. §§ 1591, 1595, 2421A and 47 U.S.C. § 230). Some discourse about FOSTA also refers to the Stop Enabling Sex Trafficking Act (SESTA), an earlier unenacted Senate bill with a similar aim. S. 1693, 115th Cong. (2017). Although the bills were not identical, Congress effectively subsumed SESTA into FOSTA prior to the latter’s enactment. 164 CONG. REC. H1248 (daily ed. Feb. 26, 2018).

7. See 164 CONG. REC. S1852 (daily ed. Mar. 21, 2018) (statement of Sen. Blumenthal); 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/> [https://perma.cc/RC5M-N3MR].

8. See 164 CONG. REC. S1852–53 (daily ed. Mar. 21, 2018) (statement of Sen. Heitkamp); see also, e.g., Scott Cohn, *Online Sex Ads Are Disappearing Due to Anti-Trafficking Law, but Is That a Good Thing?*, CNBC (July 27, 2017, 9:47 AM), <https://www.cnbc.com/2018/07/27/online-sex-ads-are-disappearing-due-to-anti-trafficking-law.html> [https://perma.cc/3W9P-Q4M3]; Jackman, *supra* note 7; Sarah N. Lynch & Lisa Lambert, *Sex Ads Website Backpage Shut Down by U.S. Authorities*, REUTERS (Apr. 6, 2018), <https://www.reuters.com/article/us-usa-backpage-justice/sex-ads-website-backpage-shut-down-by-u-s-authorities-idUSKCN1HD2QP> [https://perma.cc/Y7NF-FG7F].

9. In popular culture, the term “pimp” often connotes a coercive relationship. In reality, third parties that facilitate or benefit from commercial sex may or may not be doing so with the legitimate consent of the individual performing the sexual service. See *Pimps, Managers and Other Third Parties: Making Distinctions Between Third Parties and Exploitation*, CANADIAN ALLIANCE FOR SEX WORK L. REFORM (2014) [hereinafter *Third Parties*], <http://www.safersexwork.ca/wp-content/uploads/2014/06/PimpsManagersOthers.pdf> [https://perma.cc/5TY9-6GYJ]. As this Note distinguishes sex trafficking, which is coercive,

woman's<sup>10</sup> body, and children would be safe from predation.<sup>11</sup> These results were as good as guaranteed because a significant amount of sex trafficking occurs online.<sup>12</sup> FOSTA would make it a crime for websites to continue allowing malefactors to advertise for this abhorrent behavior on their platforms.<sup>13</sup> With trafficking off the internet, the sex industry would shrivel.<sup>14</sup> The right parties would be held responsible.<sup>15</sup> No one would get hurt.

Within one month of FOSTA's enactment, thirteen sex workers<sup>16</sup> were reported missing, and two were dead from suicide.<sup>17</sup> Sex workers operating independently faced a tremendous and immediate uptick in unwanted solicitation from individuals offering or demanding to traffic them.<sup>18</sup> Numerous others were raped, assaulted, and rendered homeless or unable to feed their children.<sup>19</sup> These egregious acts of violence and economic

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from sex work, which is not, it will avoid the word "pimp" and use the word "trafficker" instead to indicate an exploitative third-party relationship.

10. This Note acknowledges that not all sex workers and sex-trafficking victims are cisgender women. An in-depth analysis of how FOSTA disproportionately affects marginalized communities involved in either activity, including the transgender community, is largely beyond the scope of this Note; however, this should not be interpreted as an erasure of the lived experiences of such individuals or of any disproportionate harm they might face.

11. See Lynch & Lambert, *supra* note 8.

12. See H.R. REP. NO. 115-572, at 3 (2018); 164 CONG. REC. H1293 (daily ed. Feb. 27, 2018) (statement of Rep. Poe).

13. See H.R. REP. NO. 115-572, at 6 (2018).

14. *Id.* at 3; see Lynch & Lambert, *supra* note 8.

15. See Tom Jackman, *Bill Enabling Prosecutors, Victims to Pursue Websites That Host Sex Traffickers Heads to White House*, WASH. POST (Mar. 21, 2018), <https://www.washingtonpost.com/news/true-crime/wp/2018/03/21/bill-enabling-prosecutors-to-pursue-websites-that-host-sex-traffickers-heads-to-white-house/> [<https://perma.cc/4WEN-NH6Q>].

16. This Note uses the term "sex worker" and its derivatives in place of more antiquated or derogatory phrasing as it is a less stigmatized and more broadly accurate term for consensual sexual services performed in exchange for compensation. See Rachel Marshall, *Sex Workers and Human Rights: A Critical Analysis of Laws Regarding Sex Work*, 23 WM. & MARY J. WOMEN & L. 47, 49–50 (2016). The word "prostitution" and its derivatives will be used in reference to legal materials that employ the term or in situations where the deliberate use of this phrasing is necessary to make a distinction. While this Note takes the position that voluntary sex work is legitimate and deserving of protection, nothing in this Note is intended to indicate a lack of support for the victims of sex trafficking.

17. Del Valle, *supra* note 3; Caty Simon, *On Backpage, TITS & SASS* (Apr. 25, 2018), <http://titsandsass.com/on-the-death-of-backpage/> [<https://perma.cc/39AT-6MKT>].

18. Samantha Cole, *Pimps Are Preying on Sex Workers Pushed Off the Web Because of FOSTA-SESTA*, VICE: MOTHERBOARD (Apr. 30, 2018), [https://motherboard.vice.com/en\\_us/article/bjpqvz/fosta-sesta-sex-work-and-trafficking](https://motherboard.vice.com/en_us/article/bjpqvz/fosta-sesta-sex-work-and-trafficking) [<https://perma.cc/MZ25-72JX>]; Emily McCombs, *"This Bill Is Killing Us": 9 Sex Workers on Their Lives in the Wake of FOSTA*, HUFFINGTON POST (May 17, 2018), [https://www.huffingtonpost.com/entry/sex-workers-sesta-fosta\\_us\\_5ad0d7d0e4b0edca2cb964d9](https://www.huffingtonpost.com/entry/sex-workers-sesta-fosta_us_5ad0d7d0e4b0edca2cb964d9) [<https://perma.cc/6DC7-2339>].

19. Janet Burns, *Sex Workers and Immigrants Are Under Attack. Don't Like It? Send DC a Fax*, FORBES (Dec. 5, 2018, 2:48 PM), <https://www.forbes.com/sites/janetwburns/2018/12/05/sex-workers-and-immigrants-are-under-attack-dont-like-it-send-warner-a-fax/> [<https://perma.cc/877Y-9S6G>] (recognizing that FOSTA "already ha[s] a body count" and lamenting that "women . . . have been raped" and "have lost their homes" and that "[t]ens or hundreds of thousands of people across the US have no way to support themselves now, and no hope"); see also Violet Blue, *Suicide, Violence, and Going Underground: FOSTA's Body*

devastation are directly attributable to FOSTA's enactment. Meanwhile, law enforcement professionals have complained that their investigations into sex-trafficking cases have been "blinded"—they no longer have advertisements to subpoena, digital records to produce for prosecutors, and leads that can bring them to live crime scenes full of evidence, like hotel rooms.<sup>20</sup> This blindness is not for lack of anything to see: one report suggests that online sex trafficking is as prevalent as ever.<sup>21</sup>

How did this legislation miss the mark so egregiously? And why is it still the law?

To respond to these questions, this Note explores FOSTA's imprecise means and unfortunate ends. Part I introduces the legal landscape that permitted these collateral consequences. First, this Part articulates the important distinction between sex trafficking and sex work and highlights how FOSTA harmfully conflates these activities. Second, it describes the history of 47 U.S.C. § 230—the internet-immunity provision that supposedly necessitated FOSTA's intervention for the government to hold websites accountable for online sex trafficking—and how FOSTA implicates sex workers in its attempt to protect victims of sex trafficking. Finally, it outlines First Amendment overbreadth doctrine to contextualize one of the main legal concerns regarding FOSTA and the source of the law's broad negative effects.

Part II discusses FOSTA's arguable unconstitutionality under the First Amendment due to its overbreadth. FOSTA's criminalization of any internet discussion that "promotes or facilitates prostitution" ultimately prevents consensual sex workers and their advocates from sharing health and safety information—dialogue that constitutes protected speech. Further, FOSTA could proscribe political speech that advocates for more permissive legal treatment of prostitution.

Part III explores policy arguments for and against FOSTA. It notes that the law results in disastrous health and safety outcomes for sex workers by forcing the industry back into the street and generally fails to achieve its stated goal of protecting victims of sex trafficking.

Finally, Part IV argues that FOSTA cannot stand as written. While redrafting could resolve some of the law's constitutional issues, this Note argues that repeal, coupled with structured replacement legislation, is the only viable option to truly accomplish FOSTA's stated goals without

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*Count*, ENGADGET (Apr. 27, 2018), <https://www.engadget.com/2018/04/27/suicide-violence-and-going-underground-fosta-sesta/> [<https://perma.cc/JSW5-W9A3>]; Elliot Harmon, *Sex Trafficking Experts Say SESTA Is the Wrong Solution*, ELECTRONIC FRONTIER FOUND. (Oct. 3, 2017), <https://www EFF.ORG/deeplinks/2017/10/sex-trafficking-experts-say-sesta-wrong-solution> [<https://perma.cc/K2N6-KNHJ>]; McCombs, *supra* note 18.

20. Jordan Fischer, *Running Blind: IMPD Arrests First Suspected Pimp in 7 Months*, INDY CHANNEL (Dec. 12, 2018, 11:40 AM), <https://www.theindychannel.com/longform/running-blind-impd-arrests-first-suspected-pimp-in-7-months> [<https://perma.cc/N9FG-hcnc>]; Harmon, *supra* note 19.

21. Ryan Tarinelli, *Online Sex Ads Rebound, Months After Shutdown of Backpage*, PHYS.ORG (Nov. 28, 2018), <https://phys.org/news/2018-11-online-sex-ads-rebound-months.html> [<https://perma.cc/3ELY-GVJG>].

substantial and inexcusable collateral damage to sex workers, victims of sex trafficking, and free speech writ large.

### I. WHAT FOSTERED FOSTA?

Congress enacted FOSTA in April 2018 to hold websites liable for user-generated content that facilitates sex trafficking—rescinding the near-categorical immunity that such sites had previously enjoyed from liability for culpable hosted content—and to make intentionally hosting such material a federal crime.<sup>22</sup> But some have argued that the language of the law has far wider implications than that goal would suggest and unconstitutionally chills a substantial amount of protected speech under the First Amendment.<sup>23</sup> Contextualizing FOSTA within the preexisting law that governs sex work and sex trafficking, internet immunity, and First Amendment jurisprudence brings the statute’s purpose, effect, and flaws into focus.

Part I.A provides an overview of laws governing the sale of sexual services in the United States and distinguishes trafficking activity from consensual sex work. Part I.B details the history of internet liability law in the United States, describing how it has prohibited or permitted third-party liability for user-generated content and how FOSTA altered existing law. Part I.C outlines the First Amendment overbreadth doctrine and the relevant jurisprudence necessary to evaluate claims for and against FOSTA’s constitutionality.

#### A. Consent and Coercion: Categorizing Commercial Sex

Sex trafficking and sex work are not interchangeable terms.<sup>24</sup> While precise standards vary, the definition of sex trafficking generally involves using “force, fraud, or coercion” to compel another person to engage in commercial sexual conduct.<sup>25</sup> Sex work, conversely, refers to the exchange, by adults, of money or goods for consensual sexual services.<sup>26</sup> Determining the existence of coercion can be difficult, as consent entails more than outward willingness to participate in something—an assent obtained under circumstances of disproportionate power may have been coerced even in the absence of an explicit threat.<sup>27</sup> However, consent is a crucial determinant in

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22. See *infra* Part I.B.2.

23. See *infra* Part II.B.

24. See, e.g., Jennifer Beard, *It’s Dangerous to Confuse Sex Work and Trafficking*, PUB. HEALTH POST (Sept. 12, 2018), <https://www.publichealthpost.org/viewpoints/sex-work-trafficking-sesta-fosta/> [<https://perma.cc/YM6R-LYWV>].

25. See, e.g., *What Is Human Trafficking?*, U.S. DEP’T HOMELAND SECURITY, <https://www.dhs.gov/blue-campaign/what-human-trafficking> [<https://perma.cc/SYSP-7BAA>] (last visited Mar. 15, 2019).

26. See, e.g., *Understanding Sex Work in an Open Society*, OPEN SOC’Y FOUND., <https://www.opensocietyfoundations.org/explainers/understanding-sex-work-open-society> [<https://perma.cc/8JEY-5HC5>] (last updated June 2017).

27. See, e.g., Janie Chuang, Note, *Redirecting the Debate over Trafficking in Women: Definitions, Paradigms, and Contexts*, 11 HARV. HUM. RTS. J. 65, 93 (1998).

defining and distinguishing trafficking victims and sex workers as distinct groups.<sup>28</sup>

Many anti-trafficking advocates assert that there is no such thing as voluntary sex work or that individuals engaging in sex work uncoerced compose such a minority that laws infringing on their business for the sake of helping victims are fully justified.<sup>29</sup> However, unilateral lawmaking that focuses on the sexual transaction as a de facto evil, rather than identifying coercive circumstances as the event that creates a victim, fundamentally misunderstands both the unique horror of trafficking and the legitimate agency inherent in sex work.<sup>30</sup> Efforts to curtail sex trafficking that treat all commercial sex as criminal may actually drive true trafficking further from regulatory purview—“saving” those who do not see themselves as victims and threatening constitutionally protected speech of an even remotely sexual nature.<sup>31</sup>

Though the law does not always articulate this distinction clearly, separate bodies of jurisprudence have developed to govern coerced and voluntary sexual labor.<sup>32</sup> While both activities are largely criminalized in the United States, two critical points deserve emphasis: first, not all forms of sex work are illegal, and second, not all illegal sex work constitutes sex trafficking.<sup>33</sup> Part I.A.1 provides background on sex-trafficking legislation and relevant treaties in effect in the United States. Part I.A.2 details domestic laws governing sex work, usually referred to in legislation as “prostitution.”<sup>34</sup>

### 1. Legal Efforts to Stop Domestic Sex Trafficking

Though experts disagree about the size of the sex-trafficking industry in the United States,<sup>35</sup> the practice of coercing an individual into performing

28. See Janie A. Chuang, *Rescuing Trafficking from Ideological Capture: Prostitution Reform and Anti-Trafficking Law and Policy*, 158 U. PA. L. REV. 1655, 1682–83 (2010); *Sex Worker Myths vs Reality*, URB. JUST. CTR. 1, <https://swp.urbanjustice.org/sites/default/files/08-Myths.pdf> [<https://perma.cc/TSR2-SCLS>] (last visited Mar. 15, 2019).

29. See Chuang, *supra* note 28, at 1664–65.

30. See Chuang, *supra* note 27, at 80, 82; see also Carol H. Hauge, *Prostitution of Women and International Human Rights Law: Transforming Exploitation into Equality*, 8 N.Y. INT'L L. REV. 23, 49 (1995).

31. See Tina Horn, *Sex-Worker Advocates Sue over Internet “Censorship” Law*, ROLLING STONE (June 30, 2018, 10:53 AM), <https://www.rollingstone.com/culture/culture-features/sex-worker-advocates-lawsuit-Internet-censorship-sesta-fosta-666783/> [<https://perma.cc/4C7D-Z3ST>].

32. See *infra* Parts I.A.1–2.

33. See Melissa Gira Grant, *Proposed Federal Trafficking Legislation Has Surprising Opponents: Advocates Who Work with Trafficking Victims*, APPEAL (Jan. 26, 2018), <https://theappeal.org/proposed-federal-trafficking-legislation-has-surprising-opponents-advocates-who-work-with-bf418c73d5b4/> [<https://perma.cc/QL6M-KS8W>]; see also Beard, *supra* note 24.

34. See *supra* note 16.

35. See Maggie McNeill, *Lies, Damned Lies and Sex Work Statistics*, WASH. POST (Mar. 27, 2014), <https://www.washingtonpost.com/news/the-watch/wp/2014/03/27/lies-damned-lies-and-sex-work-statistics/> [<https://perma.cc/WB85-FMV2>]; see also Chuang, *supra* note 28, at 1694–95 (explaining that the original Trafficking Victims Protection Act collapsed nonsexual trafficking statistics into sex-trafficking statistics with the effect of inflating the

sexual services is abhorrent and deserves the attention of the legal community. Historically, much anti-trafficking law has either presumed that all sex work is inherently exploitative or has declined to address consent in definitions of trafficking.<sup>36</sup> The earliest international conventions on the subject focused on the fraudulent “recruitment and transportation” of women<sup>37</sup> without addressing “the end purposes of the trafficking” at all.<sup>38</sup> Conventions in 1933 and 1949 explicitly stated that “victim” consent was not a barrier to the prosecution of a trafficking offense.<sup>39</sup> The 1979 United Nations Convention on the Elimination of All Forms of Discrimination Against Women (“CEDAW”), in contrast, distinguishes sex work from exploitative prostitution and is focused only on combatting the latter,<sup>40</sup> but the United States has not ratified this treaty.<sup>41</sup>

Domestically, the United States did not enact federal legislation specifically addressing sex trafficking until the cusp of the twenty-first century, prosecuting traffickers under either the Mann Act of 1910,<sup>42</sup> which prohibits transporting individuals interstate for the purposes of prostitution, or Civil War-era statutes outlawing involuntary servitude.<sup>43</sup> The keystone effort to update this legal territory was the Trafficking Victims Protection Act of 2000<sup>44</sup> (TVPA), passed as part of omnibus legislation that created and amended law across a broad swath of federal titles and represented “the first federal law to criminalize trafficking in persons.”<sup>45</sup> Per the TVPA, “[t]he

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latter and rallying public support for the legislation); Jenny Heineman & Brooke Wagner, *The Sex Trafficking Panic Is Based on Myths*, BUZZFEED NEWS (Apr. 18, 2018, 1:46 PM), <https://www.buzzfeednews.com/article/jennyheineman/sex-trafficking-myths-sesta-fosta> [<https://perma.cc/BGA4-DBH2>].

36. See Chuang, *supra* note 27, at 83.

37. Gender-neutral language for trafficked individuals did not appear in international conventions on trafficking until 1949. See *id.* at 75. However, modern-day definitions of trafficking do not require a transportation component. See Jennifer A. L. Sheldon-Sherman, *The Missing “P”:* Prosecution, Prevention, Protection, and Partnership in the Trafficking Victims Protection Act, 117 PENN ST. L. REV. 443, 450 (2012).

38. Chuang, *supra* note 27, at 74–75.

39. See *id.* at 75–76 (discussing the 1933 International Convention on the Suppression of the Traffic in Women of Full Age and the 1949 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, respectively).

40. See *id.* at 78.

41. See *Ratification of 18 International Human Rights Treaties*, UNITED NATIONS HUM. RTS. OFF. HIGH COMMISSIONER, <http://indicators.ohchr.org/> [<https://perma.cc/PDA7-FLVY>] (last visited Mar. 15, 2019). For an examination of why the United States has not ratified CEDAW, see generally Ann Elizabeth Mayer, *Reflections on the Proposed United States Reservations to CEDAW: Should the Constitution Be an Obstacle to Human Rights?*, 23 HASTINGS CONST. L.Q. 727 (1996).

42. White-Slave Traffic (Mann) Act, ch. 395, 36 Stat. 825 (1910) (codified as amended at 18 U.S.C. §§ 2421–2424 (2012)).

43. See Sheldon-Sherman, *supra* note 37, at 451.

44. Pub. L. No. 106-386, div. A, 114 Stat. 1464, 1466–91 (codified as amended in scattered sections of 18 U.S.C. and 22 U.S.C.).

45. Sheldon-Sherman, *supra* note 37, at 452. The TVPA also criminalized nonsexual trafficking and created a pathway to citizenship for immigrant victims of trafficking (the “T visa”), both of which are beyond the scope of this Note. See generally Sasha L. Nel, *Victims of Human Trafficking: Are They Adequately Protected in the United States?*, 5 CHI.-KENT J.

term ‘sex trafficking’ means the recruitment, harboring, transportation, provision, or obtaining of a person for the purpose of a commercial sex act.”<sup>46</sup> Interestingly, the TVPA includes coercion as a factor in nonsexual trafficking offenses but declines to include it in the definition of sex trafficking, though it is a required element in the *crime* of sex trafficking under the TVPA when the trafficked person is over the age of majority.<sup>47</sup> Sex trafficking that involves “force, fraud or coercion” *or* compels a sexual act from a person under age eighteen is defined as a “severe form[] of trafficking in persons”<sup>48</sup> and is a crime under 18 U.S.C. § 1591.<sup>49</sup> The trafficking of children is punished more severely than the trafficking of adults, irrespective of coercion.<sup>50</sup>

The internet introduced a new arena where sexual services could be bought and sold.<sup>51</sup> The Stop Advertising Victims of Exploitation (SAVE) Act of 2015<sup>52</sup> added “advertising” as a mode of conduct criminalized under 18 U.S.C. § 1591, making it explicitly illegal to knowingly advertise sex trafficking or benefit financially from such advertising.<sup>53</sup>

## 2. Treatment of Sex Work in the United States

The United States tolerated prostitution—the exchange of sex for money—for much of the nation’s early history.<sup>54</sup> Efforts to corral and criminalize the practice, generally “under a theory of morality or social nuisance,”<sup>55</sup> only gained prevalence in the early twentieth century.<sup>56</sup> Congress has the authority to regulate interstate prostitution under the Commerce Clause,<sup>57</sup> but

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INT’L & COMP. L. 3 (2005). Congress has reauthorized the TVPA several times. See Sheldon-Sherman, *supra* note 37, at 467.

46. 22 U.S.C. § 7102(9) (2012); see also Mohamed Y. Mattar, *Interpreting Judicial Interpretations of the Criminal Statutes of the Trafficking Victims Protection Act: Ten Years Later*, 19 AM. U. J. GENDER SOC. POL’Y & L. 1247, 1295 (2011) (acknowledging that coercion is a necessary element to prove in a trafficking crime committed against an adult, but not against a child).

47. See Chuang, *supra* note 28, at 1679.

48. 22 U.S.C. § 7102(8)(A).

49. 18 U.S.C. § 1591 (2012).

50. 18 U.S.C. § 2422 (2012) (capping penalties for trafficking adults at twenty years, whereas penalties for trafficking children range from ten years to life).

51. See *infra* Part I.B.2.

52. Pub. L. No. 114-22, § 118, 129 Stat. 227, 247 (codified as amended at 18 U.S.C. § 1591 (Supp. III 2016)).

53. 18 U.S.C. § 1591 (2012 & Supp. III 2016); see also Backpage.com, LLC v. Lynch, 216 F. Supp. 3d 96, 99 (D.D.C. 2016).

54. See Susan E. Thompson, Note, *Prostitution—a Choice Ignored*, 21 WOMEN’S RTS. L. REP. 217, 223–25 (2000).

55. Danna Altemimei, Note, *Prostitution and the Right to Privacy: A Comparative Analysis of Current Law in the United States and Canada*, 2013 U. ILL. L. REV. 625, 629.

56. See Thompson, *supra* note 54, at 225. By 1925, every state except Nevada had outlawed prostitution. Gail M. Deady, Note, *The Girl Next Door: A Comparative Approach to Prostitution Laws and Sex Trafficking Victim Identification Within the Prostitution Industry*, 17 WASH. & LEE J.C.R. & SOC. JUST. 515, 525 (2011).

57. U.S. CONST. art. I, § 8, cl. 3; see also Lauren M. Davis, *Prostitution*, 7 GEO. J. GENDER & L. 835, 842 (2006); Altemimei, *supra* note 55, at 631.

historically, proscriptive federal legislation was largely limited to the Mann Act.<sup>58</sup> The conduct criminalized therein would be better defined as sex trafficking today, but the Act nonetheless placed a damper on the growth of prostitution as an industry in the United States.<sup>59</sup> Through the Travel Act of 1961,<sup>60</sup> however, the federal government gained a tool to prosecute individuals who used an interstate channel, like travel, mail, or telecommunications, to “promote, manage, establish, [or] carry on” unlawful activity from a list that included prostitution offenses in violation of state law.<sup>61</sup> Attempts to establish a constitutional right to engage in sex work under the Fourteenth Amendment’s privacy penumbra, through which other sex-related activity that had once been considered morally repugnant became legalized, have been unsuccessful.<sup>62</sup>

The majority of legislation governing sex work has been enacted at the state level.<sup>63</sup> In the early twentieth century, due to moral outrage, burgeoning xenophobia, and public health concerns, states began to curtail prostitution, often by enacting legislation to limit or regulate the course of business, before eventually outlawing it altogether.<sup>64</sup> Today, prostitution is legal only in

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58. White-Slave Traffic (Mann) Act, ch. 395, 36 Stat. 825 (1910) (codified as amended at 18 U.S.C. §§ 2421–2424 (2012)).

59. 18 U.S.C. § 2421 (2012); see also Nancy Kubasek & Kaela Herrera, *Combating Domestic Sex Trafficking: Time for a New Approach*, 24 TEX. J. WOMEN GENDER & L. 167, 184 (2015) (noting that the Mann Act has also been applied in cases of sex trafficking due to its relevant language on transportation and coercion). Although a 1986 amendment refined its language to refer strictly to criminal sexual activity rather than general “debauchery” or “immoral purpose,” which had been part of the Act’s original purview, the Mann Act remains good law to this day. Michael Conant, *Federalism, the Mann Act, and the Imperative to Decriminalize Prostitution*, 5 CORNELL J.L. & PUB. POL’Y 99, 99 (1996). FOSTA amended the Mann Act to add 18 U.S.C. § 2421A, which made it a federal crime for UISPs and other interactive computer services to promote or facilitate prostitution, as described throughout this Note. See *infra* Part I.B.3.

60. Pub. L. No. 87-228, 75 Stat. 498 (codified as amended at 18 U.S.C. § 1952 (2012)).

61. 18 U.S.C. § 1952 (2012). For more background on the Travel Act, see generally Andrew Wiktor, Note, *You Say Intrastate, I Say Interstate: Why We Should Call the Whole Thing Off*, 87 FORDHAM L. REV. 1323 (2018).

62. See *Erotic Serv. Provider Legal Educ. & Research Project v. Gascon*, 880 F.3d 450, 459 (9th Cir. 2018) (holding that “there is no constitutional right to engage in illegal employment, namely, prostitution”); see also Derek Hawkins, *They Argued That Prostitution Is a Constitutional Right. Nice Try, Said Federal Court*, WASH. POST (Jan. 18, 2018), <https://www.washingtonpost.com/news/morning-mix/wp/2018/01/18/they-argued-that-prostitution-is-a-constitutional-right-nice-try-said-federal-court/> [https://perma.cc/9tjp-e8xj].

63. See Davis, *supra* note 57, at 836.

64. See Thompson, *supra* note 54, at 222–25; Burns, *supra* note 19.

select parts of Nevada.<sup>65</sup> Nevertheless, sex work remains a thriving, if mostly illicit, national industry.<sup>66</sup>

While the exact definitions of prostitution differ across states, criminal statutes tend to define the act as involving “some degree of sexual activity or conduct, . . . compensation, and . . . intent to commit prostitution,”<sup>67</sup> with the precise scope of conduct and surrounding circumstances also subject to state-to-state variation.<sup>68</sup> Several states also prohibit “pandering,” definitions of which generally involve giving payment to another individual to engage in sexual activity or conduct.<sup>69</sup> Importantly, some activities that could be understood to fall under the umbrella of “sex work” may be outside a given state’s criminal definition of prostitution or pandering.<sup>70</sup>

### B. Section 230, User-Interactive Service-Provider Immunity, and FOSTA

In seeking to curtail online sex trafficking, FOSTA eliminated legal immunity for websites that host advertisements for sexual services. This immunity originally developed to resolve an unintended consequence of

65. Prostitution in Nevada is subject to numerous regulatory limits on the state and county levels. State law prohibits prostitution outside of brothels and outlaws brothels in counties with populations above 700,000. See NEV. REV. STAT. § 244.345 (2018); Daria Snadowsky, Note, *The Best Little Whorehouse Is Not in Texas: How Nevada’s Prostitution Laws Serve Public Policy, and how Those Laws May Be Improved*, 6 NEV. L.J. 217, 222 (2005). The state originally established this quota to implement a de facto ban on prostitution in Las Vegas and the rest of Clark County and has periodically raised it in response to rising population levels in rural counties. See *id.* County ordinances further prohibit, limit, or regulate brothel operation in Nevada’s remaining counties. See generally *id.*

66. See Carina Kolodny, *9 Things You Didn’t Know About American Prostitution*, HUFFINGTON POST (Nov. 8, 2017), [https://www.huffingtonpost.com/2014/03/12/sex-trade-study\\_n\\_4951891.html](https://www.huffingtonpost.com/2014/03/12/sex-trade-study_n_4951891.html) [<https://perma.cc/WV9C-4DVA>]; see also Elizabeth M. Johnson, Note, *Buyers Without Remorse: Ending the Discriminatory Enforcement of Prostitution Laws*, 92 TEX. L. REV. 717, 719 (2014).

67. Davis, *supra* note 57, at 837.

68. *Id.* at 837–39. Affirmative defenses to prostitution or pandering charges typically include only marriage and entrapment. *Id.* at 839–40; see also *U.S. Federal and State Prostitution Laws and Related Punishments*, PROCON.ORG, <https://prostitution.procon.org/view.resource.php?resourceID=000119> [<https://perma.cc/SM3L-RG8H>] (last updated May 4, 2018).

69. See Davis, *supra* note 57, at 839.

70. A blatant example of legal sexual work is pornography of adults, which is legal in all fifty states and is beyond the scope of this Note. See *Stanley v. Georgia*, 394 U.S. 557, 568 (1969) (holding that “the First and Fourteenth Amendments prohibit making mere private possession of obscene material a crime”). Legal activity closer to the traditional prototype of prostitution may include companionship escorting, fetish work that is not explicitly sexual, exotic dancing (i.e., stripping), camera work (i.e., where an individual performs an activity for the viewer’s sexual gratification via webcam), and involvement in the “sugar dating” industry. See generally Clay Calvert & Robert D. Richards, *Stripping Away First Amendment Rights: The Legislative Assault on Sexually Oriented Businesses*, 7 N.Y.U. J. LEGIS. & PUB. POL’Y 287 (2004); Alex Miller, *Sugar Dating: A New Take on an Old Issue*, 20 BUFF. J. GENDER L. & SOC. POL’Y 33 (2012); Michael Nedelman, *After Craigslist Personals Go Dark, Sex Workers Fear What’s Next*, CNN (Apr. 11, 2018, 12:18 PM), <https://www.cnn.com/2018/04/10/health/sex-workers-craigslist-personals-trafficking-bill/index.html> [<https://perma.cc/4UG4-39KT>]; Matt Richtel, *Intimacy on the Web, with a Crowd*, N.Y. TIMES (Sept. 21, 2013), <https://www.nytimes.com/2013/09/22/technology/intimacy-on-the-web-with-a-crowd.html> [<https://perma.cc/626A-FPT8>].

early internet jurisprudence that inadvertently incentivized websites not to moderate user-posted content.<sup>71</sup> In recent years, many have argued that this immunity had been misapplied to permit crime (especially sex crimes) to proliferate; it was from this concern that FOSTA emerged.<sup>72</sup> This section describes the legal history of website liability for third-party content and the genesis of “host immunity,” discusses conflicts that this immunity created as the internet has evolved in recent years, outlines FOSTA’s legislative support and provisions, and contextualizes and clarifies the role that one major website played in mobilizing support FOSTA.

### 1. A Brief History of Digital Liberty and Liability

In an attempt to corral the “Wild West” landscape of an increasingly ubiquitous and exponentially growing commercial internet, Congress passed the Telecommunications Act of 1996.<sup>73</sup> This Act represented a tremendous modernization of its predecessor, the Communications Act of 1934,<sup>74</sup> and implemented many significant changes intended to encourage market growth and preserve civil liberties.<sup>75</sup> However, the Telecommunications Act of 1996 also included a bill to *increase* regulation of speech on the internet: the Communications Decency Act of 1996 (CDA),<sup>76</sup> which sought, *inter alia*, to shield minors from obscenity and harm by criminalizing the knowing posting of indecent material online where minors could encounter it.<sup>77</sup>

The American Civil Liberties Union (ACLU) swiftly challenged the CDA as unconstitutionally overbroad under the First Amendment.<sup>78</sup> The U.S. Supreme Court agreed, striking down the majority of the CDA, including the provisions proscribing indecent content, within the year.<sup>79</sup> What did survive the challenge, however, was the CDA’s addition of § 230 to title 47 of the U.S. Code (“Section 230”), which eliminated a legal loophole<sup>80</sup> over the degree of responsibility that interactive computer services had for the third-

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71. *See infra* Part I.B.2.

72. *See infra* Part I.B.3.

73. Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.); *see* Lorraine Mercier, *The Communications Decency Act, Congress’ First Attempt to Censor Speech over the Internet*, 9 LOY. CONSUMER L. REP. 274, 274 (1997).

74. Pub. L. No. 73-416, 48 Stat. 1064 (codified as amended in scattered sections of 47 U.S.C.).

75. *See id.*

76. Pub. L. No. 104-104, § 502, 110 Stat. 56, 133 (codified as amended in scattered sections of 47 U.S.C.); *see also* Mercier, *supra* note 73, at 274. Most of the CDA’s original provisions were promptly enjoined on constitutional grounds. *See infra* note 79 and accompanying text.

77. 47 U.S.C. § 223 (2012); *see also* Mercier, *supra* note 73, at 278–79.

78. For a more in-depth discussion of the CDA’s overbreadth, *see infra* notes 206–11, 228–32 and accompanying text.

79. *See* ACLU v. Reno, 929 F. Supp. 824, 883–84 (E.D. Pa. 1996), *aff’d*, 521 U.S. 844 (1997); Danielle Keats Citron & Benjamin Wittes, *The Internet Will Not Break: Denying Bad Samaritans § 230 Immunity*, 86 FORDHAM L. REV. 401, 404 (2017).

80. *See infra* notes 89–99 and accompanying text.

party content they hosted.<sup>81</sup> This legislation helped establish the internet we recognize today.<sup>82</sup>

User-interactive computer services (UISPs),<sup>83</sup> a subset of interactive computer services, are websites that offer a forum for users to post their own content, and include all social media platforms, chatrooms, “comment” features on any website, and most digital marketplaces.<sup>84</sup> Today, UISPs represent the face of the internet for billions of people worldwide.<sup>85</sup> However, for the fledgling internet of the 1990s, UISPs presented a slew of novel legal questions that print-media jurisprudence proved an imperfect guide for resolving.<sup>86</sup>

The act of posting something online has no true equivalent in print media. It is reasonable to assume that a publisher of printed material has complete knowledge of the third-party content it disseminates because the publisher must have reviewed that content in some conscious, editorial way prior to releasing it.<sup>87</sup> In contrast, the internet made it possible for publication to be

81. 47 U.S.C. § 230(f)(2) (2012) (defining an interactive computer service 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”).

82. See 164 CONG. REC. S1866 (daily ed. Mar. 21, 2018) (statement of Sen. Wyden) (noting scholarly claims that Section 230 “created \$1 trillion worth of economic value in the private economy” and that “[i]t is impossible to imagine what the Internet ecosystem would look like today without it”); see, e.g., Olivier Sylvain, *Intermediary Design Duties*, 50 CONN. L. REV. 203, 217–18, 244 (2018) (stating that “it is hard to measure how innovative developers would be had Congress not enacted the CDA”).

83. 47 U.S.C. § 230(f)(2). Section 230 refers to these services as “interactive computer service[s].” *Id.* Much subsequent jurisprudence refers interchangeably to either “interactive service providers” or “interactive computer service providers.” See generally *Zeran v. Am. Online, Inc.*, 129 F.3d 327 (4th Cir. 1997); *Doe ex rel. Roe v. Backpage.com, LLC*, 104 F. Supp. 3d 149 (D. Mass. 2015), *aff’d sub nom. Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12 (1st Cir. 2016). Each of these terms encompasses an array of entities, some of which are beyond the scope of this Note. For a full survey of the entities covered under Section 230, which also include search engines like Google and Yahoo, see KATHLEEN ANN RUANE, CONG. RESEARCH SERV., LSB10082, HOW BROAD A SHIELD? A BRIEF OVERVIEW OF SECTION 230 OF THE COMMUNICATIONS DECENTY ACT 2 (2018), <https://fas.org/sgp/crs/misc/LSB10082.pdf> [<https://perma.cc/AY7T-RJGT>]. In today’s common technological parlance, the acronym “ISP” generally stands for “internet service provider,” which is understood to refer to broadband service providers like Verizon and AT&T. While such providers also fall within Section 230’s purview, the role of these entities in the publication of content differs substantially from those of blogs and social media platforms. *Id.* Accordingly, for clarity and to avoid unwieldy pluralization, this Note refers specifically to websites with a content-hosting function that allows interactive user behavior as “User-Interactive Service Providers,” or UISPs.

84. See RUANE, *supra* note 83.

85. See, e.g., Simon Kemp, *Digital in 2018: World’s Internet Users Pass the 4 Billion Mark*, WE ARE SOC. (Jan. 30, 2018), <https://wearesocial.com/uk/blog/2018/01/global-digital-report-2018> [<https://perma.cc/9MS5-C8MM>]; Aaron Smith & Monica Anderson, *Social Media Use in 2018*, PEW RES. CTR. (Mar. 1, 2018), <http://www.pewinternet.org/2018/03/01/social-media-use-in-2018/> [<https://perma.cc/KBE3-PSFY>].

86. See *infra* notes 89–99 and accompanying text.

87. See, e.g., *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, No. 31063/94, 1995 WL 323710, at \*3 (N.Y. Sup. Ct. May 24, 1995).

instantaneous and effectively automatic. This power permitted an unprecedented scale of communication, which accordingly necessitated a new body of jurisprudence specific to the online world.<sup>88</sup>

Relying on analogies to pre-internet paradigms, pre-CDA case law established a legal incongruity that disincentivized UISPs from moderating content on their platforms altogether.<sup>89</sup> Judge Peter K. Leisure of the Southern District of New York likened UISPs that took no moderating action whatsoever to newsstands, reasoning that each plausibly had no knowledge of the third-party content they hosted and could therefore not be held legally responsible for that content's substance.<sup>90</sup> Conversely, UISPs that took steps to moderate content donned a publisher's hat in doing so, and in exercising knowledge of—and control over—the third-party content posted to their platforms, they thereby accepted liability for actionable content they failed to delete.<sup>91</sup> This jurisprudence created a dilemma wherein it was more advantageous for UISPs to entirely abdicate moderator duties—and thus responsibility for content—than to open the door to broad liability by engaging in moderation that could later prove inexact.<sup>92</sup>

Section 230 closed this “loophole” by providing websites with federal immunity from civil liability<sup>93</sup> for user-posted content.<sup>94</sup> Section 230 specifically stated that UISPs could not be considered publishers or speakers of third-party content<sup>95</sup> and further precluded civil liability for the moderation of said content—in other words, a UISP's imperfect moderation would no longer expose it to litigation.<sup>96</sup> Legislators intended this immunity

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88. *ACLU v. Reno*, 929 F. Supp. 824, 844 (E.D. Pa. 1996) (“The Internet is . . . a unique and wholly new medium of worldwide human communication.”), *aff'd*, 521 U.S. 844 (1997).

89. *See generally* *Cubby, Inc. v. CompuServe Inc.*, 776 F. Supp. 135 (S.D.N.Y. 1991); *Stratton Oakmont*, 1995 WL 323710.

90. *See Cubby*, 776 F. Supp. at 140 (describing the defendant's role in hosting third-party content as that of a distributor, comparing it to a newsstand selling a print publication over which it exercised no editorial power, and noting that the First Amendment “protect[s] distributors of publications”).

91. *See Stratton Oakmont*, 1995 WL 323710, at \*4.

92. *See generally* *Cubby*, 776 F. Supp. 135; *Stratton Oakmont*, 1995 WL 323710.

93. *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997). “[Section 230 precludes] lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content . . .” *Id.*; *see also* Benjamin C. Zipursky, *Online Defamation, Legal Concepts, and the Good Samaritan*, 51 VAL. U. L. REV. 1, 9 (2016) (noting that “[t]he word ‘immunity’ does not appear in [Section 230]” but that “courts across the nation routinely say that it creates a federal immunity for Internet service providers and users with regard to content provided by others”).

94. 47 U.S.C. § 230 (2012). Section 230's immunity does not extend to criminal causes of action. *Id.* § 230(e). For a more expansive history of Section 230, *see generally* David S. Ardia, *Free Speech Savior or Shield for Scoundrels: An Empirical Study of Intermediary Immunity Under Section 230 of the Communications Decency Act*, 43 LOY. L.A. L. REV. 373 (2010).

95. 47 U.S.C. § 230(c)(1). FOSTA implemented statutory changes that carved out exemptions from Section 230 as it existed prior to April 11, 2018. *See infra* Part I.B.3. The specific text of 47 U.S.C. § 230(c)(1) has not changed.

96. 47 U.S.C. § 230(c)(2).

to neutralize “the threat that tort-based lawsuits pose to freedom of speech,”<sup>97</sup> as well as to “encourag[e] private efforts to deal with Internet indecency,” “promote the continued development of the Internet,” and “preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services.”<sup>98</sup> The subsection of Section 230 that actually grants this immunity is notably titled “Protection for ‘Good Samaritan’ blocking and screening of offensive material”: Section 230 was designed to encourage UISPs to moderate content, not to abandon supervisory obligations entirely.<sup>99</sup>

Under pre-FOSTA Section 230, a website like Facebook could not be held legally liable if a user’s post on its platform violated a civil law—for instance, if it was defamatory—although, of course, the same immunity was not extended to the actual writer of the defamatory content.<sup>100</sup> In addition to promoting free speech, this immunity made it possible for smaller UISPs—those that lacked the capital to aggressively police third-party content or defend against lawsuits—to proliferate.<sup>101</sup> For these reasons, at least until recently, Section 230 was “lauded as ‘the most important law protecting Internet speech’ and called ‘perhaps the most influential law to protect the kind of innovation that has allowed the Internet to thrive.’”<sup>102</sup>

## 2. Has Free Speech Become a Free Pass?

Even before FOSTA, Section 230 garnered its share of critics, many of whom felt that the law was overly permissive of, and offered no recourse against, bad conduct in what had quickly become a ubiquitous personal, professional, and commercial space.<sup>103</sup> Some argued that the law granted broader liberties than its drafters intended when severed from the rest of the original CDA;<sup>104</sup> that any need to proactively stimulate the free market online had long since become obsolete given the internet’s accelerating ubiquity since the 1990s;<sup>105</sup> and that new internet-age challenges pitting free speech

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97. *Zeran*, 129 F.3d at 330. For examples of the offending lawsuits in question, see generally *Cubby*, 776 F. Supp. 135; and *Stratton Oakmont*, 1995 WL 323710.

98. Ardia, *supra* note 94, at 410 (fourth alteration in original) (quoting 47 U.S.C. § 230(b)(2) (2006)); see also Citron & Wittes, *supra* note 79, at 407.

99. 47 U.S.C. § 230(c); see also Citron & Wittes, *supra* note 79, at 407.

100. See, e.g., *Zeran*, 129 F.3d at 330.

101. See Cindy Cohn, *Bad Facts Make Bad Law: How Platform Censorship Has Failed So Far and How to Ensure That the Response to Neo-Nazis Doesn’t Make It Worse*, 2 GEO. L. TECH. REV. 432, 439 (2018).

102. Note, *Section 230 as First Amendment Rule*, 131 HARV. L. REV. 2027, 2027 (2018) (quoting *CDA 230: The Most Important Law Protecting Internet Speech*, ELECTRONIC FRONTIER FOUND., <https://www.eff.org/issues/cda230> [<https://perma.cc/YHE7-3QN9>]). Supporters have touted Section 230’s success in limiting excessive litigation on libel and other grounds. See, e.g., Eric Goldman, *Section 230’s Success in Under-the-Radar Cases*, TECH. & MARKETING L. BLOG (Sept. 21, 2018), <https://blog.ericgoldman.org/archives/2018/09/section-230s-success-in-under-the-radar-cases.htm> [<https://perma.cc/RMK4-8C7C>].

103. See Sylvain, *supra* note 82, at 218.

104. See, e.g., Citron & Wittes, *supra* note 79, at 408.

105. See *id.* at 411.

and open-market concerns against concerns over digital privacy and safety justified reassessing the costs and benefits of the status quo.<sup>106</sup> Supporters, meanwhile, touted it as rightfully assigning individual responsibility, noting that “[Section 230] send[s] a clear message: in the online world, users are responsible for their own actions and speech, and online platforms can mediate that speech—or not—as fits the needs of their community.”<sup>107</sup>

Section 230 never offered immunity to content producers, and recently, courts have begun to explore the extent to which a UISP’s interference with user speech could constitute speech ipso facto. Both *Fair Housing Council v. Roommates.com, LLC*<sup>108</sup> and *Jane Doe No. 1 v. Backpage.com, LLC*<sup>109</sup> explored the dichotomy between a service provider and a content producer prior to the introduction of FOSTA.<sup>110</sup> In *Roommates.com*, the Ninth Circuit held that Section 230 did not afford immunity to the defendant UISP for violating the Fair Housing Act.<sup>111</sup> There, the defendant required users to fill out a questionnaire that affirmatively elicited discriminatory information, which then appeared in user-generated content on the defendant’s platform—such activity crossed the line into actual content production on the part of the UISP.<sup>112</sup> In *Backpage.com*, conversely, the First Circuit declined to find that the defendant UISP could be held liable for alleged trafficking violations committed by its users, even when it performed some editorial activities on those posts, because Section 230 precluded claims that would treat a website as the publisher of third-party content.<sup>113</sup> Many members of the public found the latter ruling morally outrageous, and along with similar lawsuits, *Backpage.com* helped engender a movement to remove this legal impediment to liability.<sup>114</sup>

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[T]he networked environment today is profoundly different from the one in 1996. Twenty years ago, commercial service providers had twelve million subscribers. Now billions of individuals are online in ways that would have been unimaginable when Congress passed the CDA. As Judge Alex Kozinski noted in *Fair Housing Council v. Roommate[s].com*, “the Internet has outgrown its swaddling clothes and no longer needs to be so gently coddled.”

*Id.* (quoting *Fair Hous. Council v. Roommates.com, LLC*, 521 F.3d 1157, 1175 n.39 (9th Cir. 2008) (en banc)).

106. See, e.g., Sara Ashley O’Brien, *1,100 Strangers Showed Up at His Home for Sex. He Blames Grindr*, CNN (Apr. 14, 2017, 1:02 PM), <https://money.cnn.com/2017/04/14/technology/grindr-lawsuit/index.html> [<https://perma.cc/M458-S7Y7>].

107. Joe Mullin, *How FOSTA Could Give Hollywood the Filters It’s Long Wanted*, ELECTRONIC FRONTIER FOUND. (Mar. 16, 2018), <https://www.eff.org/deeplinks/2018/03/how-fosta-will-get-hollywood-filters-theyve-long-wanted> [<https://perma.cc/9ZUT-2PG4>].

108. 521 F.3d 1157 (9th Cir. 2008) (en banc).

109. 817 F.3d 12 (1st Cir. 2016).

110. *Id.* at 20; *Roommates.com*, 521 F.3d at 1165.

111. 42 U.S.C. §§ 3601–3619, 3631 (2012); *Roommates.com*, 521 F.3d at 1165.

112. See *Roommates.com*, 521 F.3d at 1165.

113. See *Backpage.com*, 817 F.3d at 20.

114. See Mary Graw Leary, *The Indecency and Injustice of Section 230 of the Communications Decency Act*, 41 HARV. J.L. & PUB. POL’Y 553, 604 (2018); John Anderson, *A Movie About Online Sex-Trafficking Might Actually Get Laws Changed*, WASH. POST (May 19, 2017), [https://www.washingtonpost.com/entertainment/a-movie-about-online-sex-trafficking-might-actually-get-laws-changed/2017/05/18/039c2824-3a50-11e7-a058-ddbb23c75d82\\_story.html](https://www.washingtonpost.com/entertainment/a-movie-about-online-sex-trafficking-might-actually-get-laws-changed/2017/05/18/039c2824-3a50-11e7-a058-ddbb23c75d82_story.html) [<https://perma.cc/4V56-BN9N>].

## 3. FOSTA: Moral Messiah or Internet Iconoclast?

FOSTA's drafters officially intended to target UISPs functioning as online marketplaces that either failed to remove or actively solicited advertisements for sexual services by eliminating Section 230 immunity for these UISPs.<sup>115</sup> The bill's introductory text describes its purpose:

To amend the Communications Act of 1934 to clarify that section 230 of such Act does not prohibit the enforcement against providers and users of interactive computer services of Federal and State criminal and civil law relating to sexual exploitation of children or sex trafficking, and for other purposes.<sup>116</sup>

Section 230, Congress opined, had been co-opted against its drafters' wishes to permit sex trafficking to proceed unhindered on the internet.<sup>117</sup> It allowed websites to encourage sex traffickers to utilize their platforms, profiting from advertisement revenue while enjoying immunity from liability that legislators never intended Section 230 to grant.<sup>118</sup> The bill enjoyed broad bipartisan support<sup>119</sup> and easily passed both chambers of Congress.<sup>120</sup> President Donald J. Trump signed FOSTA into law on April 11, 2018.<sup>121</sup>

FOSTA created new criminal causes of action against UISPs operating with the "intent to promote or facilitate the prostitution of another person" or "act[ing] in reckless disregard of the fact that such conduct contributed to sex trafficking."<sup>122</sup> In addition to codifying these new criminal charges in 18 U.S.C. § 2421A<sup>123</sup> as an amendment to the Mann Act,<sup>124</sup> FOSTA amended Section 230 to expressly defer to the new law, which effectively rolled back the immunity that implicated websites had previously enjoyed.<sup>125</sup>

115. Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. No. 115-164, pmbll., 132 Stat. 1253, 1253 (2018).

116. *Id.*

117. *Id.*

118. *Id.*; see also H.R. REP. NO. 115-572, at 6 (2018).

119. See, e.g., Press Release, Senator Kamala D. Harris, Harris Statement on Passage of SESTA (Mar. 21, 2018), <https://www.harris.senate.gov/news/press-releases/harris-statement-on-senate-passage-of-sesta> [<https://perma.cc/8Y38-JWP9>]; Press Release, Representative Ann Wagner, Wagner Trafficking Bill Headed to House Floor (Feb. 21, 2018), <https://wagner.house.gov/media-center/press-releases/wagner-trafficking-bill-headed-to-house-floor> [<https://perma.cc/AR8Q-DDPF>].

120. 164 CONG. REC. S1872 (daily ed. Mar. 21, 2018); 164 CONG. REC. H1319 (daily ed. Feb. 27, 2018).

121. See Jackman, *supra* note 7.

122. 18 U.S.C.A. § 2421A (West 2019).

123. *Id.*

124. *Id.*; see Danielle Citron & Quinta Jurecic, *FOSTA: The New Anti-Sex-Trafficking Legislation May Not End the Internet, but It's Not Good Law Either*, LAWFARE (Mar. 28, 2018, 2:41 PM), <https://www.lawfareblog.com/fosta-new-anti-sex-trafficking-legislation-may-not-end-internet-its-not-good-law-either> [<https://perma.cc/8ZUY-XDAU>] (describing the amendments FOSTA makes to existing law).

125. 47 U.S.C.A § 230(e)(5)(c) (West 2019). FOSTA also created a parallel civil cause of action allowing victims of sex trafficking to sue UISPs that promote or facilitate said activity. 18 U.S.C.A. § 2421A(c). In acknowledgement of Nevada's partial legalization of sex work, FOSTA carved out an affirmative defense for the promotion of prostitution targeted to areas

As written, FOSTA may apply to a broader portion of the internet than its stated objectives would appear to target. The law does not limit criminal liability to websites functioning as marketplaces or even to content that takes the form of advertisements.<sup>126</sup> It does not rescind immunity solely over content involving sex trafficking but also criminalizes the hosting of content involving prostitution.<sup>127</sup> FOSTA also relies on several undefined terms. Neither § 2421A nor post-FOSTA Section 230 defines “promotion” or “facilitation.”<sup>128</sup> FOSTA’s drafters appear to recognize a difference between “prostitution” and “sex trafficking” by naming both concepts, but as the Act defines neither, the precise distinction intended by the legislature is unclear.<sup>129</sup> However, a House Judiciary Committee report called the two activities “inextricably linked” and stated that “where prostitution is legalized or tolerated, there is a greater demand for human trafficking victims and nearly always an increase in the number of women and children trafficked into commercial sex slavery.”<sup>130</sup>

FOSTA’s criminal statutory provision includes a noteworthy scienter requirement. The Stop Enabling Sex Trafficking Act (SESTA),<sup>131</sup> an earlier, unenacted Senate version of the bill, would have criminalized the *knowing* promotion or facilitation of prostitution.<sup>132</sup> Internet-law experts have noted that this would have reintroduced the “[m]oderator’s dilemma” faced by UISPs in the pre-CDA era, wherein websites would be discouraged from taking any steps (i.e., moderation) that would demonstrate “knowledge” of third-party speech on their platforms.<sup>133</sup> FOSTA, conversely, requires that such “promotion or facilitation” be intentional, but creates an “aggravated violation” to criminalize UISPs acting in “reckless disregard” of the manner in which this intentional conduct contributes to sex trafficking.<sup>134</sup>

Proponents of the law suggest that this requirement is narrowly tailored to inculcate only UISPs that aim to profit from commercial sex while ignoring

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where such activity is legal. *Id.* § 2421A(e). These provisions are beyond the scope of this Note.

126. 18 U.S.C.A. § 2421A.

127. *Id.*

128. *Id.*; 47 U.S.C.A § 230(e)(5)(c).

129. Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. No. 115-164, 132 Stat. 1253 (2018) (codified as amended at 18 U.S.C. §§ 1591, 1595, 2421A and 47 U.S.C. § 230).

130. H.R. REP. NO. 115-572, at 5 (2018); *see also* Alex F. Levy, *Why FOSTA’s Restriction on Prostitution Promotion Violates the First Amendment*, TECH. & MARKETING L. BLOG (Mar. 19, 2018), <https://blog.ericgoldman.org/archives/2018/03/why-fostas-restriction-on-prostitution-promotion-violates-the-first-amendment-guest-blog-post.htm> [<https://perma.cc/5KYQ-VMNY>] (noting the lack of citations in the congressional report).

131. S. 1693, 115th Cong. (2017).

132. *Id.* Congress did not pass SESTA as written but instead subsumed parts of it into FOSTA. *See supra* note 6.

133. Eric Goldman, *Congress Probably Will Ruin Section 230 This Week (SESTA/FOSTA Updates)*, TECH. & MARKETING L. BLOG (Feb. 26, 2018), <https://blog.ericgoldman.org/archives/2018/02/congress-probably-will-ruin-section-230-this-week-sestafosta-updates.htm> [<https://perma.cc/B8N9-VJPH>]; *supra* notes 89–92.

134. 18 U.S.C.A. § 2421A (West 2019).

the probability that some of those transactions constitute sex trafficking.<sup>135</sup> Opponents contend that FOSTA could reach any UIISP shown to have hosted actionable material related to sex trafficking even if the UIISP had neither knowledge of the content nor intent to assist sex traffickers.<sup>136</sup> Since FOSTA does not extend immunity to good-faith efforts to expunge objectionable content, and as it lacks a “notice-and-takedown mechanism” common to other types of internet liability,<sup>137</sup> UIISPs may be forced to overmoderate content or entirely prohibit any speech that could potentially reach controversial topics.<sup>138</sup>

#### 4. A Word About Backpage.com

On April 7, 2018, the U.S. government seized Backpage.com, a UIISP that hosted classified ads, and indicted its owners under the Travel Act for facilitation of prostitution.<sup>139</sup> Backpage.com had long been viewed as an internet scourge by many anti-trafficking and anti-sex-work advocates alike, who criticized the website’s complicity, if not active role, in operating as a clearinghouse for sexual advertisements, some of which featured minors and trafficked adults.<sup>140</sup> Conversely, some sex workers, including those who posted advertisements on Backpage.com, articulated a more positive opinion of the website, which allowed them to conduct business from the safety and anonymity of the internet.<sup>141</sup> Backpage.com had previously survived claims

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135. *See infra* Part II.A.

136. *See infra* Part II.B.

137. Tarleton Gillespie, *Platforms Are Not Intermediaries*, 2 GEO. L. TECH. REV. 198, 208 (2018); *see also* Jennifer M. Urban & Laura Quilter, *Efficient Process or “Chilling Effects”?* *Takedown Notices Under Section 512 of the Digital Millennium Copyright Act*, 22 SANTA CLARA COMPUTER & HIGH TECH. L.J. 621, 622–23 (2006) (discussing notice-and-takedown provisions in copyright infringement). An in-depth discussion of notice-and-takedown mechanisms is beyond the scope of this Note, although the lack thereof in FOSTA arguably contributes to the law’s overbreadth.

138. *See, e.g.*, Zipursky, *supra* note 93, at 17 (“[O]ne can control whether one makes a defamatory or tortious statement . . . simply by refraining from making the statement. By contrast, when someone else is doing the speaking or writing, one has far less control. One may be able to remove the statement, or conceivably filter it, but otherwise shutting down the mechanism through which it appears is the most effective method.”); *see also* Gillespie, *supra* note 137, at 208.

139. 18 U.S.C. § 1952 (2012); Charlie Savage & Timothy Williams, *U.S. Seizes Backpage.com, a Site Accused of Enabling Prostitution*, N.Y. TIMES (Apr. 7, 2018), <https://www.nytimes.com/2018/04/07/us/politics/backpage-prostitution-classified.html> [<https://perma.cc/8LFK-JFUV>]; Alina Selyukh, *Backpage Founders Indicted on Charges of Facilitating Prostitution*, NPR (Apr. 9, 2018), <https://www.npr.org/sections/thetwo-way/2018/04/09/600360618/backpage-founders-indicted-on-charges-of-facilitating-prostitution> [<https://perma.cc/Q457-424L>].

140. *See, e.g.*, Meaghan E. Mixon, Note, *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, 47–49 (2018); Nedelman, *supra* note 70.

141. *See* Elizabeth Dias, *Trump Signs Bill Amid Momentum to Crack Down on Trafficking*, N.Y. TIMES (Apr. 11, 2018), <https://www.nytimes.com/2018/04/11/us/backpage-sex-trafficking.html> [<https://perma.cc/5BGN-W7XY>]; Simon, *supra* note 17; *infra* Part III.B.

that it facilitated sex trafficking by invoking Section 230 immunity.<sup>142</sup> However, FOSTA was not yet law at the time of Backpage.com's indictment, and thus it was ultimately shuttered despite Section 230 existing "intact" at the time.<sup>143</sup>

Many media sources subsequently credited FOSTA with Backpage.com's closure.<sup>144</sup> From a policy standpoint, the effects of the Backpage.com shutdown were not especially distinguishable from FOSTA's effects more generally: FOSTA likely could have precluded most of Backpage.com's business; closing Backpage.com was an explicit impetus for passing FOSTA; and the law's impending existence after it passed through Congress—along with its drafted retroactivity provision—prompted similar UISPs, like Craigslist, to self-censor before the law was actually enacted.<sup>145</sup> Nevertheless, the legal power to close Backpage.com existed prior to, and separately from, FOSTA.<sup>146</sup>

### C. Overbreadth Doctrine Under the First Amendment

The First Amendment states that "Congress shall make no law . . . abridging the freedom of speech."<sup>147</sup> With several well-developed exceptions, government regulation of "content-based" speech<sup>148</sup> is presumptively unconstitutional<sup>149</sup> and subject to examination under a strict level of scrutiny,<sup>150</sup> so as "to ensure that communication has not been prohibited 'merely because public officials disapprove the speaker's

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142. See, e.g., *Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12, 20 (1st Cir. 2016); *supra* notes 113–14 and accompanying text.

143. See Samantha Cole, *Indictment Shows Backpage Facilitated Prostitution, but Its Shutdown Will Still Hurt Sex Workers*, VICE: MOTHERBOARD (Apr. 9, 2018, 5:15 PM), [https://motherboard.vice.com/en\\_us/article/gymwam/backpage-taken-down-read-indictment-doj-fbi](https://motherboard.vice.com/en_us/article/gymwam/backpage-taken-down-read-indictment-doj-fbi) [<https://perma.cc/EKT5-NUJP>].

144. See, e.g., *id.*

145. See Eric Goldman, "Worst of Both Worlds" FOSTA Signed into Law, Completing Section 230's Evisceration, TECH. & MARKETING L. BLOG (Apr. 11, 2018), <https://blog.ericgoldman.org/archives/2018/04/worst-of-both-worlds-fosta-signed-into-law-completing-section-230s-evisceration.htm> [<https://perma.cc/77BY-WMB7>]; Nedelman, *supra* note 70.

146. See Joe Mullin, *House Vote on FOSTA Is a Win for Censorship*, ELECTRONIC FRONTIER FOUND. (Feb. 27, 2018), <https://www.eff.org/deeplinks/2018/02/house-vote-fosta-win-censorship> [<https://perma.cc/5GP6-SXXQ>]; Savage & Williams, *supra* note 139; see also Cary Glynn, *The DOJ's Busts of MyRedbook & Rentboy Show How Backpage Might Be Prosecuted*, TECH. & MARKETING L. BLOG (Sept. 28, 2017), <https://blog.ericgoldman.org/archives/2017/09/the-doj-s-busts-of-myredbook-rentboy-show-how-backpage-might-be-prosecuted-guest-blog-post.htm> [<https://perma.cc/3RSV-DGF6>].

147. U.S. CONST. amend. I.

148. *Consol. Edison Co. of N.Y., Inc. v. Pub. Serv. Comm'n*, 447 U.S. 530, 537 (1980). Conversely, courts evaluate laws that regulate only the time, place, or manner of speech ("content-neutral" restrictions) using a lower level of scrutiny. See *Boos v. Barry*, 485 U.S. 312, 320 (1988) (plurality opinion) (clarifying that "[c]ontent-neutral speech restrictions [are] those that 'are justified without reference to the content of the regulated speech'" (quoting *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976))).

149. See, e.g., *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2222 (2015).

150. *Consol. Edison Co.*, 447 U.S. at 536.

views”<sup>151</sup> and to prevent the “prohibition of public discussion of an entire topic.”<sup>152</sup> Subject to balancing tests, categories of unprotected speech whose regulation may be constitutional despite being content-based include obscenity,<sup>153</sup> defamation,<sup>154</sup> fighting words,<sup>155</sup> and true threats,<sup>156</sup> as well as “incitement to imminent lawless action.”<sup>157</sup> However, “an important distinction [exists] between a proposal to engage in illegal activity and the abstract advocacy of illegality.”<sup>158</sup> Speech that merely advocates for breaking the law—for instance, the legalization of an illegal activity, or even the general suggestion that a person engage in criminal conduct—is constitutionally protected as long as it does not advocate for an immediate violation of the law that is likely to occur.<sup>159</sup>

The First Amendment may preclude legislation that limits unprotected speech if the law is overbroad in a way that proscribes protected speech as well.<sup>160</sup> A law that furthers a legitimate government purpose but nonetheless curtails protected speech may be found unconstitutional when narrower means to achieve that legitimate end exist.<sup>161</sup> However, when a law is “readily susceptible” to limitation—that is, when it could be read more narrowly to resolve its constitutional concerns—courts will generally decline to “rewrite” the law or enjoin it outright.<sup>162</sup> Further, “where conduct and not merely speech is involved . . . the overbreadth of a statute must not only be real, but substantial . . . judged in relation to the statute’s plainly legitimate sweep.”<sup>163</sup>

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151. *Id.* (quoting *Niemotko v. Maryland*, 340 U.S. 268, 282 (1951) (Frankfurter, J., concurring)).

152. *Id.* at 537.

153. *See generally* *Miller v. California*, 413 U.S. 15 (1973).

154. *See generally* *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964).

155. *See generally* *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

156. *See generally* *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).

157. *Brandenburg v. Ohio*, 395 U.S. 444, 449 (1969); *see also* Daniel T. Kobil, *Advocacy on Line: Brandenburg v. Ohio and Speech in the Internet Era*, 31 U. TOL. L. REV. 227, 229, 235–36 (2000). Professor Kobil described the “*Brandenburg* test,” which “asks courts to ascertain three things: (1) Did the speaker advocate unlawful conduct? (2) Did the speaker urge that violation of the law occur immediately? and (3) Was the immediate law violation likely to occur?” *Id.* at 235–36. Speech that meets all three criteria will not be protected. *Id.* at 236.

158. *United States v. Williams*, 553 U.S. 285, 298–99 (2008).

159. *See Brandenburg*, 395 U.S. at 447.

160. *See Forsyth County v. Nationalist Movement*, 505 U.S. 123, 129–30 (1992); *see also* *N.Y. State Club Ass’n v. City of New York*, 487 U.S. 1, 11 (1988).

161. *See Shelton v. Tucker*, 364 U.S. 479, 488 (1960) (“[T]his Court has held that [a] legitimate and substantial [government] purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.”).

162. *Virginia v. Am. Booksellers Ass’n*, 484 U.S. 383, 397 (1988). Note that federal courts will only undertake to redraft *federal* statutes in this context. *See United States v. Thirty-Seven (37) Photographs*, 402 U.S. 363, 369 (1971).

163. *Broadrick v. Oklahoma*, 413 U.S. 601, 615–16 (1973) (emphasis added).

## II. EXAMINING FOSTA UNDER THE FIRST AMENDMENT: PLAUSIBLY NARROW OR UNCONSTITUTIONALLY OVERBROAD?

Upon FOSTA's enactment, legislators, President Trump, certain anti-trafficking initiatives and victims of sex trafficking, and parties skeptical of a legitimate distinction between sex work and sex trafficking lauded the law as a victory for sex-trafficking victims nationwide.<sup>164</sup> On the other hand, free speech proponents and civil liberties organizations criticized the law's chilling effect on internet speech and UISP immunity, and sex workers (along with some anti-trafficking advocates) protested that the law would endanger them directly and would not lead to the hoped-for prophylactic effect on trafficking.<sup>165</sup>

Advocates have already challenged FOSTA's constitutionality.<sup>166</sup> In September 2018, five plaintiffs<sup>167</sup> filed *Woodhull Freedom Foundation v. United States*<sup>168</sup> in the U.S. District Court for the District of Columbia alleging that FOSTA either had already chilled or reasonably could chill protected speech concerning sex workers' health and safety, as well as speech entirely unrelated to sex work or sex trafficking.<sup>169</sup> The U.S. Attorney General defended FOSTA's constitutionality and filed a motion to dismiss, which the court granted.<sup>170</sup> However, the court declined to reach the

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164. See, e.g., Jackman, *supra* note 7.

165. See, e.g., Letter from Stephen E. Boyd, Assistant Att'y Gen., U.S. Dep't of Justice, to Robert W. Goodlatte, Chairman, House Comm. on the Judiciary (Feb. 27, 2018), <https://assets.documentcloud.org/documents/4390361/Views-Ltr-Re-H-R-1865-Allow-States-and-Victims.pdf> [<https://perma.cc/UC7S-WJZJ>] (describing the Justice Department's concerns over the constitutionality of the retroactivity clause in section 4 of FOSTA); Alex F. Levy, *More on the Unconstitutional Retroactivity of "Worst of Both Worlds FOSTA,"* TECH. & MARKETING 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/9SSQ-P3JW>] (expounding upon these concerns in greater detail). Constitutional concerns outside of First Amendment overbreadth doctrine are beyond the scope of this Note.

166. See *Woodhull Freedom Found. v. United States*, 334 F. Supp. 3d 185, 189 (D.D.C. 2018), *appeal docketed*, No. 18-5298 (D.C. Cir. Oct. 12, 2018).

167. See *id.* at 192–94. The plaintiffs consist of the Woodhull Freedom Foundation, a lobbying organization supporting free speech; Human Rights Watch, an organization supporting, inter alia, the rights of consensual sex workers; Jesse Maley, an advocate for sex workers' rights and owner of a forum-style UISP where sex workers may discuss and review their experiences with organizations that purport to assist them; Eric Koszyk, a licensed massage therapist whose ability to advertise his nonsexual services has been inhibited by FOSTA; and the Internet Archive, an organization that has maintained a digital record of the internet since 1996. *Id.*

168. 334 F. Supp. 3d 185 (D.D.C. 2018), *appeal docketed*, No. 18-5298 (D.C. Cir. Oct. 12, 2018).

169. See *id.* at 193–94; see also *Woodhull Freedom Foundation et al. v. United States*, ELECTRONIC FRONTIER FOUND., <https://www EFF.org/cases/woodhull-freedom-foundation-et-al-v-united-states> [<https://perma.cc/DGS4-BTGC>] (last visited Mar. 15, 2019).

170. *Woodhull Freedom Found.*, 334 F. Supp. 3d at 203–04.

constitutional merits of the plaintiffs' claim, finding that each plaintiff lacked standing.<sup>171</sup> Plaintiffs appealed on October 9, 2018.<sup>172</sup>

This Part evaluates FOSTA under the First Amendment overbreadth doctrine, addressing arguments supporting FOSTA's constitutional legitimacy in Part II.A and arguments against its constitutionality in Part II.B.

*A. Can FOSTA Avoid Unconstitutional Overbreadth Under a Narrow Reading, as Suggested in Woodhull?*

Under a narrow interpretation of FOSTA's language and scienter requirement, arguments for FOSTA's constitutionality may have merit. In its motion to dismiss the *Woodhull* complaint, the government stated that none of the protected speech that plaintiffs claimed would be proscribed was FOSTA's intended subject, and therefore, no constitutional issue existed.<sup>173</sup> Specifically, the government claimed that online speech that advocates for sexual freedom or the decriminalization of prostitution—two types of speech cited by plaintiffs as being threatened by FOSTA—fell well beyond FOSTA's purview.<sup>174</sup> The government argued that plaintiff Koszyk had no reason to believe his speech would be proscribed as his activity clearly fell outside FOSTA's ambit, and host website Craigslist would also face no "credible fear of prosecution" for publishing Koszyk's massage advertisement.<sup>175</sup> Drawing on previous federal jurisprudence on analogous subjects, the government opined:

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171. *Id.* at 198; see also Karen Gullo & David Greene, *FOSTA Case Update: Court Dismisses Lawsuit Without Ruling on Whether the Statute Is Unconstitutional*, ELECTRONIC FRONTIER FOUND. (Sept. 25, 2018), <https://www.eff.org/deeplinks/2018/09/fosta-case-update-court-dismisses-lawsuit-without-ruling-whether-statute> [https://perma.cc/M6A8-WEST]. Claims of overbreadth under the First Amendment enjoy atypical legal treatment with regard to standing. To bring an overbreadth challenge, a claimant need not have actually been harmed by the law in question; rather, standing may be asserted preemptively or on behalf of a third party who could be harmed by said law's overbreadth. See *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973) (stating that, under the First Amendment, a litigant may challenge a statute "because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression"). It is a more general principle of standing that "a plaintiff satisfies the injury-in-fact requirement where he alleges 'an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder.'" *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2342 (2014) (quoting *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979)). A claimant need not have actually been charged with a crime to assert that a law's language unconstitutionally implicates speech in which the claimant has engaged or intends to engage. *Babbitt*, 442 U.S. at 298–99.

172. See *BREAKING: Woodhull Freedom Foundation Appeals FOSTA Ruling*, WOODHULL FREEDOM FOUND. (Oct. 9, 2018), <https://www.woodhullfoundation.org/2018/10/09/breaking-woodhull-freedom-foundation-appeals-fosta-ruling/> [https://perma.cc/HPN2-R2JR]. The plaintiffs' appeal is still pending. *Id.*

173. Defendants' Opposition to Plaintiffs' Motion for Preliminary Injunction and Motion to Dismiss Plaintiffs' Complaint at 10, *Woodhull Freedom Found. v. United States*, 334 F. Supp. 3d 185 (D.D.C. 2018) (No. 18-CV-01552), ECF No. 16 [hereinafter Defendants' Opposition].

174. *Id.* at 10–11.

175. *Id.* at 11.

Advocating for the legalization of sex work . . . is the opposite of the *intentional* facilitation of *illegal* prostitution. Helping sex workers find appropriate service providers no more facilitates prostitution than rehabilitation services facilitate drug trafficking. Discussing “harm reductions, disability, age, health and personal safety” is not promoting or facilitating prostitution.<sup>176</sup>

The government then argued that having addressed and exonerated these major prototypes of speech, any further infringement on protected speech could not be considered substantial enough to reach a threshold of unconstitutional overbreadth.<sup>177</sup>

Although the *Woodhull* court declined to address plaintiffs’ constitutional claims, it largely adopted the government’s arguments vis-à-vis plaintiffs’ standing.<sup>178</sup> These arguments for lack of standing are logically similar to the arguments for FOSTA’s constitutionality: FOSTA, under its “intended” interpretation, is not so broad as to actually implicate any of these plaintiffs because the law was narrowly tailored to *only* proscribe unprotected speech from which illegal activity will directly follow.<sup>179</sup>

This narrow interpretation of FOSTA’s purview puts speech about prostitution and sex trafficking into two categories: speech that directly seeks to advertise sexual services for pay, which would be illegal and therefore unprotected by the First Amendment,<sup>180</sup> and speech that does not seek to advertise sex, which FOSTA purportedly would not criminalize.<sup>181</sup> This dichotomy would place the plaintiffs’ challenge in *Woodhull* in a position similar to Backpage.com’s failed constitutional challenge to the SAVE Act.<sup>182</sup> There, Backpage.com was unable to demonstrate that it intended to engage in speech that was at once proscribed and protected, since the SAVE Act criminalized knowingly advertising the “illegal sex trafficking of a minor or a victim of force, fraud, or coercion”<sup>183</sup> rather than the advertising of sex work generally (which would include legal adult services).<sup>184</sup> An analogous reading of FOSTA relies on the assumption that reference to the “promotion or facilitation of prostitution”<sup>185</sup> will be universally understood to make the clear distinction described above. A court could potentially hold that this is FOSTA’s *only* valid interpretation, although the issue has yet to be litigated.

A narrow reading of scienter requirements may also support FOSTA’s constitutionality. In finding that the plaintiff lacked standing, the *Woodhull* court implied that the plaintiffs’ purposeful engagement in positive speech about sex work would be protected from criminal liability because the

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176. *Id.* at 14.

177. *Id.* at 17; *see also* N.Y. State Club Ass’n v. City of New York, 487 U.S. 1, 11 (1988).

178. *See generally* *Woodhull Freedom Found.*, 334 F. Supp. 3d 185.

179. *See generally* Defendants’ Opposition, *supra* note 173.

180. *See id.* at 15; *see also* United States v. Williams, 553 U.S. 285, 297 (2008).

181. Defendants’ Opposition, *supra* note 173, at 16.

182. *See* Backpage.com, LLC v. Lynch, 216 F. Supp. 3d 96, 103 (D.D.C. 2016).

183. *See id.*

184. *See id.* at 105.

185. 18 U.S.C.A. § 2421A (West 2019).

plaintiffs would lack the requisite mens rea to have committed the crime in question.<sup>186</sup> FOSTA’s “intent” requirement applied not to the content of the speech on its face, but to its ends.<sup>187</sup> FOSTA’s legislative history supports this view somewhat and suggests that its drafters wanted the law to be interpreted narrowly;<sup>188</sup> the government further contended in *Woodhull* that it does not plan to prosecute UISPs that publish speech that is sympathetic to prostitution of the sort plaintiffs described.<sup>189</sup> Under this interpretation, challenges from parties subject to UISPs’ self-censorship in FOSTA’s wake would fail to state cognizable constitutional claims, as such censorship is arguably unnecessary under FOSTA; its proscription, therefore, would be a private action rather than a government activity and would not be prohibited by the First Amendment.<sup>190</sup>

*B. FOSTA Violates the First Amendment Because Its Ban on UISP  
“Promotion and Facilitation of Prostitution” Reaches Protected  
Speech and Compels Overbroad Censorship*

FOSTA’s opponents in *Woodhull* and beyond argue that FOSTA’s purview is significantly broader than supporters would have the public believe.<sup>191</sup> Contrary to the government’s claims that FOSTA is implicitly inapplicable to speech promoting sex workers’ health and safety, such speech has already been chilled.<sup>192</sup> As a plainly content-based regulation of speech, FOSTA is subject to strict scrutiny, which means that it should be found unconstitutional unless the government can prove that it is narrowly tailored and is the least restrictive way to achieve a legitimate government interest.<sup>193</sup> FOSTA’s opponents argue that the law fails this test. They assert that the law is “not narrowly tailored” because “[i]t prohibits . . . speech about sex work that does not involve sex trafficking” and argue that the “draconian” prison sentences FOSTA prescribes cannot possibly amount to a “least . . . restrictive alternative to restricting online speech.”<sup>194</sup> Critics also point to

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186. *Woodhull Freedom Found. v. United States*, 334 F. Supp. 3d 185, 202–03 (D.D.C. 2018), *appeal docketed*, No. 18-5298 (D.C. Cir. Oct. 12, 2018).

187. Caleb Kruckenberg, *Defending Internet Service Providers After the “End of the Web as We’ve Known It,”* CHAMPION, Mar. 2018, at 26, 30.

188. *Id.* (“Conceivably, an enterprising prosecutor might suggest that this crime is committed if a defendant merely had an awareness that his conduct would likely promote or facilitate prostitution. In context, however, it appears that this provision was a deliberate effort to target only purposeful conduct.”).

189. *See* Defendants’ Reply in Support of Motion to Dismiss and Supplemental Motion Hearing Brief at 11–16, *Woodhull Freedom Found.*, 334 F. Supp. 3d 185 (No. 18-CV-01552), ECF No. 21.

190. *See id.* at 15–16.

191. *See generally* Complaint for Declaratory and Injunctive Relief, *Woodhull Freedom Found.*, 334 F. Supp. 3d 185 (No. 18-CV-01552), ECF No. 1.

192. *See generally id.*

193. *See* *Consol. Edison Co. of N.Y. v. Pub. Serv. Comm’n*, 447 U.S. 530, 540 (1980); Levy, *supra* note 130; *supra* notes 150, 161 and accompanying text.

194. Complaint for Declaratory and Injunctive Relief, *supra* note 191, at 40–42.

FOSTA's counterproductive effects to demonstrate that it does not further a "compelling government interest" as written.<sup>195</sup>

The simple meanings of the words "promote" and "facilitate" connote a broad scope of activities.<sup>196</sup> Without statutory definitions limiting the interpretation of these words, it is difficult to argue, as the government does in its *Woodhull* filings, that FOSTA could not prosecute UISPs under the law's broader reading.<sup>197</sup> FOSTA could proscribe significant protected speech: "facilitation" of prostitution could encompass anything that makes it easier for a person to engage in sex work or exist as a sex worker, while "promotion" of prostitution could include any speech that supports or condones engaging in sex work.<sup>198</sup> Speech of this latter category that is unlikely to incite immediate illegal activity would be constitutionally protected under *Brandenburg v. Ohio*.<sup>199</sup>

Interpretation of FOSTA's scienter requirements is also not a settled issue. *Woodhull* plaintiff Jesse Maley runs a UISP called RateThatRescue.org, which functions as a review-based forum for sex workers to rate the treatment they receive from various organizations, both sex-related and otherwise, on account of their involvement with sex work.<sup>200</sup> The purpose of this UISP is to help sex workers avoid impediments to safely conducting business.<sup>201</sup> The court found that Maley lacked standing because she could not demonstrate that she planned to intentionally coordinate the prostitution of another person.<sup>202</sup> However, per FOSTA's plain meaning, Maley's activity intentionally facilitates sex work.<sup>203</sup> The government's assurance that it does not plan to prosecute such activity does not amount to a legal preemption from doing so.<sup>204</sup>

Under a broad interpretation of the law, the constitutional challenge to FOSTA is distinguished from Backpage.com's challenge to the SAVE Act

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195. *Id.* at 41.

196. *Id.* at 40–42.

197. Cathy Gellis, *District Court Misses the Forest for the Trees in Dismissing Constitutional Challenge to FOSTA*, TECHDIRT (Sept. 25, 2018, 10:44 AM), <https://www.techdirt.com/articles/20180925/03240240706/district-court-misses-forest-trees-dismissing-constitutional-challenge-to-fosta.shtml> [https://perma.cc/KQX6-42AT].

198. See *Woodhull Freedom Found. v. United States*, 334 F. Supp. 3d 185, 202 (D.D.C. 2018), *appeal docketed*, No. 18-5298 (D.C. Cir. Oct. 12, 2018); Alex F. Levy, *An Update on the Constitutional Court Challenge to FOSTA—Woodhull Freedom v. US*, TECH. & MARKETING L. BLOG (Aug. 13, 2018), <https://blog.ericgoldman.org/archives/2018/08/an-update-on-the-constitutional-court-challenge-to-fosta-woodhull-freedom-v-us-guest-blog-post.htm> [https://perma.cc/3SY6-XB6D]; Levy, *supra* note 130; *supra* note 157 and accompanying text.

199. 395 U.S. 444 (1969).

200. Complaint for Declaratory and Injunctive Relief, *supra* note 191, at 30–35; see also RATE THAT RESCUE, <https://www.ratethatrescue.org/wp/about/> [https://perma.cc/K5HN-VK4U] (last visited Mar. 15, 2019).

201. RATE THAT RESCUE, *supra* note 200.

202. *Woodhull Freedom Found.*, 334 F. Supp. 3d at 202.

203. Complaint for Declaratory and Injunctive Relief, *supra* note 191, at 30–35.

204. See *United States v. Stevens*, 559 U.S. 460, 462 (2010) (noting further that the "Court will not uphold an unconstitutional statute merely because the Government promises to use it responsibly").

and is arguably much more akin to the ACLU's successful challenge against the original CDA. In the SAVE Act challenge, Backpage.com was unable to assert that it intended to engage in speech that was both constitutionally protected and potentially proscribed by the statute in question.<sup>205</sup> This is not the case for *Woodhull's* plaintiffs or other potentially concerned parties. For example, in *Reno v. ACLU*,<sup>206</sup> the Supreme Court found that the original CDA's undefined language created uncertainty about its scope and evidenced its drafters' failure to appropriately tailor it to its goal.<sup>207</sup> The original CDA criminalized the knowing transmission of indecent material to minors over the internet and extended liability to intermediaries that knowingly permitted or engaged in such activity.<sup>208</sup> The Supreme Court found this prohibition unconstitutional, noting that the problem was not the CDA's goal of protecting minors, which was a legitimate state interest,<sup>209</sup> but the relative impossibility of enforcing the law as written without both circumscribing adults' ability to post indecent material online for other adults to consume and drastically changing the way the internet functioned.<sup>210</sup> In examining its overbreadth, the Court opined that although the original CDA was ostensibly meant to target pornographic material, "a speaker [could not] confidently assume that a serious discussion about birth control practices, homosexuality, . . . or the consequences of prison rape would not violate the CDA."<sup>211</sup> FOSTA raises parallel concerns.

Although the government contends that this preemptive chill amounts to private censorship rather than government suppression of speech, few practical alternative strategies exist to protect UISPs from liability under FOSTA.<sup>212</sup> The combination of overbroad and undefined language, strict penalties, and the rescission of third-party immunity may force UISPs to overmoderate user speech and proscribe protected material out of fear that more selective UISP efforts will leave them vulnerable to prosecution.<sup>213</sup> Further, FOSTA includes no safe harbor provision to allow UISPs to cure violations before liability sets in.<sup>214</sup> UISPs, therefore, have three choices: (1) check each piece of user content with human eyes prior to posting, which requires significant resources; (2) enlist technological efforts to moderate content, like "machine-learning algorithms to filter and block anything that relates to sex, including activities that have nothing to do with sex

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205. See *Backpage.com, LLC v. Lynch*, 216 F. Supp. 3d 96, 105 (D.D.C. 2016); *supra* note 183 and accompanying text.

206. 521 U.S. 844 (1997).

207. See *id.* at 870–71.

208. *Id.* at 859–60; see also *id.* at 846–65 (referring to older versions of § 223(a)(1) and § 223(d) of the CDA). Plaintiffs also challenged these provisions under the vagueness doctrine of the Fifth Amendment. *Id.* Similar vagueness concerns regarding FOSTA are beyond the scope of this Note.

209. *Id.* at 864–65.

210. *Id.* at 874, 885; see also *id.* at 891–92 (O'Connor, J., concurring in part and dissenting in part).

211. *Id.* at 871 (majority opinion).

212. See *supra* note 138 and accompanying text.

213. Complaint for Declaratory and Injunctive Relief, *supra* note 191, at 40–42, 47–48.

214. See *supra* note 137 and accompanying text.

trafficking”;<sup>215</sup> or (3) steer clear of all such topics entirely. This final option is the least resource intensive and the most likely to effectively preclude liability.<sup>216</sup> For UISPs like RateThatRescue.org, Craigslist, or any number of other websites that wish to intentionally host dialogue about sex work, this amounts to a categorical ban on such speech. This substantial proscription of protected speech is precisely the kind of chill the First Amendment precludes.<sup>217</sup>

Overmoderation in response to FOSTA has already occurred. Many UISPs or portions thereof, including Craigslist,<sup>218</sup> Reddit,<sup>219</sup> and TheEroticReview.com,<sup>220</sup> have been shut down or have censored themselves out of fear that the user-generated content they host could be interpreted as promoting the sale of sexual services.<sup>221</sup> Through this overcautious

215. Citron & Jurecic, *supra* note 124.

216. See Zipursky, *supra* note 93, at 17.

217. See *supra* notes 149–52 and accompanying text. In response to contentions of insubstantial overbreadth articulated above, sex workers’ interests are not a niche issue. See Nash Jenkins, *A New Bill Aims to Fight Sex Trafficking. But Critics Say It Goes Too Far*, TIME (Mar. 27, 2018), <http://time.com/5217280/sex-trafficking-fosta-craigslist-reddit/> [<https://perma.cc/P787-VTXU>] (citing statistics from the National Human Trafficking Hotline, which received 5600 reports of domestic sex trafficking in 2016, 2000 of which involved persons under eighteen, as compared to an estimated one million consensual sex workers in the United States); *supra* note 177. It is not clear that proscribing speech that furthers sex workers’ safety, or advocates for the decriminalization of the industry, amounts to insubstantial overreach under *Broadrick v. Oklahoma*. 413 U.S. 601 (1973); see *supra* note 163 and accompanying text.

218. *About FOSTA*, CRAIGSLIST, <http://www.craigslist.org/about/FOSTA> [<http://perma.cc/HK3W-42YZ>] (last visited Mar. 15, 2019). Craigslist explicitly attributed its decision to take its “personals” section offline to the then-impending passage of FOSTA, stating:

US Congress recently passed HR 1865, “FOSTA”, seeking to subject websites to criminal and civil liability when third parties (users) misuse online personals unlawfully.

Any tool or service can be misused. We can’t take such risk without jeopardizing all our other services, so we have regretfully taken craigslist personals offline.

Hopefully we can bring them back some day.

*Id.*

219. See Annamarya Scaccia, *SESTA Is Already Having Devastating Impacts on Sex Workers—Just Like They Predicted (Updated)*, REWIRE NEWS (Apr. 2, 2018), <https://rewire.news/article/2018/04/02/sesta-already-devastating-impacts-sex-workers-just-like-predicted/> [<https://perma.cc/D5T3-YVW2>] (confirming that Reddit shut down several forums related to sex work after FOSTA passed through Congress).

220. See Tara Burns, *The Deadly Consequences of the Anti-Sex Trafficking Law*, CRIME REP. (June 4, 2018), <https://thecrimereport.org/2018/06/04/the-deadly-consequences-of-the-anti-sex-trafficking-law/> [<https://perma.cc/WS8F-EW8V>].

221. See Elliot Harmon, *Facebook’s Sexual Solicitation Policy Is a Honeytrap for Trolls*, ELECTRONIC FRONTIER FOUND. (Dec. 7, 2018), <https://www.eff.org/deeplinks/2018/12/facebooks-sexual-solicitation-policy-honeytrap-trolls> [<https://perma.cc/RB4C-UQNL>] (suggesting that Facebook recently amended its terms of service to ban sexual conduct in response to FOSTA); Tina Horn, *How a New Senate Bill Will Screw Over Sex Workers*, ROLLING STONE (Mar. 23, 2018, 9:33 PM), <https://www.rollingstone.com/politics/politics-features/how-a-new-senate-bill-will-screw-over-sex-workers-205311/> [<https://perma.cc/TP7M-TWUQ>]; Paris Martineau, *Tumblr’s Porn Ban Reveals Who Controls What We See Online*, WIRED (Dec. 4, 2018, 2:07 PM), <https://www.wired.com/story/tumblrs-porn-ban-reveals-controls-we-see-online/> [<https://perma.cc/V3T9-RA4Z>] (suggesting that Tumblr.com’s ban on pornographic images may also have been prompted by FOSTA); Emily

approach, FOSTA has already curtailed internet speech that does not advertise sex, including content posted for private consumption on document-hosting services.<sup>222</sup> *Woodhull* plaintiff Koszyk has been censored as an explicit result of FOSTA.<sup>223</sup> His advertisement for his massage services obviously falls outside of FOSTA's intended scope, as acknowledged by the government and the court, and, indeed, no rational interpretation of his post could construe it as advertising illegal activity.<sup>224</sup> Craigslist's elimination of advertisements like Koszyk's in the wake of FOSTA demonstrates that compliance with FOSTA demands moderation beyond what is strictly necessary. Even UISPs that prohibit only sex-related advertisements would be overbroad in their censorship: it is not a crime for consenting adults to arrange sexual interactions over the internet,<sup>225</sup> and the indiscriminate eradication of all sexually charged advertisements would unconstitutionally infringe on such consensual interactions.<sup>226</sup> This sort of unilateral censorship is expected when any UISP can be prosecuted if a third party is eventually shown to have abused its platform.<sup>227</sup>

The *Reno* Court ultimately found that the CDA's "content-based restriction of speech impose[d] an especially heavy burden on the Government to explain why a less restrictive provision would not be as effective as the CDA," which it failed to meet.<sup>228</sup> A similar burden should arguably be demanded of the government with regard to FOSTA. The government's stated goal in implementing FOSTA is stopping online sex trafficking; FOSTA's language suggests that it will impose liability on UISPs for much more activity than hosting sex-trafficking advertisements.<sup>229</sup> The criminal penalties imposed under FOSTA, furthermore, are significant.<sup>230</sup>

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Witt, *After the Closure of Backpage, Increasingly Vulnerable Sex Workers Are Demanding Their Rights*, NEW YORKER (June 8, 2018), <https://www.newyorker.com/news/dispatch/after-the-closure-of-backpage-increasingly-vulnerable-sex-workers-are-demanding-their-rights> [https://perma.cc/6R2X-4UNQ] (citing Instagram's hiding of posts hashtagged "#lingerie" and FetLife.com's banning of advertisements for "escorts and 'consensual blackmail and financial domination' fantasies" as evidence of FOSTA-prompted censorship); see also *Documenting Tech Actions*, SURVIVORS AGAINST SESTA, <https://survivorsagainstsesta.org/documentation/> [https://perma.cc/9UZR-AKD2] (last visited Mar. 15, 2019).

222. See Samantha Cole, *Sex Workers Say Porn on Google Drive Is Suddenly Disappearing*, VICE: MOTHERBOARD (Mar. 21, 2018, 3:07 PM), [http://motherboard.vice.com/en\\_us/article/9kgwnp/porn-on-google-drive-error](http://motherboard.vice.com/en_us/article/9kgwnp/porn-on-google-drive-error) [https://perma.cc/L9V6-AXFW]. Although Google Drive's policy page prohibits users from uploading visual pornographic media, "[w]riting about porn and sex is permitted . . . as long as it's not accompanied by sexually explicit images or videos." *Id.*

223. See *Woodhull Freedom Found. v. United States*, 334 F. Supp. 3d 185, 193 (D.D.C. 2018), *appeal docketed*, No. 18-5298 (D.C. Cir. Oct. 12, 2018).

224. See *id.*; Defendants' Opposition, *supra* note 173, at 11.

225. See *Backpage.com, LLC v. Lynch*, 216 F. Supp. 3d 96, 105 (D.D.C. 2016). In fact, such interactions are protected by the First Amendment. *Id.*

226. See *supra* notes 183–84 and accompanying text.

227. See *supra* note 138 and accompanying text.

228. *Reno v. ACLU*, 521 U.S. 844, 879 (1997).

229. See *supra* notes 126–28 and accompanying text.

230. 18 U.S.C.A. § 2421A (West 2019). Sentencing under FOSTA's new criminal causes of action ranges from ten to twenty-five years' imprisonment. *Id.*

Less restrictive means of achieving this goal arguably exist;<sup>231</sup> as such, FOSTA is unconstitutional as written.<sup>232</sup>

### III. “FURTHERING A LEGITIMATE GOVERNMENT INTEREST”: WHAT DOES FOSTA REALLY DO?

Although FOSTA is still a very young law and significant data about its efficacy has yet to be collected or analyzed, some of its consequences have already surfaced on the internet and in offline communities nationwide. FOSTA’s stated legal objective is to eliminate Section 230 immunity for UISPs that facilitate online sex trafficking.<sup>233</sup> Its practical goals, per its legislative history, were to shut down Backpage.com and its analogues, gut the sex-trafficking industry, and save vulnerable women and children from harm.<sup>234</sup> However, FOSTA’s immediate effects have not toed this line—the law has, in fact, had devastating consequences for individuals performing commercial sexual services under consensual and coercive circumstances alike.<sup>235</sup> This Part first examines the extent to which FOSTA has achieved its stated goals and subsequently details FOSTA’s collateral consequences beyond, or at odds with, what its supporters hoped it would accomplish.

#### *A. A Good Cause?: Results Germane to FOSTA’s Goals*

Backpage.com has been shut down.<sup>236</sup> Craigslist has closed its personals section, which had hosted advertisements for sex.<sup>237</sup> UISPs without a direct link to commercial sexual activity have adopted more discerning policies regarding who may use their services.<sup>238</sup>

FOSTA reportedly caused an initial dip in online advertisements for sexual services.<sup>239</sup> Although such advertisements have rebounded somewhat in number, it is not clear that they have returned to original levels.<sup>240</sup> Any reduction in advertisements for trafficked persons is surely a success, though formal statistics on FOSTA’s efficacy in reducing the prevalence of sex trafficking generally, which also occurs offline, are not available.<sup>241</sup>

231. *See infra* Part IV.

232. *See generally* Levy, *supra* note 130.

233. Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. No. 115-164, 132 Stat. 1253 (2018) (codified as amended at 18 U.S.C. §§ 1591, 1595, 2421A and 47 U.S.C. § 230).

234. *See, e.g.*, 164 CONG. REC. H7165–66 (daily ed. July 25, 2018) (statement of Rep. Wagner).

235. *See infra* Part III.B.

236. Selyukh, *supra* note 139.

237. Nedelman, *supra* note 70.

238. *See* 164 CONG. REC. H7165–66 (daily ed. July 25, 2018) (statement of Rep. Wagner); *supra* note 221 and accompanying text.

239. *See, e.g.*, Cohn, *supra* note 8; Glenn Kessler, *Has the Sex-Trafficking Law Eliminated 90 Percent of Sex-Trafficking Ads?*, WASH. POST (Aug. 20, 2018), <https://www.washingtonpost.com/politics/2018/08/20/has-sex-trafficking-law-eliminated-percent-sex-trafficking-ads/> [https://perma.cc/2C78-549R].

240. Kessler, *supra* note 239; Tarinelli, *supra* note 21.

241. Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. No. 115-164, 132 Stat. 1253 (2018) (codified as amended at 18 U.S.C. §§ 1591, 1595, 2421A and

Nevertheless, supporters have high hopes for a sustained prophylactic effect on sex trafficking.<sup>242</sup>

Proponents of the increased responsibility that FOSTA imposes on UISPs can claim an immediate victory: Section 230's moderator "loophole" has been closed and the law is live.<sup>243</sup> Pre-FOSTA cases such as *M.A. ex rel. P.K. v. Village Voice Media Holdings, LLC*,<sup>244</sup> in which courts upheld UISP immunity in the face of horrific online trafficking that had occurred through an interactive platform, offer evidence of a bygone scenario that FOSTA has hopefully stymied from repetition in the future.<sup>245</sup> No case exists where a survivor of sex trafficking has sued a UISP under FOSTA's civil cause of action, or where a state or federal prosecutor has brought criminal charges under FOSTA against a UISP for its role in sex-trafficking activity, but such lawsuits could arise in the future.

### *B. An Unacceptable Cost: FOSTA's Means Do Not Justify Its Ends*

The extent to which FOSTA's effects to date align with its goals is arguably exaggerated. It is not clear that FOSTA's articulated goals can be feasibly achieved through its implemented changes.<sup>246</sup> Perhaps most disturbingly, FOSTA has already caused a slew of collateral effects that endanger sex workers, and sex-trafficking victims, nationwide.<sup>247</sup> This section explores critiques of FOSTA's prospects for ending sex trafficking and discusses the serious harm FOSTA has already caused. It then suggests that such troubling collateral consequences undermine arguments for FOSTA's practicality and constitutionality.

#### 1. Flawed Promises

FOSTA is not technically responsible for its biggest claim to fame: Backpage.com, long the white whale of Section 230 critics, was shut down under the Travel Act before FOSTA even became law.<sup>248</sup> Although online advertisements for sex initially dipped after FOSTA's enactment, this decline is arguably attributable to the closure of Backpage.com, which was not a

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47 U.S.C. § 230). FOSTA mandates a report from the U.S. Government Accountability Office on the law's efficacy three years after its enactment, which will collect data on money awarded to victims in civil litigation brought under FOSTA and the justification for said awards, as well as data on convictions secured under FOSTA's criminal provisions and the identities of the defendants. *Id.* § 8, 132 Stat. at 1255–56.

242. See Haley Halverson, *Ending Immunity of Internet-Facilitated Commercial Sexual Exploitation Through Amending the Communications Decency Act*, 21 J. INTERNET L. 3, 13 (2018); Leary, *supra* note 114, at 622.

243. See Shea M. Rhodes et al., *SESTA/FOSTA Imposes Accountability on Internet Service Providers, Remains Misinterpreted by Many*, HILL (May 22, 2018, 8:15 AM), <https://thehill.com/blogs/congress-blog/judicial/388694-sesta-fosta-imposes-accountability-on-internet-service-providers> [<https://perma.cc/7CUH-HRYZ>].

244. 809 F. Supp. 2d 1041 (E.D. Mo. 2011).

245. See, e.g., Mixon, *supra* note 140, at 55–56.

246. See *infra* Part III.B.1.

247. See *infra* Part III.B.2.

248. See Selyukh, *supra* note 139.

direct consequence of FOSTA, and evidence suggests these statistics have rebounded in recent months.<sup>249</sup> Additionally, there is no simple way to calculate which of those advertisements would have offered the services of a trafficked person as opposed to a consenting adult, or even which might have offered legal sexual services rather than activity criminalized by state prostitution laws.<sup>250</sup>

FOSTA presumes that eliminating the ability of traffickers and “clients” to access one another online will strike a lethal blow to the trafficking industry.<sup>251</sup> Rather than ending online sex trafficking, FOSTA may simply drive the kinds of UISPs it purports to regulate off of U.S. servers and away from U.S. regulatory power.<sup>252</sup> Several sites operating as classified platforms or discussion forums for sex workers, such as Switter<sup>253</sup> and Red Umbrella Hosting,<sup>254</sup> have already moved operations to servers abroad.<sup>255</sup> These platforms have not been charged with any trafficking activity, but at least one was forced from its U.S.-based server as a direct result of FOSTA.<sup>256</sup> This option to set up shop abroad is ostensibly also available to parties with nefarious intent, which calls FOSTA’s long-term efficacy into question.

For law enforcement, there is a documented ease to tracking and locating traffickers online.<sup>257</sup> Online advertisements with photographs or other

249. See, e.g., Kessler, *supra* note 239 (positing that the biggest drop in sex-trafficking ads occurred after Backpage.com was shuttered in early April 2018 and that subsequent copycat websites like “Bedpage.com” have sprung up and raised advertisement statistics once more); Tarinelli, *supra* note 21.

250. See, e.g., Kessler, *supra* note 239.

251. See Lynch & Lambert, *supra* note 8.

252. See Elizabeth Schumacher, *Sex Workers Leave Twitter for Switter After Controversial US Law*, USA TODAY (June 29, 2018, 8:58 AM), <https://www.usatoday.com/story/news/world/2018/06/29/fosta-sex-workers-leave-twitter-switter-after-us-law/744989002/> [<https://perma.cc/YW9D-XR3U>].

253. See SWITTER, <https://switter.at/about> [<https://perma.cc/BAU4-MUMH>] (last visited Mar. 15, 2019).

254. See Daniel Cooper, *FOSTA-SESTA’s Real Aim Is to Silence Sex Workers Online*, ENGADGET (Apr. 11, 2018), <https://www.engadget.com/2018/04/11/fosta-sesta-silencing-sex-workers/> [<https://perma.cc/3UTH-WDR5>]; Arvind Dilawar, *The Web-Hosting Service for Sex Workers, by Sex Workers, Against SESTA/FOSTA*, NATION (Aug. 22, 2018), <https://www.thenation.com/article/the-webhosting-service-for-sex-workers-by-sex-workers-against-sesta-fosta/> [<https://perma.cc/4SH2-29ND>]. Red Umbrella Hosting now returns a “404 Error” indicating that the requested page cannot be found. RED UMBRELLA HOSTING, <https://redumbrella.ch/about-us/> [<https://perma.cc/9WA8-3G6S>] (last visited Mar. 15, 2019).

255. See Cooper, *supra* note 254.

256. See Samantha Cole, *Cloudflare: FOSTA Was a “Very Bad Bill” That’s Left the Internet’s Infrastructure Hanging*, VICE: MOTHERBOARD (Apr. 19, 2018, 5:21 PM), [https://motherboard.vice.com/amp/en\\_us/article/9kgvga/cloudflare-switter-down-fosta-sesta](https://motherboard.vice.com/amp/en_us/article/9kgvga/cloudflare-switter-down-fosta-sesta) [<https://perma.cc/ZU23-M5XR>].

257. See Siouxsie Q, *supra* note 1 (“Every client I have ever worked with has had ads associated with online websites . . . ,” says Jamie Walton, a survivor of childhood sex trafficking and founder of . . . an organization in South Florida that provides direct services to young people victimized by exploitation. “Those ads are forms of evidence. Those ads are ways that we were able to find children who were missing. Now, all that information has been driven to places online that are difficult to search, making the work almost impossible.”); see also *supra* notes 20–21 and accompanying text.

identifying information may further assist the police in identifying and aiding specific victims.<sup>258</sup> These advertisements may constitute crucial digital evidence in eventual legal proceedings against perpetrators, as both law enforcement officials<sup>259</sup> and sex-trafficking survivors have noted.<sup>260</sup>

Finally, FOSTA assumes that prostitution and sex trafficking are synonymous enough that the successful enactment of anti-sex-trafficking legislation depends on naming and inhibiting sex work as well.<sup>261</sup> In its legislative materials, Congress cited a link between prostitution and sex trafficking and implied that where the former is found, the latter will invariably follow.<sup>262</sup> It is not clear that this implication is true.<sup>263</sup> FOSTA's critics have opined that eliminating all online advertisements for sexual services was the Act's true aim and that lawmakers masked this sweeping legislative intent behind narratives of trafficking likely to garner bipartisan sympathy.<sup>264</sup> Regardless, sex work and sex trafficking are distinct activities.<sup>265</sup> Insofar as FOSTA's articulated goal is to curb sex trafficking, widespread consequences for consensual sex workers arguably exceed its intended purview, make no regulatory sense, and serve no legitimate government interest.

## 2. A Law with a Body Count

FOSTA directly endangers individuals who perform commercial sexual services by driving these transactions away from the relative protection of the internet and back onto the street.<sup>266</sup> Traditionally, solicitation of a sex

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258. See Simon, *supra* note 17 (reporting on a mother who located her trafficked teenage daughter on Backpage.com and opining that “[i]t was horrifying for her to find her daughter on Backpage—but *she found her daughter*. Would she have been as likely to find her if the girl had been on the streets?”); see also Siouxsie Q, *supra* note 1.

259. See *Latest Developments in Combating Online Sex Trafficking: Hearing Before the Subcomm. on Comm'n's & Tech. of the H. Comm. on Energy & Commerce*, 115th Cong. (2017) [hereinafter *Sex Trafficking Hearing*] (statement of Russ Winkler, Special Agent in Charge, Tenn. Bureau of Investigation); Fischer, *supra* note 20. But cf. *Sex Trafficking Hearing, supra* (statement of Derri Smith, Chief Exec. Officer, End Slavery Tenn.).

260. See Harmon, *supra* note 19; Siouxsie Q, *supra* note 1.

261. See *supra* note 130 and accompanying text.

262. See *supra* note 130 and accompanying text.

263. Levy, *supra* note 130 (stating that FOSTA “relies on the unsubstantiated idea that reducing prostitution will reduce trafficking”).

264. See Nicole Karlis, *For Bay Area Sex Workers, a New Federal Law Means Less Safety and More Poverty*, SALON (Nov. 5, 2018), <https://www.salon.com/2018/11/04/for-bay-area-sex-workers-a-new-federal-law-means-less-safety-and-more-poverty/> [https://perma.cc/89VT-FWFW]. The bill's sympathetic name may have helped mask its overbroad language and engender support that might not have been so freely given had the bill's true scope been clearer. See Melanie Ehrenkranz, *Sex Workers Fight Back Against a Dangerous Law by Stepping into the Spotlight*, GIZMODO (June 4, 2018, 6:25 PM), <https://gizmodo.com/sex-workers-fight-back-against-a-dangerous-law-by-stepp-1826540734> [https://perma.cc/5FBE-DCW4]. Even some congressional staffers may not have understood that FOSTA “was about anything other than child sex-trafficking.” *Id.*

265. See Beard, *supra* note 24.

266. See Burns, *supra* note 220 (noting that the St. James Infirmary, a San Francisco-based health and safety clinic for sex workers, “reported a fourfold increase in street-based sex work in the first week after FOSTA/SESTA passed”); Susie Steimle, *New Laws Forced Sex Workers*

worker's services took place during an in-person encounter that also functioned as an advertisement for business: a brothel<sup>267</sup> or, more recently, the street.<sup>268</sup> Street work is more dangerous than indoor work and can even be lethal.<sup>269</sup> Rape and assault are prevalent and seen as inevitable, and workers are at risk of violence from clients and law enforcement alike.<sup>270</sup> As the internet became a ubiquitous utility, sex workers were able to move the negotiation and solicitation stages of their business to online forums that did not demand physical presence.<sup>271</sup> Sex workers gained the means to create an electronic record of client communications,<sup>272</sup> screen potential clients,<sup>273</sup> and communicate with one another about dangerous clients, safe spaces, and other industry-specific health and safety tips.<sup>274</sup> The shift online revolutionized the industry, imbuing sex work with a previously nonexistent level of safety and decreasing the need for third parties as security or advertisement intermediaries.<sup>275</sup> The effect was striking: a 2017 study found that “from 2002 to 2010, when Craigslist’s erotic-services site was active and solicitation moved indoors, the female homicide rate fell by seventeen percent.”<sup>276</sup>

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*Back on SF Streets, Caused 170% Spike in Human Trafficking*, CBS S.F. (Feb. 3, 2019), <https://sanfrancisco.cbslocal.com/2019/02/03/new-laws-forced-sex-workers-back-on-sf-streets-caused-170-spike-in-human-trafficking/> [<https://perma.cc/G9LW-D36J>].

267. See Burns, *supra* note 19.

268. See Lux Alptraum, *The Internet Made Sex Work Safer. Now Congress Has Forced It Back into the Shadows*, VERGE (May 1, 2018, 10:38 AM), <https://www.theverge.com/2018/5/1/17306486/sex-work-online-fosta-backpage-communications-decency-act> [<https://perma.cc/XK3A-UPBL>].

269. See Alana Massey, *If You Care About Sex Trafficking, Trust People in the Sex Trades—Not Celebrities*, ALLURE (Mar. 8, 2018), <https://www.allure.com/story/sesta-sex-trafficking-bill-celebrity-psa> [<https://perma.cc/9UYY-G5R4>]; Simon, *supra* note 17 (noting that indoor sex work is safer than street work); Witt, *supra* note 221.

270. See, e.g., Burns, *supra* note 19.

271. See Sofia Barrett-Ibarria, *Sex Workers Pioneered the Early Internet—and It Screwed Them Over*, VICE: MOTHERBOARD (Oct. 3, 2018, 8:00 AM), [https://motherboard.vice.com/en\\_us/article/qvazy7/sex-workers-pioneered-the-early-internet](https://motherboard.vice.com/en_us/article/qvazy7/sex-workers-pioneered-the-early-internet) [<https://perma.cc/9W3T-GTCZ>]; Setaro, *supra* note 2; see also, e.g., Miller, *supra* note 70, at 44–45.

272. See Alptraum, *supra* note 268; Massey, *supra* note 269.

273. See Nedelman, *supra* note 70 (“Many sex workers run background checks on clients, communicate through online forums and check ‘bad date lists,’ which sex workers create to warn others about hostile clients. [One worker] also has a mandatory 24-hour waiting period before she agrees to meet clients, giving her time to check for criminal records and other warning signs. She learned ways to stay safe and grow her business from other sex workers online, some of whom keep blogs.”); Setaro, *supra* note 2.

274. See, e.g., Samantha Cole, “*Sex Trafficking*” *Bill Will Take Away Online Spaces Sex Workers Need to Survive*, VICE: MOTHERBOARD (Mar. 12, 2018, 1:11 PM), [https://motherboard.vice.com/en\\_us/article/neqxaw/sex-trafficking-bill-sesta-fosta-vote](https://motherboard.vice.com/en_us/article/neqxaw/sex-trafficking-bill-sesta-fosta-vote) [<https://perma.cc/3JQD-42QB>].

275. See *Third Parties*, *supra* note 9 (noting, however, that some sex workers elect to work with third parties and that such a relationship is not necessarily undesirable).

276. Witt, *supra* note 221. See generally Scott Cunningham et al., *Craigslist’s Effect on Violence Against Women* (Nov. 2017) (unpublished manuscript), <https://perma.cc/4YDK-H2AF>.

FOSTA confines commercial sex to its most dangerous model.<sup>277</sup> Since FOSTA's enactment, sex workers have reported an increase in communication from "pimps" claiming that their services are necessary.<sup>278</sup> Although some sex workers work with third parties voluntarily,<sup>279</sup> others may feel pressured into a situation that could easily become sex trafficking, meaning that FOSTA could actually facilitate sex trafficking by forcing consensual sex workers into coercive situations.<sup>280</sup> Further, the workers most endangered by street-based sex work tend to be from marginalized communities.<sup>281</sup> Women of color are disproportionately arrested and prosecuted for prostitution-related offenses,<sup>282</sup> and forcing sex work into the street will only increase these arrests.<sup>283</sup> In addition to scrubbing advertisements for consensual sex from online forums, FOSTA threatens

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277. See Scott Cunningham et al., *Craigslist Reduced Violence Against Women 27–29* (Feb. 2019) (unpublished manuscript), <https://assets.documentcloud.org/documents/5720120/craigslistFOSTA.pdf> [<https://perma.cc/4W6L-E2QR>] (providing updated research finding that by driving sex work off the internet, FOSTA has demonstrably endangered sex workers); see also Burns, *supra* note 220; Scaccia, *supra* note 219.

278. Samantha Cole, *Trump Just Signed SESTA/FOSTA, a Law Sex Workers Say Will Literally Kill Them*, VICE: MOTHERBOARD (Apr. 11, 2018, 11:31 AM), [https://motherboard.vice.com/en\\_us/article/qvxeyq/trump-signed-fosta-sesta-into-law-sex-work](https://motherboard.vice.com/en_us/article/qvxeyq/trump-signed-fosta-sesta-into-law-sex-work) [<https://perma.cc/9FH3-KA2J>].

279. See *supra* note 275 and accompanying text.

280. See Cole, *supra* note 278; Steimle, *supra* note 266.

281. Evidence suggests that FOSTA will disproportionately endanger sex workers who are homeless, black, neuroatypical, and transgender. See Laura LeMoon, *Trump Just Signed Legislation That Could Be Deadly for Sex Workers Like Me*, HUFFINGTON POST (Apr. 15, 2018, 8:31 AM), [https://www.huffingtonpost.com/entry/trump-just-signed-two-new-laws-that-could-be-deadly-for-sex-workers-like-me\\_us\\_5ad0d3bce4b077c89ce82afa](https://www.huffingtonpost.com/entry/trump-just-signed-two-new-laws-that-could-be-deadly-for-sex-workers-like-me_us_5ad0d3bce4b077c89ce82afa) [<https://perma.cc/T7RE-UDM6>]; Nedelman, *supra* note 70; Reese Piper, *New U.S. Laws Targeting Sex Workers Will Harm Autistic People*, METRO (Apr. 17, 2018, 1:26 PM), <https://metro.co.uk/2018/04/17/new-us-laws-targeting-sex-workers-will-harm-autistic-people-7473553/> [<https://perma.cc/5RTZ-8YTW>]; Amy Zimmerman, *The New Law That Puts Transgender Sex Workers in Danger*, DAILY BEAST (Apr. 16, 2018), <https://www.thedailybeast.com/the-new-law-that-puts-transgender-sex-workers-in-danger> [<https://perma.cc/FHR4-4P5E>].

282. See GLOB. HEALTH JUSTICE P'SHIP OF THE YALE LAW SCH. & YALE SCH. OF PUB. HEALTH, UN-MEETABLE PROMISES: RHETORIC AND REALITY IN NEW YORK CITY'S HUMAN TRAFFICKING INTERVENTION COURTS 44 (2018); Melissa Gira Grant, *Flawed Justice for Sex Workers*, N.Y. DAILY NEWS (Sept. 30, 2014, 7:15 PM), <http://www.nydailynews.com/opinion/gira-grant-flawed-justice-sex-workers-article-1.1958688> [<https://perma.cc/EAP4-NLZW>] (describing such prostitution-related arrests as "akin to stop-and-frisk for black women"). For more information on loitering arrests by neighborhood and demographic in New York City, see Melissa Gira Grant, *Interactive Map: See Where the NYPD Arrests Women Who Are Black, Latina, Trans, and/or Wearing Jeans*, VILLAGE VOICE (Nov. 22, 2016), <https://www.villagevoice.com/2016/11/22/interactive-map-see-where-the-nypd-arrests-women-who-are-black-latina-trans-andor-wearing-jeans/> [<http://perma.cc/9N76-V2H3>].

283. See Cole, *supra* note 278; Mike Masnick, *Six Months Later, People Are Finally Realizing that FOSTA Actually Is Putting Lives at Risk*, TECHDIRT (Oct. 3, 2018, 9:16 AM), <https://www.techdirt.com/articles/20180927/23531640733/six-months-later-people-are-finally-realizing-that-fosta-actually-is-putting-lives-risk.shtml> [<https://perma.cc/93ME-3XK4>].

access to secondary online resources used for protection and verification.<sup>284</sup> None of these consequences has a valid relationship to FOSTA's purported aim.

#### IV. CURING FOSTA'S UNCONSTITUTIONALITY AND HALTING ITS HARMFUL CONSEQUENCES REQUIRE THE LAW'S REPEAL

FOSTA is a deeply flawed law.<sup>285</sup> Its threats to criminalize significant categories of protected speech have already led to a documented chilling effect on speech due to its gross misunderstanding of the interaction between sex work and sex trafficking.<sup>286</sup> FOSTA warrants immediate action to redraft its unconstitutionally overbroad elements. However, simply altering FOSTA's defective provisions will not completely resolve its underlying policy shortcomings. As such, while Part IV.A of this Note proposes ways in which FOSTA's statutory language may be improved, Part IV.B advocates for FOSTA's full repeal.

##### *A. Suggestions for Altering FOSTA's Faults*

FOSTA's unconstitutional overbreadth hinges chiefly on its ambiguous use of the words "promote" and "facilitate" in 18 U.S.C. § 2421A and, by extension, in Section 230.<sup>287</sup> Uncertainty over the scope of these undefined activities has led to either unconstitutional criminalization of protected speech<sup>288</sup> or an unconstitutional chilling effect emanating from overcautious

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284. See Scarlett Johnson, *A Guide to Hustling on Craigslist Without the Personals*, TITS & SASS (May 4, 2018), <http://titsandsass.com/a-guide-to-hustling-on-craigslist-without-the-personals/> [<https://perma.cc/D8FK-2TRY>] ("Vetting potential clients has become dangerously harder since the passage of the new law. [Most replies come] from people seeking to exploit the sex worker community because they know that we don't have many platforms to advertise from right now."); see also Massey, *supra* note 269 ("Before you say, 'Just get rid of the ads, then,' know that online ads themselves are one of the greatest tools for protecting yourself as a sex worker: They make it possible to screen clients, arrange safe indoor working conditions, and establish a communication record with clients that street-based work doesn't provide.").

285. FOSTA may serve as a model to stifle other kinds of speech. FOSTA's enduring existence, and the broad bipartisan support that midwived it into the world of internet law, prompt serious concerns over Section 230's ability to withstand the censorship of other speech Congress might find distasteful, especially where—as with sex work—harm-reduction efforts to curtail dangerous activity are at odds with zero-tolerance policies of strict criminalization. See Samantha Cole, *Senator Suggests the Internet Needs a FOSTA/SESTA for Drug Trafficking*, VICE: MOTHERBOARD (Sep. 5, 2018, 2:47 PM), [https://motherboard.vice.com/en\\_us/article/8xbwvp/joe-manchin-fosta-sesta-law-for-drug-trafficking-senate-intelligence-committee-hearing](https://motherboard.vice.com/en_us/article/8xbwvp/joe-manchin-fosta-sesta-law-for-drug-trafficking-senate-intelligence-committee-hearing) [<https://perma.cc/C5NY-7E2V>] (describing Senator Joe Manchin's proposal, in light of West Virginia's severe opioid crisis, to retract Section 230 immunity from UISPs services that allow users to post advertisements for the sale of illicit drugs). Overbroad legislation aiming to curtail drug trafficking, for example, could have similarly disastrous public health ramifications by driving drug dealing into the streets, preventing drug users from accessing critical health and safety information, and further disenfranchising an already marginalized population. See *id.*

286. Beard, *supra* note 24; Levy, *supra* note 130; *supra* note 263 and accompanying text.

287. See *supra* notes 196–98 and accompanying text.

288. See *supra* notes 200–04 and accompanying text.

self-censorship of speech that FOSTA does not intend to proscribe.<sup>289</sup> Replacing FOSTA’s problematic language with more explicitly targeted verbiage would potentially help quell confusion<sup>290</sup> and produce legislation that is more in line with the government’s assertion of FOSTA’s aim.<sup>291</sup>

However, this Note does not support amended legislation that fails to cure FOSTA’s meritless inclusion of prostitution in its statutory text. Although invoking prostitution in a law meant to curb sex trafficking evidences legislation not narrowly tailored to its goal, prostitution is admittedly illegal in most of the United States,<sup>292</sup> and as such, those advertising sex workers’ services online cannot claim engagement in constitutionally protected speech.<sup>293</sup> However, sex workers do have a human right to personal security. Facilitating endangerment, assault, and death, as FOSTA effectively does for sex workers, is not a legitimate government interest—ostensibly, it is the very thing FOSTA seeks to eliminate.

In addition to clarifying the activities FOSTA criminalizes, collapsing FOSTA’s principal and “aggravated”<sup>294</sup> violations into a single crime relating to sex trafficking could arguably do much more to protect consensual sex workers. Such an amendment might read:

Whoever, using a facility or means of interstate or foreign commerce or in or affecting interstate or foreign commerce, owns, manages, or operates an interactive computer service (as such term is defined in section 230(f) of the Communications Act of 1934 (47 U.S.C. 230(f))), or conspires or attempts to do so, with the intent to *coordinate sex-trafficking transactions in violation of § 1591(a) of this title*, shall be fined under this title . . . .

This revision would correctly exempt speech asserting a positive opinion of prostitution, advocating for its decriminalization, or seeking to help sex workers conduct their work safely, and it would redirect FOSTA’s focus from proscribing advertisements for sex work to eradicating those advertisements that hawk the services of trafficked persons.<sup>295</sup>

Other scholars have also proposed statutory tweaks to mitigate FOSTA’s damage, including reextending immunity to any UISP that “takes reasonable steps to prevent or address unlawful uses of its services once warned about such uses”<sup>296</sup> or setting a higher bar for UISP liability that would require the UISP to have “purposefully encourage[d] cyber stalking, nonconsensual pornography, sex trafficking, child sexual exploitation, or . . . principally

289. See *supra* notes 212–27 and accompanying text.

290. See *supra* note 204 and accompanying text.

291. See *supra* notes 176, 179, 189 and accompanying text.

292. See *supra* Part I.A.1.

293. See *supra* notes 157–59 and accompanying text. Sex workers *do*, however, have the legal right to argue for the right to engage in sex work. See *supra* note 159 and accompanying text.

294. 18 U.S.C.A. § 2421A(b) (West 2019).

295. See *supra* notes 126–30, 263 and accompanying text. This proposed amendment would require renaming § 2421A. The deference offered by 47 U.S.C.A. § 230(e)(5)(c) and the affirmative defense presented in 18 U.S.C.A. § 2421A(e) would both become unnecessary.

296. Danielle Keats Citron & Benjamin Wittes, *The Problem Isn’t Just Backpage: Revising Section 230 Immunity*, 2 GEO. L. TECH. REV. 453, 471 (2018).

hoste[d] such material.”<sup>297</sup> One issue is that using the same standard of activity to criminalize UISPs’ direct involvement in crimes conducted digitally (e.g., cyberstalking) and indirect involvement in offline crimes for which the internet is simply a conduit (e.g., sex trafficking) may result in imprecise and overbroad legislation. This concern aside, this latter proposal is promising.

*B. Repeal FOSTA: Proposing a Conscientious and Pragmatic Replacement*

Statutory improvements, however, are half measures. Arguments that sex trafficking will stop if the internet ceases to permit it<sup>298</sup> ignore a fundamental fact about sex trafficking that distinguishes it from other internet evils<sup>299</sup>: the transaction may occur online, but the act occurs in person. Driving sexual advertisements off the internet only benefits FOSTA’s cause if it significantly reduces the *offline* incidence of sex trafficking. As FOSTA does nothing to further track or criminalize traffickers themselves, there is little evidence to suggest that the market will shrink rather than simply adapt.<sup>300</sup> Traffickers will continue to operate, farther beyond the reach of law enforcement,<sup>301</sup> and at least portions of the industry will return to the dangerous street-based solicitation model predating the internet.<sup>302</sup>

Sex trafficking is a legitimate problem and a horrifying practice. The concerns that anti-trafficking advocates have about what happens to victims, especially child victims, who are *not* found and *not* saved, are real.<sup>303</sup> Stopping sex trafficking is a legitimate government aim, but a law so poorly drafted that it fails to achieve its chief objective,<sup>304</sup> while also causing significant and unnecessary collateral harm,<sup>305</sup> offers little merit to society or to populations imperiled by sex trafficking. FOSTA makes it more

297. *Id.*

298. *See supra* notes 12–14 and accompanying text.

299. *See* Citron & Jurecic, *supra* note 124 (noting that FOSTA fails to address online harassment, defamation, and other cybercrimes arguably abetted by Section 230’s UISP immunity).

300. Shannon Roddel, *Online Sex Trafficking Bill Will Make Things Worse for Victims, Expert Says*, U. NOTRE DAME (Mar. 28, 2018), <https://news.nd.edu/news/online-sex-trafficking-bill-will-make-things-worse-for-victims-expert-says/> [https://perma.cc/4U88-MM77].

301. *See, e.g.*, Press Release, Senator Ron Wyden, Wyden Statement on FOSTA-SESTA Passing House (Feb. 27, 2018), <https://www.wyden.senate.gov/news/press-releases/wyden-statement-on-fosta-sesta-passing-house> [https://perma.cc/8YFA-8Q8C] (cautioning that FOSTA’s passage will make it more difficult to catch sex traffickers); Roddel, *supra* note 300; *supra* note 252 and accompanying text.

302. *See supra* note 277 and accompanying text.

303. Tom Jackman & Jonathan O’Connell, *16-Year-Old Was Found Beaten, Stabbed to Death After Being Advertised as Prostitute on Backpage*, WASH. POST (July 11, 2017), [https://www.washingtonpost.com/local/public-safety/how-a-16-year-old-went-from-backpage-to-prostitution-to-homicide-victim/2017/07/10/72eca33c-5f55-11e7-a4f7-af34fc1d9d39\\_story.html](https://www.washingtonpost.com/local/public-safety/how-a-16-year-old-went-from-backpage-to-prostitution-to-homicide-victim/2017/07/10/72eca33c-5f55-11e7-a4f7-af34fc1d9d39_story.html) [https://perma.cc/Q3TH-TA8R].

304. *See supra* Part III.B.1.

305. *See supra* Part III.B.2.

dangerous to be a UISP operator.<sup>306</sup> It makes it more dangerous to be a sex worker.<sup>307</sup> It may even make it more dangerous to be a trafficked person.<sup>308</sup> But it does not, in any discernable way, increase the risk involved in being a sex trafficker. Nor does it address any number of socioeconomic or environmental factors that advocates for sex-trafficking survivors have identified as concrete ways to curtail such trafficking.<sup>309</sup>

If Congress truly hopes to eradicate sex trafficking, it should repeal FOSTA and replace it with a three-pronged approach consisting of: (1) the decriminalization of consensual sex work; (2) narrow legislation that compels the pursuit and capture of the true wrongdoers in commercial sex—traffickers themselves—while leaving the internet otherwise intact; and (3) comprehensive policy reform that adequately addresses the needs of trafficking survivors and offers socioeconomic support to at-risk communities to diminish future victimization.

FOSTA fails in part because its drafters focused on commercial sex as an unequivocal social harm rather than on *forced* sex as a crime that may be commodified.<sup>310</sup> Sex workers and exploited individuals have distinct needs that are difficult to meet with one-size-fits-all legislation.<sup>311</sup> A law targeting advertisements for trafficked persons online would be better tailored to its goal if it sought to proscribe only coercive sex while allowing consensual activity to continue unhindered.<sup>312</sup> This objective could be more readily realized if consensual sex work were not illegal.<sup>313</sup> Globally, decriminalizing sex work has been demonstrably beneficial to improving health and safety in commercial sex,<sup>314</sup> reducing violence against sex workers, and curtailing trafficking activity.<sup>315</sup> Adopting decriminalization in

306. See *supra* notes 213–14 and accompanying text.

307. See *supra* notes 277–84 and accompanying text.

308. See Alptraum, *supra* note 268; Harmon, *supra* note 19; *FOSTA Does Not Protect Communities at Risk of Sex Trafficking*, FREEDOM NETWORK USA, <https://assets.documentcloud.org/documents/4389576/Freedom-Network-FNUSAOpposesFOSTA.pdf> [<https://perma.cc/RV59-S4SE>] (last visited Mar. 15, 2019); *supra* notes 252–60 and accompanying text.

309. Siouxsie Q, *supra* note 1.

310. See, e.g., Jennifer Wright, *Why Prostitution Should Be Legal*, HARPER'S BAZAAR (Apr. 26, 2018), <https://www.harpersbazaar.com/culture/politics/a20067359/why-prostitution-should-be-legal/> [<https://perma.cc/R3BH-M3BT>] (“Trafficking . . . is morally heinous. Not because it’s sex work. Because it’s forced.”).

311. See Horn, *supra* note 31; *supra* notes 40–41, 271–76 and accompanying text.

312. See *supra* notes 194, 271–76 and accompanying text.

313. See *supra* notes 293, 295 and accompanying text.

314. See Tina Horn, *Sex Workers Begin New Push for Decriminalization*, ROLLING STONE (Aug. 16, 2018, 4:38 PM), <https://www.rollingstone.com/culture/culture-features/sex-workers-begin-push-for-decriminalization-711645/> [<https://perma.cc/JLE4-2ZDP>] (noting that the criminalization of sex work precludes sex workers from accessing social services and health care).

315. See Burns, *supra* note 220; Margaret Huang, *5 Reasons Decriminalization Protects Sex Workers’ Rights*, ROLLING STONE (June 9, 2016, 6:11 PM), <https://www.rollingstone.com/politics/politics-news/5-reasons-decriminalization-protects-sex-workers-rights-91292/> [<https://perma.cc/JS96-LTYK>]; Wright, *supra* note 310. See generally Chi Adanna Mgbako et al., *The Case for Decriminalization of Sex Work in South Africa*, 44 GEO. J. INT’L L. 1423 (2013) (describing overwhelmingly positive results from the decriminalization of sex work in

the United States would allow the sex work industry to be regulated and to regulate itself, which would contribute invaluable to a better-moderated internet. Sexual content could be better scrutinized for evidence of coercion without broadly implicating workers who do not see themselves as victims and who rely on the internet to safely conduct business,<sup>316</sup> and sex workers could report trafficking without fear of self-incrimination.<sup>317</sup>

An approach less dogmatic than FOSTA would also offer strategic enforcement benefits.<sup>318</sup> Eighteen states have enacted safe harbor laws that partially decriminalize child prostitution so as to properly identify trafficked children as victims, rather than perpetrators, of crimes and protect them accordingly under the law.<sup>319</sup> These safe harbor laws, however, are only meaningful when coupled with a concerted effort to locate, shield, and defend these victims. The internet is an incredible tool with the potential to be harnessed for good. Incentivizing UISPs to investigate and report unlawful activity on their platforms, instead of forcing overmoderation before content can even exist,<sup>320</sup> would keep bad actors operating within a regulatable system that can establish evidence crucial to prosecution rather than simply pushing crime out of sight.<sup>321</sup> At the same time, resources must be directed to offline enforcement actions against traffickers, including comprehensive investigation of crime tips associated with online activity and affirmative screening mechanisms to flag problematic content without broadly proscribing entire areas of speech.<sup>322</sup> In conjunction with the decriminalization of sex work, and with law enforcement able to fully utilize the internet as a resource, trafficking could be better hindered at its source, with traffickers properly held accountable instead of innocent parties.<sup>323</sup>

Finally, social supports must be augmented for trafficking survivors and at-risk populations, which will decrease the risk of victimization and revictimization.<sup>324</sup> Socioeconomic reform efforts that aim to mitigate trafficking risk factors, such as “poverty, lack of education, poor access to stable and affordable housing, undocumented status, . . . LGBTQ

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New Zealand and advocating for parallel measures in South Africa). The decriminalization of sex work is a complex issue. The brevity of the discussion herein is not meant to suggest simplicity.

316. See *supra* notes 271–76 and accompanying text.

317. See Mgbako, *supra* note 315, at 1442; Wright, *supra* note 310.

318. See Edrina Nazaradeh, Note, *There Is No Such Thing as a Child Prostitute: Why Decriminalization Is Only the First Step in California*, 45 PEPP. L. REV. 189, 214–15 (2018).

319. *Id.* at 191–92. Under safe harbor laws, the trafficked child is not charged as a criminal, though it remains a crime to sell or seek sexual interaction with a trafficked child. *Id.* at 214.

320. See *supra* notes 212–27 and accompanying text.

321. See Harmon, *supra* note 19; *supra* notes 257–60 and accompanying text. The SAVE Act already criminalizes UISPs that knowingly profit from sex-trafficking advertisements and the federal government has successfully employed the Travel Act in a similar indictment. See *supra* notes 53, 139 and accompanying text.

322. See Siouxsie Q, *supra* note 1; *supra* notes 218–27 and accompanying text.

323. See *supra* notes 252, 257–60 and accompanying text.

324. See *supra* notes 252, 257–60, 309 and accompanying text.

discrimination, . . . youth homelessness,”<sup>325</sup> and “a broken foster care system,”<sup>326</sup> would better insulate vulnerable individuals from exploitation.<sup>327</sup> Criminal justice reforms that support survivors rather than criminalize them<sup>328</sup> would help such individuals recover and could protect them from future coercion.<sup>329</sup>

By exculpating sex workers, aiding trafficked persons, and directly pursuing traffickers, a legislative effort that follows this tripartite scheme would reduce sex trafficking in the United States while also limiting injury to individuals who provide commercial sexual services. Accordingly, though redrafting could cure its overbreadth,<sup>330</sup> FOSTA must be repealed and replaced with a more pragmatic legal effort to feasibly achieve its goals.

#### CONCLUSION

Sex-trafficking victims and survivors deserve protection and justice—but consensual sex workers cannot be seen as expendable casualties of that goal. FOSTA was neither a necessary nor a productive step in abolishing online sex trafficking. It is unconstitutionally overbroad, fails to achieve its policy objectives, impermissibly harms sex workers, and frustrates law enforcement efforts to protect victims of sex trafficking. FOSTA is poorly tailored legislation that furthers an indefensible policy: it condemns sex workers to harm by unconstitutionally limiting speech that protects them and by restricting their work to a hazardous arena. The law is hostile to its own goals and to vulnerable individuals nationwide, and merely redrafting the legislation will not adequately resolve these concerns.

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325. Suraj Patel, *We Must Repeal SESTA, a Deadly Law that Does Nothing to Help Trafficking Victims*, VICE: BROADLY (May 21, 2018, 11:20 AM), [https://broadly.vice.com/en\\_us/article/xwmdkk/repeal-sesta-fosta-sex-work-suraj-patel](https://broadly.vice.com/en_us/article/xwmdkk/repeal-sesta-fosta-sex-work-suraj-patel) [<https://perma.cc/M923-C5TR>].

326. Siouxsie Q, *supra* note 1.

327. *See* Patel, *supra* note 325; Siouxsie Q, *supra* note 1.

328. *See, e.g.*, Christine Hauser, *Cyntoia Brown Is Granted Clemency After 15 Years in Prison*, N.Y. TIMES (Jan. 7, 2019), <https://www.nytimes.com/2019/01/07/us/cyntoia-brown-clemency-granted.html> [<https://perma.cc/3RKU-R6NX>]; Kellie C. Murphy, *Beyond Cyntoia Brown: How Women End Up Incarcerated for Self Defense*, ROLLING STONE (Jan. 28, 2019, 5:55 PM), <https://www.rollingstone.com/culture/culture-features/cyntoia-brown-beyond-other-cases-775874/> [<https://perma.cc/3ZDU-QDDK>].

329. *See* Harmon, *supra* note 19.

330. *Supra* Part IV.A.