

12-2-2019

## Where One Marketplace Closes, (Hopefully) Another Won't Open: In Defense of FOSTA

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### Recommended Citation

Abigail W. Balfour, *Where One Marketplace Closes, (Hopefully) Another Won't Open: In Defense of FOSTA*, 60 B.C. L. Rev. 2475 (2019), <https://lawdigitalcommons.bc.edu/bclr/vol60/iss8/6>

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# WHERE ONE MARKETPLACE CLOSES, (HOPEFULLY) ANOTHER WON'T OPEN: IN DEFENSE OF FOSTA

**Abstract:** Since federal law first acknowledged the crime of sex trafficking in 2000, the internet has exploded—and sex traffickers have taken note. Traffickers have gained a platform to sell their victims to a much larger audience and with greater ease. Posting victims' advertisements online allows traffickers to drastically expand their customer base beyond the traditional street corner. Despite congressional attempts to criminalize sex traffickers and their beneficiaries since 2000, the internet persists as an effective conduit for sex traffickers to find customers. In 2018, Congress sought to remedy this by passing legislation that expanded criminal and civil liability to websites that knowingly participate in sex trafficking by hosting sex trafficking advertisements. In part, the Allow States and Victims to Fight Online Sex Trafficking Act (FOSTA) amends a law that was widely understood to provide websites with total immunity from claims arising out of third-party content. Concerned with the potential for criminal prosecutions, internet service providers criticize FOSTA as an infringement on their First Amendment right to free speech. They argue that the law forces them to censor third-party users' content and that it improperly extends to legal speech. The First Amendment generally does not restrict the content of speech, however, and its protections do not extend to speech that solicits crime. This Note will argue that FOSTA does not violate the First Amendment and is constitutionally sound at its core because sex traffickers' advertisements solicit crime.

## INTRODUCTION

When her daughter went missing, Jane Doe's mother typed her cell phone number into Backpage.com (Backpage).<sup>1</sup> The results page offered photographs of the young girl in various states of undress, one even taken in her bedroom.<sup>2</sup> Posted to Backpage's "Escorts" section, Jane's photographs included her cell

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<sup>1</sup> Janelle Nanos, *Her 15-year-old Daughter Fell Prey to a Sex Trafficker*, BOS. GLOBE MAG. (Feb. 1, 2017), <https://www.bostonglobe.com/magazine/2017/02/01/her-year-old-daughter-fell-prey-sex-trafficker/59fekHj6aaqhkCAh8eoVvL/story.html> [<https://perma.cc/39WT-2TM5>]. After looking at her fifteen-year-old daughter's phone records, Jane's mother contacted unfamiliar numbers. *Id.* One responded that he had never met Jane but that he had received her number from the website Backpage. *Id.* For purposes of this Introduction, I refer to the victim as Jane Doe, reflecting the anonymity of the victim portrayed by both the *Globe* article (in calling her "Jane Doe") and in court documents. *Id.*; see Jane Doe No. 1 v. Backpage.com, LLC, 817 F.3d 12, 17 (1st Cir. 2016) (referring to this particular victim as "Jane Doe #3" with respect to her fellow victims also bringing suit against Backpage.com).

<sup>2</sup> Nanos, *supra* note 1. Although the photographs did not include Jane's face, Jane's mother recognized the little clothing that Jane was wearing and Jane's bedroom. *Id.*

phone number and featured language that she was both inexperienced and interested in meeting people.<sup>3</sup> Eventually, Jane's mother learned that a man kidnapped Jane and posted the photographs as advertisements to sell her daughter for commercial sex acts.<sup>4</sup> As is common with most sex traffickers, Jane's perpetrator developed a relationship with her over time before kidnapping her.<sup>5</sup> Soon after Jane's trafficker posted the advertisements to Backpage, individuals began contacting Jane's cell phone to arrange a time to meet.<sup>6</sup>

Throughout the time that Jane's trafficker held her against her will, Jane was raped multiple times by her trafficker's customer base.<sup>7</sup> Individuals responded to the Backpage advertisement and paid Jane's trafficker in order to have sex with Jane.<sup>8</sup> Even after Jane escaped her trafficker and her parents requested that Backpage remove the advertisements, the photographs remained online for at least a week.<sup>9</sup> Jane ultimately brought suit against Backpage, alleging that the website facilitated her sex trafficking by posting and refusing to edit "Escort" advertisements.<sup>10</sup> Sex trafficking is the "recruitment, harboring, transportation, provision, or obtaining of a person" for the sale of sex.<sup>11</sup>

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<sup>3</sup> See *Doe ex. rel. Roe v. Backpage.com, LLC*, 104 F. Supp. 3d 149, 153 (D. Mass. 2015) (relaying that the Backpage advertisements of Jane included words such as, "new," "sweet," and "playful"); Nanos, *supra* note 1 (inferring that the advertisements conveyed that Jane was available to be purchased for sex every night and that she was under the age of eighteen).

<sup>4</sup> See Nanos, *supra* note 1 (noting that the man took photographs of Jane from Jane's phone and used them to create the Backpage advertisement).

<sup>5</sup> See *id.* (explaining that Jane met her trafficker on Facebook).

<sup>6</sup> *Id.*

<sup>7</sup> See *Jane Doe No. 1*, 817 F.3d at 17 (finding that Jane's multiple sexual assaults occurred due to the Backpage advertisement that her trafficker posted). The other victims who brought suit against Backpage with Jane were individually raped over nine hundred times during the two-year spans that their traffickers kept them. *Id.* The court notes that the traffickers posted some of the advertisements and compelled the victims to post other advertisements. *Id.*

<sup>8</sup> See Nanos, *supra* note 1 (detailing that Jane's trafficker received payment from customers in both money and drugs). After receiving payment, Jane's trafficker often waited outside of the hotel room where men raped Jane. *Id.*

<sup>9</sup> See *Jane Doe No. 1*, 817 F.3d at 17 n.3 (noting that Jane's parents' requests did not immediately result in any removal). Jane's trafficker was found guilty of human trafficking charges and sentenced to five to seven years in prison. Nanos, *supra* note 1. One of the men who paid Jane's trafficker and assaulted Jane received no punishment because he assisted law enforcement. *Id.*

<sup>10</sup> Reply Br. for the Appellants at 11, *Jane Doe No. 1*, 817 F.3d 12 (1st Cir. Nov. 19, 2015) (No. 15-1724), 2015 WL 7444084 (alleging that Backpage's conduct amounted to the facilitation of sex trafficking). Specifically, Jane Doe alleges that Backpage's willful blindness toward known sex trafficking advertisements and profits garnered from traffickers who post the advertisements amount to Backpage profiting from sex trafficking. See *id.* (explaining that Backpage's refusal to regulate known trafficking content allows them to continue to profit from advertisements). Additionally, Jane claims that Backpage aids traffickers in avoiding law enforcement detection because the site allows third-party users to post content anonymously. See *id.* (describing how anonymous posts further facilitate sex trafficking). A Senate subcommittee report accused Backpage of editing its third-party advertisements by deleting select language that traffickers used to signify an underage victim. See Annie Kelly, *Small Ads Sex Trafficking: The Battle Against Backpage*, THE GUARDIAN (July 2, 2017), <https://www.theguardian.com/global-development/2017/jul/02/fight-for-my-daughter-battle-against-backpage->

The act of sex trafficking, which victims like Jane endured, has a long history in the United States.<sup>12</sup> The internet has contributed to its growth, allowing for traffickers like Jane's to readily and quickly access a large customer base merely by posting photographs to websites.<sup>13</sup> Due to sex trafficking's continued proliferation, legislators have repeatedly attempted to hold more individuals accountable.<sup>14</sup> With the passage of the Trafficking Victims Protection Act (TVPA) in 2000, Congress created criminal liability for the specific crime of sex trafficking.<sup>15</sup> Eight years later, Congress reauthorized the TVPA and expanded it by extending culpability to individuals who benefitted from sex trafficking beyond the trafficker.<sup>16</sup> Despite these legislative efforts, the internet continued to expand the marketplace for traffickers and customers.<sup>17</sup>

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child-sex-trafficking [<https://perma.cc/N622-RA7T>] (describing Backpage's efforts to delete words like "Lolita" from personal advertisements).

<sup>11</sup> See 22 U.S.C. § 7102(9) (2018) (defining "sex trafficking").

<sup>12</sup> See *id.* § 7101(b)(1) (noting that sex trafficking has persisted into the modern era). Congress described human trafficking as a "modern form of slavery." *Id.*

<sup>13</sup> See STAFF OF S. SUBCOMM. ON INVESTIGATIONS, 114TH CONG., BACKPAGE.COM'S KNOWING FACILITATION OF ONLINE SEX TRAFFICKING 5 (2017) [hereinafter BACKPAGE.COM'S KNOWING FACILITATION OF ONLINE SEX TRAFFICKING] <https://www.hsgac.senate.gov/imo/media/doc/Backpage%20Report%202017.01.10%20FINAL.pdf> [<https://perma.cc/5JVZ-PYJJ>] (describing the relationship between the internet and growth of sex trafficking). In addition to increasing the efficiency of finding customers, the internet has also aided traffickers in avoiding law enforcement detection due to the anonymous nature of posts. *Id.*

<sup>14</sup> See, e.g., DEP'T OF JUSTICE, FEDERAL PROSECUTION OF HUMAN-TRAFFICKING CASES, 2015, at 2 (2018) (describing Congressional attempts to combat sex trafficking and providing data from 2015 prosecutorial efforts). The report notes that federal sex trafficking legislation ultimately arises out of the Thirteenth Amendment. *Id.*

<sup>15</sup> See Victims of Trafficking and Violence Protection Act (TVPA) of 2000, Pub. L. No. 106-386, § 102(b)(14), 114 Stat. 1464, 1467 (emphasizing the need for specific legislation to combat sex trafficking). Congress noted that the then-existing statutes used to prosecute sex traffickers were inadequate because they only dealt with nonviolent offenses. *Id.* This resulted in traffickers receiving punishments that did not adequately reflect the extent of their culpability. *Id.* The TVPA sets a minimum of twenty years and a maximum of life imprisonment for any individual who sex traffics a minor. See 18 U.S.C. § 1591 (2018) (creating criminal liability for sex traffickers). If the victim was not a minor, then there is no minimum sentence and the maximum prison term is twenty years. See *id.* § 1590 (increasing the maximum sentence to life imprisonment if the offense includes kidnapping, death, or aggravated sexual assault).

<sup>16</sup> See William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, § 222, 122 Stat. 5044, 5070 (codified as amended at 18 U.S.C. § 1589) [hereinafter TVPA Reauthorization Act] (expanding criminal liability to individuals who conspired to commit sex trafficking). In addition to co-conspirators, criminal liability was also extended to individuals who profited from sex trafficking endeavors. See 18 U.S.C. § 1593A (making pecuniary gains from sex trafficking illegal).

<sup>17</sup> See URBAN INST., ESTIMATING THE SIZE AND STRUCTURE OF THE UNDERGROUND COMMERCIAL SEX ECONOMY IN EIGHT MAJOR US CITIES 218 (2014), [https://www.urban.org/sites/default/files/publication/22376/413047-estimating-the-size-and-structure-of-the-underground-commercial-sex-economy-in-eight-major-us-cities\\_0.pdf](https://www.urban.org/sites/default/files/publication/22376/413047-estimating-the-size-and-structure-of-the-underground-commercial-sex-economy-in-eight-major-us-cities_0.pdf) [<https://perma.cc/U47Q-64Z9>] (describing how the internet has changed the business model of the commercial sex trade).

In response to cases like *Jane's* and websites like Backpage, Congress passed the Allow States and Victims to Fight Online Sex Trafficking Act (FOSTA).<sup>18</sup> FOSTA seeks to shut down the online marketplace for the exploitation of sex trafficked victims by extending criminal liability to websites that “knowingly facilitate” sex trafficking.<sup>19</sup> Two days after FOSTA passed the Senate, Craigslist.com, a popular website for its personal advertisements, closed its entire classified section.<sup>20</sup> Proponents of FOSTA celebrated this closure as a website finally taking responsibility for its bad acts and indicated that the bill’s passage would have a widespread effect.<sup>21</sup> In contrast, the closure appeared to critics as proof of FOSTA’s impending threat towards revoking First Amendment protections.<sup>22</sup>

This Note explores the tension between sex trafficking advertisements and the First Amendment in today’s internet era.<sup>23</sup> Part I of the Note discusses the nature of sex trafficking and congressional efforts towards combatting it, including FOSTA’s attempt to address the role of the internet in sex trafficking’s continued expansion.<sup>24</sup> Part II reviews criticism of FOSTA, specifically internet service providers who are concerned with its effect on their First

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<sup>18</sup> See Allow States and Victims to Fight Online Sex Trafficking Act (FOSTA) of 2017, Pub. L. No. 115-164, § 3, 132 Stat. 1253 (2018) (codified as amended in scattered sections of 18 U.S.C. and 47 U.S.C.) (creating criminal liability for internet service providers involved in sex trafficking); H.R. REP. NO. 115-572, pt. 1, at 4 (2018) (citing the First Circuit’s decision in *Jane’s* case as contributing to the need for FOSTA). The First Circuit dismissed *Jane’s* claim against Backpage, citing the civil immunity for websites like Backpage with regards to content posted by third-parties, in this case *Jane’s* trafficker. See *Jane Doe No. 1*, 817 F.3d at 22 (finding that Backpage could not be held liable for the harm done to *Jane* by advertisements that her trafficker posted to Backpage).

<sup>19</sup> See FOSTA § 5 (acknowledging the role that internet service providers have played in the ongoing sex trafficking trade).

<sup>20</sup> 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), <https://www.lawfareblog.com/fosta-new-anti-sex-trafficking-legislation-may-not-end-internet-its-not-good-law-either> [<https://perma.cc/A76L-6VJD>] (finding that Craigslist closed its intimate classifieds section in response to FOSTA and out of fear of its increased civil liability under FOSTA). In addition to Craigslist, other websites also closed parts of their personal advertisement sections. See Nitasha Tiku, *Craigslist Shuts Personal Ads for Fear of New Internet Law*, WIRED (Mar. 23, 2018), <https://www.wired.com/story/craigslist-shuts-personal-ads-for-fear-of-new-internet-law/?mbid=BottomRelatedStories> [<https://perma.cc/SRV7-E9MF>] (noting that Reddit shut down its subsections entitled, “Hookers,” “Escorts,” and “SugarDaddy”).

<sup>21</sup> See Bob Goodlatte (@RepGoodlatte), TWITTER (Mar. 23, 2018, 10:34 AM), <https://twitter.com/RepGoodlatte/status/977237099089887232?> [<https://perma.cc/MG5H-37BA>] (remarking, as the House Judiciary Committee chairman and co-sponsor of the bill, on websites recently closing their personal advertisements sections as a sign of FOSTA’s success).

<sup>22</sup> See Elizabeth Nolan Brown, *The New Law That Killed Craigslist’s Personals Could End the Web as We’ve Known It*, DAILY BEAST (Mar. 23, 2018), <https://www.thedailybeast.com/the-new-law-that-killed-craigslist-personals-could-end-the-web-as-weve-known-it> [<https://perma.cc/4GEG-RQNE>] (noting FOSTA’s potential violation of First Amendment as criminalizing speech relating to consensual sex).

<sup>23</sup> See *infra* notes 27–237 and accompanying text.

<sup>24</sup> See *infra* notes 27–136 and accompanying text.

Amendment protections.<sup>25</sup> Part III argues that while FOSTA could benefit from more specific language, the law ultimately does not run afoul of any First Amendment violations.<sup>26</sup>

### I. SEX TRAFFICKING IN THE INTERNET ERA

The illicit marketplace for sex trafficked victims has continued to grow, despite congressional attempts to limit its scope.<sup>27</sup> The emergence of the internet largely caused this expansion.<sup>28</sup> The forced sale of individuals to perform sexual acts is not a new phenomenon in the United States.<sup>29</sup> Nonetheless, the legislative solutions posed by Congress have changed over time.<sup>30</sup> The remedies have expanded the scope of liability as Congress recognized the wide range of individuals involved in the illicit trade.<sup>31</sup> The most recent congressional change, the Allow States and Victims to Fight Online Sex Trafficking Act of 2017 (FOSTA), acknowledges the crucial role that the internet plays in traffickers' business.<sup>32</sup> This Part discusses the nature of sex trafficking, the role

<sup>25</sup> See *infra* notes 137–200 and accompanying text.

<sup>26</sup> See *infra* notes 201–237 and accompanying text.

<sup>27</sup> See STAFF OF S. SUBCOMM. ON INVESTIGATIONS, 114TH CONG., REC. TO ENFORCE A SUBPOENA ISSUED TO CEO OF BACKPAGE.COM, LLC 4 (2015), <http://sharedhope.org/wp-content/uploads/2016/10/PSIReport.pdf> [<https://perma.cc/W9HU-FXR5>] (describing the sex trafficking market as producing billions in profits for sex traffickers and their beneficiaries).

<sup>28</sup> See *Latest Developments in Combating Online Sex Trafficking: Hearing Before the Subcomm. on Communications and Technology of the H. Comm. on Energy and Commerce*, 115th Cong. 115-84 (2017) (statement by Yiota G. Souras, Senior Vice President and General Counsel, The National Center for Missing and Exploited Children) (detailing how the internet leads to a larger customer base and specifically noting the increased dangers for underage individuals). The internet allows for customers to search for commercial sex acts more easily and frequently. *Id.* Additionally, it allows for the complete financial transaction to occur online, increasing efficiency and allowing anonymity. *Id.*

<sup>29</sup> See Donna Hughes, *Combating Sex Trafficking: A History*, FAIR OBSERVER (Oct. 6, 2013), [https://www.fairobserver.com/region/north\\_america/combating-sex-trafficking-history/](https://www.fairobserver.com/region/north_america/combating-sex-trafficking-history/) [<https://perma.cc/JN5Y-C2YS>] (tracing the origins of sex trafficking in the United States to the 1800s). As the abolitionist movement against slavery began to garner support in the later 1800s, individuals throughout the world also began taking note of women who were forced into prostitution. See *id.* The term “sex trafficking” did not emerge until the 1980s, when the women’s movement began defending prostitution as a form of employment and differentiating it from forced prostitution, i.e. sex trafficking. *Id.*

<sup>30</sup> See ALEXANDRA F. LEVY, HUMAN TRAFFICKING LEGAL CTR., FEDERAL HUMAN TRAFFICKING CIVIL LITIGATION: 15 YEARS OF THE PRIVATE RIGHT OF ACTION 7 (2018) (providing an overview of Congressional responses to the issue of sex trafficking). Compare Mann Act (White-Slave Traffic Act), Pub. L. No. 2771, 36 Stat. 825 (1910) (codified as amended at 18 U.S.C. § 2421) (criminalizing the forced transportation of women across state lines), with FOSTA § 3 (holding websites criminally liable for participating in sex trafficking ventures).

<sup>31</sup> Compare TVPA § 102(b)(2) (creating a specific crime for individuals who either directly participate in the forced sale of commercial sex or profit in some way from such a sale), with FOSTA § 3 (extending liability to websites that facilitate the forced sale of commercial sex).

<sup>32</sup> 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/P85Q-N97K>] (describing FOSTA’s sponsors characterization of the bill). Specifically, FOSTA co-

that the internet has played in expanding its illicit market, and FOSTA's attempt to combat online advertisements.<sup>33</sup>

### A. The Scope of the Problem

#### 1. Understanding Sex Trafficking

Estimates indicate that global human trafficking produces billions of dollars annually for those involved in the trade.<sup>34</sup> In the United States, human trafficking takes the form of forced farming, household, manufacturing, and sexual labor.<sup>35</sup> Sex trafficking, a specific form of human trafficking, is the illegal trade of humans against their will and for performance of commercial sexual acts.<sup>36</sup> In the United States, sex trafficking is defined as the inducement of a commercial sex act either by "force, fraud, or coercion," or if the individual is younger than eighteen.<sup>37</sup> The act of sex trafficking extends beyond the sole individual who arranges for the transaction and subsequent sexual act to occur;

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sponsor Representative Ann Wagner referenced the multitude of websites that would now be held accountable for their role in sex trafficking under FOSTA. *Id.*

<sup>33</sup> See *infra* notes 34–136 and accompanying text.

<sup>34</sup> *What Is Human Trafficking?*, U.S. DEP'T OF HOMELAND SEC.: BLUE CAMPAIGN <https://www.dhs.gov/blue-campaign/what-human-trafficking> [<https://perma.cc/Y5WA-2656>]; see G.A. Res. 55/25, at 2, Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Nov. 15, 2000) (creating the first international definition of human trafficking). The United Nations defines "trafficking in persons" as "the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force . . . for the purpose of exploitation." *Id.* The United States ratified the Protocol in 2005. See UNITED NATIONS, *STATUS OF TREATIES* [https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XVIII-12-a&chapter=18&clang=\\_en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12-a&chapter=18&clang=_en) [<https://perma.cc/2KH9-ARES>] (listing the date of ratification). Of the highest earning international crimes, human trafficking is considered second only to drug trafficking. U.S. DEP'T OF HOMELAND SEC., *supra*.

<sup>35</sup> See SIDDHARTH KARA, *SEX TRAFFICKING: INSIDE THE BUSINESS OF MODERN SLAVERY* 183 (2017) (discussing the industries where human trafficking occurs in the United States). The number of overall sex trafficking victims brought to the U.S. accounts for roughly 0.9% of the international total of victims. *Id.* The book's author credits three factors for the relatively small amount of human trafficking that occurs in the United States compared to other nations: the expensive travel between the United States and the victims' home countries (mostly Eastern Europe and East Asia), the more efficient and just American law enforcement and judicial systems in place, and the passage of the TVPA in 2000, leading to more prosecutorial efforts. See *id.* (providing the factors that differentiate the American sex trafficking trade from the global sex trafficking trade). Nonetheless, international victims still account for roughly one-third of the sex trafficking trade in the United States. See NAT'L HUMAN TRAFFICKING RES. CTR., *2013 STATISTICAL OVERVIEW* 7 (2014) (providing data for incoming calls from self-reporting victims and finding that 32% identified themselves as foreigners to the U.S., 37% identified as U.S. citizens, and the rest did not provide country of origin).

<sup>36</sup> See 22 U.S.C. § 7102(12) (defining sex trafficking as "the recruitment, harboring, transportation, provision, obtaining, patronizing, or soliciting of a person for the purpose of a commercial sex act"). Congress defines "commercial sex act" as "any sex act on account of which anything of value is given to or received by any person." *Id.* § 7102(4).

<sup>37</sup> See 18 U.S.C. § 1591 (defining the two types of conduct that rise to the level of sex trafficking).

anyone who transports victims or otherwise enlists victims can also be held responsible.<sup>38</sup>

Sex trafficking victims often share a set of characteristics.<sup>39</sup> As a matter of law, sex trafficking victims are either under the age of eighteen or are over the age of eighteen and forced into commercial sex.<sup>40</sup> As of 2018, roughly twenty-five percent of sex trafficking victims in North America are thought to be underage.<sup>41</sup> Women and children represent the largest demographic of victims.<sup>42</sup> Sex traffickers often prey on urban communities with high immigrant populations.<sup>43</sup> Aside from domestic efforts, traffickers also ensnare individuals from Eastern Asia, particularly Thailand and the Philippines.<sup>44</sup> Brought to the United States under false pretenses, these victims are particularly vulnerable to the fear tactics used by traffickers.<sup>45</sup>

Sex traffickers employ multiple techniques to trap victims, however, the most common method employed is “grooming” the victim.<sup>46</sup> This involves

<sup>38</sup> *Id.*

<sup>39</sup> See *The Victims & Traffickers*, POLARIS, <https://polarisproject.org/victims-traffickers> [<https://perma.cc/MT62-AKV7>] (explaining that there is no singular set of traits for sex trafficking victims but that certain factors make individuals in situations more prone to traffickers’ advances).

<sup>40</sup> See 18 U.S.C. § 1591 (distinguishing between minors and adults for purposes of sex trafficking law). Individuals under eighteen are victims of sex trafficking regardless of whether there was an element of force. See *id.* (requiring force as an element for individuals charged with sex trafficking of individuals over eighteen but not as an element for individuals under eighteen).

<sup>41</sup> See U.N. OFFICE ON DRUGS & CRIME, GLOBAL REPORT ON TRAFFICKING IN PERSONS 2018, at 71, U.N. Sales No. E.19.IV.2 (2018) [hereinafter GLOBAL REPORT ON TRAFFICKING] (providing data regarding the split between underage and adult sex trafficking victims). In contrast, the sex trafficked female population in Central America is roughly half minor girls and half women. *Id.*

<sup>42</sup> See *id.* (finding that roughly 70% of trafficking victims are trafficked for sexual exploitation). The United Nations also found that of North America’s total trafficking victims, roughly 85% were women or girls. *Id.* at 71.

<sup>43</sup> See Theodore R. Sangalis, Note, *Elusive Empowerment: Compensating the Sex Trafficked Person Under the Trafficking Victims Protection Act*, 80 FORDHAM L. REV. 403, 415 (2011) (providing multiple reasons for the vulnerability of immigrant populations). Traffickers frequently exploit immigrants’ lack of trust with law enforcement and inexperience with American culture to coerce them into the illicit sex trade. See *id.* (noting that traffickers threaten to report immigrant victims to the police and often steal their identification papers).

<sup>44</sup> See GLOBAL REPORT ON TRAFFICKING, *supra* note 41, at 74 (describing the flow of foreign victims to the United States). Although the majority of victims in the United States are U.S. residents, the United States is known to be one of the larger markets for foreign victims. See *id.* at 73–74 (noting that a significant number of victims from Mexico, Central America, and East Asia are brought to the United States). Of all the trafficking victims brought to North America, roughly 8% are from East Asia and sent to the United States. *Id.*

<sup>45</sup> See Sangalis, *supra* note 43, at 415 (providing the circumstances of immigrant communities that make them more vulnerable to traffickers’ manipulation); Nicholas Kulish et al., *Behind Illicit Massage Parlors Lie a Vast Crime Network and Modern Indentured Servitude*, N.Y. TIMES (Mar. 2, 2019), <https://www.nytimes.com/2019/03/02/us/massage-parlors-human-trafficking.html> [<https://perma.cc/Z6M8-ZVD5>] (explaining how traffickers will lure potential victims from their immigrant communities and then force them into the sex trade with financial threats).

<sup>46</sup> See Stephen C. Parker & Jonathan T. Skrmetti, *Pimps Down: A Prosecutorial Perspective on Domestic Sex Trafficking*, 43 U. MEM. L. REV. 1013, 1018–19 (2013) (describing the “grooming”



creating an environment of fear and seclusion in order to make the victim feel as though she must comply with the trafficker's orders.<sup>47</sup> Traffickers engage in mental abuse by constantly declaring the victim's unworthiness and emphasizing the victim's powerlessness.<sup>48</sup> Grooming can also entail episodes of escalating violence to establish control over the victims, although psychological abuse remains more common than physical abuse.<sup>49</sup> Sex traffickers also use substances to incapacitate the victim, sometimes providing drugs and alcohol to exploit an individual's pre-existing addiction.<sup>50</sup> To maintain control over the victim, traffickers often repeat threats of physical violence and emphasize the victim's increasing separation from society, family, and friends.<sup>51</sup> Once the sex trafficker has established control over the victim, the trafficker then seeks an individual willing to pay for a commercial sex act.<sup>52</sup> Traffickers will sell their victims through a multitude of avenues including massage parlors, escort services, and street corners.<sup>53</sup>

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process as the perpetrator's identification and subsequent exploitation of the victim's vulnerabilities to ensure compliance with the perpetrator's commands). Aside from "grooming," sex traffickers will also resort to kidnapping the victim or using alcohol or drugs to overcome the victim. *See id.* (explaining that kidnapping and drugging are far less commonly employed by traffickers than "grooming").

<sup>47</sup> *See* KARA, *supra* note 35, at 187 (describing how traffickers ensure their victims follow their orders). Kara provides an example of a victim who witnessed the sex traffickers raping other victims in order to compel them to stay in the brothel. *Id.*

<sup>48</sup> *See* Mellissa Withers, *Psychological Tactics Used by Human Traffickers*, PSYCH. TODAY (Oct. 19, 2016), <https://www.psychologytoday.com/us/blog/modern-day-slavery/201610/psychological-tactics-used-human-traffickers> [<https://perma.cc/ERP2-WBWB>] (concluding that traffickers' use of mental abuse decreases their chances of law enforcement detection). Traffickers avoid inflicting bodily injuries so as to decrease the chances that medical and law enforcement personnel could notice a victim of sex trafficking. *Id.* Additionally, sex trafficking victims who have been brought to the United States without proper documentation are more vulnerable to mental manipulation because they already are in a situation without family, friends, or legal recourse. *Id.*

<sup>49</sup> *See* KARA, *supra* note 35, at 187 (noting instances where the traffickers utilized physical force against their victims); Withers, *supra* note 48 (finding that traffickers engage in psychological abuse much more frequently than physical abuse).

<sup>50</sup> *See* KARA, *supra* note 35, at 187 (providing specifics for how traffickers establish and maintain control over their victims); Emma Eastwood-Paticchio, *Addicted to You: Drug Addiction as a Means of Coercion*, HUM. TRAFFICKING INST. <https://www.traffickingmatters.com/addicted-to-you-drug-addiction-as-a-means-of-coercion/> [<https://perma.cc/WC83-32M8>] (describing how traffickers manipulate victims' drug addictions to further exert control).

<sup>51</sup> *See* U.S. DEP'T OF HEALTH & HUMAN SERVS., RESOURCES: IDENTIFYING AND INTERACTING WITH VICTIMS OF HUMAN TRAFFICKING (July 2012) (providing a list of psychological tactics that traffickers use to maintain control over their victims). The purpose of psychological abuse is to ensure the victims' constant fear of the traffickers, thus ensuring that they continue to follow the trafficker's orders. *Id.*

<sup>52</sup> *See generally* Parker & Skrmetti, *supra* note 46, at 1018–19 (providing an overview of the chronological timeline that sex traffickers take when establishing control over their victims).

<sup>53</sup> *See* U.S. DEP'T OF JUSTICE, NATIONAL STRATEGY TO COMBAT HUMAN TRAFFICKING 4 (2017) [hereinafter NATIONAL STRATEGY TO COMBAT HUMAN TRAFFICKING] (listing massage parlors and nightclubs for additional outlets that traffickers will seek to utilize aside from online advertising); BACKPAGE.COM'S KNOWING FACILITATION OF ONLINE SEX TRAFFICKING, *supra* note 13, at 5 (listing places where sex trafficking predominantly occurred prior to the internet).

## 2. The Growth of Sex Trafficking

In the United States, sex trafficking accounts for roughly eighty percent of all suspected human trafficking incidents reported to law enforcement.<sup>54</sup> It is significant to note that the breadth of sex trafficking in the U.S. is difficult to ascertain because many victims do not report the crime to law enforcement.<sup>55</sup> Like other forms of illicit conduct, sex trafficking is difficult to track because of the extent to which it operates beyond the scope of law enforcement detection.<sup>56</sup>

Despite a lack of precise data, research demonstrates that the marketplace for sex trafficked individuals has continued to expand since Congress first acknowledged sex trafficking as a specific crime in 2000.<sup>57</sup> In 2000, Congress estimated that roughly 50,000 women and children were forced into the sex trade annually in the United States.<sup>58</sup> Current estimates indicate that at least 192,000 individuals remain enslaved by sex traffickers.<sup>59</sup> In 2017 alone, the Federal Bureau of Investigation (FBI) began investigating 782 instances of suspected human trafficking.<sup>60</sup> Of the 499 individuals that the Department of

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<sup>54</sup> See U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, CHARACTERISTICS OF SUSPECTED HUMAN TRAFFICKING INCIDENTS, 2008–2010, at 1 (Apr. 2011) (noting that federal law enforcement categorized roughly 11% of the human trafficking incidents as forced labor and 7% as an undetermined form).

<sup>55</sup> See NATIONAL STRATEGY TO COMBAT HUMAN TRAFFICKING, *supra* note 53, at 2 (ascribing the scarcity of comprehensive data to the lack of self-reporting from victims and the extent that perpetrators' intimidation and threats towards victims impedes law enforcement). See generally SARAH GODOY, REBECCA SADWICK, & KATHLEEN BACA, U.C.L.A. LUSKIN SCH. OF PUB. AFFAIRS, SHEDDING LIGHT ON SEX TRAFFICKING: RESEARCH, DATA, AND TECHNOLOGIES WITH THE GREATEST IMPACT 5–6 (2016) (finding a lack of comprehensive data on sex trafficking in the United States and advocating for a centralized database accessible to both federal and local law enforcement).

<sup>56</sup> See Lindsey N. Roberson, *She Leads a Lonely Life*, 52 WAKE FOREST L. REV. 359, 362 (2017) (noting the difficulty in ascertaining data for criminal activity, including sex and drug trafficking); see also U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S TRAFFICKING IN PERSONS REPORT 2017, at 49 [hereinafter ATTORNEY GENERAL'S TRAFFICKING IN PERSONS REPORT] (noting that federal agencies do not record local or state law enforcement data regarding their efforts towards sex trafficking).

<sup>57</sup> See TVPA § 103(b)(9) (defining the act of "sex trafficking"); BACKPAGE.COM'S KNOWING FACILITATION OF ONLINE SEX TRAFFICKING, *supra* note 13, at 5 (linking the growth of online advertising to the rise in sex trafficked individuals); URBAN INST., *supra* note 17, at 234 (citing the growth of sex trafficking in recent years).

<sup>58</sup> See TVPA § 102(b)(1) (finding that over 700,000 individuals are globally sex trafficked across international borders).

<sup>59</sup> See INT'L LABOR OFFICE, GLOBAL ESTIMATES OF MODERN SLAVERY: FORCED LABOR AND FORCED MARRIAGE 39 (2017) (finding that there are roughly 4.8 million individuals globally in the sex trade and that roughly 4% of those victims are in the United States). The ILO found that over 70% of individuals forced into the sex trade are in Asia and the Pacific region. *Id.* Despite the article's title, the ILO differentiates between sex trafficking and forced marriage and, as such, the aforementioned sex trade numbers do not include individuals involved in forced marriages. *Id.*

<sup>60</sup> See ATTORNEY GENERAL'S TRAFFICKING IN PERSONS REPORT, *supra* note 56, at 18 (also noting the 833 human trafficking investigations undertaken by Immigration and Customs Enforcement (ICE) in 2017).

Justice (DOJ) convicted under human trafficking statutes in 2017, 471 were classified as sex traffickers.<sup>61</sup>

Rather than believing the internet is reducing the amount of street-level sex trafficking, researchers have argued that the internet has led to a greater demand for commercial sex.<sup>62</sup> This is partially due to the ease with which customers can now search for online advertisements and complete transactions.<sup>63</sup> The National Center for Missing and Exploited Children (NCMEC) reported a 1,432% increase in child sex trafficking cases from 2009 to 2014, a trend they attributed to sex traffickers' online advertisements.<sup>64</sup> The NCMEC also found that 88% of its reported instances of child sex trafficking from 2012 to 2017 involved the use of online classified advertisements.<sup>65</sup> Of the reports made to the National Human Trafficking Hotline in 2017, there were five times as many sex trafficking instances that arose from online escort services as opposed to sales on the traditional street corner.<sup>66</sup>

### 3. The Internet's Role in Expanding Sex Trafficking

Unlike the traditional street corner, the internet provides traffickers with a more profitable business model.<sup>67</sup> Because most websites do not charge for third-party posts, the internet allows traffickers to cheaply acquire clients for their victims' services.<sup>68</sup> The internet makes the client base exponentially larg-

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<sup>61</sup> See *id.* (explaining that the DOJ pursued these convictions under both specific trafficking statutes and non-trafficking criminal statutes).

<sup>62</sup> See URBAN INST., *supra* note 17, at 234 (concluding that online advertisements for commercial sex acts have increased the size of the customer pool for commercial sex). The study rejects the notion that the internet has led to a decrease in sales of victims by traditional avenues such as massage parlors. See *id.* (tracing the growth of sex trafficking to the emergence of the internet in the 1980s). Instead, the advent of the internet has merely allowed for traffickers to increase their customer base. See *id.* (describing the internet's ability to attract more customers than were customarily found at the street level market).

<sup>63</sup> See *The Latest Developments in Combating Online Sex Trafficking*, *supra* note 28 (detailing how the internet leads to a larger customer base).

<sup>64</sup> See Amicus Br. of Nat'l Center for Missing & Exploited Children at 2, *J.S. v. Village Voice Media Holdings, LLC*, 359 P.3d 714 (Wash. Sept. 15, 2014) (No. 4492-02-II), 2014 WL 4913544 (linking the rise in child sex trafficking to sex traffickers' ability to use the internet to advertise).

<sup>65</sup> See *id.* at 5 (noting that most of the child sex trafficking cases that the NCMEC deals with involve ads specifically posted on Backpage.com).

<sup>66</sup> See POLARIS, STATISTICS FROM THE NATIONAL HUMAN TRAFFICKING HOTLINE AND BEFREE TEXTLINE 2 (2018). It is important to note that the information garnered by the National Human Trafficking Hotline is only based upon individuals who voluntarily call and self-report their instances of trafficking. *Id.* at 1.

<sup>67</sup> See BACKPAGE.COM'S KNOWING FACILITATION OF ONLINE SEX TRAFFICKING, *supra* note 13, at 5 (listing higher profits, efficient transportation of victims, and avoidance of law enforcement as three advantages to sex traffickers for advertising online as opposed to in-person).

<sup>68</sup> See Melissa Farley et al., *Online Prostitution and Trafficking*, 77 ALB. L. REV. 1039, 1043 (2013) (noting that the internet has made sex trafficking more profitable because of traffickers' ability to reach more clients at a much faster rate); Aamer Madhani, *Backpage.com Thumbs Nose at Sheriff*

er than what is available at the street level.<sup>69</sup> Solicitation most often occurs via the internet with personal advertisements.<sup>70</sup> Traditionally used for the sales of goods or services from one individual to another, classified sites allow clients and traffickers to find one another anonymously.<sup>71</sup> In this type of transaction, the individual meets the victim at a prearranged location and exchanges money with the sex trafficker.<sup>72</sup>

Traffickers' online advertisements often contain photographs of the victim and can contain widely-known terms to signify whether the victim is underage.<sup>73</sup> For example, clients seeking underage victims can look for terms in the advertisement such as "Lolita" or "Amber Alert."<sup>74</sup> The advertisements often assume the guise of promoting escort services or personal massages.<sup>75</sup> Many of the larger websites known for their classified ad sections, such as Craigslist and Backpage, hosted specific sections for adult services where traffickers would post their advertisements.<sup>76</sup>

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*After Visa, MasterCard Cut Ties*, USA TODAY (July 9, 2015), <https://www.usatoday.com/story/money/2015/07/09/backpage-free-adult-services-ads-mastercard-visa/29931651/> [<https://perma.cc/4RDJ-3THJ>] (describing how Backpage allows third-parties to upload advertisements for free). The internet enables traffickers to reach clients who otherwise might not find themselves looking to buy sex on an ordinary street corner. See Farley et al., *supra*, at 1046 (explaining how sex traffickers can lure clients first with free pornography and then ultimately solicit them with offers of sex). Aside from the internet, traffickers sell their victims, in the form of forced prostitution, in various entertainment venues or on the street. See *id.* at 1044 (listing motels and massage parlors as two common physical locations where sex trafficking occurs without the use of the internet).

<sup>69</sup> See URBAN INST., *supra* note 17, at 192 (noting that sex traffickers profit more from online classified advertisements than other methods, such as word-of-mouth or social networking accounts, because it connects them to both a larger and wealthier base of customers).

<sup>70</sup> See NATIONAL STRATEGY TO COMBAT HUMAN TRAFFICKING, *supra* note 53, at 4 (noting that the online advertisements do not proclaim sex acts but rather take the guise of escort services and often falsify the victim's name and age).

<sup>71</sup> See 164 CONG. REC. H1290-02 (daily ed. Feb. 27, 2018) (statement of Rep. Roby) (describing how sex traffickers have taken advantage of the personal classified sections on websites to post advertisements of their victims).

<sup>72</sup> See, e.g., *Doe*, 104 F. Supp. 3d at 153 (providing the facts of Jane Doe No. 3, a sex trafficking victim, who was taken to a hotel and sexually assaulted by the individual who found her through Backpage advertisements); Charlotte Alter, *Catching Johns: Inside the National Push to Arrest Men Who Buy Sex*, TIME <http://time.com/sex-buyers-why-cops-across-the-u-s-target-men-who-buy-prostitutes/> [<https://perma.cc/UD3Y-AHSQ>] (explaining a police operation where undercover agents posted ads on Backpage and arranged for male buyers to meet them at a nearby hotel).

<sup>73</sup> See Marguerite A. O'Brien, *Free Speech or Slavery Profiteering: Solutions for Policing Online Sex-Trafficking Advertisement*, 20 VAND. J. ENT. & TECH. L. 289, 295 (2017) (describing how traffickers manipulate the advertisements to suggest to clients that the individual for sale is underage).

<sup>74</sup> See Timothy Williams, *Backpage's Sex Ads Are Gone. Child Trafficking? Hardly*, N.Y. TIMES (Mar. 11, 2017), <https://www.nytimes.com/2017/03/11/us/backpage-ads-sex-trafficking.html> [<https://perma.cc/U332-2P3C>] (noting additional phrases such as "100% young" and "oh daddy can i be your candy").

<sup>75</sup> See Kulish et al., *supra* note 45 (describing the seemingly consensual services that traffickers use to disguise the real purpose of their advertisements).

<sup>76</sup> See Jody Raphael, *Denial of Harm: Sex Trafficking, Backpage, and Free Speech Absolutism*, 2:1 (Art. 8) J. ON SEXUAL EXPLOITATION & VIOLENCE 1 (2017) (providing Craigslist's "Casual En-

## B. Legislative Responses to Sex Trafficking

### 1. The TVPA and Subsequent Reauthorizations

Congress has expanded the scope of liability for those involved in sex trafficking throughout the last century.<sup>77</sup> Originally, prosecutors charged sex traffickers under a law that criminalized transporting prostitutes across state lines.<sup>78</sup> But by the end of the twentieth century, Congress recognized that sex trafficking was so ubiquitous that it warranted its own criminal law.<sup>79</sup> Specifically, Congress acknowledged that law enforcement and federal prosecutors lacked the adequate tools to combat sex trafficking.<sup>80</sup>

In 2000, the United States government initiated its largest effort to combat sex trafficking by passing the Victims of Trafficking and Violence Protection Act (TVPA).<sup>81</sup> The TVPA was the first federal law that independently recognized sex trafficking as a crime.<sup>82</sup> The purpose of the TVPA was to specifically

counters” section and Backpage’s adult escort section as examples). Backpage’s adult escort services section was its most popular attraction, garnering 99% of its profits for charging advertisers from 2013 to 2015. *Id.* Facing a Senate investigation and subsequent publication of its findings, Backpage closed its adult services section in 2017. *Id.* at 2.

<sup>77</sup> See generally Jennifer M. Chacón, *Misery and Myopia: Understanding the Failures of U.S. Efforts to Stop Human Trafficking*, 74 *FORDHAM L. REV.* 2977, 3012–17 (2006) (providing a history of congressional action towards sex trafficking from 1875 to the passage of TVPA in 2000).

<sup>78</sup> See 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, 1250–51 (2011) (finding that prior to 2000, federal prosecutors pursued sex trafficking charges under the Mann Act of 1910). The purpose of the Act was to criminalize the transportation of non-consenting women and girls across state lines for prostitution. *Id.* Charges brought under the Mann Act stemmed from a range of activity, extending well beyond the Act’s original intent to combat interstate prostitution. See *Caminetti v. United States*, 242 U.S. 470, 487–88 (1917) (allowing for a prosecution under the Mann Act for “immoral purposes” other than commercial sexual acts). In *Caminetti*, two individuals were charged under the Mann Act for crossing state lines in order to pursue a sexual relationship with one another. See *id.* at 482–83 (explaining how a man in Nevada arranged for a woman to travel from California to Nevada in order to have sex with him). In rejecting defendants’ appeal that the prosecution misused the Mann Act because this was not a case of interstate prostitution, the court held that “immoral purposes” could be interpreted broadly. See *id.* at 487 (finding that Congress intended the Mann Act to preclude forms of sexual impropriety beyond prostitution).

<sup>79</sup> See TVPA § 102(b)(2) (noting that many individuals ensnared in human trafficking are victimized for purposes of the “international sex trade”); David Stout, *Passage in Senate Sends Bill on Forced Labor to President*, *N.Y. TIMES* (Oct. 12, 2000), <https://www.nytimes.com/2000/10/12/us/passage-in-senate-sends-bill-on-forced-labor-to-president.html?searchResultPosition=2> [<https://perma.cc/9JCK-2X6A>] (describing the lack of specific sex trafficking laws prior to the passage of the law).

<sup>80</sup> See TVPA § 102(b)(14) (concluding that current laws fail to appropriately punish the most offensive conduct of sex traffickers because they were intended to address less severe crimes).

<sup>81</sup> See *id.* § 102(a) (describing the law’s objective to be tackling the widespread problem of sex trafficking); Mattar, *supra* note 78, at 1250 (describing the TVPA as the United States’ first acknowledgement of sex trafficking as its own crime); LEVY, *supra* note 30, at 7 (finding the TVPA to be the first law in the United States that dealt collectively with all types of sex trafficking violations).

<sup>82</sup> See TVPA § 102(b)(8) (providing the relevant statutory language); 146 *CONG. REC.* S10164-02 (daily ed. Oct. 11, 2000) (statement of Sen. Brownback) (characterizing the TVPA as the first of its kind to recognize sex trafficking as a specific federal crime).

target the crime of sex trafficking, to provide protection to victims, and to provide harsher penalties to perpetrators.<sup>83</sup> Prosecutors previously looked to multiple criminal statutes to charge perpetrators, but now a single law codifies the conduct as criminal.<sup>84</sup> Moreover, the TVPA sought to protect victims by setting aside federal funds for their security.<sup>85</sup> Finally, with regards to punishment, the TVPA provides a minimum of twenty years and a maximum life sentence to those convicted.<sup>86</sup> This serves as a much harsher penalty than the previous minimum punishment of ten years if the perpetrator was found guilty under an involuntary servitude statute.<sup>87</sup>

Acknowledging that criminal liability was not sufficient to hold perpetrators accountable, Congress added a civil cause of action to the TVPA in 2003 that allowed victims to bring suit against their perpetrators.<sup>88</sup> The TVPA's civil remedy provision shifted agency from the prosecutor to the victim, demonstrating a legislative focus on empowering the victim.<sup>89</sup> Victims could bring civil suits regardless of whether there was a criminal action arising out of the same facts, although any civil suit is stayed pending the resolution of a criminal case.<sup>90</sup> The law provided victims with broader discretion to determine the

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<sup>83</sup> See TVPA § 102 (stating that the purposes of the TVPA are “to combat trafficking in persons, a contemporary manifestation of slavery whose victims are predominantly women and children, to ensure just and effective punishment of traffickers, and to protect their victims”).

<sup>84</sup> See Susan W. Tiefenbrun, *Sex Slavery in the United States and the Law Enacted to Stop It Here and Abroad*, 11 WM. & MARY J. WOMEN & L. 317, 329 (2005) (contributing the low rate of arrests and convictions of sex traffickers prior to the TVPA because prosecutors previously had to apply multiple trafficking laws).

<sup>85</sup> See *id.* at 330 (noting the TVPA's allocation of federal funds for victims' services, including protective measures and resources to assist them through the aftermath of their trafficking).

<sup>86</sup> See 18 U.S.C. § 1591(b) (providing the minimum and maximum terms of imprisonment); 146 CONG. REC. S10164-02 (daily ed. Oct. 11, 2000) (statement of Sen. Wellstone) (explaining how the punishment for traffickers prior to the TVPA enactment was inadequate).

<sup>87</sup> See 146 CONG. REC. S10164-02 (daily ed. Oct. 11, 2000) (statement of Sen. Wellstone) (acknowledging the disparity in a human trafficker's sentence of ten years under an involuntary servitude statute and a drug trafficker's potential sentence of life imprisonment).

<sup>88</sup> See Jennifer S. Nam, Note, *The Case of the Missing Case: Examining the Civil Right of Action for Human Trafficking Victims*, 107 COLUM. L. REV. 1655, 1661 (2007) (finding that the 2003 amendment addressed certain deficiencies within the original TVPA). For example, the years immediately following the passage of the TVPA in 2000 saw a very low number of criminal convictions for human traffickers, despite the expected growth in prosecutions due to the law. *Id.* at 1666.

<sup>89</sup> See 18 U.S.C. § 1595 (allowing for a victim of the sex trafficking crimes provided by §§ 1589–1591 to claim a civil cause of action against the perpetrator); Kathleen Kim & Kusia Hreshchshyn, *Human Trafficking Private Right of Action: Civil Rights for Trafficked Persons in the United States*, 16 HASTINGS WOMEN'S L.J. 1, 17 (2004) (naming the advantages that a civil remedy provides a human trafficking victim, including agency over their case); Nam, *supra* note 88, at 1666 (framing the TVPA's civil remedy provision as a significant development for victims).

<sup>90</sup> See Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, § 4, 117 Stat. 2875 (staying any civil cause of action for the duration of a criminal case that includes investigation, prosecution, and final adjudication of the claim); H.R. REP. NO. 108-264(II), at 17 (2003) (explaining that the civil stay requirement responds to the Department of Justice's concerns that civil discovery would obstruct their criminal investigations); Plaintiff A v. Schair, 744 F.3d 1247, 1254–55

outcome of their cases in three significant ways.<sup>91</sup> First, civil damages can be significantly larger amounts than the amount of restitution ordered in a criminal case.<sup>92</sup> Second, the civil remedy route allows for the victim to name more parties as co-defendants because of the lower evidentiary standard required by civil cases.<sup>93</sup> Third, because the victim is the plaintiff in a civil suit, rather than the government, the victim must approve any settlement plan.<sup>94</sup>

In 2008, Congress again reauthorized the TVPA and expanded the criminal and civil liability for individuals beyond that of the mere perpetrator.<sup>95</sup> The reauthorization extended liability to anyone who financially benefitted from the act of sex trafficking and was aware of such benefit.<sup>96</sup> The reauthorization also added a conspiracy charge, which extends culpability to those uninvolved in the physical act itself and to circumstances where the conduct does not culminate in a sex act.<sup>97</sup> Federal prosecutors celebrated the 2008 reauthorization because it enabled them to charge a broader variety of actors involved in sex trafficking.<sup>98</sup>

## 2. FOSTA and Internet Liability

Congress first confronted the issue of sex trafficking advertisements when it passed the Stop Advertising Victims of Exploitation Act of 2015 (SAVE

(11th Cir. 2014) (finding that the stay provision should not be used to aid criminal defendants in avoiding civil cases wrought from the same facts).

<sup>91</sup> See Kim & Hreshchyshyn, *supra* note 89, at 16 (noting how victims' civil cases differ from criminal prosecutions).

<sup>92</sup> See *id.* (finding that civil damages can more accurately reflect the emotional and/or physical harm done to the victim than restitution amounts). The authors also point to the potential detrimental effect of civil damages on other human traffickers. See *id.* (finding that the threat of civil damages could discourage traffickers from entering the trade).

<sup>93</sup> See *id.* at 17 (citing the preponderance-of-evidence burden as allowing plaintiffs to name larger entities as co-conspirators in human trafficking cases more easily than prosecutors could in a criminal case).

<sup>94</sup> See *id.* (naming the key difference between criminal and civil suits as the extent of decision-making capabilities that a victim holds as the plaintiff).

<sup>95</sup> See TVPA Reauthorization Act § 222 (codified as amended in scattered sections of 18 U.S.C.) (expanding criminal liability, in relevant part, to “[w]hoever knowingly benefits, financially or by receiving anything of value, from participation in a venture which has engaged in any act in violation of [the relevant sex trafficking laws] . . . shall be fined under this title or imprisoned”).

<sup>96</sup> See *id.* (expanding criminal liability to include those who are engaged in various aspects of sex trafficking).

<sup>97</sup> See *id.* (stating, in relevant part, “[w]hoever conspires with another to violate section 1591 shall be fined under this title, imprisoned for any term of years or for life, or both”).

<sup>98</sup> See Mark J. Kappelhoff, *Federal Prosecutions of Human Trafficking Cases: Striking a Blow Against Modern Day Slavery*, 6 U. ST. THOMAS L.J. 9, 19–20 (2008) (crediting the 2008 reauthorization for successful sex trafficking prosecutions). The 2008 reauthorization allowed prosecutors to charge multiple individuals beyond the individual sex trafficker. See, e.g., *United States v. Carreto*, 583 F.3d 152, 154 (2d Cir. 2009) (charging three defendants with conspiracy to commit sex trafficking).

Act).<sup>99</sup> The SAVE Act amended 18 U.S.C. § 1591, the law criminalizing sex trafficking, to include the “advertising” of sex trafficking as a TVPA violation.<sup>100</sup> The legislative intent of the SAVE Act was to hold advertisers accountable and, in doing so, expanded the realm of individuals who could be held responsible for their involvement in sex trafficking.<sup>101</sup> To be charged under the SAVE Act requires that the individual knows the advertisement pertained to a sex trafficking enterprise.<sup>102</sup> Congress expanded the reach of the SAVE Act when it passed FOSTA in 2018, explicitly extending liability to internet service providers (ISPs) that promote sex trafficking by advertising for it on their platforms.<sup>103</sup>

FOSTA creates a new statute regarding criminal and civil action towards ISPs that advertise sex trafficking.<sup>104</sup> First, it changes the liability for ISPs under the TVPA from those that “knowingly benefitted” from advertisements with sex trafficked victims to ISPs that have “the intent to promote or facili-

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<sup>99</sup> See Stop Advertising Victims of Exploitation (SAVE) Act of 2015, Pub. No. 114-22, § 2 (2015) (codified as amended at 18 U.S.C. § 1591(a)(1)) (adding the advertisement of sex trafficking to the list of offenses included in § 1591). The SAVE Act requires a party to be “knowingly advertising” sex trafficking. See *id.* For a general discussion regarding the SAVE Act and its shortcomings, see Ashley A. Cardenas, Note, *The SAVE Act of 2015: Congress’ Attempt to Reprioritize Online Child Sex Trafficking*, 91 ST. JOHN’S L. REV. 505 (2017).

<sup>100</sup> See SAVE Act § 2 (amending § 1591 to extend to advertising).

<sup>101</sup> See Sandra Elizabeth Kowalski, *Holding Internet Advertising Providers Accountable for Sex Trafficking: Impediments to Criminal Prosecution and a Proposed Response*, 27 B.U. PUB. INT. L.J. 99, 108 (2018) (describing how Congress intended to hold advertisers of sex trafficking responsible with the passage of the SAVE Act if the advertiser knew the material contained sex trafficked individuals). The SAVE Act differs from FOSTA because it does not explicitly address online advertisements and internet service providers, instead adding “advertising” to the criminal actions associated with sex trafficking in section 1591. *Id.* at 107–08.

<sup>102</sup> See *Backpage.com, LLC v. Lynch*, 216 F. Supp. 3d 96, 109 (D.D.C. 2016) (finding that the SAVE Act requires the standard of knowledge for any advertising violations). In *Lynch*, Backpage claimed that the SAVE Act extended to websites who advertised for sex trafficking, regardless of whether they knew that the content featured sex trafficked victims. See *id.* at 103 (noting Backpage’s claim that they would be held criminally liable under the SAVE Act for any third-party advertisements that they hosted that featured victims). The D.C. Circuit Court rejected this reading and interpreted the statute to require knowledge on the part of websites. See *id.* at 109 (finding that Backpage could only be held criminally liable if it intended to profit from the advertisements with sex trafficked victims).

<sup>103</sup> Compare SAVE Act § 2 (amending § 1591 to extend to advertising), with FOSTA § 3 (codified as amended at 18 U.S.C. § 2421A) (penalizing, in relevant part, “[w]hoever . . . owns, manages, or operates an interactive computer service . . . with the intent to promote or facilitate the prostitution of another person”).

<sup>104</sup> See FOSTA § 3 (creating the new statute for ISP liability in both criminal and civil claims); *Woodhull Freedom Found. v. United States*, 334 F. Supp. 3d 185, 190 (D.D.C. 2018) (describing the statutory framework of FOSTA). The *Woodhull* court described § 2421A as the cornerstone of the entire legislation. See 334 F. Supp. 3d at 190 (emphasizing the addition of § 2421A to the liability sphere for sex trafficking crimes); Citron & Jurecic, *supra* note 20 (explaining how FOSTA alters previous ISP immunity and as a consequence leaves ISPs with greater liability).



tate” sex trafficking.<sup>105</sup> Prior to FOSTA, prosecutors struggled to meet the standard of “knowingly benefitting” from advertisements as they pursued criminal charges under the TVPA.<sup>106</sup> Second, the liability applies to any individual who “owns, manages, or operates” an ISP.<sup>107</sup> The lower mens rea, coupled with the inclusive definition of ISP, allows for both victims and prosecutors to pursue claims more easily and against more actors.<sup>108</sup>

With regards to criminal prosecutions, FOSTA allows state and local prosecutors to sue ISPs, expanding its use beyond federal prosecutors.<sup>109</sup> It accomplishes this by amending a law that ISPs previously used as a liability shield for any state or local criminal action brought against them.<sup>110</sup> Additionally, state attorneys general can now bring civil actions against ISPs on behalf of their affected residents.<sup>111</sup>

After FOSTA’s passage, sex trafficking victims’ advocates and lawmakers celebrated its anticipated contribution to federal efforts to combat sex traf-

<sup>105</sup> See FOSTA § 3 (amending liability); Citron & Jurecic, *supra* note 20 (explaining that for the first time in two decades ISPs can now be held liable for third-party content).

<sup>106</sup> See Letter from Stephen E. Boyd, Assistant Att’y Gen., U.S. Dep’t of Justice, to Rep. Robert Goodlatte, Chairman, Comm. on the Judiciary (Feb. 27, 2018) (noting the high mens rea standard for ISPs under § 1591 that prosecutors have grappled with meeting); Dias, *supra* note 32 (describing the measure as providing government lawyers with an easier way to respond to ISPs engaged in the facilitation of sex trafficking).

<sup>107</sup> See FOSTA § 3 (providing relevant language).

<sup>108</sup> See Letter from Stephen E. Boyd to Rep. Robert Goodlatte, *supra* note 106 (noting a lower mens rea would ease bringing criminal charges against alleged perpetrators). The House’s version of the bill sought a lower mens rea standard of “recklessness,” holding ISPs liable when they knew or should have known that their conduct could result in harm, but this ultimately lost out to the Senate’s standard of knowledge in the version that passed into law. See H.R. 1865, 115th Cong. § 4 (as introduced in House, Apr. 3, 2017) (including the mens rea standard for the House bill); Mary Graw Leary, *Indecency and Injustice of Section 230 of the Communications Decency Act*, 41 HARV. J.L. & PUB. POL’Y 553, 610 (2018) (noting that members of the tech industry lobbied against the House version because of its lower mens rea standard for civil liability).

<sup>109</sup> See FOSTA § 4 (amending Section 230 to preclude its application to any violations of federal or state law). Prior to FOSTA’s passage, websites could use Section 230 as a defense in state law violations. See Mark Sullivan, *The 1996 Law That Made the Web Is in the Crosshairs*, FAST COMPANY (Nov. 29, 2018), <https://www.fastcompany.com/90273352/maybe-its-time-to-take-away-the-outdated-loophole-that-big-tech-exploits> [<https://perma.cc/7GCY-43CB>] (noting that neither state attorney generals nor individual victims could bring claims against websites prior to the passage of FOSTA because of the broad immunity created by Section 230 of the Communications Decency Act (CDA)). By amending the CDA, FOSTA allows for state prosecutors to charge ISPs without fear of the Section 230 liability shield. See *id.* (explaining that state attorneys general can now bring civil claims against websites due to FOSTA).

<sup>110</sup> See Sullivan, *supra* note 109 (noting that prior to the passage of FOSTA, ISPs could only be charged by federal prosecutors and not state or local prosecutors). Prior to the passage of FOSTA, Section 230 immunity was only barred from usage in federal criminal law, intellectual property law, and communications privacy law. See 47 U.S.C. § 230(e) (2018) (including immunity from state and local criminal law prior to FOSTA’s passage).

<sup>111</sup> See FOSTA § 6 (creating a new action to be taken by state attorneys general). An attorney general can sue under the legal theory of *parens patriae*, which views state actors as responsible for protecting their respective citizens. *Parens Patriae*, BLACK’S LAW DICTIONARY (11th ed. 2019).

ficking.<sup>112</sup> While some of FOSTA's supporters focused on the benefit of increased criminal prosecutions, others emphasized ISPs' inability to claim immunity.<sup>113</sup> Critics and ISPs similarly focused on these aspects.<sup>114</sup> In 2018, in *Woodhull Freedom Foundation v. United States*, the Electronic Frontier Foundation argued that the Act violates the protections guaranteed by the First Amendment.<sup>115</sup> The U.S. District Court for the District of Columbia found that the plaintiffs lacked standing, holding that they failed to prove an injury-in-fact.<sup>116</sup> Rather than challenging the law in court, other ISPs responded to FOSTA by closing down their personal advertisement sections, citing fear of litigation without their former liability shield.<sup>117</sup>

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<sup>112</sup> See Dias, *supra* note 32 (noting FOSTA received close to unanimous backing in both chambers of Congress); Cecilia Kang & Sheryl Gay Stolberg, *Sex Trafficking Bill Heads to Trump, Over Silicon Valley Concerns*, N.Y. TIMES (Mar. 21, 2018), <https://www.nytimes.com/2018/03/21/business/sex-trafficking-bill-senate.html> [<https://perma.cc/23SJ-JP9R>] (showing the positive reaction from the World Without Exploitation, a victim-focused non-profit).

<sup>113</sup> See Kang & Stolberg, *supra* note 112 (noting the influx of cases dismissed due to Section 230 immunity in which courts acknowledged the severity of the victims' alleged facts).

<sup>114</sup> 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/S5AT-5VAW>] (explaining the concerns of the tech industry, namely that it makes them vulnerable to civil lawsuits). In addition to tech companies and free speech advocates, sex workers have voiced significant concerns toward the Act, claiming that it will lead to greater danger, as they are forced to sell their services on the street. See Emily 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/VS4C-W6TJ>] (noting how sex workers' inability to advertise online is leading them to sell their services on the street and leaves them vulnerable to clients that they otherwise would try to avoid).

<sup>115</sup> See 334 F. Supp. 3d at 189 (noting that the plaintiffs also challenge FOSTA for vagueness in violation of the Fifth Amendment). With regards to the First Amendment claim, plaintiffs argue that FOSTA places them in fear of civil suits and criminal prosecution, thus creating "an injury by chilling their speech." See *id.* at 198 (noting plaintiffs' argument that the fear of civil damages will force them to censor their own speech and their users' speech). The other plaintiffs in the case included a sex workers' advocacy organization, Human Rights Watch, the Internet Archive, and a massage therapist who posted advertisements on Craigslist. See *id.* at 198–203 (describing the nature of plaintiffs' claims).

<sup>116</sup> See *id.* at 198 (noting that each respective plaintiff lacks standing in the instant case). To allow a constitutional challenge against a statute, a court must find that the statute creates a real potential of harm for the plaintiff, specifically with regards to restricting their freedom of speech. See *id.* at 197 (explaining the standing requirement for First Amendment statutory challenges).

<sup>117</sup> See Citron & Jurecic, *supra* note 20 (noting Craigslist's closure of its classified section and its provided reason that it could not afford to avail itself to such litigation); *supra* notes 109–110 and accompanying text (explaining how FOSTA amended Section 230 such that ISPs can no longer use it to claim immunity in lawsuits that allege ISPs facilitated sex trafficking).

### C. First Amendment Framework

The First Amendment protects individuals' speech from government interference.<sup>118</sup> One of its core principles is that the government cannot infringe upon an individual's speech based upon the content of the speech.<sup>119</sup> The First Amendment relies upon the premise that society benefits from an unobstructed exchange of ideas among individuals.<sup>120</sup> Its protection extends to speech that is offensive, regardless of how distasteful or disgusting society might find it.<sup>121</sup>

Generally speaking, any government restriction on the content of an individual's free speech must serve a compelling government interest.<sup>122</sup> Moreover, the restriction must be narrowly tailored to serve that interest.<sup>123</sup> Nonetheless, there are several categories of content that are exempt from this two-part test.<sup>124</sup> Speech that is obscene, fraudulent, defamatory, inciting, or in further-

<sup>118</sup> See *Ashcroft v. ACLU*, 535 U.S. 564, 573 (2002) (affirming that the First Amendment is based upon a devotion to the unobstructed spread of thoughts).

<sup>119</sup> See *id.* (finding that the government cannot curtail First Amendment freedoms based upon the substance that the speech conveys). Nonetheless, the protection granted by the First Amendment has its limits. See, e.g., *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758–59 (1985) (affirming the Supreme Court's lengthy jurisprudence that denies First Amendment protection to certain categories of speech).

<sup>120</sup> See *Greenmoss Builders*, 472 U.S. at 758–59 (describing the First Amendment's primary purpose to be the protection of speech relating to public issues); *Roth v. United States*, 354 U.S. 476, 484 (1957) (noting that the free trade of ideas allows for society to progress).

<sup>121</sup> See *Texas v. Johnson*, 491 U.S. 397, 418 (1989) (holding a Texas statute that criminalizes the burning of the Texas state flag as unconstitutional). The Court noted that a state's basis for restricting free speech cannot be founded upon the degree to which various individuals find it repulsive or upsetting. See *id.* at 414 (noting that a key purpose of the First Amendment is to allow individuals to express unpopular opinions).

<sup>122</sup> See *R.A.V. v. St. Paul*, 505 U.S. 377, 395–96 (1992) (holding that content-based restrictions on free speech must serve a "compelling government interest"). In *R.A.V.*, the Supreme Court struck down a Minnesota statute that criminalized speech that incited violence based upon its racial, religious, or gendered content. *Id.* at 378. The Court rejected the state's defense that the law was necessary because it furthered the state's interest in promoting historically marginalized individuals' ability to carry on without fear of violence. *Id.* at 395. For laws that restrict the content of speech, such as Minnesota's statute at issue in *R.A.V.*, the Court requires that the law serves a "compelling government interest." *Id.*

<sup>123</sup> See *id.* at 395 (rejecting Minnesota's argument that content-based restrictions of speech were the only means to achieve their stated purpose). The Court reasoned that the statute impermissibly punished views that the local government deemed offensive, an overly broad infringement upon the First Amendment. See *id.* at 396 (concluding that the local government can provide a safe environment for its citizens without criminalizing any speech that the city council dislikes).

<sup>124</sup> See *United States v. Stevens*, 559 U.S. 460, 468–69 (2010) (holding that some types of speech content do not receive First Amendment protection). In *Stevens*, the plaintiff claimed that a Texas statute prohibiting the dissemination of animal cruelty portrayals violated his First Amendment rights. See *id.* at 466 (describing plaintiff's violation of the statute for selling videos of dogs fighting and attacking each another). The Court listed content that is obscene, defamatory, fraudulent, inciting, and speech in furtherance of a crime as lacking First Amendment protection. See *id.* at 468 (providing the types of speech that the Texas statute could constitutionally restrict). The Court rejected the Texas government's claim that depictions of animal cruelty were in furtherance of a crime. See *id.* (finding that the statute applied to more types of speech than just that used to commit crimes, including depict-

ance of a crime does not comport with the First Amendment's goal of promoting the exchange of ideas and thus does not receive its protections.<sup>125</sup> When content is challenged for constitutionality, the Supreme Court looks to whether the content falls into said category and, if so, the government is freed from showing that it serves a compelling interest.<sup>126</sup>

The First Amendment does not extend to speech used to further a crime.<sup>127</sup> In 1949, in *Giboney v. Empire Storage & Ice Co.*, the Supreme Court found that a union's distribution of signs contributed to conduct that violated a state law and thus the signs were unprotected by the First Amendment.<sup>128</sup> There, a trade union picketed on the premises of an ice distribution company with the goal of pressuring the company to violate a state antitrust-restraint law.<sup>129</sup> The Court held that the distribution of signs, coupled with the union's other actions, qualified as criminal action.<sup>130</sup> By rejecting the theory that the First Amendment provides blanket protection to all forms of speech, the Court emphasized that the right to free speech has certain exceptions.<sup>131</sup>

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ing dead animals that died due to natural causes). The Court held that legislatures cannot add categories of unprotected speech because the list of categories is finite and should remain that way. *Id.* at 469.

<sup>125</sup> See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1941) (explaining that certain types of speech do not deserve constitutional protection because they do not align with the purpose of the First Amendment). In *Chaplinsky*, an individual was charged with violating a New Hampshire statute that prohibited verbally attacking anyone in public with derogatory or abusive language. *See id.* at 569 (describing the individual's conduct of yelling "fascist" at another individual on a public sidewalk in Rochester). Although the defendant claimed that the statute violated his First Amendment rights, the Court found that the First Amendment pertains to words that facilitate the unobstructed exchange of ideas and that his abusive words that furthered the crime served no such purpose. *See id.* at 572 (holding that words that could lead to violence are unprotected by the First Amendment).

<sup>126</sup> See *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 804 (2011) (holding that restraints on types of speech that fall within the Court's categories of unprotected speech do not have to meet the strict scrutiny test). In *Brown*, petitioners challenged a California law that tried to regulate minors' consumption of violent video games. *See id.* at 789 (describing the statute's provision that set the minimum legal age of purchase at 18 years old). The Court held that speech embedded in violent video games did not fit into any category previously defined as unprotected by the First Amendment. *See id.* at 804 (listing the categories of speech that do not receive protection). As a result, the Court applied the strict scrutiny test and found that the statute failed to demonstrate a compelling state interest. *See id.* (explaining how the Court first looks to whether the contested speech fits into a specified category and, if not, then applies the strict scrutiny test).

<sup>127</sup> See *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949) (holding that transcribed or oral words that contribute to criminal conduct are not protected by the First Amendment).

<sup>128</sup> *See id.* at 498 (holding for the first time that the First Amendment guarantee of freedom of speech does not extend to speech that constitutes a course of criminal action).

<sup>129</sup> *See id.* (finding the trade union took specific actions with the ultimate goal of pressuring the ice distribution company to stop doing business with non-organized ice salespeople).

<sup>130</sup> *See id.* (rejecting the union's contention that the distribution of signs should be viewed independent of the union's other actions).

<sup>131</sup> *See id.* (acknowledging that the breadth of First Amendment protections does not apply to every situation).

Since the *Giboney* ruling, the Supreme Court has expanded its doctrine of speech used in furtherance of a crime to include speech that solicits a crime.<sup>132</sup> In 2008, in *United States v. Williams*, the Supreme Court affirmed the constitutionality of a statute that criminalized making requests for child pornography.<sup>133</sup> Rejecting the First Amendment challenge, the Court used reasoning similar to *Giboney*, again finding that speech used to request or engage in illicit conduct is incompatible with the First Amendment.<sup>134</sup> The criminality of the speech associated with solicitation did not rely on the actual transfer of child pornography, but merely upon the request to provide or offer pornographic images.<sup>135</sup> Under the Court's reading of the statute, this included any individual who advertised for the distribution of child pornography.<sup>136</sup>

## II. ADDRESSING FOSTA'S CRITICS AND PROPONENTS

Since FOSTA's passage in 2018, there has been significant debate regarding its constitutionality and its effect on users' free speech.<sup>137</sup> ISPs are concerned about the expanded criminal and civil liability that now allows federal, state, and local prosecutors alike to bring suit against them.<sup>138</sup> They argue that this new liability amounts to a violation of their First Amendment right to free

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<sup>132</sup> See *United States v. Williams*, 553 U.S. 285, 299 (2008) (holding that solicitations to give or receive child pornography are unprotected by the First Amendment).

<sup>133</sup> See *id.* (rejecting appellant's First Amendment claims that the statute violated his First Amendment rights). The appellant was charged with violating 18 U.S.C. § 2252A(a)(3)(B) when he uploaded child pornography images to an online chat room. See *id.* at 291 (describing how appellant unknowingly sent child porn to an undercover law enforcement agent); see also 18 U.S.C. § 2252A(a)(3)(B) (penalizing anyone who, in relevant part, "knowingly . . . advertises, promotes, presents, distributes, or solicits" child pornography). In determining a First Amendment claim, the Court looks to whether the statute's language criminalizes too much constitutionally protected speech. See *United States v. Stevens*, 559 U.S. 460, 474 (2010) (holding an animal cruelty statute to be overbroad because it criminalized portrayals of animals that were not taken with malicious intent).

<sup>134</sup> See *Williams*, 553 U.S. at 298 (determining the lack of significance that such speech contributes to the free exchange of ideas); *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 388 (1973) (holding that a newspaper could not publish a third party's advertisement seeking only male applicants that violated a federal sex discrimination statute).

<sup>135</sup> See *Williams*, 553 U.S. at 293 (interpreting the statute to criminalize the offer to give or request to provide child pornography).

<sup>136</sup> See *id.* (sweeping in any advertisers of child pornography per the terms of the statute).

<sup>137</sup> See, e.g., Anna Schechter & Dennis Romero, *FOSTA Sex Trafficking Law Becomes Center of Debate About Tech Responsibility*, NBC NEWS (July 19, 2018), <https://www.nbcnews.com/tech/tech-news/sex-trafficking-bill-becomes-center-debate-about-tech-responsibility-n892876> [<https://perma.cc/VNQ2-ZBM9>] (providing the ongoing social commentary regarding FOSTA). Days after its passage, FOSTA was lauded by sex trafficking advocacy groups and denigrated by tech companies. See *id.* (describing the wide variation in responses to FOSTA).

<sup>138</sup> See, e.g., Aaron Mackey & Elliot Harmon, *Congress Censors the Internet, but EFF Continues to Fight FOSTA*, ELEC. FRONTIER FOUND. (Dec. 29, 2018), <https://www.eff.org/deeplinks/2018/12/congress-censors-internet-eff-continues-fight-fosta-2018-review> [<https://perma.cc/S9D4-K366>] (describing FOSTA as the most significant encroachment to internet free speech in the past twenty years).

speech.<sup>139</sup> Free speech advocates and tech companies attack FOSTA on the grounds that it will reduce free speech on the internet by forcing ISPs to limit third parties' ability to post content on websites.<sup>140</sup> Sex industry workers complain that FOSTA has revoked their access to advertise their consensual services.<sup>141</sup> Nonetheless, many other constituencies argue that FOSTA brings sex trafficking efforts into the twenty-first century by acknowledging the role of internet advertising in the sex trafficking trade.<sup>142</sup> This Section addresses both the critics and proponents of FOSTA.<sup>143</sup>

## A. Critics of FOSTA

### 1. Internet Service Provider Concerns Regarding the First Amendment

ISPs claim that FOSTA infringes upon their First Amendment right to free speech because FOSTA amends Section 230(c) of the Communications Decency Act (CDA), a law widely understood to provide immunity to ISPs for any content posted by third-party users.<sup>144</sup> Congress passed the CDA to encourage

<sup>139</sup> See Br. for Inst. for Free Speech as Amici Curiae Supporting Appellants at 6, *Woodhull Freedom Found. v. United States*, No. 18-5298 (D.C. Cir. Feb. 20, 2019) (describing how FOSTA will infringe upon the internet's ability to provide platforms for individuals to exchange ideas with one another).

<sup>140</sup> See *id.* at 4 (noting how FOSTA had already restricted the free speech of appellants). Specifically, appellant Woodhull Freedom Foundation claims that it cancelled an upcoming event for fear that advertising for it online would be prosecuted as the facilitation of sex trafficking under FOSTA. *Id.*

<sup>141</sup> See Amy Zimmerman, *Sex Workers Fear for Their Future: How SESTA Is Putting Many Prostitutes in Peril*, DAILY BEAST (Apr. 4, 2018), <https://www.thedailybeast.com/sex-workers-fear-for-their-future-how-sesta-is-putting-many-prostitutes-in-peril> [<https://perma.cc/DAD7-6CYG>] (listing the variety of websites that closed in the wake of FOSTA for fear of increased liability).

<sup>142</sup> See Linda Smith, SHARED HOPE STATEMENT REGARDING FOSTA-SESTA AND THE BACKPAGE SEIZURE, SHARED HOPE INT'L (Apr. 11, 2018), <https://sharedhope.org/2018/04/statement-regarding-fosta-sesta/> [<https://perma.cc/9P64-S34J>] (advocating for the need of FOSTA). In their support of FOSTA, trafficking victim advocates point to the harm caused by online advertisements and the way in which they expand the sex trafficking market. See *id.* (explaining how online advertisements further victimize individuals by allowing the trafficker complete control over when and how they are seen).

<sup>143</sup> See *infra* notes 144–203 and accompanying text.

<sup>144</sup> See 47 U.S.C. § 230(f)(2) (2018) (defining “internet service provider” in relevant part as “any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server”); *Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12, 22 (1st Cir. 2016) (holding that Section 230 prevents websites from being held liable for any claims arising out of third-party content posted on their websites); *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997) (describing Section 230's purpose as dismissing claims against ISPs that arise out of the ISPs' function as a distributor of third-party content); *Woodhull Freedom Found. v. United States*, 334 F. Supp. 3d 185, 189 (D.D.C. 2018) (noting that the plaintiffs challenge FOSTA on the grounds that it violates their First Amendment rights). The plaintiff is an organization that runs websites, which feature speech regarding consensual sex work. *Woodhull*, 334 F. Supp. 3d at 192. Specifically, the plaintiff was concerned that FOSTA would preclude it from online advertising for its annual event on consensual sex workers. *Id.*

the internet's growth.<sup>145</sup> Congress intended Section 230 to create a safe harbor for ISPs that, in good faith, tried to prohibit obscene material.<sup>146</sup> As evidence of this objective, Section 230 is titled "Protection for 'Good Samaritan' blocking and screening of offensive material."<sup>147</sup> At the same time, lawmakers wanted to balance regulation of content with encouraging the internet's growth.<sup>148</sup> Therefore, legislators made the conscious decision to treat ISPs differently than publishers of traditional media outlets.<sup>149</sup> Section 230 allows for ISPs to escape liability for publishing potentially damaging content, whereas newspapers, television, and radio can be held liable for defamation merely by publishing the material (and not actually authoring it).<sup>150</sup> Prior to FOSTA's passage, ISPs were only precluded from invoking Section 230 as an immunity shield in cases regarding federal criminal law, intellectual property law, and communications privacy law.<sup>151</sup>

In the early internet era, courts split on the question of ISPs' liability for the information posted on their sites.<sup>152</sup> Section 230 responded to a growing concern that ISPs' decision to edit material on their platforms would transform

<sup>145</sup> See S. REP. NO. 104-23, 1 (1995) (explaining that the purpose of the CDA is to create a "pro-competitive, de-regulatory national policy framework" in the emerging internet era). With the CDA, legislators also strove to protect minors from obscene content. See *Batzel v. Smith*, 333 F.3d 1018, 1026 (9th Cir. 2003) (noting the CDA's main objective with regards to regulating children's access to certain kinds of content). Although many of those provisions of the CDA were struck down as unconstitutional violations of free speech, Section 230(c) survived constitutional challenges. *Id.*; see, e.g., *Reno v. ACLU*, 521 U.S. 844, 871 (1997) (striking the CDA's prohibition on "indecent" material by finding that the word is undefined and vague, leading to the violation of individuals' First Amendment rights).

<sup>146</sup> See Danielle Keats Citron & Benjamin Wittes, *The Internet Will Not Break: Denying Bad Samaritans § 230 Immunity*, 86 FORDHAM L. REV. 401, 403 (2017) (explaining that lawmakers recognized the need for companies within the industry to moderate content because a federal agency would be unable to monitor such a high quantity of it).

<sup>147</sup> 47 U.S.C. § 230(c).

<sup>148</sup> See *id.* § 230(a)(3) (describing ISPs as providing "a forum for a true diversity of political discourse"); Leary, *supra* note 108, at 561 (articulating the purpose of the CDA as trying to incentivize ISPs to censor obscene content while simultaneously avoiding overregulation that would stifle their growth).

<sup>149</sup> See *Batzel*, 333 F.3d at 1026–27 (providing the legislative history of Section 230).

<sup>150</sup> See *id.* (explaining the different treatment that Congress chose to afford ISPs than traditional publishers of content).

<sup>151</sup> See 47 U.S.C. § 230(e) (limiting the use of Section 230 in these circumstances).

<sup>152</sup> See Marie-Helen Maras, *Online Classified Advertisement Sites: Pimps and Facilitators of Prostitution and Sex Trafficking?*, J. INTERNET L., Nov. 2017, at 17 (noting that the 1990s witnessed a growing question in the courts of how to assess liability when an individual sought tort damages from a website). Compare *Cubby, Inc. v. CompuServe Inc.*, 776 F. Supp. 135, 141 (S.D.N.Y. 1991) (finding that an online news distributor could not be held liable for posting third-party content), with *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, 1995 WL 323710, at \*5 (N.Y. Sup. Ct. May 24, 1995) (finding that a website with an online message board could be found liable for content posted by a third party).

them from “publishers of content” to “speakers” of such content.<sup>153</sup> The provision provides that an ISP will not be treated as the speaker of any content on its site that originated from a third party.<sup>154</sup> Tech companies and free speech advocates applauded Section 230 for allowing the internet to grow without fear of crippling defamation lawsuits.<sup>155</sup> Courts responded with a broad interpretation of Section 230 as providing a blanket immunity of sorts.<sup>156</sup>

Because FOSTA alters the Section 230 liability shield with regards to sex trafficking claims, ISPs argue that they could face criminal prosecutions for allowing certain types of third-party content to remain on their platforms.<sup>157</sup> They conclude that this amounts to a violation of their First Amendment right

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<sup>153</sup> See *Fair Hous. Council of San Fernando Valley v. Roommates.com*, 521 F.3d 1157, 1163 (9th Cir. 2008) (noting that Section 230 was a congressional response to the New York state court’s ruling in *Stratton Oakmont*). The *Stratton Oakmont* court found that an ISP’s decision to delete certain content, but allow other content to remain, opened itself to civil liability for what remained. See 1995 WL 323710, at \*3 (noting that the common-law of torts treats publishers the same as the original speaker or writer in instances of defamation, whereas “distributors such as book stores and libraries” are only culpable if they had specific knowledge of the defamation prior to distributing to the public).

<sup>154</sup> 47 U.S.C. § 230(c)(1) (“[N]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”).

<sup>155</sup> See Leary, *supra* note 108, at 559 (arguing that Congress enacted Section 230 to foster the development of ISPs and tech companies); Note, *Section 230 as First Amendment Rule*, 131 HARV. L. REV. 2027, 2027 (2018) (arguing that the absence of Section 230 would lead websites to block free speech in their attempts to avoid litigation).

<sup>156</sup> See *BACKPAGE.COM’S KNOWING FACILITATION OF ONLINE SEX TRAFFICKING*, *supra* note 13, at 7 (describing courts’ interpretation of Section 230 as creating “near complete criminal and civil immunity for ISPs” when posting third-party content). In 1997, in *Zeran v. America Online, Inc.*, the Fourth Circuit held that an ISP could not be held liable for content posted by a third party. See 129 F.3d at 330 (affirming a lower court’s ruling that AOL could not be held liable for posting a third-party’s defamatory content regarding plaintiff Zeran). The *Zeran* court was the first appellate circuit ruling to interpret Section 230 immunity. See Suman Mirmira, Case Comment, *Lunney v. Prodigy Services Co.*, 15 BERKELEY TECH. L.J. 437, 442–43 (2000). Other circuit courts have similarly agreed upon a broad interpretation of the protection afforded to websites from Section 230. See, e.g., *Jane Doe No. 1*, 817 F.3d at 18 (noting the “near-universal” conclusion that Section 230 should be interpreted broadly); *Doe v. MySpace, Inc.*, 528 F.3d 413, 418 (5th Cir. 2008) (listing courts’ broad interpretation of Section 230 in cases regarding third-party generated content). In 2012, one court found that federal and state courts upheld Section 230’s immunity in almost all of the roughly three-hundred reported decisions that dealt with liability claims launched against ISPs. See Hill v. Stubhub, Inc., 727 S.E.2d 550, 558 (N.C. Ct. App. 2012) (concluding that a very small minority of courts found ISPs liable despite their invocation of Section 230).

<sup>157</sup> See *The Latest Developments in Combating Online Sex Trafficking*, *supra* note 28, at 3 (statement by Eric Goldman, Professor, Santa Clara University School of Law) (arguing that FOSTA would force ISPs to either edit all their content or face increased liability for failing to do so). Goldman concludes that this could entice ISPs to not edit at all, thus producing a result that contradicts FOSTA’s aims. *Id.*; see also Aja Romano, *A New Law Intended to Curb Sex Trafficking Threatens the Future of the Internet as We Know It*, VOX (July 2, 2018), <https://www.vox.com/culture/2018/4/13/17172762/fosta-sesta-backpage-230-internet-freedom> [<https://perma.cc/K6MR-V6Y3>] (noting that websites do not know whether they will be liable to criminal prosecution and as a result are choosing to proactively shutter their personal advertisement sections).



to free speech by censoring protected speech.<sup>158</sup> In many ways, FOSTA has renewed the First Amendment debate between ISPs and the government that began when Congress passed the SAVE Act in 2015.<sup>159</sup> At that time, critics feared that ISPs could face prosecution for any sex trafficking advertisements on their platform that they either were aware of or negligently posted.<sup>160</sup> One ISP challenged the SAVE Act on the grounds that it restricted free speech and argued that it could be construed to sweep in the protected speech of escort services.<sup>161</sup> Ultimately, the court held that the ISP lacked standing because the SAVE Act only applied to third-party users' advertisements and that advertisements for illegal conduct, such as sex trafficking, do not receive First Amendment protection.<sup>162</sup>

By creating a new federal statute that explicitly holds ISPs responsible for knowingly participating in sex trafficking and prostitution, FOSTA raises the potential for ISPs to be prosecuted for third-party advertisements.<sup>163</sup> In addition to federal prosecutions, ISPs are concerned about increased prosecution at the state level.<sup>164</sup> ISPs also argue that the increased potential for civil litigation

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<sup>158</sup> See Elliot Harmon, *How Congress Censored the Internet*, ELEC. FRONTIER FOUND. (Mar. 21, 2018), <https://www.eff.org/deeplinks/2018/03/how-congress-censored-internet> [<https://perma.cc/5CVR-HSJ9>] (describing how FOSTA now makes ISPs liable for the speech of their users). Without Section 230 protection pertaining to sex trafficking, ISPs' potential liability is no longer limited to just federal prosecutors. See *id.* (explaining how FOSTA allows for more governmental actors to pursue ISPs).

<sup>159</sup> See SAVE Act, Pub. No. 114-22, § 2 (2015) (codified as amended at 18 U.S.C. § 1591(a)(1) (2018)) (adding advertising to the list of related sex trafficking conduct under the TVPA); *Backpage.com, LLC v. Lynch*, 216 F. Supp. 3d 96, 100 (D.D.C. 2016) (summarizing Backpage's constitutional claims against the SAVE Act). Prior to the passage of the SAVE Act in 2015, states passed similar laws that criminalized the advertisement of sex trafficking individuals. *Lynch*, 216 F. Supp. 3d at 100. In each instance, Backpage successfully claimed that the laws were unconstitutional on the grounds of "chilling protected speech" in the form of escort service advertisements. See *id.* (summarizing the results of the state laws and Backpage's constitutional challenges); e.g., *Backpage.com, LLC v. McKenna*, 881 F. Supp. 2d 1262, 1282 (W.D. Wash. 2012) (striking down the state law for its infringement on protected speech of escort services advertisements).

<sup>160</sup> See Sophia Cope, *SAVE Act Passes in House, Comes One Step Closer to Unnecessarily Chilling Online Speech*, ELEC. FRONTIER FOUND., (Jan. 29, 2015), <https://www.eff.org/deeplinks/2015/01/save-act-passes-house-coming-one-step-closer-chilling-online-speech> [<https://perma.cc/Z47W-8VX6>] (summarizing ISPs' fears towards the SAVE Act).

<sup>161</sup> See *Lynch*, 216 F. Supp. 3d at 100 (summarizing Backpage's claim regarding First Amendment violations). Backpage noted concern about its ability to continue operating its adult services page in fear of potential prosecution under the SAVE Act. See *id.* (arguing that the SAVE Act would force Backpage to censor its material and, as a result, might lead Backpage to shut itself down).

<sup>162</sup> See *id.* at 110 (concluding that Backpage lacked standing to bring a constitutional claim). The court found that Backpage was unaffected by the SAVE Act because Backpage does not purport to advertise for sex trafficking and the SAVE Act only touches upon that type of conduct. See *id.* at 103 (noting Backpage's self-proclaimed purpose as providing for legal exchanges of personal services).

<sup>163</sup> See Harmon, *supra* note 158 (describing ISPs' fear of increased liability as a result of broader scope of criminal prosecutions).

<sup>164</sup> See Pl. Opp. to Motion to Dismiss at 9, *Woodhull*, 334 F. Supp. 3d 185, (D.D.C. July 26, 2018) (No. 18-5298) (noting the expansion of FOSTA to include charges brought by state and local

by private actors amounts to a First Amendment violation because the government is responsible for allowing potentially ruinous litigation.<sup>165</sup> ISPs contend that FOSTA's vague language could multiply the civil suits, as prosecutors and individuals alike can interpret the language of FOSTA differently.<sup>166</sup> In making this argument, ISPs point to statutes that have forced individuals to either restrict their speech or face significant civil damages.<sup>167</sup> The Supreme Court has held that statutes can violate the First Amendment when they inflict the harm of "self-censorship."<sup>168</sup>

## 2. Additional ISP Concerns

Tech companies fear that FOSTA favors wealthier internet companies because they have the resources to fend off civil lawsuits.<sup>169</sup> They fear that small-

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prosecutors). In *Woodhull*, the litigants cited fear regarding local and state prosecutors' interpretation of FOSTA's language, arguing that the prosecutors could supplant the language with their own understanding. *See id.* (explaining how FOSTA's vague language provides no guidance to prosecutors on which conduct to consider criminal and, as a result, federal and state prosecutors will likely develop vastly different understandings of the law); *see also Woodhull*, 334 F. Supp. 3d at 189 (D.D.C. 2018) (listing the litigants as two human rights organizations and one individual who all individually operate their own websites).

<sup>165</sup> *See* Pl. Opp. to Motion to Dismiss, *supra* note 164, at 10 (describing constitutional concerns regarding the civil remedy). Faced with the threat of increased civil liability from FOSTA, ISPs could be compelled to shut down platforms that allow for their own free speech and for that of their users. *See id.* at 10–11 (emphasizing the economic consequences that could stem from increased litigation for ISPs).

<sup>166</sup> *See* Br. for Inst. for Free Speech as Amici Curiae Supporting Appellants at 8–9, *Woodhull*, 334 F. Supp. 3d 185, (D.D.C. Feb. 20, 2019) (No. 18-5298) (describing fears regarding the lack of clarity of FOSTA's language). FOSTA critics worry that unclear language coupled with a broadening scope of potential plaintiffs will lead to huge increases in civil litigation because there will not be a uniform interpretation of the language. *Id.*

<sup>167</sup> *See id.* at 2 (citing to instances where civil remedies were found to have "chilling" effects on speech). In *Bland v. Fessler*, the Ninth Circuit Court of Appeals held that an individual had standing to bring a First Amendment claim against a civil statute. 88 F.3d 729, 737 (9th Cir. 1996). There, an individual claimed that a California civil statute violated his First Amendment rights by requiring that he and his business comply with certain regulations regarding automated phone calls or face civil fines. *Id.* at 731. The court ultimately held that the individual could proceed with a constitutional claim against the civil statute. *Id.* at 739. The *Woodhull* litigants analogize their situation to that of *Bland*, finding that they must choose between the restriction of their free speech or face civil litigation. *See* Pl. Opp. to Motion to Dismiss, *supra* note 164, at 10 (citing *Bland*, 88 F.3d at 737).

<sup>168</sup> *See* *Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 393 (1988) (allowing for a litigant to meet standing requirements on their claim for a First Amendment violation). In *American Booksellers Ass'n*, the Court held that litigants can claim that a statute violates the First Amendment if it poses the effect of "self-censorship." *See id.* (explaining that a statute can violate the First Amendment even if the form of the violation does not result from government intervention).

<sup>169</sup> *See* Schecter & Romero, *supra* note 137 (noting that smaller tech companies fear they lack the resources to review user-generated content and thus might be forced to close their user-generated platforms). The tech industry fears that start-up ventures will be forced to increase the size of their legal teams and enlarge their budgets for policing user-generated content, if they choose to keep their user-generated platforms. *See id.* (noting that the failure to take proactive measures could result in crippling civil or criminal lawsuits).

er websites, ranging from lesser-known dating sites to non-profits that advocate for sex trafficked victims, will have to close for fear of increased liability.<sup>170</sup> This fear materialized when Craigslist, a large online platform, closed its personal ads section in response to the passage of FOSTA.<sup>171</sup> Smaller companies feared that if larger companies like Craigslist could not face the increased liability, then they could not either.<sup>172</sup>

In addition to First Amendment, the Fifth Amendment has been invoked as an additional constitutional challenge to FOSTA.<sup>173</sup> Specifically, they point to FOSTA's amendment of the crime of sex trafficking to extend civil and criminal liability to ISPs that post content "with the intent to promote or facilitate the prostitution of another person."<sup>174</sup> Critics' claims here are two-fold: first, that the language "promote or facilitate" is too broad and, second, that the law incorrectly conflates prostitution with sex trafficking.<sup>175</sup> Moreover, critics argue that FOSTA regulates the content of speech and that its broad language runs afoul of the applicable strict scrutiny test.<sup>176</sup>

<sup>170</sup> See Joe Mullin, *House Vote on FOSTA Is a Vote for Censorship*, ELEC. FRONTIER FOUND. (Feb. 27, 2018), <https://www.eff.org/deeplinks/2018/02/house-vote-fosta-win-censorship> [<https://perma.cc/FGC8-CMAF>] (naming non-profits' and community groups' websites as two types of ISPs that lack the financial resources to consistently screen user-generated content); Schecter & Romero, *supra* note 137 (noting that larger ISPs are better equipped to quickly make changes that would follow FOSTA's standard of liability). Moreover, Mullin argues that this is an ironic consequence because it is these same smaller websites that often provide victim-centered resources to sex trafficked victims. *See id.* (claiming that FOSTA is forcing the closure of any website that utilizes language pertaining to sex trafficking, including those websites that provide services to victims).

<sup>171</sup> See Tiku, *supra* note 20 (noting Craigslist's decision to remove its personal ads section and announcing that exposure to such liability could endanger their other online services).

<sup>172</sup> *See id.* (noting that the smaller tech industry generally opposed FOSTA whereas larger tech companies supported it).

<sup>173</sup> *See Woodhull*, 334 F. Supp. 3d at 189 (claiming that FOSTA violates the Fifth Amendment with regards to its overbreadth and lack of clear language); Mackey & Harmon, *supra* note 138 (same).

<sup>174</sup> *See* FOSTA, Pub. L. No. 115-164, § 3, 132 Stat. 1253 (2018) (codified as amended in scattered sections of 18 U.S.C. and 47 U.S.C.) ("Whoever . . . owns, manages, or operates an interactive computer service . . . with the intent to promote or facilitate the prostitution of another person shall be fined under this title, imprisoned for not more than 10 years, or both."); Mackey & Harmon, *supra* note 138 (arguing that FOSTA's over-inclusive scope extends to individuals engaging in legal conduct, such as those who use the internet to argue in favor of ending the crime of prostitution).

<sup>175</sup> *See* Alex F. Levy, *Why FOSTA's Restriction on Prostitution Promotion Violates the First Amendment*, TECH. & MKTG. 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/2ZWS-TKHS>] (concluding that FOSTA connects prostitution to sex trafficking without any evidence that supports such a relationship). Levy points out that there is no comprehensive data that prove a decline in prostitution will lead to a decline in sex trafficking. *See id.* (arguing that FOSTA's criminalization of the facilitation of online prostitution has little to do with the issue of online sex trafficking).

<sup>176</sup> *See id.* (noting that any governmental law that regulates the content of an individual's speech must meet a strict scrutiny test by showing that the law is narrowly tailored to meet a compelling government interest). Levy argues that FOSTA is not narrowly tailored because it criminalizes other-

### 3. Individual Users' Complaints

In making their First Amendment claim, critics also argue that FOSTA's language is overly broad and sweeps in users' legally protected free speech.<sup>177</sup> In doing so, FOSTA allegedly criminalizes the ISPs that allow for individuals to use the internet, in any capacity, to speak about consensual commercial sex.<sup>178</sup> Referring to ISPs that have closed certain forums on their websites, third-party users argue that the law reduces their ability to exercise free speech.<sup>179</sup> For some individuals, like sex workers, this lack of free speech poses the potential for serious bodily consequences.<sup>180</sup>

Unlike sex trafficked victims, sex workers enter into commercial sexual transactions by their own volition.<sup>181</sup> By extending liability to websites that facilitate prostitution, FOSTA led to the closure of the online classified ad sections that allowed them to market their services.<sup>182</sup> This has forced many sex workers to sell their services back out on the street, a more dangerous and less profitable way of doing business.<sup>183</sup> They conclude that this is far more dangerous because it removes their power of choice with regards to clients.<sup>184</sup> Without the existence of certain online forums, sex workers are also facing

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wise legal speech. *Id.* For example, Levy notes that a website focused on providing "harm reduction methods" could be charged with promoting prostitution, an act criminalized by FOSTA. *Id.*

<sup>177</sup> See *id.* (faulting FOSTA on the grounds that it is overly broad).

<sup>178</sup> 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/ZD9P-3HZV>] (listing websites that provide resources to sex workers and websites that connect individuals with obscure sexual preferences as two of the many kinds of ISPs pulled into the broad reach of FOSTA).

<sup>179</sup> See *Woodhull*, 334 F. Supp. 3d at 193 (providing a Craigslist user's claim that FOSTA has damaged the user's advertising capabilities). In *Woodhull*, one of the litigants used Craigslist to advertise for his osteopathic work. See *id.* (noting that the majority of litigant's clients found him through his Craigslist advertisement). The litigant claims that Craigslist has removed his business advertisements in response to FOSTA and that, as a result, the litigant can no longer use online marketing for his services. See *id.*

<sup>180</sup> See Zimmerman, *supra* note 141 (providing interviews with sex workers who explain their fears towards returning to the traditional street corner).

<sup>181</sup> See AMNESTY INT'L, AMNESTY INTERNATIONAL POLICY ON STATE OBLIGATIONS TO RESPECT, PROTECT AND FULFILL THE HUMAN RIGHTS OF SEX WORKERS 15 (2016), <https://www.amnesty.org/download/Documents/POL3040622016ENGLISH.PDF> [<https://perma.cc/PF7Z-C2L6>] (explaining that ongoing consent distinguishes sex work from sex trafficking).

<sup>182</sup> See Jenkins, *supra* note 178 (finding that FOSTA's broad language could extend liability to any website that includes mention of the consensual sexual transactions).

<sup>183</sup> See Siouxsie Q, *Anti-Sex-Trafficking Advocates Say New Law Cripples Efforts to Save Victims*, ROLLING STONE (May 25, 2018), <https://www.rollingstone.com/culture/culture-features/anti-sex-trafficking-advocates-say-new-law-cripples-efforts-to-save-victims-629081/> [<https://perma.cc/55SZ-ATD8>] [hereinafter *Anti-Sex-Trafficking Advocates*] (finding that FOSTA's effect on websites has effectively pushed sex workers to offline markets).

<sup>184</sup> See *id.* (relaying interviews with sex workers in which they admit to taking more dangerous jobs on the street because they are unable to screen their patrons online beforehand).

difficulties in communicating with one another and sharing information pertaining to safer transactions.<sup>185</sup>

Sex workers celebrated the emergence of the internet, including websites such as Backpage and Craigslist, because it improved their safety and quality of life.<sup>186</sup> In their opinion, the internet allowed them to pursue work independently of pimps, whereas now some must turn to pimps in order to find enough business.<sup>187</sup> Sex workers believe that FOSTA falsely conflates prostitution with sex trafficking.<sup>188</sup> They, like the constitutional critics, argue that FOSTA is overly broad and sweeps in conduct far beyond its original aim of sex trafficking.<sup>189</sup> Sex workers also argue that the law wrongly punishes online speech pertaining to prostitution in jurisdictions where prostitution is legal, such as Nevada.<sup>190</sup>

### B. Proponents of FOSTA

Proponents of FOSTA celebrate its extension of civil and criminal liability to websites that knowingly promote sex trafficking.<sup>191</sup> Legislators believe that FOSTA saves Section 230 from being improperly used as a liability shield in civil suits.<sup>192</sup> They argue that the judicial interpretation of Section 230 as a broad liability shield strayed from Section 230's legislative purpose of encour-

<sup>185</sup> See *id.* (noting that sex workers previously shared safety strategies online with one another via private message boards that have since closed in the wake of FOSTA).

<sup>186</sup> See Dias, *supra* note 32 (naming Craigslist and Backpage as two popular websites that sex workers credited for enhancing their agency).

<sup>187</sup> See 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/T6RN-PBER>] (noting that sex traffickers are reaching out to sex workers and successfully persuading them that they must find clients through the traffickers or else face a loss of business).

<sup>188</sup> See Michael Andor Brodeur, *Grindr, Craigslist, and the Virtual Erosion of LGBTQ Turf*, BOS. GLOBE (Apr. 5, 2018), <https://www.bostonglobe.com/arts/2018/04/05/grindr-craigslist-and-virtual-erosion-lgbtq-turf/twBW8hELJ35nHmAa6P20gL/story.html> [<https://perma.cc/YT7S-M86V>] (making a distinction between penalizing the perpetrators of sex trafficking from making sex workers' lives more dangerous); Levy, *supra* note 175 (arguing that FOSTA rests on the notion that sex trafficking and prostitution are the same).

<sup>189</sup> See Levy, *supra* note 175 (concluding that FOSTA is too broad in its inclusion of prostitution).

<sup>190</sup> See Romano, *supra* note 157 (concluding the broad reach of FOSTA goes too far when criminalizing online speech regarding legal prostitution in Nevada).

<sup>191</sup> See Amanda Arnold, *Here's What's Wrong with the So-Called Anti-Trafficking Bill*, THE CUT, (Mar. 20, 2018), <https://www.thecut.com/2018/03/sesta-anti-sex-trafficking-bill-fosta.html> [<https://perma.cc/FR8W-8NGK>] (listing the wide support for FOSTA from both political parties in Congress, anti-trafficking advocacy groups, and well-known Hollywood stars).

<sup>192</sup> See 164 CONG. REC. H1319-01 (quoting Representative Paulsen as blaming websites' continued use of Section 230 as contributing to the growth of sex trafficking advertisements on the internet); Emily Stewart, *The Next Big Battle Over Internet Freedom Is Here*, VOX (Apr. 23, 2018), <https://www.vox.com/policy-and-politics/2018/4/23/17237640/fosta-sesta-section-230-internet-freedom> [<https://perma.cc/67R9-YGYW>] (providing the viewpoint that FOSTA will have little effect beyond websites that were improperly using Section 230 to disguise their participation in sex trafficking).

aging ISPs to moderate content.<sup>193</sup> Advocates hope that the civil remedy provision for ISPs will allow victims to sue websites and recover damages that adequately reflect the harm caused by the online advertisements.<sup>194</sup> With regards to criminal prosecutions, federal prosecutors hope that FOSTA's new mens rea for ISPs will allow them to more easily pursue charges.<sup>195</sup> Moreover, state and local prosecutors can now bring charges against ISPs without relying on federal action.<sup>196</sup>

Receiving immense legislative support, FOSTA passed Congress nearly unanimously and received the president's signature within days.<sup>197</sup> Legislators regarded the lack of legal consequences for websites as the reason for sex traffickers' continued use of those websites to advertise and profit from their victims.<sup>198</sup> Additionally, it received the support of larger tech companies.<sup>199</sup> Lastly, victim advocacy groups hailed FOSTA as finally holding websites responsible for knowingly profiting from advertisements involving sex trafficked individuals.<sup>200</sup>

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<sup>193</sup> See Shea M. Rhodes et al., *SESTA/FOSTA Imposes Accountability on Internet Service Providers, Remains Misinterpreted by Many*, THE HILL (May 22, 2018), <https://thehill.com/blogs/congress-blog/judicial/388694-sesta-fosta-imposes-accountability-on-internet-service-providers> [<https://perma.cc/U9MK-U3L8>] (noting that Congress never intended Section 230 to apply to third parties who posted on ISPs and instead wanted Section 230 to foster a sense of responsibility among ISPs for what third parties posted on their platforms).

<sup>194</sup> See *Barry v. Edmunds*, 116 U.S. 550, 562 (1886) (acknowledging the common law principle of punitive damages in a tort case); *Ditullio v. Boehm*, 662 F.3d 1091, 1098 (9th Cir. 2011) (affirming the purpose for punitive damages within the common law tort jurisprudence as it applies to the civil cause of action under the TVPA); RESTATEMENT (SECOND) OF TORTS § 908 (AM. LAW INST. 1979) (finding punitive damages appropriate to respond to abhorrent behavior that involves "some element of outrage similar to that usually found in crime"); *The Latest Developments in Combating Online Sex Trafficking*, *supra* note 28 (noting that FOSTA's creation of a civil cause of action against bad actor websites forms the principal basis for much of FOSTA's support among sex trafficking opponents).

<sup>195</sup> See Letter from Stephen E. Boyd, Assistant Att'y Gen., U.S. Dep't of Justice, to Rep. Robert Goodlatte, Chairman, Comm. on the Judiciary (Feb. 27, 2018) (noting the mens rea for ISPs under § 1591 that prosecutors have struggled to meet). Prosecutors previously needed to prove that websites "knowingly benefitted" from sex trafficking content, whereas FOSTA requires prosecutors to prove that websites had "the intent to promote or facilitate" sex trafficking. See *supra* notes 104–108 and accompanying text (discussing the change in mens rea standards).

<sup>196</sup> See FOSTA § 3 (amending Section 230 to preclude its application to any violations of federal or state law).

<sup>197</sup> See Sarah Mucha, *Senate Approves Anti-Sex-Trafficking Bill*, CNN (Mar. 21, 2018), <https://www.cnn.com/2018/03/21/politics/sex-trafficking-bill/index.html> [<https://perma.cc/U9MK-U3L8>] (noting that the Senate supported FOSTA with a 97–2 margin and the House supported it with a 388–25 margin).

<sup>198</sup> See *id.* (providing Senator Mitch McConnell's characterization of FOSTA as a law that holds bad actor websites accountable for their role in facilitating sex trafficking).

<sup>199</sup> See Kang & Stolberg, *supra* note 112 (finding that prominent companies in the technology industry, such as Google and Facebook, came to support FOSTA by the time it passed Congress).

<sup>200</sup> See Rhodes et al., *supra* note 193 (defending FOSTA on the grounds that it only holds ISPs accountable for facilitating sex trafficking and refuting the notion that FOSTA reaches the conduct of individual sex workers).

### III. THE FIRST AMENDMENT DOES NOT PROTECT SEX TRAFFICKING ADVERTISEMENTS

FOSTA does not violate the First Amendment because the Supreme Court does not extend First Amendment protection to speech used to solicit crimes.<sup>201</sup> Sex traffickers' online advertisements of their victims promotes the crime of sex trafficking by seeking buyers for commercial sex acts with non-consenting victims.<sup>202</sup> Congress criminalized such conduct when it passed the TVPA, prohibiting the act of sex trafficking.<sup>203</sup> FOSTA extends this criminal liability to ISPs that intend to promote sex trafficking as well.<sup>204</sup> Just as sex traffickers lack First Amendment protection for the advertisements they put online, so too do ISPs that knowingly facilitate such advertisements.<sup>205</sup>

Although the matter has not been adjudicated explicitly, recent court decisions suggest that ISPs cannot claim that FOSTA violates their First Amendment rights.<sup>206</sup> When addressing whether the SAVE Act violated ISPs' First Amendment rights with regards to third-party advertisements, the District Court for the District of Columbia emphasized that the First Amendment does not extend to sex trafficking advertisements.<sup>207</sup> The court found that ISPs can-

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<sup>201</sup> Compare *United States v. Williams*, 553 U.S. 285, 307 (2008) (affirming the constitutionality of a statute that criminalizes speech used to induce illicit conduct), with David Greene, *EFF Sues to Invalidate FOSTA, an Unconstitutional Internet Censorship Law*, ELEC. FRONTIER FOUND. (June 28, 2018), <https://www.eff.org/deeplinks/2018/06/eff-sues-invalidate-fosta-unconstitutional-internet-censorship-law> [<https://perma.cc/2YDL-HGM6>] (alleging that FOSTA's language extends to constitutionally permissible language).

<sup>202</sup> See TVPA, Pub. L. No. 106-386 § 103(9), 114 Stat. 1488 (2000) (criminalizing the act of sex trafficking by force or of underage individuals); Kowalski, *supra* note 101, at 101 (attributing the ability of traffickers to find customers to the traffickers' use of internet advertising).

<sup>203</sup> See TVPA § 103(9) (criminalizing individuals who participate in the sale of humans for purposes of commercial sexual acts).

<sup>204</sup> See FOSTA, Pub. L. No. 115-164, § 3, 132 Stat. 1253 (2018) (codified as amended in scattered sections of 18 U.S.C. and 47 U.S.C.) (creating a new federal offense that precludes ISPs from knowingly facilitating or participating in the act of sex trafficking).

<sup>205</sup> See *Williams*, 553 U.S. at 298 (affirming the lengthy history of criminal statutes that penalize individuals' speech that leads to criminal conduct). The Court drew upon the longstanding criminal statutes that proscribed "conspiracy, incitement, and solicitation." *Id.*

<sup>206</sup> See, e.g., *Woodhull Freedom Found. v. United States*, 334 F. Supp. 3d 185, 201 (D.D.C. 2018) (rejecting the argument that FOSTA criminalizes protected speech and noting that "it is black-letter law" that individuals cannot claim First Amendment protection to speech that furthers crime, such as sex trafficking advertisements). Instead of ruling on the merits of plaintiffs' case regarding whether FOSTA violated their First Amendment right, however, the court found that the plaintiffs collectively lacked standing. *Id.* at 203.

<sup>207</sup> See *Backpage.com, LLC v. Lynch*, 216 F. Supp. 3d 96, 103 (D.D.C. 2016) (holding that sex trafficking advertisements do not receive First Amendment protection). Backpage alleged that the SAVE Act's criminalization of advertisements for sex trafficking could inadvertently extend to consensual sex advertisements on Backpage. See *id.* (arguing that it could be held in violation of the SAVE Act by allowing for third-party users to post advertisements regarding sex of any kind). The court rejected this argument, finding that the SAVE Act was solely focused on sex trafficking advertisements and as such did not incorrectly criminalize other types of legal and protected speech on

not claim a First Amendment right to speech that never qualified for the protection of the First Amendment.<sup>208</sup> In doing so, the court rested their decision on *United States v. Williams* and suggested that *Williams* extends to solicitations for criminal conduct beyond that of child pornography.<sup>209</sup>

A potential difference between the child pornography statute at issue in *Williams* and FOSTA, however, is the language used in the statutes.<sup>210</sup> FOSTA critics point to § 2421A's language of "promote or facilitate" prostitution as both overly broad and ambiguous.<sup>211</sup> They claim that the broad language violates the First Amendment by applying to both illegal and legal speech.<sup>212</sup> Similar to the litigant in *Williams*, FOSTA critics argue that the language sweeps in constitutionally protected speech.<sup>213</sup> FOSTA's language differs from that of the child pornography statute in *Williams* because it has only two verbs as compared to the lengthier verb phrase at issue in *Williams*.<sup>214</sup> Although the Court in *Williams* noted the length of the verb phrase, it did so in order to find what the

Backpage's platform. *See id.* (looking to both the legislative intent underlying the SAVE Act and its language).

<sup>208</sup> *See id.* (rejecting Backpage's argument that the SAVE Act applied to legal speech).

<sup>209</sup> *See Williams*, 553 U.S. at 298 (finding that offers to provide child pornography do not warrant First Amendment protection based "on the principle that offers to give or receive what is unlawful to possess have no social value"); *Lynch*, 216 F. Supp. 3d at 104 (denying Backpage's claim that certain types of speech on its website deserved First Amendment protection).

<sup>210</sup> *Compare Williams*, 553 U.S. at 299 (describing the child pornography statute at issue), with FOSTA § 3 (codified as amended at 18 U.S.C. § 2421A (2018)) (including an overview of the statutory language).

<sup>211</sup> *See* FOSTA § 3 (stating, in relevant part, "[w]hoever . . . owns, manages, or operates an interactive computer service . . . with the intent to promote or facilitate the prostitution of another person shall be fined under this title, imprisoned for not more than 10 years, or both"); Br. of Petitioner-Appellant at 9, *Woodhull*, 334 F. Supp. 3d 185 (D.C. Cir. Feb. 13, 2019) (No. 18-05298) (claiming the language of "promoting" and "facilitating" is unclear).

<sup>212</sup> *See* Br. for Inst. for Free Speech as Amici Curiae Supporting Appellants at 11, *Woodhull*, 334 F. Supp. 3d 185 (D.D.C. Feb. 20, 2019) (No. 18-05298) (noting that websites, in response to FOSTA, have "ceased the discussion of topics even tangentially related to FOSTA's intended targets" and thus demonstrating FOSTA's infringement on otherwise protected speech). The Supreme Court has found a statute violates the First Amendment if it restricts too much legal speech. *Williams*, 553 U.S. at 292. The Court attempts to discern between statutes that wrongfully restrain individuals from engaging in beneficial speech versus statutes that provide a social benefit by restricting harmful speech. *See Virginia v. Hicks*, 539 U.S. 113, 119–20 (2003) (explaining the danger in a law that restricts speech that is beneficial to society).

<sup>213</sup> *Compare Williams*, 553 U.S. at 297 (addressing the claim that the child pornography statute extended to legal speech), with Br. of Petitioner-Appellant, *supra* note 211, at 21 (claiming that FOSTA criminalizes legal speech such as health advice and safety tips that consensual sex workers share with one another online).

<sup>214</sup> *Compare* FOSTA § 3 (criminalizing those who use an ISP "to promote or facilitate the prostitution of another person"), with *Williams*, 553 U.S. at 294 (providing the language of the statute that criminalized, in relevant part, an individual who "advertises, promotes, presents, distributes, or solicits" child pornography).



statute sought to prohibit (i.e. child pornography).<sup>215</sup> In other words, the amount of language used in the statute was not dispositive of whether the statute was narrow enough and only applied to unprotected speech.<sup>216</sup> Instead, the Supreme Court looks to whether the language demonstrates a clear intent to only criminalize certain types of speech and uses different factors to arrive at such a conclusion.<sup>217</sup>

In *Woodhull Freedom Foundation v. United States*, the D.C. District Court became the first federal court to face a FOSTA constitutional challenge, but it did not rule on the merits of the First Amendment claim.<sup>218</sup> Nonetheless, its opinion suggested that FOSTA's language is sufficiently narrow and thus only reaches unprotected speech.<sup>219</sup> The D.C. District Court looked to FOSTA's usage of the verbs "promoting" and "facilitating" and phrase "prostitution of another person," seemingly satisfied that FOSTA exclusively extends to speech that is already considered criminal.<sup>220</sup> Similar to the Supreme Court in *Williams*, the D.C. Circuit Court did not look to a single factor but instead considered whether FOSTA included various factors that successfully limited its scope.<sup>221</sup> The court concluded that FOSTA only reached speech that pertained

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<sup>215</sup> *Williams*, 553 U.S. at 294. In determining whether a statute extends to constitutionally protected speech, the Supreme Court applied a two-step analysis. *Id.* at 293. First, it looked to the plain language of the statute to understand what the statute applies to. *See id.* (understanding the statute at issue as criminalizing solicitations of child pornography). In doing so, the Court considered several factors, including the verbs used. *See id.* (looking at factors such as language of the statute, presence of a mens rea, and definitions used). Then, the Court determined whether the statute applies to language that is protected by the First Amendment. *See id.* at 297 (finding that the statute extended to any language used to facilitate the exchange of child pornography). In *Williams*, the Court found that the statute was not overly broad because it specifically applied to child pornography and that such language was not protected by the First Amendment. *See id.* at 299 (holding that the First Amendment does not protect offers to commit crime).

<sup>216</sup> *See id.* at 293 (providing relevant factors including, but not limited to, the number of verbs used in a criminal statute).

<sup>217</sup> *See id.* at 294–96 (looking to factors including, but not limited to, (1) whether the statute contains a scienter requirement, (2) whether the language defining the criminal conduct is specific enough so that a reasonable person could understand what constitutes criminal conduct, and (3) whether the statute creates an objective standard to judge defendant's conduct).

<sup>218</sup> *See Woodhull*, 334 F. Supp. 3d at 203 (dismissing the case for lack of plaintiffs' standing). To address whether the plaintiffs are harmed by FOSTA, the court in *Woodhull* first interprets the language of the statute to determine what speech it reaches. *See id.* at 199 (finding that FOSTA extends to ISPs who utilize their speech in a way that facilitates sex trafficking). Then, the court applies that interpretation to the speech at issue. *See id.* at 198 (holding that a website providing advice for sex workers does not violate FOSTA because such speech does not knowingly facilitate sex trafficking).

<sup>219</sup> *See id.* at 201 (suggesting that FOSTA only targets speech used to further a crime and, as such, targets speech that does not receive First Amendment protection).

<sup>220</sup> *See id.* at 199 (noting that FOSTA is exclusively focused on "specific unlawful acts" and rejecting plaintiffs' argument that FOSTA's language is overly broad).

<sup>221</sup> *Compare Williams*, 553 U.S. at 294–96 (looking to factors such as whether the child pornography statute included a mens rea, whether the language was specific enough for a reasonable person to understand it, and whether the statute contained an objective standard), with *Woodhull*, 334 F. Supp. 3d at 199 (concluding that FOSTA included a mens rea of knowledge and that the statute's

to prostitution or sex trafficking and as such could not be misunderstood to extend to litigants' protected speech.<sup>222</sup>

As the Supreme Court held in *Williams*, offers to engage in illegal conduct do not receive First Amendment protection because they do not provide any societal benefit.<sup>223</sup> Applying this reasoning to sex traffickers' advertisements of their victims, the advertisements encourage illicit conduct and thus do not promote First Amendment goals.<sup>224</sup> Aside from posting images of victims without their permission, the advertisements create even greater societal harm by proffering the victims for sale.<sup>225</sup> FOSTA clarifies that ISPs, along with sex traffickers themselves, cannot promote the crime of sex trafficking by using their online platforms to do so.<sup>226</sup>

By holding individual actors and ISPs to the same criminal consequences with regards to their sex trafficking conduct, FOSTA suggests a change in the responsibility expected of ISPs.<sup>227</sup> For much of the past twenty years, ISPs shielded themselves from liability claims with Section 230.<sup>228</sup> Passed in 1996, Section 230 aimed to facilitate the growth of the internet by allowing ISPs to operate without the liability restraints imposed on traditional providers of information, such as newspaper publishers.<sup>229</sup> Now, FOSTA carves out an exception in Section 230 to preclude its application to ISPs charged with knowingly

language provided a clear focus on the illicit conduct of sex trafficking as opposed to forms of constitutionally protected speech).

<sup>222</sup> See *Woodhull*, 334 F. Supp. 3d at 199 (holding that Woodhull's concern regarding FOSTA's application to speech pertaining to prostitution was unfounded).

<sup>223</sup> See *Williams*, 553 U.S. at 298 (emphasizing the First Amendment's promotion of societally beneficial ideas); *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 563–64 (1980) (holding that the government can prohibit speech that pertains to criminal conduct without running afoul of First Amendment violations).

<sup>224</sup> See *Williams*, 553 U.S. at 298 (finding that speech that is harmful to society does not receive First Amendment protection); *URBAN INST.*, *supra* note 17, at 192 (describing how sex traffickers profit more from online classified advertisements than other avenues).

<sup>225</sup> See *Nanos*, *supra* note 1 (describing how the continued existence of a victim's advertisement online, even after her assault, further contributed to her traumatic experience).

<sup>226</sup> See 18 U.S.C. § 2421A (creating a new federal offense that precludes ISPs from knowingly facilitating or participating in the act of sex trafficking).

<sup>227</sup> See Joshua A. Geltzer, *The President and Congress Are Thinking of Changing This Important Internet Law*, SLATE (Feb. 25, 2019), <https://slate.com/technology/2019/02/cda-section-230-trump-congress.html> [<https://perma.cc/ZK5M-KLGP>] (finding that Section 230 has been misunderstood from its original legislative purpose as an immunity shield). Geltzer argues that Section 230 was enacted to encourage ISPs to develop innovative ways of dealing with negative content, without fear of being dragged down in liability claims. See *id.* Geltzer concludes that the issue is whether ISPs actually responded to the congressional expectation embedded in Section 230. See *id.*

<sup>228</sup> See, e.g., *Jane Doe No. 1 v. Backpage.com*, 817 F.3d 12, 19 (1st Cir. 2016) (describing the breadth with which courts interpreted Section 230's immunity shield).

<sup>229</sup> See S. REP. NO. 104-23, 1 (1995) (explaining that the purpose of the CDA is to create a "pro-competitive, de-regulatory national policy framework" in the newly emerging internet era).

promoting sex trafficking.<sup>230</sup> Perhaps critics fear any change to Section 230, regardless of the reason behind the change, as the ultimate reason to criticize FOSTA.<sup>231</sup>

Despite the legislative success of FOSTA, the willingness of victims and prosecutors to utilize FOSTA is beyond the control of Congress.<sup>232</sup> Since FOSTA passed, there has not been a dramatic increase in civil litigation from sex trafficking victims.<sup>233</sup> Data suggest that sex traffickers are shifting their advertisements from larger sites to smaller sites without legal consequences.<sup>234</sup> The lack of civil litigation towards ISPs and traffickers' shift to smaller websites could encourage law enforcement to pursue a seizure strategy akin to their action towards Backpage in 2018 if FOSTA proves to be ineffective at shrinking sex trafficking's illicit marketplace.<sup>235</sup> Nonetheless, the law contributes significantly to an increasing realm of legislation aimed at holding sex trafficking perpetrators accountable.<sup>236</sup> Although this change may seem drastic to FOSTA critics, a First Amendment analysis of the law demonstrates that it merely adds ISPs to the pre-existing category of sex traffickers and beneficiaries who can-

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<sup>230</sup> See 47 U.S.C. § 230(e) (explicitly providing that Section 230 cannot be used in any civil or criminal charge involving sex trafficking).

<sup>231</sup> See Geltzer, *supra* note 227 (describing Section 230 supporters' fear towards any amendment whatsoever).

<sup>232</sup> See Nam, *supra* note 88, at 1668 (providing data regarding the lack of victims' usage of the TVPA's civil remedy in the four years since it had been enacted in 2003).

<sup>233</sup> See LEVY, *supra* note 30, at 15 (noting that only 8% of all civil cases brought from human trafficking claims relate to sex trafficking specifically).

<sup>234</sup> See Press Release, Marinus Analytics, Marinus Analytics Finds Sex Trafficking Surging Online After Backpage.com Shutdown (Nov. 13, 2018), <https://www.marinusanalytics.com/articles/2018/11/1/current-us-escort-ad-activity-has-surpassed-the-volume-we-saw-on-backpage-before-the-shutdown> [<https://perma.cc/M4Q6-FJC5>] (noting an increase in third-party user activity on websites providing personal classified advertisements). Nonetheless, some warn that the increase in advertisements is due to traffickers placing the same advertisement on multiple websites to recuperate the loss from Backpage's larger audience. *Contra* Ryan Tarinelli, *Online Sex Ads Rebound, Months After Shutdown of Backpage*, NBC N.Y. (Nov. 28, 2018), <https://www.nbcnewyork.com/news/national-international/Backpage-Down-Online-Sex-Ads-Rebound—501487242.html> [<https://perma.cc/D4MN-FR5M>] (rejecting the notion that Backpage's closure led to an increase in unique sex trafficking advertisements).

<sup>235</sup> See Press Release, DEP'T OF JUSTICE, Justice Department Leads Effort to Seize Backpage.com, the Internet's Leading Forum for Prostitution Ads, and Obtains 93-Count Federal Indictment (Apr. 9, 2018), <https://www.justice.gov/opa/pr/justice-department-leads-effort-seize-backpage-com-internet-s-leading-forum-prostitution-ads> [<https://perma.cc/FL7K-XPUB>] (explaining the federal government's seizure of Backpage). The Justice Department, joined by other federal and state law enforcement agencies, seized Backpage due to its violation of prostitution facilitation charges. *Id.* This action occurred days before FOSTA's passage. See Dias, *supra* note 32 (providing FOSTA's passage date as April 11, 2018).

<sup>236</sup> See TVPA § 102(b)(13)–(14) (noting the need for specific legislation to combat sex trafficking).

not disguise sex trafficking advertisements as an exercise of their free speech.<sup>237</sup>

### CONCLUSION

Since the growth of the internet, sex traffickers have used online advertisements of their victims to find customers willing to pay for their victims' commercial sex acts. In an expanding realm of liability for the crime of sex trafficking, FOSTA acts as the most recent step to limit the scope of its growing marketplace. Starting in 2000 with the TVPA, Congress acknowledged sex trafficking as its own specific crime. Subsequently, individuals have been held responsible for their role in perpetuating it, whether they were sex traffickers, beneficiaries, or conspirators. FOSTA brings sex trafficking law into the twenty-first century by acknowledging the prominent role that the online marketplace plays in sex trafficking. FOSTA is an essential legislative development because it holds websites responsible for willfully promoting sex trafficking. The blanket internet immunity of the past can no longer be used as a shield to protect bad actors' criminal conduct. Website providers that facilitate sex trafficking should face the same consequences as traffickers themselves—and FOSTA ensures this result.

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<sup>237</sup> See *Woodhull*, 334 F. Supp. 3d at 201 (affirming that there is no First Amendment protection for speech that promotes illegal conduct).

