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Facing the Future with FOSTA: Examining the Allow States and Victims to Fight Online Sex Trafficking Act of 2017

Caitlyn Burnitis

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Facing the Future with FOSTA: Examining the Allow States and Victims to Fight Online Sex Trafficking Act of 2017

Caitlyn Burnitis*

On April 11, 2018, President Trump signed the Stop Enabling Sex Trafficking Act (SESTA) and Allow States and Victims to Fight Online Sex Trafficking Act (FOSTA) package into effect. This law amends Section 230 of the Communications and Decency Act that provides safe harbors for website hosts. Under the amended law, these safe harbor laws that provide websites civil liability immunity for the actions of their users would now exclude enforcement of federal and state sex trafficking laws. While many praised the passage of this law, many others raised concerns about its effect on free speech, prosecution, and sex workers. This comment will explore the history of its passage, what the law does, examine both the claimed effectiveness of the law and some of its unintended consequences, and call for Congress to further evaluate the effectiveness of this law and its consequences.

* Juris Doctor candidate, 2020, University of Miami School of Law. As someone who has dedicated the last ten years of her life to working against human trafficking, words cannot express how much it means to me to have the opportunity to write about this cause that I am most passionate about. I would like to thank the *Race & Social Justice Law Review* for providing me and so many others with this platform to discuss social justice issues in the legal field. I also would like to thank the entirety of the Miami Law HOPE Office- Dean Marni Lennon, Sharon Booth, Sara Baez, and Detra Fleming- who have provided me with so much support over the years; I could not be where I am without you. Thank you also to my faculty adviser, Professor Tamara Lave, for your help with this article. Thank you to Professor Samuel Stafford for continually encouraging me to pursue my dreams of law school. Special thanks to Professors Robert Latham and Barbara Martinez for encouraging and supporting my continued passion and education in this subject matter for the last two years. Finally, special thanks to my parents, Robert and Karen, and my grandmothers, Karangalan Salomon and Dolores Burnitis, for all the love and constant support that you have given to me throughout the years; I could not have done this without you. This is dedicated to all of you.

I.	INTRODUCTION	141
II.	THE HISTORY OF FOSTA	143
	<i>A. History of Section 230 of the CDA:</i>	143
	<i>B. The Misuse of Section 230</i>	145
	<i>C. The Development and Passage of FOSTA</i>	147
III.	LANGUAGE OF FOSTA	149
	<i>A. Section 2: Clarifying Congress’s Intent for Section 230 of</i> <i>the CDA</i>	149
	<i>B. Section 3: Codifying Criminal and Civil Charges Against</i> <i>Websites and their Owners for Facilitating or Promoting</i> <i>Sex Trafficking</i>	149
	<i>C. Section 4: Amending Section 230 of the CDA</i>	150
	<i>D. Section 6: Allowing State Attorneys General to Bring Forth</i> <i>Civil Actions on Behalf of Residents of their States</i>	151
	<i>E. Section 8: Government Accountability Office (GAO) Study</i>	152
IV.	POTENTIAL BENEFITS AND DRAWBACKS OF FOSTA.....	152
	<i>A. Potential Benefits and Claims Made In Support of FOSTA</i>	153
	<i>B. How FOSTA May Restrict Free Speech on the Internet</i>	154
	<i>C. How FOSTA May Make It More Difficult for Prosecutors</i> <i>and Law Enforcement To Do Their Jobs</i>	159
	<i>D. How FOSTA May Endanger Sex Workers and Human</i> <i>Trafficking Victims</i>	160
	a. FOSTA Endangers Sex Workers by Forcing Them Onto the Street	161
	b. FOSTA Endangers Sex Workers by Removing Vetting Resources	162
V.	CALLS FOR RE-EVALUATING FOSTA	163
VI.	CONCLUSION.....	165

I. INTRODUCTION

Human trafficking is an egregious problem that touches all parts of the world and affects millions of people.¹ A study released by the International Labor Organization and the Walk Free Foundation in 2016 estimated that, at the time of publication, there are 40 million victims of human trafficking worldwide.² In the United States alone, there are an estimated 403,000 people being trafficked.³

While very few people would hold that human trafficking is not a problem to be addressed, the question of how to address it is a much more difficult question to answer. Criminal prosecution is one commonplace solution;⁴ public education is another.⁵ In early 2018, however, the U.S. government passed legislation specifically aimed at addressing sex trafficking by enacting the Allow States and Victims to Fight Online Sex Trafficking Act.⁶ This known as FOSTA, after its bill in the House, and FOSTA-SESTA after its bill in the Senate⁷ holds websites accountable for any content published on their website that was found to be advertising prostitution.⁸ In so doing, the law primarily amends Section 230 of the Communications Decency Act,⁹ which provides broad immunity from

¹ GLOBAL ESTIMATES OF MODERN SLAVERY: FORCED LABOUR AND FORCED MARRIAGE, 5 (2017), https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/publication/wcms_575479.pdf.

² *Id.*

³ The Walk Free Foundation, *The 2018 Global Slavery Index*, GLOBAL SLAVERY INDEX (2018), <https://www.globallslaveryindex.org/2018/findings/country-studies/usa/>.

⁴ United States of America Department of State, 2018 TRAFFICKING IN PERSONS REPORT 443 (2018), <https://www.state.gov/wp-content/uploads/2019/01/282798.pdf> (reporting that in the 2017 Fiscal Year, the United States Department of Justice secured 499 prosecutions against human traffickers).

⁵ *Id.* at 446 (explaining that the United States federal government's various departments trained and educated personnel about human trafficking and the signs of human trafficking. In addition, the U.S. Department of Homeland Security has its own campaign to educate the public about human trafficking: the Blue Campaign).

⁶ Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Public Law 115-164, 115th Cong. (2018), <https://www.congress.gov/115/plaws/publ164/PLAW-115-publ164.pdf>.

⁷ Tom Jackman, House passes anti-online sex trafficking bill, allows targeting of websites like Backpage.com, THE WASHINGTON POST, (Feb. 27, 2018), <https://www.washingtonpost.com/news/true-crime/wp/2018/02/27/house-passes-anti-online-sex-trafficking-bill-allows-targeting-of-websites-like-backpage-com/>.

⁸ Tom Jackman, *Trump signs 'FOSTA' bill targeting online sex trafficking, enables states and victims to pursue websites*, THE WASHINGTON POST (Apr. 11, 2018), <https://www.washingtonpost.com/news/true-crime/wp/2018/04/11/trump-signs-fosta-bill-targeting-online-sex-trafficking-enables-states-and-victims-to-pursue-websites/>.

⁹ See Press Release, Ann Wagner, Wagner Trafficking Bill Headed to House Floor (Feb. 21, 2018) <https://wagner.house.gov/media-center/press-releases/wagner-trafficking-bill-headed-to-house-floor>; see also Eric Goldman, *Congress Probably Will Ruin Section 230 This Week (SESTA/FOSTA Updates)*, TECHNOLOGY & MARKETING LAW BLOG (Feb.

liability to the owners and operators of websites for the content posted on their websites by third parties.¹⁰ In passing FOSTA, Congress contended that Section 230 immunity was never intended to provide a broad umbrella of legal protections for websites that were knowingly and unlawfully promoting, advertising, or facilitating prostitution, or for websites that were facilitating the sale of sexual acts by those being sexually trafficked.¹¹ The law was signed into effect by President Donald Trump on April 11, 2018.¹²

While the passage of FOSTA was celebrated by many politicians and a number of sex trafficking survivors and their families as a significant legal victory in the fight against sex trafficking,¹³ this “victory” may come with a hefty price tag. Free speech proponents, internet rights groups, and technology company advocates claimed that the bill curbed the First Amendment and was a step toward allowing the federal government to censor the Internet.¹⁴ Sex workers and sex workers’ advocates also expressed concern, stating that this bill makes it much more dangerous for them to do their work, as it removes the ability to screen clients.¹⁵

Despite these criticisms, proponents of the bill have claimed that this will concretely tackle the issue of sex trafficking in the United States and will help prosecutors in their cases against sex traffickers.¹⁶ In order to understand the full effect of this bill, legal experts and policymakers must recognize the history of the law, its intent and purpose, and the claims of its supporters and its drawbacks – this comment will focus on exploring these issues. Section II will discuss the events and actions that led to the creation of FOSTA, Section III will discuss what the language of FOSTA explicitly states and what it does, Section IV will discuss the potential

26, 2018), <https://blog.ericgoldman.org/archives/2018/02/congress-probably-will-ruin-section-230-this-week-sestafosta-updates.htm>.

¹⁰ James Grimmelmann, *INTERNET LAW: CASES AND PROBLEMS* 184 (9th ed. 2019).

¹¹ Allow States and Victims to Fight Online Sex Trafficking Act of 2017, PUB. L. 115-164, 132 STAT. 1253.

¹² Jackman, *supra* note 8.

¹³ *See generally* Press Release, Ann Wagner & Kevin McCarthy, Wagner Statement on President Signing FOSTA Into Law (Apr. 16, 2018); *see also* Melanie Thompson, *Sex Trafficking Survivor Melanie Thompson On Why FOSTA-SESTA Is So Important*, NOW THIS NEWS (Mar. 8, 2020), <https://nowthisnews.com/videos/her/sex-trafficking-survivor-melanie-thompson-on-fosta-sesta>.

¹⁴ Anna Scheter and Dennis Romero, *FOSTA sex trafficking law becomes center about 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>.

¹⁵ Emily McCombs, *‘This Bill is Killing Us’: 9 Sex Workers On Their Lives in the Wake of FOSTA*, THE HUFFINGTON POST (May 11, 2018), https://www.huffingtonpost.com/entry/sex-workers-sesta-fosta_us_5ad0d7d0e4b0edca2cb964d9.

¹⁶ *See* Wagner and McCarthy, *supra* note 13.

benefits and drawbacks that FOSTA has created, and Section V will discuss calls that some of these unintended effects that FOSTA has created be re-evaluated.

II. THE HISTORY OF FOSTA

A. *History of Section 230 of the CDA:*

It is hard to remember a time without the Internet. Thanks to smartphone technology, people now hold the information of the world in the palm of their hands. Even though it has only been a few short decades since the advent of the World Wide Web,¹⁷ the Internet has so profoundly reshaped today's culture and society¹⁸ that it can be difficult to understand the mindsets of policymakers who feared the unknown monster that it could become.¹⁹

Foreseeing the widespread use of the Internet in American society, Congress feared that this new technology could be used as a means to expose young children to pornography and other obscene material.²⁰ Leading the charge, Senator James Exon decried the dangers an unregulated Internet posed to the American family, painting a horrific picture of the Internet becoming a virtual "red light district" used by pornographers to expose America's youth to sex and debauchery.²¹

Senator Exon's fears seemed to be well-founded at the time: in 1995, a study published by Marty Rimm in Georgetown University's Law Review declared that 83.5% of images on Usenet²² were pornographic in nature.²³ This study and its findings started becoming widespread, even

¹⁷ See generally THE EDITORS OF THE ENCYCLOPEDIA BRITANNICA, WORLD WIDE WEB (2019), <https://www.britannica.com/topic/World-Wide-Web>.

¹⁸ See generally Caitlin Dewey, *36 Ways the Web Has Changed Us*, THE WASHINGTON POST (Mar. 12, 2014), <https://www.washingtonpost.com/news/arts-and-entertainment/wp/2014/03/12/36-ways-the-web-has-changed-us/?noredirect=on>.

¹⁹ See generally Mary Graw Leary, *The Indecency and Injustice of Section 230 of the Communications Decency Act*, 41 HARV. J. L. & PUB. POL'Y 553 (2018).

²⁰ *Id.* at 559.

²¹ Robert Cannon, *The Legislative History of Senator Exon's Communications Decency Act: Regulating Barbarians on the Information Superhighway*, 49 FED. COMM. L. J. 51, 52-53 (Nov. 1996).

²² USENET, <https://en.wikipedia.org/wiki/Usenet> (explaining that usenet is an early system that allowed for worldwide discussion via the internet with computers around the world. It was an early precursor to Internet forums used today).

²³ Cannon, *supra* note 21, at 54 (citing Marty Rimm, *Marketing Pornography on the Information Superhighway: A Survey of 917, 410 Images, Descriptions, Short Stories, and Animations Downloaded 8.5 Million Times by Consumers in Over 2000 Cities in Forty Countries, Provinces, and Territories*, 83 GEO. L.J. 1849, 1867, 1914 (1995)).

going so far as to be published on the cover of Time Magazine.²⁴ Internet pornography became the monster under America's bed, ready to devour the innocence of American children.²⁵

With this in mind, Senator Exon proposed the Communications Decency Act (CDA) in an effort to protect America's children by proposing a measure never done before: regulating speech on the Internet.²⁶ However, this measure was met with fierce opposition, particularly from tech companies and their proponents who feared overregulation of a new and burgeoning industry.²⁷ Their fears were not unwarranted; just three months after Senator Exon first proposed the CDA on the Senate room floor, the New York Superior Court decided *Stratton-Oakmont*, a case which only served to enhance the fears of tech companies and the like.²⁸ In *Stratton-Oakmont*, the Court held that companies were legally liable as "publishers" for content published on its website by third parties if the companies made it a habit to regularly monitor the content posted on their websites.²⁹ After this decision, website owners and operators were placed in somewhat of a catch-22, wherein they had to decide if it would be more advantageous to monitor to try to limit illegal activity on its sites but face the risk of legal liability for the things they missed, or to leave their websites unmonitored in order to shield themselves from liability.³⁰ Owners and operators of websites and tech advocates feared that the CDA would only make this problem worse.³¹

The decision was not a popular one, and Congress was quick to begin to pass legislation in opposition to it.³² Only five short weeks after the *Stratton-Oakmont* decision was made, the language of what would become Section 230 of the CDA was proposed.³³ This section eliminated the *Stratton-Oakmont* dilemma by removing liability for website owners and

²⁴ Cannon, *supra* note 21, at 54 (citing Philip Elmer-DeWitt, Cyberporn--On A Screen Near You, Time, July 3, 1995, at 38 reprinted in 141 Cong. Rec. S9019 (daily ed. June 26, 1995)).

²⁵ See Cannon, *supra* note 21, at 54-55.

²⁶ *Id.* at 52, 57.

²⁷ Leary, *supra* note 19, at 559.

²⁸ See generally *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, No. 31063/94, 1995 WL 323710, at *1 (N.Y. Sup. Ct. May 24, 1995).

²⁹ See *id.* (showing that the defendant company, Prodigy, ran an online "bulletin board" that allowed users to post and discuss issues about the world of finance. After accusations of criminal and fraudulent acts were made against the plaintiff company by an anonymous user on the bulletin board, the New York Superior Court held Prodigy legally liable as "publishers" for these remarks because of their policy of regulating information on this bulletin board).

³⁰ See generally Cannon, *supra* note 21.

³¹ *Id.*

³² See generally *Stratton-Oakmont, Inc.*, 1995 WL 323110, at *1.

³³ Leary, *supra* note 19, at 560-61.

operators for content that was posted by third parties.³⁴ However, Section 230 of the CDA did not just simply eradicate liability for website owners for third-party content; it also reaffirmed the government's dedication to preserving a "vibrant and competitive free market" for the Internet, thus allowing for its continued growth while still working to shield children from obscene materials.³⁵

Shortly after the passage of the CDA and Section 230, the anti-indecency portions of the CDA (which is to say, the majority of the law) were held to be unconstitutional by the Supreme Court.³⁶ Yet, Section 230 remained in place in an effort to immunize the actions of "Good Samaritan" website owners and developers who, in theory, would take actions to restrict access to materials that were "obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable," from civil liability, whether these materials were constitutionally protected or not.³⁷ At the same time, Section 230 would still allow for growth of the Internet by providing these owners immunity from liability for what third parties posted on their sites.³⁸

B. *The Misuse of Section 230*

In the two decades between the creation of the CDA and the creation of FOSTA, Section 230 became a common legal defense for websites attempting to deflect liability for obscene or illegal materials posted by their users, particularly advertisements for commercial sex acts with both adults and minors.³⁹ Backpage.com, (hereinafter, "Backpage") previously the second-largest classified advertising website and the leading online marketplace for sex,⁴⁰ had been particularly successful in utilizing Section 230 as a defense against lawsuits trying to hold its owners liable for postings advertising prostitution and the sale of commercial sexual acts of human trafficking victims and young children.⁴¹ Backpage's frequent

³⁴ 47 U.S.C. §230(c)(2) (2012).

³⁵ 47 U.S.C. § 230(b) (2012); *see also* Leary, *supra* note 19, at 561-62.

³⁶ *See Reno v. ACLU*, 521 U.S. 844 (1997) (finding that the CDA was overly broad and too restrictive of free speech).

³⁷ 47 U.S.C. § 230(c)(2)(A) (2012). *See also* Grimmelmann, *supra* note 10, at 184-86.

³⁸ 47 U.S.C. § 230(b)(1)-(2), (c)(1) (2012); *see also* Grimmelmann, *supra* note 10, at 184-86.

³⁹ *See* cases *infra* note 41.

⁴⁰ PERMANENT COMM. ON INVESTIGATIONS, 114TH CONG., *Backpage.com's Knowing Facilitation of Online Sex Trafficking*, 1 (Jan.10, 2017), <https://www.hsgac.senate.gov/imo/media/doc/Backpage%20Report%202017.01.10%20FINAL.pdf> [hereinafter *Backpage.com Senate Report*].

⁴¹ *See* M.A. v. Village Voice Media Holdings, LLC, 809 F. Supp. 2d 1041, 1048-50 (E.D. Mo. 2011) (finding that, under section 230 of the CDA, Backpage.com was not legally liable for sexual advertisements of a 14-year-old girl who was being trafficked and

evasion of liability and the consistent use of its website by users to perpetuate human trafficking was of constant concern to both attorney generals⁴² and policymakers, so much so that the Senate Permanent Subcommittee of Investigations published a report that found that Backpage was knowingly facilitating online sex trafficking by automatically and manually deleting incriminating terms that potentially indicated underage victims of trafficking (e.g. “Lolita,” “teenage,” “rape,” and “amber alert”) and “coached” its users on how to post “clean” advertisements.⁴³

In an attempt to target Backpage, Congress enacted the SAVE Act, which amended existing federal sex trafficking statutes to include liability for those who knowingly advertised victims of sex trafficking.⁴⁴ SAVE was supposed to serve as a tool for the government to take down marketplace forums like Backpage that housed advertisements for sex trafficking.⁴⁵ Unlike FOSTA, the SAVE Act did not amend Section 230 of the CDA, but rather worked within its perimeters.⁴⁶ Although Backpage

that the section 230 immunity could not be defeated by Backpage.com posting instructions on how to better promote advertisements or even by knowledge of the unlawful activity by itself if the website did not post the ad itself); *Doe v. Backpage.com, LLC*, 817 F.3d 12, 18 (1st Cir. 2016) (finding that section 230 of the CDA provided legal immunity to Backpage.com for advertisements for escorts who were all minors at the time who were victims of sex trafficking); see *Backpage.com, LLC v. Cooper*, 939 F. Supp. 2d 805, 821 (M.D. Tenn. 2013) (finding that the argument that section 230 of the CDA pre-empted a state law that a person commits the offense of advertising commercial sexual abuse of a minor “if the person knowingly sells or offers to sell an advertisement that would appear to a reasonable person to be for the purpose of engaging in what would be a commercial sex act,” and that ignorance of the age of the minor depicted in the advertisement was not a defense, was valid and that, in conjunction with the other arguments that Backpage.com, was enough to grant an injunction against the law was granted because the court believed that Backpage.com was likely to succeed in its action finding the state law pre-empted); see also *Backpage.com, LLC v. Hoffman*, No. 13-cv-03952, 2013 U.S. Dist. LEXIS 119811, at *18-*20 (D.N.J. Aug. 20, 2013) (finding that a preliminary injunction requested by Backpage.com enjoining a New Jersey state law making the act of disseminating or displaying an advertisement for a commercial sex act by a minor an offense a “crime of the first degree,”--which would hold Backpage.com potentially liable for posts advertising the sale of commercial sexual acts posted by its users--was likely pre-empted by section 230 of the CDA, therefore making the granting of the injunction permissible).

⁴² See Leary, *supra* note 19, at 556-57 (citing Letter from Nat’l Ass’n of Attorneys Gen. to Cong. Regarding Amendment of Commc’ns Decency Act (Aug. 16, 2017), available at <https://www.naag.org/assets/redesign/files/sign-on-letter/CDA%20Final%20Letter.pdf>).

⁴³ Backpage.com Senate report, *supra* note 40, at 2.

⁴⁴ Eric Goldman, *The Complicated Story of FOSTA and Section 230*, 17 FIRST AMEND. L. REV. 279, 282 (2018); see Justice for Victims of Trafficking Act, Pub. L. 114-22, 129 Stat. 227, (2015).

⁴⁵ Ann Wagner, *Not For Sale: The SAVE Act: The Stop Advertising Victims of Exploitation (SAVE) Act*, <https://wagner.house.gov/notforsale> (last visited Mar. 8, 2020).

⁴⁶ Goldman, *supra* note 44, at 282.

tried to argue against the constitutionality of SAVE, the Supreme Court dismissed the challenge on procedural grounds, stating that the First Amendment does not protect advertising of illegal activities such as sex trafficking.⁴⁷ Despite the SAVE Act surviving this constitutional challenge, it has seemingly never been used to successfully prosecute Backpage or any other similar actor.⁴⁸

C. *The Development and Passage of FOSTA*

After owners of online marketplace sites like Backpage consistently (and flagrantly) used Section 230 as a shield from liability for human trafficking occurring on their site, politicians began searching for a new way to hold these websites liable, which led to the creation of FOSTA and SESTA.⁴⁹ FOSTA and SESTA began as two separate bills in the House and in the Senate, respectively.⁵⁰ The Fight Online Sex Trafficking Act (FOSTA), sponsored by Congresswoman Ann Wagner and co-sponsored by 174 other house representatives across party lines, was introduced to the House on April 3, 2017.⁵¹ On August 1, 2017, Senator Rob Portman sponsored SESTA in the Senate with 70 other bipartisan co-sponsors.⁵² While both bills proposed amending section 230 of the Communications and Decency Act (CDA),⁵³ the original language of FOSTA was harsher on tech companies than SESTA, as it proposed a lower *mens rea*⁵⁴ standard of recklessness⁵⁵ compared to SESTA's originally proposed standard of knowingly acting.⁵⁶ Tech company giants, such as Google, and the Internet Association (the trade association representing global Internet companies) were initially opposed to both FOSTA and SESTA.⁵⁷ After the scandal following the discovery that

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ See Press Release, Rob Portman, "Portman Statement on DOJ Actions Against Backpage," (Apr. 6, 2018), <https://www.portman.senate.gov/newsroom/press-releases/portman-statement-doj-actions-against-backpage>; Wagner, *supra* note 9.

⁵⁰ See Wagner, *supra* note 9.

⁵¹ Allow States and Victims to Fight Online Sex Trafficking Act of 2017, H.R. 1865, 115th Cong. (2017), <https://www.congress.gov/bill/115th-congress/house-bill/1865>.

⁵² Stop Enabling Sex Traffickers Act of 2017, S. 1693, 115th Cong. (2017), <https://www.congress.gov/bill/115th-congress/senate-bill/1693>.

⁵³ See *id.*; H.R. 1865, *supra* note 51.

⁵⁴ *Mens rea*, Black's Law Dictionary (11th ed. 2019) (defining *Mens rea* as "the state of mind that the prosecution, to secure a conviction, must prove that a defendant had when committing a crime.").

⁵⁵ Leary, *supra* note 19, at 610.

⁵⁶ S. 1693, 115th Cong. (2017).

⁵⁷ Leary, *supra* note 19, at 606, 608. See also Haley Halverson, *Ending Immunity of Internet-Facilitated Sexual Exploitation Through Amending the Communications Decency Act*, 21.12 Journal of Internet Law 3, 12 (June 2018).

Russian hackers had used social media platforms to influence the 2016 election⁵⁸ and Congressional hearings examining the role these companies may have played in it, however, the Internet Association reversed a months-long campaign against both bills and announced their support for a more narrowly-tailored SESTA bill.⁵⁹ Despite this announcement, the tech industry refocused their efforts on opposing any amendments to the CDA.⁶⁰

The Senate Committee voted SESTA through one week after the Internet Association released its statement of support.⁶¹ However, one of the original authors of the CDA, Senator Ron Wyden, put a hold on the bill as soon as it passed the Senate Committee.⁶² A few weeks later, the House Judiciary Committee proposed a new version of FOSTA that no longer included a private right of action for victims on either the federal or state level, known as the Goodlatte FOSTA.⁶³ At the same time, Representative Mimi Walters sponsored an amendment that would allow for the enforcement of civil and criminal sex trafficking charges against website owners that knowingly facilitated sex trafficking on their sites, which was accepted.⁶⁴ Eventually, rather than trying to merge the two bills into a single bill, much of the language of SESTA was transferred into FOSTA, becoming known as the FOSTA-SESTA package or just FOSTA in public circles.⁶⁵ The new combined FOSTA-SESTA package passed in the House of Representatives on February, 27, 2018, with a final vote of 388-25 and in the Senate on March 21, 2018, with a vote of 98-2.⁶⁶ President Trump signed the bill into law on April, 11, 2018.⁶⁷

⁵⁸ See *2016 Presidential Campaign Hacking Fast Facts*, CNN, (updated May 2, 2019), <https://www.cnn.com/2016/12/26/us/2016-presidential-campaign-hacking-fast-facts/index.html> (showing that there have been numerous reports alleging that Russian hackers had hacked into the DNC computer system during the 2016 election in an attempt to influence the outcome of the election).

⁵⁹ Leary, *supra* note 19, at 608.

⁶⁰ *Id.* at 609.

⁶¹ *Id.* at 610.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ H.R. 1865, *supra* note 51.

⁶⁵ Glenn Kessler, *Has the sex trafficking law eliminated 90 percent of sex-trafficking ads?*, THE WASHINGTON POST, (Aug. 20, 2018), https://www.washingtonpost.com/politics/2018/08/20/has-sex-trafficking-law-eliminated-percent-sex-trafficking-ads/?utm_term=.23ca1d70de33.

⁶⁶ H.R. 1865, *supra* note 51.

⁶⁷ *Id.*

III. LANGUAGE OF FOSTA

FOSTA was conceived in an attempt to amend Section 230 of the CDA, which had served as a common legal defense for websites which were found to contain sexual advertisements containing minors.⁶⁸ Congress did not solely undo Section 230 of the CDA, however, it also clarified its intent and created legal liability for websites that knowingly promoted or facilitated prostitution and recklessly disregarded sex trafficking.⁶⁹ While the entirety of the law contains eight sections, including sections for the title and making technical adjustments to the existing code to allow for the addition of the new amendments, this section will focus solely on the substantive sections of FOSTA.

A. Section 2: Clarifying Congress's Intent for Section 230 of the CDA

Section 2 of the law explicitly states that the current Congress believed that Section 230 “was never intended to provide legal protection to websites that unlawfully promote and facilitate prostitution and websites that facilitate traffickers in advertising the sale of unlawful sex acts with sex trafficking victims.”⁷⁰ Although Section 230 was supposed to encourage monitoring of the Internet while allowing for its growth, Congress found that websites had instead become “reckless” in allowing the sale of sex trafficking victims and children on their websites and did little to prevent it.⁷¹ Section 2 is Congress’s metaphorical “line in the sand;” Congress clearly states that these advertisements were never intended to fall under the protective umbrella of section 230 of the CDA, re-affirming its previous assertions that such advertisements are not protected free speech.⁷²

B. Section 3: Codifying Criminal and Civil Charges Against Websites and their Owners for Facilitating or Promoting Sex Trafficking

FOSTA extends beyond amending and clarifying the intent of Section 230. Section 3 of FOSTA focuses upon amending Chapter 117 of Title 18 of the United States Code, the federal statute that defines human trafficking.⁷³ FOSTA achieves this by adding an additional subsection

⁶⁸ See discussion *infra* Section II.C.

⁶⁹ PUB. L. 115-164, *supra* note 11.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

after section 2421,⁷⁴ which addresses the transportation of individuals for illegal sexual activities and related crimes.⁷⁵ Section 3 creates criminal and civil liability for website owners and managers who intend to promote or facilitate prostitution on their website.⁷⁶ The addition, entitled section 2421A, creates and outlines the elements of both a general and aggravated violation as well as the maximum penalties associated with each.⁷⁷

Subsection (a) focuses on the general violation, and the elements are as follows:⁷⁸ Anyone that (1) manages, or operates a website that (2) either uses a means of or affects interstate travel (or conspires or attempts to do so) (3) with the intent of promoting or facilitating prostitution shall be liable under this law.⁷⁹ If convicted, the individuals may be liable to fine, up to 10 years in prison, or both.⁸⁰

Subsection (b) focuses on what constitutes an “aggravated violation.”⁸¹ In addition to the aforementioned elements of a general violation, for an individual to be found guilty of an aggravated violation, the individual must also either (1) “promote[] or facilitate[] the prostitution of 5 or more persons;” or “act[] in reckless disregard of the fact that such conduct contributed to sex trafficking, in violation of 1591(a)[.]”⁸² Congress does not expand upon what specific factors they look for when determining whether a website had “reckless disregard” of its conduct contributing to sex trafficking and the few court cases regarding FOSTA so far have yet to expand upon the definition of what defines “reckless disregard” when it comes to this issue.⁸³

Section 2421A, subsection (e) allows for an affirmative defense to a charge of violating either of the aforementioned charges if the defendant can prove, by a preponderance of the evidence, that the promotion or facilitation of prostitution was legal in the jurisdiction where the promotion or facilitation was targeted.⁸⁴

C. Section 4: Amending Section 230 of the CDA

At the heart of this law was the desire to ensure that websites like Backpage were unable to continue to knowingly facilitate sex trafficking

⁷⁴ *Id.*

⁷⁵ 18 U.S.C. § 2421 Ch. 117 (2018).

⁷⁶ PUB. L. 115-164, *supra* note 11.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ See *Woodhull Freedom Foundation v. United States*, 334 F. Supp. 3d. 185 (D.D.C. 2018).

⁸⁴ *Id.*

by using Section 230 as a shield.⁸⁵ To ensure this goal, FOSTA added to the end of Section 230(e) of the CDA that “[n]othing in this section (other than subsection (c)(2)(A)) shall be construed to impair or limit” any claims in a civil action or criminal prosecution under section 1591 of Title 18, United States Code, or “any charge in a criminal prosecution brought under State law if the conduct underlying the charge would constitute a violation of section 2421A of Title 18 United States Code[.]”⁸⁶ By doing this, FOSTA has created a significant exception to the broad immunity created by the CDA, finding that the CDA does not and cannot be used to protect against civil liability or criminal charges of facilitating human trafficking and prostitution online.⁸⁷ This is a significant departure, which should prevent websites like Backpage from using Section 230 as a successful legal defense in the future.⁸⁸

D. Section 6: Allowing State Attorneys General to Bring Forth Civil Actions on Behalf of Residents of their States

Section 6 of FOSTA shifted away from amending the CDA and back to creating liability for website owners who facilitate sex trafficking or prostitution on their websites.⁸⁹ By amending section 1595 of United States Code 18 (which outlines violations in which a victim may bring forth a civil action against a perpetrator),⁹⁰ FOSTA creates civil liability for the owners of these websites.⁹¹ Furthermore, FOSTA creates civil liability for actions brought forth by those injured by the postings⁹² as well as for actions brought forth by state attorneys general.⁹³ Any state attorney general, acting as *parens patriae*,⁹⁴ who has cause to believe that residents of his or her state have been threatened or adversely affected by a violation of section 1591 may bring a federal civil action against violators of said section on behalf of the residents of his or her state.⁹⁵

⁸⁵ See Jackman, *supra* note 8.

⁸⁶ *Id.*

⁸⁷ See *id.*

⁸⁸ See discussion *infra* Section II.B; see also sources cited *supra* note 41.

⁸⁹ PUB. L. 115-164, *supra* note 11.

⁹⁰ 18 U.S.C. § 1595(a) (2016). <https://www.govinfo.gov/content/pkg/USCODE-2016-title18/html/USCODE-2016-title18-partI-chap77-sec1595.html>.

⁹¹ PUB. L. 115-164, *supra* note 11.

⁹² See *id.*; see also discussion *infra* Section III.B.

⁹³ PUB. L. 115-164, *supra* note 11.

⁹⁴ *Parens patriae*, BLACK’S LAW DICTIONARY (11th ed. 2019) (defining *Parens patriae* as “[a] doctrine by which a government has standing to prosecute a lawsuit on behalf of a citizen, esp. on behalf of someone who is under a legal disability to prosecute the suit.”).

⁹⁵ PUB. L. 115-164, *supra* note 11.

E. Section 8: Government Accountability Office (GAO) Study

Looking to the future, Congress seems to have an interest in whether this law will prompt more civil actions brought forth under section 2421A.⁹⁶ Section 8 calls for the Comptroller General of the United States⁹⁷ to conduct a study and submit a report to the Committees on the Judiciary of the House of Representatives and the Senate, the Committee on Homeland Security of the House of Representatives, and the Committee on Homeland Security and Governmental Affairs of the Senate three years after the enactment of FOSTA.⁹⁸ This study and the subsequent report is supposed to include information on every civil action brought forth pursuant to section 2421A(c) of Title 18, United States Code (both detailed reports of those that resulted in the award of damages and those that did not result in the award of damages), information on each order of restitution entered pursuant to section 2421A(d) of Title 18, United States Code, and information on every conviction of section 2421A(b) of Title 18, United States Code, where the defendant was not ordered to pay restitution.⁹⁹

IV. POTENTIAL BENEFITS AND DRAWBACKS OF FOSTA

From its early days in the House and in the Senate, FOSTA has been a controversial bill and has been met with both wholehearted support¹⁰⁰ and stark opposition and criticism.¹⁰¹ This section will address both the claims that sponsors have made in support of FOSTA, as well as the negative effects that this law may have.

⁹⁶ See generally *id.*

⁹⁷ U.S. Government Accountability Office, *Comptroller General*, U.S. GOVERNMENT ACCOUNTABILITY OFFICE WEBSITE, <https://www.gao.gov/about/comptroller-general/> (explaining that the Comptroller General is the head of the GAO and has overall responsibility over the entire agency).

⁹⁸ PUB. L. 115-164, *supra* note 11.

⁹⁹ *Id.*

¹⁰⁰ See generally Wagner & McCarthy, *supra* note 13; see also Thompson, *supra* note 13.

¹⁰¹ See generally Elliot Harmon, *How Congress Censored the Internet*, ELECTRONIC FRONTIER FOUNDATION, (Mar. 21, 2018), <https://www EFF.ORG/deeplinks/2018/03/how-congress-censored-internet>; see also Suraj Patel, *We Must Repeal SESTA, a Deadly Law That Does Nothing to Help Trafficking Victims*, BROADLY, (May 21, 2018), https://broadly.vice.com/en_us/article/xwmdkk/repeal-sesta-fosta-sex-work-suraj-patel.

A. Potential Benefits and Claims Made In Support of FOSTA

FOSTA was met with significant bipartisan support in both the House of Representatives and the Senate.¹⁰² One of the law's primary sponsors, Representative Ann Wagner, claimed that the law would finally allow for the "decimat[ion] of online sex trafficking,"¹⁰³ while other supporters, such as Representative Martha Roby, stated that FOSTA would "close the loophole," allowing for prosecutors to "bring to justice" websites that were found to be facilitating online sex trafficking.¹⁰⁴

The bill's congressional proponents believe that the bill is working. Senator Portman has continued to tout the bill and its effectiveness, upholding the fact that many of these websites where the advertisements were being posted have been shut down.¹⁰⁵ Four months after its passage, Representative Wagner made the claim that FOSTA had shut down nearly 90% of online sex trafficking.¹⁰⁶ However, an investigation by the *Washington Post* deemed that Wagner's claim was unsubstantiated and false, finding that while there was an initial decrease in sexual advertisements immediately after FOSTA's passage, there was also a rebound in the number of sex advertisements by the time Representative Wagner made that claim.¹⁰⁷ While some of the major players in advertising commercial sex (including Backpage) no longer exist or have taken steps to cut down on the advertisements for commercial sex on their website (like Craigslist did), all it takes is a simple Internet search to find that a whole host of websites have come to take their places, often spinning their names from Backpage and explicitly stating their intent to be an alternative to Backpage.¹⁰⁸ Further exploring Wagner's claim, the *Washington Post* stated that it was misleading to conflate the amount of sex trafficking with the amount of sexual advertisements.¹⁰⁹

¹⁰² H.R. 1865, *supra* note 51 (showing that FOSTA was passed in the Senate with a vote of 98-2 and in the House of Representatives with a vote of 388-25).

¹⁰³ Wagner & McCarthy, *supra* note 13.

¹⁰⁴ U.S. House Judiciary GOP, *Putting an End to Online Sex Trafficking through FOSTA: The Fight Online Sex Trafficking Act*, YOUTUBE (July 20, 2018), <https://youtu.be/Nfygwxx-IZs>.

¹⁰⁵ Press Release, Rob Portman United States Senator for Ohio, *Portman's SESTA Law Already Making a Difference in Combatting Human Trafficking* (Aug. 7, 2018), <https://www.portman.senate.gov/newsroom/press-releases/portmans-sesta-law-already-making-difference-combatting-human-trafficking>.

¹⁰⁶ U.S. House Judiciary GOP, *supra* note 104.

¹⁰⁷ Kessler, *supra* note 65.

¹⁰⁸ Backpage Alternative, GOOGLE, https://www.google.com/search?source=hp&ei=SY9mXbCHIYem5wLJ0puwCQ&q=backpage+alternative&oq=backpage+alternative&gs_l=psy-ab.3..0i10.334.3141..3303...0.0.53.834.20...0...1..gws-wiz...0i131.ti6Kp-B4TxM&ved=0ahUKEwjwz4__4qXkAhUH01kKHUnpBpYQ4dUDCAc&uact=5.

¹⁰⁹ *Id.*

Some academic studies and investigations have come to the conclusion that sex trafficking has not actually decreased.¹¹⁰ FOSTA has certainly, as the National Center for Missing and Exploited Children put it, caused a “major disruption in the online sex trafficking marketplace,”¹¹¹ with the number of sex ads dropping 75% after the removal of backpage and the passage of FOSTA.¹¹² These numbers, however, bounced back up to half of what they once were only three months after the passage of FOSTA.¹¹³ In fact, some investigations have shown that trafficking has gotten worse in some areas, increasing as much as 170%.¹¹⁴

As it has been approximately two years since the enactment of FOSTA, it may still be too early to precisely tell whether FOSTA has been successful in reducing sex trafficking. However, the few numbers we have are certainly not encouraging.¹¹⁵ The Government Accountability Office (GAO) study prescribed by section 6 of FOSTA may shed some light on the effectiveness of the law. That being said, the negative impacts feared by critics of FOSTA have already begun to show.¹¹⁶

B. *How FOSTA May Restrict Free Speech on the Internet*

Some have called Section 230 of the CDA “the most important law protecting online speech,”¹¹⁷ with many seeing the CDA as an important piece of legislation guarding the First Amendment protections of free speech.¹¹⁸ It is therefore unsurprising that any moves to amend Section 230 of the CDA would be distressing to those who see it as a bulwark of free speech. Critics of FOSTA have been outspoken about its effects of free speech,¹¹⁹ with some fearing it may lead to websites restricting open

¹¹⁰ Emily J. Born, *Too Far and Not Far Enough: Understanding the Impact of FOSTA*, 94 NYU L. REV. 1623, 1652 (Dec. 2019).

¹¹¹ National Center for Missing and Exploited Children (@MissingKids), TWITTER, (July 21, 2018, 7:30 a.m.), <https://twitter.com/MissingKids/status/1020677276285861888>.

¹¹² Born, *supra* note 110, at 1652.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ See discussion *infra*, Section IV.B-D.

¹¹⁷ Adi Kamdar, *EFF's Guide to CDA 230: The Most Important Law Protecting Online Free Speech*, ELECTRONIC FRONTIER FOUNDATION (Dec. 6, 2012), <https://www EFF.org/deeplinks/2012/12/effs-guide-cda-230-most-important-law-protecting-online-speech>.

¹¹⁸ See generally Note, *Section 230 as First Amendment Rule*, 131 HARV. L. REV. 2027 (May 2018).

¹¹⁹ See Alexandra F. Levy, *Why FOSTA's Restriction on Prostitution Promotion Violates The First Amendment (Guest Blog Post)*, TECHNOLOGY & MARKETING LAW 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>; Jeremy Malcolm, *FOSTA-SESTA Isn't Just an Attack on Sex Workers. It's Also an Attack on Free Speech*,

discussions about sex and sexual practices, particularly when it comes to kink and fetishes, due to fear that it may be indicative of page activity promoting prostitution or sex trafficking.¹²⁰

The first legal challenge against FOSTA arose only a few short months after its passage, challenging the constitutionality of the law.¹²¹ The plaintiffs in *Woodhull Freedom Foundation v. United States* moved for a preliminary injunction against the enactment of FOSTA, claiming that the law violated the First Amendment.¹²² The plaintiffs included the Woodhull Freedom Foundation, Human Rights Watch, the Internet Archive, licensed massage therapist Eric Koszyk, and self-described advocate for sex workers' rights Jesse Maley.¹²³ Each of these parties claimed that they had reason to fear criminal and civil repercussions from FOSTA due to the nature of their work, be it from promoting the legalization of prostitution, providing resources for sex workers, or simply advertising massages.¹²⁴

MEDIUM (Mar. 5, 2018), <https://medium.com/@jmalcolm/fosta-sesta-isnt-just-an-attack-on-sex-workers-it-s-also-an-attack-on-free-speech-f764f9c09452>.

¹²⁰ Malcolm, *supra* note 119.

¹²¹ See generally *Woodhull Freedom Foundation v. United States*, 334 F.Supp.3d 185 (D.D.C. 2018).

¹²² *Id.* at 189.

¹²³ *Id.* at 192-94.

¹²⁴ See *id.* (explaining that Woodhull Freedom Foundation is an advocacy and lobbying organization whose main event is their annual Sexual Freedom Summit, which features workshops about issues affecting sex workers and lobbying for the de-criminalization of sex workers. As part of their most recent summit, the organization had announced they would be using social media to livestream these workshops, but claimed they had a “well-founded fear” of prosecution as their content of their summit could be seen as promoting prostitution under the “broad, vague, and undefined prohibitions contained in FOSTA.” Human Rights Watch is an international non-profit organization that monitors potential human rights violations around the world. Part of their work includes research and advocacy on behalf of sex workers, some of which favors decriminalization. Their work includes domestic work, such as reporting on police officers who search women and use the presence of condoms on their person as evidence that they are sex workers. Because of their work and their research, Human Rights Watch fears potential liability under FOSTA. The Internet Archive is an organization that archives webpages in order to prevent webpages from “disappearing into the past.” In order to achieve this mission, its system has a function that “crawls” over the Internet, mapping and storing webpages automatically, storing around 80 million pages a day. Additionally, third-parties can also add webpages they wish to be preserved. Because of the vast number of information its system gathers every day along with the content offered by third parties, the Internet Archive fears that they will be civilly or criminally liable under FOSTA. Although they remove content at times, the owner of the Internet Archive claims that “no practical ability to evaluate the legality of any significant portion of the third-party content that it archives and makes available.” Eric Koszyk is a licensed massage therapist and the sole proprietor of Soothing Spirit Massage, a massage parlor he has operated for over a decade. He advertises on Craigslist and receives 90% of his business through Craigslist. Following the passage of FOSTA, Craigslist removed his ads and have refused to allow him to put any more up. “Jesse Maley is a self-described advocate for ‘sex workers’ health, safety, and

However, the defendants denied these claims and moved to dismiss on lack of subject-matter jurisdiction (particularly for lacking Article III standing) and for failure to state a claim upon which relief can be granted.¹²⁵

In order to receive a preliminary injunction, the plaintiffs needed to make a “clear showing” of four factors: (1) “likely success on merits;” (2) “likely irreparable harm in the absence of preliminary relief;” (3) “a balance of equities in [their] favor;” and (4) “accord with the public interest.”¹²⁶ To counter the motion to dismiss made by the defendants, the plaintiffs had to also prove, by a preponderance of the evidence, that the Court has subject-matter jurisdiction over the case by proving the case has standing under Article III.¹²⁷ To do this, the plaintiffs had to prove that they had: “(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision.”¹²⁸

When analyzing the case, the Court focused heavily upon the “injury in fact” requirement when addressing the claims made by the plaintiffs;¹²⁹ in order to meet this requirement, the plaintiffs must show “an invasion of a legally protected interest’ that is ‘concrete and particularized’ and ‘actual or imminent, not conjectural or hypothetical.’”¹³⁰ Although the Court admitted that the term “imminent” is very elastic, it relied on Supreme Court rulings to define imminent, as “certainly impending.”¹³¹ The Court stated that a subjective “chill” is not enough to substitute an objective claim of harm or future harm.¹³² For all but one of these plaintiffs (Koszyk), the Court found that, based on the black letter of the law, none

human rights.” She co-founded and manages a website called ratethatrescue.org (“Rate that Rescue”), which intends to provide resources for sex workers about resources available to them and organizations that other sex workers use. It’s primarily driven by content posted by other sex workers and provides recommendations and ratings for businesses and resources useful for sex workers, including childcare, substance abuse centers, and health care centers. Although these services are unrelated to sex work, they are used by sex workers, and Jesse Maley was fearful that Rate that Rescue could be held criminally liable under FOSTA for the speech of its users or that by providing resources that makes sex work easier (such as providing resources for child care) that Rate that Rescue could be held liable for promoting or facilitating prostitution.).

¹²⁵ *Id.* at 189, 195.

¹²⁶ *Id.* at 195 (quoting *Pursuing America’s Greatness v. Fed. Election Comm’n*, 831 F.3d 500, 505 (D.C. Cir. 2016) (quoting *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008))).

¹²⁷ *Id.*

¹²⁸ *Id.* at 197 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)).

¹²⁹ See generally *Woodhull Freedom Foundation*, 334 F.Supp.3d 185.

¹³⁰ *Id.* at 197 (quoting *Lujan*, 504 U.S. at 560).

¹³¹ *Id.* (quoting *Lujan*, 504 U.S. at 565).

¹³² *Woodhull Freedom Foundation*, 334 F.Supp.3d at 197.

of these plaintiffs had an injury in fact and their arguments about the harm to them were primarily hypothetical.¹³³ Any interpretation of FOSTA by these plaintiffs was seen as having a much broader scope than the law actually had.¹³⁴ The Court pointed to the fact that FOSTA amended section 2421A in such a way that required the Government to prove that website owners actually *intended* to promote or facilitate prostitution; merely proving that websites owners' recklessness or even knowledge of such activities is not enough to hold them liable under the amendment that FOSTA created.¹³⁵ Simply providing resources to sex workers or advocating for sex work was not directly facilitating prostitution; to meet this requirement and be liable under FOSTA, the actions of the website owners and operators would have to be shown to be facilitating *specific* acts of prostitution as a whole, not just the abstract area of prostitution or sex work.¹³⁶ Therefore, without concrete evidence of "imminent harm," none of these four plaintiffs had standing under Article III.¹³⁷

Meanwhile, Koszyk was able to maintain that he did have an actual injury because his advertisements for his massage therapy services on Craigslist were taken down as "a direct response to FOSTA."¹³⁸ Since he maintained that he was unable to operate his business without advertising on Craigslist and since he claimed his advertisements had been taken down due to FOSTA, he had an actual injury.¹³⁹ This is unlike the other plaintiffs whose injuries were deemed hypothetical by the Court.¹⁴⁰ However, the Court ultimately found that Koszyk, too, did not have standing under Article III, because he was unable to demonstrate that "a victory 'will likely alleviate the particularized injury alleged.'"¹⁴¹ As the Court determined that none of the plaintiffs had reasonable grounds to establish standing, the Court denied the plaintiffs' request for a preliminary injunction and granted the defendants' motion to dismiss.¹⁴²

Despite this victory for FOSTA and its supporters, the conversation around the validity of the ruling or the constitutionality of FOSTA continues on.¹⁴³ The Court's decision in *Woodhull* deviates from a long history of courts taking a much broader view of standing when it comes to

¹³³ See *id.* at 198-203.

¹³⁴ *Id.*

¹³⁵ *Id.* at 199.

¹³⁶ *Id.* at 200.

¹³⁷ See *id.* at 198-203.

¹³⁸ *Id.* at 203.

¹³⁹ *Id.*

¹⁴⁰ See *id.* at 198-203.

¹⁴¹ *Id.* at 203 (quoting *West v. Lynch*, 845 F.3d 1228, 1235 (D.C. C. 2017)).

¹⁴² *Woodhull Freedom Foundation*, 334 F.Supp.3d at 203-04.

¹⁴³ See *infra*, note 144.

First Amendment issues.¹⁴⁴ Indeed, even the Supreme Court has recognized the fact that parties can bring forth concerns that legislation is unconstitutionally overbroad and violates the First Amendment rights of individuals, even if a plaintiff's own speech is not found to be restricted under the legislation in question.¹⁴⁵ However, federal courts have recognized that there are limitations to that exception, and have found that plaintiffs who are attempting to bring forth a case regarding the chilling of speech on behalf of the public must do so only "where the claim is that a statute is overly broad in violation of the First Amendment."¹⁴⁶ The District Court in *Woodhull* did not seem to expressly address this recognized exception¹⁴⁷ nor did they explicitly address the constitutionality of FOSTA.¹⁴⁸ While the plaintiffs in *Woodhull* made arguments for the overbreadth of FOSTA, their arguments still fell short in the eyes of the District of Columbia District Court. The District Court's decision seems to dismiss the "chilling of speech" argument that is noted throughout history, rather focusing on the actual losses of the plaintiffs themselves.¹⁴⁹ This may open the door for other courts to decide the *Woodhull* case differently, if taken up on appeal, or allows for other plaintiffs who focus more intensely on the overbreadth of the legislature rather than on their own individual losses.

¹⁴⁴ Anna Windemuth, *The First Challenge to FOSTA was Dismissed- Along with the First Amendment's Unique Standing Doctrine*, YALE LAW SCHOOL MEDIA FREEDOM & INFORMATION ACCESS CLINIC (Dec. 27, 2018), <https://law.yale.edu/mfia/case-disclosed/first-challenge-fosta-was-dismissed-along-first-amendments-unique-standing-doctrine>; see *Sec'y of State of Md. v. Joseph H. Munson Co., Inc.*, 467 U.S. 947, 956-57 (1984) (stating that, "Within the context of the First Amendment, the Court has enunciated other concerns that justify a lessening of prudential limitations on standing. Even where a First Amendment challenge could be brought by one actually engaged in protected activity, there is a possibility that, rather than risk punishment for his conduct in challenging the statute, he will refrain from engaging further in the protected activity. Society as a whole then would be the loser. Thus, when there is a danger of chilling free speech, the concern that constitutional adjudication be avoided whenever possible may be outweighed by society's interest in having the statute challenged. 'Litigants, therefore, are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression.'" (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973))).

¹⁴⁵ *Munson*, 467 U.S. at 956-57.

¹⁴⁶ *Hardy v. Hamburg*, 69 F.Supp.3d 1, 21 (D.D.C.2014) (quoting *Munson*, 467 U.S. at 957).

¹⁴⁷ See generally *Woodhull Freedom Foundation*, 334 F.Supp.3d 185.

¹⁴⁸ See Alexandra F. Levy, *Constitutional Challenge to FOSTA Dismissed for Lack of Standing (Guest Blog Post)*, TECHNOLOGY & MARKETING LAW BLOG (Oct. 8, 2018), <https://blog.ericgoldman.org/archives/2018/10/constitutional-challenge-to-fosta-dismissed-for-lack-of-standing-guest-blog-post.htm>.

¹⁴⁹ See generally *Woodhull Freedom Foundation*, 334 F.Supp.3d 185.

C. *How FOSTA May Make It More Difficult for Prosecutors and Law Enforcement To Do Their Jobs*

FOSTA's negative effects extend not only to the arena of free speech, but also to those on the frontlines of the fight against human trafficking: law enforcement and attorneys that investigate and prosecute human trafficking cases.¹⁵⁰ A number of criminal justice experts and critics of the bill have raised concerns that FOSTA would make the jobs of law enforcement and prosecutors harder due to the common practice of using online advertisement as evidence in criminal cases.¹⁵¹ In fact, both federal and local law enforcement often used sites like Backpage to catch human traffickers and rescue human trafficking victims.¹⁵² Prior to the taking down of Backpage, and the passage of FOSTA, law enforcement would respond to ads on these sites; this provided them not only direct access to the traffickers and the trafficking victims, but access to the crime scene and the invaluable evidence that could only be found there.¹⁵³ Furthermore, law enforcement was able to subpoena the ads from the website, which was crucial evidence in the case against the traffickers that was able to tell much of the story.¹⁵⁴

All of this changed, however, with the dismantling of Backpage and the subsequent passage of FOSTA.¹⁵⁵ Local law enforcement agencies

¹⁵⁰ See, *infra*, notes 151-52.

¹⁵¹ See Kimberly Mehlman-Orozco, *OPINION: Legislation Aiming to Stop Sex Trafficking Would Hurt Investigations*, HOMELAND SECURITY TODAY (Jan. 31, 2018), <https://www.hstoday.us/subject-matter-areas/law-enforcement-and-public-safety/legislation-on-stop-sex-trafficking-would-hurt-investigations/>; see also Liz Woolery, *It's All Downsides: Hybrid FOSTA/SESTA Hinders Law Enforcement, Hurts Victims and Speakers*, CENTER FOR DEMOCRACY & TECHNOLOGY (Mar. 8, 2018), <https://cdt.org/blog/its-all-downsides-hybrid-fosta-sesta-hinders-law-enforcement-hurts-victims-and-speakers/>; see also Lynn Casey, *Police looking for more ways to investigate without Backpage*, FOX23 NEWS (May 4, 2018), <https://www.fox23.com/news/police-look-for-more-ways-to-investigate-trafficking-without-backpagecom/744121407>; see also *Freedom Network Urges Caution in Reforming the CDA*, FREEDOM NETWORK USA (Sept. 18, 2017), <https://www.eff.org/files/2017/09/18/sestahearing-freedomnetwork.pdf>; see also Tom Jackman, *Under attack, Backpage.com has its supporters as anti-trafficking tool. But many differ*, THE WASHINGTON POST (July 18, 2017), https://www.washingtonpost.com/news/true-crime/wp/2017/07/18/under-attack-backpage-com-has-its-supporters-as-anti-trafficking-tool-but-many-differ/?utm_term=.9aaf9b44be53.

¹⁵² See Jordan Fisher, *Running Blind: IMPD arrests first suspected pimp in 7 months*, RTV6 INDIANAPOLIS, THE INDY CHANNEL (updated Dec. 12, 2018), <https://www.theindychannel.com/longform/running-blind-impd-arrests-first-suspected-pimp-in-7-months>; see also Institute of Medicine and National Research Council, *Confronting Commercial Sexual Exploitation and Sex Trafficking of Minors in the United States: A Guide for the Legal Sector* (Oct. 17, 2014), <https://www.ncbi.nlm.nih.gov/books/NBK253353/>.

¹⁵³ See Fisher, *supra* note 152.

¹⁵⁴ *Id.*

¹⁵⁵ See *infra* notes 156-57.

around the country have reported that their investigations have been hit hard with the removal of Backpage and the subsequent removal of other advertising sties due to FOSTA,¹⁵⁶ leaving many in law enforcement feeling “blinded.”¹⁵⁷

D. *How FOSTA May Endanger Sex Workers and Human Trafficking Victims*

Perhaps unsurprisingly, some of the most ardent voices against FOSTA have been current and former sex workers and their advocates.¹⁵⁸ They are also joined by what may seem to be an unlikely ally: anti-trafficking advocates and experts.¹⁵⁹ Sex workers, their advocates,¹⁶⁰ and a number of anti-trafficking experts and advocates¹⁶¹ have raised concerns that this bill will only endanger those consensually taking part in sex

¹⁵⁶ See Fisher, *supra* note 152; see also Taylor Goebel, *Sex Trafficking: Backpage gone, but not the problem*, SALISBURY DAILY TIMES, DELMARVA (updated Feb. 8, 2019), <https://www.delmarvanow.com/story/news/local/delaware/2019/02/07/backpage-gone-but-not-sex-trafficking-police/2539934002/>; see also Casey, *supra* note 151.

¹⁵⁷ See Fisher, *supra* note 152.

¹⁵⁸ See *infra* note 160.

¹⁵⁹ See *infra* note 161.

¹⁶⁰ See Lux Alptraum, *The Internet Made Sex Work Safer. Now Congress Has Forced It Back Into the Shadows*, THE VERGE (May 1, 2018), <https://www.theverge.com/2018/5/1/17306486/sex-work-online-fosta-backpage-communications-decency-act> (citing several individuals who work with sex workers who explain how FOSTA has increased street solicitation and how that endangers workers); 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> (citing experts and sex workers advocates who have been against the bill and the dangers that it poses to sex workers); Carter Sherman, *Sex-trafficking bill that killed Craigslist's Personals is hurting sex workers*, VICE NEWS (Mar. 28, 2018), https://news.vice.com/en_us/article/vbxv4x/sex-trafficking-bill-that-killed-craigslist-personals-is-hurting-sex-workers (citing multiple sex workers advocates and individuals who work with sex workers claiming that the bill reduces safety for sex workers); Amanda Arnold, *Here's What's Wrong With the So-Called Anti-Sex Trafficking Bill*, THE CUT (Mar. 20, 2018), <https://www.thecut.com/2018/03/sesta-anti-sex-trafficking-bill-fosta.html> (citing adult performer Lorelai Lee who makes the claim that sex workers are safer when they can screen clients).

¹⁶¹ See Alexandra Levy, *How Section 230 Helps Sex Trafficking Victims (and SESTA Would Hurt Them)* (Guest Blog Post), TECHNOLOGY & MARKETING LAW BLOG (Aug. 15, 2017), <https://blog.ericgoldman.org/archives/2017/08/how-section-230-helps-sex-trafficking-victims-and-sesta-would-hurt-them-guest-blog-post.htm>; see also Nyssa P. Chopra, *Another Human Trafficking Expert Raises Concerns about SESTA* (Guest Blog Post), TECHNOLOGY & MARKETING LAW BLOG (Nov. 2, 2017), <https://blog.ericgoldman.org/archives/2017/11/another-human-trafficking-expert-raises-concerns-about-sesta-guest-blog-post.htm>; see also Elliot Harmon, *Sex Trafficking Experts Say SESTA Is The Wrong Solution*, ELECTRONIC FRONTIER FOUNDATION (Oct. 3, 2017), <https://www EFF.org/deeplinks/2017/10/sex-trafficking-experts-say-sesta-wrong-solution>.

work¹⁶² and even human trafficking victims who are being forced into sex work.¹⁶³

a. FOSTA Endangers Sex Workers by Forcing Them Onto the Street

Many advocates base their criticism on the fact that FOSTA has already forced sex workers to advertise on the street now that there are no longer online avenues on which to advertise.¹⁶⁴ The week following the passage of FOSTA, the mobile van outreach of the Saint James Infirmary, a medical clinic that serves sex workers in the California Bay Area, noted two to three times more sex workers on the street than before who were seeking their assistance.¹⁶⁵ Meanwhile in the Midwest, a sex worker who provides support to other sex workers noted an uptick in requests for help and advice for safely soliciting on the street by the first week after the passage of FOSTA.¹⁶⁶ Similarly, Tamika Spellman, a policy and advocacy associate for Helping Individual Prostitutes Survive (HIPS), a sex workers' advocacy group in Washington, D.C., stated that there was a notable increase in sex workers advertising on the street after the passage of FOSTA.¹⁶⁷

The increased amount of sex workers soliciting on the street is a serious cause for concern. Sex workers who work on the street are at risk of being robbed, shot at, assaulted, raped, or even killed.¹⁶⁸ Sex workers who solicit on the street are much more vulnerable to crime than those who solicit via electronic means, with some studies finding that a sex worker is 60 to 120 times more likely to be attacked while soliciting on the street compared to soliciting through the Internet.¹⁶⁹ Spellman estimates that she has seen a 75-80% increase in crimes against the population of sex workers

¹⁶² See *supra* note 160.

¹⁶³ See Harmon, *supra* note 161 (quoting anti-trafficking expert and trafficking survivor Kristen DiAngelo, who recounted the plight of a woman who was forced to work on the street by her pimp after the online platform she was working on was shut down. While the woman was walking the street, she was robbed, raped at gunpoint, and when she returned to her pimp without the money, he beat her.).

¹⁶⁴ See *infra* notes 165-71.

¹⁶⁵ Alptraum, *supra* note 160.

¹⁶⁶ *Id.* (quoting sex worker “Fancy”, “I never used to have people asking me how to stay safe on the street, or even where to advertise or how to screen,” and reporting that she claims that these questions are now part of her routine).

¹⁶⁷ Interview with Tamika Spellman, Policy and Advocacy Associate at HIPS (July 24, 2019).

¹⁶⁸ See *id.*; see also Scott Cunningham, Gregory DiAngelo, and John Tripp, *Craigslist’s Effect on Violence Against Women* (Feb. 2019), <https://www.scunning.com/craigslist110.pdf>.

¹⁶⁹ Cunningham, DiAngelo, and Tripp, *supra* note 168, at 9.

that she works with.¹⁷⁰ Current and previous sex workers, as well as their advocates, have consistently spoken out on the number of dangers that sex workers face on the street.¹⁷¹

b. FOSTA Endangers Sex Workers by Removing Vetting Resources

Adding to the inherent dangers that sex workers face on the street, sex workers are placed in further risk of danger by the removal of online forums of communication due to the threat of FOSTA.¹⁷² Websites where sex workers would post advertisements also doubled as forums for sex workers to verify potential clients from the safety of their own home.¹⁷³ In addition to these sites, sex-worker specific sites also arose over the years, providing sex workers a means to communicate with each other and warn each other away from dangerous clientele.¹⁷⁴ However, many of these websites and webpages have now been taken down as a precaution by their owners and operators to avoid criminal or civil liability under FOSTA.¹⁷⁵ When these platforms are taken down, sex workers simultaneously lose one of their only methods of vetting clients as well as their means of communicating with other sex workers about potential clientele, making their work even more dangerous.¹⁷⁶

Overall, both testimonial¹⁷⁷ and empirical data¹⁷⁸ suggest that sex workers are placed at less-risk of bodily harm when they are allowed a platform to advertise their services, vet clients, and communicate with one another freely.¹⁷⁹ It is not a stretch to assume the same would apply to victims of human trafficking coerced into sex work. Although the intent behind FOSTA is noble, it does have a strong potential to not only harm those who it purports to protect, but also those who choose to consensually take part in this work.¹⁸⁰

¹⁷⁰ Spellman, *supra* note 167.

¹⁷¹ See Arnold, *supra* note 161 (citing adult entertainer Lorelai Lee, who expressed the dangers sex workers face when soliciting on the street).

¹⁷² See, *infra* notes 173-76.

¹⁷³ See Alpraum, *supra* note 160.

¹⁷⁴ *Id.*

¹⁷⁵ Sherman, *supra* note 160.

¹⁷⁶ *Id.*

¹⁷⁷ See *supra* note 160.

¹⁷⁸ See generally Cunningham, DiAngelo, and Tripp, *supra* note 168.

¹⁷⁹ See *supra* notes 177-78.

¹⁸⁰ See Sonia Stefanizzi, *Measuring the Non-Measurable: Towards the Development of Indicators for Measuring Human Trafficking*, MEASURING HUMAN TRAFFICKING: COMPLEXITIES AND PITFALLS, 45, 45 (Ernesto U. Savona and Sonia Stefanizzi eds., 2007); see also Kauko Aromaa, *Trafficking in Human Beings: Uniform Definitions for Better Measuring and for Effective Counter-Measures*, MEASURING HUMAN TRAFFICKING:

V. CALLS FOR RE-EVALUATING FOSTA

Despite the passage and enactment of FOSTA, the conversation around FOSTA continues. Since its passage, many of FOSTA's critics have been outspoken about the negative effects that FOSTA has had, sharing their outrage through every medium, from blog posts,¹⁸¹ to protests,¹⁸² to academic articles.¹⁸³ For a time, it seemed that there was little to no hope of a re-evaluation of FOSTA, as most of the discussion about FOSTA after its passage was solely perpetrated by its most vocal critics.¹⁸⁴ Except for a few responses that lauded FOSTA by its most ardent proponents and some insubstantial claims about its effectiveness that were quickly disproven, there has been little to no discussion of whether FOSTA has been an effective law nor has there been any call for Congress to evaluate FOSTA's effectiveness nor its detrimental effects.

This all changed in December 2019, when U.S. Representatives Ro Khanna and Barbara Lee and Senators Elizabeth Warren and Ron Wyden introduced a bill proposing that the effects of FOSTA be studied by the

COMPLEXITIES AND PITFALLS, 13, 13 (Ernesto U. Savona and Sonia Stefanizzi eds., 2007); *see also*¹⁸⁰ GLOBAL ESTIMATES OF MODERN SLAVERY: FORCED LABOUR AND FORCED MARRIAGE, *supra* note 1, at 5 (showing high estimates of numbers of sex trafficking victims); *see also* Jay Albanese, *A Criminal Network Approach to Understanding & Measuring Trafficking in Human Beings*, MEASURING HUMAN TRAFFICKING: COMPLEXITIES AND PITFALLS, 55, 57-58 (Ernesto U. Savona and Sonia Stefanizzi eds., 2007); *see also* U.S. Department of Health and Human Services, *Human Trafficking Into and Within the United States: A Review of the Literature*, 1, <https://aspe.hhs.gov/system/files/pdf/75891/index.pdf> (showing that there are differing schools of thoughts about what constitutes sex trafficking); *see also* *Sex Work and Sex Trafficking*, SWOPBEHINDBARS, <https://www.swopbehindbars.org/about-swop-behind-bars/the-difference-between-sex-work-and-sex-trafficking/>; *see also* Urban Justice Center Working Group on Sex Work and Human Rights, *Human Trafficking and Sex Work*, THE GLOBAL NETWORK OF SEX WORKERS PROJECT, https://www.nswp.org/sites/nswp.org/files/KDTD_Human_Trafficking_And_Sex_Work.pdf; *see* Office for Victims of Crime, *Human Trafficking: Law Enforcement*, OFFICE FOR VICTIMS OF CRIME, <https://ovc.ncjrs.gov/humantrafficking/lawenforcement.html>; *see generally* Philip Marcelo, *State Prosecutors Struggle with Human Trafficking Cases*, THE ASSOCIATED PRESS (May 26, 2019), <https://www.apnews.com/a27f0cb72b4a48ca96f9b8249480d579>; *see generally* Office of Justice Programs, *Understanding the Perspective of the Victim*, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PROGRAM, <https://www.ojjdp.gov/pubs/252021.pdf>.

¹⁸¹ Eric Goldman, *Who Benefited from FOSTA? (Spoiler: Probably No One)*, TECHNOLOGY & MARKETING LAW BLOG (Jan. 29, 2019), <https://blog.ericgoldman.org/archives/2019/01/who-benefited-from-fosta-spoiler-probably-no-one.htm>.

¹⁸² *Sex Workers are Protesting FOSTA/SESTA Across the Country*, VICE (June 4, 2018), https://www.vice.com/en_us/article/a3ajqj/sex-workers-are-protesting-fostasesta-across-the-country.

¹⁸³ *See generally* Lura Chamberlain, *FOSTA: A Hostile Law with a Human Cost*, 87 FORDHAM L. REV. 2171 (Apr. 2019).

¹⁸⁴ *See generally supra* Section IV.B-D.

Department of Health and Human Services.¹⁸⁵ Entitled the SAFE Sex Workers Study Act, this bill would be the first national study on the health and safety of sex workers in the United States.¹⁸⁶ This bill calls for an analysis of the effects of FOSTA on the health and safety of sex workers, with a focus on those in the LGBTQ+ communities, racial and ethnic minorities, indigenous communities, people in rural communities, trafficking victims, and individuals who are undocumented.¹⁸⁷

This bill has gained support in both the House and the Senate, with Representatives André Carson, Judy Chu, Eleanor Holmes Norton, Pramila Jayapal, Alexandria Ocasio-Cortez, Jan Schakowsky, Rashida Tlaib, and Bonnie Watson Coleman serving as original co-sponsors in the House of Representatives with Senator Bernie Sanders serving as an original co-sponsor in the Senate.¹⁸⁸ What is most intriguing is that a number of these sponsors – including Senator Elizabeth Warren who introduced the bill in the Senate, as well as her co-sponsor, Senator Bernie Sanders – originally voted in favor of FOSTA.¹⁸⁹ This shows that this bill is not only sponsored by those who have been against FOSTA from the very beginning, but also those who once agreed with and voted for FOSTA.¹⁹⁰ This is an encouraging development, showing that members of Congress are realizing the need to study the negative effects of FOSTA as the bill's impact reverberates throughout the lives of sex workers across the nation.

¹⁸⁵ Press Release, Rep. Ro Khanna, RELEASE: Reps. Ro Khanna, Barbara Lee & Senators Elizabeth Warren, Ron Wyden Introduce SAFE SEX Workers Study Act (Dec. 17, 2019), <https://khanna.house.gov/media/press-releases/release-reps-ro-khanna-barbara-lee-senators-elizabeth-warren-ron-wyden>.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ See S. Res. H.R. 1865, 115th Congress (2018) https://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=115&session=2&vote=00060 (showing that out of the original sponsors in the Senate Senator Ron Wyden was the only senator to have voted “no” to FOSTA, with both Senators Bernie Sanders and Elizabeth Warren voting in favor of it); see also United States House of Representatives, *Final Vote Results for Toll Call 91* (Feb. 27, 2018), <http://clerk.house.gov/evs/2018/roll091.xml> (showing that out of the original sponsors in the House of Representatives, Representatives Ro Khanna, Barbara Lee, Pramila Jayapal, and Bonnie Watson Coleman voted “nay” to the bill, with Representatives Andre Carson, Judy Chu, Jan Schakowsky voting in favor of the bill); see also Press Release, Norton Ranked Most Effective House Democrat Last Congress in Academic Study (Mar. 1, 2019), <https://norton.house.gov/media-center/press-releases/norton-ranked-most-effective-house-democrat-last-congress-in-academic>; see also Rep. Alexandria Ocasio-Cortez, GOVTRACK, https://www.govtrack.us/congress/members/rashida_tlaib/412787.

¹⁹⁰ See *id.*

VI. CONCLUSION

Ensuring that those who encourage the facilitation or advertising of morally heinous activities such as human trafficking are held criminally and civilly liable are understandable and noble goals. However, legislators must thoroughly explore and understand the full effects and consequences that their legislation might have – both intended and unintended. While it may be too early to see the full extent of the efficacy of FOSTA in decreasing sex trafficking or hindering traffickers, the drawbacks have already affected those populations that critics most feared would be targeted. While FOSTA may do what some consider righteous work and was born with the best of intents,¹⁹¹ the realities of its drawbacks must be acknowledged to fully understand the impact of the litigation and determining whether this law is a victory or a defeat for sex trafficking legislation. If it passes, The SAFE Sex Workers Act will certainly be a significant step in the right direction.

Despite this potential step forward, studying the unintended consequences of the bill alone is insufficient to address this issue. Legislators also need to shift their focus on examining the effectiveness of the act. While there has been indication that this has certainly “disrupted” the marketplace for commercial sex, disruption does not necessarily equate with lessening, as shown by certain studies finding that sex trafficking may have actually increased.¹⁹² As there has been a recent onslaught of new alternatives to Backpage that are readily accessible,¹⁹³ it does not appear that FOSTA has had the full effectiveness that it should. Recognizant of the fact that it has only been two years since the passage of FOSTA at the time of publication, it is very possible that the positive effects of FOSTA may yet still present themselves. Nevertheless, Congress needs to take a critical analysis and examination into the effectiveness of this bill. In addition to the GAO study exploring the number of civil actions brought forth under FOSTA, Congress should also investigate: (1) whether the number of online commercial sex advertisements has actually decreased; (2) whether the decrease in commercial sex advertisements has actually led to a decrease in sex trafficking or an increase in sex trafficking investigations; and (3) whether the results of the first two queries outweigh the negative effects we have already seen arising from FOSTA.

This is a difficult task, especially considering the fact that it is hard to gain precise measurements or estimations about the amount of human trafficking due to the clandestine and illegal nature of the activity.

¹⁹¹ Wagner, *supra* note 9.

¹⁹² See Born, *supra* note 110, at 1652.

¹⁹³ See *supra* note 108.

However, in order to fully understand whether the benefits of FOSTA have outweighed its drawbacks, this challenge needs to be met. While it is certainly unreasonable to expect exact numbers, attempts to gather accurate estimations can and should be made.

Congress should have a set timeline in which to investigate these issues, allowing the potential positive effects of FOSTA to come to fruition while also allowing the negative effects to come to full fruition, as well. Once Congress has a more comprehensive understanding of both the positive and the negative effects that FOSTA has had, it can then make a more-informed decision on whether FOSTA is causing more harm than good and whether FOSTA can be amended to limit this harm or whether a full repeal of the law is necessary.

This is not to dissuade the efforts of Congress to fight against human trafficking; in fact, it is a pursuit that should be applauded and encouraged. When implementing new laws in order to combat human trafficking, however, Congress must ensure that the legislation that it puts into place to combat human trafficking is not only effective, but also is not harming those it is meant to protect. It is not enough to simply pass legislation that Congress believes will help advance the fight against human trafficking; it is also their duty to study the effects of the legislation to ensure that it is not causing more harm than good. Only with effective, well-tailored, and survivor-focused legislation can America truly begin to win the war against human trafficking.