

December 11, 2017

Berin Szóka  
President, TechFreedom  
110 Maryland Ave NE, #409  
Washington D.C. 20002



Chairman Bob Goodlatte  
House Committee on the Judiciary  
2138 Rayburn House Office Building  
Washington D.C. 20515

The Honorable Ann Wagner  
435 Cannon House Office Building  
Washington D.C. 20515

Dear Chairman Goodlatte and Representative Wagner:

We commend the thoughtful approach taken by you and your staff in drafting the manager's amendment to the 'Allow States and Victims to Fight Online Sex Trafficking Act of 2017 (FOSTA). With some further modifications, this "FOSTA 2.0" could finally resolve the difficult debate Congress has had this year over how to fight online sex trafficking effectively and without damaging legitimate websites enjoyed by law-abiding users as platforms for free speech and commerce.

**A Fresh Approach.** The Stop Enabling Sex Trafficking Act (SESTA) adds the term "knowing conduct" to the term "participation in a venture" in 18 U.S.C. § 1591(e). FOSTA 2.0 instead creates a new federal criminal standard for which the *mens rea* is intent. Generally, intent is considered a higher bar than knowledge. But FOSTA 2.0's approach has three advantages.

First, it avoids the Moderator's Dilemma: fearing increased liability for knowledge gained in monitoring user content, websites may reduce such monitoring or cease it altogether. Thus, FOSTA 2.0 would avoid undermining efforts to counter sex trafficking and thus harming victims — the perverse result that Congress intended to avoid in enacting Section 230 of the Communications Decency Act of 1996.

Second, FOSTA 2.0's intent standard is clearer: prosecutors bring intent cases routinely, and know how to win them, while relying on SESTA's "knowing conduct" standard would be an untried experiment. It is not clear that prosecutors would actually be able to bring successful prosecutions of this vague standard.

Third, while SESTA focuses exclusively on sexual exploitation (of minors and those coerced), FOSTA 2.0 creates a new, three-tiered federal criminal offense:

1. "intent to promote or facilitate any unlawful prostitution,"
2. aggravated penalties when 5 or more persons are prostituted; and

3. the same aggravated penalties for intent to promote prostitution *plus* “reckless disregard of the fact that such conduct contributed to sex trafficking.”

Breaking apart the first and third offenses means that prosecutors can (i) open a criminal investigation without having to prove that sites knew anything the age of the persons being trafficked, or that they were being sold involuntarily and (ii) through that investigation, and the grand jury process, compel websites to produce the evidence that would be needed to establish both first and third offense.

Congress should not take the creation of new federal criminal liability lightly. But the Travel Act already criminalizes the use of “any facility in interstate or foreign commerce, with intent to ... promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,” 18 U.S.C. § 1952(a)(3), which includes “any business enterprise involving ... prostitution offenses in violation of the laws of the State in which they are committed or of the United States,” 18 U.S.C. § 1952(b)(1). Thus, we understand FOSTA 2.0 to have five key effects relative to what federal law enforcement could already do under the Travel Act:

1. Allow state and local prosecution of this already-existing offense;
2. Mandate restitution to victims;
3. Create a federal civil cause of action for “anyone injured by reason of a violation of [this new federal criminal law];”
4. Enhance the penalty for this offense, from five to ten years for the base offense and twenty-five for the aggravated offense; and
5. Clarify which state’s law applies to online promotion/facilitation of prostitution.

We are generally supportive of this approach but believe some additional changes to FOSTA 2.0 will be necessary to achieve the bill’s purpose. We hope to see the following changes implemented:

**Criminal Prosecutions & Section 230.** Section 230 is the bedrock law that has made the Internet possible. It should not be amended unless absolutely necessary. And it is *not* necessary to amend Section 230 to do what FOSTA 2.0 intends: The bill could allow state and local enforcement of Sections 2421A and 1591(a) by saying essentially the same thing in these provisions of Title 18: notwithstanding Section 230’s ban on state or local criminal actions, these may be brought if, as FOSTA 2.0 already says, the conduct underlying the state law charge would violate either of these provisions. The difference in approach may seem subtle, but this approach at least requires that state or local criminal enforcement be clearly tied to a federal criminal law. This precedent would thus avoid opening the door to other, broader revisions to Section 230.

**Civil Suits & Section 230.** Section 3 of FOSTA 2.0 allows trafficking victims to bring civil suits “to recover damages and reasonable attorneys’ fees” in federal courts. The next sentence provides: “Consistent with section 230..., a defendant may be held liable, under this subsection, where promotion or facilitation of prostitution activity includes responsibility for the creation or development of all or part of the information or content provided through any interactive computer service.” The only way FOSTA 2.0 could actually be “consistent with Section 230” is to protect websites from suit unless a plaintiff can establish that the site is at least in part responsible for the development of content that promotes or facilitates sex trafficking. This safeguard is particularly

important because this section of FOSTA 2.0 does not require a “violation of section 2421A(b)” to be proven beyond a reasonable doubt, or have been determined in a previous criminal prosecution; instead, civil plaintiffs would arguably need only prove by a preponderance of the evidence that a violation of the criminal statute had occurred.

Unfortunately, as currently worded, the critical sentence quoted could, and likely would, be interpreted to mean that a website becomes liable to suit if it becomes responsible for the development of *any* content provided on its site. In other words, it is at least not clear that the content the site helped to develop must be the *same* content that constituted a violation of Section 2421A(b). Law professor Eric Goldman has proposed rewriting this sentence as follows:

Consistent with section 230 of the Communications Act of 1934 (47 U.S.C. 230), a defendant may be held liable, under this subsection, WHEN THE DEFENDANT PROMOTES OR FACILITATES prostitution activity BY CREATING OR DEVELOPING all or part of WHAT MAKES the information or content provided through ITS interactive computer service ILLEGAL.<sup>1</sup>

**Prostitution of 5+ Persons.** FOSTA 2.0 provides aggravated penalties (namely, imprisonment of an additional 15 years, up to 25 years total) not only for those involved in sex trafficking, but also for anyone who uses the Internet with the “intent to promote or facilitate the prostitution of another person” who also “promotes or facilitates the prostitution of 5 or more persons.” It seems likely any website operator found to have crossed the line on intent would also necessarily cross this line as well — and thus what is supposed to be an aggravated violation will instead become the baseline standard for website operators. This offense should either be dropped from the bill completely or significantly narrowed.

**“Targeting” & Lawful Prostitution.** Fundamental constitutional principles of federalism require respecting each state’s decision about how and whether to criminalize prostitution as a *voluntary* transaction between consenting adults — as distinct from sex trafficking involving minors or coercion. The Travel Act already codifies this principle by referring to the “laws of the State in which [acts] are committed.” This wording works with the telephone and traditional media like the mail and broadcasting, because it is relatively clear when they are being used to promote or facilitate prostitution: such actions require deliberate action on the part of the defendants. But “the Internet is ‘a unique and wholly new medium of worldwide human communication.’” *Reno v. American Civil Liberties Union*, 521 U.S. 844, 850 (1997).

It makes sense, as FOSTA 2.0 does, to ask whether a website targets a particular jurisdiction and to base that assessment on the totality of the circumstances, as FOSTA 2.0 implies. But it is difficult to predict exactly how this analysis will work in practice, and it is certainly possible that courts will be overly broad in their analysis. The Committee should clarify, if not through an amendment, then through report language, that it understands “targeting” to mean affirmative acts on the part of a

---

<sup>1</sup> Eric Goldman, *New House Bill (Substitute FOSTA) Has More Promising Approach to Regulating Online Sex Trafficking*, Technology and Marketing Law Blog (Dec. 11, 2017), <http://blog.ericgoldman.org/archives/2017/12/new-house-bill-substitute-fosta-has-more-promising-approach-to-regulating-online-sex-trafficking.htm>

website operator, like specifically advertising name of a city or state in the URL or website name, or providing a navigation structure that allows users to pinpoint specific locations of prostitutes.

**State & Local Prosecution.** Congress wrote Section 230 to make federal law enforcement responsible for policing the uniquely interstate medium that is the Internet. The law's immunity in no way limits federal prosecution. What it *does* is limit state and local prosecution of cases where a website can be shown to be responsible, if only in part, for the development of content. Furthermore, federal law already allows the deputization of state, local or tribal prosecutors as "special attorneys" empowered to prosecute federal law.<sup>2</sup> This is the right approach, principally because the need for federal deputization of specific prosecutors, and the possibility of revoking that deputization, provides a check against abusive prosecutions by overzealous or careless state and local prosecutors.

FOSTA 2.0 would allow state and local prosecutors to enforce a state's law governing the promotion or facilitation of prostitution "if the conduct underlying the charge [also] constitutes a violation of section 2421A of title 18." This effectively — and wisely — requires the state to mirror the federal law's criminal standard. Requiring prosecutors to prove intent is the best safeguard against abusive prosecutions, and thus represents a notable improvement over SESTA.

Yet the potential for abuse remains. The vast majority of America's 2,400+ state and local prosecutors are elected. That, and the prospect of running for higher office, gives them an obvious incentive to bring high-profile prosecutions. For many sites, especially small sites, an investigation or indictment alone may be the kiss of death: even if the evidence does not exist to convict them, the damage to their brand could be catastrophic, and even a small risk of spending 25 years in prison may be enough to cause them to shut down or significantly changing their offerings.

The potential for abuse is magnified by two further aspects of FOSTA 2.0 worth noting. First, as noted above, the aggravated violation for trafficking of five or more persons could be wielded freely against law large platforms as a cudgel. Second, while FOSTA 2.0 does provide an affirmative defense for websites operating in jurisdictions where prostitution is legal, nothing in the bill would limit a prosecutor to bring charges against sites that "target" that state. Instead, it appears that any of America's 2400+ prosecutors would be able to prosecute any website or its employees. If local prosecutors are not required to show that a site has targeted their state, a single rogue county prosecutor could use the new Section 2421A to conduct a private war on the operators of national or international websites — not to obtain convictions but to make headlines. Congress could avoid this problem by requiring local prosecutors to show that a website had targeted their state.

If the Department of Justice cannot guard against abuse by deciding which prosecutors to deputize, DOJ should at least be given the opportunity to review, and, if necessary, block, questionable charges by state and local prosecutors before they are filed. Absent that, it would be prudent to limit enforcement to state prosecutors: yes, 47 state Attorneys General are elected, but at least they are more subject to political discipline than local prosecutors, and, perhaps more importantly, there are

---

<sup>2</sup> 28 U.S.C. § 543(a) ("The Attorney General may appoint attorneys to assist United States attorneys when the public interest so requires"). DOJ has yet to take advantage of this power to combat sex trafficking.

only 56 state and territorial AGs — but 2400+ local prosecutors. Limiting enforcement to state AGs would at least contain the problem of potentially abusive prosecutions.

\* \* \*

FOSTA 2.0 would, like SESTA, expand federal criminal liability for online sex trafficking, authorize state and local enforcement of those provisions, and provide new mechanisms for financially compensating victims of sex trafficking. But, again, SESTA's new standard for federal criminal prosecutions will likely prove both unworkable for prosecutors and counter-productive. The term "knowing conduct" is so vague that it will be difficult to enforce, for much the same reasons the SAVE Act has not actually been used in a criminal prosecution in the [year] since the end of litigation over its constitutionality.<sup>3</sup> But this will do little to assure website operators that they will not be charged under this standard. Indeed, fearing increased liability for knowledge gained in monitoring user content, websites may reduce such monitoring or cease it altogether.

In short, SESTA offers the worst of both worlds. FOSTA 2.0, by contrast, offers prosecutors a tool they can actually use and avoids the greatest problems inherent in SESTA's approach. Again, we commend you and your staff for the thought and careful legal drafting that went into the amendment. We stand ready to assist lawmakers with the further modifications we believe are necessary.

Respectfully,

Berin Szóka, President, TechFreedom

Ashkhen Kazaryan, Legal Fellow, TechFreedom

---

<sup>3</sup> *Backpage.com v. Lynch* 2016 WL 6208368 (D.D.C., Oct. 24, 2016).