
Congress Enacts Law Creating a Sex Trafficking Exception From the Immunity Provided by Section 230 of the Communications Decency Act

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On Wednesday, April 11, the President signed into law the Allow States and Victims to Fight Online Sex Trafficking Act of 2017, also known as “FOSTA.” FOSTA aims to address congressional concerns that certain online service providers are actively promoting criminal sex trafficking through their services and that Section 230 of the Communications Decency Act (CDA) improperly shields these providers from litigation and prosecution for such conduct. In particular, a congressional investigation into the activities of Backpage.com concluded that Backpage had knowingly facilitated criminal sex trafficking through its online service. In litigation against Backpage, some courts have concluded that Section 230 prevents individuals from holding Backpage liable for its part in the sexual exploitation of sex trafficking victims. *See Doe v. Backpage.com, LLC*, 817 F.3d 12 (1st Cir. 2016), *cert. denied*, 2017 WL 69715 (No. 16-276).

FOSTA attempts to address the conduct highlighted in Congress's investigation of Backpage by amending federal sex trafficking laws, creating a new federal law criminalizing the promotion or facilitation of prostitution, and amending Section 230 to exclude from its protection certain conduct that would constitute either a violation of federal sex trafficking laws or a criminal violation of the new federal criminal prostitution law. It remains to be seen how broadly courts will construe these new provisions—and whether they risk ensnaring online providers whose conduct is far removed from the conduct that triggered the new law.

I. Expanding Definition of “Participation in a Venture” Under Sex Trafficking Law

Section 1591 of Title 18 makes it a crime to knowingly benefit, either financially or “by receiving anything of value,” from “participation in a venture” that engages in certain kinds of sex trafficking—namely, the trafficking of children, or the trafficking of adults by force, threat or coercion. 18 U.S.C. § 1591(a). Section 5 of FOSTA adds language to Section 1591 redefining what it means to “participat[e] in a venture” for purposes of that section. Under FOSTA, the term “participation in a venture” is expanded to mean “knowingly assisting, supporting, or facilitating” sex trafficking of children or sex trafficking by force. FOSTA § 5 (to be codified at 18 U.S.C. § 1591(e)(4)).

II. Providing for Civil Actions by State Attorneys General for Sex Trafficking Violations

Section 1595 of Title 18 provides a civil remedy for victims of the trafficking conduct prohibited by Section 1591. FOSTA expands that remedy provision to allow state attorneys general to bring civil actions against sex traffickers. Under FOSTA Section 6, in any case where “the attorney general of a State has reason to believe that an interest of the residents of that State has been or is threatened or adversely affected” by sex trafficking, the attorney general may bring a civil action against a person engaged in sex trafficking “on behalf of the residents of the State” in federal district court. FOSTA § 6 (to be codified at 18 U.S.C. § 1595(d)).

III. Criminalizing Intentional Promotion or Facilitation of Prostitution

In addition to amending federal sex trafficking law, FOSTA creates a new federal crime, titled “Promotion or facilitation of prostitution and reckless disregard of sex trafficking.” 18 U.S.C. § 2421A. Section 3 of FOSTA enacts 18 U.S.C. § 2421A, providing that “[w]hoever owns, manages, or operates an interactive computer service,” as defined in Section 230 of the CDA, or who attempts to do so “with the intent to promote or facilitate the prostitution of another person” shall be fined, imprisoned for up to 10 years or both. FOSTA § 3(a) (to be codified at 18 U.S.C. § 2421A). The statute includes a carveout for jurisdictions where promotion or facilitation of prostitution is legal, providing that “[i]t shall be an affirmative defense to a charge of violating subsection (a)” if the defendant proves, by a preponderance of evidence, that prostitution is “legal in the jurisdiction where the promotion or facilitation was targeted.”

FOSTA further provides that it shall be an aggravated violation if an individual “owns, manages, or operates an interactive computer service ... with the intent to promote or facilitate the prostitution of another person” and either (1) intends to promote or facilitate the prostitution of five or more people or (2) “acts in reckless disregard of the fact” that his conduct contributes to sex trafficking that would violate Section 1591. FOSTA § 3(a) (to be codified at 18 U.S.C. § 2421A). An individual who commits an aggravated violation shall be fined, imprisoned for up to 25 years or both. . If the aggravated violation contributes to sex trafficking that would violate Section 1591, a court is also directed to order mandatory restitution.

FOSTA also creates a new federal civil cause of action for certain violations of the new criminal provision. Any individual injured by conduct that would constitute an aggravated violation may recover “damages and reasonable attorneys’ fees” in an action in federal court. FOSTA § 3(a) (to be codified at 18 U.S.C. § 2421A).

IV. Stripping Section 230 Protections for Violations of Sex Trafficking Laws and for Criminal Prosecutions of Section 2421A

Finally, FOSTA amends Section 230 of the CDA to ensure that neither the expanded liability created under federal sex trafficking law nor the new criminal liability created under Section 2421A can be defeated by Section 230. Section 4 of FOSTA provides that “[n]othing in [Section 230] (other than subsection (c)(2)(A)) shall be construed to impair or limit” (1) any civil action brought under Section 1595, if the underlying conduct would violate Section 1591; (2) any criminal prosecution brought

under state law if the “conduct underlying the charge would constitute a violation” of Section 1591; or (3) any charge in a state criminal prosecution if the “conduct underlying the charge would constitute a violation of section 2421A ... and promotion or facilitation of prostitution is illegal in the jurisdiction where the defendant's promotion or facilitation was targeted.” FOSTA § 4(a) (to be codified at 47 U.S.C. § 230). FOSTA also makes the amendment to Section 230 retroactive, stating that the amendment “shall apply regardless of whether the conduct alleged occurred ... before, on, or after” the date of FOSTA's enactment. FOSTA § 4(b).

Notably, FOSTA does not limit the immunity provided by Section 230 in civil actions brought under the new criminal prostitution statute—Section 2421A. In addition, the amendment does not affect subsection 230(c)(2)(A)—which provides that an interactive computer service will not be held liable for “any action voluntarily taken in good faith to restrict access to or availability of” material that the provider considers to be objectionable.

V. Conclusion

FOSTA simultaneously expands criminal liability for interactive computer services and limits protections provided to those entities under Section 230. The practical effect of these changes will likely turn on how courts interpret the new terms and concepts that FOSTA introduces into the law, especially what it means to “knowingly assist[], support[], or facilitat[e]” sex trafficking.

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