

# All Sex Workers Deserve Protection: How FOSTA/SESTA Overlooks Consensual Sex Workers in an Attempt to Protect Sex Trafficking Victims

Heidi Tripp\*

## ABSTRACT

The internet provided consensual sex workers with a sense of safety and community not available on the streets. Screening clients before meeting them, sharing information about dangerous clients, and finding work without relying on pimps turned a historically dangerous profession into a safer, more reliable way to earn a living.

Unfortunately, the internet also provided sex traffickers with a more efficient way to advertise sex trafficking victims without detection by law enforcement. Under Section 230 of the Communications Decency Act, websites hosting advertisements of sex trafficking victims were often immune from liability. Section 230, which meant to promote free speech on the internet, repeatedly left these victims without remedy.

Congress recognized a need to hold someone responsible for online advertisements of sex trafficking victims. FOSTA/SESTA removed website immunity under Section 230 to encourage websites to diligently monitor and remove sex trafficking posts or otherwise be held responsible for facilitating the unlawful action. To avoid the work of monitoring content under FOSTA/SESTA, websites removed posting capabilities previously used by consensual sex workers. Congress failed to consider how the internet protects consensual sex workers and how this protection would be stripped from them in the wake of FOSTA/SESTA.

This Comment will argue consensual sex workers deserve protection under FOSTA/SESTA. Ultimately, this Comment will recommend that Section 230 immunity be reinstated and either enforced

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jointly with existing legislation or construed more narrowly. Under either recommendation, both sex trafficking victims and consensual sex workers will receive the protection they deserve.

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#### I. INTRODUCTION

Sex work is attributed as the oldest profession in the United States.<sup>1</sup> Although policing sexual misconduct is primarily a responsibility of the states,<sup>2</sup> the federal government has historically regulated prostitution<sup>3</sup> and sex trafficking<sup>4</sup> through legislation.<sup>5</sup> With the evolution of the internet, sex

1. See Jessica N. Drexler, *Governments' Role in Turning Tricks: The World's Oldest Profession in the Netherlands and the United States*, 15 DICK. J. INT'L L. 201, 201 (1996).

2. See *United States v. Wolf*, 787 F.2d 1094, 1097 (7th Cir. 1986).

3. See Natalia Benitez et al., *Prostitution and Sex Work*, 19 GEO. J. GENDER & L. 331, 356 (2018) (“[P]rostitution is often a consensual sexual act between two willing adults.”).

4. See *Sex Trafficking*, BLACK'S LAW DICTIONARY (11th ed. 2019) (“The act or practice of recruiting, harboring, transporting, providing, or procuring a person, or inducing a person by fraud, force, or coercion, to perform a sex act for pay.”); see also Anna Makatche, *The Commercial Sexual Exploitation of Minors, the First Amendment, and Freedom: Why Backpage.com Should Be Prevented from Selling America's Children for Sex*, 41 FORDHAM URB. L.J. 227, 239 (2013) (explaining that The Trafficking Protocol's definition of “trafficking in persons” includes victims who have not necessarily crossed state lines and victims who have been controlled by means other than physical force).

5. For an example of how the federal government has historically regulated prostitution and sex trafficking through legislation, see The Mann Act, which was passed in 1910 to stop the transportation of individuals across state lines to engage in criminal sexual activity. The Mann Act, 18 U.S.C. § 2421 (2017).

trafficking and prostitution moved from the streets to online.<sup>6</sup> Specifically, sex traffickers use the internet to find a market for their victims through online advertisements on internet service providers<sup>7</sup> (ISP).<sup>8</sup> Originally, under Section 230 of the Communications Decency Act of 1996<sup>9</sup> (CDA), ISPs hosting online advertisements were immune from liability against claims of sex trafficking activity on their websites.<sup>10</sup> Courts reasoned that immunity was appropriate when the ISP was not the party creating the illegal content.<sup>11</sup> In recent years, however, Congress passed federal legislation ensuring ISPs are held liable when fostering sex trafficking activity.<sup>12</sup>

Because of the intense and undeniable harm of sex trafficking felt by both victims and their communities, Congress passed new legislation to stop the high-speed spread of sex trafficking via the internet.<sup>13</sup> The most recent examples of protective federal legislation are the Allow States and Victims to Fight Online Sex Trafficking Act<sup>14</sup>(FOSTA) and the Stop Enabling Sex Trafficking Act<sup>15</sup> (SESTA),<sup>16</sup> passed as a package on April

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6. See 164 CONG. REC. S1827, 1828 (daily ed. Mar. 20, 2018) (statement of Sen. Portman). Senator Portman stated:

This opportunity we have before us is to pass legislation that addresses that very directly because we are seeing in this country, in this century, unbelievably, an increase in trafficking right now. The experts all say it is for one primary reason; that is, because the trafficking is moved online.

*Id.*

7. *Internet Service Provider*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("A business or other organization that offers Internet access, typically for a fee.").

8. See Marguerite A. O'Brien, *Free Speech or Slavery Profiteering?: Solutions for Policing Online Sex-Trafficking Advertisement*, 20 VAND. J. ENT. & TECH. L. 289, 295 (2017) (explaining how terms such as "young," "fresh," and "new to town" tailor advertisements to the sex trafficking market).

9. See Communications Decency Act (CDA) of 1996, 47 U.S.C. § 230 (1996), amended by 47 U.S.C. § 230 (2018).

10. See *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997).

11. See *id.*

12. See *infra* Section II.C.

13. See 164 CONG. REC. S1290, 1291 (daily ed. Feb. 27, 2018) (statement of Rep. Roby) ("It is our responsibility to provide justice for these victims and to do everything we can to protect the most vulnerable members of our society from trafficking.").

14. See Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. No. 115-64 (Apr. 11, 2018) (amending the CDA to no longer grant immunity to ISPs for content posted by third parties that promotes or facilitates prostitution and sex trafficking or the advertising of sex trafficking).

15. See Stop Enabling Sex Trafficking Act, S. 1693, 115th Cong. (2018) (amending 18 U.S.C. § 1591, the sex trafficking provision of the federal criminal code, to define "participation in a venture" as "knowingly assisting, supporting, or facilitating" sex trafficking and amending the CDA to clarify that Section 230 of the CDA does not bar or limit enforcement of neither state criminal prosecution nor 18 U.S.C. § 1595, which provides civil remedies for federal criminal sex trafficking violations).

16. Although FOSTA originated in the House of Representatives and SESTA originated in the Senate, they were signed in to law as a joint package combatting sex trafficking online. See Allow States and Victims to Fight Online Sex Trafficking Act of

11, 2018.<sup>17</sup> FOSTA and SESTA were proposed methods to combat online sex trafficking by holding ISPs such as Backpage<sup>18</sup> and Craigslist<sup>19</sup> accountable for prostitution and sex trafficking that occurs on their websites.<sup>20</sup>

Proponents of FOSTA/SESTA argued that Section 230 was never intended to protect the facilitators of sex trafficking.<sup>21</sup> These advocates proposed amending Section 230 to articulate its original purpose of encouraging free speech in a way that does not limit the growth of the internet.<sup>22</sup> FOSTA/SESTA's amendment to Section 230 permits federal civil claims against ISPs, which can now be held liable for their involvement in sex trafficking activity when sex trafficking is advertised on the ISP's websites by third party posters.<sup>23</sup>

While attempting to protect victims of sex trafficking, proponents of FOSTA/SESTA overlooked the bill's potential negative effects on consensual sex workers.<sup>24</sup> Consensual sex workers participate in legal and illegal services "including pornography, stripping, phone and internet sex,

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2017, Pub. L. No. 115-164. Throughout this Comment, these laws will be singularly referenced as FOSTA/SESTA unless otherwise individually specified.

17. See Pub. L. No. 115-164.

18. Although now seized by the government, <https://www backpage.com> was an online marketplace frequently used for classified advertisements. In addition to typical listings such as real estate, available jobs, and car sales, the website was commonly used by sex traffickers and consensual sex workers to post advertisements under the "adult" category. BACKPAGE, <https://www backpage.com> (last visited Dec. 27, 2018).

19. Until recently, <https://www craigslist.com> provided a "personals" section sex traffickers and consensual sex workers used to post advertisements. Now, the website has removed that and similar sections, but has not been seized by the government. CRAIGSLIST, <https://www craigslist.com> (last visited Dec. 27, 2018).

20. See 164 CONG. REC. S1849, 1860 (daily ed. Mar. 21, 2018) (statement of Sen. Durbin) ("SESTA is a narrowly crafted bill that would ensure that Section 230 of the Communications Decency Act does not provide legal immunity to websites like Backpage that knowingly facilitate sex trafficking.").

21. See 164 CONG. REC. S1827, 1833 (daily ed. Mar. 20, 2018) (statement of Sen. Thune) ("Needless to say, Congress never intended this provision to be used to protect websites that knowingly and deliberately facilitate trafficking, but courts have generally held that this provision does not permit them to hold websites accountable for knowingly facilitating sex trafficking.").

22. See *id.*

23. See 18 U.S.C. § 1595 (2018); see also Haley Halverson, *Ending Immunity of Internet-Facilitated Commercial Sexual Exploitation Through Amending the Communications Decency Act*, 21 J. INTERNET L. 3, 13 (2018) (explaining that the amendment allows both federal and state prosecutors to file federal civil actions for federal sex trafficking violations).

24. See Siouxsie Q, *Anti-Sex-Trafficking Advocates Say New Law Cripples Efforts to Save Victims*, ROLLING STONE (May 25, 2018), <https://bit.ly/2Q9lwjR> [hereinafter *New Law Cripples Efforts to Save Victims*]; see also AM. ASS'N SEXUALITY EDUCATORS, COUNSELORS & THERAPISTS, *Position on FOSTA[ ]SESTA and its Impact on Consensual Sex Work and the Chilling of Sexual Speech*, <https://bit.ly/2Qcq89a> (explaining how failing to define "prostitute" within FOSTA/SESTA conflates consensual sex workers and victims of sex trafficking, limiting both groups' right to free speech on the internet).

and sexual services obtained in brothels, massage parlors, through escort services, or on the street.”<sup>25</sup> Consensual sex workers have recently taken their lives into their own hands by leaving dangerous work practices on the streets and instead use ISPs to safely promote their work.<sup>26</sup> In fact, the internet helps consensual sex workers by allowing them to effectively screen their clients, share information with other sex workers, and advertise their services off the streets.<sup>27</sup>

Now, in response to FOSTA/SESTA, many ISPs completely shut down certain services on their websites or began over-censoring content beyond what was necessary to comply with FOSTA/SESTA.<sup>28</sup> These shutdowns continue to negatively affect consensual sex workers as they can no longer conduct their work online.<sup>29</sup> In addition to the free speech issue over-censoring creates,<sup>30</sup> such limitations also remove a safe space for consensual sex workers.<sup>31</sup> Sex workers who were using the internet to seek advice and safety are now forced to revert back to working on the streets. They must again put their lives in danger by approaching unknown clients and relying on pimps<sup>32</sup> to find work rather than self-employment via the internet.<sup>33</sup>

Part II of this Comment will provide a brief background on the CDA and how it balances protecting free speech on the internet with protecting sex trafficking victims.<sup>34</sup> Part II will also explain how consensual sex workers have used the internet for safety in the past.<sup>35</sup> Finally, Part II will

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25. See Benitez et al., *supra* note 3, at 331–32.

26. See Scott Cunningham et al., *Craigslist Reduced Violence Against Women*, 29 (Feb. 2019), <https://bit.ly/2y19iIG> (showing that violence against women, especially consensual sex workers, has decreased since the introduction of Craigslist).

27. See Emily McCombs, *‘This Bill Is Killing Us’: 9 Sex Workers On Their Lives In The Wake Of FOSTA*, HUFFINGTON POST (May 17, 2018), <https://bit.ly/2TfBif3>.

28. See Aja Romano, *A New Law Intended to Curb Sex Trafficking Threatens the Future of the Internet as We Know it*, VOX (Apr. 18, 2018, 5:40 PM), <https://bit.ly/2EK1qqE>.

29. See *id.*

30. See *Powell v. Am. Motors Corp.*, 834 S.W.2d 184, 190 (Mo. 1992); see also *infra* note 62 and accompanying text (discussing how free speech on the internet is protected under the Constitution and should not be restricted).

31. See Arvind Dilawar, *The Web-Hosting Service for Sex Workers, by Sex Workers, Against SESTA/FOSTA*, THE NATION (Aug. 22, 2018), <https://bit.ly/2w4Oomj> (featuring Red Umbrella Hosting, a hosting service for consensual sex workers, by consensual sex workers, that keeps their information and businesses safe as other hosting services shut down in the aftermath of FOSTA/SESTA).

32. *Pimp*, BLACK’S LAW DICTIONARY (11th ed. 2019) (“Someone who solicits customers for a prostitute [ ] in return for a share of the prostitute’s earnings.”).

33. See Natasha Lennard, *Law Claiming to Fight Sex Trafficking is Doing the Opposite – by Cracking Down on Sex Work Advocacy and Organizing*, INTERCEPT (June 13, 2018, 3:32 P.M.), <https://bit.ly/215KpA2>.

34. See *infra* Section II.A.

35. See *infra* Section II.B.

detail the history of previous anti-sex trafficking legislation<sup>36</sup> and how FOSTA/SESTA developed.<sup>37</sup> Then, Part III will analyze how FOSTA/SESTA amended Section 230 of the CDA<sup>38</sup> and how the amendment negatively affects consensual sex workers.<sup>39</sup>

Ultimately, Part III will recommend two methods of resolving the negative effects of FOSTA/SESTA on consensual sex workers. Part III recommends reinstating immunity for ISPs and enforcing existing anti-sex trafficking legislation. Alternatively, Part III recommends reinstating immunity for ISPs and applying it more narrowly.<sup>40</sup> Part IV will summarize the validity of consensual sex workers' need for free speech on the internet and conclude that there are less restrictive ways to prevent sex trafficking on the internet than FOSTA/SESTA.<sup>41</sup>

## II. BACKGROUND

Because the internet has created more ways to commit crimes than previously fathomed, new legislation is necessary to combat and control unforeseen threats.<sup>42</sup> Many attempts to control the use of the internet in general, and its use to facilitate sex trafficking specifically, have occurred through legislation.<sup>43</sup> Much of this legislation, however, restricts the First Amendment right to free speech.<sup>44</sup> FOSTA/SESTA is the most recent, and also the most restrictive, failed attempt to effectively combat online facilitation of sex trafficking.<sup>45</sup>

### A. *Development of the Communications Decency Act*

With the rise of the internet came an increase in libel and defamation cases.<sup>46</sup> Congress responded by passing the CDA in 1996 to provide remedies for claimants.<sup>47</sup> The internet made it easier to spread defamatory

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36. See *infra* Section II.C.

37. See *infra* Section II.D.

38. See *infra* Section III.A.

39. See *infra* Section III.B.

40. See *infra* Section III.C.

41. See *infra* Part IV.

42. See 164 CONG. REC. S1827, 1833 (daily ed. Mar. 20, 2018) (statement of Sen. Thune) (“[T]he internet can be used for evil as well as good, and right now, certain corners of the internet are being exploited to facilitate sex trafficking.”).

43. See *infra* Section II.B.

44. U.S. CONST. amend. I (“Congress shall make no law . . . abridging the freedom of speech.”).

45. See *infra* Section III.B.

46. See *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997) (discussing Congress's recognition of an increase in lawsuits against the freedom of speech during the expansion of the internet).

47. See *id.* at 331 (explaining how the CDA was passed in response to *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, No. 31063/94, 1995 WL 323710, at \*5 (N.Y. Sup. Ct. May 24, 1995), *superseded by statute*, 47 U.S.C. § 230 (2018), *as recognized in*

information, but more difficult to determine who was responsible for the posts.<sup>48</sup> This difficulty is primarily due to third parties' ability to anonymously post on ISPs.<sup>49</sup>

When ISPs merely distribute information, the ISPs are not liable for any defamatory information posted on their websites.<sup>50</sup> ISPs act as mere distributors of information absent a showing that the ISP knew or had reason to know that the posted information was defamatory.<sup>51</sup> Effectively, an ISP's lack of knowledge or reason to know about defamatory information is the result of having no editorial control over the content posted on their websites in the first place.<sup>52</sup> ISPs are considered publishers, rather than distributors, when they use screening software to review information posted on their websites.<sup>53</sup> ISPs acting as publishers previously opened themselves up to liability by actively reviewing content and selectively editing or removing specific posts.<sup>54</sup>

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Shiamili v. Real Estate Grp. of N.Y., Inc., 952 N.E.2d 1011, 1017 (N.Y. 2011), which disincentivized ISPs from regulating content).

48. See *Reno v. A.C.L.U.*, 521 U.S. 844, 851 (1997) ("Anyone with access to the Internet may take advantage of a wide variety of communication and information retrieval methods. These methods are constantly evolving and difficult to categorize precisely.")

49. *Id.* at 855–56.

50. For an explanation of why ISPs are not liable in these situations, see *Cubby, Inc. v. CompuServe, Inc.*, 776 F. Supp. 135, 139 (S.D.N.Y. 1991), which held that defendant ISP was not liable for distributing defamatory information contained in a news article posted to its website by a third party because the ISP was considered an interactive computer service under Section 230. *Id.* at 140. "The term 'interactive computer service' means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions." 47 U.S.C. § 230(f)(2) (2018). See also *Batzel v. Smith*, 333 F.3d 1018, 1030 (9th Cir. 2003) (determining interactive computer services include most websites hosting third-party content, and interactive computer services are immune from liability under the CDA).

51. See *Cubby, Inc.*, 776 F. Supp. at 139 (explaining that distributors are only liable for defamatory statements made by third party if the distributors knew or had reason to know defamation was an issue).

52. See *id.*

53. See *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, No. 31063/94, 1995 WL 323710, at \*2 (N.Y. Sup. Ct. May 24, 1995) (determining that an ISP explicitly exercising editorial control over content posted to its website holds itself out as a publisher and is therefore an information content provider under Section 230). "The term 'information content provider' means any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the internet or any other interactive computer service." 47 U.S.C. § 230(f)(3) (2018). See also Stephanie Silvano, *Fighting A Losing Battle to Win the War: Can States Combat Domestic Minor Sex Trafficking Despite CDA Preemption?*, 83 *FORDHAM L. REV.* 375, 387 (2014) (explaining that information content providers are websites that "personally create and develop content," and thus, face liability).

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

Fearful of being misclassified as publishers and exposed to liability, ISPs were reluctant to monitor the content posted on their websites.<sup>55</sup> Thus, in 1996, Section 230 of the CDA was passed to ensure ISPs monitor their content for unlawful posts by third parties.<sup>56</sup> Under Section 230, no ISP was liable as the publisher of third-party content when the ISP, in good faith, took actions to monitor and diminish access to objectionable content online.<sup>57</sup>

Good faith monitoring allowed third parties to post on ISPs in an unrestricted exercise of their First Amendment rights without fear that ISPs would remove their content.<sup>58</sup> This promotion of free speech on the internet has been exalted by several courts.<sup>59</sup> In *Reno v. A.C.L.U.*,<sup>60</sup> for example, the United States Supreme Court addressed free speech protections on the internet for the first time.<sup>61</sup> The Supreme Court held that speech on the internet deserves the same strict scrutiny protection as other forms of speech.<sup>62</sup> Soon after, the Fourth Circuit in *Zeran v. AOL, Inc.*<sup>63</sup> held that the broad immunity granted by Section 230 covers ISPs

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55. See Halverson, *supra* note 23, at 5.

56. See Blumenthal v. Drudge, 992 F. Supp. 44, 52 (D.D.C. 1998) (“Congress has made a . . . policy choice by providing immunity even where the interactive service provider has an active, even aggressive role in making available content prepared by others.”); see also O’Brien, *supra* note 8, at 299 (explaining how two representatives introduced Section 230 out of fear of the chilling effect the CDA would otherwise have on internet growth and free speech).

57. See 141 CONG. REC. H8470 (daily ed. Aug. 4, 1995) (statement of Rep. Cox) (explaining how Section 230 will “protect computer Good Samaritans, online service providers, anyone who provides a front end to the Internet, . . . who takes steps to screen indecency and offensive material for their customers.”). See also Universal Commc’n Sys., Inc. v. Lycos, Inc., 478 F.3d 413, 422 (1st Cir. 2007) (detailing how, when an ISP acts as a distributor, but the cause of action treats the ISP as a publisher, immunity will apply for both decisions made about the post in question and decisions about how the ISP treats all posts generally); Shiamili v. Real Estate Grp. of N.Y., Inc., 952 N.E.2d 1011, 1017 (N.Y. 2011) (following the national trend of immunizing ISPs under Section 230 when liability depends on characterizing the ISP as a publisher of content posted by third parties).

58. See Halverson, *supra* note 23, at 6.

59. See *Jane Doe No. 1 v. Backpage.com, L.L.C.*, 817 F.3d 12, 21 (1st Cir. 2016) (“Relying on [Section 230], courts have rejected claims that attempt to hold website operators liable for failing to provide sufficient protections to users from harmful content created by others.”). See, e.g., *Reno v. A.C.L.U.*, 521 U.S. 844, 882 (1997) (“The CDA, casting a far darker shadow over free speech, threatens to torch a large segment of the Internet community.”); *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 335 (4th Cir. 1997); *Chi. Lawyers’ Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666, 671 (7th Cir. 2008); *Jones v. Dirty World Entm’t Recordings L.L.C.*, 755 F.3d 398, 417 (6th Cir. 2014).

60. *Reno*, 521 U.S. at 844.

61. See *id.* at 871–72 (“[T]he CDA is a content-based regulation of speech. The vagueness of such a regulation raises special First Amendment concerns because of its obvious chilling effect on free speech.”).

62. See *id.* at 849 (“[T]he statute abridges ‘the freedom of speech’ protected by the First Amendment.”).

63. See *Zeran*, 129 F.3d at 331.



exercising editorial control so long as the ISPs are not the author of the objectionable content.<sup>64</sup> This holding allowed ISPs to exercise editorial control without being held liable as a publisher under the CDA.<sup>65</sup>

Since *Zeran*, courts have continued to expand immunity under Section 230 to cover claims other than defamation.<sup>66</sup> Immunity has been expanded in three notable ways: (1) expanding the class protected by Section 230; (2) limiting the class excluded from Section 230 protections; and (3) expanding immunity availability to various causes of actions.<sup>67</sup> Expanding immunity has allowed courts more discretion in applying Section 230.<sup>68</sup> Courts apply Section 230 immunity broadly to encourage ISPs to monitor content for unlawful or harmful posts.<sup>69</sup> Such a broad application supports the original goal of Section 230: to protect free speech on the internet.<sup>70</sup>

In addition to expanding immunity under Section 230, courts have consistently held that the CDA preempts any new state legislation.<sup>71</sup> This preemption arises from issues of interstate commerce<sup>72</sup> and restriction of

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64. *See id.* at 330 (“[L]awsuits seeking to hold a service provider liable for its exercise of a publisher’s traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content—are barred.”).

65. *See id.*

66. *See id.* (explaining that “[b]y its plain language, [Section] 230 creates a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service”) (emphasis added). *See also* GiveForward, Inc. v. Hodges, No. CIV. JFM-13-1891, 2015 WL 4716046, at \*11 (D. Md. Aug. 6, 2015) (applying Section 230 immunity to a fraud case); Doe v. MySpace, Inc., 474 F. Supp. 2d 843, 848 (W.D. Tex. 2007), *aff’d*, 528 F.3d 413 (5th Cir. 2008) (deciding that Section 230 grants immunity for negligence).

67. *See* H. Brian Holland, *In Defense of Online Intermediary Immunity: Facilitating Communities of Modified Exceptionalism*, 56 U. KAN. L. REV. 369, 374 (2008).

68. *See* Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc., 591 F.3d 250, 254 (4th Cir. 2009).

69. *See* *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 334 (4th Cir. 1997); *see also* Jones v. Dirty World Entm’t Recordings L.L.C., 755 F.3d 398, 417 (6th Cir. 2014).; *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 254 (4th Cir. 2009).

70. *See* O’Brien, *supra* note 8, at 299 (concluding that “Section 230 of the CDA—once a statute that epitomized the mid-1990’s conservative push for online censorship—is the primary First Amendment shield against liability for websites that host illegal content.”).

71. *See* Backpage.com, L.L.C. v. Hoffman, No. 13-CV-03952 DMC JAD, 2013 WL 4502097, at \*7 (D.N.J. Aug. 20, 2013); *see also* Backpage.com, L.L.C. v. Cooper, 939 F. Supp. 2d 805, 828 (M.D. Tenn. 2013); Backpage.com, L.L.C. v. McKenna, 881 F. Supp. 2d 1262, 1275 (W.D. Wash. 2012).

72. *See* U.S. CONST. art. 1, § 8 (“Congress shall have power . . . to regulate commerce . . . among the several states”); *see also* Am. Booksellers Found. v. Dean, 342 F.3d 96, 103 (2d Cir. 2003) (highlighting the difficulty for states to regulate internet activity because the internet is not limited by geographic boundaries).

freedom of speech under strict scrutiny.<sup>73</sup> Three flagship cases demonstrate how the CDA preempts attempts by state legislatures from restricting free speech on the internet.<sup>74</sup> In each case, New Jersey,<sup>75</sup> Tennessee,<sup>76</sup> and Washington<sup>77</sup> were enjoined from passing legislation that criminalized advertising commercial sexual abuse of minors online.<sup>78</sup> The courts found that such statutes would chill free speech.<sup>79</sup> Each court used similar reasoning: states could regulate illegal internet activity by enforcing already enacted legislation aimed at diminishing the exploitation of minors.<sup>80</sup>

The availability and effectiveness of already enacted legislation are particularly applicable because legislation diminishing sexual exploitation was being enacted on state and federal levels even before sex traffickers turned to the internet for advanced methods.<sup>81</sup> Although the internet accelerated the rate of sex trafficking, the internet also improved the lives of consensual sex workers by providing safety and community in a historically scorned profession.<sup>82</sup>

#### B. *Consensual Sex Workers' Use of the Internet*

Even though prostitution is possibly the oldest profession in the United States,<sup>83</sup> it has never been a legal profession.<sup>84</sup> Because prostitution

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73. See *Blaske v. Smith & Entzeroth, Inc.*, 821 S.W.2d 822, 829 (Mo. 1991) (emphasizing that the fundamental rights of freedom of speech, freedom of the press, freedom of religion, right to vote and right to procreate call for strict judicial scrutiny).

74. Backpage.com sought preliminary injunctions against pending legislation in each of these cases. See *Hoffman*, 2013 WL 4502097, at \*1; see also *Cooper*, 939 F. Supp. 2d at 845; *McKenna*, 881 F. Supp. 2d at 1286.

75. See N.J. STAT. ANN. § 2C:13-10 (West, Westlaw through Legis. Session 2018) (providing legislative findings that declare advertising commercial sexual abuse of a minor is a crime).

76. See TENN. CODE ANN. § 39-13-315 (West, Westlaw through 2018 Second Reg. Sess. of the 110th Gen. Assembly) (requiring only that a reasonable person be able to think the advertisement could appear to be for commercial sexual abuse of a minor).

77. See WASH. REV. CODE ANN. § 9.68A.104 (West 2013), *repealed by* laws 2013, ch. 9, § 2 (effective July 28, 2013) (making it a felony to knowingly, directly or indirectly, advertise commercial sexual abuse of a minor).

78. See *Hoffman*, 2013 WL 4502097, at \*7; see also *Cooper*, 939 F. Supp. 2d at 815; *McKenna*, 881 F. Supp. 2d at 1268.

79. See *Hoffman*, 2013 WL 4502097, at \*12; see also *Cooper*, 939 F. Supp. 2d at 824–25; *McKenna*, 881 F. Supp. 2d at 1282–83.

80. See *Cooper*, 939 F. Supp. 2d at 828; see also *Hoffman*, 2013 WL 4502097, at \*12; *McKenna*, 881 F. Supp. 2d at 1286.

81. See *infra* Section II.C.

82. See Drexler, *supra* note 1, at 201.

83. See *id.*

84. See *id.* at 202.

is illegal,<sup>85</sup> consensual sex workers face devastatingly high rates of violence<sup>86</sup> and judgment.<sup>87</sup> Consensual sex workers on the streets are manipulated and beat by pimps,<sup>88</sup> abused by “Johns,”<sup>89</sup> and live in fear of prosecution.<sup>90</sup> Fear of prosecution leads to fewer reports of incidents involving violence, missing persons, and homicides of consensual sex workers.<sup>91</sup>

Because of the internet, many consensual sex workers were able to leave the streets and move their work online to websites such as Backpage and Craigslist,<sup>92</sup> ensuring their own safety by screening clients before meeting with them.<sup>93</sup> Consensual sex workers also created support systems and organizations providing a forum for other consensual sex workers to share resources and tips for safe work practices.<sup>94</sup>

Moving consensual sex work to the internet also created secure payment<sup>95</sup> and a sense of legitimacy of sex work as a profession.<sup>96</sup> Consensual sex work serves as a necessary profession for many individuals with limited options for income.<sup>97</sup> Additional forms of consensual sex work became possible with the internet, including

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85. *See id.* at 229–30 (“Because clients of prostitutes are well aware that prostitutes will not report crimes committed against them, the clients often take advantage of prostitutes’ legal vulnerability.”).

86. *See id.* at 229, 231; *see also* Cunningham et al., *supra* note 26, at 9 (finding “that a female street worker is 60 to 120 times more likely to be murdered than a female non-sex worker”).

87. *See* Lennard, *supra* note 33 (discussing consensual sex workers’ fear of identifying themselves and facing stigma and criminalization).

88. *See New Law Cripples Efforts to Save Victims*, *supra* note 24; *see also* Samantha Cole, *Pimps are Preying on Sex Workers Pushed off the Web by FOSTA[ ]SESTA*, MOTHERBOARD (Apr. 30, 2018, 1:09 PM), <https://bit.ly/2LtYxj3>.

89. A “John” is considered slang for “[a] customer or prospective customer of a prostitute.” *John*, BLACK’S LAW DICTIONARY (11th ed. 2019); *see also* McCombs, *supra* note 27.

90. *See* Lennard, *supra* note 33.

91. *See New Law Cripples Efforts to Save Victims*, *supra* note 24.

92. *See* Cunningham et al., *supra* note 26, at 4.

93. *See id.* at n. 2; *see also* McCombs, *supra* note 27.

94. *See* Dilawar, *supra* note 31; *see also* Drexler, *supra* note 1, at 230–31 (showing an increase of violence against sex workers who were “unorganized” compared to those with a cohesive support system).

95. *See* Suprihmba, *Sex Work After FOSTA[ ]SESTA: Why the New Wave of Prohibition Has So Many Panicking*, AUTOSTRADDE (June 11, 2018, 12:00 PM), <https://bit.ly/2EPMjQa>.

96. *See* Drexler, *supra* note 1, at 203 (describing the only “legitimate” prostitution in the United States as certain regulated areas of Nevada).

97. *See* McCombs, *supra* note 27 (quoting current and former sex workers saying they recognize “privilege in the fact I’ve got more than one income source, and I work indoors. Others don’t have it so good, and may be forced to work on the streets” and that “for many [sex work] is our livelihood — and it is being ripped away from us as if we are not even human beings and not worthy of equal protection.”).

webcamming<sup>98</sup> and adult film acting.<sup>99</sup> And the internet allowed an ease of access that increased work for consensual sex workers while avoiding prosecution.<sup>100</sup>

Using the internet promoted safety and job security for all areas of work that consensual sex workers engage in.<sup>101</sup> Consensual sex workers experienced a decrease in violence,<sup>102</sup> an increase in sense of job security,<sup>103</sup> and the creation of support systems never found in the industry before.<sup>104</sup> Unfortunately, the misguided conflation of consensual sex work and sex trafficking<sup>105</sup> sparked fear and drastic action by ISPs in an attempt to comply with FOSTA/SESTA and other past legislation.<sup>106</sup> Although drafted with a noble and important mission, anti-sex trafficking legislation like FOSTA/SESTA often results in negative consequences for consensual sex workers.<sup>107</sup>

### C. Past Anti-Sex Trafficking Legislation

The first victim-focused piece of anti-sex trafficking federal legislation, the Trafficking Victims Protection Act<sup>108</sup> (TVPA), combatted sex trafficking through prevention, protection, and prosecution.<sup>109</sup> The

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98. See Matt Richtel, *Intimacy on the Web, With a Crowd*, N.Y. TIMES (Sept. 21, 2013), <https://nyti.ms/2HBqzJh> (describing webcamming, or camming, as a one-person show performed live, rather pre-recorded, on websites where performers earn money from tips).

99. See Jenavieve Hatch, *First Congress Took Sex Workers' Websites. Now It's Coming for Their Bank Accounts.*, HUFFINGTON POST (May 29, 2018), <https://bit.ly/2IWW9PH>.

100. See Romano, *supra* note 28.

101. See Cunningham et al., *supra* note 26, at 9.

102. See Tom Gash, *We're Safer Than Ever Before, and it's All Thanks to Technology*, THE WIRE (Dec. 27, 2016), <https://bit.ly/2CpiUJN> (asserting that criminal activity decreased because predictive policing of ISPs "made it harder to commit crimes").

103. See Cunningham et al., *supra* note 26, at 4 (concluding that consensual sex workers' ability to effectively screen clients leads to "repeat business with low-risk clients.").

104. See Dilawar, *supra* note 31.

105. See *infra* notes 149, 168, 169 and accompanying text. For further discussion on how FOSTA harmfully conflates consensual sex work and sex trafficking in violation of the overbreadth doctrine, see Lura Chamberlain, *FOSTA: A Hostile Law with A Human Cost*, 87 FORDHAM L. REV. 2171, 2177 (2019).

106. See Romano, *supra* note 28; see also AM. ASS'N OF SEXUALITY EDUCATORS, COUNSELORS & THERAPISTS, *supra* note 24; *infra* Section II.C (discussing the Trafficking Victims Protection Act, 22 U.S.C. § 7101 (2012) and the Stop Advertising Victims of Exploitation (SAVE) Act of 2015, Pub. L. No. 114-22, § 118, past examples of anti-sex trafficking legislation).

107. See *infra* Section II.C.

108. Trafficking Victims Protection Act, 22 U.S.C. § 7101 (2012).

109. See Jennifer A.L. Sheldon-Sherman, *The Missing "P": Prosecution, Prevention, Protection, and Partnership in the Trafficking Victims Protection Act*, 117 PENN ST. L. REV. 443, 452 (2012) ("Adopting a 'victim-centered' approach to addressing trafficking, the TVPA is the first federal law to criminalize trafficking in persons . . . the law sets forth

TVPA requires a showing that victims were coerced into sex work through force, fraud, coercion, or juvenile status.<sup>110</sup> In 2015, Section 1591<sup>111</sup> was amended by the Stop Advertising Victims of Sexual Exploitation (SAVE) Act.<sup>112</sup> The SAVE Act targets individuals that knowingly purchase sexual acts from human trafficking victims by adding “advertising” to the list of what is considered a sex trafficking offense.<sup>113</sup> Unlike state legislation, the SAVE Act is a federal criminal statute, which is not barred by Section 230 immunity.<sup>114</sup> Thus, the addition of advertising overcomes federal preemption for the prosecution of ISPs, who often host advertising and posting capabilities.<sup>115</sup>

Aligning the purposes of the CDA and anti-sex trafficking legislation has proven difficult.<sup>116</sup> Although Section 230 of the CDA includes a criminal enforcement exception to immunity,<sup>117</sup> it does not include a civil enforcement exception.<sup>118</sup> The purpose of the federal criminal law exception is not to allow civil actions for federal crimes, but rather to allow criminal charges when federal crimes are actually committed.<sup>119</sup> The separation of civil and criminal actions in the legislation minimizes the

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three primary purposes: to prosecute traffickers, to prevent trafficking worldwide, and to provide restorative services to trafficking victims.”).

110. *See* 22 U.S.C. § 7102(9)(A) (2015) (defining severe forms of trafficking of persons).

111. All federal law prohibiting sex trafficking is codified in Section 1591, the sex trafficking provision of the federal criminal code. *See* 18 U.S.C. § 1591 (2018).

112. Stop Advertising Victims of Exploitation (SAVE) Act of 2015, Pub. L. No. 114-22, §118 (b)(1) (2015).

113. *See* 22 U.S.C. § 7102(10) (2015) (“The term ‘sex trafficking’ means the recruitment, harboring, transportation, provision, obtaining, patronizing, or **soliciting** of a person for the purpose of a commercial sex act.”) (emphasis added).

114. *See* Sandra Elizabeth Kowalski,  *Holding Internet Advertising Providers Accountable for Sex Trafficking: Impediments to Criminal Prosecution and A Proposed Response*, 27 B.U. PUB. INT. L.J. 99, 107–08 (2018).

115. *See* H.R. Rep. No. 113-451, at 3–4 (2014) (allowing federal criminal prosecution of advertisers who benefit from sex trafficking advertisements).

116. *See* Jane Doe No. 1 v. Backpage.com, L.L.C., 817 F.3d 12, 15 (1st Cir. 2016) (“These laudable legislative efforts do not fit together seamlessly, and this case reflects the tension between them.”).

117. *See* 47 U.S.C. § 230 (2018) (“Nothing in this section shall be construed to impair the enforcement of section 223 or 231 of this title, chapter 71 (relating to obscenity) or 110 (relating to sexual exploitation of children) of Title 18, or any other [f]ederal criminal statute.”).

118. *See* Doe *ex rel.* Roe v. Backpage.com, L.L.C., 104 F. Supp. 3d 149, 160 (D. Mass. 2015), *aff’d sub nom.*, Jane Doe No. 1 v. Backpage.com, L.L.C., 817 F.3d 12 (1st Cir. 2016).

119. *See* Doe *ex rel.* Roe, 104 F. Supp. 3d at 159–60 (“Section 230 does not limit anyone’s ability to bring criminal or civil actions against the **actual** wrongdoers . . . the section 230(e)(1) exemption permits law enforcement authorities to bring criminal charges against even interactive service providers in the event that they themselves **actually** violate federal criminal laws.”) (emphasis added).

potential chilling effect that civil actions would have on internet free speech.<sup>120</sup>

When considering whether immunity exists under Section 230, exempting ISPs from civil liability, courts apply a three-part test.<sup>121</sup> First, the court determines if the provider is an interactive computer service provider.<sup>122</sup> Next, the court determines if a third party provided the posts.<sup>123</sup> Lastly, the court determines if the suit treats the provider as a publisher or speaker of the provided third-party content.<sup>124</sup> If each part of the test is answered affirmatively, the ISP receives immunity under Section 230, and any cause of action brought under state law is deemed inconsistent with the CDA.<sup>125</sup>

Under this test, ISPs are immune from both civil and criminal liability unless evidence supports that it has transitioned from acting neutrally to assisting in the creation of illegal content through its own rules and regulations.<sup>126</sup> This broad immunity under Section 230 has only resulted in a few ISP convictions.<sup>127</sup> Broad immunity under Section 230 applies to sex trafficking cases.<sup>128</sup> Because applying such broad immunity in sex trafficking cases troubled prosecutors and judges, Congress passed

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120. See *Jane Doe No. 1*, 817 F.3d at 23 (finding that, in reference to Section 230, “the distinctions between civil and criminal actions—including the disparities in the standard of proof and the availability of prosecutorial discretion—reflect a legislative judgment that it is best to avoid the potential chilling effects that private civil actions might have on internet free speech”).

121. See *Schneider v. Amazon.com, Inc.*, 31 P.3d 37, 39 (Wash. Ct. App. 2001); see also *J.S. v. Vill. Voice Media Holdings, L.L.C.*, 359 P.3d 714, 729 (Wash. 2015); *Kabbaj v. Google, Inc.*, No. CV 13-1522-RGA, 2014 WL 1369864, at \*2 (D. Del. Apr. 7, 2014). But see *Fair Hous. Council of San Fernando Valley v. Roommates.com, L.L.C.*, 521 F.3d 1157, 1167–68 (9th Cir. 2008) (delineating a “material contribution” test that removes Section 230 immunity when an ISP materially contributes to the development of unlawful content).

122. See *Schneider*, 31 P.3d at 39. For a definition of interactive computer service provider, see *supra* note 50.

123. See *Schneider*, 31 P.3d at 39.

124. See *id.*

125. See *id.* at 43.

126. See Jacqueline Hackler, *Inconsistencies in Combatting the Sex Trafficking of Minors: Backpage’s Deceptive Business Practices Should Not Be Immune from State Law Claims*, 40 SEATTLE U. L. REV. 1107, 1134 (2017); see also *Chi. Lawyers’ Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666, 671 (7th Cir. 2008) (holding that Craigslist does not inherently cause or induce their users to post unlawful content by merely providing a platform to do so).

127. See *Grace v. eBay Inc.*, 16 Cal. Rptr. 3d 192, 201 (Cal. Ct. App. 2004), *depublished* by 99 P.3d 2 (Cal. 2004); see also *Barrett v. Rosenthal*, 9 Cal. Rptr. 3d 142, *superseded*, 87 P.3d 797 (Cal. 2004), *rev’d*, 146 P.3d 510 (Cal. 2006).

128. See *Jane Doe No. 1 v. Backpage.com, L.L.C.*, 817 F.3d 12, 24 (1st Cir. 2016) (dismissing sex trafficking claims as barred by Section 230).

FOSTA/SESTA.<sup>129</sup> Congress intended to diminish sex trafficking online by holding ISPs liable for facilitating their unlawful activity.<sup>130</sup>

D. *Developing FOSTA/SESTA*

The first federal conviction of an ISP for sex-related crimes occurred before Congress passed FOSTA/SESTA.<sup>131</sup> In 2014, Redbook.com shut down after owner and operator, Eric Omuro, pled guilty to using the website to facilitate and promote prostitution.<sup>132</sup> Rather than filing a civil suit under available anti-sex trafficking statutes, federal law enforcement agencies conducted their own investigation.<sup>133</sup> In the plea, Redbook.com admitted to hosting advertisements for prostitution and to defining commonly used acronyms and codes for sex acts in the website's "Terms and Acronyms" section.<sup>134</sup> Although Redbook was free, Omuro benefitted financially by promoting enhanced memberships for both posters and seekers of sexual advertisements.<sup>135</sup> After Omuro's conviction, Congress worked to pass FOSTA/SESTA to specifically target ISPs for their involvement in sex trafficking.<sup>136</sup>

Targeting ISPs raised concerns from First Amendment advocates, online publishers, and consensual sex workers about the increased censoring of online content.<sup>137</sup> These concerns about restricted free speech do not negate the need to protect victims of sex trafficking.<sup>138</sup> The fact that sex trafficking has increased due to the ease of access provided by online

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129. See 164 CONG. REC. S1849, 1860 (daily ed. Mar. 21, 2018). For an example of how broad immunity under Section 230 applies to sex trafficking cases, see *Jane Doe No. 1*, 817 F.3d at 24.

130. See *id.*

131. See Press Release, Dep't of Justice, *California Operator of myRedBook.com Website Pleads Guilty to Facilitating Prostitution* (Dec. 11, 2014), <https://bit.ly/14wvpko>.

132. See *id.*

133. See *id.*

134. See *id.* By knowingly providing definitions for these acronyms, Omuro's involvement went beyond complicity and into active participation of facilitating prostitution.

135. See *id.* (explaining that sex workers could pay to feature their advertisements on the website and customers could pay to more easily access prostitute reviews and search options).

136. See 164 CONG. REC. S1849, 1852 (daily ed. Mar. 21, 2018) (statement of Sen. Blumenthal) ("The purpose of [FOSTA/SESTA] is much more narrowly focused: A website user or operator must intend to facilitate prostitution [to violate the law].").

137. See O'Brien, *supra* note 8, at 292.

138. See *J.S. v. Vill. Voice Media Holdings, L.L.C.*, 359 P.3d 714, 739 (Wash. 2015) (explaining that while sex trafficking pimps and third-party accomplices should face prosecutorial consequences, the CDA also undoubtedly shields certain defendants from prosecution under state law claims); see also Chamberlain, *supra* note 105, at 2208 (2019) ("Stopping sex trafficking is a legitimate government aim, but a law so poorly drafted that it fails to achieve its chief objective, while also causing significant and unnecessary collateral harm, offers little merit to society or to populations imperiled by sex trafficking.").

solicitation should not be ignored.<sup>139</sup> Nevertheless, FOSTA/SESTA's attempt to reduce online sex trafficking violates freedom of speech<sup>140</sup> for citizens outside the FOSTA/SESTA's intended scope.<sup>141</sup>

In considering how to hold ISPs responsible for sex trafficking on their websites, FOSTA/SESTA removes Section 230 immunity as a bar against many claims.<sup>142</sup> Eliminating Section 230 immunity also restricts freedom of speech for consensual sex workers seeking safe work because ISPs that fear increased prosecution avoid liability by removing posting capabilities entirely.<sup>143</sup> FOSTA/SESTA has thus forced consensual sex workers to return to work on the streets absent any online platforms willing to host their advertisements.<sup>144</sup>

### III. ANALYSIS

FOSTA/SESTA amends Section 230 of the CDA to create an exception to immunity for ISPs when content posted by third parties promotes or facilitates prostitution and sex trafficking or advertises sex trafficking.<sup>145</sup> FOSTA/SESTA also defines "participation in a venture" in the sex trafficking provision of the federal criminal code as "knowingly assisting, supporting, or facilitating" sex trafficking,<sup>146</sup> and amends the CDA to clarify that Section 230 of the CDA does not bar or limit enforcement of either state criminal law or 18 U.S.C. § 1595.<sup>147</sup>

Although targeted at sex traffickers, FOSTA/SESTA creates two conflicts unintended by Congress: (1) the exception to immunity for ISPs under Section 230 is at odds with the fundamental intent of Section 230;<sup>148</sup>

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139. See 164 CONG. REC. S1849, 1851 (daily ed. Mar. 21, 2018) (statement of Sen. Blumenthal). Senator Blumenthal stated:

For law enforcement to succeed in combating sex trafficking, there have to be consequences. The National Center for Missing & Exploited Children reported an 840-percent increase in reports of suspected child and sex trafficking from 2010 to 2015 alone. It found that spike directly correlated to the increased use of the internet to sell children for sex.

*Id.* (internal quotation marks omitted).

140. See note 62 and accompanying text (noting that the Supreme Court has deemed free speech on the internet equivalent to other forms of free speech protected by strict scrutiny).

141. See Romano, *supra* note 28 (noting that the final version of FOSTA/SESTA is much broader than the original draft and effects more than just sex traffickers).

142. See *supra* notes 14–15.

143. See *supra* notes 28, 29 and accompanying text.

144. See *infra* Section III.B.

145. See 47 U.S.C. § 230 (2018).

146. See 18 U.S.C. § 1591(e)(4) (2018).

147. See 47 U.S.C. § 230(e)(5) (2018); see also 18 U.S.C. § 1595 (2018) (providing civil remedies for federal criminal sex trafficking violations).

148. See *supra* Section II.A (discussing how Section 230 was meant to promote free speech on the internet); see also *infra* notes 171, 173 and accompanying text (providing examples of FOSTA/SESTA causing over-censoring of free speech on the internet).



and (2) the overly broad language creating the exception punishes consensual sex workers in addition to targeting sex traffickers.<sup>149</sup> Without immunity under Section 230, ISPs completely removed capabilities for third party users to post content on their websites.<sup>150</sup> The ISPs decided that monitoring content because of the new amendments was too limiting and burdensome.<sup>151</sup> To effectively monitor the unpredictability of third party users, ISPs realized they would need to either spend an enormous amount of money on software to identify potentially unlawful posts<sup>152</sup> or choose not to monitor and instead spend an equal amount on litigation arising from their inaction.<sup>153</sup>

Removing third-party users' ability to post content forced consensual sex workers off the internet and back on to the streets<sup>154</sup> where they face immediate, dangerous consequences.<sup>155</sup> On the streets, consensual sex workers see higher rates of violence,<sup>156</sup> are paid less,<sup>157</sup> and face more obstacles in reporting missing co-workers than individuals in legal professions.<sup>158</sup> Congress's quickly implemented legislation<sup>159</sup> overlooks potential negative effects, particularly for consensual sex workers.

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149. See AM. ASS'N OF SEXUALITY EDUCATORS, COUNSELORS & THERAPISTS, *supra* note 24 (“[T]he term prostitution is undefined within FOSTA[ ]SESTA, leading to a sweeping and unproductive conflation of sex trafficking and consensual sex work, and setting up an unduly broad and vague legal framework.”).

150. See Romano, *supra* note 28.

151. See *id.* (“[ISPs] would have to perpetually ward off potential legal action based on the unpredictable behavior of their users, by devoting endless resources to moderating everything their users did, by simply banning user activities altogether, or by throwing millions of dollars at litigation costs.”).

152. See Note, *Section 230 As First Amendment Rule*, 131 HARV. L. REV. 2027, 2037 (2018) [hereinafter *Section 230 As First Amendment Rule*].

153. See Romano, *supra* note 28.

154. See Emily Stewart, *The Next Big Battle Over Internet Freedom is Here*, VOX (Apr. 23, 2018, 12:20PM), <https://bit.ly/2rXqab4> (explaining that without the ability to find and screen clients online, consensual sex workers are forced to depend on intermediaries for work).

155. See Tara Burns, *The Deadly Consequences of the Anti-Sex Trafficking Law*, CRIME REPORT (June 4, 2018), <https://bit.ly/2RmqjTR>.

156. See *id.*; see also Cunningham et al., *supra* note 26, at 9.

157. See Burns, *supra* note 155; see also Suprihmba, *supra* note 95.

158. See Burns, *supra* note 155; see also *New Law Cripples Efforts to Save Victims*, *supra* note 24.

159. The bill was first introduced in the House on February 27, 2018 and was signed by the President on April 11, 2018, just eight days after being presented to him. In comparison with other bills signed in to law during the 115<sup>th</sup> Congress, eight days is unusually quick. For example, a search on congress.gov shows Public Law No. 115-29 took five months to become law, Public Law No. 115-135 took fourteen months to become law, and Public Laws No. 115-46, 115-93, 115-300, and 115-320 took almost twenty four months to be signed in to law.

A. *FOSTA/SESTA and Section 230*

One conflict FOSTA/SESTA created is between the fundamental intent of Section 230—promoting free speech on the internet—and the reality of how a lack of immunity impacts the internet.<sup>160</sup> Although FOSTA/SESTA was passed to target sex traffickers, the resulting limitations of free speech on the internet have impacted all internet users.<sup>161</sup> FOSTA/SESTA’s amendment to Section 230 now prohibits immunity for ISPs who promote or facilitate prostitution and sex trafficking.<sup>162</sup> This presents an opportunity for ISPs to misconstrue when posts promote or facilitate these illegal activities, and when posts originate from consensual posters.<sup>163</sup>

Over 20 years ago, courts, rather than Congress, decided how broadly immunity under Section 230 should be applied.<sup>164</sup> Congress, however, amended Section 230 in a way that directly contradicts the broad immunity that courts have consistently applied since Section 230’s implementation.<sup>165</sup> Now, with one exception to Section 230 immunity,<sup>166</sup> one question remains: how many more exceptions will pass before immunity for third party content no longer exists?<sup>167</sup>

B. *FOSTA/SESTA and Consensual Sex Workers*

The other conflict surrounding FOSTA/SESTA stems from the lack of a definition for “prostitution” within the amendment, resulting in an aggressive limitation of consensual sex worker’s free speech on the

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160. See Elliot Harmon, *How Congress Censored the Internet*, ELECTRONIC FRONTIER FOUNDATION (Mar. 21, 2018), <https://bit.ly/2IISAg6> (“No matter what methods platforms use to mitigate their risk [of liability], one thing is certain: when platforms choose to err on the side of censorship, marginalized voices are censored disproportionately.”).

161. See *Woodhull Freedom Found. v. United States*, No. 18-CV-01552 (R.JL), 2018 WL 4568412, at \*4 (D.D.C. Sept. 24, 2018) (emphasizing that one plaintiff challenging the constitutionality of FOSTA/SESTA is a licensed massage therapist whose professional business has since closed as a direct result of Craigslist removing his advertisements in response to FOSTA/SESTA); see also Chamberlain, *supra* note 105, at 2190–95 (analyzing FOSTA under the First Amendment’s overbreadth doctrine).

162. See 47 U.S.C. § 230 (e)(5) (2018).

163. See Romano, *supra* note 28, for an example of disgruntled Skype users posting consensual sexual content and auto-detectors determining it was prostitution or sex trafficking.

164. See *supra* Section II.B.

165. See *supra* Section II.D.

166. See 47 U.S.C. § 230 (e)(5) (2018).

167. See 164 CONG. REC. S1849, 1870 (daily ed. Mar. 21, 2018) (statement of Sen. Wyden) (“I do fear this bill is going to set off a chain reaction that leads the Congress to cut away more categories of behavior from section 230 . . .”). See also *M.A. ex rel. P.K. v. Vill. Voice Media Holdings, L.L.C.*, 809 F. Supp. 2d 1041, 1050 (E.D. Mo. 2011) (refusing to create additional exceptions to Section 230 immunity, such as a for-profit exception when ISPs profit from third party content).

internet.<sup>168</sup> Neglecting to define “prostitution” within FOSTA/SESTA conflates the distinctly different groups of sex trafficking victims and consensual sex workers, extending the immunity exception to many more ISPs and third-party posters than Congress could have foreseen or intended.<sup>169</sup> Omitting such a prominent word in FOSTA/SESTA prevents any differentiation between sex trafficking and consensual sex work on the internet.<sup>170</sup> The vague language of the amendment creates confusion and instills fear in ISPs and individuals who are unsure of how FOSTA/SESTA affects them.<sup>171</sup>

Immediately after Congress passed FOSTA/SESTA, ISPs over-censored or completely took down posting capabilities “not because those parts of the [web]sites actually *were* promoting ads for prostitutes, but because policing them against the outside possibility that they *might* was just too hard.”<sup>172</sup> Some ISPs removed entire portions of their websites while other ISPs, including Google, abruptly changed and strictly enforced their terms of service as they related to sexual speech and content.<sup>173</sup> Google made these changes in anticipation of FOSTA/SESTA’s enactment, removing content uploaded to consensual sex workers’ Google Drive accounts, often without warning.<sup>174</sup>

In addition to censorship by ISPs, fear of the potential legal consequences caused consensual sex worker organizations and advocacy groups to shut down.<sup>175</sup> These advocacy groups previously provided

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168. See AM. ASS’N OF SEXUALITY EDUCATORS, COUNSELORS & THERAPISTS, *supra* note 24; see also *New Law Cripples Efforts to Save Victims*, *supra* note 24.

169. See *Woodhull Freedom Found.*, 2018 WL 4568412, at \*3–4 (showing that FOSTA/SESTA has negatively impacted human rights organizations, digital libraries, and massage therapists, rather than just sex traffickers); see also Chamberlain, *supra* note 105, at 2206–07, for further explanation of how FOSTA violates the Constitution for overbreadth ambiguity of the words “promote” and “facilitate” in the new amendments.

170. See Lennard, *supra* note 33; see also McCombs, *supra* note 27.

171. See Hatch, *supra* note 99 (“Given the frequency with which sex trafficking and voluntary, consensual sex work are conflated, sex workers including webcam performers, adult film actors and business owners, strippers and escorts fear these efforts will hit them too.”); see also Chamberlain, *supra* note 105, at 2206–07 (“Uncertainty over the scope of these undefined activities [in FOSTA/SESTA] has led to either unconstitutional criminalization of protected speech or an unconstitutional chilling effect emanating from overcautious self-censorship of speech that FOSTA does not intend to proscribe.”); Stewart, *supra* note 154 (discussing Microsoft customers’ fear of the future of consensual sexual activity on Microsoft platforms in the wake of the company’s abrupt and drastic change of policy in response to FOSTA/SESTA).

172. See Romano, *supra* note 28.

173. See Samantha Cole, *Trump Just Signed SESTA/FOSTA, a Law Sex Workers Say Will Literally Kill Them*, MOTHERBOARD (Apr. 11, 2018, 11:31 A.M.), <https://bit.ly/2JGCWIP>; see also Stewart, *supra* note 154.

174. See Samantha Cole, *Sex Workers Say Porn on Google Drive is Suddenly Disappearing*, MOTHERBOARD (Mar. 21, 2018, 3:07 P.M.), <https://bit.ly/2IRG8ei>.

175. See Lennard, *supra* note 33 (showing that a California chapter of an organization aiding both consensual sex workers and victims of sex trafficking stopped

resources and support systems within the consensual sex worker community, and when they shut down it isolated consensual sex workers.<sup>176</sup> Since FOSTA/SESTA was passed, safety measures known as “bad date lists,” a list shared among consensual sex workers warning against dangerous clients, have stopped circulating.<sup>177</sup> Since FOSTA/SESTA was passed, consensual sex workers experience increased difficulty in receiving payment.<sup>178</sup> Commonly used pay apps, like PayPal, now lock consensual sex workers’ accounts, freeze payments, and ultimately force consensual sex workers to use pay apps that charge unreasonable processing fees.<sup>179</sup>

FOSTA/SESTA’s most concerning effect on consensual sex workers, however, is the increased difficulty in utilizing the internet for safe work practices.<sup>180</sup> For consensual sex workers, using the internet after FOSTA/SESTA means either withdrawing advertisements entirely or navigating work online through enhanced surveillance by law enforcement.<sup>181</sup> To avoid those consequences, consensual sex workers are returning to dangerous practices, such as pimping, to find clients.<sup>182</sup>

An additional consequence of FOSTA/SESTA is the removal of a once valuable tool for law enforcement agents searching for missing persons.<sup>183</sup> Advertisements found online were previously used as evidence to locate victims of sex trafficking.<sup>184</sup> Now, to avoid violating FOSTA/SESTA, traffickers have moved those advertisements to parts of the internet that are hard to access.<sup>185</sup> Effectively, the same websites

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providing resources as a direct reaction to the “political threat to sex workers” arising from FOSTA/SESTA); *but see* Dilawar, *supra* note 31 (explaining that Red Umbrella Hosting is a content hosting service made by consensual sex workers after FOSTA/SESTA that keeps consensual sex workers’ information and businesses safe).

176. *See* Lennard, *supra* note 33; *see also* Dilawar, *supra* note 31; AM. ASS’N OF SEXUALITY EDUCATORS, COUNSELORS & THERAPISTS, *supra* note 24.

177. *See* McCombs, *supra* note 27 (providing testimonials of how removing bad date lists leave consensual sex workers with one less way to screen for violent or otherwise dangerous clients).

178. *See* Suprihmba, *supra* note 95.

179. *See id.* (explaining that there is a proposed law, the End Banking for Human Traffickers Act, that would impose even more restrictions on consensual sex workers than those resulting from FOSTA/SESTA).

180. *See New Law Cripples Efforts to Save Victims*, *supra* note 24.

181. *See id.*

182. *See id.*; *see also* Burns, *supra* note 155 (reporting an increase in violence against consensual sex workers since FOSTA/SESTA, including missing individuals and three confirmed murders).

183. *See New Law Cripples Efforts to Save Victims*, *supra* note 24; *see also* AM. ASS’N OF SEXUALITY EDUCATORS, COUNSELORS & THERAPISTS, *supra* note 24.

184. *See New Law Cripples Efforts to Save Victims*, *supra* note 24; *see also* Cunningham et al., *supra* note 26, at 27–29.

185. *See* Cunningham et al., *supra* note 26, at 28 (“Whereas children were recovered when police identified them on Backpage and Craigslist, it may be increasingly difficult to

previously used by law enforcement “to disrupt sex trafficking networks and identify victims”<sup>186</sup> are now being specifically attacked by FOSTA/SESTA.<sup>187</sup>

Overall, FOSTA/SESTA failed to consider consensual sex workers. Rather than stop sex trafficking, the drastic responses of ISPs have made identifying and finding victims more difficult.<sup>188</sup> Rather than distinguishing between sex trafficking victims and consensual sex workers, consensual sex workers continue to be victimized themselves, but in new ways.<sup>189</sup> By limiting free speech on the internet, FOSTA/SESTA has made the lives of consensual sex workers, law enforcement, and everyday citizens more difficult.<sup>190</sup> Immunity under Section 230 should, therefore, be reinstated to encourage ISPs to monitor content for sex trafficking victims without conflating victims and consensual sex workers.

### C. Recommendations

Indisputably, someone should be held liable for sex trafficking on the internet.<sup>191</sup> Equally undeniable is that victims of sex trafficking deserve a remedy.<sup>192</sup> Reinstating immunity for ISPs under Section 230 is an effective way to hold sex traffickers on the internet liable and provide a remedy to victims without harming consensual sex workers. ISPs need an incentive to monitor posts by third parties for unlawful activity.<sup>193</sup> No incentive to monitor unlawful content exists with broad or absolute

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reunite them with families if solicitation moves to more clandestine solicitation channels.”).

186. See AM. ASS’N OF SEXUALITY EDUCATORS, COUNSELORS & THERAPISTS, *supra* note 24.

187. See *id.*; see also Romano, *supra* note 28 (“The solution provided by FOSTA[/]SESTA, therefore, is to attack websites that facilitate trafficking, despite the fact that they also arguably make it easier for authorities to track down perpetrators . . .”).

188. See *New Law Cripples Efforts to Save Victims*, *supra* note 24.

189. See AM. ASS’N OF SEXUALITY EDUCATORS, COUNSELORS & THERAPISTS, *supra* note 24; see also Cunningham et al., *supra* note 26, at 29 (finding that “it is important for policymakers to design policies that might improve the lives of trafficked victims without simultaneously harming others.”).

190. See Romano, *supra* note 28; Stewart, *supra* note 154, and *Woodhull Freedom Found.*, 2018 WL 4568412, at \*4, for examples of citizens not engaged in sex work who report experiencing negative impacts of FOSTA/SESTA.

191. See *J.S. v. Vill. Voice Media Holdings, L.L.C.*, 359 P.3d 714, 739 (Wash. 2015).

192. See *Jones v. Dirty World Entm’t Recordings L.L.C.*, 755 F.3d 398, 417 (6th Cir. 2014).

193. See *supra* note 56 and accompanying text; see also Danielle Keats Citron & Benjamin Wittes, *The Problem Isn’t Just Backpage: Revising Section 230 Immunity*, 2 GEO. L. TECH. REV. 453, 472 (2018) (“An immunity provision designed to encourage voluntary blocking and restriction of objectionable material should not shield providers that encourage or deliberately host such material.”).

immunity, as courts have previously construed Section 230.<sup>194</sup> Similarly, providing no immunity under FOSTA/SESTA will be ineffective because ISPs will fear taking proactive monitoring of unlawful content.<sup>195</sup> Section 230 immunity for ISPs should, therefore, be reinstated and paired with already enacted legislation. Alternatively, Section 230 immunity should be reinstated and construed more narrowly than courts have previously done.

1. Bring Back Immunity Under Section 230 and Enforce Already Enacted Legislation and Procedures

Proponents of FOSTA/SESTA supported targeting ISPs like Backpage, which was often used for advertisements of both sex trafficking victims and consensual sex workers.<sup>196</sup> The Federal Bureau of Investigation (FBI), however, seized Backpage during an investigation aided by the Department of Justice's Child Exploitation and Obscenity Section *before* President Trump signed FOSTA/SESTA into law.<sup>197</sup> The FBI's successful removal of a sex trafficking platform, like Backpage, implies FOSTA/SESTA was unnecessary to enforce already enacted legislation against sex trafficking.<sup>198</sup> Backpage's co-founder and CEO, Carl Ferrer, pled guilty to conspiracy and money laundering, and his company pled guilty to sex trafficking without enforcement of FOSTA/SESTA.<sup>199</sup> Carl Ferrer's guilty plea is an example of enforcement of previously enacted legislation following the first federal conviction of an ISP for sex-related crimes of Redbook four years prior.<sup>200</sup>

Another effective way to hold ISPs responsible while reinstating immunity under Section 230 is to enforce monitoring procedures that many ISPs targeted by FOSTA/SESTA already have. For example, Backpage had monitoring processes in place to specifically recognize

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194. See *supra* Section II.A (pointing out that due to third party user anonymity, both the poster of the content and the ISP often avoid liability).

195. See Romano, *supra* note 28; see also Harmon, *supra* note 160 (illustrating that instead of actively monitoring third party posts, ISPs are opting to completely shut down).

196. See Cole, *supra* note 173.

197. See Daniel Oberhaus, *The FBI Just Seized Backpage.com*, MOTHERBOARD (Apr. 6, 2018 5:30 P.M.), <https://bit.ly/2uR1ntJ>.

198. See Glenn Kessler, *Has the sex-trafficking law eliminated 90 percent of sex-trafficking ads?*, WASH. POST (Aug. 20, 2018), <https://wapo.st/2TiqAVe> (showing a decrease in sex-related advertisements in the months before FOSTA/SESTA was passed).

199. See Associated Press, *Backpage.com and its CEO Plead Guilty in California and Texas*, L.A. TIMES (Apr. 12, 2018), <https://lat.ms/2J1dHcW>.

200. See *California Operator of myRedBook.com Website Pleads Guilty to Facilitating Prostitution*, *supra* note 131.

victims of sex trafficking.<sup>201</sup> Backpage's staff filtered all classified ads and manually reviewed them to determine if the ads portrayed a victim or a consensual poster.<sup>202</sup>

These processes are imperfect, at best. Specifically, employees may be unable to adequately distinguish between victims and consensual posters.<sup>203</sup> Employees may fail to recognize consensual posters, resulting in consensual sex workers' content being flagged and removed as sex trafficking content.<sup>204</sup> Alternatively, when an employee monitoring content sees a post that violates Backpage's terms of service, the employee can either edit the ad, removing the specific content that violates Backpage's terms, or remove the entire post.<sup>205</sup> Consequently, when an employee edits an ad of a victim of sex trafficking, rather than removing the entire post, the victim is subject to further harm.<sup>206</sup>

Monitoring processes can be enhanced to better target sex trafficking content without chilling free speech by removing entire websites and users' posting capabilities. Although costly, ISPs should invest in more effective training or artificial intelligence and other software that can more aptly distinguish between consensual sex workers and victims of sex trafficking.<sup>207</sup> Improving content screening this way would allow consensual sex workers, victims, and law enforcement to maximize their use of the internet.

In the past, immunity encouraged ISPs to "fine-tune" their content as the internet developed.<sup>208</sup> Although processes like Backpage's are not perfect, they provided an opportunity for ISPs to develop and adapt their approach to combat unlawful posts as the internet evolved.<sup>209</sup> Now, under FOSTA/SESTA, ISPs avoid monitoring entirely.<sup>210</sup> Reauthorizing

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201. See Monica J. DeLateur, *From Craigslist to Backpage.com: Conspiracy As A Strategy to Prosecute Third-Party Websites for Sex Trafficking*, 56 SANTA CLARA L. REV. 531, 584–85 (2016).

202. See *id.* (explaining that an objective automated filter looks for posts containing key words indicative of unlawful conduct, which an employee then subjectively reviews for violations).

203. See *id.* at 585.

204. See *id.*

205. See O'Brien, *supra* note 8, at 300.

206. See *id.*

207. See *Section 230 As First Amendment Rule*, *supra* note 152, at 2037 (noting that though some websites use artificial intelligence to moderate content, software and algorithms differentiating between nudity and fine art "struggle[] to correctly moderate content").

208. See Noah Tischler, *Free Speech Under Siege: Why the Vitality of Modern Free Speech Hinges on the Survival of Section 230 of the Communications Decency Act*, 24 TEMP. POL. & CIV. RTS. L. REV. 277, 294 (2014).

209. See *id.*

210. See L.V. Anderson, *What to Know About the Terrible Anti-Trafficking Bill That Forced Craigslist to Shut Down its Personals Section*, THE DIGG (Mar. 23, 2018),

immunity under Section 230 and enforcing previously enacted legislation will encourage ISPs to monitor their content in good faith<sup>211</sup> and continue adapting their security processes to better recognize sex trafficking victims as the internet evolves.<sup>212</sup> Rather than over-censoring all users, regardless of content, reinstating full immunity under Section 230 allows convictions of sex traffickers specifically under existing legislation.<sup>213</sup>

## 2. Bring Back Immunity Under Section 230 and Construe it Narrowly

Providing blanket immunity for ISPs creates a disincentive for ISPs to monitor content.<sup>214</sup> The Seventh Circuit, for example, explained that blanket immunity is undesirable because it could create a “do-nothing” option for ISPs.<sup>215</sup> The Ninth Circuit similarly reasoned that absolute immunity would lead to “a lawless no-man's-land on the Internet,” which was not the intent of the CDA.<sup>216</sup> Immunity to some degree, however, is necessary given the internet’s constant evolution and ISPs’ need to adapt accordingly.<sup>217</sup> A more effective approach than broad or blanket immunity

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<https://bit.ly/2Vgc9CU>. Craigslist shut down its personals section before FOSTA/SESTA passed as law, by posting a message that read:

US Congress just passed HR 1865, “FOSTA”, seeking to subject websites to criminal and civil liability when third parties (users) misuse online personals unlawfully. Any tool or service can be misused. We can’t take such risk without jeopardizing all our other services, so we are regretfully taking craigslist personals offline. Hopefully we can bring them back some day. To the millions of spouses, partners, and couples who met through craigslist, we wish you every happiness!

*Id.*

211. See 47 U.S.C. § 230(c)(2)(A) (2018) (withholding liability for “any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected”). See also *J.S. v. Vill. Voice Media Holdings, L.L.C.*, 359 F.3d 714, 720 (Wash. 2015) (reasoning that Congress intended immunity for good faith actors under Section 230, but that such protection should not apply broadly to all actions taken by ISPs, including in bad faith).

212. See Tischler, *supra* note 208.

213. For examples of successful convictions of ISPs, see *supra* notes 128, 199 and accompanying text.

214. See Patricia Spiccia, *The Best Things in Life Are Not Free: Why Immunity Under Section 230 of the Communications Decency Act Should Be Earned and Not Freely Given*, 48 VAL. L. REV. 369, 393–94 (2013) (explaining the Seventh Circuit’s disapproval of blanket immunity).

215. See *Chi. Lawyers’ Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666, 670 (7th Cir. 2008).

216. See *Roommates.com*, 521 F.3d at 1164.

217. See Silvano, *supra* note 53, at 379. But see *Roommates.com*, 521 F.3d at 1164 n.15 (“The Internet is no longer a fragile new means of communication that could easily be smothered in the cradle by overzealous enforcement of laws . . .”).



is narrowly reading Section 230's immunity.<sup>218</sup> Examples of such narrowly interpreted immunity are the holdings in *NPS, L.L.C. v. StubHub, Inc.*<sup>219</sup> and *Fair Housing Council of San Fernando Valley v. Roommates.com, L.L.C.*,<sup>220</sup> both of which apply the "material contribution" test.

In *NPS*, the Massachusetts Superior Court held that immunity under Section 230 does not apply when an ISP materially contributes to or knowingly participates in alleged unlawful behavior.<sup>221</sup> Material contribution is not "merely . . . augmenting the content generally,"<sup>222</sup> but rather making an affirmative decision to publish content alleged to be unlawful.<sup>223</sup> Both a defendant's actions and words can show a material contribution.<sup>224</sup> Although Section 230 immunity applies to ISPs regardless of effective notice of potentially illegal behavior by third-party posters,<sup>225</sup> material contribution to unlawful conduct deserves retribution.<sup>226</sup>

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218. In fact, scholars proposed a more effective approach to combatting sex trafficking would be to "keep the immunity intact but condition it on a service provider taking **reasonable** steps to prevent or address unlawful third-party content that it knows about." Citron & Wittes, *supra* note 193, at 455–56. Though this proposition was made before FOSTA/SESTA modified immunity under Section 230, the merits of a conditional approach to immunity persist where FOSTA/SESTA fails to effectively address proper monitoring procedures. For a full analysis on why conditional immunity, which differs from material contribution, is crucial for free speech, see Citron & Wittes, *supra* note 193, at 453–73. See also *Vill. Voice Media Holdings*, 359 P.3d at 720; Yaffa A. Meeran, *As Justice So Requires: Making the Case for A Limited Reading of S 230 of the Communications Decency Act*, 86 GEO. WASH. L. REV. 257, 271–72 (2018) (showing how narrowing the immunity of Section 230 is one way to reconcile plaintiffs' need for recovery and Congress's original intent of Section 230).

219. See *NPS, L.L.C. v. StubHub, Inc.*, No. 06-4874-BLS1, 2009 WL 995483, at \*13 (Mass. Super. Ct. Jan. 26, 2009).

220. See *Roommates.com*, 521 F.3d at 1167–68 (9th Cir. 2008) (holding that roommate-matching ISP Roommates.com did not materially contribute to unlawful discriminatory actions resulting from information left in "Additional Comments" section by third party users, but Section 230 immunity did not apply to required questionnaire resulting in unlawful discriminatory action).

221. See *NPS, L.L.C.*, 2009 WL 995483, at \*6, \*11, \*13 (holding that StubHub materially contributed to ticket scalping because their pricing structure benefited from violations of anti-scalping laws and StubHub encouraged buyers to resell tickets at a higher price on their website). *But see* *Hill v. StubHub, Inc.*, 727 S.E.2d 550, 561 (N.C. Ct. App. 2012) (holding that material contribution to unlawful action occurs only when an ISP has control over the content posted by third parties or otherwise acts to ensure the content is lawful).

222. See *Roommates.com*, 521 F.3d at 1167–68.

223. See *id.* at 1171; see also *Jones v. Dirty World Entm't Recordings L.L.C.*, 755 F.3d 398, 410 (6th Cir. 2014) (defining a material contribution as "being responsible for what makes the displayed content allegedly unlawful.").

224. See *NPS, L.L.C.*, 2009 WL 995483, at \*13.

225. See *Universal Commc'n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 420 (1st Cir. 2007); see also *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 333 (4th Cir. 1997); (finding that, "like strict liability, liability upon notice has a chilling effect on the freedom of Internet speech").

226. See *NPS, L.L.C.*, 2009 WL 995483, at \*13; see also *Roommates.com*, 521 F.3d at 1167–68.

Applying immunity through a consistent test, such as the material contribution test, is important to aid deserving plaintiffs.<sup>227</sup> Without a consistent test, immunity is applied broadly and indiscriminately with no certainty of what relief, if any, victims will receive.<sup>228</sup> A narrow application of Section 230 immunity requires that defendants play a *substantial role* in unlawful conduct, rather than be the *direct cause* of the unlawful conduct, to be held liable.<sup>229</sup> Lowering this standard for liability forces ISPs to take a proactive approach to monitor third-party content and avoid liability.<sup>230</sup> Forcing ISPs to be more proactive in monitoring third-party posts will aid in finding victims.<sup>231</sup> Consensual sex workers will also benefit from the material contribution test because they can generate work online without the host ISP fearing liability and taking action to remove the content.<sup>232</sup>

In determining whether Section 230 immunity applies, the material contribution test provides an easier standard than assessing whether the ISP had prior knowledge or “encouragement” of unlawful activity.<sup>233</sup> The material contribution test does not depend on an ISP’s state of mind, but instead focuses on concrete, identifiable action.<sup>234</sup> Construing Section 230 immunity more narrowly provides plaintiffs with more relief by holding knowing, bad-faith actors liable for unlawful conduct, which is not always possible under a broad reading of the section.<sup>235</sup> Section 230 was a deliberate response to encourage and protect free speech on the internet and should be reinstated in full to ensure the safety of that right for all

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227. See *Jones*, 755 F.3d at 417 (noting that although immunity under the CDA is historically broad, there are other ways deserving victims can receive remedy).

228. See *id.* at 410 (finding that without a “material contribution” test, courts are left without an effective way to measure and define immunity under Section 230).

229. See *Chi. Lawyers’ Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666, 671–72 (7th Cir. 2008).

230. See *Fed. Trade. Comm’n. v. Accusearch Inc.*, 570 F.3d 1187, 1201 (10th Cir. 2009) (determining that defendant Accusearch did not act neutrally in respect to the generation of unlawful conduct on its ISP and was therefore liable as a material contributor).

231. See *supra* notes 183–87 and accompanying text.

232. See *Dart v. Craigslist, Inc.*, 665 F. Supp. 2d 961, 962 (N.D. Ill. 2009) (holding that although Craigslist created categories such as “erotic,” the users who post allegedly illegal content in those categories are legally liable).

233. See *Jones*, 755 F.3d at 414–15 (reasoning courts have declined an “encouragement test” holding websites liable for “encouraging” unlawful posts by previously editing similar content without removing it).

234. See *id.* (noting that determining material contribution through a defendant’s actions is easier than determining an ISP’s mental state or intent). The material contribution test is applied to sex trafficking cases, though sparingly compared to the more generally accepted broad immunity standard under Section 230. See *M.A. ex rel. P.K.*, 809 F. Supp. 2d at 1049 (holding that a search engine in adult categories does not amount to material contribution of sex trafficking occurring on ISP advertising platform).

235. See *supra* note 139 and accompanying text.

citizens.<sup>236</sup> Specifically, consensual sex workers deserve the protection of free speech on the internet, and FOSTA/SESTA strips them of that right by removing Section 230 immunity.

#### IV. CONCLUSION

Before the internet, consensual sex workers were forced to engage in unsafe work practices.<sup>237</sup> These workers relied on pimps to find them work, met with unknown Johns, and were scammed out of earned and necessary payments.<sup>238</sup> Then, the internet provided an opportunity for consensual sex workers to find work on their own terms, screen their clients, and use secure payment methods.<sup>239</sup> Unfortunately, the internet also provided an opportunity for sex traffickers to advertise their victims.<sup>240</sup> The CDA, seeking to reduce these advertisements while also safely promoting free speech, provided ISPs immunity when sex traffickers or consensual sex workers posted advertisements on their websites.<sup>241</sup> Although this immunity allowed consensual sex workers to take their lives into their own hands without consequence from ISPs, it also left sex trafficking victims without remedy.<sup>242</sup> To correct this, FOSTA/SESTA removed immunity for ISPs under Section 230 when these advertisements are found on their websites.<sup>243</sup>

What Congress failed to consider about FOSTA/SESTA was that ISPs would respond by removing all posting capabilities on their websites, thus limiting free speech rights on the internet.<sup>244</sup> In fact, Congress was so focused on protecting sex trafficking victims that they failed to recognize the rights of consensual sex workers.<sup>245</sup> Consensual sex workers deserve protection of their free speech on the internet and the safety measures the internet provides them. FOSTA/SESTA endangers consensual sex workers by limiting their right to free speech on the internet.<sup>246</sup> Reinstating immunity under Section 230 and either jointly applying it with existing legislation or construing Section 230 immunity more narrowly would ensure the protection of free speech on the internet for everyone and, more specifically, safe work practices for consensual sex workers.<sup>247</sup>

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236. *See supra* notes 26, 27 and accompanying text.

237. *See supra* notes 26, 27 and accompanying text.

238. *See supra* Section II.B.

239. *See supra* Section II.B.

240. *See supra* note 139 and accompanying text.

241. *See supra* Section II.A.

242. *See supra* Sections II.A., II.D.

243. *See supra* Sections II.D, III.A.

244. *See supra* Sections III.A, III.B.

245. *See supra* note 168 and accompanying text.

246. *See supra* Section III.B.

247. *See supra* Section III.C.

