

Spokes Hub Graduation

FOSTA in the Courts

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Introduction to FOSTA

FOSTA, the Allow States and Victims to Fight Online Sex Trafficking Act, and SESTA, the Stop Enabling Sex Traffickers Act, were enacted on April 11, 2018, creating new criminal and civil liability for online services who host third-party content promoting or facilitating prostitution. The laws amended the safe harbor provision of Section 230 of the Communications Decency Act, which formerly shielded websites from liability for their users' content.

The policy effects of FOSTA's passage were immediate and widespread, as online platforms began excluding people in the sex trade and content related to sex work. These changes made working in the sex trade more dangerous, depriving sex workers of online advertising platforms and access to online safety and advocacy resources.

While the disastrous policy effects of FOSTA are well-documented, what is less widely understood is FOSTA's actual legal effects and its treatment in the Courts since the law's passage. In this presentation, I will discuss (1) FOSTA's limited use thus far in criminal sex trafficking cases; (2) FOSTA's use in civil lawsuits to target online services; (3) a decision on a constitutional challenge to FOSTA which, while upholding this bad law as constitutional, gave some protection to sex workers' and their advocates' online speech; and (4) the future of FOSTA.

FOSTA in Criminal Prosecutions

In the moral panic leading up to the passage of FOSTA, its proponents emphasized that Congress needed to pass the law as quickly as possible to protect women at risk from trafficking from sites such as Backpage. Since the passage of FOSTA, however, the Department of Justice has made use of FOSTA in just one federal sex trafficking case. Moreover, State Attorney Generals, who strongly lobbied for FOSTA's passage, have yet to use FOSTA in any sex trafficking prosecutions.

The U.S. Government Accountability Office's 2021 Report to Congressional Committees on Sex Trafficking Online Platforms and Federal Prosecutions stated that FOSTA has made prosecuting sex traffickers harder, as much of the online sex advertisement marketplace has moved to websites hosted overseas and to social media, dating, and messaging apps: "Gathering

evidence to bring cases against users of online platforms has also become more difficult... the FBI's ability to identify and locate sex trafficking victims and perpetrators was significantly decreased following the takedown of backpage.com... this is largely because law enforcement was familiar with backpage.com and backpage.com was generally responsive to legal requests for information."

USA v. Martono, 3:20-CR-00274-N (N.D. Texas 2021) is the only criminal prosecution that has been brought under FOSTA. After the website cityxguides.com was seized in June 2020, federal prosecutors brought a case under FOSTA against its owner. After Martono's challenges to FOSTA were denied, he ultimately pled guilty and was sentenced to over eight years. Notably, while the case identified two minor Jane Doe sex trafficking victims who were advertised on the cityxguides website, there is no indication that charges were ever brought against the actual traffickers who used the site in the trafficking of these two women.

FOSTA in Civil Litigation

The fears raised by opponents of FOSTA that the law would be used in questionable civil lawsuits targeting websites with only tangential relationships to sex trafficking have indeed come to pass. Plaintiffs' attorneys have filed lawsuits under FOSTA against websites including Craigslist, Reddit, Mailchimp, Salesforce, and even hotel chains. Two of these civil cases have been addressed by the Federal Courts of Appeals, which have reached strikingly different conclusions.

In *Does 1-6 v. Reddit, Inc.*, 2022 WL 13743458 (9th Cir. Oct. 24, 2022), a group of Jane Doe victims sued the website Reddit for CSAM (child sexual abuse material) shared by users on the site. The Court held that Reddit could not be held liable under FOSTA. The Court stated that FOSTA "did not intend to dispense with a conventional [mental state requirement] that the defendant know the facts that make his conduct illegal." Thus, websites such as Reddit can be liable under FOSTA only if they "knowingly facilitated trafficking" and "intended to do so." Reddit was not liable under FOSTA, as there was no allegation "that Reddit knowingly participated in or benefitted from a sex trafficking venture."

In *G.G. and Deanna Rose v. Salesforce.com, Inc.*, 2023 WL 4944015 (7th Cir. August 3, 2023), sex trafficking victims sued the website Salesforce because Salesforce was used by Backpage as an online customer relationship (CRM) provider that provided sales and marketing services. In contrast to the 9th Circuit's decision in the Reddit case, the 7th Circuit rejected the specific knowledge requirement and instead held that a constructive knowledge "knew or should have known" standard is sufficient for the case to proceed under FOSTA: "Salesforce either 'knew or should have known' that at least a substantial part of Backpage's business was illegal sex trafficking... a direct connection between Salesforce and [the victims'] trafficking is not necessary."

Constitutional Challenge to FOSTA

In *Woodhull Freedom Foundation v. United States*, 2023 WL 4376244 (D.C. Cir. July 7, 2023), a constitutional challenge to FOSTA was brought by the Woodhull Freedom Foundation, Human Rights Watch, Internet Archive, Eric Koszyk (a massage therapist affected by the takedown of Craigslist’s Personal Service listings after FOSTA), and Alex Andrews (the owner of the online discussion forum *ratethatrescue.org*). While the Court upheld FOSTA and decided that FOSTA does not unconstitutionally restrict protected speech, the Court’s decision significantly narrowed the definition of what types of speech violate the law’s broad language.

The Court held that “knowingly assisting, supporting, or facilitating [sex trafficking]” and “promote and facilitate prostitution,” were intended by Congress to mean “aiding and abetting” -- meaning that the speaker has knowledge that laws were being broken and is actively aiding in that lawbreaking. Thus, the Court held that “FOSTA does not criminalize promoting prostitution broadly...[the] mental state requirement does not reach the intent to engage in general advocacy about prostitution, or to give advice to sex workers generally to protect them from abuse.”

The decision makes clear that FOSTA does not apply to (1) individual sex workers who use online forums for their own sex work; or (2) online speakers of general speech regarding sex work, including educational discussions and decriminalization advocacy. The decision leaves open many more questions than it answers, however. The Court did not rule that the phrase “prostitution of another person” means only trafficking and not consensual, adult sex work. Thus, it is still unclear, for example, whether providing a Safe John list to a specific sex worker could still violate FOSTA. Moreover, although the Court’s narrow reading makes clear that websites do not need to be afraid that general online speech about sex work violates FOSTA, given the continued uncertainty, it is unclear if online platforms will be comfortable enough to again host the type content that they shut down in the wake of FOSTA.

The Future of FOSTA

While FOSTA has had limited use in criminal cases thus far, given that the law has been upheld as constitutional, it is likely that prosecutors will attempt to use FOSTA in the future. The GOA’s 2021 Report to Congress indicates that the Department of Justice has stated that it will consider using FOSTA, either alone or in tandem with racketeering and money laundering charges, to prosecute online platforms that promote prostitution. The upcoming verdict in the criminal trial of Backpage’s founder and four former employees, which is going on right now, will certainly have implications on the potential use of FOSTA in future criminal cases.

We have seen the emergence of a “circuit split” within the Federal Courts of Appeal on the issue of the mental state requirement for an online platform’s liability under FOSTA. The 9th and D.C. Circuits (the *Reddit* and *Woodhull* cases) have found that liability under FOSTA requires a knowing participation in an illegal enterprise, while the 7th Circuit (the *Salesforce* case) has held that a website may be liable where it “should have known” it was involved in a venture facilitating sex trafficking. While a FOSTA case has not yet reached the Supreme Court,

considering the Supreme Court's recent decision in *Twitter v. Taamneh*, 598 U.S. 471 (May 18, 2023) (which held that Twitter was not liable for knowingly allowing terrorist organizations to use the platform), the Supreme Court may apply an even more limited reading of FOSTA -- that FOSTA was intended to apply only to the aiding and abetting of a specific criminal act and not an illegal enterprise generally.

While constitutional challenges to FOSTA have thus far been unsuccessful, this litigation has helped shift the public narrative around FOSTA and has given sex work advocates an important forum to highlight the harms of this terrible law. It also has prompted members of Congress to second-guess FOSTA and to introduce legislation to study the effects of FOSTA on sex worker health and safety -- the SAFE SEX Workers Study Act. The Act cites the findings of the GOA report that FOSTA has made it more difficult to investigate and prosecute sex trafficking, and that the loss of web services following FOSTA has had profound negative impacts on sex workers. While the Act has not passed, hopefully this coalition of lawmakers who support it will continue to reintroduce it in future Congressional terms. As FOSTA continues to be challenged in the Courts, there is also the potential of a legislative avenue which could lead to FOSTA's eventual repeal.



Rachel Marie is a lawyer and former sex worker. Rachel is currently working on a book about a sex worker who is the target of a FOSTA investigation, called *Sex with Uncle Sam*.