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FOSTA: A NECESSARY STEP IN ADVANCEMENT OF THE WOMEN'S RIGHTS MOVEMENT

*Alexandra Sanchez**

I. INTRODUCTION

On April 11, 2018, President Trump signed into law a controversial piece of legislation called the Allow States and Victims to Fight Online Sex Trafficking Act of 2017 (hereinafter “FOSTA”).¹ The purpose of the law is to combat online prostitution and sex trafficking of victims, but its critics claim that FOSTA will be harmful to victims.² Other opponents, including large technology companies, claim that FOSTA contains broad language, giving the government far too much power to regulate websites.³ FOSTA amended 47 USC Section 230, which had afforded immunity to online service providers when third parties posted content related to human trafficking or prostitution on their websites.⁴ Under the old statute, Congress provided this immunity in order to free online service providers from

* I am a third-year law student at Touro College Jacob D. Fuchsberg Law Center pursuing a Juris Doctor degree. I would like to dedicate this Note to my family, especially my mother, who has constantly pushed me to do my best and who has given me unconditional support throughout my law school career. I would also like to dedicate this Note to my father who passed away in 2014. He always told me that anything was possible if I tried hard enough and to never give up on my dreams. With encouragement from my mother and father, I am proud to say that I never gave up on my dream to go to law school and even to become a published author. Last, but surely not least, I would like to thank all the editors who helped me through this process, especially Professor Seplowitz who has worked tirelessly to help me publish this Note.

¹ *Woodhull Freedom Found v. U.S.*, 334 F.Supp. 3d 185, 191 (D.D.C. 2018).

² Aja Romano, *A New Law Intended to Curb Sex Trafficking Threatens the Future of the Internet As We Know it*, VOX MEDIA (Jul. 2, 2018, 1:08 PM), <https://www.vox.com/culture/2018/4/13/17172762/fosta-sesta-backpage-230-internet-freedom>.

³ *Id.*

⁴ Protection for Private Blocking and Screening of Offensive Material, 47 U.S.C.A. § 230 (West 2018); *Woodhull*, 334 F. Supp. at 191.

liability if they exercised limited editorial control over the content on their sites.⁵

FOSTA has now taken away this immunity, and companies will be held liable for these specific third-party postings.⁶ This Note will address the fallacies in the FOSTA opponents' arguments as well as how the author thinks courts should rule regarding current and prospective litigation against FOSTA for being allegedly unconstitutional.

Section II of this Note will describe the legislative history and background of FOSTA. In Section III, the author examines litigation concerning FOSTA. In Section IV, the author presents the arguments

⁵ Valerie C. Brannon, *Liability for Content Hosts: An Overview of the Communication Decency Act's Section 230*, CONGRESSIONAL RESEARCH SERVICE (Jun. 6, 2019), <https://fas.org/sgp/crs/misc/LSB10306.pdf> (providing that:

Section 230 was enacted in early 1996, in the CDA's Section 509, titled 'Online Family Empowerment.' In part, this provision responded to a 1995 decision issued by a New York state trial court: *Stratton Oakmont, Inc. v. Prodigy Services Co.* The plaintiffs in that case were an investment banking firm. The firm alleged that Prodigy, an early online service provider, had published a libelous statement that unlawfully accused the firm of committing fraud. Prodigy itself did not write the allegedly defamatory message, but it hosted the message boards where a user posted the statement. The New York court concluded that the company was nonetheless a 'publisher' of the alleged libel and therefore subject to liability. The court emphasized that Prodigy exercised 'editorial control' over the content posted on its site, actively controlling the content of its message boards through both an 'automatic software screening program' and through 'Board Leaders' who removed messages that violated Prodigy's guidelines. Section 230 sought to abrogate *Stratton-Oakmont*. One of the sponsors of the 'Online Family Empowerment' provision, Representative Chris Cox, argued on the floor of the House that the ruling against Prodigy was 'backward.' Representative Cox approvingly referenced a different case in which a federal district court had held that CompuServe, another early online service provider, could not be held liable for allegedly defamatory statements posted on its message boards. Both Representative Cox and his co-sponsor, then-Representative Ron Wyden, emphasized that they wanted to allow online service providers, working with concerned parents and others, to be able to take down offensive content without exposing themselves to liability. These 'Good Samaritan' provisions were intended to ensure that even if online service providers did exercise some limited editorial control over the content posted on their sites, they would not thereby be subject to publisher liability.)

Id.

⁶ Aja Romano, *A New Law Intended To Curb Sex Trafficking Threatens The Future Of The Internet As We Know It*, VOX MEDIA (Jul. 2, 2018, 1:08 PM), <https://www.vox.com/culture/2018/4/13/17172762/fosta-sesta-backpage-230-internet-freedom>.

of FOSTA's opponents. The author then discusses the proponents' arguments and how they debunk the truth about prostitution in Section V and the applicable law required to test FOSTA's constitutionality in Section VI. Section VII applies the law, and Section VIII concludes this Note.

II. FOSTA: LEGISLATIVE HISTORY AND BACKGROUND

FOSTA imposes liability on specific parties that are defined in Section 230 of the Communications Act of 1934 (hereinafter "Section 230") when they "promote or facilitate" prostitution. The language in FOSTA reads in part as follows:

Whoever, using a facility or means of interstate or foreign commerce or in or affecting interstate or foreign commerce, owns, manages, or operates an interactive computer service (as such term is defined in section 230(f) the Communications Act of 1934 (47 USC 230(f))), or conspires or attempts to do so, with the intent to promote or facilitate the prostitution of another person shall be fined under this title, imprisoned for not more than 10 years, or both.⁷

The statute continues by defining an "aggravated violation" as follows:

Whoever, using a facility or means of interstate or foreign commerce or in or affecting interstate or foreign commerce, owns, manages, or operates an interactive computer service (as such term is defined in section 230(f) the Communications Act of 1934 (47 USC 230(f))), or conspires or attempts to do so, with the intent to promote or facilitate the prostitution of another person and—

- (1) promotes or facilitates the prostitution of 5 or more persons; or
- (2) acts in reckless disregard of the fact that such conduct contributed to sex trafficking, in violation of

⁷ 18 U.S.C. § 2421A (West 2018).

1591(a), shall be fined under this title, imprisoned for not more than 25 years, or both.⁸

Basically, FOSTA characterizes the way in which parties can become liable and also discusses the requisite intent to impose liability.

Along with the expansion of the sex industry over the last several decades came the further exploitation of mainly women and girls.⁹ Sexual exploitation involves activities such as prostitution and other commercial sexual services.¹⁰ Unfortunately, women of lower-socioeconomic ranks throughout the world have contributed to the growth of the trafficking industry.¹¹

As a result of this expansion, Congress passed the Trafficking Victims Protection Act (hereinafter “TVPA”) in 2000.¹² The TVPA “created criminal liability” for the actual crime of sex trafficking.¹³ Eight years later, Congress revamped the TVPA to also impose criminal liability on persons who benefitted from sex trafficking.¹⁴ Notwithstanding this legislation, the internet has served to expand prostitution and sex-trade.¹⁵ Four states initiated lawsuits against Backpage.com (hereinafter “Backpage”) for its alleged facilitation of sex trafficking.¹⁶ However, Backpage, as an interactive computer service, had immunity pursuant to Section 230.¹⁷ Congress subsequently discovered that “classified advertising websites” had become “one [of] the primary channels of sex trafficking.”¹⁸ Further,

⁸ *Id.*

⁹ Victims of Trafficking and Violence Protection Act of 2000, Pub. Law No. 106-386, § 102, 114 Stat 1464 (2000).

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ Abigail W. Balfour, *Where One Marketplace Closes, (Hopefully) Another Won't Open: In Defense of FOSTA*, 60 B.C. L. REV. 2475, 2477 (2019).

¹⁴ *Id.*

¹⁵ See Meredith Dank et. al., *Estimating the Size and Structure of the Underground Commercial Sex Economy in Eight Major US Cities*, URBAN INSTITUTE (March 12, 2014), <https://www.urban.org/research/publication/estimating-size-and-structure-underground-commercial-sex-economy-eight-major-us-cities>.

¹⁶ Kristina Cooke & Dan Levine, *Child Sex Trafficking Victims Sue Backpage.com in Four States*, REUTERS (Jan. 25, 2017, 3:09 PM), <https://www.reuters.com/article/us-usa-internet-sexcrimes/child-sex-trafficking-victims-sue-backpage-com-in-four-states-idUSKBN1592MK> (stating that Texas, California, Alabama and Washington were the states who filed lawsuits against Backpage.com).

¹⁷ *Id.*; See also Protection for Private Blocking and Screening of Offensive Material, 47 U.S.C.A. § 230 (West 2018).

¹⁸ See H.R. Rep. No. 115-572, pt. 1, at 3, 5 (2018) (House Report).

a congressional investigation found that certain websites, including Backpage, had purposely facilitated online illegal prostitution and sex trafficking in order to make profits for their advertisements.¹⁹ As a result, Congress enacted FOSTA in 2018.²⁰ In the statute, a “Sense of Congress” section is added and makes several clarifications about the intentions of the Communications Decency Act of 1996. It reads as follows:

It is the sense of Congress that—
 section 230 of the Communications Act of 1934 (47 USC 230; commonly known as the “Communications Decency Act of 1996”) was never intended to provide legal protection to websites that unlawfully promote and facilitate prostitution and websites that facilitate traffickers in advertising the sale of unlawful sex acts with sex trafficking victims;
 websites that promote and facilitate prostitution have been reckless in allowing the sale of sex trafficking victims and have done nothing to prevent the trafficking of children and victims of force, fraud, and coercion;
 and
 clarification of such section is warranted to ensure that such section does not provide such protection to such websites.²¹

In this section, Congress vehemently establishes that the purpose of Section 230 was never to provide protection for websites engaged in the promotion of facilitation of prostitution or sex trafficking.

Several large companies have shown support for FOSTA, including The Internet Association, although it did not agree with the new law initially.²² Many social conservative leaders also support FOSTA.²³ Some of them include Penny Nance, the President of

¹⁹ Elizabeth Dias, *Trump Signs Bill Amid Momentum to Crack Down on Trafficking*, N.Y. TIMES (Apr. 11, 2018), <https://www.nytimes.com/2018/04/11/us/backpage-sex-trafficking.html>.

²⁰ *Id.*

²¹ See FOSTA Pub. Law No. 115-164, § 2, 132 Stat. at 1253, 1253 (2018).

²² Cecilia Kang & Sheryl Gay Stolberg, *Sex Trafficking Bill Heads to Trump, Over Silicon Valley Concerns*, N.Y. TIMES (Mar. 21, 2018), <https://www.nytimes.com/2018/03/21/business/sex-trafficking-bill-senate.html>, archived at <https://perma.cc/23SJ-JP9R> (describing The Internet Association as “a trade group whose members [consist of] Facebook, Google, Netflix and Apple.”).

²³ Dias, *supra* note 19.

Concerned Women for America (hereinafter “CWA”), a not-for-profit public policy women’s organization.²⁴ Additionally, many victims’ advocates have “hailed the bill as landmark action to fight trafficking.”²⁵ The national director of one group called, World Without Exploitation, which works to promote victims’ rights, channeled support by saying that, “[t]his is a huge day for victims because we are finally saying enough is enough,” and “[t]hey will no longer allow companies to profit from ads that make millions off the backs of exploited people.”²⁶

Various groups oppose the new law including The Women’s March, Freedom Network USA, St. James Infirmary, The Institute for Mind Body Therapy (hereinafter “IMBT”), Prostasia Foundation, Brooklyn Defender Services (hereinafter “BDS”), Free Speech Coalition (hereinafter “FSC”), National Coalition for Sexual Freedom (hereinafter “NCSF”), Decriminalize Sex Work (hereinafter “DSW”), The Sharmus Outlaw Advocacy and Rights (hereinafter “SOAR”) Institute, New York Transgender Advocacy Group (hereinafter “NYTAG”), and The Sex Workers Project (hereinafter “SWP”).²⁷ The Women’s March group stated on Twitter that the passing of FOSTA was an “‘absolute crisis’ for sex workers. . . .”²⁸ The group reasoned that it believed in the possibility of a traffic-free world where “sex workers [would not be] criminalized and ostracized by the state. . . .”²⁹ It also claimed that sex workers relied on websites such as Backpage for their safety when communicating with clients.³⁰

III. LITIGATION CONCERNING FOSTA

On June 28, 2018, a group of plaintiffs including a “national human rights organization dedicated to sexual freedom, an international human rights organization, an advocate for sex workers,

²⁴ *Id.*

²⁵ Kang et. al., *supra* note 22.

²⁶ *Id.*

²⁷ *See generally* Brief in Support of Appellants, Woodhull Freedom Found. v. United States (No. 18-5298) 2019 WL 764434.

²⁸ Dias, *supra* note 19.

²⁹ *Id.*

³⁰ Ashley McGuire, *The Women’s March and Backpage.com: A Sordid Story*, REALCLEAR POLITICS (Apr. 12, 2018), https://www.realclearpolitics.com/articles/2018/04/12/the_womens_march_and_backpagecom_a_sordid_story_136784.html.

a digital library of websites” and a certified massage therapist filed suit against the United States government asking for a preliminary injunction against the enforcement of FOSTA.³¹ The plaintiffs alleged that the language of the Act is unconstitutionally vague and overbroad and infringes on their First Amendment rights.³² The United States District Court for the District of Columbia heard the case and dismissed the plaintiffs’ motion for lack of standing without addressing the actual merits of the case.³³ The plaintiffs appealed, and the United States Court of Appeals for the District of Columbia Circuit, on January 24, 2020, reversed the District Court decision, ruling that two plaintiffs had standing, and remanded.³⁴ No further filings have yet been submitted on this matter.³⁵

On March 25, 2019, fifty female plaintiffs aged from twelve to their mid-twenties, sued the software company known as Salesforce for allegedly designing software tools “that helped traffickers sell them for sex” on Backpage.³⁶ The plaintiffs alleged that Salesforce “profited from sex trafficking by creating customized data tools for Backpage.”³⁷ The plaintiffs’ attorney claimed that “with Salesforce’s guidance, Backpage was able to use Salesforce’s tools to market to new ‘users’—that is, pimps, johns, and traffickers—on three continents.”³⁸

³¹ Woodhull Freedom Found. v. U.S., 948 F.3d 363, 369 (D.C. Cir. Jan. 24, 2020).

³² *Id.* at 368.

³³ *Id.* at 370.

³⁴ *Id.* at 371. (stating that in order “[t]o establish Article III standing, ‘a plaintiff must show (1) an ‘injury in fact,’ (2) a sufficient ‘causal connection between the injury and the conduct complained of,’ and (3) a ‘likel[i]hood’ the injury ‘will be redressed by a favorable decision.’” (citing *Susan B. Anthony List v. Driehaus (SBA)*, 573 U.S. 149, 157–58 (2014) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61(1992)). The Woodhull court ruled that an advocate for sex workers, Alex Andrews, and a licensed massage therapist, Eric Koszyk, had standing to bring their pre-enforcement challenge of FOSTA by using the test set out in *Susan B. Anthony List v. Driehaus*, 573 U.S. 149 (2014). Through this test, the court had determined that both plaintiffs ‘asserted “. . . imminent threat[s]” that [the] statute [would] be enforced against [them] because the plaintiff[s]’ conduct [was] ‘arguably . . . proscribed by [the] statute, and there exist[ed] a credible threat of prosecution thereunder.’”

³⁵ *Id.*

³⁶ Kate Ryan, *Salesforce sued by 50 women trafficked on Backpage.com*, REUTERS (Mar. 27, 2019, 7:49 PM), <https://www.reuters.com/article/us-usa-trafficking-salesforce/salesforce-sued-by-50-women-sex-trafficked-on-backpage-com-idUSKCN1R82QS>.

³⁷ *Id.*

³⁸ Plaintiff’s Original Complaint for Damages (With Jury Demand) at ¶ A, *Jane DOES #1 through #50 v. Salesforce Inc.*, (No. CGC-19-574770) 2019 WL 1373185.

Salesforce is a service that provides customer relationship management to help companies expand and grow.³⁹ Backpage was a site that allowed third parties to post advertisements for anything from job openings and roommate postings to automobile sales.⁴⁰ In December of 2013, Salesforce contracted with Backpage to expand its online services.⁴¹ However, widely-publicized investigations revealed that Backpage was primarily using its advertisements to sell sex online.⁴² In 2015, Backpage was said to be the largest publisher of sex-ads online and created roughly \$500,000,000 for its owners since the time of its first launch in 2004.⁴³ Despite this information, Salesforce actively chose to renew its contract with Backpage for over \$291,000 in 2017.⁴⁴ On April 6, 2018, federal agents arrested Michael Lacey, Backpage's co-founder, for allegedly "facilitating prostitution by running ads for sexual services and laundering the revenues."⁴⁵ As a result, federal authorities seized and shut down Backpage.⁴⁶

IV. OPPONENTS' ARGUMENTS AGAINST FOSTA

A. TECHNOLOGY COMPANIES' CONCERNS

Technology companies, along with Backpage and Salesforce, are also opposed to FOSTA.⁴⁷ They fear that the government is infringing on their First Amendment rights now that they have lost

³⁹ CRM 101: What Is CRM? SALESFORCE, <https://www.salesforce.com/crm/what-is-crm/>.

⁴⁰ Tom Porter & Reuters, *Backpage Website Shut Down, Founder Charged with 93 Counts by FBI in Sealed Indictment*, NEWSWEEK (Apr. 7, 2018, 10:57 AM), <https://www.newsweek.com/sex-ads-website-backpagecom-co-founder-charged-after-fbi-raid-876333>.

⁴¹ Ryan, *supra* note 36.

⁴² *Id.*

⁴³ Paul Demko, *The Sex-Trafficking Case Testing The Limits Of The First Amendment: How A Couple Of Crusading Journalists Made A Fortune Selling Adult Escort Ads And In The Process Became Unlikely And Widely Reviled First Amendment Advocates*, POLITICO MAGAZINE (Jul. 29, 2018), <https://www.politico.com/magazine/story/2018/07/29/first-amendment-limits-backpage-escort-ads-219034>.

⁴⁴ Kate Ryan, *Salesforce Sued By 50 Women Trafficked On Backpage.com*, REUTERS (Mar. 27, 2019, 7:49 PM), <https://www.reuters.com/article/us-usa-trafficking-salesforce/salesforce-sued-by-50-women-sex-trafficked-on-backpage-com-idUSKCN1R82QS>.

⁴⁵ Ryan, *supra* note 36.

⁴⁶ *Id.*

⁴⁷ Anna Schecter & Dennis Romero, *FOSTA Sex Trafficking Law Becomes Center of Debate About Tech Responsibility*, NBC NEWS (Jul. 19, 2018, 3:33 PM), <https://www.nbcnews.com/tech/tech-news/sex-trafficking-bill-becomes-center-debate-about-tech-responsibility-n892876>.

immunity from liability when third parties post prostitution-related content on their websites.⁴⁸ Section 230 is the specific piece of internet legislation that provided immunity to these tech companies for third party postings. It reads as follows:

Protection for “Good Samaritan” blocking and screening of offensive material

(1) Treatment of publisher or speaker

No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.

(2) Civil liability

No provider or user of an interactive computer service shall be held liable on account of—

(A) 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; or

(B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).⁴⁹

Basically, Section 230 protected providers and users from liability if they were to take any good-faith action to restrict access or availability to certain content on an interactive website.

Consequently, technology companies are opposed to the enactment of FOSTA because it amends Section 230 and removes their immunity for any third-party postings that have to do with prostitution or sex-trafficking.⁵⁰ Many of the companies claim that they are now obligated to take down content that could expose them to potential liability.⁵¹ They claim that it would be far too difficult, costly, and

⁴⁸ *Id.*

⁴⁹ Protection for Private Blocking and Screening of Offensive Material, 47 U.S.C.A. § 230 (West 2018).

⁵⁰ Kang et. al., *supra* note 22.

⁵¹ Elliot Harmon, *Changing Section 230 Would Strengthen the Biggest Tech Companies*, N.Y. TIMES (Oct. 16, 2019), <https://www.nytimes.com/2019/10/16/opinion/section-230-freedom-speech.html>.

unreasonable to monitor all third-party postings that can expose them to liability.⁵²

B. OTHER OPPONENTS' CONCERNS

Other opponents of FOSTA argue that although its primary purpose is to combat online sex trafficking, it actually will have adverse effects on the “sex-workers” involved.⁵³ They argue that the safest way to protect “sex-workers” is by decriminalizing prostitution and sex-trafficking or legalizing it completely.⁵⁴ Their main point is that the internet inherently protects “sex-workers” by making it easier for them to monitor clients instead of their being out on the street without knowledge of who their next client may be and the potential dangers they could face.⁵⁵ Opponents claim that decriminalization would make it easier to document illegal activity.⁵⁶ They also argue that the penalization of prostitution deters sex workers from reporting violent crimes committed against them.⁵⁷

Perhaps the most important argument that opponents of FOSTA make is that prostitution is a “victimless crime.”⁵⁸ They say that sex workers ultimately have chosen this path and that “the ‘victimization’ occurs when a client assaults the [prostitute]- rape, battery, etc., robs them of their fee, drugs them. . . .”⁵⁹ Some opponents assert that prostitution is merely a “simple transaction” of payment for services and that there should be no crime unless the

⁵² *Id.*

⁵³ Aja Romano, *A New Law Intended To Curb Sex Trafficking Threatens The Future Of The Internet As We Know It*, VOX MEDIA (Jul. 2, 2018, 1:08 PM), <https://www.vox.com/culture/2018/4/13/17172762/fosta-sesta-backpage-230-internet-freedom>.

⁵⁴ Peter Singer, *The Case for Legalizing Sex Work*, PROJECT SYNDICATE (Nov. 14, 2016), <https://www.project-syndicate.org/commentary/case-for-legalizing-sex-work-by-peter-singer-2016-11?barrier=accesspaylog>.

⁵⁵ Carol Leigh, *Labor Laws, Not Criminal Laws, Are the Solution to Prostitution*, N.Y. TIMES (Apr. 19, 2012, 9:52 PM), <https://www.nytimes.com/roomfordebate/2012/04/19/is-legalized-prostitution-safer/labor-laws-not-criminal-laws-are-the-solution-to-prostitution>.

⁵⁶ *Amnesty International Policy on State Obligations to Respect, Protect, and Fulfil the Human Rights of Sex Workers*, AMNESTY INTERNATIONAL (May 26, 2016), <https://www.amnesty.org/download/Documents/POL3040622016ENGLISH.PDF>.

⁵⁷ *Id.*

⁵⁸ MICHAEL SHIVELY, PH.D., KRISTINA KLIORYS, KRISTIN WHEELER, & DANA HUNT, PH.D., *A NATIONAL OVERVIEW OF PROSTITUTION AND SEX TRAFFICKING DEMAND REDUCTION EFFORTS, FINAL REPORT* 17.

⁵⁹ *Id.*

parties cannot or did not legally consent.⁶⁰ Moreover, if the United States would recognize prostitution as a transaction, opponents propose that we should follow in Germany's footsteps where prostitution is legal and taxable.⁶¹ This "occupation" could then become one that is licensed and insured, just like other occupations and regulations could impose yearly health exams to ensure safety between the worker and client.⁶² Opponents finally argue that the government should not have the power to legislate based on moral principles.⁶³ They claim that "preexisting moral bias[es]" are the foundation for proponents' arguments against legalizing or decriminalizing prostitution.⁶⁴

V. PROPONENTS' ARGUMENTS AND HOW THEY DEBUNK THE TRUTH ABOUT PROSTITUTION

The enactment of FOSTA indirectly leads society into a different way of thinking about sex work. It helps to impede the societal norms that have made sex work okay by restricting sex work on websites. Proponents' arguments in support of FOSTA are strongly linked to the concept that the decriminalization or legalization of prostitution is not a safer option for sex workers and that FOSTA helps to restrict such prostitution.⁶⁵ The consequences of repealing FOSTA, and continuously allowing websites to promote or facilitate prostitution would be catastrophic to women's rights and even children's safety.⁶⁶ When California passed its "Californians Against Sexual Exploitation Act,"⁶⁷ it recognized that more than 300,000

⁶⁰ *Id.*

⁶¹ Marshall Frank, *Marshall Frank Biography*, PROCON.ORG (Feb. 23, 2018, 9:35 AM), <https://prostitution.procon.org/view.source.php?sourceID=014648>.

⁶² *Id.*

⁶³ Ross Douthat, *Prostitution, Morality and the Law*, THE ATLANTIC (Mar. 12, 2008), <https://www.theatlantic.com/personal/archive/2008/03/prostitution-morality-and-the-law/55442/>.

⁶⁴ *Id.*

⁶⁵ *Why Prostitution Shouldn't Be Legal*, DEMAND ABOLITION, <https://www.demandabolition.org/research/evidence-against-legalizing-prostitution/>.

⁶⁶ *County of Santa Clara Board Supports Prop 35- Californians Against Sexual Exploitation Act*, COUNTY OF SANTA CLARA COUNTY NEWS (Sept. 13, 2012), <https://www.sccgov.org/sites/opa/nr/Pages/County-of-Santa-Clara-Board-Supports-Prop-35---Californians-Against-Sexual-Exploitation-Act.aspx>.

⁶⁷ *Id.* (stating that:

Proposition 35 would change California law related to the crime of human trafficking. The measure would add new crimes to the list of criminal

American children were at risk of exploitation and that most of them had entered the sex trade between the ages of 12 to 14 years old.⁶⁸ Similarly, it recognized that some victims are trafficked as young as four years old.⁶⁹

The National Center for Missing and Exploited Children (hereinafter “NCMEC”) conducted a study that found a 1,432% increase in the sex trade of children between the years of 2009 to 2014, which they have attributed to online advertisements of sex traffickers.⁷⁰ Additionally, it found that from the years 2012 to 2017, 88% of child sex trafficking reports “involved the use of online classified advertisements.”⁷¹ In 2017, within the reports taken from the National Human Trafficking Hotline, five times more were web-related sex trafficking incidents than those of traditional in-person incidents.⁷²

Prostitution can be violent and scary for anyone, especially for young children. It is degrading to those involved, even though some may become desensitized to it. Repealing FOSTA could lead society to normalize the idea of legalizing or decriminalizing sex work and proponents argue that legalizing or decriminalizing prostitution is equivalent to continuously reinforcing and promoting the degradation of victims. Joe Vargas, a former Captain of the Anaheim, California Police Department, is an opponent of legalizing prostitution.⁷³ He has served as a columnist, from July 2014 to the present, for “Behind the Badge,” a news website covering crime and crime prevention in California.⁷⁴ He shares his police career experiences with “working

violations that may be associated with human trafficking, toughen penalties imposed against those convicted of the crime, protect the rights of trafficked victims, and require registered sex offenders to disclose their Internet account information to law enforcement.)

Id.

⁶⁸ Plaintiff’s Original Complaint for Damages (With Jury Demand) at ¶ A, Jane DOES #1 through #50 v. Salesforce Inc., (No. CGC-19-574770) 2019 WL 1373185.

⁶⁹ *Id.*

⁷⁰ Abigail W. Balfour, *Where One Marketplace Closes, (Hopefully) Another Won’t Open: In Defense of FOSTA*, 60 B.C. L. REV. 2475, 2483 (2019) (citing Amicus Br. of Nat’l Center for Missing & Exploited Children at 2, *J.S. v. Village Voice Media Holdings, LLC*, 359 P.3d 714 (Wash. Sept. 15, 2014) (No. 4492-02-II), 2014 WL 4913544) (directly attributing the increased sale of children for sex to the increased use of the internet).

⁷¹ *Id.*

⁷² *Id.*

⁷³ Joe Vargas, Ma., *Joe Vargas, MA Biography*, PROCON.ORG (Apr. 3, 2017, 9:38 AM), <https://prostitution.procon.org/view.source.php?sourceID=014268>.

⁷⁴ *Id.*

girls”⁷⁵ whom he has met and developed working relationships with by explaining that, “[t]he work is nothing like Julia Roberts in ‘Pretty Woman.’”⁷⁶ Instead, he claims that “[i]t is deplorable and in many ways degrades and robs the participants of fragile parts of their humanity.”⁷⁷

He further explains:

[M]any prostitutes have been forced or coerced into sex trafficking by abusers. Legalization won’t stop that. More than likely, male abusers still will profit from trafficking their victims — this time, in legalized locations facilitated and regulated by the government itself.... Legalization would put lipstick on modern-day slavery and call it another step in the liberation of women.⁷⁸

Here, Vargas attempts to illustrate how legalizing or decriminalizing prostitution would provide a setting to permit organized crime while allowing the actions of pimps and traffickers to go unscathed. They would be permitted to continue searching for victims and using them

⁷⁵ Carol Leigh Coins the Term “SexWork,” GLOBAL NETWORK OF SEX WORK PROJECTS PROMOTING HEALTH AND HUMAN RIGHTS, (Jan. 1), <https://www.nswp.org/timeline/event/carol-leigh-coins-the-term-sex-work> (stating that in the 1970’s, Carol Leigh was a prominent “sex-worker activist” who coined the term, “sex-work” and defined it to include “various forms of erotic labor, including, but not limited to: sensual bodywork, prostitution, stripping, dominatrix/fetish work, adult film performance, and webcam or phone sex.” Further:

In her essay ‘Inventing Sex Work’, Carol Leigh wrote that, in 1979 or 1980, she attended a conference in San Francisco by Women Against Violence in Pornography and Media. She had intended to be ‘a sort of ambassador to this group, educating feminists about prostitution.’ However, she discovered that the workshop on prostitution included the phrase ‘Sex Use Industry.’ She claimed that ‘[t]he words stuck out and embarrassed [her].’ She wrote, ‘[h]ow could I sit amid other women as a political equal when I was being objectified like that, described only as something used, obscuring my role as actor and agent in the transaction?’ Leigh suggested that the title be changed to ‘Sex Work Industry’ as that [prioritized] the work of the provider rather than the customer. The term stuck and Leigh used it in her one-woman play *The Adventures of Scarlet Harlot*, which she began performing in 1980. ‘The usage of the term “sex-work” marks the beginning of a movement.’ Carol Leigh wrote in her essay, ‘[i]t acknowledges the work we do rather than defines us by our status.’)

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

for monetary benefit. Cecilia Hoffman, the secretary of the “Coalition Against Trafficking in Women” and board member of the “Women’s Education, Development, Productivity and Research Organization” has stated that allowing prostitution would essentially violate the “highest standard of physical and mental health” to those involved.⁷⁹ She claims that disease, violence, unsafe abortions, AIDS, and unwanted pregnancies present grave and constant risks and restrict prostitutes from having a healthy relationship with their bodies.⁸⁰

Dr. Melissa Farley, a research and clinical psychologist and founder of the “Prostitute Research & Education” website, notes in one of her articles that “[w]omen in prostitution face a statistical probability of weekly rape.”⁸¹ She found that these women have the highest rates of physical assault, rape, and homicide of any women ever studied before.⁸² In one Netherlands study, where prostitution has been legalized, 60% of the women studied were assaulted, 70% were threatened with physical assault, 40% were coerced into legal prostitution, and another 40% had experienced sexual violence.⁸³ Other matters of major concern are the numerous health problems that are linked to “involvement in prostitution,” which lead to the spread of fatal diseases such as tuberculosis, HIV, STDs, anemia, and hepatitis.⁸⁴

⁷⁹ Cecilia Hoffman, *Cecilia Hoffman Biography*, PROCON.ORG (Aug. 1, 2008, 12:17 PM), <https://prostitution.procon.org/view.source.php?sourceID=000397>.

⁸⁰ *Id.*

⁸¹ Melissa Farley, PhD, *Very Inconvenient Truths: Sex Buyers, Sexual Coercion, and Prostitution-Harm-Denial*, LOGOS, <http://logosjournal.com/2016/farley-2/>.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ MICHAEL SHIVELY, PH.D., KRISTINA KLIORYS, KRISTIN WHEELER, & DANA HUNT, PH.D., A NATIONAL OVERVIEW OF PROSTITUTION AND SEX TRAFFICKING DEMAND REDUCTION EFFORTS, FINAL REPORT 13, 15 (stating that:

[J]ohns are at elevated risk of contracting sexually transmitted diseases. (internal citations omitted) Johns frequently seek and pay a premium for unprotected intercourse and oral sex (e.g., Jeal and Salisbury, 2004; Strathdee et al., 2008), which greatly increases the risks of contracting and spreading STIs, HIV, hepatitis, tuberculosis and more. (internal citations omitted). Surveys of prostituted women find that those insisting on always using condoms face income losses of up to 79%, because most customers prefer sex without condoms (Rao et al., 2003). Between 35% and 55% of samples of prostituted women said they had engaged in unprotected commercial sex, and 10 to 35% never use condoms while engaging in commercial sex. (internal citations omitted) Disturbingly, surveys have found that just 47% of prostituted women know whether or not they are HIV-positive, less than half had health screenings in the prior year despite having sex with an average of 17 different men per week, and 45% were infected with hepatitis C. (internal citations omitted)).

Perhaps one of the most crucial arguments opponents of FOSTA make relates to the concept that prostitution is a “victimless” crime.⁸⁵ The majority of prostitutes are marginalized and impoverished women, claims S.M. Berg, a feminist activist against prostitution.⁸⁶ She is a freelance writer and co-founder of both the “Antiporn Activist Network” and the “Sexual Health Activist Group.”⁸⁷ In one of her articles, she powerfully noted that in 2005, “the market for female bodies enslaved more people than African slavery did 150 years ago.”⁸⁸ She drew issue with the fact that modern-day feminists have “remained silent” about the estimated 35 million prostituted women in the world, mostly “brownskinned girls from the global south” who are coerced into sexual slavery.⁸⁹

The assertion that prostitution is a free choice is a grave misconception.⁹⁰ Opponents of FOSTA claim that these people are consenting adults who chose “sex-work” as their occupation,⁹¹ but they neglected to consider how children are forced into prostitution as well. A report sponsored by the US Department of Justice demonstrated that there is evidence of how systemic discrimination is a substantial contributing factor to a prostitute’s choice for “sex work” among both children and economically and emotionally impoverished or vulnerable groups.⁹² The report states that:

Most studies find the average age of entry into prostitution to be between 12 and 16, (internal citations omitted) and the vulnerabilities leading girls and young women into commercial sex often conspire to keep

Id.

⁸⁵ Wendy Garfinkle, *Here Are the Reasons Why I Think Prostitution Should Be Legalized*, PEN AND KEYS (Nov. 4, 2016, 3:43 PM), <https://wendycgarfinkle.com/2016/11/04/here-are-the-reasons-why-i-think-prostitution-should-be-legalized/>.

⁸⁶ S.M. Berg, *S.M. Berg Biography*, PROCON.ORG (Jan. 18, 2008, 1:45 PM), <https://prostitution.procon.org/view.source.php?sourceID=003457>.

⁸⁷ *Id.*

⁸⁸ S.M. Berg, *Hey Progressives! Cathouse got your Tongue?*, NOPORNNORTHAMPTON.ORG (Nov. 28, 2007), <https://nopornnorthampton.org/2007/11/28/s-m-berg-hey-progressives-cathouse-got-your-tongue/>.

⁸⁹ *Id.*

⁹⁰ Jeanne LoCicero, JD, *Jean LoCicero, JD Biography*, PROCON.ORG (Mar. 31, 2017, 10:49 AM), <https://prostitution.procon.org/view.source.php?sourceID=014262>.

⁹¹ *Why Sex Work Should Be Decriminalized*, HUMAN RIGHTS WATCH (Aug. 7, 2019, 3:31 AM), <https://www.hrw.org/news/2019/08/07/why-sex-work-should-be-decriminalized#>.

⁹² MICHAEL SHIVELY, PH.D., KRISTINA KLIORYS, KRISTIN WHEELER, & DANA HUNT, PH.D., A NATIONAL OVERVIEW OF PROSTITUTION AND SEX TRAFFICKING DEMAND REDUCTION EFFORTS, FINAL REPORT 11.

them there. Women and girls drawn or forced into prostitution typically are economically and emotionally vulnerable, with most having been scarred by childhood sexual and physical abuse and other forms of dysfunction in the home. (internal citations omitted). For example, Farley et al. (2003) found that 63% of the prostituted women they interviewed in nine countries had been sexually abused as children, and 57% of the US respondents also reported childhood physical abuse. Similarly, McIntyre (1999) found the majority of prostituted persons have a history of sexual and physical abuse (82% and 75%, respectively). Traumatic childhood experiences contribute to prostitution via homelessness and a lack of economic self-sufficiency. Sexually and physically abused children are at an increased risk of running away, (internal citations omitted) and women and girls who are unable to sustain themselves financially are highly vulnerable to sexual exploitation. Providers of commercial sex are found to have high levels of childhood truancy, poor education, poor employment skills, and debt (e.g., Crime and Misconduct Commission, 2004; Walker, 2002a; Weisberg, 1985). Studies repeatedly find that among the most important predictors of prostitution are running away from home and homelessness. (internal citations omitted).⁹³

The report elicits how trauma and other societal factors make it easy for vulnerable women and girls to fall into lives of prostitution. The facts in the report are troubling and contradict the very foundation of what has been called a “victimless crime.”⁹⁴ Opponents claim that prostitution is a choice and should not be a crime when it occurs between consenting parties. However, they have subsequently addressed how many of these victims do not have “viable alternatives” due to discrimination in our society.⁹⁵ If they do not have viable

⁹³ *Id.*

⁹⁴ Cathy Young, *Prostitutes and Politics*, REASON (May 7, 2007, 3:28 PM), <https://reason.com/2007/05/07/prostitutes-and-politics/>.

⁹⁵ Jeanne LoCicero & Udi Ofer, *ACLU: It's Time To Decriminalize Prostitution*, NJ.COM (Jul. 6, 2016), https://www.nj.com/opinion/2016/07/its_time_to_legalize_prostitution_opinion.html.

alternatives, their “choice” for prostitution is not, in actuality, a choice at all. Likewise, opponents’ propositions that many prostitutes consent to the acts that occur within a transaction are inaccurate. It becomes clear that prostitutes have felt pressured into sex work due to a lack of alternatives.

Opponents argue that since prostitution is inevitable, regardless of its legal status, we should make it a profitable business by imposing taxes.⁹⁶ However, Julie Bindel, a journalist and co-founder of “Justice for Women,” wrote a particularly compelling article in the magazine, *The Spectator*, in which she argued against the legalization of prostitution by using the Dutch government’s approach to highlight its flaws:

In 2000 the Dutch government . . . [legalized] the already massive and highly visible brothel trade. . . . The Dutch government hoped to play the role of the honorable pimp, taking its share in the proceeds of prostitution through taxation. Illegality has simply taken a new form, with an increase in trafficking, unlicensed brothels and pimping . . .—government is profiting off of the dehumanization of women and applying it to tax dollars.⁹⁷

Basically, the Dutch government chose to make a thriving business by means of exploiting these women.

Like the Netherlands, Germany legalized prostitution in 2002.⁹⁸ Subsequently, the sex industry grew significantly since and is now valued at about 15 billion euros a year.⁹⁹ The German law intended to “recognize prostitution as a job like any other” so that “[s]ex workers could now enter into employment contracts, sue for payment and register for health insurance, pension plans and other benefits.”¹⁰⁰ However, the practices of regulating or legalizing

⁹⁶ Dennis Hof, *Dennis Hof Biography*, PROCON.ORG (Nov. 13, 2018, 12:29 PM), <https://prostitution.procon.org/view.source.php?sourceID=000619>.

⁹⁷ Julie Bindel, *Julie Bindel Biography*, PROCON.ORG (Feb. 21, 2018, 9:04 AM), <https://prostitution.procon.org/view.source.php?sourceID=000530>.

⁹⁸ *Prostitution is Legal in Countries Across Europe But it’s Nothing Like What You Think*, BUSINESS INSIDER (Mar. 13, 2019, 11:54 AM), <https://www.businessinsider.com/prostitution-is-legal-in-countries-across-europe-photos-2019-3>.

⁹⁹ *Id.*

¹⁰⁰ Joel Gunter & Ben Clissitt, *Welcome To Paradise*, THE TELEGRAPH, <https://s.telegraph.co.uk/graphics/projects/welcome-to-paradise/>.

prostitution have significant implications for the future of women's rights and children's safety that should not be ignored.

A. REPEALING FOSTA WOULD BE DETRIMENTAL TO THE WOMEN'S RIGHTS MOVEMENT

There were approximately 40-42 million sex workers in the world in 2012, among whom eighty percent were female, and an estimated one million lived in the United States—that number continues to grow.¹⁰¹ By enforcing FOSTA, we are protecting the concept that a women's body is not something that can be bought and sold as a commodity for someone else's benefit. The 39th President of the United States, Jimmy Carter, once transparently stated:

Normalizing the act of buying sex also debases men by assuming that they are entitled to access women's bodies for sexual gratification. If paying for sex is normalized, then every young boy will learn that women and girls are commodities to be bought and sold. . . .¹⁰²

Surely, one of the most detrimental effects of legalizing prostitution would be the creation of an increased demand that would create an increased market for it. This goes directly against what many women are working for: the promotion of women to be respected in body and mind as an equal to men and not to be reduced to a mere sexual symbol for the male's benefit. "Widespread sexual violence against women" is the inherent result of continuously accepting the premise that men are entitled to sex from women.¹⁰³ S.M. Berg explained how the word "sexism" means exactly that: "being discriminated against and objectified because of sex, being made into objects for men to sexually (ab)use without regard to women's humanity."¹⁰⁴

Additionally, allowing prostitution in our society would allow us to foster an environment where women's bodies are nothing more

¹⁰¹ Gus Lubin, *There Are 42 Million Prostitutes in the World, and Here's Where They Live*, BUSINESS INSIDER (Jan. 17, 2012, 1:55 PM), <https://www.businessinsider.com/there-are-42-million-prostitutes-in-the-world-and-heres-where-they-live-2012-1>.

¹⁰² Jimmy Carter, *Jimmy Carter Biography*, PROCON.ORG (Apr. 3, 2017, 6:28 AM), <https://prostitution.procon.org/view.source.php?sourceID=014266>.

¹⁰³ S.M. Berg, *S.M. Berg Biography*, PROCON.ORG (Jan. 18, 2008, 1:45 PM), <https://prostitution.procon.org/view.source.php?sourceID=003457>.

¹⁰⁴ *Id.*

than objects. Prostitution dehumanizes the body of women. Dehumanization would not just affect prostitutes but would most likely become the accepted societal outlook on all women's bodies, prostitute or not. It would become the "status quo" to think of all women in this aspect. Women have come much too far to take such a dangerous step back.

B. RECOMMENDATIONS TO COMBAT THE EFFECTS OF SEX-TRAFFICKING AND PROSTITUTION

Instead of reinforcing that it is acceptable to degrade sex workers, we should create more help and education programs for victims, and actively target the pimps and traffickers¹⁰⁵ who are taking advantage of their vulnerability. We should educate people through schools and neighborhood programs, especially those in lower socioeconomic areas, about the coercive nature of prostitution and the impacts it has on its victims.¹⁰⁶ In doing so, we can deter prospective buyers and can potentially teach vulnerable people to steer away from prostitution, starting at a young age.¹⁰⁷

Perhaps by continuously providing easily accessible services to teach victims exit strategies, we can address the issue of high sex demand. Treating sex demand may be an important first step in controlling the rate of sex-trafficking victims. Instead of feeding into that demand by allowing prostitution to occur like any other job, we can reverse the idea that it is permissible to treat sex from prostitutes like a commodity.¹⁰⁸ Many helpful initiatives and programs already exist globally for these purposes.¹⁰⁹

¹⁰⁵ Donna Gavin, *Donna Gavin Biography*, PROCON.ORG (Feb. 23, 2018, 9:36 AM), <https://prostitution.procon.org/view.source.php?sourceID=014649>.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ MICHAEL SHIVELY, PH.D., KRISTINA KLIORYS, KRISTIN WHEELER, & DANA HUNT, PH.D., A NATIONAL OVERVIEW OF PROSTITUTION AND SEX TRAFFICKING DEMAND REDUCTION EFFORTS, FINAL REPORT J-1. (naming several groups that combat sex-trafficking which include: Apne App, which empowers women and children prostitutes in India's red-light district; Businesses Ending Slavery & Trafficking; Chicago Alliance Against Sexual Exploitation; Citizens Against Trafficking; Coalition Against Trafficking in Women; The Code: We Protect Children from Sex Tourism; The Defenders USA; Demand No Demand; End Demand NYC; End Demand Illinois; and Free the Captives).

VI. THE APPLICABLE LAW REQUIRED TO TEST FOSTA'S CONSTITUTIONALITY

To determine whether FOSTA is constitutional, courts must analyze the First Amendment's Free Speech Clause. The clause states that "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ." ¹¹⁰

However, not all speech is created equal. There are different categories of speech, and some are not protected.¹¹¹ Under the Constitution, "content-based restrictions on speech are presumed invalid" until the government proves otherwise.¹¹² As stated in *United States v. Alvarez*,¹¹³ "content-based restrictions on speech have been permitted, as a general matter, only when confined to the few 'historic and traditional categories [of expression] long familiar to the bar' which include incitement, obscenity, defamation, speech integral to criminal conduct, so-called 'fighting words,' child pornography, fraud, true threats, and speech presenting some grave and imminent threat the Government has the power to prevent."¹¹⁴ The Supreme Court has asserted that these forms of speech are unprotected by the United States Constitution.¹¹⁵ Furthermore, although these types of speech may be regulated based on their content, the Court determined that as long as the government regulates the speech evenhandedly, such regulations are permissible.¹¹⁶

¹¹⁰ U.S. CONST. amend. I

¹¹¹ Victoria L. Killion, *The First Amendment: Categories of Speech*, CONGRESSIONAL RESEARCH SERVICE (Jan. 16, 2019), <https://fas.org/sgp/crs/misc/IF11072.pdf> (stating that among the types of protected speech are political, religious and commercial speech and among the types of unprotected speech are fraud, obscenity, defamation, speech integral to criminal conduct, incitement, true threats, and fighting words.); 16A AM. JUR. 2D CONSTITUTIONAL LAW § 480 (citing *Turner Broadcasting System, Inc. v. F.C.C.*, 512 U.S. 622 (1994) (stating that "[t]he most exacting scrutiny test is applied to regulations that suppress, disadvantage, or impose different burdens upon speech on the basis of its content, and to laws that compel speakers to utter or distribute speech bearing a particular message").

¹¹² *U.S. v. Alvarez*, 567 U.S. 709, 717 (2012) (citing *Ashcroft v. Am. Civil Liberties Union*, 542 U.S. 656, 660).

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

Consequently, when a court determines the constitutionality of speech, it must identify the type of speech at issue.¹¹⁷ Identifying the type of speech is an essential step because it allows the Court to determine “which level of judicial scrutiny” it should apply to the law or regulation restricting the speech.¹¹⁸ Restrictions on protected speech generally receive the highest levels of scrutiny, including strict and intermediate scrutiny, which are very high burdens to meet.¹¹⁹ The government has far more discretion in regulating unprotected speech.¹²⁰

The restriction of speech must not, however, be overbroad or vague.¹²¹ The Court in *United States v. Williams*¹²² stated that “[a]ccording to our First Amendment overbreadth doctrine, a statute is facially invalid if it prohibits a substantial amount of protected speech.”¹²³ In *Williams*, the Court convicted the respondent of the “promotion. . .and possession of child pornography” under Section 2252A(a)(3)(B) of Title 18 of the United States Code, which “criminalizes, in certain specified circumstances, the pandering or solicitation of child pornography.”¹²⁴ The respondent appealed his conviction, alleging that the statute was unconstitutionally overbroad, but the District Court rejected his claim.¹²⁵ On appeal, the Eleventh Circuit reversed and ruled that the statute was overbroad and impermissibly vague.¹²⁶ The United States Supreme Court granted certiorari and ruled that the statute was not overbroad and upheld the respondent’s pandering conviction.¹²⁷ It reasoned this because the restricted speech was a solicitation of illegal materials as opposed to mere advocacy for the legality of child pornography.¹²⁸

The rules stated above provide an analysis for regulating speech when that speech falls under an unprotected category.

¹¹⁷ Lubin, *supra* note 101.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ See generally *U.S. v. Williams*, 553 U.S. 285 (2008) (describing the overbreadth and vagueness doctrines of the Constitution).

¹²² *Id.*

¹²³ *Id.* at 292.

¹²⁴ *Id.* at 288.

¹²⁵ *Id.* at 304.

¹²⁶ *Id.*

¹²⁷ See generally *U.S. v. Williams*, 553 U.S. 285 (2008).

¹²⁸ *Id.*

However, it is possible to also analyze prostitution under the category of commercial speech, which is protected by the First Amendment.¹²⁹ Commercial speech is defined as speech that relates solely to the “economic interests of [a] speaker and its audience.”¹³⁰ In *Central Hudson Gas & Electric Corporation v. Public Service Commission of New York*,¹³¹ the Supreme Court of the United States developed a four-part analysis in order to determine whether the regulation of certain commercial speech is constitutional.¹³² First, the Court must determine “whether the expression is protected by the First Amendment,” meaning that the speech is not misleading, nor does it concern illegal activity.¹³³ Second, the Court must ask whether the government has asserted a substantial interest in regulating the speech.¹³⁴ If those two prongs are met, the Court must then ask whether “the regulation directly advances the governmental interest asserted.”¹³⁵ The last step is to determine whether the regulation is “more extensive than necessary to serve that interest.”¹³⁶ In the following Section of this Note, the author will propose two separate analyses of how courts should rule if future litigation challenges the constitutionality of FOSTA.

¹²⁹ *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 557 (1980).

¹³⁰ *Id.* at 561.

¹³¹ *Id.* (The Public Service Commission of New York halted all electric utility companies in the state from advertising material that would promote the use of electricity reasoning that New York did not have a sufficient supply of sources to meet customer demands at that time. *Id.* at 558. When the supply eventually increased, Central Hudson challenged the Commission’s decision by citing to the First Amendment and Fourteenth Amendments, but the Commission re-extended the prohibition. *Id.* Central Hudson brought suit in state court alleging that the Commission was restraining commercial speech, but both the trial and appellate courts affirmed the Commission’s decision. *Id.* at 560-561. The New York Court of Appeals also affirmed noting that there was “little value to advertising in ‘the noncompetitive market in which electric corporations operate.’” *Id.* (citing to *Consolidated Edison Co. v. Public Service Comm’n*, 47 N.Y.2d 94, 110, 417 N.Y.S.2d 30, 39, 390 N.E.2d 749, 757 (1979)). Central Hudson appealed to the Supreme Court of the United States. The Court applied a four-part test applicable to commercial speech and reversed the ruling of the N.Y. Court of Appeals in favor of Central Hudson.

¹³² *Id.* at 566.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

VII. ARGUMENT FOR FOSTA'S CONSTITUTIONALITY

The Free Speech Clause may be applicable to FOSTA because by making online interactive computer services liable for certain third-party posts on their websites, those websites eliminate content and thereby restrict third-party speech. However, in order to commence an action in federal court alleging that FOSTA has an unconstitutional “chilling effect”¹³⁷ on speech, a plaintiff must establish Article III standing (hereinafter “standing”).¹³⁸ To establish standing, a plaintiff must first prove that they have suffered an “injury in fact,” which is an “actual and imminent,” “concrete and particularized” “invasion of a legally protected interest.”¹³⁹ Next, the plaintiff must show that there is a causal connection between the injury and the “conduct complained of” and that the injury is fairly traceable to the defendant’s actions.¹⁴⁰ Last, “it must be ‘likely’... that the injury will be ‘redressed by a [decision in favor of the plaintiff].’”¹⁴¹ If the Court does not find the plaintiff to have standing, then the inquiry ends there and the Court will not entertain the cause of action. If, however, the Court finds that a plaintiff has standing, the cause of action will be heard.

Since the content that is being eliminated involves the potential promotion or facilitation of prostitution, FOSTA is considered a content-based law. Usually, laws with content-based restrictions are presumed invalid, but FOSTA falls within one of the exceptions which permit content-based restrictions.¹⁴² FOSTA restricts speech integral to criminal conduct¹⁴³, and when third parties advertise sexual acts in

¹³⁷ Jennifer M. Kinsley, *Chill*, 48 LOY. U. CHI. L.J. 253, 259 (2016) (citing *Laird v. Tatum*, 408 U.S. 1 (1972)) (Explaining how “certain regulations may [] create a deterrent, or chilling effect, upon expression that is not explicitly prohibited by the government.”)

¹³⁸ *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 559-60 (1992).

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² Berg, *supra* note 103.

¹⁴³ There is no bright-line definition for speech that is “integral to criminal conduct.” The Court has seemingly made this determination on a case by case basis. Victoria L. Killion, *The First Amendment: Categories of Speech*, CONGRESSIONAL RESEARCH SERVICE (Jan. 16, 2019), <https://fas.org/sgp/crs/misc/IF11072.pdf> (“In general, the First Amendment affords no protection to speech ‘used as an integral part of conduct in violation of a valid criminal statute.’” *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949). The Court has cited this rule as one reason the government may prohibit, for example, conspiracy or solicitation to commit a crime, offers or requests to obtain illegal material, or impersonating a government officer. See *United States v. Williams*, 553 U.S. 285, 297-98 (2008); *Alvarez*, 567 U.S. at 721.”); Eugene Volokh, *The “Speech Integral to Criminal Conduct” Exception*, 101 CORNELL L. REV.

exchange for payment on websites such as Craigslist, they are posting content that can result in the prostitution or trafficking of a person.¹⁴⁴ Therefore, the government should have far more discretion in restricting this speech.

The opponents have asserted that FOSTA causes impermissibly broad censorship of internet speech.¹⁴⁵ They argue that the language of FOSTA is overbroad and vague and, therefore, not compliant with the Constitution's overbreadth doctrine.¹⁴⁶ However, the opponents' arguments are flawed. A court should not rule that FOSTA is unconstitutional when using the *Williams*¹⁴⁷ precedent to decide the law. Like the statute in *Williams*,¹⁴⁸ FOSTA has not restricted the use of any speech that advocates for prostitution or sex-trafficking. Instead, FOSTA has restricted speech that is integral to commit the crimes of prostitution or sex trafficking. FOSTA merely holds that online service providers are accountable when their users engage in speech that is integral to commit a crime under federal law.

Conversely, the Court may determine that FOSTA's goals in restricting the promotion or facilitation of prostitution, are actually restrictions of commercial speech. In that case, the analysis would be different. The promotion or facilitation of prostitution that FOSTA restricts may fall under the category of commercial speech because the language relates to economic transactions between sex workers and

981, 993 (2016) (Explaining how the court has recognized a link between speech integral to criminal conduct and solicitation of a crime when deciding *United States v. Williams*. The Court determined that “[o]ffers to engage in illegal transactions are categorically excluded from the First Amendment protection,” and cited to the *Giboney* precedent.)

¹⁴⁴ Timothy Williams, *In Washington, A Fight to Decriminalize Prostitution Divides Allies*, N.Y. TIMES (Oct. 18, 2019), <https://www.nytimes.com/2019/10/17/us/washington-legal-prostitution.html> (noting that prostitution is illegal in all states except Nevada); *Federal Law, NATIONAL HUMAN TRAFFICKING HOTLINE*, <https://humantraffickinghotline.org/what-human-trafficking/federal-law> (citing to 22 USC § 7102) (defining sex trafficking as the:

recruitment, harboring, transportation, provision, obtaining, patronizing, or soliciting of a person for the purposes of a commercial sex act, in which the commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such an act has not attained 18 years of age.)

Id.

¹⁴⁵ Anna Schechter & Dennis Romero, *FOSTA Sex Trafficking Law Becomes Center of Debate About Tech Responsibility*, NBC NEWS (July 19, 2018, 3:33 PM), <https://www.nbcnews.com/tech/tech-news/sex-trafficking-bill-becomes-center-debate-about-tech-responsibility-n892876>.

¹⁴⁶ See generally *United States v. Williams*, 553 U.S. 285 (2008).

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

their audiences. In other words, these transactions solely concern the economic interests of prostitutes and their clients. Therefore, in order to determine whether FOSTA's regulation is constitutional, the Court would have to do an analysis using the four-part test in *Central Hudson*. It would first have to ask whether the promotion or facilitation of prostitution is misleading or if it concerns illegal activity. The Court would not likely consider this type of speech to be misleading as long as the speech actually deals with the sexual transaction(s) that it advertises. Nonetheless, since prostitution is illegal, the analysis would end on the first prong of the test, and the government would be permitted to regulate the speech.

If, however, the government legalized prostitution, the analysis would continue since the promotion or facilitation of prostitution would no longer be related to illegal conduct. The Court would then have to move to the second prong of the *Central Hudson* test by asking if the government has a substantial interest in regulating the speech. The primary governmental interest served through the enactment of FOSTA is the reduction of sex trafficking online, which the Court should find to be a substantial interest.¹⁴⁹ For the next prong, the Court should determine that FOSTA directly advances that interest because it makes websites accountable for permitting online posts that may result in sex-trafficking. Last, the Court should rule that FOSTA is tailored enough to restrict sex-trafficking online and not more extensive than necessary. Whether the Court chooses to analyze FOSTA as speech integral to criminal conduct or as commercial speech, FOSTA should pass constitutional muster in both situations.

VIII. CONCLUSION

FOSTA is necessary to protect women and children who fall victim to sex trafficking. We must hold online companies accountable when they allow third parties to post content related to prostitution or sex trafficking on their websites. If we do not, victims will be killed, abused, mistreated, or dehumanized. The First Amendment does not protect any speech that is fundamental to the commission of a crime(s). These crimes have evolved into a continuously growing epidemic in

¹⁴⁹ Aja Romano, *A New Law Intended To Curb Sex Trafficking Threatens The Future Of The Internet As We Know It*, VOX MEDIA (Jul. 2, 2018, 1:08 PM), <https://www.vox.com/culture/2018/4/13/17172762/fosta-sesta-backpage-230-internet-freedom>.

our country, and the legalization or decriminalization of prostitution will undoubtedly proliferate that growth.