

**STAVING OFF A SUPREME COURT SMACKDOWN:  
ANTICIPATING AND AVOIDING AN EX POST FACTO  
CHALLENGE TO FOSTA**

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I. INTRODUCTION AND BRIEF BACKGROUND

Before April of 2018, in mere moments a person could log onto the internet and find a bevy of advertisements for underage, sex-trafficked girls, and then point, click, and purchase a fifteen-year-old girl for cyber-sex acts,<sup>1</sup> or for in-person sex acts.<sup>2</sup> Sex trafficking does not happen *only*

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1. See Sunshine de Leon, *Cyber-Sex Trafficking: A 21st Century Scourge*, CNN (July 18, 2013, 7:58 AM), <https://www.cnn.com/2013/07/17/world/asia/philippines-cybersex-trafficking/index.html> (“Paying \$56 per minute, male customers typed their instructions onto a computer and then watched via a live camera as the girls performed sexual acts . . . [T]he girls were often forced to watch the men they served on screens.”).

2. See Marilyn Evans, *I Was Sold on Backpage.com: The Story of Jane Doe*, PROTECT YOUNG MINDS (Apr. 17, 2018), <https://protectyoungminds.org/2018/04/17/sold-on-backpage-the-story-of-jane-doe/> (“We found out later that within minutes of her ad going up on Backpage, dozens of men were responding to purchase [my fifteen-year-old daughter]—like you’d buy a car or anything.”).

on the dark web.<sup>3</sup> It does not happen *only* in a foreign country.<sup>4</sup> Sex trafficking happens *daily* right here in the United States.<sup>5</sup> And, prior to April of 2018, ordering sex online was as easy as ordering anything else online.<sup>6</sup> Law enforcement could not effectively prosecute the overwhelming number of bad actors advertising online<sup>7</sup> and, therefore, could not effectively help ensnared and exploited victims.<sup>8</sup> In a letter to Congress, the National Association of Attorneys General requested an amendment to a statute that blocked such prosecutions by affording broad immunity to internet service providers: the Communications Decency Act (“CDA”) § 230.<sup>9</sup>

Congress designed the statute to provide *limited* immunity to internet providers for third-party content posted to their sites.<sup>10</sup> Courts, however, thereafter expanded the immunity and held internet providers immune from liability or prosecution for third-party sex trafficking advertisements.<sup>11</sup> Because courts broadly interpreted § 230, internet

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3. See Jessica Formoso, *Human Trafficking on the Dark Web and Beyond*, FOX 5 N.Y.: WHAT IS IT? (Sept. 27, 2017), <http://www.fox5ny.com/news/human-trafficking-on-the-dark-web-and-beyond>.

4. See Tracy Webb, *The Brave New World of Cyber Crime Investigation and Prosecution*, 19 NEXUS 77, 83–84 (2013–2014).

5. See *id.*

6. See, e.g., Evans, *supra* note 2; see also *Child Sex Trafficking Is a Cycle of Abuse: The Role of Technology*, THORN, <https://www.wearethorn.org/child-trafficking-statistics/> (last visited May 11, 2020).

7. See Letter from Fifty Attorneys General to Senator Rockefeller, Senator Thune, Representative Upton, and Representative Waxman, NAT’L ASS’N OF. OF ATTORNEYS GEN., (July 23, 2013), <https://www.naag.org/assets/files/pdf/signons/Final%20CDA%20Sign%20n%20Letter.pdf> [hereinafter Attorneys General Letter to Senators].

8. See Michelle Robertson, *Report: ‘Every 16-Year-Old Girl in Fresno’ has been Approached by Sex-Traffickers, Police Say*, SFGATE (Nov. 16, 2017, 4:32 PM), <https://www.sfgate.com/bayarea/article/Fresno-human-trafficking-report-crime-12354587.php> (“Once entangled in the web of sex trafficking, the victims—and those running the operation—can be hard to locate.”).

9. Attorneys General Letter to Senators, *supra* note 7; see also Danielle Keats Citron & Benjamin Wittes, *The Internet Will Not Break: Denying Bad Samaritans § 230 Immunity*, 86 FORDHAM L. REV. 401, 403 (2017) (“We offer the modest proposition that § 230 immunity is too sweeping.”); Mary Graw Leary, *The Indecency and Injustice of Section 230 of the Communications Decency Act*, 41 HARV. J.L. & PUB. POL’Y 553, 580 (2018) (arguing that courts misinterpreted congressional intent for § 230 as giving “broad immunity” or “near absolute immunity” to internet providers posting third-party content; congress never intended such broad immunity). *Contra* Jeff Kosseff, *Defending Section 230: The Value of Intermediary Immunity*, 15 J. TECH. L. & POL’Y 123, 124–25 (2010) (asserting that broad immunity comports with the original congressional intent of § 230, in keeping with First Amendment principles). See *generally* 47 U.S.C. § 230 (2018).

10. See Citron & Wittes, *supra* note 9, at 403.

11. See Attorneys General Letter to Senators, *supra* note 7 (arguing that, because of broad interpretation of § 230, the CDA is “used as a shield by those who intentionally profit from prostitution and crimes against children”).

companies, in essence, were allowed to make money posting and disseminating sex trafficking advertisements.<sup>12</sup>

A lot of money.<sup>13</sup>

Courts consistently refused to reign in the broad immunity for internet providers, interpreting § 230 as affording blanket immunity.<sup>14</sup> In various decisions, courts challenged Congress to fix the law and untie the judiciary's hands, so to speak.<sup>15</sup> Finally, after years of unsuccessful sex trafficking victim lawsuits,<sup>16</sup> failed state prosecutions,<sup>17</sup> political inaction,<sup>18</sup> court rebukes challenging Congress to amend the law,<sup>19</sup> and outrage and activism from myriad sources—including anti-sex trafficking policy advocates,<sup>20</sup> victim's rights groups,<sup>21</sup> prosecutors,<sup>22</sup> members of law enforcement,<sup>23</sup> scholars,<sup>24</sup> and internet pundits<sup>25</sup>—

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12. *See id.*

13. *See* Laura Jarrett & Sara Ashley O'Brien, *Backpage Creators Indicted on Prostitution and Money Laundering Charges*, CNN (Apr. 9, 2018, 5:27 PM), <https://www.cnn.com/2018/04/09/politics/backpage-creators-indicted-on-prostitution-and-money-laundering-charges/index.html> ("According to the indictment, Backpage earned over \$500 million in prostitution-related revenue from the site and illegally routed the proceeds through unrelated entities."); *accord* Tom Porter, *Backpage.com Made \$500 Million from Prostitution, Say Prosecutors*, NEWSWEEK (Apr. 10, 2018, 9:58 AM), <https://www.newsweek.com/backpagecom-made-500-million-prostitution-say-prosecutors-878722> ("Backpage is accused of taking \$500 million revenue from sexual services ads."); Timothy Williams, *Backpage's Sex Ads Are Gone. Child Trafficking? Hardly.*, N.Y. TIMES (Mar. 11, 2017), <https://www.nytimes.com/2017/03/11/us/backpage-ads-sex-trafficking.html>.

14. *See* Leary, *supra* note 9; *see also* Citron & Wittes, *supra* note 9.

15. *See* Leary, *supra* note 9, at 592–94.

16. *See* Attorneys General Letter to Senators, *supra* note 7.

17. *Providing for Consideration of H.R. 1865, Allow States and Victims to Fight Online Sex Trafficking Act of 2017*, 164 CONG. REC. H1278 (daily ed. Feb. 27, 2018) (statement of Rep. Slaughter) (remarking that bad-actor websites have been shielded from liability and prosecution for sex trafficking).

18. Leary, *supra* note 9, at 610 ("For years victim and survivor groups had been unable to motivate Congress to clarify § 230.").

19. *Id.* at 581; *see, e.g.*, M.A. v. Vill. Voice Media Holdings, LLC, 809 F. Supp. 2d 1041, 1053 (E.D. Mo. 2011).

20. *See generally* ECPAT-USA, <https://www.ecpatusa.org/> (last visited May 11, 2020) (ECPAT is an anti-child trafficking organization focused on "awareness, advocacy, policy, and legislation.").

21. *See generally* NAT'L CTR. FOR MISSING & EXPLOITED CHILD., *The Issues: Child Sex Trafficking*, <http://www.missingkids.com/theissues/trafficking> (last visited May 11, 2020).

22. *See* Attorneys General Letter to Senators, *supra* note 7.

23. *See* COOK CTY. SHERIFF'S OFF., THOMAS J. DART, *Sheriff Dart's Demand to Defund Sex Trafficking Compels Visa and Mastercard to Sever Ties with Backpage.com* (July 1, 2015), <https://www.cookcountysheriff.org/sheriff-darts-demand-defund-sex-trafficking-compels-visa-mastercard-sever-ties-backpage-com/>.

24. *See* Citron & Wittes, *supra* note 9; *see also* Leary, *supra* note 9, at 621.

25. *See* Arthur Chu, *Mr. Obama, Tear Down This Liability Shield*, TECH CRUNCH (Sept. 29, 2015, 3:31 PM), <https://techcrunch.com/2015/09/29/mr-obama-tear-down-this-liability-shield/>.

Congress finally acted and passed the Allow States and Victims to Fight Online Sex Trafficking Act of 2017 (“FOSTA”).<sup>26</sup> The enactment was a hard-fought victory for exploited, abused, and silenced victims of internet sex trafficking.

The victory, however, may be in peril.

While FOSTA garnered significant congressional support in its passage,<sup>27</sup> and President Trump signed it without hesitation,<sup>28</sup> detractors and critics have since worked to dismantle what they consider a law curtailing freedom, a law handcuffing and hindering the open internet.<sup>29</sup> FOSTA’s critics allege that the law infringes First Amendment rights and threatens freedom of speech.<sup>30</sup> There is, however, another pressing issue to consider—one that Congress generally glossed over in considering the Act’s passage:<sup>31</sup> The law’s Effective Date Clause<sup>32</sup> and Savings Clause<sup>33</sup> each contain language that may violate the

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26. Allow States and Victims to Fight Online Sex Trafficking Act of 2017 (FOSTA), Pub. L. No. 115-164, 132 Stat. 1253 (2018) (codified as amended at 18 U.S.C. §§ 1591, 1595, 2421A and 47 U.S.C. § 230).

27. See Russell Brandom, *Controversial Sex-trafficking Bill Passes the House of Representatives*, VERGE (Feb. 27, 2018, 6:02 PM), <https://www.theverge.com/2018/2/27/17057754/sesta-fosta-passes-congress-cda-230-house-of-representatives> (noting that the measure passed in the House of Representatives with a 388-25 vote); see also Nitasha Tiku, *How a Controversial New Sex-Trafficking Law Will Change the Web*, WIRED (Mar. 22, 2018, 6:00 AM), <https://www.wired.com/story/how-a-controversial-new-sex-trafficking-law-will-change-the-web/> (noting that the measure passed in the Senate with a 97-2 vote).

28. See Remarks by President Trump at Signing of H.R. 1865, the “Allow States and Victims to Fight Online Sex Trafficking Act of 2017,” WHITE HOUSE: LAW & JUSTICE (Apr. 11, 2018, 11:08 AM) <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-signing-h-r-1865-allow-states-victims-fight-online-sex-trafficking-act-2017/> [hereinafter WHITE HOUSE].

29. See Mike Masnick, *EFF Launches Lawsuit to Stop FOSTA/SESTA*, TECHDIRT (June 29, 2018, 3:22 AM), <https://www.techdirt.com/articles/20180628/17444740136/eff-launches-lawsuit-to-stop-fosta-sesta.shtml>.

30. See Woodhull Freedom Found. v. United States, 334 F. Supp. 3d 185, 189 (D.D.C. 2018), *rev’d*, 948 F.3d 363 (D.C. Cir. 2020); see also Jon Brodtkin, *EFF Sues to Kill FOSTA, Calling It “Unconstitutional Internet Censorship Law,”* ARS TECHNICA (June 29, 2018, 12:05 PM), <https://arstechnica.com/tech-policy/2018/06/anti-sex-trafficking-law-illegally-censors-internet-lawsuit-says/>; Adi Robertson, *The EFF, the Internet Archive, and Human Rights Groups Have Sued to Stop FOSTA*, VERGE (June 29, 2018, 1:23 PM), <https://www.theverge.com/2018/6/29/17518188/fosta-sesta-lawsuit-first-amendment-eff-internet-archive-human-rights-watch-filing-injunction>.

31. See TECHFREEDOM, *Yes, SESTA Is Probably Unconstitutional After All*, MEDIUM (Mar. 21, 2018), <https://medium.com/@TechFreedom/yes-sesta-is-probably-unconstitutional-after-all-d9f58ffb0927>.

32. Allow States and Victims to Fight Online Sex Trafficking Act (FOSTA) of 2017, Pub. L. No. 115-164, § 4(b), 132 Stat. 1253, 1254–55 (2018) (codified as amended at 18 U.S.C. §§ 1591, 1595, 2421A and 47 U.S.C. § 230).

33. § 7, 132 Stat. at 1255.

constitutional prohibition on ex post facto laws.<sup>34</sup> This language is FOSTA's Achilles heel.

FOSTA's Effective Date Clause, § 4(b), stipulates that "the amendment made by subsection (a) shall apply regardless of whether the conduct alleged occurred, or is alleged to have occurred, *before, on, or after* such date of enactment."<sup>35</sup> FOSTA's Savings Clause, § 7, enables states to prosecute internet providers for acts committed "*before or after*" the enactment of FOSTA.<sup>36</sup> In § 230 cases decided prior to FOSTA's enactment, however, courts explicitly barred such prosecutions.<sup>37</sup> The constitutionality of including the word "*before*" is debatable on retroactivity grounds, and that debate makes the clause—and perhaps the entire statute—vulnerable to a legal challenge. FOSTA, in its current form, creates a legal quagmire: Can Congress legislate to enable state criminal prosecutions that Congress claims were permissible all along, but which courts previously barred due to judicial interpretation of § 230?

FOSTA is vital for protecting victims long ignored by a system that allowed internet companies like Backpage.com to exploit a legal loophole and promote online sex trafficking. But the law is vulnerable to a Supreme Court challenge seeking to invalidate the arguably retroactive Effective Date Clause and Savings Clause. If such a battle were to manifest, in order to uphold the statutory language in question, the Court would have to acknowledge that its own prior judicial interpretation of § 230 was wrong, there was no blanket immunity all along, and there is no Ex Post Facto Clause implication. That holding is a big ask. If the Court focuses on the plain language of the statute and simultaneously maintains *stare decisis*, the Court could invalidate the statute in part or as a whole. FOSTA advocates would be back at square one, and bad-actor websites like Backpage.com could regenerate and proliferate nearly overnight.

To preserve FOSTA, Congress must modify the language that creates retroactive application to prohibited conduct that occurred prior to the law's passage, or, alternatively, state prosecutors must ignore the

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34. See U.S. CONST. art. I, § 10, cl. 1. In 1798, the Supreme Court first interpreted the Ex Post Facto Clause applying to the states in the landmark case, *Calder v. Bull*, 3 U.S. 386 (1798). The Court issued a test for subsequent courts to employ when gauging whether a law violates the ex post facto prohibition: does the law "make innocent conduct criminal (*Calder* category 1), aggravate the crime (category 2), increase the punishment (category 3), or change the type or quantum of proof required for conviction (category 4)" in violation of the constitutional Ex Post Facto Clauses? Paul D. Reingold & Kimberly Thomas, *Wrong Turn on the Ex Post Facto Clause*, 106 CALIF. L. REV. 593, 597 (2018) (citation omitted).

35. FOSTA, § 4(b), 132 Stat. at 1254–55 (emphasis added).

36. § 7, 132 Stat. at 1255 (emphasis added).

37. See Leary, *supra* note 9, at 594–98.

provision, let Federal prosecutors take down bad actors, let victims sue in civil court, and let the law continue to do the good work it has already begun to do until any statutes of limitation toll.

## II. THE FATAL FLAW IN FOSTA'S EFFECTIVE DATE CLAUSE AND SAVINGS CLAUSE

At first blush, language in FOSTA's Effective Date Clause and Savings Clause appears to directly contradict the constitutional ex post facto prohibition. The Effective Date Clause provides: "The amendments made by [§ 4] shall take effect on the date of the enactment of this Act, and the amendment made by subsection (a) shall apply regardless of whether the conduct alleged occurred, or is alleged to have occurred, *before, on, or after* such date of enactment."<sup>38</sup> The Savings Clause in § 7 employs similar language, stating that civil lawsuits and criminal prosecutions are not preempted regardless of whether they were filed "*before or after*" the date of the legislation.<sup>39</sup> In these clauses, the word "before" functions as a dog whistle implicating potential ex post facto ramifications. Yet, the phrasing also raises nuanced and complex underlying issues that call into question how clear-cut the ex post facto implication is.

The first step in analyzing whether the language violates the ex post facto prohibition is to understand Congress's purpose for including the language. Congress enacted FOSTA to clarify that § 230 was "never intended to provide legal protection" to bad-actor websites that promote sex trafficking.<sup>40</sup> Congress is stating—front and center in this amendment—that courts fundamentally misconstrued § 230 and erroneously granted broad immunity protection to bad-actor internet providers.<sup>41</sup> Congress is making it known that such protection was never

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38. FOSTA, § 4(b) 132 Stat. at 1254–55 (emphasis added).

39. § 7, 132 Stat. at 1255 (emphasis added). The Savings Clause states: "Nothing in this Act or the amendments made by this Act shall be construed to limit or preempt any civil action or criminal prosecution under Federal law or State law (including State statutory law and State common law) filed *before or after* the day before the date of enactment of this Act that was not limited or preempted by section 230 of the Communications Act of 1934 (47 U.S.C. 230), as such section was in effect on the day before the date of enactment of this Act." *Id.* (emphasis added).

40. § 2(1).

41. 164 CONG. REC. H1278 (daily ed. Feb. 27, 2018) (statement of Rep. Wagner); *see also, e.g., id.* at H1291 (statement of Rep. Jackson Lee) ("[S]ection 230 of the [CDA] . . . was never intended to protect the facilitation of online prostitution or sex trafficking . . ."); *id.* at H1294 (statement of Rep. Smith) ("[T]he internet was never meant to be a zone of impunity for traffickers and their accomplices . . ."); *id.* at H1295 (statement of Rep. Maloney) ("When Congress enacted [the CDA] 22 years ago, it never, never intended to

envisioned.<sup>42</sup> In other words, FOSTA's proponents endeavored to frame the amendment as a clarification designed to correct judicial misinterpretation and bad precedent, rather than as an amendment creating new law. This congressional framing context directly impacts the retroactivity analysis.

During congressional debate on FOSTA, Representative Walters purposely submitted an amendment for Congress's consideration that included the Effective Date Clause language (*before, on, or after*) and Savings Clause language (*before or after*), in an effort to "reinstate[] [Rep. Wagner's] critical pro-victim provisions, . . . which are the meat of S. 1693, the Stop Enabling Sex Traffickers Act, or SESTA," a prior legislative iteration of FOSTA.<sup>43</sup> Senator Blumenthal offered insight into the purpose of the pro-victim provision, saying, "The purpose of our measure, very simply, is to give survivors their day in court. Right now, the courtroom doors are barred to them, as a recent court of appeals opinion remarked, outrageously so."<sup>44</sup> In other words, Congress acted so that victims could obtain the justice the courts were blocking. That

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make the internet into a red-light zone and a protected area to shield sex traffickers and corporations from selling our young people . . ."); 164 CONG. REC. S1745 (daily ed. Mar. 15, 2018) (statement of Sen. Portman) ("[The CDA] was also focused, in part, on keeping indecent material—pornography— from going to children, ironically, and now it is being used to shield these traffickers. I know Congress did not intend that broad immunity . . ."); 164 CONG. REC. S1851 (daily ed. Mar. 21, 2018) (statement of Sen. Blumenthal) ("This bill would clarify section 230 of the [CDA], which was never intended to give websites a free pass to aid and abet sex trafficking."); *id.* at S1860 (statement of Sen. Leahy) ("Clearly, CDA 230 was never intended to be a shield to protect child sex traffickers . . ."). *But see, id.* at S1866 (statement of Sen. Wyden). Senator Wyden stipulates that the overall intent of the CDA was "to protect kids from accessing pornography online," but the intent of § 230, which Wyden coauthored, specifically, was to 1) protect small businesses from litigation, 2) protect internet companies from litigation, 3) ensure bad actors would have to adhere to Federal laws, and 4) "protect the internet from the whims of State and local legislators," and ensure the Federal government—not the states—would regulate this interstate commerce concern. *Id.*

42. 164 CONG. REC. H1305 (daily ed. Feb. 27, 2018) (statement of Rep. Wagner); *see also id.* at H1291 (statement of Rep. Roby) ("Thanks to broad interpretation of existing law, specifically section 230 in America's courts, [bad actor] websites are, essentially, immune from State and local prosecutions."); *id.* at H1294 (statement of Rep. Smith) ("Today we say no to courts slamming the door on trafficking victims who want to sue website owners complicit in sexual abuse and cruelty."); *id.* at H1295 (statement of Rep. Maloney) ("This has gone to the courts, and the courts have said Congress must decide whether Congress wants to shield corporations, profit-makers, exploiters . . ."); 164 CONG. REC. S1828 (daily ed. Mar. 20, 2018) (statement of Sen. Portman) ("[N]umerous courts across the country have made it clear their hands are tied because of the illegal precedents that have been set the way the courts have interpreted this law.")

43. 164 CONG. REC. H1303 (daily ed. Feb. 27, 2018) (statement of Rep. Wagner).

44. 164 CONG. REC. S1851 (daily ed. Mar. 21, 2018) (statement of Sen. Blumenthal).

sentiment is captivating; it is also illuminating with regard to the amendment's ex post facto ramifications.

Representative Lofgren directly addressed the ex post facto issue during a floor debate, saying, "[S]ection 4 of the amendment . . . violates the ex post facto clause of the Constitution by attaching criminal liability to actions that preceded the enactment of the bill. This is clearly unconstitutional."<sup>45</sup> Representative Lofgren's concerns echoed a letter that Stephen E. Boyd, Assistant Attorney General (Department of Justice, "DOJ"), sent to Representative Goodlatte, in which Mr. Boyd expressed a "Constitutional Concern" regarding the potential ex post facto implications due to the wording of § 4 in the proposed amendment.<sup>46</sup>

Responding to Representative Lofgren's and the DOJ's concerns, Representative Wagner argued that the provisions are "pro-victim," Congress should not "allow Big Tech money and special interests to try and . . . override our criminal justice system," and "[w]e need both criminal and civil tools to properly combat the highly 'lucrative' industry of online sex trafficking."<sup>47</sup> Representative Wagner's response was a non-response; it focused on misdirection, giving a pathos argument in response to Representative Lofgren's ethos argument. Representative Wagner's response obscured the constitutionality issue. After the House Approved FOSTA in a 338-25 vote,<sup>48</sup> Representative Wagner did, however, seek clarification on the issue<sup>49</sup>—a day-late-dollar-short effort. Charles Doyle from the American Law Division ("ALD") responded to Representative Wagner's request with a letter in which he defended § 4 of the proposed amendment, outlining Supreme Court analyses of cases concerning ex post facto statutory issues, and asserting that § 4 does not

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45. 164 CONG. REC. H1303 (daily ed. Feb. 27, 2018) (statement of Rep. Lofgren) (referencing the Department of Justice letter pointing out the amendment's potential constitutional deficiency); *see also* 164 CONG. REC. S1868 (daily ed. Mar. 21, 2018) (statement of Sen. Wyden) (referencing the Department of Justice letter concerning the constitutional issues with the amendment).

46. Letter from Stephen E. Boyd, Assistant Att'y Gen., to Rep. Robert W. Goodlatte, Chairman, Comm. on the Judiciary 1-2 (Feb. 27, 2018), <https://www.eff.org/files/2018/03/19/doj-sesta.pdf> (offering technical assistance in drafting the Savings Clause so that it does not run afoul of the ex post facto prohibition and asserting that per the *Cummings* and *Beazell* cases the FOSTA Savings Clause causes "serious constitutional concern") [hereinafter Boyd Letter, DOJ].

47. 164 CONG. REC. H1303 (daily ed. Feb. 27, 2018) (statement of Rep. Wagner).

48. *Id.* H1318-19 (roll call vote).

49. Letter from Charles Doyle, Senior Specialist, Am. L. Div., to Rep. Ann Wagner 1 (Mar. 7, 2018), <https://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=2683&context=historical> [hereinafter Doyle Letter, Am. L. Div.] ("This [letter] is in response to your request for an analysis of the ex post facto implications of [FOSTA].").



violate the constitutional ex post facto prohibition.<sup>50</sup> During floor debate, Senator Portman requested that the letter be printed in the Congressional Record.<sup>51</sup>

Despite the letter's content, which was ripe for debate, Senator Portman yielded the floor to Senator Nelson, who then ignored the potential ex post facto ramifications of the amendment and instead argued to move ahead with passage, stating, "The purpose of the legislation is simple. Let's get it passed, get it signed into law, and let all of these various law enforcement entities be able to do their job [sic]."<sup>52</sup> Senator Nelson's comments essentially derailed any potential debate regarding the ex post facto issue, steering the conversation toward support for the amendment and failing to address a potentially fatal flaw in the law.

A similar non-response tactic manifested again after Senator Wyden expressed concerns about the DOJ's view of the Effective Date Clause language as a probable ex post facto violation.<sup>53</sup> Senator Wyden said, "[T]he [DOJ] takes the view that an important provision in the bill is unconstitutional. In my judgment, that is another issue that Congress ought to address before sending a bill to the President's desk, but instead it looks like everybody will drive it through as is."<sup>54</sup> Senator Wyden was prescient; shortly after his comments, the Senate—in a 97-2 vote—approved FOSTA as written, without any discussion of potential ex post facto ramifications.<sup>55</sup>

The dueling letters from the DOJ and the ALD highlight the primary issue at hand: there are multiple ways to interpret previous ex post facto cases in relation to the critical terminology ("before") in § 4 of FOSTA, as well as the mirror terminology in § 7.<sup>56</sup> And, the fact that these two letters frame the issue so differently is a harbinger of what may occur should a challenge make its way through the courts.

In the DOJ's letter, Boyd cited *Cummings v. Missouri*<sup>57</sup> and *Beazell v. Ohio*<sup>58</sup> to support the position that the critical phrasing in question violates the Ex Post Facto Clause, but then offered little analysis of the

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50. *Id.* at 3–5 (citing the *Dobbert* and *Stogner* cases in analyzing whether the FOSTA Savings Clause is constitutional or not, and arguing that the Savings Clause is constitutional per Supreme Court interpretation of the ex post facto provision as applied to the States).

51. 164 CONG. REC. S1855–56 (daily ed. Mar. 21, 2018) (statement of Sen. Portman).

52. *Id.* at S1857 (statement of Sen. Nelson).

53. *Id.* at S1868 (statement of Sen. Wyden).

54. *Id.*

55. *Id.* at S1872 (roll call vote).

56. See Boyd Letter, DOJ, *supra* note 46; Doyle Letter, Am. L. Div., *supra* note 49.

57. 71 U.S. (4 Wall.) 277 (1867).

58. 269 U.S. 167, 169–70 (1925).

cases.<sup>59</sup> Boyd quoted the Court in *Cummings*, stating that the FOSTA amendment would “‘impose[] a punishment for an act which was not punishable at the time it was committed’ or ‘impose[] additional punishment to that then prescribed.’”<sup>60</sup> Boyd’s analysis suggests that the FOSTA amendment would deprive defendants of the previous immunity they relied upon, and would thereby drastically change the available punishment.<sup>61</sup>

In the ALD’s letter,<sup>62</sup> Doyle offered an in-depth analysis of FOSTA’s ex post facto implications, and cited *Stogner v. California*<sup>63</sup> and *Dobbert v. Florida*<sup>64</sup> as primary support for the ALD’s position. Doyle said that in the *Stogner* case, “the defendant could not be prosecuted until the [statutory] impediment was removed.”<sup>65</sup> In relation to the FOSTA amendment, a defendant “could be prosecuted before the impediment’s removal if 18 U.S.C. § 1591 proscribed the underlying conduct.”<sup>66</sup> In other words, because federal remedies were available, the conduct was, in fact, proscribed already, and the defendant could technically be prosecuted regardless of the impediment’s removal. Doyle argued that the FOSTA amendment “would create no new federal crime or enhance punishment for any pre-existing federal crime and only impacts state law.”<sup>67</sup>

Boyd’s assertion, which barely scratched the surface of ex post facto analysis, fell woefully short of encapsulating the issue, but hit a mark with the inclusion of the *Cummings* case. Doyle’s optimistic and myopic analysis ignored the *Cummings* case, and ignored countervailing factors the Court would likely consider. Doyle is right that FOSTA is not *explicitly* creating new law; it is amending § 230 and clarifying Congress’s intent.<sup>68</sup> FOSTA is, however, *essentially* creating new law by creating new criminal liability, whether Doyle or Congress admit it or not.

As in *Cummings*, the word *before* in § 4 creates an opportunity for states to punish conduct that was not punishable by the states at the time it occurred. The twist with FOSTA is that Congress is suggesting

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59. Boyd Letter, DOJ, *supra* note 46.

60. *Id.* (quoting *Cummings*, 71 U.S. (4 Wall.) at 325–26). Boyd firmly situated his argument within categories one and two of the *Calder* test. See *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798); Reingold & Thomas, *supra* note 34.

61. Boyd Letter, DOJ, *supra* note 46.

62. Doyle Letter, Am. L. Div., *supra* note 49.

63. 539 U.S. 607 (2003).

64. 432 U.S. 282 (1977).

65. Doyle Letter, Am. L. Div., *supra* note 49, at 4.

66. *Id.*

67. *Id.* at 5.

68. See *id.* at 4–5.

that the conduct was not punishable specifically because of judicial interpretation of § 230. By asserting that internet providers were *never* allowed to do the activities FOSTA proscribes, and by confirming that the judiciary created the need for the clarification by allowing blanket immunity where none should have existed, Congress is asserting that the conduct was *always* punishable.<sup>69</sup>

That argument, however, is unavailing for several reasons. To begin with, Congress took no action for over twenty years, as courts consistently interpreted § 230 as giving internet providers full immunity for third-party content.<sup>70</sup> If the Court and lower courts were constantly misinterpreting § 230, Congress had ample opportunity to act and correct the judiciary.

Additionally, Congress may profess *ad nauseum* that § 230 “was never intended to provide legal protection to websites . . . ,”<sup>71</sup> and that the courts have interpreted the statute incorrectly, but the word “intended”<sup>72</sup> directly implicates the reality of defendants’—and courts’—reliance on precedent. Regardless of what Congress *intended*, the language in § 230 led the courts to hold time and time again that internet providers possessed immunity from liability for third-party content.<sup>73</sup> If § 230 did not actually provide such immunity, Congress would and should have stated in FOSTA that § 230 *never* provided internet providers with broad immunity. Employing the word *never*, instead of the phrase “was never intended,” would have definitively signaled that defendants never had immunity for such conduct and, therefore, could have been prosecuted all along. The insertion of “was never intended” confirms that § 230 did not function as Congress intended, which means that the law functioned as the Court interpreted it to function and defendants relied upon the Court’s interpretation. Defendants cannot be expected to know Congress’s intent, and can only rely on judicial interpretation.

While the judiciary may not make law, its statutory interpretations create reliance, and the constitutional prohibition on *ex post facto* laws primarily concerns defendants having notice concerning the illegality of

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69. See, e.g., 164 CONG. REC. H1278 (daily ed. Feb. 27, 2018) (statement of Rep. Wagner).

70. See Leary, *supra* note 9; see also Citron & Wittes, *supra* note 9.

71. Allow States and Victims to Fight Online Sex Trafficking Act of 2017 (FOSTA), Pub. L. No. 115-164, § 2(1), 132 Stat. 1253 (2018) (codified as amended at 18 U.S.C. §§ 1591, 1595, 2421A and 47 U.S.C. § 230).

72. *Id.*

73. See Leary, *supra* note 9, at 573–98; see also Citron & Wittes, *supra* note 9, at 408–11.

conduct.<sup>74</sup> Internet providers relied upon the Court's interpretation of immunity, thus Congress cannot simply say that immunity was never intended, as if a magic wand can wave away the judicial interpretation and public reliance on such; ignoring the reliance on judicial interpretation and punishing persons for conduct not considered criminal at the time it was committed violates category one of the seminal *ex post facto* interpretation case, *Calder v. Bull*.<sup>75</sup>

Furthermore, Doyle's argument that no new law has been created is stymied by Congressional debate testimony. During House debate, Representative Roby said, "[FOSTA] provides *increased criminal liability* and, thus, deters websites and individuals from selling human beings online. Websites will no longer be able to turn a blind eye or actively conceal this horrific practice without facing very real consequences."<sup>76</sup> Representative Jackson Lee said, "Not only does [FOSTA] *create criminal liability* and mandatory restitution for online sex traffickers and their enablers, this legislation goes even further [with new civil litigation options]."<sup>77</sup> Representative Wagner said, "FOSTA will *produce more prosecutions* of bad actor websites, *more convictions*, and put more predators behind bars."<sup>78</sup> Representative Maloney said, "This bill *removes obstacles for attorneys general* throughout the country to *enact State antitrafficking laws*."<sup>79</sup> These Representatives acknowledged FOSTA's creation of criminal liability.

Likewise, during Senate debate, Senator Blumenthal said, "[FOSTA] *would also open avenues of prosecution* to law enforcement where they are currently roadblocked."<sup>80</sup> Senator McCaskill said, "This is a *new tool in the toolbox of the frontline of criminal prosecutions* in this country . . ."<sup>81</sup> Senator Portman said, "[O]ne of the important parts of this legislation is *to simply allow* these local prosecutors . . . to take these cases while using the Federal standard rather than just relying on the Department of Justice."<sup>82</sup> These statements reinforce the fact that *prior to (before)* FOSTA's enactment, internet providers could *not* be

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74. *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390–91 (1798); *see supra* text accompanying note 34.

75. 3 U.S. (3 Dall.) at 390; *see supra* text accompanying note 34.

76. 164 CONG. REC. H1291 (daily ed. Feb. 27, 2018) (statement of Rep. Roby) (emphasis added).

77. *Id.* (statement of Rep. Jackson Lee) (emphasis added).

78. *Id.* at H1294 (statement of Rep. Wagner) (emphases added).

79. *Id.* at H1295 (statement of Rep. Maloney) (emphases added).

80. 164 CONG. REC. S1851 (daily ed. Mar. 21, 2018) (statement of Sen. Blumenthal) (emphases added).

81. *Id.* at S1854 (statement of Sen. McCaskill) (emphasis added).

82. *Id.* at S1855 (statement of Sen. Portman) (emphasis added).

prosecuted for third-party content,<sup>83</sup> and *after* FOSTA's enactment, they can be.<sup>84</sup>

### III. CONCLUSION

FOSTA is a step in the right direction, from an anti-trafficking standpoint; it is sure to produce robust prosecutorial results. FOSTA has given state prosecutors the legal authority they need to prosecute bad actor websites, which they could not do before its passage. FOSTA created new criminal liability. However, allowing prosecution to be retroactive—*before, on, or after*—makes conduct performed prior to the law's passage punishable when it was previously not. Retroactive prosecution disallows the notice that the Constitution requires. Retroactive prosecution “impose[s] a punishment for an act which was not punishable at the time it was committed . . . .”<sup>85</sup> Retroactive prosecution is exactly what the Ex Post Facto Clause prohibits.<sup>86</sup>

If states could have previously prosecuted bad actor websites, FOSTA would have been wholly unnecessary. If state prosecutors attempt to enforce FOSTA against bad actor websites, whose conduct occurred *prior* to FOSTA's passage, defendants with standing<sup>87</sup> will have a valid argument for challenging the retroactivity the statute allows. Perception is reality for the myriad internet companies that relied upon court interpretations of § 230. The government cannot have its cake and eat it too; states may prosecute bad actor websites conducting business

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83. See, e.g., 164 CONG. REC. H1291 (daily ed. Feb. 27, 2018) (statement of Rep. Roby) (“Thanks to broad interpretation of existing law, specifically section 230 in America's courts, [bad actor] websites are, essentially, immune from State and local prosecutions.”).

84. See, e.g., *id.* at H1294 (statement of Rep. Wagner).

85. Boyd Letter, DOJ, *supra* note 46 (quoting *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 325–26 (1867)).

86. See ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 516 (5th ed. 2015) (citing *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390 (1798)).

87. The Woodhull Freedom Foundation and the Electronic Frontier Foundation (“EFF”), among others, are currently appealing dismissal (for lack of standing) of a suit it filed challenging FOSTA on several constitutional grounds, including ex post facto grounds. *Woodhull Freedom Found. v. United States*, 334 F. Supp. 3d 185 (2018), *rev'd*, 948 F.3d 363 (D.C. Cir. 2020); see also Anna Windemuth, *The First Challenge to FOSTA Was Dismissed—Along with the First Amendment's Unique Standing Doctrine*, YALE L. SCH.: MEDIA FREEDOM & INFO. ACCESS CLINIC (Dec. 27, 2018), <https://law.yale.edu/mfia/case-disclosed/first-challenge-fosta-was-dismissed-along-first-amendments-unique-standing-doctrine> (assessing the Woodhull/EFF case's standing issue in a First Amendment context); see also, e.g., Brodtkin, *supra* note 30 (discussing the censorship aspect of the Woodhull/EFF case); Melissa Gira Grant, *Broad Anti-Trafficking Law Faces Its First Constitutional Challenge*, APPEAL (June 28, 2018), <https://theappeal.org/broad-anti-trafficking-law-faces-its-first-constitutional-challenge/> (arguing that the language in FOSTA is vague).

in a manner that violates FOSTA going forward, but the judicial interpretations that blocked prosecution in the past created reliance by internet providers. That reliance will be the death knell of FOSTA's §§ 4 and 7 if prosecutors use FOSTA to prosecute infractions committed before FOSTA's passage.

Consequently, if challengers combine the *ex post facto* issue with opposition on First Amendment grounds, which is a key issue for those opposing FOSTA, the Court may be reluctant to commit the sins of the past and only invalidate portions of a law that was not carefully drafted. The Court may instead strike the statute altogether, sending Congress back to the drawing board. Although FOSTA had considerable Congressional support at its time of passage, there is no way to gauge whether it could garner a sufficient level of support the second time around,<sup>88</sup> and whether the law could be re-written effectively to remedy the issues for which the Court may reject it. Performing triage on a flawed law is a delicate effort requiring foresight and careful consideration, neither of which Congress, thus far, has demonstrated in relation to this amendment.

Despite the potential challenges involved with congressional action, Congress should work to proactively amend and correct the language in §§ 4 and 7, *before* a challenge makes its way through the courts. Alternatively, if Congress does not act to amend the language, local and state prosecutors should avoid prosecuting bad-actor websites for conduct committed prior to FOSTA's passage, lest the prosecutors give those defendants standing.

While Congress intended to give victims justice, it overstepped its authority and created a situation in which justice may not manifest. Victims have access to a form of redress: they may utilize FOSTA's new civil remedies to sue for acts committed prior to the passage of FOSTA, since the *ex post facto* prohibition does not apply to civil suits.<sup>89</sup> Use civil remedies to receive a measure of justice. And let FOSTA do the work it was intended to do going forward, not looking backward.

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88. WHITE HOUSE, *supra* note 28. President Trump acknowledged the challenges lawmakers encountered passing the FOSTA legislation, even though it had significant bipartisan support. *Id.*

89. See CHEMERINSKY, *supra* note 86, at 511 (citation omitted) (“[T]he Supreme Court ruled that the *ex post facto* clauses do not invalidate civil legislation.”).