CRACKING THE COMMUNICATIONS DECENCY ACT: CIVIL RELIEF FOR SEX TRAFFICKING VICTIMS AND THE BATTLE TO HOLD BIG TECH LIABLE

ABSTRACT

As technology constantly changes, the law struggles to keep up. One such criticized law is 47 U.S.C. § 230, also known as the Communications Decency Act (the "CDA"). The statute, created in 1996, grants civil immunity to "interactive computer service providers" so long as they demonstrate a good faith effort to restrict obscene material from their websites. The law was never intended to provide legal protection to websites that unlawfully promote, facilitate, and advertise sex trafficking. Yet two decades later, Big Tech continues to avoid accountability by hiding behind this law. In fact, most suits die before ever reaching discovery. Recently, however, some online sex trafficking victims who brought suits against the internet platform that hosted their exploitation have successfully overcome the motion to dismiss phase. But the suit's outcome depends on which level of knowledge the CDA requires victims to plead. If actual knowledge is required, victims must plausibly allege that the platform knew of the trafficking and received a material benefit from the exploitation. But if constructive knowledge is required, victims must only plausibly allege that the platform should have known of the trafficking and should have known that it would receive material benefit from the exploitation. This Note explores the CDA's language and legislative history, analyzes various approaches adopted by the lower courts, and recommends that future cases should be decided under the constructive knowledge pleading standard instead of the more stringent actual knowledge pleading standard.

I. THE HISTORY OF THE COMMUNICATIONS DECENCY ACT

The creation of the World Wide Web in 1989 revolutionized the history of communication.[1] For decades, the internet was mainly used by government groups and scientists, but in 1995, consumers gained commercial internet access for the first time.[2] And for years after that, the internet expanded virtually unregulated.[3] There were several obstacles to government regulation, most notably jurisdictional problems.[4] Because

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[1] Max Roser, *The Internet's History Has Just Begun*, OUR WORLD IN DATA (Oct. 3, 2018), https://ourworldindata.org/internet-history-just-begun.

[2] *History of the Internet*, PLUSNET, https://www.plus.net/broadband/discover/history-of-the-internet/ (last visited Aug. 29, 2022).

[3] Navneet Alang, *Welcome to the Last Days of the Unregulated Internet*, GLOBE & MAIL (May 15, 2014), https://www.theglobeandmail.com/technology/digital-culture/welcome-to-the-last-days-of-the-unregulated-internet/article18661001/.

[4] *See What Are Some of the Laws Regarding Internet and Data Security?*, KASPERSKY,

the internet spanned across national borders, enforcement of any regulations posed a major roadblock. But that did not stop many plaintiffs from filing claims against interactive computer service providers ("ICSPs")[5] who were believed to be responsible for committing torts such as defamation and libel.[6]

According to tort law, defamation is the act of harming someone else's reputation by making a statement to a third party.[7] Libel is defamation transmitted via a permanent form of communication such as a writing or an electronic broadcast.[8] To plead a prima facie case of libel, a plaintiff first must demonstrate that the defamatory information was communicated to a third party.[9] Although the most culpable party is obviously the person who authored the harmful remarks, publishers of the remarks could also be liable. Traditional libel defendants included newspapers, radio or television stations, or individual citizens.[10] However, mere distributors—like newsstands, bookstores, and libraries—were not liable for defamation under the theory that they did not draft or edit any information prior to distribution.[11] Yet, the internet created a new problem: who could be held liable for defamatory posts, especially by anonymous users, published on the World Wide Web?

The initial cases addressing this issue arose between 1991 and 1995, prior to the adoption of any statutory regulations. The first reported federal district decision was *Cubby v. CompuServe*.[12] In *Cubby*, the plaintiff claimed that he was libeled in a publication called "Rumorville,"

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https://www.kaspersky.com/resource-center/preemptive-safety/internet-laws (last visited Oct. 27, 2022).

[5] ICSPs are any information services, systems, or access software providers that provide or enable computer access. *See* 47 U.S.C. § 230(f)(2). Common examples include social media platforms (e.g., Facebook and Instagram), messaging systems (e.g., WhatsApp and Kik), search engines (e.g., Google and Yahoo!), or digital marketplaces (e.g., Craigslist and Amazon). KATHLEEN ANN RUANE, CONG. RSCH. SERV., LSB10082, HOW BROAD A SHIELD? A BRIEF OVERVIEW OF SECTION 230 OF THE COMMUNICATIONS DECENCY ACT 2 (2018).

[6] *See, e.g.*, Cubby, Inc. v. CompuServe, Inc., 776 F. Supp. 135, 137 (S.D.N.Y. 1991); Stratton Oakmont v. Prodigy Servs. Co., No. 31063/94, 1995 N.Y. Misc. LEXIS 229, at *2 (Sup. Ct. May 24, 1995); Zeran v. Am. Online, Inc., 129 F.3d 327, 328 (4th Cir. 1997).

[7] RESTATEMENT (SECOND) OF TORTS § 559 (AM. L. INST. 1977) ("A communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.").

[8] RESTATEMENT (SECOND) OF TORTS § 568 (AM. L. INST. 1977) ("Libel consists of the publication of defamatory matter by written or printed words, by its embodiment in physical form or by any other form of communication that has the potentially harmful qualities characteristic of written or printed words.").

[9] RESTATEMENT OF TORTS § 577 cmt. a (AM. L. INST. 1938) ("A publication of the defamatory matter is essential to liability (see § 558). Any act whereby the defamatory matter is intentionally or negligently communicated to a third person is a publication.").

[10] *See* RESTATEMENT (SECOND) OF TORTS § 568 cmt. d (AM. L. INST. 1977).

[11] Cubby, Inc. v. Compuserve, Inc., 776 F. Supp. 135, 139 (S.D.N.Y. 1991).

[12] *Id.* at 138.

a daily newsletter carried by CompuServe's database but written and edited by another party.[13] The court held that CompuServe exercised "little or no editorial control" over Rumorville's content, so it would not be held liable as a publisher.[14] Equating CompuServe to an "electronic, for-profit library," the court noted that although CompuServe could decline to carry certain publications, once it accepted, it had no control over the publications' contents.[15] This conclusion implied that ICSPs must exercise direct editorial control to be held liable for online defamation.

Four years later, in *Stratton Oakmont v. Prodigy Services*, Prodigy—an ICSP—was faced with a libel suit when an anonymous visitor allegedly posted defamatory remarks on an online bulletin board.[16] The court, following the guidelines set forth in *Cubby*, found that Prodigy was "an online service that exercised editorial control over the content of messages posted on its computer bulletin boards."[17] By engaging in editorial conduct, Prodigy had "expressly liken[ed] itself to a newspaper" and could be deemed a publisher for defamation purposes.[18] Additionally, the court relied upon evidence that Prodigy used screening software to check postings for offensive language and appointed "Board Leaders" to enforce content guidelines.[19] Although the court acknowledged that some ICSPs can function as a "library," Prodigy's policies, technology, and staffing decisions mandated a publisher finding.[20]

After *Stratton Oakmont*, ICSPs had no incentive to remove obscene or libelous material from their databases.[21] If any good faith attempt were made to inspect content prior to publication, the online service provider risked liability for any offensive material that it missed.[22] To address this problem, Congress passed the Communications Decency Act ("CDA") in 1996.[23] Included within the CDA is a "Good Samaritan Provision"

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[13] *Id.* at 137.

[14] *Id.* at 140 ("While CompuServe may decline to carry a given publication altogether, in reality, once it does decide to carry a publication, it will have little or no editorial control over that publication's contents. This is especially so when CompuServe carries the publication as part of a forum that is managed by a company unrelated to CompuServe.").

[15] *Id.*

[16] Stratton Oakmont v. Prodigy Servs. Co., No. 31063/94, 1995 N.Y. Misc. LEXIS 229 at *3 (Sup. Ct. May 24, 1995).

[17] *Id.*

[18] *Id.* at *4.

[19] *Id.* at *10.

[20] *Id.* at *13.

[21] Mark Stepanyuk, *Stratton Oakmont v. Prodigy Services: The Case that Spawned Section 230*, WASH. J.L., TECH. & ARTS (Feb. 18, 2022), https://wjlta.com/2022/02/18/stratton-oakmont-v-prodigy-services-the-case-that-spawned-section-230/.

[22] *See* Conor Clarke, *How the Wolf of Wall Street Created the Internet*, SLATE (Jan. 7, 2014, 4:29 PM), https://slate.com/news-and-politics/2014/01/the-wolf-of-wall-street-and-the-stratton-oakmont-ruling-that-helped-write-the-rules-for-the-internet.html.

[23] The CDA, now codified as 47 U.S.C. § 230, was enacted as part of Chapter V (47 U.S.C. (§§ 151–646) of the Telecommunications Act of 1996.

designed to dissuade ICSPs from censoring online speech by assuring ICSPs that they will not be held liable for the content of posts made by third-parties.[24] Specifically, this section shields all ICSPs from liability for "any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected."[25] Additionally, it guarantees that "[n]o 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."[26]

Presumably, the statute settled whether ICSPs were publishers or editors. Congress encouraged online providers to voluntarily self-regulate without fear that they would be held accountable for any obscenity or defamation that inadvertently surfaced.[27] Although this may have solved Congress's goal of promoting "political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity" over the internet,[28] it created a new issue. Granting broad-sweeping immunity to all ICSPs seems at odds with the Congressional objective of deterring and punishing child pornography, indecency, and patently offensive speech.[29] Although no provision in the CDA suggests that it should be construed to impair or limit sex trafficking laws, the Good Samaritan Protection provides a significant exception for ICSPs.[30] Just one year after Congress passed the CDA, litigation ensued, resulting in the Supreme Court's 1997 decision of *Reno v. ACLU*.[31]

In that case, the plaintiff challenged the constitutionality of the CDA's prohibition on transmitting "indecent" and "patently offensive" materials to those under eighteen years old.[32] The Court agreed, concluding that the statute was overbroad and violated the First Amendment.[33] Although Congress aimed to curb pornography, the plain language of the statute did not further this interest. The Court reasoned that even though *obscenity* receives no First Amendment protection, "*indecency* has not been defined to exclude works of serious literary, artistic, political[,] or scientific value."[34] Finally, the Court declared that

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[24] 47 U.S.C. § 230(c) (1996).
[25] § 230(c)(2)(A).
[26] § 230(c)(1).
[27] Zeran v. Am. Online, Inc., 129 F.3d 327, 331 (4th Cir. 1997).
[28] § 230(a)(3).
[29] 47 U.S.C. § 223(d)(1)(B) (1996).
[30] 47 U.S.C. § 223(e)(5)(A)–(B).
[31] Reno v. ACLU, 521 U.S. 844, 861 (1997).
[32] § 223(a)(1)(B)(ii), (d)(1)(B) (1996).
[33] *Reno*, 521 U.S. at 864.
[34] *Id.* at 862 (emphasis added).

the internet deserved the highest First Amendment protection.[35] In doing so, the Court commended Congress for trying to protect minors from harmful online material, but ultimately decided that the potential restrictions on free speech outweighed.[36] The Court worried that serious discussion about birth control practices, homosexuality, or the consequences of prison rape across the internet would violate the CDA if anyone found the material "indecent" or "patently offensive."[37] The vagueness of such language could have a chilling effect on free speech that could cause speakers to "remain silent rather than communicate even arguably unlawful words, ideas, and images."[38]

In response to *Reno v. ACLU*, in 1998, Congress passed a different statute: the Child Online Protection Act ("COPA"),[39] which made it a crime to knowingly communicate "for commercial purposes . . . to any minor" material that is "harmful to minors."[40] The statute has since been struck down, but like the CDA, COPA included an immunity provision for ICSPs.[41] Over the next two decades, the legislature and judiciary struggled back and forth to balance the protection of children against the freedom of speech.[42]

In the late 1990s and the early 2000s, it was much easier to balance these concerns because of the internet's limited development. Filtering software was plausible, less restrictive, and available as an alternative means to banning the transmission of certain undefined materials over the internet.[43] Filters seemed like the best compromise to protect children from viewing harmful material while allowing adults to exchange unfettered information. Thus, granting immunity to ICSPs as mere hosts—instead of editors—of information made sense.

But as the internet has evolved, a new era of harmed children has arisen *because of* ICSP immunity.[44] Guaranteeing the "right" to transmit pornography over the internet is not without costs. Freedom of speech for some puts the safety, reputation, and livelihood of others at risk. Several issues have arisen. If the courts cannot protect children from *viewing*

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[35] *Id.* at 863.

[36] *Id.* at 870–72, 874.

[37] *Id.* at 871.

[38] *Id.* at 872.

[39] Child Online Protection Act, Pub. L. No. 105-277, tit. XIV, sec. 1403, § 231, 112 Stat. 2681-1, 2681-736 (codified as amended at 47 U.S.C. § 231), *invalidated by* Ashcroft v. ACLU, 542 U.S. 656, 660 (2004) (holding that COPA violated the First Amendment).

[40] 47 U.S.C. § 231(a)(1).

[41] § 231(b).

[42] *See* Alan E. Garfield, *Protecting Children from Speech*, 57 FLA. L. REV. 565, 570 (2005).

[43] *Ashcroft*, 542 U.S. at 666–67.

[44] Bruce Reed & James P. Steyer, *Why Section 230 Hurts Kids, and What to Do About It*, PROTOCOL (Dec. 8, 2020), https://www.protocol.com/why-section-230-hurts-kids.

harmful material, can it protect children—or adults—who are the *subject* of such harmful materials? Although distributing adult pornography is not a crime,[45] distribution of child pornography is.[46] However, in the age of anonymous internet posts where identifying the perpetrators can be a near impossible task, should ICSPs share liability for allowing such material to be posted and distributed on their platforms? What is a "good faith attempt" to restrict access to such materials? Are algorithms designed to block trafficking hashtags and user-reports enough? What if the ICSP is well aware that its platform is being used to buy and sell human beings? What if the ICSP receives a financial benefit, by ad revenue or page popularity, from downloads of child pornography? What if ICSPs are not active trafficking participants but passive beneficiaries? Should mere algorithms and user-reports still shield them from civil liability under such circumstances?

This Note attempts to answer these questions by exploring cases over the last two decades in which civil liability was imposed on ICSPs for hosting human trafficking on their websites. First, this Note explains key statutes necessary to understand the CDA's progress. Next, this Note explores how courts have ruled on cases brought by trafficking victims against non-internet businesses. Then, this Note discusses how the precedent set in those cases has influenced the district courts' decisions when it comes to ICSPs. Finally, this Note recommends that future courts should adopt the least restrictive pleadings standard to give victims their day in court and hold culpable parties accountable.

II. STATUTORY BACKGROUND: KEY LEGISLATION

Before exploring the cases, it is important to first understand some key pieces of legislation that influenced those decisions. Specifically, there are four statutes that factor into every court's decision: § 230 of the CDA ("§ 230"),[47] the Victims of Trafficking and Violence Protection Act ("§ 1591"),[48] the Trafficking Victims Protection Reauthorization Act ("§ 1595"),[49] and the Allow States and Victims to Fight Online Sex Trafficking Act ("FOSTA").[50]

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[45] Miller v. California, 413 U.S. 15, 27 (1973) (holding that the distribution of pornography will not be prosecuted unless it depicts "patently offensive 'hard core' sexual conduct").

[46] New York v. Ferber, 458 U.S. 747, 764 (1982).

[47] 47 U.S.C. § 230.

[48] Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, sec. 112, § 1591, 114 Stat. 1464, 1487 (codified as amended at 18 U.S.C. § 1591).

[49] Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, § 1595, 117 Stat. 2875, 2878 (codified as amended at 18 U.S.C. § 1595).

[50] Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. No. 115-164, § 2421A, 132 Stat. 1253, 1253 (codified as amended at 18 U.S.C. § 2421A).

A. The Communications Decency Act and Section 230

Section 230 of the CDA is the biggest barrier for trafficking victims seeking redress against the internet platforms that hosted their nonconsensual images and videos. Even though the CDA seeks to "ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer,"[51] it also states that the CDA is to have "no effect on sex trafficking law."[52] "Nothing within this section"—other than the Good Samaritan Protection—should "be construed to impair or limit . . . any civil claim . . . brought under Section1595" so long as the conduct "constitutes a violation of Section 1591."[53] But in the age of cyber-sex trafficking, the Good Samaritan Protection does more harm than good. Those immunized from civil liability include "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service"[54] so long as that person or entity acts in good faith to restrict access to materials that are "obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable."[55] Thus, the Good Samaritan Protection functionally renders everything else in § 230 moot. As such, the statute protects only "traditional" sex trafficking victims, leaving those who have been defamed, exploited, and abused over the internet without a civil remedy.

B. Protections for "Traditional" Trafficking Victims

1. Criminal Law: Victims of Trafficking and Violence Protection Act (§ 1591)

In 2000, Congress passed the Victims of Trafficking and Violence Protection Act, now codified as 18 U.S.C. § 1591.[56] Although § 1591 is a criminal statute, to bring a civil claim under CDA § 230, the conduct underlying the § 230 claim must constitute a violation of § 1591.[57] Section 1591 contains two important provisions. The first provision—(a)(1)—discusses *direct liability*. It reads in relevant part:

> Whoever knowingly . . . recruits, entices, harbors, transports, provides, obtains, advertises, maintains,

[51] § 230(b)(5).
[52] § 230(e)(5).
[53] § 230(e)(5)(A).
[54] § 230(f)(3).
[55] § 230(c)(2)(A).
[56] Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, sec. 112, § 1591, 114 Stat. 1464, 1487 (codified as amended at 18 U.S.C. § 1591).
[57] § 230(e)(5)(A).

> patronizes, or solicits by any means a person . . . or . . . [acts] in reckless disregard of the fact that means of force, threats of force, fraud, or coercion . . . cause[d] the person to engage in a commercial sex act, or that the person has not attained the age of 18 years . . . shall be punished . . . .[58]

The second provision—(a)(2)—discusses *beneficiary liability*:

> Whoever knowingly . . . benefits, financially or by receiving anything of value, from participation in a venture which has engaged in an act described in violation of [(a)](1) . . . or [acts] in reckless disregard of the fact that means of force, threats of force, fraud, or coercion . . . cause[d] the person to engage in a commercial sex act, or that the person has not attained the age of 18 years . . . shall be punished . . . .[59]

In 2018, Congress amended § 1591 by adding a subsection to define "participation in a venture" to mean any group of two or more individuals, associated in fact who knowingly assist, support, or facilitate sex trafficking.[60] In some districts, those who are liable under a direct liability theory are known as "primary violators," and those who are liable under a beneficiary liability theory are known as "secondary participants."[61]

Although § 1591 has always criminalized knowingly "recruit[ing], entic[ing], harbor[ing], transport[ing], provid[ing], or obtain[ing] [a person] by any means,"[62] it was not until 2015 that the statute also criminalized knowingly advertising or soliciting a person.[63] This is especially important in the age of the internet. Equally important is the criminalization of third parties who knowingly benefited from participating in a venture related to human trafficking.[64] Anyone found guilty of violating § 1591 faces a fine and imprisonment for at least ten years to life.[65]

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[58] 18 U.S.C. § 1591(a)(1).

[59] § 1591(a)(2).

[60] Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. No. 115-164, sec. 5, § 1591(e)(4), 132 Stat. 1253, 1255 (codified as amended at 18 U.S.C. § 1591(e)).

[61] *See, e.g.*, Doe v. Twitter, Inc., 555 F. Supp. 3d 889, 901 (N.D. Cal. 2021).

[62] Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, sec. 112, § 1591, 114 Stat. 1464, 1487 (codified as amended at 18 U.S.C. § 1591).

[63] Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22, tit. I, sec. 109, § 1591, 129 Stat. 227, 239 (codified as amended at 18 U.S.C. 1591(a)(1)–(2)).

[64] § 1591(a)(2).

[65] § 1591(b)(2); *see also* § 1591(b)(1) ("The punishment for an offense under subsection (a) is . . . by fine under this title and imprisonment for any term of years not less than 15 or

2. Civil Law: Trafficking Victims Protection Reauthorization Act (§ 1595)

Clearly, a sex trafficking perpetrator can be federally prosecuted under § 1591. But in the modern era, with millions of anonymous online users and the Good Samaritan Protection, sex trafficking victims struggle to receive monetary relief for the trauma they have endured. In 2003, Congress passed the Trafficking Victims Protection Reauthorization Act, now codified as 18 U.S.C. § 1595, to allow victims of trafficking to bring a civil action against their perpetrators.[66] It reads in relevant part:

> An individual who is a [trafficking] victim . . . may bring a civil action against the perpetrator (or whoever knowingly benefits, financially or by receiving anything of value from participation in a venture which that person knew or should have known has engaged in [sex trafficking]) . . . and may recover damages and reasonable attorney fees.[67]

If all the elements of the criminal statute—§ 1591—are met, a trafficking victim can bring a civil action under § 1595 against her perpetrator for direct liability or against a third party for beneficiary liability. There are many similarities between the criminal statute and the civil statute, but the biggest—and most hotly debated—difference comes from the statute's knowledge requirement.[68]

Before 2008, a sex trafficking victim could only recover damages under a theory of direct liability, meaning that the defendant must have had actual knowledge of the trafficking.[69] However, in 2008, Congress amended the statute to allow victims to recover under a theory of beneficiary liability.[70] By adding the words "should have known" to the statute, the victim may now recover by demonstrating that the defendant only had constructive knowledge of the trafficking or received something

for life . . . .").

[66] Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, 117 Stat. 2875, 2878 (codified as amended at 18 U.S.C. § 1595).

[67] 18 U.S.C. § 1595(a). *Compare* § 1595(a) (2003) ("An individual who is a victim of a violation of section 1589, 1590, or *1591* of this chapter may bring a civil action against the perpetrator") (emphasis added), *with* § 1595(a) (2022) ("An individual who is a victim . . . of this chapter may bring a civil action against the perpetrator . . .").

[68] § 1595(a) (providing a civil remedy against those who "should have known" they were violating the law).

[69] *See* Trafficking Victims Protection Reauthorization Act § 1595. Most victims do not know their perpetrators, and most victims do not know who posted their photos and/or videos online. Thus, their only form of recourse would be to sue the platform that allowed their photos and/or videos to be posted on its website.

[70] William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. 110-457, tit. II, sec. 221(1), § 1595(a)(ii), 122 Stat. 5044, 5067 (2008) (codified as amended at 18 U.S.C. § 1591).

of value from its participation in the venture.[71] This amendment relaxed the *mens rea* requirement so that victims now must only plead that the defendant possessed *either* actual *or* constructive knowledge to survive a motion to dismiss.[72]

C. The Fight Online Sex Trafficking Act (FOSTA)

Despite the strides Congress has made to help "traditional" trafficking victims, cyber sex victims remained categorically excluded from receiving monetary relief from profiting third parties regardless of § 1591 and § 1595.[73] From 1996 to 2018, the Good Samaritan Protection of CDA § 230 forbade victims from holding ICSPs civilly liable even if an ICSP knowingly benefited financially from trafficking, participated in a venture with traffickers, or advertised and solicited victims.[74] The Fight Online Sex Trafficking Act ("FOSTA") of 2017 was enacted to extend protection to cyber victims.[75] The purpose of FOSTA was to clarify that CDA § 230 does not give absolute immunity to ICSPs.[76] Instead, any ICSP that "inten[ds] to promote or facilitate the prostitution of another person . . . [or] acts in reckless disregard of the fact that such conduct contributed to sex trafficking . . . shall be fined . . . [and/or] imprisoned."[77] Additionally, any person injured by prostitution or sex trafficking may "recover damages and reasonable attorneys' fees."[78] Lastly, the statute mandates restitution for any violation, in addition to other civil or criminal penalties authorized by law.[79] In fact, courts are required to order

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[71] *Id.* ("[W]hoever knowingly benefits, *financially* or *by receiving anything of value* from participation in a venture which that person knew or *should have known* has engaged in [trafficking]" (emphasis added)).

[72] *See id.*

[73] *See, e.g.*, Jane Doe No. 1 v. Backpage.com, LLC, 817 F.3d 12, 39 (1st Cir. 2016) (holding that the appellant was not entitled to relief because when Congress "enacted the CDA . . . it chose to grant broad protections to internet publishers").

[74] *Compare* 47 U.S.C. § 230 (providing immunity for internet service providers), *with* Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. No. 115-164, sec. 3, § 2421A, 132 Stat. 1253, 1253 (codified as amended at 18 U.S.C. § 1591) (allowing victims to file suit against internet service providers that host sex trafficking content on their websites), *and* 18 U.S.C. § 1595(a) ("[A] victim . . . may bring a civil action against the perpetrator (or whoever knowingly benefits, financially[,] or by receiving anything of value from participation in a venture which that person knew or should have known has engaged in a [trafficking-related] act . . . .)").

[75] Allow States and Victims to Fight Online Sex Trafficking Act § 2421A.

[76] Jeffrey Neuburger, *FOSTA Signed into Law, Amends CDA Section 230 to Allow Enforcement Against Online Providers for Knowingly Facilitating Sex Trafficking*, NEW MEDIA & TECH. L BLOG (Apr. 11, 2018), https://newmedialaw.proskauer.com/2018/04/11/fosta-signed-into-law-amends-cda-section-230-to-allow-enforcement-against-online-providers-for-knowingly-facilitating-sex-trafficking/.

[77] 18 U.S.C. § 2421A(b), (b)(2).

[78] § 2421A(c).

[79] § 2421A(d) ("[I]n addition to any other civil or criminal penalties authorized by law,

restitution if any party acts in reckless disregard of the fact that its conduct contributed to sex trafficking.[80]

Although FOSTA should make it easier for cyber sex victims to obtain a civil remedy from ICSPs, only a handful of plaintiffs have successfully been able to progress past the pleadings stage.[81] In the last decade, every time a trafficking victim has tried to hold an ICSP civilly liable, the ICSP argues immunity under CDA § 230,[82] and that the case should be dismissed under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted.[83] The claimants' success primarily depends on how the courts will interpret FOSTA in light of §§ 230, 1591, and 1595. But before discussing how courts have interpreted those provisions, it is important to understand why conflicting interpretations exist.

III. PARALLEL CASES: NON-ICSP DEFENDANTS

Before addressing the fact that CDA § 230 provides immunity to ICSPs, courts have looked to other third-party beneficiary cases to answer the preliminary question of whether the claim pled by the plaintiff is plausible.[84] A series of cases (the "Hotel Cases") in which sex trafficking victims have sought to impose civil liability against certain hotel chains for their constructive knowledge of the victims' abuse sheds light on the pleading requirements for the same claims in other contexts.[85] In the Hotel Cases, courts have analyzed three factors to determine whether

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the court shall order restitution for any violation of [this statute].").

[80] *Id.*

[81] *Compare* Jane Doe No. 1 v. Backpage.com, LLC, 817 F.3d 12, 21 (1st Cir. 2016) ("[C]ourts have rejected claims that attempt to hold website operators liable for failing to provide sufficient protections to users from harmful content created by others."), *and* Doe v. MySpace, Inc., 528 F.3d 413, 422 (5th Cir. 2008) (holding that the plaintiff's claims against MySpace are barred by the CDA), *and* M.A. v. Wyndham Hotels & Resorts, Inc., 425 F. Supp. 3d 959, 964 (S.D. Ohio 2019) (finding that the plaintiff's allegations were sufficient to show she was a victim of sex trafficking under the TVPRA), *with* Doe v. Mindgeek USA, Inc., 558 F. Supp. 3d 828, 840 (C.D. Cal. 2021) (denying an ICSP's motion to dismiss when the plaintiff successfully alleged that the defendant (1) knowingly participated in a venture, (2) benefitted from its participation, and (3) knew or should have known that plaintiffs were victims of sex trafficking).

[82] *See, e.g.*, Doe v. Twitter, Inc., 555 F. Supp. 3d 889, 925–26 (N.D. Cal. 2021); J.B. v. G6 Hosp., LLC, No. 19-CV-07848, slip op. at 4 (N.D. Cal. Sept. 8, 2021); Doe v. Kik Interactive, Inc., 482 F. Supp. 3d 1242, 1247 (S.D. Fla. 2020).

[83] *Kik Interactive*, 482 F. Supp. 3d at 1251; *see* M.H. v. Omegle.com, LLC, No. 8:21-CV-814-VMC-TGW, slip op. at 7 (M.D. Fla. Jan. 10, 2022).

[84] Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009).

[85] A.B. v. Hilton Worldwide Holdings, Inc., 484 F. Supp. 3d 921, 936 (D. Or. 2020); *M.A.*, 425 F. Supp. 3d at 970; A.B. v. Marriott Int'l, Inc., 455 F. Supp. 3d 171, 187 (E.D. Pa. 2020); B.M. v. Wyndham Hotels & Resorts, Inc., No. 20-CV-00656-BLF, 2020 WL 4368214, at *4 (N.D. Cal. July 30, 2020).

third-party defendants have beneficiary liability.[86] First, courts have considered whether plaintiffs must plead the defendant's actual or constructive knowledge of the trafficking.[87] Second, courts have considered what must be alleged to show that the defendant participated in a "venture."[88] Lastly, courts have considered what must be alleged to show that the defendant received some benefit from the trafficking venture and that such benefit motivated its conduct.[89]

A. The Plausibility Standard and Failure to State a Claim

At the pleading stage, a complaint must contain a short and plain statement of the claim showing that the plaintiff is entitled to relief.[90] A court must review a complaint in the light most favorable to the plaintiff, and it must generally accept the plaintiff's well-pleaded facts as true.[91] Although Federal Rule of Civil Procedure 8(a) does not require "detailed factual allegations," it requires more than conclusory allegations, unwarranted deductions of facts, or legal conclusions masquerading as facts.[92] "A formulaic recitation of the elements of a cause of action" is also insufficient.[93] If a plaintiff does not meet these requirements, the defendant can file a Rule 12(b)(6) motion to dismiss for failure to state a plausible claim upon which relief can be granted.[94] To survive this motion, the plaintiff must present factual allegations that "raise a right to relief above the speculative level"[95] and are sufficient to state a claim for relief that is "plausible on its face."[96] "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."[97] The mere possibility the defendant acted unlawfully is insufficient to survive a motion to dismiss.

In the Hotel Cases, to survive a motion to dismiss, the courts held that the plaintiff must plead that the third-party defendant had the requisite *mens rea*, participated in the sex trafficking venture, and

[86] *E.g.*, *M.A.*, 425 F. Supp. 3d at 964; *A.B.*, 455 F. Supp. 3d at 181.

[87] *See M.A.*, 425 F. Supp. 3d at 965; C.S. v. Wyndham Hotels & Resorts, Inc., 538 F. Supp. 3d 1284, 1295 (M.D. Fla. 2021); S.Y. v. Naples Hotel, LLC, 476 F. Supp. 3d 1251, 1256 (M.D. Fla. 2020).

[88] *See* E.S. v. Best W. Int'l, Inc., 510 F. Supp. 3d 420, 426 (N.D. Tex. 2021); J.L. v. Best W. Int'l, Inc., 521 F. Supp. 3d 1048, 1060 (D. Colo. 2021).

[89] *See J.L.,* 521 F. Supp. 3d at 1060–61; *S.Y.,* 476 F. Supp. 3d at 1256.

[90] *A.B.*, 484 F. Supp. 3d at 943.

[91] Hishon v. King & Spalding, 467 U.S. 69, 73 (1984).

[92] Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) ("[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions.").

[93] Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007).

[94] FED. R. CIV. P. 12(b)(6).

[95] *Twombly*, 550 U.S. at 555.

[96] *Id.* at 570.

[97] *Iqbal*, 556 U.S. at 678.

financially benefited from the venture.[98] So long as the court believed that the assumed facts could lead to a reasonable inference that the defendants acted unlawfully, the case could proceed to discovery.

B. The Three Factor Test

To determine the appropriate pleadings requirement, courts analyze § 1591—the criminal statute focused solely on direct liability—and § 1595—the civil statute focused both on direct and beneficiary liability. While the criminal statute penalizes defendants who had *actual* knowledge of the sex trafficking,[99] the civil statute only penalizes defendants that had *constructive* knowledge of the trafficking.[100] Clearly, defendants try to persuade the court to apply the higher *mens rea* standard—actual knowledge, and plaintiffs try to persuade the court to apply the lower *mens rea* standard—constructive knowledge.[101] But the issue is much more nuanced than merely choosing one standard over the other. Rather, courts must decide whether plaintiffs must allege a violation of the criminal statute as a prerequisite to imposing civil liability.[102] Although § 1591 and § 1595 may seem straightforward, the passage of FOSTA[103] in 2017 complicates this analysis. The CDA states that ICSPs' immunity is abrogated in civil actions brought under § 1595 "if the conduct underlying the claim constitutes a violation of § 1591."[104] However, FOSTA states that ICSPs' immunity is abrogated when they (1) "conspire[] or attempt[] to do so with the intent to promote or facilitate prostitution" and (2) "act[] in reckless disregard of the fact that such conduct contributed to sex trafficking."[105] Wedding the CDA and FOSTA requires courts to decide if plaintiffs must allege intent *and* recklessness or whether alleging recklessness alone is sufficient to state a claim.

1. Mens Rea

In the Hotel Cases, courts emphasized that "the language of § 1591 differs from the language of § 1595" in that the former does not have a "constructive knowledge" element manifested by "should have known"

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[98] A.B. v. Hilton Worldwide Holdings, Inc., 484 F. Supp. 3d 921, 935 (D. Or. 2020); M.A. v. Wyndham Hotels & Resorts, Inc., 425 F. Supp. 3d 959, 964 (S.D. Ohio 2019); A.B. v. Marriott Int'l, Inc., 455 F. Supp. 3d 171, 181 (E.D. Pa. 2020); B.M. v. Wyndham Hotels & Resorts, Inc., No. 20-CV-00656-BLF, 2020 WL 4368214, at *4 (N.D. Cal. July 30, 2020).

[99] 18 U.S.C. § 1591(a).

[100] 18 U.S.C. § 1595(a).

[101] *See e.g.*, Doe v. Kik Interactive, Inc., 482 F. Supp. 3d 1242, 1250–51 (S.D. Fla. 2020).

[102] *See, e.g.*, *M.A.*, 425 F. Supp. 3d at 963; 47 U.S.C. § 230(e)(5)(A).

[103] Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. No. 115-164, § 2421A, 132 Stat. 1253 (codified as amended at 18 U.S.C. § 2421A).

[104] § 230(e)(5)(A).

[105] 18 U.S.C. § 2421A(a), (b)(2).

language.[106] In *M.A. v. Wyndham Hotels*, the plaintiff alleged that a hotel chain financially benefited from the rooms rented for her trafficking.[107] She further alleged that the hotel knew or should have known that trafficking was occurring there based on various signs that should have been obvious to hotel staff.[108] The court agreed with the plaintiff and held that the hotel chain benefited from the sex trafficking based on the rental of its rooms.[109] It further held that the plaintiff alleged sufficient facts to show that the hotel "knew or should have known" that the sex trafficking venture was occurring, applying the constructive knowledge requirement of § 1595 rather than the actual knowledge requirement under § 1591.[110] The court believed that the plaintiff provided facts specific to her own sex trafficking that should have been obvious to the hotel staff, as well as the fact that the hotel chain was "on notice about the prevalence of sex trafficking generally at their hotels and failed to take adequate steps to train staff in order to prevent its occurrence."[111]

2. Venture

The second factor required the courts to determine whether the hotels were participating in the sex trafficking "venture" by renting rooms to traffickers. "Participation in a venture" is defined by § 1591(e)(4) as "knowingly assisting, supporting, or facilitating" sex trafficking.[112] The plain language—knowingly—indicates a heightened state of mind. The Sixth Circuit has held that § 1591 requires defendants to actually "participate [in] . . . some 'overt act' that furthers the sex trafficking aspect of the venture."[113] Merely being "associated with the criminal venture"[114] for the purpose of "furthering the sex trafficking"[115] is not enough. Under this interpretation, a defendant cannot be criminalized for "mere negative acquiescence."[116]

However, other courts have held that the definition of "participation in a venture" under § 1591 should not bind the interpretation of "participation in a venture" under § 1595.[117] Although there is a natural

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[106] *M.A.*, 425 F. Supp. 3d at 969; S.Y. v. Naples Hotel, LLC, 476 F. Supp. 3d 1251, 1256 (M.D. Fla. 2020); A.B. v. Marriott Int'l, Inc., 455 F. Supp. 3d 171, 185 (E.D. Pa. 2020).

[107] *M.A.*, 425 F. Supp. 3d at 962.

[108] *Id.* at 965.

[109] *Id.*

[110] *Id.* at 971.

[111] *Id.* at 968.

[112] 18 U.S.C. § 1591(e)(4).

[113] United States v. Afyare, 632 F. App'x 272, 286 (6th Cir. 2016).

[114] *Id.* at 284 (emphasis omitted).

[115] *Id.* at 286.

[116] *Id.* at 282.

[117] M.A. v. Wyndham Hotels & Resorts, Inc., 425 F. Supp. 3d 959, 969 (S.D. Ohio 2019); H.H. v. G6 Hosp., LLC, No. 2:19-CV-755, 2019 WL 6682152, at *4 (S.D. Ohio Dec. 6, 2019);

presumption that identical words are intended to have the same meaning,[118] this presumption "readily yields whenever there is such variation in the connection in which the words are used as reasonably to warrant the conclusion that they were employed . . . with different intent."[119] Statutory language cannot be construed in a vacuum. Rather, the words of a statute must be read in their context and with a "view to their place in the overall statutory scheme."[120] Without considering the broader context, the "cardinal principle"[121] of statutory construction—that a statute ought to be construed so that "no clause, sentence, or word shall be superfluous, void, or insignificant"[122]—would be violated.

The language of § 1595 allows a sex trafficking victim to bring a civil action against anyone who knowingly benefited financially from participation in a venture which that person *knew or should have known* involved sex trafficking.[123] Thus, a defendant need not have actual knowledge of the trafficking to have participated in the venture. Rather, the defendant's constructive knowledge of the trafficking may be sufficient.[124] The text of § 1591 affirms this statutory interpretation by criminalizing some action taken with *less* than actual knowledge.[125] Directly following the beneficiary liability language, § 1591 notes that whoever acts "in *reckless disregard* of the fact, that . . . force, threats of force, fraud, [and/or] coercion . . . will be used to cause [a] person to engage in a commercial sex act . . . shall be punish[ed]."[126] Thus, requiring a plaintiff to plead that the defendant had actual knowledge of the sex trafficking venture would render the "should have known" language in § 1595 meaningless.[127]

As such, courts have started allowing plaintiffs to only allege the defendant's constructive knowledge in order to overcome a motion to dismiss.[128] To do this, the "[p]laintiff must allege at least a showing of a

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J.B. v. G6 Hosp., LLC, No. 19-CV-07848, slip op. at 14 (N.D. Cal. Sept. 8, 2021).

[118] Pereira v. Sessions, 138 S. Ct. 2105, 2115 (2018).

[119] Roberts v. Sea-Land Servs., 566 U.S. 93, 108 (2012).

[120] *Id.* (quoting Gilbert v. United States Olympic Comm., No. 18-CV-00981-CMA-MEH, 2019 WL 105819, at *11–12 (D. Colo. Mar. 6, 2019)).

[121] Iancu v. Brunetti, 139 S. Ct. 2294, 2318 (2019) (Sotomayor, J., concurring) (quoting NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 30 (1937)).

[122] *Id.* at 2309.

[123] 18 U.S.C. § 1595(a).

[124] *M.A.*, 425 F. Supp. 3d at 971; A.C. v. Red Roof Inns, Inc., No. 2:19-CV-4965, slip op. at 6 (S.D. Ohio June 16, 2020).

[125] 18 U.S.C. § 1591(a), (a)(2) ("Whoever knowingly [acts] . . . i*n reckless disregard* of the fact, that means of force, threats of force, fraud, coercion . . . will be used to cause the person to engage in a commercial sex act . . . shall be punished . . . .") (emphasis added).

[126] *Id.*

[127] *M.A.*, 425 F. Supp. 3d at 971.

[128] B.M. v. Wyndham Hotels & Resorts, Inc., No. 20-CV-00656-BLF, 2020 WL 4368214, at *4–5 (N.D. Cal. July 30, 2020); *A.C.*, slip op. at 4.

continuous business relationship between the trafficker and the hotels such that it would appear that the trafficker and the hotels have established a pattern of conduct or could be said to have a tacit agreement."[129] In the Hotel Cases, many courts decided that plaintiffs can meet their pleadings burden by alleging that the defendant rented rooms to people it knew or should have known were engaged in sex trafficking.[130]

3. Benefit

The last factor requires courts to consider what must be alleged to show that the defendant received a benefit from the sex trafficking venture. The trafficked plaintiff always alleges that the defendant hotel chains financially benefited from the room rentals. Although defendants argue that merely receiving revenue from room rentals cannot constitute a benefit,[131] most courts agree that § 1595 does not require the defendants to receive the benefit of *sexual services* to be held liable for what occurred.[132] Instead, defendants can be held liable for benefiting financially or by receiving *anything* of value.[133]

IV. TRAFFICKING VICTIMS V. ICSPS: A LOWER COURT SPLIT

Courts often use the Hotel Cases as a reference point when deciding whether to impose beneficiary liability on the ICSPs who are sued by trafficking victims. Cases involving hotel chains are easier to decide because third-party hotel defendants are not subject to statutory immunity. ICSPs, however, enjoy such immunity. There are three elements to a claim of immunity under the CDA.[134] The defendant must

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[129] *M.A.*, 425 F. Supp. 3d at 970; *see also* McGuire v. Lewis, No. 1:12-CV-986, 2014 WL 1276168, at *5 (S.D. Ohio Mar. 27, 2014) (finding allegations sufficient "to identify the individuals alleged to have conspired, to plausibly suggest some joint action among the individuals, and to explain how the purported joint action led to the alleged deprivation of [plaintiff's] rights . . . . [T]hey plausibly show a tacit agreement . . . .").

[130] Ricchio v. McLean, 853 F.3d 553, 556 (1st Cir. 2017); J.C. v. Choice Hotels Int'l, Inc., No. 20-CV-00155-WHO, slip op. at 5 (N.D. Cal. Oct. 28, 2020); *A.C.*, slip op. at 7; S.Y. v. Best W. Int'l, Inc., No. 2:20-CV-616-JES-MRM, slip op. at 4 (M.D. Fla. June 7, 2021); Doe S.W. v. Lorain-Elyria Motel, Inc., No. 2:19-CV-1194, 2020 WL 1244192, at *7 (S.D. Ohio Mar. 16, 2020).

[131] *E.g.*, *M.A.*, 425 F. Supp. 3d at 964.

[132] *Compare* Geiss v. Weinstein Co. Holdings, LLC, 383 F. Supp. 3d 156, 169 (S.D.N.Y. 2019) (holding that plaintiff must show that the trafficker provided benefits to defendants because of defendants' facilitation of the trafficker's sexual misconduct), *with* Gilbert v. U.S. Olympic Comm., 423 F. Supp. 3d 1112, 1137 (D. Colo. 2019) (holding that § 1595 liability does not require the defendant to benefit from the forced labor or services for liability to attach).

[133] 18 U.S.C. § 1595(a); *see Gilbert*, 423 F. Supp. 3d at 1136 (finding that the defendant had received a benefit through "collecting money through sponsorships, licensing, grants, publicity, for medals achieved at competitions, and for recruitment and training").

[134] FTC v. LeadClick Media, LLC, 838 F.3d 158, 173 (2d Cir. 2016).

plead that "(1) [it] is an [ICSP], (2) the claim is based on information provided by another information content provider, and (3) the claim would treat the defendant as the publisher or speaker of that information."[135] Although the elements remain the same, lower courts have reached opposite conclusions when determining whether the ICSP is entitled to immunity.

A. Doe v. Kik Interactive

In *Doe v. Kik Interactive*, the "[d]efendants own[ed] and operate[d] a web-based interactive service known as Kik."[136] The platform was "marketed to teenagers and young adults for purposes of sending messages to other users."[137] The plaintiffs alleged that there were multiple instances of adult Kik users "contact[ing] and solicit[ing] sexual activity with minors, with some . . . contacts resulting in death of the minors."[138] The minor plaintiff further alleged that the ICSP knew "that sexual predators used its service to prey on minors but . . . failed to provide warnings or enact policies to protect minors from such abuses."[139] The minor alleged that numerous adult male Kik users "solicited her and convinced her to take and send them sexually graphic pictures of herself using Kik," and that "these adult males sent her sexually explicit photographs via Kik."[140]

The minor alleged that Kik was a secondary participant and should be held liable for knowingly participating in ventures with traffickers.[141] She claimed that the ICSP violated § 1591 by "benefiting from[] and knowingly facilitating . . . the venture" in which the abusers used the online platform to subject the plaintiff to sex trafficking.[142] She also alleged that Kik knew or was in reckless disregard of the fact that her abusers utilized the platform to furnish harmful materials and subject her to sex trafficking yet continued to market the service to underage users without a sufficient warning or policies to protect them.[143]

Several federal circuits have interpreted the CDA to establish broad "federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service."[144] Usually, for a ICSP defendant to have a successful immunity

[135] *Id.*
[136] Doe v. Kik Interactive, Inc., 482 F. Supp. 3d 1242, 1244 (S.D. Fla. 2020).
[137] *Id.*
[138] *Id.*
[139] *Id.*
[140] *Id.*
[141] *Id.* at 1244–45.
[142] *Doe*, 482 F. Supp. 3d at 1244–45.
[143] *Id.* at 1245.
[144] *See, e.g.*, Almeida v. Amazon.com, Inc., 456 F.3d 1316, 1321 (11th Cir. 2006) (quoting Zeran v. Am. Online, Inc., 129 F.3d 327, 330 (4th Cir. 1997)).

claim, it must demonstrate that "(1) [it] is an [ICSP], (2) the claim is based on information provided by another information content provider, and (3) the claim would treat [the defendant] as the publisher or speaker of that information."[145] However, FOSTA removed sex trafficking from CDA immunity, permitting civil damages claims to be made against ICSPs under § 1595 if "the conduct underlying the claim constitutes a violation of § 1591."[146] The defendant violates § 1591 if it knowingly benefits financially from participating in a venture that has engaged in recruiting, advertising, or soliciting a person.[147] In this case, the dispute centers on the phrase "participation in a venture," mentioned in both the criminal statute and the civil remedy statute.[148] The criminal statute—requiring actual knowledge—defines "participation in a venture" as "knowingly assisting, supporting, or facilitating" sex trafficking.[149] The civil remedy statute—requiring constructive knowledge—mentions but does not define "participation in a venture."[150]

Kik argued that the minor must demonstrate that Kik had actual knowledge of benefiting from participation in a venture that assisted, supported, or facilitated her trafficking.[151] But the minor argued that "participation in a venture" should not be read as defined in the criminal statute because doing so would render the constructive knowledge requirement in the civil statute meaningless.[152] Instead, to establish civil liability, the minor argued that she must only plead that Kik "knew or should have known" that it was participating in a venture that was engaged in sex trafficking in violation of the criminal statute.[153]

The court reasoned that if Kik were not an ICSP, it would have followed the reasoning of other courts adopting the constructive knowledge standard that applies to non-ICSPs.[154] The court stated that if it were not for FOSTA, Kik would be immune from liability under CDA § 230.[155] However, FOSTA created an additional consideration: a balance between "the needs of protecting children and encouraging 'robust

[145] FTC v. LeadClick Media, LLC, 838 F.3d 158, 173 (2d Cir. 2016).

[146] *Kik Interactive*, 482 F. Supp. 3d at 1247.

[147] 18 U.S.C. § 1591(a)(1)–(2).

[148] *See* § 1591(a)(2); 18 U.S.C. § 1595(a); *Kik Interactive*, 482 F. Supp. 3d at 1249.

[149] § 1591(e)(4).

[150] *See* § 1595(a).

[151] *Kik Interactive*, 482 F. Supp. 3d at 1249, 1251.

[152] *Id.* at 1249.

[153] *Id.*

[154] *Id. Cf., e.g.*, M.A. v. Wyndham Hotels & Resorts, Inc., 425 F. Supp. 3d 959, 969 (S.D. Ohio 2019); J.C. v. Choice Hotels Int'l, Inc., No. 20-CV-00155, slip op. at 1 (N.D. Cal. June 5, 2020); A.B. v. Marriott Int'l, Inc., 455 F. Supp. 3d 171, 174 (E.D. Pa. 2020); Doe S.W. v. Lorain-Elyria Motel, Inc., No. 2:19-CV-1194, 2020 WL 1244192, at *5 (S.D. Ohio Mar. 16, 2020); H.H. v. G6 Hosp., LLC, No. 2:19-CV-755, 2019 WL 6682152, at *3 (S.D. Ohio Dec. 6, 2019).

[155] *Kik Interactive*, 482 F. Supp. 3d at 1250.

Internet communication.'"[156] The minor argued that FOSTA replaced the actual knowledge standard with a constructive knowledge standard when civil recovery is sought under the § 1591 criminal standard.[157] Yet, the court rejected this argument in favor of Congressional history, reasoning that "Congress only intended to create a narrow exception to CDA for 'openly malicious actors such as Backpage where it was plausible for a plaintiff to allege actual knowledge and overt participation.'"[158] Backpage is a website known to overtly advertise "adult services" that has faced multiple lawsuits for "advertising" (sexually exploiting) underaged victims on its platform.[159] Kik tried to distinguish its platform from Backpage by arguing that knowledge of *general* sex trafficking occurring on its platform is insufficient to meet the "knowledge" element required for *each individual victim*.[160]

The court concluded that FOSTA did not abrogate CDA immunity for all claims arising from sex trafficking but only for websites where "the conduct underlying the claim constitutes a violation of § 1591."[161] The minor only alleged that Kik "knew that other sex trafficking incidents occurred" on its platform.[162] She did not allege that Kik knowingly participated in the sex trafficking venture in which she was involved.[163] Thus, the court ruled that the minor failed to plausibly allege that Kik had violated § 1591, and the case was dismissed under Rule 12(b)(6).[164]

B. Doe v. Twitter

In *Doe v. Twitter*, the plaintiffs alleged that when they were thirteen years old, they were solicited and recruited for sex trafficking and manipulated into providing a third-party with pornographic videos of themselves through Snapchat.[165] "A few years later, when the [minors]

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[156] *Id.*
[157] *Id.*
[158] *Id.* at 1250–51.
[159] *See* M.A. v. Vill. Voice Media Holdings, LLC, 809 F. Supp. 2d 1041, 1043–44 (E.D. Mo. 2011); Backpage.com, LLC v. McKenna, 881 F. Supp. 2d 1262, 1266–67 (W.D. Wash. 2012); Backpage.com, LLC v. Cooper, 939 F. Supp. 2d 805, 813 (M.D. Tenn. 2013); Backpage.com, LLC v. Lynch, 216 F. Supp. 3d 96, 99–100 (D.D.C. 2016); Backpage.com, LLC v. Hoffman, No. 13-CV-03952, 2013 U.S. Dist. LEXIS 119811, at *3 (D.N.J. Aug. 20, 2013).
[160] *Kik Interactive*, 482 F. Supp. 3d at 1250 & n.6.
[161] *Id.* at 1247.
[162] *Id.* at 1251.
[163] *Id.*
[164] *Id.* at 1252.
[165] Doe v. Twitter, Inc., 555 F. Supp. 3d 889, 893–94 (N.D. Cal. 2021). "Snapchat is a mobile messaging application used to share photos, videos, text, and drawings." *Explainer: What Is Snapchat?*, WEBWISE, https://www.webwise.ie/parents/explainer-what-is-snapchat-2/ (last visited Oct. 2, 2022). Snapchat differs "from other forms of texting and photo sharing because the messages disappear from the recipient's phone after a few seconds"—unless the recipient of the photo screenshots the image or screen-records the video sent to them. *Id.*

were still in high school, links to the Videos were posted on Twitter."[166] The minors alleged that "when they learned of the posts, they informed law enforcement and urgently requested that Twitter remove them but Twitter initially refused to do so, allowing the posts to remain on Twitter, where they accrued more than 167,000 views and 2,223 retweets."[167]

The minors alleged that Twitter should be held responsible as a secondary participant for benefiting or profiting from the sex trafficking on their platform.[168] To demonstrate beneficiary liability, the minors must have pled that Twitter and Twitter users received something of value for the video depicting their sex acts.[169] The question, however, is whether beneficiary liability should be evaluated under the *mens rea* requirement of § 1591—actual knowledge—or of § 1595—constructive knowledge.

Twitter argued that it was shielded by CDA § 230 immunity, that the FOSTA exception did not apply, and that the minors failed to state a claim under both § 1591 and § 1595.[170] Twitter contended that because all three requirements[171] to implicate CDA § 230 immunity were met, the only question was whether the FOSTA exception abrogated Twitter's immunity.[172] Additionally, Twitter argued that Congress did not intend for FOSTA to be used to sue benevolent online platforms but only for "openly malicious actors" that knowingly facilitate sex trafficking.[173] Twitter asserted that the minors failed to plead (1) that Twitter was either a primary violator or a secondary participant,[174] (2) that Twitter possessed actual knowledge of the trafficking,[175] and (3) that Twitter knowingly received anything of value from participation in the venture.[176]

The court applied the three-factor test from the Hotel Cases analyzing the *mens rea* requirement, the definition of a "venture," and the material benefits, if any, incurred by the secondary participant.[177] In analyzing the differing standards in § 1595 and § 1591, the court held that the plaintiff did not have to plead actual knowledge.[178] The court also held that Twitter had participated in a "venture," noting that "[p]laintiffs are

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[166] *Twitter*, 555 F. Supp. 3d at 894.
[167] *Id.*
[168] *Id.*
[169] *Id.* at 901.
[170] *Id.* at 899–900.
[171] To have CDA § 230 immunity, (1) the defendants must be an ICSP, (2) the plaintiffs must treat the defendant as the publisher or speaker of the content in question, and (3) someone other than the defendant must have provided or created the content. *Twitter*, 555 F. Supp. 3d at 901.
[172] *See id.*
[173] *Id.* at 900.
[174] *Id.* at 901.
[175] *Id.* at 902.
[176] *Id.* at 901.
[177] *Twitter*, 555 F. Supp. 3d at 918.
[178] *Id.* at 922.

not required to allege an 'overt act' of participation in the sex trafficking."[179] Instead, it was sufficient to plead that Twitter maintained a "continuous business relationship" with the trafficker in order to establish "a pattern of conduct" or "a tacit agreement."[180] The court rejected the argument that "benefit" had to "derive directly from, and be knowingly received in exchange for, participating in a sex-trafficking venture."[181] Instead, the plaintiffs merely needed to allege that Twitter knowingly received a financial benefit from having a relationship with the sex trafficker.[182] The court held that Twitter "monetize[ed] content, including [Child Sexual Abuse Material],[183] through advertising, sale of access to its [Application Programming Interface], and data collection."[184] Additionally, "search[ing] for hashtags that are known to relate to [Child Sexual Abuse Material] brings up promoted links and advertisements, offering a screenshot of advertising that appeared in connection with one such hashtag."[185] Specifically, the minor alleged that the videos were monetized by Twitter because they received at least 167,000 views and 2,220 retweets and remained live for another seven days after the minors asked Twitter to remove the videos, resulting in substantially more views and retweets.[186]

V. RESOLUTION OF THE LOWER COURT SPLIT

Doe v. Kik[187] and *Doe v. Twitter*'s[188] differing interpretations of § 1591, § 1595, and FOSTA have resulted in a lower court split across the country.[189] Eventually, a circuit court, and perhaps the Supreme Court,

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[179] *Id.* (citing M.A. v. Wyndham Hotels & Resorts, Inc., 425 F. Supp. 3d 959, 970 (S.D. Ohio 2019)).

[180] *Id.* (quoting *M.A.*, 425 F. Supp. 3d at 970) ("[Plaintiffs] allege[d] that Twitter was specifically alerted that the Videos contained sexual images of children obtained without their consent on several occasions but either failed or refused to take action.").

[181] *Id.* at 923–24 (citing B.M. v. Wyndham Hotels & Resorts, Inc., No. 20-CV-00656-BLF, 2020 WL 4368214, at *4 (N.D. Cal. July 30, 2020)).

[182] *Id.* at 924.

[183] *Twitter*, 555 F. Supp. 3d at 924; *Child Sexual Abuse Material*, NAT'L CTR. FOR MISSING & EXPLOITED CHILD., https://www.missingkids.org/theissues/csam (last visited Apr. 15, 2023) ("United States federal law defines child pornography as any visual depiction of sexually explicit conduct involving a minor . . . . Outside of the legal system, NCMEC chooses to refer to these images as Child Sexual Abuse Material (CSAM).").

[184] *Twitter*, 555 F. Supp. 3d at 924.

[185] *Id.*

[186] *Id.*

[187] Doe v. Kik Interactive, Inc., 482 F. Supp. 3d 1242, 1249 (S.D. Fla. 2020) ("The plain language of the statute removes immunity only for conduct that violates 18 U.S.C. § 1591.").

[188] *See Twitter*, 555 F. Supp. 3d at 920–21 (arguing that Section 230(e)(5)(A) only narrows the types of § 1595 claims that are exempted from CDA immunity).

[189] *Compare* M.L. v. Craigslist, Inc., No. C19-6153 BHS-TLF, 2020 U.S. Dist. LEXIS 166334, at *4 (W.D. Wash. Sept. 11, 2020) (adopting the actual knowledge requirement), *and* Doe v. Reddit, Inc., SACV 21-00768 JVS (KESx), 2021 U.S. Dist. LEXIS 235993, at *19–20

will resolve the dispute. There are good arguments on both sides, but the cases' resolution hinges on each judge's view of the laws' legislative history and statutory language.

A. The Approach Most Favorable to the Victim

1. Statutory Language

In construing a statute, the statute's language should be analyzed first.[190] However, context also matters. Courts should consider not only the meaning of the word but also its "placement and purpose in the statutory scheme."[191] Specifically, remedial statutes must be "liberally construed."[192] FOSTA is a "remedial statute" because it affords a civil remedy to "victims of sex trafficking that otherwise would not have been available."[193] By adopting the most restrictive possible reading of the provision, an equally plausible reading of the plain language of FOSTA is ignored.[194]

CDA § 230(e)(5)(A) provides: "Nothing in this section (other than [the Good Samaritan Provision]) shall be construed to impair or limit—(A) any claim in a civil action brought under section 1595 . . . if the conduct underlying the claim constitutes a violation of section 1591."[195] Victims argue that because FOSTA's second clause modifies its first clause, the court should reject the conclusion that (1) the second clause "limits civil claims that fall outside of CDA § 230 immunity to claims asserted under Section 1591," and (2) § 230 immunity "allows for liability on only a subset of the civil claims that may be brought under § 1595 and § 1591."[196] Reading the statute this way would imply that "a sex trafficking victim who seeks to impose civil liability on an [ICSP] on the basis of beneficiary liability" would face a much higher burden than a victim who seeks to impose the same liability on a different type of defendant.[197] If Congress

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(C.D. Cal. Oct. 7, 2021) (adopting the actual knowledge requirement), *with* Doe v. Mindgeek USA, Inc., 558 F. Supp. 3d 828, 836 (C.D. Cal 2021) (adopting the constructive knowledge requirement).

[190] Bailey v. United States, 516 U.S. 137, 145 (1995).

[191] *Id.* at 145.

[192] Peyton v. Rowe, 391 U.S. 54, 65 (1968).

[193] *Twitter*, 555 F. Supp. 3d at 920.

[194] *Id.*

[195] 47 U.S.C. § 230(e)(5)(A).

[196] *Twitter*, 555 F. Supp. 3d at 920 ("[N]amely, those [civil claims] that can meet the more stringent burden that applies to criminal prosecutions under Section 1591.") (emphasis omitted).

[197] *Id.* For example, a victim who seeks to impose beneficiary liability on a hotel chain would face a much higher burden than a victim who seeks to impose beneficiary liability on an ICSP.

had intended to impose such a limitation on beneficiary liability as applied to ICSPs, it could have clearly stated so, but it did not.[198]

Instead, a more natural reading of "if the conduct underlying the claim constitutes a violation of section 1591"[199] is that it creates an immunity exemption for civil sex trafficking claims under § 1591 as opposed to other sections[200] of Title 18.[201] This reading of the statute makes available to victims the same civil remedies against an ICSP as it would in cases involving other types of defendants who receive indirect benefits. When Congress passed § 1591, it made clear that all parties must comply with the law or face civil liability even if all parties are not direct perpetrators.[202] To bring a cause of action under § 1591, the defendant must be either a direct violator or a knowing beneficiary.[203] Thus, it is arguable that § 1595 was intended to expand the scope of liability beyond § 1591, paving the way for civil suits against online platforms that host child sexual abuse material.[204]

2. Legislative History

During the hearing at which the House of Representatives voted on the passage of FOSTA, the bill's sponsor, Representative Ann Wagner, stated that "FOSTA is centered on the 'reckless disregard' standard."[205] She claimed that the "forward-facing bill" will "provide justice to victims of all bad actor websites, not just Backpage.com."[206] In fact, at the time FOSTA became law,[207] law enforcement had already seized Backpage and

[198] *Id.*

[199] § 230(e)(5)(A).

[200] *Cf.* 18 U.S.C. § 1581(a) (emphasizing that the prohibition on conduct includes "hold[ing] or return[ing] any person to a condition of peonage"); 18 U.S.C. § 1583 ("[e]nticement into slavery"); 18 U.S.C. § 1589(b) ("benefit[ting], financially or by receiving anything of value, from participation in a venture which has engaged in the providing or obtaining of [forced] labor").

[201] Title 18, Chapter 77 is entitled "Peonage, Slavery, and Trafficking in Persons," and contains §§ 1581–1597. Congress created civil liability for "[a]n individual who is a victim of a violation of [Chapter 77]." 18 U.S.C. § 1595.

[202] William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, tit. II, § 222(b)(5)(A)(ii), § 222(b)(5)(D), 122 Stat. 5044, 5069 (codified as amended at 18 U.S.C. § 1591).

[203] § 1595(a).

[204] Brief of Amici Curiae Anti-Trafficking Orgs. in Support of Plaintiffs' Opposition to Defendant Twitter Inc.'s Motion to Dismiss at 8–9, Doe v. Twitter, 555 F. Supp. 3d 889 (N.D. Cal. 2021) (No. 3:21-CV-00485-JCS) [hereinafter Brief of Amici Curiae].

[205] *The Latest Developments in Combating Online Sex Trafficking: Hearing on H.R. 1865 Before the Subcomm. on Commc'n & Tech.*, 115th Cong. 8 (2017) [hereinafter *FOSTA Hearing*] (statement of Rep. Ann Wagner of Missouri).

[206] *Id.* at 16.

[207] Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. No. 115-164, 132 Stat. 1253 (codified as amended at 18 U.S.C. § 2421A). President Trump signed FOSTA into law on April 11, 2018. Elizabeth Dias, *Trump Signs Bill Amid Momentum to*

shut down its marketplace,[208] confirming that Congress saw a broader need for FOSTA than just for targeting Backpage.[209]

In its review of FOSTA, the Senate highlighted the importance of discovery in cases of online sex trafficking.[210] For example, Senator McCaskill stated that internet companies believe that they can "win again in court"[211] and deny victims the opportunity to "look at the underlying evidence that one should always look at in an investigation."[212] Survivors of sex trafficking are usually "vulnerable children, and Congress has unequivocally stated its intention that [child victims] deserve their day in court."[213] Thus, writing FOSTA to grant immunity to ICSPs would undermine the purpose of FOSTA and block victims' access to justice. Shielding powerful internet companies while leaving children unremedied and exploited seems contrary to Congress's goal.[214] Instead, plaintiffs who allege violations of both the direct and beneficiary provisions of the criminal statute should proceed to discovery.

Those who opposed the bill voiced contrary opinions to those of Representative Wagner and Senator McCaskill.[215] Of course, ICSPs clearly cherry-pick favorable lines to demonstrate contrary legislative intent.[216] Regardless of who is right, the Supreme Court has cautioned

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Crack Down on Trafficking, N.Y. TIMES (Apr. 11, 2018), https://www.nytimes.com/2018/04/11/us/backpage-sex-trafficking.html.

[208] Sarah N. Lynch & Lisa Lambert, *Sex Ads Website Backpage Shut Down by U.S. Authorities*, REUTERS (Apr. 6, 2018, 3:55 PM), https://www.reuters.com/article/us-usa-backpage-justice/sex-ads-website-backpage-shut-down-by-u-s-authorities-idUSKCN1HD2QP.

[209] 164 CONG. REC. H1290, H1292 (daily ed. Feb. 27, 2018) (statement of Rep. Shelia Jackson Lee) (indicating that more than 130 websites have been identified as platforms for which "women and children are bought and sold for sex").

[210] *See* 164 CONG. REC. S1827, S1830 (daily ed. Mar. 20, 2018) (statement of Sen. Claire McCaskill).

[211] *Id.*

[212] *Id.*

[213] Brief of Amici Curiae, *supra* note 204, at 12 (citing 164 CONG. REC. S1849, S1851 (daily ed. Mar. 21, 2018) (statement of Sen. Richard Blumenthal)).

[214] *Id.*

[215] Elizabeth Strassner, *Why Some Lawmakers Opposed an Anti-Sex Trafficking Bill*, MEDILL NEWS SERV. (Mar. 23, 2018), https://dc.medill.northwestern.edu/blog/2018/03/23/why-some-lawmakers-opposed-an-anti-sex-trafficking-bill/#sthash.lNtSvALn.dpbs (citing twenty-five congresspeople who voted against FOSTA, among whom include Rep. Justin Amash, R-Mich.; Rep. Paul Gosar, R-Ariz.; Sen. Ron Wyden, D-Ore.; and Sen. Rand Paul, R-Ky.).

[216] *See, e.g.*, J.B. v. G6 Hosp., LLC, No. 19-CV-07848, slip op. at 8 (N.D. Cal. Sept. 8, 2021) (quoting *The Stop Enabling Sex Traffickers Act of 2017: Hearing on S. 1693 Before the S. Comm. on Com., Sci., & Transp.*, 115th Cong. 41–42 (2017) (statement of Sen. Brian Schatz) (stating that Congress wants to "provide space and not deter proactive actions by good actors that are doing the right thing to mitigate sex trafficking on their platforms" and voicing concerns that "big platforms" are "worried that their knowing at all triggers the knowing part of the statute")).

against the use of later legislative history in understanding an earlier-enacted statute.[217] As the Court explained, "even when it would otherwise be useful, subsequent legislative history will rarely override a reasonable interpretation of a statute . . . ."[218] Thus, statutory interpretation primarily controls the statute's construction.

B. The Approach Most Favorable to ICSPs

1. Statutory Language

Most parties do not dispute the ordinary meaning in any of the words in § 230. Rather, the dispute typically centers on whether it is sufficient that *someone* commit a § 1591 violation that underlies the plaintiff's civil claim, or whether the plaintiff must show that the conduct of the civil *defendant* amounts to a criminal violation.[219] Without debating whether the second clause modifies the first clause, this approach asserts that the most straightforward reading of the statute is that it abrogates an ICSP's immunity for a § 1595 claim if the civil defendant's conduct amounts to a violation of § 1591.[220] The courts that adopt this approach reason that "if Congress meant to exempt all claims involving sex trafficking," it could have written the statute to provide "if the claim arises out of a violation of section 1591," or "if the plaintiff is a victim of a violation of section 1591."[221] However, Congress chose not to do so.

Consistent with the remedial nature of the statute, this approach reasons that "the plain language interpretation" squares with FOSTA's "broader context, in that Congress sought to provide victims of sex trafficking access to courts and improve prosecutorial tools against websites that facilitate sex trafficking."[222] Under this reading of the statute's plain language, a plaintiff can bring a claim against either (1) a website whose conduct amounts to a violation of § 1591, including its

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[217] Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 117-18 (1980). At the time of the House of Representative's hearing, the bill had yet to be voted on by the Senate, presented to the President, or signed by the President. *See* Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. No. 115-164, 132 Stat. 1253 (codified as amended at 18 U.S.C. § 2421A).

[218] *Consumer Prod. Safety Comm'n*, 447 U.S. at 118 n.13.

[219] *J.B.*, slip op. at 5.

[220] *Id.* at 6 (citing Robinson v. Shell Oil Co., 519 U.S. 337, 341 (1997) ("The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.")).

[221] *Id.*

[222] *Id.*

beneficiary provision,[223] or (2) a website ineligible for immunity because it created or materially contributed to the content at issue.[224]

This approach analyzes the specific context in which the statutes' language is used, finding that each exemption is predicated on a violation of either § 1591 or FOSTA. In the context of a criminal charge, the underlying conduct refers to the conduct of the criminal defendant. Thus, it is consistent to construe the provisions referencing "the conduct underlying . . . a violation of § 1591" to refer to the conduct of the named defendant.[225] Because Congress included nearly identical language in the same subsection at the same time, this could suggest that it intended to give the "conduct underlying" phrases the same meaning.[226]

Additionally, FOSTA's amendments suggest that Congress chose to focus on providing civil recourse to victims whose perpetrators violated § 1591. Specifically, FOSTA added a provision to § 1595 authorizing state attorney generals to bring civil actions against "any person who violates § 1591."[227] It may seem unreasonable to conclude that Congress would allow state attorney generals to sue only "primary violators" of § 1591, while allowing private plaintiffs to sue civil defendants who only violated § 1595 based on a constructive knowledge standard. Although the approach taken by Congress may not have been the most effective way to combat online sex trafficking,[228] it is not the court's role to discern what interpretation of the statute would lead to the best policy. Rather, the court's role is to apply the legislative judgment of Congress as expressed in the words of the statute.[229]

2. Legislative History

The original purpose of FOSTA was to allow sex trafficking victims to pursue civil cases under federal and state law.[230] However, the Senate's

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[223] *Id.* (stating § 1591's beneficiary standard is "subject to a lower preponderance of the evidence standard of proof for a derivative civil claim"); *see* 18 U.S.C. § 1591(a)(2).

[224] Fair Hous. Council v. Roommates.com, LLC, 521 F.3d 1157, 1168 (9th Cir. 2008) (holding that "a website helps to develop unlawful content, and thus falls within the exception to [§] 230, if it contributes materially to the alleged illegality of the conduct").

[225] 47 U.S.C. § 230(e)(5)(A)–(B); *see* Powerex Corp. v. Reliant Energy Servs., Inc., 551 U.S. 224, 232 (2007) ("A standard principle of statutory construction provides that identical words and phrases within the same statute should normally be given the same meaning.").

[226] *Powerex Corp.*, 551 U.S. at 232 (finding the maxim that identical phrases generally have the same meaning "doubly appropriate" where a phrase "was inserted into" two provisions "at the same time").

[227] 18 U.S.C. § 1595(d).

[228] *J.B.*, slip op. at 7 ("As noted . . . during the evolution of FOSTA-SESTA some members of Congress expressed concerns about whether a knowledge-based enforcement scheme would adequately impose accountability on such websites.").

[229] *Id.*

[230] *FOSTA Hearing*, *supra* note 205, at 10 ("I believe that this bill is in many ways the gold standard in addressing online trafficking. . . . [I]t would allow victims of sex trafficking

revised proposal—entitled SESTA—conflicted with much of the original bill.[231] SESTA attempted to resolve whether the phrase "the conduct underlying the claim" referred to the plaintiff's claim against the civil defendant, who would otherwise enjoy immunity, or to the conduct of some other individual who is not a party to the claim.[232] A committee report stated that the amended SESTA would "empower State law enforcement to enforce criminal statutes against websites and introduce new civil liabilities for violations of Federal criminal laws relating to sex trafficking."[233] This statement could suggest that there is a federal carve-out for § 1595 claims which covers only defendants whose own conduct violates § 1591.

Additionally, in contrast to the "reckless disregard" standard proposed by FOSTA, SESTA defined "participation in a venture" as "*knowingly* assisting, supporting, or facilitating a violation of subsection (a)(1)."[234] At the Subcommittee on Communications and Technology, Representative Wagner urged Congress to "find a creative way to maintain the reckless disregard standard or at the very least, not raise the very high bar that victims and prosecutors must already meet in the federal criminal code."[235] She criticized SESTA for creating a "federal civil carve-out" that would be "based on the 'knowingly' *mens rea* standard, which [would] not provide operational recourse to justice for victims . . . and thus may not actually prevent future victimization."[236]

One month later, Representative Walters introduced an amendment to FOSTA that included the enactment of a new federal offense concerning prostitution, but also incorporated elements from SESTA such as the narrowed federal civil sex trafficking carve-out and the definition of "participation in a venture."[237] A committee report summarized Walters's amendment as "[a]llow[ing] enforcement of criminal and civil sex trafficking laws against websites that knowingly facilitate online sex

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and sexual exploitation of children crimes to pursue civil cases under federal and state law.").

[231] *See* Stop Enabling Sex Traffickers Act of 2017, S. 1693, 115th Cong. § 3 (2017) (including, as amended, many of the provisions that would later be incorporated into 18 U.S.C. § 2421A). It provided language nearly identical to 47 U.S.C. § 230(e)(5)(A) under the amended title "[N]o effect on sex trafficking law," stating that "[n]othing in this section (other than subsection (c)(2)(A)) shall be construed to impair or limit—any claim in a civil action brought under section 1595 of title 18, United States Code, if the conduct underlying the claim constitutes a violation of section 1591 of that title."). *Id.*

[232] *See* S. REP. NO. 115–99, at 4 (2018).

[233] *Id.* at 2.

[234] S. 1693, 115th Cong. § 4 (2017) (emphasis added). The same definition appears in 18 U.S.C. § 1591(e)(4).

[235] *FOSTA Hearing*, *supra* note 205, at 14.

[236] *Id.* at 12 n.7 ("I continue to stand in solidarity with victims who are pursuing cases based on state laws and believe Congress should keep working toward a comprehensive solution.").

[237] H.R. REP. NO. 115-583, at 3–4 (2018).

trafficking."[238] On February 26, 2018, the House Rules Committee adopted both amendments.[239] What became known as the FOSTA-SESTA bill-package passed the House on February 27, 2018, and the Senate on March 21, 2018.[240] Although it was admittedly difficult "to find middle ground with the tech industry and the victims' advocates,"[241] Congresswoman Wagner expressed hope that FOSTA, combined with Walter's amendment—SESTA—would provide "better civil justice for victims, more prosecutions of bad actor websites, more convictions, and more predators behind bars."[242] Thus, Congress ultimately passed a bill incorporating the provision that the sponsor of FOSTA described as a "narrowed" "federal civil carve-out" that is "subject to a heightened pleading standard."[243]

C. The Better Approach

Since 1996, Congress has passed laws with the clear purpose of protecting children and eradicating sex trafficking.[244] Thus, interpreting laws to shield sex traffickers from liability is counterintuitive. Yet, laws like § 230 continue to protect ICSPs rather than victims. Section 230 provides that no ICSP shall be held liable if it takes *any* voluntary action in "good faith to restrict access to or availability of material that the *provider* . . . [deems to be] objectionable."[245] This means that so long as an ICSP creates a restrictive algorithm to filter whatever *it* deems objectionable, the ICSP has met its burden under the Good Samaritan Protection.

Many website operators know trafficking occurs yet make minor cosmetic changes to fit within the Good Samaritan Protection. One of the most egregious examples, Craigslist, advertised women for sale under its "Erotic Services" category.[246] After trafficking victims accused Craigslist of knowing that these sections were used to sell adults and children for sex, Craigslist renamed its "Erotic Services" subcategory "Adult Services."[247] After receiving complaints again, Craigslist "repositioned the section's illicit and illegal 'Adult' advertisements as 'Personal Ads' and 'Massage Services.'"[248] The plaintiff pleaded that Craigslist reviewed

[238] *Id.* at 2.
[239] *Id.* at 1.
[240] 164 CONG. REC S1856, S1871 (daily ed. Mar. 21, 2018).
[241] 164 CONG. REC. H1277, H1278 (daily ed. Feb. 27, 2018) (statement of Rep. Ann Wagner).
[242] *Id.*
[243] *FOSTA Hearing*, *supra* note 205, at 12 n.7.
[244] *See* 47 U.S.C. § 230(b)(5).
[245] § 230(c)(2)(A) (emphasis added).
[246] J.B. v. G6 Hosp., LLC, No. 19-CV-07848, slip op. at 1 (N.D. Cal. Sept. 8, 2021).
[247] *Id.*
[248] *Id.*

every posting on its "Adult Services" platform—which included hundreds of advertisements per day for commercial sex, often with children. Keywords like "young and fresh," "virgin," "new girl," and "new to Craigslist" were allegedly well-known code words for "minor."[249] When those phrases were searched on Craigslist, "nude or partially nude photographs . . . of children . . . and explicit offers of sex in exchange for payment" would populate.[250] Lastly, plaintiff alleged that Craigslist received an estimated thirty-six million dollars annually in revenue from traffickers alone.[251] Yet, none of these allegations were well-pleaded enough to overcome § 230's "Good Samaritan Protection" and defeat Craigslist's motion to dismiss.[252] If that is not enough, what is?

More troublesome is the fact that members of Congress explicitly mentioned Craigslist by name during the debates leading up to the passage of the statute. Senator Blumenthal recalled being prevented from pursuing actions against Craigslist and other sites when he served as a state prosecutor because of how courts were interpreting § 230.[253] He expressed that "[c]learly the websites that facilitate . . . and profit[] from sex trafficking, must face repercussions in the courtroom. For law enforcement to succeed in combating sex trafficking, there have to be consequences."[254] Between 2010 and 2015, the National Center for Missing and Exploited Children reported an 840 percent increase, finding the spike "directly correlated to the increased use of the internet to sell children for sex."[255]

Another issue is that the ICSP must only restrict access to materials that the provider deems to be objectionable, "whether or not such material is *constitutionally* protected."[256] Historically, that which the provider deems to be objectionable can range from prohibiting users from sending emails,[257] to deleting churches' videos for promoting a religious belief,[258]

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[249] *Id.* at 2.

[250] *Id.*

[251] *Id.*

[252] *J.B.* at 12. *Cf. M.L. v. Craigslist, Inc.*, 2020 U.S. Dist. LEXIS 166334, at *11 (holding that the plaintiff alleged enough facts to plausibly state a claim that Craigslist was responsible, in whole or in part, for the development or creation of the unlawful advertisements which trafficked the plaintiff).

[253] 164 CONG. REC. S1849, S1851 (daily ed. Mar. 21, 2018) (statement of Sen. Richard Blumenthal).

[254] *Id.*

[255] *Id.*

[256] 47 U.S.C. § 230(c)(2)(A) (emphasis added).

[257] *See* E360insight, LLC v. Comcast Corp., 546 F. Supp. 2d 605, 609 (N.D. Ill. 2008) (holding that the ICSP was immunized for voluntarily filtering and blocking unsolicited and bulk emails because providers have the discretion to deem what is objectionable).

[258] *See* Domen v. Vimeo, Inc., 991 F.3d 66, 72 (2d Cir. 2021) (holding that the ICSP—Vimeo—was immunized from claims arising from its deletion of a church's account for violating Vimeo's policy barring promotion of sexual orientation change efforts), *vacated,*

to suspending the social media accounts of unpopular political figures.[259] Thus, if an ICSP finds pornography[260] unobjectionable, it has the discretion to let it remain on the internet no matter how much the victim asks the provider to take it down.[261]

Remedial statutes must be liberally construed. The courts that adopt the strictest interpretation of FOSTA and § 230 concede that they "do[] not find [the victims'] interpretation . . . wholly implausible, particularly because there arguably is some tension between the [c]ourt's reading of the statute and the constructive knowledge standard set out in § 1595."[262] Further, those courts "do[] not find that the plain language interpretation, in context, produces an absurd or unreasonable result" either.[263] If remedial statutes are to be construed liberally, the constructive knowledge standard supports beneficiary liability, and the plain language leads to a reasonable result protecting victims, why have courts refused to establish such a standard?

Supreme Court Justice Clarence Thomas recently lamented that § 230 is still being used to prevent claims from proceeding to discovery and implored courts to stop "reading extra immunity into statutes where it does not belong."[264] Justice Thomas expressed concern that extending CDA § 230 immunity beyond the natural reading of the text can have serious consequences.[265] He warned that before giving companies immunity from civil claims for knowingly hosting illegal child pornography, or for race discrimination, the Court should be "certain that is what the law demands."[266] Additionally, Justice Thomas expressed that

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withdrawn, reh'g granted, Domen v. Vimeo, Inc., No. 20-616-CV, 2 F.4th 1002 (2d Cir. July 15, 2021), *and aff'd on other grounds*, Domen v. Vimeo, Inc., No. 20-616-CV, 2021 U.S. App. LEXIS 28995, at *2 & n.1 (2d Cir. Sept. 21, 2021).

[259] Zimmerman v. Facebook Inc., No. 19-CV-04591-VC, 2020 U.S. Dist. LEXIS 183323, at *4 (N.D. Cal. Oct. 2, 2020) (holding that "a social media site's decision to delete or block access to a user's individual profile falls squarely within [§ 230] immunity"); *see* Danny Cevallos, *Trump Sues Facebook, Google and Twitter in Class-Action Lawsuits Sure to Fail*, NBC NEWS (July 7, 2021, 7:00 PM), https://www.nbcnews.com/think/opinion/trump-sues-facebook-google-twitter-class-action-lawsuits-sure-fail-ncna1273289.

[260] This does not include child pornography, because that is illegal. However, adult pornography is legal.

[261] *See* Doe v. Twitter, Inc., 555 F. Supp. 3d 889, 894 (N.D. Cal. 2021) ("[I]t wasn't until the mother of one of the boys contacted an agent of the Department of Homeland Security, who initiated contact with Twitter and requested the removal of the material, that Twitter finally took down the posts, nine days later.").

[262] J.B. v. G6 Hosp., LLC, No. 19-CV-07848, slip op. at 7 (N.D. Cal. Sept. 8, 2021).

[263] *Id.*

[264] Malwarebytes, Inc. v. Enigma Software Grp. USA, LLC, 141 S. Ct. 13, 15 (2020) (Thomas, J., concurring).

[265] *Id.* at 18.

[266] *Id.*; *see* Doe v. Bates, No. 5:05-CV-91-DF-CMC, 2006 U.S. Dist. LEXIS 93348, at *2, *9 (E.D. Tex. Dec. 27, 2006) (granting immunity to Yahoo!, Inc. for knowingly hosting illegal child pornography and claim was dismissed); Sikhs for Justice, Inc. v. Facebook, Inc., 697 F.

if Congress has the power to demand that telephone companies operate as common carriers, it can ask the same of digital platforms.[267] Because today's major internet platforms did not exist at the time Congress enacted § 230, it is problematic that the provision has never been interpreted in the two and a half decades of its existence.[268] Because of this, Justice Thomas suggested that, in the right case, the Court may be willing to address the issue.[269]

CONCLUSION

How §§ 230, 1591, 1595, and FOSTA should be properly interpreted is still up for debate. While some courts have ensured justice for victims, others—caught in a semantics battle—have failed to hold ICSPs accountable for constructively knowing about and financially profiting from victims' sexual trauma. Justice Thomas dispelled the fear that ICSPs would go out of business from hundreds of unfounded lawsuits.[270] Instead, it would merely give plaintiffs the chance to "raise their claims in the first place."[271] Undoubtedly, "[p]laintiffs still must prove the merits of their cases, and some claims will . . . fail."[272] It is difficult to believe that trafficking victims can recover damages against a hotel for its constructive knowledge and participation in a trafficking venture, but not against an ICSP. Ultimately, Congress should amend the statutes to clarify its intent to provide full protection to victims, or the Supreme Court should interpret the statutes to protect those who are defamed, exploited, and abused online. Until significant change is made, confusion, conflict, and injustice will continue.

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App'x 526, 526 (9th Cir. 2017) (granting immunity to Facebook, Inc. and racial discrimination claim was dismissed).

[267] Biden v. Knight First Amend. Inst. at Columbia Univ., 141 S. Ct. 1220, 1226 (2021) (Thomas, J., concurring).

[268] *Malwarebytes*, 141 S. Ct. at 13 (Thomas, J., concurring).

[269] *Id.* at 14 ("I write to explain why, in an appropriate case, we should consider whether the text of this increasingly important statute aligns with the current state of immunity enjoyed by internet platforms.").

[270] *Id.* at 18 ("Paring back the sweeping immunity courts have read into § 230 would not necessarily render defendants liable for online misconduct.").

[271] *Id.*

[272] *Id.*

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