

No. 22-15290

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

J.B.,

PLAINTIFF-APPELLANT,

v.

CRAIGSLIST, INC.,

DEFENDANT-APPELLEE.

Appeal from the United States District Court for the Northern District of California
Case No. 4:19-CV-07848-HSG (Hon. Haywood S. Gilliam, Jr.)

BRIEF OF AMICI CURIAE, AVERY CENTER, CHILD USA, ENOUGH IS ENOUGH, FAMILY PRIDE OF NORTH EAST OHIO, FIERCE FREEDOM, FREEDOM AND RESTORATION FOR EVERYONE ENSLAVED, JUSTICE FOR ALL, JUSTICE RESTORATION CENTER, MIRROR MINISTRIES, MISSION KIDS CHILD ADVOCACY CENTER, NATIONAL CENTER ON SEXUAL EXPLOITATION, NATIONAL TRAFFICKING SHELTERED ALLIANCE, PAVING THE WAY FOUNDATION, PBJ LEARNING, RESTORING IDENTITIES AFTER SEXUAL EXPLOITATION, SHARED HOPE INTERNATIONAL, SOUTHERN GRIT ADVOCACY, STAND AGAINST TRAFFICKING USA, STOP TRAFFICKING PROJECT, THE TRAFFICKING LAW CENTER, AND WORLD WITHOUT EXPLOITATION IN SUPPORT OF J.B., THE PLAINTIFF-APPELLANT

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rules 26.1 and 29(a)(4)(A) of the Federal Rules of Appellate Procedure, *amici curiae* state that they do not have a parent corporation and that no publicly held corporation owns 10% or more of their stock.

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IDENTIFICATION OF *AMICI CURIAE*¹

Avery Center believes that lived experience must inform change. Our research is used to reduce demand, convict traffickers, and decrease barriers for marginalized populations through evidence-based services.

CHILD USA is a national, non-profit think tank fighting for the civil rights of children. It is an expert on the proximate, immediate, and persistent harms to child-victims whose imagery is trafficked online and has a substantial interest in ensuring that courts uphold the broad remedial purpose of Congress' anti sex-trafficking legislation.

Enough Is Enough (EIE) is a national, non-partisan, not-for-profit organization and pioneering leader fighting to make the Internet safer for children and families. EIE built the foundation for and launched the national Internet Safety movement in 1994, helping establish key bi-partisan legislation to protect children from Internet pornography, sexual predators, and other dangers (CDA, COPA, CIPA, and the Child Pornography Prevention Act). EIE is committed to ensuring necessary

¹ No counsel for a party authored this brief in whole or in part, and no entity or person, aside from amici curiae, their members, and their counsel, made any monetary contribution intended to fund the preparation or submission of this brief. See Fed. R. App. P. 29(a)(4)(E). All parties have consented to the filing of this brief.

safeguards are in place to protect those that may be victimized and pathways to justice are secured.

Fierce Freedom works to end the cycle of human trafficking and exploitation through education that empowers communities and speaks to the worth and dignity of each individual. Upholding the rights of survivors seeking justice must include holding Big Tech accountable for its failure to prevent exploitation and arguably profiting from it.

Freedom and Restoration for Everyone Enslaved (FREE) exists to provide restorative care to sexually exploited women and to break the cycle of commercial sexual exploitation through prayer and community awareness. We feel strongly that this trafficking survivor's case be given the attention it deserves.

Justice For All pioneered the way for rape to be declared a tool of war and genocide globally after the Bosnia genocide. Justice For All has a deep commitment to stop sexual exploitation whether it is of entire populations or one victim of sex trafficking.

Justice Restoration Center ("JRC") is a trauma-informed, restorative *pro bono* legal center that provides representation to victims and survivors of human trafficking worldwide on issues of Florida law. JRC joins this brief on its own behalf for the purpose of representing the viewpoint of survivors and how their

victimization and trauma have been affected, if not exacerbated by websites that profit from the exploitation of people.

Mirror Ministries serves survivors of sex trafficking in their path to freedom, hope, and healing. We do purposeful online and street outreach, operate an Outreach Center with therapeutic services, and provide extensive case management for those who have been exploited in the commercial sex industry. Mirror has seen the impact of websites and apps that have been an essential element in the exploitation of the victims we serve.

Mission Kids Child Advocacy Center offers a comprehensive, multidisciplinary team response to allegations of child abuse in a dedicated, child-friendly setting and provides neutral, fact-finding forensic interviews which are coordinated to avoid additional trauma to children. In the past decade, Mission Kids has served over 6,000 children and provided a sense of hope, safety, and healing as children and families overcome the trauma of abuse.

The National Center on Sexual Exploitation (“NCOSE”) is a nonprofit organization that combats sex trafficking by advocating in state and federal courts for survivors, engaging in corporate advocacy to encourage companies to adopt responsible and safe practices, and advocating for legislative change that protects survivors and promotes human dignity.

Paving the Way Foundation is committed to empowering communities to be a fierce disruption in the cycle of child exploitation through prevention education, training and awareness programs. Having educated 19,000 young people over the past five years, we understand the danger they are in, battling predators who are intentionally targeting them online.

PBJ Learning is a leading provider of online anti-trafficking education providing awareness and response training. PBJ Learning supports a safe internet for everyone where everyone is afforded the same protections.

Restoring Identities after Sexual Exploitation (RISE) is a 501(c)(3) non-profit corporation providing a safe living environment to youth girls under age 18 from across the United States who have experienced sex trafficking and/or commercial sexual exploitation.

Shared Hope International (“Shared Hope”) provides policymakers with data-driven research on sex trafficking to promote informed efforts to address sex trafficking. Shared Hope presses for online accountability to stem the growing sex trafficking offenses carried out through internet platforms.

Southern Grit Advocacy’s mission is to prevent, disrupt, and end human trafficking through education and advocacy. We believe websites should be held accountable for providing a platform that facilitates and profits from any person being sold for sex, no matter the age of the victim. This is a violation of human rights.

Stand Against Trafficking USA (STATUSA) engages in public awareness and prevention while training advocates to go into jails, and develop safe places for survivors. Justice for survivors is an important part of the healing in the life of a survivor. Not only does it help bring closure but it prevents the next victim.

The National Trafficking Sheltered Alliance (NTSA) is a network of service providers committed to enhancing services and increasing access to care for survivors of human trafficking and sexual exploitation. NTSA provides a collaborative community and extensive resources to our over 100 member organizations and accredits long-term residential programs that meet NTSA's Essential Standards of Care.

The Stop Trafficking Project® utilizes the BeAlert® Strategy to fulfill our vision to end domestic minor sex trafficking (DMST) before it starts by disrupting the exploitation of vulnerability. Sadly, 100% of the victimized persons we work with were groomed and had their boundaries crossed. We stand in full support of victimized persons. Their cases must be heard.

The Trafficking Law Center (TLC) is a nonprofit organization that works to support human trafficking victims and survivors in the state of Oregon by providing access to *pro bono* legal services, training attorneys, and educating the public and policymakers on human trafficking issues.

World Without Exploitation (World WE) is a non-profit national coalition of 200 antitrafficking organizations around the United States and advances public policy through legislative advocacy, engagement, and education both on the state and federal levels.

ARGUMENT

I. The District Court’s FOSTA interpretation renders 18 U.S.C. § 1595 ineffective for online trafficking victims, despite the statute’s plain meaning and purpose.

In this case, the District Court erred by interpreting FOSTA to privilege CDA 230’s protections for websites while undercutting the pathways to Justice for victims available through the Trafficking Victims Protection Reauthorization Act (“TVPRA”). The District Court held that “to preserve the vibrant and competitive free market that presently exists for the Internet”² trumps Congress’ intention “to open the courthouse doors to victims of sex trafficking.”³ Respectfully, the Court got this precisely backwards. Instead, the District Court should have interpreted FOSTA within the context of the TVPRA’s statutory history, which created and then enlarged civil remedies for sex-trafficking victims.

A. The District Court’s interpretation of FOSTA clashes with Congress’ intentional expansion of the civil cause of action provision within the TVPRA.

For almost twenty years, Congress has consistently advanced trafficking victims’ ability to seek civil redress in federal court. Congress first created a civil

² *J. B. v. G6 Hosp., LLC*, 19-CV-07848-HSG, 2021 WL 4079207, at *12, ER-20 (N.D. Cal. Sept. 8, 2021).

³ *The Stop Enabling Sex Trafficking Act of 2017, Hearing on S. 1693 Before the Comm. on Commerce, Sci., and Transp.*, 115th Cong., S. Hrg. 115-590, at 6-7 (2017) (Statement of Senator Portman) <https://www.govinfo.gov/content/pkg/CHRG-115shrg36159/pdf/CHRG-115shrg36159.pdf> (last visited 6/23/22).

cause of action for trafficking victims in 2003. TVPRA, PL 108–193, 117 Stat 2875 (Dec. 19, 2003). The initial version of that civil remedy provision permitted a “victim” of a violation to bring a civil action against “the perpetrator.” 18 U.S.C. § 1595 at § 4. In 2008, Congress revised section 1595, allowing victims to sue not just perpetrators, but also “whoever knowingly benefits” from participating in what they knew or should have known was a sex trafficking venture. *See* William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, PL 110–457, 122 Stat 5044 (Dec. 23, 2008).

In 2018, Congress enacted FOSTA to address a trend of courts interpreting Section 230 to preclude any civil liability for websites under 18 U.S.C. § 1595. Allow States and Victims to Fight Online Trafficking Act of 2017, Pub. L. No. 115-164, § 2 (Apr. 11, 2018). Both Section 1595’s expansion of the civil action and FOSTA’s amendment to CDA 230 are significant changes in statutory meaning. *See*, Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts*, § 40 at 256 (2012). § 40 (“If the legislation amends...a provision...a significant change in language is presumed to entail a change of meaning.”). All these changes share the same dynamic: acute awareness that civil redress is important for trafficking victims, and willingness to expand victims’ ability to bring civil claims.

The District Court’s FOSTA interpretation breaks sharply with enacted congressional directives empowering victims. Instead of reading 47 U.S.C. §

230(e)(5)(A) to be consistent with 18 U.S.C. § 1595, the District Court reads the provision to effectively repeal it for victims in the online context. The opinion of the District Court scrutinizes the legislative history of FOSTA. But Section 1595’s background as well as the changes to CDA 230 are *statutory history*—which is far more valuable for ascertaining the meaning of the amendments to the provisions.⁴ For example, in *Jonah R. v. Carmona*, this Court looked to historical amendments of the statute at issue, and related statutes, which were made with the overriding purpose of “rehabilitation.” 446 F.3d 1000, 1005 (9th Cir. 2006). This Court used this statutory history as the “backdrop” of its analysis in ultimately deciding that juveniles, like other offenders, should receive credit for pre-sentencing detention. *Id.* Unlike this Court’s approach in *Jonah R.*, the District Court failed to consider the amendments to the TVPRA and instead favored pre-FOSTA policy (and judicial interpretations) over the policy enacted in FOSTA itself,⁵ setting back online sex trafficking victims remedies to pre-2008 TVPRA relief.

⁴ “[Q]uite separate from legislative history is statutory history—the statutes repealed or amended by the statute under consideration. These form part of the context of the statute, and (unlike legislative history) can properly be presumed to be before all the members of the legislature when they voted.” Scalia & Garner, *supra*, § 40 at 256.

⁵ *Compare Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12, 22 (1st Cir. 2016) (“We hold that claims that a website facilitates illegal conduct through its posting rules necessarily treat the website as a publisher or speaker of content provided by third parties and, thus, are precluded by section 230(c)(1).”) *with J.B.*, ER-20

B. The District Court failed to read Section 230 and § 1595 together so that each provision is given its full effect.

“[S]tatutes dealing with similar subjects should be interpreted harmoniously.” *Jonah R.*, 446 F.3d at 1007 (citing *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 738–39, 109 1989) (internal quotations omitted). And “Subsequent legislation declaring the intent of an earlier statute is entitled to great weight in statutory construction.” *Red Lion Broad. Co. v. F.C.C.*, 395 U.S. 367, 380–81 (1969); *see also Landreth v. Comm’r*, 859 F.2d 643, 648 (9th Cir. 1988) (congressional amendment to statute clarifying its meaning constitutes intervening authority so that reexamination of judicial precedent was appropriate). Furthermore, “[w]hen Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect.” *Id.* (citing *Pierce County v. Guillen*, 537 U.S. 129, 145 (2003) (internal quotations omitted)).

In *United States v. Pepe*, this Court revisited its previous interpretation of a statute in light of an amendment by Congress which made its previous interpretation nonsensical. 895 F.3d 686 (9th Cir. 2018). This Court found that, “[t]his change to the statute makes no sense as we interpreted the original version” and “the

(“The Court thus interprets section 230(e)(5)(A) to limit the scope of civil sex trafficking claims against interactive computer services that otherwise meet the requirements for CDA immunity to circumstances in which the defendant’s conduct amounts to a violation of section 1591.”).

amendment . . . would have virtually no effect” therefore the Court’s previous interpretation had to be reevaluated. *Id.*

Congress explicitly stated that FOSTA was a clarification of CDA 230 as to sex trafficking law in the online context. *See Allow States and Victims to Fight Online Trafficking Act of 2017, Pub. L. No. 115-164, § 2 (Apr. 11, 2018)* (“It is the sense of Congress that . . . clarification of such section [§ 230] is warranted to ensure that such section does not provide such protection [for its role in sex trafficking] to such websites”); *see also Doe #1 v. MG Freesites, LTD, 7:21-CV-00220-LSC, 2022 WL 407147, at *10 (N.D. Ala. Feb. 9, 2022)* (noting FOSTA’s “Sense of Congress” provision).

As such, like this court did in *Pepe*, the District Court should have reevaluated previous CDA 230 precedent in light of the new amendment, FOSTA. Before FOSTA, the First Circuit—on the basis of CDA 230—affirmed the dismissal of civil plaintiffs who alleged that as minors they were advertised for sex on a classified-ads website and were raped/trafficked as a result. *Doe No. 1 v. Backpage.com, LLC, 817 F. 3d 12 (1st Cir. 2016)*. After FOSTA, it is incumbent on courts to take Congress’ clarification about CDA 230 into consideration. *See, e.g., Doe v. Twitter, Inc., 555 F. Supp. 3d 889, 921 (N.D. Cal. 2021)* (“This more straightforward reading does not limit FOSTA’s exemption to a narrow subset of civil sex trafficking claims but rather, makes available to victims of sex trafficking the same civil remedies

against an ICS provider under Section 1591(a)(2) as are available in cases involving other types of defendants. The Court finds that this reading is consistent with the broad language used in the first clause of FOSTA as well as the remedial purpose of FOSTA.”). Instead, the District Court used pre-FOSTA precedent to override all other considerations, *J. B. v. G6 Hosp., LLC*, 19-CV-07848-HSG, 2021 WL 4079207, at *12 (N.D. Cal. Sept. 8, 2021), ignoring that this would plainly render the statute ineffective. *Compare Doe v. Mindgeek USA Inc.*, 2021 WL 5990195, at *9 (C.D. Cal. Dec. 2, 2021) (“The Court finds nothing within the statute’s text and structure to suggest anything other than the plainest interpretation of the provision, which is that as long as the conduct underlying Plaintiff’s Section 1595 claim amounts to a violation of Section 1591, then she may bring the claim alleging the lesser constructive knowledge standard. To hold otherwise . . . would effectively write Section 1595 out of existence for websites, which Congress cannot have intended to do when passing a statute designed to provide victims of sex trafficking with their day in court.”)

If victims like the plaintiff in this case, whose alleged facts are strikingly similar to those in the cases leading up to FOSTA, *see Backpage.com*, 817 F. 3d at 18, cannot bring a case against a website under section 1595, then FOSTA, like the statute in *Pepe*, “would virtually have no effect.” *Pepe*, 895 F.3d at 686.

C. The District Court’s interpretation of FOSTA renders 18 U.S.C. § 1595 ineffective for online trafficking victims

Sexual exploitation is increasingly active online,⁶ and these internet crimes are notoriously difficult to investigate, even for law enforcement agencies. Often, as with craigslist in this case, ISPs intentionally make investigation difficult for law enforcement and virtually impossible for the layperson. Encrypted messaging, complex payments systems, and data privacy requirements make gathering information on users, what data the platform harvests, and how it is used, unattainable. And Congress knew this when it enacted FOSTA.

1. Online platforms are now the primary venue for sexual exploitation

According to the 2020 Federal Human Trafficking Report issued by the Human Trafficking Institute, online solicitation “has dwarfed other tactics used by traffickers to solicit buyers of commercial sex for over a decade, appearing as the

⁶ See Organization for Security and Co-operation in Europe & Tech Against Trafficking, *Leveraging Innovation to Fight Trafficking in Human Beings: A Comprehensive Analysis of Technology Tools* 11 (2020) [hereinafter OSCE & Tech Against Trafficking] (“Over the past twenty years, there has been an increased use of technology in each of these areas [activities involved in human trafficking]. In particular, technology is used to recruit and control vulnerable individuals, facilitate their exploitation, reach out to those willing to pay for services of trafficked persons and to provide means for illicit payments and laundering of funds. Technology is also used to provide “virtual” venues for disseminating or exchanging online sexual abuse, including abuse of children.”).

primary form of solicitation in over twice as many criminal cases as any other method each year since 2008.”⁷ The internet is now the primary way that traffickers “recruit sex trafficking victims and solicit buyers of commercial sex.” *Id.* at 4. In 2021, 85 percent of trafficking cases involved online platforms as the primary source of solicitation. *Id.* at 3. Craigslist is still one of the most common platforms used to solicit buyers for commercial sex. *Id.* at 48-50. Alarming, even more children than adults are recruited online to be exploited as trafficking victims.⁸

2. Investigating Sex Trafficking online is extremely difficult

A 2021 report from the Government Accountability Office found: “Those who control online platforms may use complex and opaque payment systems, which can make it difficult to gather tips and evidence.”⁹ And that “FBI

⁷ Kyleigh Feehs & Alyssa Currier Wheeler, Hum. Trafficking Inst., *2020 Federal Human Trafficking Report 3* (2021) <https://www.traffickinginstitute.org/wp-content/uploads/2021/06/2020-Federal-Human-Trafficking-Report-Low-Res.pdf> (last visited 06/24/22).

⁸ *Backpage.com’s Knowing Facilitation of Online Sex Trafficking Before the Subcomm. on Invests. of the S. Comm. on Homeland Sec. and Govt. Affs.*, S. Hrg. 115-6, 115th Cong. 9 (Jan. 10, 2017) (statement of Sen. Daines), <https://www.govinfo.gov/content/pkg/CHRG-115shrg24401/pdf/CHRG-115shrg24401.pdf>.

⁹ U.S. Gov’t Accountability Off., GAO-21-385, *Sex Trafficking: Online Platforms and Federal Prosecutions* 21 (2021); *see also* OSCE & Tech Against Trafficking, *supra*, at 17 (“Since technology allows traffickers to advertise their victims online and conclude transactions with buyers via electronic means, traffickers are in a position to reduce their operations on the streets and move them entirely into a virtual space. This way, traffickers do not have to worry about their victims being spotted by law enforcement or anti-trafficking NGOs.”).

information also indicates that the increased use of these [online] platforms hinder the ability of law enforcement to gather tips and evidence related to sex trafficking. Specifically, . . . because platforms employ varying levels of encryption of messages . . . allow users pseudo-anonymity . . . [and] automatically delete content.¹⁰

In fact, between the 2014-2020, only 11 criminal cases have been brought by the Department of Justice (DOJ) against online platforms for facilitating prostitution and sex trafficking, and three of these were against Backpage.com.¹¹ Collecting evidence of crimes committed online takes technical expertise and skill.¹² Many local law enforcement agencies simply do not investigate such crimes because they lack the expertise to do so.¹³ The DOJ has been highlighting the problem for years.

¹⁰ *Id.*

¹¹ *Id.*

¹² See Inter-agency Coordination Group against Trafficking in Persons, *Human Trafficking and Technology: Trends, Challenges and Opportunities 2* (July, 2019), <https://www.un.org/sexualviolenceinconflict/wp-content/uploads/2019/07/report/human-trafficking-and-technology-trends-challenges-and-opportunities/Human-trafficking-and-technology-trends-challenges-and-opportunities-WEB...-1.pdf> (last visited 06/24/22) ; see also Roger A. Grimes, *Why it's so Hard to Prosecute Cybercriminals*, CSO (Dec. 6, 2016), <https://www.csoonline.com/article/3147398/why-its-so-hard-to-prosecute-cyber-criminals.html> (last visited 06/24/22) (detailing the jurisdictional issues and difficulties gathering evidence for prosecuting cybercriminals).

¹³ Nick Selby, *Local Police Don't Go After Most Cybercriminals. We Need Better Training.*, Wash. Post. (Apr. 21, 2017),

In some instances, because of certain technologies, “the government cannot obtain the electronic evidence and intelligence necessary to investigate and prosecute threats to public safety and national security, **even with a warrant or court order.**”¹⁴

Craigslist specifically has made investigation difficult by allowing anonymized messaging between users¹⁵ and being unresponsive to subpoenas.¹⁶ Lastly, increased data privacy regulations¹⁷ both in the U.S. and abroad means platforms will not release user information without a subpoena and also allows users

<https://www.washingtonpost.com/posteverything/wp/2017/04/21/local-police-dont-go-after-most-cybercriminals-we-need-better-training/> (last visited 06/24/22) (attributing the lack of cybercrime prosecutions to insufficient cybercrime expertise in local police forces and severe resource shortages in the FBI).

¹⁴ U.S. Just. Dep’t, *Lawful Access* (Oct. 30, 2020), <https://www.justice.gov/olp/lawful-access> (last visited 06/24/22) (emphasis added).

¹⁵ “Because Craigslist controlled this communication system, the location and identities of victims and purchasers were hidden not only from public view, but also from law enforcement and other agencies who were working to prevent and eliminate sex trafficking.” ER-183 at ¶ 44 (First Amended Complaint).

¹⁶ Johnny Nhan and Kendra N. Bowen, *Policing Internet Sex Trafficking*, *Qualitative Criminology*, Vol. 9 Iss. 1 (2020), available at <https://www.qualitativecriminology.com/pub/v9i1p10/release/1> (last visited 06/24/22)

¹⁷ Bastian Shah, *Commercial Free Speech Constraints on Data Privacy Statutes After Sorrell v. Ims Health*, 54 Colum. J.L. & Soc. Probs. 93, 98-99 (2020) (last visited 06/24/22); see also Paolo Campana, Council of Eur., Online and Technology, *Facilitated Trafficking in Human Beings: Summary and Recommendations* 14 (2022).

to permanently destroy their information,¹⁸ further impeding investigation and evidence-gathering.

D. Congress passed FOSTA to make it easier for victims to file civil cases against online beneficiaries of trafficking. Therefore, the District Court’s interpretation leads to an absurd result: making such cases impossible.

“[I]nterpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available.” *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982). Absurd results occur when the statute’s object and purpose are defeated. *See United States v. Casasola*, 670 F.3d 1023, 1029 (9th Cir. 2012) (“[W]e do not impute to Congress an intent to create a law that produces an unreasonable result.”) (citing *United States v. Kaldenberg*, 429 F.2d 161, 164 (9th Cir. 1970)). An absurd result often manifests as a blatant frustration of a statute’s purpose. Here’s an example from two prominent commentators:

There is a legendary story about zoning legislation stating that “no drinking saloon may exist within a mile of any schoolhouse.” Misinterpreting and misapplying this provision, the court decided that a certain schoolhouse had to be moved. That decision was precisely backward: The clear purpose of the statute, gathered from the words

¹⁸ Elizabeth L. Field, *United States Data Privacy Law: The Domino Effect After the GDPR*, 24 N.C. Banking Inst. 481, 484, 491 (2020) <https://scholarship.law.unc.edu/cgi/viewcontent.cgi?article=1514&context=ncbi> (last visited 06/24/22).

alone (“no drinking saloon” is the prohibition), was to protect schoolhouses – not saloons.¹⁹

FOSTA’s clear purpose was to protect sex trafficking victims, not websites. But unfortunately, the District Court put the saloon before the school.

The District Court acknowledged that courts have reached different conclusions about the plain reading of the text. The Court then should have chosen the interpretation that furthered rather than obstructed the statute’s purpose.²⁰ Instead, the Court interpreted FOSTA to eviscerate sex-trafficking victims’ ability to initiate civil actions against websites that facilitate their abuse. This effectively restores previous CDA 230 precedents completely frustrating the statute’s purpose.

FOSTA was a response to an outcry from sex-trafficking victims. As the General Counsel of the National Center for Missing and Exploited Children testified before the Senate Judiciary Committee regarding FOSTA:

Courts have been [un]able to find their way around the current application of the CDA, a statute that is over 21 years old and has created broad immunity, even for websites that support online child sex trafficking. These courts have called on Congress to clarify that all facilitators of online sex trafficking, including websites, are not legally protected.

...

We believe these bills address the specific legal barriers faced by child sex trafficking victims ... clarifying that sex trafficking victims can pursue civil remedies against everyone who participates in their

¹⁹ Scalia & Garner, *supra*, § 4 at 63.

²⁰ “A textually permissible interpretation that furthers rather than obstructs the document’s purpose should be favored.” *Id.*, *supra*, § 4 at 63.

trafficking, including websites . . . These broad legislative solutions specifically respond to what courts have called on Congress to do: provide children with access to justice and hold websites that facilitate sex trafficking responsible.²¹

Representative Ann Wagner, who introduced FOSTA, said in the same hearing:

Why are these websites able to sell our children? Because judges have ruled that section 230 prevents websites that exploit the most vulnerable members of our society from being held accountable. Congress' response to these rulings must be patently clear. Section 230 of the Communications Decency Act was never intended to allow businesses to commit crimes online that they could never commit offline. When Congress passed the Communications Decency Act in 1996, it explicitly acted to prevent the internet from becoming a red light district, and it clearly did not believe that rape was a prerequisite of a free and open internet.²²

²¹ *The Latest Developments in Combatting Online Sex Trafficking Before the Subcomm. on Comm. and Tech. of the H. Comm. on Enr'g and Comm.*, 115th Cong., Ser. No. 115-84 (2017) 17-19 (statement of Yiota G. Souras), <https://www.hsdl.org/?view&did=810901> (last visited 06/24/22).

²² *Id.* at 7 (statement of Hon. Ann Wagner). *See also* 164 Cong. Rec. S1849, Consideration of H.R. 1865, S1851 (Mar. 21, 2018) <https://www.govinfo.gov/content/pkg/CREC-2018-03-21/pdf/CREC-2018-03-21-senate.pdf> (statement of Sen. Blumenthal) (“The purpose of our measure, very simply, is to give survivors their day in court.”); The Stop Enabling Sex Trafficking Act of 2017, Hearing on S. 1693 Before the Comm. on Commerce, Sci., and Transp., 115th Cong., S. Hrg. 115-590, at 7 (2017) (statement of Sen. Portman) <https://www.govinfo.gov/content/pkg/CHRG-115shrg36159/pdf/CHRG-115shrg36159.pdf> (“First, [SESTA] would allow sex trafficking victims to get the justice they deserve against websites that knowingly, knowingly, facilitate sex trafficking against them.”); 164 Cong. Rec. S1849, *supra*, at S1859 (statement of Sen. Fischer) (“SESTA is critical to empowering survivors, providing the legal tools needed to seek and receive justice from all those involved in these monstrous crimes.”).

Furthermore, Congress was fully aware of how difficult these cases are to investigate even for law enforcement. Congresswoman Wagner said in a committee hearing on FOSTA, while arguing for a lower mens rea standard for *prosecutors*: “I have spoken with prosecutors across the country who have asked the House to pass a practical solution that will allow them to take predatory websites off the internet. And I am repeatedly told that any legislation that depends exclusively on the “knowingly” mens rea standard is merely a Washington, DC, feel-good exercise.”

Repeatedly, members said federal and state law enforcement needed more tools to prosecute online violators and that addressing that need was one of FOSTA’s goals.²³ It would be absurd then to interpret the statute to require civil complainants, sex-trafficking victims, to provide, without the benefit of discovery or law-enforcement authority, evidence *at the civil pleading stage* that Congress knew was difficult for even law enforcement to obtain.

In fact, in the Subcommittee on Crime, Terrorism, and Homeland Security’s hearing discussing 230, legal experts agreed that under the current 230 precedents trafficking victims could not gather the evidence needed to bring a civil case for this

²³ See e.g. 164 Cong. Rec. S1849, *supra*, at S1852 (statement of Senator Blumenthal) (“We are here today on the cusp of passing a bill that will provide victims a real opportunity to seek justice and recover damages from websites that profited from their pain of being sold for sex, while also providing new tools to prosecutors, including my former colleagues, the State attorneys general, to go after these sites and their owners.”).

reason. *See Online Sex Trafficking and the Communications Decency Act: Hearing on the Communications Decency Act Before the Subcomm. on Crime, Terrorism, and Homeland Sec. of the H. Comm. on the Judiciary*, 115th Cong., 15 (Oct. 3, 2017) <https://www.govinfo.gov/content/pkg/CHRG-115hhr32353/pdf/CHRG-115hhr32353.pdf> (“And I think the problem with all of the civil cases . . . is, frankly, both the pleading requirements under *Iqbal* and *Twombly* as well as the lack of discovery on these issues that are relevant to 230. So that’s why, I mean, a reasonable, narrowly tailored exception might be necessary. Because I think it’s very hard for us to—even if you have a company like Backpage, to be able to overcome these general pleading standards. . . .”) (statement of Jeff Kosseff, Assistant Professor, United States Naval Academy); *see also, id.* (“But let’s keep in mind what we’re talking about: an immunity provision. Immunity is not an affirmative defense. Immunity stops State prosecutors, it stops victims and survivors at the courthouse door. . . . So . . . they would never be able to engage in discovery to get this kind of information. They don’t have at their disposal a 20-month investigation with subpoena power[.]”) (statement of Mary Leary, Law Professor, Catholic University Columbus School of Law).

It is common sense that information regarding what exactly ISPs know about each individual user, including crimes specific to that user, are in the possession and control of the ISPs. Even if a sex trafficking victim has the ability, resources, and

expertise to fully gather and decipher data relating to her own account on Internet platforms, the platforms will not provide data related to other users.²⁴ And often it's the perpetrators whose data, and what the platforms knew about their activity, that would be required to meet the criminal knowledge standard. Sex trafficking victims have no ability to gather or provide this evidence at the pleading stage.

Accordingly, the District Court's FOSTA interpretation completely undermines FOSTA and renders it useless as a tool for civil justice for victims. Such an absurd interpretation of a statute meant to "open the courthouse doors to victims of sex trafficking"²⁵ must be rejected.

II. The declared and enacted purpose for FOSTA is consistent with the plain text of the Section 230 amendment and is a reliable source for its meaning.

Congress was not coy about FOSTA's purpose. The Act's very first section assigns it a short title: the "Allow States and Victims to Fight Online Trafficking Act of 2017." Pub. Law No. 115-164 § 1 (Apr. 11, 2018). The title also explains who it

²⁴ See e.g. craigslist, *craigslist Privacy Policy* (updated Sep. 15, 2020) <https://www.craigslist.org/about/privacy.policy> (last visited 06/24/22).

²⁵ S. Hrg. 115-590 at 6-7 (statement of Sen. Portman), *supra* <https://www.govinfo.gov/content/pkg/CHRG-115shrg36159/pdf/CHRG-115shrg36159.pdf>.

empowers: states and victims.²⁶ Moreover, FOSTA announces its purpose with an enacted preamble:

It is the sense of Congress that—

(1) section 230 of the Communications Act of 1934 (47 U.S.C. 230; commonly known as the “Communications Decency Act of 1996”) *was never intended* to provide legal protection to websites that unlawfully promote and facilitate prostitution and websites that facilitate traffickers in advertising the sale of unlawful sex acts with sex trafficking victims;

(2) websites that promote and facilitate prostitution have been reckless in allowing the sale of sex trafficking victims and have done nothing to prevent the trafficking of children and victims of force, fraud, and coercion; and

(3) *clarification of such section is warranted to ensure that such section does not provide such protection to such websites.*

Id. at § 2 (emphasis supplied). Congress enacted this language along with the substantive amendment to Section 230 itself. *Id.* at § 4. This is a helpful indicator of the amendment’s meaning because an enacted preamble such as this one “set[s] forth the assumed facts and the purposes that the majority of the enacting legislature [] had in mind, and these can shed light on the meaning of the operative provisions that follow.” Scalia & Garner, *supra*, § 34 at 218 (citing Joseph Story, *Commentaries on the Constitution of the United States*, § 459 at 326 (2d ed. 1858); *see also Gundy v. United States*, ___ U.S. ___, 139 S. Ct. 2116 (2019) (relying on Congress’

²⁶ “The title and headings [of legislation] are permissible indicators of meaning.” Scalia & Garner, *supra*, § 35 at 221.

“declaration of purpose” to reject an interpretation of a statute that was inconsistent with that purpose).

Here, the “Sense of Congress” provision in FOSTA’s Section 2 and the Section amending CDA 230 speak with one voice. Congress explains it is addressing an interpretation of Section 230 that was “never intended,” which was legally protecting websites that facilitated sex trafficking. Pub. Law No. 115-164 § 2. Accordingly, “clarification of such section is warranted to ensure that such section does not provide such protection to such websites.” *Id.* This purpose statement is consistent with the words of clarification that were added to CDA 230:

Nothing in this section (other than subsection (c)(2)(A)) shall be construed to impair or limit--

(A) any claim in a civil action brought under section 1595 of Title 18, if the conduct underlying the claim constitutes a violation of section 1591 of that title.

47 U.S.C. § 230(e)(5)(A) (emphasis supplied).

The District Court acknowledged that there were two competing plausible interpretations yet, the Court did not address, let alone apply, FOSTA’s “sense of congress” provision. It did, however, focus at length on certain components of FOSTA’s legislative history. Taken as a whole, however, the available legislative history does not support the District Court’s interpretation.

A. The District Court’s legislative history discussion does not support replacing the statute’s plain meaning.

The District Court’s discussion of the legislative history of FOSTA zeroed in on specific wording in one Committee Report, and comments by legislators and witnesses before the committees that considered the legislation. These excerpts from the lawmaking process do not support the District Court’s conclusion that FOSTA only permits actions to be brought when they assert that the defendant itself has violated 18 U.S.C. § 1591. *J.B.*, at ER-20.

First, the District Court seizes upon the Senate Committee Report’s language that the Senate bill version would “eliminate section 230 as a defense for websites that knowingly facilitate sex trafficking. It would also 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.” ER-16 (*quoting* the Senate Report at 2). “The latter statement” the court opined “strongly suggests that the federal carve-out for section 1595 claims as framed in SESTA as amended covers only defendants whose own conduct violates section 1591.” *Id.* But nothing in this statement suggests such a conclusion. This Senate Report provision was summarizing the result of the First Circuit’s decision in *Backpage*. Senate Report at 2. The Senate Report does make clear that the legislation’s primary concern was clarifying that Section 230 does not provide legal protection to websites that facilitate sex trafficking. *Id.* at 3-4. In any event, Congress did not enact the

Senate Committee Report. It did enact FOSTA.²⁷ And the enactment’s language is the surest evidence of its meaning and purpose.

Second, the Court focuses on comments made by lawmakers and committee witnesses at various points during the legislative process. ER-16-19. These quotes, which make up the bulk of the Court’s discussion of FOSTA’s legislative history fall short of demonstrating that the Act eliminates civil beneficiary-liability claims for online sex-trafficking victims. The Court focused on Senator Portman’s introductory comments on the Senate version, in which he remarked that the legislation would maintain a “high bar,” a “knowing standard,” and “protect good tech actors....” ER-14-15 (*quoting* Sen. Hrg. 115-590 at 7).²⁸ Senator Portman did not specify to which section of the bill he was referring. It appears, however, that Senator Portman was addressing the knowledge standard found in the “participation in a venture” definition that FOSTA added to 18 U.S.C. § 1591.²⁹ And there is no

²⁷ See Scalia & Garner, *supra*, at 380 (“No one can vote against a committee report and the President cannot veto the language of a report.”) (*quoting* Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 *Harv. J.L. & Pub. Pol’y* 59, 59 (1988)).

²⁸ S. Hrg. 115-590, *supra*. <https://www.govinfo.gov/content/pkg/CHRG-115shrg36159/pdf/CHRG-115shrg36159.pdf>

²⁹ Compare *id.* at 7 (“it would allow sex trafficking victims to get the justice they deserve against websites that knowingly, knowingly, facilitate sex trafficking against them.”) with 18 U.S.C. § 1591(e)(4) (“The term “participation in a venture” means knowingly assisting, supporting, or facilitating a violation of subsection (a)(1).”).

indication that he anticipated or supported FOSTA fundamentally changing the civil cause of action in 18 U.S.C. § 1595 for online sex trafficking victims. Moreover, read in context, the gravamen of Senator Portman’s remarks unmistakably focuses on judicial interpretations of Section 230. After detailing his work investigating Backpage, he turned to the focus of his bill:

Despite these facts, efforts by trafficking survivors and law enforcement to hold Backpage accountable have failed repeatedly. Why? Because courts around the country have ruled that Backpage has brought [sic] immunity under a Federal law, the Communications Decency Act. It’s a 1996 law that has not kept up with the times. When Congress enacted the law, I do not believe it intended to shield anyone for responsibility for serious Federal crimes, much less sex trafficking.

...

[T]he Communications Decency Act was never intended to protect those that engage in illegal conduct, and it was certainly never intended to protect online predators and sex traffickers. . . .

Judges across the country, by the way, have made it clear that it is Congress’ responsibility to fix this law. They have invited us to fix this law. Last year, the First Circuit Court of Appeals recognized Backpage’s role in the horrific crime of sex trafficking, but the court ruled that its hands were tied stating the remedy is through legislation, not litigation.

S. Hrg. 115-590, *supra*, at 6-7.

The District Court repeatedly highlighted remarks by FOSTA’s prime House Sponsor, Representative Anne Wagner. ER-16-17, 19. “Ultimately,” the court opined, “Congress passed a bill incorporating the provision that the sponsor of

FOSTA as originally introduced acknowledged presented a ‘narrowed’ ‘federal civil carve-out’ that is ‘subject to a heightened pleading standard.’” ER-19 *quoting* Rep. Wagner, S. Hrg. 115-84 at 12, n. 7 (November 30, 2017). But the probity of these mid-process remarks as to the legislation’s meaning is limited at best. Congress passed FOSTA on March 21, 2018. By then, the legislation had been amended three times.³⁰ These remarks reflect Representative Wagner’s concern about proposed changes to the legislation. Indeed, later in the process, Representative Wagner would have occasion to applaud the re-insertion of the “civil carve-out” language.

* * *

Unlike in 1996 when the internet was nascent, when Congress enacted FOSTA it was not writing on a blank slate. It was responding to decades of jurisprudence. In Congress’ judgment, when it came to online sex trafficking, some of the court decisions missed the mark. Congress responded—clarifying that Section 230 should no longer be construed to “provide such protection to such websites.” PL 115-164, *supra*, at § 2. The District Court’s decision below fails to follow this congressional guidance.

³⁰ Congress.gov, *Amendments: H.R.1865 — 115th Congress (2017-2018)* <https://www.congress.gov/bill/115th-congress/house-bill/1865/amendments> (last visited 06/24/22).

CONCLUSION

Amici respectfully submit that the District Court's CDA 230-based dismissal of the Plaintiff's sex-trafficking claims against craigslist runs afoul of the clear congressional guidance in FOSTA and should be overruled.

Dated: June 24, 2022

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief contains 6,496 words, according to Microsoft Word's "word-count" function, excluding the items exempted under Fed. R. App. P. 32(f), and complies with the length specifications set forth by Fed. R. App. 29(a)(5). I further certify that this brief was prepared using 14-point Times New Roman font, in compliance with Fed. R. App. 32(a)(5) and (6).

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CERTIFICATE OF SERVICE FOR ELECTRONIC FILING

I hereby certify that on June 24, 2022, I electronically filed the foregoing brief amici curiae with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the CM/ECF system, which effects service upon all counsel of record.

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