



## VILLANOVA UNIVERSITY

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### FOSTA Legislative Analysis

This is a legislative analysis of H. R. 1865, the “Allow States and Victims to Fight Online Sex Trafficking Act of 2017” (“FOSTA”).

#### **Analysis:**

FOSTA purports to make several legislative changes, most importantly, it proposes adding a statute to the U.S.C. (18 U.S.C. § 2421A) prohibiting the “Promotion or facilitation of prostitution and reckless disregard of sex trafficking.” This statute, however, seems aimed at preventing prostitution and trafficking in the physical sphere, rather than on the internet. In relevant part, the proposed statute penalizes “Whoever uses or operates a facility or means of interstate or foreign commerce with the *intent to promote or facilitate* the prostitution of another person – (2) and acts *in reckless disregard* of the fact that such conduct contributed to sex trafficking, in violation of 1591(a),” (emphasis added). The proposed statute fails to define “facility” and “means,” thus, it is unclear whether an internet service provider or website would qualify under the statute.

Furthermore, the next section of the proposed statute states, “(c) CIVIL RECOVERY.—Any person injured by reason of a violation of section 2421A(b) may recover damages and reasonable attorneys’ fees . . . a defendant may be held liable, under this subsection, where promotion or facilitation of prostitution activity includes responsibility for the *creation or development of all or part of the information or content* provided through any interactive computer service,” (emphasis added). This subsection, despite FOSTA’s purported intent to restrict immunity for internet service providers under the CDA, adopts the very language used in the CDA’s definition of “internet content provider.” Thus, under the proposed statute, to bring a cause of action against an interactive service provider (ISP), a plaintiff or prosecutor would have to show that the ISP engaged in the “creation” or “development” of content. This is already the standard, and courts have defined “content development” in a very limited manner.

Section 4 of FOSTA specifically addresses the CDA. Where SESTA proposes to pierce the veil of immunity that the CDA provides to ISPs by including exceptions for civil actions brought under § 1595 and prosecutions brought under state analogues to § 1591, FOSTA seeks to carve

out exceptions for the proposed statute (which, as discussed above, merely adopts the CDA standard of liability rather than changing it), and for conduct violation § 1591(a). Thus, these exceptions are narrower than those provided by SESTA and will not give victim-plaintiffs and prosecutors more opportunities to bring claims or charges against ISPs.

**Conclusion:**

As it currently exists, FOSTA will not increase the liability of interactive service providers who engage in the facilitation of sex trafficking. It does not change the standard of liability as imposed by the CDA, and its proposed statute, 18 U.S.C. § 2421A, is unclear, ill-defined, and merely adopts the language of the CDA. Furthermore, the proposed amendments to the CDA itself are narrower in scope than those included in the Senate's SESTA bill. Thus, FOSTA will not serve its intended purpose of holding ISPs accountable and providing victims of sex trafficking any recourse.