

Original FOSTA versus Substitute FOSTA

H.R. 1865, the Allow States and Victims to Fight Online Sex Trafficking (“FOSTA”), introduced by Representative Ann Wagner on April 4, 2017, represented the first bold effort to legislatively address online sex trafficking by amending the Communications Decency Act (“CDA”). The amendments to the CDA would have removed a fundamental barrier to fighting online sex trafficking: the immunity that protects online entities that facilitate sex trafficking from any civil liability as well as state criminal liability. On December 12, 2017, the House Judiciary Committee voted favorably to replace H.R. 1865 in its entirety with a substitute bill that represents an entirely new approach to this issue. However, the substitute, among other concerns, eliminated an essential reform element: the amendments to Section 230 that would provide survivors access to justice against offending websites through civil courts. The following chart compares provisions of the original FOSTA that were central to our advocacy with specific changes made in the substitute version as passed out of the House Judiciary Committee on December 12.

Original FOSTA provisions:	Substitute FOSTA provisions:	Key Differences:
Amended 18 U.S.C. § 1591, the federal sex trafficking law, to provide a specific offense for websites that facilitate sex trafficking.	Establishes a new criminal offense under the Mann Act that applies to anyone who uses an interstate facility (e.g., the internet) to promote or facilitate prostitution, and provides a penalty enhancement if commission of the offense facilitates sex trafficking.	While the original bill focused on clarifying the sex trafficking law, the substitute departs dramatically from this approach by creating a new offense that focuses on prostitution instead of sex trafficking and does not specifically apply to websites, opening the door to this offense being used to charge trafficking victims who are coerced by their traffickers to advertise other victims.
Amended Section 230 of the CDA to allow sex trafficking victims to bring civil claims against websites that violate the federal sex trafficking law or state laws that prohibit sex trafficking or sexual exploitation of children, providing access to justice for sex trafficking survivors and resolving the conflict between the civil cause of action under the Trafficking Victims Protection Act and the civil immunity provided by Section 230 of the CDA.	Creates a new civil cause of action based on violations of the new Mann Act offense <i>without addressing the immunity for online entities provided under Section 230 of the CDA</i> . As a result, this new civil cause of action provides no new tool to survivors who would attempt to use this cause of action to sue websites that facilitate sex trafficking, such as Backpage.com, since civil immunity under the CDA would still block these claims, just as it would block civil claims based on violation of the federal sex trafficking law.	By amending Section 230 of the CDA to limit immunity for online entities that facilitate sex trafficking, the original bill went to the heart of the problem – civil immunity under the CDA. The substitute bill simply establishes a new civil cause of action without addressing the civil immunity. Further, by failing to address the CDA’s civil immunity for websites that facilitate sex trafficking, the substitute version fails to resolve the current conflict between the TVPA and the CDA.

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Amended Section 230 of the Communications Decency Act to allow state prosecutors to use state laws to prosecute websites that violate the federal sex trafficking law or state laws prohibiting sexual exploitation of children.

Amends Section 230 of the Communications Decency Act to allow state prosecutions under state laws that are substantially similar to the new Mann Act offense, or for conduct that constitutes a violation of the federal sex trafficking law.

(1) While both versions of the bill amend Section 230 to allow state prosecutors to hold websites criminally liable for conduct that violates the federal sex trafficking law, the substitute fails to allow survivors' civil claims against these same websites, limiting the tools for combatting online sex trafficking to the criminal process.

(2) Since the Mann Act offense is new, few states have existing laws that would be "substantially similar" to the new Mann Act offense. Consequently, most states would have to enact new laws and/or litigate the similarity of existing laws in order to avoid the Section 230 immunity that protects websites from state prosecution.

Amended 18 U.S.C. § 1591, the federal sex trafficking law, to define "participation in a venture," responding to a legislative gap identified in the First Circuit court decision that affirmed the denial of child sex trafficking victims' claims against Backpage.com.¹

Does not amend the federal sex trafficking law to provide a definition of "participation in a venture."

By failing to amend the definition of "participation in a venture," the substitute fails to address the concerns raised by the First Circuit decision.

¹ Jane Doe v. Backpage LLC, 817 F.3d 12 (1st Cir. 2016).