

TRAFFICKINGHUB: REFORMING SECTION 230 OF THE
COMMUNICATIONS DECENCY ACT TO ADDRESS PORNHUB’S EXPLOITATION
OF SEX TRAFFICKING VICTIMS

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I. INTRODUCTION

“Pornhub became my trafficker...I’m still getting sold, even though I’m five years out of that life,”¹ said Cali, a victim who was trafficked by her adoptive family and forced to appear in nonconsensual pornographic videos from the age of nine.² In December of 2020, the *New York Times* published Cali’s story as part of a detailed feature on Pornhub.³ The *Times* article exposed the “dark side” of Pornhub, which includes capitalizing and profiting from rape, nonconsensual material, and sexual exploitation of men, women, and children.⁴ The result was an avalanche of public outrage, class action suits, and companies—such as Visa, Mastercard, and Instagram—terminating their relationship with Pornhub.⁵ In light of the exposure of Pornhub’s “dark side,”⁶ individuals who were harmed for the benefit of Pornhub’s business model filed suit against the company.⁷ The allegations against Pornhub and its parent company, MindGeek,⁸ include financial

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¹ Nicholas Kristof, *The Children of Pornhub: Why Does Canada Allow This Company to Profit Off Videos of Exploitation and Assault?*, N.Y. TIMES (Dec. 4, 2020), <https://www.nytimes.com/2020/12/04/opinion/sunday/pornhub-rape-trafficking.html> [perma.cc/XGN4-ABFP].

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ Phil Lord, *Pornhub: Opening the Floodgates?*, 11 HOUSTON L. REV. 54 (2021); John Naughton, *It’s a Sign of a Broken System When Only Credit Card Firms Can Force Pornhub to Change*, THE GUARDIAN (Dec. 19, 2020), <https://www.theguardian.com/commentisfree/2020/dec/19/pornhub-abuse-videos-new-york-times-mastercard-visa> [https://perma.cc/L4YG-9D4T].

⁶ Kristof, *supra* note 1.

⁷ Marisa Iati, *Pornhub Profits from Rape, Child Pornography, and Sex Trafficking. Dozens of Women Allege in Lawsuit*, WASH. POST (June 18, 2021), <https://www.washingtonpost.com/business/2021/06/18/pornhub-lawsuit-rape-child-porn-sex-trafficking/> [perma.cc/5E45-K8UB].

⁸ This Note focuses on Pornhub because the company is so well known. Pornhub is owned by MindGeek, a parent company to several pornography sites, such as Redtube, Youporn, XTube,

benefits from every form of nonconsensual content, such as rape videos, child pornography, and child and adult sex trafficking ventures.⁹

This Note is not anti-pornography. Rather, this Note is about the law's failure to keep up with the ever-growing industry, leading to the overprotection of the pornography industry. The lack of regulation of the pornography industry and refusal to hold providers accountable for their actions has led to the continuous sexual exploitation of men, women, and children.¹⁰

Though victims like Cali are hopeful Pornhub will be held accountable, Pornhub has claimed immunity provided by the Communications Decency Act (CDA) § 230 ("Section 230").¹¹ Pornhub's defense mirrors what other interactive computer services providers (ICSPs) assert when faced with potential liability and financial ruin.¹² Section 230 provides ICSPs a liability shield for user-generated content, or content posted on their sites by third parties.¹³ Although Congress recently amended Section 230 to create an exception to immunity for ICSPs that promote sex trafficking,¹⁴ federal district courts are split on how to apply this exception.¹⁵

The several suits filed against Pornhub demonstrate Cali's story is not uncommon.¹⁶ Though sex trafficking victims like Cali are hopeful that those who have benefitted from their harm will be held liable, the broad interpretation of Section 230 has provided blanket immunity for platforms that know or should know of objectionable material being posted on their

SpankWire, ExtremeTube, Men.com, My Dirty Hobby, Thumbzilla, PornMD, Brazzers and GayTube. See Kristof, *supra* note 1.

⁹ *Id.*; Complaint at 3, *Fleites v. MindGeek S.A.R.L.*, No. LACV-21-04920-CJC-(ADSx), 2022 U.S. Dist. LEXIS 174824 (C.D. Cal. June 17, 2021).

¹⁰ See Kristof, *supra* note 1; Lord, *supra* note 5; Iati, *supra* note 7.

¹¹ Melissa Angell, *Pornhub Says Section 230 Bars Child Sex Trafficking Case*, LAW 360 (July 8, 2021), <https://www.law360.com/articles/1401158/pornhub-says-section-230-bars-child-sex-trafficking-case> [<https://perma.cc/ZRT5-9C4S>].

¹² See *M.A. ex rel. P.K. v. Vill. Voice Media Holdings, LLC*, 809 F. Supp. 2d 1041, 1045 (E.D. Mo. 2011); *Doe v. Mark Bates & Yahoo!, Inc.*, No. 5:05-CV-91-DF-CMC, 2006 U.S. Dist. LEXIS 93348, at *9 (E.D. Tex. Dec. 27, 2006); *Reno v. ACLU*, 521 U.S. 844, 860–61 (1997).

¹³ See *M.A. ex rel. P.K. v. Vill. Voice Media Holdings, LLC*, 809 F. Supp. 2d 1041, 1045 (E.D. Mo. 2011); *Doe v. Mark Bates & Yahoo!, Inc.*, No. 5:05-CV-91-DF-CMC, 2006 U.S. Dist. LEXIS 93348, at *9 (E.D. Tex. Dec. 27, 2006); *Reno v. ACLU*, 521 U.S. 844, 860–61 (1997).

¹⁴ Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. No. 115-164 (codified as amended at 18 U.S.C §§ 2421A, 230(e), 1591(e), 1595).

¹⁵ See, e.g., *United States v. Afyare*, 632 F. App'x 272, 286 (6th Cir. 2016); *Doe v. Twitter, Inc.*, 555 F. Supp. 3d 889, 920 (N.D. Cal. 2021); *J.C. v. Choice Hotels Int'l, Inc.*, No. 20-cv-00155-WHO, 2020 WL 3035794, at *1 n.1 (N.D. Cal. June 5, 2020); see discussion *infra* Sections II.C & III.C.

¹⁶ See, e.g., Complaint at 3, *Doe v. MindGeek USA Inc.*, 574 F. Supp. 3d 760 (C.D. Cal. 2021); Complaint at 9, *Doe v. MG Freesites, Ltd.*, No. 7:21-cv-00220-LSC, 2022 U.S. Dist. LEXIS 23199 (N.D. Ala. Feb. 9, 2022); Complaint at 4, *Fleites v. MindGeek S.A.R.L.*, No. LACV-21-04920-CJC-(ADSx), 2022 U.S. Dist. LEXIS 174824 (C.D. Cal. June 17, 2021).

sites.¹⁷ Because of the blanket immunity offered by Section 230, bad faith actors refuse to implement effective monitoring systems, which is contrary to the statute’s legislative intent.¹⁸ Pornhub falls into this category of repeated bad faith actors that profit from the sexual exploitation of adult and child sex trafficking victims.¹⁹ This Note will argue that bad faith actors should not automatically receive the benefit of Section 230’s immunity.

Part II of this Note will discuss the issues regarding the lack of regulation of the growing pornography industry, the legal framework of the federal sex trafficking statutes and Section 230, and, finally, the growth of sex trafficking ventures on pornography sites. Part III explains how the broad interpretation of Section 230 provides extensive protection for bad faith actors, and it analyzes the jurisprudential district court split that has developed from the exception to Section 230 provided by the Allow States and Victims to Fight Online Sex Trafficking Act of 2017 (commonly known as “FOSTA”).²⁰ To remedy the issue of the pornography industry repeatedly benefitting from sex trafficking material, Part IV proposes that the Supreme Court adopt constructive knowledge as the required mens rea, or mental state, for the FOSTA exception to apply to Section 230 immunity. This Note also advocates for Congress to amend Section 230’s FOSTA exception to provide a Notice-and-Takedown procedure.

II. BACKGROUND

To analyze Section 230’s breadth of protection for bad faith ICSPs, it is important to understand the lack of regulation of the pornography industry, the interpretation and application of both the federal sex trafficking statutes and Section 230, and the growth of sex trafficking on the Internet—specifically, on Pornhub’s website.

¹⁷ See Kristof, *supra* note 1.

¹⁸ U.S. DEPARTMENT OF JUSTICE, SECTION 320 – NURTURING INNOVATION OR FOSTERING UNACCOUNTABILITY? 1 (June 2020), <https://nsarchive.gwu.edu/sites/default/files/documents/7049241/Key-takeaways-and-recommendations-from-the-U-S.pdf>.

¹⁹ See *infra* Section II.C.3.

²⁰ Raven Mann, *Safety or Morality? How Moral Framing Influenced FOSTA-SESTA’s Bipartisan Success* 1 (May 1, 2020) (Major Paper, University of Windsor, <https://scholar.uwindsor.ca/major-papers/130> [<https://perma.cc/G4NM-7UG3>] (discussing the unusual bipartisan support of FOSTA and the role morality politics played in the passage of the amendment and noting the policy behind FOSTA was to “uphold a legal liability to website operators for content that may be promoting human trafficking.”)).

A. General Lack of Regulation of the Pornography Industry

Companies in the pornography industry are heavily protected from liability by constitutional safeguards and Section 230 immunity.²¹ Due to technological changes in recent years, the pornography industry is qualitatively different than it was when these protections were put in place.²² There are new, more pervasive problems in the pornography industry, and the law has not adequately dealt with these issues.²³

A major reason for the lack of regulation of the pornography industry is that the Supreme Court regards pornography as constitutionally protected speech.²⁴ The Court's general rule is that "pornography can be banned only if obscene, but under *New York v. Ferber*, pornography showing minors can be proscribed whether or not the images are obscene."²⁵ For example, in *Ashcroft v. Free Speech Coalition*, the Supreme Court held the Child Pornography Prevention Act of 1996, which extended federal prohibition against child pornography to include sexually explicit images that *appear* to depict minors, abridged the First Amendment protection of freedom of speech.²⁶ Therefore, for a regulation on pornography to be upheld, it must be a regulation on either obscene material or child pornography, which is a fairly narrow scope of content that can be regulated.²⁷ As a result of constitutional implications and social dynamics, the pornography industry "enjoys minimal regulation that does little to address harmful behaviors within the industry."²⁸

The growth of the Internet throughout the 21st century has led to "easy and more ubiquitous access to pornography,"²⁹ yet the key Supreme Court

²¹ See *infra* Section II.C.

²² Tanveer Ahamd Zoel & Showkat Rashid, *Easy Access of Internet Pornography and Its Impact on Youth: A Review of the Research*, 6 INT'L J. OF SOC. SCI. & ECON. RSCH. 1385, 1385 (2021); see *infra* notes 27–29.

²³ Zoel & Rashid, *supra* note 22, at 1385.

²⁴ See *Miller v. California*, 413 U.S. 15, 22–23 (1973) ("[I]n the area of freedom of speech and press the courts must always remain sensitive to any infringement on genuinely serious literary, artistic, political, or scientific expression.").

²⁵ The basic guidelines for obscene material are: (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 240 (2002) (citing *New York v. Ferber*, 458 U.S. 747, 761 (1982)); see also *Miller*, 413 U.S. at 24 (citation omitted).

²⁶ *Ashcroft*, 535 U.S. at 239–40 (emphasis added).

²⁷ *Id.*

²⁸ Allison J. Luzwick, Note, *Human Trafficking and Pornography: Using the Trafficking Protection Act to Prosecute Trafficking for the Production of Internet Pornography*, 111 N.W. L. REV. 137, 138 (2017).

²⁹ Zoel & Rashid, *supra* note 22, at 1385.

decisions on the constitutional protection for pornography were decided in 1973,³⁰ 1982,³¹ and 2002.³² The pornography industry's expansion has resulted in fast access to pornography via the plethora of devices with Internet access, such as computers, cell phones, tablets, and televisions. Further, the content posted on pornography sites lives on forever due to the preservation of the Internet; these videos can be shared and downloaded by other users and uploaded again and again.³³ The modern-day accessibility of pornography and the preservation of the Internet contributed to exposing the “dark side” of Pornhub.³⁴

Pornhub created a marketplace that has exploited and profited from the victims of sex trafficking.³⁵ While these problems go far beyond the actions of one company,³⁶ this Note focuses solely on Pornhub because of the timely relevance of sex trafficking victims recently speaking out and filing actions against Pornhub³⁷ and its significant influence on society.³⁸ For example, a 2020 study concluded that Pornhub was the third most socially impactful technology company on society—after only Facebook and Google, but ahead of Microsoft, Apple, and Amazon.³⁹ As one complaint against Pornhub noted, “a central element of the business plan that MindGeek⁴⁰ used to become the dominant online pornography company in the world was the *maximum* use of non-consensual content.”⁴¹ Further, one Pornhub

³⁰ *Miller v. California*, 413 U.S. 15, 33–34 (1973).

³¹ *New York v. Ferber*, 458 U.S. 747, 773 (1982).

³² *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 240 (2002).

³³ Kristof, *supra* note 1.

³⁴ *Id.*

³⁵ *Id.*

³⁶ Another example of a company with similar problems is Facebook with the recent revelation of internal documents showing the prevalence of sex trafficking on the site. The Facebook whistleblower stated, “Facebook over and over again has shown it chooses profit over safety.” Jaclyn Diaz, *Facebook’s New Whistleblower is Renewing Scrutiny of the Social Media Giant*, NPR (Oct. 4, 2021, 7:09 AM), <https://www.npr.org/2021/10/04/1042921981/facebook-whistleblower-renewing-scrutiny-of-social-media-giant> [<https://perma.cc/896G-QPAF>].

³⁷ *See, e.g.*, Complaint at 3, *Doe v. MindGeek USA Inc.*, 574 F. Supp. 3d 760 (C.D. Cal. 2021); Complaint at 9, *Doe v. MG Freesites, Ltd.*, No. 7:21-cv-00220-LSC, 2022 U.S. Dist. LEXIS 23199 (N.D. Ala. Feb. 9, 2022); Complaint at 4, *Fleites v. MindGeek S.A.R.L.*, No. LACV-21-04920-CJC-(ADSx), 2022 U.S. Dist. LEXIS 174824 (C.D. Cal. June 17, 2021).

³⁸ *See* Kristof, *supra* note 1.

³⁹ *Id.*; *The Tech Companies That Have Had the Biggest Impact on Society in the 21st Century*, DIGGITY MARKETING, <https://diggitymarketing.com/most-influential-tech-companies-2020/> [<https://perma.cc/DQL3-GAMB>] (last visited Jan. 28, 2022).

⁴⁰ Pornhub’s parent company, as explained *supra* note 8.

⁴¹ Complaint at 45, *Fleites v. MindGeek S.A.R.L.*, No. LACV-21-04920-CJC-(ADSx), 2022 U.S. Dist. LEXIS 174824 (C.D. Cal. June 17, 2021) (emphasis added) (“MindGeek sought to service demand for all pornographic tastes, including tastes for child pornography, rape, extreme violence, racism and hate, and other illegal acts like bestiality.”).

whistleblower explained, “it is not an accident . . . [that] ownership and management are clearly complicit . . . 100% [because it’s] just money they care about.”⁴² Another whistleblower said if there was a question of the legality of certain content, the typical response would be, “Imagine the trouble I will get in if we report this and take time and we don’t meet quota and you will lose your job.”⁴³ In light of recent sex trafficking allegations, and for the sake of brevity, this Note’s focus on Pornhub is both timely and significant.⁴⁴

B. Federal Sex Trafficking Statutes

In 2000, Congress created and passed the Trafficking Victims Protection Act (“TVPA”) to “combat trafficking in persons, a contemporary manifestation of slavery whose victims are predominantly women and children, to ensure just and effective punishment of traffickers, and to protect their victims.”⁴⁵ Prior to passage of the TVPA, no comprehensive federal criminal law existed to specifically protect victims of trafficking or to prosecute their traffickers; the passage of the TVPA was Congress’s reaction to the previous legal framework’s failure to adequately “deter trafficking and bring traffickers to justice.”⁴⁶ The TVPA provides both criminal and civil remedies for sex trafficking violations.⁴⁷

1. Criminal Liability Statutes

The TVPA’s federal criminal statute was codified in 18 U.S.C. § 1591 (“Section 1591”) to prevent “Sex trafficking of children or by force, fraud, or coercion,”⁴⁸ stating in part:

Whoever knowingly—

⁴² *Id.*

⁴³ *Id.* at 53.

⁴⁴ For example, if Pornhub were to be penalized—or at least not granted complete immunity under Section 230—it is reasonable to assume other companies would see this and implement more effective monitoring systems because of Pornhub’s great influence.

⁴⁵ Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 102(a), 114 Stat. 1464, 1466.

⁴⁶ *Id.* §102(b)(14) (“No comprehensive law exists in the United States that penalizes the range of offenses involved in the trafficking scheme. Instead, even the most brutal instances of trafficking in the sex industry are often punished under laws that also apply to lesser offenses, so that traffickers typically escape deserved punishment.”).

⁴⁷ *See id.*

⁴⁸ 18 U.S.C. § 1591(a).

benefits, financially or by receiving anything of value, from participation in a venture which has engaged in an act...

knowing, or...in reckless disregard of the fact, that means of force, threats of force, fraud, coercion described in subsection (e)(2), or any combination of such means will be used to cause the person to engage in a commercial sex act, or that the person has not attained the age of 18 years and will be caused to engage in a commercial sex act, shall be punished...⁴⁹

Under this statute, the crime of sex trafficking of an adult comprises three elements: (1) force, fraud, or coercion must have been used in commission of the trafficking act; (2) the victim must have engaged in a commercial sex act;⁵⁰ and (3) the trafficking act must have affected interstate or foreign commerce.⁵¹ In the comprehensive statutory scheme of TVPA, “the term ‘venture’ means any group of two or more individuals associated in fact, whether or not a legal entity.”⁵² Section 1591 provides liability for the actual perpetrator(s) of the sex trafficking venture—in other words, “direct liability.”⁵³ In 2018, Congress expanded the existing federal trafficking statute to include third-party liability,⁵⁴ when it defined “participation in venture” as “knowingly assisting, supporting, or facilitating a violation of subsection(a)(1).”⁵⁵

2. Civil Liability Statutes

In 2003, Congress amended TVPA to allow sex trafficking victims to bring federal civil suits against perpetrators for actual and punitive damages.⁵⁶ A civil remedy is available under 18 U.S.C. § 1595 (“Section 1595”), which states in part:

⁴⁹ *Id.* § 1591(a)(2).

⁵⁰ “Commercial sex act” is broadly defined as “any sex act, on account of which anything of value is given to or received by any person.” 18 U.S.C. § 1591(e)(3).

⁵¹ 18 U.S.C. § 1591(a); Luzwick, *supra* note 28, at 144.

⁵² 18 U.S.C. § 1591(e)(6).

⁵³ *Id.* § 1591(a).

⁵⁴ *See* Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. No. 115-164 (codified as amended at 18 U.S.C §§ 2421A, 230(e), 1591(e), 1595).

⁵⁵ 18 U.S.C. § 1591(e)(4).

⁵⁶ Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, 117 Stat. 2875.

An individual who is a victim of a violation of this chapter 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 an act in violation of this chapter) in an appropriate district court of the United States and may recover damages and reasonable attorneys' fees.⁵⁷

Therefore, a sufficient civil claim under Section 1595 must show the defendant:⁵⁸ “(1) knowingly benefitted financially or by receiving anything of value; (2) from participation in a venture; [and] (3) it knew or should have known it was engaged in sex trafficking under Section 1591.”⁵⁹ Section 1595 provides liability against the actual perpetrator(s) and/or one who benefits and knew or should have known of the sex trafficking act—in other words, this is “beneficiary liability.”⁶⁰

3. Comparing Criminal and Civil Liability Statutes

Although the underlying conduct of Section 1591 and Section 1595 is the same,⁶¹ one significant distinction in the statutes is the different knowledge requirement in each—the criminal statute, Section 1591, requires actual knowledge on the part of the defendant,⁶² while the civil statute, Section 1595, contains a constructive knowledge element.⁶³ There have been relatively few claims brought under Section 1595.⁶⁴

Even in its infancy,⁶⁵ a lower district court split has emerged in the interpretation of whether a plaintiff asserting a Section 1595 beneficiary

⁵⁷ 18 U.S.C. § 1595(a).

⁵⁸ “The term ‘venture’ means any group of two or more individuals associated in fact, whether or not a legal entity.” Thus, “defendant” here includes both individuals and entities. 18 U.S.C. § 1591(e)(6).

⁵⁹ *Doe v. Rickey Patel, LLC*, No. 0:20-60683, 2020 WL 6121939 at *8 (S.D. Fla. Sept. 29, 2020) (finding the plaintiff’s allegations were sufficient to raise a plausible inference that defendant hotel owners knew or should have known of sex-trafficking at defendant’s hotels).

⁶⁰ 18 U.S.C. § 1595(a).

⁶¹ One who “...recruits, entices, harbors, transports, provides, obtains, advertises, maintains, patronizes, or solicits by any means a person; or benefits, financially or by receiving anything of value, from participation in [such] a venture.” 18 U.S.C. § 1591(a)(1)–(2).

⁶² *Id.* § 1591(a) (“Whoever knowingly...”) (emphasis added).

⁶³ 18 U.S.C. § 1595(a) (“...person knew or should have known...”) (emphasis added).

⁶⁴ See Jennifer S. Nam, *The Case of the Missing Case: Examining the Civil Right of Action for Human Trafficking Victims*, 107 COL. L. REV. 1655, 1655 (2007).

⁶⁵ David Bouchard, *What Court Split on Sex Trafficking Means for Hotels, Victims*, LAW 360 (June 1, 2020, 6:04 PM), <https://www.law360.com/articles/1277494/what-court-split-on-sex-trafficking->

claim must plausibly allege the defendants' conduct violated the criminal standard in Section 1591(a).⁶⁶ The split derives from the somewhat confusing statutory language of the federal sex trafficking statutes. Section 1591 requires the plaintiff to show actual knowledge of the defendant⁶⁷ by stating, “[w]hoever knowingly...”⁶⁸ before listing the elements of the crime.⁶⁹ The heightened mens rea of actual knowledge in Section 1591 is appropriate because it is a criminal statute and is primarily raised in direct liability cases against the actual perpetrator of the sex trafficking venture.

The language of the civil liability statute, Section 1595, is where the issue of interpretation of the appropriate mens rea occurs. Section 1595 states an individual can be liable for civil damages if they are the actual perpetrator “or [someone who] knowingly benefits, financially, or by receiving anything in value from participation in a venture which that *person knew or should have known* has engaged in an act in violation of this chapter.”⁷⁰ The “knew or should have known”⁷¹ language allows the plaintiff to show constructive knowledge or actual knowledge on the part of the defendant.⁷² Because of the unclear statutory language, courts are split on whether a plaintiff asserting a Section 1595 beneficiary claim must allege constructive knowledge or a heightened actual knowledge, as required by the criminal statute.⁷³ Application of the heightened mens rea of actual knowledge is not appropriate to hold beneficiaries accountable under Section 1595, and by interpreting it in such a way, courts stray from the legislature’s intent behind the statute.⁷⁴ In 2008, Congress expanded civil liability *specifically* to include the “knew or should have known” language.⁷⁵ Construing Section 1595 to

means-for-hotels-victims [https://perma.cc/NPY2-2VYU].

⁶⁶ *Id.*; see *Doe v. Rickey Patel, LLC*, No. 0:20-60683, 2020 WL 6121939 at *17 (S.D. Fla. Sept. 29, 2020) (holding that actual knowledge of the sex trafficking venture is not required for 18 U.S.C. § 1595 claims); *but see Doe v. Red Roof Inns, Inc.*, No. 1:19-cv-03840-WMR, 2020 WL 1872336 at *8–9 (N.D. Ga. Apr. 13, 2020) (holding that plaintiff must establish: “(1) *knowledge* as to a benefit received from trafficking; (2) *knowledge* as to ‘assisting, supporting or facilitating’ trafficking; and (3) *knowledge* that Plaintiff was either a minor or subject to force” for both 18 U.S.C. § 1591 and 18 U.S.C. § 1595 claims) (emphasis added).

⁶⁷ 18 U.S.C. § 1591.

⁶⁸ *Id.* § 1591(a).

⁶⁹ The elements are: (1) force, fraud, or coercion must have been used in commission of the trafficking act; (2) the victim must have engaged in a commercial sex act; and (3) the trafficking act must have affected interstate or foreign commerce. 18 U.S.C. § 1591; see *supra* Section II.B.1.

⁷⁰ 18 U.S.C. § 1595(a).

⁷¹ *Id.*

⁷² *Id.* § 1595.

⁷³ Bouchard, *supra* note 65.

⁷⁴ See *infra* Section III.C.

⁷⁵ Gallant Fish, *No Rest for the Wicked: Civil Liability Against Hotels in Cases of Sex Trafficking*, 23 BUFF. HUM. RTS. L. REV. 119, 146 (2016); Pub. L. No. 110-457, sec. 221, § 1595, 122 Stat. 5044,

require actual knowledge, similar to the criminal statute, contradicts Congress's intent in passing a separate civil liability provision and amending that provision to include the constructive knowledge requirement.

C. The Lack of Regulation of Pornography has Contributed to the Growth of Sex Trafficking within the Industry

There has been an expansion of the pornography industry in recent years, but the law has failed to adequately regulate the trade.⁷⁶ This complicity has been attributed to the expansion of sex trafficking schemes on ICSPs, such as Pornhub. The expansion and accessibility of the Internet has fundamentally changed sex trafficking.⁷⁷

1. The Expansion of Sex Trafficking on the Internet

Human trafficking is a form of modern-day slavery.⁷⁸ In 2017, the International Labor Organization (ILO) released a study⁷⁹ estimating the

5067; Theodore R. Sangalis, Comment, *Elusive Empowerment: Compensating the Sex Trafficked Person Under the Trafficking Victims Protection Act*, 80 *FORDHAM L. REV.* 403, 424 (2011) (writing the "should have known" language calls for constructive knowledge for civil liability).

⁷⁶ Zoel & Rashid, *supra* note 29, at 1385 ("The proliferation and mainstreaming of pornography over the last 2 decades, especially through the Internet, have influenced youth culture and adolescent development in unprecedented and diverse ways."); *see supra* Section II.A.

⁷⁷ *Child Sex Trafficking*, U.S. DEP'T JUST., <https://www.justice.gov/criminal-ceos/child-sex-trafficking> [<https://perma.cc/E9S3-SRKR>] (last updated May 28, 2020); *see* Sona Movsisyan, *Human Trafficking in a Digital Age: Who Should be Held Accountable?*, 27 *MICH. ST. INT'L L. REV.* 539, 547 (2019); *see infra* Section III.A.1.

⁷⁸ *What is Human Trafficking?*, U.S. DEP'T JUST., <https://www.justice.gov/humantrafficking/what-is-human-trafficking> [<https://perma.cc/K4BW-HAA3>] (last updated Oct. 13, 2020); Movsisyan, *supra* note 77, at 541.

⁷⁹ The International Labor Organization employed a combined methodology, drawing on a variety of sources to get the most accurate estimate possible. NAT'L LABOUR ORG., *GLOBAL ESTIMATES OF MODERN SLAVERY: FORCED LABOUR AND FORCED MARRIAGE* 11 (2017), https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/publication/wcms_575479.pdf. The central element was "54 specially designed, national probabilistic surveys involving interviews with more than 71,000 respondents across 48 countries." *Id.* ILO also relied on the database created by the International Organization for Migration "to estimate forced sexual exploitation and forced labour of children." *Id.* The methodology covered a five-year reference period from 2012 to 2016. *Id.* at 12.

number⁸⁰ of victims of modern-day slavery.⁸¹ ILO found approximately 89 million people experienced some form⁸² of modern-day slavery during the five-year period from 2012 to 2016.⁸³ Notably, an estimated 3.8 million adults were victims of forced sexual exploitation, and one million children were victims of commercial sexual exploitation.⁸⁴ Of the total number of victims who were sexually exploited, women and girls made up 99% of this number.⁸⁵

The technological advances and broader accessibility of the Internet in recent years has fundamentally changed—and strengthened—sex trafficking schemes and ventures.⁸⁶ The Internet has provided “a convenient worldwide marketing channel,” facilitated the use of websites to “advertise, schedule, and purchase sexual encounters,” and thus allows traffickers “to reach a larger clientele base than in the past.”⁸⁷ Traditionally, sex trafficking occurred “‘on the streets, at casinos and truck stops, and in other physical locations,’ but now the exchanges occur predominantly online, making sex trafficking an even more lucrative and unmonitored industry.”⁸⁸ One scholar wrote, “online sex trafficking has become so common in the U.S. that police note that when they receive a report for a missing child . . . the first place they look is the Internet.”⁸⁹

⁸⁰ The gathering of statistics on human trafficking is quite difficult due to: (1) the victims’ fear of coming forward or first responders not understanding the situation; (2) the lack of a comprehensive law enforcement database to keep track of the number of victims and reports of alleged trafficking; and (3) the figures primarily focus on sex trafficking, not accounting for other forms of trafficking. Movsisyan, *supra* note 77, at 543–44. For these reasons, any statistics are considered to be under-representative. *Id.*; see also NAT’L LABOUR ORG., *supra* note 79, at 9 (“[T]hese estimates are considered to be conservative.”).

⁸¹ NAT’L LABOUR ORG., *supra* note 79, at 5.

⁸² This includes forced labor, forced sexual exploitation, commercial sexual exploitation of children, and forced marriage. *Id.* at 9.

⁸³ *Id.* at 5.

⁸⁴ *Id.* at 11.

⁸⁵ *Id.*

⁸⁶ *Child Sex Trafficking*, *supra* note 77; see Movsisyan, *supra* note 77, at 547.

⁸⁷ *Child Sex Trafficking*, *supra* note 77; see also MEREDITH DANK ET AL., ESTIMATING THE SIZE AND STRUCTURE OF THE UNDERGROUND COMMERCIAL SEX ECONOMY IN EIGHT MAJOR US CITIES 3 (2014), https://www.urban.org/sites/default/files/publication/22376/413047-estimating-the-size-and-structure-of-the-underground-commercial-sex-economy-in-eight-major-us-cities_0.pdf (finding the “widespread availability and rapid expansion of the Internet has redefined the spatial and social limitations of the sex market by introducing new markets for both recruitment and advertisement.”).

⁸⁸ Movsisyan, *supra* note 77, at 548.

⁸⁹ *Id.* at 549 (citing DANK ET AL., *supra* note 87, at 68, 102 (finding law enforcement officers in Dallas and San Diego believed the internet was a driver in the expansion of sex trafficking)).

2. Sex Trafficking in the Pornography Industry

In the 21st century, the perpetrators of sex trafficking include not only the “traffickers, pimps, and Johns who sell or exploit victims, but also the Internet Service Providers who profit from facilitating and assisting the crime.”⁹⁰ Due to constitutional protections on pornography,⁹¹ there are “no laws that effectively control [the] Internet pornography” industry.⁹² The lack of regulation on the pornography industry has provided perpetrators with a new avenue to benefit from trafficking.⁹³ One study found 49% of sexually exploited women from nine different countries⁹⁴ said pornography was being made of them while they were being sold for sex.⁹⁵ Pornographic material that constitutes sex trafficking material is not constitutionally protected because: (1) the material often involves pornography showing minors;⁹⁶ and (2) even if it is not child pornography, the material would be found obscene.⁹⁷ Applying the *Miller v. California* guidelines,⁹⁸ sex trafficking material would be found “obscene” because: (1) the average person, applying contemporary community standards, would find that sex trafficking material is appealing to a prurient interest; (2) sex trafficking material depicts, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (3) sex trafficking material lacks serious literary, artistic, political, or scientific

⁹⁰ *Id.* at 541–42.

⁹¹ See *supra* Section II.A.

⁹² John Copeland Nagle, *Pornography as Pollution*, 70 MD. L. REV. 939, 940, 963 (2011) (comparing the law’s failure to regulate pornography to regulations on environmental pollution) (“Legal scholars say the law has failed to control Internet pornography. It is hard to argue with them.”).

⁹³ Robert W. Peters et al., *The Slave and the Porn Star: Sexual Trafficking and Pornography*, 5 J. OF HUM. RTS. AND CIV. SOC’Y 21 (2012) (“Human trafficking is universally recognized as an abhorrent practice that cannot be tolerated in the modern world. However, it is not a simple problem, and it is connected to countless other social phenomena, including pornography.”).

⁹⁴ Canada, Colombia, Germany, Mexico, South Africa, Thailand, Turkey, United States, and Zambia.

⁹⁵ Melissa Farley, *Renting an Organ for Ten Minutes: What Tricks Tell Us about Prostitution, Pornography, and Trafficking*, in *PORNOGRAPHY: DRIVING THE DEMAND IN INTERNATIONAL SEX TRAFFICKING* 145 (David E. Guinn & Julie DiCaro eds., 2007).

⁹⁶ Movsisyan, *supra* note 77, at 549.

⁹⁷ *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 240 (2002) (citing *New York v. Ferber*, 458 U.S. 747, 761 (1982) (“[P]ornography can be banned only if obscene, but under *Ferber*, pornography showing minors can be proscribed whether or not the images are obscene.”)); see also *supra* Section II.A.

⁹⁸ See *supra* note 25. The *Miller* guidelines for obscene material are: (a) whether “the average person, applying contemporary community standards” would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. *Miller v. California*, 413 U.S. 15, 24 (1973) (internal citation omitted).

value.⁹⁹ Thus, if the pornography industry is participating in or benefiting from sex trafficking material, not only can it be regulated, but it can also be completely banned because it is obscene material.¹⁰⁰

Even though constitutional protections do not extend to sex trafficking material, the lack of regulation of pornography has given ICSPs in the industry the opportunity to exploit and profit from sex trafficking ventures and material posted on their site. “With the expansion of the Internet and advanced digital technology, new key players involved in trafficking are coming to light.”¹⁰¹ Pornhub is one of these new key players. This is demonstrated in one way by the fact that after the *New York Times* article exposed Pornhub’s “dark side,”¹⁰² there have been three actions filed against Pornhub’s parent company—two being class action suits—regarding the corporation’s continuous exploitation of rape victims, child pornography victims, and child and adult sex trafficking victims.¹⁰³

3. Pornhub’s Role in the Sex Trafficking Scheme

Pornhub is a unique player in the sex trafficking scheme.¹⁰⁴ The entity is not the traditional, direct “perpetrator” who uses “force, fraud, or coercion” to commission a sex trafficking act.¹⁰⁵ Rather, Pornhub creates “another route to profit for traffickers who enslave victims for the production of pornographic media.”¹⁰⁶ Online sex trafficking and child pornography are closely intertwined because “traffickers post inappropriate photos of children on certain websites, while simultaneously selling the child for specific sexual acts.”¹⁰⁷ The production of this media creates a permanent record of an individual’s abuse and allows for the victimization to continue, since this media is very difficult to remove once posted.¹⁰⁸ Cali, the young woman who was trafficked by her adoptive family, said, “I’m still getting sold . . . I may never be able to get away from this . . . I may be 40 with eight kids, and

⁹⁹ *Miller*, 413 U.S. at 24.

¹⁰⁰ *See Ashcroft*, 353 U.S. at 240.

¹⁰¹ Movsisyan, *supra* note 77, at 541.

¹⁰² Kristof, *supra* note 1.

¹⁰³ *See, e.g.*, Complaint at 3, *Doe v. MindGeek USA Inc.*, 574 F. Supp. 3d 760 (C.D. Cal. 2021); Complaint at 9, *Doe v. MG Freesites, Ltd.*, No. 7:21-cv-00220-LSC, 2022 U.S. Dist. LEXIS 23199 (N.D. Ala. Feb. 9, 2022); Complaint at 4, *Fleites v. MindGeek S.A.R.L.*, No. LACV-21-04920-CJC-(ADSx), 2022 U.S. Dist. LEXIS 174824 (C.D. Cal. June 17, 2021).

¹⁰⁴ Luzwick, *supra* note 28, at 138.

¹⁰⁵ *See* 18 U.S.C. § 1591(a).

¹⁰⁶ Luzwick, *supra* note 28, at 138; Rachel N. Busick, Note, *Blurred Lines or Bright Line? Addressing the Demand for Sex Trafficking Under California Law*, 42 PEPP. L. REV. 333, 338 (2015).

¹⁰⁷ Movsisyan, *supra* note 77, at 549.

¹⁰⁸ *Id.*

people are still masturbating to my photos.”¹⁰⁹ While Pornhub may not be a direct perpetrator, they could be held liable as a third-party beneficiary under the TVPA’s statutory scheme.¹¹⁰

As stated above,¹¹¹ a third-party can be held liable for civil liability if they “(1) knowingly benefitted financially or by receiving anything of value; (2) from participation in a venture; [and] (3) it knew or should have known it was engaged in sex trafficking under Section 1591.”¹¹² First, although pornography can be created for private consumption, Pornhub produces and distributes the pornographic material for commercial distribution.¹¹³ Pornhub has knowingly benefitted financially from the content because their revenues are generated from premium subscriptions and advertisements, many of which are attributable to content posted of underaged and/or trafficked victims.¹¹⁴ This first element is construed broadly by the phrase “or by receiving *anything* of value,”¹¹⁵ thus Pornhub receiving a nonconsensual video of an underaged or sex trafficked individual, which generates revenue from views, is receiving something “of value.” Second, Pornhub has participated in a venture because they have permitted their platform to be used to facilitate sex trafficking content.¹¹⁶ Since FOSTA amended “participation in venture,” the new language allows for third-party beneficiaries to be held liable more easily.¹¹⁷ By producing nonconsensual conduct through MindGeek-owned production companies,¹¹⁸ allowing anyone to anonymously upload and download videos—making it extremely difficult for victims to have their videos permanently removed—and

¹⁰⁹ Kristof, *supra* note 1.

¹¹⁰ See Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 102(a), 114 Stat. 1464, 1466.

¹¹¹ See *supra* Section II.B.2.

¹¹² 18 U.S.C. § 1595; Doe v. Rickey Patel, LLC, No. 0:20-60683, 2020 WL 6121939, at *8 (S. D. Fla. Sept. 29, 2020) (finding plaintiff’s allegations were sufficient to raise a plausible inference that defendant hotel owners knew or should have known of sex-trafficking at defendant’s hotels).

¹¹³ Kristof, *supra* note 1.

¹¹⁴ *Id.* (“Pornhub rakes in money from almost three billion ad impressions a day.”).

¹¹⁵ 18 U.S.C. § 1595 (emphasis added).

¹¹⁶ See Kristof, *supra* note 1.

¹¹⁷ See Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. No. 115-164 (codified as amended at 18 U.S.C §§ 2421A, 230(e), 1591(e), 1595); 18 U.S.C. § 1591(e)(4) (“knowingly assisting, supporting, or facilitating a violation of subsection(a)(1).”).

¹¹⁸ Kristof, *supra* note 1 (“One Pornhub scandal involved the GirlsDoPorn production company, which recruited young women for clothed modeling gigs and then pushed them to perform in sex videos, claiming that the videos would be sold only as DVDs in other countries and would never go online.”); see also *Pornhub Owner Settles with Girls Do Porn Victims Over Videos*, BBC (Oct. 19, 2021), <https://www.bbc.com/news/technology-58917993> [<https://perma.cc/8UZC-8STK>].

facilitating the reuploading of removed videos to its sites,¹¹⁹ Pornhub has adequately participated in a “venture” as defined by the statute.

Finally, the last element, Pornhub’s level of knowledge, or mens rea, in participating in sex trafficking, will be the most difficult to prove. Therefore, the Analysis of this Note concentrates on the importance of the lower court split on the applicable mens rea.¹²⁰ If this element were to be established, the underlying conduct on Pornhub’s website would constitute as sex trafficking under Section 1591. “Sex trafficking” under Section 1591 has three elements: (1) force, fraud, or coercion must have been used in commission of the trafficking act; (2) the victim must have engaged in a commercial sex act; and (3) the trafficking act must have affected interstate or foreign commerce.¹²¹ Although empirical data on the amount of force, fraud, or coercion that occurs on Pornhub is scarce, this does not mean that force, fraud, and coercion do not occur. For example, one of Pornhub’s partner programmers, Girls Do Porn, advertised modeling jobs, and the girls were later told the work they had done involved making pornographic videos.¹²² These programmers told the women the videos would only be sold as DVDs in other countries and would never go online, but the videos were indeed distributed on sites such as Pornhub.¹²³

Second, the pornography on Pornhub’s website is produced and distributed for commercial distribution, thus affecting interstate commerce. As required by the federal sex trafficking statutes, “commercial sex act” has been defined broadly as “any sex act, on account of which *anything* of value is given to or received by any person.”¹²⁴ As stated above, the nature of Pornhub’s advertisements and subscriptions show they have received something of value.¹²⁵ Further, courts have interpreted the phrase “commercial sex act” to include pornographic material. One district court held only a causal relationship must exist between the sex act and an exchange of something valuable, and pornography was a commercial sex act for purposes of criminal liability under Section 1591.¹²⁶ A commercial sex

¹¹⁹ Kristof, *supra* note 1 (“Unlike YouTube, Pornhub allows these videos to be downloaded directly from its website. So even if a rape video is removed at the request of the authorities, it may already be too late: The video lives on as it is shared with others or uploaded again and again.”).

¹²⁰ See *infra* Section III.C.2 for more on the mens rea element and its significance.

¹²¹ 18 U.S.C. § 1591.

¹²² *Pornhub Owner Settles with Girls Do Porn Victims Over Videos*, *supra* note 118.

¹²³ Pornhub settled with the sex trafficking victims from the Girls Do Porn scandal. *Id.*; Kristof, *supra* note 1.

¹²⁴ 18 U.S.C. § 1591(e)(3) (emphasis added).

¹²⁵ Kristof, *supra* note 1.

¹²⁶ Luzwick, *supra* note 28, at 151; *United States v. Marcus*, 487 F. Supp. 2d 289 (E.D.N.Y. 2007), *vacated*, 538 F.3d 97 (2d Cir. 2008), *rev’d*, 560 U.S. 258 (2010), *aff’d in part, vacated in part*, 628 F.3d

act produced and distributed on Pornhub—a website which attracts 3.5 billion visits a month¹²⁷—substantially affects interstate commerce.

After sex trafficked victims started sharing their stories, Pornhub began to implement new policies to curb future exploitation of sex trafficking victims.¹²⁸ The new policies include that Pornhub will: (1) allow videos to be uploaded only by people who have verified their identities; (2) improve moderation; and (3) no longer allow video downloads, which allows illegal material to proliferate.¹²⁹ Although this is a step in the right direction, Pornhub is merely implementing policies that are reasonably decent. These policy changes do not allow a remedy for past harm. For example, the victims in the ongoing actions still may not have a viable claim due to the protection provided by Section 230.¹³⁰ These new policies also do not ensure the end of the sexual exploitation of women and children; rather, it merely ensures Pornhub will have further protection by the Section 230 shield from future actions.

D. Section 230 of the Communications Decency Act

ICSPs are protected by broad immunity under Section 230 of the Communication Decency Act (Section 230).¹³¹ Section 230 was enacted in 1996 as part of a broad campaign to—ironically—restrict access to sexually explicit material online.¹³² By providing immunity for ICSPs who have taken good faith actions to prevent the use of their systems for prohibited purposes, Congress hoped to “encourage...service providers to deploy new technologies and policies which would allow users to control access to prohibited communications.”¹³³ This Note concentrates on two aspects of Section 230: (1) the protection from third-party liability and (2) the FOSTA exception.

36 (2d Cir. 2010).

¹²⁷ Kristof, *supra* note 1.

¹²⁸ Nicholas Kristof, *An Uplifting Update, on the Terrible World of Pornhub*, N.Y. TIMES (Dec. 11, 2020) <https://www.nytimes.com/2020/12/09/opinion/pornhub-news-child-abuse.html> [perma.cc/8V56-XGTD].

¹²⁹ *Id.*

¹³⁰ See *infra* Section III.B.

¹³¹ Katy Noeth, *The Never-Ending Limits of § 230: Extending ISP Immunity to the Sexual Exploitation of Children*, 61 FED. COMM. L. J. 765, 766–67 (2008-2009).

¹³² Danielle Citron & Benjamin Wittes, *The Internet Will Not Break: Denying Bad Samaritans 230 Immunity*, 86 FORDHAM L. REV. 401, 408 (2017); S. REP. NO. 104-23, at 59 (1995) (“The Committee has been troubled by an increasing number of published reports of inappropriate uses of telecommunications technologies to transmit pornography, engage children in inappropriate adult contact, terrorize computer network users through ‘electronic stalking’ and seize personal information.”).

¹³³ S. REP. NO. 104-23, at 59 (1995).

1. The Protection from Third-Party Liability

The cornerstone protection for ICSPs is Section 230's immunity from being treated as a publisher or speaker. The core language of Section 230 states:

(1) Treatment of publisher or speaker. No 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.

(2) Civil liability. No provider or user of an interactive computer service shall be held liable on account of—

(A) 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...¹³⁴

In particular, Section 230 protects ICSPs in two ways: (1) ICSPs are not to be treated as the publisher or speaker of any information provided by another party; and (2) ICSPs are not to be held liable if they have taken any action in good faith to restrict access to “obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable” material.¹³⁵ A key case interpreting this provision stated that Section 230 bars “lawsuits seeking to hold a service provider liable for its exercise of a publisher’s traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content.”¹³⁶

Since the enactment of Section 230 and in the absence of a U.S. Supreme Court decision, the majority of the lower courts have construed this law broadly to confer “sweeping immunity on some of the largest companies in the world.”¹³⁷ A number of cases¹³⁸ have interpreted Section 230 broadly to

¹³⁴ 47 U.S.C.S. § 230(c).

¹³⁵ *Id.*

¹³⁶ *Zeran v. America Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997).

¹³⁷ *Malwarebytes, Inc. v. Enigma Software Grp. USA, LLC*, 141 S. Ct. 13, 13 (2020) (Thomas, J. statement respecting the denial of certiorari); *see, e.g., M.A. ex rel. P.K. v. Vill. Voice Media Holdings, LLC*, 809 F. Supp. 2d 1041, 1050 (E.D. Mo. 2011); *Doe v. Mark Bates & Yahoo!, Inc.*, No. 5:05-CV-91-DF-CMC, 2006 U.S. Dist. LEXIS 93348, at *38 (E.D. Tex. Dec. 27, 2006); *Reno v. ACLU*, 521 U.S. 844, 874 (1997).

¹³⁸ *M.A. ex rel. P.K.*, 809 F. Supp. 2d at 1050 (holding Backpage.com immune under Section 230 from child sex trafficking claims despite allegations that the website was “aware of prior cases of minors

cover even ICSPs who have material posted on their website that may be considered, as the statute says, “obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable.”¹³⁹ Consider *M.A. ex rel. P.K. v. Vill. Voice Media Holdings*, where a sex trafficked minor sued Backpage.com for posting sexually explicit nude photographs of her as advertisements and profiting off such material.¹⁴⁰ The court, citing cases from five circuits,¹⁴¹ dismissed the case and held Backpage was immune because Section 230 immunity applies “even after notice of the potentially unlawful nature of the third-party content.”¹⁴² The court could not even consider the merits of this sex trafficking victim’s claim because the breadth of Section 230 immunity terminates such a claim at the motion to dismiss stage.¹⁴³

2. The FOSTA Exception

In 2018, Congress amended Section 230 to create an exception to immunity for ICSPs who host third-party content that promotes or facilitates sex trafficking, called “Allow States and Victims to Fight Online Sex Trafficking Act of 2017” (commonly known as “FOSTA”).¹⁴⁴ Congress passed FOSTA in response to the lower courts’ broad interpretation of Section 230 and the resulting protection of websites like Backpage by a broad

being sexually trafficked on its website and based upon the posted ads and photography, no reasonable person could review the postings in the adult categories and deny prostitution was the object of almost each and every ad.”); *Mark Bates & Yahoo!, Inc.*, 2006 LEXIS 93348, at *34; *Reno*, 521 U.S. at 874.

¹³⁹ 47 U.S.C.S. § 230(c)(2)(A).

¹⁴⁰ *M.A. ex rel. P.K.*, 809 F. Supp. 2d at 1044.

¹⁴¹ See *Doe v. MySpace, Inc.*, 528 F.3d 413, 418 (5th Cir. 2008) (“Courts have construed the immunity provisions in § 230 broadly in all cases arising from the publication of user-generated content.”); *Universal Commc’n. Sys. v. Lycos, Inc.*, 478 F.3d 413, 415, 420 (1st Cir. 2007) (affirming defendant’s motion to dismiss because defendant was provided immunity by Section 230 from plaintiff’s cyberstalking claims) (“It is, by now, well established that notice of the unlawful nature of the information provided is not enough to make it the service provider’s own speech.”); *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1118 (9th Cir. 2007) (quoting *Almeida v. Amazon.com, Inc.*, 456 F.3d 1316, 1321 (11th Cir. 2006)) (“The majority of 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.’”); *Doe v. GTE Corp.*, 347 F.3d 655, 661, 660 (7th Cir. 2003) (holding the internet service provider was immune under CDA 230, even though provider enabled the customer to post objectionable content—images of plaintiff athletes who were unknowingly recorded unclothed) (“... § 230(c)(2) never requires ISPs to filter offensive content . . .”); *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 333 (4th Cir. 1997) (finding Section 230 confers immunity even when a company distributes content that it knows is illegal).

¹⁴² *M.A. ex rel. P.K.*, 809 F. Supp. 2d at 1050.

¹⁴³ See *id.* at 1058.

¹⁴⁴ Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. No. 115-164 (codified as amended at 18 U.S.C §§ 2421A, 230(e), 1591(e), 1595); Eric Goldman, *The Complicated Story of FOSTA and Section 230*, FIRST AMEND. L. REV. 279, 284 (2018).

immunity shield while promoting or benefitting from sex trafficking ventures on their sites.¹⁴⁵ Legislators in support of FOSTA argued that “judicial interpretation of Section 230 as a broad liability shield strayed from Section 230’s legislative purpose of encouraging ICSPs to moderate content.”¹⁴⁶

Although Section 230 already had a previous exception for federal criminal laws,¹⁴⁷ FOSTA added two new exceptions specifically relating to the sex trafficking statutes discussed in Section II(B): (1) for state criminal prosecutions of activity that violates Section 1591; and (2) for civil causes of action on behavior that violates Section 1591.¹⁴⁸ This Note will focus on the latter of these exceptions, which was codified under Section 230 and states:

Nothing in this section (other than subsection (c)(2)(A)) shall be construed to impair or limit—any claim in a civil action brought under 1595 of Title 18, United States Code, if the conduct underlying the claim constitutes a violation of section 1591 of that title.¹⁴⁹

In other words, FOSTA amended Section 230 to not impair or limit a Section 1595 civil claim brought against an ICSP by protecting ICSPs with broad immunity.¹⁵⁰ However, there is an exception within this exception, shown in Section 230(e)(5)’s language, which protects ICSPs who have taken action to restrict access to material considered to be “obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected.”¹⁵¹ This encourages ICSPs to take action to remove sex trafficking content.

Section 230 has provided broad immunity for ICSPs, protecting bad faith actors, such as Pornhub, from being held accountable for exploiting and profiting from sex trafficking victims. The inconsistency of the lower federal

¹⁴⁵ The House Report listed the online sites Backpage.com, Eros, Massage Troll, and cityxguide as examples of interactive computer services, protected by Section 230, that have become primary channels of sex trafficking. Abigail Balfour, *Where One Marketplace Closes (Hopefully) Another Won’t Open: In Defense of FOSTA*, 60 B.C. L. REV. 2475, 2478 (2019); H.R. REP. NO. 115-572, pt. 1, at 3 (2018) (“Because of protections provided to ‘interactive computer services’ by [Section 230], it has been challenging to hold bad-actor websites accountable criminally (at the state level) and civilly.”).

¹⁴⁶ Balfour, *supra* note 145, at 2502–03.

¹⁴⁷ 47 U.S.C.S. § 230(e)(1) (“Nothing in this section shall be construed to impair the enforcement of section 223 or 231 of this Act [47 USCS § 223 or 231], chapter 71 (relating to obscenity) or 110 (relating to sexual exploitation of children) of title 18, United States Code [18 USCS §§ 1460 et seq. or §§ 2251 et seq.], or any other Federal criminal statute.”).

¹⁴⁸ *Id.* § 230(e)(3), (5).

¹⁴⁹ *Id.* § 230(e)(5)(A).

¹⁵⁰ *See supra* Section II.B; 47 U.S.C.S. § 230(e)(5)(A).

¹⁵¹ 47 U.S.C.S. § 230(c)(2)(A).

courts' interpretations of the federal sex trafficking statutes is an important consideration in determining the scope of FOSTA's exception to broad immunity.¹⁵² The amended FOSTA exception still allows for ICSPs to attain this broad immunity because it is likely to be interpreted narrowly, and it does not provide incentives for moderating sex trafficking violations.¹⁵³

III. ANALYSIS: THE BROAD INTERPRETATION OF SECTION 230 IMMUNITY PROTECTS THE PORNOGRAPHY INDUSTRY FROM BEING HELD ACCOUNTABLE FOR THEIR EXPLOITATION OF SEX TRAFFICKING VICTIMS

Pornhub has benefited and profited from the production and distribution of nonconsensual videos and photographs of sex trafficking victims, and they are protected by Section 230's broad immunity. Although sex trafficking victims are seeking civil damages from Pornhub, the courts' broad interpretation of immunity and narrow interpretation of exceptions thereto immensely protects bad faith actors, such as Pornhub. This issue was not resolved by the passage of the FOSTA exception, as courts will interpret the exception only to be applicable in very narrow circumstances—shown by the lower court split over the applicable mens rea.¹⁵⁴ Therefore, the interpretation of Section 230 immunity must change, and the language of Section 230 must be amended to encourage moderation of such objectionable material.¹⁵⁵

A. The Broad Interpretation of Section 230 Provides Broad Protection for Bad Faith Actors

The lower courts' broad interpretation of Section 230 has provided blanket immunity for bad faith actors. Platforms, such as Pornhub, that know or should know of objectionable material being posted on their sites continuously refuse to implement effective monitoring systems. One scholar wrote that the permissive interpretation of Section 230 immunity eliminates "incentives for better behavior by those in the best position to minimize harm."¹⁵⁶ Section 230 imposes an extreme burden on victims when bringing claims against ICSPs, and thus, it is difficult for ICSPs to be held accountable for objectionable material posted on their sites.

¹⁵² See *infra* Section III.C.3.

¹⁵³ See *infra* Section III.C.2.

¹⁵⁴ See *infra* Section III.C.3.

¹⁵⁵ See *infra* Section IV.

¹⁵⁶ Danielle Keats Citron, *Cyber Civil Rights*, 89 B.U. L. REV. 61, 118 (2009); Citron & Wittes, *supra* note 132, at 413; Mark A. Lemley, *Rationalizing Internet Safe Harbors*, 6 J. ON TELECOMM. & HIGH TECH. L. 101, 105, 119 (2007).

The broad interpretation of Section 230 immunity has allowed platforms protection even if “they republished content knowing it might violate the law, encourage users to post illegal content, change design and policies for the purpose of enabling illegal activity, or sell dangerous products.”¹⁵⁷ Although Section 230 was adopted, in part, as a reaction to a New York state decision where an Internet access provider was held liable for the libelous statements of others,¹⁵⁸ its protection has expanded to protect bad faith ICSPs with illegal content on their sites. There are a number of cases in which courts have interpreted Section 230 broadly to cover ICSPs.¹⁵⁹

1. Section 230 Enables Bad Faith Actors

While Section 230 was enacted to further the policy goal of restricting access to sexually explicit material online,¹⁶⁰ the lower courts have interpreted this provision broadly to provide ICSPs immunity even regarding objectionable material. The Ninth Circuit described the breadth of immunity when it stated, “The message to website operators is clear: if you don’t encourage illegal content or design your website to require users to input illegal content, you will be immune.”¹⁶¹

In *Doe v. Bates & Yahoo!, Inc.*,¹⁶² the parents of Johnny Doe, a minor, sued Yahoo! on their son’s behalf for hosting illegal child pornography on the Candyman “e-group;”¹⁶³ they also sued the moderator of the Candyman

¹⁵⁷ Citron & Wittes, *supra* note 132, at 408.

¹⁵⁸ See *Stratton Oakmont, Inc. v. Prodigy Serv. Co.*, No. 31063/94, 1995 WL 323710, at *7 (N.Y. Sup. Ct. May 24, 1995); *Batzel v. Smith*, 333 F.3d 1018, 1029 (9th Cir. 2003) (“Congress was concerned with the impact such a holding would have on the control of material inappropriate for minors.”).

¹⁵⁹ See *M.A. ex rel. P.K. v. Vill. Voice Media Holdings, LLC*, 809 F. Supp. 2d 1041, 1050 (E.D. Mo. 2011) (holding Backpage.com was immune under Section 230 from child sex trafficking claims despite allegations that the website was “aware of prior cases of minors being sexually trafficked on its website and based upon the posted ads and photography, no reasonable person could review the postings in the adult categories and deny prostitution was the object of almost each and every ad.”); *Backpage.com, LLC v. McKenna*, 881 F. Supp. 2d 1262, 1286–87 (W.D. Wash. 2012) (granting a preliminary injunction to prevent enforcement of a new law that may hold third-party websites liable for human trafficking); *Reno v. ACLU*, 521 U.S. 844, 874 (1997).

¹⁶⁰ S. REP. NO. 104-23, at 59 (1995) (“The Committee has been troubled by an increasing number of published reports of inappropriate uses of telecommunications technologies to transmit pornography, engage children in inappropriate adult contact, terrorize computer network users through ‘electronic stalking’ and seize personal information.”).

¹⁶¹ *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1170–71 (9th Cir. 2008).

¹⁶² *Doe v. Bates & Yahoo!, Inc.*, No. 5:05-CV-91-DF-CMC, 2006 U.S. Dist. LEXIS 93348, at *1 (E.D. Tex. Dec. 27, 2006).

¹⁶³ *Id.* at *2 (“An ‘e-group’ is an internet-based forum where users can ‘engage in discussions; share photos and files; plan events; exchange ideas and information; and nurture interests and activities.’”).

e-group, Mark Bates.¹⁶⁴ The plaintiffs argued that Yahoo! should be held liable because it knowingly profited from the trafficking of illegal child pornography.¹⁶⁵ The court granted Yahoo!'s motion to dismiss, holding the ICSP was immune from civil liability even if Yahoo! knowingly received and displayed the child pornographic photographs.¹⁶⁶ In regard to the self-regulation protection on ICSPs, the court reasoned that if sites such as Yahoo! could be liable for reviewing material—in this case illegal child pornography, sites would likely choose not to regulate at all.¹⁶⁷ Although it may be true that some ICSPs would choose not to regulate at all, each site could weigh the cost and risk of potential liability versus the benefit of hosting such content. However, the court wrote, “While the facts of child pornography...may be highly offensive, Congress has decided that the parties to be punished and deterred are not the Internet service providers but rather are those who created and posted the illegal material.”¹⁶⁸ This case illustrates the immense breadth of Section 230 immunity because child pornography is arguably the clearest example of illegal online material, yet this lower court *still* granted Section 230 immunity to the ICSP.¹⁶⁹

2. A Possible Shift in the Breadth of Section 230 Immunity

The lower courts have continued to “apply the Communications Decency Act in the broadest manner.”¹⁷⁰ While there are solid policy reasons for Section 230, many legal scholars have criticized the breadth of immunity protecting ICSPs.¹⁷¹ Legislators have also come to recognize the problems with Section 230, as twenty-three bills in the 117th Congress proposed amending—or even repealing—Section 230.¹⁷² The recognition of the shortcomings of Section 230 will hopefully lead courts to consider the damage that bad faith ICSPs, such as Pornhub, are causing with no recourse.¹⁷³

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at *6.

¹⁶⁶ *Id.* at *6–7.

¹⁶⁷ *Id.* at *10–11.

¹⁶⁸ *Id.* at *11.

¹⁶⁹ *Id.*

¹⁷⁰ Maria Asención, *Classified Websites, Sex Trafficking, and the Law: Problem and Proposal*, 12 INTERCULTURAL HUM. RTS. L. REV. 227, 259 (2017).

¹⁷¹ *See id.*

¹⁷² *See, e.g., The Telecommunication Act's "Good Samaritan" Protection: Section 230*, DISRUPTIVE COMPETITION PROJECT, <https://www.project-disco.org/section-230/#230proposals> [<https://perma.cc/9BBS-L4MQ>] (last updated Oct. 21, 2021); *see also* VALERIE C. BRANNON & ERIC N. HOLMES, CONG. RSCH. SERV., R46751, SECTION 230: AN OVERVIEW (2021).

¹⁷³ Asención, *supra* note 170, at 258.

The Supreme Court of the United States (SCOTUS) has not yet interpreted the breadth of Section 230 immunity.¹⁷⁴ At least one sitting Justice—Justice Clarence Thomas—has shown a willingness for SCOTUS to consider and to narrow Section 230’s scope of immunity which protects ICSPs from civil liability.¹⁷⁵ In a statement respecting denial of certiorari, he wrote the sweeping, blanket immunity provided by Section 230 has been consistent, while the Internet has changed drastically in the past 25 years and “most of today’s major Internet platforms did not exist.”¹⁷⁶ Justice Thomas criticized the lower courts’ broad interpretation of Section 230: “But by construing § 230(c)(1) to protect any decision to edit or remove content...courts have curtailed the limits Congress placed on decisions to remove content.”¹⁷⁷

The courts have interpreted Section 230 broadly. Consequently, this blanket immunity has given websites, such as Pornhub, the freedom to solicit and profit from objectionable activity that would otherwise be regulated and punished through sex trafficking statutes, and “bad faith” actors have no incentive to act in good faith.

B. The Courts Protect Bad Faith Actors by Narrowly Interpreting the Section 230 Exceptions

In contrast to the broad interpretation of the application of Section 230’s immunity, the courts narrowly apply the exceptions in subsection (e) of Section 230.¹⁷⁸ In other words, ICSPs are *usually* protected by Section 230 immunity, and if a plaintiff/victim has a claim that could possibly fall into one of the exceptions—to actually hold an ICSP liable—the courts narrowly apply the exception and likely rule that the exception does not apply. Thus, immunity is broadly applied to ICSPs, even though there are statutory exceptions.

¹⁷⁴ *Malwarebytes, Inc. v. Enigma Software Grp. USA, LLC*, 141 S. Ct. 13, 13 (2020) (Thomas, J. statement respecting the denial of certiorari).

¹⁷⁵ *Id.*; Wiley Rein LLP, *Justice Thomas Lays Blueprint for Supreme Court to Limit Section 230 in a Future Case*, JD SUPRA (Oct. 15, 2020), <https://www.jdsupra.com/legalnews/justice-thomas-lays-blueprint-for-67566/> [<https://perma.cc/3MSX-3Z27>].

¹⁷⁶ *Malwarebytes, Inc.*, 141 S. Ct. at 13 (Thomas, J. statement respecting the denial of certiorari); see Daisuke Wakabayashi, *Legal Shield for Social Media is Targeted by Lawmakers*, N.Y. TIMES (updated Dec. 15, 2020), <https://www.nytimes.com/2020/05/28/business/section-230-internet-speech.html> [<https://perma.cc/M588-4EYK>] (“When the most consequential law governing speech on the internet was created in 1996, Google.com didn’t exist and Mark Zuckerberg was 11 years old.”).

¹⁷⁷ *Malwarebytes, Inc.*, 141 S. Ct. at 17 (Thomas, J. statement respecting the denial of certiorari).

¹⁷⁸ 47 U.S.C.S. § 230(e).

For example, in *Doe v. Bates & Yahoo!, Inc.*,¹⁷⁹ the claims against Yahoo! were due to the hosting of illegal child pornography on their site.¹⁸⁰ Similar to the FOSTA exception to sex trafficking claims, the court in *Bates* evaluated how another Section 230 immunity exception applied to claims relating to the sexual exploitation of children.¹⁸¹ This exception in Section 230(e)(1) states, “Nothing in this section shall be construed to impair the enforcement of ... chapter ... 110 of Title 18, or any other Federal criminal statute.”¹⁸² Recognizing the plaintiffs’ claim is under chapter 110 of Title 18, the court stated it could be covered by the exception, but the court differentiated between the ability of the government to prosecute for alleged criminal violations and the ability for individuals to bring civil suits based on the alleged violations.¹⁸³ For the former, the court stated, “the ability of the government to prosecute Internet service providers for alleged violations of 18 U.S.C. § 2252 is not disputed...”¹⁸⁴ Because the Section 230 exception was based on a federal criminal statute, the court found that “immunity from *all private civil liability* comports with the clear congressional policies”¹⁸⁵ and dismissed the claims.¹⁸⁶ The court held intentional violation of the criminal law—illegal child pornography—is not an exception to the immunity provided to ICSPs for civil liability.¹⁸⁷ Further, the court suggested that an exception to immunity would also not apply to allegations that Yahoo! had profited from illegal child pornography.¹⁸⁸

This is the narrowest interpretation of the Section 230 exception the court could have made. Justice Thomas expressed his distaste for such interpretation when he stated, “Extending § 230 immunity beyond the natural reading of the text can have serious consequences. Before giving companies immunity from civil claims for ‘knowingly host[ing] illegal child pornography,’ ... we should be certain that is what the law demands.”¹⁸⁹ Indeed, this interpretation is in no way what the law demands or what Congress intended in passing Section 230. Section 230, as part of the CDA

¹⁷⁹ See *infra* Section IV.B.1.

¹⁸⁰ *Doe v. Bates & Yahoo!, Inc.*, No. 5:05-CV-91-DF-CMC, 2006 U.S. Dist. LEXIS 93348, at *2 (E.D. Tex. Dec. 27, 2006).

¹⁸¹ *Id.* at *7–8; 47 U.S.C.S. § 230(e)(1).

¹⁸² 47 U.S.C.S. § 230(e)(1).

¹⁸³ *Mark Bates & Yahoo!, Inc.*, 2006 U.S. Dist. LEXIS 93348, at *8.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* (emphasis added).

¹⁸⁶ *Id.* at *9.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at *9–10.

¹⁸⁹ *Malwarebytes, Inc. v. Enigma Software Grp. USA, LLC*, 141 S. Ct. 13, 18 (2020) (internal citation omitted) (citing *Mark Bates & Yahoo!, Inc.*, 2006 U.S. Dist. LEXIS 93348).

as a whole, was intended to “modernize the existing protections against obscene, lewd, indecent, or harassing uses of a telephone [or Internet in general].”¹⁹⁰ Section 230 was enacted as part of a broad campaign to—ironically—restrict access to sexually explicit material online.¹⁹¹ As courts interpret Section 230 immunity more broadly, Congress attempts to narrow the breadth of immunity by amending the statute and adding exceptions. Judicially restricting the application of congressional exceptions is both counterintuitive and conflicts with what the law actually demands.

*C. The Courts’ Narrow Interpretation of the Appropriate Mens Rea
for the FOSTA Exception Further Protects Pornhub’s Sex
Trafficking Schemes*

The passage of the FOSTA exception further shows the judicial deviation from Congress’s intent for Section 230, which was to restrict sexually obscene material.¹⁹² By enacting the FOSTA exception, Congress recognized and attempted to remedy the significant burden imposed on sex trafficking victims who endeavor to bring claims against ICSPs, due to the broad interpretation of Section 230.¹⁹³ Despite Congress’s efforts, the FOSTA exception has not remedied the problems it was enacted to fix. Only a small number of claimants have attempted to hold ICSPs liable for sex trafficking ventures, even with the exception to Section 230 immunity.¹⁹⁴

Further, based on the interpretations of other exceptions to Section 230 immunity, the courts are likely to apply the FOSTA exception narrowly. In effect, this would allow an exception to Section 230 immunity only in a limited window of circumstances. Although the FOSTA exception is a recent

¹⁹⁰ BRANNON & HOLMES, *supra* note 172 (quoting S. REP. NO. 104-23, at 59 (1995)); *see also* Pub. L. No. 104-104, § 501, 110 Stat. 133–43 (1996) (“The decency provisions increase the penalties for obscene, indecent, harassing or other wrongful uses of telecommunications facilities; protect privacy; protect families from uninvited and unwanted cable programming which is unsuitable for children and give cable operators authority to refuse to transmit programs or portions of programs on public or leased access channels which contain obscenity, indecency, or nudity.”).

¹⁹¹ Citron & Wittes, *supra* note 132, at 408; S. REP. NO. 104-23, at 59 (1995) (“The Committee has been troubled by an increasing number of published reports of inappropriate uses of telecommunications technologies to transmit pornography, engage children in inappropriate adult contact, terrorize computer network users through ‘electronic stalking’ and seize personal information.”).

¹⁹² Balfour, *supra* note 145, at 2502–03 (legislators noted the “judicial interpretation of Section 230 as a broad liability shield strayed from Section 230’s legislative purpose of encouraging ICSPs to moderate content.”).

¹⁹³ H.R. REP. NO. 115-572, pt. 1, at 3 (2018) (“Because of protections provided to ‘interactive computer services’ by [Section 230], it has been challenging to hold bad-actor websites accountable criminally (at the state level) and civilly.”).

¹⁹⁴ Nam, *supra* note 64, at 1655.

amendment to Section 230, courts are already attempting to narrowly interpret the applicable circumstances in which the exception will apply,¹⁹⁵ by finding a claim will qualify only if the ICSP has actual knowledge that it was participating in a sex trafficking venture.¹⁹⁶ The lower district courts are split on whether the plaintiff must show the ICSPs' mens rea is actual or constructive knowledge to qualify for the FOSTA exception.¹⁹⁷ As discussed below,¹⁹⁸ the implications of requiring actual knowledge, rather than constructive, would render ICSPs immune for the majority of sex trafficking cases, thereby leaving sex trafficking victims without a remedy.¹⁹⁹

1. The Statutory Language in Dispute

The discrepancy between how courts define the relationship between Section 1591 and Section 1595²⁰⁰ has spilled over into interpreting these statutes within the FOSTA exception. Section 230 states there is an exception to immunity for “any claim in a civil action brought under 1595 of Title 18, United States Code, if the conduct underlying the claim constitutes a violation of Section 1591 of that title.”²⁰¹ This language is particularly confusing concerning: (1) whether the mens rea for a civil action brought under Section 1595 is actual or constructive knowledge, and (2) whether the “conduct underlying the claim” relates only to the sex trafficking elements or whether it includes a heightened mens rea of actual knowledge on the part of ICSP. The district courts are split over the level of knowledge a sex trafficking victim must allege against an ICSP to simply get past the motion to dismiss stage.²⁰² For interpreting Section 230, the constructive knowledge requirement is consistent with legislative intent, and it is practical in terms of establishing an ICSP's mental state.

¹⁹⁵ Bouchard, *supra* note 65.

¹⁹⁶ See *Doe v. Kik Interactive, Inc.*, 482 F. Supp. 3d 1242, 1252 (2020).

¹⁹⁷ See *United States v. Afyare*, 632 F. App'x 272, 286 (6th Cir. 2016); *Doe v. Twitter, Inc.*, 555 F. Supp. 3d 889, 922 (N.D. Cal. 2021), *abrogated by* *Does 1-6 v. Reddit, Inc.*, No. 21-56293, 2022 WL 13743458 (9th Cir. Oct. 24, 2022); *J.C. v. Choice Hotels Int'l, Inc.*, No. 20-cv-00155-WHO, 2020 WL 3035794, at *1 n.1 (N.D. Cal. June 5, 2020).

¹⁹⁸ See *infra* Sections III.C.2–3.

¹⁹⁹ See David S. Ardia, *Free Speech Savior or Shield for Scoundrels: An Empirical Study of Intermediary Immunity Under Section 230 of the Communications Decency Act*, 43 LOY. L.A. L. REV. 373, 438–39 (2010) (reporting that almost all unreversed federal decisions involving invocations of Section 230 between Section 230's passage and September 30, 2009, happened at the motion to dismiss or summary judgment stage).

²⁰⁰ See *supra* Section II.B.3.

²⁰¹ 47 U.S.C.S. § 230(e)(5)(A).

²⁰² See *infra* Sections III.C.2–3.

2. Courts Requiring Actual Knowledge

Based on the language of Section 230's FOSTA exception, some federal district courts have held that a sex trafficking victim must plead facts that would plausibly establish an ICSP knowingly participated in the sex trafficking venture.²⁰³ Courts requiring actual knowledge reason that FOSTA does not abrogate immunity for *all* sex trafficking claims, but it permits civil liability for sex trafficking claims only "if the conduct underlying the claim constitutes a violation of Section 1591."²⁰⁴ Because Section 1591 requires knowing and active participation in sex trafficking by the defendants, a victim of sex trafficking must allege that the ICSP *knowingly* participated in the sex trafficking venture *specifically* involving him or her.²⁰⁵ This means a plaintiff alleging an ICSP knew of other sex trafficking ventures on their site, or knew of a repeated perpetrator using their site, would not satisfy the requirement²⁰⁶—the ICSP would receive immunity, and the case would be dismissed.

The Southern District of Florida has adopted this narrow view of the FOSTA exception.²⁰⁷ In *Doe v. Kik Interactive, Inc.*, the minor plaintiff was "solicited" and "convinced" by adults to send and receive sexually explicit pictures over the online messaging service, Kik.²⁰⁸ The plaintiff sued Kik for a civil remedy under Section 1595, alleging "Defendants have knowledge that sexual predators use its service to prey on minors but have failed to provide any warning or enact policies to protect minors from such abuses."²⁰⁹ In order to avoid Section 230 immunity and allow the suit to proceed, the court reasoned that the plaintiff must prove the underlying conduct violated the substantive criminal law.²¹⁰ So, the court posed two additional burdens on the plaintiff: "a finding of actual knowledge *and* overt participation in a venture of sexual trafficking."²¹¹ Congress did not intend for courts to create these additional burdens;²¹² on the contrary, its intention was to clarify that

²⁰³ See *Doe v. Kik Interactive, Inc.*, 482 F. Supp. 3d 1242, 1251 (2020).

²⁰⁴ *Id.* (quoting 47 U.S.C.S. § 230(e)(5)(A)).

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.* at 1244; BRANNON & HOLMES, *supra* note 172, at 29.

²⁰⁹ *Doe v. Kik Interactive, Inc.*, 482 F. Supp. 3d 1242, 1244; BRANNON & HOLMES, *supra* note 172, at 29 ("[T]he company knew or should have known its services had been used in this way and should have implemented policies to prevent this use.").

²¹⁰ *Kik Interactive, Inc.*, 482 F. Supp. 3d at 1251.

²¹¹ *Id.* at 1250–51.

²¹² See Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. No. 115-164 (codified as amended at 18 U.S.C §§ 2421A, 230(e), 1591(e), 1595).

Section 230 was not created to “provide legal protection to websites that unlawfully promote and facilitate prostitution.”²¹³ However, the Florida District Court stated that FOSTA was “only intended to create a narrow exception to the CDA for openly malicious actors such as Backpage...”²¹⁴ Although FOSTA’s legislative history mentions Backpage, Congress did not insinuate the FOSTA exception was to only apply to “openly malicious actors,”²¹⁵ and the *Kik* court provided no standard with which courts should evaluate who is an “openly malicious actor.”²¹⁶

The *Kik* court validated its decision by stating, “Congress—in balancing the needs of protecting children and encouraging ‘robust Internet communication’—enacted a statute protecting interactive computer service providers from liability for their users’ content and conduct. If it were not for FOSTA, Defendants in this case would be completely immune from liability under the CDA.”²¹⁷ The court emphasized the policy behind Section 230 but ignored the policy behind the FOSTA exception to make sure ICSPs were *completely* immune from liability under Section 230 when a sex trafficking claim is involved.²¹⁸ Courts that limit the FOSTA exception to apply in narrow circumstances, where an ICSP has actual knowledge, continue to stray from Section 230’s legislative purpose of encouraging ICSPs to regulate content.²¹⁹ This is the most critical element because it means that the majority of plaintiffs’ claims will be barred by Section 230 unless they can prove the heightened knowledge of the criminal statute.

3. Courts Allowing Constructive Knowledge

Some district courts have interpreted the FOSTA exception to apply in civil liability cases if the plaintiff alleges the ICSP knew or should have known of the sex trafficking venture—constructive knowledge, the mens rea required for civil sex trafficking claims.²²⁰ Courts using this interpretation

²¹³ *Id.*

²¹⁴ *Kik Interactive, Inc.*, 482 F. Supp. 3d at 1250; *see supra* Section II.D.1.

²¹⁵ *Kik Interactive, Inc.*, 482 F. Supp. 3d at 1250; *see* Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. No. 115-164 (codified as amended at 18 U.S.C. §§ 2421A, 230(e), 1591(e), 1595).

²¹⁶ *Kik Interactive, Inc.*, 482 F. Supp. 3d at 1250.

²¹⁷ *Id.*

²¹⁸ Balfour, *supra* note 145, at 2502–03 (explaining that FOSTA reasoned “judicial interpretation of Section 230 as a broad liability shield strayed from Section 230’s legislative purpose of encouraging ICSPs to moderate content.”).

²¹⁹ *Id.*

²²⁰ 18 U.S.C. § 1595(a).

rely on a string of civil liability cases against hotel chains²²¹ because they “[reject] the application of the criminal definition to civil claims under the TVPRA.”²²² Although the hotel cases do not involve the issue of Section 230 immunity, these courts interpret the relationship between criminal and civil sex trafficking claims, which is an important starting point when interpreting the relationship between these claims within Section 230.

The Northern District of California explicitly disagreed with *Kik*'s statutory interpretation of the FOSTA exception.²²³ In *Doe v. Twitter*, the minor plaintiffs alleged they were solicited and recruited for sex trafficking, and they were manipulated into providing a third-party sex trafficker with several pornographic videos of themselves through the social media platform Snapchat.²²⁴ Several years later, the videos were posted on Twitter; the plaintiffs informed law enforcement and urgently requested that Twitter remove the videos.²²⁵ Twitter initially refused to delete the videos, and over the span of 9 days, the videos accrued more than 167,000 views.²²⁶ The website finally took the videos down after one of the plaintiff's parents contacted an agent from the Department of Homeland Security.²²⁷ The plaintiffs sued Twitter for their involvement, enabling, and/or benefitting within the sex trafficking venture.²²⁸ Analyzing the relationship between Section 230 immunity and the FOSTA exception, the court stated that *Kik* “improperly adopted the most restrictive possible reading” of the FOSTA exception.²²⁹ This restrictive interpretation is not surprising considering the narrow interpretation of other Section 230 exceptions.²³⁰

The *Twitter* court's analysis began with statutory language²³¹ recognizing the statutory maxim that interpretation requires “that no words shall be discarded as meaningless, redundant, or mere surplusage.”²³² The court found

²²¹ *A.B. v. Hilton Worldwide Holdings, Inc.*, 484 F. Supp. 3d 921, 937 (D. Or. 2020) (citing *M.A. v. Wyndham Hotels & Resorts, Inc.*, 425 F. Supp. 3d 959, 969 (S.D. Ohio 2019)); *A.B. v. Marriott Int'l, Inc.*, 455 F. Supp. 3d 171, 186–88 (E.D. Pa. 2020); *B.M. v. Wyndham Hotels & Resorts, Inc.*, No. 20-cv-00656-BLF, 2020 WL 4368214, at *3 (N.D. Cal. July 30, 2020).

²²² *Doe v. Twitter, Inc.*, 555 F. Supp. 3d 889, 916 (N.D. Cal. 2021), *abrogated by* *Does 1-6 v. Reddit, Inc.*, No. 21-56293, 2022 WL 13743458 (9th Cir. Oct. 24, 2022) (quoting *Wyndham Hotels & Resorts, Inc.*, 425 F. Supp. 3d at 969).

²²³ *Twitter, Inc.*, 555 F. Supp. 3d at 920 (“The undersigned respectfully disagrees with the *Kik* court's analysis.”).

²²⁴ *Id.* at 894.

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ *Id.* at 920.

²³⁰ *See supra* Section III.B.

²³¹ *Twitter, Inc.*, 555 F. Supp. 3d at 896.

²³² *Id.* at 919 (quoting *United States v. DBB, Inc.*, 180 F.3d 1277, 1285 (11th Cir. 1999)).

the “more natural reading” of the clause “if the conduct underlying the claim constitutes a violation of Section 1591” is that there is an exception to Section 230 immunity for civil sex trafficking claims under Section 1591, but there is not an exception to other sections within Title 18 that may give rise to civil liability under Section 1595.²³³ The civil liability statute, Section 1595, creates liability for a plethora of conduct such as peonage, slavery, and trafficking.²³⁴ For example, this includes a violation of Section 1581, for one who “holds or returns any person to a condition of peonage.”²³⁵ Because of the TVPA’s statutory framework, the *Twitter* court construed the language to mean there is an exception in federal civil sex trafficking claims (under Section 1591), but there is not an exception to the other sections in Title 18 that could give rise to civil liability under Section 1595.²³⁶

The court also adhered to the Supreme Court’s instruction that context matters in legislative interpretation, and “where a statute is ‘remedial,’ it ‘should be liberally construed.’”²³⁷ Because FOSTA affords remedies to sex trafficking victims that were otherwise not available before—due to the broad interpretation of Section 230 immunity, the court properly categorized it as a remedial statute.²³⁸ The remedial purpose and context of the broader statutory framework—of both FOSTA and the TVPRA—show that Congress did not intend for victims who seek to impose beneficiary liability for sex trafficking to face a higher burden than a victim who seeks to impose such liability on any other type of defendant.²³⁹ Based on the language and context, the court denied the “more stringent”²⁴⁰ mens rea requirement that applies to criminal violations, holding the plaintiffs need allege only an ICSP knew or should have known that the plaintiff was a victim of sex trafficking.²⁴¹ Applying the constructive knowledge requirement, the court found the plaintiff had sufficiently alleged their claim by showing Twitter had been alerted of the nonconsensual videos, Twitter had used the word “twinks” to describe the videos,²⁴² and the fact the plaintiffs were minors was evident from the videos.²⁴³

²³³ *Twitter, Inc.*, 555 F. Supp. 3d at 920–21.

²³⁴ 18 U.S.C. § 1595(a) (“An individual who is a victim of a violation of this chapter [18 USCS § 1581 et seq.] may bring a civil action against the perpetrator.”).

²³⁵ 18 U.S.C. § 1581(a).

²³⁶ *Twitter, Inc.*, 555 F. Supp. 3d at 920–21.

²³⁷ *Id.* at 920 (quoting *Peyton v. Rowe*, 391 U.S. 54, 65 (1968)).

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ *Id.* at 922.

²⁴¹ *Id.* at 924.

²⁴² *Id.* at 925 (showing that Twitter should have known the plaintiffs were minors).

²⁴³ *Id.*

The most significant difference between *Kik* and *Twitter* is that the sex trafficking victims' claims in *Twitter* survived a motion to dismiss whereas the victims' claims in *Kik* were dismissed on the pleadings.²⁴⁴ Therefore, the result of allowing constructive knowledge rather than actual knowledge is that sex trafficking victims' claims are heard and judged on the merits.²⁴⁵ Because Congress's intention behind FOSTA was to narrow Section 230 immunity for ICSPs who benefit from sex trafficking on their sites, the courts should interpret FOSTA with constructive knowledge as the mens rea required.

4. The Pornhub Litigation

Although the FOSTA exception is relatively new,²⁴⁶ the federal district court decisions are already inconsistent in the interpretation of the exception. The uncertainty of the mens rea required for the Section 230 immunity exception to apply is important for sex trafficking victims' ability to bring claims against bad faith websites—including the claims against Pornhub.

Even with the exception provided by FOSTA, Pornhub has claimed Section 230 immunity in the ongoing civil sex trafficking cases.²⁴⁷ In September 2021, the Central District of California denied MindGeek's motion to dismiss based on its assertion of Section 230 immunity.²⁴⁸ Pornhub argued that, in order to fit within the FOSTA exception, the plaintiffs must allege the ICSP had "actual knowledge" as provided by Section 1591.²⁴⁹ However, the court interpreted FOSTA as requiring the plaintiff to allege facts to plausibly meet the more lenient mens rea requirement of constructive knowledge.²⁵⁰ The court reasoned, "To carry over § 1591's...definition would impose a heightened mens rea standard inconsistent with the plain language of § 1595."²⁵¹ Because the court interpreted the FOSTA exception based on its plain language, the sex trafficking victims' claims were not dismissed.²⁵² The court found that based on the factual allegations, it was at least plausible that Pornhub knew or should have known that the videos constituted child pornography, and Jane Doe was trafficked into such acts.²⁵³

²⁴⁴ *Id.* at 932; *Doe v. Kik Interactive, Inc.*, 482 F. Supp. 3d 1242, 1252 (S.D. Fla. 2020).

²⁴⁵ *See Twitter, Inc.*, 555 F. Supp. 3d at 922.

²⁴⁶ Enacted in 2018.

²⁴⁷ *Doe v. MindGeek USA, Inc.*, 558 F. Supp. 3d 828, 834 (C.D. Cal. 2021).

²⁴⁸ *Id.* at 843.

²⁴⁹ *Id.* at 836.

²⁵⁰ *Id.*

²⁵¹ *Id.* (quoting *J.B. v. G6 Hosp., LLC*, No. 19-cv-07848-HSG, 2020 U.S. Dist. LEXIS 151213 (N.D. Cal. Aug. 20, 2020)).

²⁵² *Id.*

²⁵³ *Id.* at 839.

After denying Pornhub's motion to dismiss, the company asked for reconsideration on the issue of whether Section 230 immunity applies.²⁵⁴ The district court made clear that, because of the FOSTA exception, an ICSP cannot assert Section 230 immunity if they have violated federal anti-trafficking laws.²⁵⁵ On the mens rea issue, the court relied on *Twitter* and held that if "Congress intended to limit a remedial statute to such narrow and limited circumstances, it could have made that plain. But Congress took no such action."²⁵⁶ The court further stated, "Since there is no question that Section 1595, applied to *any other* civil defendant, only requires constructive knowledge, Plaintiff's claims stand at any rate."²⁵⁷ The constructive knowledge interpretation of FOSTA is consistent with the plain reading of the statute and the congressional intent behind the statute.

IV. RESOLUTION: ALLOWING SEX TRAFFICKING VICTIMS THEIR DAY IN COURT

As discussed above, Section 230 has provided protection for bad faith actors, such as Pornhub, for far too long.²⁵⁸ As pornography has grown in the past decade, sex trafficking content has flourished within the industry.²⁵⁹ Pornhub has benefitted from sex trafficking content on its site largely because of Section 230's broad protection.²⁶⁰ Without a Supreme Court interpretation of Section 230's scope, the lower courts' broad interpretation of Section 230 will continue to protect bad faith actors.²⁶¹ Because the mens rea is a critical element of sex trafficking claims, the adoption of the Central District of California's interpretation of the FOSTA exception requiring constructive knowledge would allow sex trafficking victims their day in court. Additionally, supplemental legislation to Section 230 could create a feasible procedure that would mitigate the harm to future sex trafficking victims.

²⁵⁴ *Doe v. MindGeek USA, Inc.*, 574 F. Supp. 3d 760, 763 (C.D. Ca. 2021) (Order Denying in substantial part defendant's motion to dismiss).

²⁵⁵ *Id.* at 767.

²⁵⁶ *Id.* at 773.

²⁵⁷ *Id.* at 775.

²⁵⁸ *See supra* Section III.

²⁵⁹ *See supra* Section II.C.

²⁶⁰ *See supra* Section III.A.

²⁶¹ *Malwarebytes, Inc. v. Enigma Software Grp. USA, LLC*, 141 S. Ct. 13, 13 (2020) (Thomas, J. statement respecting the denial of certiorari).

A. Adopting the Central District of California's Interpretation of FOSTA's Application

The Supreme Court should adopt the Central District of California's interpretation of the FOSTA exception. As discussed above, courts are split on whether the mens rea required for a claim to qualify for the sex trafficking exception is actual or constructive knowledge.²⁶² Due to the nature and hardship of proving the knowledge of ICSPs, courts should adopt the less stringent mens rea requirement of constructive knowledge. Further, constructive knowledge is the most congruent interpretation to congressional intent.²⁶³

In the pending case against Pornhub, the Central District Court of California has interpreted the FOSTA exception to apply when a plaintiff alleges constructive knowledge rather than actual knowledge.²⁶⁴ This view allowed the sex trafficking victims who alleged that Pornhub had financially benefitted from their videos of nonconsensual sexual conduct to clear the motion to dismiss stage,²⁶⁵ whereas most claims against ICSPs fail because of courts' broad interpretation of Section 230 immunity.²⁶⁶ The adoption of the constructive knowledge standard would slightly narrow the breadth of Section 230, as Congress intended, for those ICSPs who know or should know of sex trafficking ventures on their sites.

Because the FOSTA exception is in its infancy, little judicial analysis exists to determine what evidence satisfies the "knew or should have known" standard.²⁶⁷ The Supreme Court holding that a plaintiff can allege constructive knowledge for FOSTA to apply would lead to a more extensive analysis.²⁶⁸ The current standard allows a victim to allege facts that may "raise a plausible inference" that the beneficiary ICSP "knew or should have known."²⁶⁹ For example, in the case against Pornhub, the plaintiff put forth evidence that: (1) Pornhub has moderators review and approve each and every video posted to its platforms, including the videos of the victim; (2) Pornhub was familiar with her perpetrator, who had previously posted nonconsensual content of other victims; and (3) Pornhub is aware of its

²⁶² See *supra* Section III.C.

²⁶³ See *Doe v. MindGeek USA, Inc.*, 574 F. Supp. 3d 760, 773 (C.D. Cal. 2021).

²⁶⁴ *Id.*

²⁶⁵ *Id.*

²⁶⁶ Ardia, *supra* note 199, at 438–39.

²⁶⁷ Bouchard, *supra* note 65.

²⁶⁸ The potential ruling of an appellate court also has broad implications for the volume and types of future lawsuits. *Id.*

²⁶⁹ *Doe v. Rickey Patel, LLC*, No. 0:20-60683-WPD-CIV, 2020 WL 6121939, at *19 (S.D. Fla. Sept. 29, 2020).

influence, yet they refuse to implement tools that verify the age of those depicted.²⁷⁰ The court found that this evidence, taken together, was sufficient to allege constructive knowledge, and the FOSTA exception to Section 230 thus applied.²⁷¹

In contrast, the actual knowledge requirement is a heightened standard requiring a victim to allege that the ICSP knew about the sex trafficking venture in the specific case.²⁷² In effect, the actual knowledge requirement enables bad faith actors to continue benefitting from sex trafficking ventures,²⁷³ and it even encourages ICSPs to *reduce* regulation on their websites. This is because ICSPs will choose to not *actually know* of ventures on their sites. In effect, large companies like Pornhub could easily deny knowledge. For example, the more processes Pornhub uses to discover nonconsensual, sex trafficking material on its site, the more likely the company is to actually “know” of the material, thereby losing Section 230’s liability protection and facing liability. By contrast, with a constructive knowledge requirement, a victim could allege because the ICSP was aware of either other similar sex trafficking ventures or her sex trafficking perpetrator, the defendant *knew or should have known* of the sex trafficking venture. Moreover, with the lower constructive knowledge standard, a plaintiff would be able to allege circumstantial facts. This could incentivize Pornhub to be more diligent in regulating and moderating content on its site.

Removing Section 230 immunity for civil sex trafficking claims will likely motivate Pornhub to oversee and remove nonconsensual material to avoid facing a lawsuit.²⁷⁴ However, Pornhub will continue to host and benefit from such content if they believe (1) the benefits of the nonconsensual sex trafficking material outweigh the potential litigation costs, and (2) they are likely to prevail in any potential lawsuits, or that lawsuits are unlikely.²⁷⁵ Thus, judicial adoption of constructive knowledge is critical, both to provide a remedy for victims who are exploited by companies that host and benefit from the victim’s nonconsensual conduct and to prevent the hosting of content of future sex trafficking victims.

²⁷⁰ Doe v. MindGeek USA, Inc., 574 F. Supp. 3d 760, 774 (C.D. Cal. 2021), *abrogated by* Does 1-6 v. Reddit, Inc., No. 21-56293, 2022 WL 13743458 (9th Cir. Oct. 24, 2022).

²⁷¹ *Id.*

²⁷² *See supra* Section III.C.2.

²⁷³ *See id.*

²⁷⁴ BRANNON & HOLMES, *supra* note 172, at 31 (“Accordingly, creating new exceptions could cause service providers and users to remove or restrict content that could possibly be subject to those exceptions more frequently, either preemptively or in response to litigation.”).

²⁷⁵ *Id.*

The courts that advocate for actual knowledge rather than constructive knowledge rely on the policy behind Section 230, noting that the purpose behind the statute was to shield ICSPs from civil liability.²⁷⁶ These courts argue that adopting constructive knowledge opens the door to the exact claims Congress intended to protect ICSPs from through Section 230.²⁷⁷ Although Section 230 was enacted to promote the development of the Internet by shielding ICSPs from most civil liability claims,²⁷⁸ it also was enacted to deter and punish trafficking in “obscenity, stalking, and harassment by means of computer.”²⁷⁹ In order to promote and persuade ICSPs to remove such conduct on their sites, Congress added the Good Samaritan provision to protect ICSPs from liability for the removal of or restriction of access to material that is obscene or otherwise objectionable.²⁸⁰

If the courts were to require sex trafficking victims to allege and to prove actual knowledge, it would effectively write out the exception of Section 1595 claims to Section 230. When Congress passed the FOSTA exception,²⁸¹ Section 230 *already* recognized an exception for federal criminal laws.²⁸² Because actual knowledge is a requirement for federal *criminal* sex trafficking claims, adding actual knowledge to the FOSTA exception would result in the courts’ disregard of statutory language “as meaningless, redundant, or mere surplusage.”²⁸³ In passing an exception for Section 1595 claims, Congress did not intend for courts to require criminal standards. If it had intended this, Congress would have explicitly stated “if the plaintiff alleges actual knowledge.”²⁸⁴ FOSTA was designed to “provide victims of

²⁷⁶ See *Doe v. Kik Interactive, Inc.*, 482 F. Supp. 3d 1242, 1248–49 (2020) (“[Plaintiff] assert[ed] that her claim is that Defendants violated 18 U.S.C. § 1591 by failing to enact policies that would have prevented her from being trafficked by fellow Kik users. But this is exactly the type of claim that CDA immunity bars.”).

²⁷⁷ *Id.*

²⁷⁸ 47 U.S.C.S. § 230(b)(1); Telecommunications Act of 1996, 1996 Enacted S. 652, 104 Enacted S. 652, 110 Stat. 56.

²⁷⁹ 47 U.S.C.S. § 230(b)(5).

²⁸⁰ *Id.* § 230(c).

²⁸¹ Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. No. 115-164 (codified as amended at 18 U.S.C §§ 2421A, 230(e), 1591(e), 1595).

²⁸² Telecommunications Act of 1996, 1996 Enacted S. 652, 104 Enacted S. 652, 110 Stat. 56 (“Nothing in this section shall be construed to impair the enforcement of section 223 of this Act, chapter 71 (relating to obscenity) or 110 (relating to sexual exploitation of children) of title 18, United States Code, or *any other Federal criminal statute.*”) (emphasis added).

²⁸³ *Doe v. Twitter, Inc.*, 555 F. Supp. 3d 889, 919 (N.D. Cal. 2021), *abrogated by* *Does 1-6 v. Reddit, Inc.*, No. 21-56293, 2022 WL 13743458 (9th Cir. Oct. 24, 2022) (quoting *United States v. DBB, Inc.*, 180 F.3d 1277, 1285 (11th Cir. 1999)).

²⁸⁴ *Doe v. MindGeek USA, Inc.*, 574 F. Supp. 3d 760, 773 (C.D. Cal. 2021), *abrogated by* *Does 1-6 v. Reddit, Inc.*, No. 21-56293, 2022 WL 13743458 (9th Cir. Oct. 24, 2022).

sex trafficking with their day in court,”²⁸⁵ and the courts requiring the allegation of actual knowledge prevents sex trafficking victims from their day in court. The FOSTA exception was designed to halt courts from providing Section 230 immunity to ICSPs who violate federal sex trafficking laws.²⁸⁶ The heightened standard of actual knowledge allows courts to continue asserting Section 230 immunity to ICSPs that are violating the federal anti-trafficking laws.²⁸⁷

The label of “Internet service provider” should not be an automatic exemption for claims against ICSPs, especially those that are benefiting from sex trafficking on their sites. Agreeing with this notion and seeing a gap in Section 230 case law, Congress passed the FOSTA exception to afford a remedy to sex trafficking victims that otherwise would have been unavailable.²⁸⁸ The district courts’ interpretation of FOSTA as requiring actual knowledge would effectively widen the Section 230 gap that Congress is attempting to narrow. The Supreme Court’s adoption of a constructive knowledge standard would slightly narrow the breadth of Section 230, thereby widening liability for these ICSPs.²⁸⁹

B. Adopting a Notice-Takedown Procedure comparable to the Digital Millennium Copyright Act

Even if the courts adopt constructive knowledge as the requirement for the FOSTA exception, the protection of Section 230 immunity would remain overly broad. Legislators recognize the problems with Section 230 as well,²⁹⁰ as there have been proposals ranging from repealing Section 230 entirely²⁹¹ to incremental rollbacks that focus on removing immunity for certain claims or providers.²⁹² In order to balance the competing policy goals behind Section

²⁸⁵ *Id.* at 774.

²⁸⁶ See Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. No. 115-164 (codified as amended at 18 U.S.C §§ 2421A, 230(e), 1591(e), 1595).

²⁸⁷ See *MindGeek USA, Inc.*, 574 F. Supp. 3d at 773.

²⁸⁸ See Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. No. 115-164 (codified as amended at 18 U.S.C §§ 2421A, 230(e), 1591(e), 1595).

²⁸⁹ BRANNON & HOLMES, *supra* note 172, at 31.

²⁹⁰ See, e.g., *The Telecommunication Act’s “Good Samaritan” Protection: Section 230*, *supra* note 172; see also BRANNON & HOLMES, *supra* note 172, at 31.

²⁹¹ BRANNON & HOLMES, *supra* note 172, at 30; see, e.g., S. 5085, 116th Cong. (2020) (proposing to repeal Section 230); S. 5020, 116th Cong. (2020) (proposing to sunset Section 230 on January 2, 2023); H.R. 8896, 116th Cong. (2020) (proposing to repeal Section 230).

²⁹² BRANNON & HOLMES, *supra* note 172, at 30; see, e.g., Holding Sexual Predators and Online Enablers Accountable Act, S. 5012, 116th Cong. § 5 (2020); Protecting Americans from Dangerous Algorithms Act, H.R. 8636, 116th Cong. § 2 (2020); PACT Act, S. 4066, 116th Cong. § 7 (2020); Stopping Big Tech’s Censorship Act, S. 4062, 116th Cong. § 2 (2020); Limiting Section 230 Immunity to Good

230, which are encouraging creativity and development of the Internet and ensuring the enforcement of laws to deter and punish trafficking material,²⁹³ Congress should adopt a Notice-Takedown “safe harbor” process within Section 230. The modification would work similarly to the procedures within the Digital Millennium Copyright Act (DMCA)²⁹⁴ and would motivate the removal of illegal content by granting conditional immunity to ICSPs that remove allegedly illegal material, allowing ICSPs to weigh the benefit of not removing the content against the risk of potential litigation.

In the context of solving issues regarding revenge porn,²⁹⁵ many legal scholars have advocated amending Section 230 and using the procedures within the DMCA as a model.²⁹⁶ Because revenge porn and sex trafficking pornography are both posted without consent,²⁹⁷ an amendment based on the procedures in the DMCA would provide sex trafficking victims a way to have material removed from ICSPs and still impose potential liability upon ICSPs that ignore notices of nonconsensual, sex trafficking material on their sites.²⁹⁸

1. The Digital Millennium Copyright Act Procedure

The DMCA procedure is a workable mechanism that was passed to provide “greater certainty to service providers concerning their legal exposure for infringements that may occur in the course of their activities.”²⁹⁹ The DMCA applies only to copyright violations,³⁰⁰ outlining a “notice and takedown” procedure that imposes a duty upon an ICSP, after receiving “notice” of possible illegal content to “act expeditiously to remove, or disable access to, the material.”³⁰¹ If the ICSP does take action to remove the content

Samaritans Act, S. 3983, 116th Cong. § 2 (2020).

²⁹³ 47 U.S.C.S. § 230(b)(3), (5).

²⁹⁴ 17 U.S.C. § 512 (2006); BRANNON & HOLMES, *supra* note 172, at 32.

²⁹⁵ Generally, revenge porn is nonconsensual pornography—in other words, pornography that is posted of an individual without that individual’s consent. Ariel Ronneburger, Sex, Privacy, and Webpages: Creating a Legal Remedy for Victims of Porn 2.0, 21 SYRACUSE SCI. & TECH. L. REP. 1, 2 (2009).

²⁹⁶ *Id.* at 4; Dalisi Ostero, *Confronting Nonconsensual Pornography with Federal Criminalization and a “Notice-and-Takedown” Provision*, 70 U. MIAMI L. REV. 585, 589-90 (2016); Amanda Levendowski, *Using Copyright to Combat Revenge Porn*, 3 N.Y.U. J. OF INTELL. PROP. & ENT. LAW 422, 443 (2014); Phillip Takhar, *A Proposal for a Notice-and-Takedown Process for Revenge Porn*, HARV. J. L. & TECH. DIG. 2, 4 (2018).

²⁹⁷ The difference here is that the sexual act in revenge porn *could* have been consensual, but the sexual act in sex trafficking porn is not consensual. However, revenge porn and sex trafficking porn could very well be interchangeable in some cases.

²⁹⁸ Ronneburger, *supra* note 295, at 3 (discussing how the DMCA procedures could help victims of revenge porn obtain a legal remedy).

²⁹⁹ S. REP. NO. 105-190, at 20 (1998); H.R. REP. NO. 105-551, pt. 2, at 49 (1998).

³⁰⁰ Digital Millennium Copyright Act, 17 U.S.C. § 1201(a)(1)(A) (2006).

³⁰¹ 17 U.S.C. § 512(c)(1)(A)(iii) (2006); Ronneburger, *supra* note 295, at 26.

or does not receive notice of the copyright infringement,³⁰² the DMCA provides a “safe harbor” that protects the ICSP from lawsuits premised on hosting potentially infringing content.³⁰³ This “safe harbor” works similarly to Section 230 immunity, but it is dependent upon the knowledge of the ICSP and a good faith effort taken to reduce the risk of potential liability.³⁰⁴ As long as the DMCA procedures are followed, the ICSP is immune from liability for the possible infringing content posted by third parties.³⁰⁵

The ICSP designates an agent who receives notifications of the alleged copyright infringement; the notification includes all the relevant information³⁰⁶ an ICSP needs in order to assess whether the material should be removed.³⁰⁷ The DMCA procedure also provides a process for the third-party that posted the allegedly infringing material to challenge the initial notice if they have a good faith belief the material was mistakenly removed.³⁰⁸ When there is such “counter notification,” the ICSP may be able to replace the initial post and retain immunity.³⁰⁹ If there is no “counter notification,” the ICSP does not act, and copyright infringement has occurred, the service provider can be sued for contributory infringement.³¹⁰ The notice and takedown procedure is a powerful tool for copyright holders, and as one legal scholar put it, “the incentives to comply with a takedown notice are powerful, and counterincentives are virtually nonexistent.”³¹¹ The DMCA procedures could provide a commendable model for an amendment to Section 230 immunity.

³⁰² Ostero, *supra* note 296, at 609.

³⁰³ BRANNON & HOLMES, *supra* note 172, at 31 (citing Kevin J. Hickey, Cong. Rsch. Serv., IF11478, *Digital Millennium Copyright Act (DMCA) Safe Harbor Provisions for Online Service Providers: A Legal Overview* (2020); U.S. Copyright Office, Section 512 of Title 17 (2020)).

³⁰⁴ BRANNON & HOLMES, *supra* note 172, at 31.

³⁰⁵ Ostero, *supra* note 296, at 610.

³⁰⁶ The requirements for adequate notification of copyright infringement include: adequate notification of copyright infringement under the DMCA, including a physical or electronic signature of someone authorized to act on behalf of the owner of the copyright; an identification of the copyrighted work allegedly being infringed; contact information for the complaining party; a statement of good faith belief that copyright infringement is occurring; and a statement that all the information in the notification is accurate under penalty of perjury. Ronneburger, *supra* note 295, at 26.

³⁰⁷ *Id.*

³⁰⁸ BRANNON & HOLMES, *supra* note 172, at 33; 17 U.S.C. § 512(g)(2)–(3).

³⁰⁹ BRANNON & HOLMES, *supra* note 172, at 33; 17 U.S.C. § 512(g)(2), (4).

³¹⁰ Ostero, *supra* note 296, at 611; Ronneburger, *supra* note 295, at 27.

³¹¹ Ann Bartow, *Copyright Law and Pornography*, 91 OR. L. REV. 1, 24 (2012).

2. Amending Section 230 to Include Procedures as in the Digital Millennium Copyright Act

Legal scholars³¹² have recognized the feasibility and the benefits of amending Section 230 to incorporate a notice-takedown procedure.³¹³ At its basic level, a notice and takedown amendment would require ICSPs to “act upon the knowledge” of nonconsensual, sex trafficking material on their site.³¹⁴ One of the major benefits of a notice and takedown approach is that it does not automatically penalize online services if they fail to remove all potentially harmful or illegal content on their platforms as long as they follow the notice and takedown process.³¹⁵ This conditional immunity would be a step in the right direction of holding bad faith ICSPs liable by narrowing the breadth of Section 230 immunity. For sizeable websites such as Pornhub, it would be nearly impossible to find and remove every single piece of content that is nonconsensual and illegal, no matter the number of moderators hired. A notice and takedown procedure would allow ICSPs to receive effective notice of illegal sex trafficking material (thereby having knowledge) and would avoid the need to find illegal material on the site.

The notice and takedown procedure would function in a very similar way to the DMCA provision.³¹⁶ The mechanism would start with a victim contacting the ICSP, which means the victim has the initial burden of discovering the material.³¹⁷ In this notice, the victim would (1) sign or authorize that she is the individual shown in the material; (2) give a reason why the material is illegal (i.e., it is nonconsensual, sex trafficking material); (3) provide her contact information; (4) affirm there is a good faith belief that the material includes nonconsensual, sex trafficked content; and (5) affirm

³¹² Ronneburger, *supra* note 295, at 4; Ostero, *supra* note 296, at 589–90; Levendowski, *supra* note 296; Takhar, *supra* note 296.

³¹³ Several other countries have benefitted from a notice and takedown procedure for civil intermediary liability claims against ICSPs. For example, New Zealand, South Africa, and the United Kingdom all have notice and takedown provisions for content on their sites that the state deems unlawful. Ashley Johnson & Daniel Castro, *How Other Countries Have Dealt with Intermediary Liability*, ITIF (Feb. 22, 2021), <https://itif.org/publications/2021/02/22/how-other-countries-have-dealt-intermediary-liability> [<https://perma.cc/4TGS-K5JE>]. The European Union’s E-Commerce Directive operates somewhat similarly to the DMCA procedure, providing that for certain service providers to receive immunity, the provider must “act expeditiously to remove or to disable access to the information concerned” once the service “obtain[s] actual knowledge or awareness of illegal activities.” BRANNON & HOLMES, *supra* note 172, at 32 (citing Parliament and Council Directive 2000/31/EC, 2000 O.J. (L 178) 6).

³¹⁴ Ronneburger, *supra* note 295, at 22–23.

³¹⁵ Johnson & Castro, *supra* note 313.

³¹⁶ *Id.* at 28.

³¹⁷ Takhar, *supra* note 296.

under the penalty of perjury that all the information in the notification is accurate.³¹⁸ The ICSP hosting the illegal content then decides whether to accept the notice and “expeditiously” take down the material and be covered by immunity, or to ignore the notice and risk liability.³¹⁹ The ICSP would then give notice to the content uploader, who could give a counter-notice challenging the initial complaint if they have a good faith belief the material was mistakenly removed.³²⁰ The ICSP could then repost the material, and the original complainant—the victim—would have 14 days to decide whether to bring suit to keep the material off the site.³²¹ Because the conditions would parallel the DMCA, ICSPs are already aware of the specifics of the procedure and systems in place within the copyright context.

Critics of the DMCA and conditional immunity procedures question how the content is determined to be unlawful.³²² The initial determination of the content’s legality largely belongs to private parties, rather than the courts—the same as how Section 230 currently operates. To decide what illegal content qualifies, an incremental, content-specific approach is the best way to assess the effectiveness of the notice and take down procedure. Due to the flourishing nature of sex trafficking material and the legislative readiness to combat such content, the notice and takedown amendment should be first added to the FOSTA exception in Section 230. The procedure would be available to sex trafficking victims whose nonconsensual, sex trafficking content has been posted. The adoption of this narrow amendment would allow legislators to assess the advantages and disadvantages of the notice and takedown procedure; it follows that the legislature could possibly amend to add other material. Further, because sex trafficking material is obscene,³²³ it is not protected by the First Amendment and can be regulated by such a notice and takedown procedure.³²⁴

For ICSPs such as Pornhub, which are repeated, bad faith actors, the fear of financial liability is a necessary step in solving the problem of sex trafficking material on the Internet. Although a notice and takedown procedure would not prevent the downloading of sex trafficked material, or sex trafficking in general, it would at least provide a mechanism for victims to notify the website, have the content removed, and attempt to regain their

³¹⁸ *Id.*; see 17 U.S.C. § 512(c)(3).

³¹⁹ BRANNON & HOLMES, *supra* note 172, at 32–33.

³²⁰ Takhar, *supra* note 296.

³²¹ *Id.*

³²² BRANNON & HOLMES, *supra* note 172, at 32.

³²³ See *supra* Sections II.A & C.

³²⁴ See *supra* Section II.A.

privacy.³²⁵ Such procedures were not available to victims like Cali, who struggled for years to get Pornhub to remove the nonconsensual content,³²⁶ but they should be available for future victims of such horrid crimes.

Congress should amend Section 230 to grant conditional immunity for sex trafficking content through a notice and takedown procedure. This will incentivize bad faith ICSPs, such as Pornhub, to remove or restrict access to sex trafficking content after notice, rather than face the threat of a lawsuit. The notice and takedown amendment would increase ICSPs' accountability for illegal, sex trafficking content on their platforms "without overburdening them by forcing them to proactively screen for all potentially harmful or illegal content."³²⁷ It would strip Section 230 immunity for sex-trafficking-related material for which ICSPs have received notice. Further, like the constructive knowledge interpretation for the FOSTA exception,³²⁸ a notice and takedown procedure would not automatically result in an ICSP being held liable for hosting content; it merely means that liability would not be barred by Section 230. Thus, sex trafficking victims' claims could survive a motion to dismiss, and they could have their day in court.

V. CONCLUSION

As it is currently interpreted, Section 230 renders ICSPs virtually untouchable. As Supreme Court Justice Thomas stated, "in short, the statute suggests that if a company unknowingly leaves up illegal third-party content, it is protected from publisher liability by § 230(c)(1); and if it takes down certain third-party content in good faith, it is protected by § 230(c)(2)(A)."³²⁹ The lower courts interpret the protection of Section 230 immunity in the broadest sense. This broad interpretation has allowed bad faith actors to claim immunity for nonconsensual, sex trafficking material on their sites. Realizing the consequences of interpreting Section 230 immunity broadly, Congress passed the FOSTA exception to allow sex trafficking victims an opportunity to recover from ICSPs. Pornhub has hosted and benefited from illegal, nonconsensual, sex trafficking material on its site, and the FOSTA exception should allow victims an opportunity to be heard and to recover. However, the courts are split on the interpretation of FOSTA; the courts requiring actual knowledge will further bar victims an opportunity to recover. This Note urges

³²⁵ Ronneburger, *supra* note 295, at 31.

³²⁶ Kristof, *supra* note 1.

³²⁷ Johnson & Castro, *supra* note 313.

³²⁸ See *supra* Section IV.A.

³²⁹ *Malwarebytes, Inc. v. Enigma Software Grp. USA, LLC*, 141 S. Ct. 13, 14–15 (2020) (Thomas, J. statement respecting the denial of certiorari).

the Supreme Court to adopt constructive knowledge as the requirement for FOSTA to be applicable so that bad faith actors, such as Pornhub, are not immune from federal sex trafficking claims as Congress wished. Further, this Note urges Congress to adopt a notice and takedown provision within Section 230, which would incentivize removal of sex trafficking content by granting conditional immunity to ICSPs that act to remove the alleged sex trafficking material.

To be clear, “Paring back the sweeping immunity courts have read into [Section] 230 would not necessarily render defendants liable for online misconduct. It simply would give plaintiffs a chance to raise their claims in the first place. Plaintiffs still must prove the merits of their cases, and some claims will undoubtedly fail.”³³⁰ Nevertheless, the justice system should not deny sex trafficking victims their day in court.

³³⁰ *Id.* at 18.