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U.S. Court of Appeals for the Ninth Circuit Interprets Fight Online Sex Trafficking Act's Restriction on Section 230 Narrowly

By Aaron P. Rubin, J. Alexander Lawrence and Dillon Kraus

The U.S. Court of Appeals for the Ninth Circuit has ruled that Section 230 of the Communications Decency Act¹ shielded Reddit Inc. from liability under the Trafficking Victims Protection Reauthorization Act (TVPRA).² The court considered the text of a 2018 amendment to Section 230, known as the Fight Online Sex Trafficking Act (FOSTA),³ which created a carve-out to Section 230's broad protections by allowing victims to bring claims against platforms that aided in their trafficking. The Ninth Circuit held that the FOSTA exception does not apply where a provider does not "knowingly benefit" from such trafficking.⁴

This is the first time that a federal court of appeals has interpreted how broadly the FOSTA exception to Section 230 applies.

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SECTION 230 PROTECTIONS AND FOSTA

Section 230, once hailed as "the law that gave us the modern Internet,"⁵ provides broad immunities to internet platforms that host third-party content.⁶ It has emerged in recent years as the cause of much debate.

In 2018, FOSTA was enacted as a response to sex trafficking claims against Backpage.com, and the belief that Section 230 insulated the site from liability for facilitating sex trafficking.⁷ FOSTA provides that Section 230 does not impair enforcement of "any State criminal prosecution or civil enforcement action targeting conduct that violates a Federal criminal law prohibiting [sex trafficking]," nor "impair the enforcement or limit the application of section 1595 of title 18, United States Code."⁸ While there has been much discourse about whether and how to amend Section 230, FOSTA is the only piece of proposed federal legislation to date that has become law.⁹

Section 230 provides important protections for many major companies, and these companies, alongside proponents of an uncensored Internet, raised concerns that FOSTA would have deleterious ripple effects, including

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limiting free speech.¹⁰ The central question that concerned platforms was whether FOSTA meant that they could be held liable when their users violated the sex trafficking statutes underlying FOSTA, or whether they themselves had to violate those laws.¹¹

THE DISTRICT COURT OPINION

Reddit is a social news aggregation and discussion website that allows users to create forums, or “subreddits,” based on specific interests or community themes. It is essentially a huge collection of forums in which users can comment on and share content, including photos, videos, and links to other sites. Given that it hosts large quantities of user-generated content, Reddit relies heavily on Section 230 to shield it from liability.

In April 2021, the plaintiffs sued Reddit as part of a putative class action, alleging that Reddit not only failed to stop, but actively profits from, child sexual exploitation materials (CSEM) on its site.¹² The plaintiffs alleged that Reddit was lackluster in its attempts to remove CSEM from its site and to enforce its own CSEM policies.¹³

For instance, Doe 1 alleged that her ex-boyfriend posted sexually explicit images and videos of her, taken while she was 16, to Reddit without her consent.¹⁴ Then, each time she reported the CSEM of herself to subreddit moderators, the moderators were slow to act, and when the content was eventually removed, it would be added again in minutes.¹⁵ The complaint alleged that Reddit was in violation of the TVPRA, which makes it illegal for any entity to knowingly benefit financially from sex trafficking, including when a minor is made to engage in a commercial sex act.¹⁶ The plaintiffs sought to represent a class of people who were under 18 when they appeared in an image or video uploaded to Reddit in the last 10 years.¹⁷ Reddit moved to dismiss, arguing that the plaintiffs’ claims were barred by Section 230.¹⁸

Judge Selna, in the U.S. District Court for the Northern District of California, granted Reddit’s motion to dismiss for failure to state a claim, holding that Reddit was protected by Section 230 because Reddit was clearly an interactive computer service, rather than an information content provider, as the plaintiffs contended.¹⁹ The plaintiffs argued that Reddit was responsible in whole or in part for the creation or development of information, making it an information content provider not protected by Section 230.²⁰ But the court held that Reddit simply provided “neutral tools,” which is not sufficient to make an entity an information content provider.²¹

Further, the court held that Reddit’s system of community moderation was not particularly permissive of

CSEM material, and so did not materially contribute to users posting CSEM on its website.²²

Lastly, but most significantly, the court held that, to avoid Section 230 immunity under FOSTA, the plaintiffs had to show that Reddit knowingly facilitated posting of CSEM.²³

THE NINTH CIRCUIT OPINION

On appeal, the Ninth Circuit considered the scope of FOSTA’s exception to Section 230 immunity for civil child sex trafficking claims.²⁴ The court opened with a blunt factual framing, stating that, as of 2021, when this suit was filed, there were numerous subreddits that explicitly marketed themselves as fora for CSEM, with names like /r/BestofYoungNSFW and /r/YoungGirlsGoneWild.²⁵ The court then gave a clear statement of the breadth of Section 230’s protections, “this provision immunizes providers of interactive computer services against liability arising from content created by third parties,” and an affirmation that this protection is “robust.”²⁶

The court outlined the multiple statutory provisions that were implicated in its analysis, first Section 230; then FOSTA, which amended Section 230; and then two sections of the TVPRA that FOSTA incorporates, 18 U.S.C. §§ 1591 and 1595. In concert, the provisions mean that “websites are generally immune from liability for user-posted content, but that immunity does not cover sex trafficking claims *if* the conduct underlying the claim violates 18 U.S.C. § 1591.”²⁷ Reddit argued that a website may only be liable for its own criminal conduct, while the plaintiffs argued that a website may be liable as a beneficiary when someone else’s conduct violated the criminal statute.²⁸

To resolve the dispute, the Ninth Circuit considered the plain text of FOSTA, as well as the underlying provisions of the TVPRA. Section 1591 of the TVPRA makes it a crime to knowingly benefit from participation in sex trafficking, while Section 1595 creates a private right of action for victims of sex trafficking.²⁹

In its analysis, the court concluded that FOSTA’s plain text, and Supreme Court precedent interpreting a similar immunity exception, required the court to look to the elements of the “underlying” claim.³⁰ As to the underlying claims, the court found that a website can only be held liable if its own conduct – not a third party’s – violates Section 1591.³¹

Meanwhile, the text of Section 1595 makes clear that the defendant-website’s conduct is essential to the survival of the claim, and even the structure of the plaintiffs’ complaint emphasized the import of Reddit’s conduct.³²

The court therefore concluded that, because an interpretation of the immunity provision in FOSTA requires an interpretation of the underlying statutes, and because the underlying statutes look to the defendant's own conduct, in order for a plaintiff to invoke FOSTA's immunity exception, she must plausibly allege that the website's own conduct violated Section 1591.³³ This resolved the question that had previously split district courts in the Ninth Circuit.³⁴

An interesting note regarding this analysis is that, in order to determine whether the FOSTA exception applied, the court had to consider whether the underlying TVPRA provisions applied in the first place.³⁵ In its analysis, it determined that Reddit was not liable under Section 1595 at all, because that cause of action required that Reddit's own conduct to violate Section 1591, not the conduct of its users.³⁶ This finding ultimately means that the plaintiffs' claims against Reddit could not have survived, even if Section 230 did not exist at all.

Beyond the text, the court looked to FOSTA's original legislative proponents' understanding of how FOSTA would be interpreted.³⁷ Congress passed FOSTA in 2018 because courts had shown they were reluctant to hold websites liable in civil trafficking suits stemming from user posts, even when the website had participated in the scheme.³⁸

Further, although Section 230 as drafted did not immunize websites like Backpage.com from federal criminal sex trafficking laws, it was unclear whether states could bring analogous prosecutions.³⁹

Critics of the bill were concerned it went too far in undermining Section 230 and would lead to a deluge of frivolous litigation targeting law-abiding intermediaries.⁴⁰ So the Senate altered the bill to its current form, only abridging protections for websites that knowingly facilitate sex trafficking.⁴¹ The court acknowledged that, as enacted, 47 U.S.C. § 230(e)(5) (A), the FOSTA amendment, retains only a "limited capacity to accomplish its original goal of allowing trafficking victims to hold websites accountable," but that this flaw, or feature, is not one that can be rewritten by judicial fiat.⁴²

Having concluded that, to overcome Section 230 immunity for sex trafficking claims, a plaintiff must plead and prove that a defendant-website's own conduct violated 18 U.S.C. § 1591, the Ninth Circuit determined that the allegations that Reddit "turned a blind eye" to the unlawful content posted on its platform were not allegations that it actively participated in sex trafficking.⁴³ As such, the court affirmed the district court's decision to dismiss the plaintiffs' claims.⁴⁴

WHAT IT MEANS

This ruling is a significant win for proponents of broad and unfettered Section 230 protections. Even in the face of disturbing factual allegations, the Ninth Circuit interpreted FOSTA narrowly according to its text, holding that it only applies when websites knowingly facilitate sex trafficking conduct.

Notes

1. 47 U.S.C. § 230.
2. 18 U.S.C. § 1589 et seq.
3. Pub. L. No. 115-164, 132 Stat. 1253 (Apr. 11, 2018), the full text of which can be found online at <http://www.congress.gov/115/plaws/publ164/PLAW-115publ164.pdf>.
4. *Does 1-6 v. Reddit, Inc.*, No. 21-56293, 2022 WL 13743458 (9th Cir. Oct. 24, 2022).
5. Derek Khanna, *The Law that Gave Us the Modern Internet – and the Campaign to Kill It*, *The Atlantic* (Sept. 12, 2013) <https://www.theatlantic.com/business/archive/2013/09/the-law-that-gave-us-the-modern-internet-and-the-campaign-to-kill-it/279588/>.
6. Section 230 specifically exempts federal criminal liability (§230(e)(1)), electronic privacy violations (§230(e)(4)) and intellectual property claims (§230(e)(2)).
7. Aja Romano, *A new law intended to curb sex trafficking threatens the future of the internet as we know it*, *vox* (Jul. 2, 2018) <https://www.vox.com/culture/2018/4/13/17172762/fosta-sesta-backpage-230-internet-freedom>.
8. "S.1693 - Stop Enabling Sex Traffickers Act of 2017." Archived from the original on September 20, 2017. Retrieved September 20, 2017.
9. There have been instances of state level anti-Section 230 legislation, for example in Florida and in Texas. The Florida law, Senate Bill 7072, was preliminarily enjoined from coming into effect on June 30, 2022. The Texas law, House Bill 20, was upheld by the Fifth Circuit on September 16, 2022, after being initially enjoined, but on October 12, 2022, was paused again by the Fifth Circuit while parties seek review from the Supreme Court.
10. See supra note 7; see also EFF opposition piece on SESTA amendments to FOSTA, Electronic Frontier Foundation, <https://www.eff.org/document/fostasesta-one-pager> (last visited Oct. 26, 2022).
11. Compare *J. B. v. G6 Hosp., LLC*, No. 19-CV-07848-HSG, 2021 WL 4079207, at *6 (N.D. Cal. Sept. 8, 2021) (holding defendant's own conduct must violate criminal statute), *M. L. v. Craigslist Inc.*, No. C19-6153 BHS-TLF, 2020 WL 5494903, at *4 (W.D. Wash. Sept. 11, 2020), and *A.M. v. Omegle.com, LLC*, No. 3:21-CV-01674-MO, — E.Supp.3d —, —, 2022 WL 2713721, at *7 (D. Or. July 13, 2022), with *Doe v. Twitter, Inc.*, 555 F. Supp. 3d 889, 921 (N.D. Cal. 2021) (holding that the remedial purpose of FOSTA supports a liberal construction of the immunity exception), and *Doe v. Mindgeek USA Inc.*, 574 F. Supp. 3d 760, 773-74 (C.D. Cal. 2021).

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12. Doe v. Reddit, Inc., No. SACV2100768JVSKESEX, 2021 WL 5860904, at *1 (C.D. Cal. Oct. 7, 2021), aff'd sub nom. Does 1-6 v. Reddit, Inc., No. 21-56293, 2022 WL 13743458 (9th Cir. Oct. 24, 2022).
13. Id.
14. Id.
15. Id.
16. Id. at *2.
17. Id.
18. Id. at *3.
19. Id. at *5.
20. Id. at *4.
21. Id.
22. Id. at *5.
23. Id. at *7-8.
24. Does 1-6 v. Reddit, Inc., 2022 WL 13743458, at *3.
25. Id. at *2.
26. Id. (internal quotations omitted).
27. Id. at *3.
28. Id. at *4.
29. 18 U.S.C. §§ 1591, 1595.
30. Id.
31. Id.
32. Id.
33. Id.
34. See supra note 11.
35. Does 1-6 v. Reddit, Inc., 2022 WL 13743458, at *4-5.
36. Id.
37. Id. at *6.
38. Id.
39. Id.
40. Id.
41. Id. at *7.
42. Id.
43. Id. at *8.
44. Id.

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