



MEMORANDUM

March 7, 2018

To: Honorable Ann Wagner
Attention: Rachel Wagley

From: American Law Division

Subject: **Ex Post Facto Implications of the Allow States and Victims to Fight Online Sex Trafficking Act of 2017 (H.R. 1865), as Passed by the House of Representatives**

This is in response to your request for an analysis of the ex post facto implications of the Allow States and Victims to Fight Online Sex Trafficking Act of 2017 (FOSTA) (H.R. 1865), as passed by the House of Representatives in February, 2018. You expressed particular interest in the ex post facto implication of Section 4 as it relates to Section 230 of the Communications Act of 1934 (Section 230) (47 U.S.C. § 230), originally enacted as part of the Communications Decency Act of 1996.

As discussed below, the Constitution’s Ex Post Facto Clauses limit congressional and state authority to pass legislation that applies retroactively. Because Section 230(e)(5)(B) and (C) would amend the Communications Act to allow states to prosecute online facilitators of sex trafficking but would not create any new federal crimes or enhance the punishment for any existing federal crimes, the Ex Post Facto Clause does not appear likely to bar Congress from making these amendments. In addition, Section 230(e)(5)(A), which amends Section 230 to allow civil causes of action under 18 U.S.C. § 1595 for 18 U.S.C. § 1591 violations, does not appear to violate the Ex Post Facto, Due Process, and Takings Clauses.

DISCUSSION

Among other things, Section 230 of the Communications Act protects online providers of internet services from being treated as publishers of information provided by other entities.¹ Section 230 states: “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 Section 230 does not bar criminal prosecutions under federal law.³

¹ 47 U.S.C. § 230

² *Id.*

³ 47 U.S.C. § 203(e)(1).

Courts have found Section 230 to prevent states from enforcing state laws intended to reduce sexual abuse of minors. For example, in 2012, a court found Section 230 to bar state prosecution of an online classified advertising service pursuant to a state law that criminalized advertising commercial sexual abuse of a minor.⁴ Other courts have construed Section 230 to immunize online classified advertising services from civil liability.⁵

Among other things, FOSTA is intended to clarify that Section 230 of the Communications Act does not protect providers and users of interactive computer services from federal and state criminal and civil laws relating to sexual exploitation of children or sex trafficking. The relevant substantive provisions FOSTA include:

- Section 3 (proposed 18 U.S.C. §2421A), which would proscribe “promotion or facilitation of prostitution and reckless disregard of sex trafficking,” authorize restitution, and provide a civil cause of action for the victims of such an offense;
- Section 4, which would amend Section 230, to “ensur[e] [the] ability to enforce federal and state criminal and civil law relating to sex trafficking”;
- Section 5, which would amend 18 U.S.C. § 1591, which proscribes certain aspects of commercial sex trafficking of children or by force, fraud, or coercion, by defining the term “participation in a venture”;
- Section 6, which would amend 18 U.S.C. § 1595, which establishes a cause of action for damages and attorneys’ fees to benefit victims of violations of 18 U.S.C. ch. 77 (18 U.S.C. §§ 1581-1597) (relating to peonage, slavery, and trafficking in persons, including commercial sex trafficking), to allow state attorneys general to bring civil actions on behalf of victims of commercial sex trafficking.
- Section 7, which would establish a savings clause relating to pending federal and state criminal and civil litigation.

Section 4 of FOSTA addresses the scope of Section 230’s grants of civil and criminal immunity. It reads:

(a) In General.--Section 230(e) of the Communications Act of 1934 (47 U.S.C. 230(e)) is amended by adding at the end the following:

“(5) No effect on sex trafficking law.--Nothing in this section (other than subsection (c)(2)(A))⁶ shall be construed to impair or limit--

⁴ Backpage.Com, LLC v. McKenna, 881 F. Supp. 2d 1262 (W.D. Wash. 2012).

⁵ Jane Doe No. 1 v. Backpage.Com, LLC, 817 F.3d 12, 18-9 (1st Cir. 2016) (holding that Section 203 protected Backpage.Com from liability under the Trafficking Victims Protection Reauthorization Act (TVPRA) and the Massachusetts Anti-Human Trafficking and Victim Protection Act (MATA) in the case before it) (“Congress enacted [Section 230] partially in response to court cases that held internet publishers liable for the defamatory statements posted by third parties on message boards maintained by the publishers. ... There has been near-universal agreement that section 230 should not be construed grudgingly. ... Such a hands-off approach is fully consistent with Congress’s avowed desire to permit the continued development of the internet with minimal regulatory interference. In holding Backpage harmless here, the district court found section 230(c)(1) can be broken down into three component parts. It shields conduct if the defendant (1) is a ‘provider or user of an interactive computer service’; (2) the claim is based on ‘information provided by another information content provider; and (3) the claim would treat [the defendant] ‘as the publisher or speaker of that information.’”).

⁶ Section 230(c)(2)(A) provides: “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 (continued...)”

“(A) any claim in a civil action brought under section 1595 of title 18, United States Code, if the conduct underlying the claim constitutes a violation of section 1591 of that title;
“(B) any charge in a criminal prosecution brought under State law if the conduct underlying the charge would constitute a violation of section 1591 of title 18, United States Code; or
“(C) any charge in a criminal prosecution brought under State law if the conduct underlying the charge would constitute a violation of section 2421A of title 18, United States Code, and promotion or facilitation of prostitution is illegal in the jurisdiction where the defendant's promotion or facilitation of prostitution was targeted.

(b) Effective Date.--The amendments made by this section shall take effect on the date of the enactment of this Act, and the amendment made by subsection (a) shall apply regardless of whether the conduct alleged occurred, or is alleged to have occurred, before, on, or after such date of enactment.

Section 4(b) clarifies that the Section 4(a) amendments apply retroactively, which raises the possibility of ex post facto issues. With respect to Congress, the Constitution provides that “No ... ex post facto Law shall be passed,”⁷ and, with respect to the states, the Constitution provides that “No State shall ... pass any ... ex post facto Law...”⁸

Proposed Section 230(e)(5)(B) and (C)

Proposed Section 230(e)(5)(B) and (C) concern state criminal prosecutions. Section 4 of FOSTA would amend existing federal law to remove impediments to criminal prosecution under state law as described in proposed Section 230(e)(5)(B) and (C). Strictly speaking, it would neither create new federal crimes nor enhance the punishment for existing federal crimes. Thus, on its face, it would not appear to violate the Ex Post Facto Clause that binds Congress. Because Section 4 does not contemplate state enactment of retroactive legislation, it would not appear likely to violate the Ex Post Facto Clause that applies to states. It is possible, however, that an argument could be made that allowing prosecution for parallel state offenses effectively enhances punishments for 18 U.S.C. § 1591 and proposed 18 U.S.C. § 2421A violations retroactively.⁹

The Supreme Court has considered two ex post facto cases that involved removing impediments to state prosecution and punishment—*Stogner v. California* and *Dobbert v. Florida*. In *Stogner*, the Supreme Court found a California statute that attempted to revive expired statutes of limitations to violate the Ex Post Clause. The Court stated:

The second category [of *Calder v. Bull*'s inventory of statutes that violate ex post facto] – including any law that aggravates a crime, or makes it greater than it was, when committed – describes California's statute as long as those words are understood as Justice Chase understood them – *i.e.*, as

(...continued)

obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected.”

⁷ U.S. CONST. art. I, § 9, cl. 3.

⁸ U.S. CONST. art. I, § 10, cl. 1.

⁹ The Constitution's Double Jeopardy Clauses pose no impediment to dual federal-state prosecution for the same misconduct. *United States v. Lanza*, 260 U.S. 377, 382 (1922).

referring to a statute that inflicts punishments, where the party was not, by law, liable to any punishment. After (but not before) the original statute of limitations had expired, a party such as *Stogner* was not liable to any punishment. California's new statute therefore aggravated *Stogner's* alleged crime, or made it greater than it was, when committed, in the sense that, and to the extent that, it inflicted punishment for past criminal conduct that (when the new law was enacted) did not trigger such liability.¹⁰

In *Dobbert v. Florida*, the Court considered a Florida statute that sought to revive the death penalty.¹¹ *Dobbert* had committed murder, then a capital offense, several months before the Court decided *Furman v. Georgia*, which invalidated Georgia's, and by implication Florida's, procedures for determining death sentences. After reinstating the death penalty with constitutionally valid procedures, Florida prosecuted *Dobbert*, and sentenced him to death. The Court found no ex post facto violation. "The new statute simply altered the methods employed in determining whether the death penalty was to be imposed; there was no change in the quantum of punishment to the crime."¹² The Court explained further:

Petitioner's second ex post facto claim is based on the contention that at the time he murdered his children there was no death penalty in effect in Florida. This is so, he contends, because, the earlier statute enacted by the legislature was, after the time he acted, found by the Supreme Court of Florida to be invalid under our decision in *Furman v. Georgia*, 408 U.S. 238 (1972). Therefore, argues petitioner, there was no valid death penalty in effect in Florida as of the date of his actions. But this sophistic argument mocks the substance of the Ex Post Facto Clause. Whether or not the old statute would, in the future, withstand constitutional attack, it clearly indicated Florida's view of the severity of murder and of the degree of punishment which the legislature wished to impose upon murderers. The statute was intended to provide maximum deterrence, and its existence on the statute books provided fair warning as to the degree of culpability which the State ascribed to the act of murder... Here the existence of the statute served as an operative fact to warn the petitioner of the penalty which Florida would seek to impose on him if he were convicted of first-degree murder. This was sufficient compliance with the ex post facto provision of the United States Constitution.¹³

Because Section 230(e)(5)(B) revives the prospect of state prosecution for conduct outlawed by 18 U.S.C. § 1591, it seems analogous to *Dobbert* and critically distinct from *Stogner*. In *Stogner*, the defendant could not be prosecuted until the impediment was removed. Under proposed Section 230(e)(5)(B), defendants could be prosecuted before the impediment's removal if 18 U.S.C. § 1591 proscribed the underlying conduct. In *Dobbert* and under proposed Section 230(e)(5)(B), the defendant knew beforehand that government authorities considered the underlying conduct criminal and warranting punishment under the law.

Proposed Section 230(e)(5)(C) is different because dual state and federal prosecutions would only occur after proposed 18 U.S.C. § 2421A's enactment and, consequently, any conduct subject to revived state prosecution would not have been a federal crime when the conduct occurred.

¹⁰ *Stogner v. California*, 539 U.S. 607, 613 (2003).

¹¹ *Dobbert v. Florida*, 432 U.S. 282 (1977).

¹² *Id.* at 293-94.

¹³ *Id.* at 297, 298.

However, Section 230(e)(5)(C) would create no new federal crime or enhance punishment for any pre-existing federal crime and only impacts state law. We have been unable to locate any case that indicates that the Ex Post Facto Clause limits Congress's legislative authority in such a situation.

Proposed Section 230(e)(5)(A)

Proposed Section 230(e)(5)(A) concerns civil causes of action.¹⁴ Section 230(e)(5)(A) would remove Section 230 bars to causes of action under 18 U.S.C. § 1595 and predicated on 18 U.S.C. § 1591 (relating to commercial sex trafficking) violations. Ex Post Facto Clauses ordinarily do not apply to statutes providing retroactive civil remedies. The Supreme Court has stated: “Because [the Court will] ordinarily defer to the legislature’s stated intent, only the clearest proof will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty.”¹⁵ Section 1595 appears to be remedial in contrast to the criminal provisions in the same chapter of Title 18 of the United States Code, including Section 1591.

Retroactive civil remedial statutes raise Due Process Clause and, occasionally, Takings Clause concerns. The Court has not presumed retroactivity in civil cases unless such legislative intent is clearly indicated.¹⁶ When legislation is explicitly retroactive, the Court’s due process analysis generally is more forgiving than its ex post facto analysis. The Court has stated: “Provided that the retroactive application of a statute is supported by a legitimate legislative purpose furthered by rational means, judgments about the wisdom of such legislation remain within the exclusive province of the legislative and executive branches.”¹⁷ Section 230(e)(5)(A) appears to have a legitimate legislative purpose—to make facilitators of commercial sex trafficking compensate its victims and, having a narrowly drawn cause of action, its means appear rational.

In rare cases, retroactively imposing liability on private parties raises Takings Clause claims. The Court in a 5-4, plurality decision, *Eastern Enterprises v. Apfel*, found it unconstitutional to require coal companies to cover health care expenses of retired miners whom they had employed before exiting the coal industry.¹⁸ Four members of the Court found the legislation violated the Takings Clause because it “imposes severe retroactive liability on a limited class of parties that could not have anticipated the liability, and the extent of that liability is substantially disproportionate to the parties’ experience.”¹⁹ Justice Thomas concurred, but wrote separately to suggest revisiting whether to apply the Ex Post Facto Clauses in civil cases.²⁰ Justice Kennedy concurred in the judgment, but maintained that a Due Process standard provided a more

¹⁴ “Because [the Court will] ordinarily defer to the legislature’s stated intent, only the clearest proof will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty.” *Smith v. Doe*, 538 U.S. 84, 92 (2003).

¹⁵ *Smith v. Doe*, 538 U.S. 84, 92 (2003).

¹⁶ *Landgraf v. USI Film Products*, 511 U.S. 244, 270-73 (1994).

¹⁷ *United States v. Carlton*, 512 U.S. 26, 30-1 (1994) (quoting *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 16 (1976)).

¹⁸ 524 U.S. 498, 504 (1998).

¹⁹ *Id.* at 528-29.

²⁰ *Id.* at 538-39.

appropriate analysis.²¹ The four dissenters agreed that the Due Process Clause should control and that, accordingly, the legislation was constitutional.²² It is not clear, however, that Section 230(e)(5)(A) would impose retroactively the kind of massive, unanticipated civil liability at issue in *Eastern Enterprises*.

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²¹ *Id.* at 539.

²² *Id.* at 553-54 (Breyer, J., dissenting).
