IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES OF AMERICA	§	
	§	
v.	§	CRIMINAL NO. 3:20-CR-00274-N
	§	
WILHAN MARTONO (1)	§	

DEFENDANT'S MOTION TO DISMISS

TO THE HONORABLE DAVID C. GODBEY, UNITED STATES DISTRICT JUDGE:

COMES NOW WILHAN MARTONO, Defendant, by and through undersigned counsel in the above entitled and numbered case, and files this Defendant's Motion to Dismiss, based on FOSTA and their associated forfeiture allegations because the statute is unconstitutionally over-broad and therefore invalid. The statute is also unconstitutionally vague and therefore void. In the alternative, the indictment fails to state the essential elements of 18 U.S.C. §2421A so the charges stemming from that statute should be dismissed. Defendant also moves the court to dismiss counts three through eleven which assert violations of the Travel Act, plus their associated criminal forfeiture allegations. These counts are fatally defective because they fail to assert the essential elements of the offense. Finally, the Court should also dismiss counts twelve through twenty-eight which allege money laundering because those counts rely on violations of FOSTA and the Travel Act as predicate offenses.

Respectfully submitted,

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MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS

TO THE HONORABLE DAVID C. GODBEY, UNITED STATES DISTRICT JUDGE:

COMES NOW WILHAN MARTONO, Defendant, by and through undersigned counsel in the above entitled and numbered case, and files this Defendant's Memorandum in Support of Defendant's Motion to Dismiss, and respectfully shows this Court as follows:

Introduction

A grand jury returned an indictment against Wilhan Martono, charging him with violating 18 U.S.C. §2421A, Promotion or Facilitation of Prostitution and Reckless Disregard of Sex Trafficking ("FOSTA"). The first count of the indictment charges Martono with the base offense and both aggravated forms of the offense. IN.10. Martono's alleged violation of this statute also serves as the predicate offense for counts 12 through 28, charging him with the laundering of money instruments in violation of 18 U.S.C. §1956(a)(1)(B)(i). IN.10, 15–17. FOSTA also serves as a predicate offense for criminal forfeiture under 18 U.S.C. §2428(a) and 18 U.S.C. §982(a)(1). IN.18.

The indictment also charges Martono for conspiracy and substantive counts under the Travel Act—18 U.S.C. §1952(a)(3)(A) and 371. These charges also serve as predicate offenses for criminal forfeiture.

Grounds for Dismissal of Certain Counts

Federal Rule of Criminal Procedure 12(b) authorizes motions to dismiss that raise any defense, objection, or request which is capable of determination without a trial of the general issue. Martono moves for dismissal of all charges with the exception of count two which charges a violation of conspiracy to violate the Travel Act.

Martono moves for dismissal of the FOSTA derived counts because FOSTA is invalid because it is unconstitutionally overbroad and vague. The First Amendment to the Constitution dictates that "Congress shall make no law . . . abridging the freedom of speech." While laws or policies that target conduct but only incidentally burden speech have been upheld as valid, see, e.g., *Virginia v. Hicks*, 539 U.S. 113, 122–23 (2003), and courts have recognized narrow constitutional carve outs, such as obscenity, defamation, fraud, incitement, and speech integral to criminal conduct, United States v. Stevens, 559 U.S. 460, 468 (2010), laws imposing criminal penalties on protected speech constitute speech suppression and are invalid. *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 244 (2002). FOSTA explicitly criminalizes speech through its use of the terms "promotes" and "facilitates." Its speech restriction is content-based and viewpoint-discriminatory because it criminalizes only speech that is opposed to the Government's view of prostitution. Even if the statute were said to target some conduct, its sweep of protected speech is too broad. It is unconstitutionally overbroad and invalid as a result.

The statute is unconstitutionally vague as well. It criminalizes an interactive computer user who promotes or facilitates the prostitution of another person, but doesn't define "promote," "facilitate," or even "prostitution." It allows an affirmative defense where the defendant proves the promotion or facilitation of prostitution is legal in the jurisdiction where the promotion or facilitation was targeted," but doesn't define "jurisdiction" or "targeted" either. All of these words are susceptible to multiple and wide-ranging meanings. They render the statute so vague that it fails

to give ordinary people fair notice of the conduct it punishes, and is so standardless that it invites arbitrary enforcement. It flouts the essentials of due process and is therefore invalid.

Alternatively, if the court were to judicially construct "facilitates or promotes the prostitution of another person" to mean to ensnare only specific unlawful acts with respect to a particular individual, and not the broad subject matter of prostitution, *see Woodhull Freedom Found. v. United States*, 334 F. Supp. 3d 185 (D.D.C. 2018), reversed by *Woodhull Freedom Found. v. United States*, 948 F.3d 363 (D.C. Cir. 2020), the indictment would still be fatally defective because it fails to assert the essential elements of 18 U.S.C. §2421A under that construction.

Martono also moves for dismissal of the substantive Travel Act charges because they fail to state the essential elements of the offenses. Alternatively, the Court should dismiss these charges because they are too vague to enable the Court to determine whether the conduct can be punished without infringing the First Amendment. Failing that, the Court should strike vague language references and indistinct laws.

Legal Standards for Indictments

Rule 7 of the Federal Rules of Criminal Procedure requires an indictment to include a "plain, concise, and definite written statement of the essential facts constituting the offense charge. The Fifth and Sixth Amendments demand that a grand-jury indictment set forth each essential element of an offense. *United States v. Wilson*, 884 F.2d 174, 179 (5th Cir. 1989). The indictment must do more than simply repeat the language of the criminal statute. *Russell v. United States*, 369 U.S. 749, 764, 82 S. Ct. 1038, 8 L. Ed. 2d 240 (1962). It "must charge positively and not inferentially everything essential." *United States v. Dentler*, 492 F.3d 306, 309 (5th Cir. 2007). Language of a statute may be used to describe the offense, but that language must be accompa-

nied with enough "facts and circumstances" to "inform the accused of the specific offense . . . with which he is charged." *Hamling v. United States*, 418 U.S. 87, 117–18 (1974) ("Undoubtedly the language of the statute may be used in the general description of an offence [sic], but it must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offense, coming under the general description, with which he is charged."), (quoting *United States v. Hess*, 124 U.S. 483, 487 (1888)). Indictments that involve speech, as this one does, must go further. It must specifically identify the precise conduct alleged to fall outside of constitutional protection. *See United States v. Buddenberg*, No. CR-09-00263, 2010 U.S. Dist. LEXIS 78201, 2010 WL 2735547, at *11 (N.D. Cal. July 12, 2010) ("Rule 7 requires the United States to identify or at least summarize the actual words or expressive conduct that forms the basis of the charge."); *United States v. Cassidy*, 814 F. Supp. 2d 574, 582–83 (D. Md. 2011). A bill of particulars cannot save an invalid indictment. *See Russell*, 369 U.S. at 769–70.

When considering a motion to dismiss, the court is to "take the allegations of the indictment as true and determine whether an offense has been stated" in a challenge to the sufficiency of the indictment under Rule 12(b)(1)(B)(v). *United States v. Kay*, 359 F.3d 738, 742 (5th Cir. 2004). It, however, should not consider allegations that are not relevant to the charges, gratuitous or inflammatory and prejudicial. See Fed. R. Crim. P. 7(d); United *States v. Hughes*, 766 F.2d 875, 879 (5th Cir. 1985) (observing that irrelevant or immaterial facts, particularly those that might prejudice the jury may be struck from an indictment); *United States v. Bullock*, 451 F.2d 884, 888 (5th Cir. 1971) (holding that the "inclusion of clearly unnecessary language in an indictment that could only serve to inflame the jury, confuse the issues, and blur the elements necessary for confusion under the separate counts involved surely can be prejudicial"). That said, the Court also should not accept as true conclusory allegations, unwarranted factual inferences, or legal conclusions. See United *States v. Reece*, No. 12-CR-00146, 2013 U.S. Dist. 92298, at *7 (5th

Cir. April 30, 2013) (finding that the Government's descriptive term confused the issues and was prejudicial); *Ashcroft v. Iqbal*, 556 U.S. 662, 677–79 (2009) (outlining the standard of review for the dismissal of civil complaints).

The FOSTA Statute

The Statute that allows States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. No. 115-164, 132 Stat. 1253 (2018) ("FOSTA" or "the Act") was signed into law on April 11, 2018 and took immediate effect. 132 Stat. 1253, §4(b). 18 U.S.C. §2421A is a new section of the U.S. Code and is the centerpiece of FOSTA. This section reads as follows:

> (a) In general. Whoever, using a facility or means of interstate or foreign commerce or in or affecting interstate or foreign commerce, owns, manages, or operates an interactive computer service (as such term is defined in defined in section 230(f) the Communications Act of 1934 or conspires or attempts to do so, with the intent to promote or facilitate the prostitution of another person shall be fined under this title, imprisoned for not more than 10 years, or both.
>
> (b) Aggravated violation. Whoever, using a facility or means of interstate or foreign commerce or in or affecting interstate or foreign commerce, owns, manages, or operates an interactive computer service (as such term is defined in section 230(f) the Communications Act of 1934 (47 U.S.C. 230(f)), or conspires or attempts to do so, with the intent to promote or facilitate the prostitution of another person and—
>
> (1) promotes or facilitates the prostitution of 5 or more persons; or
>
> (2) acts in reckless disregard of the fact that such conduct contributed to sex trafficking, in violation of 1591(a) shall be fined under this title, imprisoned for not more than 25 years, or both.
>
> (c) Civil recovery. Any person injured by reason of a violation of section 2421A(b) may recover damages and reasonable attorneys' fees in an action before any appropriate United States district court.
>
> (d) Mandatory restitution. Notwithstanding sections 3663 or 3663A and in addition to any other civil or criminal penalties authorized by law, the court shall order restitution for any violation of subsection (b)(2). The scope and nature of such restitution shall be consistent with section 2327(b).
>
> (e) Affirmative defense. It shall be an affirmative defense to a charge of violating subsection (a), or subsection (b)(1) where the defendant proves, by a preponder-

> ance of the evidence, that the promotion or facilitation of prostitution is legal in the jurisdiction where the promotion or facilitation was targeted.

It creates a federal criminal offense for owning, managing, or operating "an interactive computer service . . . with the intent to promote or facilitate the prostitution of another person," or attempting or conspiring to do so. 18 U.S.C. §2421A(a). This offense is punishable by a fine or up to ten years' imprisonment. *Id.* Section 2421A further provides for aggravated versions of the offense, punishable by a fine or up to 25 years in prison. *See id*. at §2421(A)(b). The aggravated versions add the elements of "promotes or facilitates the prostitution of five or more persons" or "acts in reckless disregard of the fact that such conduct contributed to sex trafficking in violation of 18 U.S.C. §1591(a)" to the base offense.

Section 1591(a) is an existing statute, prohibiting sex trafficking. Under FOSTA, victims of violations of Section 2421A may bring civil suits in federal court to "recover damages and reasonable attorneys' fees." *Id*. at 2421A(c). FOSTA also directs the district court to order restitution for any violation of subsection (b)(2).

Next, FOSTA amends 47 U.S.C. §230, the "safe harbor" of the Communications Decency Act of 1996 ("CDA"). Section 230 has two key functions. First, it immunizes interactive computer services from criminal and civil liability for content created by third parties. *See* 47 U.S.C. §230(c)(1) (providing that "[n]o 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"); *Id.* at 230(e)(3) (preempting conflicting state and local law); see also *Bennett v. Google*, LLC, 882 F.3d 1163, 1165 (D.C. Cir. 2018) ("The intent of the [Communications Decency Act] is thus to promote rather than chill internet speech."); see also *Jones v. Dirty World Entertainment Recordings LLC*, 755 F.3d 398, 407 (6th Cir. 2014) ("Section 230 marks a departure from the common-law rule that allocates liability to publishers or distributors of tortious material written or prepared by others."). Section 230, at the time, encouraged service providers to

self regulate the dissemination of offensive material. *Bennett*, 882 F.3d at 1165. These two grants of immunity "incentivize[s] companies to neither restrict content nor bury their heads in the sand in order to avoid liability." *Id*.

FOSTA narrows the scope of Section 230's immunities and preemptive effect. The Act states that "nothing in" Section 230(c)(1) "shall be construed to impair or limit" three categories of civil claims and criminal prosecutions. *Id*. at 230(e)(5). First, it makes clear that Section 230 does not preclude civil claims by victims against perpetrators and persons in a [sex trafficking] venture" under 18 U.S.C. §1595 if the participation was "knowing." *See* §230(e)(5)(A); 18 U.S.C. §1591. Second, Section 230 doesn't preclude state criminal prosecution if the conduct underlying the charge would have violated 18 U.S.C. §1591. *Id*. at 230(e)(5)(B). And third, Section 230 doesn't preclude state criminal prosecution if the conduct would constitute a violation of 18 U.S.C. §2421A. *Id*. at 230(e)(5)(C). These amendments to Section 230 "apply regardless of whether the conduct alleged occurred, or is alleged to have occurred, before, on, or after such date of enactment." 132 Stat. 1253, § 4(b).

FOSTA also added a definition to 18 U.S.C. §1591. It clarified "participation in a venture" to mean "knowingly assisting, supporting, or facilitating" sex trafficking. *Id*. at §1591(e)(4). "Participation in a venture" had appeared in the same section, but was undefined. *See id*. at 1591(a)(2) (criminalizing the knowing "participation in a venture" to cause sex trafficking of an adult by "force, fraud, or coercion" or of a minor).

Finally, FOSTA amended Section 1595 to authorize state attorneys general to bring civil actions in parens patriae on behalf of state residents who have been "threatened or adversely affected by any person who violates" 18 U.S.C. §1591. *See* 18 U.S.C. §1591(d). Section 1595, in other words, allows state attorneys general to step into the shoes of victims and bring civil suits on their behalf. *Id*.

Constitutional Overbreadth

The Constitution provides significant protection from overbroad laws that chill speech within the First Amendment's vast and privileged sphere. *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 244 (2002). The Government may not suppress lawful speech as the means to suppress unlawful speech. *Id.* at 255. Consequently, a law—even a criminal law—may be invalidated as overbroad if "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *United States v. Stevens*, 559 U.S. 460, 472 (2009) (quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 n. 6 (2008); *United States v. Williams*, 553 U.S. 285, 292 (2008) ("A statute is facially invalid if it prohibits a substantial amount of protected speech"). This is because speakers may be chilled from expressing themselves if overbroad criminal laws are on the books. See *New York v. Ferber*, 458 U.S. 747, 768–69 (1982) (citing *Vill. of Schaumburg v. Citizens for a Better Env't.*, 444 U.S. 620, 634 (1980)). If the overbreadth is "substantial," the law may not be enforced against anyone, including the party before the court, unless it is narrowed to reach only unprotected activity, whether by legislative action, judicial construction, or partial invalidation. *Brockett v. Spokane Arcades*, 472 U.S. 491, 503 (1985) (*citing Broadrick v. Oklahoma*, 413 U.S. 601 (1973)).

The Government might want to argue that Martono's "prostitution ads" are clearly not protected so he cannot challenge the validity of FOSTA, but that argument would be misplaced. Martono, charged with promoting or facilitating prostitution, can challenge FOSTA on its face as overbroad to combat its chilling effect. *Ferber*, 458 U.S. at 768–69; *Williams*, 553 U.S. at 292. This is because the statute threatens others not before the court—those who desire to engage in

legally protected expression but who may refrain from doing so rather than risk prosecution or undertake to have the law declared partially invalid. *Brockett*, 472 U.S. at 503.

First Amendment Principles

The Supreme Court has made it clear that "sexual expression which is indecent but not obscene is protected by the First Amendment." *Reno v. ACLU*, 521 U.S. 844, 847 (1997) (citing *Sable Comm. of Cal. v. FCC*, 492 U.S. 115, 126 (1989); *Carey v. Population Services Int'l*, 431 U.S. 678, 701 (1977)). The indictment does not allege that any of the communications made the object of the charges were obscene. See *Sable*, 492 U.S. at 125 (holding that there is no constitutional stricture against Congress' prohibiting the interstate transmission of obscene commercial telephone recordings). Escort services, for instance, enjoy First Amendment protections. *See*, e.g.s., Tenn. Code Ann. §§ 7-51-1102(11) & (12); Utah Code Ann. §§ 59-27-101 to 108; Ariz. Rev. Stat. §13-1422; Ala. Code § 13A-6-184; Kan. Stat. Ann. § 12-770(a)(8) and (9); Ark. Code Ann. §14-1-302(9), (10). So does expressive nude dancing and all kinds of sex-related advertisements. *See Schad v. Mt. Ephraim*, 452 U.S. 61, 64–66 (1981); *Backpage.com, L.L.C. v. Dart*, 807 F.3d 229, 230, 234 (7th Cir. 2015) (observing that advertisements promoting escorts, body rubs, strip clubs, domination, adult jobs didn't infringe on any criminal laws and were protected by the First Amendment).

The First Amendment also protects editorial control and judgment. *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974) ("The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to

this time."). These constitutional protections extend to electronic platforms. *Reno*, 521 U.S. at 870; see also *Brown v. Entm't Merch. Ass'n*, 131 S. Ct. 2729, 2733, 180 L. Ed. 2d 708 (2011) (observing that basic principles of speech and press do not vary when a new and different medium for communication, such as the internet, appears).

Congressional enactments are usually presumed constitutional, but this presumption is reversed when the Government seeks to restrict speech based on content. *R.A.V. v. St. Paul*, 505 U.S. 377, 382 (1992). Content-based regulations are presumptively invalid. Id. The Government bears the burden to rebut that presumption. *Id.*; *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 816 (2000); *see also Bd. of Trustees v. State of Univ. of N.J.*, 492 U.S. 469, 480 (1989) ("[T]he State bears the burden of justifying its restrictions[.]").

FOSTA's Overbreadth

FOSTA is unconstitutionally overbroad because it covers large swaths of protected speech. *Williams*, 553 U.S. at 293 (reasoning that the key in overbreadth analysis is understanding what a statute covers). Section 2421A makes it a crime for an interactive computer owner or manager to "promote or facilitate the prostitution of another person." 18 U.S.C. §2421A(a). The verbs "promote" and "facilitate" are disjunctive, meaning that the interactive computer owner or manager could be criminally liable for "promoting" the prostitution of another person even in the absence of "facilitating" it, or vice versa. Neither verb is defined and is consequently susceptible to multiple and wide-ranging meanings. "Facilitating," for instance, has been defined broadly in past cases such as "making it easier" or less difficult. See, e.g.s., *United States v. Rivera*, 775 F.2d 1559, 1562 (11th Cir. 1985); *United States v. Binkley*, 903 F.2d 1130, 1135–36 (7th Cir. 1990). The Government argued for this definition in *Abuelhawa v. United States*, a case involving the construction and scope of 21 U.S.C. 843(b). 556 U.S. 816 (2009). The Court recognized that de-

fining "facilitates" this way would give "improbable breadth" to the statute, and almost boundless discretion to the prosecution. *Id*. at 819, 823 n. 3. It rejected the Government's proposed definition and narrowed its scope, but did so on the basis of the statute's calibration of drug buyer-seller penalties. *Id.* at 821–22 ("The respect owed to that penalty calibration cannot be minimized."). But FOSTA isn't structured with such a tier of penalties. The verb isn't tethered to anything—a calibration of penalties or even another verb for that matter. Compare *Williams*, 553 U.S. at 294 (recognizing "facilitates" was limited by a string of adjacent verbs, such as advertises, distributes, or solicits, thereby conveying a transactional meaning narrowing the statute's reach). And there is nothing in the statute suggesting Congress even had judicial limitations of unlawful activity in mind. The statute, in fact, recognizes that prostitution is not a crime in certain jurisdictions. 18 U.S.C. §2124A This means that an interactive computer owner or manager—a SquareSpace site owner—may be criminally prosecuted for a third-party's postings—a blogger's comments—that could be construed in any way as making the act of prostitution easier or less difficult. This could apply to suggestions about electronic payments, location services, health-care services, security, child care, or even personal hygiene. As the *Abuelhawa* Court observed, the Government's prosecutorial discretion would be virtually boundless.

"Promote," a disjunctive too, doesn't modify "facilitate" and carries the same kind of wide-ranging meaning. *See Woodhull Freedom Found*., 948 F.3d at 372 ("The terms 'promote' and 'facilitate,' when considered in isolation, 'are susceptible of multiple and wide-ranging meanings.'"). The Oxford American English Dictionary defines it as "support or actively encourage a cause, venture, or aim." Case law demonstrates arguments over the scope of its meaning. See, e.g.s., *Rush v. Wyeth* (In re Prempro Liab. Litig.), 514 F.3d 825, 832 (8th Cir. 2008) (observing that the district court's definition of "promote" was different from that of a testifying expert); *Omni Quartz, Ltd. v. CVS Corp*., 98 Fed. Appx. 67, 67 (2d Cir. 2004) (deciding dispute between

two definitions of "promotion"). Like "facilitate," "promote" cannot be narrowed to something akin to aiding and abetting a crime because the statute doesn't define prostitution as a crime.[1] So, an interactive computer owner or manager may be criminally prosecuted for a third-party's postings that support or seek to advance the commission of prostitution even as a legal act.

These disjunctive verbs share the same constitutional defects that "encourages" and "induces" have in 8 U.S.C. §1324(a)(1)(A)(iv),("Subsection (iv)"). The Ninth Circuit in *United States v. Sineneng-Smith* found that these disjunctive verbs rendered the criminal statute facially invalid because of unconstitutional overbreadth. *United States v. Sineneng-Smith*, 910 F.3d 461 (9th Cir. 2018), vacated and remanded on other grounds, 2020 U.S. LEXIS 2639 (U.S. May 7, 2020).

Evelyn Sineneng-Smith was convicted on two counts of encouraging and inducing an alien to remain in the United States for purposes of financial gain in violation of 8 U.S.C. §1324(a)(1)(A)(iv) and 1324(a)(1)(B)(i). *Id*. at 467. Section 1324(a)(1)(A)(iv), ("Subsection (iv)") permits the felony prosecution of any person who "encourages or induces an alien to come to, enter, or reside in the United States" if the encourager knew, or recklessly disregarded "the fact that such coming to, entry, or residence is or will be in violation of law." Id. The *Sineneng-Smith* court had to decide whether Subsection (iv) abridged constitutionally-protected speech because the plain meaning of the verbs "encourage" and "induce" were said to "restrict vast swaths of protected expression in violation of the First Amendment." *Id*.

The court analyzed the meanings of "encourage or induce" and whether, and to what extent these verbs criminalized protected speech. *Id.* at 473. It considered the plain meanings given to both in case law and in dictionaries and concluded that the phrase "encourage or induce" could encompass both speech and conduct. *Id*. ("It is indisputable that one can encourage or induce

[1] The fact that the statute offers the legality of prostitution in a jurisdiction as an affirmative defense demonstrates that the Government does not need to prove illegality to obtain a conviction.

with words, or deeds, or both."). It also examined the context in which the phrase was used in the statute. *Id*. at 474. It concluded that "encourage" and "induce" could not be read so as not to encompass speech. *Id*. at 475. While the verbs might have applied to some conduct, "there is no way to get around the fact that [they] also plainly refer to First Amendment protected expression." *Id*. at 475.

Deciding that the statute reached speech, the court considered whether the statute's legitimate sweep restricted a substantial amount of speech. *Id*. at 479; see *City of Houston v. Hill*, 482 U.S. 451, 459 (1987) (holding that criminal laws "that make unlawful a substantial amount of constitutionally protected conduct may be held facially invalid even if they also have legitimate application"). The Government argued it did not. It said that the statute didn't restrain protected speech at all because the speech involved was integral to assisting others in violating the immigration laws. *Id*. at 480. The court, considering various examples of constitutionally protected speech coming within the ambit of the statute, concluded that the statute was "susceptible to regulation application to constitutionally protected speech and that there [was] a realistic (and actual) danger that the statute will infringe upon recognized First Amendment protections." *Id*. at 483–84. It invalidated the statute, finding that it criminalized "a substantial amount of protected expression in relation to the statute's narrow legitimate sweep" and thus was unconstitutionally overbroad. Id. at 485. The court said that even applying an implied mens rea only to speech to a particular person couldn't save it. *Id*. at 484.

FOSTA, like Section iv, doesn't contain an act or assistance requirement. *See Sineneng-Smith*, 910 F.3d at 484; *Woodhull Freedom Found*, 948 F.3d at 373 (recognizing that "prostitution" could be viewed as an abstract theory or policy matter). Its breadth is unprecedented. Its terms sweep so broadly that it can be construed to criminalize any speech or conduct that "makes prostitution easier" or more likely. Its not limited to "bad-actor websites," or even to classified-

advertising websites. *Woodhull Freedom Found*., 948 F.3d at 373. Various individuals and organizations purporting to engage in constitutionally protected speech on the internet in advocacy for, dissemination of information and resources to, or hosting of others' online speech about sex workers could be characterized as "promoting" or "facilitating" prostitution. *Id*. at 369. These include a national human rights organization dedicated to sexual freedom, an international human rights organization, an advocate for sex workers, a digital library of websites, and even a licensed massage therapist. *Id*. at 369–370. Discussions of what products or services sex workers use or should use, such as payment processors like PayPal, arguably come within the ambit of the statute because they could be thought to "facilitate" prostitution by making payment for sexual services easier. *Id*. at 372. And these aren't fanciful hypotheticals. Once it was enacted, a number of online service providers that had enabled interpersonal contact between users, like Craigslist and Reddit, immediately removed content and eliminated entire sections of their platforms. *Id*. at 368.

The statute criminalizes a substantial amount of constitutionally-protected expression. Its open-ended prohibitions embrace advocacy groups, nonprofit entities, website forums, anybody posting anything that isn't consistent with the Government's view on prostitution. It is constitutionally overbroad and therefore invalid. The court should dismiss counts one on this basis alone.

FOSTA is Unconstitutionally Vague

The Fifth Amendment provides that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. Const. amend V; *see Williams*, 553 U.S. 285, 304 (2008) (vagueness doctrine is an outgrowth of the Due Process Clause of the Fifth Amendment, not the First Amendment). The Government violates this guarantee by taking away someone's life, liberty, or property under a criminal law that is so vague that it fails to give ordinary people fair notice of the conduct it punishes or is so standardless that it invites arbitrary enforcement. *Kolender*

v. Lawson, 461 U.S. 352, 357–58 (1983). The prohibition of vagueness in criminal statutes "is a well-recognized requirement, consonant alike with ordinary notions of fair play and settled rules of law," and a statute that flouts it "violates the first essential of due process." *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926).

What renders a statute vague is not the possibility that it will sometimes be difficult to determine whether the incriminating fact it establishes has been proved; but rather the indeterminancy of precisely what that fact is. *Williams*, at 305–06; *See Coates v. Cincinnati*, 402 U.S. 611, 614 (1971); *Reno*, 521 U.S. at 870–71 n. 25. Thus, a law is vague, not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all. People must necessarily guess at its meaning as a result. *Coates*, 402 U.S. at 614. This is the problem with FOSTA. One must guess at its meanings and prohibition. This makes it unconstitutionally vague and invalid.

Section 2421A criminalizes,

> Whoever, using a facility or means of interstate or foreign commerce or in or affecting interstate or foreign commerce, owns, manages, or operates an interactive computer service (as such term is defined in defined in section 230(f) the Communications Act of 1934 or conspires or attempts to do so, with the intent to promote or facilitate the prostitution of another person

"Promote" isn't defined. "Facilitate" isn't defined. And neither is "prostitution." There is no discernible limit as to what constitutes the promotion or facilitation of the prostitution of a person.

"Facilitating," as said, has been defined broadly in the past as "making it easier." *Rivera*, 775 F.2d at 1562. Consider the Seventh Circuit's use of the word in *Doe v. GTE Corporation*, a case construing 47 U.S.C. 230.

> A web host, like a delivery service or phone company, is an intermediary and normally is indifferent to the content of what it transmits. Even entities that know the information's content do not become liable for the sponsor's deeds. Does a newspaper that carries an advertisement for "escort services" or "massage parlors" aid and abet the crime of prostitution, if it turns out that some (or many) of

> the advertisers make money from that activity? How about Verizon, which furnishes pagers and cell phones to drug dealers and thus facilitates their business?

347 F.3d 655, 659 (7th Cir. 2003) (emphasis supplied).

Section 2421A doesn't contain an act or assistance requirement or any requirement that the interactive computer owner have a specific desire to promote the content provider's success. See generally *United States v. Pino-Perez*, 870 F.2d 1230 (7th Cir. 1989) (en banc). So, as shown in GTE, "facilitate" on its own can be applied to almost any scenario, giving prosecutors unbridled prosecutorial discretion as a result. *See Abuelhawa,* 556 U.S. at 819–20, 823 n. 3 (observing that a word in a statute may extend to the outer limits of its definitional possibilities, giving the Government almost unlimited discretionary prosecutorial power).

"Promote," meaning "advance" or "support," doesn't provide any clarification either. A disjunctive, its meaning is not limited by a string of other verbs. *Cf. Williams,* 553 U.S. at 294 (recognizing "facilitates" was limited by a string of adjacent verbs, such as advertises, distributes, or solicits, thereby conveying a transactional meaning narrowing the statute's reach). The Government could argue that when Congress enacted FOSTA, it intended the verbs to be defined with traditional judicial limitations on applying terms like "aid," "abet," and "assist." See *Abuelhawa,* 556 U.S. at 821(resolving a split among the circuits on whether the buyer's use of phone in purchasing drugs facilitated seller's drug distribution). But the statute doesn't lend any textual or structural support to the argument. Plus, there is no indication that Congress enacted the statute with any such traditional judicial limitation in mind. Compare id. This lack of such support, in fact, lends credence to giving both verbs their broadest and widest definitions which, in turn, lends itself to vagueness and arbitrary prosecution.

The statute not only does not define or limit its verbs, it doesn't define "prostitution" either. "Prostitution" isn't defined as the violation of any specific law, the commission of any specific act, or even a certain type of transaction. The word can mean "the act of debasing," see, e.g.,

Garner's Dictionary of Legal Usage 725 (3d Ed. Oxford Univ. Press 2011) (providing the example of "The New York World called it 'a conscious prostitution of his court to the service of one side in a partisan squabble.'"), and there is nothing in the text that suggests it cannot be defined this way.

The statute's affirmative defense is of no help. It actually adds yet another layer of vagueness onto the phrase of "the prostitution of another person." It provides,

> (e) Affirmative defense. It shall be an affirmative defense to a charge of violating subsection (a), or subsection (b)(1) where the defendant proves, by a preponderance of the evidence, that the promotion or facilitation of prostitution is legal in the jurisdiction where the promotion or facilitation was targeted.

Whether "prostitution" is legal in a jurisdiction could very well depend upon how you want to define it. Prostitution in California means to engage in sexual conduct for money or other consideration but doesn't include sexual conduct as part of a stage performance, play, or other entertainment open to the public. Cal. Penal Code 653.20. New Mexico doesn't exempt public performances, but does define "sexual act" differently, as "sexual intercourse, cunnilingus, fellatio, masturbation of another, anal intercourse or the causing of penetration to any extent and with any object of the genital or anal opening of another, whether or not there is any emission." N.M.S.A. 1978, 30-9-2. New Mexico doesn't include anilingus, but Virginia does. *See* VA Code Ann. 18.2-346. Virginia requires the intent to sexually arouse or gratify. New Mexico does not. Oregon defines "sexual contact" as "any touching of the sexual organs or other intimate parts of a person not married to the actor for the purpose of arousing or gratifying the sexual desire of either party" and sexual conduct as "sexual intercourse or oral or anal sexual intercourse" without defining sexual organs or intimate parts. O.R.S. 167.002. Texas doesn't mention intimate parts. Tex. Penal Code 43.01.

What this shows is that "prostitution" as used in the affirmative defense is a fact-specific question dependent upon idiosyncratic circumstances of who is doing what exactly to whom and

where he is doing it.[2] In other words, there isn't any singular definition of "prostitution" as used in the affirmative defense.[3]

The fact that local legality is an affirmative defense proves that illegality is not an element of the substantive offense. *See Free Speech Coalition*, 535 U.S. at 237 (rejecting Government reliance on a statutory affirmative defense which left a substantial amount of speech unprotected). In other words, the "prostitution of another person" doesn't necessarily involve an illegal act. This being so, what definition is "prostitution" in the base offense supposed to carry? A common dictionary definition? A legal definition? A Model State definition?[4] One state's definition over another? Is it an abstract theory? Or does it at least involve a sex act? Does it include particular sex acts and exclude others? Cunnilingus? Masturbation? What about anilingus? Can an interactive computer owner may be successfully prosecuted for favorable reviews of a risqué version of Shakespeare in the Park?[5] Or does the definition carry the same public performance exemption that California has? The fact that a single word in the base offense can carry so many multi-faceted definitions in its application and doesn't necessarily involve any illegal conduct should end the inquiry.

But it doesn't. "Targeted" is also undefined and indefinite. See *Horizon Pharma, Inc. v. Dr. Reddy's Labs, Inc.*, No. 15-3324, 2018 U.S. Dist. LEXIS 196702 (D.C. N.J. Nov. 19, 2018) (discussing how "target" clauses were invalid for indefiniteness); *WBIP, LLC V. Kohler Co.*, 910 F.

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[22] The indictment refers to "hundreds of jurisdictions." IN.7. It wouldn't be a stretch to say that most, if not all, of them would have their own idiosyncratic definitions of "prostitution."

[3] Neither "promotion" nor "facilitation" are defined in the affirmative defense, which raises yet another vagueness issue.

[4] See Model State Provisions on Pimping, Pandering, and Prostitution at https://www.justice.gov/olp/model-state-provisions-pimping-pandering-and-prostitution. Url searched on September 1, 2020.

[5] A favorable review could "promote" or "facilitate" more ticket sales. More ticket sales could mean more revenue for costumes, stage craft, better insurance against STDs, better health care, condoms, and better trained actors for even better performances. "Prostitution" made easier.

Supp. 2d 325, 331 (D.C. Mass. 2012) (construing "target value" to include fluctuations around that target value during regular operation). (A "target" is a predetermined goal or objective and thus is neither random or arbitrary.).

"Jurisdiction," too, "a word of many, too many, meanings," isn't defined either. *See N. Cal. River Watch v. Wilcox*, 633 F.3d 766, 774 (9th Cir. 2011) (quoting Steel *Co. v. Citizens for a Better Env't.*, 523 U.S. 83, 90 (1998). The phrase "under federal jurisdiction," considered on its own, has been said does not have any obvious meaning. *City of Amador v. United States DOI*, 872 F.3d 1012 (9th Cir. 2017). And it doesn't have any obvious meaning in FOSTA. The statute allows a defendant to present an affirmative defense if "prostitution is legal in the jurisdiction where the promotion or facilitation was targeted." The indictment alleges that the "Illicit Web-sites openly advertise commercial sex acts in hundreds of jurisdictions where prostitution is illegal." IN.7. It also alleges "[p]rostitution is illegal in Texas and in all 14 of the 'Favorite Cities' listed." IN.7. States enact criminal laws, and there are only 50 of them. The indictment suggests that cities, townships, and villages have all enacted laws against prostitution. How is "jurisdiction" supposed to be defined? How is a defendant supposed to prepare a defense when the Government even mixes and matches definitions?

The statutory text of FOSTA is so vague that it fails to give ordinary people fair notice of the conduct it punishes. It is so standardless that it invites arbitrary enforcement. It is therefore unconstitutional and invalid.

The FOSTA Counts are Defective Under Even a Narrow Construction

Count one of the indictment charges Martono with FOSTA violations under 18 U.C.S. §2421A. IN.10. The district court in *Woodhull Freedom Found. v. United States*, construed FOSTA narrowly, presumably to save its constitutionality. 334 S. Supp. 3d 185 (D.C. 2020), reversed by 948 F.3d 363 (D.C. Cir. 2020). It held that the Travel Act gave the statute a sense of both mean-

ing of the plain text of Section 2421A and of the likelihood of enforcement for specific conduct. Id. at 199, (citing GTE Corp., 347 F.3d at 659 (stating that the activity which the internet service provides "does not satisfy the ordinary understanding of culpable assistance to a wrongdoer, which requires a desire to promote the wrongful venture's success"); *see also In re Aimster Copyright Litig.*, 334 F.3d 643, 651 (7th Cir. 2003). It said that by making reference to the laws of specific jurisdictions, Section 2421A(e)'s affirmative defense tethered subsection (a)'s prohibition on acts intended to promote or facilitate "the prostitution of another person" to specific crimes much in the way the Travel Act is usually construed. *Woodhull*, 334 F. Supp. 3d at 200. It construed the reference to "the prostitution of another person" as applying only to specific unlawful acts with respect to a particular individual, not the broad subject-matter of prostitution. *See id*. In other words, FOSTA targets only specific acts of illegal prostitution. *Id*. (citing *United States v. Williams*, 553 U.S. 285, 294 (2008); cf. *South Carolina v. Catawba Indian Tribe, Inc*., 476 U.S. 498, 510 n. 22 (1986) ("It is an elementary canon of construction that a statute should be interpreted so as not to render one part inoperative.").

That court also said that Section 2421A imposes a heightened mens rea requirement for platforms said to promote or facilitate particular illegal acts. *Woodhull*, 334 F. Supp. 3d 185, 199 (D.C.C. 2020), (citing *Doe v. GTE Corp*., 347 F.3d 655, 659 (7th Cir. 2003) (stating that the activity of the internet service provides "does not satisfy the ordinary understanding of culpable assistance to a wrongdoer, which requires a desire to promote the wrongful venture's success"); see also *In re Aimster Copyright Litig.*, 334 F.3d 643, 651 (7th Cir. 2003). The mere promotion or facilitation of prostitution is not enough. The Government must prove not simply that the defendant was aware of a potential result of the criminal offense, but that he intended to "explicitly further" a specified unlawful act. *See Woodhull*, 334 F. Supp. 3d at 201 (citing *United States v. Brown*, 186 F.3d 661, 670 (5th Cir. 1999). The reference to "the prostitution of another person"

is calculated to ensnare only specific unlawful acts with respect to a particular individual, not the broad subject matter of prostitution. Id.

The indictment is insufficient even under this narrow construction.[6]

Count one of the indictment charges an offense under 18 U.S.C. 2421A and tracks the statutory language, but that is not enough. Under a narrow construction of the statute, the mere promotion or facilitation of prostitution is not enough. The Government must prove not simply that the defendant was aware of a potential result of the criminal offense, but that he intended to "explicitly further" a specified unlawful act against a specific individual. While some actions do not require identification of the victim, *see, e.g.s., United States v. Valencia*, 2006 U.S. Dist. LEXIS 90298, 2006 WL 3716657, at *4 (S.D. Tex. Dec. 14, 2006), aff'd, 600 F.3d 389 (5th Cir. 2010) (holding that although wire fraud requires a victim, the victim need not be named in the indictment); *United States v. Hatch*, 926 F.2d 387, 392 (5th Cir. 1991) (affirming denial of defendant's motion to dismiss where defendant argued that failure to identify proper legal victim violated his due-process rights by hindering his ability to prepare his defense), the existence and identity "of a person" is an essential element of the offense. Cf. *United States v. Biyiklioglu*, 652 Fed. App'x 274, 283 (5th Cir. 2016) (reversing conviction of identity theft when the Government failed to prove the victim was a real person).

The indictment describes promoters as prostitutes, pimps, and brothels, but does not otherwise identify any specific "persons" who were the object of prostitution. See IN.2. The indictment generally identifies "prostitution advertisements," but doesn't define what exactly they are, how

[6] The Government advocated the district court's narrow construction on appeal, also presumably to save its constitutionality. See Woodhull, 948 F.3d at 372 ("The government maintains that even if the terms 'promote' or "facilitate' can be read broadly in isolation, FOSTA cannot be read to encompass plaintiffs' intended conduct because advocacy and educational activities do not promote or facilitate any specific, unlawful instance of prostitution. . . . It endorses the district court's interpretation that the text of Section 2421A is 'plainly calculated to ensnare only specific unlawful acts with respect to a particular individual.'").

they are materially different from ordinary and legal sex-related advertisements, or how they constitute advertisements for illegal conduct. See *Backpage.com*, 807 F.3d at 234 (describing different types of sex-related advertisements that do not constitute unlawful conduct). Indeed, nowhere in the introduction or in the substantive count does the indictment describe any illegal conduct with specificity or how Martono intended to explicitly further a specified unlawful act against a specific individual. *See id*. (recognizing that not all advertisements for sex are advertisements for illegal sex).

Count one therefore fails to state an offense and is subject to dismissal. Counts twelve through twenty-eight and the Government's seeking of criminal forfeiture based on counts twelve through twenty-eight are also subject to dismissal for the Government's failure to state an offense under 18 U.S.C. 2421A.

The Travel Act Charges Are Insufficient and Defective

The indictment, in counts two through eleven, charges Martono with nine substantive violations of the Travel Act. IN.13–14. The Travel Act provides:

> (a) Whoever travels in interstate or foreign commerce or uses the mail or any facility in interstate or foreign commerce, with intent to—
>
> (3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity, and thereafter performs or attempts to perform—
> (A) an act described in paragraph (1) or (3) shall be fined under this title, imprisoned not more than 5 years, or both.

18 U.S.C. 1952(a)(3)(A).

The charges are insufficient and fatally defective for several reasons. First, the indictment charges Martono with the specific intent to promote, manage, establish, or carry on the unlawful activity of prostitution. IN.13–14. The Travel Act defines "unlawful activity" with regard to prostitution as "any business enterprise involving . . . prostitution offenses." 18 U.S.C. 1952(b). Thus, an

ongoing business enterprise is an essential element of a Travel Act violation involving prostitution. *See United States v. Hagmann*, 950 F.2d 175, 182 (1991) (observing that "business enterprise" was an essential element of the Travel Act offense as indicted). Individual postings, even if they are presumed to constitute offers for commercial sex transactions, do not constitute a business enterprise in and of themselves. The indictment fails to allege this essential element of the offense and is therefore fatally defective.

The indictment is also fatally defective because it fails to allege that Martono performed an overt act subsequent using an interstate facility. See 18 U.S.C. 1952(a)(3)(A) (. . . thereafter performs or attempts to perform an act") The indictment contains several factual allegations to be taken as true: Martono is the "creator, owner, manager, and operator" of various websites; the websites were a passive platform which third parties used to post speech; and the websites allow "promoters" to post and pay for advertisements. IN.1, 2. The indictment doesn't assert that Martono himself posted or published the advertisements.[7] Its plain terms demonstrate that the promoters were the content providers.[8] IN.2. The "advertisements," then, cannot and do not constitute Martono's own overt acts in the promotion, management, establishment, or carrying on of a Texas business enterprise of prostitution. Moreover, the advertisements cited in the counts constitute speech, not overt acts. Failure to allege a defendant's subsequent overt act is a fatal defect. *See Hagmann*, 950 F.2d at 183–84; see also *United States v. Hayes*, 775 F.2d 1279, 1282–83 (4th

[7] Under 47 U.S.C. 230(c)(1), 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. 47 U.S.C. 230 is to have no effect on criminal law, but the section demonstrates the passive nature of an internet platform.

[8] Under 47 U.S.C. 230(f)(3), the term "information content provider" means any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the internet or any other interactive computer service. The section demonstrates the fact that a content provider can act—create and develop information on a website—without the aid or assistance of an interactive computer service provider.

Cir. 1983) (holding that an indictment for violation of the Travel Act which does not allege a subsequent overt act in furtherance of unlawful activity is fatally defective).

Finally, the cited "advertisements," constituting speech, do not plainly allege unlawful activity. *See Backpage.com*, 807 F.3d at 234 (describing different types of sex-related advertisement that do not constitute unlawful conduct). Texas Penal Code 43.02 criminalizes commercial transactions for statutorily defined sex:

> (a) A person commits an offense if the person knowingly offers or agrees to receive a fee from another to engage in sexual conduct.
>
> (b) A person commits an offense if the person knowingly offers or agrees to pay a fee to another person for the purpose of engaging in sexual conduct with that person or another.

Tex. Pen. Code 43.02.

The indictment characterizes the postings as "prostitution advertisements," but none of them refers to or mentions a fee. They do not constitute an offer or acceptance to receive or pay a fee for a statutorily defined sex act. No reader could consummate a transaction from the descriptions stated in the indictment. They do not constitute transactions for prostitution. See *State v. Roberts*, 779 S.W.2d 576, 579 (Mo. 1989) (en banc) (holding that the words uttered as an integral part of the prostitution transaction do not have a lawful objective and are not entitled to constitutional protection) (emphasis supplied). They thus enjoy First Amendment protection because they do not constitute speech integral to a criminal act. The indictment, then, contains inadequate specificity of an overt act in furtherance of an illegal activity given these First Amendment concerns. See generally *United States v. Buddenberg*, No. CR-09-00263 RMW, 2010 U.S. Dist. LEXIS 78201, at *12 (N. D. Cal. July 12, 2010) (holding that an indictment was too vague to enable the court to review the charged conduct in order to determine whether such conduct could be punished without infringing the First Amendment). This is especially true because third parties posted the information, not Martono. The Court should therefore dismiss the Travel Act counts be-

cause they fail to allege the facts of the crimes charged with sufficient sufficiency to meet the requirements of the Fifth Amendment of the Constitution and Federal Rule of Criminal Procedure 7(c)(1). See *Id*.

In the alternative, the Court should strike references to unspecified or indistinct laws. A predicate to a Travel Act conviction is that the defendant must have specifically intended to promote, manage, establish, or carry on some form of unlawful activity prohibited by a specific state law or a distinct law of the United States. *See United States v. Goldfarb*, 643 F.2d 422, 426 (6th Cir.), cert. denied, 454 U.S. 827, 102 S. Ct. 118, 20 L. Ed. 2d 101 (1981). The indictment describes unlawful activity as "prostitution offenses in violation of the laws of the State in which they are committed and of the United States, including but not limited to Texas Penal Code §43.02." IN.13. The specific reference to Texas Penal Code § 43.02 complies with the requirement of the identification of a specific law, but the rest of the description does not. The Court should strike the language of "of the laws of the State in which they are committed and of the United States, including but not limited to."

In sum, the indictment fails to sufficiently allege the essential element of a business enterprise or a subsequent overt act of Martono unlawful activity. These defects are fatal and compel dismissal of the Travel Act charges. Alternatively, the indictment fails to identify acts or conduct that is not protected by the First Amendment and the counts should be dismissed. Finally, and in the alternative, the Court should strike language that refers to vague and indistinct laws.

Conclusion

For the foregoing reasons, the Court should dismiss all counts of the indictment which charges a violation of FOSTA, 18 U.S.C. §2421A, and its attendant forfeiture allegation. The Court should also dismiss counts three through eleven which charge violations of the Travel Act, 18 U.S.C. §1952(a)(3)(A), and their attendant forfeiture allegations. Finally, the Court should also

dismiss counts twelve through twenty-eight which allege money laundering in violation of 18 U.S.C. §1956(a)(1)(B)(i) because those counts rely on violations of FOSTA and the Travel Act as predicate offenses.

In the alternative, if the Court does not dismiss the Travel Act counts, the Court should strike language that refers to unspecified or indistinct laws.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on Thursday, September 17, 2020, a true and correct copy of the foregoing Defendant's Motion to Dismiss and Memorandum in Support of Defendant's Motion to Dismiss were served upon all parties entitled to notice via the U.S. Northern District CM/ECF system.

/s/ Peter M. Barrett
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