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FOSTA, Explicit Content Bans, and Free Speech

1. Introduction

Despite jokes about the nature of the internet, sexual content has been one of the most limited types of speech online. Mechanisms that govern broad subsets of U.S. internet platforms and services set limits on sexual content that trickle down to individual transactions, website closures, and social media explicit content policies. The most notable of these mechanisms is a bill passed in March 2018, the Allow States and Victims to Fight Online Sex Trafficking Act (FOSTA), which incorporated portions of an earlier bill, the Stop Enabling Sex Traffickers Act (SESTA). FOSTA makes internet companies liable for sex trafficking content — defined extremely broadly — on their platforms. The purpose of this paper is to provide an overview on the changes to platform policies and the site closures that have occurred in response to FOSTA and to tie them into a longer history of restrictions stemming from payment processor policies, the iOS App Store, and law enforcement action targeted at human trafficking and sex work. While platforms are free to make choices to create spaces for speech without sexual content, legislation and policies that underpin the entire internet can have an undue influence on those choices.

Moreover, restrictions on content frequently turn into restrictions on the people associated with the content. Sex workers and members of LGBTQ+ communities have had their legal speech severely impacted by these policies. While this pattern has been pointed out by the affected communities and advocacy groups, it is often forgotten in the broader conversation

around internet censorship — even though these laws and policies have much greater reach than many of the criticized moves the platforms have taken around, for instance, hate speech. This paper aims to illuminate a trend that is dangerous in itself and to serve as a case study for how sweeping responses to an emotionally-charged problem can impact free speech on the internet. The problem in this case is human trafficking, but similar issues might arise from responses to terrorism, hate speech, fake news, and more.

This paper will outline the restrictions put in place by FOSTA, the iOS App Store, and payment processor restrictions. It will then look at cases of websites that shut down in response to FOSTA and preexisting laws. Then it will review changes to social media platforms' explicit content policies that have been linked to each of these mechanisms. These case studies show that sexual speech and commerce are significant free speech issues. They also show that both legislation and transaction points controlled by a small number of companies should be taken into account in analyzing online speech issues more broadly.

2. FOSTA content and history

FOSTA creates exceptions to Section 230, the statute that limits the liability online platforms bear for user posts. It created potential civil and criminal liability for online platforms for any sex trafficking advertisement posted by users. It allows for lawsuits by individuals who allege that they were sex trafficked using the platform.¹ It also removes the immunity for state criminal lawsuits for violations of state law that correspond to the violations of federal law described in

¹ Allow States and Victims to Fight Online Sex Trafficking Act of 2017 (FOSTA), Pub. L. No. 115-164, § 3; David Greene, Electronic Frontier Foundation, *EFF Sues to Invalidate FOSTA, an Unconstitutional Internet Censorship Law* (June 28, 2018), <https://www.eff.org/deeplinks/2018/06/eff-sues-invalidate-fosta-unconstitutional-internet-censorship-law>.

the bill, allowing state prosecutors to go after internet platforms for these advertisements.² Section 230 had an existing exception for violations of federal criminal law. FOSTA expanded the federal criminal law on sex trafficking in a way that may open platforms to broad liability under these provisions. Previous to FOSTA, it was a crime to advertise the sexual services of a minor or a person under force, fraud, or coercion only if the perpetrator knew that the advertisement was for sex trafficking.³ It was also “a crime to financially benefit from ‘participation in a venture’ of sex trafficking.”⁴ FOSTA expanded the definition of “participation in a venture” to include “assisting, supporting, or facilitating.”⁵ It is unclear under this language what activities are included in “assisting, supporting, or facilitating” and whether the perpetrator must have intended to facilitate or known that they were facilitating sex trafficking, or if unintentional facilitation qualifies.⁶ It also is unclear if content such as sexual health or safety advice for sex workers will qualify as facilitation. Thus it is possible for a federal prosecutor, state prosecutor, or individual to sue a platform for a broad range of user conduct on the site.

FOSTA also added a section to the Mann Act, a federal statute that previously only criminalized transportation of a person across state lines for purposes of prostitution. The new statute makes it a crime punishable by ten years in prison to own, manage, or operate an “interactive computer service... with the intent to promote or facilitate the prostitution of another person.”⁷ This becomes a crime punishable by 25 years in prison if it facilitates the prostitution of five or more persons or is done with “reckless disregard of the fact that such conduct

² FOSTA, § 6; Greene, *supra* note 1.

³ Greene, *supra* note 1.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ FOSTA, § 3(a).

contributed to sex trafficking.”⁸ The latter may also be a basis for a civil lawsuit.⁹ Thus it is a crime to run a platform to facilitate sex work, regardless of whether or not it involves trafficking. The unclear definition of “facilitate” carries over and the addition of the word “promote” calls into question whether the law criminalizes a website that intends to allow users to advocate for the legalization of sex work or for better treatment for sex workers.

FOSTA was billed as a way to end online sex trafficking. However, the exact definition of trafficking and the difference between trafficking and sex work was often blurred in the discussions surrounding the bill. Some of the proponents of the bill hope to end both all forms of sex work and a number of other types of sexual expression on the internet, including pornography, and therefore supported broad language in the bill.¹⁰ Several organizations that work with victims of sex trafficking came out against the bill because removal of online ads would make it more difficult to locate victims and arrest traffickers and liability provisions in the bill would make remaining websites less willing to participate in investigations, ultimately aggravating the problem it intended to solve.¹¹ Other anti-trafficking groups supported the bill, along with some women’s groups and religious right groups.¹² Large internet companies originally opposed the bills but the Internet Association, an industry group representing large companies, ultimately supported the package.¹³ Proponents cited horrible stories about sex

⁸ FOSTA, § 3(b).

⁹ FOSTA, § 3(c).

¹⁰ See Melissa Gira Grant, *Anti-Online Trafficking Bills Advance in Congress, Despite Opposition from Survivors Themselves*, APPEAL (Mar. 14, 2018), <https://theappeal.org/anti-online-trafficking-bills-advance-in-congress-despite-opposition-from-survivors-themselves-e741ea300307/>.

¹¹ Elliot Harmon, Electronic Frontier Foundation, *Sex Trafficking Experts Say SESTA Is the Wrong Solution* (Oct. 3, 2017), <https://www.eff.org/deeplinks/2017/10/sex-trafficking-experts-say-sesta-wrong-solution>.

¹² Grant, *supra* note 10.

¹³ Elliot Harmon, Electronic Frontier Foundation, *How Congress Censored the Internet* (Mar. 21, 2018), <https://www.eff.org/deeplinks/2018/03/how-congress-censored-internet>.

trafficking victims who had been the subject of online advertising. It is politically difficult to come out against a bill to combat human trafficking. Despite strong opposition by free speech groups, survivors of trafficking, sex workers, and women's and LGBT groups, the final version of FOSTA passed the House 388 to 25 and the Senate 97 to 2 before being signed into law.¹⁴

The impact of these laws was immediate for some platforms. Others made possibly-related changes to platform policies later in 2018. However, in order to understand the impact and context of FOSTA, it is necessary to understand how preexisting institutions governing internet speech and commerce already disfavored sexual content.

3. *FOSTA precursors: systematic factors opposed to explicit content on the internet*

It is inaccurate to assume that all explicit content restrictions are based on FOSTA alone. Several parts of the infrastructure of the internet also limit the ability of websites and users to freely choose whether or not to host explicit content. These include payment processor rules and the iOS App Store. There are other important overarching factors such as advertiser policies and preexisting law that will not be covered here. Each of these limits the ability of websites to freely choose what kind of content to host by making it more expensive to permit explicit content.

a. Payment processors

Payment processor rules have often limited the types of content and services that can be exchanged on the internet. Visa and MasterCard classified adult sites as “high risk” in 2002 due

¹⁴ H.R. 1865 - Allow States and Victims to Fight Online Sex Trafficking Act of 2017, <https://www.congress.gov/bill/115th-congress/house-bill/1865/all-actions?overview=closed&q=%7B%22roll-call-vote%22%3A%22all%22%7D>; Grant, *supra* note 10 (describing opposition coalition).

to a high incidence of chargebacks from regretful purchasers or sketchy sites.¹⁵ They now require a steep upfront registration fee and yearly renewal for anyone processing payments for adult content.¹⁶ Shortly after, PayPal stopped processing payments for any adult content or services — including sex toys.¹⁷ Nearly every popular payment processor followed suit.¹⁸ Mainstream processors that ignore the use of their services for adult content tend to be less well-known, more complicated, and unreliable.¹⁹ Payment processors that are specifically intended for use in the adult industry are substantially more expensive.²⁰ While this may not be a problem for major porn sites, independent operators such as cam girls, indie porn producers, and escorts are often left with little option but to try to go unnoticed on a mainstream payment processor. If caught on PayPal, these sex workers have their accounts frozen and funds seized with no notice.²¹ This makes it more difficult for independent creators of erotica to function on the internet, which limits their ability to express themselves. This is particularly problematic because these creators may provide content that is more feminist or queer and trans-friendly than the larger, more profitable, websites. It also deters sex workers from self-identifying on the internet to organize for legal rights.

The broad restrictions on use of payment processors has also enabled harassers. In November 2018, a group of men who identify as involuntary celibates, or incels, and share a violent misogynist ideology started a harassment campaign called the ThotAudit, after a derogatory term

¹⁵ Lux Alpraum, *How Sex Workers Get Paid*, Motherboard (Jan. 29, 2016), https://motherboard.vice.com/en_us/article/nz7b4k/how-sex-workers-get-paid.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

for sex workers or sexually promiscuous women.²² The group created a spreadsheet of women who it believed to be engaged in sale of sexual content, searched for their accounts on PayPal, Venmo, CirclePay, Amazon Pay, and other processors, and reported their accounts for violation of the rules.²³ Dozens of women were banned from the services and had their funds retained by the processors.²⁴ Some also received hundreds of racist and misogynistic messages on social media. This is an example of how minimally-enforced broad prohibitions on certain types of content on major internet services and platforms, coupled with reporting mechanisms, can turn into weapons in the hands of organized hate groups.

Payment processor rules do not only limit the ability to sell adult content without paying large fees. They also have limited the ability of sex workers to crowdsource funds for unrelated purposes. In 2015, GoFundMe was in the news for cancelling the campaign for a sex worker advocacy group, the Erotic Service Providers Legal, Education and Research Project, which was raising money for a lawsuit against the California Attorney General challenging the state's prostitution laws on constitutional grounds.²⁵ The group had raised \$30,000 for the suit in a previous GoFundMe campaign. GoFundMe's terms of service at the time prohibited "solicitation" and "adult services or products."²⁶ It did not clearly explain how the legal campaign fundraiser violated its terms of service. This was not the only example of payment processors targeting fundraising campaigns for sex workers that were unrelated to sex work. Sex workers have also had their accounts closed and funds retained by WePay and PayPal for

²² Paris Martineau, *A Quiet War Rages Over Who Can Make Money Online*, WIRED (Nov. 30, 2018), <https://www.wired.com/story/quiet-war-rages-who-can-make-money-online/>.

²³ *Id.*

²⁴ *Id.*

²⁵ EJ Dickson, *Gofundme Cancels Sex Workers' Legal Fundraising Efforts*, DAILY DOT (Dec. 11, 2015), <https://www.dailydot.com/irl/gofundme-crowdfunding-sex-workers/>.

²⁶ *Id.*

attempting to raise money for medical bills, plane tickets to an event, and a volunteer trip provide earthquake relief in Haiti.²⁷

b. iOS App Store policies

Apple has been accused of using the substantial power of its App Store to “sanitize” the internet.²⁸ The App Store Review Guidelines prohibit “[o]vertly sexual or pornographic material, defined by Webster’s Dictionary as “explicit descriptions or displays of sexual organs or activities intended to stimulate erotic rather than aesthetic or emotional feelings.”²⁹ This is listed in the “safety” category under “objectionable content” along with discriminatory content and content that encourages violence. In practice, this means that the iOS App Store does not allow apps with “user generated content that is frequently pornographic.”³⁰

In November 2018, the Supreme Court heard arguments about whether or not the Apple App Store was an unauthorized monopoly.³¹ Apple iPhone users are only allowed to download apps that Apple’s App Store has authorized — and charged a 30% commission for — unless they “jailbreak” their devices and void the warranty.³² Whether or not the Supreme Court ultimately considers this to be a monopoly, it highlights the power that iOS App Store policies have over content creators. As discussed below, Tumblr’s removal of adult content from its platform

²⁷ Dickson, *supra* note 25; Siouxsie Q, *Kicked Out: Crowdsourcing Shows its Bias*, SF WEEKLY (Apr. 2, 2014), <https://archives.sfweekly.com/sanfrancisco/kicked-out-crowdsourcing-shows-its-bias/Content?oid=2949065>.

²⁸ Jason Koebler and Samantha Cole, *Apple Sucked Tumblr Into Its Walled Garden, Where Sex Is Bad*, MOTHERBOARD (Dec. 3, 2018), https://motherboard.vice.com/en_us/article/a3mjxg/apple-tumblr-porn-nsfw-adult-content-banned.

²⁹ Apple Developer, *App Store Review Guidelines* (last updated Dec. 19, 2018), <https://developer.apple.com/app-store/review/guidelines/#safety>.

³⁰ Koebler & Cole, *supra* note 28.

³¹ Kari Bode, *Supreme Court Weighs Whether Apple’s App Store Is a Monopoly*, MOTHERBOARD (Nov. 26, 2018), https://motherboard.vice.com/en_us/article/zmd38y/supreme-court-weighs-whether-apples-app-store-is-a-monopoly.

³² *Id.*

followed Apple's removal of the Tumblr app from its store after child pornography was found on the site. The iOS App Store was in the news previously for demanding that Reddit app developers remove settings that allowed users to turn on the ability to browse NSFW³³ content inside the app and deleting those apps that did not quickly comply.³⁴ This does not completely remove the ability to see NSFW content in a Reddit app, but requires users to change settings on the website, making it more difficult for users to decide that they only want to see that content at certain times.³⁵ All types of content can still be accessed on the Safari browser on iPhones. Apps do allow for greater functionality than a mobile browser, however, so limitations placed on websites by access to the app store of a major cell phone manufacturer can be a significant influence.

4. Closure of websites after FOSTA

A number of websites shut down altogether in the immediate aftermath of FOSTA, citing increased liability. Some of these websites formed an important role as dating sites for LGBTQ+ and niche sexual communities. Others specifically catered to sex workers, allowing them to find clients, compare notes on dangerous clients, run background checks on clients, exchange information about best practices to keep themselves safe, engage in advocacy against the criminalization of sex work, and organize protests and other activism against issues including widespread abuse by police.

³³ Not Safe for Work, a catch-all term used on the internet for content you would not want your boss to see over your shoulder, including a broad conception of explicit content.

³⁴ Nicholas Deleon, *Apple Is Cracking Down on NSFW Content Inside Reddit Apps*, MOTHERBOARD (Apr. 12, 2016), https://motherboard.vice.com/en_us/article/78k8yb/reddit-ios-apps-disappear-nsfw-content.

³⁵ *Id.*

a. Dating sites

Within two days of FOSTA’s passage, Craigslist announced that it was “regretfully” removing its personal ads section due to the new legislation.³⁶ The personal ads section included “casual encounters,” “misc romance,” “strictly platonic,” and similar categories. Craigslist had already removed its “erotic services” section in 2009 under pressures from attorneys general because it was being used for illegal activities.³⁷ Craigslist Personals was disproportionately used by what one study of the site called “sexual outsiders” — “LGBTQ people, non-monogamous people, and kink and fetish communities who aren’t a leading target market for the milquetoast dating sites.”³⁸ Relatively few of the ads related to sex trafficking or sex work, despite the vast majority of news coverage of the site focusing on those uses.³⁹ Craigslist offered anonymity, openness to explicit descriptions of sexual desires, and resonance with the long history of personal ads facilitating clandestine queer relationships, which made it an important queer community space, especially for those people living in communities where it is still not safe to be openly LGBTQ+.⁴⁰ Some members of the impacted communities worry about what FOSTA means for the ability to replicate and maintain similar spaces.⁴¹

³⁶ Samantha Cole, *Craigslist Just Nuked Its Personal Ads Section Because of a Sex-Trafficking Bill*, MOTHERBOARD (Mar. 23, 2018), https://motherboard.vice.com/en_us/article/wj75ab/craigslist-personal-ads-sesta-fosta; Jon Shadel, *As Craigslist Personal Ads Shut Down, We’re Losing an Important Queer Space*, WASH. POST (Mar. 27, 2018), https://www.washingtonpost.com/news/soloish/wp/2018/03/27/as-craigslist-personal-ads-shut-down-were-losing-an-important-queer-space/?noredirect=on&utm_term=.0496097016aa.

³⁷ Cole, *supra* note 36.

³⁸ Jon Shadel, *As Craigslist Personal Ads Shut Down, We’re Losing an Important Queer Space*, WASH. POST (Mar. 27, 2018), https://www.washingtonpost.com/news/soloish/wp/2018/03/27/as-craigslist-personal-ads-shut-down-were-losing-an-important-queer-space/?noredirect=on&utm_term=.0496097016aa.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

Another quick site closure explicitly linked to FOSTA was Pounced.org, a furry dating site that voluntarily shut down immediately following the passage of FOSTA.⁴² The site runners explained that as a small organization they could not take on the increased potential liability. According to the site runners, the site did not promote prostitution or sex trafficking but they were worried by the provision in FOSTA that made even unknowing facilitation of prostitution a basis for liability. The site consulted the EFF about setting up protective policies in April, but it still appears to be down today.⁴³ While this move affects smaller numbers of people than the large sites, it may be significant for those who used the site to find romantic partners.

b. Sex-work focused sites

FOSTA also led to the closure of a number of sites that explicitly catered to sex workers — both for advertisement and for the exchange of safety information. The highest profile site closure around the time was that of Backpage, a large site for sex work advertisement, by federal authorities. The Backpage closure, however, was based on laws that predated FOSTA, with indictments including facilitating prostitution and money laundering.⁴⁴ The runners of Backpage were both more involved in the content generated and more indifferent to child trafficking — including editing ads to remove terms used to reference children, like “Lolita,” before allowing them to post — than any version of Section 230 would allow.⁴⁵ The closure of Backpage was reminiscent of earlier government shut-downs of sex work advertising sites, including Rentboy

⁴² Samantha Cole, *Furry Dating Site Shuts Down Because of FOSTA*, VICE (Apr. 2, 2018), https://motherboard.vice.com/en_us/article/8xk8m4/furry-dating-site-pounced-is-down-fosta-sesta.

⁴³ *Id.*; Pounced.org (could not establish a connection as of Jan. 15, 2019).

⁴⁴ Michael Nedelman, *After Craigslist Personals Go Dark, Sex Workers Fear What's Next*, CNN (Apr. 11, 2018), <https://www.cnn.com/2018/04/10/health/sex-workers-craigslist-personals-trafficking-bill/index.html>.

⁴⁵ *Id.*; Caty Simon, *On Backpage*, TITS AND SASS (Apr. 25, 2018), <http://titsandsass.com/on-the-death-of-backpage/>.

in 2017 and MyRedBook in 2014.⁴⁶ However, the torrent of other site closures related to sex work that followed was due to FOSTA, and the cumulative effect on the lives of sex workers was substantial. As of June 2018, sites that had shut down included several Reddit threads for discussion of sex work, “advertising sites like CityVibe, Nightshift, and Men4Rent; and several platforms and bulletin boards that sex workers and their clients used to screen, review, and verify each other, including Eccie, VerifyHim, the Erotic Review’s U.S. boards, and P411.”⁴⁷

The closure of these websites meant that sex workers who had formerly been able to find clients through advertising, screen them for safety, and arrange to meet indoors turned to more dangerous forms of work.⁴⁸ Some returned to working outdoors where they face increased risk from police and unscreened clients.⁴⁹ After the closure of Backpage, sex workers accustomed to managing their own work reported getting text messages from former pimps urging them to return.⁵⁰ Sex workers have also reported the deaths and assaults of several workers who were forced to return to more dangerous street work in the aftermath of FOSTA.⁵¹ The claims linking access to these online services to sex worker safety are not new — a research paper still under peer review uses statistical analysis to link access to Craigslist’s erstwhile “erotic” services section to a drop in the female homicide rate.⁵² Many sex workers saw FOSTA as an attack that

⁴⁶ Emily Witt, *After the Closure of Backpage, Increasingly Vulnerable Sex Workers Are Demanding Their Rights*, NEW YORKER (June 8, 2018), <https://www.newyorker.com/news/dispatch/after-the-closure-of-backpage-increasingly-vulnerable-sex-workers-are-demanding-their-rights>.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ Samantha Cole, *Pimps Are Preying on Sex Workers Pushed Off the Web Because of FOSTA-SESTA*, MOTHERBOARD (Apr. 30, 2018), https://motherboard.vice.com/en_us/article/bjpvz/fosta-sesta-sex-work-and-trafficking.

⁵¹ Simon, *supra* note 45.

⁵² Nedelman, *supra* note 44.

would make it difficult for them to survive.⁵³ Groups have fought back with protests across the country against the criminalization of sex work.⁵⁴

5. *Changes to social media explicit content policies after FOSTA*

Internet companies make frequent changes to their content moderation policies and are often secretive about their decision-making processes. This makes it difficult to say which changes are in response to FOSTA or other external pressures. However, several major platforms made changes to their explicit content policies at the end of 2018 — most notably Facebook and Tumblr — which mirror the changes predicted by critics of SESTA and FOSTA.

a. Tumblr

Tumblr made major waves at the end of 2018 when it banned all sexual content on its platform. The announcement took place on December 3, with the rule being implemented December 17.⁵⁵ Unlike many other platforms, Tumblr previously allowed a wide range of explicit imagery, including pornography. It was widely used to exchange erotic imagery and to organize queer, kink, and sex-worker activist communities. It did have a system to flag certain blogs and posts as “explicit” and overlay them with a content filter requiring users to be over 18 and to actively click through to see the content.⁵⁶

⁵³ Simon, *supra* note 45.

⁵⁴ Witt, *supra* note 46.

⁵⁵ Mikelle Street, *RIP: Tumblr Is Banning All Porn from the App*, OUT (Dec. 3, 2018), <https://www.out.com/news-opinion/2018/12/03/rip-tumblr-banning-all-porn-app>.

⁵⁶ Tumblr, *Adult Content*, <https://tumblr.zendesk.com/hc/en-us/articles/231885248>.

Tumblr’s new rules ban “images, videos, or GIFs that show real-life human genitals or female-presenting nipples...” and content that depicts sex acts.⁵⁷ They do allow “female-presenting nipples” in connection with breastfeeding or “health-related situations” including gender confirmation surgery, “[w]ritten content such as erotica, nudity related to political or newsworthy speech, and nudity found in art, such as sculptures and illustrations...”⁵⁸ Presumably photography does not count as art under this policy. All existing posts that were flagged as adult were reverted to a private setting when the new rules took effect.⁵⁹ Users who disagree with a decision on a post can use a button on the post to appeal.⁶⁰

It is not clear what role FOSTA played in this change. The company did not address any outside factors, saying merely that after considering the impacts of hosting adult content on various customer groups, “without this content we have the opportunity to create a place where more people feel comfortable expressing themselves”⁶¹ News reports have linked the change to Tumblr’s mobile app being removed from Apple’s App Store on November 16, 2018 after Apple found that Tumblr had failed to eradicate child pornography from the site after previous warnings.⁶² Others speculated that the Tumblr change was demanded by Verizon, Tumblr’s

⁵⁷ Tumblr, *Community Guidelines* (last modified Dec. 17, 2018), <https://www.tumblr.com/policy/en/community>.

⁵⁸ Tumblr, *Adult Content*, <https://tumblr.zendesk.com/hc/en-us/articles/231885248>.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ Jeff D’Onofrio, Tumblr Staff, *A Better, More Positive Tumblr* (Dec. 3, 2018), <https://staff.tumblr.com/post/180758987165/a-better-more-positive-tumblr>.

⁶² Alexander Cheves, *The Dangerous Trend of LGBTQ Censorship on the Internet*, OUT (Dec. 6, 2018), <https://www.out.com/out-exclusives/2018/12/06/dangerous-trend-lgbtq-censorship-internet>.

parent company, because it is difficult to place ads next to erotic content.⁶³ However, the timing and the breadth of the change has led many to assume FOSTA played a role.⁶⁴

The Tumblr announcement caused a substantial reaction. The concept of “female-presenting nipples” was a popular target, both for serious critiques of sexism and jokes about how a nipple might show its gender-identity.⁶⁵ Many of these reactions focused on how the changes will affect particular communities on Tumblr. Tumblr was an epicenter for young, queer, and kink communities.⁶⁶ Sharing explicit images intermingled with activist speech, sexual education, and emotional support.⁶⁷ Tumblr’s policy announcement claimed that “[t]here are no shortage of sites on the internet that feature adult content. We will leave it to them....”⁶⁸ Porn sites do not serve the same purpose as a social networking site, however. For people with less mainstream sexual orientations or interests, Tumblr as a platform with a range of communication options that included explicit images served as a way to find each other, to provide validation for those interests and identities, to find romantic and sexual partners, to discuss sexual and kink safety, and to share explicit material created by indie creators “outside of an often racist, transmisogynist, fatphobic [porn] industry.”⁶⁹ Tumblr also hosts huge fan communities that exchange fiction and art, often as methods of inserting characters that share underrepresented identities into media. The notion that an algorithm would sift through repositories of explicit fan art to determine what qualifies as “art” or “newsworthy” versus porn did not sit well.

⁶³ Aja Romana, *Tumblr is Banning Adult Content. It’s About So Much More Than Porn.*, VOX (Dec. 17, 2018), <https://www.vox.com/2018/12/4/18124120/tumblr-porn-adult-content-ban-user-backlash>.

⁶⁴ See, e.g., Cheves, *supra* note 62.

⁶⁵ Romana, *supra* note 63.

⁶⁶ *Id.*

⁶⁷ Cheves, *supra* note 62.

⁶⁸ D’Onofrio, *supra* note 61.

⁶⁹ Koebler & Cole, *supra* note 28.

Others were worried about losing not just their communities but also their livelihoods. Artists use the site to find customers, including for erotic art.⁷⁰ Sex workers who create pornography, operate camming sites, or work as escorts used the site to post photos and cultivate relationships with potential clients.⁷¹ Even those selling legal services expressed concern after the announcement that they would not be able to find customers.⁷² Sex workers also use the platform to connect as a community to discuss how to deal with abusive clients, file taxes, and organize politically.⁷³ While this type of conversation should still be allowed, accounts that have posted adult content in the past risk being banned, emptying out the communities. Moreover, Tumblr allows users to report posts for adult content. Similar flagging systems have been used by organized trolling groups to target people who have identified themselves as sex workers on other platforms, even when they were not using that platform to advertise for clients.⁷⁴

Other reactions pointed out the many mistakes made by the filtering algorithm. This difficulty started before the adult content ban. After the initial removal of the app from the iOS App Store, Tumblr swept the platform for child sexual abuse material. While this was certainly a necessary and important goal, a number of users reported their blogs being deleted despite containing only adult sexual material or non-sexual art.⁷⁵ As the new rules were put into place, similar issues arose. Screenshots spread through the internet of innocuous photos, including a screenshot of Tumblr's own policy announcement and a group of puppies, that were marked as

⁷⁰ Romana, *supra* note 63.

⁷¹ Mathew Olson, *Tumblr Moves To Ban All 'Adult Content' — Here's Why That Matters*, Digg (Dec. 3, 2018), <http://digg.com/2018/tumblr-explicit-adult-content-policy-ban-december>.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ Ana Valens, *NSFW Artists Speak Out as Their Accounts Are Suddenly 'Purged' on Tumblr*, DAILY DOT (Nov. 20, 2018), <https://www.dailydot.com/irl/tumblr-nsfw-artists-purged-child-porn/>.

prohibited adult images.⁷⁶ A post discussing AIDS, a photo commenting on Tumblr’s censorship of kink, pictures of pride flags, and a selfie labelled as “lesbian” were also banned — but the widespread nature of the mistakes makes it difficult to assess if the unintentional effects disproportionately affect certain communities and communications.⁷⁷

Queer communities have a basis for concern about disparate impact from such filters. Electronic Frontier Foundation research has found a pattern of LGBTQ+ content being marked as explicit, even when it merely alludes to the fact of the poster having an LGBTQ+ identity and does not contain any sexual content.⁷⁸ YouTube videos with the words “trans” in their title are reported to be regularly demonetized.⁷⁹ In one case, a YouTube channel seeking to provide “kink-friendly sexual education” had its thumbnails disabled in search because it was considered “inappropriate for viewers” — even though sexual education without a kink angle was not treated similarly.⁸⁰ Twitter makes it more difficult to view tweets it considers “abusive” or “low-quality.” Users found that tweets containing the word “queer” or “vagina” were affected.⁸¹ Other reporting found that Facebook was blocking many LGBTQ+ advertising as “political.”⁸² Facebook called this an error and allowed the ads later. While there is a limited amount of

⁷⁶ Romana, *supra* note 63; Katharine Trendacosta & Jillian C. York, Electronic Frontier Foundation, *Dear Tumblr: Banning "Adult Content" Won't Make Your Site Better But It Will Harm Sex-Positive Communities* (Dec. 5, 2018), <https://www.eff.org/deeplinks/2018/12/dear-tumblr-banning-adult-content-wont-make-your-site-better-it-will-harm-sex>.

⁷⁷ Rachael Krishna, *Tumblr Launched An Algorithm To Flag Porn And So Far It's Just Caused Chaos*, BUZZFEED NEWS (Dec. 4, 2018), <https://www.buzzfeednews.com/article/krishrach/tumblr-porn-algorithm-ban>.

⁷⁸ Jillian C. York, Electronic Frontier Foundation, *Blunt Policies and Secretive Enforcement Mechanisms: LGBTQ+ and Sexual Health on the Corporate Web* (Oct. 24, 2018), <https://www.eff.org/deeplinks/2018/10/blunt-policies-and-secretive-enforcement-mechanisms-lgbtq-and-sexual-health>; Cheves, *supra* note 62.

⁷⁹ York, *supra* note 78.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² Jessa Powers, *Facebook Marks LGBTQ Advertisements as Political, Blocking Them Again*, ADVOCATE (Oct. 7, 2018), <https://www.advocate.com/business/2018/10/07/facebook-marks-lgbtq-advertisements-political-blocking-them-again>; see also Cheves, *supra* note 62.

systematic quantitative research on the subject, there appears to be a pattern of queer people having their content flagged, demoted, or disabled on major social media sites, especially when adult content policies are enforced either on the entire site or as part of a “safe mode.”⁸³ When a platform that has been so important for these communities as Tumblr implements an adult content policy, there is reason to be concerned that mistakes will be disruptive.

b. Facebook

Facebook has banned most explicit sexual content on its platform for some time, but it adopted a new policy in October 2018 that seems to include substantial amounts of non-explicit common adult conversation.⁸⁴ The site added a “sexual solicitation” section to its Community Standards.⁸⁵ Sexual solicitation was already prohibited under the "Sexual Exploitation of Adults" and "Adult Nudity and Sexual Activity" sections, but this policy added substantial detail to flesh out the difference between sexual exploitation and solicitation, both of which are prohibited.⁸⁶

The sexual solicitation policy bans all “[a]tttempted coordination of or recruitment for adult sexual activities.”⁸⁷ This includes coordination of or recruitment for “pornographic activities, strip club shows,” and other similar activities. It also includes both “explicit” and “implicit sexual solicitation.” Explicit sexual solicitation includes “offering or asking for” sex, sexual partners, sex chat, or nude images. Implicit sexual solicitation is an offer or request paired with “suggestive statements,” “sexualized slang,” “[s]exual hints such as mentioning sexual

⁸³ Cheves, *supra* note 62.

⁸⁴ Michael Kan, *New Facebook Policy Sparks Fears of Sex Talk Crackdown*, PC MAG (Dec. 5, 2018), <https://www.pcmag.com/news/365330/new-facebook-policy-sparks-fears-of-sex-talk-crackdown>.

⁸⁵ Facebook Community Standards, 15. *Sexual Solicitation*, https://www.facebook.com/communitystandards/sexual_solicitation.

⁸⁶ Kan, *supra* note 84.

⁸⁷ Facebook Community Standards, *supra* note 85.

roles, sex positions, fetish scenarios, state of arousal, act of sexual intercourse or activity (sexual penetration or self-pleasuring), commonly sexualized areas of the body such as the breasts, groin, or buttocks, state of hygiene of genitalia or buttocks, and “[c]ontent (hand drawn or real-world art) that may depict explicit sexual activity or suggestively posed person(s).”⁸⁸

In its “policy rationale” the site notes that it wants to allow for people to use the site to draw attention to sexual violence and exploitation but that it “draw[s] the line... when content facilitates, encourages or coordinates sexual encounters between adults” and that it “restrict[s] sexually explicit language that may lead to solicitation because some audiences within our global community may be sensitive to this type of content and it may impede the ability for people to connect with their friends and the broader community.” It is unclear if the ban on solicitation without explicit language is also for the sensitivities of the global community. Facebook clarified separately that content in Groups and Pages is subject to the policy but will only be reviewed and removed if a user in the group reports it.⁸⁹ It also provided the example of “Looking for swingers. Friday at 8 PM, [name of bar]. Wear pink.” as impermissible sexual solicitation, confirming that an invitation did not need to use explicit language or be directed at a specific unwilling target to be prohibited.⁹⁰

This policy adjustment did not have the same drastic effects on Facebook users as the Tumblr announcement, since it was closer to the previous policy and was not immediately enforced in major visible ways. Few took notice when it was added to the Community Standards

⁸⁸ *Id.*

⁸⁹ Ashley Carman, *No, Facebook’s Updated Sex Policy Doesn’t Prohibit Discussing Your Sexual Orientation*, VERGE (Dec. 6, 2018), <https://www.theverge.com/2018/12/6/18129635/facebook-sex-policy-community-guidelines-update>.

⁹⁰ *Id.*

in October.⁹¹ In the wake of the Tumblr announcement, however, the policy began to circulate widely online and garnered a substantial reaction. It is unclear if FOSTA played a role in the policy change. A Facebook spokesman said it was a clarification of existing policy and not a response to FOSTA, but the Electronic Frontier Foundation called it “a perfect example of what we feared would happen” after FOSTA made platforms potentially liable for unwitting hosting of ads related to sex trafficking.⁹²

Many expressed concern that the references to “fetish scenarios,” “sexual roles” and “sexual preference/sexual partner preference” could prevent queer and kink communities from discussing their identities and daily lives.⁹³ Facebook clarified that discussion of sexual orientation alone would not trigger the policy.⁹⁴ Given the frequency of transgender and queer people having content flagged as explicit even when equivalent cisgender or heterosexual content was not — and as political in Facebook’s advertising categorizations — not everyone found this reassuring.⁹⁵ These groups are often the target of mass flagging campaigns by internet harassers.⁹⁶ The broad language in the policy means a wide range of expressions of interest in sexuality or attempts to organize events based around sexual preferences could be impacted. Even groups or pages run for discussion of sexual content or identities can be moderated if a single member decides to report content — and many of these groups have thousands of

⁹¹ Kan, *supra* note 84.

⁹² Kitty Stryker, *Queer Sex Educators Fear New Facebook Policy Could Get Them Banned*, ROLLING STONE (Dec. 14, 2018), <https://www.rollingstone.com/culture/culture-features/facebook-policy-ban-sex-educators-769551/>.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

members. Sex educators also rely heavily on Facebook to share their messages, including sex tips, and some worried that their content would get caught up in enforcement.⁹⁷

6. *Conclusions*

A common response to commentators worried about free speech on the internet is that platforms are private companies with the right to decide what types of content they want to host, and that customers with different preferences can find competing products. This logic weakens, however, when national laws or major components of internet infrastructure put their thumbs on the scale against certain types of content. Each site runner can and should be able to make its own decisions about the types of content it wants to host on its platform. Platforms should take steps to prevent their users from being exposed to explicit imagery by accident. Serious steps need to be taken to fight all forms of child exploitation online. However, if these decisions are affected by laws or structural factors that will impact all competing platforms, that is a problem for free speech that will have a disproportionate impact on vulnerable communities.

This paper is intended to identify a few of overarching mechanisms of internet censorship and their effects, not to identify a replacement system. A few conclusions are worth mentioning, however. First, erotic speech and commerce are free speech issues. So-called “adult content” can be an important mechanism for people with less mainstream sexualities and sex workers to find each other, form communities, and advocate for their rights as a group. An infrastructure that makes it more difficult and expensive to monetize this content relative to other types of content will favor content that appeals to more mainstream audiences or benefits from exploitative labor

⁹⁷ *Id.*

practices. While a full First Amendment analysis is outside of the scope of this paper, the effects of FOSTA on online discourse in general and on particular vulnerable communities must be considered when asking if the law is narrowly tailored to its intended purpose of combatting human trafficking.

A high percentage of speech and commerce takes place online. The concentrated power of a small number of credit cards, payment processors, and phone operating system companies to decide what types of speech can be monetized can become a substantial form of censorship. Facebook, Twitter, and Google receive much of the attention in discussions of online speech because they have such large user bases and have some features of monopolies. However, national laws in an influential country such as the U.S., speech-limiting rules coordinated among credit card companies and payment processors, and major operating systems can have an influence on the types of speech that can thrive online that is much harder to fight through competition. These infrastructure factors must be incorporated into any analysis of free speech online.

It is also worth noting how content limitations and reporting tools can be weaponized by harassers against vulnerable communities. Internet platforms and services may prefer broadly written content limitations to preserve their ability to scale decisions made in fuzzy areas of language and society. However, the breadth of these rules outside of what humans can handle and the failure of algorithms to make nuanced decisions encourages people with few other options to skirt the rules. The enforcement of these rules is often guided by flagging systems. The ability of online hate groups to organize flagging campaigns means that rules are often disproportionately enforced against vulnerable communities targeted by these groups, leading

sex workers and sex educators to suddenly find themselves cut off from their funds and communities. Even rules are neutrally-written and obeyed by the targets, there is a history of algorithms, or maybe just other people on the platforms, finding LGBTQ+ content to be “adult” when similar heterosexual content is not. Platforms should recognize when they are considering setting up rules that cannot possibly be enforced in every instance and consider the likelihood of disparate enforcement against groups of people who most need online forums to connect as communities.