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Where's the Consumer Harm? The BOTS Act: A Fruitless Boogeyman Hunt

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Where’s the Consumer Harm?  
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A Fruitless Boogeyman Hunt

ABSTRACT

Historically, the secondary-ticket market for sporting events, concerts, and the like entailed hollering scalpers perched outside of venues. Though this practice has not been entirely extinguished, the internet has largely moved the secondary-ticket market online to websites like StubHub, the largest player in this arena. Instead of yelling loudest or finding the best real estate outside a stadium from which to perch, the modern ticket scalper competes most effectively in the secondary-ticket market by finding ways to access primary tickets online. By using ticket “bots,” programs designed to autofill customer information and solve CAPTCHA prompts, modern scalpers can quickly purchase large quantities of tickets from primary-market sites like Ticketmaster. The goal of the modern scalper is the same as the goal of the hollering scalper of the past: to resell these tickets for a marked-up price.

States have responded to modern bots-based ticket resales with the whole gamut of legislation, ranging from no regulation, to disallowing online ticket bots, to wholesalers banning ticket resale altogether. Congress upended states’ disparate approaches in 2016 with the enactment of the Better Online Ticket Sales (BOTS) Act, which effectively prohibits the use of bots for online ticket resale and charges the Federal Trade Commission (FTC) with its enforcement. The problem, however, is that the BOTS Act attacks a nonexistent boogeyman. Neither ticket bots nor the modern scalper creates marked-up ticket prices in the secondary market; consumer demand does. Moreover, consumers have no right to attain underpriced tickets. On the flip side, performers and sports teams have every right to set prices as they see fit. Every day, the FTC prosecutes bad actors who defraud the elderly of their savings, deliberately fool consumers into believing falsehoods about a product (like sham dietary supplements), and trick people into believing celebrities endorse scam-centered products. These are legitimate consumer harms. Purchasing tickets—with full information and disclosures—on the secondary market at prices higher than one wishes
to pay is not the sort of fraudulent activity that the FTC should be forced to police as "consumer protection." Accordingly, this Note argues that the BOTS Act should be repealed or, at a minimum, removed from the FTC's consumer-protection apparatus.

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Historically, ticket scalpers lurked outside sporting and concert venues and shouted “Get tickets here!” or “Selling tickets?” to passersby to facilitate secondary-market transactions. The historical scalper garnered a competitive advantage by pinpointing the best part of the stadium parking lot in which to perch or by utilizing in-person charisma to engender greater confidence in the authenticity of the tickets. In the modern scalping world, however, the internet’s secondary-market preeminence has largely displaced the in-person scalpers as mere artifacts of childhood nostalgia.

The modern scalper is the faceless Ticketmaster shopper who sells his tickets in an online secondary market like StubHub. He derives competitive advantage by employing the best computer algorithm, internet robot (“bot”), or software that can bypass security measures, autofill customer data, like one’s credit card number and address, and snatch up the primary market’s underpriced tickets as quickly as possible before unloading them on StubHub. Primary-market sellers like Ticketmaster cap individuals’ ticket quantities and require consumers to solve CAPTCHAS that are supposed to distinguish real human buyers from computer programs. But these barriers pose no problem for the modern scalper, whose computer algorithm, bot, or computer program immediately sidesteps Ticketmaster’s restrictions.

From the ordinary consumer’s perspective, what are the effects of scalper activities’ migration to the internet? If primary-market tickets are underpriced—as they typically are—then the advent of

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3. Id.


6. Id. at 14.

algorithmic scalpers means that fewer ordinary consumers have the ability to purchase tickets in the primary market. For the most popular sporting and entertainment events, scalpers use bots to buy upwards of half of the posted tickets. At Broadway’s popular Hamilton show, for example, scalpers purchased more than 40 percent of the tickets by way of ticket bots. As a result, ordinary consumers are, presumably, less likely to access tickets on the primary market. But because ticket prices in the primary market are related to ticket prices in the secondary market, the price effects of bots are unclear. Nonetheless, Congress enacted the Better Online Ticket Sales Act of 2016 (the “BOTS Act”) to try to create “reasonable” ticket prices by way of outlawing bots in the ticket-purchasing process. This Note describes the BOTS Act and argues that (a) the BOTS Act is a solution without a problem, because no legitimate consumer harm exists with respect to secondary-ticket sales; and (b) if such harm were cognizable, then the FTC should abdicate enforcement authority of the BOTS Act.

I. BACKGROUND: NON-BOTS ACT TACTICS TO THWART SCALPERS

Sports teams, musicians, performers, Ticketmaster, and government actors have all deployed different mechanisms to try to thwart computerized ticket purchasers and to minimize scalper surplus in the secondary market. Broadly construed, these efforts center on two principal routes: private enforcement and government enforcement.


11. Studies often decry the high percentage of tickets sold on the secondary market in today’s bots-filled world, but there is no mention of the percentage of tickets sold in the secondary market in the pre-internet, pre-bots-filled world.


A. Private Enforcement

Anything outside the government’s regulatory apparatus can be viewed as private enforcement in the ticket-sales industry. Performers, sports teams, and primary-ticket market sites like Ticketmaster aim to curtail secondary-market arbitrage opportunities for a few reasons. First, all things being equal, these entities would prefer to actualize surplus themselves instead of allowing algorithmic scalpers to squeeze out profits that exist outside the primary market. Next, sports teams and artists prefer to sell out tickets to their events in order to create a livelier environment and to increase the volume of merchandise and food sales during events. For food and merchandise sales, a performer might wish to forgo ticket profits in lieu of greater profits at the stadium. Finally, performers and sports teams might desire that end consumers pay lower prices for tickets so that a broader swath of fans can attend.

Based on these disparate justifications, private entities have undertaken different approaches to counteract scalper surplus: (1) website security, (2) in-person sales, (3) rewards systems, (4) photo identification, (5) primary-market price changes, and (6) the private bar.

The first measure, website security, centers on the already-mentioned restrictions that primary-market sellers like Ticketmaster institute. These include maximum ticket quantities, CAPTCHA-solving prompts, and more sophisticated techniques starting to emerge that include waiting “queues” with random assignment of places in line and phone number-identification verification. Primary-market security measures compete with scalpers’ adapting software in a seemingly endless arms race that

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16. Schroeder et al., supra note 7, at 31.
produces higher primary-market administrative costs, forcing Ticketmaster to charge higher processing fees to end consumers.\textsuperscript{22}

Dissatisfied by algorithmic ticket purchasers, the Foo Fighters unveiled a “beat the bots” campaign, where they sold a significant portion of tickets to fans in person only.\textsuperscript{23} In-person sales setups entirely displace online ticket bots. Another approach focuses on rewards systems for “true” fans. Taylor Swift’s rewards program for ticket sales drew national attention for its novelty.\textsuperscript{24} She teamed up with Ticketmaster in creating a “boost” system that inflated fans’ odds of securing tickets if they were to purchase her album, watch her videos, and promote her on social media.\textsuperscript{25}

Another increasingly common procedure to diminish the impact of ticket bots is a photo-identification requirement for fans who wish to enter an event. By requiring ticket holders to present photo identification (at the entrance of events) that matches the name on purchased tickets, venues effectively disallow ticket resale altogether. Requiring photo identification faces three main drawbacks, however. First, ordinary fans who wish to resell their tickets for whatever reason—an unforeseen emergency, for example—cannot.\textsuperscript{26} Next, purchasing tickets as gifts becomes more difficult because the donor must always know the donee’s name, or venues might require the credit card holder’s name to match the photo identification.\textsuperscript{27} Finally, group ticket purchases are more logistically cumbersome because one credit card purchaser who buys tickets on behalf of a group would be required to wait until all group members arrive before entering a stadium.\textsuperscript{28}

Instead of internalizing costs to avoid ticket bots, venues have increasingly opted to try to expel ticket bots by simply raising prices on the primary market. In a variety of ways, teams and performers have changed their pricing strategies so as to suppress scalper surplus. The


\textsuperscript{23} Jaskier, \emph{supra} note 15, at 94.


\textsuperscript{25} Id.


\textsuperscript{27} Id.

\textsuperscript{28} Id.
Atlanta Braves,\(^{29}\) the Rolling Stones,\(^{30}\) and the Kansas City Royals,\(^{31}\) for example, all use a species of “dynamic pricing.” In other words, they adjust prices for events based on demand factors like time or day\(^{32}\) of ticket sale. Sports organizations have also entered into exclusive contracts with secondary-market websites in order to establish a proprietary exchange that cuts out scalpers.\(^{33}\) Sports teams will sometimes give tickets directly to secondary websites and stipulate minimum price floors.\(^{34}\) Finally, Ticketmaster, the largest player in the primary market, opened its own secondary-market website called “TicketsNow” to catch downstream transactions in that exchange.\(^{35}\)

Separate from the above measures, some venues or performers turn to the private bar to bring legal action against those who violate bots-related rules. When scalpers violate contractual terms when buying tickets, this gives sports franchises, performers, and primary-ticket market sites the ability to bring suit against scalpers for infractions. The New England Patriots forbid season-ticket holders from reselling tickets, and famously pursue litigation against fans who violate this policy and against sites like StubHub for facilitating exchanges violative of the Patriots’ policies.\(^{36}\)

**B. Government Enforcement**

Government enforcement is not mutually exclusive from private enforcement, but rather the two run parallel. Before Congress codified the BOTS Act in 2016, a patchwork of different state laws shaped the ticket-scalping regulatory landscape.\(^{37}\) As expected with state-level regulations, there are many nuances in these laws, but four broad
categories account for the majority of these statutes: outright bans, price restrictions, bots bans, or no regulation whatsoever.

Some states, like North Carolina and Rhode Island, prohibit ticket scalping altogether.\textsuperscript{38} This outright-ban approach invites aforementioned jurisdictional challenges. A significant number of states prohibit scalpers from selling tickets on the secondary market at any price greater than face value. This type of regulatory scheme is generally termed a “price restriction.”\textsuperscript{39}

Some states, like New York and Tennessee, prohibit the use of ticket-purchasing computer software and bots.\textsuperscript{40} Like prohibiting ticket scalping altogether, banning bots altogether presents both jurisdictional and logistical hurdles for enforcement. Finally, some states lack any regulations whatsoever for ticket scalping.\textsuperscript{41}

Though state-level legislation is not new in this arena and some attorneys general have pursued enforcement actions based on state law,\textsuperscript{42} overall enforcement capabilities are traditionally weak for two central reasons. First, jurisdictional complexities inherent in out-of-state, online users make it impossible to prosecute certain violators.\textsuperscript{43} Second, tracking down the faceless, sometimes anonymous, individuals who use bots to purchase tickets is a technologically impracticable endeavor.\textsuperscript{44}

Against this backdrop of minimal state enforcement targeting scalpers who use bots to purchase tickets, the federal government sought to provide more comprehensive enforcement capabilities via the BOTS Act. The Senate Report for the act documents the conventional justifications for the legislation, which mirrors the states’ justifications for state legislation targeting the same activity. The Senate Report elucidates that the act seeks to “ensure equitable consumer access to tickets for any given event” and to “make tickets available equitably

\begin{thebibliography}{99}
\bibitem{38} Schroeder et al., \textit{supra} note 7, at 29–30.
\bibitem{39} \textit{Id.} at 27–30.
\bibitem{41} Schroeder et al., \textit{supra} note 7, at 27–30.
\bibitem{42} \textit{EVENT TICKET SALES}, \textit{supra} note 8, at 48–49.
\end{thebibliography}
and at reasonable prices." The report goes on to highlight that the BOTS Act aims to "ensure a large percentage of tickets remain available to fans at fair and reasonable prices." More, the report admonishes the average 49 percent markups scalpers enjoy above the ticket seller's posted price. In other words, the Senate Report provides two rationales for the statute: to ensure end consumers (a) have equitable access to tickets, and (b) pay reasonable prices for those tickets. As enacted in 2016 and in relevant part, the BOTS Act makes it illegal to "circumvent a security measure, access control system, or other technological control or measure on an Internet website or online service that is used by the ticket issuer to enforce posted event ticket purchasing limits or to maintain the integrity of posted online ticket purchasing order rules."

The BOTS Act thus does not ban secondary-ticket market profits altogether, nor does it ban scalping activity, but instead it more closely resembles the North Carolina and New York statutes that prohibit the use of ticket-purchasing bots. Additionally, Congress makes clear that infringement of the BOTS Act is also an "unfair or deceptive act" in violation of the Federal Trade Commission (FTC) Act. Enforcement, therefore, rests with the FTC through its Bureau of Consumer Protection.

The Federal Trade Commission has yet to finalize any enforcement actions rooted in the BOTS Act, but the agency is reportedly monitoring the ticket industry for actionable claims. Meanwhile, New York and Washington state attorney general offices have prosecuted violators of BOTS-like, state-level regulations, so federal action seems imminent. Though the BOTS Act creates more broadly encompassing enforcement at the federal level—bringing the resources of the Federal Trade Commission and sidestepping of the aforementioned interstate jurisdictional challenges—commentators on the topic have lauded the statute or called for even greater protection from ticket-purchasing bots. This Note argues just the opposite: the

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46. Id. at 4.
47. Id. at 2.
49. § 2(b)(1), 130 Stat. at 1401–02.
50. § 2(b)(1)–(2), 130 Stat. at 1401–02.
51. EVENT TICKET SALES, supra note 8, at 48–49.
52. See generally Erefant, supra note 5; Jaskier, supra note 15; Azerkan, supra note 44; McFadden, supra note 26; Dylan C. Porcello, Note, A Fixed Game: The Frustrations of Ticket Scalping and the Realities of Its Solutions, 84 BROOK. L. REV. 259 (2018).
BOTS Act attacks an imaginary market defect and, consequently, should be repealed or removed from the FTC’s authority.

II. THE BOTS ACT ATTEMPTS TO SOLVE A MARKET FAILURE WHERE NONE EXISTS

Imagine a nonprofit organization hosts a charity event and organizes a raffle for all attendees. The nonprofit gives out raffle tickets and stipulates that each participant can receive one ticket at maximum. All participants pay nothing to enter the raffle, and they all value the prize at some positive dollar amount; their willingness to pay is therefore greater than their offered payment amount of zero dollars. In other words, the raffle will result in the winner accumulating consumer surplus.

Now imagine that a particular attendee, Scott Scammer, figures out a way to circumvent the nonprofit’s ticket limit. Perhaps he forges the ticket numbers or hacks into the nonprofit’s computer system. Better yet, suppose Scott Scammer figures out a way to accumulate hundreds of tickets. All the while, each of the other attendees has just one ticket. Not surprisingly, based on Scott’s unscrupulous gobbling of tickets, he wins the charity raffle and enjoys all the consumer surplus therein. The other attendees did not pay anything, but they did not have a fair chance at winning the raffle. Moreover, these other attendees did not violate the nonprofit’s regulations, while Scott did. Even if Scott ventured to sell his pirated prize on the black market, only the richest attendee (or the one willing to pay the most for the prize) would be able to acquire the good. Although the noncheating raffle participants did not obtain the good, they also did not suffer any economic harm. Each participant hoped to win the raffle prize because each placed a positive value on the prize and would not have paid anything for winning the prize. So, Scott’s scheme-ridden ways lessened the likelihood that a noncheating raffle participant could enjoy consumer surplus from the raffle.

What should be the appropriate response to Scott’s behavior in duping the nonprofit, acquiring hundreds of tickets, and unfairly winning the raffle? Perhaps it might make sense to put pressure on the nonprofit to institute more secure procedures at the next auction. Or maybe the nonprofit should sue Scott and anyone involved in the scheme. What if Congress were to pass a law forbidding the Scotts of the world from violating nonprofits’ charity raffle rules, and Congress went further to rest enforcement authority of this statute in the purview of the Federal Trade Commission? This response would be logically untenable and a reallocation of government resources to an
unjust end—one void of any legitimate consumer harm. Unfortunately, this is the exact solution Congress has instituted through the BOTS Act with respect to unscrupulous ticket scalpers who violate primary-market distributors’ contractual terms. Notwithstanding the collective distaste for scalper surplus, legislating against this activity via the BOTS Act invokes an indefensible allocation of scarce government resources.

A. No Market Defect nor Consumer Harm Exists

Despite Congress’s claim that the BOTS Act seeks to bring forth “reasonable prices” and “equitable access” to tickets, these two goals are one and the same. Tickets are easily accessible on the secondary market, and willing consumers with means to afford secondary-ticket prices have no trouble accessing these tickets. Congress’s aim to create “reasonable” ticket prices is detestable because there is no way for the government to omnisciently ascertain what constitutes a reasonable price for each ticket at each second of the day. Relatedly, what “price” is Congress referring to? The primary-ticket price? The secondary-ticket price? The average ticket price for all tickets in both the primary and secondary market? Primary-ticket market prices are related to secondary-ticket market prices, so the congressional aim of a reasonable “price” poses more questions than it answers. With respect to the allegedly unreasonable prices on the secondary market, ticket bots do not create the high prices on that market. Instead, consumer demand generates the high prices in that market. Furthermore, a consumer’s inability to glut herself with consumer surplus (by purchasing tickets at prices below her willingness to pay) is not a cognizable consumer harm. On the contrary, this outcome differs from legitimate consumer harms—ones with real fraud or deception—that the FTC otherwise prosecutes. Finally, even if the BOTS Act were effective in reducing secondary-ticket prices, it could nonetheless be welfare detracting. As mere middlemen, scalpers, by definition, buy tickets with the express purpose of reselling those tickets. Ordinary

54. KARL E. CASE & RAY C. FAIR, PRINCIPLES OF ECONOMICS 80–81 (7th ed. 2004) (defining “consumer surplus” as “the difference between the maximum amount a person is willing to pay for a good and its current market price”).
consumers, on the other hand, are more likely to suffer from the endowment effect, preventing welfare-enhancing secondary sales from taking place.

1. The Twin Aims of the BOTS Act Collapse into One

The BOTS Act is couched in terms of supporting the dual goals of ensuring (a) “reasonable prices” for and (b) “equitable access” to tickets. In reality, these dual aims collapse into one: reasonable prices. Consumers who are unencumbered by price deterrents can easily access tickets on the secondary market. In fact, as will be later discussed, in a world without the BOTS Act, endowment effects would likely lead to fewer transactions and, thus, diminished consumer access to tickets. Moreover, there is nothing inherently special about purchasing tickets from Ticketmaster or an arena’s website instead of on a secondary-market site like StubHub. As distinct from the value a consumer might derive from purchasing an apple at a farmers market from the harvester of that fruit, a consumer has no parallel interest in purchasing the ticket from Ticketmaster instead of from StubHub. If price in the primary market were equal to price in the secondary market, then the “equitable access” rationale would rightly evaporate. Therefore, the BOTS Act aims to accomplish the singular goal of cajoling “reasonable” prices for consumers in the ticket industry.

2. Legislating “Reasonable” Ticket Prices Is a Repugnant Statutory Aim

Government efforts to decree reasonable prices reek of Soviet-era central planning. Aside from the impossible task of coordinating each member of society’s heterogeneous preferences in determining price, the government faces the inexorable roadblock that “the reasonable fixed price today may through economic and business changes become the unreasonable price of tomorrow.” Situating the federal government as an omniscient price commander is, therefore, an absurd legislative goal. Even if the goal of the BOTS Act were to

58. This analogy comes from Kevin Stack, Vanderbilt University Law School professor, discussing how the access argument collapses into the reasonable-price argument.
establish price ceilings, rather than changing prices on any given day, this would still amount to a condemnable objective. The one area in which virtually all economists agree is that price ceilings lead to a shrinking in supply known as a shortage.\textsuperscript{61} Therefore, price-ceiling regulations\textsuperscript{62} tend to effectuate higher prices, which is the exact opposite result these measures seek to achieve.\textsuperscript{63}

What evidence suggests that prices in the ticket industry are too high and require government oversight? To provide support for the assertion that tickets currently sell at above-market prices, the BOTS Act, as well as much of the literature praising the legislation and similar state measures, relies on a study from the New York attorney general’s office indicating that (a) scalpers buy more than half the tickets on the primary market, and (b) tickets on the secondary market sell on average 49 percent above the primary market’s listed prices.\textsuperscript{64} This evidence is flawed in two respects. First, the study does not discuss the percentage of tickets sold on the secondary market before the onset of algorithmic scalping. Though on its face unlikely, it could be the case that the advent of bots did not increase the percentage of primary tickets resold on the secondary market. Next, and more importantly, this study does not address the fact that a change in the number of

\begin{footnotesize}
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\item \textsuperscript{61} See Megan McArdle, The One Issue Every Economist Can Agree Is Bad: Rent Control, WASH. POST (June 14, 2019, 7:13 PM), https://www.washingtonpost.com/opinions/2019/06/15/comeback-rent-control-just-time-make-housing-shortages-worse/ [https://perma.cc/HSQ3-7YVB].
\item \textsuperscript{62} Price-ceiling regulations typically surface in the case of “necessity” goods, like housing, food, or electricity. Necessity goods are less sensitive to income changes than “normal” goods. But high-end concert and sporting tickets are not necessity goods. In fact, for some ticket transactions, they are probably “luxury” goods; this means that when income increases, demand for these products increases by a greater proportion than income. Typical examples of luxury goods include yachts or expensive diamonds. It comes as no surprise, therefore, that legislators set price ceilings for necessity goods because these legislators intend to reduce the price of things like food, medicine, or shelter. Though the economics literature generally finds that price ceilings lead to higher prices, it is quite understandable and, to a certain extent, laudable that these lawmakers intend to reduce prices on these sorts of goods. Unfortunately, these intentions are not realized, because price ceilings usually lead to higher prices. So, that the BOTS Act targets non-necessity goods is perplexing. Like in the case of price ceilings for necessity goods, price ceilings for tickets likely do not produce their intended results. But unlike in the case of price ceilings for necessity goods, price ceilings for tickets do not invite the same sort of laudable intentions. Consumers would not view kindly price ceilings on yachts, private jets, or expensive jewelry. So why should Hamilton tickets fare any differently? See CASE & FAIR, supra note 54, at 49–50 (explaining the difference between normal and inferior goods); HAL R. VARIAN, INTERMEDIATE MICROECONOMICS WITH CALCULUS 102 (2014) (defining luxury and necessary goods); Prateek Agarwal, Price Ceiling, INTELLIGENT ECONOMIST (Feb. 3, 2020), https://www.intelligenteconomist.com/price-ceiling/ [https://perma.cc/N88K-42AL] (“The price ceiling is usually instituted via law and is typically applied to necessary goods like food, rent, and energy sources.”).
\item \textsuperscript{63} McArdle, supra note 61.
\item \textsuperscript{64} OBSTRUCTED VIEW, supra note 9, at 4, 15, 19, 25.
\end{itemize}
\end{footnotesize}
tickets on the secondary market will affect the average price of a ticket in the secondary market.

Even if fewer tickets enter the secondary market in a bots-free world, then a higher markup\(^{65}\) for the tickets sold in the secondary market could offset the fact that fewer transactions occur in the secondary market. In fact, the number of tickets on the secondary market and average ticket price in that secondary market should exhibit an inverse relationship; all else equal, lower quantity leads to inflated price.\(^ {66}\) In sum, the New York attorney general’s statistics reveal very little. Without data on the counterfactual, it remains an open question how the presence of ticket bots impact prices. Half the tickets landing on secondary-market sites for 50 percent markups might sound worrisome, but no evidence indicates what average ticket prices look like without bots. Without adequate data, Congress nonetheless felt comfortable standing in the stead of God in adjudging current prices as not “reasonable” and requiring top-down adjustments.

3. What “Price” Is Congress Attacking?

Congress seeks to create reasonable prices for tickets by way of the BOTS Act. But there is a crucial question that must be answered when thinking about the BOTS Act: Which price is Congress talking about? The average secondary-ticket price? The average ticket price in both the primary and secondary market? Should season tickets\(^ {67}\) be factored into this “price” analysis? What about add-on, ticket-related purchases,\(^ {68}\) such as insurance products?\(^ {69}\) There is no single “price” for

\(^ {65}\) A higher markup would be expected if there were fewer tickets available on the secondary market. A lower supply would lead to increased price in the secondary-market tickets. See Agarwal, supra note 62.


\(^ {67}\) Oftentimes, consumers feel more comfortable purchasing season tickets for sporting teams because they can sell high-demand, single-game tickets for high prices. The price of a single NBA game, for example, thus affects the price of other NBA games. See Mitch Lipka, How to Time the Season Ticket Market Like a Stock Pro, REUTERS (Apr. 3, 2012, 7:25 AM), https://www.reuters.com/article/us-column-yourmoney-sportstickets/how-to-time-the-season-ticket-market-like-a-stock-pro-idUSBRE8320FU20120403 [https://perma.cc/4BAG-G4MH].

\(^ {68}\) Another example of a ticket-related purchase is parking, which often reflects some bundling. Amber Banks, Vanderbilt University Law School class of 2020 provided this example.

\(^ {69}\) Fansure is a company that sells ticket insurance to NBA fans. If a specified superstar does not play in an NBA game, then Fansure will pay the ticket holder for the price of the ticket. See About Us, FANSURE https://fansure.com/user/aboutUs [https://perma.cc/ZG3P-JDHX] (last visited Mar. 30, 2020).
sporting events or concert tickets but rather different prices over time.\textsuperscript{70} Accordingly, when Congress seeks to omnisciently determine the “price” of tickets, it must specify which price it seeks to decree.

Primary-market ticket purchasers have several risk-bearing assumptions baked into their buying decisions. For example, a concertgoer does not know the precise weather forecast for the day of the concert. If on the day of the concert the weather is unusually nice, then the primary-ticket purchaser might wish to sell his tickets for a profit; if it is rainy or cold, then he might have trouble finding another buyer. Similarly, the football fan cannot know whether his favorite team will be in playoff contention later in the season. A primary-ticket purchaser can never fully predict if an unforeseen event like an emergency will prevent him from attending. In the case of NBA games,\textsuperscript{71} a fan cannot be sure that the superstar player will be healthy enough to play on a given night.\textsuperscript{72} All these examples highlight the reality that secondary-market price setting does not operate in isolation but rather sends pricing ripples into the primary market as well.

The Senate Report for the BOTS Act admonishes the above-face value markups tickets exhibit on the secondary market.\textsuperscript{73} Presumably, then, Congress targets secondary-ticket prices as being too high. This makes little sense, given the fact that tickets on the primary market are more expensive than ever.\textsuperscript{74} Also, ticket prices for a single event or game affect the price of other tickets during the season. Commonly, consumers agree to become season-ticket holders because they have the assurance of selling high-demand, single-game tickets for high resale prices.\textsuperscript{75} Furthermore, money cannot be viewed in a

\textsuperscript{70} See Lipka, supra note 67.

\textsuperscript{71} See About Us, supra note 69.

\textsuperscript{72} For this reason, companies have stepped in to offer superstar-absence insurance so that fans can purchase the right to be reimbursed if a particular star does not play on a given night. See id. If the government caps resale profits, this sets some maximum price consumers pay on sites like StubHub. But if this causes a mere substitution into buying risk-bearing products, then consumers are still paying for the risk agreement in addition to the posted ticket price. So, if the government is concerned about ticket prices, then it should be concerned as well about these risk-agreement prices and market therein; that market is engulfed into the total price of the tickets.


vacuum; inflation and the time value of money\textsuperscript{76} require Congress to constantly adjust the decreed “reasonable” price each second of the day.

4. Ticket Bots Do Not Create High Prices

Assuming Congress is right that ticket prices for sporting events, concerts, and theatrical performances are high, what causes the high prices consumers face? Unfortunately for proponents of the BOTS Act, ticket bots are not the culprit of high ticket prices. Just like in any other competitive market, the forces of supply and demand determine the equilibrium prices in the ticket market.\textsuperscript{77} The scalpers do not cause the high demand in the secondary market; they respond to it.\textsuperscript{78} Consumer demand for tickets—even tickets at prices well above primary-ticket market prices—incentivizes the creation of the scalper market. If the ticket bots did not exist, then the secondary market would still flourish because underpriced primary-market tickets give way to excess demand for those tickets.\textsuperscript{79} But if, on the other hand, there were no excess demand in the primary market, then scalpers (with or without bots) would be homeless in this setup. Accordingly, high secondary-ticket market prices (through excess demand in the primary-ticket market) create bots, not vice versa. Therefore, legislators entirely miss the plot by trying to remove bots from the secondary-ticket market. That is to say, the BOTS Act shoots the proverbial messenger.

5. Ticket Bots Produce No Cognizable Consumer Harm

Suppose an end consumer either (a) purchases a StubHub ticket for double the price she would have paid on Ticketmaster or (b) has been priced out of the market because she cannot afford the StubHub price but could have afforded the Ticketmaster price. In either case, the consumer cannot point to a cognizable harm. In the first scenario, the consumer pays at or below her willingness to pay for the ticket, all the games they want to attend, and then trying to mitigate the cost by selling tickets to games they are less interested in.


\textsuperscript{78} Gregory M. Stein, Will Ticket Scalpers Meet the Same Fate as Spinal Tap Drummers? The Sale and Resale of Concert and Sports Tickets, 42 PEPP. L. REV. 1, 11–12 (2014).

\textsuperscript{79} Id.
Granted, if she could have obtained a ticket on Ticketmaster, she would have paid an even lower price and thus would have enjoyed some positive amount of consumer surplus. But this buyer has no right to windfalls in the form of consumer surplus. This is the functional equivalent of asserting that, in line with the aforementioned analogy, a consumer has a right to win a charity raffle award. In the second scenario, where the buyer is priced out of the secondary market, two possibilities exist. First, even without the existence of ticket bots, only a fraction of willing consumers can acquire tickets on the primary market. So, by not being one of the lucky few to acquire tickets in the primary market, the consumer would have been in the exact same ticketless position in the bots-filled and bots-less worlds. Second, even if this hypothetical buyer could show she would have obtained the Ticketmaster ticket in a bots-less world, there still would be no harm because this buyer has no right to purchase that ticket at the price she desires. In other words, the performer can set prices at whatever price he wishes, can reserve tickets for friends at specialized prices, can play for a special event with no tickets at all, or can create any number of idiosyncratic systems designed to allocate tickets to fans. A would-be buyer has no right, therefore, to purchase a ticket from Ticketmaster.

The Rolling Stones’ dynamic ticket-pricing model demonstrates the impoverished logic of suggesting consumers enjoy some right to purchase tickets below their willingness to pay. The Rolling Stones sought to crowd scalpers out of the ticket market by adjusting primary-ticket market prices for concert events based on changing demand characteristics. Consumers faced higher prices, Rolling Stones successfully appropriated a greater percent of the rents available, and scalpers could not exploit the same degree of secondary-market markups as they would have without the dynamic pricing model. Therefore, the higher prices in the primary market led to an evisceration of the secondary market (and any bots used to lubricate transactions therein). But it also led to the same sorts of high prices in the primary market consumers would have otherwise seen in the secondary market had dynamic pricing not taken shape. In this

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80. CASE & FAIR, supra note 54, at 80–81 (defining “consumer surplus” as “the difference between the maximum amount a person is willing to pay for a good and its current market price”).
81. One can imagine an unobjectionable ticket system that a Silicon Valley company might create so that only the best hackers get access to tickets.
82. Jaskier, supra note 15, at 94.
83. Id.
84. Id.
85. Id.
86. Id.
setup, what consumer harm unraveled? If one adopts the reasoning of the BOTS Act, then a consumer harm must exist simply because a class of buyers could not purchase tickets below their willingness to pay. Certainly, this cannot be the test for consumer harm, lest consumers achieve causes of action for every desirable consumer surplus imaginable.

6. The BOTS Act Is Welfare Detracting, Not Welfare Enhancing

If ticket bots disappeared, then only buyers lucky enough to gobble up tickets in the primary market (without the aid of bots) would sell tickets on the secondary market. When these ordinary buyers obtain tickets in the primary market, however, their willingness to accept bids for the tickets strangely increases. The endowment effect operates in such a way as to drive these purchasers’ willingness to accept upward by the mere fact of ownership over the tickets.87 Mere middlemen who employ ticket bots for the express purpose of resale on the secondary market, on the other hand, obviously would not reveal the same ownership-based increase in willingness to accept based on an endowment effect. Therefore, that the ticket bots presumably lead to a greater percent of primary tickets selling on the secondary market for lower prices means that more transactions take place on the secondary market. More transactions occurring on the secondary market means that greater surplus—both from sellers and purchasers in the secondary market—transpires in a world where ticket bots facilitate scalping. Therefore, the BOTS Act’s express goal in curbing ticket-bot usage leads to a decrease rather than increase in total surplus in the ticket-sales market. Consequently, the BOTS Act is welfare detracting, not welfare enhancing.

B. Enforcement of the BOTS Act Should Not Rest with the FTC’s Bureau of Consumer Protection

The BOTS Act targets a type of activity that finds no home in the FTC’s consumer-protection mission of preventing “unfair, deceptive, and fraudulent business practices.”88 When consumers purchase tickets on the secondary market, they have full information in that purchasing decision and are not duped by swindlers. They might pay higher prices than they wish to pay, but they do not face some sort of con or

87. See generally Carmon & Ariely, supra note 56, at 360.
trick—the cornerstones of the FTC’s consumer-protection dominion.\textsuperscript{89} Even if this ticket-purchasing activity did fall within the FTC’s consumer-protection mission, the agency still has scarce resources.\textsuperscript{90} Thwarting more obviously fraudulent activity is a more defensible use of those scarce resources. Additionally, when the FTC prosecutes BOTS Act violations, it awkwardly and unjustifiably plays the roles of private contract drafter and private contract enforcer. Billion-dollar giants like Ticketmaster do not deserve contractual enforcement subsidies from the federal government.\textsuperscript{91}

1. BOTS Act Enforcement Falls Outside the Scope of the FTC’s Consumer-Protection Mission

The Federal Trade Commission’s Bureau of Consumer Protection seeks to prevent “unfair, deceptive, and fraudulent business practices.”\textsuperscript{92} The FTC clarifies that it targets businesses that fail to “make good on their promises or cheat people out of money.”\textsuperscript{93} The typical FTC consumer-protection enforcement actions mirror these delineated goals. For example, a common scam is when individuals pretend to be police officers in order to scare citizens into paying debts that may or may not exist.\textsuperscript{94} A related scam involves those who pretend to be Internal Revenue Service employees hunting down citizens for tax evasion.\textsuperscript{95} Another typical scam involves companies that make false claims about their products, including claims that their aloe creams cure lifelong conditions like Crohn’s disease.\textsuperscript{96} An additional scheme centers on the unauthorized use of celebrities’ photos in order to fool consumers into believing those celebrities actually promote the

\begin{thebibliography}{99}
\bibitem{88} Id.
\bibitem{91} Bureau of Consumer Protection, supra note 88.
\bibitem{92} Id.
\bibitem{93} Alvaro Puig, Scammers Impersonate the Police, FTC: CONSUMER INFO. (July 17, 2015), https://www.consumer.ftc.gov/blog/2015/07/scammers impersonate police [https://perma.cc/K3YZ-VRZ].
\bibitem{94} Id.
\end{thebibliography}
products on a particular site. In another prototypical scam, fraudsters pretend to be elderly individuals' nephews, nieces, or loved ones and then act as if they are in an emergency situation in desperate need of money.

In stark contrast to the above-mentioned scammers the FTC's consumer-protection arm typically targets, scalpers who use ticket bots do not deceive, defraud, or fool consumers. Instead, these scalpers purchase underpriced tickets from performers. When ordinary consumers purchase tickets on the primary or secondary market, they are not fooled, duped, or deceived. In fact, just the opposite occurs. They are fully aware of the price they pay for tickets, and they voluntarily make such transactions. Therefore, absent any indicia of deception or fraud, the FTC's Bureau of Consumer Protection should not be tasked with enforcing the BOTS Act and its imaginary consumer harms, which bear no resemblance to the FTC's consumer-protection mission.

2. The FTC Should Not Allocate Its Scarce Resources to the BOTS Act

Even if the BOTS Act did fall within the FTC's consumer-protection mission, then the FTC should dedicate little or no resources to enforcing the Act. When scammers legitimately dupe, fool, and deceive consumers—into thinking a product cures a disease, a government official is collecting money, or a nephew requires cash for a medical emergency—then the FTC should certainly step in to prosecute such flagrant wrongdoers. However, scalpers who use ticket bots do not fool consumers in a comparable way. So, even if such ticket-bot usage falls within the FTC's mission, it does not lay at the very core of that mission. Moreover, that the FTC has limited resources and must exercise discretion in prosecuting fraudsters bolsters the notion that ticket-bot scalpers ought to remain a low priority on the consumer-protection enforcement spectrum.

By targeting scalpers who capitalize on Ticketmaster's lack of rent appropriations, the BOTS Act directs resources to help end purchasers of Hamilton shows and Floyd Mayweather fights. For

98. Kando-Pineda, supra note 55; Family Emergency Scams, supra note 55.
100. FISCAL YEAR 2020, supra note 90.
these high-cost events, the opportunities for arbitrage (for high markups between primary- and secondary-ticket markets) would presumably be the most acute, and the BOTS Act, if enforced, would have the strongest effect. Accordingly, if a fully enforced BOTS Act lowered ticket prices, then the most privileged members of society would reap the lion’s share of the benefits of these lower prices. When the FTC takes action against business coaching scammers, it helps restore elderly citizens’ robbed retirement savings; when the FTC enforces the BOTS Act, it lowers *Hamilton* tickets for Tribeca’s elite. This is a socially undesirable reallocation of government resources for an apparatus designed to protect US consumers.

3. The BOTS Act Inappropriately Situates the Government as a Private Contract Policeman

The FTC’s Bureau of Consumer Protection should not enforce the BOTS Act because the federal government should not enforce private parties’ contractual disputes. The BOTS Act prohibits computer programs that violate primary-ticket sites’ “posted event ticket purchasing limits” or the “posted online ticket purchasing order rules.” This statutory language expressly outlaws ticket-purchasing order rules, but who creates these rules? The companies who control the primary-ticket market websites create these rules, and Ticketmaster captures more than 80 percent of this market.

A few issues surface from a law that bases its enforcement on Ticketmaster’s ordering rules. First, Ticketmaster could change its rules in any number of imaginable ways that would run counter to both consumer protection and, more generally, public-governance goals. For instance, Ticketmaster could change its rules, even if only temporarily, to the following: “Only card-carrying National Rifle Association (NRA) members can purchase tickets, and buyers cannot use computer algorithms to bypass security measures aimed to verify that ticket purchasers are members of the National Rifle Association.” Then, assume a shifty buyer could use a computer algorithm to pretend as if he is an NRA member, bypassing Ticketmaster’s NRA rules to purchase tickets. Then, according to the text of the BOTS Act, the Federal Trade Commission should prosecute this non-NRA buyer as having committed


an "unfair and deceptive act" because he sidestepped Ticketmaster’s
“online ticket purchasing order rules.” Why should the federal
government be subservient to the almighty Ticketmaster’s
ticket-purchasing rules? These rules could be entirely arbitrary and
undesirable, so placing the federal government in the role of
Ticketmaster’s contract policeman strains credulity and rationality.

Ticketmaster, and the performers with whom it contracts, are
sophisticated parties who control the terms in their agreements. These companies have full information and are not confused about the
ticket quantity limits or other purchasing order rules they put in place. As such, these parties do not need and should not receive the
governmental subsidies the BOTS Act establishes through placing the
FTC in the role of contract enforcer. If Ticketmaster takes issue with
scalpers utilizing ticket bots that violate the website’s “purchasing
order rules,” then Ticketmaster itself should prosecute those who
violate its policies. Likewise, if performers truly detest Ticketmaster’s
inability to uphold ordering rules, then these performers should
either litigate such violations against Ticketmaster or use another
primary-ticket website that better enforces its contractual provisions.

Even if the government were to police third-party contractual
disputes, the Federal Trade Commission should not do so if the
contractual disputes at issue do not involve ordinary consumers. When
scalpers use ticket bots to purchase hundreds of tickets on
Ticketmaster’s website in violation of Ticketmaster’s ordering rules,
ordinary consumers are entirely removed from these transactions. It is
not the case that Ticketmaster reneges its promises to nor swindles
ordinary consumers when scalpers violate ordering rules. Instead, it is
the scalpers who swindle Ticketmaster through the use of ticket bots.
As a result, the federal government should not litigate contractual
disputes on behalf of private parties, especially when the private party
is a multibillion-dollar company like Ticketmaster.

C. The BOTS Act Fails to Cover the Scope of Wrongs It Targets

This Note argues that the BOTS Act aims to remedy a consumer
harm when no consumer harm exists and that enforcement of the BOTS
Act should not rest with the FTC. However, even if one were to accept
Congress’s justifications for the BOTS Act and assume it a laudable

104. § 2, 130 Stat. at 1401.
105. Andrew A. Schwartz, Consumer Contract Exchanges and the Problem of Adhesion, 28
YALE J. ON REG. 313, 331 (2011).
106. Cohan, supra note 91.
public policy tool, the BOTS Act is still objectionable because it fails to solve the problems it targets. It does nothing to address human-based services for CAPTCHA solving, it is difficult to enforce, and it does not produce desired prices even if it is fully enforced.

1. Human-Based CAPTCHA Services Substitute for Automatic Services

A CAPTCHA, or “completely automated public turing test to tell computers and humans apart,” is a commonly used website tool that is meant to distinguish between human users and computer programs. The BOTS Act says that scalpers cannot circumvent online security measures or technological controls in order to violate ticket-purchasing rules or quantity limits. This makes it illegal for scalpers to pay for technological services that automatically solve CAPTCHA prompts. But if a scalper pays a friend to sit in front of a computer on his behalf to solve a CAPTCHA, then nobody has circumvented an online security measure. Instead, the scalper and his friend have contracted among themselves to abide by the security measures.

Because scalpers can, in light of the BOTS ACT, move away from automated CAPTCHA-solving services and into human-based CAPTCHA-solving services, this substitution renders the BOTS Act largely ineffective. The BOTS Act does not cover human-based CAPTCHA-solving services because these services do not circumvent or dupe security measures. To think otherwise would mean that nobody can purchase tickets—for example, as a gift—on behalf of another person. Human-based CAPTCHA-solving services are popular, cheap, and make it difficult for ordinary consumers without this service to acquire tickets on the primary market in the same way that automated services do. Therefore, the BOTS Act likely causes scalper substitution from automated services to human-based ones without reducing the price of tickets for end consumers.

There is one additional sense in which the BOTS Act’s encouragement of human-based CAPTCHA-solving services is not merely consummate with but instead worse than the non-BOTS Act world. Incentivizing human-based services means that regions with low

108. § 2(a)(1), 130 Stat. at 1401.
labor costs\textsuperscript{110} are the most likely to host these services. Accordingly, low-income individuals in impoverished areas are, thanks to the BOTS Act, probably now more likely to sit all day in front of computer screens solving CAPTCHA prompts that cost users two dollars for each thousand CAPTCHAs solved.\textsuperscript{111} Our laws should not push people into this sort of socially wasteful work.\textsuperscript{112} Individuals who solve CAPTCHAs all day do not produce new value for the world; instead, they engage in this type of work because the BOTS Act artificially induces it.

2. The Nature of Online Transactions Produce Enforcement Inadequacies that Render the BOTS Act Largely Toothless

Online sales afford convenience by the fact that individuals need not be physically present in a particular place in order to engage in a transaction.\textsuperscript{113} With an internet connection, one can purchase a vast array of products from anywhere in the world.\textsuperscript{114} As it pertains to ticket sales, however, online transactions create an inability to verify the identity of ticket purchasers in two ways. First, if an automated computer program decodes a CAPTCHA prompt, then the prompt will not know whether a human or automated software solved the CAPTCHA.\textsuperscript{115} In this way, the BOTS Act outlaws a relatively undetectable act. Second, even if ticket-sales websites could detect if an automated service decoded the CAPTCHA, it still does not reveal who purchased or deployed the automated software. Through two layers of online challenges, therefore, the BOTS Act is hard to enforce, making it largely toothless.

\textsuperscript{110} For a discussion of countries with low labor costs, see Ralph Jennings, \textit{From India to the Philippines, These Are the Cheapest Countries in Asia}, FORBES (Apr. 12, 2017, 6:00 PM), https://www.forbes.com/sites/mlph Jennings/2017/04/12/these-are-the-5-cheapest-countries-in-asia/#c8e1f3126a [https://perma.cc/K8GA-DNWM].


\textsuperscript{112} A counterargument would be, however, that low-wage workers might prefer the BOTS Act if it contributes to more earnings opportunities.


\textsuperscript{114} Id.

3. A Fully Enforced BOTS Act Would Not Necessarily Lower End-Consumer Prices

The BOTS Act is notoriously difficult to enforce. Even if there were perfect enforcement, however, the BOTS Act would not necessarily lead to much lower prices for end consumers. If the government could successfully thwart scalpers’ abilities to use computer bots to solve CAPTCHAs, then scalpers would be at a disadvantage (relative to the non-BOTS world) in accessing tickets on the primary market. Nonetheless, ordinary consumers lucky enough to purchase underpriced tickets in the primary market would still be allowed to unload those tickets in the secondary market. The BOTS Act does not eradicate the forces of supply and demand, so excess demand would still create an incentive for primary-ticket purchasers to sell tickets on the secondary market for a profit. Consequently, a fully enforced BOTS Act might slightly diminish, but would not eliminate, the surge of high-priced tickets on the secondary market. This ultimately produces the effect of high prices for end consumers, and it is unclear how these prices fare relative to the counterfactual scenario. Presumably, high prices would still appear in the secondary market, which means that the BOTS Act’s goal of delivering “reasonable” ticket prices becomes unrealized even in a perfectly policed BOTS Act landscape.

III. SOLUTIONS

A. Repeal the BOTS Act

Repealing the BOTS Act reinstates scalpers’ capacities to purchase automated computer programs that solve CAPTCHA prompts. This solution has several benefits. First, it removes the government from the position of cajoling Soviet-like price maintenance. The government is not in the appropriate position to determine what constitutes a reasonable ticket price, so the repeal of the BOTS Act best reflects that reality. Second, this solution redirects scarce government resources to more legitimate ends. There is no cognizable consumer harm in the realm of online ticket sales because consumers are not entitled to purchase underpriced tickets. Therefore, instead of pursuing the strange goal of coaxing inappropriately low-priced tickets for a lucky fraction of willing ticket purchasers, government resources

116. Schroeder et al., supra note 7, at 26 (“The existence of the excess demand is responsible for the secondary ticket market.”).
117. Id.
should be redirected to areas where legitimate market failures and consumer harms take place. Third, this solution eliminates what otherwise amounts to a government handout to primary-market sites for tickets and performers. It has already been acknowledged that performers are permitted to set prices as they see fit, such as the case of the Rolling Stones’ “dynamic pricing” strategy.118 Performers and primary-ticket vendors can choose prices without government oversight, and they can enforce contractual provisions without government oversight. If a multibillion-dollar giant like Ticketmaster119 wishes to enforce its posted ticket quantity limits or CAPTCHA-solving rules that it contractually erects, then it can do so through the private bar. These parties are not helpless; instead, they can privately sue to enforce contractual terms. They can also take other measures, like photo-identification requirements,120 to privately dissuade bots-based scalpers from swallowing massive numbers of tickets on the primary market.

B. Divorce the FTC from the BOTS Act

The second solution is to unshackle the FTC from the BOTS Act. As has been delineated in this Note, ticket resale—even with the use of automated CAPTCHA-solving bots—is not inherently an “unfair” or “deceptive” act121 that should be treated similar to other FTC prosecutorial activities. It is not unfair because consumers have no right to underpriced tickets, and performers can charge whatever prices they see fit under the terms they desire. It is not deceptive because consumers in the secondary market are not duped into purchasing products under insufficient information; consumers instead are well aware of their purchasing decisions.

This solution could take two forms. The first would be for another government agency to carry out the BOTS Act. The BOTS Act seeks to establish reasonable end prices for tickets, so an agency specializing in price setting should enforce the BOTS Act. The US Department of Agriculture (USDA) has had a long history of price-setting in the milk and dairy industry,122 so another agency might

118. Jaskier, supra note 15, at 94.
119. Cohan, supra note 91.
120. McFadden, supra note 26, at 439-41.
follow some USDA procedures when the government follows the BOTS Act to lower ticket prices. The actions outlawed by the BOTS Act are not unfair or deceptive; the government can enforce the act if it wishes, but no agency should dress up ticket price setting as consumer protection. The second approach would be to keep the BOTS Act on the books but relieve the FTC from enforcement of the act, and instead allow private parties to sue under the BOTS Act. This way, performers and primary-ticket vendors could rely on federal law, instead of their own contractual provisions, when attempting to enjoin bots-wielding scalpers from using computer programs to bypass CAPTCHA codes in the purchase of tickets.

C. Real Price Setting: Capping Resale Profits

Congress does not hide its intentions with respect to the BOTS Act: the goal is to produce “reasonable” ticket prices for end consumers.\textsuperscript{123} The BOTS Act prohibits software programs that sidestep online security measures,\textsuperscript{124} which Congress hopes will spur lower ticket prices. For a number of reasons, including that the government’s price setting of tickets is not a worthy aim, this Note argues the BOTS Act should either be repealed or taken out of the FTC’s consumer-protection wing. But even if government-mandated “reasonable” ticket prices were a laudable public-policy goal, then the BOTS Act should still be replaced by a more straightforward legislative alternative.

One way the government could set ticket prices is through capping the above-face value ticket price that secondary-market suppliers can charge. For example, the government could prohibit ticket resellers from charging any above-face value price. Or, the government could say that secondary-market suppliers can charge a maximum of, say, 10 percent above face value for ticket resales. This would be easier to enforce than the BOTS Act because government agents could, instead of developing sophisticated tools to decipher whether a human or a bot solved a CAPTCHA code, simply compare StubHub’s price with the face-value price of a ticket to determine the legality of a secondary-market ticket resale. Additionally, as has been previously outlined, a fully enforced BOTS Act could very well leave end-consumer


prices at similar levels because primary-market ticket purchasers will still have an incentive to charge high prices on the secondary market if arbitrage opportunities exist. A government cap on resale prices, on the other hand, directly addresses resale ticket prices with a blunt and direct instrument. Super high prices on the secondary market would not be discouraged—they would be illegal.

Although a government-determined ceiling on ticket-resale profits is a more effective way to actualize the goals of the BOTS Act than is the BOTS Act itself, several features of this alternative approach must be highlighted. First, a cap on resale profit appears to punish ticket resellers who wish to extract high profits. These resellers appear to be the ones who “pay” for this legislative approach. But this is not true. The incidence of a tax, meaning the one who bears the burden of the tax, depends not on who the tax is levied against but rather the respective supply and demand elasticities of market participants. Second, this solution would not eliminate incentives to cheat. With sufficiently high arbitrage incentives, a ticket-resale black market would emerge. Third, this measure will affect primary-market ticket prices. Even if the average ticket price in the secondary market becomes lower, the average consumer might pay higher prices in the primary market or be more likely to purchase ticket insurance products. If this approach were to artificially lower all ticket-related prices, then suppliers would find these endeavors less profitable and,

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125. Schroeder et al., supra note 7, at 26.
126. See Elasticity and Tax Revenue, KHAN ACADEMY: ECON. & FIN., https://www.khanacademy.org/economics-finance-domain/microeconomics/elasticity-tutorial/price-elasticity-tutorial/elasticity-and-tax-incidence [https://perma.cc/KLJ5-CUKB] (last visited Mar. 30, 2020) ("The tax incidence depends on the relative price elasticity of supply and demand."). The same holds true in the case of a tax on billion-dollar yachts. One might think of the billionaire yacht buyers as “paying” for this yacht tax, but whether yacht purchasers or suppliers (for example, the middle-class salesperson) are less responsive to changes in price. See id.
thus, would be less likely to supply events and less likely to invest in quality as a means to attract buyers.\textsuperscript{128}

IV. CONCLUSION

Congress sought to effectuate "reasonable" ticket prices when it passed the BOTS Act in 2016.\textsuperscript{129} The BOTS Act prohibits ticket resellers from using software to bypass security measures or automatically solve CAPTCHA codes. However, no consumer harm exists for the BOTS Act to remedy with respect to the ticket-resale industry—consumers have no right to purchase underpriced tickets, and performers can set prices at whatever value they wish. Furthermore, congressional aspiration of reasonable prices is murky because there is no single ticket price. Instead, the face value of tickets, resale value of tickets, season tickets for sporting events, and extraneous ticket-related purchases like ticket insurance are all dependent upon one another. Worse, Congress rests enforcement authority of the BOTS Act with the FTC’s Bureau of Consumer Protection. However, this sort of activity is entirely unrelated to consumer protection. Unlike the FTC’s enforcement of legitimate consumer harms and deception, such as schemes that defraud the elderly through fake calling schemes or the promotion of fake herbal medicines, the enforcement of low ticket prices has nothing to do with deception-related transactions. Finally, even if cajoling low-priced tickets were a laudable public-policy goal, the BOTS Act is ill-equipped to tackle that goal. It permits scalpers to substitute into human-based CAPTCHA-solving services, it is difficult to enforce, and even if it were fully enforced, the effect on ticket prices is still uncertain. Against this backdrop, the two most defensible alternative solutions are to repeal the BOTS Act or to remove it from the purview of the FTC. Otherwise, if Congress wishes to legitimately affect secondary-market resale prices, then it should do so in the most direct and easily


\textsuperscript{129} S. REP. NO. 114–391, at 2.
enforceable way—by capping resale profits.

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