ORAL ARGUMENT NOT YET SCHEDULED

No. 18-5298

In the

United States Court of Appeals
for the District of Columbia Circuit

WOODHULL FREEDOM FOUNDATION, HUMAN RIGHTS WATCH, ERIC KOSZYK, JESSE MALEY a/k/a ALEX ANDREWS and THE INTERNET ARCHIVE,

Appellants,

v.

THE UNITED STATES OF AMERICA AND MATTHEW G. WHITAKER, IN HIS OFFICIAL CAPACITY AS ACTING ATTORNEY GENERAL OF THE UNITED STATES,

Appellees.

From an Order by the U.S. District Court for the District of Columbia
The Honorable Richard J. Leon, Judge Presiding (Case No. 1:18-cv-1552-RJL)

APPELLANTS' OPENING BRIEF

(Joint Appendix Filed Separately)

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CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

Pursuant to D.C. Circuit R. 28(a)(1), Appellants certify that:

A. Parties and *Amici*

Woodhull Freedom Foundation, Human Rights Watch, Eric Koszyk, Jesse Maley, a/k/a Alex Andrews, and The Internet Archive, Plaintiffs below, Appellants here, filed suit challenging the constitutionality of the Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. No. 115-164, 132 Stat. 1253 (2018) ("FOSTA"), naming as Defendants, the Appellees here, the United States, and the Attorney General of the United States in his official capacity, currently Matthew G. Whitaker (Acting). Appellants anticipate that *amici* in support of this appeal will include (1) Freedom Network USA, the Sex Workers Project, the National Center for Transgender Equality, New York Transgender Advocacy Group, Sharmus Outlaw Advocacy and Rights (SOAR) Institute, Decriminalize Sex Work, the National Coalition for Sexual Freedom, Free Speech Coalition, Brooklyn Defender Services, and Protasia Foundation; (2) Copia Institute, Engine Advocacy, and other entities aligned with their position; and (3) the Institute for Free Speech, Center for Democracy and Technology, and other entities aligned with their position. There are no other parties or *amici* at this time.

B. Rulings Under Review

The ruling under review is *Woodhull Freedom Foundation, et al. v. United States*, 334 F. Supp. 3d 185 (D.D.C. 2018), and its accompanying Order, by which the District Court denied Appellants' motion for a preliminary injunction and dismissed their Complaint, each challenging the constitutionality of the Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. No. 115-164, 132 Stat. 1253 (2018) ("FOSTA").

C. Related Cases

There are no related cases.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and D.C. Circuit Rule 26.1, Appellant states as follows:

Appellants Eric Koszyk and Jesse Maley a/k/a Alex Andrews are individuals not required to submit a corporate disclosure statement, and Woodhull Freedom Foundation, Human Rights Watch, and The Internet Archive are incorporated as nonprofit organizations, with no parent corporations, and no stock or other interest owned by a publicly held company.

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JURISDICTIONAL STATEMENT

The District Court had jurisdiction of this action arising under the Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. No. 115-164, 132 Stat. 1253 (2018) ("FOSTA"), and the United States Constitution, particularly the First and Fifth Amendments, pursuant to 28 U.S.C. §§ 1331, 2201, and 2202, and Federal Rules of Civil Procedure 57 and 65. Plaintiffs-Appellants filed a timely notice of appeal of the District Court's September 24, 2018, JA417-419, final Memorandum Opinion and Order on October 9, 2018. JA387-416. This Court has jurisdiction over both appeals under 28 U.S.C. § 1291.

ISSUES PRESENTED

1. Whether the District Court erred in holding Appellants lack standing to challenge FOSTA's constitutionality where, on its face and in its reach and ambiguity, it presents a credible threat of prosecution, and thus has chilled Appellants' speech (and that of numerous non-parties), led them to refrain from online speech engaged in freely pre-enactment, and deprived them of previously available online platforms.

2. Whether Appellants are likely to succeed on their constitutional challenges to FOSTA where there is a credible threat of prosecution, cessation and diminution of online speech, and loss of access to online platforms, thereby establishing irreparable harm due to loss of constitutional rights if FOSTA is not preliminarily enjoined.

INTRODUCTION

The Allow States and Victims to Fight Online Sex Trafficking Act ("FOSTA") is the furthest-reaching attempt to censor online speech since Congress first attempted to regulate the Internet through anti-indecency provisions in the Communications Decency Act, 47 U.S.C. § 223 ("CDA"). FOSTA makes it easier for federal prosecutors, state law enforcement officials, and civil litigants to impose crushing liability on Internet speech using expansive but undefined terms regarding the "promotion" or "facilitation" of prostitution and/or the "reckless disregard" of conduct that "contributes to sex trafficking." FOSTA's new, content-based criminal penalties and heavy civil liability for online publishers have already led to substantial diminution of online speech on these subjects, and on issues peripheral to them.

Appellants Woodhull Freedom Foundation ("Woodhull"), Human Rights Watch ("HRW"), Eric Koszyk, Jesse Maley, a/k/a Alex Andrews ("Andrews"), and the Internet Archive ("the Archive") brought a pre-enforcement facial challenge to FOSTA on several grounds: The law is a content-based prohibition of online speech that fails strict First Amendment scrutiny; its provisions are unconstitutionally vague, overbroad and viewpoint-discriminatory; and it constitutes a forbidden *ex post facto* law. Appellants showed FOSTA had an immediate and widespread censorial effect across the Internet, and upon each of them individually, and should be preliminarily enjoined.

The District Court disagreed. Without reaching the merits or analyzing how FOSTA altered the existing status of online speech regulation, the Court accepted the Government's position that none of the Appellants were injured by FOSTA. It accordingly held that Appellants lacked standing to challenge the law in the absence of a credible threat of prosecution. JA403.

That holding is incorrect. Under the proper standard, when addressing pre-enforcement challenges to recently enacted statutes that facially restrict expressive activity, courts must assume a credible threat of prosecution in the absence of compelling contrary evidence. Appellants need not await prosecution or face imminent civil liability before they may challenge a law regulating speech. Moreover, standing should have been adjudged according to the plaintiffs' interpretation of the statute, not that of the Government. The District Court failed to apply this standard, and more importantly, ignored entirely the fact that FOSTA authorizes enforcement not just by federal prosecutors, but also law enforcement officials in every state, and by countless numbers of civil litigants.

Accordingly, Appellants ask this Court to reverse the District Court's incorrect dismissal of their constitutional claims. In addition, under *de novo* review, Appellants ask this Court to hold that Appellants are likely to succeed on the merits of their constitutional claims and that preliminary injunctive relief should be granted.

STATEMENT OF THE CASE

A. Internet Regulation, the First Amendment, and Section 230

The Internet gives individuals the ability to access and share information as "diverse as human thought," on topics ranging from "the music of Wagner to Balkan politics to AIDS prevention to the Chicago Bulls." *Reno v. ACLU*, 521 U.S. 844, 849-52 (1997) (citation omitted). The first courts to consider the implications of this new medium quickly realized the Internet is "the most participatory form of mass speech yet developed" that makes possible for the first time "a never-ending worldwide conversation." *ACLU v. Reno*, 929 F. Supp. 824, 883 (E.D. Pa. 1996) (Dalzell, J.) ("*Reno I*"), *aff'd*, 521 U.S. 844. This naturally enabled people to communicate about sex, which the Supreme Court has long acknowledged as "a great and mysterious motive force in human life" that "indisputably [has] been a subject of absorbing interest … through the ages," as "one of the vital problems of human interest and [] concern." *Roth* v. *United States*, 354 U.S. 476, 487 (1957).

Congress responded to the emergence of the publicly available Internet by trying to censor it. Senator James Exon proposed the CDA to prohibit "indecent" speech online as part of a comprehensive rewrite of the Communications Act. At the time, Congress believed it could freely regulate the Internet under relaxed First Amendment scrutiny just as it regulates broadcasting, expression directed to minors, or certain "secondary effects." *Reno*, 521 U.S. at 867. However, another provision

of the CDA, Section 230, was added to Senator Exon's proposal as something of a First Amendment "savings clause." Internet Freedom and Family Empowerment Act, H.R. 1978, 104th Cong. (1995). It recognized that free expression on the Internet would depend greatly on online publishers' ability to host third-party speech without risking liability, and to make editorial judgments about expression they decided to permit. *See, e.g.*, *Batzel v. Smith*, 333 F.3d 1018, 1027-29 (9th Cir. 2003).

The Supreme Court rejected the censorial provisions of the CDA, as well as their constitutional premise, finding "our cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium." *Reno*, 521 U.S. at 870. It raised alarms about any approach to Internet regulation that would lead speakers to worry whether they might risk liability if they communicated about such things as birth control, homosexuality, sexually oriented topics, or prison rape (among many others). *Id*. at 871. Meanwhile, the CDA's speech-protective federal immunity provisions in Section 230 remained intact, providing essential support for online freedom of expression. *E.g.*, *Jones v. Dirty World Entm't Recordings LLC*, 755 F.3d 398, 408-09 (6th Cir. 2014); *Universal Commc'n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 418-19 (1st Cir. 2007); *Batzel*, 333 F.3d at 1027-29.

These twin pillars of online free expression—strict scrutiny of speech regulation, coupled with freedom to transmit third-party speech without risk of civil

or criminal sanctions—have helped maintain the Internet as "the premier technological innovation of the present age." *American Libraries Ass'n v. Pataki*, 969 F. Supp. 160, 161 (S.D.N.Y. 1997). Without such protection, online communication would have been far less robust, diverse, and free. *Zeran v. America Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997).

B. FOSTA's Specific Provisions

FOSTA effects three major changes in the law:

First, newly added 18 U.S.C. § 2421A makes it a felony for anyone to own, manage, or operate an interactive computer service—as defined in Section 230—using any facility or means of interstate commerce "with the intent to promote or facilitate the prostitution of another person." 18 U.S.C. § 2421A(a). It also creates an "aggravated violation" for when the underlying conduct "promotes or facilitates the prostitution of 5 or more persons" or the person "acts in reckless disregard" of the fact that their conduct "contributed to sex trafficking." *Id*. § 2421A(b).[1] Anyone convicted of violating Section 2421A(a) can be fined, imprisoned for up to 10 years, or both; for "aggravated violations" under Section 2421A(b) imprisonment may be for up to 25 years. *Id*. § 2421A(a)-(b). The statute does not define the terms

[1] Sections 2421A(c) and (d) allow for, respectively, civil recovery damages and attorneys' fees, and mandatory restitution for victims of the crime.

"promotes," "facilitates," or "prostitution." Nor are "promote," "facilitate," or "contribute to sex trafficking" defined for purposes of Section 2421A(b).

Second, FOSTA expanded the existing federal criminal trafficking law in 18 U.S.C. § 1591 and related civil claims under 18 U.S.C. § 1595.[2] The law not only prohibits specific acts of traffickers, but reaches anyone who "participates in a venture," which requires only "reckless disregard" to make out a violation, and which is broadly defined as including anyone who "benefits" either financially, or by receiving "anything of value" from their participation. FOSTA further muddies the waters by newly defining "participation in a venture" to mean "knowingly assisting, supporting, or facilitating a violation of" Section 1591 (which incorporates the "reckless disregard" standard). *See id.* § 1591(e)(4). The House Report explained that under Section 1591 prior to its amendment by FOSTA, the "knowledge standard [was] difficult to prove beyond a reasonable doubt," and that the law needed to more broadly target promotion and facilitation. H.R. Rep. No. 115-572, 2018 U.S.C.C.A.N. 73, 76 (2018). FOSTA thus broadens what acts are covered by the

[2] Section 1591(a) imposes criminal penalties (and, through Section 1595, civil liability) for anyone who knowingly recruits, entices, harbors, transports, provides, obtains, advertises, maintains, patronizes, or solicits a person, *or* who "benefits financially or by receiving anything of value from participation in a venture" involving those enumerated acts. The *mens rea* set forth in Section 1591 is knowledge *or* reckless disregard (unless the act is advertising, in which case only knowledge suffices) that a person caused to engage in a commercial sex act is a minor or was subject to force, threats of force, fraud, and/or coercion. 18 U.S.C. § 1591(a).

law through use of the verbs "assisting or supporting, or facilitating" trafficking, and confusingly ties back into the "reckless disregard" standard of *mens rea*. 18 U.S.C. § 1591(a)(2).

Under Section 1591 as amended, speakers or Internet platforms seeking to avoid liability now must navigate overlapping and impenetrable *mens rea* standards. The result is that FOSTA appears to create liability whether or not the platform realized or suspected that a crime occurred or might occur, and online intermediaries must anticipate how law enforcement officials in every state might interpret these standards. This is because FOSTA amends the trafficking law to permit state attorneys general to bring civil actions *parens patriae* if there is reason to believe "an interest of the residents of that State has been or is threatened or adversely affected by any person who violates section 1591." *See id*. § 1595(d). They must also anticipate how countless numbers of civil litigants might construe the law, because FOSTA eliminated Section 230 immunities from liability under Section 1595.

Third, FOSTA diminished Section 230 immunity in two significant ways. Primarily, it vastly expanded the risk of enforcement by amending Section 230(e) to allow for both state criminal prosecutions and private civil actions, eliminating immunity for: (A) any claim in a civil action under Section 1595 if the conduct underlying the claim constitutes a violation of Section 1591; (B) any charge in a criminal prosecution under state law if the underlying conduct would constitute a

violation of Section 1591; or (C) any charge in a criminal prosecution under state law if the underlying conduct would constitute a violation of section 2421A. *See* 47 U.S.C. § 230(e)(5). Further, by adding new offenses under federal law and expanding existing ones, FOSTA broadened potential liability for Internet intermediaries, who are not shielded by Section 230 from federal criminal claims. 47 U.S.C. § 230(e).

The amendments to Section 230, like all of FOSTA, became effective on the date of enactment. However, the changes to Section 230's statutory immunities are *retroactive* in that they apply "regardless of whether the conduct alleged occurred, or is alleged to have occurred, before, on, or after … enactment." *See* FOSTA, Pub. L. No. 115-164 § 4(b).

C. FOSTA's Immediate Impact

1. Generally

FOSTA profoundly altered the ecosystem for online speech in at least two critical ways: (1) it chilled numerous would-be online speakers into self-censoring because of the risk of criminal and civil liability; and (2) it burdened numerous online platforms and service providers with new oversight obligations, causing many that had previously hosted such speech and otherwise provided services to cease

doing so. These were precisely the censorial effect many predicted before FOSTA was enacted.[3]

Online service providers that enable interpersonal contact by users—including many lacking a connection to sexual content—immediately removed content, eliminated entire sections of websites, or were shuttered altogether out of fear of state or federal prosecution, or ruinous civil liability. *See* JA124-127 ¶ 13. These included websites that hosted personals ads, community forums devoted to discussions of sexuality and lawful adult sexual relationships, speech about non-sexual massage therapy and other non-sexual services, as well as dating sites. *Id*. ¶ 13. Some online service providers took these actions simply because they could not afford to monitor the activities of third parties on their sites as the new law effectively requires. *Id*. (discussing how the volunteer-led personals ad website www.pounced.org shut down).

Just two days after the Senate passed H.R. 1865, the online classified ad service Craigslist eliminated all personals ads, including non-sexual categories such as "Missed Connections" and "Strictly Platonic." In a public statement, it explained that it censored these sections due to FOSTA:

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[3] *See, e.g.*, Eric Goldman, *'Worst of Both Worlds' FOSTA Signed Into Law, Completing Section 230's Evisceration*, Tech. & Mktg. Law Blog, April 11, 2018 (https://blog.ericgoldman.org/archives/2018/04/worst-of-both-worlds-fosta-signed-into-law-completing-section-230s-evisceration.htm).

> US Congress recently passed HR 1865, "FOSTA," seeking to subject websites to criminal and civil liability when third parties (users) misuse online personals unlawfully.
>
> Any tool or service can be misused. We can't take such risk without jeopardizing all our other services, so we have regretfully taken craigslist personals offline. Hopefully we can bring them back some day.

JA123-124 ¶ 10.[4]

Reddit, a site where users post content, including news articles, photos, or links, and participate in comment threads discussing the posts, began removing "subreddits" that relate to sex. JA124 ¶ 11. It also warned the moderator of the r/sexworkers subreddit, which is a "community forum for sex workers, clients, and even those unaffiliated with the industry to … ask questions and share resources," that the forum could be shut down if administrators felt it infringed Reddit's post-FOSTA policy. *Id*. Google changed enforcement of its Google Play policy to forbid publishing of "sexually explicit or pornographic images or videos." JA125 ¶ 13.

The Desiree Alliance, a national coalition of current and former sex workers, health professionals, social scientists, sex educators, and their supporting networks, cancelled its July 2019 conference, scuttling what would have been the largest U.S. gathering to address human, labor, and civil rights for sex workers. In an online post, its director announced that because of FOSTA, "our leadership made

[4] *See* About FOSTA, CRAIGSLIST, https://www.craigslist.org/about/FOSTA (last visited June 12, 2018.). Users now receive "404 Errors" if they try to access URLs where Craigslist's personals formerly appeared.

the decision that we cannot put our organization and our attendees at risk." *See* http://desireealliance.org/conference. *See also* JA135 ¶ 39.

2. Impact on Appellants

Appellants are individuals and organizations engaged in constitutionally protected speech on the Internet—including a national human rights organization dedicated to sexual freedom, an international human rights organization, a massage therapist, an activist dedicated to assisting and advocating for the rights of sex workers, and a digital library of Internet sites and other cultural artifacts in digital form. The Complaint alleged that FOSTA had adversely affected each Appellant, and they submitted detailed supporting declarations in subsequent briefing.

Woodhull Freedom Foundation, a tax-exempt education, advocacy and lobbying organization dedicated to protecting the fundamental human right to sexual freedom, focuses on supporting the health, safety, and protection of those under the broad umbrella of "sex workers," including adult film performers, live webcam models, sexual wellness instructors, escorts, and prostitutes. JA128-129 ¶¶ 2-3, 5. Because Woodhull's pursuit of its mission involves using the Internet in interstate commerce, FOSTA caused it to censor its publication of information on its site that could assist sex workers negatively impacted by the law, and to cease posting other resources for sex workers. Examples included limiting Woodhull from voicing on its blog and in social media opposition to FOSTA's enforcement against

marginalized sex workers, from allowing third parties to post similar material on Woodhull's *Sex and Politics* blog, and restricting the online speech associated with Woodhull's signature event, its annual multi-day Sexual Freedom Summit, held each August. JA133-134 ¶¶ 28, 31-32.

Alex Andrews is a long-time advocate for sex worker rights and co-founder and organizer of both a number of advocacy groups for sex worker health, safety, and human rights, and of the website Rate That Rescue (www.ratethatrescue.org), a free sex worker-led, community effort to share information, the legality of which is uncertain because of FOSTA. JA146-148 ¶¶ 1-10, 12-13. Further, Andrews canceled her acquisition and development of an electronic tool for sex workers to report violence, harassment, and other harmful behavior. JA152-153 ¶¶ 32-34, 37-39.

FOSTA endangers **Human Rights Watch's** human rights advocacy because HRW seeks to make sex work safer, which has the concomitant effect of making it easier. HRW advocates on behalf of sex workers' rights and safety in the US and internationally, and by documenting abuses against sex workers with a goal of making sex work less dangerous. For example, HRW has warned sex workers about methods police use to discover and shut down sex work. HRW credibly fears these activities could be seen as violating FOSTA. JA138 ¶ 5.

The Internet Archive intentionally stores and displays a vast amount of both historical website data and third-party content, including content related to prostitution and trafficking, and has "no practical ability to evaluate the legality of" such third-party material. JA157 ¶ 14. The Internet Archive reasonably fears prosecution for both its preservation of web pages that may later be found to violate FOSTA, and for third-party material it hosts. Additionally, FOSTA has inhibited the Internet Archive's mission of preserving access to online information for the general public by driving a significant amount of content off the web.

Eric Koszyk is a licensed massage therapist and sole proprietor of Soothing Spirit Massage, who, before FOSTA, used the online classified ad platform Craigslist.org to reach approximately 90 percent of his clientele. When Craigslist eliminated its Therapeutic Services section in response to FOSTA, he lost this channel, and the business and revenues associated with it.

D. District Court Proceedings

Appellants filed a Complaint seeking declaratory and injunctive relief, challenging FOSTA's constitutionality under the First and Fourteenth Amendments, both on its face and as applied. Appellants simultaneously sought a preliminary injunction pending resolution of the constitutional challenge, *see, e.g.*, *Abdullah v. Bush*, 945 F. Supp. 2d 64, 67 (D.D.C. 2013), *aff'd sub nom. Abdullah v. Obama*, 753 F.3d 193 (D.C. Cir. 2014), because "loss of First Amendment freedoms, for even

minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976).

The Government moved to dismiss on grounds that Appellants lacked standing to bring the claims, and on the merits. On September 24, 2018, the District Court dismissed the case and the motion for preliminary injunction, holding that Appellants lacked standing. It did not reach the merits of Appellants' claims.

Appellants timely appealed.

STANDARD OF REVIEW

This Court exercises *de novo* review over the District Court's conclusions of law, *Menkes v. U.S. Dep't of Homeland Sec.*, 637 F.3d 319, 329 (D.C. Cir. 2011), and conducts an independent examination of the whole record to ensure that the judgment does not constitute a forbidden intrusion on First Amendment rights. *E.g.*, *Liberty Lobby, Inc. v. Rees*, 852 F.2d 595, 598 (D.C. Cir. 1988) (quoting *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 499 (1984)).

STATUTES AND REGULATIONS

The text of 18 U.S.C. §§ 1591 and 2421A, as amended and added by FOSTA, respectively, and the text of 47 U.S.C. § 230, as amended by FOSTA, appear in the Addendum.

SUMMARY OF ARGUMENT

FOSTA specifically targets speech. It newly criminalizes undefined acts of "promoting" or "facilitating" prostitution via interactive computer service, 18 U.S.C.

§ 2421A; expands federal trafficking offenses for "participating in a venture" by "assisting," "supporting," or "facilitating" violations, all of which are undefined, *id.* § 1591(a), (e)(4); and eliminates statutory immunity from state prosecution and civil liability for interactive computer services in these areas. 47 U.S.C. § 230(e)(5). The impact of the statute on protected online speech was immediate, widespread, and dramatic.

Appellants, speakers engaged in protected online expression—comprising a national sexual freedom human rights organization, an international human rights organization, a massage therapist, a sex worker activist, and a library of online and other cultural digital artifacts— along with many others in the online ecosphere, self-censored in reaction to FOSTA, and lost access to online platforms. Despite detailed declarations supporting the facial constitutional challenge, the District Court erroneously dismissed for lack of standing, holding, based on the Government's interpretation of FOSTA, that most Appellants did not show a credible threat of prosecution; for the remaining Appellant, it held redressability was lacking due to absence of proof he would regain access to lost online platforms upon invalidation of the law.

To reach its conclusion, the District Court disregarded the liberal standing doctrine that governs pre-enforcement facial challenges to laws that burden speech. Such challenges need not await prosecution or imminent civil liability—due to the risk of self-censorship. Standing must be adjudged under plaintiffs' interpretation

of the statute, not that of the government. Under the proper standard, courts assume credible threat of prosecution absent compelling contrary evidence. The District Court ignored these rules, applying instead the standard for pre-enforcement challenges to laws *not* burdening expressive rights, and conflating the merits and standing analyses.

The District Court erred by focusing primarily on Section 2421A, while overlooking FOSTA's multifaceted provisions for imposing liability on speakers and online intermediaries. It failed to address the extent to which FOSTA's plain terms can encompass constitutionally-protected advocacy for sex workers, provision of health-related information, and harm-reduction efforts. Its conclusion that FOSTA requires intent to promote "specific unlawful acts"—even though it lacks such an express requirement—ignores that terms such as "promote" or "facilitate" as used in FOSTA are susceptible to multiple, wide-ranging meanings that reach speech that makes sex work easier or assists it in any way. And the District Court's attempt to support its view of FOSTA by analogizing to the Travel Act was inapt. That law prohibits only conduct not speech, includes terms narrowing its application as compared to FOSTA, and its applications in prosecutions make it less clear—not more—how online speech avoids "promoting" or "facilitating" prostitution.

The District Court's "credible threat" assessment also ignored that FOSTA's chilling effect is beyond the federal Government's control. In addition to giving it

new offenses to pursue, the law can now be enforced by state prosecutors and private litigants, each of which will likely have their own definitions of FOSTA's operative terms such as "promote," "facilitate," "assist," and "support," with the state laws that may now be enforced no doubt applying differing *mens rea* standards as well. Likelihood of enforcement finds support in the history of Internet regulation and of FOSTA, which clearly reflect it was designed specifically to facilitate pursuit of online intermediaries.

In this case each Appellant demonstrated standing, whether through removal of their online content, likelihood of denied services, or reasonable fear of prosecution or civil liability, often resulting in self- censorship. Most Appellants showed how their advocacy, provision of information and resources, and/or hosting of others' online speech could be characterized by those so motivated as "promoting" or "facilitating" sex work by making it easier—with the remaining Appellant showing he had been censored already when an online intermediary cut off service, citing FOSTA as the reason. The credible threat of FOSTA's enforcement also establishes its overbreadth and vagueness, and thus Appellants' likelihood of success on the merits and right to a preliminary injunction, in that such success is effectively determinative in First Amendment challenges like this.

ARGUMENT

I. THE DISTRICT COURT ERRED IN DISMISSING THE CONSTITUTIONAL CHALLENGE FOR LACK OF STANDING

To establish Article III standing, a plaintiff must show (1) an "injury in fact," (2) a sufficient "causal connection between the injury and the conduct complained of," and (3) a "likel[ihood]" the injury "will be redressed by a favorable decision." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 157-58 (2014) ("*SBA List*") (quoting *Lujan* v. *Defenders of Wildlife*, 504 U. S. 555, 560-61 (1992)).

In this pre-enforcement challenge to FOSTA, Appellants established injury-in-fact by plausibly alleging "an intention to engage in a course of conduct [1] arguably affected with a constitutional interest, but [2] proscribed by a statute, and [3] [that] there exists a credible threat of prosecution thereunder." *SBA List*, 573 U.S. at 159 (quoting *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979)). Each of the Appellants established a concrete stake in the outcome of this case, as set forth in the Complaint and in declarations filed in support of their Motion for Preliminary Injunction.

The District Court's holding denying standing is incorrect must be reversed. First, it disregarded the liberal standing doctrine employed in First Amendment challenges. Second, it misread the plain text of FOSTA in numerous ways. Third, it ignored the myriad avenues FOSTA creates for credible threats of prosecution and civil liability for Appellants and others who engage in online speech, disregarding

the fulsome history of prosecutorial and legislative efforts to punish unpopular speech online.

A. Relaxed Standing Requirements Govern Facial Pre-Enforcement Challenges to Laws That Burden Speech

The District Court's standing analysis bypassed decades of First Amendment precedent. "[C]ourts have shown special solicitude to pre-enforcement challenges brought under the First Amendment, relaxing standing requirements and fashioning doctrines, such as overbreadth and vagueness, meant to avoid the chilling effects that come from unnecessarily expansive proscriptions on speech." *N.Y. Republican State Comm. v. SEC*, 799 F.3d 1126, 1135-36 (D.C. Cir. 2015). This Court has found that "courts' willingness to permit pre-enforcement review is 'at its peak' when claims are rooted in the First Amendment." *Id*. (quoting *Unity08 v. FEC*, 596 F.3d 861, 865 (D.C. Cir. 2010)). When a law targets speech, "the alleged danger … is, in large measure, one of self-censorship; a harm that can be realized even without an actual prosecution." *Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 393 (1988).[5] As a consequence, "actual arrest, prosecution, or other enforcement action is not a

[5] Relaxed standing recognizes that laws restricting speech chill numerous speakers aside from the plaintiffs. *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973) ("[T]he statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression."); *Secretary of State v. Joseph H. Munson Co.*, 467 U.S. 947, 958 (1984) ("Facial challenges to overly broad statutes are allowed not primarily for the benefit of the litigant, but for the benefit of society.").

prerequisite to challenging [a] law" that regulates speech. *SBA List*, 573 U.S. at 158-59.

In First Amendment challenges, the "credible threat of prosecution" standard "is quite forgiving." *ACLU v. Reno*, 31 F. Supp. 2d 473, 479-80 (E.D. Pa. 1999) ("*Reno II*") (quoting *New Hampshire Right to Life PAC v. Gardner*, 99 F.3d 8, 14 (1st Cir. 1996)). A plaintiff's fear of prosecution remains "credible" even if the government disclaims any intention to enforce the law against it, and even if the law has not been previously enforced.[6] As one court explained, "there is nothing that prevents the State from changing its mind," and as such, the state's asserted intention to not enforce the law against the plaintiff "cannot remove [a plaintiff's] reasonable fear that it will be subjected to penalties for its [] expressive activities." *Vermont Right to Life Comm. v. Sorrell*, 221 F.3d 376, 383 (2d Cir. 2000). *See also National Org. for Marriage, Inc. v. Walsh*, 714 F.3d 682, 689-90 (2d Cir. 2013) (finding a claim ripe because plaintiff "feared" the law applied to it, absent any governmental indication one way or the other). A party has standing even if it has no intention to violate the challenged law, so long as it reasonably believes others may accuse it of

[6] *See, e.g.*, *Babbitt*, 442 U.S. at 302 (standing exists even though government maintains law limiting speech that "has not yet been applied and may never be applied"); *Doe v. Bolton*, 410 U.S. 179, 188 (1973) ("Georgia-licensed doctors … have standing despite the fact that the record does not disclose that any one of them has been prosecuted, or threatened with prosecution, for violation of the State's abortion statutes.").

doing so. *See U.S. Telecom Ass'n v. FCC*, 825 F.3d 674, 739 (D.C. Cir. 2016), *cert. denied*, 139 S. Ct. 475 (2018).

This Court "has interpreted the Supreme Court's pre-enforcement standing doctrine broadly in the First Amendment sphere," and held that "'at the motion to dismiss stage, a plaintiff's non-frivolous contention regarding the meaning of a statute must be taken as correct for purposes of standing.'" *Sandvig v. Sessions*, 315 F. Supp. 3d 1, 15, 18 (D.D.C. 2018) (quoting *Info. Handling Servs., Inc. v. Defense Automated Printing Servs.*, 338 F.3d 1024, 1030 (D.C. Cir. 2003)). *See American Booksellers*, 484 U.S. at 392 (finding injury-in-fact for plaintiffs "who, *if their interpretation of the statute is correct*, will have to take significant and costly compliance measures or risk criminal prosecution") (emphasis added); *Emergency Coal. to Defend Educ. Travel v. U.S. Dep't of Treasury*, 545 F.3d 4, 10 (D.C. Cir. 2008) ("In considering standing [in a First Amendment challenge], we must assume the merits in favor of the party invoking our jurisdiction."); *American Fed'n of Gov't Emps. v. Pierce*, 697 F.2d 303, 305 (D.C. Cir. 1982) (*per curiam*) ("For purposes of the standing issue, we accept [plaintiff's legal theory] as valid[.]"). *See also generally Barr v. Clinton*, 370 F.3d 1196, 1199 (D.C. Cir. 2003) (reviewing motion to dismiss for

lack of standing under Rule 12(b)(1) requires construing the complaint liberally, granting plaintiff the benefit of all inferences that can be derived from facts alleged).[7]

The threat of enforcement is magnified when the challenged statute is enforceable "by any person" and not just a prosecutor. *SBA List*, 573 U.S. at 164. Thus, the threat that speakers may be objectively chilled by the prospect of civil penalties or private rights of action provides an independent basis for pre-enforcement standing. *See Chamber of Commerce of U.S. v. FEC*, 69 F.3d 600, 603 (D.C. Cir. 1995) (finding standing and noting that statute allowed private parties to trigger enforcement). *See also Bland v. Fessler*, 88 F.3d 729, 736-37 & n.11 (9th Cir. 1996) (finding standing based on possible civil fines and private enforcement actions even where state had never enforced statute); *Walsh*, 714 F.3d at 689-90 ("The fear of

[7] The Second Circuit has explained that "there may be other, perhaps even better [constructions of the disputed statute]," but standing exists if a plaintiff's interpretation "is reasonable enough that [plaintiff] may legitimately fear [] it will face enforcement of the statute by the State." *Sorrell*, 221 F.3d at 383; *Reno II*, 31 F. Supp. 2d at 481 (relying on plaintiffs' interpretation of Child Online Protection Act, which court found "not unreasonable"). *See also California Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1095 (9th Cir. 2003) (requiring only that plaintiff's intended speech "*arguably* falls within the statute[]") (emphasis added); *Majors v. Abell*, 317 F.3d 719, 721 (7th Cir. 2003) (holding any ambiguity in statute must be interpreted in plaintiffs' favor at motion to dismiss stage, with plaintiffs' interpretation credited unless statute "clearly fails" to cover their conduct).

civil penalties can be as inhibiting of speech as can trepidation in the face of threatened criminal prosecution.") (quoting *Sorrell*, 221 F.3d at 382).[8]

The element of redressability is also subject to relaxed standing rules in First Amendment cases. This Court has held that speakers have standing to challenge restrictions that target third parties they rely upon to reach audiences. *Block v. Meese*, 793 F.2d 1303, 1308 (D.C. Cir. 1986) (movie distributor had standing to challenge government classification of his films as "political propaganda" based on possibility of deterring potential customers). Challengers of online speech restrictions have standing even when the restriction targets third-party online platforms and services, which respond by curtailing the speakers' lawful speech. *Center for Democracy & Tech. v. Pappert*, 337 F. Supp. 2d 606, 649-50 (E.D. Penn. 2004). Plaintiffs in such cases need not prove their speech will be restored once legal impediments are lifted. It suffices to show that, if the case succeeds, future decisions will be made without the government's restriction.[9]

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[8] The Supreme Court has recognized that federal courts have long found injury-in-fact in cases in which "plaintiff's self-avoidance of imminent injury is coerced by threatened enforcement action of a *private party* rather than the government." *Medimmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 130 (2007); *Abbott Labs. v. Gardner*, 387 U.S. 136, 152-53 (1967).

[9] *See, e.g., Backpage.com, LLC v. Dart*, 807 F.3d 229, 238 (7th Cir. 2015); *Council for Periodical Distribs. Ass'n v. Evans*, 642 F. Supp. 552, 560 (M.D. Ala. 1986) (publishers' claims were redressable because challenge would ensure future decisions about hosting publishers' content "would be made free of coercion and without prior restraint"). *See also Parsons v. Dep't of Justice*, 801 F.3d 701, 717

B. The District Court Misapplied Standing Doctrine

The District Court neither cited nor addressed any of this Circuit's controlling precedents regarding standing in the First Amendment context, relying instead on this Court's general summary of pre-enforcement standing in *Seegars v. Gonzales*, 396 F.3d 1248 (D.C. Cir. 2005). JA403. But *Seegars* expressly set forth the standard for "preenforcement challenges to a criminal statute *not* burdening expressive rights," *id.* at 1253 (emphasis added), and acknowledged the "tension between [the non-First Amendment standard] and our cases upholding preenforcement review of First Amendment challenges to criminal statutes." *Id.* at 1254 (discussing *Navegar, Inc. v. United States*, 103 F.3d 994 (D.C. Cir. 1997)). This Court explained that in First Amendment cases such as this, plaintiffs need only show "an intent to commit acts that would really or arguably violate the provisions challenged." *Id*. (citing *Chamber of Commerce of U.S.*, 69 F.3d at 603-04, and *American Library Ass'n v. Barr*, 956 F.2d 1178, 1194, 1196 (D.C. Cir. 1992)).[10]

(6th Cir. 2015) ("it is reasonable to assume a likelihood that the injury would be partially redressed" even though court did not know how declaratory judgment might affect actions of third-party law enforcement officers).

[10] The only case the District Court cited regarding application of the standard in First Amendment cases is *Blum v. Holder*, 744 F.3d 790 (1st Cir. 2014), an out-of-circuit decision that is readily distinguishable. *Blum* involved a pre-enforcement challenge to 18 U.S.C. § 43, which criminalizes "force, violence, and threats involving animal enterprises." Unlike FOSTA, Congress specified that the statute did not apply to "*any* expressive conduct (including peaceful picketing or other peaceful

The District Court also erred by conflating the merits and standing analyses. For standing, the issue is not whether the Government could obtain a conviction if it prosecuted one of the Appellants under the law, or whether FOSTA's terms are constitutionally infirm. Rather, the court "must assume the merits in favor of the party invoking [its] jurisdiction," and it is improper to mix a merits question into the standing analysis. *Emergency Coal. to Defend Educational Travel*, 545 F.3d at 10. The proper issue is not whether a plaintiff would lose a case brought under FOSTA, but whether the Appellants reasonably believe they might be forced to defend such a case. *See U.S. Telecom Ass'n*, 825 F.3d at 739.[11]

C. The District Court Misread FOSTA

The District Court's standing analysis also was founded on an erroneous reading of FOSTA that adopted the Government's interpretation, not the Plaintiffs' as required. JA403.

1. Statutory Analysis

FOSTA adopted a number of changes in the law, including new prohibitions set forth in Section 2421A, modifications of Section 1591 that broadened its scope,

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demonstration) protected from legal prohibition by the First Amendment to the Constitution." 18 U.S.C. § 43(e)(1) (emphasis added).

[11] Although the court claimed this analysis "does not go to the merits," JA401 n.11, it also said that it "need not determine what daylight, if any, exists between the 12(b)(1) and 12(b)(6) standards." JA400 n.9.

and amendments to Section 230 that diminished immunity for online intermediaries. The District Court's analysis largely ignored the constellation of changes and focused primarily on the text of Section 2421A as if it were a solitary enactment. Even from that limited perspective, the District Court's analysis is erroneous.

Section 2421A makes it a crime to "promote or facilitate the prostitution of another person." 18 U.S.C. § 2421A(a). But the law does not define "promotes" or "facilitates." Nor does it specify what constitutes "prostitution," a term undefined by federal law. The verbs "promote" and "facilitate" are disjunctive: thus, the law bars one from "facilitating" prostitution, that is, "making it easier," *United States v. Rivera*, 775 F.2d 1559, 1562 (11th Cir. 1985), even in the absence of "promoting" it, that is, "advancing or actively supporting it."[12] FOSTA can thus apply broadly to "any act that would cause the unlawful activity to be accomplished or to assist in the unlawful activity in any way." *United States v. Bennett*, 1996 WL 477048, at *5 (9th Cir. Aug. 21, 1996).

As Appellants Woodhull, Human Rights Watch, and Andrews pointed out in their motion for preliminary injunction and supporting declarations, FOSTA's plain terms can be read to encompass their advocacy for sex workers, provision of health-

[12] According to the Oxford English Dictionary, "promote" means "to advance or actively support (a process, cause, result, etc.)," Oxford English Dictionary (3d ed. 2007), while Black's Law Dictionary defines "to facilitate" as "to make the occurrence of (something) less difficult." Black's Law Dictionary (10th ed. 2014).

related information, and harm-reduction activities. Woodhull, HRW, and Andrews all use and operate interactive computer services with the intent to advocate for, and to provide assistance to sex workers—including those involved in prostitution. All of these activities fall within the broad parameters of the term "facilitate." In particular, those who advocate decriminalization have good reason for concern, as such advocacy may be considered evidence of intent to facilitate a violation of the law. *See* Eugene Volokh, *Crime-Facilitating Speech*, 57 STAN. L. REV. 1095, 1187-90 (March 2005) ("an intent test will tend to deter ideological advocacy, and not just intentionally crime-facilitating speech").

But the District Court disagreed that FOSTA threatened to reach such constitutionally-protected speech, concluding instead that it required the Government to prove intent to promote "specific unlawful acts" of prostitution. JA406. However, the language of Section 2421A contains no such limitation. Unlike the Travel Act (discussed below), which requires promotion of specified criminal acts, FOSTA targets facilitation of "prostitution of another person" as a general concept.

The District Court's construction of the statute does not foreclose a credible threat of prosecution, as the Ninth Circuit recently explained in its approach to statutory construction in *United States v. Sineneng-Smith*, 910 F.3d 461 (9th Cir. 2018). The Ninth Circuit invalidated a section of the Immigration and Nationality Act that outlawed "encourag[ing] or induc[ing] an alien to come to, enter, or reside

in the United States, knowing or in reckless disregard of the fact that such coming to, entry, or residence is or will be in violation of law." *Id*. at 471 (quoting 8 U.S.C. § 1324(a)(1)(A)(iv) ("INA")). There, as here, the government argued that to show "encouragement" or "inducement" compelled the government to show "an 'intent' to violate the immigration laws," and that the encouragement had to be directed "toward [a] known audience." *Id*. at 472, 479.

But the court concluded that it didn't matter: It held that even "implying a *mens rea* requirement into the statute, and applying it only to speech to a particular person does not cure the statute's impermissible scope." *Id*. at 484. The court found it "apparent" that the INA was "susceptible to regular application to constitutionally protected speech and that there is a realistic (and actual) danger that the statute will infringe upon recognized First Amendment protections." *Id*. at 483. Thus, even under the government's reading of the statute, it could be applied to reach "[a] speech addressed to a gathered crowd, or directed at undocumented individuals on social media." *Id*. (internal footnotes omitted).

The court acknowledged the INA was "intended to restrict the facilitation of illegal immigration" and that other parts of the statute targeted specific illegal actions, but that "there is no way to get around that fact that the terms ['encourage' or 'induce'] also plainly refer to First Amendment-protected expression." *Sineneng-Smith*, 910 F.3d at 475. It therefore held the law violated the First Amendment

because it could be applied to "pure advocacy on a hotly-debated issue in our society." *Id*. at 484.[13]

By the same reasoning, there is no doubt that the verbs "promote" or "facilitate" in FOSTA could be applied to the assistance and advocacy on behalf of sex workers in which Appellants engage. Like the "encourage" or "induce" prong of the INA, FOSTA's terms on their face could apply to either speech or conduct that makes sex work "easier" or "assists" it "in any way." *Rivera*, 775 F.2d at 1562; *Bennett*, 1996 WL 477048, at *5. And, as in the INA, the two operative verbs in Section 2421A(a)—promotes and facilitates—are susceptible to "multiple and wide-ranging meanings." Unlike the statute at issue in *Williams*, they are not linked to other well-defined verbs that might cabin them to only proscribe unprotected speech. *See Williams*, 553 U.S. at 294.[14] Appellants' concern about the threat FOSTA poses is far from speculative.

[13] In reaching this conclusion, the Ninth Circuit distinguished the analysis in *United States v. Williams*, 553 U.S. 285, 293 (2008), where the Supreme Court interpreted the multiple verbs in 18 U.S.C. § 2252A(a)(3)(B)—advertises, promotes, presents, distributes, or solicits—as being limited to "offers to provide and requests to obtain child pornography." The court explained that the immigration law "does not have a string of five verbs—it is limited to only two" that "can be applied to speech, conduct, or both." *Sineneng-Smith*, 910 F.3d at 474.

[14] Likewise, the operative verbs in Section 1591(e)(4)—assisting, supporting, and facilitating—are not presented in a context that narrows their meanings to avoid broad application to speech protected by the First Amendment; FOSTA amended

2. The District Court Erroneously Analogized FOSTA to the Travel Act

The District Court also erred by relying on what it called "a persuasive body of evidence concerning prosecution under an analogous statute," JA403, finding that Section 2421A "mirrors" the Travel Act, 18 U.S.C. § 1952. It found "[t]he history of enforcement of the Travel Act gives a sense both of the meaning of the plain text of Section 2421A, and of the likelihood of enforcement for specific conduct," JA403, 407 n.12, and faulted Appellants for "not present[ing] the Court with *any* example of prosecution under the Travel Act that tracks its own theory of FOSTA's vast sweep." JA407.

If this were true, FOSTA is gratuitous surplusage. But the District Court overlooked the significant differences between FOSTA and the Travel Act:

- The Travel Act prohibits only conduct, not speech. Conversely, FOSTA specifically targets online endeavors, which necessarily involve solely speech.
- The Travel Act applies only to "offenses in violation of the laws of the State in which they are committed or of the United States." 18 U.S.C. § 1952(b) (defining "unlawful activity" as a violation of specific state laws). Conversely, in Section 2421A, the offense of "promoting" or "facilitating" prostitution requires no predicate state offense.
- The Travel Act conjoins a series of verbs that connote active involvement, making it illegal to "promote, manage, establish, carry on, or facilitate the promotion, management, establishing, or

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the existing statute expressly to broaden the law's prohibition. And Section 2421A(b)(2)'s "contribute to sex trafficking" is not defined or cabined in at all.

> carrying on, of any unlawful activity," 18 U.S.C. § 1952(a), thus narrowing the range of actions that fall within the law's scope. In sharp contrast, FOSTA criminalizes speech that "promotes" or "facilitates" prostitution.[15]

The District Court's reference to recent Travel Act prosecutions only underscores the difference between the two laws. *United States v. Reiner*, 500 F.3d 10, 13 (1st Cir. 2007), was a Travel Act prosecution where the defendant was convicted because he made all personnel decisions and handled the business's financial aspects, and *United States v. Seals*, 2014 WL 3847916, at *9 (W.D. Ark. Aug. 5, 2014), involved a defendant who hired prostitutes and handled the business's finances. JA407. These cases may illustrate what it means to "promote, manage, establish, carry on, or facilitate the promotion, management, establishing, or carrying on, of any unlawful activity" in violation of specified state laws (under 18 U.S.C. § 1952(a)), but say nothing about what it might mean to operate a website in a way that "facilitates" prostitution under FOSTA. They certainly provide Appellants no assurance they might not be prosecuted for nothing more than publishing information online, or hosting third-party speech, under FOSTA's broader prohibitions.

[15] This distinction is critical insofar as Appellants credibly fear being targeted by criminal *and* civil actions under FOSTA, because they intentionally act to make the prostitution of other people "easier" (*e.g.*, safer), but are not involved in the types of activities or direct involvement that constitutes "promotion" under the Travel Act.

Even if the comparison to the Travel Act were apt, the asserted absence of prior cases says nothing about whether Appellants' speech could be targeted under FOSTA. The Ninth Circuit rejected similar arguments in *Sineneng-Smith*, finding "the absence of convictions based purely on protectable expression is not evidence that the statute does not criminalize speech." *Sineneng-Smith*, 910 F.3d at 478. The Ninth Circuit correctly observed that "[j]ust because the government has not (yet) sought many prosecutions based on speech, it does not follow that the government cannot or will not use an overbroad law to obtain such convictions." *Id*.

D. The District Court Failed to Consider FOSTA's Multiple Pathways to Liability

The District Court's assessment of Appellants' "credible threat" under FOSTA also failed to account for the myriad new avenues of potential liability it created. In enacting FOSTA, Congress did not merely empower federal prosecutors to bring the same charges they could previously have brought under the Travel Act. To the contrary, Congress modified Sections 1591 and 230, creating multiple ways for federal and local prosecutors and private actors to drag into court those who host or post information using an interactive computer service.

Under FOSTA, federal prosecutors may charge speakers directly under Section 2421A. They may prosecute under Section 1591 as well, which was amended by FOSTA to expand its reach to include "participation in a venture" based on "reckless disregard" of activities that may assist, support, or facilitate trafficking.

FOSTA also permits state and local prosecutors to bring charges under state laws that mirror Sections 2421A and 1591. By amending Section 230 to eliminate federal immunity for such charges, FOSTA § 4 (adding 47 U.S.C. § 230(e)(5)(B)-(C)), FOSTA now allows state prosecutions that were formerly preempted.[16] Private litigants also can "enforce" FOSTA because it removes Section 230 immunity for suits brought under Section 1595 (which authorizes civil actions for damages and attorney fees for violations of Section 1591) and for civil claims in federal court for violation of 18 U.S.C. § 2421A(b).

Additionally, FOSTA allows state attorneys general to bring *parens patriae* actions on behalf of state residents anytime they have "reason to believe [their] interest … has been or is threated or adversely affected by any person who violates Section 1591." FOSTA § 6(a) (adding 18 U.S.C. § 1591(d)). FOSTA purports to impose liability for conduct occurring even before the law was signed. *Id*. § 4(b).

The chilling effect of this regime is beyond the federal Government's control. State attorneys general and private civil litigants each will likely have their own definitions of "promote," "facilitate," "assist," "support" and "contribute to sex trafficking." The various state laws that now may be enforced under FOSTA no

[16] *See, e.g.*, *People v. Ferrer*, 2016 WL 7237305 (Cal. Super. Ct. Dec. 9, 2016) and *People v. Ferrer*, No. 16FE024013 (Cal. Super. Ct. Aug. 23, 2017) (each dismissing state charges against website operators on Section 230 and First Amendment grounds); *Dart v. Craigslist, Inc.*, 665 F. Supp. 2d 961, 961 (N.D. Ill. 2009).

doubt will apply differing standards, as well as differing levels of *mens rea*.[17] Even the prospect of having to defend a meritless lawsuit brought by a state attorney general or private litigant creates a powerful disincentive to speak anywhere close to FOSTA's blurry lines.

Standing exists where "any person" may lodge a complaint under a law regulating speech where the plaintiff is a possible target of such action. *SBA List*, 573 U.S. at 164. *See 281 CARE Comm. v. Arneson*, 766 F.3d 774, 782 (8th Cir. 2014). In pre-enforcement First Amendment challenges, the issue is not whether officials or private litigants *will* apply the law to a plaintiff's speech, it is whether they *could* do so, regardless of the likelihood of that occurring. *See*, *e.g.*, *Reno I*, 929 F. Supp. at 870-72 (Dalzell, J.).

E. The District Court Ignored the Context in Which FOSTA Was Adopted

The District Court also ignored the history of Internet regulation and enforcement, and the events that led to FOSTA's adoption. In so doing, "the district judge failed to consider the full panoply of circumstances relevant to the plaintiffs'

[17] All 50 states have laws prohibiting trafficking that correspond to Section 1591. *See* Congressional Research Service, *Sex Trafficking: An Overview of Federal Criminal Law*, June 25, 2015, at 1 n.1 (listing state statutes). Almost all states ban prostitution as well through various laws, and define the offense in different ways. For example, Virginia prohibits "aiding" prostitution by various means, including "giv[ing] any information or direction to any person with intent to enable such person to commit an act of prostitution." Va. Code § 18.2-348.

claim of an imminent threat of prosecution" and instead "focused on a few saplings in a forest of far more significant growth." *Navegar*, 103 F.3d at 999.

The District Court failed to acknowledge that, for nearly a decade, law enforcement officials at the state and local levels have attempted to impose criminal and civil liability on Internet intermediaries for hosting speech related to sex. In 2008, 42 state attorneys general issued a joint statement seeking to limit the "erotic services" section of Craigslist. *See, e.g.*, http://blog.craigslist.org/2008/ 11/06/joint-statement-with-attorneys-general-ncmec. South Carolina Attorney General Henry McMaster threatened Craigslist with "criminal investigation and potential prosecution" for aiding and abetting prostitution if it did not remove its "erotic services" section as well as any "graphic pornographic material." *Craigslist, Inc. v. McMaster*, No. 2:09-cv-01308-CWH (D.S.C. 2010). A similar action was brought by the Sheriff of Cook County, Illinois, who filed suit to force Craigslist to eliminate its adult category for merely providing a neutral platform for advertising. *Dart v. Craigslist*, 665 F. Supp. 2d at 967-69. Mississippi Attorney General Jim Hood threatened to prosecute Google and served extensive document subpoenas after demanding it "take down entire websites that possibly contain illegal or dangerous content and, in his opinion, facilitate illegal activity," including human trafficking. *Google, Inc. v. Hood*, 96 F. Supp. 3d 584, 593 (S.D. Miss. 2015), *vacated and remanded*, 822 F.3d 212 (5th Cir. 2016).

States also adopted legislation aimed at online "escort" advertising. In 2012, legislatures in Washington State, New Jersey, and Tennessee passed laws banning ads for "commercial sex acts," but federal courts enjoined each one as a violation of the First Amendment and preempted by Section 230. In each case, they rejected arguments that the laws prohibited only ads for illegal transactions. *Backpage.com, LLC v. McKenna*, 881 F. Supp. 2d 1262 (W.D. Wash. 2012); *Backpage.com, LLC v. Cooper*, 939 F. Supp. 2d 805 (M.D. Tenn. 2013); *Backpage.com, LLC v. Hoffman*, 2013 WL 4502097 (D.N.J. Aug. 20, 2013).

Civil litigants also sought to impose liability on various online platforms notwithstanding the protections of Section 230. Use of civil litigation is common-place against interactive computer services to punish third-party speech asserted to have caused harm, to deny disfavored speakers a platform, to seek to effect social change, or to simply target deep pockets.[18]

[18] *See, e.g.*, *Saponaro v. Grindr, LLC*, 93 F. Supp. 3d 319, 323 (D.N.J. 2015) (Section 230 barred claim that service provider "fail[ed] to properly supervise its site," such that "a thirteen-year-old was allowed to use its services and [] hold himself out as an adult"); *Doe v. MySpace, Inc.*, 474 F. Supp. 2d 843, 849 (W.D. Tex. 2007) (Section 230 barred Plaintiff's claims that the service provider failed to implement sufficient safeguards to protect minors from sexual assault), *aff'd*, 528 F.3d 413 (5th Cir. 2008); *Doe v. SexSearch.com*, 502 F. Supp. 2d 719, 727 (N.D. Ohio 2007) ("Plaintiff attempts to do the same [] as the plaintiffs in *Doe v. MySpace* and, in fact, comes right out and tells the Court his Complaint is artfully pled to avoid the CDA."), *aff'd on other grounds*, 551 F.3d 412 (6th Cir. 2008).

When these governmental and private efforts were unsuccessful, pressure mounted for Congress to change the law, with a particular focus on cutting back on immunities Section 230 provides. *E.g.*, Letter from Nat'l Ass'n of Attorneys General to Sens. Rockefeller and Thune and Reps. Upton and Waxman, July 23, 2013 (https://www.eff.org/files/cda-ag-letter.pdf). Civil litigants who had been actively involved in suing online platforms also sought to modify the law to make imposing liability easier. Goldman, *supra* note 3.

FOSTA's *raison d'être* is to make claims and enforcement actions like those described above newly viable. It is virtually certain that its expansive terms will be used by politically ambitious prosecutors to target speech they dislike, or by aggressive plaintiffs' lawyers (particularly given FOSTA's fee-shifting and mandatory reparations provisions).

The District Court failed to acknowledge how this background underlies Appellants' perception of a credible threat of prosecution. For example, it pointed to cases Appellants cited below where courts had applied Section 230 to block efforts by local law enforcement officials and private litigants to impose liability on intermediaries, to conclude that "[t]hat line of cases, however, only reaffirms the Government's position!" JA405 (exclamation point in original). But far from supporting the Government's interpretation of the law, these cases illustrate the types

of cases that previously were barred by Section 230 that now will be permitted to go forward under FOSTA.

In addition, FOSTA will increase the risk of prosecution because it altered the level of *mens rea* required to bring a prosecution. Congress amended Section 1591 to broaden "participation in a venture" to undo the *mens rea* standard articulated in *Backpage.com, LLC v. Lynch*, 216 F. Supp. 3d 96 (D.D.C. 2016). The House Report on FOSTA explained the reason for these changes: proving specific knowledge was too difficult, so Congress had to adopt a new statute that "targets promotion and facilitation of prostitution" based on the premise that "[p]rostitution and sex trafficking are inextricably linked." H.R. Rep. No. 115-572, 2018 U.S.C.C.A.N. at 76.[19]

II. ALL OF THE APPELLANTS HAVE STANDING TO CHALLENGE FOSTA

Each of the Appellants has demonstrated standing, whether through the removal of their content, the likelihood of denied services, or a reasonable fear of criminal prosecution or civil liability often resulting in self-censorship. Under the

[19] The Government confirmed this point in the law's "signing statement," which explains that FOSTA was adopted because, under prior law, prosecutors were "limited by the high evidentiary standard needed to bring federal criminal charges." *See* Letter from Prim F. Escalona to Mick Mulvaney, Director, Office of Management and Budget, JA216-217 (explaining that FOSTA "provides for an aggravated felony if the defendant recklessly disregards that the crime contributed to sex trafficking as prohibited by 18 U.S.C. § 1591(a)," and that Section 1591's definition of "participation in a venture" was amended to "ensure federal liability" and "is not intended to be limiting").

law of this Circuit, and all others, that is enough. However, this case may proceed even if only one of the Appellants has established standing to bring a facial challenge. *Emergency Coal. to Defend Educ. Travel*, 545 F.3d at 9.

A. Woodhull Freedom Foundation

Appellant Woodhull has standing because the organization intentionally engages in activity that can easily be encompassed within FOSTA's vague and over-broad prohibitions.

Woodhull alleged sufficient facts and submitted declarations demonstrating that its speech supporting sex workers otherwise falls within Section 2421A's broad prohibitions on speech related to prostitution, and that Woodhull speaks with the intent to "facilitate" prostitution of other people by seeking to make sex work safer and thus easier. *See* JA327-300 (describing various forms of advice and support for sex workers); JA228-230 (describing activities of Woodhull, and how its speech has been chilled); JA86-88 (same). Woodhull self-censored information from its website that could assist sex workers adversely affected by the law, and declined to publish the speech of others on computer services it operates. JA133-134 ¶¶ 28, 31-33.

Woodhull also demonstrated a credible fear of prosecution based on its role as an online intermediary with respect to third party speech. JA136 ¶ 42. It was inhibited from posting other resources for sex workers on its site, from voicing on

its blog and in social media opposition to FOSTA's enforcement against marginalized sex workers, and from allowing third parties to post similar material on Woodhull's *Sex and Politics* blog. JA135-136 ¶¶ 41-42; JA133 ¶ 28. Further, FOSTA deterred it from fully promoting its Sexual Freedom Summit, JA134-135 ¶¶ 32-36, and caused Woodhull to forgo incorporation into the Summit of workshops focused on sex work. JA135 ¶ 40.

Woodhull's assessment of the risks posed by FOSTA is eminently reasonable in light of the law's text, the history that led to its enactment, and historical efforts to regulate and censor erotic speech on the Internet. Woodhull acted in significant part based on awareness that numerous other websites that provided platforms for publication of information about sex workers or sex work have closed, blocked United States users, or shut down channels associated with this category of information. JA123-127 ¶¶ 10-13; *see also* JA24-27; JA133 ¶ 29.

B. Human Rights Watch

HRW plausibly alleged a credible threat of prosecution under FOSTA, sufficient to confer standing. Like Woodhull, HRW engages in speech intended to facilitate the prostitution of another person, by making sex work safer and thus inevitably easier. Thus, for many of the same reasons as Woodhull, HRW faces a

credible threat of prosecution under Section 2421A.[20] HRW also fears that social media and other Internet platforms will be unwilling to republish its advocacy materials, based on fear of prosecution following FOSTA's reduction of Section 230's intermediary immunity, thus costing it an important means of spreading its message. JA139 ¶ 9.

The District Court has little to say about this, except to repeat the same Travel Act comparison and assert that "without that *mens rea*, there is no credible threat of prosecution, and thus no standing to bring this pre-enforcement challenge." JA410. However, this is incorrect for the reasons outlined above: FOSTA's prohibitions on "promoting" or "facilitating" the prostitution of another person are not limited to criminal actions, and can instead encompass constitutionally-protected advocacy on behalf of sex workers.

C. Alex Andrews

Alex Andrews faces a credible fear of prosecution and civil liability under FOSTA for maintaining and developing digital tools with the intent to assist sex workers. FOSTA imposes two different forms of liability on Andrews. First, there

[20] HRW documents abuses against sex workers in the United States, and elsewhere. JA137 ¶ 2. HRW publishes online documents which advocate for the rights of sex workers, including advocacy that sex work be decriminalized. JA137-139 ¶¶ 2, 3-8. HRW believes that its global advocacy against criminalization of sex work can be viewed by U.S. law enforcement or civil litigants as "promoting" or "facilitating" prostitution. JA139 ¶ 8.

is a credible risk of enforcement of Section 2421A against Andrews as a speaker, threatening liability for her advocacy, as FOSTA makes it a felony for anyone to own, manage, or operate an interactive computer service "with the intent to promote or facilitate the prostitution of another person." 18 U.S.C. § 2421A. Second, the reduction of Section 230 immunity threatens Andrews as an intermediary that operates by helping to create and maintain a website where users provides resources to sex workers, and an application that would have, but for FOSTA, increased sex worker safety. JA148-150, 152-153 ¶¶ 12-18, 23, 30-31, 32-33.

Andrews' website Rate That Rescue reflects her intent to improve the lives, health, safety, and well-being of sex workers and thus runs the risk that her advocacy will be viewed as intending to facilitate the prostitution of other people, and indeed, more than five, making her potential offense "aggravated." JA148-150, 152 ¶¶ 12-18, 23, 30-31. The website was created to "share information about all types of organizations that provide services that sex workers use." JA150 ¶ 23. This includes listing and rating a variety of organizations that provide services to sex workers, including "housing, childcare, counseling, education, and outreach." JA150 ¶ 22.[21]

[21] Andrews' fear of direct liability under Section 2421A also caused her to recommend that the Sex Workers Outreach Project put on hold a bid to purchase a mobile application and website that would have also served to improve sex worker safety by distributing information to sex workers. JA152-154 ¶¶ 32-39.

Rate That Rescue provides a list of organizations that provide free services to sex workers—including healthcare, housing, and childcare. JA151 ¶ 28. Providing childcare to sex workers makes sex work easier during the time that sex workers' children would not be otherwise cared for. JA151 ¶ 28. Evaluating "rescue services" that identify organizations that move a sex worker out of trafficking and into consensual sex work, rather than out of sex work altogether, also makes sex work safer and easier. JA149 ¶¶ 15-16. Providing a space for sex workers to review other types of online services that they regularly use, such as website hosting providers and payment processors, makes sex work easier as well. JA150 ¶ 23.

Andrews also credibly fears FOSTA liability because in providing a platform for speech of others on Rate That Rescue, she intends the website will provide helpful services and resources to sex workers.[22] Because the entire purpose of the platform is to assist sex workers and make their lives and work easier, it is highly likely the content created by its users—most of whom are sex workers and their allies—could be construed as promoting or facilitating prostitution under Section 2421A. JA151-152 ¶¶ 28-29.

As with Woodhull and HRW, the District Court found that Andrews lacked standing only by ignoring her stated intent and wrongfully limiting Section 2421A

[22] FOSTA's 230 carveouts removed state criminal and civil liability protections that previously applied to Rate That Rescue. 47 U.S.C. § 230(e)(5)(A)-(C).

to require an individual to promote or facilitate a specific, individual act of prostitution. JA411.

D. Internet Archive

The Internet Archive has standing as an online intermediary that republishes others' content and is directly targeted by FOSTA's various carve-outs from Section 230 intermediary immunity. The Internet Archive is an online library that "collects and displays web materials on behalf of the Library of Congress, the National Archives, most state archives and libraries, as well as universities and other countries, with the vast majority in its collection being material authored by third parties." JA156 ¶ 6. Given the massive scale of content available through it, the Internet Archive has no practical ability to evaluate the legality of any significant portion of the third-party content that it archives and makes available. JA157 ¶ 14.[23]

As such, the Internet Archive relies heavily on Section 230 immunity. JA157 ¶ 15. Any weakening in Section 230 immunity, thus increasing the risk that it may bear liability for the content it hosts, thus imposes great oversight burdens on the

[23] The material includes over 330 billion web pages spanning from 1996 to the present, over 17 million texts (including over 2 million scanned public-domain works), 5 million audio files, and 4 million video files. JA156 ¶¶ 8, 9, 12. The Archive "crawls" and archives about 80 million web pages per day, and over 20,000 items are added to the collection by third parties daily. These files are downloaded by tens of millions of users each month. JA156-157 ¶¶ 7, 12, 13.

Archive, creating an injury in fact and conferring standing to challenge the source of those new burdens.

The District Court disregarded the Internet Archive's concerns, both misunderstanding *how* FOSTA exposes Internet intermediaries to liability—and why that incentivizes them to silence users—and assuming that FOSTA sets forth a clear *mens rea* standard when it does not. According to the District Court, the Internet Archive has nothing to reasonably fear because it "simply cannot meet the stringent *mens rea* standard required for liability" if it cannot proactively review all user-generated content. JA414. But the question is not what liability plaintiffs may face in the abstract or simply as operators of sites hosting user speech. The practical question is what will happen when platforms receive claims that illegal speech is on their sites—and how this will affect their overall policies toward third-party content.

The Supreme Court in *Reno v. ACLU* referred to this as the problem of the "heckler's veto" and struck down a law that would have "confer[red] broad powers of censorship … upon any person" who might make false allegations. 521 U.S. at 880. *See also Zeran*, 129 F.3d at 333 (explaining that notice liability requires an intermediary to make "an on-the-spot editorial decision whether to risk liability by allowing the continued publication" of a user's speech, or else yield to the "natural incentive simply to remove messages upon notification, whether the contents were [unlawful] or not"); *Loveday v. FCC*, 707 F.2d 1443, 1458 (D.C. Cir. 1983)

(acknowledging that duty of broadcast intermediaries to investigate would cause self-censorship and render them easy targets for abuse). On its face, FOSTA will force intermediaries like the Internet Archive to err on the side of deleting content.

E. Eric Koszyk

While FOSTA raises the specter for all Appellants that they will lose services from online intermediaries on which they rely, Koszyk has been censored already. He is not bringing a pre-enforcement challenge based on objective chilling effect.[24] Because of FOSTA his protected speech was in fact removed and avenues for future speech blocked on Craigslist. Whether Koszyk has standing can thus be answered without having to parse the broad and undefined terms in FOSTA or adjudge the credibility of the threat the law poses to speakers. This Court need only determine that Koszyk's injury is redressable by a favorable judgment here, a determination the District Court got wrong.

"Redressability examines whether the relief sought, assuming that the court chooses to grant it, will likely alleviate the particularized injury alleged by the plaintiff." *Fla. Audubon Soc'y v. Bentsen*, 94 F.3d 658, 663-64 (D.C. Cir. 1996) (*en banc*) (footnote omitted). The key word is "likely." *Lujan*, 504 U.S. at 561. Under the proper standard, Koszyk's injury is redressable for several reasons.

[24] The District Court did not dispute that Koszyk suffered a concrete and particularized injury fairly traceable to FOSTA.

First, a publisher's or speaker's injuries are redressable by a court even when the legal challenge concerns a speech restriction that affects third parties not before the court, as removing the speech restriction ensures any decisions to distribute the speaker's speech are made without coercion.

It is well settled that courts can redress the injuries of speakers who depend on services of third parties targeted by challenged speech restrictions. The Supreme Court held in *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963), that publishers had standing to challenge a Rhode Island law that targeted bookstores and distributors of the publishers' works.[25] In upholding book publishers' standing, the Supreme Court understood that "[t]he distributor who is prevented from selling a few titles is not likely to sustain sufficient economic injury" to challenge speech-suppressive laws. *Id.* at 64 n.6. Thus, unless the publisher itself "is permitted to sue, infringements of freedom of the press may too often go unremedied." *Id.*[26]

[25] Earlier, in *Smith v. California*, the Court struck down a law holding booksellers strictly liable for obscene books on their shelves. The problem, the court noted, was that the booksellers' resulting caution would burden third parties' speech rights. Such "self-censorship, compelled by the State would be a censorship affecting the whole public, hardly less virulent for being privately administered." 361 U.S. 147, 154 (1959).

[26] *See also Denver Area Educ. Telecom. Consortium v. FCC*, 518 U.S. 727 (1996) (upholding cable programmers' First Amendment challenge to laws requiring cable operators that distributed their content to segregate and block patently offensive sexual content); *Meese v. Keene*, 481 U.S. 465, 477 (finding plaintiff's challenge to government's "political propaganda" film-labeling rules redressable

This Court and other federal appellate courts have similarly recognized that speakers have standing to challenge speech restrictions that target third parties they rely upon to reach audiences. *See, e.g.*, *Block*, 793 F.2d at 1308 (movie distributor had standing to challenge government classification of one of his films as "political propaganda," because the restriction stopped potential customers from purchasing and playing the film); *ACLU v. Ashcroft*, 322 F.3d 240, 266 n.33 (3d Cir. 2003) (affirming ACLU "listener" standing to challenge law regulating online speakers), *aff'd*, *Ashcroft v. ACLU*, 542 U.S. 656 (2004).

This well-established rule applies in full force to online speakers. In *Pappert*, 337 F. Supp. 2d at 649-50, the court held Internet users had standing to challenge a Pennsylvania statute requiring ISPs to block child pornography, which had led ISPs to block additional, lawful content as well. In striking down the statute, the court recognized "the action taken by private actors to comply with the Act has blocked a significant amount of speech protected by the First Amendment." *Id.* at 652 (applying *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803 (2000)).

These cases demonstrate—contrary to the District Court's reasoning—that a speaker need not prove that their removed speech would be republished to establish redressability. It is enough that any future decisions would be made without the

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because "judgment declaring the Act unconstitutional would eliminate the need to choose between exhibiting the films and incurring the risk").

government speech restriction. In *Council for Periodical Distributors*, 642 F. Supp. 552), magazine publishers seeking to invalidate government action that led merchants to remove their publications had redressable claims because the challenge would ensure future decisions about hosting the publishers' content "would be made free of coercion and without prior restraint." *Id*. at 560. *See also Parsons*, 801 F.3d at 717 (assuming speech injury was redressable even though "we cannot be certain whether and how" the requested judgment would lessen the injury).

Koszyk is in the same position as the speakers, publishers, and booksellers described above, all of whom had redressable legal claims. He seeks to distribute advertisements for his business on Craigslist, which accounted for an estimated 90 percent of his customers. JA141, 144-145 ¶¶ 6, 23-24. But that platform ceased distributing his speech out of concern that continuing to provide a platform for therapeutic massage ads risks liability under FOSTA. JA144-145 ¶¶ 21-24. Koszyk's injuries would thus be redressed by a ruling enjoining FOSTA because it would ensure that Craigslist can make future decisions about whether to host his advertisements free from the coercive, censorious effect of FOSTA.

Even under the inapposite authorities cited by the District Court,[27] Koszyk sufficiently demonstrated that, for purposes of surviving a motion to dismiss,

[27] Koszyk's claims are unlike those this Court found lacking in *West v. Lynch*, 845 F.3d 1228 (D.C. Cir. 2017). There, the plaintiff sought to set aside a DOJ memorandum regarding enforcement of federal drug laws in states that legalized the

enjoining FOSTA will result in Craigslist allowing him to post advertisements once more. Craigslist publicly announced it had closed various sections because of FOSTA, and, at the same time, said it wanted to "bring them back someday." A ruling that FOSTA is unconstitutional would likely enable Craigslist to re-open the portions of its website that it shuttered in response to the law. JA123 ¶ 10. *See Tozzi v. U.S. Dep't of Health & Human Servs.*, 271 F.3d 301, 308-09 (D.C. Cir. 2001) (finding plaintiffs' claims redressable based on affidavits and other record evidence establishing likelihood that a favorable decision would alleviate their injuries).

III. INJUNCTIVE RELIEF SHOULD BE GRANTED

The credible threat to Appellants from FOSTA as properly viewed on a pre-enforcement challenge also establishes their right to a preliminary injunction. *See*,

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sale of marijuana, on the theory that doing so would force Washington state officials to stop marijuana sales and take other actions. *Id*. at 1235-37. The Court held the gap between the plaintiff's legal claims regarding a federal law enforcement guidance memo and its impact on Washington state officials *not governed* by the memorandum were simply too implausible to confer standing. *Id*. The situation in *West*, however, is far afield from this case, where the direct connection between FOSTA and Craigslist's removal of ad categories is undisputed. *Teton Historic Aviation Found. v. DOD*, 785 F.3d 719 (D.C. Cir. 2015), also cited by the District Court, shows why the redressability requirement is satisfied here. In that case, this Court held the government's past decisions and future incentives were sufficient evidence to demonstrate that the government and third parties were likely to act as they had previously. *Id*. at 725-26 ("The Department has sold parts like these in the past and has incentives to do so in the future."). The same is true of Craigslist in this case, which historically hosted categories in which Koszyk's ads ran, and expressed the hope it could do so again.

e.g., *Pursuing America's Greatness v. FEC*, 831 F.3d 500, 505 (D.C. Cir. 2016) (preliminary injunction warranted where movants are likely to succeed on the merits, irreparable harm is likely, equities balance in their favor, and public interest favors relief). The ways in which the District Court ignored the malleability and reach of FOSTA's undefined terms, and its enforceability in federal, state and civil contexts as outlined above, show that, at a minimum, Plaintiffs likely will prevail on their overbreadth, vagueness, and strict scrutiny challenges.[28] Thus, if this Court reverses the District Court's holding on standing, it should also instruct the court to grant injunctive relief. *See*, *e.g.*, *Chamber of Commerce of U.S.*, 69 F.3d at 606.

This likelihood of success is effectively "determinative," as it "will often be" in First Amendment challenges like this. *Pursuing America's Greatness*, 831 F.3d at 511. *See Bays v. City of Fairborn*, 668 F.3d 814, 819 (6th Cir. 2012) (when First Amendment rights are implicated, preliminary injunction test essentially collapses). A loss of First Amendment freedoms and other constitutional rights under FOSTA, even if for a "minimal period[] …, unquestionably constitutes irreparable injury." *Elrod*, 427 U.S. at 373. *See Mills v. D.C.*, 571 F.3d 1304, 1312 (D.C. Cir. 2009).

[28] Though this is clear on the face of the law, the record also is undisputed that Appellants curtailed protected speech due to FOSTA and will continue to do so, as is true for other websites, to their detriment and that of those who use them. *See supra* 11-13, 41-45, 51-52. And DOJ itself highlighted the law's *Ex Post Facto* infirmities. *See* JA82 (citing 164 Cong. Rec. H1297 (daily ed. Feb. 27, 2018)).

The record also is clear that not only will DOJ suffer little if any harm given existing criminal laws, FOSTA has been *counterproductive* in preventing sex trafficking (due to diminished online "leads" for law enforcement) and in reducing harm from sex work (due to cowing resources like those Appellants offer). JA163-165 ¶¶ 11-19, 20-21; JA176-177 ¶¶ 24-25, 28, 31.[29]

Further, "no substantial harm to others can be said to inhere" in allowing constitutional violations to continue, *Déjà vu of Nashville, Inc. v. Metro. Gov't of Nashville & Davidson Cty.*, 274 F.3d 377, 400 (6th Cir. 2001), which is also "always contrary to the public interest," which lies in protecting First Amendment rights. *Pursuing America's Greatness*, 831 F.3d at 511-12. "[T]he public's interest in preserving [] constitutional protections—and … the Government's concomitant interest in not violating [] constitutional rights" is paramount.[30] That is especially the case here, where the public "has a strong interest in having largely-unfettered access to Internet mediums for … publishing and viewing content and information," in the exercise of First Amendment rights. *Google v. Hood*, 96 F. Supp. 3d at 601.

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[29] Congress was forewarned of these effects. *See* JA80-81, 100, 117; JA123-127 ¶¶ 10-13; JA163-165 ¶¶ 11-21; JA168-169 ¶¶ 6-9; JA176-177 ¶¶ 24-29, 31.

[30] *R.J. Reynolds Co. v. FDA*, 823 F. Supp. 2d 36, 52 (D.D.C. 2011), *aff'd*, 696 F.3d 1205 (D.C. Cir. 2012), *overruled on other grounds*, *American Meat Inst. v. USDA*, 760 F.3d 18 (D.C. Cir. 2014) (*en banc*). *See also PHE, Inc. v. U.S. Dep't of Justice*, 743 F. Supp. 15, 26 (D.D.C. 1990) ("Simply stated, it is in the public interest to uphold a constitutionally guaranteed right.") (citation omitted).

CONCLUSION

For the foregoing reasons, this Court should vacate the District Court's order dismissing this action and denying Appellants a preliminary injunction, and order that it enter a preliminary injunction against *pendente lite* enforcement of FOSTA, and take such other steps as are consistent with this Court's determination.

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18 U.S.C. § 1591, as amended and added by FOSTA A-1

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ADDENDUM

United States Code Annotated
Title 18. Crimes and Criminal Procedure
Part I. Crimes
Chapter 77. Peonage, Slavery, and Trafficking in Persons

18 U.S.C. § 1591

§ 1591. Sex trafficking of children or by force, fraud, or coercion

(a) Whoever knowingly--

(1) in or affecting interstate or foreign commerce, or within the special maritime and territorial jurisdiction of the United States, recruits, entices, harbors, transports, provides, obtains, advertises, maintains, patronizes, or solicits by any means a person; or

(2) benefits, financially or by receiving anything of value, from participation in a venture which has engaged in an act described in violation of paragraph (1),

knowing, or, except where the act constituting the violation of paragraph (1) is advertising, in reckless disregard of the fact, that means of force, threats of force, fraud, coercion described in subsection (e)(2), or any combination of such means will be used to cause the person to engage in a commercial sex act, or that the person has not attained the age of 18 years and will be caused to engage in a commercial sex act, shall be punished as provided in subsection (b).

(b) The punishment for an offense under subsection (a) is--

(1) if the offense was effected by means of force, threats of force, fraud, or coercion described in subsection (e)(2), or by any combination of such means, or if the person recruited, enticed, harbored, transported, provided, obtained, advertised, patronized, or solicited had not attained the age of 14 years at the time of such offense, by a fine under this title and imprisonment for any term of years not less than 15 or for life; or

(2) if the offense was not so effected, and the person recruited, enticed, harbored, transported, provided, obtained, advertised, patronized, or solicited had attained the age of 14 years but had not attained the age of 18 years at the time of such

offense, by a fine under this title and imprisonment for not less than 10 years or for life.

(c) In a prosecution under subsection (a)(1) in which the defendant had a reasonable opportunity to observe the person so recruited, enticed, harbored, transported, provided, obtained, maintained, patronized, or solicited, the Government need not prove that the defendant knew, or recklessly disregarded the fact, that the person had not attained the age of 18 years.

(d) Whoever obstructs, attempts to obstruct, or in any way interferes with or prevents the enforcement of this section, shall be fined under this title, imprisoned for a term not to exceed 20 years, or both.

(e) In this section:

(1) The term "abuse or threatened abuse of law or legal process" means the use or threatened use of a law or legal process, whether administrative, civil, or criminal, in any manner or for any purpose for which the law was not designed, in order to exert pressure on another person to cause that person to take some action or refrain from taking some action.

(2) The term "coercion" means--

(A) threats of serious harm to or physical restraint against any person;

(B) any scheme, plan, or pattern intended to cause a person to believe that failure to perform an act would result in serious harm to or physical restraint against any person; or

(C) the abuse or threatened abuse of law or the legal process.

(3) The term "commercial sex act" means any sex act, on account of which anything of value is given to or received by any person.

(4) The term "participation in a venture" means knowingly assisting, supporting, or facilitating a violation of subsection (a)(1).

(5) The term "serious harm" means any harm, whether physical or nonphysical, including psychological, financial, or reputational harm, that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to perform or to continue performing commercial sexual activity in order to avoid incurring that harm.

(6) The term "venture" means any group of two or more individuals associated in fact, whether or not a legal entity.

United States Code Annotated
Title 18. Crimes and Criminal Procedure
Part I. Crimes
Chapter 117. Transportation for Illegal Sexual Activity and Related Crimes

18 U.S.C. § 2421A

§ 2421A. Promotion or facilitation of prostitution and reckless disregard of sex trafficking
Effective: April 11, 2018

(a) In general.--Whoever, using a facility or means of interstate or foreign commerce or in or affecting interstate or foreign commerce, owns, manages, or operates an interactive computer service (as such term is defined in defined in[1] section 230(f) the Communications Act of 1934 (47 U.S.C. 230(f))), or conspires or attempts to do so, with the intent to promote or facilitate the prostitution of another person shall be fined under this title, imprisoned for not more than 10 years, or both.

(b) Aggravated violation.--Whoever, using a facility or means of interstate or foreign commerce or in or affecting interstate or foreign commerce, owns, manages, or operates an interactive computer service (as such term is defined in defined in[1] section 230(f) the Communications Act of 1934 (47 U.S.C. 230(f))), or conspires or attempts to do so, with the intent to promote or facilitate the prostitution of another person and--

(1) promotes or facilitates the prostitution of 5 or more persons; or

(2) acts in reckless disregard of the fact that such conduct contributed to sex trafficking, in violation of 1591(a),[2]

shall be fined under this title, imprisoned for not more than 25 years, or both.

(c) Civil recovery.--Any person injured by reason of a violation of section 2421A(b) may recover damages and reasonable attorneys' fees in an action before any appropriate United States district court.

(d) Mandatory restitution.--Notwithstanding sections 3663 or 3663A[3] and in addition to any other civil or criminal penalties authorized by law, the court shall

order restitution for any violation of subsection (b)(2). The scope and nature of such restitution shall be consistent with section 2327(b).

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

Footnotes

[1] So in original.

[2] So in original. Probably should be "section 1591(a)".

[3] So in original. Probably should be "section 3663 or 3663A".

United States Code Annotated
Title 47. Telecommunications
Chapter 5. Wire or Radio Communication
Subchapter II. Common Carriers
Part I. Common Carrier Regulation

47 U.S.C. § 230

§ 230. Protection for private blocking and screening of offensive material
Effective: April 11, 2018

(a) Findings

The Congress finds the following:

(1) The rapidly developing array of Internet and other interactive computer services available to individual Americans represent an extraordinary advance in the availability of educational and informational resources to our citizens.

(2) These services offer users a great degree of control over the information that they receive, as well as the potential for even greater control in the future as technology develops.

(3) The Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.

(4) The Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation.

(5) Increasingly Americans are relying on interactive media for a variety of political, educational, cultural, and entertainment services.

(b) Policy

It is the policy of the United States--

(1) to promote the continued development of the Internet and other interactive computer services and other interactive media;

(2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation;

(3) to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services;

(4) to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material; and

(5) to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.

(c) Protection for "Good Samaritan" blocking and screening of offensive material

(1) Treatment of publisher or speaker

No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.

(2) Civil liability

No provider or user of an interactive computer service shall be held liable on account of--

(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or

(B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).[1]

(d) Obligations of interactive computer service

A provider of interactive computer service shall, at the time of entering an agreement with a customer for the provision of interactive computer service and in a manner deemed appropriate by the provider, notify such customer that parental control protections (such as computer hardware, software, or filtering services) are commercially available that may assist the customer in limiting access to material that is harmful to minors. Such notice shall identify, or provide the customer with access to information identifying, current providers of such protections.

(e) Effect on other laws

(1) No effect on criminal law

Nothing in this section shall be construed to impair the enforcement of section 223 or 231 of this title, chapter 71 (relating to obscenity) or 110 (relating to sexual exploitation of children) of Title 18, or any other Federal criminal statute.

(2) No effect on intellectual property law

Nothing in this section shall be construed to limit or expand any law pertaining to intellectual property.

(3) State law

Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section. No cause of action may be brought

and no liability may be imposed under any State or local law that is inconsistent with this section.

(4) No effect on communications privacy law

Nothing in this section shall be construed to limit the application of the Electronic Communications Privacy Act of 1986 or any of the amendments made by such Act, or any similar State law.

(5) No effect on sex trafficking law

Nothing in this section (other than subsection (c)(2)(A)) shall be construed to impair or limit--

(A) any claim in a civil action brought under section 1595 of Title 18, if the conduct underlying the claim constitutes a violation of section 1591 of that title;

(B) any charge in a criminal prosecution brought under State law if the conduct underlying the charge would constitute a violation of section 1591 of Title 18; or

(C) any charge in a criminal prosecution brought under State law if the conduct underlying the charge would constitute a violation of section 2421A of Title 18, and promotion or facilitation of prostitution is illegal in the jurisdiction where the defendant's promotion or facilitation of prostitution was targeted.

(f) Definitions

As used in this section:

(1) Internet

The term "Internet" means the international computer network of both Federal and non-Federal interoperable packet switched data networks.

(2) Interactive computer service

The term "interactive computer service" means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.

(3) Information content provider

The term "information content provider" means any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.

(4) Access software provider

The term "access software provider" means a provider of software (including client or server software), or enabling tools that do any one or more of the following:

(A) filter, screen, allow, or disallow content;

(B) pick, choose, analyze, or digest content; or

(C) transmit, receive, display, forward, cache, search, subset, organize, reorganize, or translate content.

Footnotes

[1]

So in original. Probably should be "subparagraph (A)".

CERTIFICATE OF COMPLIANCE

I certify that pursuant to Fed. R. App. P. 32(a)(7)(C) and Circuit Rule 32-1, the attached brief is proportionately spaced, has a typeface of 14 points or more and contains 12,920 words.

Counsel relies on the computer program used to create this brief for the word count.

By: /s/ Ronald G. London
Ronald G. London

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system on February 13, 2018.

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Ronald G. London