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 WILLIAM BARR, IN HIS OFFICIAL CAPACITY AS 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' REPLY BRIEF

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INTRODUCTION AND SUMMARY OF ARGUMENT

The Government's claim that the Allow States and Victims to Fight Online Sex Trafficking Act ("FOSTA") simply "clarifies" existing law because Congress never intended to immunize "classified advertising websites" like Backpage.com, is belied by the plain language of the Act, its legislative history, and the many amici who tout their intention to take advantage of the myriad litigation opportunities the Act provides. The Government and its supporting amici refer to "classified advertising websites," and, in particular, Backpage.com, over fifty times, but ignore that FOSTA's reach is not limited to websites like Backpage.com or to advertising.

Nor is FOSTA just a targeted recodification of the Travel Act, as the Government tries to frame it. It creates new offenses focused specifically on speech, strips away existing immunities, and multiplies the public and private entities who can bring claims. By its plain terms, FOSTA's newly-adopted prohibitions reach any interactive computer service that can be said to "promote" or "facilitate" prostitution, not just advertising websites, and leaves the contours of these undefined terms to be determined case-by-case.

FOSTA also amended federal criminal trafficking law in Section 1591 (and its civil component in Section 1595) to expand both who may be subject to liability and who may bring suit. FOSTA significantly limited immunities from both criminal and civil liability formerly provided by 47 U.S.C. § 230, and amici

supporting the Government already are using the law as a "heckler's veto" against online speech platforms. FOSTA has broadly chilled free expression across the Internet, and Appellants each have been adversely affected. The Government's claim that Appellants lack standing is thus incorrect, as is the District Court's ruling.

ARGUMENT

I. FOSTA BROADLY CHANGES THE ECOSYSTEM OF INTERNET INTERMEDIARY LIABILITY AND PROHIBITS SPEECH UNRELATED TO TRAFFICKING

A. Section 2421A Reaches Any Online Speech Platform That Can be Said to "Facilitate" Prostitution

As set forth in the opening brief, Appellants Woodhull, Andrews, and Human Rights Watch ("HRW") reasonably fear liability under Section 2421A because through their online speech, they intend to make the prostitution of another person safer, and therefore easier. *See United States v. Rivera*, 775 F.2d 1559, 1562 (11th Cir. 1985); *United States v. Bennett*, 1996 WL 477048, at *5 (9th Cir. Aug. 21, 1996). In disputing standing, the Government relies on the District Court's flawed interpretation of § 2421A, which purportedly requires that Appellants intentionally promote or facilitate *specific illegal acts* of prostitution. Appellants' Opening Brief ("AOB") 20; JA406.

The Government's reading of FOSTA places more weight on the phrase "prostitution of another person" than it can bear, relying on creative use of italics.

E.g., Gov't Br. 17 ("The statute requires intent to promote or facilitate '*the* prostitution *of another person*'"); *id*. 20 ("§ 2421A uses the phrase '*the* prostitution of another person,'"); *id*. 21 ("To violate § 2421A, a person must own, operate, or manage an interactive computer service '*with the intent* to promote or facilitate *the* prostitution of another person.'"). But emphasis and inflection neither supply statutory limitations that are absent, nor assuage Appellants' realistic concerns.[1]

Appellants Woodhull, Andrews, and HRW in fact operate interactive computer services *with the intent* to "promote" or "facilitate" sex work by making the lives of sex workers safer and easier, and when communicating with particular individuals, they do so *with intent* to facilitate such activities by *another person*. The Government's argument that they need not worry because Congress was concerned about "anonymous 'classified advertising websites'" that were "profit[ing] off of advertisements' for illegal prostitution and sex trafficking," Gov't Br. 17-18 (quoting H.R. Rep. No. 115-572, pt. 1, at 3, 5 (2018)), is unavailing because

[1] The fact that prostitution must involve "another person" is no limiting factor, as the target of the law is the owner, manager, or operator of an interactive computer service—not a participant in the prostitution transaction. To be potentially liable under this prohibition, an Appellant need not be a party to any specific commercial sex transactions, or even have knowledge of such specific instances. It need only operate a website that promotes or facilitates prostitution of "another person" besides itself. If, in the operation of that website, it promotes prostitution by 5 or more sex workers, or acts in reckless disregard that its activity contributes to sex trafficking, it would be subject to the enhanced penalties of § 2421A(b).

Congress did not draft a law limited to "anonymous 'classified advertising websites.'" *Cf. Reno v. ACLU*, 521 U.S. 844, 880 (1997) ("Even the strongest reading of the 'specific person' requirement … cannot save the statute.").[2]

Appellants' opening brief explained how FOSTA suffers the same infirmities as the Immigration and Nationality Act ("INA") provision invalidated in *United States v. Sineneng-Smith*, 910 F.3d 461 (9th Cir. 2018). *See* AOB 29-31. The Ninth Circuit rejected the same arguments the Government is making here. 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." *Sineneng-Smith*, 910 F.3d at 484. The Government's attempt to distinguish *Sineneng-Smith* is pure gibberish. It argues the INA is a different law than FOSTA (well, yes) that employed "different statutory terms, in a different statutory context." Gov't Br. 24. The Government makes no attempt to analyze or explain how the terms "encourage or induce" held constitutionally overbroad in *Sineneng-Smith*

[2] Nor does the Government's reliance on the *mens rea* element of § 2421A prevent finding that FOSTA applies to Appellants for purposes of standing. A prosecutor or civil claimant can simply allege criminal intent regarding a defendant's promotion of the careers of sex workers, and that factual issue must be determined by a jury. *Levine v. United States*, 261 F.2d 747, 751 (D.C. Cir. 1958) (quoting *Morissette v. United States*, 342 U.S. 246, 274 (1952) (criminal intent is "a question of fact that must be submitted to the jury")).

differ meaningfully from FOSTA's "promote" or "facilitate." *See* 910 F.3d at 476-77 (exploring definitions of "induce" or "encourage").[3]

Nor is the constitutionality of Section 2421A secured by FOSTA's affirmative defense, whereby a FOSTA defendant may be relieved of liability if it "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." 18 U.S.C. § 2421A(e). The Government implies FOSTA could never apply to protected speech since protected speech is always "legal in the jurisdiction where the promotion or facilitation was targeted." Gov't Br. 16, 20. But the affirmative defense is available only if the defendant can prove it specifically "targeted" a jurisdiction in which "promotion or facilitation of prostitution" is legal. This could be difficult for an Internet publisher. *See, e.g.*, *United States v. Kilbride*, 584 F.3d 1240, 1250 (9th Cir. 2009).

In any event, affirmative defenses do not cure First Amendment infirmities, and certainly do not eliminate the chilling effect speakers experience when they are

[3] If anything, there is a stronger argument for upholding the INA, because it prohibits "inducing" acts of immigration "knowing or in reckless disregard … that [] coming to, entry, or residence is or will be in violation of law." FOSTA contains no comparable reference to criminal acts. The Government also suggests the INA provision was broader than FOSTA because it could apply to violations of both civil and criminal law. Gov't Br. 24. But this does not distinguish the INA from FOSTA which also be enforced either criminally or civilly.

concerned about facing numerous lawsuits. "The Government raises serious constitutional difficulties by seeking to impose on the defendant the burden of proving his speech is not unlawful. An affirmative defense applies only after prosecution has begun, and the speaker must himself prove, on pain of a felony conviction, that his conduct falls within the affirmative defense." *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 255 (2002). Affirmative defenses are especially concerning where, as here, they are incomplete. *See id*. at 256. The affirmative defense here is not available for alleged violations of Section 2421A(b)(2), which is triggered where, by owning, managing, or operating an interactive computer service with intent to promote or facilitate prostitution, a speaker somehow "contribute[s] to sex trafficking." *See* 18 U.S.C. §§ 2421A(a), (b)(1)-(2), (e).

B. Section 2421A is Materially Different From the Travel Act

The Government wrongly contends that federal prosecutions brought under the Travel Act, 18 U.S.C. § 1952, define the outer bounds of prosecutions one can reasonably fear under FOSTA. This ignores the material differences between the two laws.

First, unlike the Travel Act, FOSTA applies *exclusively* to speech. The Government argues Section 2421A "is not directed to 'speech' in the abstract," but instead applies to "conduct" of "owning, managing, or operating an 'interactive computer service.'" Gov't Br. 20 (citing 18 U.S.C. § 2421A(a)). But an unbroken

chain of authority recognizes that such operations implicitly involve the speech rights of both Internet *users* and interactive computer services, because decisions about what content to permit involve the operator's *own* First Amendment rights.[4] The Travel Act's prohibitions reach non-speech conduct, applying to "whoever travels in interstate or foreign commerce or uses … any facility in interstate or foreign commerce." 18 U.S.C. § 1952.[5] Of course, laws specifically targeting speech must meet more exacting scrutiny when challenged facially. *Reno*, 521 U.S. at 868.

Second, the Travel Act applies only when the requisite intent to violate specific laws exists. 18 U.S.C. § 1952(b) (defining "unlawful activity" as a violation of specific state or U.S. laws). FOSTA, in contrast, makes it illegal simply "to promote or facilitate the prostitution of another person," without incorporating any

[4] *See, e.g.*, *Reno v. ACLU*, 521 U.S. at 868; *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330-31 (4th Cir. 1997); *La'Tiejira v. Facebook, Inc.*, 272 F. Supp. 3d 981, 991-92 (S.D. Tex. 2017) ("online publishers have a First Amendment right to distribute others' speech and exercise editorial control on their platforms"); *Jian Zhang v. Baidu.com Inc.*, 10 F. Supp. 3d 433, 438-39 (S.D.N.Y. 2014) (When online platforms "select and arrange others' materials, and add the all-important ordering that causes some materials to be displayed first and others last, they are engaging in fully protected First Amendment expression—'[t]he presentation of an edited compilation of speech generated by other persons.'") (citation omitted).

[5] The Government tries to equate the laws by noting "[t]he Travel Act applies to facilities in interstate commerce, which includes the internet as well as phones and other communication devices." Gov't Br. 23. But there is a significant constitutional distinction between laws that *can* be applied to communications facilities (but almost never are) and statutes—like FOSTA—that apply *only* to communications facilities.

specific state or federal law. The affirmative defense in FOSTA does not change this result. Indeed, the fact that local legality is an *affirmative defense* proves that illegality is not an element of the offense, that is, part of the prosecution's case. *See Free Speech Coalition*, 535 U.S. at 237 (rejecting Government reliance on statutory affirmative defense which left substantial amount of speech unprotected).

Third, while the terms "facilitate" and "promotion" appear in both laws, in the Travel Act they are contained in a string of verbs ("promote, manage, establish, carry on, or facilitate the promotion, management, or establishing, or carrying on, of any unlawful activity") that connote active involvement in crime. *United States v. Williams*, 553 U.S. 285, 294 (2008). In FOSTA, by contrast, the terms "promote" and "facilitate" are used in the disjunctive and FOSTA can apply to any speech that could make prostitution "easier." *See* AOB 32-33. Just as the Ninth Circuit held "there is no way to get around the fact that ['encourage' or 'induce' in the INA] refer to First Amendment-protected expression," *Sineneng-Smith*, 910 F.3d at 475, there is no way to avoid the conclusion that FOSTA does the same when it prohibits interactive computer services from "promoting" or "facilitating" prostitution.

Because of the differences between the laws, the Government's facile claim that "the Travel Act has been on the books for over fifty years, but plaintiffs do not cite (and the government is not aware of) any decision interpreting the Travel Act as prohibiting advocacy or education about 'prostitution' as a concept or subject

matter," Gov't Br. 22, is beside the point. FOSTA is a different law, and its proponents have made clear their intention to use it to regulate online speech.[6]

C. FOSTA Modifies the *Mens Rea* in Section 1591

Any claim that FOSTA did not expand Section 1591 but merely "clarified a previously-undefined phrase … as including [] knowledge" cannot be squared with its language or legislative history. Gov't Br. 12, 25-26. FOSTA amended the statute (and thus its civil action in § 1595) by defining "participation in a venture" for the prohibition against benefitting financially or receiving anything of value from sex trafficking, to mean "knowingly assisting, supporting, or facilitating a violation," *see* 18 U.S.C. §§ 1591(a)(2), (e)(4), without defining those terms or specifying the applicable *mens rea*.[7] DOJ admitted below that this newly "defined a term" of operative import. JA206. By making "participation in a venture" not just

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[6] *See infra* 13-16. *See also* Cathy Gellis, *Twenty-one States Inadvertently Tell the DC Circuit That the Plaintiffs Challenging FOSTA Have a Case*, May 2, 2019, https://www.techdirt.com/articles/20190429/14513542110/twenty-one-states-inadvertently-tell-dc-circuit-that-plaintiffs-challenging-fosta-have-case.shtml?threaded=false.

[7] Elsewhere, Section 1591 requires only "reckless disregard" for violations involving anything but advertising. Before FOSTA, Section 1591, using the language "except where the act constituting the violation … is advertising," had a separate *mens rea* for advertising. Now, despite the Government's and amici's sole focus on advertising, it is actually treated more favorably than other prohibited acts—liability must be based on specific knowledge that an ad is for a coerced or minor participant, whereas liability for other activities, including non-advertising speech that assists, facilitates, or supports sex trafficking requires an undetermined *mens rea*, but no more than a reckless disregard. 18 U.S.C. § 1591(e).

"knowing," active involvement, but *expanding* it to include "assisting, supporting or facilitating," FOSTA intentionally broadened the law's scope.

That is evident in the evolution of Section 1591 and in FOSTA's legislative history showing that Congress intentionally relaxed *mens rea* requirements. The last revision to Section 1591 (before FOSTA) added "advertising" to the conduct that can constitute an offense. Stop Advertising Victims of Exploitation Act of 2015, Pub. L. No. 114-22. However, after a court held that an offense involving advertising required the government to prove specific knowledge, *Backpage.com, LLC v. Lynch*, 216 F. Supp. 3d 96, 108-09 (D.D.C. 2016), FOSTA amended Section 1591 to reduce the *mens rea* requirement. In doing so, Congress acted to make prosecutions easier with a generalized knowledge standard by defining "participation in a venture" to undo the stricter *mens rea* standard upheld in *Lynch*.[8]

Given the new undefined terms in Section 1591, Appellants credibly believe that civil litigants under Section 1595 will push its boundaries. Even *before* FOSTA, private litigants sought to use Section 1591 to target disfavored platforms, and they redoubled their effort post-amendment. JA243-244 & nn.23-25 (collecting cases). Advocates can now use their own views of what it means to "assist," "support"

[8] *See* AOB 8-9 (quoting H.R. Rep. No. 115-572, 2018 U.S.C.C.A.N. 73, 76 (2018)); *see also id*. 40 n.19 (quoting FOSTA signing statement).

and/or "facilitate" trafficking to mount punishing civil cases, regardless of any DOJ interpretation or federal prosecutorial guidelines. *See also infra* § I.E.

D. Selective Removal of Section 230 Immunity Threatens Intermediaries

FOSTA's changes to the immunity previously provided by Section 230 create powerful incentives to over-censor websites to avoid potential liability.[9] FOSTA limits the scope of Section 230(c)(1) and preserves intact only the immunity of Section 230(c)(2) based on *blocking or removing* posted content, which provides immunity under a nebulous and undefined "good faith" standard. *See* S. Rep. 115-199, at 4 (Jan. 10, 2018).[10] As a consequence, advocates already are arguing FOSTA's changes impose a duty on intermediaries to monitor and remove content.

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[9] FOSTA amended Section 230(c)(1), which previously provided that online intermediaries are not to be treated as the publisher or speaker of third-party speech, so that it no longer bars civil claims under 18 U.S.C. § 1595, or state criminal charges where the underlying conduct would violate 18 U.S.C. § 1591, or state criminal charges that parallel 18 U.S.C. § 2421A in jurisdictions where prostitution is illegal. However, it does not change Section 230(c)(2), which shields service providers from liability for good faith efforts to restrict access to material they consider "obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected."

[10] These different immunity provisions in Section 230 were created to perform very different functions. *See Chi. Lawyers' Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666, 670 (7th Cir. 2008) (explaining that Section 230 as a whole allows interactive computer service providers to be "indifferent to the content of information they host or transmit: whether they do (subsection (c)(2)) or do not (subsection (c)(1)) take precautions, there is no liability under either state or federal law").

See infra 15-16. Thus "FOSTA effectively resurrects a dilemma Section 230 had been designed to eliminate."[11] The upshot of limiting Section 230(c)(1) immunity, while leaving Section 230(c)(2) immunity based on "good faith" intact, is that platforms choosing to moderate must be prepared to defend their efforts as being in "good faith."

Appellants explained how these changes to Section 230 undermine important First Amendment immunities for online intermediaries and enable the law to be used as a heckler's veto, as the Government's amici appear eager to do. AOB 46-48. The Government ignores these concerns. Instead, it merely repeats its claim that Sections 2421A and 1591 do not reach Appellants' online activities, and concludes "to lose their Section 230 immunity for civil actions or State prosecutions, plaintiffs' conduct must 'constitute[] a violation of section 1591' or § 2421A."[12]

This is wrong even if the Government correctly interpreted those provisions. First, the Government's claims regarding the "narrow" scope of Sections 2421A and

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[11] Eric Goldman, *The Complicated Story of FOSTA and Section 230*, 17 FIRST AMENDMENT L. REV. 279, 288 (2019). In this "moderator's dilemma," most larger platforms tend to over-censor to avoid potential liability and many smaller sites simply shut down. In reaction to FOSTA's passage, "Craigslist … turned off its 'Personals' section entirely" and "[d]ozens of other services that enabled dating or catered to the sex worker community shut down as well." *Id*. at 289.

[12] Gov't Br. 26. *See also id*. at 29 ("Because plaintiffs do not have a credible fear of prosecution under § 1591 or § 2421A, they cannot credibly fear prosecution as a result of FOSTA's circumscribed amendments to Section 230.").

1591, based on strict *mens rea* requirements, say nothing about corresponding state laws or civil actions. FOSTA does not specify that state laws employ the same level of *mens rea* as federal law. *See* 47 U.S.C. § 230(e)(5). *See* AOB 34-36. Second, regardless of the standards that may eventually evolve, the law governing these provisions will be developed case-by-case in lawsuits and prosecutions brought by countless state officials and civil litigants. As a result of the changes to Section 230 immunity, websites will be forced to err on the side of excessive censorship; the new provisions thus provide a mechanism for a heckler's veto.[13]

E. Amici Supporting the Government Illustrate FOSTA's Expansive Scope and Chilling Effect

As Appellants pointed out in their opening brief, FOSTA's expansive terms will be used by politically ambitious prosecutors to target speech they dislike and by aggressive plaintiffs' lawyers to seek to impose liability on online platforms. *See* AOB 36-40. The Government's only response is to falsely suggest FOSTA, despite its language, focuses entirely on classified advertising. *See* Gov't Br. 17. But had

[13] Based on past experience, those seeking to impose liability under Sections 1591 or 1595 (and, by logical extension, under the new federal crime under Section 2421A), simply will argue that any website that allows postings regarding "escorts" or "adult services" (or anything else promoting human interaction, such as "dating" or "personals") promote or facilitate prostitution or trafficking. *E.g.*, *Dart v. Craigslist, Inc.*, 665 F. Supp. 2d 961, 967-69 (N.D. Ill. 2009); *Doe v. MySpace, Inc.*, 528 F.3d 413 (5th Cir. 2008) (social media platform sued for failing to adopt "safety measures"). *See* AOB 36-40.

there been any doubt, amicus briefs supporting the Government powerfully highlight how FOSTA is a threat, and why Appellants have standing.

The amicus brief submitted by twenty-one states demonstrates eagerness by law enforcement officials in nearly half the states to take a more aggressive role policing online speech. *Brief of the States of Texas, et al.* ("*State Amici*"). They explain that "federal law no longer can be said to provide legal protection for web-sites that unlawfully facilitate sex trafficking" and that they "may now pursue state-law prosecutions based on conduct that would also violate FOSTA." *Id*. at 9. State prosecutors "need not wait for the Department of Justice" to take action, as "State's prosecutors may do so themselves," and Attorneys General may pursue civil remedies. *Id*. at 9-10. *State Amici* describe a range of major initiatives they are undertaking in this area, and even cite pending legislation that would criminalize online speech. *Id*. at 3-9 & n.3. Certain signatories to the states' brief have a history of interpreting their authority to regulate online speech very broadly while disre-garding First Amendment limits; FOSTA only exacerbates this threat.[14]

[14] *See e.g.*, *Google, Inc. v. Hood*, 96 F. Supp. 3d 584, 593 (S.D. Miss. 2015) (Mississippi AG threatened to prosecute Google after demanding it "take down entire websites that possibly contain illegal or dangerous content and, in his opinion, facilitate illegal activity," including human trafficking.), *vacated and remanded on other grounds*, 822 F.3d 212 (6th Cir. 2016).

How can Woodhull, Andrews, HRW, and the Internet Archive not be chilled when advocacy groups like amici clamor to "ensur[e] that those who choose to aid illegal conduct can be held responsible by those they have harmed?" *See* Brief of Amici Curiae of Legal Momentum, *et al.* ("*Legal Momentum Amici*") at 6. The amicus filing by Equality Now illustrates how these groups already are using FOSTA as a heckler's veto. They contend FOSTA "discourages misconduct by internet service providers by exposing them to additional liability," and add that Section 230 now extends immunity only to "those actors who can demonstrate that they undertook a good-faith effort to prevent their platforms from being utilized for sex trafficking."[15] Amici argue this will alter the incentives of online platforms to "encourage monitoring" of third-party content, and they offer to provide "education" to "encourage[] web platforms … to accept accountability for [] trafficking that they facilitate." *Equality Now Amici* at 16, 20. Under FOSTA, such "encouragement" comes with an implied "or else," which is the very definition of the heckler's veto. *See Reno*, 521 U.S. at 880 (law "would confer broad powers of censorship" on private parties).

[15] *See* Brief of Amici Curiae Equality Now, The Coalition Against Trafficking in Women, the Organization for Prostitution Survivors, Rights4Girls, Shared Hope International, Survivors for Solutions, and World Without Exploitation in Support of Appellees ("*Equality Now Amici*") at 15-16.

FOSTA thus opens the litigation door wide for advocates, like these amici, who urge broader liability for sexually-oriented speech, and diminished immunity generally. Notably in this regard, Sections 2421A(c)-(d) offer a bounty for, respectively, civil recovery and attorney's fees and mandatory restitution.

II. APPELLANTS HAVE STANDING TO CHALLENGE FOSTA

A. Relaxed Standing Principles Govern Facial First Amendment Challenges

The Government, like the district court, misconstrues the standard for assessing standing in First Amendment cases. A pre-enforcement suit lies when plaintiff alleges an "intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159 (2014) ("*SBA List*") (quoting *Babbitt v. United Farm Workers*, 442 U.S. 289, 298 (1979)). In First Amendment cases, this "credible fear" standard is highly forgiving. As this Court has held, "courts' willingness to permit pre-enforcement review is 'at its peak' when claims are rooted in the First Amendment." *N.Y. Repub. State Comm. v. SEC*, 799 F.3d 1126, 1135-36 (D.C. Cir. 2015) (quoting *Unity08 v. FEC*, 596 F.3d 861, 865 (D.C. Cir. 2010)). This relaxed approach to standing recognizes that First Amendment challenges implicate potential threats to the structure of our democracy, and that laws restricting speech chill numerous speakers aside from

the plaintiffs.[16] In addition to the credible threat of prosecution, relaxed standing applies because of FOSTA's dampening effects on online intermediaries.

The Government's effort to deny Appellants the benefit of this relaxed approach to standing cannot prevail. As this Court held, "'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) (citation omitted). The government claims this applies only "[w]hen a plaintiff's theory of injury is that the *defendant* has violated a statute and caused the plaintiff harm," and "not [] in a pre-enforcement challenge." Gov't Br. 28. Yet the opening brief offered a full page of authority from this Court and the Supreme Court (and cases from other Circuits as well), *including in pre-enforcement challenges*, that applied the rule reiterated in *Sandvig*. *See* App. Br. 23 & n.7. The Government addresses none of these.

The Government's interpretation should be given even less credence where, as here, the challenged statute is enforceable by "any person." *See SBA List*, 573 U.S. at 164. The DOJ may refrain from pursuing Appellants, but that will not prevent state actors or private parties from doing so. *See Chamber of Commerce of U.S.*

[16] *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973); *Secretary of State v. Joseph H. Munson Co.*, 467 U.S. 947, 958 (1984). *See also Cooksey v. Futrell*, 721 F.3d 226, 235 (4th Cir. 2013) (First Amendment cases "raise unique standing considerations that tilt dramatically toward a finding of standing") (citation omitted).

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). FOSTA forces Plaintiffs to operate under a Sword of Damocles, waiting for it to fall the moment someone other than the DOJ decides to pursue a contrary view and hale them into court.

B. Online Platforms and Their Users Have Standing to Challenge FOSTA

Because laws like FOSTA regulate speech shared on platforms and affect platform operators and their users, both have standing to bring a pre-enforcement challenge. *CDT v. Pappert*, 337 F. Supp. 2d 606, 649-50 (E.D. Pa. 2004) (Internet users have standing to challenge statute requiring ISPs to block child pornography). *See Bantam Books v. Sullivan*, 372 U.S. 58, 64 n.6 (1963) (book *publishers* have standing to challenge a law that, on its face, regulated only book *sellers*); *Denver Area Educ. Telecom. Consortium v. FCC*, 518 U.S. 727 (1996) (upholding cable *programmers'* First Amendment challenge to laws requiring cable *operators* to segregate and block content). Applying the same principles, this Court upheld speakers' standing in *American Library Ass'n v. FCC*, 406 F.3d 689, 697 (D.C. Cir. 2005) (individuals wishing to distribute copyrighted material had standing to challenge FCC rules for digital TV manufacturers requiring blocking technology,

rejecting as "specious" the argument that the anticipated harm was hypothetical and "due solely to the independent … decisions of third parties not before this Court") (citation omitted).

FOSTA's new regime for online speech burdens all Appellants' First Amendment rights, and all thus have standing to challenge it. Speakers like Woodhull, Andrews, HRW, and untold others risk being silenced or banned from platforms if they speak on subjects relating to sex work. Speakers like Koszyk already have lost forums to communicate about their lawful businesses. Those who operate platforms, like Andrews and the Internet Archive, are forced into the choice of burdensome content review of every claimed violation of FOSTA and taking the content down. *See Zeran*, 129 F.3d at 333 (explaining that platform operator can undertake a "careful yet rapid investigation" and make "an on-the-spot editorial decision whether to risk liability" to protect users' speech, or yield to the "natural incentive simply to remove messages upon notification, whether the contents are [unlawful] or not"). FOSTA strongly encourages the latter, and the Equality Now brief confirms this is exactly how FOSTA is being used by advocacy groups. *Equality Now Amici* at 16, 20.

Both the Government and the court below thus improperly discounted the heckler's veto, ignoring the Supreme Court's admonition to the contrary. *See Reno*, 521 U.S. at 880. Platform operators reasonably fear the threat of prosecution or civil

litigation any time they fail to accede to demands to remove user speech from their platforms. A similar dynamic was recognized by this Court in *Loveday v. FCC*, 707 F.2d 1443 (D.C. Cir. 1983). This Court noted that, if the law were interpreted to require broadcasters to investigate conflicting claims about ads, "opponents of groups sponsoring political messages would have a ready means of harassing and perhaps silencing their adversaries by making charges, however baseless." *Id.* at 1458. In the case of FOSTA, this is precisely the chilling effect amici supporting the Government are counting on.

C. FOSTA Has Harmed Appellants

1. Koszyk Lost Access to an Online Platform

Appellant Eric Koszyk has established redressability even under the standard articulated by the government. *Compare* Gov't Br. 31-33 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562 (1992), as holding evidence is needed to establish redressability) *with* AOB 51-52 (discussing evidence supporting redressability of Koszyk's claims). The Government does not dispute that Koszyk lost access to Craigslist due to its response to FOSTA, but incorrectly argues he lacks standing because that decision to remove his speech was discretionary. Gov't Br. 31-32. As discussed above, Koszyk has standing to challenge speech restrictions that target third parties, such as Craigslist, on whom he relies to reach audiences. AOB 48-50.

The Government further errs by denying Koszyk's standing on grounds that he can only speculate that enjoining FOSTA would result in Craigslist allowing his ads again. Gov't Br. 32. But to establish redressability, Koszyk need only prove future decisions by Craigslist would be made free of the coercive effect of FOSTA. AOB 50-51 (citing *Council for Periodical Distribs. Ass'n v. Evans*, 642 F. Supp. 552 (M.D. Ala. 1986); *Parsons v. Dep't of Justice*, 801 F.3d 701 (6th Cir. 2015)). Nevertheless, Craigslist expressed a future desire to "bring [] back" services it terminated due to FOSTA, JA123-124 ¶ 10, supporting Koszyk's well-pled allegation that, but for FOSTA, Craigslist would continue to host Koszyk and others' speech.

2. Appellants Who Operate Online Services Have a Reasonable Fear of Enforcement

The Government disputes the remaining Appellants' reasonable fear of enforcement, largely by intentionally ignoring that Woodhull, Andrews, HRW, and the Internet Archive, own, operate, or manage interactive computer services, such as websites, that FOSTA (especially § 2421A) regulates, Gov't Br. 18 n.4, and by ignoring Woodhull's, Andrews's, and HRW's stated intent to make the prostitution of other people easier and less dangerous. With respect to Woodhull and Andrews especially, the Government's supposition that their activities do not fall within FOSTA, because they cannot be viewed as promoting or facilitating specific acts of illegal prostitution of another person, is simply wrong. AOB 19-22. The Government's analysis in any case fails to address platform operators' fear of liability for

hosted third-party speech, and the resulting incentive to err on the side of removal—to the detriment of the users' and the platforms' own First Amendment rights.

Woodhull alleged that it intends to advance and promote the careers of sex workers. JA30. Prior to FOSTA, in addition to online events offering general advocacy and advice,[17] Woodhull published direct contact information for specific sex workers—on its own website and on other social media. JA31; 134. Woodhull initially self-censored this over concern it could be "promoting the prostitution of another person" in violation of FOSTA (though it later chose to resume).[18] JA31-32; 134-135. Woodhull also alleged it owns a website that published sex worker contact information, JA30-31, and a blog, JA28, which it censored due to FOSTA.[19] Andrews similarly attested she intends for individual sex workers to use Rate That

[17] This included providing information on client screening for sex workers, human rights to engage in prostitution, and efforts to legitimize sex work, including online promotion of workshops on life balance for sex-workers ("*Courting and Whoring; Balancing Work and Play*") and avoiding conflicts with law enforcement ("*Avoiding Harm When You Need an Ambulance*"). JA29-30; 131-132.

[18] *Cf. Constantine v. Rectors & Visitors of George Mason Univ.*, 411 F.3d 474, 499-500 (4th Cir. 2005) (standing only requires tendency to chill speech, challenged law does not have to "freeze[] it completely") (collecting cases across Circuits).

[19] The Complaint and supporting Declaration contain numerous additional references to interactive computer services that Woodhull owned and/or operated in promoting its activities and associated information about sex workers. JA30; 129-130 (online databases, cloud storage, email systems, social media, live video streaming, ticketing system, link shortening device, and online promotional tools).

Rescue to make sex work easier and safer. AOB 44.[20] The government's contentions downplaying this, Gov't Br. 21-22, ignore Andrews' clearly stated intent. *See* JA151-152 ¶¶ 28-29.

Woodhull faced additional concerns with the enhanced penalties imposed by Section 2421A(b) against those who operate an interactive computer service with "reckless disregard" that their activities "contribute" to sex trafficking. JA33; 136. Such an open-ended prohibition imposes additional, serious criminal penalties against Woodhull if some third-party posts content on Woodhull's blog that ultimately contributes to sex trafficking, without Woodhull ever intending this result. Woodhull thus censored sex worker content from its blog that was critical to its mission. JA28; 133. The Government submitted no evidence to contradict these sworn statements.

Under FOSTA, a prosecutor can simply allege criminal intent regarding promotion of prostitution, creating a jury issue. *See supra* 4 n.2 (citing *Levine* and *Morissette*). Woodhull is also subject to potential civil suits, actions by state attorneys general, and criminal liability for prostitution or sex trafficking based on its status as an owner and operator of a blog which allows third-party posts. JA28;

[20] The government thus dramatically understates the implications of Andrews' website Rate That Rescue, labeling it abstract advocacy for decriminalization of sex work and sex-worker safety. Gov't Br. 18-19,

33. FOSTA's passage forced Woodhull to censor its own speech, and the speech of third parties on its blog, to mitigate potential legal exposure created by the carve-outs to Section 230 immunity. JA28-29; 130, 133, 136. Andrews opted to forgo a bid to purchase a mobile app and website that would have served to improve sex worker safety. JA152-154 ¶¶ 32-39. The multiple sources of potential liability created by FOSTA enhance the risks if the law is not enjoined.

Similarly, HRW's advocacy is not mere abstract support for sex workers. Gov't Br. 20-21. Its publication of documents on its website that advocate decriminalization of sex work could easily be construed as promoting or facilitating prostitution under Section 2421A. AOB 42-43; JA137-139 ¶¶ 2, 3-8. And Internet Archive, to the extent it engages in "broadly capturing materials on the internet," as the Government puts it, Gov't Br. 19-20, and thus posts material from, *e.g.*, Woodhull, Andrews, HRW, or myriad other online speakers, faces the same risks. The Government dismisses this, arguing "Internet Archive potentially [publishes] a wide range of material prohibited by federal law," criminal enforcement of which "has never been restricted" by Section 230. Gov't Br. 20 (citing 47 U.S.C. § 230(e)). But that only underscores how FOSTA's changes create reasonable fear of enforcement.

Before FOSTA, according to the Government, the Internet Archive "d[id] not fear federal prosecution for [] archiving." *Id*. In fact, as a nonprofit seeking to fulfill its mission on a shoestring budget, the Archive has struggled to comply with

previous requirements. JA157 ¶ 14. It has met that challenge, but now, the new substantive offense in Section 2421A, the expansion of Section 1591 and dilution of its *mens rea* standard, and—especially—the retrenchment of Section 230 immunity to newly allow enforcement by state authorities and private litigants, create both a new and credible fear of enforcement, and susceptibility to censorship demands.

Thus, the Government's "trust us, you have nothing to fear" attitude does not defeat standing, as prior case law involving First Amendment challenges to Internet regulation demonstrate. As the court held in *ACLU v. Reno*, 929 F. Supp. 824 (E.D. Pa. 1996), *aff'd*, 521 U.S. 844 (1997), in sustaining the standing of a plaintiff whose online activity involved republishing others' content over which it lacked editorial control: "it is perhaps unlikely that the Carnegie Library will ever stand in the dock" for "communications over the Internet which might be deemed 'indecent' or 'patently offensive' for minors," but a court "cannot ignore that the Act *could* reach [the Library's] activities," especially where statutory definitions did not exactly employ "a rigid formula." *Id*. at 827, 843, 871 (emphasis added).

For all these reasons, each of the Appellants who provide and publish on online services harbor a well-founded fear of prosecution under FOSTA's prohibitions on promotion or facilitation of prostitution, and are chilled by the selective withdrawal of statutory immunities.

III. INJUNCTIVE RELIEF

The Government faults Appellants for an assertedly "summary" or "perfunctory" approach to their right to preliminary injunctive relief, Gov't Br. 33, but the opening brief showed how each element of the relevant standard is met, the record supports entry of the requested order, and no substantive counter has been offered. *See id*. Given the posture of the case the issue is straightforward. A credible threat of enforcement of a potentially constitutionally invalid statute creates irreparable First Amendment injury, into which the remaining factors are subsumed. As the Government admits, an extensive case was made below establishing the basis for relief, *id*. (citing the "bulk" of arguments on the merits and in favor of a preliminary injunction), the record is clear, JA113-119, JA237-250,[21] and the District Court's failure to reach the issue leaves no need for extensive replication or additional analysis. The Government complains that Appellants did not reiterate their extensive showing, but does not dispute that where there are colorable constitutional claims—as there are here—the standard for a preliminary injunction "collapses," and here, each element of the applicable standard is met.

[21] And the devastating human toll already exacted by FOSTA is well documented. *See* Lura Chamberlain, *FOSTA: A Hostile Law with a Human Cost*, 87 FORDHAM L. REV. 2171 (2019).

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.

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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 6,489 words.

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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 May 10, 2019.

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