

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

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

Plaintiffs,

v.

THE UNITED STATES OF AMERICA  
and JEFFERSON B. SESSIONS, in his  
official capacity as ATTORNEY GENERAL  
OF THE UNITED STATES,

Defendants.

Case No. 1:18-cv-1552

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**MOTION FOR PRELIMINARY INJUNCTION**

Plaintiffs Woodhull Foundation, Human Rights Watch, Eric Koszyk, Jesse Maley a/k/a Alex Andrews, and The Internet Archive, by and through counsel, and pursuant to Rule 65(a) of the Federal Rules of Civil Procedure, hereby respectfully move this Court for a preliminary injunction that enjoins the enforcement of the Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. No. 115-164 (“FOSTA” or “the Act”), as codified at 18 U.S.C. § 2421A, 18 U.S.C. § 1591(e)(4), and 47 U.S.C. § 230(e)(5), during the pendency of this case. A Memorandum of Law Supporting Plaintiffs’ Motion for Preliminary Injunction is filed concurrently herewith, and a draft order preliminarily enjoining FOSTA is attached. **Plaintiff requests oral hearing of this Motion, and action is respectfully requested by August 1, 2018, given the threat FOSTA poses to Plaintiff Woodhull Foundation’s ability to engage in protected online speech in connection with its annual Sexual Freedom Summit on August 2-5, 2018, as outlined in the supporting memorandum.**

In support of this Motion, Plaintiffs submit a supporting memorandum of points and authorities and declarations, and state as follows:

1. Plaintiffs are advocacy and human rights organizations, two individuals and the leading archival collection of Internet content. Each either operates online services like websites, social media accounts, and applications as part of speech and advocacy in support of sex workers; otherwise provides resources and information to sex workers; hosts the speech of others who provide such information; or relies on platforms in order to seek information or share their own speech. FOSTA's direct prohibitions on speech "facilitating the prostitution of another person" and other vague, ambiguous and overbroad provisions conflating sex work with sex trafficking cast serious doubt on the legality of Plaintiffs' speech, or, in the case of Plaintiff Koszyk, have left him without a platform to advertise his non-sexual services.

2. The Court should grant preliminary injunctive relief in this case "to maintain the status quo pending a final determination of the merits" of Plaintiffs' constitutional challenge to FOSTA, *Smoking Everywhere, Inc. v. FDA*, 680 F. Supp. 2d 62, 78 (D.D.C. 2010) (citation omitted) 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).

3. A preliminary injunction will be granted when the plaintiff demonstrates likely success on the merits, likely irreparable harm in the absence of preliminary relief, a balance of the equities in its favor, and accord with the public interest. *Pursuing America's Greatness v. FEC*, 831 F.3d 500, 505 (D.C. Cir. 2016) (citing *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)).

4. Plaintiffs are likely to succeed on the merits of their First and Fifth Amendment claims because FOSTA as a whole is both overbroad and fails to satisfy First Amendment strict

scrutiny, its individual provisions are vague, and it contains an unconstitutional *ex post facto* provision. FOSTA targets online speech by (1) creating a new federal offense for anyone who “owns, manages, or operates an interactive computer service” with the intent to “promote” or “facilitate” prostitution, (2) expanding potential liability for federal sex trafficking offenses based on speech, and (3) diluting the speech-protective immunity provision provided for online platforms that host third party speech in the Communications Decency Act of 1996, 47 U.S.C. § 230. FOSTA §§ 3(a), 4(a) & 5; 18 U.S.C. § 2421A(a); 47 U.S.C. § 230(e)(5). These new, entirely content-based prohibitions impose harsh criminal penalties and authorize heavy civil liability for online publishers based on expansive but undefined terms regarding “promotion” or “facilitation” of “prostitution” and/or “reckless disregard” of conduct that “contributes to sex trafficking.” FOSTA’s provisions are subject to but cannot satisfy strict scrutiny, *see United States v. Stevens*, 559 U.S. 460, 468 (2010); *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015); are overbroad insofar as a substantial number of its applications are unconstitutional judged in relation to its plainly legitimate sweep, *Stevens*, 559 U.S. at 473; are unconstitutionally vague in their failure to give people of ordinary intelligence fair warning of what conduct is prohibited, *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972); unconstitutionally impose liability for distributing expressive materials absent proof of scienter; *Smith v. California*, 361 U.S. 147 (1959); and turn Section 230’s online intermediary immunity into a tool for censorship. *See Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1174 (9th Cir. 2008). Plaintiffs will also succeed on their claim that the law violates the *Ex Post Facto* Clause. U.S. Const. art. I, §§ 9-10; *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994).

5. Plaintiffs *have already suffered* irreparable harm, and will continue to do so, absent a preliminary injunction because they face unlawful restrictions on their ability to engage in constitutionally protected speech. *Pearson v. Shalala*, 130 F. Supp. 2d 105, 119 (D.D.C. 2001) (citing *Elrod*, 427 U.S. at 373; *New York Times Co. v. United States*, 403 U.S. 713 (1971); *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 758 (1988)).

6. Moreover, the balance of the equities tips strongly in Plaintiffs' favor. *See, e.g., Bays v. City of Fairborn*, 668 F.3d 814, 819 (6th Cir. 2012) (when First Amendment rights are implicated, factors for granting preliminary injunction essentially collapse). The government will experience minimal harm, or none at all, from an order temporarily preserving the *status quo* of laws that only recently took effect, particularly given preexisting criminal laws that remain in effect, and because “no substantial harm to others can be said to inhere” in allowing violations of constitutional rights to continue. *Déjà vu of Nashville, Inc. v. Metro. Gov't of Nashville & Davidson Cty.*, 274 F.3d 377, 400 (6th Cir. 2001). If anything, in view of the adverse impact FOSTA is having in preventing sex trafficking and endangering sex workers, a preliminary injunction would, in fact, *serve* that particular public interest as well – and in any case, the public interest is served, as always, by safeguarding constitutional rights and preserving laws that have fostered a free and open Internet. *PHE, Inc. v. U.S. Dep't of Justice*, 743 F. Supp. 15, 26 (D.D.C. 1990); *Pursuing America's Greatness v. FEC*, 831 F.3d at 511-12; *Google v. Hood*, 96 F. Supp. 3d 584, 601 (S.D. Miss. 2015), *rev'd on other grounds*, 822 F.3d 212 (5th Cir. 2016).

WHEREFORE, Plaintiffs respectfully request that this Court enter an order preliminarily enjoining the enforcement of FOSTA.

DATED: June 28, 2018

Respectfully submitted,

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**MEMORANDUM IN SUPPORT OF PLAINTIFFS'  
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## INTRODUCTION

This is a constitutional challenge to the Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. No. 115-164, 132 Stat. 1253 (2018) (“FOSTA” or “the Act”), 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 of 1996, 47 U.S.C. § 223 (“CDA”). FOSTA targets online speech by (1) creating a new federal offense for anyone who “owns, manages, or operates an interactive computer service” with the intent to “promote” or “facilitate” prostitution, (2) vaguely expanding potential liability for federal sex trafficking offenses, and (3) diluting the CDA’s only pro-free speech provision – Section 230 – by limiting federal immunity provided online platforms that host third party speech. These new, entirely content-based prohibitions provide for harsh criminal penalties and heavy civil liability for online publishers based on expansive but undefined terms regarding “promotion” or “facilitation” of prostitution and/or “reckless disregard” of conduct that “contributes to sex trafficking.”

Attempts to regulate the Internet are not new, nor is this the first time Congress has looked past “the importance of preserving free speech on the internet, even though [it] serves as a conduit for much that is distasteful or unlawful.” *Google v. Hood*, 822 F.3d 212, 220 (5th Cir. 2016). But starting with the Supreme Court’s landmark ruling in *Reno v. ACLU*, 521 U.S. 844 (1997), courts consistently have held the First Amendment prohibits content-based, overly broad, and vague regulations that threaten online speech. FOSTA is the latest in this line of censorial efforts. Both through direct restrictions and broad chilling effects on protected speech, FOSTA, like the CDA before, “threatens to torch a large segment of the Internet community.” *Id.* at 882.

FOSTA casts into doubt the legality of constitutionally protected, commercial and non-commercial speech that “promotes,” “assists” or “facilitates” sex work, including advocacy for decriminalization, the provision of health and safety resources to sex workers such as bad date



lists, and provision of other information that helps sex workers. It has already had widespread effects across the Internet generally, and has limited speech by the Plaintiffs, which include organizations and individuals who engage in constitutionally protected online speech. As a consequence, Plaintiffs seek to have the Act held unconstitutional under the First and Fifth Amendments both on its face and as applied. While Plaintiffs strongly oppose all forms of coerced sexual activity and support appropriately targeted and effective measures to end sex trafficking, FOSTA will not reduce such practices, and only makes matters worse.

FOSTA erroneously conflates online communications relating to sex work with prostitution, and treats prostitution as synonymous with trafficking. By employing expansive and undefined terms to regulate online speech, backed by threat of severe criminal penalties and massive civil liability, Congress adopted a measure that instantly cast a pall over any online communication with even remote connections to sexual relations. FOSTA has impeded efforts to prevent trafficking and rescue victims, hindered harm-reduction activity, and made all forms of sex work more dangerous – all while undermining protection for free online expression, contrary to the near unanimity of judicial decisions over the past two decades.

To allow due consideration of their claims, while avoiding the harm to free speech that FOSTA has had and will continue to have, Plaintiffs ask that the Court preliminarily enjoin the government from enforcing it. Plaintiffs therefore urge this Court to preserve the *status quo ante* because they are likely to prevail in having FOSTA declared unconstitutional and because the public interest supports barring enforcement of a counterproductive law.

## **BACKGROUND**

### **A. Internet Regulation, the Courts and the First Amendment**

As the Supreme Court recognized, 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*, 521 U.S. at 849-52. 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) (Dalzel, J.), *aff’d*, 521 U.S. 844. This naturally enabled people to communicate about sex, which the 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).

The initial impulse of Congress in reaction to the emergence of the publicly available Internet was 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 not just the specific censorial provisions of the CDA but also the very premise on which they were based, 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 cast doubt among

speakers about whether they might risk liability if they communicated about such things as birth control, homosexuality, sexually oriented topics, or prison rape (among many other matters). *Id.* at 871. Yet even after the Court invalidated the CDA's indecency regulations, Congress adopted and the government defended the Child Online Protection Act, ultimately to no avail. *See Ashcroft v. ACLU*, 542 U.S. 656 (2004); *ACLU v. Mukasey*, 534 F.3d 181 (3d Cir. 2008).

Meanwhile, the CDA's speech-protective federal immunity provisions 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. The twin pillars of online free expression – strict scrutiny of any regulation of online expression, 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).

The need to protect the online ecosystem has become even more vital in the two decades since these initial decisions, as ways to access the Internet have multiplied and social media have become a part of daily life. Yet precisely because the Internet is the most democratized forum for communication in human history, and facilitates speech both good and bad, efforts to impose various restrictions have not ceased. As the Supreme Court observed just last year, the Internet has become an indispensable place to exchange ideas, because it “offers ‘relatively unlimited, low-cost capacity for communication of all kinds.’” *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735-36 (2017) (quoting *Reno*, 521 U.S. at 870). Affirming the strong constitutional value

of that exchange, the Court urged “extreme caution before suggesting that the First Amendment provides scant protection for access to vast networks in that medium.” *Id.* at 1736.

## **B. FOSTA’s Legislative History**

As enacted, FOSTA combined provisions of a bill passed by the House, the Allow States and Victims to Fight Online Sex Trafficking Act, and a bill the Senate passed, the Stop Enabling Sex Traffickers Act (“SESTA”), to create what experts have called “the worst of both worlds.”<sup>1</sup> Through various combinations, amendments, and reconciliations, FOSTA ultimately erroneously conflated a vast range of sex work with illegal sex trafficking, by widening the scope of the law to include websites related to sex work.

The first step toward this outcome was Representative Ann Wagner’s April 3, 2017, introduction of FOSTA, H.R. 1865, with a stated purpose of “clarify[ing] that Section 230 ... does not prohibit the enforcement ... of Federal and State criminal and civil law relating to sexual exploitation of children or sex trafficking[.]” 163 Cong. Rec. H2629 (daily ed. Apr. 3, 2017). As later explained in the House Report on the bill, it was “designed to combat online sex trafficking by providing new tools to law enforcement through a new federal criminal statute and by making it easier for states to prosecute criminal actor websites by amending section 230.” H.R. Rep. No. 115-572, pt. 1, at 3 (2018). However, the bill also proposed to amend 18 U.S.C. § 1591 to define “participation in a venture” relating to trafficking, and to impose liability on interactive computer services in connection with “publish[ing] information” in furtherance of trafficking offenses.

On August 1, 2017, Senator Rob Portman introduced S.1693, the first version of SESTA, the purpose of which was said to be the same as FOSTA. *See* 163 Cong. Rec. S4670-71 (daily

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<sup>1</sup> 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>).

ed. Aug. 1, 2017). It proposed amending CDA Section 230 to eliminate immunity for “any State criminal prosecution or civil enforcement action targeting conduct” that violates federal criminal law prohibiting certain forms of sex trafficking, and to remove immunity for federal civil suits by victims of sex trafficking under 18 U.S.C. § 1595. *Id.* It also proposed its own definition of “participation in a venture,” to make knowingly “assist[ing], support[ing], or facilitat[ing]” sex trafficking a violation of federal law. *Id.*

As Congress weighed the legislation, experts warned it would broadly censor online speech, fail to reduce trafficking, and make sex work more dangerous. Senator Ron Wyden warned that the bill “punches a hole in the legal framework of the open internet.” 164 Cong. Rec. S1869 (daily ed. Mar. 21, 2018). Groups as diverse as the ACLU and the Cato Institute opposed the measure. Cato cautioned that “[a] combined FOSTA/SESTA would benefit established social media platforms and trial lawyers at the expense of an open internet while doing little to prevent sex trafficking.” *Id.* S1867. The ACLU predicted “the bill’s language will encompass the actions of sex workers who have no connection to trafficking whatsoever ..., including effective harm reduction and anti-violence tactics.” *Id.*

Congress also was warned that despite its stated intention to assist law enforcement and anti-trafficking efforts, the proposed law would actually hinder such efforts, and pose grave risks to sex workers. The Freedom Network, an anti-trafficking organization, urged caution in making changes to Section 230 immunity, explaining that:

It is important to note that responsible website administration can make trafficking more visible - - which can lead to increased identification. There are many cases of victims being identified online - and little doubt that without this platform, they would have not been identified. Internet sites provide a digital footprint that law enforcement can use to investigate trafficking into the sex trade, and to locate trafficking victims. When websites are shut down, the sex trade is pushed underground and sex trafficking victims are forced into even more dangerous circumstances. Street-based sex workers report significantly

higher levels of victimization, including physical and sexual violence. This means that trafficking victims face even more violence, are less likely to be identified, with less evidence of their victimization.

<https://freedomnetworkusa.org/app/uploads/2017/10/FNUSAUrgesCautionCDAREform.pdf>.

Russ Winkler, a Special Agent with the Tennessee Bureau of Investigation who oversees trafficking investigations, explained the investigative value of above-ground online advertising sites, and urged Congress “to consider this as yet another example of the need for legal structure that ensures that law enforcement can access the digital evidence we need to keep the public safe.”<sup>2</sup>

A coalition of women’s rights organizations similarly cautioned Congress that the law would harm rather than help sex workers:

By removing online platforms for sex workers, the legislation eliminates an important tool to screen clients and negotiate safe working conditions, exposing sex workers to violence and putting their lives at risk. The legislation not only harms sex workers, it will also undermine the US government’s own goal of ending trafficking.

“Women’s Rights Organizations Call on Congress to Protect Sex Workers Rights in Fight to End Trafficking of Persons,” <https://iwhc.org/press-releases/congress-protect-sex-workers-rights-end-trafficking>.

On February 20, 2018, the House Judiciary Committee reported out FOSTA with an amendment that expanded it by adding a new provision to the federal criminal code, 18 U.S.C. § 2421A, governing interactive computer services. It sought to prohibit reckless disregard of trafficking, and promotion or facilitation of prostitution. The provision reflected Congress’s belief that “[p]rostitution and sex trafficking are inextricably linked.” H.R. Rep. No. 115-572, pt. 1

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<sup>2</sup> *Latest Developments in Combating Online Sex Trafficking: Hearing before the Subcomm. on Commc’ns and Tech. of the H. Comm. on Energy and Commerce*, 115th Cong. 4 (2017) (statement of Russ Winkler, Special Agent in Charge, Tennessee Bureau of Investigation) at p.4. <http://docs.house.gov/meetings/IF/IF16/20171130/106657/HHRG-115-IF16-Wstate-WinklerR-20171130-U41.pdf>

at 5. Less than a week later, the House Committee on Rules approved FOSTA with an amendment by Representative Walters to add SESTA, turning H.R. 1865 into a combined FOSTA-SESTA bill. 163 Cong. Rec. H1248 (daily ed. Feb. 26, 2018). The House then passed H.R. 1865, and referred it to the Senate the next day, 164 Cong. Rec. S1293 (daily ed. Feb. 28, 2018).

As the combined H.R. 1865 was proceeding toward enactment, the Department of Justice (“DOJ”) wrote one of the bill’s sponsors, Representative Robert Goodlatte, to voice serious concerns. *See* 164 Cong. Rec. H1297 (daily ed. Feb. 27, 2018). DOJ wrote that “Section 2421A as originally drafted is broader than necessary because it would extend to situations where there is a minimal federal interest, such as to instances [where] an individual uses a cell phone to manage local commercial sex transactions involving consenting adults.” *Id.* DOJ also criticized the changes to Section 1591 as “unnecessary,” and shared a “serious constitutional concern” with the retroactive removal of Section 230 immunity. *Id.* DOJ wrote that “[i]nsofar as this [] would ‘impose[] a punishment for an act which was not punishable at the time it was committed’ or ‘impose[] additional punishment to that then prescribed,’ it would violate the Constitution’s Ex post facto Clause.” *Id.* (quoting *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 325-26 (1867), and citing *Beazell v. Ohio*, 269 U.S. 167, 169-70 (1925); U.S. Const. art. I, § 9, cl. 3).

Despite this warning, the House made no changes to the bill’s revisions to Section 1591 or to its retroactivity for the new carve-out from Section 230 immunity. On March 21, 2018, the Senate passed the legislation without amendment. 164 Cong. Rec. S1849 (daily ed. Mar. 21, 2018). The President signed H.R. 1865 into law on April 11, 2018, and FOSTA took effect.

### **C. FOSTA’s Specific Provisions**

As enacted, FOSTA effects three major changes in the law: (1) Section 3 creates a new federal crime and civil claim, codified at 18 U.S.C. § 2421A, prohibiting use or attempted use of any facility of interstate commerce, including interactive computer services, to promote or facili-

tate prostitution; (2) Section 4 amends CDA Section 230 to allow state authorities to prosecute interactive computer services if the underlying conduct would violate 18 U.S.C. § 2421A or § 1591, and to permit civil causes of action based on violations of Section 1591; and (3) Section 5 expands Section 1591’s prohibition on “participation in a venture” involving sex trafficking to include any action “knowingly assisting, supporting, or facilitating” a violation thereof.

Section 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” when the underlying conduct “promotes or facilitates the prostitution of 5 or more persons” or one “acts in reckless disregard” of the fact that his conduct “contributed to sex trafficking.” *Id.* § 2421A(b).<sup>3</sup> 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). Operators of interactive computer services can also face civil suits for violations of 2421A(b). *Id.* § 2421A(c). The law does not define what it means to “promote” or “facilitate” prostitution, nor even what constitutes “prostitution,” which is undefined in federal law; nor are “promote,” “facilitate,” or “contribute to sex trafficking” defined for purposes of Section 2421A(b).

As to preexisting CDA immunity from civil claims and from state law, FOSTA amended Section 230(e) to eliminate immunity for: “(A) any claim in a civil action [] under section 1595 of title 18 ... if the conduct underlying the claim constitutes a violation of section 1591 ... ;” “(B) any charge in a criminal prosecution [] under State law if the conduct underlying ... would constitute a violation of section 1591 ... ;” or “(C) any charge in a criminal prosecution [] under

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<sup>3</sup> Sections 2421A(c) and (d) allow for, respectively, civil recovery damages and attorneys’ fees, and mandatory restitution for victims of the crime.



State law if the conduct underlying ... would constitute a violation of section 2421A.” *See* 47 U.S.C. § 230(e)(5). The amendments to Section 230, like all of FOSTA, became effective upon the date of enactment. However, these changes to the CDA’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).

FOSTA also expands the federal criminal trafficking law in 18 U.S.C. § 1591 by newly defining “participation in a venture” (in the prohibition in Section 1591(a)(2) against benefitting financially or receiving anything of value from sex trafficking) to mean “knowingly assisting or supporting, or facilitating a violation of” the sex trafficking law. *See* 18 U.S.C. § 1591(e)(4).<sup>4</sup> The law does not specify what *mens rea* “participation in a venture” requires. It does not, however, appear to require that a participant realize, or even suspect, that a crime has occurred or will occur. Violations of Section 1591 are punishable by mandatory minimum sentences of ten or fifteen years (depending on the victim’s age and use of coercion), and fines of \$250,000 for individuals, \$500,000 for organizations. Additionally, FOSTA amends Section 1595 to provide that state attorneys general may 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* 18 U.S.C. § 1595(d).

#### **D. FOSTA’s Immediate Impact**

Creation of new federal offenses for “promotion or facilitating prostitution” and “reckless disregard of a contribution to sex trafficking” with broad, undefined terms, expansion of federal sex trafficking law via a similarly unclear “participation in a venture” definition, and related retrenchments of Section 230 immunity had precisely the censorial effect predicted during consi-

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<sup>4</sup> As noted, the newly expanded “participation in a venture” offense no longer falls within the immunity for civil claims and state prosecution provided by Section 230. *See supra* 6, 9.

deration of FOSTA. Numerous 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* Declaration of Kate D’Adamo ¶¶ 9-13 (“D’Adamo Decl.”). These include websites that host personal ads, facilitate dating, or are community forums devoted to lawful adult sexual relationships, as well as online platforms that hosted speech about non-sexual massage therapy and other non-sexual services. *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.

Just two days after the Senate passed H.R. 1865, online classified ad service Craigslist eliminated all personals ads, including non-sexual categories such as “Missed Connections” and “Strictly Platonic.” It released a statement explaining it censored these sections due to FOSTA: “Any tool or service can be misused. We can’t take such risk without jeopardizing all our other services, so we are regretfully taking [the] personals offline.”<sup>5</sup> D’Adamo Decl. ¶ 10. Reddit, a site where users post content, including news articles, photos or links, and participate in comment threads discussing the posts, began removing “subreddits” relating to sex. *Id.* ¶ 11. It also warned the moderator of the r/sexworkers subreddit, 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,” *id.* ¶ 13, even though any “[s]exual expression which

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<sup>5</sup> *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 personal formerly appeared.

is indecent but not obscene is protected by the First Amendment,” and cannot be criminalized under FOSTA. *See Sable Commc’ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989).

In the same vein, 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 the decision that we cannot put our organization and our attendees at risk.” *See* <http://desireealliance.org/conference>.

Websites adjacent to sex-related services, even if not directly connected to them, also were affected. VerifyHim.com, a tool that helped sex workers avoid abusive clients, announced it would “change the direction of the site.” D’Adamo Decl. ¶ 12. The “adult-ad forum” CityVibe.com disappeared two days after the President signed FOSTA. *Id.* ¶ 13. And TheEroticReview.com, a site where users post reviews about services of adult entertainers and escorts, blocked all U.S. users given potential FOSTA enforcement. *Id.* Similar impacts occurred at adult websites [www.myscarlettbook.com](http://www.myscarlettbook.com), [www.escortdesign.com](http://www.escortdesign.com), and [www.getluckyhere.com](http://www.getluckyhere.com), among others. *Id.*

#### **E. Impact on Plaintiffs**

Plaintiffs have likewise been forced to refrain from speaking or had their ability to speak cast into great uncertainty by FOSTA’s enactment. Woodhull, a tax-exempt education, advocacy and lobbying organization, is the only national human rights group working full-time toward affirming and protecting the fundamental human right to sexual freedom. Declaration of Ricci Levy (“Levy Decl.”) ¶¶ 2-3. Its mission focuses on supporting the health, safety, and protection of those under the broad umbrella of “sex workers,” including adult film performers, live web-cam models, sexual wellness instructors, escorts, and prostitutes. *Id.* ¶ 5. Woodhull strongly

opposes sex trafficking or sexual assault in any form, while supporting the right to engage in consensual sexual activity, including through advocacy and other efforts at its website. *Id.*

As Woodhull's pursuit of its mission involves using the Internet and other means of interstate commerce, immediately in the wake of FOSTA it censored its publication of information on its site that could assist sex workers negatively impacted by the law. *Id.* ¶¶ 31-32. It also 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. *Id.* ¶ 28.

FOSTA also has affected speech associated with Woodhull's signature event, its annual multi-day Sexual Freedom Summit, scheduled this year for August 2-5 in Alexandria, Virginia, to bring together hundreds of educators, therapists, legal and medical professionals, and leaders of advocacy groups to strategize, share information, and work collaboratively to protect members of their diverse communities. *Id.* ¶ 16. The Summit has long consisted of various workshops organized into tracks focused on different aspects of sexual freedom, which in recent years has included a "sex worker" track with sessions, among others, devoted to, *e.g.*, harm reduction, disability, age, health, and personal safety. *Id.* ¶ 17. Woodhull utilizes a wide variety of interactive computer services to organize, facilitate, and promote the Summit. *Id.* ¶¶ 10-15. This includes online databases and cloud storage for planning and scheduling, emailing participants and other members of the Summit constituency, and promoting workshops on the Summit website and on social media such as Facebook and Twitter, all of which historically has featured biographies and contact information for presenters. *Id.* ¶¶ 10, 23, 24. Woodhull also intends to livestream the sex work track on Facebook Live, and live tweet the event on Twitter, so that those who cannot attend can benefit from the information and commentary. *Id.* ¶¶ 25-26.

But this year, with enactment of FOSTA, Woodhull became concerned over promotion of the Summit's sex worker track, and publication of presenters' contact information, and thus in April 2018 ceased all online promotion of the sex work track. *Id.* ¶¶ 33-34. Given Woodhull's mission, this quickly led to social media backlash and threats to boycott the Summit. *Id.* ¶ 35. In June, Woodhull decided to publish and promote information about the sex worker track online after all, including presenters' contact and biographical information, and to promote workshops on Facebook and Twitter, despite uncertainty whether this risks violating FOSTA. *Id.* at 36. Even so, although it considered offering the Desiree Alliance the opportunity to conduct its cancelled July 2019 institute during the 2018 Summit, Woodhull concluded it would be too risky under FOSTA to promote the institute in conjunction with the Summit. *Id.* ¶ 40. And Woodhull remains uncertain whether it would be committing a crime or exposing itself to civil liability to livestream and live tweet the sex work track.

Plaintiff Human Rights Watch, one of the major international human rights monitoring organizations, sees its mission as exposing violations of international human rights law to public scrutiny around the world and generating momentum for change. Among those violations are exploitation and violence directed at women and girls, including those who are sex workers. Declaration of Dinah PoKempner ("PoKempner Decl.") ¶ 3. Every year, HRW produces and publishes many hundreds of reports, press releases, videos, podcasts and other online documents on its website and social media accounts. Some of these include research and advocacy on behalf of the rights of sex workers, including our advocacy that sex work be decriminalized.<sup>6</sup>

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<sup>6</sup> For example, in 2010, HRW reported on the unlawful arrests and detention of sex workers in Cambodia; in 2012, it reported on police searches of women for condoms as evidence of prostitution in four US cities; in 2013, it documented torture, beatings and other assaults by police officials against sex workers, and similar abuses against sex workers in Tanzania; and in

Human Rights Watch’s policy, adopted in 2013, opposes criminalization of consensual adult sex work and states that criminalization of voluntary, consensual sexual relations among adults is incompatible with respect for a number of internationally recognized human rights, including the rights to personal autonomy and privacy. The policy further states that “[f]orced prostitution and trafficking in human beings are among the most serious violations of human rights” and that “[a]ll states have an obligation to take necessary measures to prevent and combat such criminal activities.” However, HRW believes “those engaged in sex work are more likely to be capable of seeking protection from the law if they and their work are not treated as criminal” and it advocates accordingly. *Id.* ¶¶ 6-7.

Despite these clear distinctions in its policy, HRW is concerned that its global advocacy against criminalization of sex work and arrest of sex workers could be seen by U.S. litigants as “facilitating” “prostitution” or in some way assisting sex trafficking, thus violating FOSTA. Moreover, because HRW relies heavily on individuals spreading its reporting and advocacy through social media, it is concerned that social media platforms and websites that host, disseminate, or allow users to spread its reports and advocacy materials may be inhibited from doing so due to the substantial additional penalties of Section 2421A for “reckless disregard” of a connection to sex trafficking activities. *Id.* ¶¶ 8-9.

Plaintiff Eric Koszyk, a licensed massage therapist living in Portland, Oregon, and sole proprietor of Soothing Spirit Massage – a business he has run for over a decade – has also felt the effects of FOSTA. Mr. Koszyk had used the online classified ad platform Craigslist.org, the largest such U.S. site, as the primary way to find clients for Soothing Spirit, with approximately 90 percent of its clientele coming through Craigslist ads. Declaration of Eric Koszyk (“Koszyk 2014, it advocated against a Canadian anti-prostitution bill. PoKempner Decl. ¶ 5. HRW has also documented abuses against sex workers in Ukraine, Greece, Lebanon and South Africa. *Id.*

Decl.”) ¶ 6. The ads typically posted in the website’s Therapeutic Services section, specified Mr. Koszyk’s gender and that his massage therapy is professional, licensed, and therapeutic, and have largely remained unchanged during the entire time Mr. Koszyk used Craigslist. *Id.* ¶ 7.

After FOSTA was signed into law on April 11, 2018, Mr. Koszyk discovered Craigslist had removed his most recent ad for Soothing Spirit, and learned it had shut down its Therapeutic Services section in response to FOSTA’s passage. *Id.* ¶¶ 21-23. Though Mr. Koszyk tried to re-post the same long-running ad in Craigslist’s Skilled Services section, the site blocked the posting, and Mr. Koszyk has since been unable to post on *any* part of Craigslist, and thus since April 11, 2018, has been unable to advertise his therapeutic massage service. *Id.* ¶¶ 23-24.

FOSTA also has cast great doubt on the legality and actionability of the advocacy work by Plaintiff Jesse Maley, a long-time advocate for sex worker rights (under the name “Alex Andrews”), 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](http://www.ratethatrescue.org)), a free sex worker-led, community effort to share information. Declaration of Jesse Maley (“Maley Decl.”) ¶¶ 1-10, 12-13. Rate That Rescue is a ratings and review site created in response to the rapid growth of organizations that claim to assist or rescue sex workers, because some such groups offer services and support that may not match the needs of sex workers who do not view themselves as victims. *Id.* ¶¶ 14-16. Rate That Rescue also has expanded to share information about all types of entities that provide services sex workers use – be they public, private, non-profit, or commercial – including those that do not focus on sex workers but have products or services they use, like Twitter, Wix, or PayPal. *Id.* ¶¶ 18-23.

As the Rate That Rescue website hosts content created by both organizations and the sex worker community, it relied heavily on CDA immunity under Section 230, especially insofar as

users can post anonymously. *Id.* ¶¶ 19-21, 24-25. Without Section 230’s protections, Rate That Rescue will be unable to function and faces potentially ruinous liability for the content of users’ speech, as the site produces no revenue, is volunteer-operated, and cannot actively or comprehensively review, edit, or moderate user-generated content. *Id.* ¶¶ 27-29. There is also concern that Rate That Rescue could face claims of direct liability under FOSTA’s new Section 2421A ban on owning, managing, or operating a website with the intent to promote or facilitate prostitution, especially given that listing organizations that provide free services to sex workers – including healthcare, housing, and childcare – could be seen as helping or assisting them. *Id.* ¶¶ 30-31. The fact that Rate That Rescue was established by sex workers and their advocates to improve their lives, health, safety, and wellbeing raises the same concerns. *Id.* Additionally, FOSTA has delayed Ms. Maley’s decision about whether to purchase an in-development smartphone application and website designed to increase sex worker safety by allowing them to report violence, harassment and other harmful behavior, and by maintaining a database of reports so other sex workers could avoid violence and bad actors. *Id.* ¶¶ 32-39.

Plaintiff The Internet Archive (“the Archive”) is a 501(c)(3) organization located in San Francisco, California, that works to prevent the Internet and other “born-digital” materials from disappearing into the past, by offering permanent access for researchers, historians, scholars, people with disabilities, and the general public to historical collections that exist in digital format. The vast majority of the material in the Archive’s collection is authored by third parties and includes over 330 billion web pages spanning 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. Declaration of Brewster Kahle (“Kahle Decl.”) ¶¶ 2, 4, 5, 8, 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. Files are downloaded by tens of millions of users each month. *Id.* ¶¶ 7, 12, 13. The Archive does at times remove content, but has no practical ability to evaluate the legality of any significant portion of the third-party content it archives and makes available. The Archive relies upon immunity granted by 47 U.S.C. § 230 for third-party content. *Id.* ¶¶ 14-15.

The Archive is concerned the changes to 18 U.S.C. §1591 and § 2421A will subject it to federal criminal, state criminal, and civil liability. This is because some third-party content the Archive hosts, such as particular websites, information about books, and books themselves, may be construed as promoting or facilitating prostitution, or assisting, supporting, or facilitating sex trafficking. The Archive also fears that after FOSTA it can no longer rely on Section 230 to bar liability for content created by third parties and hosted by the Archive. *Id.* ¶¶ 21-22.

### **ARGUMENT**

The Court should grant preliminary injunctive relief in this case “to maintain the status quo pending a final determination of the merits” of Plaintiffs’ constitutional challenge to FOSTA, *Smoking Everywhere, Inc. v. FDA*, 680 F. Supp. 2d 62, 78 (D.D.C. 2010), 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). As demonstrated below, Plaintiffs are likely to succeed on the merits of their challenge to FOSTA, irreparable harm is likely absent preliminary relief, the equities balance in their favor, and preliminary relief accords with the public interest. *Pursuing America’s Greatness v. FEC*, 831 F.3d 500, 505 (D.C. Cir. 2016) (citing *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)).

FOSTA creates immediate threats of criminal prosecution and civil liability and violates the constitutional rights to publish, post to, and access websites for Plaintiffs, other websites, and all Internet users and service providers. Because FOSTA changes existing law and creates new criminal penalties in ways that violate well-established First Amendment principles, and stands

as an unconstitutional *ex post facto* law, Plaintiffs are likely to prevail on the merits, and have shown irreparable harm. *See, e.g., Bays v. City of Fairborn*, 668 F.3d 814, 819 (6th Cir. 2012) (when First Amendment rights are implicated, preliminary injunction factors essentially collapse). The government will experience minimal harm, or none at all, from an order preserving the *status quo* of laws that took effect only recently, particularly given preexisting criminal laws that remain in effect. If anything, in view of the harm resulting from FOSTA's hindrance of sex trafficking prevention efforts, and harms being suffered by sex workers, a preliminary injunction would, in fact, *serve* that particular public interest as well. And the public interest also will be served, as always, by safeguarding constitutional rights and preserving laws that have fostered a free and open internet. *See Pursuing America's Greatness*, 831 F.3d at 511-12; *Google v. Hood*, 96 F. Supp. 3d 584, 601 (S.D. Miss. 2015), *vacated on other grounds*, 822 F.3d 212.

**I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS BECAUSE FOSTA VIOLATES THE FIRST AMENDMENT AND DUE PROCESS, AND IMPOSES EX POST FACTO PENALTIES**

**A. FOSTA Violates the First Amendment Because it is a Vague and Overly Broad Content-Based Regulation of Internet Speech**

**1. FOSTA's Prohibitions are Unconstitutionally Overbroad**

The Constitution “gives significant protection from overbroad laws that chill speech within the First Amendment’s vast and privileged sphere.” *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 244 (2002). A law thus “may be invalidated as overbroad if ‘a substantial number of its applications are unconstitutional, judged in relation to the statute’s plainly legitimate sweep.’” *United States v. Stevens*, 559 U.S. 460, 473 (2010). *See Free Speech Coalition*, 535 U.S. at 244 (a law is “unconstitutional on its face if it prohibits a substantial amount of protected expression”). Likewise, a law that targets speech is facially unconstitutional if there is a “likelihood that the statute’s very existence will inhibit free expression” by “inhibiting the speech of

third parties who are not before the Court.” *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 799 (1984). “Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.” *NAACP v. Button*, 371 U.S. 415, 433 (1963). For that reason, “if the Government could achieve its interests in a manner that does not restrict speech, or that restricts less speech, [it] must do so.” *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 371 (2002).

There can be no doubt FOSTA “prohibits a substantial amount of protected expression.” It creates a new federal crime targeting anyone who “owns, manages, or operates an interactive computer service” with the intent to “promote” or “facilitate” prostitution or who recklessly disregard that they are “contributing to sex trafficking” and it authorizes state prosecutions and civil actions for such activity. The law provides no definitions, nor does it suggest discernable limits for what might constitute promotion or facilitation of prostitution or trafficking. By asserting that sex trafficking and prostitution are “inextricably linked,” Congress indicated its intent to combat sex trafficking by imposing liability on a broad range of non-trafficking speech, thus threatening sex worker advocates with potential liability for trafficking.

FOSTA’s new restrictions on speech and its changes to Section 230 immunity for hosting third-party speech are overly broad. The U.S. District Court for the Northern District of Illinois explained that “[f]acilitating’ and ‘assisting’ encompass a broader range of conduct, so broad in fact that they include ... intermediaries like phone companies, ISPs, and computer manufacturers.” *Dart v. Craigslist*, 665 F. Supp. 2d 961, 967 (N.D. Ill. 2009). To suggest that providing a platform for speech of someone who might commit illegal acts “promotes” or “facilitates” those acts “does not satisfy the ordinary understanding of culpable assistance to a wrongdoer.” *Doe v. GTE Corp.*, 347 F.3d 655, 659 (7th Cir. 2003) (“Just as the telephone company is not

liable ... for [video]tapes or narcotics sold by phone, ... a web host cannot be classified as an aider and abettor of criminal activities conducted through access to the Internet.”). *See also In re Aimster Copyright Litig.*, 334 F.3d 643, 651 (7th Cir. 2003) (“A retailer of slinky dresses is not guilty of aiding and abetting [] even if he knows that some of his customers are prostitutes ....”).

Under FOSTA’s plain terms, anything on an online platform, commercial or non-commercial alike, that can be said to “promote” or “facilitate” prostitution or trafficking is at risk of criminal prosecution or ruinous civil liability. Websites that support sex workers by providing health-related information or safety tips could be liable for promoting or facilitating prostitution, *see* Maley Decl. ¶¶ 30-31, while those that make prostitution easier – *i.e.*, “facilitate” it – by advocating for decriminalization are now uncertain of their own legality. PoKempner Decl. ¶¶ 8-9. Merely indicating online without negativity that a person is a sex worker – thus “promoting the[ir] prostitution” – could trigger similar ruinous liability. Additionally, websites that enable interpersonal or intimate connections, such as “personals” or “dating” information, face obvious risks. That is why an unprecedented array of sites closed down or severely restricted access to constitutionally protected material immediately after FOSTA passed. D’Adamo Decl. ¶¶ 10-13.

FOSTA is also unconstitutionally overbroad because it intends to rehabilitate claims filed to suppress constitutionally protected speech, and its terms chill that expression. Those who previously brought actions to close down online classified ad services, but were blocked by Section 230, advocated for FOSTA based on claims that ad sections for “adult” services or “escorts” were synonymous with prostitution. *See supra* 7-8. Yet such arguments have been rejected as unconstitutional by every court that considered them.<sup>7</sup> FOSTA seeks to overturn this settled law.

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<sup>7</sup> *See, e.g., Backpage.com v. Dart*, 807 F.3d 229, 234 (7th Cir. 2015) (“[N]ot all advertisements for sex are advertisements for illegal sex.”); *Doe v. Backpage.com LLC*, 104 F. Supp. 3d 149, 156-57 (D. Mass. 2015), *aff’d*, 817 F.3d 12 (1st Cir. 2016) (“The existence of an escorts

The result is widespread confusion about what online speech is safe from prosecution or civil liability. A similar uncertainty underlay the Supreme Court's concern about the CDA's indecency prohibition. It asked: "Could a speaker confidently assume that a serious discussion about birth control [], homosexuality, the First Amendment issues raised by the Appendix to our *Pacifica* opinion, or ... prison rape would not violate the CDA?" *Reno*, 521 U.S. at 871. The answer, of course, was "no." But FOSTA is even worse because it empowers 50 state attorneys general, local prosecutors, and enterprising plaintiffs' lawyers across America to concoct arguments for what might constitute promoting of facilitating prostitution or trafficking.<sup>8</sup>

## 2. FOSTA Fails Strict Scrutiny

Strict scrutiny applies to FOSTA because it imposes content-based restrictions on speech. As a general matter, "the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Stevens*, 559 U.S. at 468. "[R]egulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Reed v. Town of Gilbert*, 135 S. Ct. 2218,

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section in a classified ad service, whatever its social merits, is not illegal."), *cert. denied*, 137 S. Ct. 622 (2017); *Backpage.com v. McKenna*, 881 F. Supp. 2d 1262, 1282 (W.D. Wash. 2012) (escort ads have long been permitted and escort services are licensed and regulated in many states); *Backpage.com v. Cooper*, 939 F. Supp. 2d 805, 833-34 (M.D. Tenn. 2013) (ads on Backpage.com are protected speech under the First Amendment); *Backpage.com v. Hoffman*, 2013 WL 4502097, at \*9-11 (D.N.J. Aug. 20, 2013) (rejecting argument that escort ads on the website are unprotected speech); *M.A. v. Village Voice Media Holdings, LLC*, 809 F. Supp. 2d 1041, 1049-50 (E.D. Mo. 2011). *See also Craigslist*, 665 F. Supp. 2d at 968 ("We disagree ... that the 'adult services' section is a special case. The phrase 'adult,' even in conjunction with 'services,' is not unlawful in itself nor does it necessarily call for unlawful content."); *Cohen v. Bd. of Supervisors*, 707 P.2d 840, 852 (Cal. 1985) ("An escort service may very well involve lawful activities relating to sex.") (internal quotation marks omitted).

<sup>8</sup> *See Fair Housing Council of San Fernando Valley v. Roommates.com*, 521 F.3d 1157, 1174 (9th Cir. 2008) ("there will always be close cases where a clever lawyer could argue that *something* the website operator did encouraged the illegality" and websites will be faced with "death by ten thousand duck-bites, fighting off claims that they promoted or encouraged – or at least tacitly assented to – the illegality of third parties").

2227 (2015). *See Consolidated Edison Co. of N.Y. v. Public Serv. Comm’n of N.Y.*, 447 U.S. 530, 537 (1980) (“The First Amendment’s hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic.”). “Some facial distinctions based on a message are obvious, defining regulated speech by particular subject matter, and others are more subtle, defining regulated speech by its function or purpose. Both are distinctions drawn based on the message a speaker conveys, and, therefore, are subject to strict scrutiny.” *Reed*, 135 S. Ct. at 2227.

FOSTA creates new criminal provisions in 18 U.S.C. § 2421A that apply to any online publisher who intends to “promote” or “facilitate” the prostitution of another or acts in “reckless disregard” that their actions “contributed to sex trafficking.” Section 2421A thus targets speech based on its “message” and “function” – the promotion or facilitation of prostitution. *Reed*, 135 S. Ct. at 2227. *See also Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991) (statute restricting speech about crime is content-based). Section 2421A “focuses *only* on the content of the speech .... This is the essence of content-based regulation.” *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 811-12 (2000).

Section 2421A not only imposes content-based restrictions, but also allows the government to discriminate against certain viewpoints, which is an even more “blatant” and “egregious form of content discrimination.” *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995); *True the Vote, Inc. v. IRS*, 831 F.3d 551, 560 (D.C. Cir. 2016). By criminalizing speech that promotes or facilitates prostitution, the law’s sweep includes speech by Plaintiffs such as harm-reduction education aimed at sex workers, and advocacy intended to bring about decriminalization of sex work. Maley Decl. ¶¶ 27-31; Declaration of Dr. Alexandra Lutnick (“Lutnick Decl.”) ¶ 20. Speech condemning prostitution faces no such prohibition. The statute

does not define “promote” and “facilitate,” but by their plain meanings, these terms encompass advocacy and education that has the effect of furthering prostitution.<sup>9</sup> *See also United States v. Rivera*, 775 F.2d 1559, 1562 (11th Cir. 1985) (defining “facilitate” as “to make easier or less difficult”); *cf. Holder v. Humanitarian Law Project*, 561 U.S. 1, 7 (2010) (statute prohibiting “material support” of terrorist organizations meant “any contribution” that “facilitate[d]” their criminal conduct); *id.* at 36 (statute applied even where providers of support meant to “*promote* only the groups’ nonviolent ends”) (emphasis added).

For similar reasons, the exception added by FOSTA to 47 U.S.C. § 230(e)(5)(C) is also content-based. Together, subsections 230(c)(1) and (e)(3) provide broad immunity to providers of interactive computer services who host speech by others that violates state law. *See id.* § 230(e)(3) (“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.”). Subsection (e)(5)(C) selectively cuts back this protection based entirely on the content of speech, exposing platforms to prosecution under state laws “if the conduct underlying the charge would constitute a violation” of 18 U.S.C. § 2421A and “prostitution is illegal in the jurisdiction where the defendant’s promotion or facilitation of prostitution was targeted.” The law is content-based because it discriminates against platforms based on the content of the speech they host, providing protection for hosting any and all speech that may be illegal under state law *except* speech that “facilitates” prostitution.

Because FOSTA imposes content-based restrictions on speech, it is subject to strict scrutiny, “regardless of the government’s benign motive, content-neutral justification, or lack of ‘animus toward the ideas contained’ in the regulated speech.” *Pursuing America’s Greatness*,

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<sup>9</sup> 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).

831 F.3d at 509 (quoting *Reed*, 135 S. Ct. at 2228). Such content-based restrictions of speech, “enforced by severe criminal penalties, have the constant potential to be a repressive force in the lives and thoughts of a free people.” *Ashcroft v. ACLU*, 542 U.S. at 660. *See also Brown v. Entm’t Merchs. Ass’n*, 564 U.S. 786, 799 (2011) (“It is rare that a regulation restricting speech because of its content will ever be permissible.”). The First Amendment “demands” that such restrictions “be presumed invalid, and that the Government bear the burden of showing their constitutionality.” *Ashcroft*, 542 U.S. at 660 (citations omitted).

To satisfy strict scrutiny, the government must prove the law is “narrowly tailored to promote a compelling Government interest,” and that no “less restrictive alternative would serve the [its] purpose.” *Playboy*, 529 U.S. at 813; *Brown*, 564 U.S. at 799. This means it may limit speech “no further than necessary to achieve the goal,” to “ensure that legitimate speech is not chilled or punished.” *Ashcroft*, 542 U.S. at 666. Any speech restriction must directly advance the government interest and be neither overinclusive nor underinclusive, and there can be no less speech-restrictive alternatives to serve the government interest. *Reno*, 521 U.S. at 874.

The government’s burden is particularly heavy in this case where Congress adopted “nuclear option”-level penalties to ensure compliance. *See Free Speech Coalition*, 535 U.S. at 244 (“a law imposing criminal penalties on protected speech is a stark example of speech suppression” and “a textbook example of why we permit facial challenges to statutes that burden expression”). In *Reno*, the Supreme Court noted that violations of the CDA could be punished by up to two years in prison and concluded “the severity of criminal sanctions may well cause speakers to remain silent rather than communicate even arguably unlawful words, ideas, and images.” *Reno*, 521 U.S. at 872. But where the threat of such sanctions under the CDA were undeniably chilling, FOSTA imposes a deep freeze: Violations of Section 2421A are subject to



10 years in prison, while aggravated violations carry a sentence of up to 25 years. 18 U.S.C. § 2421A(a)-(b). While the CDA raised possible enforcement by federal prosecutors, FOSTA authorizes criminal enforcement by federal authorities, 50 state attorneys general, *and* hundreds of local prosecutors. 18 U.S.C. § 2421A(a); 47 U.S.C. § 230(e)(5); 18 U.S.C. § 1595(d).<sup>10</sup>

Here, FOSTA fails strict scrutiny because the law does not directly advance the government's objective. If anything, the law has made it more difficult, as Congress was warned, for law enforcement to investigate trafficking. *See* Winkler Statement, *Latest Developments in Combating Online Sex Trafficking*, *supra* note 2, at p.4; Declaration of Professor Alexandra Frell Levy ("Professor Levy Decl.") ¶¶ 7-9; Declaration of Dr. Kimberly Mehlman-Orozco ("Mehlman-Orozco Decl.") ¶¶ 247-29, 31; Lutnick Decl. ¶¶ 17-19. It has also hindered operations of anti-trafficking organizations. Lutnick Decl. ¶ 21; Freedom Network Statement, *supra* 6-7.

Further, the government cannot meet the heavy burden to demonstrate that FOSTA is narrowly tailored. First, it is overinclusive because it restricts more speech than necessary to further the government's interest. Even granting that there is a compelling interest in preventing sex trafficking, "[t]he prospect of crime ... by itself does not justify laws suppressing protected speech." *Free Speech Coalition*, 535 U.S. at 244-45; *see also Kingsley Int'l Pictures Corp. v. Regents of Univ. of N.Y.*, 360 U.S. 684, 689 (1959). Section 2421A reaches beyond prostitution and sex trafficking, criminalizing speech intended to promote sex workers' rights and safety, including advocacy and education that may "facilitate" prostitution. Congress' belief that such speech about sex work contributes to sex trafficking is not supported by evidence.

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<sup>10</sup> In addition, FOSTA authorizes civil damages, strips away existing statutory immunities from civil liability in state and federal courts, and imposes mandatory restitution "in addition to any other civil or criminal penalties." 18 U.S.C. § 2421A(c)-(d); 47 U.S.C. § 230(e)(5). As with criminal penalties, the prospect of significant civil liability based on the exercise of free speech is circumscribed by the First Amendment. *Snyder v. Phelps*, 580 F.3d 206, 217-18 (4th Cir. 2009), *aff'd*, 562 U.S. 443 (2011); *New York Times Co. v. Sullivan*, 376 U.S. 254, 264-65 (1964).

Just as “the Government may not reduce the adult population to only what is fit for children,” *Reno*, 521 U.S. at 875, neither may it limit how Americans may discuss issues that may include illegal behavior. FOSTA’s chilling effects go even further. It has adversely affected online platforms that host classified ads (whether or not sexually-oriented), even though it cannot be presumed speech about sex is necessarily illegal or unprotected by the First Amendment. *Backpage.com, LLC v. Dart*, 807 F.3d at 234 (“not all advertisements for sex are advertisements for illegal sex”). This is the very definition of a chilling effect. Given this broad impact, the government cannot meet its “heavy burden” under strict scrutiny, *Reno*, 521 U.S. at 879, unless it can show that FOSTA restricts speech “no further than necessary.” *Ashcroft*, 542 U.S. at 666. Here, however, the law’s vague and expansive terms, combined with its watered-down scienter requirements and draconian penalties show that Congress used “a butcher knife on a problem that requires a scalpel to fix.” *Cooper*, 939 F. Supp. 2d at 813.

Second, there are less speech-restrictive alternatives that would effectively further the government’s stated interest in eliminating sex trafficking. “When a plausible, less restrictive alternative is offered to a content-based speech restriction, it is the Government’s obligation to prove that [it] will be ineffective to achieve its goals.” *Playboy*, 529 U.S. at 816. Indeed, some of these alternatives already exist in federal law; prior to FOSTA’s enactment, it was already a crime to “advertise[]” sex trafficking (on the Internet or elsewhere) and to “benefit[] financially” from a venture involving such ads. 18 U.S.C. § 1591(a)(1), (2). Such laws, subject to First Amendment limits and when enforced pursuant to constitutionally required *mens rea* requirements, constitute less restrictive ways to address the government’s interest. *Backpage.com, LLC v. Lynch*, 216 F. Supp. 3d 96, 108-09 (D.D.C. 2016); *Playboy*, 529 U.S. at 816-26.

### 3. FOSTA's Prohibitions are Unconstitutionally Vague

Not only is FOSTA overly broad, its restrictions on speech also are unconstitutionally vague.<sup>11</sup> As a general proposition, vague laws offend due process because they fail to give people of ordinary intelligence fair warning of what conduct is prohibited, allow arbitrary and discriminatory enforcement, and delegate basic policy matters to policemen, judges and juries for resolution on an ad hoc and subjective basis. *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). Statutory vagueness takes on added significance beyond normal due process concerns where the government seeks to regulate speech. Vague statutes that affect “sensitive areas of basic First Amendment freedoms” are unconstitutional because they “inevitably lead citizens to ‘steer far wider of the unlawful zone’ ... than if the boundaries of the forbidden areas were clearly marked.” *Id.* at 108 (quoting *Baggett*, 377 U.S. at 372). As a result, “this Circuit has ruled that officials must have ‘explicit guidelines in order to avoid arbitrary and discriminatory enforcement.’” *Armstrong v. D.C. Public Library*, 154 F. Supp. 2d 67, 81 (D.D.C. 2001) (quoting *Big Mama Rag, Inc. v. United States*, 631 F.2d 1030, 1035 (D.C. Cir. 1980)). If a law “lacks terms which can be defined objectively, a court will strike it down for vagueness.” *Id.* at 77 (quoting *Fire Fighters Ass’n, D.C. v. Barry*, 742 F. Supp. 1182, 1196 (D.D.C. 1990)).

A vague law that regulates expression “‘raises special First Amendment concerns because of its obvious chilling effect on free speech.’” *Brown*, 564 U.S. at 807 (quoting *Reno*, 521 U.S. at 871-72). *See also Smith v. Goguen*, 415 U.S. 566, 573 (1974) (“Where a statute’s literal

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<sup>11</sup> Questions involving overbreadth and vagueness in laws that regulate speech necessarily are related. However, a restriction can be unconstitutionally overbroad without being vague. *E.g., Bd. of Airport Comm’rs of City of Los Angeles v. Jews for Jesus, Inc.*, 482 U.S. 569, 570, 577 (1987) (resolution banning all “First Amendment activities” at Los Angeles International Airport is overbroad). At the same time, vague restrictions on speech are inherently overbroad, because a nebulous law really imposes “no rule or standard at all.” *Baggett v. Bullitt*, 377 U.S. 360, 365 (1964). *Reno*, 521 U.S. at 864 (vagueness is relevant to the First Amendment overbreadth inquiry).

scope ... is capable of reaching expression sheltered by the First Amendment, the [vagueness] doctrine demands a greater degree of specificity than in other contexts.”). And where penal statutes are involved, “[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms.” *NAACP*, 371 U.S. at 438. Finally, for reasons already discussed, the “unique nature of the [Internet] cannot be overemphasized in discussing and determining the vagueness issue.” *Reno*, 929 F. Supp. at 865 n.9.

FOSTA falls far short of this constitutional standard. It imposes criminal penalties based entirely on speaking or publishing online with “intent” to “promote” or “facilitate” the prohibited offenses but does not define those terms.<sup>12</sup> The Act creates further ambiguity by increasing punishment for those who act “in reckless disregard ... that ... conduct contributed to sex trafficking,” without defining how one “contributes to sex trafficking.” 18 U.S.C. § 2421A(b)(2). The vagueness of “contributed to sex trafficking” is compounded by Congress’s belief that sex trafficking and consensual sex work are “inherently linked,” thus raising the probability that it considers anything that “contributes to” sex work, whatever that means, to also “inherently” “contribute to sex trafficking.” Even under normal due process standards, an intent to “facilitate” criminal activity can be constitutionally vague.<sup>13</sup> But the Supreme Court has held this requirement takes on even greater urgency in the First Amendment context.

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<sup>12</sup> FOSTA’s inclusion of an “intent” standard does nothing to cure the law’s vagueness where the operative terms “promote” or “facilitate” are ambiguous and undefined. *Amusement Devices Ass’n v. Ohio*, 443 F. Supp. 1040, 1051 (S.D. Ohio 1977) (“[T]he Supreme Court has never to our knowledge held that the imposition of a scienter element upon a statute necessarily renders the statute’s prohibitions sufficiently precise to withstand a vagueness challenge.”). In any event, the law’s scienter elements are defective, as explained *infra* § I.A.4.

<sup>13</sup> *E.g.*, *Amusement Devices Ass’n*, 443 F. Supp. at 1051 (invalidating state law prohibiting provision of legal services to criminal syndicate with a purpose of “establishing or maintaining” the syndicate or “facilitating any of its activities” because the language “fails to specify with reasonable clarity which kind or kinds of conduct it prohibits”).

The operative terms of FOSTA impose a far more amorphous burden on protected speech by prohibiting any communication that may be said to “promote” or “facilitate” prostitution or trafficking than the undefined terms the Supreme Court held unconstitutionally vague in *Reno*: “obscene or indecent” and “patently offensive.” *Reno*, 521 U.S. at 858-59, 871-79. Not only does FOSTA fail to define the key terms “promote” or “facilitate,” other federal statutes with those terms have been interpreted fairly boundlessly, with facilitate, for example, meaning simply “to make easy or less difficult.” *E.g.*, *United States v. Miller*, 379 F.2d 483, 485-86 (7th Cir. 1967) (interpreting provisions of Travel Act). Under these vague parameters, any online speech that might be considered encouraging to sex workers, or that provides services or seeks to minimize harm in a way that encourages, or makes sex work easier and safer for sex workers, could be swept up in prosecutions or civil claims. Or, as the Court put it in *Reno*, no one could say with confidence that such speech would not be subject to legal sanctions. 521 U.S. at 871.

The same dynamic is at work here. As the Court observed in *Baggett*, “the susceptibility of the statutory language to require the foreswearing of an undefined variety of ‘guiltless knowing behavior’” makes a law unconstitutionally vague. *Id.* at 366-68 (striking down a statute requiring teachers to sign oaths affirming they did not “advise, teach, abet, or advocate” overthrow of government). *Compare Reno*, 521 U.S. at 871 (“Could a speaker confidently assume that a serious discussion about birth control [], homosexuality, the First Amendment issues raised by the Appendix to our *Pacifica* opinion, or ... prison rape would not violate the CDA?”), with *Baggett*, 377 U.S. at 368 (“Does the statute reach endorsement or support for Communist candidates for office? Does it reach a lawyer who represents the Communist Party or its members or a journalist who defends [the] constitutional rights of the Communist Party or its members or

anyone who supports any cause which is likewise supported by Communists or the Communist Party?”).<sup>14</sup>

It would ignore reality – as well as the history of Internet censorship – to disregard how FOSTA’s vague mandate will be used by prosecutors and private litigants in all 50 states to censor speech and threaten lifestyle choices with which they disagree. FOSTA provides them a perfect tool for driving material they dislike from the Internet, even though it is constitutionally protected. Given the massive criminal penalties and onerous potential civil liability, online platforms large and small will have no choice but to “steer far wider of the unlawful zone.” *Grayned*, 408 U.S. at 109. Indeed, they have already done so on a massive scale. *See supra* 11-12.

#### **4. FOSTA Lacks the Necessary Scienter to Satisfy First Amendment Requirements**

FOSTA is also unconstitutional because it does not include the requisite standard of *mens rea*. The Supreme Court has long held the First Amendment bars the State from imposing liability for distributing expressive materials without proof of scienter. In *Smith v. California*, 361 U.S. 147 (1959), for example, the Court struck down a Los Angeles ordinance making it a crime for booksellers to possess obscene books. Even though the First Amendment does not protect obscene speech, the Court held a bookseller could not be liable without proof of knowledge of the contents of a given book. *Id.* at 153-54 (“It would be altogether unreasonable to demand so near an approach to omniscience. And the bookseller’s burden would become the public’s burden”). *See also Mishkin v. New York*, 383 U.S. 502, 511 (1966) (“The Constitution requires proof of scienter to avoid the hazard of self-censorship of constitutionally protected

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<sup>14</sup> *See also Cramp v. Board of Pub. Instruction*, 368 U.S. 278, 281 (1961) (invalidating Florida law that required public employees to swear they never lent “aid, support, advice, counsel or influence to the Communist Party”).

material ....”).<sup>15</sup> The First Amendment burden imposed by self-censorship is magnified online, because “websites ... will bear an impossible burden to review all of their millions of postings or, more likely, shut down their adult services entirely.” *Cooper*, 939 F. Supp. 2d at 830.

FOSTA amended Section 1591 to provide that violation of the law requires only “participation in a venture” that includes “knowingly assisting, supporting, or facilitating” prostitution or trafficking, but left undefined what constitutes “assisting, supporting, or facilitating” such activities. *See Cooper*, 939 F. Supp. 2d at 830 (broad and undefined terms undermine scienter requirements). FOSTA’s “aggravated” offense in Section 2421A further dispenses of scienter by imposing liability based on “reckless disregard” of the fact that conduct “contributed to sex trafficking.” 18 U.S.C. § 2421A(b)(2). This provision strips away the requirement of specific knowledge mandated by the Constitution in favor of an amorphous standard that imposes massive liability based on generalized knowledge that online speech may be construed to “promote or facilitate” prostitution or to “contribute to sex trafficking.” *See Elonis*, 135 S. Ct. at 2009 (holding defendant “must know the facts that make his conduct fit the definition of the offense, even if he does not know that those facts give rise to a crime”).

The House Report on the legislation explained that the purpose of this change was to create a workaround to the specific knowledge requirement for advertising in the prior version of Section 1591. It noted Section 1591’s previous knowledge requirement was difficult to prove because “online advertisements rarely, if ever, indicate that sex trafficking is involved.” H.R. Rep. No. 115-572, pt. 1, at 5. The Report added that “federal prosecutors usually cannot

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<sup>15</sup> *See also United States v. X-Citement Video, Inc.*, 513 U.S. 64, 78 (1994) (“[A] statute completely bereft of a scienter requirement as to the age of the performers would raise serious constitutional doubts.”); *Video Software Dealers Ass’n v. Webster*, 968 F.2d 684, 690 (8th Cir. 1992) (“Statutes that impose criminal responsibility for dissemination of unprotected speech must contain a knowledge requirement.”); *Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) (“[W]rongdoing must be conscious to be criminal.”).

demonstrate beyond a reasonable doubt that the website operators knew the advertisements involved sex trafficking.” FOSTA therefore adopted a generalized knowledge standard, contrary to constitutional requirements.

The predictable result of this legislation has been “self-censorship of constitutionally protected material” on a massive scale, *Mishkin*, 383 U.S. at 511, such as where Craigslist eliminated its entire personals section. *See supra* 11, 16. Such mainstream, general-purpose websites are of the sort that the Supreme Court called “indispensable” in *Packingham*. 137 S. Ct. at 1735-36. And that is without even consideration of online services like those of the Plaintiffs, which merely *talk about* sex work and related topics (or, in the case of Mr. Koszyk, does not involve such subject matter at all) yet have restricted themselves in an effort to “steer far wide[] of the unlawful zone.” *Speiser v. Randall*, 357 U.S. 513, 526 (1958).

**B. FOSTA’s Selective Modification of Section 230’s Immunity for Online Intermediaries Violates the First Amendment and Promotes Widespread Censorship of Internet Speech**

Section 230 of the CDA was based on understanding that the Internet would be crippled if online providers could be held liable for third-party content, “given the volume of material communicated ..., the difficulty of separating lawful from unlawful speech, and the relative lack of incentives to protect lawful speech.” *Lycos*, 478 F.3d at 418-19. At the same time, Congress recognized that “Internet service providers are likely to abandon efforts to self-regulate content posted on their site[s]” if “efforts to review and omit third-party ... inappropriate material make a computer service provider ... liable for posted speech.” *Batzel*, 333 F.3d at 1029. To serve these twin goals, Congress adopted two different immunity provisions: Section 230(c)(1), which bars imposing liability on service providers for alleged harms arising from content posted by third parties, and 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.”<sup>16</sup> Together, the two immunity provisions reinforce important First Amendment protections. However, by limiting the scope of Section 230(c)(1) and preserving only the immunity of (c)(2) based on *blocking or removing* posted content, FOSTA transforms Section 230 into an engine of censorship in violation of the First Amendment.

Section 230 was adopted to promote free expression online, to free intermediaries from threats of liability for hosting third-party speech, and to encourage websites to make editorial judgments without risking liability. *See, e.g., Batzel*, 333 F.3d at 1027-29 (Section 230 was added to the CDA “to further First Amendment and e-commerce interests on the Internet while also promoting the protection of minors”); *Barrett v. Rosenthal*, 40 Cal. 4th 33, 56 (2006) (Section 230 reflects “legislative commitment to the value of maintaining a free market for online expression”).<sup>17</sup> It flows from recognition that online platforms have a constitutional right to make editorial choices,<sup>18</sup> as well as from the understanding that Internet speech will be

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<sup>16</sup> Section 230(c)(1) protects free speech online by allowing intermediaries to post third-party content without the threat of unlimited liability from state prosecutors or civil litigants who claim to be harmed by the postings. Section 230(c)(2), on the other hand, protects against liability *from third parties* when editorial policies are enforced that prevent certain materials from posting. *See Zango, Inc. v. Kaspersky Lab, Inc.*, 568 F.3d 1169, 1174-75 (9th Cir. 2009) (explaining different purposes of respective Section 230 immunities); *Chicago Lawyers’ Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666, 670-71 (7th Cir. 2008) (Section 230(c)(1)’s immunity is “general,” while (c)(2) ensures providers who filter offensive material are “‘not liable to the **censored customer**’”) (emphasis added).

<sup>17</sup> *See also Google v. Hood*, 822 F.3d at 220 (“First Amendment values ... drive the CDA”); *Zeran*, 129 F.3d at 330; *Lycos*, 478 F.3d at 418-19; *Delfino v. Agilent Techs., Inc.* 145 Cal. App. 4th 790, 802-03 (2006) (Section 230 was intended to “avoid the chilling effect upon Internet free speech” that would arise from imposing liability on intermediaries).

<sup>18</sup> *La’Tiejira v. Facebook, Inc.*, 272 F. Supp. 3d 981, 991-22 (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

broadly stifled if platforms are held liable for speech posted by third parties. *Lycos*, 478 F.3d at 418-19; *Zeran*, 129 F.3d at 331.

FOSTA ignores the First Amendment basis for Section 230 immunity and seeks to limit selectively the scope of Section 230 immunity for third-party postings that relate to prostitution and sex trafficking. It amends 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 the parallel 18 U.S.C. § 2421A in jurisdictions where prostitution is illegal. At the same time, it does not affect immunity under Section 230(c)(2), which immunizes actions taken to *restrict* speech in various categories “whether or not protected by the First Amendment,” so long as it is done in “good faith.” Thus, as reformulated, Section 230(c)(2) now provides a powerful incentive for online platforms to over-censor speech to qualify for immunity, and to do so under a nebulous and undefined “good faith” standard.<sup>19</sup>

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engaging in fully protected First Amendment expression—“[t]he presentation of an edited compilation of speech generated by other persons”); *Langdon v. Google, Inc.*, 474 F. Supp. 2d 622, 629-30 (D. Del. 2007) (First Amendment protects decisions about placement, ranking, or rejection of online advertisements); *Search King, Inc. v. Google Tech., Inc.*, 2003 WL 21464568, at \*4 (W.D. Okla. 2003) (“Google’s PageRanks are entitled to ‘full constitutional protection.’”) (citation omitted).

<sup>19</sup> The Senate Report on SESTA confused the immunities provided by Section 230(c)(1) versus 230(c)(2) in suggesting interactive computer service providers “would not have their good faith efforts to restrict access to objectionable content used against them” because the legislation “would not abrogate section 230(c)(2)(A).” S. Rep. No. 115-199, at 4 (2018). This congressional action misstates the purpose of Section 230(c)(2), which was enacted to protect intermediaries against claims made *by their customers* who might object to deletions to posted material or other editorial choices made by the service provider. *See supra* 33-34 & n.16. As now reinterpreted by Congress, Section 230(c)(1) immunity from prosecution or for claims brought by those claiming harm from third-party posts in the prescribed content categories would depend on the “good faith” limitation in Section 230(c)(2), which authorizes deleting content “whether or not [such speech is] protected by the First Amendment.” 47 U.S.C. § 230(c)(2).

Because this change will be effectuated through potential state prosecutions and civil lawsuits, websites have been, and will continue to be, forced to err on the side of excessive censorship. Moreover, the new provisions provide a mechanism for exercise of a heckler's veto, whereby any person can claim a website contains illegal content, thus triggering that site's "knowledge" – and forcing sites to choose between investigating each claim or simply taking the challenged content down.

Based on past experience, this is exactly what will happen: those seeking to impose liability under Sections 1591 or 1595 (and, by logical extension, under the new federal crime under Section 2421A), will argue that any website that allows postings regarding "escorts" or "adult services" (or anything else promoting human interaction, such as "dating" or "personals") promotes or facilitates prostitution or trafficking. *E.g.*, *Craigslist*, 665 F. Supp. 2d at 962. *See also* Koszyk Decl. ¶¶ 21-24 (describing Craigslist's closure of its Therapeutic Services section after FOSTA's passage). The fact that such speech is constitutionally protected will no longer matter, and online platforms will have no option but to err on the side of censorship.

Section 230 previously barred liability based on bare allegations that a website "encouraged" unlawful content in some way based on the understanding that such a basis for liability effectively eclipses the immunity Congress sought to provide. *E.g.*, *Jones*, 755 F.3d at 408-09. Under FOSTA, it is not necessary to allege a website encouraged the posting of material in violation of its provisions, but only that the operator "promoted" or "*facilitated*" prostitution, or disregarded that postings "*contributed to sex trafficking*," which could encompass a wide range of behavior. As the Ninth Circuit concluded, under Section 230 prior to FOSTA, such cases "must be resolved in favor of immunity, lest we cut the heart out of section 230 by forcing websites to face death by ten thousand duck-bites, fighting off claims that they promoted or

encouraged – or at least tacitly assented to – the illegality of third parties.” *Roommates.com*, 521 F.3d at 1174. But after FOSTA, websites (and especially those without substantial legal resources) face just that kind of death. Lutnick Decl. ¶ 12. The only rational response is to broadly censor constitutionally protected material and to immediately take down material subject to a complaint – which is exactly what has occurred.

### C. FOSTA is an Unconstitutional *Ex Post Facto* Law

On its face, FOSTA violates the Constitution’s command that “[n]o ... *ex post facto* Law shall be passed.” U.S. Const. art. I, § 9. *See also* U.S. Const. art. I, § 10 (barring states from adopting *ex post facto* laws). “[T]he presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic.” *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994).<sup>20</sup> The Supreme Court has thus long recognized retroactive legislation as “oppressive, unjust, and tyrannical,” and therefore “condemned by the universal sentence of civilized man.” *Ogden v. Sanders*, 25 U.S. (12 Wheat.) 213, 266 (1827).

FOSTA is an *ex post facto* law because its effective date enables enforcement “regardless of whether the conduct alleged occurred, or is alleged to have occurred, before, on, or after such date of enactment.” FOSTA § 4(b). This provision implements changes to 47 U.S.C. § 230(e), which authorizes (1) civil claims that are predicated on violations of criminal law in 18 U.S.C. § 1591; (2) criminal prosecutions under state law where the underlying conduct violates Section 1591; and (3) criminal prosecutions under state law where the underlying conduct violates newly adopted prohibitions in 18 U.S.C. § 2421A.

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<sup>20</sup> The Constitution’s Framers were keenly aware of the dangers posed by such laws. *See* The Federalist No. 44 (James Madison) (“ex-post-facto laws ... are contrary to the first principles of the social compact, and to every principle of sound legislation”); The Federalist No. 84 (Alexander Hamilton) (“the prohibition of ex-post-facto laws ... are perhaps greater securities to liberty and republicanism” than any other constitutional principles).

Congress was clearly aware of this constitutional concern, yet the provision passed both houses of Congress and was signed into law without change. As noted, DOJ warned Congress about this defect prior to FOSTA's passage. Citing the proposed effective date, DOJ notified the Chairman of the House Judiciary Committee that the Department "objects to this provision because it is unconstitutional." U.S. DEPT. OF JUSTICE OFFICE OF LEGISLATIVE AFFAIRS, *Memorandum to Hon. Robert Goodlatte, Chairman, U.S. House of Representatives Committee of the Judiciary* (Feb. 27, 2018). The Memorandum explained that "Insofar as this will "impose[] a punishment for an act which was not punishable at the time it was committed" or "impose[] additional punishment to that then prescribed" it would violate the Constitution's *Ex post facto* Clause. *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 325-26 (1867); *see Beazell v. Ohio*, 269 U.S. 167, 169-70 (1925); U.S. Const. art. I, § 9, cl. 3.

As both DOJ and *Congress* understood,<sup>21</sup> this provision is unconstitutional. For present purposes, however, the question is whether the government will defend this provision or agree it must be enjoined.<sup>22</sup> "Federal officials are not only bound by the Constitution, they must also take a specific oath to support and defend it. U.S. Const. art. VI, cl. 3. To enforce a ... policy that the [government] itself believes is unconstitutional may well constitute a violation of that

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<sup>21</sup> Representative Goodlatte acknowledged the law's constitutional problems in a floor speech shortly before the legislation passed the House. HOUSE OF REPRESENTATIVES JUDICIARY COMMITTEE, Goodlatte Floor Speech in Support of FOSTA (Feb. 27, 2018), *available at* <https://judiciary.house.gov/press-release/69685/> (noting that retroactive application of FOSTA "could subject this legislation to a constitutional challenge under the *Ex Post Facto* Clause"). Chairman Goodlatte said that he hoped the problem could be fixed and promised to propose an amendment to do so. However, no such amendment was forthcoming and the bill was passed with the constitutional flaws intact.

<sup>22</sup> DOJ faced a similar issue with the CDA, which originally contained a section prohibiting the transmission of information "intended for producing abortion." *See Sanger v. Reno*, 966 F. Supp. 151, 157-58 (E.D.N.Y. 1997) (discussing the Hyde Amendment, codified as CDA § 507). Upon passage, the Attorney General wrote to Congress explaining that § 507 violated the First Amendment and that DOJ would decline to enforce it. *Id.* at 158.

oath.” *Meredith Corp. v. FCC*, 809 F.2d 863, 874 (D.C. Cir. 1987).<sup>23</sup> In light of DOJ’s position on FOSTA’s *ex post facto* provisions, it cannot defend the provision.<sup>24</sup>

## **II. PLAINTIFFS AND ALL OTHER INTERNET PUBLISHERS AND USERS HAVE SUFFERED AND WILL CONTINUE TO SUFFER IRREPARABLE HARM ABSENT PRELIMINARY RELIEF**

Because Plaintiffs are likely to succeed on the merits of their challenges to FOSTA, and in particular that it violates the First Amendment, they also have shown likelihood of irreparable harm. The Supreme Court has repeatedly held that “[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” *Elrod*, 427 U.S. at 373. *See also supra* 19 (citing *Bays*, 668 F.3d at 819, regarding how preliminary injunction factors essentially collapse when First Amendment rights are implicated). Here, the Plaintiffs have already had their protected speech curtailed due to FOSTA’s chilling effect, and the need to self-censor, causing further loss of First Amendment rights, will only continue. The same is true for other websites, and the members of the public who use them.

FOSTA’s enactment is substantially inhibiting Woodhull’s mission to advocate for harm-reduction, and for the health and safety of sex workers, by forcing it to curtail its use of online resources. Levy Decl. ¶ 28. Woodhull has already censored publication of information on its website that could assist sex workers negatively impacted by FOSTA, and was inhibited from posting other resources for sex workers, from expressing opposition to FOSTA, and from allowing third parties to make similar posts to Woodhull’s *Sex and Politics* blog. *Id.* It also held back

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<sup>23</sup> Even if violation of the oath did not present a constitutional problem, taking a position in court that contradicts DOJ’s representations to Congress at least raises a question whether pleadings signed by government lawyers “are warranted by existing law.” Fed. R. Civ. P. 11(b)(2).

<sup>24</sup> The Attorney General is obligated to notify Congress whenever the Justice Department establishes a policy of declining to enforce or defend a given law passed by Congress based on the Department’s conclusion that the act is unconstitutional. Pub. L. No. 96-132, § 21(a)(2), 93 Stat. 1040, 1049 (1979).

from promoting portions of its 2018 Summit dedicated to sex workers – even though the material is educational and informational, and participants include advocates, educators, therapists and legal and medical professionals – from the time of FOSTA’s enactment until such time that Woodhull was so whipsawed by its constituents’ reactions that it had to bear the risk FOSTA presented and promote the Summit’s sex work track. *Id.* ¶¶ 32-36. This decision prevented Woodhull from fully publicizing and promoting its Summit activities, and singled out sex worker content for disparate treatment. *Id.* ¶ 34. Despite its nervous self-reversal on promoting the Summit, Woodhull still felt unable to offer a platform there to the Desiree Alliance’s conference, and Woodhull remains hesitant to continue former efforts to promote sex worker education and harm-reduction on its website. *Id.* ¶ 40. And Woodhull does not know whether it will commit a federal crime if it livestreams or live tweets the sex work track as it hopes to do. *Id.* ¶ 38.

HRW is uncertain whether its global advocacy against criminalization of sex work and arrest of sex workers could be seen by U.S. litigants as “facilitating” “prostitution” or in some way assisting sex trafficking, thus violating FOSTA. Also, HRW relies heavily on individuals disseminating its content through social media, and is concerned that social media platforms and websites that host, disseminate, or allow users to spread its reports and advocacy materials may be inhibited from doing so, on the basis of the substantial additional penalties of Section 2421A for “reckless[] indifferen[ce]” to sex trafficking activities. PoKempner Decl. ¶¶ 8-9.

Alex Andrews’ Rate That Rescue website continues to operate under the uncertainty that retrenched Section 230 immunity presents given its inability to moderate the third-party content at its site. The very fact that Rate That Rescue was established by sex workers and advocates for them to improve their lives, health, safety, and wellbeing creates existential doubts given the speech FOSTA criminalizes. Maley Decl. ¶¶ 27-31. The new law is also impeding progress on

an in-development smartphone app and website, the *raison d'être* of which is intended to be the communication of safety information critical to protecting sex workers. *Id.* ¶¶ 32-39.

Eric Koszyk, meanwhile, he has lost all access to Craigslist, the one national, well-known online platform for promotion of his licensed, therapeutic massage business – which comprises exclusively protected speech. Koszyk Decl. ¶¶ 21-24. As Mr. Koszyk attests, he is unaware of any other website that will allow him to post similar ads and reach a similar sized audience as Craigslist. *Id.* ¶ 25. FOSTA has prevented him from being able to post ads on Craigslist for months, with no end in sight absent a preliminary injunction.

And Mr. Koszyk's circumstance highlights the irreparable harm of lost First Amendment rights by others not presently before the Court. *See* Lutnick Decl. ¶¶ 12-16. Some of these are connected to Plaintiffs, such as the speaker scheduled for Woodhull's Summit who pulled out after FOSTA silenced the organization's promotion of workshops in the sex worker track, or the Desiree Alliance, which given Woodhull's inability to step in, was forced to cancel what would have been the largest U.S. gathering to address human, labor, and civil rights for sex workers. The removal of content, shuttering of services, and changes in policies outlined above by numerous online services further evidences the incursion on First Amendment rights FOSTA imposes.

This is especially true of websites and interactive computer services that enable interpersonal contact by users such as those for personal ads, dating services, and similar platforms that facilitate the "unlimited ... communication of all kinds" that the Supreme Court deemed so vital. *Packingham*, 137 S. Ct. at 1735-36 (citation omitted); Lutnick Decl. ¶¶ 12-16. This intrusion on the types of speech that online intermediaries facilitate, and that mark the Internet as a unique mass medium, trenches deeply on "the right of the public to ... social, political, esthetic, moral, and other ideas and experiences," *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1967),



and the right more generally of willing listeners to receive information from willing speakers. *E.g.*, *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 756 (1976).

The Internet Archive is concerned its practice of hosting third-party content, such as archives of particular websites, information about books, and the books themselves, could be construed as promoting or facilitating prostitution, or assisting, supporting, or facilitating sex trafficking. The Archive also fears it can no longer rely on Section 230 to bar liability for third-party content hosted by the Archive, on account of FOSTA. Kahle Decl. ¶¶ 21-22.

This, of course, affects not just the First Amendment interests of online platforms that host speech, but those of the millions of individuals who use them to access that information, as “[f]reedom of speech is not merely freedom to speak; it is also freedom to read.” *Koger v. Dart*, 114 F. Supp. 3d 572, 578 (N.D. Ill. 2015) (quoting *King v. Fed. Bureau of Prisons*, 415 F.3d 634, 638 (7th Cir. 2005)). And it all, of course, reflects the specter of criminal and civil exposure under FOSTA’s addition of Section 2421A as a new criminal offense and its amendments to Section 1591 and to the scope of Section 230 immunity. If the Supreme Court agreed in *Reno* that a threat of two years in prison under the CDA justified the district court’s entry of a preliminary injunction, *see* 521 U.S. at 862, 885; *see also id.* at 872, the prospect of ten years in prison, ratcheting up to as many as 25 under FOSTA, certainly warrants preliminary injunctive relief. All of the above incursions on Plaintiffs’ rights to free expression, and the self-censoring conduct of non-parties, constitute irreparable harm that compels preliminary injunctive relief.

### **III. THE BALANCE OF EQUITIES FAVORS INJUNCTIVE RELIEF**

Any harm the government might cite from grant of a preliminary injunction pales compared to the loss of First Amendment freedoms Plaintiffs have shown. As a threshold matter, all of the laws that already criminalize the conduct of traffickers will continue to apply. Further,

although FOSTA is premised on preventing sex trafficking and helping ameliorate harm that may be involved in sex work, it is having a decidedly opposite impact. Organizations like Woodhull, Desiree Alliance, and their cohorts, and websites like Rate That Rescue, seek to provide information, education, and strategies geared to the safety and well-being of their constituencies. Yet FOSTA has forced them to curtail those efforts. The same is true of online services and forums such as Reddit or VerifyHim.com, which have limited or eliminated opportunities for users to communicate in these areas. *See* D’Adamo Decl. ¶¶ 10-13 (documenting actions by websites in response to FOSTA); Professor Levy Decl. ¶¶ 6-9 (discussing how shuttering online platforms will inhibit detection of sex trafficking); Lutnick Decl. ¶¶ 20-21.

Moreover, by eliminating online forums for sex workers, FOSTA is having a devastating impact of sex workers’ health and safety. Sex workers have lost the ability to screen clients, protect their identities, and arrange safe meeting places. FOSTA also is driving sex workers back to street-based work and pimps, which is far more dangerous. Street-based sex workers are far more likely to experience violence or exploitation. Street-based sex work also increases marginalization and isolation, which in turn increases violence, and diminishes a sex worker’s ability to seek help when needed. Lutnick Decl. ¶¶ 11-15.

At the same time, there is no evidence FOSTA will, in fact, curtail sex trafficking, and censorship of online content is a questionable approach – at best – to combatting it. Indeed, there is evidence that it actually hinders anti-trafficking efforts. Lutnick Decl. ¶¶ 16-19. It also hinders law enforcement in targeting trafficking. *See* Winkler Statement, *supra* note 2, at p.4. As expert Dr. Mehlman-Orozco testifies, trafficking is clandestine and difficult to identify; so where law enforcement could once turn to a small number of concentrated, open-access websites in the U.S. to catalyze arrests and rescues, FOSTA caused commercial sex ads to disperse to

hundreds of platforms, leaving trafficking even more hidden from law enforcement. Mehlman-Orozco Decl. ¶¶ 16, 24-25, 28, 31. As noted above, Congress was warned of this very outcome.

Given that Plaintiffs have demonstrated irreparable injury if a preliminary injunction does not issue, the balance of equities clearly tips in Plaintiffs' favor. *See Winter*, 555 U.S. at 20. The balance of equities also favors injunctive relief because "no substantial harm to others can be said to inhere" in allowing a violation of constitutional rights to continue. *Déjà vu of Nashville, Inc. v. Metro. Gov't of Nashville & Davidson Cty.*, 274 F.3d 377, 400 (6th Cir. 2001).

#### **IV. PRELIMINARY RELIEF WOULD SERVE THE PUBLIC INTEREST**

A preliminary injunction is particularly warranted in this case because, as this Court has held, "[s]imply stated, it is in the public interest to uphold a constitutionally guaranteed right." *PHE, Inc. v. U.S. Dep't of Justice*, 743 F. Supp. 15, 26 (D.D.C. 1990); *cf. Pearson v. Shalala*, 130 F. Supp. 2d 105, 119 (D.D.C. 2001) ("it is clearly in the public interest to ensure that [the] government[] ... fully compl[ies] with the law, especially when that law concerns the parameters of a party's First Amendment rights" ). As the D.C. Circuit has stressed, allowing unconstitutional government action to stand "is always contrary to the public interest," which lies in "protecting First Amendment rights." *Pursuing America's Greatness*, 831 F.3d at 511-12 (quoting *Gordon v. Holder*, 721 F.3d 638, 653 (D.C. Cir. 2013)).

Injunctive relief is especially in the public interest here because the public "has a strong interest in having largely-unfettered access to Internet mediums for the purpose of publishing and viewing content and information," consistent with the exercise of First Amendment rights. *Google v. Hood*, 96 F. Supp. 3d at 601. *See also Pursuing America's Greatness*, 831 F.3d at 511 ("there is always a strong public interest in the exercise of free speech rights otherwise abridged by an unconstitutional regulation"). For the same reasons that FOSTA's counter-productivity undermines the government's interest, *see supra* 43-44, it is likewise in the public interest to

allow those like Plaintiffs, the platforms that they offer and/or use, and those who would speak through them to continue to do so without the incursion on First Amendment rights that FOSTA imposes.

### CONCLUSION

For the reasons above, Plaintiffs respectfully request that this Court grant a preliminary injunction against enforcement of FOSTA pending resolution of the constitutional challenges to the law.

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Respectfully submitted,

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Attorneys for Plaintiffs

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

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

Plaintiffs,

v.

THE UNITED STATES OF AMERICA  
and JEFFERSON B. SESSIONS, in his  
official capacity as ATTORNEY GENERAL  
OF THE UNITED STATES,

Defendants.

Case No. \_\_\_\_\_

**DECLARATION OF KATE D'ADAMO**

Pursuant to 28 U.S.C. § 1746, I, KATE D'ADAMO, hereby declare as follows:

1. The facts contained in the following affidavit are known to me of my own personal knowledge, and if called upon to testify, I could and would competently do so. I am a sex worker rights advocate who for more than 10 years has focused on economic justice, anti-policing and incarceration and public health issues related to sex work. I received a bachelor of arts degree in political science in 2006 from California Polytechnic State University, San Luis Obispo and a master's degree in international affairs in 2012 from The New School University.

2. I am a member of the board of directors of Plaintiff Woodhull Freedom Foundation. My previous work includes serving as the National Policy Advocate at the Sex Workers Project at the Urban Justice Center. In that position, I focused on laws, policies and

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advocacy surrounding individuals who trade sex, including the criminalization of sex work, anti-trafficking policies, and HIV-specific laws.

3. Prior to joining the Sex Workers Project, I was a community organizer and advocate with the Sex Workers Outreach Project and Sex Workers Action New York. In this role, I developed programming to promote community building, provided peer support and advanced political advocacy to support the rights and well-being of people engaged in the sex trade both on and off the job.

4. I have also participated in coalitions such as the Human Rights for All campaign, which sought to incorporate sex worker rights within the Universal Periodic Review, and was a founding member of the Persist Health Project.

5. As part of my advocacy for sex workers' rights, I worked with a broader coalition to oppose the Allow State and Victims to Fight Online Sex Trafficking Act (H.R. 1865) ("FOSTA") and the Stop Enabling Sex Traffickers Act (S. 1693) ("SESTA") as they moved through Congress.

6. Along with a coalition of other sex worker advocates, sex workers, and their allies, I helped create the website Survivors Against SESTA, [www.survivorsagainstsesta.org](http://www.survivorsagainstsesta.org). The coalition who created Survivors Against SESTA were concerned about the impact the law would have on sex workers and the websites and other online services they rely upon to stay safe. The website was created to support sex workers, to disseminate information about the bill and potential advocacy that individuals could engage in, and to gather and post information about sex workers' legal rights and how they can work safely.

7. The organizers of Survivors Against SESTA also held multiple calls with members of the sex worker community throughout the United States to disseminate the

information we had collected. Additionally, advocates, both in association with Survivors Against SESTA and independently, organized know your rights trainings and community meet-ups in multiple cities with the goal of sharing information about the then-pending legislation and connecting organizers with people who would be affected by the law.

8. The organizers of Survivors Against SESTA arranged the first national sex worker lobby day on June 1. Dozens of sex workers and their allies traveled to Washington, D.C. to meet with their representatives' offices. At the same time, advocates in cities throughout the country hosted events to help with education and outreach for sex workers' rights. On June 2, sex workers and their allies arranged rallies and marches in 15 cities across the country.

9. Survivors Against SESTA also decided to document some of the impact of the legislation. Even before FOSTA became law, the creators of Survivors Against SESTA and the broader community advocating on behalf of sex workers began noticing that certain websites and online services used by sex workers were changing their policies, removing certain services, or shutting down completely. It appeared to us as though many were doing so out of fear and uncertainty regarding their potential liability under SESTA.

10. For example, the online classified ads website Craigslist, [www.craigslist.com](http://www.craigslist.com), shut down its personals section on March 23, publicly attributing the closure to the Senate's passage of FOSTA. In a post on its website, Craigslist wrote:

US Congress just 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 are regretfully taking craigslist personals offline. Hopefully we can bring them back some day.

To the millions of spouses, partners, and couples who met through craigslist, we wish you every happiness!



See <https://www.craigslist.org/about/FOSTA>.

11. Around the same time, Reddit published an announcement that specifically banned “Paid services involving physical sexual contact.” See [https://www.reddit.com/r/announcements/comments/863xcj/new\\_addition\\_to\\_sitewide\\_rules\\_regarding\\_the\\_use/](https://www.reddit.com/r/announcements/comments/863xcj/new_addition_to_sitewide_rules_regarding_the_use/). Reddit began to remove several “subreddits” relating to sex, including: r/Escorts, r/MaleEscorts, r/Hookers, and r/SugarDaddy. Elizabeth Nolan Brown, “Hours After FOSTA Passes, Reddit Bans ‘Escorts’ and ‘SugarDaddy’ Communities,” REASON (March 22, 2018 10:35 am), <https://reason.com/blog/2018/03/22/reddit-bans-escort-subreddits>. The moderator of the r/sexworkers subreddit—which is described as “a community forum for sex workers, clients, and even those unaffiliated with the industry to come together and ask questions and share resources”—received a warning that the subreddit could be shut down if administrators felt that it infringed on Reddit’s new policy. Tina Horn, “How a New Senate Bill Will Screw Over Sex Workers,” ROLLINGSTONE (March 23, 2018), <https://www.rollingstone.com/politics/features/controversial-anti-sex-trafficking-bill-screw-over-sex-workers-w518323>.

12. Additionally, VerifyHim, a tool that helps sex workers avoid abusive clients and describes itself as “the biggest dating blacklist database on earth,” said at the around same time that it was “working to change the direction of the site.” Nitasha Tiku, “Craigslist Shuts Personal Ads For Fear of New Internet Law,” WIRED (March 23, 2018), <https://www.wired.com/story/craigslist-shuts-personal-ads-for-fear-of-new-internet-law/>.

13. In the days before and after FOSTA became law, several other online platforms, websites and services either changed their behavior or shut down entirely. Some examples include:

- The Google Play Store Google Play updated its policy to ban explicit content such as “promotional images of sex toys” and “apps that promote escort services.”  
<https://play.google.com/about/restricted-content/inappropriate-content/sexually-explicit-content/>. Google also began deleting explicit content that users uploaded to its Google Drive service and also appeared to lock out users from the service. Samantha Cole, “Sex workers are reporting that their Google Drive files are mysteriously locked or vanishing,” Motherboard (March 21, 2018),  
[https://motherboard.vice.com/en\\_us/article/9kgwnp/porn-on-google-drive-error](https://motherboard.vice.com/en_us/article/9kgwnp/porn-on-google-drive-error).
- Eventbrite, the online ticketing and event service, updated its policies to prohibit events that would “constitute or promote . . . explicit sexual activity or pornography.”  
[https://www.eventbrite.com/support/articles/en\\_US/Troubleshooting/community-guidelines](https://www.eventbrite.com/support/articles/en_US/Troubleshooting/community-guidelines).
- The “adult-ad forum” CityVibe.com disappeared two days after the President signed FOSTA. Elizabeth Nolan Brown, “The New Law That Killed Craigslist’s Personals Could End the Web As We’ve Known It,” THE DAILY BEAST (Mar. 23, 2018),  
<https://www.thedailybeast.com/the-new-law-that-killed-craigslist-personals-could-end-the-web-as-weve-known-it>.
- Pounced.org, a personals website serving the “furry” community, shut down, explaining that as a free site staffed by volunteers, it could not manage the news burden created by potential liability under section 2412A if it did not have the protection of section 230:  
“FOSTA changes that in a way that makes sites operated by small organizations like pounced.org much riskier to operate. FOSTA essentially says that if we facilitate the prostitution of another person we're liable. If you read FOSTA carefully the bill says "or facilitate" - the problem is that "or facilitate" is ill-defined.

...

“We don't promote prostitution or sex trafficking. We're a personals site for the furry community, our goal was to allow members of our community to have a personals site dedicated solely to the community, and we've tried to serve our community well.

“The problem is, with limited resources and a small volunteer staff, our risk for operating the site has now significantly increased. Now if someone posts an ad looking to exchange sex for something to pounced.org, and we don't catch it, is that facilitating prostitution? Is it enough to simply re-train our volunteer staff and update our terms of service?

“Do we try to filter advertisements and forum posts? Do we ask our volunteer staff to take on the burden of reviewing all personal ads to insure we're in compliance - and what if they miss one? If we try to implement filtering will it be anything other than intrusive and ineffective, given the resources of a small organization like ours?

“And we must now account for the fact that our liability to operate a service such as pounced.org has unequivocally increased, especially given that FOSTA explicitly makes this a criminal liability.

“We now can be held accountable for the actions of others using our service.

...

“In many ways this bill targets small sites like ours directly, it favors organizations with the resources to invest in filtering technology, paid staff and legal support staff. It is less of an impediment for big organizations, while doing significant harm to small organizations like ours, which service niche communities like ours. Our larger competitors are not likely to find a large market in servicing the furry community, and so our community will suffer.”

<http://pounced.org/why.html>.

- The Erotic Review, a review website for sex workers with forums and other features, shut down its advertising forums for users in the United States and later blocked access by any U.S. visitor. <https://www.theeroticreview.com/na.asp>.
- The adult live streaming website MyFreeCams changed its policies to specifically ban its performers and its users from engaging in any transactions, including offering to meet up

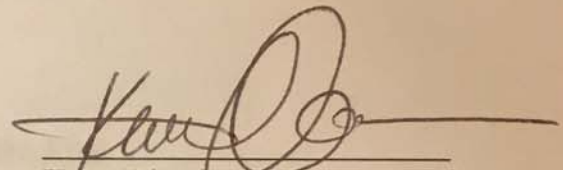
in person in exchange for anything of value.

[https://wiki.myfreecams.com/wiki/Rules\\_and\\_Guidelines](https://wiki.myfreecams.com/wiki/Rules_and_Guidelines).

- First Choice Pay, an online payment processor and platform used by online adult livestreaming performers, stopped receiving or processing payments shortly after passage of FOSTA. <https://firstchoicepay.custhelp.com/>.
- A number of other adult websites, such as [www.myscarlettbook.com](http://www.myscarlettbook.com), [www.escortdesign.com](http://www.escortdesign.com)/, and [www.getluckyhere.com](http://www.getluckyhere.com), shut down.

14. I declare under penalty of perjury of the laws of the State of MA that the foregoing is true and correct to the best of my knowledge and belief.

Executed on this 28th day of June 2018 at 9:35 Am.

  
Kate D'Adamo

**IN THE UNITED STATES DISTRICT COURT  
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WOODHULL FREEDOM FOUNDATION,  
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THE INTERNET ARCHIVE,

Plaintiffs,

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THE UNITED STATES OF AMERICA and  
JEFFERSON B. SESSIONS, in his official  
capacity as ATTORNEY GENERAL OF THE  
UNITED STATES,

Defendants.

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Case No. \_\_\_\_\_

**DECLARATION OF RICCI LEVY IN SUPPORT OF  
MOTION FOR PRELIMINARY INJUNCTION**

I, Ricci Levy, swear or affirm, under the penalties of perjury pursuant to the laws of the United States, that the following is true and correct.

1. My name is Ricci Levy, I am competent to make this Declaration, and the statements made herein are based on my personal knowledge.

2. I am the President and Chief Executive Officer of the Woodhull Freedom Foundation, a charitable 501(c)(3) tax-exempt organization based in Washington, DC (“Woodhull”).

3. Woodhull was founded in February, 2003, and is the only national human rights organization working full time toward affirming and protecting the fundamental human right to sexual freedom.

4. Woodhull envisions sexual freedom as inclusive of the right to enjoy sexual pleasure, form relationships and families of our choosing, and protect our bodies from sexual violence.

5. Woodhull's mission includes support for the health, safety, and protection of sex workers, which include adult film performers, live webcam models, sexual wellness instructors, exotic dancers, escorts, and prostitutes. Woodhull believes that if every human being has a right to work and be paid to support themselves, and a right to autonomy over their body, then the rights of sex workers must be protected as well. Woodhull strongly opposes sex trafficking or sexual assault in any form, while advocating for the right to engage in consensual sexual activity.

6. Woodhull's work is conducted through education, advocacy, lobbying, and collaboration with other organizations.

7. For example, in 2005, Woodhull submitted testimony to the U.S. Senate, Judiciary Committee, Subcommittee on Constitution, Civil Rights, and Property, regarding the First Amendment protections associated with sexual explicit media. Woodhull also submitted testimony in opposition to Washington D.C.'s "Prostitution-Free Zone Amendment Act of 2011." In 2012, Woodhull successfully lobbied the State of Florida to pass legislation ending the practice of shackling and restraining pregnant female inmates. In addition, Woodhull participates as *amicus curiae* in cases impacting sexual freedom issues.

8. Woodhull operates a website containing information about the organization, its events, and donation instructions. *See* <https://www.woodhullfoundation.org/>.

9. Woodhull's website also contains a blog called *Sex and Politics*, which contains posts written by various contributors. *See* <https://www.woodhullfoundation.org/news-blogs/>. The blog allows users to comment on the posts.

10. Woodhull uses a variety of other online technologies to conduct its business and organize its events, such as Google Docs, Formidable form generator, online databases and cloud storage services.

11. Woodhull also exchanges frequent emails with event organizers and volunteers along with website developers, promoters, and presenters.

12. Woodhull regularly uses social media such as Facebook, Twitter, and Instagram, along with a social media post scheduling tool called Hootsuite, and a link shortening service called Bitly to promote the organization and its events.

13. Woodhull uses an online ticketing service to register attendees for its events.

14. Woodhull uses a mobile event application called YAPP, which provides information to attendees about activities occurring at Woodhull events.

15. Woodhull intends to use Youtube.com to store and publish workshop presenter videos to provide information about the presenter.

16. Woodhull's signature event is its annual multi-day Sexual Freedom Summit ("Summit") held in the Washington, DC area during August, which brings together hundreds of educators, therapists, legal and medical professionals, and leaders of advocacy organizations to strategize, share information, and work collaboratively to protect the members of our communities

and their right to information, health, and pleasure. Woodhull publishes a separate website devoted to the Summit, at [www.sexualfreedomsummit.org](http://www.sexualfreedomsummit.org).

17. Historically, the Summit has included a variety of educations or informational workshops, organized into distinct tracks, each of which focus on specific aspects of sexual freedom. Recent years have included a “sex worker” track which involved workshops devoted to issues impacting sex workers, such as harm reductions, disability, age, health, and personal safety.

18. For example, in 2017, the Summit included workshops entitled: Sex Work, Human Trafficking and the Void Between; Making Pleasure Political: How To Be Politically Engaged While Repping Your Pleasure-based Business; The Unexpected Consequences of Age of Consent Laws; The New War on Sexual Expression; and Promoting HIV Education and Biomedical Prevention Tools: Lessons and Next Steps From the Field.

19. Additionally, in 2016, the Summit included workshops entitled: Intuition & Technology: A Client Screening Workshop for Sex Workers; Sex Work is Work: Examining Ways to Legitimize Sex Industry Experience in the Business World; The Whore Singularity: When Everyone is Naked on the Internet, Is No One Naked on the Internet; The Road to Criminalization; The Gameshow on How Sex for Money Became Criminalized in the US; and Advocacy: Sexual Health for Sex Workers!

20. Previous years’ events included a day long institute entitled: Sex Work, Sex Trade, Prostitution & Human Rights, and workshops entitled: Breaking Ground: Understanding Criminalization of Sex Work as Violence; End Demand and How the Anti-Trafficking Movement is Hurting Sex Workers, LGBTQ Individuals, and the Sex-positive Community.

21. The 2018 Summit is scheduled to occur from August 2-5, 2018, at the Hilton Alexandria Mark Center in Alexandria, Virginia.



22. In early 2018, Woodhull began preparing for its annual Summit by selecting workshop topics and presenters. After a rigorous selection process, Woodhull identified fifty-four (54) workshop presentations, organized into six different tracks. One of the official tracks is entitled “Sex As Work” and includes workshops entitled: Sex Work and Disability: Shifting the Focus to Disabled Sex Workers; Capitalism is not Consensual: Sex Work and the Shaky Foundations of Consent; Criminalization of Sex Work is a Human Rights Violation and a Labor Rights Concern; Avoiding Harm When You Need An Ambulance; and Courting and Whoring: Balancing Work and Play. A copy of the descriptions of these workshops as they appear on the Summit site are attached as Exhibit 1. Woodhull historically promotes the titles of all workshops on its Summit website, *See* <https://www.sexualfreedomsummit.org/workshops/>. In past years, the workshop information appeared in a section of Woodhull’s primary website: <https://www.woodhullfoundation.org/sexual-freedom-summit/>.

23. Woodhull also publishes the biographies and contact information for workshop presenters on its Summit website. *See* <https://www.sexualfreedomsummit.org/presenters/>.

24. Woodhull also promotes most, if not all, of the workshops in advance of the Summit on social media such as Facebook, Instagram, and Twitter. The social media posts include links to the presenter’s workshop and biography.

25. Woodhull intends to livestream one of the sex worker track workshops on Facebook Live during its upcoming 2018 Summit, to make the content available to those who are not able to attend in person.

26. Woodhull also intends to “live tweet” the sex worker track workshops on Twitter, using the hashtag #SFS18, during the upcoming Summit.

27. Woodhull learned that a new bill, labeled SESTA / FOSTA, H.R. 1865 / S. 1693 (“FOSTA”) was passed by Congress, and signed into law on April 11, 2018. Woodhull understands that the law contains a new criminal prohibition on promoting or facilitating prostitution using an interactive computer service and expands liability associated with sex trafficking.

28. Woodhull’s mission would have included immediate efforts to publish information on its website designed to assist sex workers who were negatively impacted by FOSTA, in an effort to educate these individuals about their rights, risks, and options under the new legal environment, and promote their overall well-being. Woodhull would also have published resources available for sex workers on its site, and would have strongly opposed enforcement of the law against marginalized sex workers on its *Sex and Politics* blog and social media. Woodhull would have permitted third parties to post similar information about sex work on its blog. Instead, Woodhull has been forced to censor its own online advocacy efforts, and the speech of third parties on its blog out of fear that its activities could be deemed to promote or facilitate prostitution.

29. Near the time that FOSTA was signed into law, Woodhull learned that numerous websites that provided information about sex workers or sex work had closed, blocked United States users, or shut down channels associated with this category of information, such as: Craigslist.org (closed its adult personals ads), reddit.com (closed sub-reddits such as: r/escorts, r/maleescorts, r/sugardaddy, r/hookers, r/sexworkerblogs), yellowpages.com (closed adult boards), cityvibe.com (closed), men4rentnow.com (closed), theeroticreview.com (closed due to FOSTA), nightshift.co (closed due to FOSTA), myproviderguide.com (closed), and others.

30. The widespread response to the law by the online community suggested to Woodhull that the law could be broadly construed to criminalize a wide swath of online speech relating to human sexual activity.

31. After the enactment of FOSTA Woodhull became concerned that the operation of its websites, and use of various interactive computer services to organize and promote the sex worker track workshops, including publication of the biographical information for the presenters, could violate FOSTA given the broad, vague and uncertain scope of the new law.

32. Immediately upon passage of FOSTA, Woodhull ceased all online promotion of the sex work track workshops for the Summit, and blocked all information associated with these workshops from its Summit website.

33. Woodhull also restrained publication of the titles of the sex work track workshops, along with the biographies and contact information for the presenters.

34. This decision prevented Woodhull from fully publicizing and promoting its Summit activities, and singled out sex worker content for disparate treatment, in advance of the Summit.

35. As a result of its effort to comply with FOSTA by not promoting or publishing online information about its sex worker track, Woodhull faced a social media backlash and threats to boycott the Summit. At least one sex work track presenter cancelled her planned presentation due to Woodhull's efforts to comply with the law. These developments threatened the success and reputation of the Summit.

36. While Woodhull remains uncertain whether online publication and promotion of its sex worker track workshops and presenter information is prohibited by FOSTA, it has chosen to engage in some of these activities due to the adverse consequences it endured in attempting to comply with the law through self-censorship. In June, 2018, in conjunction with its decision to initiate a legal challenge to FOSTA, Woodhull decided to publish and promote all information about the sex worker track workshops, including biographical and contact information about the presenters. It also decided to promote the workshops on social media such as Twitter and Facebook.

Woodhull has struggled to understand its legal obligations and remains uncertain as to its potential liability under FOSTA, in connection with its past and future activities.

37. As a result of its activities and decisions regarding the upcoming Summit, Woodhull has a well-founded fear that its efforts to promote information about sex workers on the Internet could be construed by an ambitious prosecutor or enterprising plaintiff's attorney as promoting or facilitating prostitution in violation of FOSTA.

38. Woodhull is further concerned about its potential liability under FOSTA for the content of Facebook Live streams or live tweets, as it cannot review or moderate the content of such communications before they are published online.

39. Woodhull has learned, upon information and belief, that in response to FOSTA, the Desiree Alliance, a national coalition of current and former sex workers, working for an improved understanding of sexual policies and its human, social and political impacts of criminalization surrounding global policies in sex work, cancelled its July 2019 conference: *Transcending Borders: Immigration, Migration, and Sex Work*. In an online post the Director of Desiree Alliance, Cris Sardina, announced that because of FOSTA, "our leadership made the decision that we cannot put our organization and our attendees at risk." See <http://desireealliance.org/conference/>.

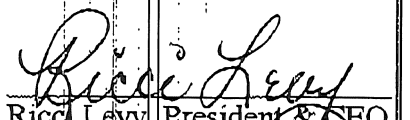
40. After the Desiree Alliance cancelled its July conference in response to FOSTA, Woodhull considered offering the group an opportunity to conduct its institute during Woodhull's 2018 Summit, described above. However, Woodhull concluded it would be too risky under FOSTA to promote the institute in conjunction with the Summit.

41. FOSTA's passage substantially inhibits Woodhull's mission which includes advocacy for harm reduction, health, and safety of sex workers, by restricting the use of its online resources for these purposes.

42. Woodhull staunchly opposes sex trafficking and all forms of sexual abuse and coercion. However, Woodhull is uncertain regarding its liability for aggravated violations of Section 2421A, which impose substantial additional penalties for anyone who operates an interactive computer service and is "recklessly indifferent" to sex trafficking activities. Due to the efforts of lawmakers and the proponents of FOSTA to conflate consensual sex work with sex trafficking, along with the potential liability imposed for actions of third parties imposed by FOSTA, Woodhull has a credible fear of prosecution under these broad, vague, and undefined provisions.

43. The FOSTA amendments that create state, criminal, and civil liability for platforms by carving out significant exceptions to Section 230 immunity have exposed Woodhull to potential liability for speech of third parties on its blog or social media accounts.

44. The passage of FOSTA further inhibits Woodhull's mission, which includes advocacy for harm reduction, health, and safety of sex workers, by preventing the use of online resources for these purposes.

  
Ricci Levy, President & CEO  
Woodhull Freedom Foundation

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

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

Plaintiffs,

v.

THE UNITED STATES OF AMERICA  
and JEFFERSON B. SESSIONS, in his  
official capacity as ATTORNEY GENERAL  
OF THE UNITED STATES,

Defendants.

Case No. \_\_\_\_\_

**DECLARATION OF DINAH POKEMPNER  
FOR PLAINTIFF HUMAN RIGHTS WATCH**

Pursuant to 28 U.S.C. § 1746, I, DINAH POKEMPNER hereby declare as follows:

1. I am the General Counsel of Plaintiff Human Rights Watch, Inc. (“HRW”). The facts contained in the following affidavit are known to me of my own personal knowledge and if called upon to testify, I could and would completely do so.

2. HRW is a 501(c)(3) tax-exempt organization based in New York, NY that monitors human rights conditions worldwide and advocates for the cessation and remediation of human rights violations worldwide. HRW advocates for respect of the human rights of sex workers around the world, including in the United States, and since 2013, for the decriminalization of sex work.

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3. Human Rights Watch (“HRW”) is one of the key international human rights monitoring organizations, that sees its mission as exposing violations of international human rights law to public scrutiny around the world and generating momentum for change. Among those violations are exploitation and violence directed at women and girls, including women and girls who are sex workers.

4. Sex workers, like other types of workers, may experience a wide range of human rights violations. Some may be trafficked or held in conditions akin to modern slavery; others may be subjected to violence, coercion, health risks or other dangerous conditions through their work. HRW believes that the criminalization of sex work impedes sex workers in finding protection and redress for such violations and in exercising basic rights such as access to essential health services and police protection.

5. Every year, HRW produces and publishes many hundreds of reports, press releases, videos, podcasts and other online documents on its website and social media accounts. Some of these include research and advocacy on behalf of the rights of sex workers, including our advocacy that sex work be decriminalized. For example, in 2010, HRW reported on the unlawful arrests and detention of sex workers in Cambodia; in 2012, HRW reported on police searches of women for condoms as evidence of prostitution in four US cities; in 2013, HRW documented torture, beatings and other assaults by police officials against sex workers, and similar abuses against sex workers in Tanzania; in 2014, HRW advocated against a Canadian anti-prostitution bill. HRW has also documented abuses against sex workers in the United States, Lebanon and South Africa.

6. Human Rights Watch’s policy, adopted in 2013, opposes the criminalization of consensual adult sex work and states that the criminalization of voluntary, consensual sexual

relations among adults is incompatible with respect for a number of internationally recognized human rights including the rights to personal autonomy and privacy.

7. The policy further states that “[f]orced prostitution and trafficking in human beings are among the most serious violations of human rights” and that “[a]ll states have an obligation to take necessary measures to prevent and combat such criminal activities.” However, HRW believes that “those engaged in sex work are more likely to be capable of seeking protection from the law if they and their work are not treated as criminal” and advocates accordingly.

8. Despite these clear distinctions in its policy, HRW is concerned that its global advocacy against criminalization of sex work and arrest of sex workers could be seen by US litigants as “facilitating” “prostitution” or in some way assisting sex trafficking, thus violating FOSTA.

9. Moreover, because HRW relies heavily on individuals spreading its reporting and advocacy through social media, it is concerned that social media platforms and websites that host, disseminate, or allow users to spread our reports and advocacy materials may be inhibited from doing so on the basis of the substantial additional penalties of Section 2421A, as demonstrating a “reckless disregard” of sex trafficking activities.

10. I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on this 27th day of June 2018 at New York, New York.



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Dinah PoKempner



**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

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

Plaintiffs,

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THE UNITED STATES OF AMERICA  
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OF THE UNITED STATES,

Defendants.

Case No. \_\_\_\_\_

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**DECLARATION OF ERIC KOSZYK**

Pursuant to 28 U.S.C. § 1746, I, ERIC KOSZYK, hereby declare as follows:

1. I am a licensed massage therapist who lives in Portland, Oregon. I have personal knowledge of the matters stated in this declaration. If called upon to do so, I am competent to testify to all matters set forth herein.

2. I have worked as a licensed massage therapist since 2006, when I graduated from the Brenneke School of Massage in Seattle, Washington after completing 1,000 hours of program study. I am licensed as a massage therapist in Washington State, Virginia, Washington, D.C., and Oregon. I have also been licensed in Florida when I resided there. I also carry liability insurance that covers property damage and personal injury for my clients.

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3. Although each state's licensure requirements are different, they generally require applicants to prove that they have formal education and training in massage therapy and anatomy and physiology. They also generally require licensees to pass background checks and, as part of that process, some require applicants to provide fingerprints and other personal information.

4. In my time as a licensed massage therapist, I have never lost any of my licenses, had any of my licenses suspended, or had any other disciplinary action taken against me by any licensing agency.

5. I am the owner and sole proprietor of Soothing Spirit Massage, my personal massage business that I have run since 2007. I have operated Soothing Spirit as both a full- and part-time business for the past twelve years.

6. I have used the online classified advertising platform Craigslist ([www.craigslist.org](http://www.craigslist.org)) as the primary way of finding clients for Soothing Spirit. I estimate that I find approximately 90 percent of Soothing Spirit's clients through Craigslist.

7. Since 2007, I have generally posted one or two advertisements per week on Craigslist to find clients. I would typically post my ads within the Therapeutic Services section of Craigslist. Over time, I was also able to edit my ad to make clear that I was a man providing massage therapy and that my services were professional and therapeutic. My ad has largely remained unchanged during the entire period I've advertised on Craigslist.

8. When I first began posting ads in 2007, Craigslist allowed massage therapists to post for free. Starting in 2009, Craigslist began charging to post ads appearing in the Therapeutic Services section. To the best of my recollection, it initially cost \$10 to post the first ad and an additional \$5 to repost the ad within the week. On average, I spent anywhere between \$100-300 per year to advertise Soothing Spirit on Craigslist.

9. Generally speaking, I found Craigslist to be the easiest and the best way to reach clients for Soothing Spirit. Over the past twelve years, I have placed ads on other websites but did not find them to be as effective at finding clients whom I could provide therapy for on my schedule. I believe the success of Soothing Spirit is directly related to my ability to use Craigslist to advertise my service. This is because Craigslist is such a well-known platform used by all sorts of individuals and businesses while also being popular with Internet users.

10. I have depended on Craigslist to advertise for Soothing Spirit because the website provided me with numerous benefits, including:

- a. Giving me the flexibility to determine when I provided massages to clients;
- b. Allowing me to screen potential clients to avoid unsafe working conditions or dangerous individuals;
- c. Helping me develop my business' reputation for providing professional, quality massage therapy;
- d. Allowing me to decide whether to host clients at my own home or to visit clients at their homes or hotels;
- e. Allowing me to advertise in the multiple cities over the course of moving to multiple states between 2009-16.

11. The flexibility that Craigslist afforded my business was crucial because, during the time I have operated Soothing Spirit, I have also had been pursuing many other professional, political and personal opportunities, and have moved across the country twice.

12. From 2007-2011, while living in Seattle, I worked as a massage therapist for three different businesses and did contract work at an acupuncturist's office. Having the ability to schedule massages for Soothing Spirit around those professional commitments helped me grow my new business while supplementing my personal income. During the first two years of

operating Soothing Spirit, I made an average of \$2,500 annually. By 2009, I made more than \$7,000 from Soothing Spirit.

13. In 2011, I moved to Florida to be closer to my girlfriend, whom I would later marry. In Florida, I worked as a substitute teacher and also continued to operate Soothing Spirit. Because I could continue to post massage therapy ads on Craigslist, I was able to schedule appointments around my work and personal life.

14. In 2012, I moved to northern Virginia and did political work for an organization called Virginia New Majority. I continued to work through Soothing Spirit and post ads on Craigslist. I found the supplemental income it provided me – nearly \$5,000 in 2012 – to be extremely helpful, while doing other full time work.

15. In 2013, I married my wife and also began pursuing a master's degree in public administration (with a concentration in international development) from George Mason University. When not studying, conducting research, or attending classes in pursuit of my degree, I continued to provide massage therapy through Soothing Spirit. In 2013, for example, I made \$14,205.

16. Craigslist proved particularly valuable to my business during this period because I could post ads for massage therapy for Northern Virginia communities such as Arlington, Alexandria, and Falls Church and post advertisements for Washington, D.C. This meant I could screen out individuals and decide which geographic locations I would work in, allowing me to decide when and where I would work.

17. In 2014, I was taking classes for my master's degree full-time and my wife and I had our first child. I continued to schedule massages through Craigslist and I made approximately \$8,800.

18. After graduating with my master's degree in 2015, I took on full-time childcare duties for our daughter while my wife worked. I continued to provide massage therapy through Soothing Spirit and the ads I placed on Craigslist. The flexibility that Craigslist enabled for my business was very important as I juggled my commitments as a stay-at-home father and husband. Although I worked less than in years past, I still made around \$4,500 in supplemental income for my family.

19. In 2016, my family moved to Portland, Oregon where we currently reside. Once again, being able to use Craigslist to advertise Soothing Spirit was extremely helpful, as I was able to work between 10-15 hours per week and bring in roughly \$8,300 that year while still being the primary caretaker for our daughter.

20. In December 2017, we had our second daughter. I continued to use Craigslist in 2017 and 2018 to post advertisements for Soothing Spirit and to provide supplemental income for my family until April 2018.

21. In late March 2018, I learned that the Allow States and Victims to Fight Online Sex Trafficking Act (H.R. 1865), known as SESTA, passed both chambers of Congress.

22. On Friday, April 6, 2018 I learned that Craigslist had removed the most recent ad for Soothing Spirit that I had posted earlier that week. I also learned that Craigslist had shut down its Therapeutic Services section.

23. The following week, on April 10, 2018, I attempted to re-post the ad I had been posting on Craigslist for many years in another section of the website, known as Skilled Services. Craigslist blocked my posting and I was thus unable to advertise therapeutic massages for Soothing Spirit. I have not been able to post my ad on any part of Craigslist's website since

April 6, 2018 and thus I no longer have a place on the website to advertise my services as a licensed massage therapist.

24. Because I have been unable to post my ads on Craigslist, I have not been able to get new clients for Soothing Spirit.

25. I am not aware of any other website that would allow me to post similar advertisements and to reach a similar sized audience as I was able to using Craigslist. I do not know how or whether I will be able to continue to operate and grow Soothing Spirit if I do not have the ability to post advertisements on Craigslist.

26. I know from my participation in online professional massage therapy support groups that other licensed and certified massage therapists experienced similar problems with their advertisements on Craigslist.

27. To the best of my knowledge, no professional massage therapists have been able to advertise on Craigslist since approximately April 6, 2018. I know from conversations with other professional massage therapists that, like me, many of them relied on Craigslist as their sole source of business and personal income and that they no longer have such a reliable and essential platform to use for their businesses.

28. I declare under penalty of perjury under the laws of the State of Oregon and the United States of America that the foregoing is true and correct.

Executed on this 27th day of June 2018 at Portland, Oregon.

  
Eric Koszyk

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

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

Plaintiffs,

v.

THE UNITED STATES OF AMERICA  
and JEFFERSON B. SESSIONS, in his  
official capacity as ATTORNEY GENERAL  
OF THE UNITED STATES,

Defendants.

Case No. \_\_\_\_\_

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**DECLARATION OF JESSE MALEY**

Pursuant to 28 U.S.C. § 1746, I, JESSE MALEY, hereby declare as follows:

1. I am the co-founder, organizer, and board member of several organizations and a website that advocate for or support sex workers' health, safety, and human rights who resides in Altamonte Springs, Florida. I have personal knowledge of the matters stated in this declaration. If called upon to do so, I am competent to testify to all matters set forth herein.

2. For roughly 8 years, I have worked as a community organizer and advocate for sex workers, including acting as the co-founder, director, employee, or volunteer for organizations that provide direct services to sex workers and advocate on broader issues impacting sex workers. In my work, I identify myself as Alex Andrews.

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3. I am currently a member of the board of directors and serve as the treasurer of the Sex Workers Outreach Project USA (“SWOP USA”). SWOP USA is a national social justice network dedicated to the fundamental human rights of people involved in the sex trade and their communities, focusing on ending violence and stigma through education and advocacy.

4. SWOP USA was founded in 2003 and promotes decriminalization as the best means of decreasing harm and promoting agency among people in the sex trade. SWOP adopts the principles and practices of nonviolent action in order to reduce violence and achieve dignity and rights for sex workers. SWOP is committed to the respect, safety, and autonomy of all sex workers, and seeks to amplify the voices of those who are often left out of discourse around the issues we address collectively as a social justice movement.

5. SWOP USA operates a volunteer-staffed hotline where current and former sex workers, as well as activists and other seeking peer support, can access direct support.

6. SWOP USA also assists advocates throughout the country in creating local SWOP chapters that provide public education, awareness, advocacy, peer support, empowerment, and leadership development for sex workers and their allies. SWOP USA sometimes provides financial support to these chapters.

7. In addition to my role with SWOP USA, I founded the local chapter SWOP Orlando, which provides a range of direct services to sex workers in the region and also advocates on behalf of them. In my role as founder of SWOP Orlando, I have regularly met with local and state elected officials to advocate for sex workers’ rights and their basic dignity.

8. I also co-founded another chapter affiliated with SWOP USA, called SWOP Behind Bars, in May 2016. SWOP Behind Bars was created to provide support and services to sex workers in prisons and jails throughout the United States. SWOP Behind Bars operates a



support line that connects sex workers with national and local resources they need, including local SWOP chapters or other sex worker advocacy or support organizations.

9. SWOP Behind Bars provides an electronic newsletter to incarcerated sex workers, a pen pal service, and also allows individuals to request necessities that other members or supporters can purchase for them. The goal of all of these services is to provide individuals in prison with a community and support network. This is essential because sex work and imprisonment are extremely isolating.

10. SWOP Behind Bars also publishes a re-entry guide for individuals being released from prison with the goal helping people transition back to their community and not re-offend.

11. Before moving to Florida in 1991, I operated an escort service in San Antonio, Texas that closed the same year. All of my employees were at least 21 years old. In 1993, I was convicted of one count of aggravated promotion of prostitution in violation of Texas law. I was sentenced to 10 years of probation, and the probation was terminated three years early in 2001. I no longer operate the escort service and have not since my conviction. Rather, I have been an advocate and ally for sex workers as described above and have also owned a business in Florida with my husband.

12. In addition to my advocacy for sex workers described above, in 2015 I collaborated with other advocates and sex workers to create an online resource for sex workers to learn more about the various organizations that provide services to them.

13. The website, Rate That Rescue ([www.ratethatrescue.org](http://www.ratethatrescue.org)), is a sex worker-led, public, free, community effort to help everyone share information about both the organizations they can rely on, and those they should avoid.

14. Rate That Rescue was created in response to the rapid growth of organizations that have publicly stated missions to assist or rescue sex workers. The site works as a ratings and review website of these various organizations, hosting content created by both organizations and the sex worker community.

15. We created the website because we were concerned that many of the organizations were often failing to help sex workers and sometimes were harming them. This concern was based on experiences by the organizers of the website and others in the sex worker community who either had sought help from or had been provided services by these organizations. To read more about the beginnings of Rate That Rescue, visit <https://www.ratethatrescue.org/wp/about/how-rate-that-rescue-got-started/>.

16. Some rescue organizations, for example, fail to distinguish between adult sex workers who choose their work and those who are coerced into sex work. Because those organizations treat all sex workers as victims, the services and support they provide often do not match the needs of sex workers who do not view themselves as victims. This discrepancy can frustrate and harm sex workers using the organization's services.

17. Based on my experience from working directly with a variety of sex workers for more than 25 years, I have observed that sex workers have a variety of needs that often are unrelated to their sex work. Those needs can include help with substance abuse and addiction, intimate partner violence, and healthcare. Given the diversity of needs among sex workers, I believe it is essential that sex workers have the opportunity to understand the services organizations provide before seeking their help.

18. We created Rate That Rescue so that sex workers seeking help or who are contacted by various organizations can get information about those organizations based on the

experiences of other sex workers. We believe that sex workers who have received services from the various organizations are in the best position to describe their experiences and provide feedback.

19. Rate That Rescue works by allowing any user to create a listing for a particular organization or to post a review of any organization. Users can post anonymously or create an account. After creating an account, a user can receive notifications when another user responds to their reviews or comments.

20. Rate That Rescue also allows the organizations being reviewed to take control of their listing, to edit it, and to respond to reviewers.

21. Each review listing on Rate That Rescue provides basic information about the organization, including a brief description of the service, contact information, and the type of services that the organization offers, such as legal, educational, and healthcare. Organizations can further self-identify based on various categories, including whether they are religious based, led by sex workers, or led by women.

22. Users can rate the organization on a scale of 1-5 for an overall rating and can also rate the organization's provision of various services, such as housing, childcare, counseling, education, and outreach. Users can also post comments describing their experiences and other users and the rescue organizations can reply to those comments.

23. Although Rate That Rescue was originally designed to provide information about sex worker support and rescue organizations, it has expanded to share information about all types of organizations that provide services that sex workers use, be they public, private, non-profit, or commercial. This includes organizations that do not focus on sex workers, but have products or services that sex workers commonly use – like Twitter, Wix, or PayPal.

24. Because Rate That Rescue is designed to host the speech of its users, it relies on 47 U.S.C. § 230 (“Section 230”), a provision of the Communications Decency Act that provides immunity from suit to online platforms based on the content of user-generated speech on the site. Rate That Rescue makes clear on its site that it is not the publisher or speaker of its users’ content. *See* <https://www.ratethatrescue.org/wp/about/>.

25. Without Section 230’s protections, Rate That Rescue would not be able to function and would face incredible liability for the content of users’ speech. The website makes no revenue and is run by volunteers, and we are unable to actively or comprehensively review, edit, or moderate user-generated content.

26. Since passage of the Allow States and Victims to Fight Online Sex Trafficking Act, (“FOSTA”) I have been extremely worried that Rate That Rescue is potentially criminally liable for the speech of our users. SESTA created several new exceptions to Section 230’s immunity that create liability based on the content of user-generated speech about sex work.

27. For example, SESTA created a new exception to Section 230 that makes websites such as Rate That Rescue criminally liable under both federal and state laws for hosting user-generated speech that intends “to promote or facilitate the prostitution of another person” under the criminal anti-prostitution provisions of 18 U.S.C. § 2421A(a). 47 U.S.C. § 230(e)(5)(C).

28. SESTA does not define what “promote” or “facilitate” means. The terms could be interpreted broadly to include a variety of speech hosted on Rate That Rescue, such as speech about how to increase sex workers’ safety, which could be interpreted as promoting prostitution. Similarly, user-generated content on Rate That Rescue listing the organizations that provide free services to sex workers, including healthcare, housing, and childcare, could be seen as helping or assisting sex workers and thus be construed as facilitating prostitution.

29. Because this user-generated speech could be viewed as helping or assisting sex workers or expressing positive views about sex work, I am concerned that a court could find that the user-generated content on Rate That Rescue promotes or facilitates prostitution and that Section 230's immunity shield is inapplicable. Rate That Rescue would then be criminally liable for the content of its users' speech.

30. I am also extremely concerned that Rate That Rescue may also be directly liable under SESTA's new criminal provisions that prohibit anyone from owning, managing, or operating a website with the intent to promote or facilitate prostitution, or to attempt or conspire to do so. 18 U.S.C. § 2421A(a). Because Rate That Rescue was established by sex workers and their advocates to improve the lives, health, safety, and wellbeing of sex workers, it is not unreasonable to think that law enforcement may interpret the website and its founders speech as promoting or facilitating prostitution.

31. SESTA also contains a criminal enhancement for Section 2421A(a) if the individuals who own, manage, or operate the website with the intent to promote or facilitate prostitution do so to five or more people. 18 U.S.C. § 2421A(b)(1). Because Rate That Rescue has thousands of users, it is not difficult to imagine law enforcement arguing that Rate That Rescue should be subject to SESTA's criminal enhancement penalty for promoting or facilitating the prostitution of five or more individuals.

32. Recently, in my role as treasurer and board member of SWOP USA, I helped lead an effort to purchase an in-development mobile application and website dedicated to increasing sex worker safety. Initially, SWOP USA intended to purchase the application and make it available for free. Though, as explained below, on my recommendation SWOP USA has held off on purchasing the application because we are concerned that it may be illegal under FOSTA.

33. Although the application is still being developed, its main features would allow sex workers to use the app to report violence, harassment, and other harmful behavior against them. The app would maintain a database of these reports so that other sex workers could query to avoid bad actors and to decrease violence against them.

34. Additionally, the application would send out notifications to others near the location of the sex worker who reported an incident, alerting them about violent or otherwise harmful individuals.

35. Sex workers and their allies have long maintained similar “bad date” lists in both paper and digital form as a way to reduce violence against sex workers and increase their safety. SWOP USA was particularly interested in purchasing this app because it would provide similar benefits to sex workers throughout the United States via a readily accessible and easy to use online platform.

36. Prior to SESTA passing, I understood that Section 230 would provide immunity to SWOP USA for any harmful speech that would be hosted on the application and corresponding website. But as I described above regarding Rate That Rescue, SESTA created new exceptions to Section 230’s immunity when the user-generated speech concerns sex work.

37. Because the application would host speech from sex workers that intends to help others work safely and avoid violence and harassment, that speech could be construed as promoting or facilitating prostitution. The application, and by extension, SWOP USA, could thus be ineligible for Section 230’s immunity and could face liability for its users’ speech under Section 2421A(a).

38. Additionally, it is reasonable to believe that law enforcement may perceive the application itself as an online platform that intends to promote or facilitate prostitution, or at least

attempts or conspires to do so. SWOP USA, as its owner, operator, and manager, could thus be directly liable under Section 2421A for the same reasons that Rate That Rescue would be as described above. Similarly, the app could likely face criminal enhancement penalties created by SESTA because the application and website could easily be seen as promoting or facilitating the prostitution of five or more people.

39. I cannot in good conscience recommend that SWOP USA take on such expansive criminal liability, despite the fact that the application would help thousands of sex workers keep themselves safe. As a result, I have recommended that SWOP USA not purchase the application, even though it would directly support our mission to support and advocate for sex workers.

40. I declare under penalty of perjury of the laws of the State of Florida that the foregoing is true and correct to the best of my knowledge

Executed on this 27th day of June 2018 at Altamonte Springs, Florida.

  
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Jesse Maley

 Verified by PDFfiller  
06/27/2018

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

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

Plaintiffs,

v.

THE UNITED STATES OF AMERICA  
and JEFFERSON B. SESSIONS, in his  
official capacity as ATTORNEY GENERAL  
OF THE UNITED STATES,

Defendants.

Case No. \_\_\_\_\_

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**DECLARATION OF BREWSTER KAHLE**

Pursuant to 28 U.S.C. § 1746, I, BREWSTER KAHLE, hereby declare as follows:

1. The facts contained in the following affidavit are known to me of my own personal knowledge, and if called upon to testify, I could and would competently do so.

2. I am a computer engineer, advocate of universal access to knowledge, digital librarian, and founder of the Internet Archive, a 501(c)(3) organization located in San Francisco, California. (<http://archive.org>).

3. I am a member of the National Digital Information Infrastructure and Preservation Program of the Library of Congress, and in 2012, I was inducted into the Internet Hall of Fame for having made “significant contributions to the development and advancement of the global Internet” (<http://internethalloffame.org/about>).

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4. The Internet Archive works to prevent the Internet and other “born-digital” materials from disappearing into the past. It offers permanent access for researchers, historians, scholars, people with disabilities, and the general public to historical collections that exist in digital format. The vast majority of the material in the Internet Archive’s collection is authored by third parties.

5. The Internet Archive has archived web pages since it began in 1996, expanding to include other media types in its digital archives in late 1999. Today, the Internet Archive includes texts, audio, moving images, and software, as well as archived web pages in its collections. The Internet Archive also provides specialized services for adaptive reading and information access for the blind and other persons with disabilities.

6. The Internet Archive 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, working to preserve a record for generations to come.

7. As part of its mission to create an accurate and historically relevant archive of the Internet, the Internet Archive regularly gathers “snapshots” – accessible copies – of content on the World Wide Web through its “crawling” and indexing processes. The Internet Archive currently crawls and archives approximately 80 million web pages per day.

8. The Internet Archive currently maintains over 330 billion web pages archived from 1996 to (nearly) the present from web sites around the world, including archives of third-party content posted to web sites like craigslist.org.

9. As part of its mission to build an Internet library, the Internet Archive maintains Open Library, which aims to create a public catalog of information about every book ever

published. Open Library also functions as a free digital lending library, providing access to over 2 million scanned public-domain works.

10. The Internet Archive scans and digitizes over one thousand books a day on behalf of libraries, museums, and authors. Many of those books are made available through the Internet Archive, and information on those books is added to Open Library's catalog.

11. Currently, the Internet Archive has over 1.4 million unique users per day across all of its services and adds about 100,000 registered users per month.

12. The Internet Archive circulates over 17 million texts, 5 million audio items, and 4 million video items that are downloaded by tens of millions of users each month.

13. The general public uploads over 20,000 items per day to our collections.

14. While the Internet Archive does at times remove content, it has no practical ability to evaluate the legality of any significant portion of the third-party content that it archives and makes available.

15. The Internet Archive relies upon the immunity from liability granted by 47 U.S.C. § 230 ("Section 230") for suits based on the content uploaded to the Internet Archive by third parties.

16. The Allow States and Victims to Fight Online Sex Trafficking Act ("FOSTA") amended §18 U.S.C. §1591, a federal anti-sex trafficking statute, defining "participation in a venture" to mean "knowingly assisting, supporting, or facilitating" conduct that leads to sex trafficking.

17. Under the amended §18 U.S.C. §1591, a speaker may be liable for an advertisement on their platform if that speaker knows that the advertisement is for sex

trafficking. However, for speech other than commercial advertising, a speaker is liable under a reckless disregard standard if that speech assists, supports, or facilitates sex trafficking.

18. FOSTA also amended the Mann Act, 18 U.S.C. §2421, by adding §2421A, which creates liability for an operator of an interactive computer service that “promotes or facilitates” prostitution.

19. FOSTA also created several exceptions to Section 230’s immunity. This includes creating both criminal and civil liability for platforms that host third-party content uploaded to their sites that would violate Sections 1591 or 2421A.

20. A House Report on FOSTA states a belief that “prostitution and sex trafficking are inextricably linked.”

21. I am afraid that FOSTA will result in the Internet Archive being subjected to federal criminal, state criminal, and civil liability for the content that it hosts. Some content, such as archives of particular websites, information about books, and the books themselves, could be construed as promoting or facilitating prostitution or assisting, supporting, or facilitating sex trafficking. Because Congress created exceptions to Section 230 for platforms that host content that would violate Sections 1591 and 2421A, I am concerned that the Internet Archive can no longer rely on Section 230 to bar state criminal and civil liability.

22. I am aware that FOSTA has resulted in significant actions by online platforms to remove speech or shutter their services because of concerns about potential liability. Such concerns and actions threaten to undermine free expression online.

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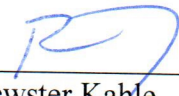
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I declare under penalty of perjury of the laws of the State of California that the foregoing is true and correct to the best of my knowledge and belief.

Executed on this 27 th day of June 2018 at San Francisco, California.

  
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Brewster Kahle

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

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

Plaintiffs,

v.

THE UNITED STATES OF AMERICA  
and JEFFERSON B. SESSIONS, in his  
official capacity as ATTORNEY GENERAL  
OF THE UNITED STATES,

Defendants.

Case No. \_\_\_\_\_

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**DECLARATION OF DR. ALEXANDRA LUTNICK**

Pursuant to 28 U.S.C. § 1746, I, ALEXANDRA LUTNICK, PhD, hereby declare as follows:

1. I am a senior research scientist for the Behavioral and Urban Health Program in RTI International's Behavioral Health and Criminal Justice Research Division, and an adjunct professor at the University of California, Berkeley. I have personal knowledge of the matters stated in this declaration. If called upon to do so, I am competent to testify to all matters set forth herein.

2. I have extensive experience developing and conducting mixed-methods research with marginalized populations such as drug users, the homeless, sex workers, and trafficked persons. My research focus includes community-based participatory methods, the sex industry,

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trafficking, substance use, and criminalization. I have authored and coauthored many publications, including articles in the *Journal of Urban Health*, *Children and Youth Services Review*, *Journal of Social Work Practice in the Addictions*, *American Journal of Epidemiology*, *Reproductive Health Matters*, and *Sexually Transmitted Infections*. I have been an invited speaker for many conferences, including the Freedom Network Annual Conference, the National Harm Reduction Conference, and the International AIDS Conference. My book, *Domestic Minor Sex Trafficking: Beyond Victims and Villains*, was published in early 2016 by Columbia University Press.

3. I received a PhD in Social Welfare from the University of California, Berkeley, an MA in Sexuality Studies from San Francisco State University, and a BA in sociology from the University of San Francisco.

4. I am currently the Principal Investigator of a National Institute of Justice funded evaluation of the Mayor's Task Force on Anti-Human Trafficking in San Francisco. Our researcher-survivor led evaluation is documenting essential task force elements and identifying indicators and criteria for successful task force implementation and outcomes. We are also developing guidance on how to forge researcher-survivor partnerships.

5. I am also currently the Senior Advisor to the Evaluation of the National Human Trafficking Hotline Program, funded by the Office of Planning, Research, and Evaluation within the U.S. Department of Health and Human Services Administration for Children and Families. The objectives of the evaluation are to provide significant information about the processes and outcomes of the NHTH program, as well as the circumstances surrounding human trafficking, victims, and service provider and law enforcement responses.

6. From 2009 to 2013, I was a research public health analyst on the Evaluation of

Services for Domestic Minor victims of Human Trafficking, an evaluation funded by the U.S. Department of Justice. The evaluation documented components of program implementation in three programs serving domestic minor victims of human trafficking. It sought to identify promising practices for service delivery programs for domestic minor victims of human trafficking and inform delivery of current and future efforts by youth-serving agencies, law enforcement, and others. As director of the San Francisco site, I worked collaboratively with the other project staff and the project director to create a unified evaluation plan for all three sites, implement that plan, and analyze and disseminate the findings.

7. My roles in other studies and evaluations, additional professional activities and affiliations, and professional publications, are detailed in my curriculum vitae, attached hereto as Exhibit A.

8. I have served as an expert witness regarding prostitution and human trafficking in cases in Monterey County (2018), Solano County (2017), and Santa Clara County (2017), all in California state courts.

9. I am aware of the law recently passed by Congress and signed by President Trump, the Allow States and Victims to Fight Online Sex Trafficking Act (H.R. 1865) (“FOSTA”). I closely followed the law as it was being debated in the U.S. Senate and House of Representatives.

10. FOSTA is based on erroneous factual assumptions. It falsely conflates prostitution and other forms of sex work with sex trafficking. Because it misdiagnoses the problem, the law will increase the risks of harm and exploitation associated with sex work and will hinder the efforts of law enforcement and private watchdogs to identify trafficking victims and prosecute traffickers.

11. Although I strongly support prosecuting sex traffickers and those who collaborate with them, shutting down websites that people use to advertise sexual services is extremely harmful to people experiencing trafficking in the sex industry. It will also be detrimental to people engaging in sex work, whether by choice or circumstance.

12. One of the most noticeable and serious harms is the disappearance of online forums, including, but not limited to, classified-ad-style websites, that people in the sex industry used to stay safe. By listing their sex work services online, sex workers were able to screen clients, protect their identities, and arrange safe meeting places.

13. With the disappearance of these sites because of FOSTA, sex workers and people being trafficked in the sex industry have been pushed in to street-based sex work, which is far more dangerous. Street-based sex workers are far more likely to experience violence or exploitation. This is equally true for those who voluntarily enter the sex industry as well as for those forced into it by force, fraud, or coercion. Street-based sex work also increases marginalization and isolation, which in turn increases violence, and diminishes a sex worker's ability to reach out for help when needed.

14. The 2017 study, "Craigslist's Effect on Violence Against Women," illustrates the importance of online advertising to keeping sex workers off the streets and safer. The authors of the study looked at the effect of Craigslist's "erotic services" section on the safety of women. They found a 17.4% reduction in the female homicide rate following the introduction of "erotic services." The authors suggest this reduction in female violence "was the result of street prostitutes moving indoors and matching more efficiently with safer clients."

(<http://gregoryjdeangelo.com/workingpapers/Craigslist5.0.pdf>)

15. The loss of online advertising platforms also drives sex workers to third party



controllers, such as pimps, thus also greatly exacerbating the risks of violence and exploitation.

16. The loss of online classified advertising sites also deprives law enforcement of an important tool for fighting human trafficking, by making it more difficult to both locate potential victims of trafficking and to build cases against traffickers.

17. From a law enforcement perspective, online profiles make it far easier to identify trafficking victims than when they are working on the street. A 2016 State Department report found that being able to access sites like Backpage, the number of identified victims of sex trafficking increased over a seven-year period from fewer than 31,000 to nearly 78,000. Having online advertising venues makes it easier to screen ads for potential trafficking. For example, a lot of law enforcement agencies scrub online ads looking for indicators of trafficking, such as pictures of people who look underage. Responsible website administration can also make trafficking more visible, which can lead to increased identification. Internet sites also provide a digital footprint that law enforcement can use to investigate trafficking into the sex trade, and to locate trafficking victims. U.S. Department of State, Trafficking in Persons Report. (2016) (<https://www.state.gov/j/tip/rls/tiprpt/2016/index.htm>).

18. According to published reports, police involved in anti-trafficking enforcement have observed a drop-off in leads and a conspicuous increase in street prostitution since online advertising sites have gone dark. (<https://www.nytimes.com/2017/03/11/us/backpage-ads-sex-trafficking.html>).

19. Online profiles similarly assist prosecutors because they often allow them to link phone numbers from people being charged with trafficking to other online ads (thus identifying more potential victims).

20. In addition to advertising, those in and adjacent to the sex industry used their own

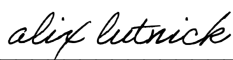
and third-party websites to post bad date lists – typically user-generated lists of clients with whom sex workers are warned not to engage – and to distribute occupational health and safety information, to link to health service providers and other community resources.

21. Shutting down websites will not eradicate sex trafficking or sex work. Instead it will make things more dangerous for victims of trafficking and for sex workers. Shutting down websites affects the most marginalized people in the sex industry, including those being trafficked.

22. The best way to protect sex workers from both physical harm and exploitation is for sex-workers to develop, run, or maintain online advertising forums. *See* Jana, S., B. Dey, S. Reza-Paul, and R. Steen. 2013. Combating human trafficking in the sex trade: Can sex workers do it better? *Journal of Public Health* (Oxford) 36 (4): 622–628. Unfortunately, FOSTA makes it impossible to operate such forums.

23. I declare under penalty of perjury under the laws of the State of California, that the foregoing is true and correct to the best of my knowledge.

Executed on this 27th day of June 2018 at Berkeley, California.

  
\_\_\_\_\_  
Alexandra Lutnick, PhD

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

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

Plaintiffs,

v.

THE UNITED STATES OF AMERICA  
and JEFFERSON B. SESSIONS, in his  
official capacity as ATTORNEY GENERAL  
OF THE UNITED STATES,

Defendants.

Case No. \_\_\_\_\_

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**DECLARATION OF ALEXANDRA FRELL LEVY**

Pursuant to 28 U.S.C. § 1746, I, ALEXANDRA FRELL LEVY, hereby declare as follows:

1. I am an adjunct professor at Notre Dame Law School and a senior staff attorney at the Human Trafficking Legal Center. I give this declaration in my personal capacity and not on behalf of any organization.

2. I created and teach Notre Dame Law School's only course on human trafficking. My course includes substantial coverage of intermediary liability for sex trafficking offenses. I have also taught guest courses and delivered lectures on topics related to human trafficking, intermediary liability, and black markets at universities across the United States and in Europe.

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3. My article entitled “The Virtues of Unvirtuous Spaces,” published last year in the Wake Forest Law Review, analyzes the sex trafficking-related repercussions of holding platforms accountable for third-party content. It concluded that allowing online platforms to host content related to sex work without fear of liability fosters efforts to apprehend traffickers and recover victims. *See The Virtues of Unvirtuous Spaces*, 50 WAKE FOREST L. REV. 403 (2017), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2994114](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2994114).

4. I have given interviews on issues related to the Allow Victims to Fight Online Sex Trafficking Act (“FOSTA”) to National Public Radio’s Marketplace and Vox’s Today Explained, and I contribute regularly to the Technology & Marketing Law Blog on the topic of FOSTA’s implications for anti-trafficking advocacy. My work on this subject has been covered by Reason, Bloomberg Law, and Ars Technica, among other publications.

5. There is no good evidence that the internet has caused an increase in child sex trafficking or that it has put more minors at risk of being victimized. FOSTA’s proponents frequently point to a recent rise in reports of suspected commercial sexual exploitation of minors as evidence that platforms are responsible for an “explosion in sex trafficking.” Shared Hope, “White Paper: Online Facilitation of Domestic Minor Sex Trafficking” (August 2014), <http://sharedhope.org/wp-content/uploads/2014/09/Online-Faciliator-White-Paper-August-2014.pdf> (noting that “[t]echnology, including classifieds websites, is widely viewed as responsible for the explosion in sex trafficking in the United States”). Besides the lack of evidence that the internet is *causing* a rise in sex trafficking, there is some reason to doubt that sex trafficking has increased *in the first place*. *See Backpage.com, LLC v. Dart*, 807 F.3d 229 (7th Cir. 2015) (No. 15-3047) (discussing evidence that trafficking may have declined in the early 2000s).

6. The argument that the internet has caused an increase in child sex trafficking is flawed insofar as it conflates the frequency with which sex trafficking is *reported* with the frequency with which it *happens*. Indeed, it ignores the critical possibility that the rise in reports is due to the fact that platforms make it easier to notice and alert law enforcement to trafficking.

7. If FOSTA succeeds in shutting down high-traffic, high-visibility websites, it will suppress a key means of detecting and reporting sex trafficking, thus decreasing trafficking victims' chances of being recovered. Victims who are trafficked on high-visibility websites are regularly discovered by family members, good Samaritans, and non-profit organizations. *See, e.g.* Caitlin Randle, Brother takes action after girl, 14, is advertised online for sex, officers say, Sun Sentinel (Aug 11, 2017), <http://www.sun-sentinel.com/local/broward/deerfield-beach/fl-sb-deerfield-man-teen-sex-arrest-20170810-story.html> (describing how a runaway teenager was recovered when her brother “used [her] ad’s listed phone number to take the action that led to the [trafficker’s] arrest”); Nicholas Kristof, Opinion, Making Life Harder for Pimps, N.Y. Times (Aug. 6, 2015), <https://www.nytimes.com/2015/08/06/opinion/nicholas-kristof-making-life-harder-for-pimps.html> (describing how a journalist “pulled out [his] laptop, opened up Backpage and quickly found seminude advertisements for [a teenage runaway],” leading to her recovery). I know of no accounts of victims trafficked in less-visible venues (for instance, on the street) being found or recovered this way.

8. FOSTA’s expansive definition of venture participation under 18 U.S.C. § 1591(e)(4), paired with the exposure to civil liability for third-party content it creates under 47 U.S.C. § 230(e)(5)(A) and state criminal actions under 47 U.S.C. § 230(e)(5)(B), exposes websites to potentially severe consequences for continuing to operate while merely *knowing* about trafficking. *See* 18 U.S.C. § 1591(e)(4). Read in conjunction with 18 U.S.C. § 1591(a)(2),

this new provision exposes anyone who knowingly benefits from knowingly supporting an entity that knowingly advertises a minor's sexual services to a potential life sentence. *See* 18 U.S.C. § 1591(b)(1). FOSTA thus incentivizes websites to turn a blind eye to suspicious posts, compromising yet another mechanism for reaching victims. Before FOSTA was passed, websites' content moderators regularly collaborated with law enforcement and the National Center for Missing and Exploited Children (NCMEC) to find problematic content and recover possible minor victims. *See, e.g.* Tom Jackman, Under attack, Backpage.com has its supporters as anti-trafficking tool. But many differ., *The Washington Post* (July 18, 2017), [https://www.washingtonpost.com/news/true-crime/wp/2017/07/18/under-attack-backpage-com-has-its-supporters-as-anti-trafficking-tool-but-many-differ/?utm\\_term=.da55f3bb7235](https://www.washingtonpost.com/news/true-crime/wp/2017/07/18/under-attack-backpage-com-has-its-supporters-as-anti-trafficking-tool-but-many-differ/?utm_term=.da55f3bb7235).

9. To be sure, classified advertising websites came under fire for not doing enough. NCMEC's strong denunciation of Backpage's handling of problematic material may have been instrumental in getting FOSTA passed. *See* Statement to the United States House of Representatives by Yiota G. Souras, "Latest Developments in Combating Online Sex Trafficking" (Nov 30, 2017), <https://docs.house.gov/meetings/IF/IF16/20171130/106657/HHRG-115-IF16-Wstate-SourasY-20171130-U20.pdf>. But one might question the wisdom of punishing intermediaries for not doing *enough* by passing a law that threatens them with criminal and civil liability if they do *anything*.

10. I declare under penalty of perjury of the laws of the State of Indiana and the United States of America that the foregoing is true and correct to the best of my knowledge.

Executed on this 27th day of June 2018 at South Bend, Indiana

  
Alexandra Frell Levy

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

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

Plaintiffs,

v.

THE UNITED STATES OF AMERICA  
and JEFFERSON B. SESSIONS, in his  
official capacity as ATTORNEY GENERAL  
OF THE UNITED STATES,

Defendants.

Case No. \_\_\_\_\_

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**DECLARATION OF DR. KIMBERLY MEHLMAN-OROZCO**

I, KIMBERLY MEHLMAN-OROZCO, do hereby state and declare:

1. The facts contained in the following affidavit are known to me of my own personal knowledge and if called upon to testify, I could and would completely do so.

2. I serve as a human trafficking expert witness in criminal and civil cases across the United States:

- *United States v. Cornelius Galloway*, United States District of New Mexico
- *United States of America v. Miguel Scott Arnold, Terrence Hawkins, Tevin Bynoe, Emonie Murphy, and Joshua Guity-Nunez*, United States District Court for the Middle District of Pennsylvania
- *M.B. v Roosevelt Inn, LLC, et al.*, Civil Litigation, State of Maryland
- *Doe v. Subh Properties, et al.*, Civil Litigation, State of Maryland
- *United States of America vs. Savannah April Via*, U.S. District Court for the District of Arizona
- *Commonwealth of Virginia v. Corey Cardoza*, Henrico County

- *People v. Kareem Abdur-Razzaaq*, Ind. No. 3154/2013, and *People v. Lemuel Skipper*, Ind. No. 2409/2015, Bronx County
  - *People of the State of California Plaintiff v. Tracy Sims*, Superior Court of California, County of Los Angeles
  - *Keo Ratha; Sem Kosal; Sophea Bun; Yem Ban; Nakry Phan; and Sok Sang v. Phatthana Seafood Co., Ltd; S.S. Frozen Food Co., Ltd.; Doe Corporations 1-5; Rubicon Resources, LLC; and Wales & Co. Universe, Ltd.*, United States District Court for the Central District of California
  - *J.S., S.L., and L.C. v. Village Voice Media Holdings LLC*, Supreme Court of the State of Washington
  - *People of the State of California Plaintiff v. Young Kyung Cho*, Superior Court of California, County of Los Angeles
  - *People of the State of California v. Mixon-Givens*, Santa Clara County Court
  - *People of the State of California v. Joseph, et. al.*, Contra Costa County Court
3. I have trained law enforcement on how to identify human trafficking, including:
- Royal Canadian Mounted Police in Nova Scotia, Canada
  - Homeland Security Investigations in Buffalo, New York
  - Homeland Security Investigations in Raleigh, North Carolina
  - North Carolina State Bureau of Investigations in Raleigh, North Carolina
  - Montebello Police Department in Montebello, California
4. I have taught human trafficking to my students at George Mason University and previously at University of Maryland, College Park.
5. I have trained service providers and the public on human trafficking, including:
- Soroptimist International of the Americas, Inc.
  - Prevent Abuse and Neglect through Dental Awareness (P.A.N.D.A)
  - Kappa Delta Phi International Sorority
  - Bernadette's House



- Westminster at Lake Ridge
  - Trinity Episcopal Church
  - Stern Symposium - Hidden in Plain Sight: Emerging Labor Policy Issues
  - Women in Homeland Security Human Trafficking Symposium
  - Human Trafficking Symposium Panelist at Liberty University School of Law
6. I have been interviewed by the media on human trafficking, including:
- BuzzFeed
  - The News Journal
  - Gray TV
  - The Ringer
  - Miami Herald
  - The Washington Post
  - The Crime Report
  - Governing
  - Kansas City Star
  - Homeland Security Today
  - International Business Times
  - Majority Report
  - WNPR
  - I24 News
  - Al Jazeera
  - Fox News
  - USA Today

7. I have authored research on human trafficking published in peer-reviewed journals, including:

- **Mehlman-Orozco, Kimberly B.** (2017). “Projected Heroes and Self-Perceived Manipulators: Understanding the Duplicitous Identities of Human Traffickers.” *Trends in Organized Crime*.
- Syme, Sheryl, Camardese, Susan, and **Mehlman-Orozco, Kimberly B.** (2017). “Identifying Victims of Human Trafficking.” *Dimensions of Dental Hygiene*.
- Syme, Sheryl, Camardese, Susan, and **Kimberly Mehlman-Orozco.** (2017). “Human Trafficking: Red Flags for Dental Professionals.” *Decisions in Dentistry*.
- **Mehlman-Orozco, Kimberly B.** (2015). “Safe Harbor Legislation for Juvenile Victims of Sex Trafficking: A Myopic View of Improvements in Practice. *Social Inclusion*.

8. I have authored a book on human trafficking, Hidden in Plain Sight: America’s Slaves of the New Millennium, which received overwhelming praise from anti-trafficking experts and is used to train law enforcement.

9. I have served as a peer-reviewer for human trafficking journal articles published in Justice Quarterly, Journal of Human Trafficking, and American Journal of Evaluation.

10. I received my B.S. cum laude in administration of justice from George Mason University in 2005, my M.A. in justice, law, and crime policy in 2010, and my Ph.D. in criminology, law and society in 2012.

11. I previously served as an adjunct human trafficking subject matter expert for RAND Corporation, a nonprofit institution that helps improve policy and decision-making through research and analysis. In that capacity, I worked on three study proposals:

- (i) Research design to evaluate the National Human Trafficking Hotline;
- (ii) Development of an evidence based human trafficking risk assessment tool for organizations working with minors; and
- (iii) Evaluating the outcomes of housing services for adult and juvenile human trafficking survivors.

12. I currently serve as the Executive Director of an anti-trafficking non-profit organization—Freedom Light.

13. In Fall 2017, I founded a human trafficking survivor scholarship, administered by Soroptimist International of Woodbridge.

14. Since 2014, I have volunteered with Manassas City Police department's TEAM Quest on a yearly basis to speak to and mentor at-risk youth.

15. FOSTA makes it illegal to knowingly assist, facilitate, or support sex trafficking. In this context, it is demonstrably unclear what is meant by "knowingly" and it is demonstrably unclear what rises to the level of "facilitation." Following the passage of FOSTA, businesses that unknowingly encountered human trafficking, and took no action to make human trafficking easy or easier, have experienced increased scrutiny and liability.

16. Human trafficking is a clandestine crime that is difficult to identify.

17. Police officers frequently misidentify victims of human trafficking, resulting in erroneous criminalization, denied services, and missed opportunities for interventions.

18. Most third parties who encounter human trafficking, do so without any awareness or consciousness of the force, fraud, coercion, deception, or threat used to exploit the victim.

19. The Internet as a whole has facilitated information exchange, including for commercial sex exchanges. Prior to the advent of the Internet, commercial sex and sex trafficking were advertised through peer-to-peer referral, on the street, in classified advertisements, by fliers or business cards, and through independent publications, such as Blue Books. Following the advent of the Internet, commercial sex and sex trafficking continues to be diversely advertised.

20. At present, there is no evidence to suggest that one website or virtual platform makes sex trafficking easier than any other website or virtual platform.

21. There is absolutely no rigorous quantitative data to suggest that FOSTA has had or will have any significant impact in reducing the prevalence of sex trafficking. Extant “statistics” that are cited in support of the legislation are interpreted through ecological fallacies and do not actually support the proposed efficacy of the legislation. For example, the National Center for Missing and Exploited Children claimed that 73 percent of the 10,000 child-trafficking reports it receives annually involve Backpage.com. This “statistic” is erroneously interpreted to suggest that Backpage.com was “facilitating” the practice, but in actuality these data reflect the reality that the website was used more often by law enforcement and victim service providers as an information source and catalyst for victim rescues. Following the passage of FOSTA, NCMEC has updated this statistic to read 75% of their referrals involve a child trafficked on the Internet.

22. FOSTA is prone to inequitable enforcement. Some businesses, such as Backpage.com and Craigslist.org, have been vilified as “facilitating” sex trafficking, despite the fact that the websites administrators had been completely cooperative with law enforcement investigations. Other websites, such as Facebook, have similarly been used by sex traffickers to recruit and sell victims, but have not experienced comparable condemnation.

23. There is absolutely no criminological theory to support the hypothesis that FOSTA will have any significant impact in reducing the prevalence of sex trafficking. Criminological theory does support the null hypothesis that FOSTA will have no impact on the prevalence of sex trafficking. For example, Routine Activities Theory suggests that crime occurs when three things converge in time and space: (1) a motivated offender, (2) a suitable target, and

(3) lack of a capable guardian. FOSTA does not address any of those three elements and in fact, threatens the capability of law enforcement (guardianship) by displacing and dispersing the advertisements.

24. Prior to the passage FOSTA, law enforcement used open-access, United States based websites that hosted commercial sex advertisements, such as Backpage.com and Craigslist, as tools to catalyze arrests and rescues.

25. According to law enforcement and prosecutors, websites such as Backpage.com and Craigslist, were of great utility in their anti-trafficking operations and the website administrators were consistently responsive to requests for information and subpoenas.

26. Anti-trafficking organizations would use websites like Backpage.com to train law enforcement officers on how to conduct anti-trafficking sting operations.

27. FOSTA supporters erroneously claimed that Craigslist “facilitated” sex trafficking. When Craigslist shuttered the adult section of its website, those who sought to change the law erroneously claimed that Backpage.com “facilitated” sex trafficking. When Backpage.com was seized by federal law enforcement, and FOSTA was passed, the commercial sex advertisements were again displaced across the Internet, including to social media, dating platforms, and websites based overseas.

28. Following the passage of FOSTA, commercial sex advertisements have been dispersed, from a small number of concentrated websites, to hundreds of Internet platforms.

29. Website administrators based outside of the United States have made public statements on their impunity and lack of cooperation with law enforcement.

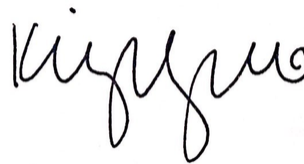
30. The “red flags” of sex trafficking have not been tested for sensitivity or specificity. Erroneously reporting law-abiding persons can result in additional liability for

defamation or racial profiling. For example, Airline Ambassadors International trains flight attendants on how to spot human trafficking. According to the organization, one red flag is “if a child is traveling with someone who does not appear to be a parent or relative.” This “red flag” has been accused of resulting in the disproportionate questioning of parents and children of mixed-race families.

31. By displacing and dispersing the commercial sex advertisements, FOSTA has made the already clandestine crime of sex trafficking even more hidden from law enforcement.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on June 28, 2018, at Montclair, Virginia.

A handwritten signature in black ink, appearing to read 'Kimberly Mehlman-Orozco', is written over a light blue circular stamp.

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KIMBERLY MEHLMAN-OROZCO

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

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

Plaintiffs,

v.

THE UNITED STATES OF AMERICA  
and JEFFERSON B. SESSIONS, in his  
official capacity as ATTORNEY GENERAL  
OF THE UNITED STATES,

Defendants.

Case No. 1:18-cv-1552

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**[PROPOSED] ORDER**

Upon consideration of the Motion for Preliminary Injunction and supporting papers of Plaintiffs Woodhull Freedom Foundation, Human Rights Watch, Eric Koszyk, Jesse Maley a/k/a Alex Andrews, and The Internet Archive, and Defendants’ opposition thereto, together with the arguments of the parties, the Court makes the following FINDINGS OF FACT and CONCLUSIONS OF LAW:

Plaintiffs are advocacy and human rights organizations, two individuals and the leading archival collection of Internet content. Each either operates online services like websites, social media accounts, and applications as part of speech and advocacy in support of sex workers; otherwise provides resources and information to sex workers; hosts the speech of others who provide such information; or relies on platforms in order to seek information or share their own speech. FOSTA’s direct prohibitions on speech “facilitating the prostitution of another person” and other vague, ambiguous and overbroad provisions conflating sex work with sex trafficking

cast serious doubt on the legality of Plaintiffs speech, or, in the case of Plaintiff Koszyk, have left him without a platform to advertise his non-sexual services.

The Court finds that it should grant preliminary injunctive relief in this case “to maintain the status quo pending a final determination of the merits” of Plaintiffs’ constitutional challenge to FOSTA, *Smoking Everywhere, Inc. v. FDA*, 680 F. Supp. 2d 62, 78 (D.D.C. 2010), 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).

Initially, a preliminary injunction is appropriate when the plaintiff demonstrates likely success on the merits, likely irreparable harm in the absence of preliminary relief, a balance of the equities in its favor, and accord with the public interest. *Pursuing America’s Greatness v. FEC*, 831 F.3d 500, 505 (D.C. Cir. 2016) (citing *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)).

The Court finds that Plaintiffs are likely to succeed on the merits of their First and Fifth Amendment claims because FOSTA as a whole is both overbroad and fails to satisfy First Amendment strict scrutiny, its individual provisions are vague, and it contains an unconstitutional *ex post facto* provision. FOSTA targets online speech by (1) creating a new federal offense for anyone who “owns, manages, or operates an interactive computer service” with the intent to “promote” or “facilitate” prostitution, (2) expanding potential liability for federal sex trafficking offenses based on speech, and (3) diluting the speech-protective immunity provision provided for online platforms that host or disseminate third party speech in the Communications Decency Act of 1996, 47 U.S.C. § 230. FOSTA §§ 3(a), 4(a) & 5; 18 U.S.C. § 2421A(a); 47 U.S.C. § 230(e)(5). These new, content-based prohibitions impose criminal penalties and authorize heavy civil liability for online publishers based on expansive but undefined terms



regarding “promotion” or “facilitation” of “prostitution” and/or “reckless disregard” of conduct that “contributes to sex trafficking.”

FOSTA’s provisions are subject to but cannot satisfy strict scrutiny, *see United States v. Stevens*, 559 U.S. 460, 468 (2010); *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015); are overbroad insofar as a substantial number of its applications are unconstitutional judged in relation to its plainly legitimate sweep, *Stevens*, 559 U.S. at 473; are unconstitutionally vague in their failure to give people of ordinary intelligence fair warning of what conduct is prohibited, *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972); unconstitutionally impose liability for distributing expressive materials absent proof of scienter; *Smith v. California*, 361 U.S. 147 (1959); and, turn Section 230’s online intermediary immunity into a tool for censorship, *see Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1174 (9th Cir. 2008). The Court further finds that plaintiffs are also likely to succeed on their claim that the law violates the *Ex Post Facto* Clause. U.S. Const. art. I, §§ 9-10; *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994).

Plaintiffs have suffered irreparable harm, and will continue to do so, absent a preliminary injunction because they face unlawful restrictions on their ability to engage in constitutionally protected speech. *Pearson v. Shalala*, 130 F. Supp. 2d 105, 119 (D.D.C. 2001) (citing *Elrod*, 427 U.S. at 373 (1976); *New York Times Co. v. United States*, 403 U.S. 713 (1971); *City of Lakewood v. Plain Dealer Publ’g Co.*, 486 U.S. 750, 758 (1988)). Moreover, the balance of the equities tip in Plaintiffs’ favor. *See, e.g., Bays v. City of Fairborn*, 668 F.3d 814, 819 (6th Cir. 2012) (when First Amendment rights are implicated, factors for granting preliminary injunction essentially collapse). The government will experience minimal harm, or none at all, from an order temporarily preserving the *status quo* of laws that only recently took effect, particularly

given preexisting criminal laws that remain in effect, and because “no substantial harm to others can be said to inhere” in allowing violations of constitutional rights to continue. *Déjà vu of Nashville, Inc. v. Metro. Gov’t of Nashville & Davidson Cty.*, 274 F.3d 377, 400 (6th Cir. 2001). If anything, in view of the adverse impact FOSTA is having in preventing sex trafficking and endangering sex workers, a preliminary injunction would, in fact, *serve* that particular public interest as well – and in any case, the public interest is served, as always, by safeguarding constitutional rights and preserving laws that have fostered a free and open Internet. *PHE, Inc. v. U.S. Dep’t of Justice*, 743 F. Supp. 15, 26 (D.D.C. 1990); *Pursuing America’s Greatness*, 831 F.3d at 511-12; *Google v. Hood*, 96 F. Supp. 3d 584, 601 (S.D. Miss. 2015), *rev’d on other grounds*, 822 F.3d 212 (5th Cir. 2016).

IT IS HEREBY ORDERED that Plaintiff’s Motion is GRANTED.

Defendants are hereby enjoined from enforcing the Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. No. 115-164 (“FOSTA” or “the Act”), as codified at 18 U.S.C. § 2421A, 18 U.S.C. § 1591(e)(4), and 47 U.S.C. § 230(e)(5), during the pendency of this case.

DATED: \_\_\_\_\_, 2018

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United States District Judge

cc: Counsel of Record