Oral Argument Not Yet Scheduled

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

18-5298

WOODHULL FREEDOM FOUNDATION; HUMAN RIGHTS WATCH; ERIC KOSZYK; JESSE MALEY, also known as ALEX ANDREWS; INTERNET ARCHIVE,

Plaintiffs-Appellants,

—v.—

UNITED STATES OF AMERICA; MATTHEW G. WHITAKER, in his official capacity as Acting Attorney General of the United States,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

CORRECTED BRIEF OF *AMICUS CURIAE* CENTER FOR DEMOCRACY & TECHNOLOGY IN SUPPORT OF PLAINTIFFS-APPELLANTS

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29(c), amicus curiae Center for Democracy & Technology ("CDT") discloses that it has no parent corporation, and no publicly held corporation owns 10% or more of the stock of CDT.

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Counsel for CDT certifies the following:

A. **Parties and Amici.** All parties and amici appearing before this Court are listed in the Brief of Appellants Woodhull Freedom Foundation, Human Rights Watch, Eric Koszyk, Jesse Maley a/k/a Alex Andrews, and the Internet Archive ("Appellants"). *See* USCA Case No. 18-5298, Doc. No. 1773343 (Feb. 13, 2019) ("Appellants' Opening Brief").

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

C. **Related Cases.** There are no related cases.

STATEMENT REGARDING CONSENT TO FILE AND SEPARATE BRIEFING

Pursuant to Federal Rule of Appellate Procedure 29(a), Center for Democracy & Technology ("CDT") certifies that it has filed an Unopposed Motion for Leave to Participate as Amicus Curiae concurrently with this motion. CDT further certifies that it has consulted with the parties, none of whom have opposed the filing of this amicus brief.

Pursuant to District of Columbia Circuit Rule 29(d), CDT certifies that this separate amicus brief is necessary because it reflects a perspective on this case not found in either the parties' briefs or any of the other amicus briefs. As set forth in its Unopposed Motion for Leave to Participate as Amicus Curiae, CDT is a non-profit public interest organization that advocates for individual rights in Internet law and policy. Integral to this work is CDT's representation of the public interest in the creation of an open and innovative Internet that promotes the constitutional and democratic values of free expression, privacy, and individual liberty. Through its deep experience litigating some of the same issues presented by this case, CDT brings dedicated interest and unique expertise to the Court's consideration of this appeal.

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INTRODUCTION & SUMMARY OF ARGUMENT

The Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. No. 115-164, 132 Stat. 1253 (2018) ("FOSTA"), is the latest in a long line of government efforts to limit access to protected speech online as a way to achieve other policy goals. Courts have not hesitated to strike down previous censorship laws, and this Court should do the same with FOSTA.

When the World Wide Web emerged in the 1990s, everyone recognized the Internet's importance as a platform for free expression. By facilitating the near-instant exchange of information, the Internet gave ordinary people an unprecedented platform for speech with the power to foment political, cultural, social, and commercial action in communities local, global, and virtual. But alongside the widespread celebration and excitement it invoked, the Internet also provoked moral panic. With the Internet's potential for education, creativity, and political discourse came easy access to pornography, along with other material that most regard as inappropriate for children. These concerns spurred a series of efforts to keep offensive material offline, beginning with the Communications Decency Act of 1996 ("CDA"): a federal statute that prohibited the online transmission or display of "indecent" and "patently offensive" material.

But for as long as lawmakers have tried to censor constitutionally protected speech online, courts have stood ready to apply the First Amendment to reject their

efforts. In a series of landmark cases, courts struck down the CDA and several other laws that came in its wake. These rulings recognized both the importance of online speech and the dangers of its restriction by government actors. The principles that emerge from this history reflect the unrivaled power of the Internet as a medium for protected speech, and the special role that online intermediaries play in the dissemination of that speech.

That is why Congress, at the same time that it enacted the speech-restrictive (and ultimately unconstitutional) provisions of the CDA, also crafted Section 230 of that statute: a broad federal protection that would shield online service providers from liability for hosting, publishing, and making available other people's speech. By enacting Section 230, Congress recognized that the scale of the Internet makes it essential to protect intermediaries from potentially staggering liability for hosting the speech of their countless individual users. Failing to do so would lead to massive chilling effects, as those intermediaries, fearing their own liability, would crack down on free and open expression by their users. At the same time, Section 230 recognized the importance of allowing online service providers to make their own editorial judgments about the kinds of content they want to host, publish, or disseminate. In this way, Section 230 reinforces both the rights of individuals who use the Internet to express themselves, as well as the First Amendment rights of platforms to curate and present third-party material.

FOSTA is fundamentally incompatible with these vital First Amendment protections. The law simultaneously criminalizes the operation of websites based on their contents and abrogates Section 230 protections for broad categories of speech. *See* 18 U.S.C. § 2421A; 47 U.S.C. § 230(e)(5). While admirably intended to stop crimes related to sex trafficking and other forms of sexual abuse, this inartfully drafted law sweeps in significant amounts of protected speech. It threatens legitimate speakers and online services with liability, including criminal liability. Further, it already has resulted in chilling lawful, even desirable, speech about prostitution and sex work. Under the First Amendment principles that invalidated prior online censorship efforts and that undergird Section 230, FOSTA goes too far and threatens too much. This Court should strike it down.

IDENTITY AND INTEREST OF AMICUS CURIAE[1]

Center for Democracy & Technology ("CDT") is a non-profit public interest organization that advocates for individual rights in Internet law and policy. Integral to this work is CDT's representation of the public interest in the creation of an open and innovative Internet that promotes the constitutional and democratic values of free expression, privacy, and individual liberty. For nearly 25 years, CDT has advocated in support of protections for online speech, including limits on

[1] Pursuant to Fed. R. App. P. 29(a)(4)(E), CDT states that no counsel for a party authored this brief in whole or in part, and no party or entity other than CDT and its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

intermediary liability for user-generated content. CDT has participated in a number of cases addressing First Amendment rights on the Internet, both as party to and amicus curiae, including: *Center for Democracy & Technology v. Pappert*, 337 F. Supp. 2d 606 (E.D. Pa. 2004); *Backpage.com, LLC v. Dart*, 807 F.3d 229 (7th Cir. 2015); *Does #1-5 v. Snyder*, 834 F.3d 696 (6th Cir. 2016); and *Packingham v. North Carolina*, 137 S. Ct. 1730 (2017). Like those cases, this appeal has profound ramifications reaching far beyond the named parties. CDT respectfully submits this brief on behalf of those whose speech rights are threatened by FOSTA.

ARGUMENT

I. THE GOVERNMENT'S EFFORTS TO CENSOR THE INTERNET IN THE 1990S PROVIDE ESSENTIAL BACKGROUND TO THE ENACTMENT OF FOSTA

It was in the early 1990s that the Internet first emerged as a major force in American commercial and social life. The Internet was quickly recognized as an unprecedented medium for speech: "a vast platform from which to address and hear from a worldwide audience of millions of readers, viewers, researchers, and buyers." *Reno v. ACLU*, 521 U.S. 844, 853 (1997). Nevertheless—and perhaps because "the content on the Internet is as diverse as human thought," *id.* at 870 (quoting *ACLU v. Reno*, 929 F. Supp. 824, 842 (E.D. Pa. 1996))—many came to believe that "this vast world of computer information," included "some things … that our children ought not to see," 141 Cong. Rec. H8469 (daily ed. Aug. 4, 1995)

(statement of Rep. Cox); Sen. Exon, *Letter to the Editor*, Wash. Post, Dec. 2, 1995, at A20 ("[The Internet] is a great boon to mankind. But we should not ignore the dark roads of pornography, indecency, and obscenity it makes possible.").

These competing sentiments spurred competing legal regimes: first, the federal government and many state governments enacted censorship laws aimed at blocking, filtering, or controlling material that was deemed to be "offensive" or unfit for minors. At the same time, however, legislators recognized that this burgeoning new medium for speech should not be strangled in its cradle. The focus here was on the content hosts, website operators, and other online service providers that allowed such an incredible diversity of speech to proliferate online. Reinforcing the First Amendment rights of these service providers as publishers and editors of third-party speech, Congress enacted Section 230 of the CDA to shield such intermediaries from liability for the inevitable distasteful or even unlawful content that individual users might create and share. The legal principles that emerged from these competing narratives created the Internet as it now exists and set the stage for this case, in which another dangerous attempt by the federal government to clamp down on online speech faces its first judicial challenge.

A. A Brief History Of Online Speech Regulation

1. Federal Online Censorship Efforts, from the CDA to COPA

In 1995, following a series of reports about the surge in online pornography, (*see* Philip Elmer-Dewitt & Hannah Bloch, *On a screen near you: Cyberporn*, Time, July 3, 1995), Senator J. James Exon proposed the first major federal regulation of the Internet: what became the Communications Decency Act. Senator Exon admonished that "the information superhighway should not become a red light district. [The CDA] will keep that from happening and extend the standards of decency which have protected telephone users to new telecommunications devices." 141 Cong. Rec. S1953 (daily ed. Feb. 1, 1995) (statement of Rep. Exon). As enacted in 1996, the CDA included two provisions intended to regulate content: "the 'indecent transmission' provision," 47 U.S.C. § 223(a)(1), and "the 'patently offensive display' provision," 47 U.S.C.§ 223(d). *Reno*, 521 U.S. at 857-59.

The former prohibited the "knowing transmission of obscene or indecent messages to any recipient under 18 years of age." *Id.* at 859. The latter prohibited the "knowing sending or displaying of patently offensive messages in a manner that is available to a person under 18 years of age." *Id.* However, the statute did not define either "indecent" or "patently offensive," much less in clear terms. *Id.* at 871. Indeed, even at the time the CDA was under debate, members of Congress understood that the language in the bill was overly broad and unlikely to withstand

constitutional review. 141 Cong. Rec. H8470 (daily ed. Aug. 4, 1995) (statement of Rep. Wyden) (the CDA "will essentially involve the Federal Government spending vast sums of money trying to define elusive terms that are going to lead to a flood of legal challenges while our kids are unprotected").

Immediately after the CDA was enacted, a lawsuit challenged it as a clear violation of the First Amendment. *Reno*, 521 U.S. at 861. In its landmark decision in *Reno v. ACLU*, the Supreme Court agreed. At the outset, the Court rejected the government's argument that the Internet should be subject to qualified scrutiny similar to broadcast media.

> Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer. As the District Court found, "the content on the Internet is as diverse as human thought." We agree with its conclusion that our cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium.

521 U.S. at 870 (citation omitted).

The Court proceeded to hold that the law did not satisfy strict scrutiny: "[t]he general, undefined terms 'indecent' and 'patently offensive' cover large amounts of nonpornographic material with serious educational or other value." *Id.* at 877. The CDA therefore "unquestionably silence[d] some speakers whose messages would be entitled to constitutional protection." *Id.* at 873. Recognizing the open nature of the Internet, the Court rejected the argument that the law was

sufficiently narrowly tailored because it was designed to protect minors and did not, on its face, limit dissemination of information to adults. "This argument ignores the fact that most Internet fora—including chat rooms, newsgroups, mail exploders, and the Web—are open to all comers." *Id.* at 880. Warning that "governmental regulation of the content of speech is more likely to interfere with the free exchange of ideas than to encourage it," the Court held that "[t]he interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship." *Id.* at 885.

Two years later, Congress tried again. It enacted the Child Online Protection Act of 1998 ("COPA"), 47 U.S.C. § 231, which imposed "criminal penalties … for the knowing posting, for 'commercial purposes,' of World Wide Web content that is 'harmful to minors.'" *Ashcroft v. ACLU*, 542 U.S. 656, 661 (2004). Mindful of the CDA's fate in *Reno*, Congress attempted to define the term "harmful to minors," enacting a complicated four-part definition that referenced "obscen[ity]," "contemporary community standards," and material "lack[ing] serious literary, artistic, political, or scientific value." 47 U.S.C. § 231(e)(6).

That was not enough to save the statute. In *Ashcroft v. ACLU*, the Supreme Court found COPA likely unconstitutional and affirmed a preliminary injunction against its enforcement. The Court explained that "[c]ontent-based prohibitions, enforced by severe criminal penalties, have the constant potential to be a repressive

force in the lives and thoughts of a free people. To guard against that threat the Constitution demands that content-based restrictions on speech be presumed invalid." *Ashcroft*, 542 U.S. at 660.

Four years later, the Third Circuit put the final nail in COPA's coffin. In holding the statute unconstitutional, the court explained that "Web publishers that are not commercial pornographers will be uncertain as to whether they will face prosecution under the statute, chilling their speech." *ACLU v. Mukasey*, 534 F.3d 181, 205 (3d Cir. 2008). In addition, the operative term of the statute was unconstitutionally vague and overbroad: "COPA's definition of 'material harmful to minors' 'impermissibly places at risk a wide spectrum of speech that is constitutionally protected.'" *Id.* at 206 (citation omitted). When the Supreme Court denied certiorari in *Mukasey*, the decade-long federal effort to broadly censor online speech was dead.

2. Internet Censorship Efforts By State and Local Governments

Undeterred by the federal government's failed online censorship efforts, state and local lawmakers and law enforcers jumped on the bandwagon. In 2002, for example, Pennsylvania enacted the Internet Child Pornography Act, 18 Pa. Stat. Ann. § 7621-7630. This law imposed potential liability on Internet Service Providers ("ISPs") that enabled access to "child pornography" available on the Internet, even if the "ISPs" were not themselves hosting the content and had no

relationship whatsoever with the publishers of the content. *Ctr. for Democracy & Tech. v. Pappert*, 337 F. Supp. 2d 606, 610 (E.D. Pa. 2004). The statute authorized the state Attorney General or any district attorney to seek an ex parte order warning of the presence of child pornography with a showing of probable cause. *Id.* at 619. Upon receipt of an informal notice, the ISPs were compelled to block access to the content. ISPs that failed to comply with these notices faced criminal liability. *Id.*

CDT challenged the law on First Amendment grounds, and the court agreed that it was unconstitutional. Among other shortcomings, the statute "fail[ed] to specify any means of compliance, let alone provide guidance as to which method will minimize or avoid suppression of protected speech." *Id.* at 656. In effect, the court found the law unconstitutional based on the interconnected nature of the Internet. Because ISPs were unable to target a specific webpage, much less a specific item of purportedly obscene material, they were effectively compelled to silence far more protected speech than was necessary to further the government interest in combating child abuse. *Id*. at 655-56.

In 2009, Sheriff Tom Dart of Cook County, Illinois, tried another tactic, attempting to censor online speech through litigation. Dart filed a lawsuit against Craigslist, claiming that its adult services section constituted a public nuisance. *Dart v. Craigslist, Inc.*, 665 F. Supp. 2d 961 (N.D. Ill. 2009). Notwithstanding the

presence of lawful speech on the service, and notwithstanding the websites' Terms of Use prohibiting "offers for or the solicitation of prostitution," the Sheriff sought to enjoin the service based on the allegation that users routinely posted unlawful advertisements offering sex for money. *Id.* at 962-63. The court dismissed Dart's lawsuit on statutory grounds without reaching Craigslist's alternative argument that the requested injunction would violate Craigslist's own right to publish the content on its platform. *See id.* at 969 & n.10; *see also, e.g., Backpage.com, LLC v. Dart*, 807 F.3d 229, 230-31 (7th Cir. 2015) (invalidating Sheriff Dart's subsequent effort to compel credit card processors to stop providing services to Backpage.com; explaining that the use of "coercive state power to stifle protected speech violates a plaintiff's First Amendment rights, regardless of whether the threatened punishment comes in the form of the use (or misuse) of the defendant's direct regulatory or decisionmaking authority … or in some less-direct form").

Continuing in this tradition of targeting online speech related to adult activities, in 2012, several states passed laws aiming to prohibit online advertising for "escort" services. For example, Washington, seeking to "eliminate escort ads and similar Internet postings," enacted a law that made it a felony "to knowingly publish, disseminate, or display or to 'directly or indirectly' cause content to be published, disseminated or displayed if it contains a 'depiction of a minor' and any 'explicit or implicit offer' of sex for 'something of value.'" *Backpage.com, LLC v.*

McKenna, 881 F. Supp. 2d 1262, 1268, 1270 (W.D. Wash. 2012). The Western District of Washington enjoined the law and held that it likely violated the First Amendment. Because the law targeted the act of publishing, the law effectively compelled pre-screening and would therefore limit the amount of content published and impose a collateral burden on protected speech. *Id.* at 1277-78.

New Jersey and Tennessee also passed laws banning ads for commercial sex. Federal courts enjoined both. *See Backpage.com, LLC v. Cooper*, 939 F. Supp. 2d 805 (M.D. Tenn. 2013); *Backpage.com, LLC v. Hoffman*, No. 13-cv-03952 (DMC)(JAD), 2013 WL 4502097 (D.N.J. Aug. 20, 2013). The courts again recognized the "the hazards of self-censorship" posed by the law as applied to online services: "websites ... will bear an impossible burden to review all of their millions of postings or, more likely, shut down their adult services section entirely; in addition, many users would likely refrain from posting constitutionally permissible advertisements." *Cooper*, 939 F. Supp. 2d at 830 (citation omitted); *see also Hoffman*, 2013 WL 4502097, at *12 (observing that "speakers may self-censor rather than risk the perils of trial").

Most recently, North Carolina made it a felony for a registered sex offender to use or access any online social media platforms used by minors. In striking down this law, the Supreme Court cited the "fundamental" First Amendment principle that "all persons have access to places where they can speak and listen."

Packingham v. N. Carolina, 137 S. Ct. 1730, 1735 (2017). This principle, the Court explained, applied with special force online: the forums of the Internet "provide perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard. They allow a person with an Internet connection to 'become a town crier with a voice that resonates farther than it could from any soapbox.'" *Id*. at 1737 (quoting *Reno*, 521 U.S. at 870).

B. Cases Striking Down Online Censorship Laws Have Enshrined Core First Amendment Principles And Allowed Speech On The Internet To Flourish

The history discussed above reflects two overarching principles that govern modern-day efforts to regulate online speech.

First, the Internet's unparalleled importance as a forum for individual expression means that online speech is entitled to "the highest protection from governmental intrusion." *Reno*, 521 U.S. at 865 (citation omitted). As the Supreme Court put it in *Packingham*: "While in the past there may have been difficulty in identifying the most important places (in a spatial sense) for the exchange of views, today the answer is clear. It is cyberspace." 137 S. Ct. at 1737. Given that, "[t]he Court must exercise extreme caution" and review with special scrutiny any law that purports to regulate speech on the "vast democratic forums of the Internet.'" *Id*. at 1735-36 (quoting *Reno*, 521 U.S. at 868). Because the Internet "provides relatively unlimited, low cost capacity for communication of all kinds,"

there is "no basis for qualifying the level of First Amendment scrutiny that should be applied." *Reno*, 521 U.S. at 870.

Second, the "special attributes of Internet communication" require robust application of the First Amendment doctrines of overbreadth and vagueness. *Id.* at 863 (citation omitted). Any law that purports to regulate speech across "the entire universe of cyberspace" risks suppressing not merely a large amount of speech, but speech that is unfathomably diverse, constantly expanding, and globally interconnected. *Id*. at 868. For that reason, the principle that the "Government may not suppress lawful speech as the means to suppress unlawful speech," *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 255 (2002), is heightened on the Internet. *See, e.g.*, *Pappert*, 337 F. Supp. 2d at 655 (striking down law where "[m]ore than 1,190,000 innocent web sites were blocked in an effort to block less than 400 child pornography web sites"); *ACLU*, 929 F. Supp. at 865 n.9 (Buckwalter, J. concurring) (concluding that the "unique nature" of the Internet aggravated the vagueness of the statute). In short, given the scale of speech burdened by clumsy efforts at censorship, courts are especially ready to "presume that governmental regulation of the content of speech is more likely to interfere with the free exchange of ideas than to encourage it." *Reno*, 521 U.S. at 885.

Moreover, because the Internet is generally "open to all comers," overbreadth concerns generally cannot be saved by *mens rea* requirements, for

example those limiting liability based on an Internet service's awareness of a website's contents or the age of its users. *Id.* at 880. After all, "[a]ny person or organization with a computer connected to the Internet can 'publish' information." *Id.* at 853. Regimes that require website operators to remove content based on knowledge "confer broad powers of censorship, in the form of a 'heckler's veto,' upon any opponent of indecent speech." *Id.* at 880.

In short, courts have consistently held that the First Amendment cannot abide comprehensive online speech restrictions. As the Supreme Court has explained, Internet censorship laws can "with one broad stroke" bar access to "the principal sources for knowing current events, checking ads for employment, speaking and listening in the modern public square, and otherwise exploring the vast realms of human thought and knowledge." *Packingham*, 137 S. Ct. at 1737.

II. THE RIGHTS OF ONLINE INTERMEDIARIES ARE PROTECTED BY SECTION 230 OF THE CDA AND THE FIRST AMENDMENT

A. Congress Enacted Section 230 To Foster Speech By Protecting The Editorial Decisions Of Online Service Providers

But direct speech by billions of individuals who use the Internet is only part of the online free speech story. Facilitating these individual acts of self-expression are a wide-ranging group of intermediaries—including search engines like Google and DuckDuckGo; social media sites like Facebook, Reddit, and Pinterest; video-hosting websites like YouTube and Vimeo; web-hosting services like Amazon

Web Services; remote storage services such as DropBox; consumer-review sites like Yelp and TripAdvisor; online classified ad services like Craigslist; collaborative encyclopedias such as Wikipedia and Ballotpedia; and many others. These intermediaries publish or distribute other people's speech. They make it possible for individuals to broadcast their message around the world and find an audience. And they function best when their editorial or curatorial choices are protected. *See, e.g.*, Ctr. for Democracy & Tech., *Shielding The Messengers: Protecting Platforms For Expression And Innovation* (Dec. 2012), https://cdt.org/files/pdfs/CDT-Intermediary-Liability-2012.pdf ("Interactive platforms have become vital not only to democratic participation but also to the ability of users to forge communities, access information, and discuss issues of public and private concern.").

Even as it was trying to regulate indecent speech online, Congress understood the critical role of online intermediaries. Although the CDA's "primary goal ... was to control the exposure of minors to indecent material," *Batzel v. Smith*, 333 F.3d 1018, 1026 (9th Cir. 2003), the statute had a second, equally significant objective: to protect the Internet as a "forum for a true diversity of ... myriad avenues for intellectual activity," which "ha[s] flourished ... with a minimum of government regulation," 47 U.S.C. § 230(a)(3)-(4). That was the genesis of Section 230. This provision sought "to promote the free exchange of

information and ideas over the Internet," *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1099-1100 (9th Cir. 2009) (citation omitted), by forbidding "the imposition of publisher liability on a service provider for the exercise of its editorial and self-regulatory functions," *Zeran v. AOL*, 129 F.3d 327, 331 (4th Cir. 1997); *accord* 47 U.S.C. § 230(b)(1)-(2) (explaining Section 230's purpose "to promote the continued development of the Internet and other interactive computer services" by allowing them to continue to develop "unfettered by Federal or State regulation").

More specifically, Section 230(c)(1) provides that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1). As this Court and others have recognized, Section 230 "protects against liability for the 'exercise of a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone, or alter content.'" *Klayman v. Zuckerberg*, 753 F.3d 1354, 1359 (D.C. Cir. 2014) (quoting *Zeran*, 129 F.3d at 330). As the Fourth Circuit explained:

> The purpose of this statutory immunity is not difficult to discern. Congress recognized the threat that tort-based lawsuits pose to freedom of speech in the new and burgeoning Internet medium. The imposition of tort liability on service providers for the communications of others represented, for Congress, simply another form of intrusive government regulation of speech. Section 230 was enacted, in part, to maintain the robust nature of Internet communication and, accordingly, to keep government interference in the medium to a minimum.

Zeran, 129 F.3d at 330.

This limitation on liability reflects an understanding of the scale of online speech and the special role that Internet intermediaries play in facilitating such speech. "[G]iven the volume of material communicated … , the difficulty of separating lawful from unlawful speech, and the relative lack of incentives to protect lawful speech" on the Internet, online services would be chilled from operating their platforms in ways that enable and foster free expression if they were threatened with liability, and especially criminal liability, for hosting content posted by their users. *Universal Commc'n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 418-19 (1st Cir. 2007); *accord Delfino v. Agilent Techs., Inc.*, 145 Cal. App. 4th 790, 802-03 (2006) (Section 230 works "to avoid the chilling effect upon Internet free speech that would be occasioned by the imposition of tort liability upon companies that do not create potentially harmful messages but are simply intermediaries for their delivery").

Without protection from liability for their users' speech, online service providers could be forced to screen content before it is shared and to remove content that even arguably threatened liability. Anyone who wished to silence unwelcome speech could threaten online services with litigation, forcing them to either remove content or face serious legal risk. *See Zeran*, 129 F.3d at 331 ("Faced with potential liability for each message republished by their services,

interactive computer service providers might choose to severely restrict the number and type of messages posted."). In this way, Section 230 "protects against the 'heckler's veto' that would chill free speech." *Jones v. Dirty World Entm't Recordings LLC*, 755 F.3d 398, 407 (6th Cir. 2014). By protecting online intermediaries, therefore, the statute protects and promotes the lawful speech of individuals.

B. Section 230 Reinforced The Independent First Amendment Rights Of Online Platforms To Make Editorial Judgments About Third-Party Speech

By affording affirmative protection to website operators to formulate and enforce their own editorial standards, Section 230 gave statutory expression to bedrock First Amendment principles. Like other publishers, online platforms—given their role in facilitating speech and their vulnerability to censorship pressures—have their own First Amendment rights to select, arrange, and regulate content on their services. This right predates Section 230 and exists independently from it.

Indeed, courts have often acknowledged the essential First Amendment underpinnings for the protections that Section 230 provides. *See Google, Inc. v. Hood*, 822 F.3d 212, 220 (5th Cir. 2016) ("First Amendment values … drive the CDA" (citation omitted)); *Batzel*, 333 F.3d at 1028-29 (explaining that Section 230 was added "to further First Amendment and e-commerce interests on the

Internet"); *People v. Ferrer*, No. 16FE024013, slip op. 11 (Cal. Super. Ct. Aug. 23, 2017) ("[T]he protections afforded by the First Amendment were the motivating factors behind … the CDA."). That is why courts will sometimes invoke *both* the First Amendment and Section 230 when invalidating efforts to control content on online platforms. *See, e.g.*, *McKenna*, 881 F. Supp. 2d at 1275-84; *Hoffman*, 2013 WL 4502097, at *7-10; *Cooper*, 939 F. Supp. 2d at 828-40.

The First Amendment rights of platforms and speech intermediaries are well established. As far back as 1959, for example, the Supreme Court explained the particular danger of subjecting a bookseller to a censorship regime that made it unlawful to possess an obscene book in any bookstore:

> The bookseller's limitation in the amount of reading material with which he could familiarize himself, and his timidity in the face of his absolute criminal liability, thus would tend to restrict the public's access to forms of the printed word which the State could not constitutionally suppress directly.The bookseller's self-censorship, compelled by the State, would be a censorship affecting the whole public, hardly less virulent for being privately administered.

Smith v. California, 361 U.S. 147, 153-54 (1959).

Applying similar principles, the Supreme Court has long held that the First Amendment protects the editorial judgments of publishers and other entities who arrange, present, or disseminate other people's speech. In *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), the Court struck down a law that required newspapers to publish messages from political candidates. The Court held

that this requirement violated the First Amendment as an "intrusion into the function of editors," because "[t]he choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment." *Id.* at 258.

Two decades later, the Court applied this rule to cable systems. In *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994), the Court held that "'by exercising editorial discretion over which stations or programs to include in its repertoire,' cable programmers and operators 'seek to communicate messages on a wide variety of topics and in a wide variety of formats.'" *Id.* at 636 (quoting *Los Angeles v. Preferred Commc'ns, Inc.*, 476 U.S. 488, 494 (1986)). Those editorial choices are protected by "settled principles of … First Amendment jurisprudence." *Id*. at 639.

Similarly, in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group*, 515 U.S. 557 (1995), the Court held that the state could not compel parade organizers "to include among the marchers a group imparting a message the organizers do not wish to convey." *Id.* at 559. That holding was based on the "fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message," including both "what to say and what to leave unsaid." *Id.* at 573; *accord id*. at 574 (explaining that the parade organizer "clearly

decided to exclude a message it did not like from the communication it chose to make, and that is enough to invoke its right as a private speaker to shape its expression by speaking on one subject while remaining silent on another").

What is true for booksellers, newspapers, cable providers, and parades is equally true for online intermediaries. Courts have consistently held that "online publishers have a First Amendment right to distribute others' speech and exercise editorial control on their platforms." *La'Tiejira v. Facebook, Inc.*, 272 F. Supp. 3d 981, 991-92 (S.D. Tex. 2017). In *e-ventures Worldwide, LLC v. Google, Inc.*, No. 2:14-cv-646-FtM-PAM-CM, 2017 WL 2210029 (M.D. Fla. Feb. 8, 2017), for example, the court held that the First Amendment barred claims against Google arising from its removal of a particular website from its search results. It explained that the First Amendment protects such online publishing decisions, "whether they are fair or unfair, or motivated by profit or altruism." *Id.* at *4. Likewise, in *Zhang v. Baidu.com, Inc.*, a lawsuit against a search engine for choosing to exclude certain politically sensitive information from its results, the court explained that efforts to hold online intermediaries liable for their "editorial judgments about what political ideas to promote cannot be squared with the First Amendment." 10 F. Supp. 3d 433, 443 (S.D.N.Y. 2014).

While the right to make these editorial judgments is generally also secured by Section 230, the First Amendment provides an inalienable protection against

government efforts to compel or forbid the display of speech by online service providers. Even where Section 230 is not available, the First Amendment stands ready to fill the gap. Congress cannot legislate away online intermediaries' rights to select and present third-party speech.

III. FOSTA VIOLATES THE FIRST AMENDMENT BY DIRECTLY CENSORING ONLINE SPEECH AND THREATENING THE RIGHTS OF ONLINE INTERMEDIARIES

Unfortunately, that is just what FOSTA purports to do. FOSTA's enactment is the latest chapter in this story of online speech regulation. The statute's restrictions implicate both of the First Amendment rules discussed above. FOSTA directly limits what online speakers can say—restricting potentially broad swaths of speech relating to sex work—and exposes online service providers to potential liability for hosting or making available certain types of content. Thus, FOSTA both threatens constitutionally protected speech and interferes in the editorial judgment of intermediaries in regard to such speech.

More specifically, FOSTA imposes two new speech restrictions. To begin, it creates a brand new federal crime (and a related civil cause of action), the vague terms of which directly burden protected online speech. The newly created Section 2421A prohibits operating an interactive computer service "with the intent to promote or facilitate the prostitution of another person." 18 U.S.C. § 2421A(a).

Any person injured by a violation of Section 2421A also may bring a civil action in federal court. *Id*. § 2421A(c).

At the same time, FOSTA also expanded the existing criminal provisions codified in 18 U.S.C. § 1591(a). Whereas this statute had previously been held to apply only to unprotected speech—"advertisements concerning illegal sex trafficking," *Backpage.com, LLC v. Lynch*, 216 F. Supp. 3d 96, 106 (D.D.C. 2016)—FOSTA broadened it by redefining the term "participation in a venture" to mean "knowingly assisting, supporting, or facilitating" a violation of § 1591(a)(1). 18 U.S.C. § 1591(e)(4). And a violation of Section 1591 can be a basis for a private civil cause of action under 18 U.S.C. § 1595.

Especially given the absence of any limiting definitions—the terms "promote" and "facilitate" are undefined—FOSTA's new criminal provisions readily may be read to encompass activity that is constitutionally protected: hosting advertisements for legal adult sexual services, providing health information to sex workers, or hosting content that advocates for their rights. A website that urges the legalization of prostitution, or one that provides resources and safety information for those involved in the sex trade, could readily be understood to "promote" or "facilitate" prostitution. *Cf. Reno*, 521 U.S. at 871 (observing that "the absence of a definition" of key terms in the CDA "will provoke uncertainty among speakers"). At a minimum, uncertainty about the law's scope—combined with the criminal

penalties it imposes—"may well cause speakers to remain silent rather than communicate even arguably unlawful words, ideas, and images." *Id.* at 872.

Beyond expanding the substantive criminal law in ways that directly burden protected speech and threaten online intermediaries for hosting speech, FOSTA also targets online platforms even more directly by expressly abrogating Section 230 protections for several new categories of claims. FOSTA represents the first time that Congress has ever narrowed the scope of Section 230's protections. Doing so not only broadens the range of possible civil and criminal claims that can be brought against interactive computer service providers, it opens up such claims to be brought by state officials and private civil plaintiffs.

This abrogation of Section 230 exposes online platforms to significant new legal risks for hosting content related to prostitution and to the broad and loosely defined category of "sex trafficking." This change threatens all manner of lawful speech. The line between material that discusses sex work in favorable or value-neutral terms and that which "promotes" it is hazy, as is the distinction between ads or posts that relate to legal adult services and those that might be deemed to "facilitate" unlawful sex trafficking. Thus, although offering adult services is not itself unlawful, "nor does it necessarily call for unlawful content," *Dart*, 665 F. Supp. 2d at 968, a platform with an adult-services section may generally be aware that its users have posted or may post material that violates (or arguably might

violate) Section 1591 or 2421A. *Cf. McKenna*, 881 F. Supp. 2d at 1279 (if the Internet Archive ("IA") crawls an unlawful ad on another platform "and publishes it through its Wayback Machine, knowing that [the platform] has an 'adult services' ad section … , is IA liable?").

That is especially so given the realities of Internet speech, as reflected in the case law above. The sheer volume and diversity of material posted by billions of Internet users makes it all but impossible for online platforms to filter out all "bad" speech without simultaneously sweeping in, and restricting, a broad swath of lawful material. *See, e.g.*, Zoe Kleinman, *Fury over Facebook 'Napalm girl' censorship*, BBC News (Sept. 9, 2016), https://www.bbc.com/news/technology-37318031. Without limits on liability for hosting user speech, such intermediaries are likely to react by significantly limiting what their users can say, including a potentially wide range of lawful speech, from discussions on dating forums about consensual adult sex, to resources for promoting safety among sex workers. Indeed, as discussed in Appellants' brief, that has already started to happen, with platforms restricting access to information that promotes public health and safety, political discourse, and economic growth. *See* Appellants' Opening Brief at 11-15; *see also, e.g.*, Survivors Against SESTA, Documenting Tech Actions, https://survivorsagainstsesta.org/documentation/.

Against this backdrop, FOSTA's limitation of Section 230 impinges the First Amendment in two related ways. *First*, by threatening online platforms with new forms of liability for hosting or facilitating user speech, the statute seeks to conscript online platforms into widespread filtering or blocking of material posted by their users. The risks of intermediary liability that FOSTA creates can readily be expected to result in service providers more aggressively monitoring and removing user content—or disallowing whole categories of speech on their platform, thereby compromising users' ability to engage in the "vast democratic forums of the Internet." *Reno*, 521 U.S. at 868. Such government-compelled censorship significantly threatens the First Amendment rights of online speakers. *See* Daphne Keller, *Who Do You Sue? State and Platform Hybrid Power Over Online Speech*, Aegis Series Paper No. 1902, Jan. 29, 2019, at 7.

Second, online intermediaries' own First Amendment rights have been jeopardized by the threat of liability for their decisions about what third-party content to host. As discussed above, those rights have long been secured by statute, but the abrogation of statutory protections for hosting or facilitating access to third-party speech only brings to the fore the underlying First Amendment rights that protect the editorial judgments of online publishers and platforms. By withdrawing Section 230 protection for claims that implicate the decisions of service providers to make available lawful, protected speech, FOSTA goes beyond what the First

Amendment allows. It should meet the same fate as Congress's previous efforts to censor speech on the Internet.

CONCLUSION

Because FOSTA threatens to chill both the speech of Internet users and the discretion of online platforms that enable that speech, the District Court's decision should be reversed.

Respectfully submitted,

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February 21, 2019

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because it contains 6,437 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

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Dated: February 21, 2019

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CERTIFICATE OF SERVICE

I hereby certify that on February 21, 2019, I electronically filed the foregoing motion with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. The participants in this case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

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