

No. 18-5298

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

WOODHULL FREEDOM FOUNDATION; HUMAN RIGHTS WATCH; ERIC
KOSZYK; JESSE MALEY, A/K/A 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 United States District Court
for the District of Columbia

**BRIEF OF AMICI CURIAE LEGAL MOMENTUM, FLORIDA
ABOLITIONIST, AND THE NATIONAL COALITION AGAINST
DOMESTIC VIOLENCE IN SUPPORT OF DEFENDANTS-APPELLEES**

DAVID BOIES
BOIES SCHILLER FLEXNER LLP
333 Main Street
Armonk, NY 10504
(914) 749-8200

KAREN A. CHESLEY
KATE FERGUSON
55 Hudson Yards
New York, NY 10001
(212) 446-2300

April 22, 2019

Counsel for Amici Curiae

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, amici certify as follows:

Legal Momentum, also known as the Women’s Legal Defense and Education Fund, is a national non-profit gender justice advocacy organization. Legal Momentum advocates for equal rights for girls and women through legislative efforts, impact litigation, and through direct representation of clients.

Florida Abolitionist, Inc. (“Florida Abolitionist”) is a non-profit, anti-trafficking organization committed to the prevention of sex trafficking and to crisis intervention for sex trafficking victims.

The National Coalition Against Domestic Violence (“NCADV”) is a non-profit group that is the nation’s oldest national grassroots domestic violence organization.

Amici represent that no party to this brief is a publicly held corporation, issues stock, or has a parent corporation. Amici anticipate that three other amicus curiae briefs will be filed from the following organizations: the National Center for Missing and Exploited Children (“NCMEC”), a group of state Attorneys General, and Equality Now and other entities aligned with their position. Amici file this brief separately to give a voice to the victims that we have encountered while treating

survivors and advocating for an end to online sex trafficking. Amici here are unaware of any other parties or amici at this time.

Pursuant to Circuit Rule 28(a)(1), amici curiae Legal Momentum, Florida Abolitionist, and NCADV further certify:

Ruling Under Review: The ruling under review is *Woodhull Freedom Foundation, et al. v. United States*, 334 F. Supp. 3d 185 (D.D.C. 2018), and its accompanying Order, by which the District Court denied Appellants' motion for a preliminary injunction and dismissed their Complaint 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").

Related Cases: There are no related cases within the meaning of Circuit Rule 28(a)(1)(c).

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INTEREST OF AMICUS CURIAE¹

Legal Momentum, the Women's Legal Defense and Education Fund, is a national non-profit gender justice advocacy organization. For nearly 50 years, Legal Momentum has been advancing equal rights for girls and women through legislative efforts, impact litigation, and direct representation of clients. Its areas of focus have included employment law, campus safety, sports, and all forms of gender-based violence. Legal Momentum considers sex trafficking to be one of the most extreme forms of violence against women and is involved in efforts to end gender-based violence perpetrated online. As part of these efforts, Legal Momentum partnered with non-profit organizations and cities throughout the country to end the online commercial sexual exploitation of women and girls, including sex trafficking on Backpage.com.

Florida Abolitionist, founded in 2009, is an anti-trafficking organization committed to the prevention of sex trafficking and to crisis intervention for sex trafficking victims. A leading service provider in the Greater Orlando area, it runs Orlando's local trafficking hotline. It also conducts widespread outreach and

¹ All parties have consented to the filing of this brief. Pursuant to Circuit Rule 37.6, amici certify that no counsel for a party authored this brief in whole or in part, and no persons other than amici curiae or their counsel made a monetary contribution to its preparation or submission.

awareness campaigns throughout Central Florida, including to juvenile justice centers. As part of its extensive organizing and advocacy efforts, Florida Abolitionist co-founded the Greater Orlando Human Trafficking Task Force and has partnered with the Orange County School Board for prevention education.

The National Coalition Against Domestic Violence (“NCADV”) is the nation’s oldest national grassroots domestic violence organization. NCADV’s mission is to lead, mobilize, and raise our voices to support efforts that demand a change of conditions that lead to domestic violence such as patriarchy, privilege, racism, sexism, and classism – the same conditions that perpetuate commission of crimes such as sex trafficking. Domestic violence and sex trafficking can overlap, with survivors of domestic violence also being victims of sex trafficking. NCADV is dedicated to supporting survivors and holding offenders accountable.

* * *

The present case concerns amici because, as described further herein, online sex trafficking has resulted in harm to numerous victims throughout the United States (and beyond). The undersigned organizations are devoted to ending human trafficking and ensuring that victims are able to achieve justice through the judicial system.

This brief is submitted of behalf of those men, women, and children who have been victims of online sex trafficking. It is submitted separately from that of other

amici in order to highlight the impact of online sex trafficking on victims that amici have worked with directly. Throughout the years, amici have heard these victims' harrowing stories and know that they have suffered a level of harm that is almost unimaginable. Amici strongly believe that all trafficking survivors should have a right to recover damages from website operators that knowingly facilitated and profited from their trafficking. They also believe that permitting victims to seek restitution against such websites will have a deterrent effect on those website operators who might otherwise turn a blind eye to the sex trafficking that occurs through their websites. Thus, amici view the enactment of FOSTA as a critical tool to reduce the prevalence of online sex trafficking nationwide.

SUMMARY OF ARGUMENT

While the rapid growth of the Internet has enabled people to become increasingly more connected, it has also created new opportunities for criminals to abuse those connections to facilitate illegal activity. The ability to reach thousands of people through online classified ads, targeted to specific regions, has had a particularly profound effect on the market for sex trafficking—including the sale of children and people who are sold without their consent. Because a single advertisement can lead to dozens of sales, the use of an online platform has made sex trafficking easier and considerably more profitable.

Amici and many other organizations witnessed the increasing prevalence of online sex trafficking firsthand through the horrific stories told by the victims they treated. Amici and other advocates implored websites to adopt practices that would help stem the tide of online sex trafficking, including the use of technology to monitor content and the adoption of strict no-tolerance policies towards sex trafficking advertisements and the people who post them. Many responsible website operators did just that, and have worked diligently to ensure that suspicious advertisements are removed and reported to the appropriate authorities, and users who post advertisements for illegal activity are banned from the websites.

Other websites took a different approach. Most prominently, Backpage stubbornly refused to take even the most basic steps to prevent minors from being

sold for sex, arguing that it did not need to do anything to address this problem because it was immune from all liability under Section 230 of the Communications Decency Act (“Section 230”). A two-year investigation by the Senate Subcommittee on Investigations revealed that Backpage welcomed illegal content on its website and actively worked to ensure that traffickers would not face criminal liability for their actions. Worse, even when a specific advertisement was flagged for removal because someone reported the depicted person was a child, the Senate found that Backpage *still* refused to remove the posting. Because of its user-friendly stance on advertising content, Backpage quickly came to dominate the market for sex ads. At its peak, Backpage operated in over 400 cities in the United States and more than 900 cities worldwide. Backpage’s facilitation of sex trafficking harmed thousands of victims, while earning Backpage and its officers millions in profits.

The undersigned amici submit this brief to bring the Court’s attention to the importance of FOSTA to those who have been victimized by Backpage and other websites like it. These victims include a 15-year-old honors student who was repeatedly raped after her traffickers posted an advertisement for her on Backpage. Even after she escaped her traffickers and returned home, Backpage refused her mother’s pleas to take down the advertisement with her picture from its website. They also include a college student who was held captive and raped by at least five different men in the span of twelve hours after her traffickers posted an

advertisement on Backpage. Stories like these have been repeated thousands of times nationwide.

Despite the immense harm they suffered, victims struggled to bring lawsuits against Backpage and its affiliates because several courts ruled that Backpage was shielded from liability by Section 230. Congress enacted FOSTA as a direct response to this injustice. This statute plays a key role in stopping online trafficking because it encourages the effective use of monitoring technology to remove advertisements indicative of sex trafficking and serves as a deterrent to websites who might otherwise exhibit the same willful indifference shown by Backpage's executives.

While Appellants and their amici assert that FOSTA raises First Amendment concerns, Congress targeted FOSTA to prohibit the knowing facilitation of a real-life crime that has real-life consequences for its victims. This law is not about speech; it is about ensuring that those who choose to aid illegal conduct can be held responsible by those they have harmed. Since none of the Appellants claim that they intend to facilitate illegal conduct, the District Court correctly held that they did not have standing to challenge FOSTA. Amici agree with the District Court's thoughtful opinion and urge this Court to affirm that ruling on appeal.

ARGUMENT

This appeal raises only a single question: whether Appellants have standing to bring a pre-enforcement challenge to the enactment of FOSTA. In order to have standing, as the District Court explained, Appellants must show that they face a “credible threat of prosecution” because, “without a credible threat of prosecution, they have suffered no cognizable injury.”² To demonstrate a “credible threat of prosecution,” they must show that their conduct is “arguably ‘proscribed by [the challenged] statute.’”³

Amici filed this brief to give the Court context regarding the conduct that Congress was actually regulating when it enacted FOSTA. Congress was deeply concerned about the proliferation of sex trafficking online, particularly given that websites knowingly facilitating the sale of real children and other victims often evaded legal consequences for their conduct by invoking the protection of Section 230. Congress narrowly targeted FOSTA at the actions of those websites. This is a stark difference from the conduct Appellants suggest is prohibited by the statute.

It is a matter of public record that FOSTA was inspired by the abhorrent conduct of executives affiliated with Backpage.com. Until it was shut down in April

² JA 403.

³ JA 403 (citation omitted).

2018, Backpage was the leading site for sex trafficking. Thousands of victims were trafficked on Backpage, which, in turn, reaped enormous profits. Backpage was valued at over \$600 million in 2015 — a valuation that was based on the website generating substantial profits from the sale of children and coerced people, which qualifies as “sex trafficking.”⁴

Prior to FOSTA’s enactment in 2018, however, the legal system made it difficult for victims to hold Backpage accountable for the harm it caused. While victims could file civil suits against Backpage, courts often found that Section 230 shielded Backpage from liability for the advertisements posted on the site, regardless of Backpage’s knowledge of the content of these advertisements. As a result, even victims who were sold as children were prevented from recovering any money from Backpage. Indeed, Backpage retained the money it earned from posting advertisements for those same child victims. Worse, Backpage had no incentive to

⁴ Staff of S. Permanent Subcomm. on Investigations, 114th Cong., Recommendation to Enforce a Subpoena Issued to CEO of Backpage.com, LLC, at 25–26 (hereinafter, the “PSI Staff Report”), <http://www.hsgac.senate.gov/subcommittees/investigations/hearings/human-trafficking-investigation> (quoting Testimony of Yiota G. Souras, Senior Vice President & General Counsel, National Center for Missing & Exploited Children, before S. Permanent Subcomm. on Investigations, at 2 (Nov. 19, 2015)). Under federal law, “sex trafficking” is defined to include causing a person to engage in a commercial sex act (i) through means of force, threats or force, fraud, coercion, or any combination thereof, or (ii) when that person is under the age of 18 years old. 18 U.S.C. § 1591(a)(2).

change its practices, or to adopt policies that would help prevent the trafficking of children and others on its website.

Against this backdrop, Congress enacted FOSTA. The purpose of the legislation was to reduce the prevalence of online sex trafficking and provide some recourse for victims of sex trafficking to seek justice against the sites, such as Backpage, that allowed their traffickers to more easily sell them. Congress heard from victims and their families, and carefully and thoughtfully drafted FOSTA to address these pressing concerns. FOSTA is now an essential part of the war to combat the insidious practice of online sex trafficking, and the effort to allow victims to receive some semblance of justice through the use of legal process. It is not, as Appellants wildly overstate, a law that criminalizes websites for encouraging free and open debate. Instead, it is a law that is directed at those website operators who make a decision to knowingly facilitate illegal conduct.

I. VICTIMS HAVE SUFFERED IMMENSE HARM FROM BEING TRAFFICKED ONLINE

In considering the type of conduct that Congress sought to criminalize, it is paramount that courts acknowledge the deep harm suffered by victims of that conduct. We write here to provide the Court with the story of two victims who have filed lawsuits against Backpage, but there are many more victims nationwide who have similar experiences and are equally deserving of an opportunity to seek justice.

“Alice” was a 15-year-old honors student when her traffickers took photographs of her to create an online advertisement on Backpage that offered her for sex.⁵ Her traffickers kept her confined, branded her, and used a cell phone to take numerous photographs of her to continue creating ads on Backpage that would attract new “customers.” Over the course of two weeks, Alice was raped by numerous individuals who responded to the Backpage advertisement posted by her traffickers. Fortunately, Alice was able to escape by calling her mother to tell her where she was being held by her traffickers. Immediately upon her return home, Alice and her family reported her traffickers to law enforcement. However, even after she was back home, the advertisement containing images of her remained on Backpage. Alice’s parents emailed Backpage, requesting that the advertisement be removed and noting that Alice was still a child. Backpage ignored their pleas, and allowed the advertisement to remain on its website.

Alice remains permanently psychologically and physically traumatized by her experience. Prior to being trafficked, Alice was an honor roll student. Now, she has difficulty staying motivated and has trouble focusing for long periods of time, making school substantially more difficult. She also has suffered shame, humiliation, and embarrassment from her photograph being featured multiple times

⁵ We have used aliases to protect the identities of the victims described herein.

on Backpage, where it was publicly available to view and was associated with the sale of sex. Furthermore, she now has intense anxiety, and attends therapy regularly as a result of the deep psychological trauma inflicted by Backpage's conduct. Nonetheless, Alice has not nearly been compensated for the harms that were inflicted upon her by the advertisements posted on Backpage.

“Sarah” was a high-functioning college student when she was trafficked using Backpage. By the time Sarah was abducted by her traffickers, they had already repeatedly used Backpage to traffic other women, and had become experienced using the website. Sarah's traffickers confined her to a hotel room and took photos of her against her will. They then used those photos to create an advertisement offering her for sexual services on Backpage without her consent or authorization. In only 12 hours, Sarah was raped by five different individuals who responded to the Backpage advertisement placed by her traffickers.

Like Alice, Sarah has suffered long-lasting injuries from being trafficked on Backpage. She stopped attending college courses after the trauma of being raped because she could no longer focus on her coursework. She also missed significant periods of work due to her need to attend medical appointments and psychological therapy. She received intense psychological therapy twice a week for two years, and still suffers from post-traumatic stress disorder as a result of her trafficking. Even

worse, due to the physical trauma caused by being repeatedly and forcibly raped, Sarah was forced to undergo a hysterectomy last year at just 30 years old.

These two stories are emblematic of the stories of thousands of other victims that were trafficked on Backpage. For instance, in another case against Backpage, the 15-year-old female plaintiffs who were trafficked via Backpage had been raped 900 to 1000 times each. *See Doe ex rel. Roe v. Backpage.com, LLC*, 104 F. Supp. 3d 149, 153 (D. Mass. 2015). Again, the parents of one of the 15-year-old girls reported to Backpage that she was being trafficked on the site throughout New England. They provided Backpage with information to locate the advertisements and demanded that the illegal advertisements be taken down. Just as with Alice, Backpage failed to respond to the report. A week after the rape of the 15-year-old girl, the advertisements remained featured on Backpage. *Id.* at 153 n.2. In another case against Backpage, *Backpage.com, LLC v. McKenna*, law enforcement in Seattle asked Backpage to remove an advertisement of a confirmed minor, and any other advertisements by that poster. Even though Backpage removed that singular advertisement, only a few days later the same child appeared in six more advertisements on the site. 881 F. Supp. 2d 1262, 1267–68 (W.D. Wash. 2012).

The full scope of the damage Backpage inflicted on victims of trafficking, like Alice and Sarah, is enormous. It will likely never be fully quantified.

II. THOUSANDS OF VICTIMS WERE TRAFFICKED ONLINE

Alice and Sarah are just two of many victims of online sex trafficking. Thousands of American children are sold for sex online each day throughout the United States,⁶ from Seattle,⁷ to Silicon Valley,⁸ to Phoenix,⁹ to Chicago,¹⁰ to Washington, DC.¹¹ It has been reported that girls as young as 11 years old are being trafficked online.¹²

⁶ Smith, Linda & Coloma, Cindy, *Renting Lacy: A Story of America's Prostituted Children*, at 95, Shared Hope Int'l (2009).

⁷ *Backpage.com, LLC v. McKenna*, 881 F. Supp. 2d 1262 (W.D. Wash. 2012).

⁸ Juniper Networks Foundation Fund & Silicon Valley Community Foundation, *Human Trafficking in Silicon Valley*, at 9 (2014), <https://flipflashpages.uniflip.com/3/88537/339160/pub/html5.html#page/14>.

⁹ Dominique Roe-Sepowitz, Ariz. State Univ., *Report on the Incidence of Sex Trafficking in Arizona Juvenile Probation*, 4 (2016), http://endsextrafficking.az.gov/sites/default/files/estaz_012716_materials.pdf.

¹⁰ *See Backpage.com, LLC v. Dart*, 127 F. Supp. 3d 919, 922 (N.D. Ill. 2015) (“In over 800 sting operations responding to Backpage ads since 2009, Dart’s officers have made arrests for prostitution, child trafficking, or a related crime 100% of the time.”).

¹¹ Press Release, U.S. Dep’t of Justice, *Man Convicted of Sex Trafficking A 15-Year-Old Girl* (June 25, 2013), <https://www.justice.gov/usao-edva/pr/man-convicted-sex-trafficking-15-year-old-girl>. A 29-year old man met a runaway girl outside of her home, had sex with her hours later, and then began selling her on Backpage.com.

¹² ABC News, *Girls Sold for Sex Online, Backpage Defends Decision to Keep Ads Up* (Apr. 24, 2012), <http://abcnews.go.com/US/girls-sold-sex-online-backpage-defends-decision-ads/story?id=16193220>.

The effects of trafficking are long-lasting and widespread. For the rest of their lives, exploited children face devastating health and psychological problems, high rates of suicide and attempted suicide, and post-traumatic stress disorder.¹³ Service providers, shelters, health care workers, government agencies, law enforcement, family members, and schools are deeply impacted by caring for victims of trafficking. With respect to children, who make up more than half of all sex trafficking victims, experts have explained that the 846% increase in reports of suspected trafficking over the past five years is “directly correlated to the increased use of the Internet to sell children for sex.”¹⁴

Until Backpage was shut down in April 2018, it monopolized the sex trafficking industry, becoming the highly profitable go-to website for sex trafficking.¹⁵ Service providers across the country, when asked how many of the victims they serve were trafficked on Backpage, reported percentages ranging from 70-100%. When NCMEC received a report of a missing child, it first searched Backpage, as over 71% of cases that the public reported to NCMEC relating to child

¹³ Melissa Farley & Howard Barkan, *Prostitution, Violence, and Posttraumatic Stress Disorder*, 27(3) *Women & Health* 37–49 (1998).

¹⁴ PSI Staff Report at 4 (citation omitted).

¹⁵ PSI Staff Report at 6.

sex trafficking are of children listed on the site.¹⁶ NCMEC received approximately 10,000 reports of suspected child sex trafficking each year—meaning that there were more than 7,100 *reported* incidents of child sex trafficking involving Backpage.¹⁷ The number of unreported incidents is presumably much higher.

Backpage dominated the sex trafficking market by making it easy for traffickers to use the website and evade law enforcement. Backpage engaged in a number of practices to increase its profitability at the cost of exposing children to harm.¹⁸ Both the Senate’s investigation of Backpage, as well as Backpage’s guilty plea in the criminal case brought by federal authorities in Arizona, show that Backpage was keenly aware of the sex trafficking rampant on its website and that it did not monitor advertisements in good faith. In its plea agreement submitted in the District of Arizona, Backpage admitted not only that it knew that “the great majority of these advertisements are, in fact, advertisements for prostitution services” but that Backpage “knowingly facilitate[ed]” prostitution.¹⁹ The company admitted to using

¹⁶ PSI Staff Report at 6.

¹⁷ Brief of Amicus Curiae NCMEC, *Jane Doe, et al., v. Backpage.com LLC*, Case No. 16-276, at 3 (Sept. 27, 2016).

¹⁸ *United States of America v. Lacey, et al.*, Case No. 18-cr-422, Dkt. 230 (D. Az. July 25, 2018).

¹⁹ *United States of America v. Backpage.com, LLC*, Case No. 18-cr-465, Dkt. 8-1 at 11 (D. Az. Apr. 5, 2018).

“‘moderation’ processes through which Backpage would remove terms and pictures that were particularly indicative of prostitution and then publish a revised version of the ad . . . [as part of a] company-wide culture and policy of concealing and refusing to officially acknowledge the true nature of the services being offered in Backpage’s ‘escort and ‘adult’ ads.’”²⁰

Backpage consistently ignored pleas that it take even the most basic steps to prevent trafficking. On September 16, 2011, the National Association of Attorneys General (“NAAG”) sent a letter to Backpage, eventually signed by all 51 state Attorneys General, expressing grave concern over its practices.²¹ NAAG noted that when Missouri investigators flagged 25 postings advertising children in July 2011, four days later, Backpage had removed only five of those postings.²² NAAG requested that Backpage substantiate its claims that it systematically moderates and removes illegal content, but Backpage refused. In 2012, the United States Senate and the House of Representatives each passed resolutions calling on Backpage to

²⁰ *Id.*

²¹ NAAG letter to Samuel Fifer (Sept. 16, 2011), *available at* <https://www.naag.org/assets/files/pdf/signons/Backpage.com%20FINAL%209-16-11.pdf>.

²² *Id.*

shut down its “adult services” section, where children are often listed for sex.²³ The resolutions noted that girls are often trafficked for the first time between the ages of 12 and 14 and stated that “40 percent of incidents investigated . . . involved . . . the sexual exploitation of a child.”²⁴ Again, Backpage refused to change its business practices, at the expense of thousands of sex trafficking victims.

Backpage’s consistent refusal to change its conduct was motivated in large part by its belief that it was inoculated from any civil liability for its actions. Over the years, victims who were trafficked on Backpage frequently attempted to bring civil litigation against Backpage. Despite Backpage’s flagrant conduct, courts were often forced to dismiss these suits, deferring to what they perceived as Congress’s intent in passing Section 230. *See, e.g., Doe ex rel. Roe v. Backpage.com, LLC*, 104 F. Supp. 3d 149, 165 (D. Mass. 2015), *aff’d*, 817 F.3d 12 (1st Cir. 2016) (dismissing claims brought by three teenage victims, finding that “Congress has made the determination that the balance between suppression of trafficking and freedom of expression should be struck in favor of the latter in so far as the Internet is concerned. Putting aside the moral judgment that one might pass on Backpage’s business practices, this court has no choice but to adhere to the law that Congress has seen fit

²³ S. Res. 439, 112th Cong. (Apr. 25, 2012); H.R. Res. 646, 112th Cong. (May 7, 2012).

²⁴ H. Res. 646.

to enact.”); *M.A. ex rel. P.K. v. Vill. Voice Media Holdings, LLC*, 809 F. Supp. 2d 1041, 1058 (E.D. Mo. 2011) (holding that the victim, who was sold on Backpage at the age of 14, had not “distinguish[ed] the complained-of actions of Backpage from any other website that posted content that led to an innocent person’s injury. Congress has declared such websites to be immune from suits arising from such injuries. It is for Congress to change the policy that gave rise to such immunity.”).²⁵ During the time when Backpage was able to evade liability in this way, it had little incentive to change its practices and continued to profit from the sexual exploitation of children and other victims. Meanwhile, the plaintiffs in many of those lawsuits were left with no legal remedy against the website that knowingly helped their pimps sell them for sex.

III. CONGRESS ENACTED FOSTA TO ENSURE JUSTICE FOR VICTIMS AND TO PREVENT FURTHER SEX TRAFFICKING

It is this historical backdrop — the fact that certain website operators made the brazen, greedy decision to facilitate sex trafficking while simultaneously enjoying protection from civil liability due to Section 230 — in which Congress

²⁵ In some cases, plaintiffs were able to overcome the pleading hurdle created by Section 230. *See, e.g., Florida Abolitionist, et al. v. Backpage.com, et al.*, No. 17-cv-218, 2018 WL 1587477, at *5 (M.D. Fla. Mar. 31, 2018); *J.S. v. Vill. Voice Media Holdings, L.L.C.*, 359 P.3d 714, 715 (Wash. 2015). Nonetheless, the split of authority on this issue left substantial uncertainty about whether Backpage could be held liable prior to the enactment of FOSTA.

began considering a legislative fix. After spirited debate in both the Senate and the House of Representatives, Congress enacted FOSTA to address the real harm inflicted on victims of sex trafficking facilitated through the internet. As the Government made clear in its brief, the statute was enacted because “classified advertising websites” had become “one [of] the primary channels of sex trafficking[.]”²⁶ The legislation itself states that the purpose of the Act was to “clarify that section 230 of [the CDA] does not prohibit the enforcement against providers and users of interactive computer services of Federal and State criminal and civil law relating to sexual exploitation of children or sex trafficking[.]”²⁷

While drafting and discussing the enactment of FOSTA, Congress made an effort to hear from victims and their families. These stories, and the concerns for victims, are what motivated Congress to pass FOSTA. For instance, multiple Senators when arguing for FOSTA’s passage referenced the testimony of Yvonne Ambrose, whose daughter Desiree Robinson was trafficked and raped repeatedly on Backpage before being murdered. As Senator Thune stated, “Desiree was just 16 years old, a bright and loving girl who dreamed of becoming a doctor in the Air Force. Instead, she was raped and murdered by a man twice her age who had sought

²⁶ Doc. No. 1782997, at 17 (citing H.R. Rep. No. 115-572, pt. 1, at 3, 5 (2018)).

²⁷ Pub. L. No.115-164, 132 Stat. 1253 (2018).

her for sex after seeing her advertised on an internet site.”²⁸ It was Ms. Ambrose’s “powerful testimony [that] helped the members of [the Senate] committee understand the terrible pain that victims of sex trafficking and their families are exposed to.”²⁹ Senator Portman also referenced Yvonne Ambrose’s testimony, stating that her testimony presented “the hard, ugly truth about sex trafficking” and “is the reason that [Congress] must pass this measure.”³⁰

Senator Portman also referenced testimony from other victims and their families, such as Kubiiki Pride. Ms. Pride is a mother whose daughter, at age 14, went missing. Ms. Pride later found her daughter listed on Backpage. After she was reunited with her daughter, she reached out to Backpage to get the advertisement for her child removed, but Backpage refused to take down the advertisement. She later attempted to sue Backpage, but the court dismissed her lawsuit based on Section 230. *See infra* pp. 17–18. When discussing her case, Senator Portman observed that Ms. Pride was told by the court system, “I am sorry. Under a Federal law that was passed by the Congress — a 21-year-old law — this website is not culpable. It has a shield. It has an immunity.”³¹

²⁸ 164 Cong. Rec. S1849-08 (Mar. 21, 2018) (Statement of Sen. Thune).

²⁹ *Id.*

³⁰ *Id.* (Statement of Sen. Portman).

³¹ *Id.*

Congress explicitly considered the First Amendment arguments asserted by Appellants and their amici and found that FOSTA's critics presented a false choice between promoting free speech and stopping sex trafficking. Concerns regarding the First Amendment do not and should not prevent Congress from acting to curb the significant harm caused by websites that facilitate sex trafficking. This is because, as Congress recognized, these websites' complicity in criminal acts was not speech, but illegal conduct that should be subject to consequences for the terrible harm it inflicts on its victims. As Senator Wyden observed, "it is perfectly reasonable to expect some greater responsibility from these giant, multibillion-dollar corporations that were able to thrive as a result of protection that they were guaranteed by law. That was the idea behind section 230. That doesn't carry any obligation to suppress free speech, but it is definitely about being a responsible citizen, a responsible member of the community."³² Senator Thune further observed that Congress doesn't have the ability "to restrict or modify the First Amendment in this body" but it does, in fact, have the power to "amend a law that is being used inappropriately to protect the most hideous criminals in America" as "[n]o law

³² *Id.* (Statement of Sen. Wyden).

should put anyone above liability if they are actively involved and complicit in selling children for sex.”³³

Congress drafted FOSTA to protect the numerous victims of Backpage’s conduct and other victims trafficked online. Like the District Court here, Congress considered – and rejected – the First Amendment concerns cited by Appellants and their amici as unpersuasive. This Court should do the same, recognizing that FOSTA’s essential purpose is to provide justice to victims of sex trafficking and to deter websites from knowingly aiding such activity in the future.

CONCLUSION

For the foregoing reasons, the undersigned amici ask this Court to affirm the District Court’s opinion.

Respectfully submitted,

BOIES SCHILLER FLEXNER LLP

/s/ David Boies

David Boies

333 Main Street

Armonk, NY 10504

Phone: (914) 749-8200

DBoies@bsfllp.com

Karen A. Chesley

Kate A. Ferguson

55 Hudson Yards

New York, NY 10001

³³ *Id.* (Statement of Sen. Thune).

Phone: (212) 446-2300
KChesley@bsfllp.com
KFerguson@bsfllp.com

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CERTIFICATE OF COMPLIANCE

I certify that pursuant to Fed. R. App. P. 32(a)(7)(C) and Circuit Rule 32-1, the attached brief is proportionally spaced, has a typeface of 14 points or more and contains 4,763 words.

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

DATED: April 22, 2019

/s/ David Boies

David Boies

CERTIFICATE OF SERVICE

I, David Boies, hereby certify that I electronically filed the foregoing Brief with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the appellate CM/ECF system on April 22, 2019, which will send notice of such filing to all registered CM/ECF users.

/s/ David Boies_____

David Boies