

ORAL ARGUMENT NOT YET SCHEDULED
No. 18-5298

**In the United States Court of Appeals
for the District of Columbia Circuit**

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

Appellants,

v.

THE UNITED STATES OF AMERICA and WILLIAM P. BARR,
in his official capacity as Attorney General of the United States,

Appellees.

Appeal from the United States District Court for the District of Columbia

**BRIEF OF AMICUS CURIAE
THE NATIONAL CENTER FOR MISSING AND EXPLOITED CHILDREN
IN SUPPORT OF APPELLEES AND AFFIRMANCE**

Adam L. Shaw
BRYAN CAVE LEIGHTON PAISNER LLP
1155 F Street NW
Washington, DC 20004
adam.shaw@bclplaw.com
(202) 508-6000

Christopher J. Schmidt
Lee Marshall
Jonathan B. Potts
BRYAN CAVE LEIGHTON PAISNER LLP
211 N. Broadway, Suite 3600
St. Louis, MO 63102
cjschmidt@bclplaw.com
klmarshall@bclplaw.com
jonathan.potts@bclplaw.com
(314) 259-2000

*Attorneys for Amicus Curiae The National Center
for Missing and Exploited Children*

**CERTIFICATE AS TO PARTIES, RULINGS
UNDER REVIEW, AND RELATED CASES**

A. Parties and Amici Curiae. All parties appearing before the Court appear in the Brief for Appellees. *Amici curiae* in support of appellants are: (1) Center for Democracy & Technology; (2) Institute for Free Speech; (3) Floor64, Inc. d/b/a The Copia Institute, Engine Advocacy, and Reddit, Inc.; and (4) Freedom Network USA, Sex Workers Project, New York Transgender Advocacy Group, Sharmus Outlaw Advocacy and Rights Institute, Decriminalize Sex Work, National Coalition for Sexual Freedom, Free Speech Coalition, Brooklyn Defender Services, Prostasia Foundation, Institute for Mind Body Therapy, and St. James Infirmary. *Amicus*, The National Center for Missing and Exploited Children (“NCMEC”), anticipates that other *amici* in support of the appellees will include: (1) Legal Momentum; and (2) Equality Now, The Coalition Against Trafficking in Women, The Organization for Prostitution Survivors, Rights4Girls, Shared Hope International, Survivors for Solutions, and World Without Exploitation. This separate brief is necessary to set forth the legislative and judicial history of the challenged statute, as well as to explain the institutional knowledge that NCMEC shared with Congress throughout the legislative process.

B. Ruling Under Review. An accurate reference to the ruling at issue appears in the Brief for Appellees.

C. Related Cases. Counsel is not aware of any related cases within the meaning of D.C. Circuit Rule 28(a)(1)(C).

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and D.C. Circuit Rule 26.1, NCMEC states that it is a private, non-profit corporation. NCMEC has no parent corporation, and no publicly held company has 10% or greater ownership in NCMEC.

TABLE OF CONTENTS

CERTIFICATE AS TO PARTIES, RULINGS UNDER REVIEW, AND RELATED CASES	i
CORPORATE DISCLOSURE STATEMENT	iii
GLOSSARY OF ABBREVIATIONS	1
STATUTES AND REGULATIONS	1
STATEMENT OF IDENTITY, INTEREST IN CASE, AND SOURCE OF AUTHORITY TO FILE	1
STATEMENT OF AUTHORSHIP AND FINANCIAL CONTRIBUTIONS	4
SUMMARY OF ARGUMENT	4
ARGUMENT	6
I. Congress Enacted FOSTA to Ensure That Website Operators Cannot Knowingly Facilitate Online Sex Trafficking With Impunity.	6
A. The Emergence of Online Child Sex Trafficking and the Rise of Backpage	6
B. The Relationship Between § 230 of the CDA and Legislation Prohibiting Online Child Sex Trafficking.....	10
C. Courts Reluctantly Concluded That § 230 Shields Websites Facilitating Online Sex Trafficking From Criminal and Civil Liability.	12
D. FOSTA Was Congress’s Narrow Response to Its Own Investigative Findings and Specific Court Rulings Regarding Online Sex Trafficking and Not a Fundamental Change in the Law Governing the Internet.....	15
E. FOSTA Makes Narrow, but Important Changes to Substantive Sex Trafficking Law.....	18
F. Online Commercial Sex Activity Has Been Dramatically Disrupted After FOSTA.	21

G. Plaintiffs Are Not the Target of FOSTA.....22

II. The Court Should Affirm the Dismissal of Plaintiffs’ Pre-Enforcement
Action Because Plaintiffs Lack Article III Standing.....24

A. There Is No “Relaxed” Standard That Grants Unaffected Parties
Article III Standing to Strike Down an Act of Congress.24

B. FOSTA Does Not Proscribe the Activities of Plaintiffs, and There
Is No Credible Threat of Prosecution.....26

CONCLUSION.....30

CERTIFICATE OF COMPLIANCE.....31

CERTIFICATE OF SERVICE32

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Am. Fed. of Gov't Emps. v. Pierce</i> , 697 F.2d 303 (D.C. Cir. 1982) (per curiam).....	25
<i>Am. Library Ass'n v. Barr</i> , 956 F.2d 1178 (D.C. Cir. 1992).....	28
<i>Babbitt v. United Farm Workers Nat'l Union</i> , 442 U.S. 289, 298 (1979).....	24, 26
<i>Backpage.com, LLC v. McKenna</i> , 881 F. Supp. 2d 1262 (W.D. Wash. 2012)	14
<i>Clapper v. Amnesty Int'l USA</i> , 568 U.S. 398 (2013).....	24, 28
<i>Info. Handling Servs., Inc. v. Defense Automated Printing Servs.</i> , 338 F.3d 1024 (D.C. Cir. 2003).....	25
<i>Jane Doe No. 1 v. Backpage.com, LLC</i> , 817 F.3d 12 (1st Cir. 2016).....	12, 13
<i>Laird v. Tatum</i> , 408 U.S. 1 (1972).....	28
<i>M.A. ex. Rel. P.K. v. Village Voice Media Holdings, LLC</i> , 809 F. Supp. 2d 1041 (E.D. Mo. 2011)	12
<i>People v. Ferrer</i> , Case No. 16FE019224, slip op. (Cal. Super. Ct., Sacramento Cnty. Dec. 9, 2016).....	14
<i>People v. Ferrer</i> , Case No. 16FE024013, slip op. (Cal. Super. Ct., Sacramento Cnty. Aug. 23, 2017)	14
<i>Raines v. Byrd</i> , 521 U.S. 811 (1997).....	25

<i>Senate Permanent Subcomm. on Investigations v. Ferrer</i> , 856 F.3d 1080 (D.C. Cir. 2017).....	15
<i>Susan B. Anthony List v. Driehaus</i> , 573 U.S. 149 (2014).....	24, 26
<i>United Presbyterian Church in the U.S.A. v. Reagan</i> , 738 F.2d 1375 (D.C. Cir. 1984).....	28
<i>Virginia v. Am. Booksellers Ass’n, Inc.</i> , 484 U.S. 383 (1988).....	27
<i>Williams v. Lew</i> , 819 F.3d 466 (D.C. Cir. 2016).....	25
<i>Younger v. Harris</i> , 401 U.S. 37 (1971).....	26
Statutes	
18 U.S.C. § 1591	19, 20
18 U.S.C. § 1591(a)	11, 18, 19
18 U.S.C. § 1591(a)(2).....	11, 24
18 U.S.C. § 1591(e)(4).....	19
18 U.S.C. § 1595	12, 20
18 U.S.C. § 1595(a)	19
18 U.S.C. § 1595(d)	19
18 U.S.C. § 1952.....	19
18 U.S.C. § 2421A.....	4, 19, 20
18 U.S.C. § 2421A(a).....	19, 23
18 U.S.C. § 2421A(b)	19
18 U.S.C. § 2421A(c).....	20
18 U.S.C. § 2421A(d)	20

18 U.S.C. § 2421A(e).....	20
34 U.S.C. § 11293.....	1
47 U.S.C. § 230.....	12, 17
47 U.S.C. § 230(c)(1).....	11, 13, 20
47 U.S.C. § 230(c)(2).....	11, 20
47 U.S.C. § 230(e)(1).....	20
47 U.S.C. § 230(e)(3).....	20
47 U.S.C. § 230(e)(5).....	20
I.R.C. § 501(c)(3).....	1
Pub. L. 106-386, 114 Stat. 1464	11
Pub. L. 108-193, 117 Stat. 2875	12

Other Authorities

childsafef.ai, <i>Beyond Backpage: Buying and Selling Sex in the United States One Year Later</i> , at 12, available at https://www.childsafe.ai/beyond-backpage-buying-and-selling-sex-in-the-united-states-one-year-later (last visited Apr. 11, 2019)	21, 22
Fed. R. Civ. P. 12(b)(1).....	25
H.R. Rep. 115-572(I) (2018).....	17, 28
Letter from Nat’l Ass’n of Attorneys General to Senator Roger Wicker, et al. (Aug. 16, 2017)	15
S. Rep. 115-199 (2018).....	16, 17
Staff of S. Subcomm. on Investigations, 114th Cong., <i>Rep. on Backpage.com’s Knowing Facilitation of Online Sex Trafficking 4</i> (Comm. Print 2017)	7, 8, 9, 16
Statement by John F. Clark Regarding Senate Action on Legislation to Provide Justice to Child Sex Trafficking Victims (Mar. 19, 2018).....	18

Statement by Yiota G. Souras before the S. Subcomm. on
Investigations (Nov. 19, 2015)10

U.S. Seizes Backpage.com, a Site Accused of Enabling Prostitution,
N.Y. Times (Apr. 7, 2018).....21

GLOSSARY OF ABBREVIATIONS

CDA	Communications Decency Act of 1996
FOSTA	Allow States and Victims to Fight Online Sex Trafficking Act of 2017
NCMEC	The National Center for Missing and Exploited Children
SESTA	Stop Enabling Sex Traffickers Act of 2017

STATUTES AND REGULATIONS

All applicable statutes are contained in the Addendum to Brief for Appellees.

STATEMENT OF IDENTITY, INTEREST IN CASE, AND SOURCE OF AUTHORITY TO FILE

NCMEC is recognized by Congress as the official national resource center and clearinghouse on all issues relating to missing and exploited children. 34 U.S.C. § 11293. For over thirty-five years, NCMEC has pursued its private, non-profit § 501(c)(3) mission to help find missing children, reduce child sexual exploitation, prevent child victimization, and help eliminate child sex trafficking. NCMEC's mission is not only to increase public awareness regarding these issues, but also to achieve direct, real-world results by helping to locate, recover, and reunify missing children—including victims of child sex trafficking—with their families.

Today, NCMEC performs 15 core programs in cooperation with families, child advocates, law enforcement, corporate partners, and the United States Department of Justice's Office of Juvenile Justice and Delinquency Prevention. NCMEC's Child Sex Trafficking Team consists of a dedicated staff who provide assistance and analysis on domestic child sex trafficking cases to families, law enforcement, and child-serving professionals to help identify, locate, recover, and provide services for victims of child sex trafficking.

As the national clearinghouse on child sexual exploitation issues, NCMEC has unique institutional knowledge and experience regarding how traffickers use the Internet to facilitate child sex trafficking. Additionally, NCMEC operates the CyberTipline, which is the national reporting mechanism for suspected online child sexual exploitation, including child sex trafficking. Between 2012 and 2017, NCMEC's CyberTipline annually received approximately 10,000 reports relating to suspected child sex trafficking.

With the advent of the Internet, much of NCMEC's work has shifted to working with families, law enforcement agencies, technology companies, and nonprofit organizations to reduce the distribution of child sexual abuse images online, including online advertisements selling children for rape and sexual abuse. Every day NCMEC's staff reviews often-graphic reports of children who are being trafficked for sex online. Between 2012 and 2017, many of these reports related to

child sex trafficking advertisements on websites like backpage.com (“Backpage”), which in NCMEC’s experience was the largest facilitator of online child sex trafficking ads until it shut down in April 2018.

As a result of these efforts, NCMEC possesses deep institutional knowledge of the issues relating to child sex trafficking and is specially situated to aid in the Court’s consideration of the issues presented in this case.

Plaintiffs-appellants Woodhull Freedom Foundation, Human Rights Watch, Eric Koszyk, Jesse Maley a/k/a Alex Andrews and the Internet Archive (“plaintiffs”) have challenged the Allow States and Victims to Fight Online Sex Trafficking Act of 2017 (“FOSTA”) as unconstitutional, alleging that they are at risk of criminal or civil liability under the statute. FOSTA addressed an emerging disconnect under federal law that denied sex trafficking victims the ability to seek justice against all parties, including online facilitators, involved in knowingly assisting their trafficking online. As a result of NCMEC’s unique expertise in this area, NCMEC assisted Congress in understanding the landscape, scope, and nature of online child sex trafficking. NCMEC shared with Congress its knowledge of predatory actions and trends of certain websites intended to facilitate online child sex trafficking. NCMEC did this to help Congress identify and determine how best to combat “bad actor” websites that facilitated online child sex trafficking in order to protect children from this exploitation. Therefore, NCMEC also possesses

insight about the legislative purpose behind FOSTA and, in particular, the narrow criminal activity FOSTA was enacted to address.

All parties have consented to the filing of this brief.

STATEMENT OF AUTHORSHIP AND FINANCIAL CONTRIBUTIONS

No counsel for a party authored this brief in whole or in part, and no person other than *amicus curiae* or its counsel contributed money that was intended to fund the preparation or submission of this brief.

SUMMARY OF ARGUMENT

Plaintiffs consist of human rights organizations and activists, an organization that archives webpages, and a massage therapist, who claim they fear prosecution or civil liability under FOSTA. To make this argument, plaintiffs primarily focus on a single element of FOSTA: Congress's criminalization of operating an interactive computer service to intentionally "promote" or "facilitate" the prostitution of another person. *See, e.g.*, 18 U.S.C. § 2421A. Plaintiffs do not, however, host online platforms designed to intentionally facilitate the prostitution or trafficking of another person. Instead, plaintiffs claim that FOSTA might conceivably apply to advocacy and outreach efforts with individuals engaged in commercial sex work or the rote archiving of webpages on a global scale. The government's brief amply explains how the plain language of FOSTA is not susceptible to these interpretations, so NCMEC does not address them here.

Rather, NCMEC provides the Court with an overview of how online child sex trafficking operated pre-FOSTA and the historical context in which Congress enacted FOSTA. For years, a small contingency of particularly bad actors repeatedly eluded criminal and civil responsibility for designing and supporting websites that knowingly facilitated child sex trafficking. FOSTA was Congress's narrow response to the growth of this online marketplace on which children were sold for sex in growing numbers. FOSTA also responded directly to alarming judicial rulings across the country holding that website operators could not be prosecuted or found civilly liable, even when they knowingly facilitated online sex trafficking. These state and federal courts had reluctantly concluded that the Communications Decency Act of 1996 ("CDA") was so broad that: (i) these bad actors were immunized from all legal responsibility for their online illegal activity, and (ii) sex trafficking victims could not assert competing rights established under other federal laws. These courts called on Congress to intervene.

Against this unsettled legal landscape, NCMEC was handling rapidly increasing reports of children being trafficked for sex online. NCMEC and other nonprofits were also supporting victims and their families when they were denied a legal remedy. Ultimately, Congress listened to the voices of victims and the experiences of non-profit advocates, as well as the judges and state prosecutors who signaled the need for Congress to act. Through FOSTA, Congress carefully

eliminated any perceived conflict in federal law and clarified that all criminal actors, including online entities, should be held accountable for knowingly facilitating online child sex trafficking.

FOSTA, however, does not signal a sea change in the criminal and civil immunities generally available to online service providers. The longstanding protections available to these providers remain intact. Instead, FOSTA's narrow revisions target only illegal commercial sex activity, and most importantly impact child sex trafficking. FOSTA's high standards shield inadvertent or unknowing actions from civil or criminal responsibility. The atmosphere in which FOSTA was enacted makes it especially clear that plaintiffs' professed fears of prosecution or civil liability are unfounded.

ARGUMENT

I. Congress Enacted FOSTA to Ensure That Website Operators Cannot Knowingly Facilitate Online Sex Trafficking With Impunity.

A. The Emergence of Online Child Sex Trafficking and the Rise of Backpage

Over the past decade, NCMEC has seen child sex trafficking undergo a paradigm shift as traffickers, like the rest of society, have evolved with modern technology. Everyday advances—personal computers, text messaging, smartphones, and, of course, the Internet—have had the unintended effect of lowering certain barriers to child sex trafficking. Previously, the risk of public visibility and the absence of a formal, easily accessible “marketplace” were

powerful impediments to the commercial trafficking of children for sex. But in the Internet Age, some websites created efficient platforms for sex traffickers to market child victims with virtual anonymity, and for sexual predators to commit sexual assaults by purchasing children for rape and sexual abuse. In this fashion, the Internet enabled the emergence of a marketplace for child sex trafficking that was unprecedented in scope and reach, and furthered the normalization of this horrendous crime.

In this digital environment, websites such as the now-defunct Backpage designed and curated interactive marketplaces to promote and facilitate the sex trafficking of children. Finding these websites did not require knowledge of the “dark web”; they were accessible through a simple online search by anyone with a laptop, tablet, or smartphone. Traffickers and offenders thrived in this atmosphere, in which they simultaneously enjoyed the perceived anonymity of “shopping” for a child from a phone or computer; the relative privacy of posting and responding to ads without the need for face-to-face contact in advance; and a wider selection of child victims.

This shift in child sex trafficking methods not only changed how the crime was conducted, but also rapidly increased its prevalence. NCMEC personally witnessed this shift. Between 2010 and 2015, the number of reports relating to child sex trafficking received by NCMEC spiked 846%. Staff of S. Subcomm. on

Investigations, 114th Cong., *Rep. on Backpage.com's Knowing Facilitation of Online Sex Trafficking* 4 (Comm. Print 2017) (hereinafter, "*Senate Report on Backpage*"). This spike was directly correlated to increased use of the Internet to sell children for sex. *See id.*

Companies like Backpage were emboldened by the ease with which they could control the online sex trafficking marketplace and the corresponding profits they could generate. Backpage and similar websites operated with perceived legal impunity, which only solidified the marketplace. Traffickers realized they could sell children online mostly undetected. Website operators knew they could facilitate the business of online trafficking and avoid legal liability by cloaking themselves in over-broad immunity under federal law.

Backpage emerged as the most well-known platform for child sex trafficking. In 2016, more than 70% of the child sex trafficking reports NCMEC received from members of the public involved ads on Backpage. *Id.* at 1, 6. NCMEC worked on thousands of cases in which a missing child was trafficked for sex on Backpage's website. At Backpage's apex, the disturbing reality was that, for *any* missing child at risk for being a victim of sex trafficking, Backpage became the first resource that NCMEC would check.

Although Backpage was only one of many bad actors, its success was carefully built on a relentless business model that managed to circumvent liability

at every turn. That model illustrated the obstacles that child victims, their families, and prosecutors faced in combating online child sex trafficking in the pre-FOSTA environment.

One component of Backpage's business model was that it did not conduct independent age verification to place an "escort" ad, and instead relied on the mere representation of the person posting the ad. If users *did* admit that they were under 18, they only received an error message ("Oops! Sorry, the ad poster must be over 18 years of age."). *Senate Report on Backpage*, at 3. Backpage then allowed the user to adjust the age upward and post the identical text and photograph of the child. *Id.* Additionally, while Backpage implemented verification techniques that required a phone number to post ads for pets and boats, the same techniques were not implemented in the "escort" section, which Backpage knew was being used to facilitate the rape of children. *Id.* at 3, 35.

Backpage also engaged in the practice of "sanitizing" advertisements by scrubbing incriminating words, phrases, and images from child sex trafficking ads instead of rejecting ads altogether and then blocking that user. *Id.* at 17. Backpage even coached users by instructing them which words or phrases they needed to eliminate in order to prevent advertisements from being flagged. *Id.*

When family members discovered their children were being trafficked on Backpage and notified the website, Backpage frequently refused to remove the

advertisements. Upon reporting their concerns, these family members received the following message: “If you accidentally reported this ad, do not worry. It takes multiple reports from multiple people for an ad to be removed.” Statement by Yiota G. Souras before the S. Subcomm. on Investigations (Nov. 19, 2015), at 7 *available at* <https://www.hsgac.senate.gov/imo/media/doc/Souras%20Testimony%20-%20PSI%202015-11-19.pdf> (last visited Apr. 22, 2019).

Even when Backpage made half-hearted efforts to “self-report” individual child sex trafficking ads to NCMEC or remove certain ads, NCMEC would often discover that Backpage allowed the traffickers to post new or additional ads with the same email address, telephone number, and even the same photograph of the trafficked child using the same debit or credit card. It was later discovered that Backpage artificially manipulated its report numbers to NCMEC in order to mask the true volume of child sex trafficking ads on its site. *Senate Report on Backpage*, at 3, 42.

All of these actions were taken by Backpage to increase its profits while every day through its website children suffered rape, exploitation, and even torture.

B. The Relationship Between § 230 of the CDA and Legislation Prohibiting Online Child Sex Trafficking

The rise of online child sex trafficking materialized against the backdrop of the CDA. The CDA generally protects providers and users of interactive computer services from being held liable as the publisher or speaker of information provided

by another provider. 47 U.S.C. § 230(c)(1). To reiterate this goal, Congress inserted Good Samaritan provisions, which established that providers and users cannot be held civilly liable for actions: (A) voluntarily taken in good faith to restrict access to, or the availability of, obscene, lewd, excessively violent, and other objectionable material; and (B) taken to enable or make available to providers or others technical means to restrict access to those materials. *Id.* § 230(c)(2).

But following enactment of the CDA, Congress made clear that it also wanted to provide far-reaching legal remedies to child sex trafficking victims by enacting a variety of laws to provide rights to these victims. Among these statutes, the Trafficking Victims Protection Act of 2000 criminalized child sex trafficking by prohibiting the recruiting, enticing, harboring, transporting, providing, obtaining, maintaining, patronizing, or soliciting a person “knowing” that the individual is under 18 and “will be caused to engage in a commercial sex act.” *See* Pub. L. 106-386, 114 Stat. 1464; 18 U.S.C. § 1591(a). The later-enacted Trafficking Victims Protection Reauthorization Act (“TVPRA”) bars individuals from “benefit[ing], financially or by receiving anything of value, from participation in a venture which has engaged” in child sex trafficking. 18 U.S.C. § 1591(a)(2). And the TVPRA Act of 2003 created a civil remedy for victims of

child sex trafficking, which Congress codified at 18 U.S.C. § 1595. *See* Pub. L. 108-193, 117 Stat. 2875.

C. Courts Reluctantly Concluded That § 230 Shields Websites Facilitating Online Sex Trafficking From Criminal and Civil Liability.

The confluence of protections granted to websites, on the one hand, and the victims of sex trafficking crimes, on the other, came into sharp conflict when child sex trafficking victims sought to exercise their rights against online trafficking facilitators such as Backpage. At each juncture, Backpage wielded § 230 of the CDA to protect itself from liability for knowingly facilitating child sex trafficking. Alarming, courts soon began to agree that § 230 overrode § 1595 when victims brought civil suits against Backpage. *See, e.g., M.A. ex. Rel. P.K. v. Village Voice Media Holdings, LLC*, 809 F. Supp. 2d 1041, 1058 (E.D. Mo. 2011) (“Plaintiff artfully and eloquently attempts to phrase her allegations to avoid the reach of § 230.... 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.”).

The issue finally reached a federal appellate court in 2016. *See Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12 (1st Cir. 2016). Multiple women who had been trafficked and raped as children through Backpage advertisements had filed suit against Backpage relying on § 1595. The women alleged that

“Backpage’s expansion strategy involved the deliberate structuring of its website to facilitate sex trafficking.” *Id.* at 16.

The First Circuit affirmed dismissal of the victims’ lawsuit, holding “that claims that a website facilitates illegal conduct through its posting rules necessarily treat the website as a publisher or speaker of content provided by third parties and, thus, are precluded by section 230(c)(1).” *Id.* at 22. In reaching this holding, however, the court wrote:

This is a hard case—hard not in the sense that the legal issues defy resolution, but hard in the sense that the law requires that we, like the court below, deny relief to plaintiffs whose circumstances evoke outrage.

* * *

If the evils that the appellants have identified are deemed to outweigh the First Amendment values that derive the CDA, the remedy is through legislation, not through litigation.

Id. at 15, 29.

These rulings were not limited to civil suits. Criminal courts also held that the CDA’s grant of immunity was impenetrable. The California Attorney General brought state-law pimping and conspiracy charges against Backpage’s officers, but the trial court reluctantly dismissed the charges under the CDA:

[A]ny rational mind would concur that the selling of minors for the purpose of sex is particularly horrifying and the government has a right and a duty to protect these most vulnerable victims.... Congress has had ample opportunity to statutorily modify the immunity provision if it disagrees with prevailing judicial application of [§ 230].

Congress has not done so, and the current legal framework binds this Court.

* * *

[T]he Court understands the importance and urgency in waging war against sexual exploitation.... Congress has precluded liability for online publishers for the action of publishing third party speech and thus provided for both a foreclosure from prosecution and an affirmative defense at trial. **Congress has spoken on this matter and it is for Congress, not this Court, to revisit.**

People v. Ferrer, Case No. 16FE019224, slip op. at 1-2, 14-15 (Cal. Super. Ct., Sacramento Cnty. Dec. 9, 2016).

Subsequently, the California Attorney General refiled pimping charges, but met the same result:

As amply briefed by the parties, federal law provides broad immunity for internet service providers from both federal and state prosecutions.... If and until Congress sees fit to amend the immunity law, the broad reach of section 230 of the Communications Decency Act even applies to those alleged to support the exploitation of others by human trafficking.

People v. Ferrer, Case No. 16FE024013, slip op. at 18 (Cal. Super. Ct., Sacramento Cnty. Aug. 23, 2017); *see also Backpage.com, LLC v. McKenna*, 881 F. Supp. 2d 1262, 1275 (W.D. Wash. 2012) (“If Congress did not want the CDA to apply in state criminal actions, it would have said so.”).

In 2017, Attorneys General from 50 states and territories joined these judicial calls when they wrote to Congress and called for an amendment to the CDA to make clear that companies like Backpage were not outside the reach of

state and local law enforcement when they knowingly facilitated the online trafficking of children for sex. *See* Letter from Nat'l Ass'n of Attorneys General to Senator Roger Wicker, et al. (Aug. 16, 2017), *available at* <https://www.naag.org/assets/redesign/files/sign-on-letter/CDA%20Final%20Letter.pdf> (last visited Apr. 22, 2019).

D. FOSTA Was Congress's Narrow Response to Its Own Investigative Findings and Specific Court Rulings Regarding Online Sex Trafficking and Not a Fundamental Change in the Law Governing the Internet.

While victims and law enforcement faced one roadblock after another, Congress had already started to take action. In early 2015, Senator Portman, as Chairman of the Senate Permanent Subcommittee on Investigations, began leading an investigation into the scope of online sex trafficking. The investigation quickly turned to Backpage and the volume of advertisements for child sex trafficking on its website. *See also Senate Permanent Subcomm. on Investigations v. Ferrer*, 856 F.3d 1080, 1083-84 (D.C. Cir. 2017) (describing Backpage's efforts to fight Subcommittee subpoenas).

As part of its exhaustive investigation, the Subcommittee spoke with NCMEC and other nonprofit organizations that were fighting to help victims trafficked for sex online. As the investigation unfolded, the Subcommittee reached a number of conclusions about Backpage's illegal activity, finding, among other disturbing practices, that "Backpage ha[d] maintained a practice of altering ads

before publication by deleting words, phrases, and images indicative of criminality, including child sex trafficking.” *Senate Report on Backpage*, at 1. Backpage’s “practices served to sanitize the content of innumerable advertisements for illegal transactions—even as Backpage represented to the public and the courts that it merely hosted content others had created.” *Id.* The Subcommittee concluded that “Backpage [was] aware that its website facilitates prostitution and child sex trafficking.” *Id.* at 3.

During this investigation, Congress’s own alarming findings thus began to align with judicial calls for action. As an increasing number of courts dismissed cases on the basis that they could not reconcile rights granted to victims with immunity granted to website operators, the extent of the problem—and the need for legislative action—became even clearer to the Subcommittee.

Bipartisan legislation—known as the Stop Enabling Sex Traffickers Act of 2017 (“SESTA”)—was introduced by Senators Portman and Blumenthal for the purpose of “clarify[ing] that section 230 ... does not prohibit the enforcement against providers and users of interactive computer services of Federal and State criminal and civil law relating to sex trafficking....” S. Rep. 115-199, at 1 (2018). In a report issued by the Senate Committee on Commerce, Science, and Transportation, it was further noted that the CDA’s “protections have been held by courts to shield from civil liability and State criminal prosecution nefarious actors,

such as the website BackPage.com, that are accused of knowingly facilitating sex trafficking.” S. Rep. No. 115-199, at 2 (2018). The report further stated “that section 230 was never intended to provide legal protection to websites that facilitate traffickers in advertising the sale of unlawful sex acts with sex trafficking victims; and that clarification of section 230 is warranted to ensure that that section does not provide such protection to such websites.” *Id.* at 3.

SESTA was later incorporated into a bill introduced in the House of Representatives as FOSTA, again with bipartisan support. In a report issued by the House Judiciary Committee, the Committee reiterated that the CDA “was never intended to provide legal protection to websites that unlawfully promote and facilitate prostitution and contribute to sex trafficking.” H. Rep. 115-572(I), at 8 (2018). The Committee noted that certain “websites, including online classified sites like Backpage.com, Eros, Massage Troll, and cityxguide, have ... become one of the primary channels of sex trafficking” and “have gone beyond merely hosting advertisements ... purposely creat[ing] platforms designed to facilitate prostitution and sex trafficking.” *Id.* at 3.

The House Judiciary Committee reaffirmed the Senate Subcommittee’s findings about Backpage and concluded that “Backpage had engaged in a ruse, holding itself out to be a mere conduit, but in fact actively engaged in content creation and purposely concealing illegality in order to profit off of

advertisements.” *Id.* at 5. Although Backpage remained the most visible bad actor, FOSTA was aimed against all such “bad-actor websites, not just Backpage.com.” *Id.* at 6.

With its unique expertise in the area of child sex trafficking, NCMEC worked closely with legislators during this process and publicly supported passage of FOSTA. *See, e.g.*, Statement by John F. Clark Regarding Senate Action on Legislation to Provide Justice to Child Sex Trafficking Victims (Mar. 19, 2018), *available at* <https://www.capito.senate.gov/imo/media/doc/NCMEC%20-%202003-19-18%20-%20Statement%20of%20Support%20Revised%20for%20Senate%20action%20on%20FOS....pdf> (last visited Apr. 22, 2019). Ultimately, FOSTA passed with overwhelming support in both chambers of Congress. The House voted 388-25 in favor, and the Senate voted 97-2 in favor.

E. FOSTA Makes Narrow, but Important Changes to Substantive Sex Trafficking Law.

FOSTA addresses four narrow issues, though plaintiffs primarily take issue with only one issue that does not, in the end, apply to them.

The first item FOSTA addresses is in 18 U.S.C. § 1591(a). FOSTA does not change existing language in § 1591(a), but for the first time defines “participation in a venture” to clarify that no one may benefit, financially or by receiving anything of value, from knowingly assisting, supporting, or facilitating sex

trafficking. *Id.* §§ 1591(a), (e)(4). The activity criminalized under § 1591 and the *mens rea* for such criminal activity is not expanded or altered by FOSTA.

The second item FOSTA addresses is under § 1595(a), which provides victims with the right to bring a private civil action based on sex trafficking under § 1591. FOSTA mirrors the rights of individual victims for state attorneys general, by enabling them to bring *parens patriae* actions in federal court in response to violations of § 1591. *See* 18 U.S.C. § 1595(d). While FOSTA enables state attorneys general to protect their citizens from online sex trafficking, it does not expand or redefine the criminal activity at issue.

The third item FOSTA addresses is creating a new criminal provision, § 2421A. This section contains multiple components and is the primary source of plaintiffs' constitutional challenge. Section 2421A(a) prohibits owning, managing, or operating an interactive computer service, or conspiring to do so, "with the intent to promote or facilitate the prostitution of another person." Section § 2421A(b) also creates an aggravated violation when the offender: (1) "promotes or facilitates the prostitution of 5 or more persons"; or (2) "acts in reckless disregard of the fact that such conduct contributed to sex trafficking, in violation of 1591(a)." As the government observes in its brief, these provisions closely track the language of the Travel Act, which has existed for more than a half-century. *See* 18 U.S.C. § 1952. But while the Travel Act relates to "any unlawful activity,"

by anyone, FOSTA narrowly updates this language to prostitution and trafficking crimes involving owners, operators, and managers of interactive computer services.

Section 2421A also tracks § 1595 by creating a private right of action for victims of aggravated violations. 18 U.S.C. §§ 2421A(c), (d). But it establishes an affirmative defense that, except in instances of sex trafficking, a defendant may defend against a claim by establishing that promoting or facilitating prostitution is legal in the jurisdiction in which the activity is targeted. *Id.* § 2421A(e).

FOSTA's final change concerns the CDA. While the CDA makes clear that it does not impair or limit the enforcement of federal criminal law, 47 U.S.C. § 230(e)(1), newly enacted § 230(e)(5) clarifies that the CDA shall not impair or limit: (i) a civil action under § 1595 based on a violation of § 1591; (ii) charges in a criminal prosecution under state law if the underlying conduct violates § 1591; or (iii) any criminal prosecution under state law if the underlying conduct would violate § 2421A *and* the promotion or facilitation of prostitution is illegal in the targeted jurisdiction. 47 U.S.C. § 230(e)(5); *see also id.* § 230(e)(3) (preexisting provision regarding preemption and non-preemption of state law).

FOSTA introduced no other carve-outs to the CDA and did not change any of the "traditional" Good Samaritan protections to websites enshrined in § 230(c)(1)-(2).

F. Online Commercial Sex Activity Has Been Dramatically Disrupted After FOSTA.

To most law-abiding users of the Internet, FOSTA's impact has been imperceptible. But early indicators already show that, just a year after its passage, FOSTA has substantially disrupted the online commercial sex industry. In short, FOSTA is working, and today it is harder for a trafficker to readily sell a child for sex online or for a predator to find a child online to purchase for sex.

The Department of Justice seized Backpage's website just a few days before Congress enacted FOSTA. *See U.S. Seizes Backpage.com, a Site Accused of Enabling Prostitution*, N.Y. Times (Apr. 7, 2018). Backpage is now defunct, but the demise of Backpage was not the demise of child sex trafficking. Though 70% of child sex trafficking reports made to NCMEC by the public referenced Backpage, that still left 30% from other sources. And it is unknown how many thousands of cases were unreported. Without FOSTA, nothing would prevent another website from stepping into the role as the market leader in online child sex trafficking.

Within two months of FOSTA's enactment, however, eight competitor websites that advertised commercial sex shut down: CityVibe, Escorts.com, Escorts in College, Escort Phone List, Humaniplex, MassageTroll, Nightshift, and My Scarlett Book. *See childsafe.ai, Beyond Backpage: Buying and Selling Sex in the United States One Year Later*, at 12, available at

<https://www.childsafe.ai/beyond-backpage-buying-and-selling-sex-in-the-united-states-one-year-later> (last visited Apr. 11, 2019). The only publicly released report analyzing the impact of FOSTA and the seizure of Backpage indicates that the eight most popular websites advertising commercial sex and the most popular advertising aggregator of this type now reach only a small percentage of the audience that Backpage commanded in 2016. *Id.* at 14. And over the past six months, eight of these nine platforms showed flat or declining growth. *Id.* at 15. Therefore, Plaintiffs' argument that FOSTA has been "counterproductive" based on "diminished online 'leads' for law enforcement" (Appellants' Opening Br. 54) wrongly presumes that the same volume of child sex trafficking activity is occurring online. That does not appear to be the case.

These are powerful signs of progress. While FOSTA has not signaled the end of child sex trafficking, FOSTA has fulfilled Congress's goal of fashioning a critical new weapon in shattering the online classified ad marketplace for sex trafficking.

G. Plaintiffs Are Not the Target of FOSTA.

As the legislative history details, FOSTA was a narrowly crafted response following Congress's realization that vulnerable children were being sold for rape and sexual abuse in an online marketplace. The deliberate facilitators of online child sex trafficking were seemingly immune from existing legal remedies, as

emphasized by a groundswell of state and federal court rulings that permitted Backpage and its officers to evade responsibility. FOSTA foreclosed the ability of these bad actors to escape criminal and civil responsibility in the future.

The plaintiffs in this case, however, are not website owners or operators who have structured online platforms for others to conduct child sex trafficking (or other illegal commercial sex activity). They are not seeking to join the marketplace for online trafficking, and they are not Backpage's competitors or successors. Rather, plaintiffs describe themselves as "a national human rights organization dedicated to sexual freedom, an international human rights organization, a massage therapist, an activist dedicated to assisting and advocating for the rights of sex workers, and a digital library of Internet sites and other cultural artifacts in digital form." Appellants' Opening Br. 13. These types of actors, and their daily business and civic activities, are not mentioned anywhere in FOSTA or its legislative history

In addition to plaintiffs' activities falling outside FOSTA's scope, FOSTA's *mens rea* requirements ensure that plaintiffs are not at risk of criminal or civil liability for their actions. To reach the level of sex trafficking, FOSTA first imposes an initial hurdle of establishing "intent" to promote or facilitate the prostitution of another person. 18 U.S.C. § 2421A(a). Likewise, "participation in a venture" of sex trafficking requires "knowingly" assisting, supporting, or

facilitating sex trafficking. *Id.* § 1591(a)(2). There is no discernible way that plaintiffs' intended actions, which are generalized activities unrelated to any particular illegal transaction, would meet these standards. Plaintiffs therefore cannot pursue a pre-enforcement challenge because they have expressed no intent to engage in activity barred under FOSTA are not subject to any legitimate risk.

II. The Court Should Affirm the Dismissal of Plaintiffs' Pre-Enforcement Action Because Plaintiffs Lack Article III Standing.

A. There Is No "Relaxed" Standard That Grants Unaffected Parties Article III Standing to Strike Down an Act of Congress.

To establish Article III standing, an injury must always be concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013). In a pre-enforcement action, "a plaintiff satisfies the injury-in-fact requirement where he alleges 'an intention to engage in a course of conduct arguably affected with a constitutional interest, *but proscribed by a statute*, and there exists a credible threat of prosecution thereunder.'" *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159 (2014) (quoting *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979)) (emphasis added). The Supreme Court's "standing inquiry has been *especially rigorous* when reaching the merits of the dispute would force [the Court] to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional.'" *Clapper*,

568 U.S. at 409 (quoting *Raines v. Byrd*, 521 U.S. 811, 819-20 (1997)) (emphasis added).

Plaintiffs ignore the rigor of this injury-in-fact requirement and ask the Court to accept their erroneous legal interpretation of FOSTA without question. *See* Appellants' Opening Br. 4 (standing must be "adjudged according to the plaintiffs' interpretation of the statute"); *see also id.* at 23 (contending the Court must accept "a plaintiff's non-frivolous contention regarding the meaning of a statute" at the motion to dismiss stage). But it is well established in the context of a Rule 12(b)(1) motion based on lack of standing that courts do *not* assume the truth of the plaintiff's legal conclusions. *Williams v. Lew*, 819 F.3d 466, 472 (D.C. Cir. 2016).

Moreover, plaintiffs' cited authorities include inapposite decisions that did not involve pre-enforcement, constitutional challenges to statutes.¹ None of these cases allowed a plaintiff to survive an Article III challenge by assuming, purely for the sake of argument, that the plaintiff's activity would violate the law.

Plaintiffs also contend—erroneously—that the Court must "*assume* a credible threat of prosecution absent compelling contrary evidence." Appellants'

¹ *See, e.g., Info. Handling Servs., Inc. v. Defense Automated Printing Servs.*, 338 F.3d 1024 (D.C. Cir. 2003) (declaratory judgment action alleging failure to comply with procurement statute and another statute regarding recoupment of government costs); *Am. Fed. of Gov't Emps. v. Pierce*, 697 F.2d 303 (D.C. Cir. 1982) (*per curiam*) (congressman and member of Appropriations Committee had standing to challenge executive department's reduction in force because members had right under appropriations act to participate in approval of departmental reorganization).

Opening Br. 4, 18 (emphasis added). They offer no authority for this proposition, and invoking an assumption would be inconsistent with the burden that rests with all plaintiffs to establish Article III standing. *Susan B. Anthony*, 573 U.S. at 158.

As always, plaintiffs must plead *facts* to show the existence of a credible threat:

“[P]ersons having no fears of state prosecution except those that are imaginary or speculative, are not to be accepted as appropriate plaintiffs.” When plaintiffs “do not claim that they have ever been threatened with prosecution, that a prosecution is likely, or even that a prosecution is remotely possible,” they do not allege a dispute susceptible to resolution by a federal court.

Babbitt, 442 U.S. at 298 (quoting *Younger v. Harris*, 401 U.S. 37, 42 (1971)) (internal citation omitted).

The demand of Article III is straightforward: to bring a pre-enforcement challenge in federal court to democratically passed legislation like FOSTA, plaintiffs must establish that FOSTA actually prohibits activity that, as pleaded, they intend to undertake. *See Susan B. Anthony*, 573 U.S. at 158. Plaintiffs have not met this burden.

B. FOSTA Does Not Proscribe the Activities of Plaintiffs, and There Is No Credible Threat of Prosecution.

Plaintiffs filed this lawsuit seeking to invalidate FOSTA, just three months after its enactment. None had been charged with any crimes or threatened with criminal charges. None had been sued in civil court or threatened with a civil suit. That remains true today. The United States, through the Attorney General, who is

charged with enforcing FOSTA and all federal criminal prosecutions brought under it, maintains that plaintiffs are not at risk of prosecution.

Similarly, it is telling that plaintiffs' discussion of FOSTA's impact begins with a description of non-parties' grievances instead of their own. *See* Appellants' Opening Br. 10-13. Plaintiffs never seriously contend that they *actually* are facilitating or will facilitate specific online sex trafficking transactions, such as by operating an online platform with the intent to facilitate the prostitution of another person. *Cf.* Appellants' Opening Br. 41 ("Woodhull speaks with the intent to 'facilitate' prostitution of other people by seeking to make sex work safer and thus easier."). They never contend that they seek to participate in a sex trafficking "venture" with others. Rather, Plaintiffs are left to contend that they believe FOSTA could "be read to encompass their advocacy for sex workers, provision of health-related information, and harm-reduction activities." Appellants' Opening Br. 28. There is nothing in the language or history of FOSTA that remotely suggests misguided litigants or prosecutors could use FOSTA to attack routine, general advocacy work on behalf of individuals engaged in commercial sex work.

With these high standards, plaintiffs are not at risk, and FOSTA is not "aimed" at plaintiffs, directly or otherwise. *Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 392 (1988). In the unlikely event that plaintiffs are subject to a prosecution or civil case based on FOSTA in the future, they would have ample

opportunity to raise challenges at that time. The reality, however, is that FOSTA responds to a relatively small community of “bad actors” who eluded responsibility for their crimes for many years. H.R. Rep. 115-572(I), at 3 (2018). These individuals and entities contributed to the physical, sexual, and psychological trauma of countless victims, including children, with impunity. Their actions include activity that most of society would consider evil—namely, facilitating the rape of children in exchange for a profit.

FOSTA ensures that companies and individuals cannot cloak themselves in perceived immunity under the CDA when they knowingly promote or facilitate child sex trafficking on the Internet. The decision to terminate unrelated websites that do not advertise trafficking, or to cease other unrelated activities, are unrelated to FOSTA’s proscription. “Subjective ‘chill’ ...is not enough to constitute injury in fact.” *Am. Library Ass’n v. Barr*, 956 F.2d 1178, 1193 (D.C. Cir. 1992) (citing *Laird v. Tatum*, 408 U.S. 1, 13-14 (1972); *United Presbyterian Church in the U.S.A. v. Reagan*, 738 F.2d 1375, 1378 (D.C. Cir. 1984)). Rather, standing “depends on how likely it is that the government will attempt to use these provisions against them—that is, on the threat of enforcement—and not on how much the prospect of enforcement worries” plaintiffs. *Id.*; see also *Clapper*, 568 U.S. at 416 (plaintiffs cannot manufacture Article III standing “based on a

nonparanoid fear”). Here, there is no threat of enforcement, and plaintiffs’ pre-enforcement challenge is unfounded.

One year after the enactment of FOSTA, NCMEC stands witness to the true impact of this legislation: a massive disruption in the Internet marketplace for sex trafficking and an online environment in which it is significantly more difficult for a predator to find a child to purchase for rape and sexual abuse. There is still child sex trafficking online—this is the nature of the crime—but the paradigm has shifted yet again. The online classified advertising marketplace that had prospered from facilitating sex trafficking has been devastated. Significantly, no clear successor to Backpage has emerged, and online locations where traffickers and buyers currently connect to buy and sell children are fragmented, transient, and veiled. This was the intended outcome and goal of FOSTA. FOSTA also serves as a significant disincentive for new entrants to this marketplace, and the normalization of child sex trafficking that was fueled by websites like Backpage is diminishing. Equally significant is the deep sense of justice that survivors convey knowing that Congress recognized the horror they had endured, and spoke clearly and narrowly to end this unintended legal immunity for the benefit of past and future victims.

CONCLUSION

The Court should affirm the district court's dismissal of plaintiffs' complaint for lack of subject matter jurisdiction.

Dated: April 22, 2019

Respectfully submitted,

BRYAN CAVE LEIGHTON PAISNER LLP

By: /s/ Adam L. Shaw

Adam L. Shaw

1155 F Street NW

Washington, DC 20004

adam.shaw@bclplaw.com

(202) 508-6000

Christopher J. Schmidt

Lee Marshall

Jonathan B. Potts

211 N. Broadway, Suite 3600

St. Louis, MO 63102

cjschmidt@bclplaw.com

klmarshall@bclplaw.com

jonathan.potts@bclplaw.com

(314) 259-2000

*Attorneys for Amicus Curiae The
National Center for Missing and
Exploited Children*

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 6,497 words, excluding the parts of the brief exempted by Rule 23(a)(7)(B)(iii).

This brief complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14-point font.

/s/ Adam L. Shaw

Adam L. Shaw

1155 F Street NW

Washington, DC 20004

adam.shaw@bclplaw.com

(202) 508-6000

CERTIFICATE OF SERVICE

I hereby certify that on April 22, 2019, I electronically filed the foregoing brief 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.

/s/ Adam L. Shaw

Adam L. Shaw

1155 F Street NW

Washington, DC 20004

adam.shaw@bclplaw.com

(202) 508-6000