

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.

From an Order by the U.S. District Court for the District of Columbia
The Honorable Richard J. Leon, Judge Presiding
(Case No. 1:18-cv-1552-RJL)

**BRIEF OF *AMICI CURIAE* EQUALITY NOW, THE COALITION
AGAINST TRAFFICKING IN WOMEN, THE ORGANIZATION FOR
PROSTITUTION SURVIVORS, RIGHTS4GIRLS, SHARED HOPE
INTERNATIONAL, SURVIVORS FOR SOLUTIONS, AND WORLD
WITHOUT EXPLOITATION IN SUPPORT OF APPELLEES**

Paul J. Nathanson
Margarita Clarens
Erik Herron
Davis Polk & Wardwell LLP
901 15th St. NW
Washington, D.C. 20005
(202) 962-7055
paul.nathanson@davispolk.com

Shelby Quast
Romina Canessa
Equality Now
125 Maiden Lane, 9th Fl. Suite B
New York, NY 10038
(212) 841-5630
squast@equalitynow.org

Counsel for Amici Curiae

April 22, 2019

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties.

Woodhull Freedom Foundation, Human Rights Watch, Eric Koszyk, Jesse Maley a/k/a Alex Andrews, and The Internet Archive, Plaintiffs below, Appellants here, filed suit 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”), naming as Defendants, the Appellees here, the United States, and the Attorney General of the United States in his official capacity, currently William P. Barr.

B. Rulings Under Review.

The ruling under review is *Woodhull Freedom Found. 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, each challenging the constitutionality of FOSTA.

C. Related Cases.

There are no related cases.

April 22, 2019

/s/ Paul J. Nathanson

Paul J. Nathanson
Counsel for Amici Curiae

**CORPORATE DISCLOSURE, AUTHORSHIP, AND
FINANCIAL CONTRIBUTION STATEMENTS**

Pursuant to Rule 29(a)(4)(A) of the Federal Rules of Appellate Procedure, and consistent with D.C. Cir. Rule 26.1, *amici curiae* state that each party to this brief is a nonpartisan, nonprofit organization with no parent corporation and that no publicly held corporation owns 10% or more of its respective stock or other interest in the respective organizations.

Pursuant to Rule 29(a)(4)(E) of the Federal Rules of Appellate Procedure, *amici curiae* state that no counsel to a party in the matter before the Court authored this brief in whole or in part; that no party or party's counsel contributed money intended to fund preparing or submitting this brief; and that no person contributed money to *amici curiae* that was intended to fund preparing or submitting this brief.

Pursuant to District of Columbia Circuit Rule 29(d), *amici curiae* certify that this separate amici brief is necessary and non-duplicative with any other brief that may be submitted. A separate brief is necessary to ensure that the unique interests of the amici organizations that advocate for the protection and promotion of the rights of women and girls, an end to human trafficking, and an end to commercial sexual exploitation may be put before the court.

TABLE OF CONTENTS

	<u>PAGE</u>
CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES	i
A. Parties.....	i
B. Rulings Under Review.....	i
C. Related Cases.....	i
CORPORATE DISCLOSURE, AUTHORSHIP, AND FINANCIAL CONTRIBUTION STATEMENTS	ii
TABLE OF AUTHORITIES	v
INTEREST OF AMICI CURIAE.....	1
SUMMARY OF ARGUMENT	4
ARGUMENT	5
I. FOSTA PROVIDES A NECESSARY SOLUTION TO THE SERIOUS PROBLEM OF WEB PLATFORMS KNOWINGLY FACILITATING SEX TRAFFICKING ON THE INTERNET.....	5
A. Portrait of Pre-FOSTA Use of the Internet to Facilitate and Promote Sex Trafficking	5
B. Prior to FOSTA, Victims Were Unable to Get Justice.....	8
II. FOSTA’S STATUTORY SCHEME NARROWLY ADDRESSES THE WELL-DOCUMENTED PROBLEM OF SEX TRAFFICKING ON THE INTERNET.....	11
A. FOSTA Provides Victims with the Ability to Hold Their Exploiters Accountable	11
B. FOSTA Aligns the Interests of the Tech Industry with Those Fighting to End the Sex Trafficking	14
C. FOSTA Does Not Dramatically Change What Underlying Conduct Is Prohibited	18

CONCLUSION.....22

CERTIFICATE OF COMPLIANCE.....23

CERTIFICATE OF SERVICE24

TABLE OF AUTHORITIES

PAGE

CASES

<i>Dart v. Craigslist, Inc.</i> , 665 F. Supp. 2d 961 (N.D. Ill. 2009)	16
<i>Doe ex rel. Roe v. Backpage.com, LLC</i> , 104 F. Supp. 3d 149 (D. Mass. 2014) (No. 14-13870), <i>aff'd sub nom.</i> <i>Jane Doe No. 1 v. Backpage.com, LLC</i> , 817 F.3d 12 (1st Cir. 2016)	8
<i>Doe v. MySpace, Inc.</i> , 474 F. Supp. 2d 843 (W.D. Tex. 2007), <i>aff'd</i> , 528 F.3d 413 (5th Cir. 2008)	14
<i>Jane Doe No. 1 v. Backpage.com, LLC</i> , 817 F.3d 12 (1st Cir. 2016)	<i>passim</i>
<i>J.S. v. Vill. Voice Media Holdings, LLC</i> , 359 P.3d 714 (Wash. 2015)	15
<i>M.A. ex rel. P.K. v. Vill. Voice Media Holdings, LLC</i> , 809 F. Supp. 2d 1041 (E.D. Mo. 2011)	10
<i>People v. Ferrer</i> , No. 16FE019224, 2016 WL 7237305 (Cal. Super. Ct. Dec. 9, 2016)	10
<i>Woodhull Freedom Found. v. United States</i> , 334 F. Supp. 3d 185 (D.D.C. 2018), <i>appeal docketed</i> , No. 18-cv-01552 (D.C. Cir. Oct. 12, 2018)	4, 12
<i>Zeran v. Am. Online, Inc.</i> , 129 F.3d 327 (4th Cir. 1997)	9

ADMINISTRATIVE MATERIALS

110 Cong. Rec. S10937 (2008).....	4
Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. No. 115-164, 132 Stat. 1253 (2018)	<i>passim</i>

Backpage.com’s Knowing Facilitation of Online Sex Trafficking, S. Perm. Subcomm. on Investigations of the Comm. on Homeland Sec. & Governmental Affairs, 105 Cong. 1 (2017) *passim*

DOJ, THE NAT’L STRATEGY FOR CHILD EXPLOITATION PREVENTION & INTERDICTION 77 (2016), <https://www.justice.gov/psc/file/842411/download> 7

Human Trafficking Investigation Before the S. Perm. Subcomm. on Investigations of the S. Comm. on Homeland Sec. and Governmental Affairs, 114 Cong. 17–22 (2015).....8, 11

Letter from Steven E. Boyd, Asst. Att’y Gen., to Hon. Robert W. Goodlatte, Chairman, Comm. on Judiciary (Feb. 27, 2018), <https://www.eff.org/files/2018/03/19/doj-sesta.pdf> 11

Linda A. Smith et al., *The National Report on Domestic Minor Sex Trafficking: America’s Prostituted Children*, SHARED HOPE 37–40 (May 2009)6

The Latest Developments in Combating Online Sex Trafficking: Hearing Before the H. Subcomm. on Commc’ns and Tech. of the Comm. on Energy and Commerce, 105 Cong. 2 (2017) 6, 11

STATUTES

18 U.S.C. § 1591 13

18 U.S.C. § 1591(a) 6

18 U.S.C. § 1591(e)(4)13, 20

18 U.S.C. § 1592 18, 20

18 U.S.C. § 159513

18 U.S.C. § 1595(a)13

18 U.S.C. § 1595(d) 13

18 U.S.C. § 2421A 14, 20

18 U.S.C. § 2421A(a)12

18 U.S.C. § 2421A(b)12, 20

18 U.S.C. § 2421A(c)12

22 U.S.C. § 7102(9) 6

47 U.S.C. § 230 (2012) 12, 18

47 U.S.C. § 230(c)	4, 9, 10
47 U.S.C. § 230(c)(1)	<i>passim</i>
47 U.S.C. § 230(c)(2)	15
47 U.S.C. § 230(c)(2)(A)	13, 15, 16
47 U.S.C. § 230(e)(5)	13, 15
47 U.S.C. § 230(e)(5)(A)	13
47 U.S.C. § 230(e)(5)(B)-(C)	14

OTHER AUTHORITIES

Dan Whitcomb, <i>Exclusive: Report Gives Glimpse Into Murky World of U.S. Prostitution in Post-Backpage era</i> , REUTERS (Apr. 11, 2019)	21
Ellen Wright Clayton et al., <i>Confronting Commercial Sexual Exploitation & Sex Trafficking of Minors in the United States</i> , NAT'L ACAD. OF SCIENCES, 2013, https://www.ojjdp.gov/pubs/243838.pdf	6
Mark Zuckerberg, <i>Mark Zuckerberg: The Internet Needs New Rules. Let's Start in These Four Areas</i> , WASH. POST (Mar. 30, 2019), https://www.washingtonpost.com/opinions/mark-zuckerberg-the-internet-needs-new-rules-lets-start-in-these-four-areas/2019/03/29/9e6f0504-521a-11e9-a3f7-78b7525a8d5f_story.html?utm_term=.c1deed3a2331	18
Mary Graw Leary, <i>The Indecency and Injustice of Section 230 of the Communications Decency Act</i> , 41 HARV. J. OF L. & PUB. POL'Y, 553 (2018)	11
Mary Leary, Shea Rhodes, Chad Flanders & Audrey Rogers, <i>Law Professors Weigh in on Amending the CDA – Part 2</i> , SHARED HOPE INT'L (Sept. 15, 2017), https://sharedhope.org/2017/09/law-professors-weigh-amending-cda-part-2/ 16	
Megan Anitto, <i>Consent, Coercion, and Compassion: Crafting a Commonsense Approach to Commercial Sexual Exploitation of Minors</i> , 30 Yale L. & Pol'y Rev. 1 (2011)	6

Mike Isaac, <i>Facebook’s Mark Zuckerberg Says He’ll Shift Focus to Users’ Privacy</i> , N.Y. TIMES (Mar. 6, 2019), https://www.nytimes.com/2019/03/06/technology/mark-zuckerberg-facebook-privacy.html	17
Press Release, DOJ, <i>California Operator of myRedBook.com Website Pleads Guilty to Facilitating Prostitution</i> (Dec. 11, 2014), https://www.justice.gov/opa/pr/california-operator-myredbookcom-website-pleads-guilty-facilitating-prostitution	19
Press Release, FBI, Philadelphia Division, <i>Internet Escort Services Firms Charged with Money Laundering Sentenced in Federal Court</i> (Mar. 19, 2012), https://archives.fbi.gov/archives/philadelphia/press-releases/2012/internet-escort-services-firms-charged-with-money-laundering-sentenced-in-federal-court	19
Press Release, <i>Justice Department Leads Effort to Seize Backpage.com, the Internet’s Leading Forum for Prostitution Ads, and Obtains 93-Count Federal Indictment</i> (Apr. 9, 2018) https://www.justice.gov/opa/pr/justice-department-leads-effort-seize-backpagecom-internet-s-leading-forum-prostitution-ads	19
Press Release, U.S. Attorney’s Office, E.D.N.Y., <i>Largest Online Male Escort Service Raided</i> (Aug. 25, 2015), https://www.justice.gov/usao-edny/pr/largest-online-male-escort-service-raided	19
Rob Spectre, <i>Beyond Backpage: Buying and Selling Sex in the United States One Year Later</i> , Childsafe.ai (2019)	21
<i>Sex Trafficking Campaign</i> , EQUALITY NOW, https://www.equalitynow.org/sex_trafficking_campaign	5
Shea Rhodes, <i>SESTA: A Narrow Exception to the CDA That Fulfills Its Intended Purpose</i> , VILL. UNIV. INST. TO ADDRESS COMMERCIAL SEXUAL EXPLOITATION (Dec. 16, 2017), https://cseinstitute.org/wp-content/uploads/2017/12/SESTA-Analysis-.pdf	15
<i>Statement in Support of the Bipartisan Compromise to The Stop Enabling Sex Traffickers Act</i> , INTERNET ASSOC. (Nov. 3, 2017), https://internetassociation.org/statement-in-support-of-the-bipartisan-compromise-to-stop-enabling-sex-trafficking-act-sesta/	17

The Human Trafficking Institute, *2017 Federal Human Trafficking Report 3*
(2017),

https://www.traffickingmatters.com/wp-content/uploads/2018/05/2017-Federal-Human-Trafficking-Report_hi-res.pdf7

INTEREST OF AMICI CURIAE

Equality Now is an international human rights organization that advocates for the protection and promotion of the rights of women and girls worldwide, with a membership network of individuals and organizations in more than 160 countries. Founded in 1992, Equality Now has a long history of working on issues of sex trafficking and sexual exploitation and has been involved in advocating for action against websites that facilitate sex trafficking for over 10 years.

The Coalition Against Trafficking in Women (“CATW”) is one of the oldest international organizations working to end human trafficking and commercial sexual exploitation as severe violations of the human rights of women and girls. To reach those goals, CATW engages in advocacy, education, victim services, and prevention programs for victims of trafficking and commercial sexual exploitation in Asia, Africa, Europe, and the Americas, as it collaborates with grassroots and survivor leaders.

The Organization for Prostitution Survivors (“OPS”) is a survivor-led and run social service agency and agent of social change. OPS facilitates recovery from the harms of prostitution through survivor-centered, trauma-informed services that empower its participants and community to heal from, and end, this system of gender-based violence. Through community education, advocacy and directly serving survivors of commercial sexual exploitation, OPS works to create

systemic change in local and national communities. It acknowledges prostitution as a form of gender-based violence that disproportionately impacts the most marginalized populations. Its work strives to encourage healing in those it serves and to empower survivors to advocate for policy that acknowledges the violence inherent in the sex trade while holding those responsible for that violence accountable.

Rights4Girls is a national human rights organization working to end sex trafficking and gender-based violence in the United States. Rights4Girls advocates for the dignity and rights of young women and girls so that every girl can be safe and live a life free of violence and exploitation. The organization has long worked to advance state and federal policies to improve its response toward child sex trafficking survivors and prevent the exploitation of vulnerable young women and girls.

Shared Hope International (“Shared Hope”) is an organization that strives to combat child sex trafficking through training, legislative advocacy, research, and education. Working to ultimately prevent exploitation, Shared Hope trains professionals and community members to identify vulnerabilities and conditions that foster sex trafficking and victimization. The organization engages in federal and state advocacy to strengthen legislation and policies that prioritize survivors’ access to justice, specialized services, and legal protections.

Survivors for Solutions (“S4S”) is an organization that offers 20 years of experience in advocacy, peer education, and support to survivors of commercial sexual exploitation and male violence against women. It seeks to abolish all forms of prostitution through awareness, education, training, demand reduction, survivor leadership and development, and incorporating the survivor’s voice into international, U.S., state, and local policies.

World Without Exploitation is a national coalition of over 140 organizations and individuals committed to creating a world where no person is bought, sold, or exploited. Its membership includes survivor-led organizations, direct service providers, foster care agencies, advocacy organizations, and children’s rights programs. Through education, legislative efforts and supporting survivor initiatives, World Without Exploitation works to create a culture where those who have been trafficked or sexually exploited are treated as victims of a crime, while holding accountable those who exploit. It survivor-led and survivor-driven trainings explore the dynamics of exploitation, as well as its root causes, particular vulnerabilities and common recruiting techniques.

Owing to the public interest nature of the suit as well as the important effects that this case may have on the momentum gained to ensure that websites that facilitate and profit from sex trafficking are no longer free from liability, all of these parties maintain a strong interest in the outcome of the case. By email, counsel for the parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

Appellants exalt the internet as “an unprecedented innovation” that “facilitates countless interactions on a worldwide scale.” Compl. ¶ 7, *Woodhull Freedom Found. v. United States*, 334 F. Supp. 3d 185 (D.D.C. 2018), *appeal docketed*, No. 18-cv-01552 (D.C. Cir. Oct. 12, 2018). However, those interactions have not been universally positive, or even simply benign; sex traffickers have used the internet to facilitate the rape and exploitation of women and girls on an unprecedented scale. Until the passage of the Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. No. 115-164, 132 Stat. 1253 (2018) (“FOSTA”) in 2018, this “[growing] debasement of our common humanity,” 110 Cong. Rec. S10937 (2008) (remarks by Sen. Durbin quoting President-elect Barack Obama), was brazenly enabled by web platforms that were largely exempt from liability for these crimes as a consequence of Section 230 of the Communications Decency Act of 1996 (“CDA”), 47 U.S.C. § 230(c).

Trafficking for sexual exploitation is one of the fastest-growing criminal enterprises in the world. It nets \$99 billion each year and 96% of its victims are women and girls.¹ Amici curiae are committed to a victim-centric approach to combatting sex trafficking and thus “advocate[] for a legal framework that[]

¹ Although several amici curiae are organizations dedicated to addressing violence and discrimination against women and girls, their efforts to combat human trafficking will serve to benefit all victims of this malevolent practice, including men and boys.

[c]riminalizes those who exploit people for profit . . . [and] [d]ecriminalizes people in prostitution, including victims of trafficking . . .” *Sex Trafficking Campaign*, EQUALITY NOW, https://www.equalitynow.org/sex_trafficking_campaign. For the reasons set forth by the District Court, amici curiae agree that FOSTA does not target those who are prostituted, including trafficking victims, or their advocates and supporters.

Amici curiae respectfully submit that, much to the contrary, FOSTA narrowly targets pimps, exploiters, and other knowing sex traffickers and addresses a profound injustice created by the CDA by providing victims the right to fight against those who knowingly profit from their exploitation through civil litigation, arming the various states to join in this fight, and by providing incentives to internet service providers to take necessary steps to combat sex trafficking on their platforms.

ARGUMENT

I. FOSTA PROVIDES A NECESSARY SOLUTION TO THE SERIOUS PROBLEM OF WEB PLATFORMS KNOWINGLY FACILITATING SEX TRAFFICKING ON THE INTERNET

A. Portrait of Pre-FOSTA Use of the Internet to Facilitate and Promote Sex Trafficking

Federal law defines “severe forms of trafficking in persons” to include “[s]ex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18

years of age . . .” 22 U.S.C. § 7102(9); *see also* 18 U.S.C. § 1591(a) (sex trafficking of children or by force, fraud, or coercion). Traffickers coerce their victims in a variety of ways, including through threats of physical violence, isolation, psychological manipulation, and induced drug dependency. *See* Linda A. Smith et al., *The National Report on Domestic Minor Sex Trafficking: America’s Prostituted Children*, SHARED HOPE 37–40 (May 2009). Children are especially vulnerable to manipulation by traffickers because they are generally economically dependent on adults and not fully developed emotionally and intellectually. *See* Megan Anitto, *Consent, Coercion, and Compassion: Crafting a Commonsense Approach to Commercial Sexual Exploitation of Minors*, 30 YALE L. & POL’Y REV. 1, 7, 13–14 (2011).

Researchers have found it impossible to reliably measure the prevalence of child sex trafficking in the United States. Ellen Wright Clayton et al., *Confronting Commercial Sexual Exploitation and Sex Trafficking of Minors in the United States*, NAT’L ACAD. OF SCIENCES, 2013, pp. 42–57, <https://www.ojjdp.gov/pubs/243838.pdf>. However, it is clear that the internet has made it easier and more ubiquitous by allowing traffickers to control their operations, including by grooming, recruiting, and advertising their victims, anonymously, at low cost, and to a wider audience with a lower risk of encountering law enforcement. *The Latest Developments in Combating Online Sex*

Trafficking: Hearing Before the H. Subcomm. on Commc'ns and Tech. of the Comm. on Energy and Commerce, 105 Cong. 2, 15, 22 (2017) [hereinafter "Online Sex Trafficking Hearing"]; *see also* DOJ, THE NAT'L STRATEGY FOR CHILD EXPLOITATION PREVENTION AND INTERDICTION 77 (2016), <https://www.justice.gov/psc/file/842411/download> ("As escort and social networking websites have grown in number, they have gained popularity with pimps and have become the most popular platform to advertise sex trafficking victims. These websites provide anonymity and 24-hour accessibility to a large pool of clients, thus increasing revenue to traffickers.").

The National Center for Missing and Exploited Children ("NCMEC") reported an 846 percent increase in reports of suspected child sex trafficking from 2010 to 2015, which the organization found to be "directly correlated to the increased use of the Internet to sell children for sex." *Backpage.com's Knowing Facilitation of Online Sex Trafficking*, S. Perm. Subcomm. on Investigations of the Comm. on Homeland Sec. and Governmental Affairs, 105 Cong. 1, 16 (2017) [hereinafter "Backpage Hearing"]. A report covering all criminal and civil human trafficking cases handled by federal courts in 2017 recorded 661 active sex trafficking cases, 65.8 percent involving child victims, 84.3 percent involving the use of the internet to solicit customers, and 72.3 percent involving classified advertisements posted on Backpage.com ("Backpage"). The Human Trafficking

Institute, *2017 Federal Human Trafficking Report* 3, 14 (2017),

https://www.traffickingmatters.com/wp-content/uploads/2018/05/2017-Federal-Human-Trafficking-Report_hi-res.pdf.

B. Prior to FOSTA, Victims Were Unable to Get Justice

Before the passage of FOSTA, sites like Backpage that presented themselves as broad platforms for classified advertising, but that allowed users to post advertisements for sexual services, operated with almost complete impunity, even when their actions reflected a clear intent to facilitate child sex trafficking. For instance, Backpage was not simply turning a blind eye to child sex trafficking; it actively promoted it by (1) systematically sanitizing advertisements to conceal evidence of child prostitution, Backpage Hearing at 59–61; (2) removing phone numbers, email addresses, IP addresses, and metadata from sex ads to frustrate the pursuit of sex traffickers by law enforcement, *Human Trafficking Investigation Before the S. Perm. Subcomm. on Investigations of the S. Comm. on Homeland Sec. and Governmental Affairs*, 114 Cong. 17–22 (2015) [hereinafter “Human Trafficking Hearing”]; (3) waiving verification requirements for sex advertisements, even though they were required for other advertisements, *id.* at 8; (4) deliberately removing advertisements posted by anti-trafficking groups and law enforcement agencies seeking to aid sex trafficking victims, Second Am. Compl. ¶ 40, *Doe ex rel. Roe v. Backpage.com, LLC*, 104 F. Supp. 3d 149 (D. Mass. 2014)

(No. 14-13870), *aff'd sub nom. Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12 (1st Cir. 2016); and (5) allowing traffickers to pay for ads with prepaid credit cards and cryptocurrencies to evade law enforcement, *id.* ¶ 47; Compl. ¶¶ 77–78, *Sojourner Center v. Backpage.com, LLC*, 2:17-cv-00399 (D. Ariz. Feb. 7, 2017).

As an example of Backpage’s flagrant connivance, it used an ad filter that automatically deleted terms from advertisements suggesting that child sex trafficking was afoot, such as “Lolita,” “rape,” “little girl,” or “Amber Alert.” Backpage Hearing at 2–3. In another instance, a Backpage content moderator reported that he was told by Backpage’s COO that “[l]eaving notes on our site that imply we are aware of prostitution, or in any position to define it, is enough to lose your job.” *Id.* at 4.

Despite this abhorrent conduct, private plaintiffs could not hold Backpage responsible for its meretricious business model because of the immunity granted by Section 230(c) of the CDA, which shields websites “from being ‘treated as the publisher or speaker’ of material posted by users of the site, 47 U.S.C. § 230(c)(1), meaning that ‘lawsuits seeking to hold a service provider liable for its exercise of a publisher’s traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content—are barred,’” *Jane Doe No. 1*, 817 F.3d at 18 (citing *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997)).

The failed lawsuits against Backpage vividly illustrate the perverse results of Section 230(c) as it existed before FOSTA. In *Doe No. 1*, the First Circuit explained:

“Beginning at age 15, each of the appellants was trafficked through advertisements posted on Backpage. Jane Doe # 1 was advertised on Backpage during two periods in 2012 and 2013. She estimates that, as a result, she was raped over 1,000 times. Jane Doe # 2 was advertised on Backpage between 2010 and 2012. She estimates that, as a result, she was raped over 900 times.” 817 F.3d at 17.

Yet the court denied relief because Congress “chose to grant broad protections to internet publishers” and “[w]hatever Backpage’s motivations, those motivations do not alter the fact that the complaint premises liability on the decisions that Backpage is making as a publisher with respect to third-party content.” *Id.* at 21, 29.

Similarly, a 2010 lawsuit alleged that traffickers manipulated an emotionally distraught 15-year-old girl into joining them and then sold her for sex on Backpage across the United States. Again, Section 230 immunized Backpage from liability for this “horrific victimization.” *M.A. ex rel. P.K. v. Vill. Voice Media Holdings, LLC*, 809 F. Supp. 2d 1041 (E.D. Mo. 2011).

State criminal prosecutions were likewise stymied by the CDA. For instance, the State of California charged Backpage with sex trafficking offenses in 2016, linking specific payments to the company to the rape of five children, *see* Compl., 2016 WL 6091120, *People v. Ferrer*, No. 16FE019224, 2016 WL

7237305 (Cal. Super. Ct. Dec. 9, 2016), but a state court dismissed the charges, citing the CDA, *id.* at *3–5.²

This state of affairs was widely recognized as untenable, *see generally* Backpage Hearing, Online Sex Trafficking Hearing, Human Trafficking Hearing, and accordingly, Congress amended the CDA by passing FOSTA.

II. FOSTA’S STATUTORY SCHEME NARROWLY ADDRESSES THE WELL-DOCUMENTED PROBLEM OF SEX TRAFFICKING ON THE INTERNET

A. FOSTA Provides Victims with the Ability to Hold Their Exploiters Accountable

There can be no doubt of the seriousness of the problem that Congress was trying to address by enacting FOSTA. *See generally* Mary Graw Leary, *The Indecency and Injustice of Section 230 of the Communications Decency Act*, 41 HARV. J. OF L. & PUB. POL’Y, 553 (2018). The previous regime facilitated human sex trafficking and thwarted efforts to combat it and to provide restitution to its victims.

FOSTA effectuates two principal changes to address the problems of online sex trafficking by holding the conscious facilitators of online sex trafficking

² Federal authorities were exempt from Section 230, but the Department of Justice reported “serious challenges” meeting the “high evidentiary standard needed to bring federal criminal charges for advertising sex trafficking.” Letter from Steven E. Boyd, Asst. Att’y Gen., to Hon. Robert W. Goodlatte, Chairman, Comm. on Judiciary (Feb. 27, 2018), <https://www.eff.org/files/2018/03/19/doj-sesta.pdf>.

accountable to their victims and the public.³ First, it creates a new criminal statute that prohibits owning, managing, or operating “an interactive computer service . . . with the intent to promote or facilitate the prostitution of another person,” or attempting or conspiring to do so. 18 U.S.C. § 2421A(a). This statute also provides for an “aggravated violation,” which applies to those who (1) act with specific intent to promote or facilitate the prostitution of another person and (2) either (a) promote or facilitate the prostitution of five or more persons or (b) act in reckless disregard that the offending conduct contributed to sex trafficking under 18 U.S.C. § 1591, which is a preexisting statute that prohibits sex trafficking. 18 U.S.C. § 2421A(b). Critically, a civil cause of action is also created for victims of the aggravated violation, which permits recovery for damages and reasonable attorneys’ fees. *Id.* § 2421A(c).

Next, FOSTA amends Section 230 of U.S.C. Title 47, the “safe harbor” of the CDA. Section 230 serves two primary purposes. First, in order to promote the marketplace of free speech on the internet, it provides civil and criminal immunity to interactive computer service providers for content created by third parties. 47 U.S.C. § 230(c)(1). Next, in an effort to encourage providers to screen their platforms for offensive material, Section 230 provides immunity for actions taken

³ A detailed summary of the statutory scheme can be found in the decision below. *See Woodhull Freedom Found.*, 334 F. Supp. 3d at 189–92.

by service providers to *restrict* access to material deemed obscene or otherwise objectionable. *Id.* § 230(c)(2)(A).

FOSTA amends Section 230 by adding one subsection, Section 230(e)(5), which states that the immunity offered by Section 230(c)(1) will have “no effect on sex trafficking law.” First, Section 230(e)(5) states that the immunity under Section 230(c)(1) shall not impair certain civil claims by victims of sex trafficking. *See id.* § 230(e)(5)(A). These claims must be brought under 18 U.S.C. § 1595, which authorizes private claims brought by victims under a number of statutory provisions relating to slavery, peonage, and trafficking, if the conduct underlying the claim constitutes a violation of the federal criminal sex trafficking law, 18 U.S.C. § 1591. *Id.* Liability under 18 U.S.C. § 1595 and § 1591 requires that the perpetrator act knowingly in participating in sex trafficking or in assisting, supporting, or facilitating sex trafficking.⁴ *See* 18 U.S.C. § 1595(a); § 1591(e)(4).

Section 230(e)(5) also provides that the immunity of Section 230(c)(1) will not limit two other types of claims: (1) state criminal prosecutions, if the conduct underlying a charge would also violate 18 U.S.C. § 1591; and (2) state criminal

⁴ FOSTA also amends Section 1595 to allow for state attorneys general to bring civil actions in federal court on behalf of residents in their state where “the attorney general . . . has reason to believe” that a violation of Section 1591 has occurred. *See* 18 U.S.C. § 1595(d).

prosecutions, if the underlying conduct would violate the newly created 18 U.S.C. § 2421A, *see id.* § 230(e)(5)(B)-(C).

Affording victims of online sex trafficking the long-denied opportunity to receive restitution for their suffering corrects the blatant miscarriage of justice that was occurring before this law was enacted: the conferring of absolute immunity to internet service providers simply because their malfeasance occurred online. Just as importantly, allowing for such liability deters internet service providers from knowingly promoting or facilitating sex trafficking in the future.

B. FOSTA Aligns the Interests of the Tech Industry with Those Fighting to End the Sex Trafficking

Given the vast expanse of the internet and sheer volume of internet service providers in existence, any attempt to root out online sex trafficking would be impotent without some level of cooperation by the providers themselves. FOSTA encourages vigilance on the part of internet service providers in preventing their services from being used for the promotion of sex trafficking. *Compare Jane Doe No. 1*, 817 F.3d at 29, *with Doe v. MySpace, Inc.*, 474 F. Supp. 2d 843, 851 (W.D. Tex. 2007), *aff'd*, 528 F.3d 413 (5th Cir. 2008).⁵

⁵ Indeed, *MySpace* is a clear example of how the Good Samaritan provision provides protection to internet service providers who try in good faith to curb sex trafficking. There, the mother of a minor who was sexually assaulted by a man she met on MySpace brought a negligence suit against the website, claiming that it knew that sexual predators were using the service to communicate with minors and did not react appropriately. *MySpace*, 474 F. Supp. 2d at 846. To be sure, the

FOSTA not only discourages misconduct by internet service providers by exposing them to additional liability, it also further incentivizes them to take proactive measures to prevent their platforms from being utilized for sex trafficking by maintaining the so-called “Good Samaritan” exemption of Section 230(c)(2)(A), which “protects providers from civil liability when they act in good faith to limit access to objectionable content, regardless of their status as a publisher or speaker.” *See J.S. v. Village Voice Media Holdings, L.L.C.*, 359 P.3d 714, 720 (Wa. 2015) (Wiggins, J. concurring); 47 U.S.C. § 230(e)(5) (“Nothing in this section (*other than subsection (c)(2)(A)*) shall be construed to impair or limit . . .”) (emphasis added).

court denied the claims, finding that MySpace was immune from suit under Section 230(c)(1) since the claims were directed toward the site’s owner and operator in their publishing, editorial, or screening capacities. *Id.* at 849–50. However, “the Court alternately [found] such claims are barred under § 230(c)(2)(A),” since the site’s security measures and age verification policies were undertaken in good faith. *Id.* at 851. Accordingly, under FOSTA, though the *MySpace* defendants could no longer rely on the immunity of Section 230(c)(1), they would nevertheless remain immune from suit in the same circumstances by the Good Samaritan exemption of Section 230(c)(2) because they undertook good-faith measures to restrict their site from being utilized for malign purposes, even if not perfect in preventing the misuse of their platforms. *See also* Shea Rhodes, *SESTA: A Narrow Exception to the CDA That Fulfills Its Intended Purpose*, VILL. UNIV. INST. TO ADDRESS COMMERCIAL SEXUAL EXPLOITATION (Dec. 16, 2017), <https://cseinstitute.org/wp-content/uploads/2017/12/SESTA-Analysis.pdf> (“Proponents of [FOSTA] do not expect service providers to be omniscient: they recognize that any good-faith screening mechanism, however flawed, will help the fight against trafficking.”) (emphasis in original).

Because FOSTA did not weaken the “Good Samaritan” immunity under Section 230(c)(2)(A), those actors who can demonstrate that they undertook a good-faith effort to prevent their platforms from being utilized for sex trafficking remain able to protect themselves against civil litigation. *See* Mary Leary, Shea Rhodes, Chad Flanders & Audrey Rogers, *Law Professors Weigh in on Amending the CDA – Part 2*, SHARED HOPE INT’L (Sept. 15, 2017), <https://sharedhope.org/2017/09/law-professors-weigh-amending-cda-part-2/> (explaining that FOSTA will “do nothing to limit the Good Samaritan exemption. Good Samaritans will continue to be protected just as they are now. Bad Samaritans will not.”). By retaining protections for those acting in good faith, FOSTA narrowly targets the conscious facilitators of online sex trafficking.

In this way, FOSTA aligns the interests of internet service providers with those fighting sex trafficking. *See Dart v. Craigslist, Inc.*, 665 F. Supp. 2d 961, 966 (N.D. Ill. 2009) (noting, prior to the passage of FOSTA, that it was “inconsistent with the statute’s apparent purpose to encourage monitoring [reflected in the “Good Samaritan” provision] . . . to read § 230(c)(1) to immunize internet service providers [] who do nothing to monitor the content they make available to the public. Why, in that case, would an [internet service provider] undertake ‘costly’ precautions?”).

For precisely this reason, the Internet Association expressed its support of the Senate bill that became FOSTA because the law “will grant victims the ability to secure the justice they deserve, allow internet platforms to continue their work combating human trafficking, and protect good actors in the ecosystem.” *Statement in Support of the Bipartisan Compromise to The Stop Enabling Sex Traffickers Act*, INTERNET ASSOC. (Nov. 3, 2017), <https://internetassociation.org/statement-in-support-of-the-bipartisan-compromise-to-stop-enabling-sex-trafficking-act-sesta/>.

This support from the tech industry is critical in combatting sex trafficking in the modern era. The internet is dynamic and trends change constantly, often in ways that are problematic for victims of sex trafficking. For example, in just the past weeks, internet giants like Facebook have announced that they are “shifting people toward private conversations and away from public broadcasting,” with a “focus on private and encrypted communications . . . that could [] be deleted after a certain period of time.” Mike Isaac, *Facebook’s Mark Zuckerberg Says He’ll Shift Focus to Users’ Privacy*, N.Y. TIMES (Mar. 6, 2019), <https://www.nytimes.com/2019/03/06/technology/mark-zuckerberg-facebook-privacy.html>. This focus on privacy, which is becoming more and more prevalent, could significantly hamper the ability of law enforcement to root out online sex trafficking since an increasing amount of communications will remain visible only to the web platforms

themselves. Such announcements reinforce the need to have the tech industry attuned and committed to fighting sex trafficking.

Internet providers have recognized this responsibility and many have not shied away from it. Facebook founder and CEO Mark Zuckerberg, for example, has argued in favor of more consistent regulation for removing harmful content while insisting that internet companies be involved in those discussions. *See* Mark Zuckerberg, *Mark Zuckerberg: The Internet Needs New Rules. Let's Start in These Four Areas*, WASH. POST (Mar. 30, 2019),

https://www.washingtonpost.com/opinions/mark-zuckerberg-the-internet-needs-new-rules-lets-start-in-these-four-areas/2019/03/29/9e6f0504-521a-11e9-a3f7-78b7525a8d5f_story.html?utm_term=.c1deed3a2331. He has insisted that “[i]nternet companies should be accountable for enforcing standards on harmful content,” and “by updating the rules for the Internet, we can preserve what’s best about it — the freedom for people to express themselves and for entrepreneurs to build new things — while also protecting society from broader harms.”

C. FOSTA Does Not Dramatically Change What Underlying Conduct Is Prohibited

Although the changes brought by FOSTA were desperately needed and will address the pervasive problem of online sex trafficking by increasing the risk of liability and providing remediation to the victims, they will not drastically alter what conduct is, in fact, prohibited under the law. Prior to FOSTA, Section 230

contained an exception for federal criminal laws. This exception allowed prosecutions for violations under the Travel Act, 18 U.S.C. § 1592, of Escorts.com, MyRedbook.com, and Rentboy.com. *See* Press Release, FBI, Philadelphia Division, *Internet Escort Services Firms Charged with Money Laundering Sentenced in Federal Court* (Mar. 19, 2012), <https://archives.fbi.gov/archives/philadelphia/press-releases/2012/internet-escort-services-firms-charged-with-money-laundering-sentenced-in-federal-court> (Escorts.com); Press Release, DOJ, *California Operator of myRedBook.com Website Pleads Guilty to Facilitating Prostitution* (Dec. 11, 2014), <https://www.justice.gov/opa/pr/california-operator-myredbookcom-website-pleads-guilty-facilitating-prostitution> (MyRedbook.com); Press Release, U.S. Attorney's Office, E.D.N.Y., *Largest Online Male Escort Service Raided* (Aug. 25, 2015), <https://www.justice.gov/usao-edny/pr/largest-online-male-escort-service-raided> (Rentboy.com). After a years-long struggle, the Justice Department was ultimately able to shut down Backpage just days before FOSTA was signed into law in April 2018. Press Release, *Justice Department Leads Effort to Seize Backpage.com, the Internet's Leading Forum for Prostitution Ads, and Obtains 93-Count Federal Indictment* (Apr. 9, 2018) <https://www.justice.gov/opa/pr/justice-department-leads-effort-seize-backpagecom-internet-s-leading-forum-prostitution-ads>.

In addition, like the federal criminal sex trafficking law before it, civil liability under FOSTA will require a “knowing” violation.⁶ Indeed, while appellants make much of the “reckless disregard” *mens rea* standard in the aggravated violation of Section 2421A, proving such a violation still requires showing that a perpetrator first act “with the intent to promote or facilitate the prostitution of another person,” *id.* § 2421A(b) (emphasis added) and, second, act with a reckless disregard of sex trafficking, a *mens rea* which is different, but not lower than what was already required under the law. *See* 18 U.S.C. § 1592 (requiring specific intent for a violation of the Travel Act).

Further, any inadvertent “chilling” effects on speech can be remedied through education regarding what the law does and does not do—efforts that amici curiae are committed to carrying out. Indeed, for years, amici curiae has encouraged web platforms, through dialogue and education, to accept accountability for the trafficking that they facilitate. These efforts were either rebuffed outright or given token acknowledgment. All of that changed with the passage of FOSTA. Since the bill passed, amici curiae have engaged with several platforms to educate them regarding their responsibilities to victims under the law. Amici curiae recognize that this law does not solve the issue of sex trafficking and

⁶ Indeed, the new definition of “participation in a venture” under 18 U.S.C. § 1591(e)(4) only adds to the elements that a prosecutor or civil litigant must prove in order to hold a website liable.

will continue to be vigilant both to ensure it continues to operate as it was intended and to fight against the law's misuse, including against the criminalization of victims. However, this law is an important step forward and should be upheld.

Indeed, in just over a year, this statutory scheme has made it difficult and less profitable for traffickers to operate online. According to an analysis conducted by a counter-human trafficking technology company Childsafe.ai, a year after the seizure of Backpage and the passage of FOSTA, demand for commercial sex is declining. Sex trafficking has become more costly and “the online distribution layer for the underground commercial sex economy — and as a subset, the sex trafficking economy — remains significantly disrupted.” Rob Spectre, *Beyond Backpage: Buying and Selling Sex in the United States One Year Later*, Childsafe.ai (2019); see also Dan Whitcomb, *Exclusive: Report Gives Glimpse Into Murky World of U.S. Prostitution in Post-Backpage era*, REUTERS (Apr. 11, 2019). Indeed, while the gap left by Backpage has led some advertisements to other sites, the overall volume is down. *See id.* Bad news for traffickers and welcome relief for victims.

CONCLUSION

For the reasons stated above, the district court's order dismissing the complaint and denying a preliminary injunction should be affirmed.

Respectfully submitted,

/s/ Paul J. Nathanson

Paul J. Nathanson
Davis Polk & Wardwell LLP
901 15th St. NW
Washington, D.C. 20005
(202) 962-7055
paul.nathanson@davispolk.com

Dated: April 22, 2019

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the length limitations of Fed. R. App. P. 29(a)(5) because it contains 5,158 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), which is less than one-half the maximum length authorized for a principal brief under Fed. R. App. P. 32(a)(7)(B).

I further certify that the attached *amici* brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016, 14-point Times New Roman font.

/s/ Paul J. Nathanson

Paul J. Nathanson
Counsel for Amici Curiae

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing 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. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system. Executed this 22nd day of April, 2019.

/s/ Paul J. Nathanson

Paul J. Nathanson
Counsel for Amici Curiae