Oral Argument Not Yet Scheduled

No. 18-5298

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

WOODHULL FREEDOM FOUNDATION, *ET AL.*
Appellants,

v.

UNITED STATES OF AMERICA AND
WILLIAM BARR IN HIS OFFICIAL CAPACITY AS
ATTORNEY GENERAL OF THE UNITED STATES,
Appellees.

On appeal from the United States District Court
for the District of Columbia, No. 1:18-cv-1552-RJL

Amicus Curiae Brief of the Institute for Free Speech in Support of Appellants

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February 20, 2019

CERTIFICATES AS TO PARTIES, RULINGS UNDER REVIEW, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), *Amicus Curiae* Institute for Free Speech submits its Certificate as to Parties, Rulings, and Related Cases.

A. Parties and *Amici*[1]

Appellants are the Woodhull Freedom Foundation, Human Rights Watch, Eric Koszyk, Jesse Maley a/k/a Alex Andrews, and The Internet Archive, Plaintiffs below. Appellees, Defendants below, are the United States and William P. Barr, in his official capacity as the Attorney General of the United States. In addition to its own brief, *Amicus* is aware that briefs will be filed by the Parties listed in Appellants' Certificate as to Parties, Rulings, and Related Cases.

B. Rulings Under Review

On September 24, 2018, in *Woodhull Freedom Foundation v. United States*, 334 F. Supp. 3d 185 (D.D.C. 2018), Judge Richard J. Leon denied a request for preliminary relief and dismissed Appellants' complaint on the grounds that Appellants lacked Article III standing.

C. Related Cases

There are no related cases.

[1]The Institute reaffirms its previous filing, stating that it has no parent company, and no publicly-held company has a 10 percent or greater ownership interest in it.

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GLOSSARY

FOSTA .....Allow States and Victims to Fight Online Sex Trafficking Act

DOJ.....United States Department of Justice

STATUTES AND REGULATIONS

The pertinent statutes and regulations at issue are provided in Appellants' Brief and Addendum.

STATEMENT OF IDENTITY, INTEREST IN CASE, AND SOURCE OF AUTHORITY TO FILE [2]

Founded in 2005, the Institute for Free Speech is a nonpartisan, nonprofit organization that works to protect and defend the rights to free speech, assembly, press, and petition. As part of that mission, the Institute often brings First Amendment pre-enforcement challenges that rely on the specialized standing requirements for such suits. The Institute has also been involved in litigation brought pursuant to third-party enforcement regimes, and has developed important expertise concerning the dangers posed by such systems in the First Amendment context.

The Institute certifies that its brief will be of unique help to the Court, as the filing will provide an experienced perspective on both points.

Counsel for all Parties have consented to the Institute's participation as *amicus curiae*.

[2] No other party's counsel authored this brief in whole or in part, nor did any person contribute money that was intended to fund the preparation or submission of this brief. Fed. R. App. P. 29(a)(4)(E).

INTRODUCTION AND SUMMARY OF ARGUMENT

Courts have long recognized that the First Amendment needs "breathing space" to survive, *NAACP v. Button*, 371 U.S. 415, 433 (1963), and that the danger posed by regulating speech is not limited to specific criminal prosecutions. Rather, such laws threaten to chill protected activity outside a specific case, and courts have wisely allowed hardy or well-resourced plaintiffs to vindicate not only their own rights, but also those of their fellow citizens. *E.g. SpeechNow.org v. Fed. Election Comm'n*, 599 F.3d 686 (D.C. Cir. 2010) (*en banc*). Similarly, the specific nature of First Amendment chill – the danger that citizens will not risk speaking in the face of ambiguous or merely possible governmental action, the resulting damage to public discourse, and the government's slight or nonexistent countervailing interests – has long been understood to require that courts take special care to remain open to litigants, and that judges not accept governmental proffers of good faith at face value.

These goals have been accomplished, in large part, by relaxing the traditional rules of standing. After all, the First Amendment must be "protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference." *Bates v. City of Little Rock*, 361 U.S. 516, 523 (1960).

This is precisely the kind of case for which First Amendment standing doctrine was developed. It is a pre-enforcement challenge to a statute of startling scope and uncertain meaning, directly regulating a major frontier of First

Amendment-protected activity. And Congress chose to decentralize its enforcement, permitting numerous parties, including private litigants and state attorneys general, to bring lawsuits against alleged violators.

Nevertheless, the district court refused to consider the case's merits, instead finding that Appellants failed to "'demonstrate a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement.'" *Woodhull Freedom Found*, 334 F. Supp. 3d at 197 (quoting *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979)).

But a "party has standing to challenge, pre-enforcement, even the constitutionality of a statute if First Amendment rights are [merely] *arguably* chilled, so as long as there is a *credible* threat of prosecution." *Chamber of Commerce v. Fed. Election Comm'n*, 69 F.3d 600, 603 (D.C. Cir. 1995) (emphasis altered, brackets supplied). Regardless of the eventual outcome of this case, such a showing was made here, and the district court should review the merits of Appellants' claims.

ARGUMENT

I. When First Amendment rights are threatened, the federal courts have an obligation to broadly construe standing.

The Supreme Court has long recognized that statutes which present an intrinsic "danger…of self-censorship; a harm that can be realized even without an actual prosecution," require immediate judicial review. *Va. v. Am. Booksellers Ass'n*,

484 U.S. 383, 393 (1988). The Allow States and Victims to Fight Online Sex Trafficking Act ("FOSTA" or "Act") is such a statute.

Appellants credibly explained the ways in which FOSTA's vague provisions have harmed their business and advocacy interests. *See, generally*, JA 20-36, Complaint ("Impact on Plaintiffs"). For example, the Woodhull Freedom Foundation not only pointed to a specific, annual event threatened by FOSTA, JA 30, ¶ 70-71, but also described how FOSTA had already chilled particular modifications to the 2018 event. JA 32-33, ¶ 82 ("After the Desiree Alliance cancelled its July conference in response to FOSTA, Woodhull considered offering it the opportunity to conduct its institute during Woodhull's 2018 Summit. However, Woodhull concluded it would be too risky under FOSTA to promote the institute in conjunction with the Summit").

Nevertheless, the district court accepted the Government's interpretation of FOSTA at face value, and accordingly dismissed all of Appellants' claims.

But the standard is not whether the United States, only one of many potential enforcers, makes a nonbinding statement that it will not enforce against particular plaintiffs with the "civic courage" to bring a lawsuit. *Doe v. Reed*, 561 U.S. 186, 228 (2010) (Scalia, J., concurring in the judgment). Nor should parties be required to plead their likely future activity with the exactness of a criminal indictment, lest the Government's nonbinding representations be conveniently distinguished in some

future prosecution. Rather, "where, as here, First Amendment rights are implicated and *arguably* chilled by a 'credible threat of prosecution'" a court's "reluctan[ce] to require parties to subject themselves to enforcement proceedings" is "at its peak." *Unity08 v. Fed. Election Comm'n*, 596 F.3d 861, 865 (D.C. Cir. 2010) (quoting *Chamber of Commerce*, 69 F.3d at 603, emphasis supplied).

"For many decades, the courts have shown special solicitude to pre-enforcement challenges brought under the First Amendment, relaxing standing requirements and fashioning doctrines, such as overbreadth and vagueness, meant to avoid the chilling effects that come from unnecessarily expansive proscriptions on speech." *N.Y. Republican State Comm. v. Securities and Exch. Comm'n*, 799 F.3d 1126, 1135-1136 (D.C. Cir. 2015) (collecting cases). Unless Congress expressly limits a court's jurisdiction to review such challenges, *N.Y. Republican State Comm.*, 799 F.3d at 1136, the general rule is that "[i]n the First Amendment context, the standing requirements are somewhat relaxed." *McConnell v. Fed. Election Comm'n*, 251 F. Supp. 2d 176, 258 (D.D.C. 2003); *aff'd* 540 U.S. 93 (2003). Thus, the mere making of "'a claim of specific present objective harm or a threat of specific future harm'" will hold open the courthouse door. *Id*. (quoting *Bigelow v. Va.*, 421 U.S. 809, 816-817 (1975)).

This leniency is essential to our constitutional scheme, which includes "a profound national commitment to the principle that debate on public issues should

be uninhibited, robust, and wide-open," *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964), and ensures that "our people are guaranteed the right to express any thought, free from government censorship." *Police Dep't of Chi. v. Mosley*, 408 U.S. 92, 96 (1972). These commitments are especially pressing when the Government seeks to regulate the Internet, as "[i]t must be remembered…that the [I]nternet is the new soapbox; it is the new town square." *Coal. for Secular Gov't v. Gessler*, 71 F. Supp. 3d 1176, 1182 (D. Colo. 2014); *aff'd sub nom. Coal. for Secular Gov't v. Williams* 815 F.3d 1267 (10th Cir. 2016).

These First Amendment norms and considerations were disregarded below. Rather than take seriously Appellants' credible concerns regarding FOSTA, which "impose[s] crushing liability on Internet speech using expansive but undefined terms," the district court took the Government at its word when it claimed these terms would not be wielded against Appellants. Br. of Appellants at 3. To be clear, the district court did not decline to find standing because FOSTA limited its jurisdiction to act. Nor did it find that Appellants' conduct was outside of the statute after promulgating a protective narrowing construction. *Cf. Buckley v. Valeo*, 424 U.S. 1, 79-81 (1976) (*per curiam*) (in First Amendment pre-enforcement challenge, refashioning statutory reach by defining statute's terms in accordance with the

Constitution). Nor did the court issue a consent decree expressly protecting Appellants in the future.[3]

Such trust in the Government's present litigation posture is unfounded. It is Appellants that have made sworn statements regarding their conduct, not the United States of America. Yet, the district court repeatedly embraced the Government's assertions that it did not consider Appellants' proposed conduct and evidence sufficient to show "*mens rea*," an inherently subjective and fact-specific inquiry, and one which often must be resolved at trial. *E.g. Woodhull Freedom Found*, 334 F. Supp. 3d at 202 ("Without that *mens rea*, there is no credible threat of prosecution, and thus no standing to bring this pre-enforcement challenge"); *cf.* Br. of Appellants at 9 ("Under Section 1591 as amended, speakers or Internet platforms seeking to avoid liability must now navigate overlapping and impenetrable *mens rea* standards").

The district court's credulous belief that the Department of Justice's ("DOJ") present interpretation of a statute will bind future prosecutors merits reversal.[4] The

[3]Although, given the third-party enforcement mechanisms discussed *infra*, that would not have been enough.

[4]It is hardly uncommon for the Government to reinterpret a statute's reach and come to a new understanding. *See* Tr. of Oral Argument at 28, *Husted v. A. Philip Randolph Inst.*, 584 U.S. __; 138 S. Ct. 1833 (U.S. Jan. 10, 2018) ("JUSTICE SOTOMAYOR: General, could you tell me, there's a 24-year history of solicitor generals of both parties under both—Presidents of political parties who have taken a position contrary to yours").

district court should have acted pursuant to the "constitutional skepticism with which th[is] Court regards government regulation of private speech." *Nat'l Treas. Emps. Union v. United States*, 3 F.3d 1555, 1566 (D.C. Cir. 1993) (Silberman, J., dissenting from denial of rehearing *en banc*). Such skepticism was particularly essential here, given the weighty punishments contemplated by the Act—including up to 25 years in prison for certain online speech. 18 U.S.C. § 2421A(b)(2).

II. The district court failed to account for FOSTA's third-party enforcement mechanisms.

To read the district court's opinion is to read about a statute that, while somewhat expansive, has been faithfully cabined by the ironclad promises of the Federal Government. Indeed, one might be forgiven for forgetting that the Act is named the "*Allow States and Victims* to Fight Online Sex Trafficking Act;" the opinion contains few references to state governments or private lawsuits. The district court simply ignored the relevance that parties aside from the United States have been given standing to enforce FOSTA's dictates.

"*Any* person injured by" certain FOSTA violations "may recover damages and reasonable attorneys' fees in an action before any appropriate United States district court." 18 U.S.C. § 2421A(c) (emphasis supplied). In addition, in the government's phrasing, "FOSTA's 'key innovation' is 'to allow states to bring prosecutions for…sex trafficking…and intentional facilitation or promotion of illegal prostitution' that [federal law] previously precluded." JA 316, Plaintiffs' Br. in

Opp'n on Mot. to Dismiss at 9 (quoting JA 206, Def. Mot. to Dismiss at 19) (brackets supplied, ellipses in original); *see* 47 U.S.C. § 230(e)(5). Yet, this dramatic expansion of prosecutorial authority to state governments, the Act's "key innovation," merited little discussion below.[5] This is particularly troubling, as it means that the district court's ruling was premised on the Government's bare "conten[tions] that plaintiffs' conduct, as described…would *not* fall within FOSTA's ambit." *Woodhull*, 334 F. Supp. at 198 (emphasis in original).

Even if the United States were bound by the decision below, which it is not, that ruling does nothing to stay the hand of state attorneys general, litigious individuals, or judges in other districts. The Department of Justice cannot speak for the States, let alone individual Americans. The Federal Government's word is cold comfort for defendants that will find themselves haled into court by other parties

[5]This silence is not due to the Appellants' failure to raise this point. Appellants' papers below are chock full of references to FOSTA's expansive enforcement provisions. JA 96, Mem. in Supp. of Plaintiffs' Mot. for Prelim. Inj. at 22 ("But FOSTA is even worse because it empowers 50 state attorneys general, local prosecutors, and enterprising plaintiffs' lawyers across America to concoct arguments for what might constitute promoting of facilitating prostitution or trafficking"); JA 105, *Id*. at 31 ("It would ignore reality – as well as the history of Internet censorship – to disregard how FOSTA's vague mandate will be used by prosecutors and private litigants in all 50 states to censor speech and threaten lifestyle choices with which they disagree"); JA 235, 244, 245 Plaintiffs' Reply Br. at 10, 19, 20; JA 313, 314, 316, 323 n. 21, Plaintiffs' Br. in Opp'n to Mot. to Dismiss at 6, 7, 9, 16 n.21, Hearing Tr. at 6, *l* 7-10 ("It's not difficult to imagine that rescue organizations that don't like the ratings they get will file suit under the new provisions of FOSTA that remove immunity under Section 230").

filing suits based on their own, individual interpretations of FOSTA's vague and undefined terms. The Attorney General, and the department he oversees, will have precisely no control over whether those cases are filed, or how they will proceed.

Amicus are aware of litigation, in the campaign finance context, where grants of third-party standing led to efforts by those parties to control and deter speech through the process of private litigation. In that context, such provisions inevitably enable a cottage industry of complaint mills, constantly filing new complaints intended to cow political opponents. *See, e.g. Coloradans for a Better Future v. Campaign Integrity Watchdog*, 409 P.3d 350, 351 (Colo. 2018) ("[Mr.] Arnold, or his organization Campaign Integrity Watchdog…has since filed a series of campaign-finance complaints against Better Future; this is the fourth…"). These filings force defendants to suffer the expense of legal representation, the diverted time and attention of their staff, the distraction from their mission, and the reputational harm of being accused of wrongdoing. Such harms are particularly acute for small grassroots activists, who may be high on enthusiasm but low on funds. *E.g. Sampson v. Buescher*, 625 F.3d 1247, 1260 (10th Cir. 2010) ("It is no surprise that Plaintiffs felt the need to hire counsel upon receiving the complaint against them filed with the Secretary of State. One would expect, as was the case here, that an attorney's fee would be comparable to, if not exceed, the $782.02 that had been contributed by that time to the anti-annexation effort"). And while these filings occur

in the admittedly heated and often irrational atmosphere of electoral politicking, there is no evidence that individuals are significantly more rational in the context of sex trafficking or forced prostitution.

It is unsurprising, then, that in response to the threat of third-party enforcement, entities have already curtailed their conduct and ceased the discussion of topics even tangentially related to FOSTA's intended targets. Br. of Appellants at 11 ("Just two days after the Senate passed [FOSTA], the online classified ad service Craigslist eliminated all personals ads, including non-sexual categories such as 'Missed Connections' and 'Strictly Platonic'"). "No speaker, in such circumstances, safely could assume that anything he might say upon the general subject would not be understood by some as an invitation." *Thomas v. Collins*, 323 U.S. 516, 535 (1945).

This risk of individual enforcement is only compounded by the additional authority granted to state attorneys general, many of whom are selected in partisan elections. Cracking down on sex trafficking is an obviously popular position, and it would be foolhardy to assume that elected officials will stick to the conservative litigation posture promised by Appellees here. Editorial Bd., *Felony Charges Are A Disturbing Overreach For The Duo Behind The Planned Parenthood Sting Videos*, L.A. Times, Mar. 30, 2017 ("It's disturbingly aggressive for [California Attorney General] Becerra to apply this criminal statute to people who were trying to influence

a contested issue of public policy, regardless of how sound or popular that policy may be");[6] Dan Frosch and Jacob Gershman, *Abbott's Strategy in Texas: 44 Lawsuits, One Opponent: Obama Administration*, ("During Mr. Abbott's first term as governor, and while he was state attorney general before that, Texas has challenged the president's signature issues in court—tougher carbon-emission standards, health-care reform, transgender rights and others").[7]

The district court would have Appellants wait and see if the DOJ's present understanding of FOSTA will be persuasive to all 50 state attorneys general, not to mention prosecutors representing the District of Columbia and the federal territories. Appellants should not be forced to wait and see whether roving writs are judiciously used. Rather, the First Amendment calls for inspection, and if need be, removal of the suspended sword before dining begins. *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (Brennan, J., plurality op.) (injunctive relief appropriate where "First Amendment interests" are "threatened or in fact being impaired").

Indeed, *regardless* of how a suit comes about, if Appellees' present reading of FOSTA is ever rejected before another court, it will instantly expose Appellants to substantial personal and financial costs. Until the language of the Act is directly

[6]https://www.latimes.com/opinion/editorials/la-ed-planned-parenthood-charges-20170330-story.html
[7]https://www.wsj.com/articles/abbotts-strategy-in-texas-44-lawsuits-one-opponent-obama-administration-1466778976

reviewed and cabined, this threat will be ever-present. This situation counsels in favor of swift review of the underlying Act *before* such harms fully materialize. *See Freedman v. Md.*, 380 U.S. 51, 57 (1965) ("In substance his argument is that, because the apparatus operates in a statutory context in which judicial review may be too little and too late, the Maryland statute lacks sufficient safeguards for confining the censor's action to judicially determined constitutional limits").

CONCLUSION

The district court below was "troubled by the pre-enforcement nature of this suit." *Am. Booksellers Ass'n*, 484 U.S. at 393. This was error. The First Amendment provides for Article III standing in cases precisely like this one, where the constitutional "harm" is one "that can be realized even without an actual prosecution." *Id*. To hold otherwise, and to lend this Court's authority to a narrow view of First Amendment standing, would imperil judicial review of controversial speech regulations before they irreparably chill protected expression.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation set forth in Rule 32(a)(7)(B)(ii) of the Federal Rules of Appellate Procedure because it contains 2,982 words, according to a word count by Microsoft Word 2016, excluding the parts of the brief exempted by Circuit Rule 32(e)(1).

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

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CERTIFICATE OF SERVICE

I hereby certify that on February 20, 2019, I caused the foregoing to be filed with the Clerk of this Court via the appellate CM/ECF system. Counsel for all parties in the instant matter are registered CM/ECF users and will be served by the appellate CM/ECF system.

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