[ORAL ARGUMENT NOT SCHEDULED]

No. 18-5298

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

WOODHULL FREEDOM FOUNDATION, et al.,

Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA, et al.,

Defendants-Appellees.

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

BRIEF FOR APPELLEES

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), the undersigned counsel certifies as follows:

A. *Parties and Amici.* Plaintiffs-appellants are Woodhull Freedom Foundation, Human Rights Watch, Eric Koszyk, Jesse Maley, a/k/a Alex Andrews, and the Internet Archive. Defendants-appellees are the United States of America and William P. Barr, in his official capacity as Attorney General of the United States. Jefferson B. Sessions and Matthew G. Whitaker (in their then-official-capacity as Attorney General and Acting Attorney General of the United States, respectively) were previously named as defendants.

B. *Ruling Under Review.* Plaintiffs appeal from the memorandum opinion and order issued on September 24, 2018 by the Honorable Richard J. Leon (D.D.C. No. 18-CV-01552(RJL)), denying plaintiffs' motion for preliminary injunction and granting defendants' motion to dismiss.

C. *Related Cases.* Counsel is aware of no related cases within the meaning of D.C. Circuit Rule 28(a)(1)(C).

s/ Courtney L. Dixon
Courtney L. Dixon

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GLOSSARY

Backpage	Backpage.com
CDA	Communications Decency Act of 1996
Craigslist	Craigslist.com
FOSTA	Allow States and Victims to Fight Online Sex Trafficking Act of 2017
NCMEC	National Center for Missing and Exploited Children

STATEMENT OF JURISDICTION

Plaintiffs invoked the district court's jurisdiction under 28 U.S.C. § 1331. JA16. The district court denied plaintiffs' motion for preliminary injunction and granted the governments' motion to dismiss on September 24, 2018. *See* JA387. This court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

Whether the district court correctly held that plaintiffs lack standing to bring a pre-enforcement facial challenge to FOSTA because plaintiffs' intended activities are not within the scope of FOSTA.

PERTINENT STATUTES AND REGULATIONS

Pertinent statutes and regulations are reproduced in the addendum to this brief.

STATEMENT OF THE CASE

A. Statutory Background

1. In the Communications Decency Act of 1996 (CDA), 47 U.S.C. § 230, in order to "preserve the vibrant and competitive free market that presently exists for the Internet," *id.* § 230(b)(2), Congress made a policy decision to "depart[] from the common-law rule that" a publisher or distributor "of tortious material written or prepared by others" could be liable for that tortious material, *Jones v. Dirty World Entm't Recordings LLC*, 755 F.3d 398, 407 (6th Cir. 2014); *see also Zeran v. America Online, Inc.*, 129 F.3d 327, 330–31 (4th Cir. 1997) ("Congress made a policy choice . . . not to deter harmful online speech through the separate route of imposing tort

liability on companies that serve as intermediaries."). Congress therefore provided in Section 230 of the CDA that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider," 47 U.S.C. § 230(c)(1), and that "[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section," *id.* § 230(e)(3). Section 230 does not restrict the enforcement of federal criminal laws. *See id.* § 230(e)(1).

2. In the two decades since Section 230 was enacted, the Internet has grown and changed substantially. An unfortunate component of this growth has been the increased use of online anonymous marketplace websites to illegally traffic in persons for sex. According to the National Center for Missing and Exploited Children (NCMEC), there was an 846% increase in suspected sex trafficking from 2010 to 2015, which the NCMEC found to be "directly correlated to the increased use of the Internet to sell children for sex."[1] An investigation by the Senate Permanent Subcommittee on Investigations into the anonymous marketplace website Backpage.com (Backpage)—a site that "reportedly net more than 80% of all revenue

[1] *See* U.S. Senate, Permanent Subcomm. on Investigations, *Backpage.com's Knowing Facilitation of Online Sex Trafficking,* https://go.usa.gov/xmgPW (last visited Apr. 12, 2019) (Senate Investigation Report); *see also* U.S. Dep't of Justice, *The National Strategy for Child Exploitation Prevention and Interdiction*, 4, 10, 76 (Apr. 2016), https://go.usa.gov/xmgPA (stating that the Internet and "[w]ebsites like Backpage.com have emerged as a primary vehicle for the advertisement of children to engage in prostitution.").

from online commercial sex advertising in the United States"—found that Backpage had taken intentional measures to help sex traffickers avoid detection when posting advertisements online for commercial sex. *See* Senate Investigation Report, at 23–41.

Sex-trafficking victims brought suit against Backpage under various state laws and 18 U.S.C. § 1595, a provision that allows victims to bring civil actions for violations of 18 U.S.C. § 1591, a federal criminal statute that prohibits sex trafficking.[2] *See, e.g.*, *Doe ex rel. Roe v. Backpage.com, LLC*, 104 F. Supp. 3d 149 (D. Mass. 2015); *see also M.A. ex rel. P.K. v. Village Voice Media Holdings, LLC*, 809 F. Supp. 2d 1041, 1053 (E.D. Mo. 2011). Courts dismissed these claims, however, because they reasoned that such claims sought to hold Backpage liable as the "publisher" of the unlawful advertisements, and were thus barred by Section 230 of the CDA. *See, e.g.*, *Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12, 27 (1st Cir. 2016). In affirming the dismissal of such a suit, the First Circuit explained that, to the extent victims of sex trafficking wished to bring civil suits against internet publishers such as Backpage that "tailor[]

[2] Section 1591(a) proscribes "knowingly" performing certain actions, such as "provid[ing], obtain[ing], advertis[ing], . . . or solicit[ing] by any means a person," "knowing, or, except where the act" is advertising, "in reckless disregard of the fact, that" force, fraud, or coercion "will be used to cause the person to engage in a commercial sex act," or that the person was a minor "and will be caused to engage in a commercial sex act." 18 U.S.C. § 1591(a). The statute also prohibits "knowingly" benefitting financially from "participation in a venture" performing such acts. *Id.* § 1591(a)(2).

[their] website[s] to make sex trafficking easier," "the remedy is through legislation" to amend Section 230, "not through litigation." *Jane Doe No. 1*, 817 F. 3d at 29.

3. Congress responded by enacting the Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. No. 115-164, 132 Stat. 1253 (2018) (FOSTA). FOSTA sets forth "the sense of Congress that" "websites that promote and facilitate prostitution have been reckless in allowing the sale of sex trafficking victims," and that "section 230 of the [CDA] was never intended to provide legal protection to websites that unlawfully promote and facilitate prostitution and websites that facilitate traffickers in advertising the sale of unlawful sex acts with sex trafficking victims." *See* FOSTA § 2, 132 Stat. at 1253.

In order to "clarif[y]" existing law, FOSTA § 2, 132 Stat. at 1253, FOSTA made two primary statutory changes. First, FOSTA added 18 U.S.C. § 2421A to the criminal code. *See* FOSTA § 3(a), 132 Stat. at 1253–54 (codified at 18 U.S.C. § 2421A). Section 2421A proscribes "own[ing], manag[ing], or operat[ing] an interactive computer service . . . with the intent to promote or facilitate the prostitution of another person." 18 U.S.C. § 2421A(a).[3] A violation of § 2421A(a) is punishable by fine or up to ten years in prison. *Id.* Section 2421A also sets forth an

[3] The term "interactive computer service" in § 2421A is defined by reference to Section 230(f) of the CDA, where the term "interactive computer service" means "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions," 47 U.S.C. § 230(f)(2).

aggravated violation, allowing imprisonment for up to 25 years, if someone commits a violation of § 2421A(a) and either (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 [18 U.S.C. §] 1591(a)." *Id.* § 2421A(b). The statute provides for mandatory restitution for aggravated violations, and a person injured by an aggravated violation may recover civilly. *Id.* § 2421A(c), (d). Section 2421A also sets forth an affirmative defense: a person is not liable under § 2421A if "the promotion or facilitation of prostitution is legal in the jurisdiction where the promotion or facilitation was targeted." *Id.* § 2421A(e).

Second, FOSTA amended Section 230 of the CDA to clarify that Section 230 immunity does not apply to claims involving particular underlying violations of federal criminal law. Specifically, FOSTA clarified that Section 230 does not provide immunity from: (1) "any charge in a criminal prosecution brought under State law if the conduct underlying the charge would constitute a violation of section 2421A of Title 18, and promotion or facilitation of prostitution is illegal in the jurisdiction where the defendant's promotion or facilitation of prostitution was targeted"; (2) "any claim in a civil action brought under section 1595 of Title 18," the civil-recovery provision for violations of 18 U.S.C. § 1591, "if the conduct underlying the claim constitutes a violation of section 1591"; and (3) "any charge in a criminal prosecution brought under State law if the conduct underlying the charge would constitute a

violation of section 1591 of Title 18." *See* FOSTA § 4(a), 125 Stat. at 1254 (codified at 47 U.S.C. 230(e)(5)).

In addition to these changes, FOSTA defined "participation in a venture" in § 1591(a)(2)—a phrase that was previously undefined—as "knowingly assisting, supporting, or facilitating a violation" of § 1591(a)(1). FOSTA § 5, 132 Stat. at 1255. FOSTA also amended § 1595 to allow State attorneys generals to bring civil *parens patriae* suits for violations of § 1591. *Id.* § 6(a), 132 Stat. at 1255 (codified at 18 U.S.C. § 1595(d)).

B. Factual Background and Prior Proceedings

1. Plaintiffs are advocacy and human rights organizations, an Internet archival website, and two individuals.

Plaintiff Woodhull Freedom Foundation (Woodhull) is an advocacy organization whose "mission includes support for the health, safety, and protection of sex workers." JA129. Woodhull "strongly opposes sex trafficking or sexual assault in any form." *Id.* Woodhull advocates, through education, lobbying, and litigation efforts, "for the right to engage in consensual sexual activity." *Id.* As part of these efforts, Woodhull hosts an annual "Sexual Freedom Summit" to "bring[] together hundreds of educators, therapists, legal and medical professionals, and leaders of advocacy organizations to strategize, share information, and work collaboratively to protect" the "right to information, health, and pleasure." JA130–31. Woodhull

maintains a website through which it promotes its events, maintains a blog, and posts information and advocacy materials. *Id.*

Human Rights Watch is an advocacy and human rights organization "that monitors human rights conditions worldwide and advocates for the cessation and remediation of human rights violations worldwide." JA137. Human Rights Watch opposes sex trafficking and forced prostitution, and documents abuses against sex workers around the world. JA137–38. Because Human Rights Watch believes that the criminalization of sex work "impedes sex workers in finding protection and redress" for the human rights violations committed against them, it also advocates for the decriminalization of sex work. JA138. Human Rights Watch uses its website and other social media accounts to publish reports and research on prostitution and sex work. *Id.*

Plaintiff Jesse Maley, also known as Alex Andrews (Andrews), is a community organizer and advocate for "issues impacting sex workers." JA146. Andrews is a member of the board of directors for the Sex Workers Outreach Project USA, which is "focus[ed] on ending violence and stigma through education and advocacy." JA147. Andrews works as "an advocate and ally for sex workers," and also maintains a website, Rate That Rescue, which is a "community effort to help [sex workers] share information about" rescue organizations—such as substance abuse, domestic violence, and healthcare facilities—to inform sex workers about which organizations "they can rely on, and those they should avoid." JA148–49.

The Internet Archive "collects and displays web materials on behalf of the Library of Congress, the National Archives, most state archives and libraries, as well as universities and other countries." JA156–57. The Internet Archive maintains "snapshots" of content across the internet, including from websites such as Craigslist.com (Craigslist), and "has no practical ability to evaluate the legality of any significant portion of the third-party content that it archives and makes available." JA156–57.

Finally, Eric Koszyk is a licensed massage therapist who used Craigslist's "Therapeutic Services" advertising section to post advertisements for his massage business. JA144. Following the passage of FOSTA, Craigslist "shut down its Therapeutic Services section," *id.*, out of fear that the section could "be misused" for illegal advertisements, JA123. Koszyk attempted to "advertise therapeutic massages" in a separate section, but Craigslist blocked the posting. JA144.

2. Plaintiffs filed a pre-enforcement facial challenge against FOSTA, alleging that its criminal prohibition, § 2421A, violated the First Amendment by imposing a content-based restriction on speech. According to plaintiffs, "[t]he statutory language to 'promote or facilitate' extends to websites or individuals who engage in . . . speech advocating for the legalization of prostitution, harm reduction," or speech seeking to inform sex workers "of their legal rights, medical resources, or other informational material." JA47. Plaintiffs further alleged that § 2421A was unconstitutionally vague, and that it violated the Ex Post Facto clause. Plaintiffs moved for a preliminary

injunction, alleging irreparable harm from "FOSTA's chilling effect, and the need to self-censor." JA113.

The government opposed the motion for preliminary injunction and moved to dismiss. JA188. The government explained that plaintiffs lacked standing because their intended conduct is not proscribed by § 2421A or § 1591, and they therefore face no risk of prosecution. *See* JA196–97. The government further contended that plaintiffs' arguments failed on the merits in any event, as FOSTA applies only to conduct that is not protected by the First Amendment: owning, operating, or maintaining an interactive computer service to intentionally promote or facilitate illegal prostitution and sex trafficking. *See* JA202.

3. The district court denied plaintiffs' motion for preliminary injunction and dismissed the complaint, finding that plaintiffs lacked standing because they did not face a credible threat of prosecution as a result of FOSTA. JA388. The district court noted several "key textual indications that make clear that FOSTA targets specific acts of illegal prostitution—not the abstract topic of prostitution or sex work," and thus did not apply to plaintiffs' intended activities. JA408. For example, "the text of Section 2421A criminalizes the conduct of owning, operating, or managing an interactive computer service with the intent to promote or facilitate 'the *prostitution of another person*,'" language that was "plainly calculated to ensnare only specific unlawful acts with respect to a particular individual." *Id.* (emphasis in original). And the statute provides for an affirmative defense if "prostitution is legal 'in the jurisdiction where

the promotion or facilitation was targeted,'" which also indicated the statute is "tether[ed]" to the promotion or facilitation of "specific crimes." JA408–09. The district court further noted the law's "mens rea requirement, which only further narrows" § 2421A's scope by requiring the government to prove "not simply that the defendant was aware of a potential result of the criminal offense, but instead that the defendant intended to 'explicitly further[]' a specified unlawful act." JA409 (brackets in original) (quoting *United States v. Brown*, 186 F.3d 661, 670 (5th Cir. 1999)). The court found that, in using their websites to advocate for the rights and safety of sex workers, Woodhull, Human Rights Watch, and Andrews could not "possibly be said to act 'with the intent to promote or facilitate the prostitution of another person' in violation of Section 2421A." JA412.

Lastly, the district court held that Koszyk's alleged injury—Craigslist's removal of his lawful advertisement—was insufficient to confer standing because Craigslist is an independent third party not before the court who could "exercise broad and legitimate discretion" over its advertisements that the court could neither "control [nor] predict." JA413–14 (quotation marks omitted).

SUMMARY OF ARGUMENT

A. Plaintiffs lack standing to bring a "pre-enforcement facial challenge" (Br. 3) to FOSTA. As the district court correctly concluded, plaintiffs' conduct is not "proscribed by [the] statute," and plaintiffs face no "credible threat of prosecution thereunder." *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979).

Absent a "sufficiently imminent" threat of prosecution, plaintiffs do not have an Article III injury-in-fact. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159 (2014).

1. Plaintiffs primarily allege a fear of prosecution under 18 U.S.C. § 2421A, the new criminal provision added by FOSTA. Section 2421A prohibits "own[ing], manag[ing], or operat[ing]" "an interactive computer service" "with the intent to promote or facilitate the prostitution of another person," *id.* § 2421A(a), and it is an affirmative defense if "the promotion or facilitation of prostitution is legal in the jurisdiction where the promotion or facilitation was targeted," *id.* § 2421A(e). The district court correctly recognized that the plain terms of this provision only prohibit owning, operating, or managing an interactive computer service to intentionally promote or facilitate "specific unlawful acts" of prostitution or sex-trafficking. JA408. The statute requires that a person act "with the intent to promote or facilitate *the* prostitution of *another person*," 18 U.S.C. § 2421A(a) (emphasis added), and the promotion or facilitation must be unlawful in the relevant jurisdiction, *id.* § 2421A(e). The statute's aggravated-violation provision is similarly directed to specific, unlawful acts of prostitution or sex-trafficking with respect to particular individuals. *See id.* § 2421A(b) (enhancing the penalty if the violation "promotes or facilitates *the* prostitution of 5 or more *persons*" or constitutes sex-trafficking in violation of 18 U.S.C. § 1591(a) (emphases added)).

Plaintiffs' intended conduct is worlds away from the sex trafficking activities that led to the enactment of FOSTA, and it is manifestly not proscribed by § 2421A.

Plaintiffs advocate for the health and safety of sex workers, JA148–49, and archive internet materials on behalf of organizations such as the National Archives and the Library of Congress, JA156–57. Such activities cannot plausibly be claimed to constitute owning, managing, or operating an interactive computer service "with the intent to promote or facilitate the prostitution of another person" within the meaning of § 2421A. Plaintiffs insist that § 2421A targets "speech related to prostitution" (Br. 41), or the promotion of prostitution "as a general concept" (Br. 29), but this assertion is entirely divorced from § 2421A's actual text.

2. Plaintiffs' activities are also outside the scope of FOSTA's other statutory amendments. FOSTA amended 18 U.S.C. § 1591, a pre-existing federal criminal prohibition on sex trafficking, to define a previously undefined phrase in the statute ("participation in a venture") to mean "knowingly assisting, supporting, or facilitating" a violation of § 1591. FOSTA § 5, 132 Stat. at 1255 (codified at 18 U.S.C. § 1591(e)(4)) (emphasis added). Plaintiffs' conduct was not sex trafficking under § 1591 prior to FOSTA, and plaintiffs' conduct has not become sex trafficking under § 1591 now that FOSTA clarified a previously-undefined phrase in the statute as including a knowledge standard.

Nor is plaintiffs' conduct affected by FOSTA's amendments to Section 230 of the Communications Decency Act of 1996, 47 U.S.C. § 230(a). FOSTA amended Section 230 to clarify that its immunity does not extend to three types of judicial actions involving criminal conduct: (1) civil actions under § 1595 "if the conduct

underlying the claim constitutes a violation of section 1591"; (2) "prosecution[s] brought under State law if the conduct underlying the charge would constitute a violation of section 1591"; and (3) "prosecution[s] brought under State law if the conduct underlying the charge would constitute a violation of § 2421A of Title 18, and promotion or facilitation of prostitution is illegal in the jurisdiction where the defendant's promotion or facilitation of prostitution was targeted." 47 U.S.C. § 230(e)(5). To lose their Section 230 immunity, therefore, a party's conduct must "constitute a violation of section 2421A" or § 1591. *See id.* § 230(e)(5). Because plaintiffs' conduct does not even arguably violate § 2421A or § 1591, plaintiffs cannot credibly fear prosecution as a result of FOSTA's amendments to Section 230. The district court correctly held that plaintiffs lack an Article III injury-in-fact.

B. The district court also correctly dismissed plaintiff Eric Koszyk, a licensed massage therapist, for lack of standing. Koszyk does not allege a fear of prosecution under FOSTA; rather, he alleges that following FOSTA's enactment, the website Craigslist.com stopped allowing advertisements for "Therapeutic Services," and thus no longer allows Koszyk to post advertisements for his licensed massage-therapy business. As the district court explained, Koszyk's alleged injury is the result of the discretionary decisions of a third party that is not before the court. His alleged harm is not fairly traceable to the government's enactment of FOSTA (which, as plaintiffs agree, does not proscribe Koszyk's advertisements), nor is it redressable in this action.

STANDARD OF REVIEW

This Court reviews de novo a district court's grant of a motion to dismiss for lack of standing. *See Information Handling Servs., Inc. v. Defense Automated Printing Servs.*, , 338 F.3d 1024, 1029 (D.C. Cir. 2003).

ARGUMENT

I. Plaintiffs Lack Standing to Challenge FOSTA

"To establish Article III standing, a plaintiff must show (1) an 'injury in fact,' (2) a sufficient 'causal connection between the injury and the conduct complained of,' and (3) a 'likel[ihood]' that the injury 'will be redressed by a favorable decision.'" *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 157–58 (2014) (alteration in original) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992)). "The party invoking federal jurisdiction bears the burden of establishing these elements." *Defenders of Wildlife*, 504 U.S. at 560.

The district court correctly held that plaintiffs cannot satisfy these requirements. Plaintiffs Woodhull, Human Rights Watch, Andrews, and the Internet Archive lack injury-in-fact because FOSTA clearly does not prohibit their intended conduct, and thus they have no credible fear of prosecution pursuant to its terms. Plaintiff Koszyk lacks standing because his alleged injury is the result of the independent actions of a third-party that is not before the court, and is neither fairly traceable to the government's enactment of FOSTA nor redressable here.

A. Plaintiffs Lack a Credible Fear of Prosecution Under FOSTA

Plaintiffs bring a "pre-enforcement facial challenge" to FOSTA. Br. 3. In order to demonstrate an injury-in-fact before the statute has been enforced against them, plaintiffs must allege "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." *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979) (emphasis added). "If the threat [of enforcement] is imagined or wholly speculative, the dispute does not present a justiciable case or controversy." *Seegars v. Gonzales*, 396 F.3d 1248, 1252 (D.C. Cir. 2005).

The district court correctly held that plaintiffs' actions are not "proscribed by" FOSTA, *Babbitt*, 442 U.S. at 298, and thus plaintiffs lack any credible threat of enforcement as a result of its provisions. It is "fundamental to a pre-enforcement challenge" that there is "some desired conduct by the plaintiff that might trigger an enforcement action in the first place." *Matthew A. Goldstein, PLLC v. U.S. Dep't of State*, 851 F.3d 1, 4 (D.C. Cir. 2017). Woodhull, Human Rights Watch, and Andrews engage in advocacy and other educational work in order to protect the health, safety, and human rights of sex workers, and the Internet Archive indiscriminately collects and archives screen captures of internet webpages on behalf of institutions such as the Library of Congress and the National Archives. *See, e.g.*, JA129–30, 138–39, 147–50, 156. This activity is wholly outside of FOSTA's ambit. It is not proscribed by § 2421A, which prohibits owning, managing, or operating an interactive computer

service with the intent to promote or facilitate specific instances of illegal prostitution. Nor is it prohibited by § 1591, the pre-existing federal criminal prohibition on sex-trafficking. And because FOSTA amended Section 230 immunity only to permit civil claims under § 1595 "if the conduct underlying the claim constitutes a violation of section 1591," and State criminal prosecutions "if the conduct underlying the charge would constitute a violation of section 1591" or § 2421A, *see* 47 U.S.C. § 230(e)(5), plaintiffs do not face a reasonable fear of prosecution as a result of those amendments, either.

1. Plaintiffs' Intended Conduct Is Not Proscribed by § 2421A

In challenging the district court's standing determination, plaintiffs primarily allege a threat of prosecution under 18 U.S.C. § 2421A, the new criminal provision enacted by FOSTA. *See* Br. 28, 41–47. Section 2421A proscribes "own[ing], manag[ing], or operat[ing]" "an interactive computer service" "with the intent to promote or facilitate the prostitution of another person," if "the promotion or facilitation of prostitution" is not legal in "the jurisdiction where the promotion or facilitation was targeted." 18 U.S.C. § 2421A(a), (e).

a. As the district court correctly concluded, "the text of Section 2421A criminalizes the conduct of owning, operating, or managing an interactive computer service with the intent to" "promote or facilitate *specific acts* of prostitution in violation of state or federal law." JA408, 410 (emphasis added). The statute does not impose liability based on the mere intent to promote or facilitate "prostitution" in the

abstract. The statute requires intent to promote or facilitate "*the* prostitution of *another person*." 18 U.S.C. § 2421A(a) (emphasis added). Moreover, promotion or facilitation of prostitution must be unlawful in "the jurisdiction where the promotion or facilitation was targeted." *Id.*§ 2421A(e); *see* JA408–09. This language makes clear that § 2421A is confined to the promotion or facilitation of specific, unlawful acts of prostitution. That reading is further confirmed by the statute's aggravated-violation provision, which enhances the penalty if the violation "promotes or facilitates *the* prostitution of 5 or more *persons*," 18 U.S.C. § 2421A(b)(1) (emphasis added), or contributes to sex trafficking in violation of § 1591(a), an offense that requires showing that "force, fraud," or coercion was used "to cause *the person* to engage in a commercial sex act," or that the victim was under the age of 18, *id.* § 1591(a) (emphasis added); *see id.* § 2421A(b)(2). Taken as a whole, § 2421A is "plainly calculated" to reach owning, managing, or operating an interactive computer service to intentionally promote or facilitate "specific unlawful acts" of prostitution or sex-trafficking "with respect to a particular individual." JA408.

This interpretation of the statute's text is consistent with FOSTA's statutory purpose. Congress enacted FOSTA because it recognized that anonymous "classified advertising websites" had become "one [of] the primary channels of sex trafficking," and a congressional investigation had determined that that "[s]ome websites," such as Backpage.com, had "purposely conceal[ed] illegality in order to profit off of advertisements" for illegal prostitution and sex trafficking. *See* H.R. Rep. No. 115-

572, pt. 1, at 3, 5 (2018) (House Report). Although States had attempted to sue Backpage for its role in facilitating the sale of sex trafficking victims, courts had dismissed those suits as inconsistent with Section 230 of the CDA, which immunizes interactive computer services from certain suits by States and private parties. *Id.* at 4–5; *see also Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12, 22 (1st Cir. 2016). Congress enacted FOSTA in explicit response to these court decisions, so that "bad-actor websites" could be held accountable for owning, managing, or operating an interactive computer service to intentionally promote or facilitate specific, unlawful instances of prostitution or sex-trafficking. *See* House Report 6; *see also id.* at 4–5. The district court's interpretation of § 2421A is faithful to these legislative concerns.

b. Plaintiffs' conduct is not prohibited by § 2421A. Woodhull and Human Rights Watch allege that they use their websites to advocate for the health, safety, and human rights of sex workers, as well as the decriminalization of consensual commercial sex work. *See* JA129–31, 137–39.[4] Similarly, Andrews operates a website that collects reviews of rescue resources for sex workers, such as housing, rehabilitation, and domestic-violence facilities. *See* JA148–49; *see also* Br. 41–44

[4] Although all of the plaintiffs other than Koszyk claim to fear that they will be prosecuted under § 2421A, it is not clear whether all of them own, manage, or operate an "interactive computer service[]" as that term is defined in Section 230 of the CDA. *See, e.g.*, JA138–39 (alleging that Human Rights Watch worries that the "websites that host" their reports "may be inhibited from doing so on the basis of" § 2421A).

(asserting plaintiffs' intent to advocate to "improve the lives, health, safety, and well-being of sex workers").

These activities cannot plausibly be described as owning, operating, or managing an interactive computer service "with the intent to promote or facilitate" specific instances of the illegal "prostitution of another person." 18 U.S.C. § 2421A; *see* JA412. Advocacy for the *decriminalization* of an activity does not suggest any intent to encourage violation of the law. (For example, no one would think that members of Congress who advocate for the decriminalization of marijuana are thereby attempting to encourage violations of existing marijuana laws.) Similarly, an individual who advocates for the safety or well-being of sex workers, as a social group, does not cause or contribute to the accomplishment of a specific instance of illegal prostitution, let alone act "*with the intent*" to do so, the mens rea standard that § 2421A requires. *See* JA409–12. As Senator Blumenthal (a primary sponsor of the legislation that became FOSTA) explained in urging the bill's passage, FOSTA "was not designed to target websites that spread harm reduction information, and the language of the bill makes that clear." 164 Cong. Rec. S1852 (daily ed. Mar. 21, 2018).

The Internet Archive's conduct is similarly not prohibited by § 2421A. The Internet Archive indiscriminately captures materials from the internet to archive on behalf of organizations such as the National Archives and the Library of Congress, with "no practical ability to evaluate the legality" of that content. JA156–57. In broadly capturing materials on the internet, the Internet Archive does not operate a

website "*with the intent* to promote or facilitate the prostitution of another person." § 2421A(a) (emphasis added); *see* JA414. Indeed, in broadly capturing materials from the internet, the Internet Archive potentially archives a wide range of material prohibited by federal law. Section 230 immunity has never restricted the enforcement of federal criminal law, 47 U.S.C. § 230(e)(1), but the Internet Archive presumably does not fear federal prosecution for its archiving of this content for the same reason its actions are not proscribed by § 2421A: it lacks the required mens rea.

c. Plaintiffs' contrary arguments rest on a mischaracterization of § 2421A. At bottom, plaintiffs insist that their advocacy activity is proscribed by § 2421A because the statute targets "speech related to prostitution" (Br. 41), or the promotion of prostitution "as a general concept" (Br. 29), rather than specific, unlawful acts of prostitution. As the district court explained, however, this argument "ignore[s] key textual" provisions of § 2421A. JA408.

Section 2421A is directed to the conduct of owning, managing, or operating an "interactive computer service," 18 U.S.C. § 2421A; it is not directed to "speech" in the abstract (Br. 41). And in order to violate the statute, an individual must own, manage, or operate an interactive computer service "with the intent" "to promote or facilitate" specific, unlawful acts of prostitution or sex trafficking. As discussed above, § 2421A uses the phrase "*the* prostitution of another person," 18 U.S.C. § 2421A(a) (emphasis added), and the promotion or facilitation of prostitution must be illegal in "the jurisdiction where the promotion or facilitation was targeted," *id.*

§ 2421A(e). The statute's aggravated-violation provision is similarly focused on specific, unlawful acts with respect to particular individuals. *See id.* § 2421A(b) (using phrase "*the* prostitution of 5 or more *persons*," and cross-referencing § 1591(a), which proscribes trafficking a person to engage in a commercial sex act through the use of force, fraud, or coercion, or where the victim is a minor). Taken as a whole, the text of § 2421A cannot reasonably be read to criminalize "speech related to prostitution" (Br. 41) or the promotion of prostitution as a "concept" (Br. 29). Nor would such a reading be consistent with FOSTA's purpose or context. *See supra* pp. 17–18.

For similar reasons, plaintiffs' arguments with respect to the terms "promote" and "facilitate" in § 2421A are unavailing. Plaintiffs argue that, because those terms are undefined in the statute, they are subject to broad interpretations that could encompass their advocacy and educational activities. *See* Br. 28–31. But here again, plaintiffs mischaracterize the statutory text. To violate § 2421A, a person must own, operate, or manage an interactive computer service "*with the intent* to promote or facilitate *the* prostitution of another person." 18 U.S.C. § 2421A(a) (emphasis added). The terms "promote" and "facilitate" are thus "tether[ed]" to the remaining statutory requirements, including the mens rea requirement, and the requirement that the promotion or facilitation be directed to a specific, unlawful instance of prostitution. JA 408–09. Thus, even if the terms "promote" or "facilitate" in § 2421A have the broad meaning that plaintiffs ascribe to them when viewed in isolation, the statute still cannot be read to encompass plaintiffs' advocacy and educational activities because

plaintiffs do not act to intentionally promote or facilitate any specific, unlawful instance of prostitution or sex trafficking.

Plaintiffs' contention that § 2421A criminalizes "speech related to prostitution" (Br. 41) is untenable for the additional reason that § 2421A's criminal prohibition is substantially similar to an existing statute, the Travel Act, 18 U.S.C. § 1952, which was first enacted in 1961. The Travel Act makes it a crime, punishable for up to five years in prison, to use a facility in interstate commerce, such as the Internet, "with intent to" "promote, manage, establish, carry on, or facilitate the promotion . . . of any unlawful activity," *id.* § 1952(a)(3), including "prostitution offenses in violation of the laws of the State in which they are committed or of the United States," *id.* § 1952(b). Like § 2421A, therefore, the Travel Act prohibits using the internet "with intent to" "promote . . . or facilitate the promotion" of illegal "prostitution offenses." *Id.* The Travel Act has been on the books for over fifty years, but plaintiffs do not cite (and the government is not aware of) any decision interpreting the Travel Act as prohibiting advocacy or education about "prostitution" as a concept or subject matter. That a substantially similar statute has been law for over fifty years, but has never been held or even suggested to proscribe such conduct, further demonstrates that plaintiffs' conduct is outside the scope of § 2421A.

Plaintiffs insist that § 2421A must apply more broadly than the Travel Act (and thus encompass their activities) because if § 2421A and the Travel Act prohibit the same conduct, then § 2421A is "gratuitous surplusage." Br. 32. This is incorrect. In

enacting FOSTA, Congress separated out for an independent criminal prohibition conduct specific to the internet and illegal prostitution. In so doing, Congress provided for mandatory restitution for sex-trafficking victims, as well as for a higher term of imprisonment: up to ten or twenty-five years, as opposed to only five. *Compare* 18 U.S.C. § 2421A(a), (b), *with id.* § 1952. Congress was also able to more precisely amend Section 230 of the CDA to make clear that Section 230 does not immunize websites from state criminal prosecutions "if the conduct underlying the charge would constitute a violation of section 2421A." 47 U.S.C. § 230(e)(5)(C). Section 2421A thus furthers the purposes of FOSTA: clarifying exiting law, providing restitution for sex-trafficking victims, and better allowing States and victims to fight online sex trafficking. *See* House Report at 3–5; *see also* 164 Cong. Rec. S1851 (daily ed. Mar. 21, 2018) (statement of Sen. Blumenthal). It is not "surplusage."

Plaintiffs also insist that § 2421A must prohibit speech more broadly than the Travel Act because § 2421A "targets online endeavors, which necessarily involve solely speech," whereas the Travel Act "prohibits only conduct." Br. 33. Plaintiffs cite no authority for this proposition, and the distinction fails on its own terms. The Travel Act applies to facilities in interstate commerce, which includes the internet as well as phones and other communication devices. *See, e.g.*, *United States v. Halloran*, 821 F.3d 321, 342 (2d Cir. 2016) (explaining that, under the "Travel Act, the government was required to prove that [the defendant] traveled interstate or used a facility in interstate commerce (e.g., the telephone or the internet)").

Lastly, plaintiffs' reliance (Br. 29–30) on the Ninth Circuit's decision in *United States v. Sineneng-Smith*, 910 F.3d 461 (9th Cir. 2018), is misplaced. That case involved an immigration statute, 8 U.S.C. § 1324(a)(1)(A)(iv), which prohibits "'encourag[ing] or induc[ing] an alien to come to, enter, or reside in the United States, . . . knowing or in reckless disregard of the fact that such coming to, entry, or residence is or will be in violation of law.'" 910 F.3d at 471 (quoting 8 U.S.C. § 1324(a)(1)(A)(iv)). In holding the statute overbroad under the First Amendment, the Ninth Circuit focused on the statute's use of the broad term "encourage," and explained that the statute would prohibit encouraging an immigrant to stay in violation of civil law, not just criminal law. *Id.* at 482. Thus, a grandmother who "encourage[d]" "her grandson to overstay his visa" by telling him 'I encourage you to stay'" would be in violation of the statute. *Id.* at 482–83. Section 2421A bears no resemblance to the statute at issue in *Sineneng-Smith*; it uses entirely different statutory terms, in a different statutory context, to prohibit conduct relating to the ownership, operation, or management of an interactive computer service. The Ninth Circuit's interpretation of the immigration statute at issue in *Sineneng-Smith* does not aid plaintiffs here.

2. Plaintiffs' Actions Are Not Within the Scope of FOSTA's Other Provisions

Plaintiffs' intended actions are also not implicated by FOSTA's other statutory amendments.

a. First, plaintiffs conclusorily assert (Br. 34) that they face an increased risk of federal prosecution under 18 U.S.C. § 1591 as a result of FOSTA. This is plainly incorrect. Section 1591(a) is a federal criminal prohibition on sex-trafficking. Prior to FOSTA, as now, it prohibits "knowingly" performing specified actions, such as recruiting, harboring, advertising, or soliciting, "by any means a person," "knowing, or, except where the act . . . is advertising, in reckless disregard of the fact, that means of force, threats of force, fraud," or coercion "will be used to cause the person to engage in a commercial sex act, or that the person has not attained the age of 18 years and will be caused to engage in a commercial sex act." 18 U.S.C. § 1591(a)(1). The statute also prohibits (both prior to FOSTA and now) "knowingly" benefitting "financially or by receiving anything of value, from participation in a venture which has engaged in" such activity. *Id.* § 1591(a)(2).

FOSTA amended § 1591 to define the pre-existing term "participation in a venture" in § 1591(a)(2), which was previously undefined, as "knowingly assisting, supporting, or facilitating a violation of subsection (a)(1)." FOSTA § 5, 132 Stat. at 1255 (codified at § 1591(e)(4)).

Plaintiffs' advocacy, educational, and archiving activity was not sex trafficking under § 1591 prior to FOSTA, and it has not been transformed into sex trafficking under § 1591 by FOSTA's clarification of a pre-existing statutory phrase. Plaintiffs conclusorily assert that they now fear prosecution because FOSTA "expand[ed] [§ 1591's] reach to include 'participation in a venture' based on 'reckless disregard' of

activities" in support of sex-trafficking. Br. 34. But this is plainly a misreading of FOSTA's definition of "participation in a venture" which, as explained above, defined the phrase to mean "*knowingly* assisting, supporting, or facilitating a violation of subsection (a)(1)." FOSTA § 5, 132 Stat. at 1255 (emphasis added). Plaintiffs' argument with respect to § 1591 is meritless.

b. Second, plaintiffs contend that, even if their conduct does not violate § 2421A or § 1591, they fear prosecution as a result of FOSTA's "reduction of" Section 230 immunity. Br. 43–44. Plaintiffs' argument is again divorced from FOSTA's statutory text. FOSTA amended Section 230 to carve out three types of claims, all of which involve underlying violations of criminal statutes: (1) civil actions under § 1595 "if the conduct underlying the claim constitutes a violation of section 1591"; (2) "prosecution[s] brought under State law if the conduct underlying the charge would constitute a violation of section 1591"; and (3) "prosecution[s] brought under State law if the conduct underlying the charge would constitute a violation of § 2421A of Title 18, and promotion or facilitation of prostitution is illegal in the jurisdiction where the defendant's promotion or facilitation of prostitution was targeted." 47 U.S.C. § 230(e)(5). Thus, to lose their Section 230 immunity for civil actions or State prosecutions, plaintiffs' conduct must "constitute[] a violation of section 1591" or § 2421A. *Id.* For the reasons set forth above, plaintiffs' intended conduct does not violate either § 1591 or § 2421A, and thus plaintiffs' Section 230

immunity remains intact. Plaintiffs' advocacy and educational activities are not within FOSTA's scope.

3. Because Plaintiffs' Conduct Is Clearly Outside of FOSTA's Ambit, the District Court Correctly Held That Plaintiffs Lack Injury-in-Fact

For the reasons set forth above, plaintiffs have not alleged any "desired conduct . . . that might trigger" enforcement under FOSTA. *Matthew A. Goldstein, PLLC*, 851 F.3d at 4. Because plaintiffs' "activities, as they have described them, would not bring them within the ambit of the statute[]," they lack a credible fear of the statute being enforced against them sufficient to satisfy Article III. *American Library Ass'n v. Barr*, 956 F.2d 1178 (D.C. Cir. 1992). The district court thus correctly dismissed plaintiffs' pre-enforcement challenge for lack of standing.

Plaintiffs' arguments to the contrary are incorrect. First, plaintiffs contend that the district court applied the wrong standing analysis because a "relaxed" analysis applies in the First Amendment context, and the district court should have judged plaintiffs' standing based on "plaintiffs' interpretation of the statute." *See* Br. at 5, 22–23. But the Supreme Court has long made clear that, even in the First Amendment context, a plaintiff has standing to seek pre-enforcement review only if the statute's enforcement is "sufficiently imminent." *Susan B. Anthony List*, 573 U.S. at 159. "It is the enforcement of an allegedly unconstitutional statute, 'past or immediately threatened,' that causes the injury entitling those in the line of fire to seek judicial relief." *American Library Ass'n*, 956 F.2d at 1196 (quoting *United Presbyterian Church in*

the U.S.A. v. Reagan, 738 F.2d 1375, 1378 (D.C. Cir. 1984) (Scalia, J.)). A plaintiff's "subjective chill, fear, is not sufficient" to constitute an injury-in-fact. *Id.* Thus, to the extent a plaintiff "misunderstand[s]" a relevant statutory provision, a subjective fear of prosecution arising from that misunderstanding does not suffice to create an Article III injury. *See Matthew A. Goldstein, PLLC*, 851 F.3d at 6–7 (affirming dismissal of pre-enforcement challenge for lack of standing where plaintiff's fear of enforcement was "based on a misunderstanding" of a State Department letter and the relevant regulation).

Contrary to plaintiffs' assertion (Br. 27), this does not "conflat[e]" the standings and merits inquiries. When a plaintiff's theory of injury is that the *defendant* has violated a statute and caused the plaintiff harm, the court assumes at the standing stage that the plaintiff's legal theory is correct because, "[w]ere that not the case, [the court] would effectively be deciding the merits under the guise of determining the plaintiff's standing." *Information Handling Servs., Inc. v. Defense Automated Printing Servs.*, 338 F.3d 1024, 1030 (D.C. Cir. 2003); *see also American Fed'n of Gov't Emps. AFL-CIO v. Pierce*, 697 F.2d 303, 304–05 (D.C. Cir. 1982) (per curiam) (assuming plaintiff's legal theory was correct for purposes of standing where plaintiff alleged "[t]he Secretary's actions injured [the plaintiff] by depriving him of [a] specific statutory right"). But the same is not true in a pre-enforcement challenge. In a pre-enforcement challenge, the plaintiff's asserted injury is that there is an "imminent threat" that a statute will be enforced against *them*. *Susan B. Anthony List*, 573 U.S. at 156, 159. The standing

inquiry itself in such a suit demands a determination of whether the plaintiff's conduct is "*proscribed by a statute*, and there exists a credible threat of prosecution thereunder," because if it is not proscribed, then the plaintiff does not have an Article III injury-in-fact. *United Farm Workers*, 442 U.S. at 298 (emphasis added). It is "fundamental to a pre-enforcement challenge" that a plaintiff allege "conduct . . . that might trigger an enforcement action in the first place." *Matthew A. Goldstein, PLLC*, 851 F.3d at 4. The district court did not conflate standing with the merits in determining whether plaintiffs' conduct was within the scope of § 2421A; the district court assessed plaintiffs' standing under the principles established by the Supreme Court and this Court.

Second, plaintiffs are also wrong that standing exists merely because FOSTA amended Section 230 to allow States and private parties to bring suits against interactive computer services under certain circumstances. Br. 24. As discussed above, FOSTA clarified that Section 230 immunity does not apply in suits brought by States and private litigants where the underlying conduct would "constitute[] a violation of section 1591" or § 2421A. *See supra* p. 26. Because plaintiffs do not have a credible fear of prosecution under § 1591 or § 2421A, they cannot credibly fear prosecution as a result of FOSTA's circumscribed amendments to Section 230, either. To the extent plaintiffs are concerned that a State or private litigant might attempt to bring a lawsuit against them in the future *notwithstanding the text of FOSTA*, that concern cannot provide plaintiffs with standing to sue the federal government here.

First, that fear is entirely conjectural, and "require[s] guesswork as to how independent decisionmakers will exercise their judgment." *Cf. Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 1150 (2013). Second, even if a hypothetical third party brought such a suit, plaintiffs' injury in that circumstance would not be caused by FOSTA or the federal government, but would rather be the result of the third party's decision to bring a suit that is unsupported by FOSTA's statutory text.

The district court correctly dismissed Woodhull, Human Rights Watch, and Andrews for lack of standing.

B. Plaintiff Koszyk's Alleged Injury Is Neither Fairly Traceable to FOSTA Nor Redressable Here.

The district court also correctly dismissed plaintiff Koszyk for lack of standing. Koszyk does not allege a fear of prosecution under § 2421A or § 1591, nor does he allege a fear of civil enforcement or State criminal prosecution. Rather, Koszyk alleges that he operates a licensed massage therapy business and has historically advertised his business on Craigslist.com, but following FOSTA, Craigslist "shut down its Therapeutic Services section" where Koszyk used to advertise and has not allowed him "to advertise therapeutic massages." *See, e.g.* JA144–45. Koszyk claims that this injury is a result of FOSTA's enactment, and that it "would thus be redressed by a ruling enjoining FOSTA because it would ensure that Craigslist can make future decisions about whether to host his advertisements free from the coercive, censorious effect of FOSTA." Br. 51.

These allegations do not establish Koszyk's standing to sue the federal government. Article III standing requires an injury that is "'fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court.'" *Defenders of Wildlife*, 504 U.S. at 560 (quoting *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 41–42 (1976)). When "a plaintiff's asserted injury arises from the government's allegedly unlawful regulation . . . of *someone else*, much more is needed" to satisfy Article III. *Id.* at 562. "In that circumstance, causation and redressability ordinarily hinge on the response of the regulated . . . third party to the government action." *Id.* Because standing in this circumstance "depends on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict," standing in such circumstances is "substantially more difficult" to establish. *Id.*

Koszyk cannot meet this standard. It is not disputed that Koszyk's advertisements are not proscribed by FOSTA, and thus Craigslist did not need to remove Koszyk's advertisements as a result of FOSTA. Rather, Craigslist—a "third party not before the court," *Defenders of Wildlife*, 504 U.S. at 560—chose to categorically ban *all* advertisements for "Therapeutic Services" on its websites out of concern that its service could be "misused." *See* JA025, 123, 144. Craigslist's decision to categorically remove legal advertisements for licensed massage therapy businesses such as Koszyk's, rather than take other measures to ensure that advertisements for

therapeutic massages on its website are not for illegal prostitution or sex trafficking, is Craigslist's own independent business decision, made in its "broad and legitimate" discretion in operating its website. *Defenders of Wildlife*, 504 U.S. at 562.

Moreover, it is entirely speculative that an injunction directed at FOSTA would cause Craigslist to reverse course and allow advertisements for therapeutic massages. As discussed above, Section 230 has never immunized websites from prosecution under federal law, and federal law prior to FOSTA's enactment—§ 1591(a) and the Travel Act—criminalized knowingly advertising sex-trafficking or using a website to intentionally promote illegal prostitution. Even in the absence of FOSTA, therefore, Craigslist would be vulnerable to federal prosecution if it were to operate its website with the intent to knowingly promote or facilitate specific unlawful acts of prostitution or sex trafficking. Indeed, Craigslist acted prior to FOSTA to prohibit certain forms of advertisements "due to concerns about sex trafficking." *Jane Doe No. 1*, 817 F.3d at 16 (explaining that "[i]n 2010," Craigslist.com "shuttered its adult advertising section due to concerns about sex trafficking"). If Craigslist fears that bad actors might use its website to post advertisements for illegitimate businesses, and has made the business decision to categorically ban advertisements for certain topics as a result, it is entirely speculative that an order enjoining FOSTA, by itself, would cause Craigslist to reverse course. This Court "cannot presume either to control or predict" how Craigslist would choose to operate its own business if FOSTA were enjoined. *Defenders of Wildlife*, 504 U.S. at 560. Craigslist's decision to remove Koszyk's

advertisements for his licensed business does not provide him with standing to sue the federal government here.

II. Plaintiffs Are Not Entitled to an Injunction

Plaintiffs' summary request that this Court not only reverse the dismissal of their suit, but also award preliminary injunctive relief as well (Br. 53), is entirely without merit. In contrast to their presentation in the district court, where they devoted the bulk of their briefing to arguing the merits of their constitutional claims, *see, e.g.*, JA237–48, their merits "argument" in this Court consists of a single conclusory sentence, Br. 53 (asserting without support that "[p]laintiffs likely will prevail on their overbreadth, vagueness, and strict scrutiny challenges"). Plaintiffs' perfunctory allusion to their constitutional claims cannot demonstrate entitlement to the extraordinary relief of a preliminary injunction. Indeed, even if the district court had reached the merits below, which it did not, such a cursory reference to their constitutional claims would not suffice to preserve the issue on appeal. *See City of Waukesha v. EPA*, 320 F.3d 228, 250 n.22 (D.C. Cir. 2003) (explaining that an argument "raised in the opening brief only summarily, without explanation or reasoning . . . is waived").

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 8,121 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in Garamond 14-point font, a proportionally spaced typeface.

s/ Courtney L. Dixon
Courtney L. Dixon

CERTIFICATE OF SERVICE

I hereby certify that on April 15, 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. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

s/ Courtney L. Dixon
Courtney L. Dixon

ADDENDUM

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18 U.S.C. § 1591

§ 1591. Sex trafficking of children or by force, fraud, or coercion

(a) Whoever knowingly--

(1) in or affecting interstate or foreign commerce, or within the special maritime and territorial jurisdiction of the United States, recruits, entices, harbors, transports, provides, obtains, advertises, maintains, patronizes, or solicits by any means a person; or

(2) benefits financially or by receiving anything of value, from participation in a venture which has engaged in an act described in violation of paragraph (1),

knowing, or, except where the act constituting the violation of paragraph (1) is advertising, in reckless disregard of the fact, that means of force, threats of force, fraud, coercion described in subsection (e)(2), or any combination of such means will be used to cause the person to engage in a commercial sex act, or that the person has not attained the age of 18 years and will be caused to engage in a commercial sex act, shall be punished as provided in subsection (b).

(b) The punishment for an offense under subsection (a) is—

(1) if the offense was effected by means of force, threats of force, fraud, or coercion described in subsection (e)(2), or by any combination of such means, or if the person recruited, enticed, harbored, transported, provided, obtained, advertised, patronized, or solicited had not attained the age of 14 years at the time of such offense, by a fine under this title and imprisonment for any term of years not less than 15 or for life; or

(2) if the offense was not so effected, and the person recruited, enticed, harbored, transported, provided, obtained, advertised, patronized, or solicited had attained the age of 14 years but had not attained the age of 18 years at the time of such offense, by a fine under this title and imprisonment for not less than 10 years or for life.

(c) In a prosecution under subsection (a)(1) in which the defendant had a reasonable opportunity to observe the person so recruited, enticed, harbored, transported, provided, obtained, maintained, patronized, or solicited, the Government need not prove that the defendant knew, or recklessly disregarded the fact, that the person had not attained the age of 18 years.

(d) Whoever obstructs, attempts to obstruct, or in any way interferes with or prevents the enforcement of this section, shall be fined under this title, imprisoned for a term not to exceed 25 years, or both.

(e) In this section:

(1) the term "abuse or threatened abuse of law or legal process" means the use or threatened use of a law or legal process, whether administrative, civil, or criminal, in any manner for any purpose for which the law was not designed, in order to exert pressure on another person to cause that person to take some action or refrain from taking some action.

(2) The term "coercion" means—

(A) threats of serious harm to or physical restraint against any person

(B) any scheme, plan, or pattern intended to cause a person to believe that failure to perform an act would result in serious harm to or physical restraint against any person; or

(C) the abuse or threatened abuse of law or the legal process.

(3) The term "commercial sex act" means any sex act, on account of which anything of value is given to or received by any person.

(4) The term "participation in a venture" means knowingly assisting, supporting, or facilitating a violation of subsection (a)(1).

(5) The term "serious harm" means any harm, whether physical or nonphysical, including psychological, financial, or reputational harm, that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to perform or to continue performing commercial sexual activity in order to avoid incurring that harm.

(6) The term "venture" means any group of two or more individuals associated in fact, whether or not a legal entity.

18 U.S.C. § 1595

§ 1595. Civil remedy

(a) An individual who is a victim of a violation of this chapter may bring a civil action against the perpetrator (or whoever knowingly benefits, financially or by receiving anything of value from participation in a venture which that person knew or should have known has engaged in an act in violation of this chapter) in an appropriate district court of the United States and may recover damages and reasonable attorneys fees.

(b)(1) Any civil action filed under subsection (a) shall be stayed during the pendency of any criminal action arising out of the same occurrence in which the claimant is the victim.

(2) In this subsection, a "criminal action" includes investigation and prosecution and is pending until final adjudication in the trial court.

(c) No action may be maintained under subsection (a) unless it is commenced not later than the later of—

(1) 10 years after the cause of action arose; or
(2) 10 years after the victim reaches 18 years of age, if the victim was a minor at the time of the alleged offense.

(d) In any case in which the attorney general of a State has reason to believe that an interest of the residents of that State has been or is threatened or adversely affected by any person who violates section 1591, the attorney general of the State, as parens patriae, may bring a civil action against such person on behalf of the residents of the State in an appropriate district court of the United States to obtain appropriate relief.

18 U.S.C. § 1952

§ 1952. Interstate and foreign travel or transportation in aid of racketeering enterprises.

(a) Whoever travels in interstate or foreign commerce or uses the mail or any facility in interstate or foreign commerce, with intent to—

(1) distribute the proceeds of any unlawful activity; or
(2) commit any crime of violence to further any unlawful activity; or
(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform—

(A) an act described in paragraph (1) or (3) shall be fined under this title, imprisoned not more than 5 years, or both; or
(B) an act described in paragraph (2) shall be fined under this title, imprisoned for not more than 20 years, or both, and if death results shall be imprisoned for any term of years or for life.

(b) As used in this section (i) "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics or controlled substances (as defined in section 102(6) of the Controlled Substances Act), or prostitution offenses, in violation of the laws of the State in which they are committed or of the United States, (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States, or (3) any act which is indictable under subchapter II of chapter 53 of title 31, United States Code, or under section 1956 or 1957 of this title and (ii) the term "State" includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States.

. . . .

18 U.S.C. § 2421A

§ 2421A. Promotion or facilitation of prostitution and reckless disregard of sex trafficking

(a) In general. Whoever, using a facility or means of interstate or foreign commerce or in or affecting interstate or foreign commerce, owns, manages, or operates an interactive computer service (as such term is defined in section 230(f) of the Communications Act of 1934 (47 U.S.C. 230(f)), or conspires or attempts to do so, with the intent to promote or facilitate the prostitution of another person shall be fined under this title, imprisoned for not more than 10 years, or both.

(b) Aggravated violation. Whoever, using a facility or means of interstate or foreign commerce or in or affecting interstate or foreign commerce, owns, manages, or operates an interactive computer service (as such term is defined in section 230(f) of the Communications Act of 1934 (47 U.S.C. 230(f)), or conspires or attempts to do so, with the intent to promote or facilitate the prostitution of another person and—

(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),

shall be fined under this title, imprisoned for not more than 25 years, or both.

(c) Civil recovery. Any person injured by reason of a violation of section 2421A(b) may recover damages and reasonable attorneys' fees in an action before an appropriate United States district court.

(d) Mandatory restitution. Notwithstanding sections 3663 or 3663A and in addition to any other civil or criminal penalties authorized by law, the court shall order restitution for any violation of subsection (b)(2). The scope and nature of such restitution shall be consistent with section 2327(b).

(e) Affirmative defense. It shall be an affirmative defense to a charge of violating subsection (a), or subsection (b)(1) where the defendant proves, by a preponderance of the evidence, that the promotion or facilitation of prostitution is legal in the jurisdiction where the promotion or facilitation was targeted.

47 U.S.C. § 230

§ 230. Protection for private blocking and screening of offensive material

(a) Findings

The Congress finds the following:

(1) The rapidly developing array of Internet and other interactive computer services available to individual Americans represent an extraordinary advance in the availability of educational and information resources to our citizens.

(2) These services offer users a great degree of control over the information that they receive, as well as the potential for even greater control in the future as technology develops.

(3) The Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.

(4) The Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation.

(5) Increasingly Americans are relying on interactive media for a variety of political, educational, cultural, and entertainment services.

(b) Policy

It is the policy of the United States—

(1) to promote the continued development of the Internet and other interactive computer services and other interactive media;

(2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation;

(3) to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services;

(4) to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material; and

(5) to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.

(c) Protection for "Good Samaritan" blocking and screening of offensive material

(1) Treatment of publisher or speaker

No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.

(2) Civil liability

No provider or user of an interactive computer service shall be held liable on account of—

(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or

(B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).

(d) Obligations of interactive computer service

. . . .

(e) Effect on other laws

(1) No effect on criminal law

Nothing in this section shall be construed to impair the enforcement of section 223 or 231 of this title, chapter 71 (relating to obscenity) or 110 (relating to sexual exploitation of children) of Title 18, or any other Federal criminal statute.

(2) No effect on intellectual property law

Nothing in this section shall be construed to limit or expand any law pertaining to intellectual property.

(3) State law

Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section. No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.

(4) No effect on communications privacy law

Nothing in this section shall be construed to limit the application of the Electronic Communications Privacy Act of 1986 or any of the amendments made by such Act, or any similar State law.

(5) No effect on sex trafficking law

Nothing in this section (other than subsection (c)(2)(A)) shall be construed to impair or limit—

(A) Any claim in a civil action brought under section 1595 of Title 18, if the conduct underlying the claim constitutes a violation of section 1591 of that title;

(B) Any charge in a criminal prosecution brought under State law if the conduct underlying the charge would constitute a violation of section 1591 of Title 18; or

(C) Any charge in a criminal prosecution brought under State law if the conduct underlying the charge would constitute a violation of section 2421A of Title 18, and promotion or facilitation of prostitution is illegal in the jurisdiction where the defendant's promotion or facilitation of prostitution was targeted.