

ORAL ARGUMENT NOT YET SCHEDULED

No. 18-5298

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In the  
**United States Court of Appeals for the D.C. Circuit**

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

*Appellants,*

v.

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

*Appellees.*

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

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**BRIEF OF FREEDOM NETWORK USA, SEX WORKERS PROJECT,  
NEW YORK TRANSGENDER ADVOCACY GROUP, SHARMUS  
OUTLAW ADVOCACY AND RIGHTS INSTITUTE, DECRIMINALIZE  
SEX WORK, NATIONAL COALITION FOR SEXUAL FREEDOM, FREE  
SPEECH COALITION, BROOKLYN DEFENDER SERVICES,  
PROSTASIA FOUNDATION, INSTITUTE FOR MIND BODY THERAPY,  
and ST. JAMES INFIRMARY IN SUPPORT OF APPELLANTS**

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## CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), amici curiae Freedom Network USA, the Sex Workers Project, New York Transgender Advocacy Group, Sharmus Outlaw Advocacy and Rights (SOAR) Institute, Decriminalize Sex Work, the National Coalition for Sexual Freedom, Free Speech Coalition, Brooklyn Defender Services, Protasia Foundation, Institute for Mind Body Therapy, and St. James Infirmary certify the following:

**Parties and Amici:** Woodhull Freedom Foundation, Human Rights Watch, Eric Koszyk, Jesse Maley, a/k/a Alex Andrews, and The Internet Archive, Plaintiffs below, Appellants here, filed suit challenging the constitutionality of the Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. No. 115-164, 132 Stat. 1253 (2018) (“FOSTA”), naming as Defendants, the Appellees here, the United States, and the Attorney General of the United States in his official capacity, currently William P. Barr. The amici here anticipate that two other amicus curiae briefs will be filed, one from the Copia Institute, Engine Advocacy, and other entities aligned with their position; and another from the Institute for Free Speech, Center for Democracy and Technology, and other entities aligned with their position. Amici here are unaware of any other parties or *amici* at this time.

**Ruling Under Review:** The ruling under review is *Woodhull Freedom Foundation, et al. v. United States*, 334 F. Supp. 3d 185 (D.D.C. 2018), and its accompanying Order, by which the District Court denied Appellants’ motion for a preliminary injunction and dismissed their Complaint, each challenging the constitutionality of the Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. No. 115-164, 132 Stat. 1253 (2018) (“FOSTA”).

**Related Cases:** There are no related cases.

**Corporate Disclosure Statement:** Pursuant to Fed. R. App. P. 26.1 and D.C. Cir. R. 26.1, *amici* represent that no party to this brief is a publicly held corporation, issues stock, or has a parent corporation.

### **STATUTES AND REGULATIONS**

Applicable statutes are contained in the Brief for Appellants.

### **SOURCE OF AUTHORITY TO FILE**

*Amici* submit that Both Appellants and Appellees have consented to the filing of this *amicus* brief and thus it is permitted under Fed. R. App. P. 29(a)(2).

### **STATEMENT OF AUTHORSHIP AND FINANCIAL CONTRIBUTIONS**

No party’s counsel authored this brief in whole or in part; no party or party’s counsel contributed money intended to fund the brief’s preparation or submission; and no person other than *amici* contributed money intended to fund the brief’s preparation or submission.

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## INTEREST OF AMICI CURIAE

Amici have a long history in the struggle to ensure that all persons who have been discriminated against, criminalized, or marginalized due to their sexual orientation, sexual or gender identity or expression, or behavior are protected. Many amici also work to support and provide services to people who are trafficked and abused. The Fighting Online Sex Trafficking Act [hereinafter referred to as FOSTA] and the Stop Enabling Sex Trafficking Act [hereinafter referred to as SESTA, although for brevity, the brief will reference FOSTA] have dramatically impacted the clients, communities, and constituents of the Amici. The harms that have resulted from FOSTA are numerous and widespread, and Amici will show how various diverse populations have endured financial, emotional, and professional harm ten months into its passage.

*Amici curiae* are eleven rights-based organizations or coalitions advocating for sex workers, survivors of trafficking, the prevention of child sexual abuse, and the promotion of sexual freedom and health for adults. FOSTA has had significant, harmful outcomes for the clients, communities and members of *amici* organizations, including serious economic consequences and impacts on well-being, health, and safety. Ten of the eleven *amici* were described in the Notice of Intent to File Amicus Brief and their descriptions will also be in the Addendum to

this Brief. One more organization, St. James Infirmary (SJI), is being added as well.

## **SUMMARY OF ARGUMENT**

FOSTA is part of a long history of laws that have overlooked the realities of both human trafficking and sex work, and the law has resulted in extensive harms.

## **ARGUMENT**

Amici will outline the history of uninformed U.S. laws that conflate human trafficking and sex work, and detail how FOSTA, like other laws before it, has had a devastating impact on both the individuals it was intended to protect and some of the most marginalized communities in our society. An appreciation of the extensive harms that FOSTA has caused should enable the Court to understand the Appellants' argument for standing and injunctive relief in its broader context.

### **I. How the Conflation of Human Trafficking and Sex Work Leads to Misguided Policy**

A survey of laws that have attempted to address human trafficking shows that U.S. policy has entirely ignored the existence of sex work to the detriment of sex workers and victims of trafficking.

#### **A. Definition of Terms**

Defining key terms—specifically trafficking in persons, sex work, and prostitution—is important in framing the discussion. These three terms represent distinct acts or experiences. “Sex trafficking” is defined as “The recruitment,

harboring, transportation, provision, obtaining, patronizing, or soliciting of a person for the purpose of a commercial sex act.” 22 U.S.C. § 7102(10) (Supp. II 2016). “Severe forms of trafficking” include:

“a) sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age; or

b) the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.”

*Id.* § 7102(9).

Sex work denotes *voluntary* erotic labor of adults. This term was coined by Carol Leigh, a leading sex worker activist, in the late 1970s. Carol Leigh, *Inventing Sex Work, in Whores and Other Feminists* (Jill Nagle ed., 1997). Sex work encompasses various forms of erotic labor, including, but not limited to: sensual bodywork, prostitution, stripping, dominatrix/fetish work, adult film performance, and webcam or phone sex.

The majority of sex work is legal. Prostitution, largely defined as the exchange of sexual acts for a fee, is illegal in nearly every state with the exception of legalized and regulated brothels in Nevada. Nev. Rev. Stat. §§ 201.354, 201.360 (2017). However, the precise definition of prostitution varies state-by-state. *Compare* Md. Code Ann. Crim. Law § 11-301(c) (2017) (“the performance of a sexual act, sexual contact, or vaginal intercourse for hire”) *with* N.Y. Penal Law §

230.00 (2017) (“engag[ing] or agree[ing] to engage in sexual conduct with another person in return for a fee” *and* N.J. Stat. Ann. 2C:34-1 (2018) (“sexual activity with another person in exchange for something of economic value, or the offer or acceptance of an offer to engage in sexual activity in exchange for something of economic value”). People engage in prostitution for a wide variety of reasons, including: the ability to set one’s own schedule, financial need, empowerment, or accessibility of the work for particular populations (e.g. transgender women). *See* Karen Leppel, *The Labor Force Status of Transgender Men and Women*, 17 *International Journal of Transgenderism* 155 (2016), (finding unemployment rates higher for transgender individuals, with transgender women more likely to be out of the labor force).

While forced prostitution, i.e. “sex trafficking,” certainly does exist, the majority of trafficking occurs in legal labor sectors, such as restaurant work, farm labor, and nail salons. International Labour Organization-United Nations and Walk Free Foundation, *Global Estimates of Modern Slavery: Forced Labour and Forced Marriage*, 18, 2017, available at [https://www.ilo.org/wcmsp5/groups/public/@dgreports/@dcomm/documents/publication/wcms\\_575479.pdf](https://www.ilo.org/wcmsp5/groups/public/@dgreports/@dcomm/documents/publication/wcms_575479.pdf) (nearly sixteen million worldwide subjected to labor exploitation, compared to less than five million subjected to exploitation in the sex trade); Jonathan Todres, *The Private Sector’s Pivotal Role in Combating Human Trafficking*, Calif. L. Rev. Circuit, Vol.

3, 80, 89 (2012). Nevertheless, our approach to combating exploitation in these labor sectors does not condemn every person in these sectors, nor do we seek to end the industries in which they work. It is critical that we evaluate whether our policies are effective in diminishing exploitation or are overbroad and punitive (but not effective).

### **B. History of Conflation of Sex Work and Human Trafficking**

There is a long history that explains the difficulty policymakers have in navigating the distinction between human trafficking and sex work. This history predates the advent of trafficking laws in the early 2000s and points to a divide about the nature of female sexuality and the sex industry. The sex workers' rights movement views prostitution and trafficking as distinct, with all forms of erotic labor being a viable occupational choice, not victimization or harm. When there is a fundamental misunderstanding of an issue, especially one with such emotional overtones, misguided and ineffective laws follow. As leading scholar Melissa Ditmore writes:

“Two groups lose out when sex work and trafficking are conflated: trafficked persons, because the lurid focus on sex trafficking obscures the plight of forced laborers in other fields including agriculture, construction, and domestic work; and sex workers, whose agency is denied and who are made subject to further intrusions of legal authorities.”

Melissa Ditmore, *New U.S. Funding Policies on Trafficking Affect Sex Work and HIV-Prevention Efforts World Wide*, SIECUS Report 33, Spring 2003, at 26.

**C. FOSTA is just one of many misguided laws that purports to help survivors, but stifles freedom of speech and movement.**

Before “human trafficking” was defined federally, the Mann Act sought to curtail movement across state lines for the purpose of engaging in prostitution. White-Slave Traffic (Mann) Act, Ch. 395, 36 Stat. 825 (1910) (codified as amended at 18 U.S.C. §§ 2421-2424 (2012)) [hereinafter The Mann Act]. It prohibits the transport, persuasion, inducement, enticement or coercion of any individual to travel in interstate or foreign commerce to engage in prostitution. *Id.* The Mann Act was an overbroad reaction to a perceived moral panic. However, in its overbreadth, it failed to specifically define “prostitution,” leading to the absurd consequence of women convicted as co-conspirators in their own exploitation. *See United States v. Holte*, 236 U.S. 140 (1915) (conviction of a woman for conspiracy to exploit herself upheld).

These absurd results are happening again, a consequence of the hysterical and overbroad reaction to the perceived threat of sex trafficking. *See* Hilary Hanson, *In Alaska Not All ‘Sex Traffickers’ Are Sex Traffickers*, Huffington Post (August 26, 2015), [https://www.huffingtonpost.com/entry/alaska-sex-trafficking-law\\_us\\_55dce149e4b04ae49704e28a](https://www.huffingtonpost.com/entry/alaska-sex-trafficking-law_us_55dce149e4b04ae49704e28a) (woman charged with fourth-degree sex trafficking (“aiding and facilitating”) for posting her own services on craigslist).

The Trafficking Victims Protection Act and the Trafficking Victims Protection Re-Authorization Acts rely on the political ideology of conflation:

trafficking and prostitution both cause violence to women. 22 U.S.C. §§ 7101-7110 (2012) (as amended). *See also* Grace Chang and Kathleen Kim, *Reconceptualizing Approaches to Human Trafficking: New Directions and Perspectives From the Field(s)*, 3 *Stanford Journal of Civil Rights and Civil Liberties* 317, 320 (2007). In the wake of FOSTA, legislation continues to emerge that conflates trafficking and prostitution. For example, the End Banking for Human Traffickers Act of 2018, H.R. 2219 (2018), seeks to put pressure on financial institutions to close accounts of individuals suspected of human trafficking. There is fear amongst people in the sex industry that their bank accounts will continue to be shut down out of overzealous reactions, similar to the widespread shutdowns of websites in the wake of FOSTA. Jenavieve Hatch, *First Congress Took Sex Workers' Websites. Now It's Coming for Their Bank Accounts.*, *Huffington Post* (May 29, 2018), [https://www.huffingtonpost.com/entry/human-trafficking-banking-bill-sex-workers\\_us\\_5b045577e4b0740c25e5efd1](https://www.huffingtonpost.com/entry/human-trafficking-banking-bill-sex-workers_us_5b045577e4b0740c25e5efd1).

The far-reaching effects of FOSTA are directly tied to the conflation of trafficking with prostitution. FOSTA's broad language has created harms for a wide variety of people and organizations. In some cases, as this brief will attest, the law has adversely impacted those actively fighting against sexual exploitation through harm-reduction and preventive non-profit work in the areas of human trafficking and child sexual abuse.



## II. Analysis of Appellants' Standing

The District Court erred in dismissing Appellant-Plaintiff's case for lack of standing due to a failure to apply First Amendment standing doctrine and a misreading of FOSTA's provisions.

### **A. Appellants have established an injury which is traceable to the passage of FOSTA and likely to be redressed by a favorable judicial decision.**

FOSTA has chilled the speech of many, Appellants included, in addition to causing countless other injuries. Because both the speech-related and the non-speech-related harms are vast, as demonstrated in part by the impacts on *amici* parties, Appellants have clearly established standing.

A plaintiff establishes Article III standing by showing (1) injury in fact, (2) that the injury is fairly traceable to the challenged conduct of the defendant, and (3) that the injury is likely to be redressed by a favorable judicial decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992). First, to establish an injury in fact, a plaintiff must show “an invasion of a legally-protected interest which is (a) concrete and particularized . . . and (b) ‘actual or imminent, not conjectural or hypothetical.’” *Id.* (*additional internal quotations omitted*). Where plaintiffs indicate that their speech has been chilled, they have shown both a concrete, particularized “invasion of a legally protected interest”—namely, a violation of the right to free speech—and that the injury is actual rather than hypothetical—it has already occurred.

Actual prosecution is not necessary for standing in first amendment cases. Chilling of speech for fear of prosecution confers standing, *Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 393 (1988), as does a “credible threat” of prosecution, *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159 (2014) (quoting *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979)). In fact, courts have recognized injury even where the government has denied their intention to prosecute. *See, e.g., New Hampshire Right to Life Political Action Comm. v. Gardner*, 99 F.3d 8, 17 (1st Cir. 1996) (holding that although the statute in question had not yet been enforced against *any* person, including plaintiff, plaintiff had standing). Here, Appellants alleged in their complaint either that they have refrained from protected speech or that they reasonably fear their speech may come within the ambit of FOSTA’s prohibitions (with the exception of Eric Koszyk, whose injury was economic and acknowledged by the District Court). Before dismissing a case for want of standing, courts are required to conduct a factual, case-specific analysis. *Navegar v United States*, 103 F.3d 994, 999 (D.C. Cir. 1997). As part of this analysis they must accept “the truth of all material factual allegations in the complaint” *Am. Nat'l Ins. Co. v. Fed. Deposit. Ins. Corp.*, 642 F.3d 1137, 1139 (D.C. Cir. 2011). Under this standard, Appellants have established injuries in fact: all have presented evidence of the chilling of speech and the credible threat of prosecution in the appended declarations.

In addition to injury, Appellants must show traceability to the conduct of the Appellee. FOSTA has had a far-reaching impact on a wide variety of groups, and there is a direct causal link between its passage, the swift response of Internet platforms, and injury to the people who found the platforms they had utilized no longer available, including Appellants. But there is an even more direct chain of causation as well, applicable to all Appellants in this case: individuals have self-censored due to their reasonable fear of this law. Thus, the injury is directly traceable to the government's enactment of FOSTA. *See Am. Booksellers Ass'n*, 484 U.S. at 393 (injury was self-censorship itself).

The final prong for standing, which Appellants have established, is that their injuries are likely to be redressed by the judicial relief sought. Appellants explain in their brief how plaintiffs alleging First Amendment violations can have standing even where their grievance can be redressed only via a judicial outcome on a third party (those arguments will not be repeated here, in the interests of avoiding redundancy). If FOSTA were no longer enforced, this would clearly alter Internet platforms' policies, and this would provide redress for the injuries sustained. However, Appellants have also established redressability in a more direct manner, given that self-censorship has occurred. The self-censorship that is directly traceable to the government's conduct (as explained above) would also be directly

remedied by a change in the law: without FOSTA, Appellants' free expression would no longer be stifled.

Redressability is less strict in the First Amendment context in another sense as well. In First Amendment cases, courts may “predict[]” or “assum[e]” that “others not before the court” have been affected, i.e. that their speech has been successfully chilled. *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973).

Accordingly, the injury at play in a case with implications for a large class of people will assuredly be redressed if the unconstitutional law is no longer in force. *Amici* hope that their input will give context to Appellants' establishment of standing, particularly regarding the injury prong.

#### **B. The District Court's standing analysis misapplied FOSTA.**

FOSTA holds website providers criminally liable for the promotion and facilitation of prostitution on their sites, however the act does not define these two terms. The Court does not deny this – but they insert their own interpretation of these non-specific words. They say that the context of FOSTA—and specifically the language “promote or facilitate the prostitution of another person”—means that the “promotion” or “facilitation” identified by FOSTA is criminalized only when it promotes or facilitates a specific act of prostitution by a specific person. The “promotion” or “facilitation” of “the broad subject—matter of prostitution” is not criminalized by FOSTA, the Court concludes.

But it is the Court that ignores the context of FOSTA with respect to the legitimacy of plaintiffs' concerns as to potential criminal prosecution or civil liability. The act which FOSTA criminalizes and subjects to civil liability is, as the Court acknowledges, the act of "a provider or user of an interactive computer service... as the publisher or speaker of [certain] information provided by another information contact provider". That act is inherently not aimed at specific conduct by a specific person. Rather, publication of content on an interactive web site is aimed at a general audience. When a provider of an interactive computer service allows another person's content to appear on that service, it is preposterous to contend that the service provider intends anything other than what in fact happens—namely, that anyone who tunes in to that site can and will be exposed to that content. There is never a message or information, much less a "promotion" or "assistance", sent to a specific person for a specific act of prostitution.

The Court also argues that plaintiffs face no threat of prosecution because the defendant does not meet the test for mens rea—that they intended to "explicitly further"[ ] a specified unlawful act. Again, it is the Court that divorces its analysis from the clear context of the statute. What the statute does is remove the former insulation of an interactive computer service supplier from criminal liability for carrying content created by another person. The interactive computer supplier, who is not the creator of the content that gives rise to potential criminal liability, is not

the party who does or does not have the intent (the mens rea) that the content “promotes” or “assists” prostitution, whether in general or as a specific act by a specific prostitute. The only party chargeable with such mens rea is the creator of the content. FOSTA creates liability for the third-party platform, who simply hosts the content, and thus is not responsible for the creation of (or intent behind) the content.

Since the provider does not know the intent of the creator and does not know who will view that content or what they will do with it, and since the terms “promote” and “assist” are so broad that they have multiple possible interpretations, the provider may well conclude that any content that is of a sexual nature conceivably related to prostitution creates a threat of criminal liability and thus must be removed as a precaution. That is the classic definition of a chilling effect on freedom of expression.

It is unsurprising then that there are rapidly proliferating examples of interactive computer service providers deleting or refusing to carry content provided by others that has some sexual nature. Such action is taken in a reasonable fear of prosecution for violation of an overly vague and broad statute. The amici here present numerous examples of precisely such “chilling effects”.

ii. FOSTA has had wide-ranging harms on broad and diverse groups of individuals and their protected speech related to legal activities.

### **III. The Harms FOSTA has Caused to *Amici* and Others**

FOSTA has caused a variety of harms and injuries to a wide variety of groups, including *amici* parties.

#### **A. Types of Harms**

The consequences of FOSTA have included: loss of income for many individuals, the inability to ensure safety, loss of access to harm-reduction resources, and increased criminal prosecutions.

##### **1. *Loss of Income***

The primary measurable harm that legal erotic service providers, sex educators, massage therapists, and others who engage in legal but intimate work have experienced is loss of income. Once FOSTA passed, dozens of websites immediately closed, severely hampering the ability of workers to access clients due to an inability to post advertisements on the platforms. With the shifting of information from print to online publication, diminished platform access curtails access to labor markets.

A community-based research survey was conducted from April 15, 2018 (4 days after FOSTA became law) through May 25, 2018. Two hundred and sixty-two consensual sex workers in the United States participated and reported significant harms as a direct result of this law's passage. Seventy percent cited sex work as their sole form of income. Forty-one percent of respondents report not

being able to pay for food, thirty-seven percent report not being able to pay for utilities, thirty-five percent were not able to pay for transportation, thirty-six percent were not able to afford paying their mobile phone bill, twenty-three percent could not afford their health insurance or child care, and twenty-one percent could not afford their college tuition as a result of income loss due to FOSTA.

Respondents also report predators have been preying on their desperation due to a lack of income. Coyote Rhode Island, *After FOSTA It's Like Hunger Games on Sex Workers*. (May 22, 2018) <http://coyoteri.org/wp/after-fosta-its-like-hunger-games-on-sex-workers/>.

## **2. *Inability to Screen Clients/Partners and Ensure Safety***

The internet has allowed people seeking sexual encounters (with or without pay) a measure of safety. A 2017 paper found that after Craigslist created an “erotic services” section, the rate of female homicides in U.S. cities fell by seventeen percent (excluding crimes in which the victim knew her killer, such as domestic violence). The researchers concluded that sex workers who advertised online spent less time on the streets, where they were more likely to face danger. Scott Cunningham et al., *Craigslist Reduced Violence Against Women*, 29 (Feb. 2019, under submission), *available at* <http://scunning.com/craigslist110.pdf>. The internet places the ability to adequately and thoroughly screen potential partners, giving parties the ability to take control of the vetting process by having time to



ask questions, research one another, consult with colleagues to ensure the person is safe, and other safety practices.

The COYOTE study found that post-FOSTA outcomes include higher risk-taking behaviors such as an inability to screen clients effectively. Respondents reported a twenty-eight percent drop in screening clients since passage of FOSTA. Coyote Rhode Island, *After FOSTA It's Like Hunger Games on Sex Workers*. (May 22, 2018) <http://coyoteri.org/wp/after-fosta-its-like-hunger-games-on-sex-workers/>. There were increases in violent encounters with clients (including rape and sexual assault). *Id.*

### **3. *Inability to Find Community, Support, and Harm-Reduction Information and Services***

Many sex workers are fearful to communicate online about information such as potentially harmful clients or places to avoid because this could be considered ‘promoting prostitution.’ While this was true pre-FOSTA, the fear that such life-saving speech could be targeted is due to FOSTA. In some jurisdictions, this communication can even be considered trafficking, even if the sex work is legal such as in brothels in Nevada.

### **4. *Increased Street-Based Work, Leading to Violence***

Propositions from “pimps” were reported to COYOTE, citing FOSTA directly as the reason those sex workers needed to work for them because they cannot advertise on known platforms. Sixty-five percent of sex workers said

someone had tried to threaten, exploit, or get freebies from them post-FOSTA.

Sixty percent of sex workers said they've had to take on less safe clients to make ends meet. *Id.* The survey included a harrowing example of how diminished access to screening and safety mechanisms has led to increased violence. As told by one worker:

“Since FOSTA passed I’ve been working mostly with regular clients, but I can’t make my living off of just regulars and it’s hard to screen now. So I met with a new client that I had only met that night. I got in his car and we went to his place a town over from where I live. We got to his place and there were four other men there. I was terrified but I was afraid to try to leave because I knew they would probably follow me. I knew I would get hurt if I stayed and I would get hurt if I tried to leave. I was gang raped that night by five men. I was not paid. They stole everything I had [sic] on me (which was not much). I was covered in bruises and scrapes and cuts. I did not go to the hospital because I was afraid.”

*Id.* See also April Glaser, *There is No New Backpage*, Slate (Feb.13, 2019)

<https://slate.com/technology/2019/02/backpage-sex-workers-fosta-sesta-swifter-tryst-trafficking.html>.

## **B. Communities and Organizations Impacted by FOSTA**

*Amici* respectively represent many of the diverse groups for whom FOSTA has had a detrimental impact.

### **1. *Legal Sex Workers***

As delineated above, most sex work is fully legal. Fetish work, non-sexual escorting, webcam, erotic dancing, and myriad other forms of erotic labor fall

within legal boundaries. Thus, speaking about these acts could not be construed as promoting prostitution or trafficking into prostitution; however, these communities have still been impacted by the law.

The Declaration of J. Leigh Brantly delineates numerous harms they have incurred as a professional fetish worker: “Part of my income is derived from my status as a public figure within the BDSM/fetish communities and this is evidenced by my social media presence, informational links to my website, reviews on my work, news stories, or videos. Even though there are not explicit materials in those links, online advertisements (that are not US-based) will no longer link to that information. This has led to a significant decrease in my income as a worker and educator.” Brantly Decl. ¶ 3. (appended)

FetLife is the premier US social media for people engaged with alternative lifestyle interests (both for pay and pleasure). After FOSTA, FetLife began continuously deleting any “pay for play” advertisements and editing posting language. Forums and chats were stifled, which are used by professional fetish providers, such as dominants, submissives, switches, and wrestlers who are not prostitutes and do not provide sexual services. *See* Wright Decl. ¶¶ 3–19. (appended)

Escort chat groups on Facebook and Instagram have been deleted. Humaniplex removed classifieds section on April 14, 2018. YourDominatrix.com

shut down all US-based advertisements. The Erotic Review.com is no longer accessible from the US. EventBrite changed its Terms of Services to exclude events that constitute or promote “explicit sexual activity or pornography.” Wright Decl. ¶ 9. Reddit closed subreddits such as /escorts and is closed to US users. Preferred411.com is no longer accepting new US profiles. Webcam performers have been affected. MyFreeCams changed terms of service to explicitly ban any transaction, such as offering to meet a site member for a token. *See* Wright Decl.

Free Speech Coalition, which represents adult performers and businesses, reports the deletion of community forums where consumers would discuss content and exchange information about consensual practices. Douglas Decl. ¶ 5.

(appended)

## **2. *Sex Educators and Therapists***

Sex therapists utilize the Institute for Mind Body Therapy (IMBT) Process, which is a sex therapy model for use by bodywork practitioners and therapists who have completed IMBT-related training in order to support clients. Kaye Decl. ¶ 2. (appended). As Dr. Susan Kaye states in her declaration, IMBT learned of the SESTA/FOSTA ruling in April 2018. At that time, their Executive Director suggested they take down their Resource Directory out of fear of criminal and/or civil liability. Taking down this directory has affected the income of these twenty-five to thirty people.” *Id.* at ¶ 3. It has also affected the clients who are now fearful

of contacting them for sexuality therapy. Their “client load has decreased at least half since taking down the directory.” *Id.* at ¶ 4.

Google Drive is deleting explicit content and/or locking out users, including sexual education materials. Microsoft Terms-of-Service updated that the use of “offensive language” and “inappropriate content” such as nudity may result in suspensions or bans. Skype, Xbox, Office and other services are to be affected. Google Play updated its policy to ban explicit content such as “promotional images of sex toys”. YouTube is shadow-banning public figures and sex educators. Paypal banned several sex educators from being paid using their platform. *See* Wright Decl. (appended)

### **3. *Art, Fetish, Kink, and Alternative Lifestyle Communities***

People who engage in “alternative” lifestyle practices or play often fall within the fetish/kink or BDSM communities, for whom the internet has created a safe and welcoming environment to find community, events, and partners. Many community members consider themselves performance artists or consumers of an artistic display. Brantly Decl. ¶ 5 (appended). J. Brantly reports: “My ability to connect with other alternative lifestyle artists is now stifled...” *Id.* at ¶ 6. (appended)

Bizarrely, a kink event in Texas was cancelled by the hotel in May 2018 when it was alleged they were sex traffickers. Wright Decl. ¶ 7. (appended). A

religious group sent emails to the host hotel and threatened the hotel with a negative social media campaign that would falsely claim the event was encouraging sex trafficking. The hotel canceled the contract for the event, fearing the negative repercussions. Previously this event had been held for a number of years without any problems. *Id.*

Pounced.org was a dating website for alternative lifestyle “furries.” It shut down following FOSTA, citing Craigslist’s choice to shut down their personals section. Aja Roman, *A New Law Intended to Curb Sex Trafficking Threatens the Future of the Internet as We Know It*. Vox (July 2, 2018), <https://www.vox.com/culture/2018/4/13/17172762/fosta-sesta-backpage-230-internet-freedom>. SwingLifestyle.com is no longer allowing members to message each other. Collarspace.com is no longer allowing journal entries, updates to profiles, or accepting new profiles. *See* Wright Decl. (appended)

Whiplr is a social media application targeting fetish and BDSM communities. “Since FOSTA, they have censored users’ profiles by editing words and images, including illustrations or non-nude ‘suggestive’ photos...What’s worse is that Whiplr is now a BDSM/fetish application that does not allow the words ‘BDSM’ or ‘fetish’ in a person’s profile. I know this because all of that censorship happened to me.” Brantly Decl. ¶ 4. (appended)

#### **4. *Harm-Reduction and Advocacy Organizations and Forums***

While direct services and advocacy groups are not the target of FOSTA, there has been a chilling effect on speech and the ability of organizations to engage constituents. Amici Decriminalize Sex Work, a new organization that was formed as a direct result of FOSTA, had its Twitter account suspended in February 2019.

Desiree Alliance, a national organization that has consistently organized conferences for sex workers and allies since 2005 cancelled its 2019 conference because of FOSTA. Desiree Alliance, Conference,

<http://desireealliance.org/conference> . Director Cris Sardina announced that her group's biennial conference, scheduled for July 2019, would not take place owing to fears that FOSTA/SESTA-wielding federal agents might target attendees.

Stephen Lemons, *National Sex Workers' Summit Culminates in Manifesto Calling for Decriminalization of Prostitution* (June 27, 2018),

<https://sexualpolitixxx.blog/2018/06/27/national-sex-workers-summit-culminates-in-manifesto-calling-for-decriminalization-of-prostitution-by-stephen-lemons/>].

#### **5. *Assault Prevention Organizations***

Significantly, organizations serving victims of sexual violence have found it harder to reach populations and share information or sustain a safe environment to obtain services or share stories. Prostasia Foundation provides services to researchers, internet platforms, and those involved in law enforcement to further

abuse prevention for children. The Declaration of Jeremy Malcolm of Prostasia delineates how FOSTA has caused harms to this vulnerable population:

“FOSTA only addresses one side of this relationship: that an Internet platform technically facilitates the abuse of a minor who engages in sex work through that platform. Less well understood is the fact that Internet platforms can actually protect minors from child sexual abuse, by contributing towards a culture of “primary prevention” of child sexual abuse. Primary prevention describes a set of interventions that target the whole population with measures that can stop child sexual abuse before it happens. Not only does FOSTA overlook the beneficial role of Internet platforms in advancing the primary prevention of child sexual abuse, but it does the opposite: it actively *penalizes* Internet platforms that can be used to keep minors from sexual harm, by making it more risky for them to allow for the free and open discussion of sex and child sexual abuse prevention online.”

Malcolm Decl. ¶¶ 3–4 (citing Harriet L. MacMillan et al., *Primary Prevention of Child Sexual Abuse: A Critical Review, Part II*, 35:5 J. Child Psychol. & Psychiatry 857, 857–76 (1994)) (appended). Further, people who are attracted to minors (minor-attracted persons or MAPs) can assist one another with proper information and support. Prostasia cites examples in which preventive platforms were targeted after FOSTA:

- a. In August 2018, the online network Medium banned a publication called Pedophiles on Pedophilia that promoted the positive message that there is no excuse for child sexual abuse, and laid out a roadmap enabling MAPs to avoid ever offending. *Id.* at ¶ 8.
- b. The online chat network Discord has banned several support fora...that were used by experts and MAPs for peer and professional support. The highest profile



example was the banning in July 2018 of a server called MAP Support Chat, which professionals from the UK's Lucy Faithfull Foundation used to provide support services to MAPs and a similar Dutch server has also been repeatedly censored. *Id.* (citing Katie Herzog, *Online Support Groups Can Keep Pedophiles From Offending but They Keep Getting Shut Down*, *The Stranger* (July 20, 2018), <https://www.thestranger.com/slog/2018/07/20/29453977/online-support-groups-can-keep-pedophiles-from-offending-but-they-keep-getting-shut-down/>).

c. Since FOSTA's passage, the social network Tumblr has engaged in an escalating pattern of the removal of sexual speech, but the initial wave of such censorship targeted speech about child sexual abuse prevention. This applied not only to MAPs, but to mental health professionals who worked with this population to prevent child sexual abuse. *Id.*

Lastly, Prostasia makes clear how post-FOSTA censorship has also affected minors:

a. Tumblr's initial wave of removal of content relating to the prevention of child sexual abuse by MAPs was massively extended in December 2018 to include all forms of graphically sexual content, with the heaviest impact of this ban falling on the most stigmatized sexual minorities such as the LGBTQIA+ communities. *Id.* at ¶ 9 (citing Vivian Ho, *Tumblr's Adult Content Ban Dismays Some Users*, *The Guardian* (Dec. 4, 2018),

<https://www.theguardian.com/technology/2018/dec/03/tumblr-adult-content-ban-lgbt-community-gender>).

b. In November 2018, Facebook introduced its own stricter regulations on sexual content, which expands the platform's Community Guidelines to prohibit content "that attempts to coordinate or recruit for adult sexual activities," or mentions of "sexual positions or fetish scenarios," among other new restrictions.

*Id.* (citing Mikelle Street, *Facebook's New Censorship Policy Reveals a 'Sex Panic' on the Platform*, Out (Dec. 6, 2018), <https://www.out.com/news-opinion/2018/12/06/facebooks-new-censorship-policy-reveals-sex-panic-platform>).

c. Other Internet platforms including YouTube, Twitter, Apple, Instagram, Reddit, and Google have also ramped up their censorship of sexual content since FOSTA, even including the deletion of sex education information. Malcolm Decl. ¶ 9 (citing Violet Blue, *How Sex Censorship Killed the Internet We Love* (Jan. 31, 2019) <https://www.engadget.com/2019/01/31/sex-censorship-killed-internet-fosta-sesta/>). (appended).

## **6. *Transgender and Gender-Nonconforming/Non-Binary Communities***

There is a higher incidence of transgender and gender non-conforming or non-binary individuals in the sex trade than cis-gender individuals for a variety of reasons, including: inability to obtain jobs due to discrimination and family and community rejection, leading to financial independence (and poverty) at an early

age. While all transgender individuals face heightened stigmatization and employment barriers, transgender women, specifically women of color, face the most barriers and will thus be most significantly harmed when laws or other structures remove tools that support safety and economic independence, such as FOSTA.

According to a 2015 study by the National Center for Transgender Equality, transgender women have a nearly fifteen percent rate of participation in the sex industry. However, for trans women of color, this figure is far higher: black transgender individuals reported participation at nearly forty percent; Latinx transgender individuals reported participation at thirty-three percent. Forty-three percent of trans people of color with experience in the sex trade reported an annual income of less than \$10,000. Black trans sex workers reported an eighty-seven percent rate of police interaction. Nearly forty-seven percent of trans people of color report experiencing arrest due to their trans status—often due to suspected prostitution, loitering, or other similar charges. Erin Fitzgerald et al. *Meaningful Work: transgender Experiences in the Sex trade* (Dec. 2015), available at [https://www.transequality.org/sites/default/files/Meaningful\\_Work-FullReport\\_Final\\_2.pdf/](https://www.transequality.org/sites/default/files/Meaningful_Work-FullReport_Final_2.pdf/).

Thus, it is not surprising that transgender women of color have suffered significantly since the passage of FOSTA. Coy Gordon (a.k.a. “Ceyenne

Doroshov”) is the Founder/Director of GLITS Inc., an organization that serves LGBTQIA and sex worker communities. As she states in her Declaration:

“FOSTA has caused community members to be homeless. It has increased unsafe sex practices, survival has really become survival because of the desperation that has been created by the law...I have seen alarming numbers of transgender women being murdered in 2018...When my community suffers, my work and organization suffer. I am over capacity. I don’t have the capability to say no to someone in crises, and FOSTA has placed so many people in heightened crises.” Gordon Decl.

¶¶ 3, 7, 9. (appended)

#### **7. *Marginalized and Street-Based Sex Workers***

Public defenders have reported an increase in street-based arrests since FOSTA. Attorney Jillian Modzeleski, the dedicated attorney to the Human Trafficking Intervention Part for Brooklyn Defender Services in New York, describes a significant upswing of cases in her Declaration:

Prior to FOSTA/SESTA, street-based arrests for “loitering for the purposes of prostitution” and “prostitution” had become almost non-existent in Brooklyn. According to clients and advocates, this is because sex workers did not have the need to go to the street or the “track” or other public places to seek work....Post FOSTA/SESTA, I have witnessed a dramatic increase in my caseload volume; most weeks, my caseload is now double what it would have been at this time last year. Where there were only 3 to 5 cases per week that tracked to the Human Trafficking Intervention Court at this time last year, now I have at least 10 to 12 cases every week in the part...

Modzeleski Decl. ¶ 4–5. (appended).

*Amici* St. James' Infirmery has a sex worker outreach team. They reported that there were approximately four times the number of sex workers engaged in street-based sex work in the month following the passage of FOSTA/SESTA. The passage of FOSTA/SESTA has left workers without the ability to vet their clients online properly, exposing them to potential dangers that they previously were empowered to avoid. They are also unable to agree on negotiated terms beforehand, giving clients more power and opportunity to argue for unprotected sex. Burch Decl. ¶ 5. They are also susceptible to robbery, assault, sexual assault, etc.

One St. James' participant after the passage of FOSTA/SESTA was contacted by a former client who they had previously ended communications with because they deemed the client to be potentially harmful. When the client next reached out (after FOSTA/SESTA), the St. James' participant agreed to meet with them because they had experienced a severe decrease in work and needed the money. When they did meet, they were sexually assaulted. *Id.* ¶ 7.

There have been notable increases in reports of human trafficking since FOSTA was signed into law. In San Francisco, violent crimes have decreased in all areas except for one. 2018 saw a spike increase of one-hundred seventy percent in human trafficking reports, according to police statistics. While direct causation is unclear, the increase in street-based sex work, which is inherently more dangerous,

is certainly tied to FOSTA. Susie Steimle, *New Laws Forced Sex Workers Back on SF Streets, Caused 170% Spike in Human Trafficking*, CBS 5 SF BayArea (Feb. 3, 2019), [https://sanfrancisco.cbslocal.com/2019/02/03/new-laws-forced-sex-workers-back-on-sf-streets-caused-170-spike-in-human-trafficking/?fbclid=IwAR2qqF3Vr6oTjSfFLPpsGrOxEikg8RWDzg-stATMgHxYXlQ0e\\_MZ\\_5ILWhY](https://sanfrancisco.cbslocal.com/2019/02/03/new-laws-forced-sex-workers-back-on-sf-streets-caused-170-spike-in-human-trafficking/?fbclid=IwAR2qqF3Vr6oTjSfFLPpsGrOxEikg8RWDzg-stATMgHxYXlQ0e_MZ_5ILWhY).

### CONCLUSION

For all of the aforementioned reasons, the Court should find that the Appellants have standing to challenge FOSTA, which is overbroad and has had significant harmful impacts on many populations and organizations.

DATED: February 20, 2019

Respectfully submitted,

/s/James Turner

**CERTIFICATE OF COMPLIANCE**

I certify that pursuant to Fed. R. App. P. 32(a)(7)(C) and Circuit Rule 32-1, the attached brief is proportionally spaced, has a typeface of 14 points or more and contains 6,405 words.

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

DATED: February 20, 2019

Respectfully Submitted,

/s/James Turner

*Attorney for Amici Curiae*

**CERTIFICATE OF SERVICE**

I hereby certify that on February 20, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Dated: February 20, 2019

Respectfully Submitted,

/s/James Turner

*Attorney for Amici Curiae*



**ADDENDUM**

## ADDENDUM – LIST OF AMICI CURIAE

**Freedom Network USA** is the country's largest network of anti-trafficking professionals and organizations. The Network advocates for best practices to combat both labor and sex trafficking, and has been outspoken against FOSTA. The Network works to replace ineffective laws with evidence-based means to successfully fight human trafficking.

**The Sex Workers Project (SWP)** is an organization providing direct legal and social services, and a project of the Urban Justice Center in New York City. SWP provides critical immigration representation, therapy, and case management, and engages in policy advocacy for sex workers and survivors of trafficking. Significantly, SWP was one of the first programs in the nation to assist survivors of trafficking.

**New York Transgender Advocacy Group (NYTAG)** advocates for gender-based policies that benefit transgender and gender non-conforming individuals by building community leaders, educating practitioners, dismantling systems, and influencing policy makers. NYTAG had a large role in passing the Gender Expression Non-Discrimination Act (GENDA) in New York state in early 2019.

**The Sharmus Outlaw Advocacy and Rights (SOAR) Institute** was formed in 2018 to advocate for rights-based policies for sex workers and survivors

of trafficking. SOAR engages in narrative shifting, coalition building, grassroots support, direct policy advocacy, and legal advice/referrals.

**Decriminalize Sex Work (DSW)** was founded in 2018 in direct response to FOSTA and was founded specifically to remove criminal penalties for adult, consensual sexual exchange. DSW's four co-directors are seasoned advocates in the areas of sex work and the consequences of criminalization. The organization is pursuing state-level changes nationwide, and has recently introduced a bill for a study commission in Rhode Island.

**National Coalition for Sexual Freedom (NCSF)** is a nationwide association of professionals and businesses serving individuals and communities engaged in alternative sexual relationships. NCSF advocates for equal rights and privacy protections for those in any and all types of consensual adult relationships.

**Free Speech Coalition (FSC)** is a non-profit association of businesses and individuals in the adult entertainment industry. FSC seeks to protect the liberty interests of each of its members and the industry as a whole.

**Brooklyn Defender Services (BDS)** is a high-volume public defense agency in Brooklyn, NY. BDS has been a pioneering force in developing practices in New York City's Human Trafficking Intervention Courts, where many sex workers and survivors of trafficking have their cases heard. BDS regularly engages

in policy advocacy on issues affecting clients, such as the issue before the Court in this case.

**Prostasia Foundation** is a research and advocacy organization working with diverse stakeholders towards the prevention of child sexual abuse. Prostasia advocates for laws which target abuse while upholding human rights.

**The Institute for Mind Body Therapy (IMBT)**, led by Dr. Susan Kaye, provides training and community for sex therapy professionals. Through the IMBT Process, clients work with both a talk therapist and a bodywork practitioner to address issues ranging from sexual abuse to relationship concerns. FOSTA has had a profound impact both on clients and on IMBT directly, due to concerns that marketing the IMBT Process, and the services of professionals who have undergone IMBT's trainings, could fall under the criminal liability created by FOSTA's provisions.

**St. James Infirmary** is a peer-led clinic for sex workers and their families located in San Francisco, providing medical and social services. St. James is intimately familiar with the dangers sex workers face and has seen these dangers increase following the passage of FOSTA.

## **Appendices**

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

WOODHULL FREEDOM FOUNDATION, )  
HUMAN RIGHTS WATCH, ERIC KOSZYK, )  
JESSE MALEY, A/K/A ALEX ANDREWS, )  
AND THE INTERNET ARCHIVE, )

Appellants, )

v. )

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

Appellees. )

No. 18-5298

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**DECLARATION OF JEREMY MARK MALCOLM**

Pursuant to 28 U.S.C. § 1746, I, JEREMY MARK MALCOLM, hereby  
declare as follows:

1. I am the Executive Director of Prostasia Foundation.
2. Under federal law, any minor who is engaged in sex work is deemed to have been trafficked, even if they were in fact self-engaged in that work without any adult’s direct assistance or encouragement.<sup>1</sup> Yet a minor never bears responsibility for their own sexual abuse, since they do not have the legal capacity to consent. Before FOSTA, that responsibility fell

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<sup>1</sup> 22 USC § 7102

solely on the child's abusers. Following FOSTA, it also falls on Internet platforms.

3. The relationship of Internet platforms to minors who engage in sex work online is a more complex one than FOSTA admits. FOSTA only addresses one side of this relationship: that an Internet platform technically facilitates the abuse of a minor who engages in sex work through that platform. Less well understood is the fact that Internet platforms can actually protect minors from child sexual abuse, by contributing towards a culture of "primary prevention" of child sexual abuse. Primary prevention describes a set of interventions that target the whole population with measures that can stop child sexual abuse before it happens.<sup>2</sup>
4. Not only does FOSTA overlook the beneficial role of Internet platforms in advancing the primary prevention of child sexual abuse, but it does the opposite: it actively penalizes Internet platforms that can be used to keep minors from sexual harm, by making it more risky for them to allow for the free and open discussion of sex and child sexual abuse prevention online.

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<sup>2</sup> H. L. MacMillan et al., *Primary prevention of child sexual abuse: a critical review. Part II*, 35 JOURNAL OF CHILD PSYCHOLOGY AND PSYCHIATRY, AND ALLIED DISCIPLINES 857–876 (1994)

5. There are two ways that Internet platforms can contribute towards the primary prevention of child sexual abuse, both of which have been endangered by FOSTA:
- a. Providing information and support to those who are at risk of becoming child abusers (either as a client of a minor in sex work, or by abusing a minor in some other context).
  - b. Providing minors themselves—including those who are at risk of being abused through sex work—with information about sexual health, consent and relationships.
6. Nobody will inevitably abuse a child. This is even true of pedophiles (those whose primary sexual attraction is to prepubescent minors), and those who are attracted to older minors (hebephiles and ephobophiles). Collectively, these so-called MAPs (for minor-attracted persons) are at a higher risk of offending than those without such a sexual attraction, but they can be prevented from offending with good information and support.<sup>3</sup>

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<sup>3</sup> Beier, Klaus M. et al., *Can pedophiles be reached for primary prevention of child sexual abuse? First results of the Berlin Prevention Project Dunkelfeld (PPD)*, 20 THE JOURNAL OF FORENSIC PSYCHIATRY & PSYCHOLOGY 851–867 (2009)



7. The Internet is the first place where many MAPs (especially young MAPs) turn for information and support about dealing with their attraction. The best source of information and support comes from qualified experts. However on a psychological level, such information is more likely to be taken in and believed by a MAP when they receive it from their peers. Experts have therefore acknowledged the unique value of non-offending, anti-contact MAPs providing testimony to their peers about how they can remain law-abiding.<sup>4</sup>
  
8. However in the wake of FOSTA, such resources have been and continue to be censored:
  - a. In August 2018, the online network Medium banned a publication called *Pedophiles on Pedophilia* that promoted the positive message that there is no excuse for child sexual abuse, and laid out a roadmap enabling MAPs to avoid ever offending. The publication had been lauded by the world's leading child protection experts for its contribution to child sexual abuse prevention.<sup>5</sup>

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4 James M. Cantor & Ian V. McPhail, *Non-offending Pedophiles*, 8 CURRENT SEXUAL HEALTH REPORTS 121–128 (2016), <http://link.springer.com/10.1007/s11930-016-0076-z> (last visited Oct 26, 2018)

5 FOSTA AND THE ALT-RIGHT ARE CENSORING SPEECH ABOUT CHILD PROTECTION - PROSTASIA FOUNDATION PROSTASIA FOUNDATION, <https://prostasia.org/blog/censoring-speech-child-protection/> (last visited Feb 13, 2019)

- b. The online chat network Discord has banned several support fora (called “servers” on Discord) that were used by experts and MAPs for peer and professional support. The highest profile example was the banning in July 2018 of a server called MAP Support Chat, which professionals from the UK’s Lucy Faithfull Foundation used to provide support services to MAPs,<sup>6</sup> and a similar Dutch server has also been repeatedly censored.<sup>7</sup>
- c. Since FOSTA’s passage, the social network Tumblr has engaged in an escalating pattern of the removal of sexual speech, but the initial wave of such censorship targeted speech about child sexual abuse prevention. This applied not only to MAPs, but to mental health professionals who worked with this population to prevent child sexual abuse.<sup>8</sup>

9. In addition to the censorship of prevention information and resources directed towards those who are at risk of offending, censorship has also affected minors who are at risk of becoming victims of child sexual

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6 ONLINE SUPPORT GROUPS CAN KEEP PEDOPHILES FROM OFFENDING BUT THEY KEEP GETTING SHUT DOWN THE STRANGER, <https://www.thestranger.com/slog/2018/07/20/29453977/online-support-groups-can-keep-pedophiles-from-offending-but-they-keep-getting-shut-down> (last visited Feb 13, 2019)

7 See <https://www.pedofilie.nl/node/10580>.

8 TUMBLR IS CENSORING PREVENTION MESSAGES AND AMPLIFYING HARMFUL ONES - PROSTASIA FOUNDATION PROSTASIA FOUNDATION, <https://prostasia.org/blog/tumblr-is-censoring-prevention-messages-and-amplifying-harmful-ones/> (last visited Feb 13, 2019)

abuse. This is seen in the increasing censorship of educational and support information following the passage of FOSTA:

- a. Tumblr's initial wave of removal of content relating to the prevention of child sexual abuse by MAPs was massively extended in December 2018 to include all forms of graphically sexual content, with the heaviest impact of this ban falling on the most stigmatized sexual minorities such as the LGBTQIA+ communities.<sup>9</sup>
- b. In November 2018, Facebook introduced its own stricter regulations on sexual content, which expands the platform's Community Guidelines to prohibit content "that attempts to coordinate or recruit for adult sexual activities," or mentions of "sexual positions or fetish scenarios," among other new restrictions. These changes go far beyond limiting the misuse of the platform for sex trafficking, and will impede legitimate discussion about sex, again impacting minorities most heavily.<sup>10</sup>

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9 Vivian Ho, *Tumblr's adult content ban dismays some users: "It was a safe space,"* THE GUARDIAN, Dec. 4, 2018, <https://www.theguardian.com/technology/2018/dec/03/tumblr-adult-content-ban-lgbt-community-gender> (last visited Feb 13, 2019)

10 FACEBOOK'S NEW CENSORSHIP POLICY REVEALS A "SEX PANIC" ON THE PLATFORM, <https://www.out.com/news-opinion/2018/12/06/facebooks-new-censorship-policy-reveals-sex-panic-platform> (last visited Feb 13, 2019)

c. Other Internet platforms including YouTube, Twitter, Apple, Instagram, Reddit, and Google have also ramped up their censorship of sexual content since FOSTA, even including the deletion of sex education information. For example, film production agency Sex School Hub has had its Instagram account repeatedly deactivated.<sup>11</sup>

10. ProStasia Foundation has met with several Internet companies who have affirmed privately to us that their removal of speech about child sexual abuse and its prevention decisions were partly motivated by the increased risk in hosting such speech caused by FOSTA. However, they have been unwilling to testify to this on the record.

11. It is unlikely that we will ever have more than inferential evidence of the reasoning of corporate decision makers for removing content related to child sexual abuse prevention. This is because of the significant stigma associated with the discussion of that topic, even by professionals who are trying to help.<sup>12</sup> This stigma adds to the existing reticence of Internet companies to publicly speak about their internal content moderation processes.

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11 HOW SEX CENSORSHIP KILLED THE INTERNET WE LOVE ENGADGET, <https://www.engadget.com/2019/01/31/sex-censorship-killed-internet-fosta-sesta/> (last visited Feb 13, 2019)

12 Sara Jahnke, *The Stigma of Pedophilia: Clinical and Forensic Implications*, 23 EUROPEAN PSYCHOLOGIST 144–153 (2018), <https://econtent.hogrefe.com/doi/10.1027/1016-9040/a000325> (last visited Nov 1, 2018)

12. However, even though we may not be able to form a solid link between specific instances of censorship and FOSTA, the overall pattern of increased censorship of sexual speech across the Internet is apparent, and child sexual abuse professionals have attested to how harmful the censorship of such speech can be to the cause of primary prevention.<sup>13</sup>

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 19<sup>th</sup> day of February, 2019 in Oakland, California.

  
\_\_\_\_\_  
Jeremy Malcolm  
Executive Director  
Prostasia Foundation

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<sup>13</sup> EXPERTS, POLICE, AND VIGILANTES FACE OFF OVER PEDOPHILES ON TWITTER MEDIUM,  
<https://medium.com/@jmalcolm/experts-police-and-vigilantes-face-off-over-pedophiles-on-twitter-96307e9476f8> (last visited Feb 13, 2019)

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

WOODHULL FREEDOM FOUNDATION, )  
HUMAN RIGHTS WATCH, ERIC KOSZYK, )  
JESSE MALEY, A/K/A ALEX ANDREWS, )  
AND THE INTERNET ARCHIVE, )

Appellants, )

v. )

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

Appellees. )

No. 18-5298

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**DECLARATION OF JILLIAN MODZELESKI**

Pursuant to 28 U.S.C. § 1746, I, Jillian Modzeleski, Esq., hereby declare as follows:

1. I am a senior attorney with Brooklyn Defender Services, a public defender office in Brooklyn, New York. I provide specialized criminal defense to individual defendants whose cases are heard in New York’s Human Trafficking Intervention Court.
2. In 2013 New York created the Human Trafficking Intervention Court, which presides over the cases of any person arrested and charged with prostitution

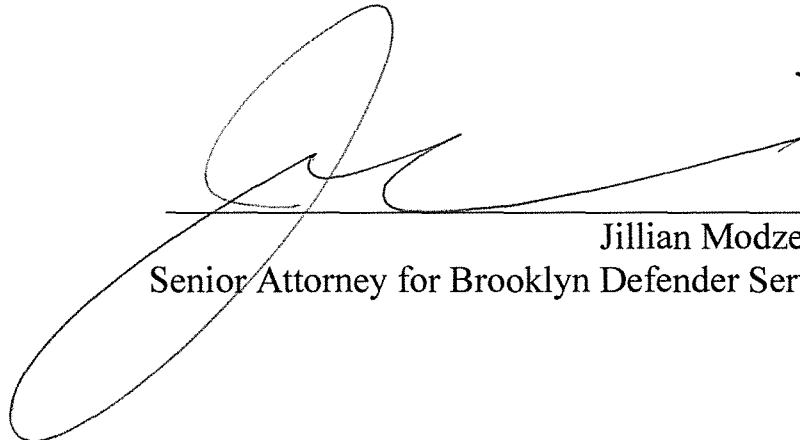
related offenses, including loitering for the purposes of prostitution and prostitution.

3. I am the attorney dedicated to staffing the Human Trafficking Court in Brooklyn for Brooklyn Defender Services since the Court's 2013 inception, and I am therefore in a unique position to observe first-hand the spike in street-based arrests that FOSTA has produced since its passage.
4. Prior to FOSTA/SESTA, street-based arrests for "loitering for the purposes of prostitution" and "prostitution" had become almost non-existent in Brooklyn. According to clients and advocates, this is because sex workers did not have the need to go to the street or the "track" or other public places to seek work. The arrests prosecuted in the Human Trafficking Intervention Court at this time last year mainly resulted from the New York Police Department answering ads placed online: an undercover officer would answer an ad, set up a meeting, meet that person, then have his team make an arrest.
5. Post FOSTA/SESTA, I have witnessed a dramatic increase in my caseload volume; most weeks, my caseload is now double what it would have been at this time last year. Where there were only 3 to 5 cases per week that tracked to the Human Trafficking Intervention Court at this time last year, now I have at least 10 to 12 cases every week in the part—which represents the

increased caseload of only one of the two assigned defenders in the part— with about half of my cases now consisting of street arrests for loitering or for prostitution of women on the street that NYPD suspects are looking for work.

6. Most of the cases that are heard in the Human Trafficking Intervention Court are of cis or trans-gender women.
7. I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 19<sup>th</sup> day of February, 2019 in Brooklyn, NY.



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Jillian Modzeleski  
Senior Attorney for Brooklyn Defender Services



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

WOODHULL FREEDOM FOUNDATION, )  
HUMAN RIGHTS WATCH, ERIC KOSZYK, )  
JESSE MALEY, A/K/A ALEX ANDREWS, )  
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No. 18-5298

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**DECLARATION OF JAMES DOUGLAS BURCH**

Pursuant to 28 U.S.C. § 1746, I, James Douglas Burch, hereby declare as follows:

1. I am the Policy and Advocacy Officer for St. James Infirmary, a peer-based occupational health and safety clinic in San Francisco, California for sex workers of all genders. I am also an attorney licensed to practice law in the State Courts of California.

2. St. James Infirmary has served thousands of sex workers since we opened in June of 1999. Each year, we provide approximately one thousand medical services to over three hundred unduplicated sex workers and make approximately five thousand five hundred contacts via our street and venue based outreach programs and our syringe distribution program.
3. St. James provides public education regarding sex work in a number of different ways: First and foremost, St. James Infirmary has provided peer education and training to hundreds of sex workers. Second, St. James Infirmary also focuses on educating governmental officials, NGOs, and other interested entities on sex workers' rights and improving cultural understanding and literacy with respects to people in the sex trades. Finally, St. James Infirmary presents to medical and social service providers on sex work and harm reduction approaches to working with the vibrant and diverse sex worker community.
4. As St. James Infirmary receives direct and consistent input from a diverse community of sex workers in San Francisco, our organization has a unique understanding of the impact of FOSTA/SESTA on the daily lives of those engaged in sex work in the city.

5. The enactment of FOSTA/SESTA has caused significant harm to sex workers in San Francisco. Before the enactment of FOSTA/SESTA, many sex workers were able to pre-arrange meeting their clients online. This allowed them to agree on rates beforehand and see if clients had mistreated, abused, assaulted, underpaid, or otherwise caused a sex worker to leave a negative review encouraging other sex workers to stay away. Importantly, it also allowed them to arrange a secure, indoor location to meet.
6. After FOSTA/SESTA, virtually all of the websites commonly used to screen clients were taken down, leaving sex workers without the ability to use the internet to screen their clients. As a result, St. James Infirmary mobile outreach workers report observing approximately four times the number of sex workers engaged in street-based sex work in the month immediately following the passage of FOSTA/SESTA.
7. One sex worker who participates in St. James Infirmary's outreach programming reported that they were contacted by a former client with whom they had ended communications because they deemed them to be potentially harmful. When the client next reached out, after the passage of FOSTA/SESTA, our participant agreed to meet with them because

they had experienced a severe decrease in work and needed the money.

When they did meet the former client, they were sexually assaulted.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 19<sup>th</sup> day of February, 2019 in San Francisco, California.



James Douglas Burch  
Policy and Advocacy Officer  
St. James Infirmary

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

WOODHULL FREEDOM FOUNDATION, )  
HUMAN RIGHTS WATCH, ERIC KOSZYK, )  
JESSE MALEY, A/K/A ALEX ANDREWS, )  
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No. 18-5298

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**DECLARATION OF JEFFREY J. DOUGLAS**

Pursuant to 28 U.S.C. § 1746, I, Jeffrey J. Douglas, hereby declare as follows:

1. I am the Chair of the Board of Directors of the Free Speech Coalition, the trade association of the adult entertainment industry. I am also an attorney licensed to practice law in Federal and State Courts of California.
2. I am the Chair of the Board of Directors of the Free Speech Coalition (“FSC”). Founded in 1991, FSC is the trade association of the adult entertainment and products industry based in the United States. Our

mission is to lead, protect and support the growth and well-being of businesses and workers in the adult industry, as well as the communities to which they belong. The Free Speech Coalition has, *inter alia*, (1) defeated numerous industry hostile legislative efforts, including imposition of excise taxes on adult products and services and mandating condom use, (2) overturned in the U.S. Supreme Court an unconstitutional law expanding the definition of child pornography (*Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002)) and prevailed in litigation resulting in the elimination of onerous regulations requiring record-keeping and criminal penalties in an unconstitutional Federal law (18 U.S.C. § 2257) in the current case of *Free Speech Coalition, et al. v. Sessions*, 825 F.3d 149 (3rd Cir., 2015) and 314 F.Supp.3d 678 (E.D.Pa, 2018), and (3) lead the opposition to a statewide initiative, defeating Proposition 60 in the 2016 election.

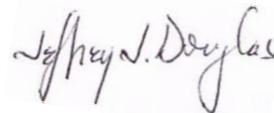
3. Our membership encompasses every aspect of the adult entertainment and products industry, including individual performers and creative artists, directors, producers, manufacturers, distributors, websites as well as supporting businesses such as billing and marketing services. This provides our organization unique insight into the impact that public policy has on the lives and businesses participating in the industry.

4. The enactment of FESTA/SOSTA has significantly harmed numerous members, both businesses and individuals throughout the broad reach of our industry. Even before its effective date, avenues of communication and commerce were foreclosed. Since then the environment has worsened.
5. Specifically, several member companies have decided to close their user to user forums out of fear that someone may post content creating liability that would not be caught by their customer support team. This damages their users' ability to freely post comments on videos and share comments with other viewers. As a consequence, the sites have a less robust, dynamic relationship with their users.
6. One company terminated its plan to acquire another company which provided online services to screen and recruit performers out of fear of liability under FOSTA/SESTA. Other companies have reduced advertising for legal adult content because it is unclear what the extent of responsibility to them as a marketplace would be.
7. The restrictiveness of the rules and both the vagueness and overbreadth of the rules are at a major part of the problem. These problems are aggravated by the difficulty for getting reliable advice from lawyers otherwise knowledgeable and experienced in the representation of adult

businesses. Because the law allows for, indeed encourages, enforcement by state law enforcement, it is virtually impossible to anticipate how the language of FESTA/SOSTA will be interpreted and enforced by fifty different jurisdictions. This results in advice being biased toward self-censorship and the most restrictive possible interpretation. Businesses are not interested in being prosecuted and “winning” a case. Businesses necessarily wish to be told how to avoid any and all prosecutions, no matter how unreasonable the interpretation of the statutory language underpinning that litigation might be.

8. I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 19<sup>th</sup> day of February, 2019 in Santa Monica, California.



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Jeffrey J. Douglas  
Chair, Board of Directors  
Free Speech Coalition



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

WOODHULL FREEDOM FOUNDATION, )  
HUMAN RIGHTS WATCH, ERIC KOSZYK, )  
JESSE MALEY, A/K/A ALEX ANDREWS, )  
AND THE INTERNET ARCHIVE, )

Appellants, )

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WILLIAM P. BARR, IN HIS OFFICIAL )  
CAPACITY AS ATTORNEY GENERAL )  
OF THE UNITED STATES, )

Appellees. )

No. 18-5298

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**DECLARATION OF COY GORDON**

Pursuant to 28 U.S.C. § 1746, I, Coy Gordon (known as “Ceyenne Doroshov”), hereby declare as follows:

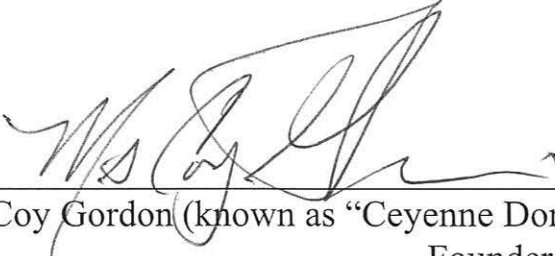
1. I am the Founder and Director of GLITS Inc., an organization that serves LGBTQIA and sex worker communities. GLITS was founded in 2016 and is based in Queens, New York. GLITS provides peer-based services and support, including helping people find housing, assisting with drug

treatment/rehabilitation, introduction to social and case management services, and referral to legal support.

2. I am a former sex worker and worked in the industry for nearly 30 years. I therefore can understand the impact of FOSTA on current sex workers and transgender women from both a personal perspective as well as an advocate's perspective.
3. FOSTA has caused community members to be homeless. It has increased unsafe sex practices, survival has really become survival because of the desperation that has been created by the law.
4. People are doing the most risky behaviors. Sex workers have been known to use prophylactics and protection but you are now seeing an increase in people having sex without condoms.
5. Domestic violence has increased, sexual abuse has increased in our communities. People are more economically desperate.
6. I have personally seen an increase in substance abuse and serious mental health crises. I have had to assist numerous individuals in obtaining inpatient treatment for one or both of these concerns in the wake of FOSTA. I have seen a huge increase in these incidences in the community.

7. I have seen alarming numbers of transgender women being murdered in 2018.
8. There is one client of GLITS who came to me in May 2018. He is a young cisgender male sex worker and he came seeking my help. He went from high end sex work where he was able to sustain himself to high risk sex work dealing with addiction that had spiraled out of control, dangerous clients, increased financial desperation, and low self-esteem. There is no doubt that FOSTA played a role in making his situation much worse.
9. When my community suffers, my work and organization suffer. I am over capacity. I don't have the capability to say no to someone in crises, and FOSTA has placed so many people in heightened crises.
10. I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 19<sup>th</sup> day of February, 2019 in Queens, NY.

  
Coy Gordon (known as "Ceyenne Doroshov")  
Founder/Director  
GLITS, Inc.

 : 02/19/19

AMARJEET S MULTANI  
Notary Public, State of New York  
Reg. No. 01MU6103749  
Qualified in Queens County  
My Commission Expires Jan. 12, 2020

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

WOODHULL FREEDOM FOUNDATION, )  
HUMAN RIGHTS WATCH, ERIC KOSZYK, )  
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No. 18-5298

**DECLARATION OF DR. SUSAN KAYE**

Pursuant to 28 U.S.C. § 1746, I, Dr. Susan Kaye, hereby declare as follows:

1. I am Co-Founder of The Institute for Mind Body Therapy. The IMBT Process is a sex therapy model for supporting clients that has been developed by the Institute for Mind Body Therapy (IMBT) for use of trained bodywork practitioners and mental health therapists who have completed IMBT-related training. These trainings were developed for and by IMBT, and forms the foundation for all interactions with clients seeking therapy regarding issues from sexual abuse to relationship concerns. I give this declaration in my personal capacity and not on behalf of any organization.

2. As a sex educator, sexologist and human sexuality professor, I have designed The Institute for Mind Body Therapy ("IMBT") to provide

training, community, and support to touch and sexuality professionals who support individuals in mind and body, known as integrated mind/body (somatic arts) practices.

**How we have been harmed by SESTA/FOSTA:**

3. We learned of the ruling last April. At that time our Executive Director suggested we take down our Resource Directory. On this directory is everyone who has trained with us to learn how to work in the Triadic Model. This Model consists of Sex and Relationship Therapists, Body work Practitioners, trauma and Medical Personnel who all are degreed and professional. Taking down this directory has affected the income of these 25-30 people.

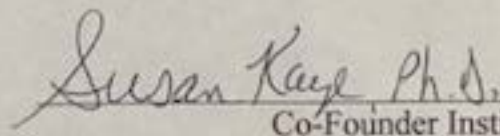
4. It has also affected the clients who are now fearful of contacting sexuality therapy. Our client load has decreased at least half since taking down the directory and another half since S/F went into law this January 1st.

5. Also affected is the entire human sexuality therapy, research and sex education industry. The lack of maturity and education of our sex and body phobic culture sees our services in the least as immoral and at the worst as punishable.

6. It is time for us (US) to grow up, catch up with the rest off the developed countries and teach respect and appreciation for the natural functions of bodies, how they work and how to keep them safe and well. Especially for women!

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 19<sup>th</sup> day of February, 2019 in Austin, Texas.

 Susan Kaye, Ph.D. Sexologist  
Co-Founder Institute for Mind/Body Therapy

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

WOODHULL FREEDOM FOUNDATION, )  
HUMAN RIGHTS WATCH, ERIC KOSZYK, )  
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No. 18-5298

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**DECLARATION OF SUSAN WRIGHT**

Pursuant to 28 U.S.C. § 1746, I, Susan Wright, hereby declare as follows:

1. I am the Chairperson for the National Coalition for Sexual Freedom (NCSF), a nonprofit 501(c)(4) membership organization, and the NCSF Foundation, a charitable 501(c)(3) tax-exempt organization based in Baltimore, MD.
2. NCSF was founded in 1997 and is committed to creating a political, legal and social environment in the US that advances equal rights for consenting adults who engage in alternative sexual and relationship expressions.
3. The NCSF has, in recent months, become informed of numerous instances in which innocent organizations and individuals have been deprived of access to

information on websites operated by providers of interactive computer services who have deleted content provided by third parties in fear of potential criminal prosecution under the Allow States and Victims to Fight Online Sex Trafficking Act (FOSTA). This information has become available to NCSF in two ways:

4. First, this information has become available to NCSF because NCSF is a membership coalition of 81 Coalition Partner organizations and 68 Supporting Member organizations, all of which are involved with sexual freedom issues and rely on interactive computer service providers that carry on their services a wide range of data of a sexual nature. Thus, when such a member organization is harmed by the inability to access such information, that constitutes harm to NCSF.
5. Among the reports we have received from Coalition Partners and Supporting Members, which we would be willing to share confidentially in full with the Court, are:
6. NCSF Coalition Partner members have had their contracts with their host hotels canceled since FOSTA/SESTA was made law.
7. In one example, in May, 2018, a religious political extremist group sent emails to the host hotel of a kink event and threatened the hotel with a negative social media campaign that would falsely claim the event was encouraging sex trafficking. The hotel canceled the contract for the event, fearing the negative

repercussions of a social media campaign. Previously this event had been held for a number of years without any problems with local law enforcement.

8. Since FOSTA became law, NCSF Coalition Partner members have also experienced issues with payment processing.
9. One example was reported at NCSF's Coalition Town Hall Meeting on June 10, 2018, by a member group whose educational kink event was removed from EventBrite. EventBrite changed its TOS to exclude events that constitute or promote "explicit sexual activity" on April 3, 2018. The benefit of EventBrite is that they release a portion of the funds from tickets sold prior to the event, which enables nonprofit groups to pay an advance deposit for their venue space. Without EventBrite ticketing, nonprofit groups may be unable to meet the advance deposit required by many contracts.
10. Second, NCSF operates a nationwide Incident Reporting & Response program in which we are regularly contacted by allied organizations and persons about harmful incidents that they have encountered that relate to nontraditional sexual practices and situations. Among the reports we have received recently about harm caused by FOSTA about which we would be willing to share details with the Court in confidence, are:
  11. NCSF has received reports from allied persons who have had their Patreon.com accounts shut down starting in June, 2018.



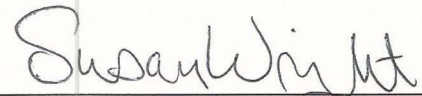
12. For example, one Patreon page was home to rope art how-to videos that contained no nudity and no sexual activity, and resulted in the loss of potential income of hundreds to several thousand dollars a month. Another Patreon page that was shut down featured a web cam artist who focused on kink.
13. NCSF has also received reports on social media censorship since the passage of FOSTA which interferes with professionals' and organizations' ability to publicize their educational and therapeutic services.
14. For example, licensed marriage and family therapists and sex therapists have reported to NCSF that their Facebook and Google ads have been declined post-FOSTA because they included "sexual content" simply for mentioning the words "sex therapist." These were ads that had been previously been running for months/years.
15. Nonprofit fraternal groups have also reported that their Facebook ads for events have been denied for having "sexual content" in them, despite clear descriptions about the educational, non-profit nature of the workshops and that the audience is for consenting adults only.
16. Sex educators have reported censorship of their content, including a sex educator whose 5-year-old video was removed from YouTube for "sexual content" even though it was an educational tutorial about gags.

17. NCSF has also received reports from therapists about the needs of their patients, and how they've been stretching their practices to offer more support since FOSTA.
18. For example, one therapist reported that around a quarter to a third of their clients are sex workers, and every single one of them is suffering due to this legislation. All symptoms (e.g., related to depression, anxiety, and PTSD, and suicidal ideation) are exacerbated, relationships are being affected, and resources are being stretched thin to nonexistent. Their clients are worried about eating and having a place to live, and are subsequently lowering their screening practices out of necessity, putting themselves at greater risk of assault or worse. Many of these clients don't have health insurance.
19. Lastly, NCSF experienced social media restrictions on its own Facebook page in January and February 2019, when we tried to post about an essay contest focusing on sex and adult industry workers' personal experiences eight months after the FOSTA/SESTA bill became law. The website sponsoring the contest features escorts and adult entertainers, and they contacted NCSF via email asking us to help spread the word because they were having difficulty reaching out on social media. When we tried to post a link directly to the essay contest page on the sponsor website, Facebook wouldn't let it be posted. The post finally was accepted when we instead inserted a link to the NCSF Blog

containing the announcement and link to the essay contest. There was no notice from Facebook explaining why the post wasn't allowed.

20. I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 19<sup>th</sup> day of February, 2019 in Phoenix, AZ.



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Susan Wright  
Chairperson

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

WOODHULL FREEDOM FOUNDATION, )  
HUMAN RIGHTS WATCH, ERIC KOSZYK, )  
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**DECLARATION OF JESSICA LEIGH BRANTLY**

Pursuant to 28 U.S.C. § 1746, I, Jessica Leigh Brantly, hereby declare as follows:

1. I am a fetish worker, social justice advocate, and educator in alternative lifestyle practices.
2. I have been personally and professionally harmed by the effects of FOSTA. I use online platforms and applications for my advocacy work, personal interests, educational workshops, and income.

3. My speech on Facebook and Twitter has been censored. My ability to advertise online has suffered; this includes non-US based advertising platforms that have directly cited FOSTA liability concerns and have made advertising dramatically more difficult and less effective. Part of my income is derived from my status as a public figure within the BDSM/fetish communities and this is evidenced by my social media presence, informational links to my website, reviews on my work, news stories, or videos. Even though there are not explicit materials in those links, online advertisements (that are not US-based) will no longer link to that information. This has led to a significant decrease in my income as a worker and educator.
4. Whiplr is a social media application specifically targeting fetish and BDSM communities. Since FOSTA, they have censored users' profiles by editing words and images, including illustrations or non-nude "suggestive" photos. They do not allow depictions of domination or submission, pictures of sex toys or common "play instruments" (such as floggers, leather belts, or paddles). Even a picture of a doll representation in a person's profile is not approved if one doll is standing and another doll is kneeling before them, as this is perceived as a "BDSM" depiction.

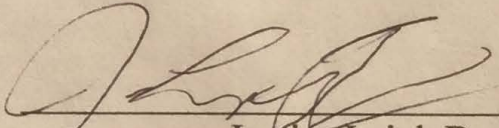
What's worse is that Whiplr is now a BDSM/fetish application that does not allow the words "BDSM" or "fetish" in a person's profile. I know this because all of that censorship happened to me.

5. People who engage in "alternative" lifestyle practices or play often fall within the fetish/kink or BDSM communities, for whom the internet has created a safe and welcoming environment to find community, events, and partners. Many community members consider themselves performance artists or consumers of an artistic display.
6. My ability to connect with other alternative lifestyle artists is now stifled, as I can no longer see their work on the premier place we all went to share each other's BDSM images, Tumblr.com, a microblogging and social networking website. It focuses on illustration and photography imagery. It provides a search engine to be able to connect with images based upon simple word searches. As a result of FOSTA, the following words now return no results: "BDSM", "fetish", "dominatrix", "dominant", "sex work", "escort", "stripper", "domination", "sexual surrogate", "bondage", "sadism", "rope bondage", or "kinbaku", while the word "sex" does return results. How the word "bondage" could have a perceived value that is more gratuitous than the

word “sex” is a direct indicator of platforms incorrectly conflating alternative lifestyles with trafficking and targeting our free speech and expression.

7. “All in a Day’s (Sex) Work” is a photographic art book I was featured in about the everyday lives of sex workers. It went on sale via Amazon.com. After SESTA, Facebook banned an advertisement link to this book due to its name.
8. I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 19<sup>th</sup> day of February, 2019 in Brooklyn, NY.



\_\_\_\_\_  
Jessica Leigh Brantly  
Fetish Worker & Educator, Advocate  
SOAR Institute, GLITS INC.

**IN THE UNITED STATES COURT OF APPEALS  
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WOODHULL FREEDOM FOUNDATION, )  
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No. 18-5298

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**DECLARATION OF REBECCA ROTHSCHILD**

Pursuant to 28 U.S.C. § 1746, I, Rebecca Rothschild, hereby declare as follows:

1. I am a volunteer for an organization that provides educational and social opportunities to sexual minorities.
2. The programming includes, but is not limited to, sexual health and safety, consent, and empowerment through sexuality. Our social events are welcoming of non-normative sexualities, such as members of the



LGBTQIA community, but they do not allow sex. We do not produce any sexually explicit content which is not also explicitly educational.

3. Since SESTA/FOSTA came into effect, we have taken steps to alter our language in advertising and self-description so as to avoid accidentally being misidentified as involved in anything illegal. Language that welcomes sex workers and explains what behavior is expected of them in our spaces has been changed to be more ambiguous.
4. Mentions of sex in relation to education have been scrubbed.
5. Programming that the community we serve would benefit from has been turned down as too risky to offer.
6. We have also shut down online forums and social media accounts in which we were advertising our events, drastically limiting our ability to reach those who need us the most.
7. On the subject of misidentification, this has already occurred, even despite our efforts to self-censor. Square closed our account because they decided we were a pornography company - apparently offering safe spaces for sexual minorities and education about safety and consent is considered pornographic.

8. We were denied a new account on a new social media platform for the same reason.
9. The overall effect of this has been to hamstring our ability to communicate who we are and what resources we have available. This ambiguity means that those who need us may not realize we welcome them.
10. Since we can't explicitly explain what is and is not permitted, people who are actually looking for something illicit may think that they can find it at our events. This has resulted in an uptick in inappropriate behavior and us having to remove people from our spaces.
11. A class that was designed to educate people about what the laws surrounding sexual assault, sex work, and trafficking actually ARE almost didn't happen because we were unsure about what language we could safely use to advertise it.
12. Our social media accounts have halted open support of advocacy groups that work with sex workers for fear of being flagged by a word search algorithm seeking to quash communication about sex work.
13. This has harmed our relationships with other advocacy organizations, severely reduced our ability to participate in supporting our community,

and cost us money in the form of reduced attendance following reduced advertising and loss of payment processing options.

14. I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 19<sup>th</sup> day of February, 2019 in New York City, NY.

A handwritten signature in black ink, appearing to read "Rebecca Rothschild", written over a horizontal line.

Rebecca Rothschild  
Volunteer