

ORAL ARGUMENT NOT YET SCHEDULED

NO. 18-5298

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

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

PLAINTIFFS-APPELLANTS,

v.

THE UNITED STATES OF AMERICA, ET AL.

,

DEFENDANTS-APPELLEES,

On Appeal from the United States District Court for the District of Columbia
The Honorable Richard J. Leon, Judge Presiding (Case No. 1:18-cv-1552-RJL)

***BRIEF OF AMICI CURIAE FLOOR64, INC. D/B/A THE COPIA
INSTITUTE, ENGINE ADVOCACY, AND REDDIT, INC. IN SUPPORT OF
PLAINTIFFS-APPELLANTS***

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CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

Pursuant to D.C. Circuit R. 28(a)(1), Amici certify that:

A. 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, which at the time was claimed to be Matthew G. Whitaker (Acting). Amici anticipate that other amici in support of this appeal will include (1) Freedom Network USA, the Sex Workers Project, the National Center for Transgender Equality, 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, and Protasia Foundation and (2) the Institute for Free Speech, Center for Democracy and Technology, and other entities aligned with their position. There are no other parties or known amici at this time.

B. 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").

C. Related cases

There are no related cases.

STATUTES AND REGULATIONS

All applicable statutes, etc., are contained in the Brief for Plaintiffs-Appellants.

RULE 29 STATEMENT

Pursuant to Federal Rule of Appellate Procedure 29(a), amici curiae certify that all parties in this case have consented to the filing of this brief. Pursuant to Federal Rule of Appellate Procedure 29(c)(5), amici curiae further certify that no party or party's counsel authored this brief in whole or in part, that no party or party's counsel provided any money that was intended to fund the preparation or submission of this brief, and no party or person—other than the amici curiae, its members, or its counsel—contributed money that was intended to fund the preparation or submission of this brief.

Pursuant to District of Columbia Circuit Rule 29(d), amici curiae certify that this separate amicus brief is necessary and non-duplicative with any other brief that may be submitted. This case impacts every online platform, whose size, dimensions, and subject matter may vary widely. A separate brief is necessary to ensure that the unique interests of the undersigned signatories, and those they represent, may be put before the court.

**DISCLOSURE OF CORPORATE AFFILIATIONS AND
OTHER ENTITIES WITH A DIRECT FINANCIAL INTEREST IN
LITIGATION**

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, amicus curiae Floor64, Inc. d/b/a The Copia Institute states that it does not have a parent corporation, and that no publicly held corporation owns 10% or more of the stock of it. Engine Advocacy discloses that it is a nonprofit corporation organized under the laws of the state of California, that it does not have any parent company, and that no publicly held corporation owns 10% or more of its stock. Reddit, Inc. states that it does not have a parent corporation, and that no publicly held corporation owns 10% or more of stock in it.

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STATEMENT OF INTEREST

This case challenges 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”). Among FOSTA’s legislative effects are the direct and indirect changes it made to the operation of the statutory immunity provided by 47 U.S.C. Section 230 (“Section 230”). All of the undersigned amici are, or represent, small businesses that depended on Section 230 in its original, unmodified form, to be able to provide speech and services to other online users without adverse impact. All of them have therefore been adversely affected by FOSTA’s changes.

Amicus curiae Floor64, Inc. d/b/a The Copia Institute, is a privately-held small business that advises and educates innovative technology startups on policy issues, including those relating to platforms and the important free speech interests associated with their protection. Through the Copia Institute, Floor64 works directly with innovators and entrepreneurs to better understand the regulatory terrain, while Floor64’s online publication, Techdirt.com, has published over 70,000 posts commenting on these subjects. The site regularly receives more than a million page views per month, and its posts have also attracted more than a million reader comments—user speech that advances discovery and discussion around these topics. Floor64 depends on Section 230 to both enable the robust public discourse found on its website and for its own speech to be shared and read throughout the Internet.

Amicus curiae Engine Advocacy (“Engine”) is a nonprofit technology policy, research, and advocacy organization that bridges the gap between policymakers and startups. It regularly works with government and a community of high-technology, growth-oriented startups across the nation to support technology entrepreneurship. These startups are among the most innovative and fastest-growing companies in the country, fundamentally altering and challenging entrenched business models, ideas, and institutions across all industries. Engine and its community of entrepreneurs have an interest in protecting the startup ecosystem that thrived under the robust statutory protection from liability arising from third-party content Section 230 used to afford these interactive Internet services and their users. Engine believes exposing the startup community to liability with the changes FOSTA made to Section 230 threatens their ability to develop due to higher costs to enter and stay in the market.

Amicus curiae Reddit, Inc. operates Reddit, an online network of more than 130,000 active individual communities known as “subreddits.” Each subreddit is moderated by passionate volunteers, and there is a subreddit for virtually every topic and interest—including many related to sex. Conversation within each subreddit is driven by users submitting, voting on, and discussing stories and other content within the parameters of the subreddit defined by its moderators. Reddit depends on the statutory protection afforded platforms in order to host the diverse and robust discourse its 330 million monthly users wish to engage in.

SUMMARY OF ARGUMENT

Speech is chilled by fear. Section 230 protected online speech by ensuring platforms would not have to fear legal liability for facilitating it. The changes FOSTA made to its operation have now brought the fear back, and as a result online speech has suffered.

The plaintiffs in this case are not alone in being afraid of the changes, both direct and indirect, that FOSTA has made to the statutory protection they depended upon to speak freely online. The chilling effect wrought by FOSTA, the law passed by Congress last year, can reach every Internet user and every platform they use to speak. Amici represent many Internet platform businesses, including smaller ones hit especially hard by FOSTA's changes. By eroding the statutory protection that used to enable platforms to facilitate user speech, FOSTA has eroded their ability to facilitate this speech, and with it eroded their businesses, by replacing this critical statutory protection they depended on to protect them from liability with a palpable fear of new liability of indefinite scope. Not only has FOSTA caused them to lose users, their expression, and their communities to terrified, self-censoring silence due to FOSTA's vague and expansive statutory language, but the reasonable fear of enormous civil and criminal liability is now driving platforms' site moderation decisions, resulting in over-censorship of legitimate user expression and neglect of

their forums. In distorting the balance Congress originally baked into Section 230 to enable online speech Congress has now chilled it.

ARGUMENT

I. FOSTA chilled speech by replacing the protection from liability platforms needed to facilitate others' online speech with the fear of it.

A. By replacing the protective statutory regime platforms depended on with one that is punitive, FOSTA disrupts the deliberate balance Congress originally struck to encourage the most good, and least bad, expression online, and unconstitutionally leads to the opposite result.

Congress got it right the first time. Back in 1996 it recognized the potential of the Internet and other interactive computer services to unite people and ideas. *See, e.g.*, 47 U.S.C. § 230(a). It also knew that these benefits could not be realized if platforms had to fear liability from how people used their systems and services. *Batzel v. Smith*, 333 F.3d 1018, 1026-7 (9th Cir. 2003). *See also* Br. amicus curiae for Chris Cox and NetChoice at 15, *Homeaway.com v. City of Santa Monica*, No. 18-55367 (9th Cir. filed Apr. 25, 2018) (“Cox Brief”), available at <https://tdrt.io/gPJ> (“The inevitable consequence of attaching platform liability to user-generated content is to force intermediaries to monitor everything posted on their sites.”).¹

Congress wanted to ensure two things about this new online world. *Batzel*, 333 F.3d at 1027. First, it wanted to foster free speech on the Internet, along with

¹ Last year former member of Congress Chris Cox, Section 230's co-author submitted an amicus brief in another case considering the operation of Section 230 to give more insight into its intended purpose, effect, and reach.

the development of e-commerce, which could not happen if the intermediary platforms carrying this speech and e-commerce had to fear be held liable for the speech and e-commerce they enabled. *Id.* At the same time, Congress also wanted these same platforms to feel able to help protect the public by ensuring that they also would not find themselves facing liability for trying to minimize the unwelcome consequences of the worst speech. *Id.* at 1028. See also *Carafano v. Metroplash.com, Inc.*, 339, F.3d 1119, 1122 (9th Cir. 2003) (“The Statute is designed at once to promote the free exchange of information and ideas over the Internet and to encourage voluntary monitoring for offensive or obscene material.”).

So Congress passed Section 230 to dispel platforms’ liability fears. It did this with two complementary provisions: The first, at Subsection (c)(1), precludes holding a platform liable for content created by another. 47 U.S.C. § 230(c)(1). The second, at Subsection (c)(2), prevents holding a platform liable for its attempts to remove others’ speech from their systems. 47 U.S.C. § 230(c)(2). While the first provision encourages platforms to play a critical role in promoting the most online speech, the second encourages platforms to help rid the Internet of the most undesirable. As subparts of the same heading, the two provisions are designed to work in tandem. *See* 47 U.S.C. § 230(c) (“Protection for ‘Good Samaritan’ blocking and screening of offensive material.”). In other words, Appellants are not the first

to lament the existence of odious speech online: Congress anticipated this concern and expressly designed Section 230 to address it. *Batzel*, 333 F.3d at 1028.

What is notable about how Congress sought to achieve these twin goals is that, as part of this balanced approach, instead of threatening intermediary platforms with sanction, by removing their fear of liability from the equation it instead put them in the best position to both promote online speech and take whatever steps they could to protect the public from the worst of it. The wisdom of structuring the statute with this “carrot” rather than “stick” approach is evidenced in several ways: For one thing, it encouraged platforms to help police the Internet by ensuring that they will not be worse off than those that do not bother to. *Id.* at 1029. Second, had Congress not structured Section 230 this way it would have discouraged platforms from doing all they could to protect users because they would have needed to conserve resources to deal with the unanticipated liability that might arise should they not have done it in a way that satisfied ex post judicial review. *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997); 141 Cong. Rec. H8460-01, H8470 (1995) (statement of Rep. Barton) (“Congress enacted 230 to give interactive service providers ‘a reasonable way to ... help them self-regulate themselves without penalty of law.’”).

The ability of Section 230 to serve as a mechanism for promoting Internet hygiene was also predicated on platforms not having their enforcement priorities commandeered by an infinite number of specific policing demands. *See, e.g., Zeran*,

129 F.3d at 330-31 (“It would be impossible for service providers to screen each of their millions of postings for possible problems.”). Broad immunity meant that they would not have to divert their resources away from policing activities that might be more valuable or effective overall for their user communities and spend them instead on tasks designed simply to avoid liability.

Unfortunately, with FOSTA, Congress has now replaced carrots with sticks and upended the balance. Instead of encouraging platforms to enable speech, Congress has caused them to fear it, and thus caused them to stop letting large amounts of protected speech be made through their systems. And instead of encouraging platforms to monitor content, as would be more consistent with Congress’s overall desire to rid the Internet of the worst expression, it has caused many to fear knowing what content is on their systems, and thus caused them to stop policing it. The declaration of the twin goals of Section 230 – to encourage the most good content and the least bad – still remains unamended by FOSTA in Section 230’s preamble text. 47 U.S.C. § 230(a) and (b). But by replacing protection with fear in order to pressure platforms to target speech it does not like, Congress has now made it impossible to meet either goal.

Whether this chilling of online speech is simply the accidental effect of a poorly-drafted law that led to protected speech being eliminated, *Reno v. ACLU*, 521 U.S. 844, 874 (1997), or a deliberate effort by Congress to target speech, the problem

remains. Br. 36-40. *See also* Br. amicus curiae for Members of Congress at 7, *Daniel v. Armslist*, No. 2017-AP-344 (Wi. Sup. Ct. filed Jan. 28, 2019), *available at* <https://tdrt.io/hcB> (admitting that FOSTA was passed to punish “the sort of publication-related conduct that Section 230 ordinarily immunizes”). After Section 230 was passed the Supreme Court ruled that online speech was entitled to the same protection as offline, and thus, as plaintiffs-appellants correctly argue, just as protected from collateral damage by a law like FOSTA so mismatched in its intended purpose and impact on protected speech. *Reno*, 521 U.S. at 870 (“[O]ur cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to [the Internet].”).

B. FOSTA causes platforms to fear ruin for facilitating others’ speech.

FOSTA introduces risk for platforms of all sizes. *See, e.g.*, Mike Masnick, *Facebook, Whose Support Made FOSTA Law, Now Sued For Facilitating Sex Trafficking Under FOSTA*, TECHDIRT (Oct. 10, 2018), <https://tdrt.io/h0r> (describing how one of the largest Internet platforms is now being sued for third-party activity as a result of the statutory changes brought by FOSTA). But the danger it creates for smaller platforms, or those less-resourced in proportion to their user base, like those represented by amici is the greatest because they have the least ability to weather the storms a withered Section 230 now invites.

Civil litigation is notoriously expensive. The cost of defending even a frivolous claim can easily exceed a startup's valuation. Engine, *Section 230 Cost Report* (last accessed Feb. 19, 2019), <http://www.engine.is/s/Section-230-cost-study.pdf>. Simply responding to demand letters can cost companies thousands of dollars in lawyer fees, not to mention any obligations to preserve documents the letter might trigger, which themselves impose non-trivial costs, especially for smaller companies without the infrastructure larger companies may have to manage them. *Id.* And if these cases somehow manage to go forward, the costs threaten to be even more ruinous. A motion to dismiss can easily cost in the tens of thousands of dollars. *Id.* But at least if the company can get out of the case at that stage they will be spared the even more exorbitant costs of discovery, or, worse, trial. *Id.*

Because it is not just a damage award that can be fatal to these small companies. *See UMG Recordings, Inc. v. Shelter Capital Partners*, 718 F.3d 1006 (9th Cir. 2013) (finding the already bankrupted platform ultimately immune from liability). Having Section 230 deter these lawsuits outright, or at least help companies get out of them relatively inexpensively, helps ensure that a company won't die a "death by ten thousand duck-bites." *Fair Housing Coun. Of San Fernando Valley v. Roommates.com*, 521 F.3d 1157, 1174 (9th Cir. 2008). Yet with FOSTA's weakening of Section 230 they now need to worry about increased and more expensive litigation, as well as potential damage awards, depleting their bank

accounts and scaring off needed investment. *See* Cox Brief 26 (“[Platforms], facing massive exposure to potential liability if they do not monitor user content and take responsibility for third parties’ legal compliance, would encounter significant obstacles to capital formation.”). *See also* Peter Kafka, *Veoh finally calls it quits: layoffs yesterday, bankruptcy filing soon*, C|NET (Feb. 11, 2010), <http://www.cnet.com/news/veoh-finally-calls-it-quits-layoffs-yesterday-bankruptcy-filing-soon/> (describing how the startup platform in *UMG v. Shelter Capital*, *supra*, could not get funding and thus went out of business while it was litigating the lawsuit it later won). Whittling away at the critical balance Congress had originally struck when it passed Section 230 thus unduly threatens these smaller and more vulnerable platform companies and puts greater pressure on them to refuse their users’ expression. *See Zeran*, 129 F.3d at 331 (“Faced with potential liability for each message republished by their services, interactive computer service providers might choose to severely restrict the number and type of messages posted.”).

Civil litigation is also not the only threat faced by platforms for their being platforms: FOSTA also raises the specter of criminal prosecution. True, prior to FOSTA’s passage liability Section 230 did not provide any immunity for liability arising from violations of federal crimes. 47 U.S.C. § 230(e)(1). But FOSTA nevertheless significantly raised the legal risk for platforms. First, prior to FOSTA

platforms only had to worry about federal prosecutors taking issue with any of their user activity. Now, with FOSTA, it is not just federal prosecutors whom platforms have to fear but prosecutors from every single state jurisdiction, who in practice will almost unavoidably vary in their interpretation of federal criminal statutes. 47 U.S.C. § 230(e)(5)(B) and (C). The *Ex Post Facto* provision also means that any of these prosecutions can be pursued on the basis of any of the voluminous user activity the platform has ever facilitated, sending platforms on the expensive errand of scrubbing their sites of all the speech they never used to have to fear but now must. Br. 53 fn 28 (citing 164 Cong. Rec. H1297 (daily ed. Feb. 27, 2018)). In addition, state prosecutors may also bring civil actions, as well as criminal. 18 U.S.C. § 1595(d). FOSTA thus raises a company's potential defense costs substantially, and, again in a way that is most difficult for a smaller company, or its smaller staff, to manage.

And even if these companies could somehow set aside such substantial amounts of their operating budgets to fend off this heightened risk FOSTA has brought them – even though it would be at the expense of developing their services, facilitating certain types of legitimate expression, or nurturing their communities most effectively – it is impossible to know how to effectively budget for this legal risk given the definitional vagueness as to what sort of activity by users, or the platform, can subject the platform to liability. *See infra* Section C. Instead they are

forced to see threats everywhere, which can be particularly hard on smaller businesses that may be more niche in the types of expression they facilitate and thus less able to survive if they feel compelled to stop serving users expressing certain types of ideas. In sum, by trying to protect their businesses, thanks to FOSTA, they may be forced to ruin them.

C. FOSTA’s vague and overbroad language makes it impossible for platforms know how to comport themselves to avoid liability without unduly harming the speech it facilitates.

FOSTA is ostensibly intended to prevent sex trafficking. But as plaintiffs-appellants argue, its overbroad and vague language threatens liability for speech far beyond that which might enable such acts. Br. 27-31.

Among its problems, FOSTA expands the prohibition against the “participation in a venture” to engage in sex trafficking to include “knowingly assisting, supporting, or facilitating” such a venture. It is difficult for a platform to know what activity this definition prohibits. 18 U.S.C. § 1591. Given FOSTA’s explicit removal of statutory protection for internet platforms, the prudent operator of such a platform that wishes to avoid breaking federal sex trafficking laws would assume that merely serving as an Internet platform can constitute “assisting, supporting, or facilitating” such a venture.²

² FOSTA’s language limiting liability to only those parties who “benefit[], financially or by receiving anything of value, from participation in the venture” offers little comfort to platforms that host speech online. Plaintiffs or prosecutors

It is also unclear how concretely a platform must know there is a sex trafficking venture afoot in order to be potential liable if it continues to provide its speech-facilitation services to those participating in this venture. Br. 8-10. As a result, in order to protect themselves, platforms must assume that it would require very little knowledge. Unfortunately this assumption has an enormous effect on platform moderation practices, either deterring platforms from policing their systems in order to avoid having even an inkling that some of the speech they are facilitating may fall into FOSTA's crosshairs and thus create liability for them, or prompting them to be quick and ruthless in censoring any expression that could ever possibly be construed to be involved with sex trafficking under FOSTA's broad definitions, or both. There may not be a whiff of any impropriety connected to any of the speech driving these choices, but if platforms know that this sort of speech is on their systems, they may reasonably fear that if it turns out that this speech is indeed connected to anything nefarious they will be presumed to have known about it. This fear drives platforms' censoring and neglectful monitoring behavior, because, thanks to the statutory minefield FOSTA sets with its vague and broad terms, platforms may reasonably feel it is better to be safe than sorry to be conservative in their speech-

would allege that the operator receives some incremental benefit, however small, from each individual piece of content to its platform.

facilitating provision, even though these choices are so destructive to the speech and services their businesses were built to foster.

II. The fear of liability raised by FOSTA's statutory changes has already affected platforms like those amici represent.

Every undersigned amicus, or its industry partners, depends on Section 230 and has been affected by the erosion of its liability protection. The type of speech and services each platform relies on Section 230 to enable may vary, as has how they've reacted to the loss of its effective protection, but the story is essentially the same for all: FOSTA has compromised their ability to provide the speech facilitating services they were built to provide.

Even for platforms still unsure or unaware of how FOSTA may affect them, this ignorance will not spare them from the liability FOSTA's definitional broadness invites. Just because no lawsuit or prosecution may have yet landed at their door, there is no reason to believe it is not simply a matter of time. *See, e.g.,* Mike Masnick, *Is There A Single Online Service Not Put At Risk By SESTA?*, TECHDIRT (Sep. 19, 2017), <https://tdrt.io/gq8> (discussing the proposed SESTA legislation that eventually became FOSTA). And for those platforms aware of the danger the law poses for them but who have not yet overtly changed how they do business, there remains the sense overshadowing their business and editorial decisions that they are

playing a form of Russian roulette by not limiting their platform services.³ FOSTA's mere passage has changed the risk profile for platforms, and with it their valuation for investors and ability to budget for the future growth and development of their services.

And for many platforms the costs have already begun to accrue. First there is the loss of certain speakers and speaker communities now afraid that the broad terms of the statute put them at risk of personal liability. Sex-related content in particular is often perfectly legal, yet because of the breadth of the statutory definitions creators of adult content are often fearful to continue to create it publicly, even if they could have found a platform host to enable it. *See, e.g.*, Br. 43-45.⁴

³ Amicus Copia Institute, for example, allows users to comment on articles posted on its Techdirt.com news site. It prides itself on its comment discussion and the robust discourse found in these thousands of reader contributions and every weekend celebrates the most humorous and insightful comments from the week before. See <https://www.techdirt.com/search.php?q=funniest&search=Search&edition=&tid=Techdirt&aid=&searchin=stories> (collecting these weekly posts). The Copia Institute depends on Section 230 to allow it to allow this third-party speech. Yet it now does so aware that the wrong comment could run afoul of FOSTA's prohibitions and expose it to liability, even where no bad act was committed, or intended to be committed, by the Copia Institute itself, and all it has done is provide a forum for user speech as Section 230 used to allow and encourage. Mike Masnick, *Dear Senators Portman & Blumenthal: What Should Blogs Do If SESTA Passes?*, TECHDIRT, (Nov. 7, 2017), <https://tdrt.io/gv1>.

⁴ Undersigned counsel is aware of at least one platform that has observed users having become tentative. That platform has opted not to participate in the submission of this brief, however, because it is afraid to attract the public attention of prosecutors and litigants eager to test the bounds of the new and expansive liability FOSTA has exposed them to. It is also not the only platform that has expressed similar reticence to speak against FOSTA publicly, even in court filings

These broad definitions have also led to broad censorship. In an attempt to minimize the risk many platforms are taking steps to eliminate any sort of user speech that could even possibly be construed to advance “sex trafficking.” Unfortunately that censorship has led to the loss of dating sites, forums for abuse survivors, advocacy for trafficked victims, and other sexual and non-sexual content that is not easy to determine is innocuous given the volume of user content even small platforms intermediate.⁵ Amicus Reddit, for example, is a platform that has more than 130,000 active user communities and 330 million monthly active users, but fewer than 500 employees, only a fraction of whose work for the company entails monitoring the expression Reddit facilitates. Even with its reliance on volunteer users to moderate content in their communities, Reddit still must implement rules

such as this brief. It is why Engine is an amicus, because as a nonprofit advocacy organization it can more easily describe the contours of the predicament the startup community at large finds itself in as a result of FOSTA. Yet even then it must still exercise considerable discretion in telling the industry's stories in order not to tempt trouble for these platforms. FOSTA's chilling effect has thus also reached the First Amendment petitioning right.

⁵ The problem of the scope of expression facilitated by platforms was a driving force behind the original passage of Section 230. *See, e.g.*, Cox Brief 2 (“While the volume of users [in 1995] was only in the millions, not the billions as today, it was evident [...] even then that no group of human beings would ever be able to keep pace with the growth of user-generated content on the Web.”). Section 230 was designed to relieve platforms of this burden so that they could allow, rather than be driven to prevent, speech. *Id.* at 12 (“All of the unique benefits the Internet provides are dependent upon platforms being able to facilitate communication among vast numbers of people without being required to review those communications individually.”).

that it can apply at scale across its many and varied communities. Broadly written rules almost necessarily result in lawful content being removed because there is no way for Reddit to weigh all the voluminous expression it reviews in a sufficiently nuanced and contextualized way to eliminate the risk of content targeted by FOSTA slipping through.

Before FOSTA platforms could compete for users based on how well they nurtured their user communities. Reddit's success owes much to its philosophy of enabling its constituent communities to moderate themselves. But as discussed above, some platforms are finding themselves needing to abandon close monitoring of their forums lest in the course of policing them they learn too much about the expression contained there and thus exposing themselves to liability. See discussion *supra* Section I.C. This bind forces them to censor more content either reactively, upon the faintest suspicion that their knowledge of the content might create FOSTA liability, or, like Reddit, prophylactically as a way of minimizing the risk upfront.⁶

⁶ Reddit used to host the "r/escorts" community, which had more than 8,000 subscribers and addressed "education, safety, and health for clients and providers alike." The community's own rules prohibited all advertisement of escort services. Although it seemed to be a forum for discussion focused on harm reduction (and therefore a valuable safety resource for sexworkers), Reddit felt pressured by FOSTA to close this forum for this expression to minimize the threat of liability, even though doing so may have increased the actual threat to sex workers that FOSTA was ostensibly designed to reduce.

In addition, platforms need other platforms to thrive as businesses. For example, some platforms are dependent on app stores to distribute the software users need to use their services. See, e.g., Elyse Wanshel, *New App Will Serve As ‘TripAdvisor’ For People With Disabilities*, HUFFINGTON POST (May 5, 2016), https://www.huffingtonpost.com/entry/access-earth-app-disabled-rate-businesses-places-accessibility_us_572a46d1e4b096e9f0901521 (describing a platform where user content is submitted via an app). Others need the services of payment providers in order to earn money and are thus subject to the risk management practices of these platforms. Mike Masnick, *FOSTA Provides Another Tool For Silencing People You Dislike*, TECHDIRT (Sep. 27, 2018), <https://tdrt.io/g-I> (describing how PayPal stopped processing payments for speakers mischaracterized as pornographers). Even if a particular platform would like to provide its speech-facilitation services to certain users, if the payment provider, fearing their own potential liability, refuses to process their payments, the platform may have no choice but to discontinue facilitating these users’ expression.⁷

⁷ These chilling effects do not merely flow down from one platform to the next; they can compound. To reduce its risk of liability under FOSTA, a payment provider may articulate a policy prohibiting the use of its payment services for certain purposes. Because that policy must apply to many varied clients (and also because the language of FOSTA makes the scope of a platform’s liability unclear in the first place), the policy is very likely to prohibit somewhat more conduct than would actually give rise to liability under FOSTA. Likewise, a web forum that relies on the payment processor may articulate its own policy prohibiting the use of its forum service for certain types of communications. The web forum’s policy,

Furthermore, many online media outlets including Techdirt and Reddit rely on ads to generate revenue. Ads are often provided by third-party services, which is important especially for smaller sites who would otherwise have to spend their limited resources vetting each and every ad appearing on their pages. Techdirt is more than twenty years old and thus has more than 70,000 posts. Not only have these thousands of posts collected thousands of comments, but there are also thousands of ads appearing on these pages. It would be an impossible task to muster the enormous amount of attention and expertise required to vet them all. Yet thanks to FOSTA these platforms need to trust their ad providers to ensure that ads that FOSTA might target do not slip through, and ad providers now are in the crosshairs of FOSTA as well, needing to ensure that each of the myriad ads they process also will not expose them to its liability. If the fear of liability begins to obliterate these services the loss will not be limited only to them but all the media sites that depended on them to survive.

however, needs to be written to avoid violating not only the law but also the payment processor's rules. User discussion on the web forum is thereby restricted two degrees beyond what might actually create any liability. Analogous behavior can be observed in communities on Reddit touching on issues faced by sex workers. In response to Reddit's increased enforcement under FOSTA, the volunteer moderators of some remaining communities appear to have restricted the allowable topics of discussion even further, apparently to avoid running afoul of Reddit's enforcement.

CONCLUSION

Because FOSTA erodes the statutory protection for platforms by replacing protection from liability with the fear of it, FOSTA has chilled platforms and the speech they used to be able to enable and thus should be found unconstitutional.

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**CERTIFICATE OF COMPLIANCE
WITH TYPE-VOLUME LIMITATION,
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PURSUANT TO FED. R. APP. P. 32(a)(7)(C)**

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify as follows:

1. This Brief of Amicus Floor64, Inc. d/b/a The Copia Institute, Engine Advocacy, and Reddit, Inc. In Support Of Plaintiffs-appellants complies with the word limit of Fed. R. App. P. 29(c)(2) because this brief contains 4955 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii); and

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016, the word processing system used to prepare the brief, in 14 point font in Times New Roman font.

Dated: February 20, 2019

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system on February 20, 2019.

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