UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WOODHULL FREEDOM FOUNDATION, *et al.*,	)	
Plaintiffs,	)	
v.	)	**Civil Case No. 18-1552 (RJL)**
UNITED STATES OF AMERICA, *et al.*,	)	
Defendants.	)	

MEMORANDUM OPINION

(March 29, 2022) [Dkt. ## 34, 35]

Plaintiffs—comprised of "advocacy and human rights organizations, two individuals and the leading archival collection of Internet content," Compl. ¶ 2 [Dkt. # 1][1]—have brought this action 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" or "the Act"). Plaintiffs raise a number of constitutional claims, including that FOSTA violates the First and Fifth Amendments to the U.S. Constitution, as well as the Ex Post Facto clause of Article I, Section 9. *See id.* ¶¶ 126–174. More specifically, plaintiffs assert that FOSTA is overbroad and vague in multiple ways; that it discriminates against certain speech based on its content and viewpoint; and that it

[1] The plaintiffs are: the Woodhull Freedom Foundation (an advocacy and lobbying organization for sexual freedom); Human Rights Watch (a generalized human rights monitoring and advocacy organization); Jesse Maley (also known as Alex Andrews, who founded and manages a website, "Rate that Rescue," which provides resources and information to sex workers); Eric Koszyk (a licensed massage therapist who relies on Craigslist for advertising); and the Internet Archive (an internet service that, unsurprisingly, focuses on preserving websites to prevent their erasure or disappearance with the passage of time). *See* Compl. ¶¶ 15–19.

in allowing the sale of sex trafficking victims and have done nothing to prevent the trafficking of children and victims of force, fraud, and coercion." *Id.* § 2(2). As a result, the Act notes, Congress concluded that "clarification of [Section 230] is warranted" to ensure that it does not shield "such websites" from appropriate liability. *Id.* § 2(3).

To this end, the Act adds one section to the U.S. Code while amending three others. First, FOSTA enacted 18 U.S.C. § 2421A, which creates a federal criminal offense for owning, managing, or operating "an interactive computer service . . . with the intent to promote or facilitate the prostitution of another person," or attempting or conspiring to do so. 18 U.S.C. § 2421A(a). This offense is punishable by fine or imprisonment for a term of up to ten years. *Id.* FOSTA further allows that any defendant facing this charge may raise an affirmative defense that "the promotion or facilitation of prostitution is legal in the jurisdiction where the promotion or facilitation was targeted." *Id.* § 2421A(e). The defendant bears the burden of establishing this affirmative defense by a preponderance of the evidence. *Id.*

FOSTA also creates an "aggravated" version of this offense, punishable by a fine or a term of imprisonment of up to twenty-five years. *Id.* § 2421A(b). This aggravated offense requires proof of an additional element on top of those already required to be convicted for the base offense contained in § 2421A(a). Therefore, liability under § 2421A(b) may attach only to a defendant who owns, manages, or operates an interactive computer service with the intent to promote or facilitate the prostitution of another person—the base offense—*and* either (1) "promotes or facilitates the prostitution of five

discussed above), and where the affirmative defense contained in § 2421A(e) does not apply. *See id.*; *see also* FOSTA § 4(a), 132 Stat. at 1254. Section 4 of the Act lastly provides that its amendments "shall take effect on the date of the enactment of this Act," and that the above-described changes to Section 230 preemption "shall apply regardless of whether the conduct alleged occurred, or is alleged to have occurred, before, on, or after such date of enactment." FOSTA § 4(b), 132 Stat. at 1264–65.

Next, FOSTA amends 18 U.S.C. § 1591, the provision of the U.S. Code that prohibits sex trafficking, by inserting a new definition. The new definition clarifies that the term "participation in a venture" as used in that section means "knowingly assisting, supporting, or facilitating" sex trafficking. *See id.* § 5, 132 Stat. at 1265; 18 U.S.C. § 1591(e)(4). The term "participation in a venture" appears earlier in the same section but previously was left undefined. *See* 18 U.S.C. § 1591(a)(2) (criminalizing the knowing "participation in a venture" to cause sex trafficking of an adult by "force, fraud, or coercion" or of a minor). Lastly, FOSTA amends 18 U.S.C. § 1595 by authorizing state attorneys general to bring civil actions on behalf of residents of the state who have been "threatened or adversely affected by any person who violates" 18 U.S.C. § 1591. *See* 18 U.S.C. § 1595(d).[4]

[4] FOSTA also includes a so-called savings clause (clarifying that the Act should not be construed to limit or preempt prosecutions or civil actions that were previously not limited or preempted by Section 230), as well as a requirement that the Government Accountability Office produce a study on cases brought pursuant to FOSTA's amendments, *see* FOSTA §§ 7, 8, 132 Stat. at 1255–56, but these provisions are not directly at issue in this case.

constitutional challenge to the Act because they could not demonstrate a credible threat of prosecution under the act, and thus lacked the injury requisite for Article III standing. *See* Defs.' Mem. in Opp. to Pls.' Mot. for Prelim. Inj. and Mot. to Dismiss [Dkt. # 15]. I agreed with the defendants and granted the motion to dismiss. *See Woodhull I*, 334 F. Supp. 3d at 198–203.

Plaintiffs appealed from that decision, and our Court of Appeals reversed, finding that at least the two individual plaintiffs, Andrews and Koszyk, had sufficiently established their Article III standing such that this case could proceed. *See Woodhull Freedom Fdn. v. United States (Woodhull II)*, 948 F.3d 363, 371–73 (D.C. Cir. 2020). Because both parties contend that the reasoning behind this holding on standing bears on the merits of plaintiffs' claims on remand, I provide a brief description of the opinion of the panel majority and the partial concurrence here:

The majority held that Andrews had established Article III standing to mount a pre-enforcement challenge to FOSTA under the standard clarified by the Supreme Court in *Susan B. Anthony List v. Driehaus ("SBA")*, 573 U.S. 149 (2014). In *SBA*, the Court held that pre-enforcement standing in this context required a prospective plaintiff to show that they intended to engage in conduct "arguably affected with a constitutional interest," that the conduct was "arguably proscribed by [the] statute," and that "the threat of future enforcement of the [statute] was substantial." *Woodhull II*, 948 F.3d at 371 (quoting *SBA*, 573 U.S. at 164). As relevant here, the panel concluded that Andrews, by alleging an intent to continue operating Rate that Rescue, had met this bar: more specifically, the operation

LEGAL STANDARD

The Court may enter summary judgment for a moving party "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The parties agree that there are no facts in dispute material to the merits of plaintiffs' facial constitutional claims, *see* Defs.' Mem. in Opp. to Pls.' Mot. for Summ. J. at 44 [Dkt. # 37]; Pls.' Reply to Defs.' Opp. at 24 [Dkt. # 39], and thus the Court may enter judgment based solely on FOSTA's statutory language.[5] *See, e.g., Ezell v. City of Chi.*, 651 F.3d 684, 698 (7th Cir. 2011).

ANALYSIS

Plaintiffs muster six distinct bases on which to conclude that FOSTA is facially unconstitutional: first, that the statute is "overbroad" in violation of the First Amendment, chilling constitutionally protected speech undertaken by the plaintiffs and others; second, that FOSTA is impermissibly vague such that it does not provide fair notice of what it prohibits, violating the due process clause of the Fifth Amendment; third, that FOSTA violates the First Amendment by selectively removing Section § 230 immunity for the hosting of content while leaving intact immunity for removal of content; fourth, that FOSTA violates the First Amendment by discriminating against certain types of speech and lacking a sufficient justification for such discrimination to survive strict scrutiny; fifth,

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[5] In conjunction with their motion for summary judgment, plaintiffs did submit a statement of facts accompanied with a number of supporting affidavits. *See* Pls.' Statement of Facts & Ex. A–I [Dkt. # 34-2 to -15]. However, these facts and affidavits are material only to establishing plaintiffs' ongoing standing—which defendants do not challenge—and the entitlement of plaintiffs to injunctive relief should they prevail on the merits. Because, as explained below, I find that plaintiffs' facial constitutional claims are without merit, there is no need to address the facts underpinning plaintiffs' request for injunctive relief.

as other "expressive or communicative conduct" based on the chilling effect of that regulation on others. *Broadrick v. Oklahoma*, 413 U.S. 601, 612–13 (1973). Though it has approved of such challenges over time, the Supreme Court has simultaneously been careful to note that granting a claim of overbreadth is "'strong medicine' [that should be] employed . . . with hesitation, and then 'only as a last resort.'" *L.A. Police Dep't v. United Reporting Pub. Corp.*, 528 U.S. 32, 39 (1999) (quoting *New York v. Ferber*, 458 U.S. 747, 769 (1982)). In particular, the Court has noted that "invalidating a law that in some of its applications is perfectly constitutional—particularly a law directed at conduct so antisocial that it has been made criminal—has obvious harmful effects." *United States v. Williams*, 553 U.S. 285, 292 (2008). For this reason, the Supreme Court has "vigorously enforced the requirement that a statute's overbreadth be substantial, not only in an absolute sense, but also relative to the statute's plainly legitimate sweep," for the statute to be declared facially unconstitutional on this basis. *Id.*

In undertaking this analysis of whether the challenged statute sweeps substantially too far, the "first step" for this Court is "to construe the challenged statute" because "it is impossible to determine whether a statute reaches too far without first knowing what the statute covers." *Id.* at 293; *see also United States v. Stevens*, 559 U.S. 460, 473 (2010) (noting, in overbreadth context, that "the constitutionality of [the challenged statute] hinges on how broadly it is construed"); *United States v. Hillie*, 14 F.4th 677, 685 (D.C. Cir. 2021) (noting that proper interpretations of challenged statutes "were necessary antecedents to determining whether the statutes at issue . . . were overbroad"). Unfortunately for the

within FOSTA itself and from background criminal-law interpretive principles—that serve to narrow these terms such that the Act itself is not overbroad. *Cf. United States v. Abuelhawa*, 556 U.S. 816, 819–20 (2009) ("[B]ecause statutes are not read as a collection of isolated phrases . . . [a] word in a statute may or may not extend to the outer limits of its definitional possibilities." (citations omitted)).

First, the relevant promotion and facilitation that is encompassed by the statute is not that of the general concepts of sex work or prostitution, as plaintiffs contend. Instead, as I noted in my previous opinion, FOSTA contains textual indications that make it quite clear that the Act targets the promotion and facilitation only of *specific instances* of prostitution: it is not a crime to operate an internet service with the intent to "promote . . . prostitution" as a general matter, as plaintiffs would read it, but instead to promote (or facilitate) the "prostitution of another person." *See Woodhull I*, 334 F. Supp. 3d at 200; *see also Woodhull II*, 948 F.3d at 375 (Katsas, J., concurring in part and concurring in the judgment) ("FOSTA focuses not on prostitution as an abstract legal or policy matter, but on 'the prostitution of another person'—a widely criminalized act involving the exchange of sex for money . . . .").[6]

[6] This conclusion is only strengthened by the existence of FOSTA's affirmative defense, which allows a defendant to avoid liability on the basis that "promotion or facilitation of prostitution" is legal in the jurisdiction at which that conduct was targeted; because the forms of generalized advocacy, harm-reduction, and other discussion that plaintiffs allege are encompassed by the language of § 2421A *could not be illegal* in any jurisdiction—and plaintiffs certainly have not tried to contend as much—it is either the case that this affirmative defense swallows the entire statute, or that "promotion or facilitation of prostitution" must be a narrower category of activity than plaintiffs contend.

Rather than target advocacy, debate, or discussion, FOSTA is narrowly tailored to those services that are owned, operated, or managed with the intent to aid, abet, or assist specific instances of prostitution. Far from encompassing a substantial portion of protected speech, then, FOSTA's scope is limited to legitimately criminal activity. In light of this conclusion, plaintiffs' claim of overbreadth must fail.

Plaintiffs contend that I should instead follow the path recently taken by the Fourth Circuit in *United States v. Miselis*, 972 F.3d 518, 535–37 (4th Cir. 2020), in which that Court agreed in part with an overbreadth challenge to the federal Anti-Riot Act, 18 U.S.C. § 2101. That statute criminalizes, among other things, travel or use of a facility in interstate or foreign commerce with "intent . . . to organize, promote, [or] encourage . . . a riot." 18 U.S.C. § 2101(a)(2). The Fourth Circuit concluded that in the context of the Anti-Riot Act, criminalization of an intent to "promote" or to "encourage" a riot rendered the statute overbroad. The Fourth Circuit commenced its analysis by noting that "mere encouragement is quintessential protected advocacy," citing the Supreme Court's past holding that "[t]he mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it." *Miselis*, 972 F.3d at 536 (citing *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 253 (2002)). Turning to "promote," the Fourth Circuit noted its "wide range of meanings depending on context" but concluded that "in the context of an enterprise of a riot," the verb was "best understood" to take on a definition akin to "encourage," and thus its use in the Anti-Riot Act rendered that statute overbroad. *Id.* In reaching that conclusion, the court rejected the Government's contention that "promote" was "readily susceptible"

readily available to the Court, and for that reason I find unpersuasive plaintiffs' reliance on *Miselis* as a basis to hold FOSTA unconstitutional.[7]

Plaintiffs also contend that the prior decision of our Court of Appeals as to plaintiffs' standing in this case precludes my holding that § 2421A is susceptible to the narrowing construction I endorse above. I disagree. Indeed, I find that plaintiffs' argument not only overreads the majority's opinion, but also ignores Judge Katsas's concurrence. More specifically, while the majority did point out that FOSTA's language, including the "promote or facilitate" elements discussed above, *could* be read to sweep broadly "when considered in isolation," *Woodhull I*, 948 F.3d at 372, the panel did so in the context of its analysis of plaintiffs' standing to bring a pre-enforcement challenge. That standing analysis merely requires considering whether plaintiffs have established that they engage in activities "arguably" within the scope of the challenged statute, *see SBA*, 573 U.S. at 164, *not* that the statute does in fact prohibit the alleged activities. As such, the majority was not determining the precise scope of what FOSTA proscribes, but rather whether plaintiffs' broad reading of FOSTA was "arguably" a valid one. In short, the majority did not decide how FOSTA *should* be construed, only how it *could* be construed. To that end, the narrowing construction of the law discussed above was neither endorsed, nor rejected,

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[7] For much the same reason, my conclusion on the constitutionality of FOSTA is not affected by the recent decision of the Ninth Circuit in *United States v. Hansen*, 25 F.4th 1103, 1107–09 (9th Cir. 2022), in which that court found unconstitutional a statute that imposes criminal liability on anyone who "encouraged or induced an alien to 'enter[] or reside in the United States . . . in violation of law.'" *Id.* at 1108 (quoting 8 U.S.C. § 1324 (a)(1)(A)(iv)). Like the Fourth Circuit in *Miselis*, the Ninth Circuit concluded that the relevant immigration law lacked the types of textual and contextual indicators that would provide for a narrowing construction sufficient to avoid constitutional difficulty. *Id.* Indeed, the Ninth Circuit specifically noted that a *separate* provision in the statute provided for aiding and abetting liability such that the challenged "encourage" and "induce" language should not be read to take on that meaning. *Id.* In contrast, here I find that "promote or facilitate" as used in § 2421A are best understood as equivalents to aiding and abetting.

II. Plaintiffs' Additional First and Fifth Amendment Challenges

Though overbreadth is the primary basis on which plaintiffs challenge FOSTA, plaintiffs have also raised a number of other theories rooted in the First and Fifth Amendments as to why the Act is facially unconstitutional. However, these theories too are unpersuasive: they depend in large part on the same overbroad reading of FOSTA that I rejected above. As such, I will briefly explain my specific disagreement with each of these claims below.

a. Void for Vagueness

First, plaintiffs allege that FOSTA is void for vagueness under the Due Process Clause of the Fifth Amendment. "[A]n enactment is void for vagueness if its prohibitions are not clearly defined." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). The doctrine applies to any statute that "fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement." *Williams*, 553 U.S. at 304. Though these concerns are heightened "where a vague statute abuts upon sensitive areas of basic First Amendment freedoms," *Grayned*, 408 U.S. at 109, the Supreme Court has at the same time cautioned that "perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity," *Ward v. Rock Against Racism*, 491 U.S. 781, 794 (1989).

Here, plaintiffs' vagueness claims against FOSTA rest in substantial part on their construction of § 2421A, which, I have already concluded, misreads the key terms of that section. Properly construed, § 2421A provides clear notice of the type of conduct

person" *plus* "reckless disregard of the fact that such conduct contributed to sex trafficking"). Requiring such evidence of *mens rea* serves to further protect against discriminatory enforcement while also vastly reducing the risk of prosecution for guiltless behavior. In short, I find FOSTA's language to easily clear the bar of providing constitutionally required notice of its scope, while the heightened scienter requirements contained in the statute further mitigate any risk of the harms protected against by the void-for-vagueness doctrine.

b. Selective Removal of Immunity

Plaintiffs next claim that FOSTA is violative of the First Amendment due to its "selective" removal of Section 230 immunity. More specifically, plaintiffs take issue with the fact that FOSTA removes immunity for violations of FOSTA's substantive provisions under § 230(c)(1)—that is, for treatment of an interactive computer service as a publisher or speaker of content—while leaving intact those services' § 230(c)(2) immunity for "any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected." *See* 47 U.S.C. § 230(c). To plaintiffs, this choice encourages an overbroad censoring and removal of content, with platforms facing liability for allowing certain content on their sites but no reciprocal liability for removing too much content. *See, e.g.*, Compl. ¶ 163. While this claim may plausibly encapsulate the incentives created by this section of FOSTA, plaintiffs cannot point to a First Amendment principle that, generally

expressive activity is content neutral so long as it is '*justified* without reference to the content of the regulated speech.'" (quoting *Clark v. Community for Creative Non–Violence*, 468 U.S. 288, 293 (1984)); *see also A.N.S.W.E.R. Coal. v. Basham*, 845 F.3d 1199, 1208–09 (D.C. Cir. 2017). Though FOSTA may well implicate speech in achieving its separate purpose, such an indirect effect does not provide a basis for strict scrutiny: "even if [a law] has an incidental effect on some speakers or messages but not others," it is to be treated as content neutral. *A.N.S.W.E.R. Coal.*, 845 F.3d at 1210 (quoting *Ward*, 491 U.S. at 791). Plaintiffs' contention to the contrary rests, again, primarily on their overreading of § 2421A. As discussed above, FOSTA does not purport to regulate the use of the internet to host the generalized "promotion" of prostitution as a concept, including via advocacy, and thus FOSTA does not enact a government regulation of speech that takes a "pro-prostitution" stance, as plaintiffs suggest. Instead, FOSTA prohibits only a much narrower range of activity, that which can be shown to aid or abet specific instances of prostitution: while the former type of legislation could be viewed as targeting the source of certain messages but not others, the latter is quite clearly justified by purposes wholly related to any expressive content. As a result, plaintiffs' claim that FOSTA fails strict scrutiny must also be rejected.[10]

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[10] Plaintiffs raised the argument that FOSTA fails even lesser forms of scrutiny only in their response to the Government's cross-motion, *see* Pls. Opp. to Defs.' Mot. for Summ. J. ("Pls.' Opp.") [Dkt. # 38] at 33–34, and their Complaint contains no suggestion that plaintiffs challenge the Act on this basis, and thus the Court need not address such a claim. *See, e.g., District of Columbia v. Barrie*, 741 F.Supp.2d 250, 263 (D.D.C. 2010) ("It is well established that a party may not amend its complaint or broaden its claims through summary judgment briefing.") In any event, plaintiffs' claim based on intermediate scrutiny is unpersuasive, for it relies on the same misreading of § 2421A to argue that FOSTA does not have the requisite "close fit between means and ends." Pls. Opp. at 34. Construed correctly, FOSTA is narrowly targeted at a band of conduct that materially advances specific instances of illegal prostitution; it does not sweep beyond that purpose in any manner sufficient to trigger First Amendment concern.

in a venture" to § 1591, defining the term as "knowingly assisting, supporting, or facilitating" a criminal sex-trafficking violation as defined in subsection (a)(1) of § 1591. *See* 18 U.S.C. § 1591(a)(1), (e)(4). Before this addition, § 1591 criminalized knowingly benefitting from participation in a venture, and plaintiffs suggest that the additional verbs in the new definition serve to in fact expand the scope of criminalized participation, even as they provide greater definition. But the new verbs—including, once more, facilitating—are analogues to aiding and abetting in this criminal law context; they do not, as plaintiffs suggest, capture such a broad and undefined scope of conduct that a defendant could unwittingly be violating this provision. Section 1591 thus continues to include a sufficiently defined scienter requirement of knowledge of the illegal conduct in question; as with § 2421A, this element is more than enough for the amended § 1591 to pass constitutional muster.

III. Ex Post Facto Liability

Lastly, moving outside of the context of the First and Fifth Amendments, plaintiffs ask this Court to declare the Act unconstitutional on its face as violating the Constitution's Ex Post Facto Clause, *see* U.S. Const. art. I, § 9, cl. 3 ("No Bill of Attainder or ex post facto Law shall be passed."). Plaintiffs make this claim on the basis that § 4(b) notes that FOSTA's amendments to the grants of immunity contained in Section 230 "shall apply regardless of whether the conduct alleged occurred, or is alleged to have occurred, before, on, or after such date of enactment." FOSTA § 4(b), 132 Stat. at 1254–55. As discussed above, the Act's amendments to Section 230 are provided for in FOSTA § 4(a), which

enforcement challenge to FOSTA. The Government contends that such claims may be brought only on an as-applied basis, once a defendant faces a specific enforcement action that it claims is unconstitutional.

Here, however, I need not decide whether the Government is correct that facial, pre-enforcement challenges based on the Ex Post Facto Clause are *per se* barred. This is so because in this case, plaintiffs seek injunctive relief only against defendants comprising the federal law enforcement community, asking the Court to enjoin them from enforcing FOSTA. By the Act's plain terms, however, any enforcement of § 4(b)—the provision claimed to be a violation of the Ex Post Facto Clause—would be undertaken by parties not before the Court. Indeed, any retroactive application of FOSTA would be initiated instead either by private plaintiffs bringing civil suits under 18 U.S.C. § 1595 or by state law enforcement bringing prosecutions pursuant to state criminal laws. *See* FOSTA § 4(a), 132 Stat. at 1254. "[A] federal court exercising its equitable authority may enjoin named defendants from taking specified unlawful actions," but "no court may 'lawfully enjoin the world at large,'" or even "challenged laws themselves." *Whole Women's Health v. Jackson*, 145 S. Ct. 522, 535 (2021) (quoting *Alemite Mfg. Corp. v. Staff*, 42 F.2d 832, 832 (2d Cir. 1930) (Learned Hand, J.)). As such, without a named defendant before me who could even hypothetically undertake enforcement of FOSTA in a manner that would violate the Ex Post Facto Clause, I cannot provide the plaintiffs with any relief, and this claim must be dismissed as well.