

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WOODHULL FREEDOM FOUNDATION,)	
ET AL.,)	
)	
Plaintiffs,)	CV No. 18-1552
)	
vs.)	Washington, D.C.
)	July 19, 2018
UNITED STATES OF AMERICA, ET AL.,)	4:00 p.m.
)	
Defendants.)	
)	
)	
)	

TRANSCRIPT OF MOTION FOR PRELIMINARY INJUNCTION HEARING
BEFORE THE HONORABLE RICHARD J. LEON
UNITED STATES SENIOR DISTRICT JUDGE

APPEARANCES:

For the Plaintiffs:	Robert Corn-Revere DAVIS WRIGHT TREMAINE LLP 1919 Pennsylvania Avenue, NW Suite 800 Washington, D.C. 20006 (202) 973-4225 bobcornrevere@dwt.com
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1 P R O C E E D I N G S

2 DEPUTY CLERK: All rise. The United States
3 District Court for the District of Columbia is now in
4 session, the Honorable Richard J. Leon presiding. God save
5 the United States and this Honorable Court. Please be
6 seated and come to order.

7 Your Honor, this afternoon we have Civil Action
8 No. 18-1552, Woodhull Freedom Foundation, et al., versus the
9 United States of America, et al.

10 Will counsel please approach the lectern, identify
11 yourselves for the record, and name the party or parties
12 that you represent, please.

13 MR. COHEN: Good afternoon, Your Honor.
14 Jason Cohen on behalf of the defendants.

15 With me at counsel table is Alexander Gelber from
16 the Child Exploitation and Obscenity Section as agency
17 counsel. Thank you.

18 THE COURT: Welcome.

19 MR. CORN-REVERE: Robert Corn-Revere, Davis,
20 Wright, Tremaine for the plaintiffs.

21 I'll let other counsel introduce themselves as
22 well.

23 MR. GREENE: David Greene, Electronic Frontier
24 Foundation.

25 THE COURT: Welcome.

1 MR. LONDON: Ronnie London, Davis, Wright,
2 Tremaine.

3 THE COURT: Welcome.

4 MR. LONDON: Lawrence G. Walters, Walters Law
5 Group.

6 THE COURT: All right, Counsel. We're here for a
7 PI argument. The moving party can have 15 minutes, five for
8 rebuttal. Opposing party has 20 minutes.

9 It's your case.

10 MR. CORN-REVERE: Good afternoon, Judge Leon, and
11 if it may please the Court.

12 I think the papers are fairly self-explanatory and
13 raise a number of First Amendment issues, but I think I'll
14 focus on, first, just ones that are necessary to resolve the
15 case:

16 Injunctions --

17 THE COURT: Resolve the case or to resolve the PI?

18 MR. CORN-REVERE: I'm sorry, Your Honor. To
19 resolve the motion before you.

20 An injunction should be granted if at least one of
21 the plaintiffs has standing and we are likely to succeed on
22 any of the substantive claims.

23 And so let me just identify a couple of the
24 top-line issues and then we can talk about some of the
25 others.

1 In terms of standing, I think each of the
2 plaintiffs have demonstrated that they have a reasonable
3 concern about prosecution under this new law.

4 THE COURT: You represent all the plaintiffs?

5 MR. CORN-REVERE: Yes, Your Honor.

6 THE COURT: You represent them all?

7 MR. CORN-REVERE: Yes.

8 THE COURT: Okay.

9 MR. CORN-REVERE: Along with co-counsel Electronic
10 Frontier Foundation.

11 THE COURT: Along with who?

12 MR. CORN-REVERE: Electronic Frontier Foundation.

13 THE COURT: Okay.

14 MR. CORN-REVERE: Let me just mention first,
15 Jesse Male, also known in the complaint as Alex Andrews.
16 She submitted a declaration.

17 And one of the things that she discusses is an
18 online presence she has called "Rate That Rescue" that
19 provides assistance to sex workers by providing information
20 about bad dates and so on. This allows third parties to
21 submit information to the Website that warns other sex
22 workers about dangerous situations and is designed to
23 protect -- provide information that will help keep women
24 safe.

25 If you think about the areas in which there has

1 been substantial litigation under Section 230 of the
2 Communications Decency Act, where it's provided immunity,
3 one of the top areas -- there are dozens of cases involving
4 rating sites, the very kind of third-party speech that
5 people often object to and feel they're injured by, and it's
6 resulted in a substantial amount of litigation.

7 It's not difficult to imagine that rescue
8 organizations that don't like the ratings they get will file
9 suit under the new provisions of FOSTA that remove immunity
10 under Section 230.

11 As a matter of fact, there was just a decision on
12 one of these rating sites three weeks ago, decided by the
13 California Supreme Court in *Hassell versus Bird*. This is
14 precisely the kind of risk that the plaintiffs are going to
15 face and have faced already under FOSTA.

16 We also indicate in the declaration of Ricci Levy
17 from Woodhull Freedom Foundation that they provide workshops
18 for sex workers, again, to provide safety information, to
19 advocate on their behalf. And that is a sort of thing --
20 they are concerned that that would be considered by some to
21 be promotion or facilitation of prostitution, in violation
22 of the law.

23 THE COURT: What's that got to do with this event
24 that you're hosting in August?

25 MR. CORN-REVERE: That is the very kind of

1 workshop that they are hosting at the August summit,
2 beginning August 2nd through the 5th.

3 They have an online presence. They've been trying
4 to promote the summit and have been hampered in doing so
5 because of concern over prosecution under FOSTA.

6 And each --

7 THE COURT: Why is it called a summit?

8 MR. CORN-REVERE: Why do they call it a summit?
9 I don't know the answer to that, Your Honor. But that is
10 the name that they have chosen.

11 And it's an annual event. It has presence --

12 THE COURT: This is the first time they've done
13 it?

14 MR. CORN-REVERE: I'm sorry?

15 THE COURT: Is this the first time they have done
16 it?

17 MR. CORN-REVERE: No, it's not.

18 But it's the first time --

19 THE COURT: They do it every year?

20 MR. CORN-REVERE: They do it every year.

21 THE COURT: So this has been in the planning for
22 over a year?

23 MR. CORN-REVERE: Yes.

24 And the planning for this year, as indicated in
25 the complaint, began earlier in the year and became hampered

1 once they became aware of the passage of FOSTA.

2 They have lost one --

3 THE COURT: When was FOSTA passed?

4 MR. CORN-REVERE: I'm sorry, Your Honor?

5 THE COURT: When was FOSTA passed?

6 MR. CORN-REVERE: It was passed at the end of
7 March, it was signed into law in April.

8 And we've seen an immediate impact of the passage
9 of the law ever since.

10 Immediately upon its passage by the Senate,
11 Craigslist announced it was closing down its entire personal
12 section, including the strictly platonic section. It closed
13 its ability to post in therapeutic services, which affected
14 our plaintiff, Eric Koszyk.

15 And we have seen, as indicated in the declaration
16 of Kate D'Adamo, widespread effects across the Web, I would
17 say unprecedented censorial effects.

18 THE COURT: How many people come to this summit?

19 MR. CORN-REVERE: Probably 100.

20 THE COURT: How many organizations do they
21 represent, if any?

22 MR. CORN-REVERE: There are people from different
23 organizations. I'm not certain how many organizations also
24 participate.

25 One organization that is a separate organization

1 called the DesireeAlliance, also has an annual conference
2 that it hosts for sex workers. They're more strictly
3 focused on that area. That was scheduled for July, and that
4 conference was canceled out of concern because of FOSTA.

5 There was a consideration of whether or not some
6 of those workshop sessions could be picked up in the
7 Woodhull Freedom Foundation sessions, but those plans were
8 scuttled because they couldn't take the risk under this new
9 law.

10 I think each of these concerns provides sufficient
11 grounds for the plaintiffs to have standing, and as a
12 consequence, it has to be analyzed under the
13 First Amendment.

14 Now, we provide a number of different reasons why
15 we think that it's unconstitutional, but let me focus on
16 just one, because I think it's sort of an easy one that the
17 Justice Department has provided for us in their opposition,
18 and that is the strict scrutiny argument.

19 The Justice Department says that FOSTA is nothing
20 new; that this is something that could have been prosecuted
21 under the Travel Act. And as they have put it at page 19 of
22 their brief, before FOSTA was enacted, Websites could have
23 been prosecuted for those same or substantially similar
24 crimes under the Travel Act.

25 Now, they say that the key innovation of the law

1 was simply that it changes who can bring suit.

2 Now, we disagree with their characterization of
3 the Travel Act, and I'll get into that in a little bit.

4 But even if you accepted everything that they say
5 about it, this is the reason why the Court should find there
6 is substantial likelihood of success, because the law cannot
7 satisfy strict scrutiny. It is a content-based change in
8 the law because -- and so it has to --

9 THE COURT: Who do you think is going to prosecute
10 him?

11 MR. CORN-REVERE: I'm sorry?

12 THE COURT: Who do you think is going to prosecute
13 the people attending this conference -- or summit? Excuse
14 me.

15 MR. CORN-REVERE: Basically, anyone who wants to.

16 THE COURT: Whoa, whoa, whoa, whoa. That's too
17 clever by half.

18 MR. CORN-REVERE: Okay. Let me just --

19 THE COURT: The U.S. Attorney in the Eastern
20 District of Virginia? Let's start there.

21 MR. CORN-REVERE: If --

22 THE COURT: You're talking about a federal
23 offense, right?

24 You're alleging that they're at risk of being
25 prosecuted under a federal law, right?

1 MR. CORN-REVERE: Under a federal law.

2 But the law also authorizes state attorney
3 generals to bring suit.

4 It also authorizes --

5 THE COURT: To bring suit? That's not
6 prosecution.

7 MR. CORN-REVERE: I'll try and be more precise
8 with my language, Your Honor.

9 THE COURT: Good. That'll help.

10 MR. CORN-REVERE: It authorizes state attorney
11 generals and local prosecutor to prosecute.

12 It allows civil litigants to bring suit.

13 THE COURT: Well, what's --

14 MR. CORN-REVERE: If you look --

15 THE COURT: Whoa, whoa. Slow down.

16 What Virginia statute are you concerned about
17 these people being prosecuted, state statute?

18 MR. CORN-REVERE: But the prosecution would not be
19 under a state statute. It would be under authorization
20 under FOSTA, which --

21 THE COURT: Then there's no way the state
22 attorney general can bring a prosecution under a federal
23 statute. That's just not -- that is not happening.
24 You know that. You know better than that.

25 How about Main Justice?

1 MR. CORN-REVERE: I think we should ask them.

2 THE COURT: You've read their brief.

3 MR. CORN-REVERE: I have read their brief.

4 THE COURT: They say that there's no basis to
5 believe that anyone is going to be prosecuted.

6 MR. CORN-REVERE: I know.

7 It's the same argument they made under the
8 Communications Decency Act when they said that allowing --
9 or creating a federal crime for indecency. It was fanciful
10 to consider that the U.S. Attorney would go after anyone for
11 posting online.

12 And the examples that were given at the time
13 included the Carnegie library, saying they were concerned
14 about putting their card catalog online, because it would
15 contain language that might run afoul of the statute.

16 The rape organization that was trying to advocate
17 against prison rape was worried that allowing inmates to
18 post their stories online would run afoul of the law.

19 In all of those cases, the Federal Government
20 assured people: You do not have to worry about anyone
21 prosecuting you because we will not interpret the law in
22 that way.

23 In the case of --

24 THE COURT: And they were prosecuted?

25 MR. CORN-REVERE: No, they were not prosecuted,

1 but the Court ruled that they had sufficient standing
2 because of their concern over the possibility of being
3 prosecuted.

4 THE COURT: I'm asking you a different question.
5 Do you have any examples of situations analogous
6 to this where people were prosecuted?

7 MR. CORN-REVERE: What I do have is a history of
8 advocacy against online postings in the anti-trafficking
9 community threatening litigation that led to state laws
10 being adopted, trying to prohibit online classified ads
11 services.

12 THE COURT: But, you know, sir, you're here --
13 Mr. Revere, you're here seeking extraordinary relief prior
14 to an event that's supposed to take place in a matter of a
15 few weeks.

16 Indeed, you're the one who chose to file it as
17 late as you did, June 28th I think was the date that it was
18 filed, off the top of my head.

19 MR. CORN-REVERE: That is the date, Your Honor.

20 THE COURT: June 28th.

21 Under our rules, as you well know, a hearing isn't
22 necessary to be scheduled for 20 days, within 20 days.

23 You don't possibly think you're going to get an
24 opinion out of this Court in the next ten days?

25 That's not even theoretically possible on matters

1 of novel issues, novel statutes.

2 There's no way that can be done. You could have
3 filed this back in April or May.

4 You planned this conference a year in advance.

5 MR. CORN-REVERE: We may have planned the
6 conference a year in advance, but the law didn't exist until
7 the end of March.

8 THE COURT: You knew the law was going through the
9 system, was percolating through the system. Your people
10 follow all those things, right?

11 Don't tell me your clients were caught by
12 surprise.

13 MR. CORN-REVERE: Their people were involved in
14 the legislative discussions.

15 THE COURT: Of course they were. They knew it was
16 coming. They knew how it was heading through the
17 legislative process.

18 You had plenty of time to get your briefs ready
19 way back in the spring. You didn't. You filed it in late
20 June.

21 You can't come into this court and expect you're
22 going to get an opinion in two weeks. That's not even
23 realistic.

24 MR. CORN-REVERE: Well, Your Honor --

25 THE COURT: Jumping the line. That's what you're

1 doing. You're jumping the line.

2 MR. CORN-REVERE: That wasn't our intent,
3 Your Honor.

4 THE COURT: Well, it's obvious that that's what
5 you're doing.

6 MR. CORN-REVERE: We put together the arguments
7 and the plaintiffs that were --

8 THE COURT: You're putting it together at your
9 pace and convenience.

10 MR. CORN-REVERE: As quickly as we could,
11 Your Honor.

12 THE COURT: What else have you got? You've got
13 three minutes left in your time.

14 MR. CORN-REVERE: Okay.

15 All I can say is that for similar kinds of
16 concerns, when you have broad regulation of Internet speech,
17 courts have been willing to consider how a law might be
18 enforced.

19 This was exactly the situation, not so much in the
20 online world but in looking at the breadth of legislation,
21 in *United States versus Stevens*, when you had a law against
22 crush videos.

23 And you even had a signing statement in that case,
24 where the President said this would never be enforced
25 against general websites that are against anyone but bizarre

1 aficionados of fetish videos; nevertheless, the United
2 States government brought prosecution against someone who
3 did documentaries about training pit bulls and wrote
4 treatises on training pit bulls. That case went to the
5 Supreme Court.

6 And because --

7 THE COURT: The prosecutions here, though, would
8 have to be for very specific conduct that promoted sexually
9 illegal conduct, right?

10 MR. CORN-REVERE: Except the law is written so
11 that anything that promotes or facilitates prostitution, and
12 not a specific crime, which is what distinguishes it from
13 the Travel Act, can be subject to prosecution.

14 And this is an area where there has been
15 significant advocacy, both by government entities and by
16 private citizens.

17 THE COURT: Give me an example of a case in the
18 Eastern District of Virginia where this event is supposed to
19 take place, where they've interpreted the law in the way
20 that you suggest?

21 MR. CORN-REVERE: I can't give you a case that is
22 that specific.

23 THE COURT: There is no such a case.

24 How about Main Justice has prosecuted in another
25 jurisdiction where they've issued A -- where they've brought

1 a prosecution, interpreting the law as broadly as you
2 suggest they will, are going to do in this case?

3 MR. CORN-REVERE: This law?

4 I mean, again, this law is brand new.

5 THE COURT: It doesn't have to be this law.

6 Take another statutory situation where they've
7 interpreted "promote and facilitate" as broadly as you
8 suggested.

9 MR. CORN-REVERE: In the Western District of
10 Pennsylvania.

11 THE COURT: You just told me a second ago no one's
12 prosecuted.

13 Has anyone prosecuted?

14 MR. CORN-REVERE: Not --

15 THE COURT: Criminal prosecution.

16 MR. CORN-REVERE: No.

17 I was mentioning a different law, because I was --
18 I mentioned this is a pre-enforcement challenge. We don't
19 have anyone who has yet been prosecuted.

20 But that is not a legal requirement for granting
21 injunctive relief, where you have an overbroad statute that
22 regulates speech.

23 Where you have that, if you have a credible threat
24 that the law could be interpreted in this way, then that's
25 grounds for granting injunctive relief.

1 And as I was mentioning, the Western District of
2 Pennsylvania, involving the *Stevens* case, again, involving
3 the issue of crush videos, the first prosecution brought by
4 the Justice Department was in a situation that was expressly
5 disavowed by the Presidential signing statement for that
6 law.

7 Here, you have an area that has been actively
8 subject of litigation, and, more recently, prosecutions
9 involving sex trafficking and postings that are said to
10 contribute to sex trafficking, for the past ten years.

11 And so that's the reason why you have had
12 widespread chilling effect across the Internet with the
13 passage of this law, because people look at what's happened
14 with this kind of advocacy nationwide, both by state
15 attorneys general, by prosecutors, and by private litigants
16 that have essentially driven this content from the Web.

17 And so it doesn't relate just to this. You look
18 at the breadth of the statute that was being created.

19 And here, you have the operative precisions of --

20 THE COURT: Has any prosecution been brought under
21 this statute yet?

22 MR. CORN-REVERE: Not under this statute yet.

23 It has been added to some civil complaints,
24 including the Florida Abortionist versus Backpage case down
25 in Florida, where it was added as one of the civil counts.

1 THE COURT: Has the Justice Department issued any
2 update to its U.S. Attorney manual or its prosecution manual
3 at Main Justice regarding prosecution under this statute?

4 MR. CORN-REVERE: Not that I'm aware of.

5 But it's the very situation that Judge Sloviter
6 addressed in *Reno versus ACLU*, in which she said that the
7 Justice Department has assured us they'll apply the law
8 responsibly. But in the First Amendment context, that's not
9 good enough.

10 This case is even more challenging, because here,
11 it doesn't matter whether the Justice Department promises to
12 show restraint, because this allows state attorneys general
13 and local prosecutors to prosecute, and it allows civil
14 litigant to bring challenges, civil cases, for basically
15 whatever they can dream up that might violate this -- the
16 provisions of this statute.

17 And as I mentioned, for the factual allegations --

18 THE COURT: You've got four minutes left on your
19 rebuttal time. Do you want to keep using it or not?

20 MR. CORN-REVERE: Thank you for the update on the
21 time. I'll reserve the rest of my time for rebuttal.

22 THE COURT: You're welcome.

23 MR. COHEN: Good afternoon, Your Honor.

24 THE COURT: Do you want to start with the
25 Pittsburgh case that he's so concerned about?

1 MR. COHEN: Your Honor, that's --

2 THE COURT: Are you familiar with it even?

3 MR. COHEN: I'm not familiar with the crush case.

4 THE COURT: All right. Well, then let's focus on
5 your argument.

6 Why isn't there standing here, in your view?

7 MR. COHEN: Your Honor, plaintiffs don't face a
8 credible threat of prosecution in this case.

9 But the allegations they've -- the conduct they
10 say that they're going to undertake would not be a violation
11 of the statute. Short and plain, that's the conduct that --

12 THE COURT: The conduct they say they're going to
13 undertake at this summit, right, is basically a bunch of
14 people sitting around chatting with one another, right?

15 MR. COHEN: It sounded like -- they have a website
16 up. It sounds -- it's still operative as far as -- and last
17 I checked just a day or two ago, it lists a number of
18 speakers, different topics.

19 And, yeah, that's the most I know about what
20 they're going to do.

21 THE COURT: It says they're going to have
22 workshops devoted to issues affecting sex workers such as --
23 this is a quote: "Such as harm reductions, disability, age,
24 health, and personal safety."

25 Right? That's what they say they're going to be

1 doing.

2 MR. COHEN: Yeah.

3 THE COURT: How does that constitute promote and
4 facilitate prostitution and illegal sex trafficking?

5 MR. COHEN: It doesn't, Your Honor. I think
6 that's part of our point.

7 That's -- I think we want -- the point I wanted to
8 make was that plaintiffs keep pulling out certain words that
9 just promote and facilitate all by himself.

10 But I think cases like *Williams* from the
11 Supreme Court, I think make the point that you have to look
12 at the whole statute, the whole -- the phrase as a whole.

13 And in this case, looking at Section 2421A, which
14 is the criminal statute that we're talking about, it speaks
15 about owning and managing or operating an interactive
16 computer service, with the intent to promote or facilitate
17 the prostitution of another person.

18 So it's not directed at speech at all, unlike
19 plaintiff counsel's allegations. It's directed at the
20 owning, managing or operating of an interactive computer
21 website or service.

22 And the promotion or facilitation goes to the
23 intent. It's part of the evidence that the government would
24 have to present, presumably, if they did prosecute someone,
25 to show that they had this intent to promote or facilitate

1 the prostitution of another person of a specific
2 prostitution act.

3 THE COURT: In theory, Counsel, who would be
4 bringing that prosecution in the federal system? Would it
5 not be a U.S. Attorney's Office?

6 MR. COHEN: The only defendants in this case are,
7 of course, the federal defendants.

8 And, yes, if this Section 2421A was going to be
9 prosecuted, it would be by the U.S. Attorney's Office.

10 THE COURT: Is there a unit anymore in Main
11 Justice's criminal division that brings sex trafficking
12 cases, to your knowledge?

13 MR. COHEN: I believe the Child Sexual
14 Exploitation and Obscenity Section is the one who handles
15 that. And Ms. Gelber is here from that section, because
16 they're primarily responsible for the sex trafficking
17 statute.

18 THE COURT: So they would prosecute it potentially
19 also or --

20 MR. COHEN: Yes.

21 And I think one of the points -- they prosecute
22 crimes.

23 They have previously -- it's been around for,
24 since at least the 19 -- early 1970s, was Section 1952,
25 which kind of -- which was kind of more of a general-purpose

1 statute for interstate -- or actions that promoted or
2 facilitated the promotion of certain crimes, one of those
3 being illegal prostitution.

4 So what this statute did was essentially pull out
5 that specific crime of the promotion and facilitation of
6 prostitution and make it a separate crime.

7 THE COURT: Right.

8 MR. COHEN: It's not something that couldn't --
9 really couldn't have been prosecuted before by the Federal
10 Government, and it would have been handled by that section
11 before, and I think this new crime would be handled by the
12 same section.

13 THE COURT: So they'd have to be the ones who
14 brought an Indictment and then got the burden of proving the
15 case in the Federal Court?

16 MR. COHEN: Yes.

17 And they certainly have no intent of prosecuting
18 anyone from Woodhull Sexual Freedom Foundation for their
19 summit, which --

20 We've talked about analogies. It would be
21 somewhat similar to prosecuting a health-services group for
22 handing out needles to heroin users and arguing that that
23 was somehow promoting heroin use or facilitating the use of
24 heroin. I mean, no one would do that in their right mind.
25 It's just -- it's not a realistic possibility here of

1 prosecution.

2 THE COURT: Yeah.

3 So in the absence of that being a realistic
4 possibility, how do they get standing?

5 MR. COHEN: We don't believe there is standing in
6 this case, Your Honor, and that's why we moved as well to
7 dismiss.

8 And I realize that it's with short notice.

9 And, of course, you know, we didn't have a lot of
10 time.

11 THE COURT: Well, the whole thing is short notice.
12 That's a separate issue.

13 MR. COHEN: Yeah.

14 So we --

15 THE COURT: And that's the plaintiff's doing.
16 That's not your doing.

17 MR. COHEN: We think this case is very similar to
18 the *Backpage.com* case from 2016 before Judge Walton, where
19 he dismissed for lack of standing. In fact, I believe it
20 was the same plaintiff attorney who tried that case.

21 And I think there, you had *Backpage.com* saying
22 they were worried that they could be prosecuted.

23 THE COURT: Was that a PI case?

24 MR. COHEN: It was not a PI. It was on a motion
25 to dismiss.

1 THE COURT: Okay.

2 MR. COHEN: And I think in a very similar factual
3 pattern there, you had the plaintiff saying they were going
4 to undertake an activity, but it probably -- they didn't
5 know if it violated the statute.

6 There was no realistic possibility of prosecution,
7 and the Court dismissed.

8 THE COURT: Was it appealed?

9 MR. COHEN: I don't think it's up on appeal,
10 so I think it's -- I don't believe -- there's no Circuit
11 Court decision, that I know of.

12 THE COURT: Yeah.

13 MR. COHEN: And, you know, we also emphasized in
14 our papers -- and I'll just reiterate it here -- that FOSTA,
15 the statute, is directed towards -- and it only applies to
16 illegal prostitution and sex trafficking. It's not, as
17 plaintiff says, anything that promotes or facilitates
18 prostitution or sex trafficking. It's specifically directed
19 to an illegal act, this prostitution or sex trafficking of
20 another person. So it has to be directed to a specific act.

21 And even the -- that's shown as well when you look
22 at the statute in the aggravated section of the statute,
23 Part B, where it talks about it's only aggravated if it's
24 directed towards the prostitution of five or more people or
25 someone who knows that it's -- that involves actual sex

1 trafficking of an individual.

2 THE COURT: What about this rating organization he
3 raised? How is their conduct, as you understand it, in any
4 way related to promoting and facilitating illegal sex
5 trafficking or prostitution? It's a rating company.

6 MR. COHEN: I don't see how there could possibly
7 be a mens rea of promoting or -- with the intent to promote
8 or facilitate prostitution or sex trafficking.

9 It seems to me that the intent there -- and
10 they've made that quite clear in their mission statement and
11 what they have stated in the papers here -- is to just
12 protect the health and safety of these people who are --
13 happen to be working in some kind of sex work.

14 But they're not trying to promote the actual sex
15 work or have the intent to facilitate the prostitution of
16 another person. So I would have a hard time imagining how
17 they could possibly be prosecuted, Your Honor.

18 THE COURT: I hear you.

19 What else have you got?

20 MR. COHEN: You asked, Your Honor, about training.
21 My understanding is that -- or -- well, you asked about
22 whether the U.S. Attorney's manual had been updated.

23 THE COURT: Yeah.

24 If they're going to go out and prosecute these
25 kind of cases, at least in theory, usually, as a preliminary

1 step, there's some kind of guidance provided by Main Justice
2 from the criminal division.

3 Like you, I'm straining to imagine the situation
4 where they're using this type of conduct that the plaintiffs
5 are saying they're going to participate in as a basis to
6 constitute promotion and facilitation of prostitution.

7 So there would have to be some guidance, because
8 you don't want -- the Justice Department, as a general
9 proposition -- and I speak to this issue as an alum -- they
10 don't want people out prosecuting cases they're going to be
11 losing, because that's going to have a terrible impact on
12 the credibility of the statutory framework that they're
13 using for these prosecutions. So they come up with some
14 guidance, give us some guidance.

15 Has any such guidance been created, to your
16 knowledge?

17 MR. COHEN: My understanding is, no, there has
18 been some training in how the statute works and what it says
19 and how it applies, but there's not been updates to the U.S.
20 Attorney's manual.

21 I think that there's -- you know, I would refer
22 the Court to that signing statement, or the statement to
23 the -- that the Department of Justice issued to the
24 White House just before the signing, where they kind of
25 explained their understanding of the law and endorsed the

1 signing of it to the White House. That probably provides
2 some guidance on -- probably the best guidance as to what
3 the Department of Justice sees as the law and how it
4 interprets it.

5 I do want to reiterate that I also, with respect
6 to standing -- I don't know if it was clear in the papers,
7 but there are a couple -- several provisions in the
8 statute -- the statute does several things.

9 And, for example, the change to Section 230,
10 I believe it is, that changes the ability of these states to
11 bring a prosecution, that's just to -- that's just to bring
12 prosecutions that are under state laws that are basically
13 this mirror or have the same effect as Section 2421A and the
14 sex trafficking statute. But those, of course -- you know,
15 those parties aren't before the Court.

16 So as -- again, I think there's a standing problem
17 there with respect to that, and that's -- the only
18 plaintiffs made -- said that there was an ex post facto
19 problem in the way the statute is written, but, of course,
20 that only applies to that change in the CDA, which applies
21 to cases that could be brought by the state pros- -- or
22 local prosecutors.

23 Only the Federal Government's here. There's no
24 way -- the Federal Government can't prosecute someone for
25 actions that happened before this was enacted; in other

1 words, that doesn't apply to them. So there's no way to --
2 there's no standing there with respect to that part of the
3 statute.

4 THE COURT: This Court can't issue injunctive
5 relief against state authorities that are pursuing statutes
6 that the state has already enacted through its legislature.

7 MR. COHEN: I agree, Your Honor.

8 And I think a similar problem occurs with respect
9 to these civil remedies that the plaintiffs have complained
10 about that are introduced. Those, of course, can only be
11 brought by victims of sex trafficking, and obviously,
12 they're not before the Court either in terms of injunctive
13 relief and standing.

14 THE COURT: All right.

15 Assuming for the sake of discussion that they got
16 over the standing hurdle, as high a hurdle as it is, how
17 do you see their chances of winning on the merits,
18 likelihood of success on the merits?

19 MR. COHEN: We don't believe that they have any
20 likelihood of success on the merits, Your Honor.

21 I think, obviously, the main argument the
22 plaintiffs have made is over-breadth. They've argued that.

23 But as I said before, this is not a statute
24 directed at speech itself.

25 It's not -- there are statutes -- as the

1 plaintiffs brought up as an example, you know, something
2 that talks about a prohibition against indecent speech or
3 something, sure, that's directed at speech.

4 This is directed at the management, operation,
5 ownership of an interactive website. It's not speech
6 itself.

7 The way the promotion and facilitation of
8 prostitution of another person comes into effect is with
9 respect to the intent of the management of the website.

10 So its speech might be -- there might be speech
11 involved in that, in trying to determine their intent,
12 similar to maybe a statute that prohibits certain kinds of
13 picketing in certain places or something.

14 And sure, there's speech involved in what they
15 want to hold up on their signs. But the terms of the
16 statute itself are not directed at speech. So I think it's
17 a high hurdle for them to get over because of that problem,
18 to start with.

19 And I think we've also reiterated the fact that
20 the term, these words "promote and facilitate," they're not
21 something new, they're not pulled out of thin air by
22 Congress or the government here. They're terms that are
23 commonly used.

24 I said, they're basically -- they've been in use
25 in Section 1952 since the '70s and have not been found to be

1 unconstitutional. And there's case law interpreting that.
2 And we cited to one of the cases, I believe, from 1996, the
3 *Bennett* case, which basically, it describes exactly what
4 those terms mean.

5 And I would also point the Court to -- even
6 looking recently in the U.S. Supreme Court, the *Rosemond*
7 *versus U.S.*, 572 U.S. 65, the Court favorably cites LaFave
8 substantive criminal law Section 13.2, which defines
9 "accomplice" as someone who's liable as a principal when he
10 gives assistance or encouragement with the intent thereby to
11 promote or facilitate commission of the crime.

12 So these are just common terms that are commonly
13 understood in the criminal law and common law and provide
14 plenty of notice and -- to the common person who could be a
15 victim of -- or could be prosecuted under the statute.

16 THE COURT: How about the irreparable harm
17 requirement, how are they going to establish that?

18 MR. COHEN: Well, they'd have to show a likelihood
19 of prosecution, Your Honor. And I think that, as I said,
20 there's no one that's going to prosecute them in this case,
21 whether that's Woodhull, under the summit, or any other
22 plaintiffs that are part of the case.

23 I mean, we've -- there's the Internet archive, the
24 one who's just archiving material. And my understanding is
25 that they have claimed that they don't know what -- they

1 just pulled information off the Web, make it available to
2 others. They don't know what -- there's such a huge volume
3 of information that they don't have the -- it's impossible
4 for them to review it.

5 So, of course, there's no mens rea there. I mean,
6 there would be no way to prosecute them for having the
7 intent to promote or facilitate the prostitution of another
8 person.

9 Just as, I'm sure -- and this they know, that
10 there's -- all this -- since they're pulling so much
11 information off the Internet, that, of course, it's going to
12 include other probably obscene material or child pornography
13 material. And they're not worried about prosecution for
14 those things either because there's no mens rea; there's no
15 way for the government to prove that. So just as there's no
16 way for them to prove these crimes.

17 THE COURT: Well, this Court has a little
18 experience with the difficulty of proving in a federal
19 courtroom interstate transmission of obscene material.

20 It's not a joke, sir.

21 MR. CORN-REVERE: Sorry.

22 THE COURT: The government tried in *U.S. versus*
23 *Stagliano* and got nowhere. The Court had to throw the case
24 out at Rule 29. It was the first-ever prosecution in this
25 District of interstate transmission of obscene material.

1 So bringing these kind of cases or cases of like
2 this are not simple and not done lightly.

3 MR. COHEN: Oh, no one wants to -- yeah.

4 THE COURT: And have to be done very carefully
5 because of the potential consequences -- difficulty of proof
6 and potential consequences to the chilling effect that's
7 been alluded to and hasn't been quite established yet here.

8 MR. COHEN: Understood, Your Honor.

9 THE COURT: Do you have anything else? You've got
10 about a minute. You can rest on your papers.

11 MR. COHEN: No, Your Honor, there's nothing else.
12 I'm happy to answer any questions the Court has, though.

13 THE COURT: Well, look, cases like this, normally
14 I give -- by which I mean novel cases -- I usually give the
15 parties an opportunity to take a look at the transcript, and
16 if they want to supplement their pleadings, they can have
17 ten pages to do it.

18 You might want to check out this Pittsburgh case
19 that's been alluded to here that you're not familiar with.

20 And you might want to talk to your co-counsel over
21 there about what, if any, guidance has been created just to
22 verify that.

23 But you write it any way you want to write it, if
24 you want to do it. I'm not requiring you to write a
25 supplement, but if you want to, after reviewing the

1 transcript, go ahead.

2 MR. COHEN: I appreciate the opportunity.

3 Thank you, Your Honor.

4 THE COURT: Thank you.

5 Mr. Revere, you've got four minutes.

6 MR. CORN-REVERE: I want to start with the points
7 that Mr. Cohen made about the Travel Act, saying that it is
8 very similar and uses commonly understood words.

9 This is where the Travel Act differs from FOSTA.
10 FOSTA focuses only on speech.

11 The Travel Act focuses on facilities of interstate
12 commerce that are found to violate state crimes.

13 And for here, the specific section is Section
14 1952B that specifically defines unlawful activity.

15 In this case, prostitution offenses in violation
16 of laws of the state in which they are committed or of the
17 United States.

18 Here, FOSTA simply prohibits the operation of a
19 website, with the intent to promote or facilitate the
20 prostitution of another person, shall be fined under this
21 title.

22 There's no connection to an actual crime. It is
23 simply the amorphous prohibition of promotion or
24 facilitation of prostitution as a concept, and that's the
25 difference between the two.

1 The Travel Act focuses on physical actions that
2 facilitate crime. FOSTA focuses only on speech, because
3 it's dealing with operating a website that uses speech that
4 the government would interpret promotes or facilitates a
5 prostitution.

6 Mr. Cohen says that those words are commonly
7 understood, and they are in the Travel Act cases. In fact,
8 if you look at the cases they cite in their brief,
9 *United States versus Bennett*, it says that to facilitate
10 means to do any act that would cause the unlawful activity
11 to be accomplished in a way, or to insist in the lawful
12 attempt in any way.

13 Which may be a commonly understood term in normal
14 criminal law when you've already got a crime established
15 under state law and then you look at whether or not a
16 federal use of interstate commerce, facility of interstate
17 commerce assisted in that.

18 But here we're talking about speech that is
19 considered to promote or facilitate crime, and that's why
20 the plaintiffs in this case are concerned, because a lot of
21 their activities, while they are not criminal in nature
22 themselves, are made to assist people who operate in the
23 area.

24 THE COURT: Give me an example of where they're
25 promoting prostitution.

1 MR. CORN-REVERE: They are -- well --

2 THE COURT: Promoting.

3 MR. CORN-REVERE: They are facilitated.

4 THE COURT: No.

5 Promote. Let's start with promoting.

6 MR. CORN-REVERE: Okay. Well, they're advocating
7 for the legalization of prostitution, both Human Rights
8 Watch and other organizations do as well.

9 They also take a number of steps to --

10 THE COURT: Has that ever been prostitution
11 advocacy?

12 MR. CORN-REVERE: No. This law didn't exist
13 before.

14 And under the Travel Act, you had to violate --

15 THE COURT: Hold on. I'm not saying under this
16 law. This law is brand new; it's only a few months old.

17 MR. CORN-REVERE: That's right.

18 THE COURT: I'm talking about in any state at any
19 time or under any other provision of the federal law,
20 advocacy for the legalization of prostitution.

21 MR. CORN-REVERE: Well, there are --

22 THE COURT: That's prime.

23 MR. CORN-REVERE: There are three states that
24 adapted laws to prohibit websites that carried classified
25 ads. We mentioned those cases in our papers; *Backpage.com*

1 *versus McKenna, versus Hoffman, and versus Cooper.* Those
2 three cases are all cited.

3 And, as a matter of fact, they talk about having a
4 more amorphous definition of what is promotion of
5 prostitution in those cases and how -- why that was
6 considered to be constitutionally defective. It was
7 considered to be both vague and overly broad.

8 Now, Mr. Cohen talks about how you don't have to
9 worry about that because you don't have the scienter.

10 And in one of those cases -- actually, in two of
11 those cases, the Internet archive was a plaintiff and was
12 found to have standing because --

13 THE COURT: Are you familiar with the
14 Supreme Court's recent decisions on prosecution under the
15 fraud statute as it applied to Governor McDonnell, in
16 particular?

17 MR. CORN-REVERE: I'm not familiar with it, no,
18 Your Honor.

19 THE COURT: Yeah.

20 You might want to look at those cases sometime.

21 The Supreme Court takes a dim view on this kind of
22 amorphous language as it relates to federal criminal
23 prosecution.

24 MR. CORN-REVERE: Well, but it's also -- we take a
25 dim view of this law, because it was specifically designed

1 to create a more amorphous standard.

2 Mr. Cohen mentions *Backpage versus Lynch* and said
3 that that case was dismissed. And, in fact, it was, because
4 the Court did find, under the law as it previously existed,
5 had an adequate standard that required specific knowledge.

6 But if you look at page 5 of the House report,
7 which we cite, that talks about the changes in language in
8 FOSTA. They were designed expressly to eliminate that
9 specific knowledge requirement.

10 THE COURT: You've got a minute.

11 MR. CORN-REVERE: Okay.

12 And so, again, the statutory changes in FOSTA were
13 the ones that directly addressed the scienter standard. It
14 runs afoul of having a constitutionally sufficient standard
15 for scienter, as we pointed out in our papers.

16 You had asked earlier what about the rating
17 organization? And this goes to the other point about this.
18 Whether or not the U.S. Attorney is going to prosecute,
19 whether or not state AGs are going to prosecute, and we
20 think that we've presented evidence showing that they have
21 been --

22 THE COURT: Under what state statute?

23 They're not going to prosecute under federal
24 statutes. They don't have the authority to.

25 What state statute do you have in mind in

1 Virginia?

2 Do you have a state statute that the
3 Attorney General of Virginia can prosecute under?

4 MR. CORN-REVERE: They could prosecute under a
5 state statute if they are promoting prostitution.

6 Again --

7 THE COURT: Does it exist?

8 MR. CORN-REVERE: I mentioned three in Washington
9 State, Tennessee, and in New Jersey, where states sought to
10 prohibit websites that, in their view, promoted online
11 trafficking. And because they were written with the kind of
12 language used in FOSTA, District Courts in all three cases
13 struck those statutes down, and FOSTA was adopted to
14 specifically authorize those kind of cases to go forward.

15 And more importantly, the civil claims, where
16 plaintiffs are already beginning to make use of FOSTA -- you
17 had asked Mr. Cohen what is the relevance of having a rating
18 organization, and that was the declaration saying that
19 having advocates on behalf of sex workers rate rescue
20 organizations and have third-party postings that criticized
21 those service organizations are precisely the kinds of
22 things that are -- that have been the target of cases that,
23 before FOSTA, were immunized --

24 THE COURT: How does that constitute promoting
25 prostitution and sex trafficking?

1 MR. CORN-REVERE: Because they're advocating on
2 behalf of -- sex workers advocating on behalf of people who
3 are in the business, who are then critical of the
4 organizations that are engaged in those issues.

5 Again, one of the more active areas of litigation
6 in cases that have been previously immunized, under
7 Section 230, are rating sites.

8 THE COURT: Speaking of cites, do you have any
9 cites for that Pittsburgh case you kept talking about?

10 MR. CORN-REVERE: That was the *United States*
11 *versus Stevens*.

12 THE COURT: All right. And that cite's in your
13 pleadings?

14 MR. CORN-REVERE: The Supreme Court case is -- we
15 don't cite to the Trial Court decision below, but we do cite
16 several times to *United States versus Stevens*.

17 THE COURT: Okay. And is that the case that you
18 referred to Judge Sloviter's remarks? Did she write it?

19 MR. CORN-REVERE: No. That -- I'm sorry. That
20 was *Reno versus the* -- I'm sorry, *ACLU versus Reno* [sic],
21 which then led to the 1997 Supreme Court decision.

22 But at the District Court, and it was a
23 three-judge District Court, that granted -- well, first
24 found standing and then granted injunctive relief.

25 Judge Sloviter talked about, she can't just trust

1 the government to say, trust us.

2 It was also in the same holding of Judge Lowell
3 Reed in the follow-up legislation, after the CDA, COPA, in
4 *ACLU versus Reno II* [sic].

5 THE COURT: Okay. You can have a week to
6 supplement your pleadings, both sides can, a week from the
7 date you get the transcript. Obviously, you can't review a
8 transcript until it's done.

9 So when my very abled court reporter has completed
10 the transcript, you can have one week from that date to
11 supplement your pleadings. If you want to. I mean, after
12 you've reviewed it, my experience has been that invariably
13 you review a transcript and you say, I wish I said this,
14 that, or the other thing in response to something that the
15 opposing counsel said or the Court said, so I want to give
16 you a chance to do that. This is obviously a novel case, a
17 novel statute.

18 As I said previously, it's not even conceivable to
19 give you a PI opinion. As you know, we have to issue an
20 opinion, a publishable opinion. We don't just whip them
21 off, especially on novel issues and novel cases and novel
22 statutes.

23 So there's no chance you're going to get a PI
24 opinion out of this Court, none, by that date. It's not
25 possible.

1 MR. CORN-REVERE: No. I appreciate that, Your
2 Honor.

3 THE COURT: Today is the 20th; next Friday is the
4 27th -- I mean, if you got the transcript tomorrow, which
5 you probably won't; it takes time to do a transcript. Next
6 Friday is the 27th.

7 There's no way it can be done that fast. And
8 believe me, you're talking to a Court that knows how to do
9 things fast. See e.g., *U.S. versus AT&T*, 175-page opinion
10 in six weeks.

11 So you've got to be realistic here. You can't
12 come into this courthouse on June 28th and think you're
13 going to have an opinion by August 2nd. That's just not --
14 that can't be done.

15 MR. CORN-REVERE: I understand.

16 THE COURT: So you can supplement your pleadings;
17 I'll get you an opinion as fast as I can get it. I can't
18 tell you when. It won't be by August 2nd, I can tell you
19 that for certain.

20 And thanks for your efforts, Counsel. Have a good
21 day.

22 MR. CORN-REVERE: Thank you.

23 DEPUTY CLERK: All rise. This Honorable Court
24 will stand in recess until the return of court.

25 (Proceedings concluded at 5:01 p.m.)

C E R T I F I C A T E

I, William P. Zaremba, RMR, CRR, certify that the foregoing is a correct transcript from the record of proceedings in the above-titled matter.

Date: July 22, 2018 /S/ William P. Zaremba

William P. Zaremba, RMR, CRR