

NO. 22-10338

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

M.H, J.H., on behalf of

V
OMEGLE.C

On Appeal from the United States District Court
for the Middle District of Florida
Case No. 8:21-cv-00000
(Hon. Virginia M. Harbo)

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D A D E F F E EE

Vera Eidelman
Counsel of Record
Laura Moraff
Joshua Block
AMERICAN CIVIL
LIBERTIES UNION
FOUNDATION
125 Broad Street, 18th Fl.
New York, NY 10004
(212) 549-2500
veidelman@aclu.org

Jennifer Stisa Granick*
AMERICAN CIVIL
LIBERTIES UNION
FOUNDATION
39 Drumm Street
San Francisco, CA 94111
Daniel Tilley
AMERICAN CIVIL
LIBERTIES UNION
FOUNDATION OF
FLORIDA
4500 Biscayne Blvd., Ste. 340
Miami, FL 33137

Samir Jain*
Emma Llansó*
Caitlin Vogus*
CENTER FOR
DEMOCRACY &
TECHNOLOGY
1401 K St. NW, Suite 200
Washington, DC 20005

* *Of counsel*

A E C E A C E D D A C E C

Pursuant to 11th Cir. R. 26.1-1 and Fed. R. App. P. 29(a)(4)(A), amici curiae state that they do not have a parent corporation and that no publicly held corporation owns 10% or more of their stock.

Pursuant to 11th Cir. R. 26.1-1, amici curiae certify that the following additional individuals and entities have an interest in the outcome of this appeal:

American Civil Liberties Union (amicus curiae)

American Civil Liberties Union of Florida (amicus curiae)

Center for Democracy & Technology (amicus curiae)

Center for LGBTQ Economic Advancement & Research (amicus curiae)

Eidelman, Vera (Counsel of Record for amici curiae)

Engine Advocacy (amicus curiae)

Free Speech Coalition (amicus curiae)

Reframe Health and Justice (amicus curiae)

The Sex Workers Project of the Urban Justice Center (amicus curiae)

Pursuant to 11th Cir. R. 26.1-2(b), this Certificate includes only those

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A**E E****FF E**

The **A** (**ACLU**) is a nationwide, nonprofit, nonpartisan organization dedicated to defending the principles embodied in the Federal Constitution and our nation's civil rights laws. The **A** is **C** the Florida affiliate of the ACLU. Since its founding in 1920, the ACLU has frequently appeared before the U.S. Supreme Court, this Court, and other federal courts in cases defending Americans' free speech and freedom of association, including their exercise of those rights online. *See, e.g., Reno v. ACLU*, 521 U.S. 844 (1997) (counsel); *NetChoice, LLC v. Att'y Gen. of Fla.*, 34 F.4th 1196 (11th Cir. 2022) (amici). Through its LGBTQ & HIV Project, the ACLU advocates for the equal rights of lesbian, gay, bisexual, and transgender people, and people living with HIV. The ACLU also works to reform laws that harm sex workers, or discriminatorily target trans sex workers and sex workers of color. *See, e.g. Erotic Serv. Provider Legal Educ. & Rsch. Proj. v. Gascon et al.*, 881 F.3d 792 (9th Cir. 2018) (amici).

The

D &**(CDT)** is a non-profit public

interest organization. For more than twenty-five years, CDT has represented the public's interest in an open, decentralized Internet and worked to ensure that the constitutional and democratic values of free expression and privacy are protected in the digital age. CDT regularly advocates before legislatures, regulatory

workers. FSC fights for a world in which body sovereignty is recognized, sexual expression is destigmatized and sex work is decriminalized.

H (RHJ) is a collective of advocates working at the intersection of harm reduction, criminal-legal reform and healing. RHJ has over 30 years of collective experience specifically focused on the health and safety of sex workers across the country as community organizers, advocates for policy change, service providers and experts offering training and technical assistance. As harm reductionists, RHJ works on developing and disseminating harm reduction tools and information for people who trade sex to combat interpersonal violence, exploitation and trafficking and poor health outcomes.

The (SWP) is a **C**

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Counsel for Plaintiffs–Appellants and Defendant–Appellee consent to the filing of this brief. *See* Fed. R. App. P. 29(a)(2).

. . AD (. 2 B) D A 4 E E E

Amici declare that:

1. no party’s counsel authored the brief in whole or in part;
2. no party or party’s counsel contributed money intended to fund preparing or submitting the brief; and
3. no person, other than amici, their members, or their counsel contributed money intended to fund preparing or submitting

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Whether the district court’s order granting Defendant–Appellee’s motion to dismiss on the grounds that 47 U.S.C. § 230 bars Plaintiffs–Appellants’ claim under 18 U.S.C. § 1595 should be affirmed.

The New York Times has reported, “recordings of Omegle videos have helped creators generate content on other platforms and go viral.”²

Recognizing the importance of online intermediaries and the risks that imposing open-ended liability on them could pose to communication, Congress passed Section 230 of the Communications Decency Act in 1996, 47 U.S.C. § 230 (“Section 230”). The law immunizes interactive computer service providers, including the kinds of intermediaries identified above, from most civil liability and state law criminal charges based on the speech of their users. As this Court and others have recognized, Section 230(c)(1) protects against liability for the “exercise of a publisher’s traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content.” *Zeran v. AOL*, 129 F.3d 327, 330 (4th Cir. 1997); *Dowbenko v. Google Inc.*

for participating in a sex trafficking venture under 18 U.S.C. § 1595—but only “if the conduct underlying the claim constitutes a violation of [18 U.S.C. § 1591].” 47 U.S.C. § 230(e)(5)(A). Although Section 1595 allows for liability where a participant “knew or should have known” the venture was illegal, Section 1591 requires knowing participation or, for offenses not related to advertising a person for sex trafficking, reckless disregard.

One of the issues in this case is what level of knowledge an intermediary must have to lose immunity under Section 230(e)(5)(A) and thereby be subject to civil liability: constructive knowledge, as under Section 1595, or actual knowledge, as under Section 1591.³ The court below correctly held that intermediaries cannot tte(i)2.1 (a) vll

Imposing liability on them can have a severe, unconstitutional chilling effect that substantially diminishes the universe of materials available to the public.

The same is equally, if not more, true for online intermediaries, which act as funnels for billions of pieces of content every day. Given the scale of the speech they enable, imposing liability on online intermediaries on the basis of merely constructive knowledge would have disastrous consequences for users:

Intermediaries would choose either to remove protected, societally beneficial content, or even whole services, to avoid the threat of liability—thereby depleting the full scope of speech and information available to the public—or they would try to avoid learning about content posted on their services to avoid having even arguably constructive knowledge of illegal content appearing there—thereby foregoing content moderation on their sites.

Plaintiffs' overbroad interpretation of FOSTA would adversely affect Omegle's ability to provide a platform for people to connect, create, perform, record, and share audio and video—as well as the myriad services offered by other interactive computer service providers. The district court's holding that an intermediary's loss of immunity under Section 230(e)(5)(A) cannot be based on constructive knowledge avoids both constitutional problems and dire practical effects. Therefore, this Court should affirm the district court's grant of Omegle's motion to dismiss.

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The principle of constitutional avoidance holds that courts should adopt a statutory construction that avoids “grave and doubtful constitutional questions.” *Bond v. United States*, 572 U.S. 844, 869 (2014) (Scalia, J. concurring). Construing FOSTA to allow online intermediaries to face civil liability without any actual knowledge or awareness of sex trafficking occurring on their sites would raise serious First Amendment questions. This Court can and should avoid determining what scienter requirement is robust enough to avoid chilling speech and undermining First Amendment interests by holding that FOSTA does not impose liability on intermediaries based on generalized or constructive knowledge.

Though the Supreme Court has not squarely determined what level of scienter a plaintiff must show to hold a distributor liable for carrying obscenity or child pornography, it has made clear that the answer implicates the First Amendment. This is because the imposition of liability with too low a scienter requirement has a chilling effect. It “tends to impose a severe limitation on the public’s access to constitutionally protected matter” by “stifl[ing] the flow of democratic expression and controversy at one of its chief sources.” *Smith v. California*, 361 U.S. 147, 152–53 (1959); *see also Ginsberg v. New York*, 390 U.S.

effect that imposing liability without actual knowledge would have. This is one reason that the First Amendment distinguishes between creators of illegal materials and those who make them available. *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 77 n.5 (1994) (explaining that a video store must have a higher scienter than a producer in order to be liable for distributing child pornography because of “the reality that producers are more conveniently able to ascertain” information about the content).⁶

The fact that the liability at issue here is civil does not change the analysis. “What a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law,” for “[t]he fear of damage awards . . . may be markedly more inhibiting than the fear of prosecution under a criminal statute.” *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 277 (1964).

there was “no issue of actual or constructive knowledge because the Florida right of publicity does not impose upon interactive service providers an obligation to filter or censor content”); *see also* 18 U.S.C. § 2258A(f) (obligation to report sex crimes involving minors does not impose an obligation to monitor users or service).

⁶ It is also worth noting that individuals and organizations engaging in constitutionally protected online speech are challenging FOSTA’s constitutionality in the courts. For example, the plaintiffs in *Woodhull Freedom Foundation v. United States*, No. 18-1552, 2022 WL 910600 (D.D.C. Mar. 29, 2022), *appeal docketed*, No. 22-5105 (D.C. Cir. Apr. 25, 2022), assert that Section 1591(e) violates the First Amendment and the Due Process clause by making “assisting, supporting, or facilitating” sex trafficking a violation of federal law without specifying what those acts entail.

Indeed, in *Manual Enterprises, Inc. v. Day*, the Supreme Court reversed a lower court's determination that the government could civilly bar distribution of magazines without, at a minimum, first establishing that the magazine publisher "knew that at least some of his advertisers were offering to sell obscene material." 370 U.S. 478, 492 (1962). In the opinion offering the narrowest grounds for the judgment and therefore the holding of the case, *see Marks v. United States*, 430 U.S. 188, 193 (1977), Justice Harlan, joined by Justice Stewart, explained that "a substantial constitutional question would arise were we to construe [the law] as not requiring proof of scienter in civil proceedings." *Manual Enterprises*, 370 U.S. at 492.⁷

While noting that the statute at issue in *Smith* was criminal, the justices concluded that its logic must also apply to a civil penalty, because the "heavy financial sacrifice" a civil judgment could entail would as effectively "

recognized that “[f]aced 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.” *Zeran*, 129 F.3d at 331; *see also Jones v. Dirty World Entm’t. Recordings LLC*

an interactive computer service “cannot avoid liability” if it is “knowingly assisting, supporting, or facilitating sex trafficking”). By targeting FOSTA’s Section 230(e)(5)(A) revision at intermediaries that knowingly engage in sex trafficking, Congress purportedly attempted to create a limited exception to the immunity conferred by Section 230—one which would not undermine Section 230’s overall purpose of protecting online freedom of expression.

B. FOSTA has already harmed online speech and online communities.

In addition to the civil implications at issue here, FOSTA expanded t (B.)Tjj3.409t □

FOSTA has also caused platforms to shut down harm reduction tools like “bad johns” lists¹⁷ and “VerifyHim,” a system that helped sex workers vet clients by providing them with references. Individuals and harm reduction organizations also reported that FOSTA made them wary of sharing harm-reduction and safety tips or doing check-ins with fellow workers.¹⁸ Some sex workers have had to return to in-person client-seeking in bars and clubs, where screening is necessarily more rushed, and where workers are more vulnerable.¹⁹ TheBody, an organization that publishes HIV-related information, news, support, and personal perspectives, reports that FOSTA has put sex workers at greater risk of HIV infection.²⁰

C. Expanding civil liability under FOSTA to reach less-than-knowing conduct would only exacerbate these problems.

Plaintiffs’ interpretation of FOSTA would only further encourage online intermediaries to engage in undesirable content moderation practices, and could thereby exacerbate harms imposed on sex workers, as well as healthcare workers

¹⁷ Nitasha Tiku, *Craigslist Shuts Personal Ads for Fear of New Internet Law*, WIRED (Mar. 23, 2018)

and teens. As reflected by the experiences detailed above, some intermediaries will respond by removing even more lawful content. Others may design their services to avoid learning facts that could be said to give them constructive knowledge about the content posted on their services, and may carry content they would prefer not to in order to avoid any liability risk, potentially resulting in a bad experience for their users and customers.

1. *Plaintiffs' interpretation of FOSTA creates a strong incentive for online intermediaries to*

other services, makes it all but impossible for intermediaries to filter out all illegal or legally risky speech without simultaneously sweeping in, and restricting, a broad swath of lawful material.²¹ As the Eighth Circuit recognized, a statute restricting sales of violent videos that “penaliz[ed] video dealers regardless of their knowledge of a video’s contents” would lead dealers to “limit videos available to the public to videos the dealers have viewed . . . [which] would impede rental and sale of all videos, including those that the statute does not purport to regulate and that the First Amendment fully protects.” *Video Software Dealers Ass’n v. Webster*, 968 F.2d 684, 690–91 (8th Cir. 1992).

In order to moderate content at scale, service providers often rely at least in part on automated content moderation tools.²² But those tools increase the risk of over-removals of lawful content, in part because they tend to perpetuate real-world

²¹ See, e.g., Zoe Kleinman, *Fury over Facebook ‘Napalm Girl’ Censorship*, BBC News (Sept. 9, 2016), <https://bbc.in/2NkjVvf>.

²² In general, automated tools for content moderation—which often take the form of content filters—fall into two categories: (1) matching tools, which “recogniz[e] something as identical or sufficiently similar to something [the tool] has seen before” and (2) prediction, which “recogniz[es] the nature of something based on the [tool’s] prior learning,” to “predict the likelihood that a previously-unseen piece of content violates a policy.” Carey Shenkman, Dhanaraj Thakur & Emma Llansó, Cent. Dem. & Tech., *Do You See What I See?* 12 (May 2021), <https://bit.ly/3H9YmGm>; Nafia Chowdhury, Stanford Freeman Spogli Inst. Int’l Studies, *Automated Content Moderation: A Primer 2* (Mar. 19, 2022), <https://bit.ly/3zD96Lo>.

In short, if this Court adopts Plaintiffs’ reading of FOSTA, online intermediaries will rely heavily on imprecise automated content moderation tools, which will indiscriminately detect, wrongly label, and remove a range of content that has nothing to do with sex trafficking.²⁶ Even intermediaries that do not increase their reliance on automated moderation will likely direct their human moderators to remove content more aggressively.

And, much like the criminal provisions of FOSTA—which already have had an asymmetric impact on individuals depending on their sexual orientation,²⁷ race,²⁸ and body-type²⁹—these effects will not be felt equally. LGBTQ users are particularly likely to be censorship targets. For example, in 2019, Instagram banned six advertisements for the newsletter *Salty* which featured transgender and non-binary people of color, on the erroneous basis that the ads promoted escort

services.³⁰ Another study showed that Perspective, an artificial intelligence tool created by Google to assign a “toxicity” score to online content, tended to rate tweets by drag queens as “on average more toxic than” those by white supremacists.³¹ If intermediaries increase their reliance on automated filters intended to detect sexually explicit materials in order to minimize liability risk, these types of erroneous removals of content by and about LGBTQ people will increase.

Over-censorship is also particularly likely for discussions of sex, sexual health, and sex work. This includes content intended to educate sex workers on their health and safety. For example, strippers who post videos to TikTok have reported having “informational TikToks about sexual health, safety tips and general tutorials” targeted by removals or shadow bans.³²

Sexual health information more generally is also at greater risk of removal, especially if it is aimed at minors. According to a 2020 report by UNESCO on digital sex education and young people, “sexuality education and information are

³⁰ EJ Dickson, *Why Did Instagram Confuse These Ads Featuring LGBTQ People for Escort Ads?*, Rolling Stone (July 11, 2019), <https://bit.ly/3QiTgvI>.

³¹ Mark Hay, *How AI Lets Bigots and Trolls Flourish While Censoring LGBTQ+ Voices*, Mic (Mar. 21, 2021), <https://bit.ly/3tuv3se>.

³² Madeleine Connors, *StripTok: Where the Workers Are V.I.P.s*, N.Y. Times (July 29, 2021), <https://nyti.ms/3HfXhgi>.

increasingly being delivered through digital spaces, reaching millions.”³³ Yet online sexual educators already face over-removal of their content.³⁴ For example, sex educators on Instagram report facing bans and account removals and that “posts that use flagged words, like ‘sex’ and ‘clitoris,’ have been removed from Instagram’s search function.”³⁵ An intermediary concerned about liability under an interpretation of FOSTA that imposes liability without actual knowledge may, for example, err on the side of removing content from Planned Parenthood’s Teen Council³⁶ or True Love Waits.³⁷

As these examples show, the impact of interpreting FOSTA to impose liability based on generalized knowledge will by no means be limited to intermediaries focused on sex work and sexual health. But these categories of content will face especially challenging hurdles even on general-interest platforms,

³³ Susie Jolly et al., UNESCO, *A Review of the Evidence: Sexuality Education for Young People in Digital Spaces* 7 (2020), <https://bit.ly/3OcGZXP>.

³⁴ See Amber Madison, *When Social-Media Companies Censor Sex Education*, The Atlantic (Mar. 4, 2015), <https://bit.ly/3H9gvnH> (reporting that Twitter, Facebook, and Google had rejected advertisements from various sexual health organizations as violating their policies prohibiting promotion of sexual or vulgar products or services).

³⁵ Abigail Moss, *‘Such a Backwards Step’: Instagram Is Now Censoring Sex Education Accounts*, Vice (Jan. 8, 2021), <https://bit.ly/3aQ2L5e>.

³⁶ E.g., Planned Parenthood, *Teen Council*, <https://bit.ly/3MDG51N>.

³⁷ E.g., Lifeway, *Help Students Understand Sexual Purity*, <https://bit.ly/3H9Nd8s>.

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For these reasons, amici respectfully urge this Court to uphold the district court's decision granting Defendant–Appellee's motion to dismiss and to hold that loss of immunity under Section 230(e)(5)(A) cannot be based on constructive knowledge.

Dated: June 24, 2022

Respectfully submitted,

/s/ Vera Eidelman

Vera Eidelman

AMERICAN CIVIL LIBERTIES UNION
FOUNDATION

125 Broad Street, 18th Floor

New York, NY 10004

(212) 549-2500

veidelman@aclu.org

Counsel of Record for Amici Curiae

A E C A E E C

I hereby certify that this brief contains 6,170 words, excluding the items exempted by Fed. R. App. P. 32(f), and complies with the length specifications set forth by Fed. R. App. P. 29(a)(5). I further certify that this brief was prepared using 14-point Times New Roman font, in compliance with Fed. R. App. P. 32(a)(5) and (6).

Dated: June 24, 2022

/s/ Vera Eidelman
Vera Eidelman
AMERICAN CIVIL LIBERTIES
UNION
FOUNDATION
125 Broad Street, 18th Floor
New York, NY 10004
(212) 549-2500
veidelman@aclu.org

Counsel of Record for Amici Curiae

A E C E E F G F

I hereby certify that on June 24, 2022, I electronically filed the foregoing Amici Curiae Brief with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit using the CM/ECF system, which effects service upon all counsel of record.

Dated: June 24, 2022

/s/ Vera Eidelman
Vera Eidelman
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION
125 Broad Street, 18th Floor
New York, NY 10004
(212) 549-2500
veidelman@aclu.org

Counsel of Record for Amici Curiae