NO. 22-15103, 22-15104

In The

United States Court Of Appeals

For The Ninth Circuit

JOHN DOE #1 AND JOHN DOE #2,

Plaintiffs – Appellees,

v.

TWITTER, INC.,

Defendant – Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
THE HONORABLE JOSEPH C. SPERO
DISTRICT COURT CASE NO. 21-CV-000485

AMICUS BRIEF OF CHILD USA and RAINN AS *AMICUS CURIAE*
SUPPORTING THE POSITION OF PLAINTIFFS- APPELLEES,
JOHN DOE #1 AND JOHN DOE #2 AND DECISION OF THE DISTRICT COURT

James R. Marsh *
Margaret E. Mabie
MARSH LAW FIRM, PLLC
31 Hudson Yards Floor 11
New York, NY 10001
(212) 372-3030

Counsel for Amici Curiae

Marci A. Hamilton, Esq.
CHILD USA
Jessica Schidlow, Esq.
Staff Attorney, CHILD USA
3508 Market Street
Suite 202
Philadelphia, PA 19104
(215) 539-1906

Erin Earp
RAINN
1220 L St. NW
Suite 500
Washington, D.C. 20005
(202) 544-3064

Additional Counsel for Amici Curiae listed on following page

Sin-Ting Mary Liu
Catherine A. Mitchell
AYLSTOCK, WITKIN, KREIS & OVERHOLTZ, PLLC
17 E. Main Street Suite 200
Pensacola, FL 32502
(844) 794-7402

Greg G. Gutzler
Joshua J. Lax
Justin S. Abbarno
Joseph T. Frate
DICELLO LEVITT GUTZLER, LLC
One Grand Central Plaza
60 East 42nd St., Suite 2400
New York, NY 10165
(646) 933-1000

Hillary Nappi
Frank R. Schirripa
HACH, ROSE, SCHIRRIPA & CHEVERIE, LLP
112 Madison Ave Fl 10
New York, NY 10016
(212) 213-8311

Vincent Nappo
PFAU COCHRAN VERTETIS AMALA, PLLC
701 Fifth Ave., Suite 4300
Seattle, WA 98104
Tel: (206) 451-8260
Vnappo@pcvalaw.com

Micha Star Liberty
LIBERTY LAW OFFICE, INC.
1999 Harrison, Suite 1800
Oakland, CA 94612
(510) 645-1000

DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, amici curiae, by and through its undersigned counsel, hereby certifies that it has no parent corporation and that no publicly held corporation owns 10% or more of its stock.

/s/ James R. Marsh
James R. Marsh
MARSH LAW FIRM PLLC
31 Hudson Yards, 11th Floor
New York, New York 10001
Phone: 212–372–3030
Email: jamesmarsh@marsh.law

Counsel for Amicus Curiae

TABLE OF CONTENTS

Page:

TABLE OF AUTHORITIES

Page(s):

Cases:

Statutes:

Rules:

Other Authorities:

STATEMENT OF IDENTIFICATION

Marsh Law Firm's fight against online abuse led to major law reform in 2006 (Masha's Law 18 U.S.C. § 2255) and 2018 (Protecting Young Victims from Sexual Abuse and Safe Sport Authorization Act of 2017 [PL 115-126] and the Amy Vicky & Andy Child Pornography Victim Assistance Act of 2018 [PL 115-299]), as well as the United States Supreme Court case interpreting 18 U.S.C. § 2259 (*Paroline v. United States*, 572 U.S. 434 (2014)). In 2019, the New York Times ran a story entitled *Child Abusers Run Rampant as Tech Companies Look the Other Way* featuring two of our clients. The firm's interest in this case is related to its work protecting victims and promoting Section 230 reform.

CHILD USA is the leading national non-profit think tank fighting for the civil rights of children. CHILD USA's interests in this case are directly correlated with its mission to eliminate barriers to justice for victims. CHILD USA is an expert on the proximate, immediate, and persistent harms to child-victims whose imagery is trafficked online, the ways in which digital communication platforms exacerbate this abuse, and Congressional action to hold entities like Twitter accountable.

RAINN (Rape, Abuse, and Incest National Network) is the nation's largest anti-sexual violence organization whose purpose is to provide services to victims of sexual violence and advocate for judicial reform. RAINN founded and continues to operate the National Sexual Assault Hotline. RAINN is a leader in public education on sexual violence and advocates to improve related legislation.

Aylstock, Witkin, Kreis & Overholtz, PLLC's attorneys protect the rights of individuals who have been seriously injured because of defective products and other negligent behavior. The firm's interest in this case is directly correlated with its experience working with and supporting victims of sexual abuse, online exploitation, and CDA 230 impunity.

Hach Rose Schirripa & Cheverie, LLP's attorneys believe in standing up for sexual abuse survivors and their families. The firm's attorneys remain committed to protecting victims of wrongdoing. The firm's interest in this case is directly correlated with its experience working with and supporting victims of sexual abuse and online exploitation.

Micha Star Liberty is the owner of Liberty Law Office, Inc. where she primarily represents victims of sexual violence and abuse. Micha received the Women's Advocate of the Year Award for work related to the #MeToo movement. The firm's interest in this case is directly correlated with Micha's experience supporting victims of sexual violence.

DiCello, Levitt, Gutzler, LLC represents businesses, individuals, and public clients injured by the wrongs of others. DiCello Levitt works tirelessly to secure a more just and equitable future for its clients.

Pfau, Cochran, Vertetis, Amala, PLLC (PCVA) attorneys have been involved in complicated sexual abuse cases in the country, including against the ISP

Backpage.com, LLC. The firm's interest in this case is directly correlated with its experience supporting victims of online exploitation.

Marsh Law Firm, CHILD USA, RAINN, Aylstock, Witkin, Kreis & Overholtz, PLLC, Hach Rose Schirripa & Cheverie, LLP, Liberty Law Office, Inc., DiCello, Levitt, Gutzler, LLC and Pfau, Vertetis, Amala, PLLC file this brief pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure and all parties to the appeal have consented to the filing of this brief.

Counsel for the Appellee did not author the brief in whole or in part. Neither Appellee nor Appellee's counsel contributed financial support intended to fund the preparation or submission of this brief. No other individual(s) or organization(s) contributed financial support intended to fund the preparation or submission of this brief.

STATEMENT OF FACTS

Eighty percent of Twitter's revenue comes from advertising and licensing access to its data. 2–ER–127–30 ¶30–41. Although Twitter boasts a "zero–tolerance child sexual exploitation policy," 2–ER–135–36 at ¶¶56–57, it nonetheless enables the distribution of massive amounts of child sex abuse material ("CSAM") on its platform. 2– ER–138–39 at ¶¶61–62, 70.

Twitter's search feature sorts and aggregates information and suggests content to drive user engagement. 2–ER–144 at ¶¶80–82. Twitter's interface also serves

promoted tweets or advertisements to guide user activity. 2–ER–141 at ¶76. Twitter monetizes content regardless of whether it is contraband, and otherwise promotes illegal content. 2–ER–134 at ¶¶53–54. Twitter profits from every user who interacts with an advertisement on its platform. 2–ER–127–30 at ¶¶30–36.

Plaintiffs John Doe #1 and John Doe #2 were 13–14 years old when they were sexually exploited on Twitter. Children across the globe use Twitter every day. 2–ER–145 at ¶87. Believing that they were interacting with peers, Plaintiffs instead exchanged CASM with traffickers who later distributed it. 2–ER–146 at ¶¶89, 97–98. Plaintiffs learned that CSAM depicting them was distributed on Twitter. 2–ER–149 at ¶105–07. John Doe #1 complained to Twitter that CSAM depicting him was on the platform. 2–ER–149–50 at ¶112. Twitter asked him to confirm his identity and age but did not provisionally remove the post. 2–ER–150 at ¶¶113–114. CSAM depicting the Plaintiffs resulted in substantial user engagement on Twitter. 2–ER–155 at ¶124.

Twitter refused to remove the CSAM and failed to contact law enforcement even after being contacted by Plaintiff and his mother. 2–ER–156 at ¶127. Only after being contacted by a federal agent did Twitter finally acquiesce and remove the CSAM. *Id*. at ¶¶128–29.

ARGUMENT

I. TWITTER KNOWINGLY BENEFITTED FINANCIALLY AND RECIEVED VALUE FROM DISTRIBUTING CSAM DEPICTING THE PLAINTIFFS

Establishing liability under section 1595 only requires a plaintiff to plead that the defendant knew that it was receiving benefits (financial or otherwise) due to its participation in a venture that violated section 1591. *See B.M. v. Wyndham Hotels & Resorts, Inc.*, No. 20–cv–00656–BLF, 2020 WL 4368214, at *4 (N.D. Cal. July 30, 2020) (finding that the rental of a room or a franchisor's receipt of royalties for that rental "constitutes a financial benefit from a relationship with the trafficker sufficient to meet this element").

A. Twitter benefitted financially from user engagement with CSAM and received value for distributing CSAM depicting the Plaintiffs

Section 1595 "opened the door for liability against facilitators who did not directly traffic the victim but benefitted from what the facilitator should have known was a trafficking venture." *J.C. v. Choice Hotels Int'l, Inc.*, No. 20–CV–00155–WHO, 2020 WL 6318707, at *3 (N.D. Cal. Oct. 28, 2020) (quoting *A.B. v. Marriott Int'l, Inc.*, 455 F. Supp. 3d 171, 181 (E.D. Pa. 2020) quoting *Gallant Fish, No Rest for the Wicked:* Civil Liability Against Hotels in Cases of Sex Trafficking, 23 Buff. Hum. RTS. L. Rev. 119, 138 (2011)). In *J.C. v. Choice Hotels Int'l, Inc.*, the court found that receiving a percentage of gross revenue from a trafficker's payment for a hotel room used for trafficking constitutes a financial benefit sufficient to establish liability under section 1595. *Id.* at 4.

Section 1595(a) extends liability to everyone who benefits financially by "receiving anything of value from participation in a venture which that person knew or should have known" committed a violation of trafficking and forced labor laws. *Lesnik v. Eisenmann SE*, 374 F. Supp. 3d 923, 951 (N.D. Cal. 2019) (quoting *Shuvalova v. Cunningham*, 2010 WL 5387770, at *3 & n.3 (N.D. Cal. Dec. 22, 2010)). In *Lesnik*, the court found that merely contracting to establish a future commercial enterprise constituted a thing of value sufficient to establish liability for participating in a venture. *Id.* at 953.

In this case, Twitter allowed CSAM depicting John Doe #1 and John Doe #2 to be possessed and distributed on its site. 2–ER–155 at ¶124. Almost immediately, over a matter of days, Twitter users engaged with the video compilation of CSAM depicting the Plaintiffs hundreds of thousands of times in various ways. *Id*. These engagements materially benefited Twitter as it facilitated the spread of CSAM depicting the Plaintiffs on its site and beyond. The ad revenue received by Twitter for user "engagement" with CSAM depicting the Plaintiffs constitutes a financial benefit and "a thing of value." Twitter also monetizes engagement by using data generated by user engagement which results in hashtags associated with CSAM to further drive engagement. Some of this engagement results in users clicking on promoted tweets (which themselves become associated with CSAM) thereby driving further engagement and further revenue. 2–ER–127–30 at ¶¶30, 33–41; 2–ER–141

at ¶76. Simply speaking, Twitter profits from user interaction and engagement on its platform. 2–ER–127– 30 at ¶¶30–36. Twitter materially benefits from increased user engagement on its platform. *Id*. Twitter also substantially facilitated and contributed to the online marketplace for CSAM depicting the Plaintiffs. Twitter, thus, received a "thing of value" for facilitating and participating in the mass distribution of CSAM depicting the Plaintiffs on its platform just like the defendants who received a percentage of gross revenue for hotel sales in *J.C. v. Choice Hotels Int'l, Inc.* as well as those that received the benefit of contractual commitments in *Lesnik.*

B. Twitter knowingly advertised, distributed, and possessed CSAM depicting the Plaintiffs

For forty years, the Supreme Court has recognized the grave "physiological, emotional, and mental" injuries suffered by victims of child pornography. *New York v. Ferber*, 458 U.S. 747, 758 (1982). Congress enacted, revised, and updated sections 230, 1595, and 1591 against this backdrop. The defendant in *Ferber* was a bookstore proprietor who knowingly promoted a sexual performance by a child by distributing material depicting such a performance. In this case, Twitter was, like *Ferber*, a CSAM distributor. *People v. Ferber*, 52 N.Y.2d 674, 677 (1981), *rev'd sub nom. New York v. Ferber*, 458 U.S. 747 (1982).

Twitter's distribution of CSAM depicting the Plaintiffs occurred outside any protection under Section 230 which has 'no effect on criminal law' including Chapter 110 of Title 18 (which contains sections 1591, 2252, and 2252A). 47 U.S.C.

§ 230(e)(1). Twitter's distribution of CSAM depicting the Plaintiffs also occurred "without the protection of the First Amendment." *Osborne v. Ohio*, 495 U.S. 103, 110–11 (1990). "Given the importance of the State's interest in protecting the victims of child pornography," federal and state regulation is necessary to "stamp out this vice at all levels in the distribution chain." *Id*. Allowing Twitter to advertise, distribute, and possess child pornography with impunity is directly antagonistic to forty years of Supreme Court precedent. *Id*. CDA 230 does not give Twitter a free pass to cause grave "physiological, emotional, and mental" injuries to the Plaintiffs. Child pornography trafficking "injures a child's reputation and emotional well–being, as well as violat[es] the interest in avoiding the disclosure of personal matters." *Amy v. Curtis*, No. 19CV02184PJHRMI, 2020 WL 5365979, at *4 (N.D. Cal. Sept. 8, 2020) quoting *Doe v. Boland*, 698 F.3d 880 (6th Cir. 2012). Accordingly, the *Boland* court explained that the "dissemination, or transportation of visual depictions of this sort of abuse will necessarily cause personal injury to the depicted person's reputational and privacy interests, as well as their emotional well–being." *Boland*, 698 F.3d at 881 (citing *United States v. Burke*, 504 U.S. 229, 235–36 (1992).

Therefore, Plaintiffs properly pleaded claims under 1595 as well as Masha's Law (18 U.S.C. § 2255) predicated upon Twitter's clear violation of criminal predicates under Chapter 110 of Title 18. Similar in operation to section 1595, Masha's Law states:

> Any person who, while a minor, was a victim of a violation of section 1589, 1590, **1591,** 2241(c), 2242, 2243, 2251, 2251A, 2252, 2252A, 2260, 2421, 2422, or 2423 of this title and who suffers personal injury as a result of such violation, regardless of whether the injury occurred while such person was a minor, may sue in any appropriate United States District Court.

18 U.S.C. § 2255 (emphasis added). Thus, Masha's Law contains non–limiting language which allows plaintiffs to remedy violations of 1591 and other criminal predicates under Chapter 110 that do not benefit from CDA 230 immunity. See 47 U.S.C. § 230(e)(1). Corporations like Twitter "should not be treated leniently because of their artificial nature[.]" 9–28.000–Principles of Federal Prosecution of Business Organizations, *United States Department of Justice* (2020), https://www.justice.gov/jm/jm-9-28000-principles-federal-prosecution-business-organizations.

II. TWITTER'S OVERT PARTICIPATION IN A SEX TRAFFICKING VENTURE IS NOT PROTECTED BY SECTION 230

When Congress passed Section 230 it did not intend to prevent the enforcement of all laws regulating online activity. *Fair Housing Council of San Francisco Valley v. Roommates.com LLC*, 521 F.3d 1157, 1164 (9th Cir. 2008) ("The Internet is no longer a fragile new means of communication that could easily be smothered in the cradle by overzealous enforcement of laws and regulations applicable to brick–and–mortar businesses. […] And its vast reach into the lives of millions is exactly why we must be careful not to exceed the scope of the immunity

provided by Congress and thus give online businesses an unfair advantage over their real–world counterparts, which must comply with laws of general applicability."). The Ninth Circuit has made clear that the statute does not "create a lawless no–man's–land on the internet." *Id*.

Pursuant to 47 U.S.C. § 230(e)(2), internet service providers ("ISPs") are not immune from suit for violations of federal intellectual property claims. *See Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1118 (9th Cir. 2007). Section 230 includes another crucial exemption because "[n]othing in this section shall be construed to impair…chapter…110 (relating to sexual exploitation of children) of title 18…." 47 U.S.C. § 230(e)(1). The Ninth Circuit should join the Seventh Circuit which is less willing to grant immunity under Section 230. *See City of Chicago, Ill. v. StubHub!, Inc.*, 624 F.3d 363, 366 (7th Cir. 2010) ("As earlier decisions in this circuit establish, subsection (c)(1) does not create an 'immunity' of any kind." (citing *Doe v. GTE Corp*., 347 F.3d 655, 660 (7th Cir. 2003)); *see also Chicago Lawyers' Comm. for C.R. Under L., Inc. v. Craigslist, Inc.*, 519 F.3d 666, 669 (7th Cir. 2008), as amended (May 2, 2008) ("our opinion in *Doe* explains why § 230(c) as a whole cannot be understood as a general prohibition of civil liability for web–site operators and other online content hosts.").

The Seventh Circuit has held that Section 230(c)(1) plays a limited role, noting that it merely "limits who may be called the publisher [or speaker] of

information that appears online." And while that "might matter to liability for defamation, obscenity, or copyright infringement," that does not necessarily mean that Section 230 will have a role to play in all cases. *StubHub*!, 624 F.3d at 366; *see also Huon v. Denton*, 841 F.3d 733, 741 (7th Cir. 2016). Section 230 is not an all–encompassing shield against liability.

As the pervasiveness of internet crimes became more obvious over time, reservations against construing Section 230 broadly became more common. The Supreme Court's recent denial of a writ of certiorari for a Ninth Circuit case denying Section 230 immunity presented the question of "whether the text of this increasingly important statute aligns with the current state of immunity enjoyed by Internet platforms." *Malwarebytes, Inc. v. Enigma Software Grp. USA, LLC*, —U.S. —, 141 S. Ct. 13, 208 L. Ed. 2d 197, 2020 WL 6037214, at *14 (2020) (Statement by Thomas, J.). "[C]ourts have relied on policy and purpose arguments to grant sweeping protection to Internet platforms," arguably extending Section 230 immunity "'far beyond anything that plausibly could have been intended by Congress.'" *Id*. at *15 (quoting 1 R. SMOLLA, LAW OF DEFAMATION § 4:86, at 4–380 (2d ed. 2019)) (internal citations omitted). Any grant of immunity against claims like this one that rests on "alleged product design flaws—that is, the defendant's own misconduct" should be questioned. *Id*. at *18. It is clear that "[p]aring back the sweeping immunity courts have read into §230 would not necessarily render defendants liable for online

misconduct. It simply would give plaintiffs a chance to raise their claims in the first place." *Id*. *See also Webber v. Armslist LLC*, No. 20–C–1526, 2021 WL 5206580, at *5–6 (E.D. Wis. Nov. 9, 2021). The Plaintiffs in this case should be similarly entitled to that chance.

A. Twitter knowingly participated in a sex trafficking venture

Twitter knowingly participated in a sex trafficking venture under the Trafficking Victims Protection Reauthorization Act ("TVPRA"). Twitter profited from, designed, and created an unsafe product that widely distributes CSAM and encouraged and materially contributed to the trafficking of CSAM depicting the Plaintiffs. A website creator knowingly participates in a sex trafficking venture when it "establishes a pattern of conduct or could be said to have a tacit agreement" with the traffickers. *Doe v. Mindgeek USA Inc*., 558 F. Supp. 3d 828 (C.D. Cal. 2021), *adhered to on denial of reconsideration*, No. SACV2100338CJCADSX, 2021 WL 5990195 (C.D. Cal. Dec. 2, 2021). In *Mindgeek*, a website creator facilitated child sex trafficking on its websites, failed to remove CSAM depicting a minor, and entered into agreements to share the proceeds of advertising revenue earned from the CSAM videos posted on its website. *Id*. The court established that these actions made it plausible that Mindgeek—the defendant website creator—had a continuous business relationship with CSAM traffickers and that Mindgeek had established a pattern of conduct—or had a tacit agreement—sufficient to satisfy the "knowing participation" requirement. *Id*.

A Plaintiff need only establish facts that confirm the connection between the plaintiff's trafficking and a specific defendant. *G.G. v. Salesforce.com, Inc.*, No. 20–CV–02335, 2022 WL 1541408, at *1 (N.D. Ill. May 16, 2022). In addition to showing a financial benefit, a plaintiff must establish that a defendant participated in an alleged common undertaking or enterprise with sex traffickers. *Id*. In this case, Plaintiffs allege that Twitter enables the posting of tweets containing CSAM; allows for and suggests well–known CSAM–associated hashtags through its search feature to enable users to quickly locate CSAM; refused to remove Plaintiffs' CSAM after being alerted to its existence; and maintains active advertising agreements by which Twitter benefits from and shares proceeds with sex traffickers. These factors constitute a pattern of conduct and form a tacit agreement between Twitter and sex traffickers of illegal CSAM depicting the Plaintiffs.

Twitter also designed a product that is inherently unsafe for children and which spreads CSAM. Section 230 immunity is not available to a defendant when it materially contributes to the spread of illegal activity involving sex trafficking on its platform. *See Doe #1 v. MG Freesites, LTD*, No. 7:21–CV–00220–LSC, 2022 WL 407147 (N.D. Ala. Feb. 9, 2022); *M. L. v. Craigslist Inc.*, No. C19-6153 BHS-TLF, 2020 WL 5494903, at *9 (W.D. Wash. Sept. 11, 2020); *Mindgeek*, 558 F. Supp. 3d 828. In determining that Section 230 immunity did not apply in *Mindgeek* and *MG Freesites*, courts relied on several factors enumerated in *M.L. v. Craigslist*,

specifically, (1) traffickers used Craigslist's rules and guidelines to create the content and format of the advertisements; (2) traffickers would pay Craigslist a fee to post the advertisement on Craigslist's erotic services section; (3) Craigslist designed a communication system to allow traffickers and purchasers to communicate anonymously and evade law enforcement; (4) Craigslist developed user interfaces to make it easier for purchasers to find desired trafficking victims; and (5) that Craigslist was aware that this was occurring but had relationships with traffickers to facilitate the illegal conduct in exchange for payment. *Mindgeek*, at 842; *MG Freesites*, at *16.

Similarly, Twitter materially contributed to the distrubution of the sex traffickers' tweets of CSAM depicting the Plaintiffs. Sex traffickers used Twitter's rules and guidelines to create the tweets containing Plaintiffs' CSAM. 2–ER–155 at ¶124. Twitter designed a product which allows CSAM traffickers to evade law enforcement as they communicate and distribute CSAM (which is illegal contraband) anonymously worldwide. Users can also promote content, which establishes an ongoing business relationship between Twitter and the traffickers. 2–ER–140 at ¶ 76. Twitter makes it easy for traffickers of CSAM to post and locate more CSAM. 2–ER–128 at ¶32. Twitter knows that CSAM was being promoted using its non–neutral tools and still formed business relationships that facilitated the trafficking of illegal content in exchange for payments received for advertisements placed on Twitter. Multiple accounts tweeted the CSAM depicting the Plaintiffs which garnered over

167,000 views and 2,233 retweets. 2–ER–153 at ¶121. "[E]veryone who reproduces, distributes, or possesses the images of the victim's abuse…plays a part in sustaining and aggravating this tragedy." *Paroline v. United States*, 572 U.S. 434, 457 (2014). Aside from posting CSAM depicting the Plaintiffs, Twitter refused to remove the posts after receiving actual knowledge of their contents. 2–ER–152–53 at ¶120. Just like the defendants in *Craigslist*, *Mindgeek*, and *MG Freesites* could not avoid discovery, Twitter should be held responsible for its knowing participation in a sex trafficking venture.

B. Twitter knowingly encouraged the distribution of CSAM

Twitter knowingly encouraged the creation and distribution of CSAM on its platform. Twitter actively created non–neutral tools which encouraged the production and distribution of illegal content, specifically CSAM depicting the Plaintiffs. A website's tools are not neutral when they encourage the creation of illegal content, including contraband such as CSAM. *MG Freesites*, 2022 WL 407147 at *16. The *MG Freesites* court found that when "Defendants *themselves* generate tags, categories, and keywords that users wishing to post CSAM videos can use, and in fact are encouraged to use, to maximize views" the tools are no longer neutral tools (emphasis in original). *Id*. Rather, these website–generated tags, categories, and keywords "do even more than merely encourage the posting of CSAM." *Id*. Similarly, Twitter created a search-suggestion product on its platform wherein a search for any number of CSAM–

associated hashtags returns other CSAM–associtated hashtags, accounts, users, comments, and solicitations to discuss, distribute, and trade CSAM. 2– ER–141 at ¶76. As such—and like *MG Freesites*—Twitter does more than merely enable the posting and distribution of CSAM, it encourages and facilitates it.

C. Twitter materially contributed to the distribution of CSAM

Twitter became more than a platform hosting third–party material into a platform providing "material contribution" when it created and designed its search–suggestion product that materially contributes to the distribution of CSAM. Further, Twitter's profits from advertisements are directly related to views, retweets, and engagement with CSAM. As such, Twitter cannot and should not be permitted to hide behind Section 230 immunity especially when further discovery of Twitter's knowledge, design, and algorithm would further elucidate these issues. "A website helps to develop unlawful content, and thus falls within the exception to Section 230, if it contributes materially to the alleged illegality of the conduct." *Fair Hous. Council of San Fernando Valley v. Roommates.Com, LLC*, 521 F.3d 1157, 1168 (9th Cir. 2008). "A 'material contribution' does not refer to 'merely…augmenting the content generally, but to materially contributing to its alleged unlawfulness.'" *Gonzalez v. Google LLC*, 2 F.4th 871, 892 (9th Cir. 2021).

As outlined above, Twitter materially contributes to the spread of CSAM. Twitter created and designed a product wherein a search of a CSAM–associated hashtag

returns multiple other CSAM–associated hashtags, allowing traffickers to easily view and distribute CSAM. Twitter entered into business relationships with obvious traffickers and encourages users to pay Twitter to promote their tweets and accounts. This causes the CSAM to be displayed more prominently, increases the views and retweets of illegal CSAM, and repeatedly increases the extent of the harm victims suffer. Twitter financially benefits from all CSAM views and retweets because Twitter gains more users and engagement from the sharing of this material. This contributes to, and increases, the overall value of advertisement placements and other paid content on its platform. Although it has the authority to remove posts that violate its community standards, Twitter chose not to remove the CSAM depicting the Plaintiffs even after it knew and should have known that the posts constituted illegal CSAM. So too, Twitter makes it exponentially more difficult to report CSAM posts than other content. This clearly moves beyond "general augmenting" of content and into material contribution.

III. TWITTER'S KNOWLEDGE OF CSAM DEPICTING THE PLAINTIFFS ON ITS PLATFORM CLEARLY NECESSITATES DISCOVERY REGARDING TWITER'S *MENS REA*

Plaintiffs need not show that Twitter was criminally prosecuted for Twitter to be civilly liable. *See Smith v. Husband*, 376 F. Supp 2d 603 (E.D. Va. 2005) citing *Sedima S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479 (1985) (finding that a civil cause of action based on a violation of a criminal predicate can proceed without a criminal conviction). A plaintiff bringing a beneficiary liability claim under section 1595(a)

must plead facts establishing an underlying violation of section 1591 by ***someone*** (in this case the CSAM trafficker) and allege three elements against the civil defendant: that the beneficiary (1) knowingly benefits (2) from participation in a venture (3) which that person ***knew or should have known*** has engaged in an act in violation of section 1591.

Defendant asks this Court to rewrite Section 230(e)(5)(A) to effectively eliminate section 1595 beneficiary liability claims against online platforms like Twitter by finding that a plaintiff bringing claims must plead that the ISP itself violated section 1591 and that section 1591's criminal *mens rea* standard must be applied to those claims even though the constructive knowledge standard is *explicitly* written into section 1595. "Nothing within the statute's text and structure […] suggest anything other than the plainest interpretation of the provision, which is as long as the conduct underlying Plaintiff's Section 1595 claim amounts to a violation of Section 1591, then [Plaintiffs] may bring the claim alleging the lesser constructive knowledge standard." *Doe v. Mindgeek II*, 2021 WL 5990195, at *9; *see also Doe S.W. v. Lorain–Elyria Motel, Inc.*, No. 2:19–CV–1194, 2020 WL 1244192, at *5 (S.D. Ohio Mar. 16, 2020) ("[T]he plain text of § 1595(a) makes clear that the standard under this section is a negligence standard of constructive knowledge."). *G.G. v. Salesforce.com, Inc.*, No. 20–CV–02335, 2022 WL 1541408, at *13 (N.D. Ill. May 16, 2022). Imposing the statutory definition from this criminal provision to the civil cause of action is improper.

First, section 1591 "clearly states that its definition of 'participation in a venture' applies only 'in this section.'" *Doe #1 v. Red Roof Inns, Inc.*, 21 F.4th 714, 724 (11th Cir. 2021). Second, "the civil provisions of § 1595(a) make no sense with § 1591's definition of 'participation in a venture' read in" because it makes the "should have known" language in section 1595 "superfluous." *Id*. The Eleventh Circuit has previously applied the proper standard to a non–ISP defendant. The Court's analysis applies equally here. Replacing section 1595's constructive knowledge standard with section 1591's actual knowledge standard results in "nonsense" in violation of a "cardinal principle of statutory construction" that "'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'" *Hooks v. Kitsap Tenant Support Servs., Inc.*, 816 F.3d 550, 560 (9th Cir. 2016) (quoting *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001)).

Congress—moved by victim testimony—ultimately rejected amendments to "protect websites that identify sex trafficking ads and then leave them up in order to continue profiting from them." 164 Cong. Rec. S 1827, 1829 (Blumenthal); *see also*, 164 Cong. Rec. H 1290, 1292–93 (Feb. 27, 2018) (Jackson Lee). Congress explicitly described the lower the requisite *mens rea* under section 1595 in 2008 to hold third–party beneficiaries—who, like Twitter, possessed constructive knowledge of illegal content on their platforms—accountable for their role in the online sex trafficking

market. *See Wadler v. Bio Rad Labs., Inc.*, 916 F.3d 1176, 1187 (9th Cir. 2019) (quoting *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967) ("It is a 'familiar canon of statutory construction that remedial legislation should be construed broadly to effectuate its purposes.'"); *Peyton v. Rowe*, 391 U.S. 54, 65 (1968) ("remedial" statutes must be "liberally construed").

A. The extent of Twitter's knowledge cannot be determined without further discovery

The scope of Twitter's actual or constructive knowledge of their possession of CSAM is a fact– intensive inquiry related to their power over and ability to control CSAM. See *United States v. Pruitt*, 638 F.3d 763, 766–67 (11th Cir. 2011); *United States v. Romm*, 455 F.3d 990, 1004 (9th Cir. 2006). Since these facts are uniquely in Twitter's possession, the question cannot be resolved at the pre–discovery stage. *See, e.g.*, Fed. R. Civ. P. 9(b) ("knowledge…may be alleged generally"). Plaintiffs in this case satisfied the lenient pleading standard for establishing Twitter's knowledge.

The opportunity for discovery is especially important here given the proprietary algorithms Twitter uses which prioritize user engagement and profitability at the expense of children's safety. *See, e.g.*, Wells, G., Horwitz, J., & Seetharaman, D., *Facebook Knows Instagram is Toxic for Teen Girls, Company Documents Show*, THE WALL STREET JOURNAL (Sep. 14, 2021); Craig Timberg, *YouTube Says It Bans Preteens But Its Still Delivering Troubling Content to Young Children*, THE WASHINGTON POST (Mar. 14, 2019),

https://www.washingtonpost.com/technology/2019/03/14/youtube-says-it-bans-preteens-its-site-its-still-delivering-troubling-content-young-children/.

Congress recognized the importance of discovery in cases of online sex trafficking, observing that internet companies believed they "would be able to win again in court and deny us our opportunity to look at the documents and to look at the underlying evidence that one should always look at in an investigation." 164 Cong. Rec S 1827, 1830 (Sen. McCaskill). Moreover, in *United States v. Thomas*, 893 F.2d 1066, 1070 (CA9), *cert. denied*, 498 U.S. 826, 111 S. Ct. 80, 112 L. Ed. 2d 53 (1990), the Ninth Circuit's scienter standard did not require a criminal defendant to have knowledge of the sexual content or age of the victim to convict.

B. Twitter had constructive knowledge that CSAM depicting the Plaintiffs was being distributed on its platform

Plaintiffs alleged that Twitter "knew or should have known" about CSAM on its platform. TVPRA liability exists where, as here, a defendant is on notice about the prevalence of trafficking at its business but fails to take adequate steps to prevent its recurrence. *See, e.g.*, *M.A. v. Wyndham Hotels & Resorts, Inc.*, 425 F. Supp. 3d 959, 966–68 (S.D. Ohio 2019) ("[F]ailure to implement policies sufficient to combat a known problem in one's operations can rise to the level of willful blindness or negligence [under §1595]."); *H.H. v. G6 Hospitality, LLC*, 2019 WL 6682152, at *3 (S.D. Ohio Dec. 6, 2019) (same). Twitter's content moderation practices demonstrate it has the infrastructure, capacity, and resources to monitor and remove

CSAM reported on its platform and Twitter fails to do so at its own peril. *See* 2–ER–131, 134–36 at ¶¶42–43, 55–57; 2–ER–156 at ¶¶128–29; 2–ER–82–89. Twitter *affirmatively refused* to remove such reported illegal content. 2–ER– 52– 53 at ¶120. Twitter enables hashtags that target CSAM consumers without restriction and this reveals its constructive knowledge of the illegal contraband and activity on its platform. 2–ER–140 at ¶¶72–74. Twitter facilitates the distribution of CSAM with related hashtags and even suggests additional CSAM–related hashtags. *Id*.

Twitter all but guarantees it will promote the distribution of CSAM, which is regularly traded by Twitter users with considerable post engagement and little consequence. 2–ER–138–39 at ¶¶61–62, 70. This engagement is integral to Twitter's bottom line. Twitter was thus on notice of illegal CSAM material on its site to an extent far beyond the constructive knowledge standard in section 1595. *See Williams v. Yamaha*, 851 F.3d 1015, 1028 (9th Cir. 2017); *see also*, *Doe S.W. v. Lorain–Elyria Motel, Inc.*, No. 2:19–CV–1194, 2020 WL 1244192, at *5–6 (S.D. Ohio Mar. 16, 2020) (finding a hotel had constructive knowledge of sex trafficking based on "online review websites such as TripAdvisor and http://www.yelp.com./" and observing that reviews showed inattentiveness to pervasiveness of sex trafficking).

C. Twitter had actual knowledge of Plaintiffs' CSAM on its platform

The complaint sufficiently alleged the requisite *mens rea* to support Twitter's liability after John Doe #1 reported CSAM depicting him to Twitter because Twitter

had a statutory duty under federal law and "obligation to report child pornography". *See United States v. Rosenow*, 33 F.4th 529, 541 (9th Cir. 2022) (citing *United States v. Cameron*, 699 F.3d 621, 636–38 (1st Cir. 2012)). Twitter had actual knowledge that CSAM depicting the Plaintiffs was on its platform and failed to act. 2–ER149–52 at ¶¶112–19. Twitter demanded John Doe #1 prove his age but did not remove or report the CSAM. *Id.* The CSAM spread on Twitter despite Twitter's actual knowledge of the sexual content in the post and Plaintiffs' age. *Id.* Twitter severely exacerbated and prolonged Plaintiffs' grave "physiological, emotional, and mental" injuries and only removed the CSAM after receiving contact from law enforcement. 2–ER–156 at ¶128.

CONCLUSION

For the foregoing reasons, this Court should affirm the District Court's denial of Appellants Motion to Dismiss Plaintiffs' 1595 claims and allow all the Appellees claims to prevail.

Dated: August 11, 2022
New York, New York

/s/ James R. Marsh
James R. Marsh
MARSH LAW FIRM PLLC
31 Hudson Yards, 11th Floor
New York, New York 10001
Phone: 212–372–3030
Email: jamesmarsh@marsh.law

Counsel for Amicus Curiae

CERTIFICATE OF COMPLIANCE

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

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

   this Appellant's brief contains 5,528 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f)

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

   this brief has been prepared in a proportionally-spaced typeface using Microsoft Word in 14 point Times New Roman.

/s/ James R. Marsh
James R. Marsh
MARSH LAW FIRM PLLC
31 Hudson Yards, 11th Floor
New York, New York 10001
Phone: 212–372–3030
Email: jamesmarsh@marsh.law

Counsel for Amicus Curiae

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on August 11, 2022.

All participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

/s/ James R. Marsh
James R. Marsh
MARSH LAW FIRM PLLC
31 Hudson Yards, 11th Floor
New York, New York 10001
Phone: 212–372–3030
Email: jamesmarsh@marsh.law

Counsel for Amicus Curiae

Michael G. Rhodes (116127)
Kathleen Hartnett (314267)
Kyle C. Wong (224021)
COOLEY LLP
3 Embarcadero Center 20th Floor
San Francisco, CA 94111– 4004
Tel: (415) 693– 2000
rhodesmg@cooley.com
khartnett@cooley.com
kwong@cooley.com

Linh K. Nguyen (305737)
Jamie D. Robertson (326003)
COOLEY LLP
4401 Eastgate Mall
San Diego, California 92121
Tel: (858) 550– 6000
lknguyen@cooley.com
jdrobertson@cooley.com

Attorneys for Appellant Twitter, Inc.

Benjamin W. Bull*
Peter A. Gentala*
Danielle Bianculli Pinter*
Christen M. Price*
NATIONAL CENTER ON SEXUAL EXPLOITATION
1201 F ST NW, Suite 200
Washington, D.C., 20004
Tel: (202) 3937245
bbull@ncose.com
pgentala@ncoselaw.org
dpinter@ncoselaw.org
cprice@ncoselaw.org

Lisa D. Haba*
Adam A. Haba*
THE HABA LAW FIRM, P.A.
1220 Commerce Park Dr., Suite 207
Longwood, FL 32779
Tel: (844) 422– 2529
lisahaba@habalaw.com
adamhaba@habalaw.com

Paul A. Matiasic (SBN 226448)
Hannah E. Mohr (SBN 294193)
THE MATIASIC FIRM, P.C.
4 Embarcadero Center, Suite 1400
San Francisco, CA 94111
Tel: (415) 675– 1089
matiasic@mjlawoffice.com

*Admitted Pro Hac Vice

Attorneys for Appellee John Doe #1 and John Doe #2

James R. Marsh
Margaret E. Mabie
Attorneys for Amicus Curiae
Marsh Law Firm, PLLC
31 Hudson Yards, 11th Fl.
New York, NY 10001
Tel: (212) 372– 3030
jamesmarsh@marsh.law

Marci A. Hamilton, Esq.
CHILD USA
3508 Market Street, Suite 202
Philadelphia, PA 19104
Tel: (215) 539– 1906
mhamilton@childusa.org
Jessica Schidlow, Esq.
Staff Attorney, CHILD USA
jschidlow@childusa.org

Erin Earp
RAINN
1220 L St. NW, Suite 500
Washington, D.C. 20005
Tel: (202) 544– 3064
erin@rainn.org

Sin– Ting Mary Liu
Catherine A. Mitchell
AYLSTOCK, WITKIN, KREIS & OVERHOLTZ, PLLC
17 E. Main Street, Suite 200
Pensacola, FL 32502
Tel: (844) 794– 7402
mliu@awkolaw.com
kmitchell@awkolaw.com

Hillary Nappi
Frank R. Schirripa
HACH, ROSE, SCHIRRIPA & CHEVERIE, LLP
112 Madison Ave. Fl. 10
New York, NY 10016
Tel: (212) 213– 8311

Micha Liberty
LIBERTY LAW OFFICE, INC.
1999 Harrison, Suite 1800
Broadway,
Oakland, CA 94612
Tel: (510) 645– 1000
micha@libertylaw.com

Greg G. Gutzler
Joshua J. Lax
Justin S. Abbarno
Joseph T. Frate
DICELLO LEVITT GUTZLER, LLC
One Grand Central Plaza
60 East 42nd St., Suite 2400
New York, NY 10165
Tel: (646) 933– 1000
Jlax@dicellolevitt.com
Jfrate@dicellolevitt.com

Vincent Nappo
PFAU COCHRAN VERTETIS AMALA, PLLC
701 Fifth Ave., Suite 4300
Seattle, WA 98104
Tel: (206) 451– 8260
Vnappo@pcvalaw.com

Counsel for Amici Curiae