

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

JOHN DOE #1 AND JOHN DOE #2,

*Plaintiffs-Appellants,*

v.

TWITTER, INC., and X CORP.,  
SUCCESSOR IN INTEREST TO  
TWITTER, INC.,

*Defendants-Appellees.*

No. 2024-00177

Appeal from the United  
States District Court for  
the Northern District of  
California

Case No. 21-cv-0485

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**MOTION FOR LEAVE OF CHILD USA, HILLARY NAPPI, ESQ.,  
AND MARY LIU, ESQ. TO FILE BRIEF OF *AMICI CURIAE* IN  
SUPPORT PLAINTIFFS-APPELLANTS AND URGING  
REVERSAL OF THE DECISION BELOW**

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CHILD USA, Hillary Nappi, Esq., and Mary Liu, Esq. respectfully submit this Motion for Leave to Appear as *Amici Curiae* and File a Brief in Support of Plaintiffs-Appellants and Urging Reversal of the Decision Below, pursuant to Fed. R. App. Pro. 29 & 32.

**INTERESTS OF *AMICI***

CHILD USA is the leading non-profit interdisciplinary think tank fighting for the civil rights of children. CHILD USA engages in in-depth

legal analysis and cutting-edge social science research to determine the most effective public policies to protect children from sexual abuse and online exploitation and ensure access to justice for victims. Hillary Nappi, Esq. and Mary Liu, Esq. are attorneys with decades of collective experience working with victims and survivors of sexual violence and online exploitation. As an organization and professionals dedicated to ensuring that individuals and entities are held accountable for their wrongful conduct that harms children, and to eliminating barriers to justice for victims of sexual abuse and online exploitation, *Amici* have a strong interest in the outcome of this case and believe their expertise and experience in this area will be of assistance to the Court.

*Amici* are experts on the proximate, immediate, and persistent harms to child-victims whose imagery is trafficked online, the ways in which digital communication platforms like Twitter exacerbate this abuse and the attendant harms, and on the measures Congress has taken to address the epidemic of sex trafficking and exploitation by holding entities like Twitter accountable. *Amici* therefore have a substantial interest in ensuring that courts uphold the broad remedial purpose of Congress's child protection legislation by ensuring tech companies like

Twitter are held accountable for their criminal and tortious conduct.

**THE *AMICUS CURIAE* BRIEF WOULD AID THIS COURT IN  
CONSIDERATION OF THE ISSUES ADDRESSED BY  
PLAINTIFFS-APPELLANTS ON APPEAL**

The District Court erroneously concluded that Section 230 of the Communications Decency Act (“CDA”) barred Plaintiffs-Appellants’ §1591 and §1595 beneficiary-liability sex-trafficking claims, state-law products liability claim, negligence per se claim based on Twitter’s violation of §2252(A) regarding duty to report, and §2255 child pornography claim; however, there is nothing in the CDA’s text or legislative history that shields platforms like Twitter from liability based on their own wrongful conduct—here the participation in an illegal sex trafficking venture.

*Amici* are concerned that the decision below, if permitted to stand, would provide a shield to powerful internet companies with broad reach, while leaving the vulnerable victims of sex trafficking—many of whom are children—powerless and unprotected online.

*Amici* are uniquely positioned to provide this Court with the social science research on the prevalence and effects of online child exploitation, highlighting our understanding of the impact on children and victims of

sex-trafficking should the District Court decision be permitted to stand. Finally, *Amici* can assist this Court by providing an extensive overview of the legislative history behind Congress's anti-sex trafficking laws, the CDA including Section 230's limited defense, as well as how courts have attempted to reconcile these two areas of the law.

### **CONCLUSION**

For the foregoing reasons, *Amici* respectfully requests that this Court enter an Order granting this Motion for Leave to Appear as *Amici Curiae* and accepting the *Amicus* brief attached hereto in consideration of Plaintiffs-Appellants' Brief and in support of reversal.

Respectfully submitted 13th day of May 2024,

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ESQ. AS AMICI CURIAE IN SUPPORT OF PLAINTIFFS-  
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## RULE 29 STATEMENTS

Pursuant to Fed. R. App. P. 29(a)(4)(E), *Amici* affirm that no party or party's counsel authored the brief in whole or in part or contributed money that was intended to fund preparing or submitting the brief. No person other than *Amici*, their members, or their counsel contributed money that was intended to fund preparing or submitting the brief.

Date: May 13th, 2024

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## **IDENTITY AND INTEREST OF AMICI**

Pursuant to Fed. R. App. P. 29 & 32, *Amici* submit this brief in support of Plaintiffs-Appellants' Opening Brief and urging reversal of the decision below.

CHILD USA is the leading non-profit interdisciplinary think tank fighting for the civil rights of children. CHILD USA engages in in-depth legal analysis and cutting-edge social science research to determine the most effective public polices to protect children from sexual abuse and online exploitation and ensure access to justice for victims. Hillary Nappi, Esq. and Mary Liu, Esq. are attorneys with decades of collective experience working with victims and survivors of sexual violence and online exploitation. *Amici* are experts on the proximate, immediate, and persistent harms to child-victims whose imagery is trafficked online, the ways in which digital communication platforms like Twitter exacerbate this abuse and the attendant harms, and on the measures Congress has taken to address the epidemic of sex trafficking and exploitation by holding entities like Twitter accountable. *Amici* therefore have a substantial interest in ensuring that courts uphold the broad remedial

purpose of Congress's child protection legislation by ensuring tech companies like Twitter are held accountable for their criminal and tortious misconduct.

## **INTRODUCTION**

Sex trafficking and the production and distribution of child sexual abuse materials ("CSAM")<sup>1</sup> are rapidly growing problems in the United States—ones that irreparably harm not only victims but also society. For decades, these heinous crimes have been brazenly enabled by online platforms like Twitter that have escaped liability under an expansive reading of Section 230 of the Communications Decency Act ("CDA"). The categorical immunity asserted by Twitter and affirmed by the court below is irreconcilable with the over two decades of legislative enactments aimed at combatting sex trafficking, protecting children from exploitation and abuse, and ensuring accountability for those who financially benefit from such crimes. Likewise, it ignores the clear statutory text which contains an explicit exemption from immunity for

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<sup>1</sup> While the term child pornography is used in federal statutes, this brief will use the term child sexual abuse material ("CSAM") instead, as it more accurately reflects the abuse depicted in these images and videos and the resulting trauma to the child.

violations of child sexual exploitation laws under Chapter 110. 47 U.S.C. § 230(e)(1). This exemption includes private rights of action by victims of CSAM and child sex trafficking. See, 18 U.S.C. § 2255(a); 18 U.S.C. § 1591 and §1595.

Congress never intended to give internet service providers (“ISPs”) general immunity to liability for all potential claims. In Section 230, Congress sought to provide defendants with a *limited defense* to liability only from those claims that would require treating an ISP as the “publisher” or “speaker” of third-party posts on their platform. Barnes v. Yahoo!, Inc., 570 F.3d 1096, 1100-01 (9th Cir. 2009). The claims brought by Plaintiffs-Appellants in this case do not seek to hold Twitter liable based on its status or conduct as a publisher of third-party content. Rather, Plaintiffs-Appellants seek to hold Twitter liable for its *own* criminal and tortious misconduct.

The District Court’s decision, if adopted, would deprive Plaintiffs-Appellants—and future CSAM victims—the access to justice that Congress has so clearly promised. It would do so without providing Plaintiffs-Appellants the benefit of any fact- finding that would show that Twitter knowingly places its own profits above the safety of our most

vulnerable members of society. *Amici* therefore respectfully submits that this Court reverse the decision below to ensure that victims of technology companies like Twitter that knowingly and recklessly aid their abusers are not unfairly shut out of court.

### ARGUMENT

#### **I. THE CONTEXT OF ONLINE CHILD SEXUAL EXPLOITATION IS A COMPELLING HUMANITARIAN CRISIS THAT MUST BE GIVEN DUE CONSIDERATION WHEN ASSESSING LIABILITY UNDER §230 OF THE CDA**

The history of online child sexual exploitation and trafficking shows that the tech industry and specifically social media companies like Twitter have been unwilling to prioritize child safety over profits—a position that the District Court has tacitly endorsed by granting Defendant immunity from liability for their own illegal conduct. Such a broad grant of immunity ensures that the marketplace for CSAM will continue to thrive to the detriment of current victims, future children, and society.

#### **A. The Online Marketplace for CSAM Has Reached Epidemic Proportions**



The expansion of the internet and widespread use of mobile digital technologies together have facilitated an explosive growth in the online marketplace for the production and trafficking of CSAM. Indeed, online exploitation and abuse of children has increased by a staggering 422% over the last 15 years. U.S. SENT'G COMM'N, FEDERAL SENTENCING OF CHILD PORNOGRAPHY: PRODUCTION OFFENSES 3 (2021), [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2021/20211013\\_Production-CP.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2021/20211013_Production-CP.pdf). At any given time, there are at least one million child sex offenders searching for CSAM online. EUR. PARLIAMENTARY RSCH. SERV., CURBING THE SURGE IN ONLINE CHILD ABUSE: THE DUAL ROLE OF DIGITAL TECHNOLOGY IN FIGHTING AND FACILITATING ITS PROLIFERATION 2 (Nov. 2020), [https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/659360/EP\\_RS\\_BRI\(2020\)659360\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/659360/EP_RS_BRI(2020)659360_EN.pdf). Millions of individual users consume more than 15 million child sexual abuse images in a market currently valued between \$3 and \$20 billion dollars annually. Michael H. Keller & Gabriel J.X. Dance, The Internet Is Overrun With Images of Child Sexual Abuse. What Went Wrong?, NYTIMES.COM (Sep. 2019), available at <https://www.nytimes.com/2019/09/02/technology/child-sexual-abuse-images.html>

<https://www.nytimes.com/interactive/2019/09/28/us/child-sex-abuse.html?msclkid=531b2a24a55511ec9733999ed45d40bd>.

Unfortunately, there are no signs that the market is slowing down.

Before the digital age, CSAM could only be shared physically thus making it risky to find, and costly to produce and duplicate. Today, the availability of encrypted messaging platforms, peer to peer networks, and the like have made it easier and cheaper for perpetrators to produce CSAM and to connect, collaborate, and exchange such materials with individual users—and to do so with virtual anonymity. Id. Tragically, the demand for CSAM has reached epidemic proportions in recent years. The COVID-19 crisis created a “perfect storm” for CSAM to mushroom as children spent more time online. In 2020, 65.4 million images and video files of CSAM were reported to the National Center for Missing and Exploited Children’s (“NCMEC”) CyberTipline, the highest number of reports ever received in a single year. Overview. (2020). National Center for Missing and Exploited Children. <https://www.missingkids.org/gethelpnow/cybertipline>. As of 2018, there was a backlog of millions of suspected CSAM images and videos in need of review while police reported being overwhelmed by the increase in

overall cases *and* the increased volume and severity of CSAM in each case. ECPAT International. (2018). Trends in online child sexual abuse material. Bangkok: ECPAT International. 32.

## **B. CSAM Victims Suffer Significant Short-and Long-Term Harms**

The trauma stemming from child sexual abuse is complex and individualized, and it impacts victims both in the short-term and throughout their lifetimes. See generally, BESSEL VAN DER KOLK, *THE BODY KEEPS THE SCORE: BRAIN, MIND, AND BODY IN THE HEALING OF TRAUMA* (Viking 2014). Child sexual abuse takes a significant toll on victims' overall health, increasing the risk not only for depression, anxiety, substance abuse, post-traumatic stress disorder, and suicidal ideation, but also physical ailments such as high blood pressure and chronic illness. See CENTERS FOR DISEASE CONTROL AND PREVENTION, NATIONAL CENTER FOR INJURY PREVENTION AND CONTROL, DIVISION OF VIOLENCE PREVENTION, *PREVENTING SEXUAL VIOLENCE* (last reviewed by the CDC on Jan. 17, 2020), available at [https://www.cdc.gov/violenceprevention/sexualviolence/fastfact.html?CD\\_C\\_AA\\_refVal=https%3A%2F%2Fwww.cdc.gov%2Fviolenceprevention%2](https://www.cdc.gov/violenceprevention/sexualviolence/fastfact.html?CD_C_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fviolenceprevention%2)

[Fsexualviolence%2Fconsequences.html](#). The paradigm shift from tangible to digital CSAM has exacerbated these effects. Von Weiler, J., Haardt-Becker, A., & Schulte, S. Care and treatment of child victims of child pornographic exploitation (CPE) in Germany, 16 J. OF SEXUAL AGGRESSION 211, 216 (2010). A victim's mere knowledge of the presence and distribution of their abusive imagery causes intense feelings of shame, humiliation, and powerlessness. Id. As explained by NCMEC, "[o]nce these images are on the internet, they are irretrievable and can continue to circulate forever. The child is re-victimized as the images are viewed again and again." NATIONAL CENTER FOR MISSING & EXPLOITED CHILDREN, CHILD PORNOGRAPHY POSSESSORS ARRESTED IN INTERNET-RELATED CRIMES: FINDINGS FROM THE NATIONAL JUVENILE ONLINE VICTIMIZATION STUDY, available at [http://us.missingkids.com/en\\_US/publications/NC144.pdf](http://us.missingkids.com/en_US/publications/NC144.pdf). Sadly, these feelings usually persist and even intensify over time. U.S. DEPT OF JUSTICE, THE NATIONAL STRATEGY FOR CHILD EXPLOITATION AND PREVENTION AND INTERDICTION, 11 at D-12 (2010), available at <http://www.justice.gov/psc/docs/natstrategyreport.pdf> (finding that almost ninety-five percent of CSAM victims suffer lifelong psychological

damage and may never overcome the harm, even after lifelong therapy). The problem has taken on a new dimension as CSAM involves increasingly younger victims and is becoming more violent and graphic over time. ID.

In addition to the permanence of their imagery, CSAM victims are also traumatized by the image's reach. Victims whose images have been distributed online experience debilitating anxiety about who has seen the images (i.e., family members, coworkers) and preoccupation with the context and motives of their viewing. Leonard, M.M., 'I did what I was directed to do but he didn't touch me': The impact of being a victim of internet offending, 16 J. OF SEXUAL AGGRESSION 249, 254 (2010). The most difficult part of their revictimization is victims' knowledge that their images may be used to groom future victims and to normalize the abusive behavior. Id. Often, perpetrators strategically produce CSAM in which victims are seen smiling, leading victims to worry that others will assume the victim's enjoyment or complicity in their own abuse. PALMER, T. & STACEY, L., JUST ONE CLICK: SEXUAL ABUSE OF CHILDREN AND YOUNG PEOPLE THROUGH THE INTERNET AND MOBILE PHONE TECHNOLOGY (Barkingside, UK: Barnardo's, 2013) . In fact, it is common for victims to

feel as though they were an active participant in their abuse, which compounds a range of psychological difficulties. Steel, J., et. al., Psychological sequelae of childhood sexual abuse: Abuse-related characteristics, coping strategies and attributional style, 28 CHILD ABUSE AND NEGLECT 785 (2004). These concerns are not entirely unjustified as the possession and viewing of CSAM drives market demand and results in further exploitation and sexual abuse of children. See, e.g., United States v. Williams, 444 F.3d 1286, 1290 (11th Cir. 2006) (“Our concern is not confined to the immediate abuse of the children depicted in these images but is also to enlargement of the market and the universe of this deviant conduct that, in turn, results in more exploitation and abuse of children.”).

## **II. THE DISTRICT COURT’S DECISION, IF ADOPTED, WOULD EVISCERATE DECADES OF LEGISLATIVE ENACTMENTS THAT HAVE SOUGHT PROTECTION, ACCOUNTABILITY, AND JUSTICE FOR VICTIMS OF SEXUAL EXPLOITATION AND ABUSE**

The categorical immunity imputed to Twitter by the decision below is antithetical to Congressional objectives and, if adopted, would deprive Plaintiffs-Appellants—and future CSAM victims—of the access to justice to which they are entitled under the law. Over two decades of legislative

efforts make it clear that the CDA was never intended to bar private rights of actions against ISPs for CSAM and child sex trafficking crimes. Indeed, the decision fails to reconcile the purpose of the limited defense provided under Section 230 of the CDA with that of the Trafficking Victims Protection Reauthorization Act (“TVPRA”) to criminalize sex trafficking, or that of Masha’s Law to address the revictimization attendant to having one’s CSAM redistributed—both of which were intended to provide victims redress. The District Court’s reasoning eviscerates the protections of the Allow States and Victims to Fight Online Sex Trafficking Act (“FOSTA”) and allows Twitter to continue profiting from the harms to children on its platform.

**A. Section 230 of the CDA Was Never Intended to Immunize ISPs That Facilitate and Profit from CSAM and Sex Trafficking Crimes**

Congress enacted the CDA in 1996 for the clear purpose of ensuring that the internet, then in its infancy, would be “a safe place for our children and our families.” 141 Cong. Rec. S8087 (daily ed. June 9, 1995) (statement of Sen. Exon). The same interest in protecting children online prompted Congress to enact the amendment titled “Protection for ‘Good

Samaritan' Blocking and Screening of Offensive Material," that eventually became Section 230 of the CDA. See, e.g., 141 Cong. Rec. S8089 (daily ed. June 9, 1995) (statement of Sen. Exon). Together, their purpose is twofold: to restrict children's access to sexually explicit and otherwise harmful content online and to incentivize the development of technologies that would allow parents and users to filter out such materials. To that end, Congress provided ISPs with a limited defense from liability for their "good faith" attempts at restricting user access to obscene and indecent materials on their platforms. 141 Cong. Rec. (daily ed. Aug. 4, 1995). (statement of Rep. Goodlatte); H.R. Conf. Rep. 104-458 at 194 (1996). There is nothing in the language of Section 230 that creates the kind of sweeping immunity for all online misconduct imputed by the decision below. To the contrary, the statutory text contains two key exceptions to Section 230's limited defense: (1) that it shall have "no effect on criminal law" including chapter 110 of Title 18 (relating to sexual exploitation of children ) or "any other Federal criminal statute" 47 U.S.C. § 230(e)(1); and (2) that "[n]othing in this section shall be construed to impair...any claim in a civil action brought under 18 U.S.C. §1595 . . ." (relating to sex trafficking). 47 U.S.C. § 230(e)(5)(A). Congress



clearly intended to retain liability for ISPs with knowledge of illegal conduct on their platforms and others acting in bad faith. See, e.g., 141 Cong. Rec. S8345 (daily ed. June 14, 1995) (commentary by Sen. Coates) (explaining that the CDA permitted liability for “someone who, among other things, manages the prohibited or restricted material, charges a fee for such material, provides instructions on how to access such material or provides an index of the material); 141 CONG. REC. H8470 (daily ed. Aug. 4, 1995) (statement of Rep. Goodlatte) (“Congress has a responsibility to help encourage the private sector to protect our children from being exposed to obscene and indecent material on the Internet”).

The District Court’s decision reflects a gross departure from the statute’s plain text and overriding policy objectives and thus begs for reversal.

### **B. Congress Passed the TVPA and TVPRA to Expand the Scope of Liability for Those Involved in Sex Trafficking**

By the 20th century, online sex-trafficking was ubiquitous. To combat the proliferation of this “modern day slavery,” Congress passed the Trafficking Victims Protection Act (“TVPA”)—the first federal law to independently recognize child sex trafficking as a crime. Pub. L. No. 106-

386, 114 Stat. 1464, 1486–88 (Oct. 28, 2000). Since federal recognition of sex trafficking in 2000, Congress has continuously expanded the scope of liability for sex trafficking—first in 2003 through the TVPRA which allowed victims to bring civil suits against their traffickers and other co-defendants, regardless of whether there was a criminal action arising out of the same facts, and again in 2008 by amending the TVPRA to lower the requisite *mens rea* under §1595 so that third-party beneficiaries, like Twitter, with constructive knowledge of illegal content on their platforms could be held appropriately accountable. P.L. 108-193, § 4(a)(4)(A); 18 U.S.C. §1595(a).

When Congress passed the TVPRA, it was focused on empowering victims and providing a sense of agency over their case. See Kathleen Kim & Kusia Hreshchyshyn, Human Trafficking Private Right of Action: Civil Rights for Trafficked Persons in the United States, 16 HASTINGS WOMEN'S L.J. 1, 17 (2004). The expansion was intended to create a pathway for victims to bring civil suits against ISPs, like Twitter, that facilitate and profit from the trafficking of CSAM on their platforms. Unfortunately, courts have struggled to reconcile the purpose of Section 230's limited defense, which predates the TVPRA, with the broad

remedial purpose of the TVPRA. The District Court's decision epitomizes the most common outcome of such uncertainty—victims are completely barred from seeking judicial relief against third-party beneficiaries of their abuse.

### **C. Congress Passed Masha's Law to Provide Redress for CSAM Victims**

Congress recognized the grave injuries suffered by victims of CSAM when it passed the Adam Walsh Child Protection and Safety Act of 2006. Pub. L. No. 109-248, § 501(2)(D), 120 Stat. 587, 624 (2006). As Congress emphasized, “[e]very instance of viewing images of child pornography represents a renewed violation of the privacy of the victims and a repetition of their abuse”, *Id.*, and “[t]he illegal production, transportation, distribution, receipt, advertising and possession of child pornography. . . is harmful to the physiological, emotional and mental health of the children depicted in child pornography and has a substantial and detrimental effect on society as a whole.” § 501(1)(A), 120 Stat. at 623. Finally, Congress declared that “[t]he government has a compelling State interest in protecting children from those who sexually exploit them, and this interest extends to stamping out the vice of child

pornography *at all levels in the distribution chain.*" § 501(2)(C), 120 Stat. at 624 (emphasis added).

Notably, Congress passed Masha's Law, which it later incorporated into the Adam Walsh Child Protection and Safety Act, to address the revictimization of child exploitation victims when their images are redistributed online. James R. Marsh, Masha's Law: A Federal Civil Remedy for Child Pornography Victims, 61 SYRACUSE L. REV. 459, 460 (2011). Specifically, Masha's Law provides CSAM victims the right to sue not only those who initially produced the abusive material, but also those who perpetuate the exploitation by possessing and distributing their imagery. 18 U.S.C. § 2255. To prevail under Masha's Law, a victim need only establish that the defendant committed a federal "child pornography" or child exploitation crime, and that they suffered personal injury as a result. Id. It permits victims to seek redress without distinguishing between individuals and entities, such as ISPs.

The legislation's history together with the lack of any exclusionary language in the statute is evidence of Congress's intent that victims be compensated, not only by direct perpetrators of their sexual abuse and

exploitation, but also by distributors, receivers, and facilitators of their CSAM, including ISPs.

#### **D. Congress Passed FOSTA to Clarify That Section 230 Does Not Immunize ISPs that Facilitate and Profit from CSAM Hosted and Trafficked on Their Platforms**

In the years following the passage of TVPRA, websites hosting or profiting from sex trafficking content increasingly turned to Section 230 to shield themselves from criminal or civil liability. Danielle Citron & Benjamin Wittes, The Internet Won't Break, 86 FORDHAM L. REV. 401, 404 (2017). The most prolific violator, the now defunct Backpage.com, had been so successful in utilizing Section 230 as a defense against liability for their knowing facilitation of child sex-trafficking through their posting and advertising procedures, that Congress launched a formal investigation into the problem. See Backpage.com's Knowing Facilitation of Online Sex Trafficking: Hearing Before the Subcomm. on Investigations of the S. Comm. On Homeland Security & Governmental Affairs, 115th Cong. (2017). Although Section 230 was supposed to encourage self-regulation, Congress found that many websites had instead become "reckless" in allowing for the sex trafficking of children on their platforms and that website owners did little to prevent it. Id.

was in direct response to this egregious misapplication of Section 230 immunity that Congress passed FOSTA in 2018. With the desire to ensure websites like Backpage could not use Section 230 as a shield for its *own illegal conduct*, FOSTA amended Section 230 to include an express exemption from claims under the TVPRA to the expansive immunity for ISPs that courts have read into the CDA. 47 U.S.C. §230(e)(5)(A). As Congress clarified, Section 230 “does not prohibit the enforcement against providers and users of interactive computer services of Federal and State criminal and civil law relating to sexual exploitation of children or sex trafficking” because it “was never intended by Congress to provide legal protection to websites that unlawfully promote and facilitate prostitution and contribute to sex trafficking.” H.R. Rep. No. 115-572 (2018) (emphasis added); see also, Pub. L. No. 115-164 §4, 132

Stat. 1253, 1254 (header: “ensur[e] ability to enforce federal and state criminal and civil law relating to sex trafficking”); 164 Cong. Rec. S 1827, 1829 (Blumenthal) (explaining that the law was designed to hold tech companies accountable “that identify sex trafficking ads and then leave them up in order to continue profiting from them.”).

Although Backpage, as the impetus for FOSTA nor its legislative history limits its immunity exception to a particular actor. In fact, Congress explicitly rejected such a limitation, noting that FOSTA would allow “vigorous criminal enforcement against all bad-actor websites, not just Backpage.com, through the creation of a new federal law and by explicitly permitting states to enforce criminal laws that mirror this new federal law and current federal sex trafficking law.” H. Rep. No. 115-572, pt. 1, at 5. FOSTA merely “close[d] the loophole,” so that victims could “bring to justice” online platforms that were found to be facilitating online exploitation and abuse. *Id.*

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Thus, the fact that Twitter profits from the illegal content posted on its online platform rather than through some other medium, does not exempt it from liability for its *own criminal activity*. FOSTA was passed to prevent precisely such an argument.

**III. THIS COURT SHOULD INTERPRET SECTION 230 CONSISTENT WITH ITS TEXT AND CHILD SAFETY PURPOSE TO AVOID FURTHER INJUSTICE AND TO GIVE VICTIMS AN AVENUE FOR MEANINGFUL REDRESS**

At the core of Section 230 is subsection (c) which addresses certain limitations on liability for ISPs. It states, in relevant part, that “[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.” 47 U.S.C. § 230(c)(1). Thus, by its own terms, Section 230 creates a limited defense from liability only for those defendants who can establish that “the cause of action inherently requires the court to treat the defendant as the ‘publisher or speaker’ of content provided by another.” FTC v. LeadClick Media, LLC, 838 F.3d 158, 175 (2d Cir. 2016); see also Barnes v. Yahoo!, Inc., 570 F.3d 1096, 1100 (9th Cir. 2009) (holding that § 230(c)(1) does not create an immunity). The key to proper analysis of publisher liability under Section 230 lies in the careful evaluation of the claimant’s cause of action to determine if the defendant’s conduct—the alleged source of harm—goes beyond the entity’s traditional editorial functions. See Bauer v. Armslist, LLC, 572 F. Supp. 3d 641, 664 (E.D. Wis. 2021) (describing Section 230 as a “definitional provision” requiring a “fact-based inquiry.”). That is, “Section 230(c)(1) limits liability *based on the function the defendant performs, not its identity.*” Force v. Facebook, Inc., 934 F.3d 53, 81 (2d



Cir. 2019). Here, Plaintiffs-Appellants do not seek to hold Twitter liable as the original poster of their CSAM but instead for Twitter's own conduct—namely its creation of a dangerous product that was designed to facilitate criminal activity and used to distribute and profit from their CSAM which it affirmatively refused to report or remove from its platform. “When a plaintiff brings a claim that is based not on the content of the information shown” but rather on the defendant's own violations of federal and state criminal and civil laws “the CDA does not and should not bar relief.” *Force*, 934 F.3d at 82; see also *FTC v. Accusearch Inc.*, 570 F.3d 1187, 1204 (Tymkovich, J.) (10th Cir. 2009). Thus, Twitter is not entitled to immunity from the federal sex-trafficking, CSAM, state-law products liability, and negligence per se claims, even if third-party content (victims' CSAM) set Plaintiffs-Appellants' injury in motion.

**A. ISPs Are Subject to Liability When They Breach Their Duties to Consumers and the Public as Manufacturers of Products**

The internet has changed in unimaginable ways since Congress passed Section 230 as part of the CDA in 1996. Modern tech companies like Twitter are vastly larger, wealthier, and more powerful than were the online service providers of almost three decades ago, and the

activities in which they engage are less obviously about speech. See Shira Ovide, Big Tech Has Outgrown This Planet, THE NEW YORK TIMES (Oct. 12, 2021), <https://www.nytimes.com/2021/07/29/technology/big-tech-profits.html>. The functional transformation from a rudimentary internet into a virtual world filled with a plethora of cybernetic products and services has changed the way online platforms relate with third-party content, such that online platforms frequently have duties to their users beyond their role as publisher. These are different in kind and severable from traditional publisher functions.

While an ISP may be primarily designed for posting and exchanging content, that fact alone does not sweep all decisions made by the platform within the scope of its publishing function. As this Court has explained with respect to Section 230 preemption, “[p]ublishing activity is a but-for cause of just about everything [Defendant] is involved in,” however, “the CDA does not provide a general immunity against all claims derived from third-party content . . . . Congress has not provided an all-purpose get-out-of-jail-free card for businesses that publish user content on the internet, though any claims might have a marginal chilling effect on internet publishing businesses.” Doe v. Internet Brands, Inc., 824 F.3d

846, 852-53 (9th Cir. 2016). Further this Court notes that the duty alleged in a products liability claim “differs markedly from the duties of publishers as defined in the CDA. Manufacturers have a specific duty to refrain from designing a product that poses an unreasonable risk of injury or harm to consumers. Meanwhile, entities acting solely as publishers—*i.e.*, those that review material submitted for publication, perhaps edit it for style or technical fluency, and then decide whether to publish it—generally have no similar duty.” Lemmon v. Snap, Inc., 995 F.3d 1085 (9th Cir. 2021).

Here, Plaintiffs-Appellants allege that Twitter violated its duty as a designer and manufacturer of products when, upon knowledge of CSAM on its platform, it not only refused to take any responsibility to stem its flow but in fact affirmatively propelled the illicit content to drive user engagement and increase revenue with little to no regard to the collateral consequences. By granting Twitter immunity, the District Court ignored the fact that the alleged harm stemmed from Twitter’s affirmative deployment of its own unreasonably dangerous product and not from the contents of any posts by a third-party predator. Dismissal of such claims at the pre-discovery phase is especially problematic as it not only

prevents victims from seeking any meaningful redress, but it also prevents the public from learning about what these powerful companies know about the potential harms to children on their platforms. If accepted, the District Court's interpretation of Section 230 would allow social media platforms to eschew their responsibilities to consumers and then to sidestep accountability when their products cause serious harm.

**B. ISPs Are Subject to Liability When They Violate Their Statutory Duty to Report CSAM**

As part of a cohesive national effort to “reduce the proliferation of online child sexual exploitation and to prevent the online sexual exploitation of children,” Congress passed the Providing Resources, Officers, and Technology to Eradicate Cyber Threats to Our Children Act of 2008 (“PROTECT Our Children Act”) which, among other things, requires ISPs in knowing possession of CSAM to make a timely report to NCMEC’s CyberTipline. 18 U.S.C. § 2258A(a)(1)(A). The statutory duty imposed on ISPs under the PROTECT Our Children Act exists independent of the duties required of ISPs when acting in their capacity as publishers.

Plaintiffs-Appellants in this case have not raised a claim related to the initial distribution of their CSAM on Twitter or Twitter's failure to effectively moderate its platform to locate and remove the same. Instead, Plaintiffs-Appellants' negligence per se claim arises from Twitter's *own* choice to violate federal law by failing to timely report victims' CSAM to NCMEC's CyberTipline after having actual knowledge that it was in possession of the same. See 18 U.S.C. § 2258(A) (creating a "duty to report").<sup>2</sup> As a result of Twitter's breach of its statutory duty, Plaintiffs-Appellants abusive imagery was permitted to remain on Twitter's platform for nine days and to accumulate hundreds of thousands of additional engagements causing further harm.

Thus, the District Court's broad interpretation of Section 230 creates a perverse incentive for online platforms to behave knowingly or recklessly in pursuit of profit. As Justice Lewis questioned in his incisive dissent in Doe v. America Online,

[w]hat conceivable good could a statute purporting to promote ISP self-policing efforts do if, by virtue of the courts'

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<sup>2</sup> Just days prior to the filing of this brief, the Revising Existing Procedures on Reporting via Technology (REPORT) Act was enacted. The REPORT Act requires online service providers to submit reports of suspected crimes against children, including sex trafficking and other forms of online exploitation. This is illustrative of the continued intent that ISPs face liability for their own wrongdoing.

interpretation of that statute, an ISP which is specifically made aware of child pornography being distributed by an identified customer through solicitation occurring on its service, may, with impunity, do absolutely nothing, and reap the economic benefits flowing from the activity?

783 So. 2d 1010, 1024-25 (Fla. 2001). Indeed, Twitter should not be permitted to bury its head in the sand and feign ignorance over its knowing receipt and continued ongoing possession of CSAM. Section 230 cannot and does not shield Twitter from liability for such acts and omissions. Without an obligation for online service providers to address harmful activities on their platforms, no matter how easily they could do so, and no requisite standard of care by which to conform their conduct, consumers—especially children and victims of abuse—are left to bear the consequences.

**ISPs Are Subject to Liability for Their Knowing Operation as A Distributor in the Modern CSAM Marketplace**

Section 230 unambiguously proclaims that “it is the policy of the United States to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.” 47 U.S.C. § 230(5). It is without question that

Plaintiffs-Appellants are trafficking victims by means of computer facilitated by Twitter which knowingly contributed to the virtual CSAM marketplace.

The United States Supreme Court has repeatedly recognized that the marketplace for CSAM must be broadly targeted and eliminated. See, e.g., Osborne v. Ohio, 495 U.S. 103, 107 (1990); Ashcroft v. Free Speech Coalition, 535 U.S. 234, 249 (2002). The Court has further stated, “everyone 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). Twitter not only facilitates the “traffic in images depicting a child’s sexual abuse,” it is part of the modern “mass distribution system for child pornography.”

Recognizing the severity of such offenses and the States’ interest in protecting the wellbeing of children, the Supreme Court went so far as to carve-out an exception to First Amendment protections for the production and distribution of child pornography. See generally, New York v. Ferber, 458 U.S. 747 (1982). The *Ferber* Court extensively discussed the unique harms borne by CSAM victims, finding that the traffic in images depicting sexual abuse “poses an even greater threat to

the child victim than does sexual abuse or prostitution” because the victim must “go through life knowing that the recording is circulating within the mass distribution system for child pornography.” *Ferber*, 458 U.S. at 759 n. 10. This rationale—that the very existence of CSAM harms the victim—suggests that the possessor of such materials injures the child, even if the possessor did not directly perpetrate the abuse themselves, and even if that possessor is an ISP, like Twitter.

Simply put, Congress, legislating against the backdrop of *Ferber* and its progeny—and as recognized in Section 230(5), Chapter 110, and elsewhere in the United States Code—never intended to immunize defendants like Twitter for their role in the modern CSAM marketplace. A holding by this Court that Twitter has a free pass to produce, advertise, distribute, and possess CSAM would be directly contrary to forty years of Supreme Court precedent and Congress’s overriding child protection policy objectives.

### **CONCLUSION**

For the foregoing reasons, *Amici* respectfully submit that this Court should reverse the District Court’s decision and find that Section 230



does not protect Twitter from accountability for its own criminal and tortious misconduct.

Respectfully submitted 13th day of May 2024,

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that the foregoing MOTION FOR LEAVE TO APPEAR AS AMICI CURIAE AND FILE A BRIEF IN SUPPORT OF PLAINTIFFS-APPELLANTS AND URGING REVERSAL OF THE DECISION BELOW and the proposed Amicus brief attached thereto have been served this 13th day of May 2024 via the e-filing system in CM/ECT on all counsel of record.

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**CERTIFICATE OF COMPLIANCE UNDER RULE 32(g)(1)**

This brief complies with type-volume requirement of Rule 29(5) of the Federal Rules of Appellate Procedure because it contains **5,258 words**, not including the items excluded under by Rule 32(f) of the Federal Rules of Appellate Procedure, which is not more than one-half the maximum word count (13,000) authorized by Rule 32(a)(7)(B)(i) of the Federal Rules of Appellate Procedure for the party's principal brief. This brief complies with the typeface and type-style requirements of Rules 32(a)(5) and 32(a)(6) of the Federal Rules of Appellate Procedure because the brief was prepared using Microsoft Word in 14-point Century Schoolbook font, which is a proportionately spaced serif typeface.

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