Nos. 22–15103 and 22–15104

IN THE

United States Court of Appeals
For the Ninth Circuit

JOHN DOE #1 AND JOHN DOE #2,

Plaintiffs–Appellees–Cross-Appellees,

v.

TWITTER, INC.,

Defendant–Appellant–Cross-Appellee.

Interlocutory Appeal from the United States District Court
for the Northern District of California
The Honorable Joseph C. Spero
Case No. 21–cv–000485

BRIEF OF CHILD USA AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS–APPELLEES–CROSS-APPELLEES

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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.

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STATEMENT OF IDENTIFICATION

CHILD USA is a 501(c)(3) nonprofit thinktank based in Philadelphia, Pennsylvania, dedicated to nonpartisan legislative reform for child victims of sexual abuse nationwide. The issue before the Court is of interest to *amicus* CHILD USA because of the profound impact the case has and will have on the health and safety of child pornography victims across the country.

CHILD USA is the leading national non-profit 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 to ensure access to justice for victims. Distinct from an organization engaged in the direct delivery of services, CHILD USA produces evidence-based solutions and information needed by policymakers, organizations, courts, media, and society as a whole to increase child protection and the common good. CHILD USA's interests in this case are directly correlated with its mission to increase child protection and to eliminate barriers to justice for victims of sexual abuse and online exploitation. CHILD USA is an expert on the

proximate, immediate, and persistent harms to child-victims whose imagery is hosted and trafficked online, the ways in which digital communication platforms like Twitter exacerbate this abuse and its attendant harms, and on the measures Congress has taken to address the epidemic of child sexual exploitation by holding entities like Twitter accountable. CHILD USA thus has a substantial interest in ensuring that this Court uphold the broad remedial purposes of the relevant child exploitation and trafficking legislation.

CHILD USA files this amicus brief without a motion pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure and 9th Circuit Rule 29-3 since 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. Fed. R. App. P. 29(a)(4)(E).

ARGUMENT

TWITTER KNOWINGLY OPERATED AS A DISTRIBUTOR IN THE MODERN CHILD PORNOGRAPHY 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). The Appellees in this case, 13–14 years old John Does #1 and #2, were undeniably victims of trafficking in obscenity, stalking, and harassment by means of a computer facilitated by Twitter which knowingly created and maintained a virtual child trafficking marketplace.

The United States Supreme Court has repeatedly recognized that the marketplace for child sex abuse material must be broadly targeted and eliminated finding repeatedly that "[c]hild pornography harms and debases the most defenseless of our citizens. Both the State and Federal Governments have sought to suppress it for many years, only to find it proliferating through the new medium of the Internet." *United States v.*

Williams, 553 U.S. 285, 307 (2008).[1] "[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).

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). The traffic in images depicting a child's 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." *Id*. at 759, n. 10. Twitter not only facilitates the "traffic in images depicting a child's sexual abuse," it is part of the modern "mass

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[1] *See also United States v. Smith*, 459 F.3d 1276, 1285 (11th Cir. 2006) (there is nothing irrational about Congress's conclusion, supported by its findings, that pornography begets pornography, regardless of its origin. Nor is it irrational for Congress to conclude that its inability to regulate the intrastate incidence of child pornography would undermine its broader regulatory scheme designed to eliminate the market in its entirety, or that "the enforcement difficulties that attend distinguishing between [purely intrastate and interstate child pornography]," would frustrate Congress's interest in completely eliminating the interstate market.)

distribution system for child pornography." *Id*. As the Supreme Court emphasized repeatedly, the child pornography images distributed on platforms like Twitter cause "continuing harm by haunting the chil[d] in years to come." *Paroline*, 572 U.S. at 472.

Congress enacted, revised, and updated 18 U.S.C. §§ 230, 1595, and 1591 against this backdrop. It is important to note that the defendant in *Ferber* was a bookstore proprietor who was convicted under a New York statute prohibiting persons from knowingly promoting a sexual performance by a child under the age of sixteen by distributing material which depicted such a performance.

Paul Ferber was indicted on two counts of promoting an obscene sexual performance by a child and two counts of promoting a sexual performance by a child based on the sale of two films to an undercover New York City police officer. *People v. Ferber*, 52 N.Y.2d 674, 677 (1981), rev'd sub nom. *New York v. Ferber*, 458 U.S. 747 (1982). Mr. Ferber challenged the constitutionality of the New York state statute which defined "to promote" the sexual performance of a child as "to procure, manufacture, issue, sell, give…publish, *distribute*, circulate, disseminate… exhibit or advertise." *New York v. Ferber*, 458 U.S. at 751

(emphasis added). The Supreme Court's ruling in *Ferber* effectively established the precedent that the distribution of child sexual abuse material is not considered protected speech and that "the prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance." *Id.* at 757. Mr. Ferber, like Twitter, was a so called "third party" distributor of child pornography, not the direct producer or consumer. In this case, Twitter's promotion of child sexual abuse material is no different.

In *United States v. Laraneta*, 700 F.3d 983 (7th Cir. 2012), Judge Posner held that distributors of child pornography can be held jointly liable for the full amount of a victim's losses:

> When two or more tortfeasors, though not acting in concert, inflict a single loss as a result of their separate acts, they can be sued as joint tortfeasors and each made liable for the full amount of the plaintiff's loss…. The approach may be applicable to distributors of pornography…because it may be impossible as a practical matter to apportion liability among distributors. The number of pornographic images of a child that are propagated across the Internet may be independent of the number of distributors. A recipient of the image may upload it to the Internet; dozens or hundreds of consumers of child pornography on the Internet may download the uploaded image and many of them may then upload it to their favorite child–pornography web sites; and the chain of

> downloading and uploading and thus distributing might continue indefinitely.

Id. at 992. Under this reasoning, Twitter is just as liable to the Plaintiffs in this case as the individual who originally posted their child sex abuse material. It is fundamentally unfair, and a violation of basic Equal Protection, to hold the original posters liable for the full amount of the victims' losses, while Twitter—a knowing joint distributor—is completely exempt from liability in contravention of traditional notions of joint liability among tortfeasors.

There is no doubt that Twitter was a knowing distributor of the Plaintiffs' child sex abuse material. For example, in *United States v. Budziak*, 697 F.3d 1105, 1109–10 (2012), this Court held that sufficient evidence of "distribution" exists when it there is evidence that "the defendant maintained child pornography in a shared folder, knew that doing so would allow others to download it, and another person actually downloaded it." In this case, the victims themselves accessed their own child sex abuse material on the Twitter platform and informed Twitter.[2]

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[2] *See also United States v. Chiaradio*, 684 F.3d 265, 282 (2012) (distribution occurs "[w]hen an individual consciously makes files available for others to take and those files are in fact taken.").

In finding that the government is "entitled to greater leeway in the regulation of pornographic depictions of children," the Supreme Court made the following findings which are as relevant to modern Internet distributor Twitter as they were to Madison Book Store proprietor Paul Ferber. *New York v. Ferber*, 458 U.S. at 756.

> *First*. It is evident beyond the need for elaboration that a State's interest in "safeguarding the physical and psychological well-being of a minor" is "compelling."... The prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance…. The legislative judgment, as well as the judgment found in the relevant literature, is that the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child.
>
> *Id*. at 756–58.
>
> *Second*. The distribution of photographs and films depicting sexual activity by juveniles is intrinsically related to the sexual abuse of children in at least two ways. First, the materials produced are a permanent record of the children's participation and the harm to the child is exacerbated by their circulation. Second, the distribution network for child pornography must be closed if the production of material which requires the sexual exploitation of children is to be effectively controlled…. it is difficult, if not impossible, to halt the exploitation of children by pursuing only those who produce the photographs and movies.
>
> *Id*. at 759–60.

> *Third*. The advertising and selling of child pornography provide an economic motive for and are thus an integral part of the production of such materials, an activity illegal throughout the Nation. "It rarely has been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute."
>
> *Id*. at 761–62.
>
> *Fourth*. The value of permitting live performances and photographic reproductions of children engaged in lewd sexual conduct is exceedingly modest, if not *de minimis*.
>
> *Id*. at 762.
>
> *Fifth*. Recognizing and classifying child pornography as a category of material outside the protection of the First Amendment is not incompatible with our earlier decisions…. When a definable class of material, such as that covered by § 263.15, bears so heavily and pervasively on the welfare of children engaged in its production, we think the balance of competing interests is clearly struck and that it is permissible to consider these materials as without the protection of the First Amendment.
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> *Id*. at 763–64.

The child pornography facilitated, created, and distributed by Twitter is "without the protection of the First Amendment" and without the protection of Section 230. "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." *Osborne v. Ohio*, 495 U.S. 103, 110–11 (1990). As recognized in *Osborne* over 33 years ago, "much of the child pornography market has been driven underground; as a result, it is now difficult, if not impossible, to solve the child pornography problem by only attacking production and distribution." *Id.* at 110. This challenge has grown exponentially over time due to the modern methods of child pornography production and distribution on platforms 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 child pornography marketplace. A holding by this Court that Twitter has a free pass to produce, advertise, distribute, and possess child pornography would be directly contrary to forty years of Supreme Court precedent.

Section 230 includes a crucial exemption in that "[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). Child sexual abuse material or child pornography is unlike sexual material of

adults because it is contraband. *Doe #1 v. MG Freesites, LTD*, No. 7:21-CV-00220-LSC, 2022 WL 407147, at *22 (N.D. Ala. Feb. 9, 2022) ("child pornography is not lawful 'information provided by another information content provider' as contemplated by Section 230…. Rather, it is illegal contraband, stemming from the sexual abuse of a child, beyond the covering of First Amendment protection, and outside any other protection or immunity under the law, including Section 230"…which "has 'no effect on criminal law,' including chapter 110 of Title 18, which contains sections 2252 and 2252A.")

CONCLUSION

For the foregoing reasons, panel decision should be reheard by this Circuit sitting en banc. This case presents a matter of national importance where the safety and protection of children is of paramount importance under the laws and policies of the United States.

Dated: May 24, 2023

Respectfully submitted,

/s/

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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 May 24, 2023.

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Marci A. Hamilton