No. 21-459

IN THE

Supreme Court of the United States

JANE DOE,

Petitioner,

V.

FACEBOOK, INC.,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Texas

BRIEF OF THE LIBERTY JUSTICE CENTER AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Daniel R. Suhr
Counsel of Record
Brian K. Kelsey
Mallory Reader
LIBERTY JUSTICE CENTER
141 W. Jackson Blvd.
Suite 1065
Chicago, IL 60604
(312) 637-2280
dsuhr@libertyjusticecenter.org
bkelsey@libertyjusticecenter.org
mreader@libertyjusticecenter.org

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QUESTION PRESENTED

Whether Section 230 of the Communications Decency Act provides immunity from suit to internet platforms in any case arising from the publication of third-party content, regardless of the platform's own misconduct.

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INTEREST OF AMICUS CURIAE[1]

The Liberty Justice Center is a nonprofit, public-interest litigation firm that seeks to defend free speech, expand school choice, secure the rights of workers, and protect all Americans from government overreach. We are nonpartisan, do not accept government funding, and do not support or promote political campaigns. Our groundbreaking lawsuits stake out Americans' constitutional rights.

To support these goals, the Liberty Justice Center began bringing suits on behalf of our clients who have had their Freedom of Speech restricted by social media platforms. Regardless of the cause of action, Section 230 is being used by these platforms as a defense to claim absolute immunity from suit. The Liberty Justice Center's interest in this case is to have the Court clarify the scope of internet platforms' immunity from suit under Section 230 of the Communications Decency Act.

INTRODUCTION AND SUMMARY OF REASONS TO GRANT THE PETITION

"What many consider the largest public space in human history is not public at all." David S. Ardia, *Free Speech Savior or Shield for Scoundrels: An Empirical Study of Intermediary Immunity Under Section 230 of the Communications Decency Act*, 43

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[1] No counsel for a party authored any part of this brief, and no person other than *amicus curiae*, its members, or its counsel made a monetary contribution intended to fund its preparation or submission. *Amicus curiae* timely provided notice of intent to file this brief to all parties, and all parties have consented to the filing of this brief.

Loy. L.A. L. Rev. 373, 377 (2010). The Internet—a communication network available to anyone with computer access—contains no true "public forum." *Id.* Rather, it is a network of "privately owned Web sites, privately owned serves, privately owned routers, and privately owned backbones." *Id.* This does not mean that these private intermediaries are free from all limits: "civil and criminal liability may attach to the content they intermediate." *Id.*

The pervasiveness of internet platforms and the power they hold over modern speech make them attractive targets for both regulators and litigants. But targeting internet platforms comes with risks for both the intermediary and for America's system of free expression. *Id.* at 379. Mindful of this, Congress stepped in by enacting Section 230 ("Section 230") of the Communications Decency Act ("CDA") in 1996. Section 230 provides that: "No 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).

"In deceptively simple language," Section 230 "sweep[s] away the common law's distinction between publisher and distributor liability[.]" Ardia, *supra,* at 377, 379. In doing so, it grants operators of interactive websites "broad protection from claims based on the speech of third parties." *Id.* The "broad construction accorded to section 230 as a whole has resulted in a capacious conception of what it means to treat a website operator as the publisher or speaker of information provided by a third party." *Jane Doe No. I v. Backpage.com, LLC*, 817 F.3d 12, 19 (1st Cir. 2016), *cert. denied*, 2017 U.S. LEXIS 441 (claims

related to websites' active participation in human trafficking enterprise barred by Section 230).

As this Brief will explain, the prevailing interpretation of Section 230 improperly immunizes the misconduct of internet companies—especially social media platforms. The Court should take this opportunity to define the proper, narrow scope of Section 230 immunity based on the text of the statute.

REASON TO GRANT THE PETITION

I. The prevailing interpretation of Section 230 improperly immunizes the misconduct of social media platforms.

The claim that Section 230 has operated to shield website operators from lawsuits arising out of their own misconduct is not hypothetical. This is because Section 230 has been read so that "lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions — such as deciding whether to publish, withdraw, postpone or alter content — are barred[.]" *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997).

For example, the First Circuit allowed Section 230 to be used as a successful defense against the claim that the website purposely facilitated sex trafficking. *Backpage.com*, 817 F.3d at 15. In *Jane Doe I v. Backpage.com, LLC*, three children, beginning at the age of 15, were trafficked through advertisements posted on Backpage under the "Adult Entertainment" category. *Id.* at 17. Sometimes their traffickers posted the advertisements directly, and sometimes the victims themselves were forced to post the advertisements. *Id.* The advertisements typically

included images of the child and coded terminology meant to refer to the fact that the girls were underage. *Id.*

The three girls sued Backpage asserting three sets of claims. *Id.* Of relevance here is the set of claims alleging that Backpage engaged in sex trafficking of minors as defined by federal and state law. *Id.* After a motion to dismiss from Backpage, the district court dismissed the action in its entirety. *Doe ex rel. Roe v. Backpage.com, LLC*, 104 F. Supp. 3d 149, 165 (D. Mass. 2015). On appeal to the First Circuit, the girls challenged the district court's conclusion that Section 230 shielded Backpage from liability for their conduct that allegedly amounted to participation in sex trafficking. *Backpage.com*, 817 F.3d at 18. The girls asserted that "Backpage's rules and processes governing the content of advertisements were designed to encourage sex trafficking." *Id.* at 16. And that allegation was not unfounded. Backpage's search system screened out advertisements that contained certain prohibited terms, like "barely legal" and "high school," but when a user's search failed for using such terms, they could easily use coded search terms, like "brly legl" or "high schl." *Id.* at 17. The First Circuit, begrudgingly, affirmed the district court's decision to dismiss. *Id.* at 29.

Writing for the Court, Circuit Judge Selya acknowledged that "[t]his is a hard case — hard not in the sense that the legal issues defy resolution, but hard in the sense that the law requires that we, like the court below, deny relief to plaintiffs whose circumstances evoke outrage." *Id.* at 15. That is because there has been "near-universal" agreement from the federal courts that Section 230 should not be

construed stingily. *Id.* at 18; *see, e.g., Doe v. MySpace, Inc.*, 528 F.3d 413, 418 (5th Cir. 2008); *Universal Commc'n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 419 (1st Cir. 2007); *Almeida v. Amazon.com, Inc.*, 456 F.3d 1316, 1321–22 (11th Cir. 2006); *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1123 (9th Cir. 2003). This preference "recognizes that websites that display third-party content may have an infinite number of users generating an enormous amount of potentially harmful content[.]" *Backpage.com*, 817 F.3d at 18–19. Holding websites liable for all that content "would have an obvious chilling effect[.]" *Id.* at 19 (citing *Zeran*, 129 F.3d at 331). However, failing to hold websites liable for content which they knowingly supported or promoted is equally problematic.

Immediately after the decision in *Backpage.com*, Congress passed the Allow States and Victims to Fight Online Sex Trafficking Act ("FOSTA"), which amended the CDA and created liability for internet companies if any third-party content on their websites promote or facilitate prostitution or if their websites facilitate traffickers in advertising the sale of unlawful sex acts with sex trafficking victims. 47 U.S.C. § 230(e)(5); 18 U.S.C. §§ 1591, 1595, 2421(a). But post-*Backpage.com* and FOSTA, courts today still use Section 230 to protect internet companies from civil liability arising from a vast array of claims. *See generally* Danielle Keats Citron & Benjamin Wittes, *The Problem Isn't Just* Backpage*: Revising Section 230 Immunity*, 2 Geo. L. Tech. Rev. 453, 458 (2018) (explaining that "federal courts have reached a near-universal agreement that [Section 230] should be construed broadly").

Another example of Section 230 abuse is found at TheDirty.com, a website once devoted to spreading gossip. *Id.* at 453. The website's founder, Nik Richie, encouraged his audience to email him "dirt" on people they know. *Id.* at 453–54. Richie then posted emails in blog posts alongside photos of ordinary people "scantily clad, inebriated, and unfaithful." Kate Knibbs, *Cleaning Up the Dirty*, RINGER (Apr. 19, 2017, 12:21 PM).[2] The blog posts led to abuse, with commentors accusing the subject of the posts of having sexually transmitted infections, psychiatric disorders, and financial troubles. Kashmir Hill, *The Dirty Business: How Gossipmonger Nik Richie Stays Afloat*, FORBES (Nov. 11, 2010, 8:37 PM).[3] Richie admitted to ruining peoples' lives "sometimes out of fun." Knibbs, *supra.* "That admission is not against interest—he knows well that he cannot be sued for his role in the abuse because the onus of the abuse is on the users." Citron & Wittes, *supra,* at 454; *see, e.g., Jones v. Dirty World Entm't Recordings LLC*, 755 F.3d 398 (6th Cir. 2014); *S.C. v. Dirty World, LLC*, No. 11-CV-00392, 2012 U.S. Dist. LEXIS 118297 (W.D. Mo. March 12, 2012); and *Gauck v. Karamian*, 805 F. Supp. 2d 495, n.3 (W.D. Tenn. 2011).

A final example of the need for this Court to define the scope of Section 230 immunity lies in the relationship between social media companies and terrorist groups. A survey of overseas groups, formally designated as terrorists, found that many still had active social media accounts. Citron & Wittes, *supra,* at 454. Federal law creates civil—and criminal—

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[2] https://perma.cc/WF3X-K9EM

[3] https://perma-archives.org/warc/20170909184903/https://www.forbes.com/

penalties for providing material support, anything of value, to designated foreign terrorist groups. 18 U.S.C. § 2339(b). Yet many of these groups, including Hamas, Hezbollah, the PKK, and Lakshar-e-Taiba, openly maintain an online presence on social media platforms like Facebook and Twitter. *See* Zack Bedell & Benjamin Wittes, *Tweeting Terrorists, Part I: Don't Look Now but a Lot of Terrorist Groups Are Using Twitter*, LAWFARE (Feb. 14, 2016, 5:05 PM).[4] Thanks to Section 230's current interpretation, efforts to hold social media platforms responsible for providing material support to terrorist groups have failed. *See, e.g., Cohen v. Facebook*, 252 F. Supp. 3d 140 (E.D.N.Y. 2017) (dismissing claims based on federal material support statute against Facebook because failure to remove Hamas postings concerned defendant's role as publisher of online content and thus fell within Section 230(c)(1)'s immunity provision); *Fields v. Twitter*, 200 F. Supp. 3d 964 (N.D. Cal. 2016).

Today, most courts dismiss any civil suit brought against an internet company if that claim "could even tangentially fall under Section 230's purview." Kira M. Geary, *Comment: Section 230 of the Communications Decency Act, Product Liability, and a Proposal for Preventing Dating-App Harassment*, 125 Penn. St. L. Rev. 501, 518 (2021).

> Courts have built a mighty fortress protecting platforms from any accountability for unlawful activity on their systems—even when they actively encourage such activity or deliberately refuse to address it. The Supreme Court has declined to weigh in on the meaning of Section 230, but state

[4] https://perma.cc/JFN4-LQJZ

> and lower federal courts have reached a near-universal agreement that it should be construed broadly.

Citron & Wittes, *supra,* at 458. With the ever-increasing use of social media platforms and the influence they hold over American culture, it is necessary that this Court step in to define when and from what internet companies are immune. This case presents an ideal vehicle for this Court to reign in Section 230 immunity from civil liability.

CONCLUSION

The internet may not be a public forum, but rather a series of private websites. But in its preface to Section 230, Congress included a finding identifying the internet as "a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity." 47 U.S.C. § 230(a)(3). A proper reading of Section 230 will nudge the internet close to Congress' vision of a lightly regulated but decent place.

For the reasons stated above, this Court should grant the petition for writ of certiorari.

October 27, 2021

Respectfully submitted,

Daniel R. Suhr
Counsel of Record
Brian K. Kelsey
Mallory Reader
LIBERTY JUSTICE CENTER
141 W. Jackson Blvd.
Suite 1065
Chicago IL 60604
(312) 637-2280
dsuhr@libertyjusticecenter.org
bkelsey@libertyjusticecenter.org
mreader@libertyjusticecenter.org