No. 23-

In the

Supreme Court of the United States

JOHN DOE NO. 1 AND JOHN DOE NO. 2,

Petitioners,

v.

TWITTER, INC.,

Respondent.

On Application for Extension of Time to File a Petition for Writ of Certiorari to Associate Justice Elena Kagan

PETITIONERS' APPLICATION FOR AN EXTENSION OF TIME TO FILE A PETITION FOR A WRIT OF CERTIORARI

Lisa D. Haba
Adam A. Haba
Maria E. Bryant
THE HABA LAW FIRM, P.A.
1220 Commerce Park Dr., Suite 207
Longwood, FL 32779

Paul A. Matiasic
The Matiasic Firm, P.C.
4 Embarcadero Center, Suite 1400
San Francisco, CA 94111

Paul G. Cassell
Counsel of Record
Utah Appellate Project
S.J. Quinney College of Law at the University of Utah College of Law
383 South University Street
Salt Lake City, UT 84112
(801) 585-5202
pgcassell.law@gmail.com

Peter A. Gentala
Benjamin W. Bull
Danielle Bianculli Pinter
Christen M. Price
National Center on Sexual Exploitation
1201 F. Street, NW, Suite 200
Washington, DC 20004

Counsel for Petitioners

322823

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No. ________

In the Supreme Court of the United States

JOHN DOE NO. 1 AND JOHN DOE NO. 2, PETITIONERS

v.

TWITTER, INC., RESPONDENT

PETITIONERS' APPLICATION FOR AN EXTENSION OF TIME TO FILE A PETITION FOR A WRIT OF CERTIORARI

To the Honorable Elena Kagan, Associate Justice of the Supreme Court of the United States and Circuit Justice for the United States Court of Appeals for the Ninth Circuit:

1. Pursuant to Supreme Court Rule 13.5, petitioners John Doe No. 1 and John Doe No. 2 respectfully request a 57-day extension of time, up to and including Friday, November 3, 2023, within which to file a petition for a writ of certiorari. The Ninth Circuit issued its opinion on May 3, 2023. The Circuit denied rehearing en banc on June 9, 2023. Both decisions are attached. This Court's jurisdiction would be invoked under 28 U.S.C. § 1254(1). Respondent Twitter consents to the motion.

2. Absent an extension, a petition for a writ of certiorari would be due on September 7, 2023. Petitioners are filing this application more than ten days in advance of that date and have made no prior application in this case.

3. This case concerns the scope of immunity that Section 230 of the Communications Decency Act (CDA), 47 U.S.C. § 230(c)(1), extends to a major social-media company that knowingly violates a federal criminal statute.

4. After being alerted by child petitioners John Doe No. 1 and John Doe No. 2, Twitter reviewed child sex abuse materials ("CSAM," sometimes referred to as "child pornography") depicting the petitioners. But Twitter refused to remove the sexually explicit materials, resulting in widespread distribution on its platform. Under 18 U.S.C. § 2252A, it is illegal for any person to knowingly possess, receive, advertise, present, promote, or distribute CSAM. Victims of the crimes prohibited by § 2252A are entitled to bring civil claims for damages, as specifically provided in sections 2252A(f) and 2255 of Title 18.

5. Based on Twitter's refusal to remove the materials, John Doe No. 1 and John Doe No. 2 filed several civil causes of action against Twitter, including an action under § 2252A. Twitter moved to dismiss the John Does' complaint. The U.S. District Court for the Northern District of California granted in part and denied in part Twitter's motion to dismiss, including dismissing their § 2252A claim. The district court noted that Twitter agreed that the John Does had properly alleged a violation of § 2252A—i.e., that Twitter had violated the criminal law regarding the receipt and distribution of CSAM. Notwithstanding that violation of federal criminal law, Twitter argued—and the district court agreed—that under Ninth Circuit precedent, Twitter had immunity from civil suit under § 230(c)(1).

6. Section 230(c)(1) of the Communications Decency Act states that "[n]o provider or user of an interactive computer service ["ICS"] shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1). Lower courts—including the Ninth Circuit en banc—have interpreted these words to provide broad

immunity for internet companies whenever litigation seeks to hold an ICS liable as a publisher or speaker of third-party content. *See, e.g., Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157 (9th Cir.) (en banc); *Doe v. Internet Brands*, 824 F.3d 846, 853 (9th Cir. 2016); *Gonzalez v. Google LLC,* 2 F.4th 871, 891 (9th Cir. 2021), *cert. granted*, 143 S. Ct. 80 (2022), and *cert. granted sub nom. Twitter, Inc. v. Taamneh*, 143 S. Ct. 81 (2022), and *vacated and remanded*, 143 S. Ct. 1191 (2023), and *rev'd sub nom. Twitter, Inc. v. Taamneh*, 143 S. Ct. 1206 (2023).

7. In this case, the district court dismissed the petitioners' CSAM claim against Twitter based on § 230(c)(1). The district court concluded that while the Government could prosecute an ICS provider for receipt and distribution of CSAM, a civil cause of action for that same conduct was barred by § 230(c)(1) immunity. Accordingly, the district court dismissed the John Does' claim against Twitter (along with 11 other claims), while allowing one separate claim to move forward under the Trafficking Victims Protection Act (TVPA), 18 U.S.C. §§ 1591(a)(2) (benefiting from sex trafficking), §1595(a).

8. The district court granted Twitter's motion for an order permitting it to seek an interlocutory appeal pursuant to 28 U.S.C. § 1292(b). Thereafter, Twitter petitioned the Ninth Circuit for permission for an interlocutory appeal and the John Does cross-petitioned for permission to appeal the dismissal of their causes of action based on 18 U.S.C. § 1591(a)(1) (direct sex trafficking) and 18 U.S.C. § 2252A (child pornography). The Ninth Circuit granted both petitions, opening cross-appeals by the John Does and Twitter.

9. Following briefing (which included amicus briefs on both sides of the case) and oral argument, the Ninth Circuit affirmed the dismissal of the John Does' § 2252A cause of action in an unpublished decision. The Circuit affirmed based on the broad-immunity interpretation of

§ 230(c)(1) it previously recognized en banc in *Roommates.com.,* 521 F.3d at 1170-71. The Circuit explained that because the John Doe's complaint "targets 'activity that can be boiled down to deciding whether to exclude material that third parties seek to post online,' such activity 'is perforce immune under section 230.'" Op. at 5 (quoting *Roommates.com*, 521 F.3d at 1170–71).

10. The John Does intend to file a certiorari petition raising (among other issues) the issue of whether § 230(c)(1) precludes civil liability for ICS providers that knowingly violate 18 U.S.C. § 2252A so long as the providers did not themselves originally create or post the illegal CSAM. This is an important issue with far-reaching implications that warrants review by the Court. As Justice Thomas has explained regarding a petition presenting similar claims against another major social-media company (Facebook), "courts have interpreted § 230 'to confer sweeping immunity on some of the largest companies in the world,' particularly by employing a 'capacious conception of what it means to treat a website operator as [a] publisher or speaker.'" *Doe v. Facebook, Inc.,* 142 S. Ct. 1087, 1088 (2022) (mem.) (statement of Thomas, J., respecting denial of certiorari) (quoting *Malwarebytes*, *Inc.* v. *Enigma Software Group USA*, *LLC*, 592 U. S. ——, ——, 141 S.Ct. 13, 13, 17 (2020) (statement of Thomas, J., respecting denial of certiorari) (internal quotation marks omitted)). Moreover, "the arguments in favor of broad immunity under § 230 rest largely on 'policy and purpose,' not on the statute's plain text." *Id.* at 1088 (statement of Thomas, J., respecting denial of certiorari).

11. In *Malwarebytes*, Justice Thomas expressed concern that "[c]ourts have long stressed nontextual arguments when interpreting § 230, leaving questionable precedent in their wake." *Id.* at 14. During "the past two decades, federal courts have stretched Section 230's immunity for publisher liability to cover every conceivable tort, thus violating a basic principle that a responsible website is an answerable one." Michael L. Ruistad, *Global Internet Law* 633 (4th ed.

2021). The breadth of the lower court interpretations of section 230 has been widely criticized.[1] Thus, a "growing chorus of voices" has "call[ed] for a more limited reading of the scope of section 230 immunity." *Gonzalez,* 2 F.4th at 913 (Berzon, J., concurring).

12. This Court seemed poised to clarify some of these important questions about the scope of § 230 immunity when it granted certiorari to review the Ninth Circuit's broad immunizing application of § 230 in *Gonzalez v. Google LLC.* But following briefing and oral argument, in a terse per-curiam opinion, this Court decided not to address the important question of the scope of § 230 immunity. The Court explained that the complaint in that case "appear[ed] to state little, if any, plausible claim for relief." *Gonzalez*, 143 S. Ct. at 1192.

13. This case presents an excellent vehicle to address the question that the Court granted certiorari to resolve last Term in *Gonzalez*. Here, Twitter has not challenged (nor could it reasonably challenge) that it knowingly violated § 2252A when it refused to act after being notified that it was possessing and distributing sexually explicit images of the minor children, petitioners

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[1] *See* 1 R. Smolla, *Law of Defamation* § 4:86, p. 4-380 (2d ed. 2019); Matthew P. Bergman, *Assaulting the Citadel of Section 230 Immunity: Products Liability, Social Media, and the Youth Mental Health Crisis*, 26 Lewis & Clark L. Rev. 1159 (2023); Hannah DePoy Hayden, *Note, Traffickinghub: Reforming Section 230 of the Communications Decency Act to Address Pornhub's Exploitation of Sex Trafficking Victims*, 61 U. Louisville L. Rev. 413 (2023); Ellison Snider, *Evolving Online Terrain in an Inert Legal Landscape: How Algorithms and AI Necessitate an Amendment of Section 230 of the Communications Decency Act*, 107 Minn. L. Rev. 1829 (2023); Geoffrey A. Manne et al., Who Moderates the Moderators? : *A Law and Economics Approach to Holding Online Platforms Accountable Without Destroying the Internet*, 49 Rutgers Computer & Tech. L.J. 26 (2022); Danielle Keats Citron & Benjamin Wittes, *The Problem Isn't Just Backpage: Revising Section 230 Immunity*, 2 Geo. L. Tech. 453, 454-55 (2018); Anna Elisabeth Jayne Goodman, *Note and Comment, When You Give a Terrorist a Twitter: Holding Social Media Companies Liable for their Support of Terrorism*, 46 Pepp. L. Rev. 147, 189 (2018); Nicole Phe, *Note, Social Media Terror: Reevaluating Intermediary Liability Under the Communications Decency Act*, 51 Suffolk U.L. Rev. 99, 116 (2018); Danielle Keats Citron, *Cyber Civil Rights*, 89 B.U. L. Rev. 61, 116 (2009); Rustad & Koenig, *Rebooting Cybertort Law*, 80 Wash. L. Rev. 335, 342-43 (2005).

John Does No. 1 and 2. And here, petitioners have presented a very strong claim for holding Twitter liable—a claim that was defeated solely because of broad § 230 immunity recognized in controlling circuit precedent below. The sweep of § 230 immunity is thus squarely and cleanly presented.

14. Petitioners John Doe No. 1 and John Doe No. 2 respectfully request an extension of time to file a petition for certiorari. Following the Ninth Circuit's denial of rehearing en banc, petitioners engaged experienced Supreme Court counsel, who was not previously involved in the case and who is handling the matter on a pro bono basis. A 57-day extension would allow counsel sufficient time to fully examine the decision's consequences, research and analyze the issues presented, and prepare the petition for filing. Additionally, newly retained counsel has several other pending legal matters and professional obligations at S.J. Quinney College of Law at the University of Utah that will interfere with his ability to thoroughly prepare and file the petition by September 7, 2023.

Wherefore, petitioners respectfully request that an order be entered extending their time to file a petition for a writ of certiorari to Friday, November 3, 2023.

August 3, 2023

Respectfully submitted,

Paul G. Cassell
Counsel of Record

UTAH APPELLATE PROJECT
S.J. Quinney College of Law
at the University of Utah College of Law*
383 South University Street
Salt Lake City, Utah 84112
(801) 585-5202
pgcassell.law@gmail.com

Peter A. Gentala
Benjamin W. Bull
Danielle Bianculli Pinter
Christen M. Price
NATIONAL CENTER ON SEXUAL EXPLOITATION
1201 F. St., NW, Suite 200 Washington, DC 20004

Lisa D. Haba
Adam A. Haba
Maria E. Bryant
THE HABA LAW FIRM, P.A.
1220 Commerce Park Dr., Suite 207
Longwood, FL 32779

Paul A. Matiasic
THE MATIASIC FIRM, P.C.
4 Embarcadero Center, Suite 1400
San Francisco, CA 94111

Counsel for Petitioners

* Institutional information provided only for identification purposes; does not imply institutional endorsement by the University of Utah.

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APPENDIX B — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED JUNE 9, 2023 . . . . . . 7a

NOT FOR PUBLICATION

FILED

MAY 3 2023

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN DOE #1; JOHN DOE #2, Plaintiffs-Appellees, v. TWITTER, INC., Defendant-Appellant.	Nos. 22-15103 D.C. No. 3:21-cv-00485-JCS MEMORANDUM[*]
JOHN DOE #1; JOHN DOE #2, Plaintiffs-Appellants, v. TWITTER, INC., Defendant-Appellee.	No. 22-15104 D.C. No. 3:21-cv-00485-JCS

Appeal from the United States District Court
for the Northern District of California
Joseph C. Spero, Magistrate Judge, Presiding

Argued and Submitted April 20, 2023
San Francisco, California

[*] This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Before: VANDYKE and SANCHEZ, Circuit Judges, and S. MURPHY,** District Judge.

On interlocutory cross-appeals, Plaintiffs John Doe #1 and John Doe #2 and Defendant Twitter, Inc. challenge the district court's order granting in part and denying in part Twitter's motion to dismiss the Plaintiffs' complaint. Specifically, Plaintiffs challenge the district court's dismissal of Counts 1 and 4 of their complaint. Count 1 asserts that Twitter is liable under the Trafficking Victims Protection Act (TVPRA), 18 U.S.C. §§ 1591(a)(1), 1595(a), for directly violating the TVPRA's prohibition on sex trafficking by providing, obtaining, or maintaining child sexual abuse material (CSAM) depicting them on its platform. Count 4 asserts that Twitter is liable for possessing, receiving, maintaining, and distributing child pornography depicting them in violation of 18 U.S.C. §§ 2252A, 2255. Defendant challenges the denial of its motion to dismiss Count 2 of the complaint. Count 2 asserts that Twitter is liable under the TVPRA, 18 U.S.C. §§ 1591(a)(2), 1595(a), for benefitting from third-party trafficking activities that its platform allegedly facilitated. We have jurisdiction under 28 U.S.C. § 1292(b), and we affirm the dismissal of Counts 1 and 4 and reverse the district court's denial of dismissal of Count 2. We assume familiarity with the underlying facts and arguments in these

** The Honorable Stephen Joseph Murphy, III, United States District Judge for the Eastern District of Michigan, sitting by designation.

cross-appeals.

"We review de novo both a district court order dismissing a plaintiff's claims pursuant to Federal Rule of Civil Procedure 12(b)(6) and questions of statutory interpretation." *Dyroff v. Ultimate Software Grp., Inc.*, 934 F.3d 1093, 1096 (9th Cir. 2019). Only a complaint that states a plausible claim for relief may survive a motion to dismiss. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Section 230 of the Communications Decency Act states 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). Our court has held that section 230 "provides broad immunity" for claims against interactive computer service providers "for publishing content provided primarily by third parties." *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1123 (9th Cir. 2003). And "any activity that can be boiled down to deciding whether to exclude material that third parties seek to post online is perforce immune under section 230." *Fair Housing Council of San Fernando Valley v. Roommates.Com, LLC*, 521 F.3d 1157, 1170–71 (9th Cir. 2008).

The district court granted Twitter's motion for certification of an interlocutory appeal as to Count 2. Specifically, Twitter sought certification of the following two questions:

(1) whether the immunity carve-out in Section 230(e)(5)(A) requires that a plaintiff plead a violation of Section 1591; and

> (2) whether "participation in a venture" under Section 1591(a)(2) requires that a defendant have a "continuous business relationship" with the traffickers in the form of business dealings or a monetary relationship.

With respect to Count 2, the legal standard applicable to that issue has now been decided by *Jane Does 1–6 v. Reddit, Inc.*, 51 F.4th 1137 (9th Cir. 2022), *petition for cert. filed*, --- U.S.L.W. --- (U.S. Jan. 25, 2023) (No. 22-695). *Reddit* answered the first certified question in the affirmative: "[F]or a plaintiff to invoke FOSTA's immunity exception, she must plausibly allege that the website's own conduct violated section 1591." 51 F.4th at 1141. *Reddit* answered the second question in the negative: "In a sex trafficking beneficiary suit *against a defendant-website*, the most important component is the *defendant website's* own conduct—its 'participation in the venture.'" *Id.* at 1142. "A complaint against a website that merely alleges trafficking by the website's users—without the participation of the website—would not survive." *Id.* The term "'[p]articipation in a venture,' in turn, is defined as 'knowingly assisting, supporting, or facilitating' sex trafficking activities. [18 U.S.C.] § 1591(e)(4). Accordingly, establishing criminal liability requires that a defendant knowingly benefit from knowingly participating in child sex trafficking." *Id.* at 1145. *Reddit* therefore requires a more active degree of "participation in the venture" than a "continuous business relationship" between a platform and its users. Because these questions certified for interlocutory appeal

are controlled by *Reddit*, the district court's contrary holding is reversed.

Regarding Count 1, the district court correctly ruled that Plaintiffs failed to state a claim for direct sex trafficking liability under the TVPRA, 18 U.S.C. §§ 1591(a)(1) and 1595(a). Section 1591(a)(1) creates a direct liability claim for "[w]hoever knowingly … recruits, entices, harbors, transports, provides, obtains, advertises, maintains, patronizes, or solicits by any means *a person*." 18 U.S.C. § 1591(a)(1) (emphasis added).[1] Because Plaintiffs nowhere allege in their complaint that Twitter "provided," "obtained," or "maintained" *a person*, the district court correctly concluded that Twitter's alleged conduct relates only to CSAM depicting Plaintiffs, not to their persons (as required to implicate a direct violation of the TVPRA).

Finally, as to Count 4, the district court correctly ruled that section 230 precluded Plaintiffs from stating a viable claim for possession and distribution of child pornography under 18 U.S.C. §§ 2252A and 2255. Because the complaint targets "activity that can be boiled down to deciding whether to exclude material that third parties seek to post online," such activity "is perforce immune under section 230." *Roommates.Com*, 521 F.3d at 1170–71. And although section 230(e)(1)

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[1] Plaintiffs expressly disclaimed before the district court that Twitter "advertised" them (or CSAM content depicting them) in violation of section 1591(a)(1), so they are estopped from alleging to the contrary on appeal. *See United States v. Ibrahim*, 522 F.3d 1003, 1009 (9th Cir. 2008).

exempts from immunity the enforcement of criminal laws under Chapter 110 of Title 18 (which contains sections 2252A and 2255), our court has "consistently held that § 230(e)(1)'s limitation on § 230 immunity extends only to criminal prosecutions, and not to civil actions based on criminal statutes." *Gonzalez v. Google, LLC*, 2 F.4th 871, 890 (9th Cir. 2021), *cert. granted*, 143 S. Ct. 80–81 (Mem) (U.S. Oct 3, 2022) (Nos. 21-1333, 21-1496).[2]

Accordingly, the district court's order is **AFFIRMED** as to Counts 1 and 4, but because the holding of the district court regarding Count 2 is contrary to our court's *Reddit* decision, the order is **REVERSED** with respect to Count 2 and **REMANDED** for further proceedings to be conducted in a manner consistent with this court's *Reddit* decision.

[2] We recognize that a petition for certiorari in *Reddit* is pending, and that the Supreme Court also has before it two related cases, the disposition of which could affect our court's *Reddit* precedent. *See Gonzalez v. Google LLC*, No. 21-1333 (argued Feb. 21, 2023), and *Twitter, Inc. v. Taamneh*, No. 21-1496 (argued Feb. 22, 2023). To the extent developments in any of those cases might affect our court's holding in *Reddit*, the district court is well-equipped to address such arguments in the first instance.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

JUN 9 2023

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

JOHN DOE #1; JOHN DOE #2, Plaintiffs-Appellees, v. TWITTER, INC., Defendant-Appellant.	Nos. 22-15103 D.C. No. 3:21-cv-00485-JCS Northern District of California, San Francisco ORDER
JOHN DOE #1; JOHN DOE #2, Plaintiffs-Appellants, v. TWITTER, INC., Defendant-Appellee.	No. 22-15104 D.C. No. 3:21-cv-00485-JCS Northern District of California, San Francisco

Before: VANDYKE and SANCHEZ, Circuit Judges, and S. MURPHY, III,* District Judge.

Judges VanDyke and Sanchez have voted to deny rehearing en banc, and Judge Murphy has recommended to deny the same. The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether

* The Honorable Stephen Joseph Murphy III, United States District Judge for the Eastern District of Michigan, sitting by designation.

to rehear the matter en banc. Fed. R. App. P. 35. The panel judges have voted to deny the petition for panel rehearing.

Accordingly, Plaintiffs' petition for panel rehearing and rehearing en banc, filed May 17, 2023 (Docket Entry No. 80 in Case No. 22-15103 and Docket Entry No. 78 in Case No. 22-15104), is DENIED.