No. 22-695

IN THE
Supreme Court of the United States

JANE DOES NO. 1-6 *et al.*,

Petitioners,

v.

REDDIT, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF IN OPPOSITION

Theane Evangelis
Counsel of Record
Bradley J. Hamburger
Matt Aidan Getz
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, CA 90071
(213) 229-7726
tevangelis@gibsondunn.com

Kristin A. Linsley
Emily Riff
GIBSON, DUNN & CRUTCHER LLP
555 Mission Street, Suite 3000
San Francisco, CA 94105

Counsel for Respondent

QUESTION PRESENTED

The Allow States and Victims to Fight Online Sex Trafficking Act (FOSTA) exempts from section 230 of the Communications Decency Act "any claim in a civil action brought under section 1595 of title 18, if the conduct underlying the claim constitutes a violation of section 1591 of that title." 47 U.S.C. § 230(e)(5)(A). The Ninth Circuit, the only court of appeals to date to address the scope of this exception, held that the "conduct underlying" the civil sex-trafficking claim is that of the civil defendant—i.e., the interactive computer service asserting section 230's protections. The question presented is:

Whether FOSTA's exception for certain civil sex-trafficking claims, 47 U.S.C. § 230(e)(5)(A), requires the plaintiff to plead and prove that the defendant's conduct amounted to a criminal sex-trafficking violation under 18 U.S.C. § 1591.

RULE 29.6 STATEMENT

Reddit, Inc. has no parent corporation, and no publicly traded corporation owns 10% or more of its stock.

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BRIEF IN OPPOSITION

Respondent Reddit, Inc. respectfully submits this brief in opposition to the petition for a writ of certiorari.

STATEMENT

The Court should deny the petition because the decision of the Ninth Circuit, the first and only court of appeals to address the question presented, does not conflict with any decision of this Court or any other circuit. This case is also a poor vehicle to resolve the question presented because petitioners have not alleged sex trafficking as required by the statute they invoke. And because petitioners waived any argument that their claims do not fall within the general scope of section 230 of the Communications Decency Act, any decision in *Gonzalez v. Google LLC* (No. 21-1333) addressing the scope of section 230 will have no impact here.

In 2018, Congress enacted the Allow States and Victims to Fight Online Sex Trafficking Act. FOSTA was the product of extensive debate and revision, and as enacted it represents a balance between two distinct interests: protecting minors from sex trafficking and preserving the core protections of section 230. FOSTA's text reflects that balance, exempting from section 230 "any claim in a civil action brought under section 1595 of title 18," but only "if the conduct underlying the claim constitutes a violation of section 1591 of that title"—i.e., of the federal criminal sex-trafficking provision. 47 U.S.C. § 230(e)(5)(A). In other words, a plaintiff may bring a civil sex-trafficking claim against an interactive computer service otherwise protected under section 230, but only if the

plaintiff can plead and prove that the defendant committed a criminal sex-trafficking violation—including by acting with knowledge that the victim would be trafficked. *See* 18 U.S.C. § 1591(a).

Under petitioners' view, FOSTA should be read to exempt civil sex-trafficking claims even where plaintiffs can plead and prove only that the defendant "should have known" that the victims would be trafficked, 18 U.S.C. § 1595(a), so long as third-party traffickers (rather than the civil defendant) acted with the criminal *mens rea* that section 1591 requires. That theory would exempt all civil sex-trafficking claims from section 230, even if the defendant's conduct did not "constitute[] a violation of section 1591." 47 U.S.C. § 230(e)(5)(A).

In the decision below, the Ninth Circuit correctly rejected that theory, holding that a plaintiff invoking FOSTA's exception to section 230 must plead and prove that the defendant knowingly facilitated sex trafficking in violation of section 1591. Pet. App. 4a-5a, 9a. As the court of appeals explained, that interpretation is compelled by the statutory text, which requires that the conduct "underlying" the civil "claim" against the defendant constitute a violation of section 1591; by the broader statutory context, given Congress's use of identical language in neighboring exceptions permitting state criminal prosecutions; and by the statute's enactment history, given Congress's express rejection of language that would have exempted all civil sex-trafficking claims from section 230's reach. *Id.* at 9a-16a.

There is no reason to grant review of that decision. The decision below is the first and only time any court of appeals has addressed the question. And the Ninth Circuit's interpretation comports with that of the

overwhelming majority of federal district courts that have addressed the question. Given the lack of any conflict and the trajectory of recent decisions, there is no need for this Court's review.

Aside from the lack of any conflict, the facts alleged in this case present a poor vehicle for this Court to consider FOSTA's exception for certain sex-trafficking claims. The claims here arise out of third parties' alleged production and distribution of sexually explicit images. That conduct is reprehensible, and it is prohibited by many other statutory schemes—including ones that Congress considered exempting, but ultimately decided not to exempt, from section 230's reach. But it is not sex trafficking under any plausible reading of 18 U.S.C. § 1591, which means petitioners cannot even invoke the exception they are asking the Court to construe.

Finally, there is no basis to hold the petition to await any decision in *Gonzalez*. The question presented in that case is whether section 230's protections apply when interactive computer services "make targeted recommendations of information." Petition for a Writ of Certiorari at i, *Gonzalez*, 143 S. Ct. 80 (2022) (No. 21-1333), 2022 WL 1050223. Here, although petitioners argued before the district court that their claims did not fall within the general scope of section 230 (an argument the court rejected), they voluntarily abandoned that argument before the Ninth Circuit. The Ninth Circuit recognized as much, observing that "[b]oth parties agree that section 230 immunity applies" to petitioners' claims. Pet. App. 8a. This Court generally does not review issues that parties have waived, and petitioners identify no sound reason to depart from that principle here. Moreover, petitioners do not allege that they were harmed by the

sort of "targeted recommendations" at issue in *Gonzalez*; instead, they challenge only the sort of traditional publishing activities, like screening or reviewing third-party content, that even the petitioners in *Gonzalez* agree are covered by section 230.

I. STATUTORY BACKGROUND

1. In the mid-2010s, Congress began investigating websites that were "knowingly facilitat[ing] sex trafficking." 164 Cong. Rec. S1851 (daily ed. Mar. 21, 2018) (statement of Sen. Blumenthal); *id.* at S1854 (statement of Sen. McCaskill). By far the "worst offender" was Backpage.com, which was deemed "a 'hub' of human trafficking." *Id.* at S1860 (statement of Sen. Durbin). Thousands of minors were being trafficked for sex on Backpage, and the site was actively taking part in that trafficking, including by deliberately editing ads it knew were advertising children for sex so that the ads would not be flagged by the site's filtering system. *Id.* at S1854 (statement of Sen. Portman).

Courts soon confronted the question whether a website in Backpage's position could assert the protections of section 230 of the Communications Decency Act, which states that no provider of an interactive computer service "shall be treated as the publisher or speaker" of information that third parties create or post. 47 U.S.C. § 230(c)(1). Under the case law of many courts of appeals at the time, because Backpage was affirmatively contributing to the illegal activity, it should not have been able to invoke section 230. *See, e.g.*, *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1167-72 (9th Cir. 2008) (en banc). But other courts held that section 230 did protect Backpage, despite the site's knowing facilitation of sex trafficking. *See, e.g.*, *Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12, 21-23 (1st

Cir. 2016); *M.A. ex rel. P.K. v. Vill. Voice Media Holdings, LLC*, 809 F. Supp. 2d 1041, 1051-53 (E.D. Mo. 2011). And although section 230 has never given websites like Backpage protection from federal criminal prosecution, *see* 47 U.S.C. § 230(e)(1) (2017), there was no comparable provision expressly allowing *states* to prosecute websites for criminal activity. *See* 164 Cong. Rec. at S1851 (statement of Sen. Blumenthal).

2. In 2017, a bill was introduced in the House to address these issues. In its original form, the bill would have amended section 230 to state that "[n]othing in th[e] section shall be construed to impair the enforcement or limit the application of . . . section 1595 of title 18" (which provides a civil remedy for victims of sex trafficking) or "any other Federal or State law" that creates remedies for victims of "sexual exploitation of children" or "sex trafficking of children." H.R. 1865, 115th Cong. § 3 (Apr. 3, 2017). The bill also would have clarified that section 230 did not prevent the enforcement of "any State criminal statute" prohibiting the "sexual exploitation of children" or "sex trafficking of children." *Id.*

A similar bill was introduced in the Senate. That bill would have amended section 230 by providing that "[n]othing in th[e] section shall be construed to impair the enforcement or limit the application of section 1595 of title 18." S. 1693, 115th Cong. § 3 (Aug. 1, 2017). Although the Senate bill lacked a provision akin to the House bill's proposed exception for all claims involving the "sexual exploitation of children," the Senate bill likewise would have clarified that section 230 does not prevent enforcement of state criminal laws prohibiting "sex trafficking of children." *Id.*

The exceptions in those bills for all civil sex-trafficking claims encountered fierce opposition.

Section 1595 allows sex-trafficking victims to seek damages from two types of defendants. Victims can sue "the perpetrator," 15 U.S.C. § 1595(a), meaning the person who "knowingly" trafficked the victim in violation of federal criminal law, *id.* § 1591(a). Victims can also sue anyone who knowingly benefited "from participation in a venture which that person knew *or should have known*" violated the criminal provision. *Id.* § 1595(a) (emphasis added). Section 1595's "negligence standard" allows suit against civil defendants who have "a less culpable mental state than actual knowledge or recklessness." *Ratha v. Phatthana Seafood Co.*, 35 F.4th 1159, 1177 (9th Cir. 2022) (cleaned up).

Because the exceptions in the draft bills were "unbounded by any actual knowledge" requirement, organizations and commentators objected that allowing negligence-based suits against interactive computer services would "bring a deluge of frivolous litigation targeting legitimate, law-abiding intermediaries." *The Stop Enabling Sex Traffickers Act of 2017: Hearing on S. 1693 Before the S. Comm. on Com., Sci. & Transp.*, 115th Cong. 35 (2017) (statement of Abigail Slater, General Counsel, Internet Association). To resolve that problem, the objectors proposed "targeted legislative changes" limiting the exception to claims against "bad actor[]" websites that "knowingly facilitate sex trafficking." *Id.* at 30-31. Amending the legislation to require "a clear sense of knowing" on the part of website defendants, the objectors explained, would allow victims to seek relief from the worst, most culpable perpetrators, but without derailing the protection section 230 provides or imposing dramatic liability on websites "trying to grow and innovate based on that protection." *Id.* at 53 (statement of Xavier Becerra, Attorney General of Cal.).

3. Following those objections, the Senate rewrote the bill, striking a balance between allowing civil claims against "nefarious actor[]" websites like Backpage that "knowingly facilitat[e] sex trafficking" in violation of federal trafficking laws and preserving the protections of section 230, an "essential underpinning of the modern internet." S. Rep. No. 115-199, at 2 (2018). As rewritten, the bill provided that section 230 would not apply to "any claim in a civil action brought under section 1595 of title 18, . . . if the conduct underlying the claim constitutes a violation of section 1591 of that title." S. 1693, 115th Cong. § 3 (Jan. 10, 2018). The revised bill similarly narrowed the provision addressing state criminal prosecutions, requiring "the conduct underlying the charge" to "constitute[] a violation of section 1591." *Id.*

Representative Wagner, the sponsor of the original House bill, objected that "[t]he Senate version of the federal civil carve-out has been narrowed and is now based on the 'knowingly' *mens rea* standard." *The Latest Developments in Combating Online Sex Trafficking: Hearing Before the Subcomm. on Commc'ns & Tech. of the H. Comm. on Energy & Com.*, 115th Cong. 12 n.7 (2017) [hereinafter *Latest Developments*].[1]

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[1] Petitioners assert that these statements were made "before the language in Section 230(e)(5)(A) was proposed." Pet. 26. That is incorrect. Weeks before the November 30, 2017 hearing, the Senate Committee on Commerce, Science, and Transportation approved a revised bill that contained the amendment limiting the exception to claims for which "the conduct underlying the claim constitutes a violation of section 1591." *Latest Developments* 51. In her remarks, Representative Wagner expressly referred to "the Senate's recent action," which in her view remained "a step in the right direction" but made the bill too "narrow" by increasing the "mens rea standard" that plaintiffs would have to satisfy. *Id.* at 7-8.

Other supporters of the original draft bills voiced similar concerns. *See id.* at 72-73 (statement of Rep. Walters) (asking legal experts how plaintiffs would prove knowledge on behalf of websites). But many lauded the change, including the National Center for Missing and Exploited Children, which called it an appropriate "compromise" between protecting "the rights of child victims" and ensuring "a healthy and robust internet." *Id.* at 28 (statement of Yiota G. Souras, Senior Vice President & General Counsel, NCMEC).

The amended text carried the day. As enacted, FOSTA exempts from section 230 "any claim in a civil action brought under section 1595 of title 18," but only "if the conduct underlying the claim constitutes a violation of section 1591 of that title." 47 U.S.C. § 230(e)(5)(A). FOSTA likewise permits state criminal prosecutions only "if the conduct underlying the charge would constitute a violation of" section 1591, the federal criminal sex-trafficking law, or 18 U.S.C. § 2421A, which prohibits the promotion or facilitation of prostitution. 47 U.S.C. § 230(e)(5)(B)-(C). As Representative Wagner put it after the final bill passed both houses of Congress, FOSTA represents a "middle ground" between dueling interests, allowing civil sex-trafficking suits against interactive computer services that violate section 1591 by "knowingly facilitating the sale of trafficking victims." 164 Cong. Rec. H1278, H1303 (daily ed. Feb. 27, 2018).

II. PROCEDURAL HISTORY

1. Reddit is an online community of communities called "subreddits." Pet. App. 66a. Each subreddit is devoted to the shared interests of its members and provides a virtual space where users post messages, pictures, and links related to those interests. *Id.* at 66a-69a. Subreddits cover a wide array of topics,

including politics, social issues, and arts and entertainment. *See id.* at 66a-67a, 79a.

Volunteer moderators, typically the users who create the subreddits, establish and enforce the rules of each community, determining "what types of content are allowed." Pet. App. 69a. Reddit has a content policy that applies to every user and community, and Reddit administrators enforce the policy by, as appropriate, removing violative content, stripping moderators of their privileges, and banning subreddits or content from the site. *Id.* at 69a-70a. Reddit also uses automated software to flag content that violates its policies. *Id.* at 70a.

Reddit works hard "to locate and prevent the sharing of child pornography and other illegal material" on its platform. Pet. App. 81a. Its content policy prohibits the sharing of any child sexual exploitation materials. *See id.* at 73a. Reddit gives all users the ability to flag posts or comments as "sexual or suggestive content involving minors" and employs "'dedicated teams'" that remove such content, ban the users who share it, and "'create engineering solutions to detect and prevent'" similar misbehavior in the future. *Id.* at 81a-82a. Reddit also regularly removes images that violate its policies and shuts down subreddits where users are posting such material. *See id.* at 72a-73a.

2. Petitioners sued Reddit after third parties violated Reddit's rules and posted sexually explicit images of minors to the platform. Although Reddit frequently removed the images and banned the Reddit accounts that posted them, petitioners alleged that the images were often re-posted and that the banned users soon created new accounts. Pet. App. 107a-08a, 110a-11a, 114a, 116a-17a. Petitioners argued that

Reddit should do more to prevent users from posting such images—for instance, by instituting a "robust way of verifying user age" or improving its "response times and effectiveness" when unlawful material is reported. *Id.* at 71a, 94a. Petitioners claimed Reddit was liable under 18 U.S.C. § 1595, alleging that Reddit "knew or should have known" about sexually explicit images of minors on its platform and that it "knowingly benefit[ed]" from those images because it derives advertising revenue from all posts on its platform. *Id.* at 137a.

Reddit moved to dismiss. It explained that because petitioners' claim sought to hold it liable as the publisher or speaker of content—namely, the explicit images of minors—that third parties created and posted to the platform, the claim was barred by section 230. C.A. ECF 23 at 17-22. Reddit also explained that FOSTA's exception to section 230 for certain civil sex-trafficking claims did not apply: That exception covers "any claim in a civil action" brought under 18 U.S.C. § 1595 only if "the conduct underlying the claim constitutes a violation of" 18 U.S.C. § 1591, and petitioners did not plausibly allege that Reddit had committed a criminal sex-trafficking violation of that kind. C.A. ECF 23 at 23-30 (quoting 47 U.S.C. § 230(e)(5)(A)). Reddit further argued that the posting of sexually explicit images of minors described in petitioners' complaint, though unlawful under other statutory provisions, was not sex trafficking as defined in section 1591 and incorporated into section 1595. *Id.* at 23-25.

3. The district court dismissed the complaint. It held (in a ruling petitioners would not challenge on appeal) that petitioners' claim fell within section 230 because it sought to treat Reddit as the publisher or

speaker of third-party content. Pet. App. 27a-34a. In so holding, the court rejected petitioners' arguments that Reddit should instead be treated as the creator of the unlawful content (because, for instance, Reddit's platform relies on supposedly "poorly trained" moderators or gives users a "pseudonymous, private messaging system" that could be used to "eva[de] . . . law enforcement"). *Id.* at 29a-33a.

The district court also held that petitioners could not invoke FOSTA's exception (the issue petitioners would later press on appeal). Pet. App. 35a-39a. Joining a growing majority of federal trial judges across the country, the district court concluded that the "most persuasive reading" of FOSTA's statutory text "is that it provides an exemption from immunity for a section 1595 claim if, but only if, the defendant's conduct amounts to a violation of section 1591." *Id.* at 36a (quoting *J.B. v. G6 Hosp., LLC*, 2021 WL 4079207, at *12 (N.D. Cal. Sept. 8, 2021)).

The district court found support for that reading in the "plain text" of the statute, which indicates that the conduct "underlying the claim" can mean only the conduct at issue "in the civil action brought under section 1595"—i.e., the civil defendant's conduct. Pet. App. 36a. It also explained that petitioners' broader reading, under which the exception would apply to *all* civil sex-trafficking claims under section 1595, could not be reconciled with Congress's rejection of proposed language with that broader scope in favor of narrower language. *Id.* (citing *J.B.*, 2021 WL 4079207, at *7-11). And the court rejected petitioners' invitation to read the statute a different way in light of FOSTA's "remedial nature," explaining that the statute reflected a balance between competing interests and that in any event a perceived remedial purpose cannot

"overcome the plain language of the statute." *Id.* at 36a-37a.

Because petitioners had not plausibly alleged that Reddit's conduct amounted to criminal sex trafficking, the district court dismissed the complaint. Pet. App. 37a-39a. The court reserved the question whether the posting of sexually explicit images, without more, "is a form of sex trafficking as contemplated by [18 U.S.C.] § 1591(a)(1)." *Id.* at 39a n.7.

4. Petitioners appealed to the Ninth Circuit. They abandoned their argument that their claim did not treat Reddit "as a publisher of third-party content," such that section 230 did not apply in the first instance. *See* C.A. ECF 23 at 68 (citing *Gonzalez v. Google, Inc.*, 2 F.4th 871, 897-99 (9th Cir. 2021)); *see also* Pet. App. 8a ("Both parties agree that section 230 immunity applies to the claims against Reddit."). Petitioners instead challenged only the district court's interpretation of FOSTA. *See* Pet. App. 4a-5a.

The Ninth Circuit affirmed, holding "that for a plaintiff to invoke FOSTA's immunity exception, she must plausibly allege that the website's own conduct violated section 1591." Pet. App. 9a. The court of appeals grounded that conclusion in the statute's text, structure, and history.

As to text, the Ninth Circuit explained that the words " 'the claim,' as used in 'the conduct underlying the claim,' " can refer only to "the 'claim in a civil action brought under section 1595' " mentioned earlier in the same sentence. Pet. App. 10a n.1 (quoting 47 U.S.C. § 230(e)(5)(A)). The conduct "underlying" the civil sex-trafficking claim, the court continued, must be "the *defendant-website's* own conduct," because the conduct that "underlies" a civil lawsuit is what the

plaintiff must prove to win relief from the defendant. *Id.* at 10a-11a. As the court put it, a section 1595 complaint that alleged only misconduct by third-party users, and not conduct of the defendant website, "would not survive." *Id.* at 11a. In support, the Ninth Circuit cited *OBB Personenverkehr AG v. Sachs*, 577 U.S. 27 (2015), which held that the conduct a claim is "based upon" is that which, "'if proven, would entitle a plaintiff to relief.'" *Id.* at 33-34. *Sachs* is instructive here, the Ninth Circuit explained, because the statutory uses of "'underlying' and 'based upon' are analogous," in that both describe what is "most important to proving the claim." Pet. App. 11a.

As to structure, the court of appeals highlighted the second and third exceptions to section 230 that Congress enacted alongside the exception at issue here. Pet. App. 12a. Those exceptions allow states to prosecute interactive computer services "if the conduct underlying the charge would constitute a violation of" federal criminal laws prohibiting sex trafficking and the promotion or facilitation of prostitution. 47 U.S.C. § 230(e)(5)(B)-(C). The Ninth Circuit explained that, given the well-established presumption that criminal statutes do not "'dispense with a conventional mens rea element'" requiring a criminal defendant to "'know the facts that make his conduct illegal,'" "there is good reason to think that 'the conduct underlying the charge'" in those neighboring exceptions can "refer[] only to the defendant's own conduct." Pet. App. 12a-13a. Because the three exceptions "are adjacent and were enacted simultaneously," the court reasoned, the phrase "conduct underlying" in the exception at issue here should "'be given th[at] same meaning.'" *Id.*

As to history, the Ninth Circuit explained that FOSTA's path to enactment "decidedly supports Reddit's interpretation." Pet. App. 13a. The original proposed legislation would have created an exception covering *all* civil sex-trafficking claims under section 1595, but that proposal drew objections precisely because it would not require plaintiffs to prove that the interactive computer service had knowingly facilitated sex trafficking. *Id.* at 15a. By rejecting the original proposed text and adding limiting language, Congress left no room for doubt: "FOSTA requires that a defendant-website violate the criminal statute." *Id.* at 15a-16a. On this point, Judge Nelson concurred in part, agreeing with the majority that the "proposed amendments to FOSTA that were eventually enacted support[] the panel's holding that FOSTA's language is unambiguous" but departing from the majority insofar as it had also cited additional materials from the legislative record. *Id.* at 20a.

The Ninth Circuit agreed with the district court that petitioners had not plausibly alleged that Reddit's conduct amounted to a criminal sex-trafficking violation under section 1591. Pet. App. 16a-19a. Like the district court, the court of appeals did not decide whether the conduct alleged in petitioners' complaint would constitute sex trafficking covered by section 1591.

5. Petitioners did not seek rehearing. They filed their petition for a writ of certiorari on January 23, 2023.

REASONS FOR DENYING THE PETITION

There is no split among the courts of appeals on the question presented. In the few years since FOSTA's enactment, only the Ninth Circuit has

addressed its exception for certain civil sex-trafficking claims. The "conflict" petitioners try to conjure among district courts (Pet. 26-28) is illusory or, at best, lopsided. And there is no other compelling reason for review—the question is not cleanly presented because petitioners' case does not involve allegations of sex trafficking, and the decision below was correct. Finally, there is no reason to hold the petition for *Gonzalez* because petitioners abandoned their argument that section 230 did not apply in the first instance, Pet. App. 8a-9a, and their complaint does not allege targeted recommendations of information.

I. THERE IS NO CONFLICT.

1. FOSTA became law in April 2018. Allow States and Victims to Fight Online Sex Trafficking Act, Pub. L. No. 115-164, 132 Stat. 1253 (2018). The earliest decision addressing the scope of FOSTA's exception for certain civil sex-trafficking claims did not come until August 2020. *Doe v. Kik Interactive, Inc.*, 482 F. Supp. 3d 1242, 1249-51 (S.D. Fla. 2020) (holding that the "plain language and structure of FOSTA" requires plaintiffs to plead and prove that the defendant website violated section 1591). And since then, among the courts of appeals, only the Ninth Circuit—in the decision below—has addressed it. Pet. App. 9a.

Petitioners do not cite any contrary decision of any court of appeals. Instead, they try to manufacture a "conflict" among district courts. Pet. 26-28. This Court does not grant review to resolve conflicts among district courts, *see* Sup. Ct. R. 10(a), and in any event, petitioners substantially overstate the supposed conflict.

2. A "conspicuous majority" of district courts to consider the question have held that FOSTA's

exception requires plaintiffs to plead and prove that the defendant committed a criminal sex-trafficking violation under section 1591. *L.H. v. Marriott Int'l, Inc.*, 604 F. Supp. 3d 1346, 1366 (S.D. Fla. 2022); *see Kik*, 482 F. Supp. 3d at 1249-51; *M.L. v. craigslist Inc.*, 2020 WL 5494903, at *4 (W.D. Wash. Sept. 11, 2020); *J.B. v. G6 Hosp., LLC*, 2021 WL 4079207, at *4-12 (N.D. Cal. Sept. 8, 2021), *appeal docketed*, No. 22-15290 (9th Cir. Feb. 28, 2022); Pet. App. 35a-37a (decision below); *M.H. v. Omegle.com, LLC*, 2022 WL 93575, at *3 (M.D. Fla. Jan. 10, 2022), *appeal docketed*, No. 22-10338 (11th Cir. Jan. 31, 2022); *G.G. v. Salesforce.com, Inc.*, 603 F. Supp. 3d 626, 639-43 (N.D. Ill. 2022), *appeal docketed*, No. 22-2621 (7th Cir. Sept. 15, 2022); *A.M. v. Omegle.com, LLC*, — F. Supp. 3d —, 2022 WL 2713721, at *6-7 (D. Or. July 13, 2022).

Those decisions drew from extensive "statutory and contextual indicators" of Congress's intent, including "the plain language of the statutory provision" and the need to ensure "consistency between the subparagraphs of Section 230(e)(5)" that use the same "conduct underlying" language. *L.H.*, 604 F. Supp. 3d at 1366; *see, e.g.*, *Kik*, 482 F. Supp. 3d at 1249 (emphasizing the "plain language of the statute"); *J.B.*, 2021 WL 4079207, at *6 (basing interpretation on "the most straightforward reading" of "the language itself" and "'the specific context in which that language is used'"); *G.G.*, 603 F. Supp. 3d at 640 (endorsing that analysis); *A.M.*, 2022 WL 2713721, at *6 (same).

Petitioners characterize those decisions as having inappropriately turned on "statements from individual legislators." Pet. 27. That is incorrect. To the extent those courts considered the legislative record, they focused on the statute's enactment history, and

specifically "Congress's rejection of a more broadly worded exception." *L.H.*, 604 F. Supp. 3d at 1366; *see, e.g.*, *J.B.*, 2021 WL 4079207, at *8-12; *G.G.*, 603 F. Supp. 3d at 642. Moreover, that history, far from being the primary basis of their holdings, merely "confirm[ed]" the textual and contextual analysis those courts performed. *G.G.*, 603 F. Supp. 3d at 642; *see, e.g.*, *J.B.*, 2021 WL 4079207, at *12 (the legislative history is "consistent with the statutory language"); *Kik*, 482 F. Supp. 3d at 1250-51 (similar).

3. Only two district courts—both in the Ninth Circuit, in decisions issued before the decision below—have reached a different conclusion. Pet. 27. Neither decision remains good law following the Ninth Circuit's ruling below and, in any event, neither is a model of sound statutory interpretation.

In *Doe v. Twitter, Inc.*, 555 F. Supp. 3d 889 (N.D. Cal. 2021), *appeal docketed*, No. 22-15104 (9th Cir. Jan. 25, 2022), the district court began its analysis by stating that although the "language of the statute" is important, "purpose" should be at the forefront—including whether "a statute is 'remedial'" and so "'should be liberally construed.'" *Id.* at 920 (quoting *Peyton v. Rowe*, 391 U.S. 54, 65 (1968)). On that basis, the court declined to impose what it deemed a "higher burden" on sex-trafficking victims, reasoning that Congress did not state its intention to impose that burden "clearly" enough, and instead adopted an interpretation it considered more consistent with FOSTA's general "remedial purpose." *Id.* at 920-21. Other courts have rejected the *Twitter* court's analysis. *See, e.g.*, *A.M.*, 2022 WL 2713721, at *7 (criticizing *Twitter*'s mode of "statutory analysis"); *J.B.*, 2021 WL 4079207, at *6 (rejecting "remedial" analysis in favor of "plain language" and "broader context").

And in *Doe v. Mindgeek USA Inc.*, 558 F. Supp. 3d 828 (C.D. Cal. 2021), the court addressed a different question altogether: whether the definition of "participation in a venture" in section 1591's criminal provision, 18 U.S.C. § 1591(e)(4), should carry over to all civil claims under section 1595. *Doe*, 558 F. Supp. 3d at 836. True, in the typical section 1595 case, the statute's constructive-knowledge standard, and not section 1591's higher *mens rea*, will apply. *See, e.g.*, *Doe #1 v. Red Roof Inns, Inc.*, 21 F.4th 714, 725 (11th Cir. 2021) (holding, in a case not involving interactive computer services, that courts should not "transpose the definition of 'participation in a venture' from the criminal section to the civil cause of action"); *see also Kik*, 482 F. Supp. 23 at 1249 ("If Defendants were not interactive computer service providers, [that] argument might prevail."). But in the "limited circumstances" where "the defendant is an interactive computer service and the claims seek to treat the defendant as a publisher of third-party content," section 230's protections yield only if the defendant itself violated section 1591. *G.G.*, 603 F. Supp. 3d at 641.

Petitioners have not made good on their promise of a "clear and intractable conflict over methods of statutory interpretation." Pet. 26 (capitalization altered). If anything, petitioners have it backward: The decisions in this area that are "atextual" (*id.* at i, 15), are the two (now abrogated) district court decisions on which they rely.

Moreover, those decisions were only the third and fourth times any court addressed the scope of FOSTA's exception. Since then, six courts (including both courts below) have rejected their reasoning, and no court has endorsed it. So although this issue has barely begun to percolate, it may well be heading

toward consensus. This Court's resources would be poorly served by granting review now.

II. THIS CASE IS A POOR VEHICLE.

This is not the right case to decide the question presented anyway. Both sides agree that for FOSTA's exception to apply, *someone* has to violate section 1591, which prohibits trafficking "a person" with knowledge that the person "will be caused to engage in a commercial sex act." 18 U.S.C. § 1591(a). Because the minors here were not *trafficked* under any plausible reading of that language, petitioners could not invoke FOSTA's exception even if their reading of the statute were correct.

1. Many federal and state statutes prohibit the conduct petitioners challenge here—namely, the creation or sharing of sexually explicit images of minors. Congress has long prohibited sexual exploitation in the form of enticement or coercion of minors to engage in "sexually explicit conduct for the purpose of producing any visual depiction of such conduct." 18 U.S.C. § 2251(a); *see also, e.g.*, *id.* § 2260 (prohibiting inducement, enticement, or coercion of any minor to engage in "sexually explicit conduct for the purpose of producing any visual depiction of such conduct" with intent to import or transmit the depiction into the United States). Federal law likewise bars the distribution of "visual depiction[s]" depicting "a minor engaging in sexually explicit conduct." *Id.* § 2252(a). And Congress has enacted similar prohibitions involving "any child pornography." *Id.* § 2252A(a). Those criminal offenses also give rise to a civil remedy through a provision distinct from section 1595. *Id.* § 2255(a). In short, Congress has no trouble specifying when it wants its criminal or civil laws to reach the creation or distribution of sexually explicit images. The same

is true for the states (including those in which petitioners here reside), which have a wide array of laws that address forms of sexual exploitation related to explicit images of minors. *See, e.g.*, Cal. Penal Code §§ 311.1-.3; N.J. Stat. Ann. § 2C:24-4.

Contrary to petitioners' assertion (Pet. 16), section 1591 addresses a different crime: trafficking "a person," with knowledge "that the person . . . will be caused to engage in a commercial sex act." 18 U.S.C. § 1591(a). Unlike statutes governing visual depictions, explicit images, or pornography, section 1591 requires the victim to be forced into a "sex act," which necessarily involves some form of physical sexual contact. *See, e.g.*, *id.* § 2246(2) (defining "sexual act" as various forms of intimate contact); BLACK'S LAW DICTIONARY 1651-52 (11th ed. 2019) (defining "sex act" as synonymous with "sexual relations," a term that likewise requires intimate contact); BLACK'S LAW DICTIONARY 1379 (7th ed. 1999) (defining "sexual activity" in similar terms). That language is narrower than the language Congress has employed in other criminal laws, such as "sexually explicit conduct," which is a broad term comprising not just sex acts but also "graphic or simulated lascivious exhibition" of the genitals. 18 U.S.C. § 2256(2)(B). By its plain language, then, section 1591 does not reach all sexually explicit or exploitative images of minors, but rather actions taken with respect to minors who will be trafficked for sex.

To be sure, sexually explicit images can be used in service of sex trafficking. In some cases, for instance, traffickers have used websites to post sexually explicit photos of minors in order "to solicit commercial sex purchases." *M.L.*, 2020 WL 5494903, at *1; *see also, e.g.*, *M.A.*, 809 F. Supp. 2d at 1043-44. That conduct

falls within section 1591, but not because it involves sexually explicit images—it is sex trafficking because it involves the advertisement of "a person" knowing that "the person . . . will be caused to engage in a commercial sex act" in the future. 18 U.S.C. § 1591(a).

Even petitioners recognize this distinction. As they put it, explicit images may be the "cause of" sex trafficking, at least where traffickers "display[] pornographic photographs of [minors] as advertisements to sell [them] for sexual services." Pet. i, 18. But without more, sharing sexually explicit images of minors—no matter how despicable or unlawful under *other* statutes—is not "sex trafficking" under section 1591.

2. This case does not involve sex trafficking, as properly understood. Petitioners allege that unnamed Reddit users coerced or tricked them into taking sexually explicit images that the users later posted on Reddit's platform. *See, e.g.*, Pet. App. 106a-07a, 109a-10a, 115a-16a. Unlike in other cases where third parties used explicit images in service of trafficking minors for future sex acts, here petitioners allege only that the third parties shared and promoted *the images*—for instance, sharing the photos "to get more 'exposure,'" encouraging other users to trade their own videos, or re-posting the images on other subreddits or using new accounts. *Id.* at 107a, 112a-13a. Petitioners did not allege that any of the third parties misusing Reddit's platform to post or promote these images did so "knowing" that the minors here "w[ould] be caused to engage in a commercial sex act." 18 U.S.C. § 1591(a).

Below, petitioners argued that many of the minors were "enticed" into taking the sexually explicit images that third parties posted to the platform. C.A. ECF 11 at 43. There are statutes that criminalize

"entic[ing] . . . any minor . . . with the intent that such minor engage in . . . any sexually explicit conduct for the purpose of producing any visual depiction of such conduct." 18 U.S.C. § 2251(a). But Congress exempted from section 230 only civil sex-trafficking claims for which the conduct underlying the claim violates section 1591, *see* 47 U.S.C. § 230(e)(5)(A), and section 1591 criminalizes trafficking in "a person" with knowledge that the person "will be caused to engage in a commercial sex act." 18 U.S.C. § 1591(a). The minors here were victims of serious, inexcusable crimes—but not of sex trafficking.

Conflating sexually explicit images with sex trafficking in the way petitioners suggest would be especially inappropriate given FOSTA's enactment history. The initial House bill would have provided that section 230 did not affect "any . . . Federal or State law" that created remedies not just for "sex trafficking of children," but also for "sexual exploitation of children." H.R. 1865, 115th Cong. § 3 (Apr. 3, 2017). But Congress later removed the broader provision covering all laws related to sexual *exploitation*, leaving only the narrower provision addressing sex *trafficking*. 47 U.S.C. § 230(e)(5)(A). It did the same thing with the neighboring exceptions for state criminal prosecutions, which apply only where the conduct underlying the state charge constitutes a violation of federal laws criminalizing sex trafficking and offenses related to prosecution. *Id.* § 230(e)(5)(B)-(C).

If this Court is ever to decide the scope of FOSTA's exception for certain civil sex-trafficking claims, it should do so in a case involving allegations of actual sex trafficking.

III. THE DECISION BELOW IS CORRECT.

This case also does not warrant review because the decision below is correct. The Ninth Circuit's conclusion that FOSTA's exception requires plaintiffs to plead and prove that the defendant violated section 1591 follows directly from the statutory text, context, and history. Petitioners' strained reading, which would disregard that evidence in favor of a perceived remedial purpose, would defy the plain language of the statute and disrupt the delicate balance Congress struck.

1. FOSTA exempts from section 230 "any claim in a civil action brought under section 1595 of title 18, if the conduct underlying the claim constitutes a violation of section 1591." 47 U.S.C. § 230(e)(5)(A). As the Ninth Circuit explained (and as petitioners conceded below), Congress's use of "claim" twice in succession and of the definite article "the" before the second instance makes clear that the conduct that must violate section 1591's criminal prohibitions is the same conduct that underlies the civil section 1595 claim. Pet. App. 10a n.1.

The question, then, is whose conduct "underl[ies]" the civil section 1595 claim against a website: the website itself, or a third-party trafficker? The text provides the answer. "Underlying" means "to be the foundation, cause, or basis of." COLLINS ENGLISH DICTIONARY 2141 (2016 ed.); *accord, e.g.*, AMERICAN HERITAGE DICTIONARY 1888 (5th ed. 2016) ("[t]o be the support or basis of"); MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 1288 (10th ed. 1999) ("to be at the basis" or "form the foundation of"). And the only plausible "basis" or "foundation" of a civil claim against a website defendant is *the website's conduct*—i.e., the

conduct the plaintiff must plead and prove in order to recover from the website.

As the Ninth Circuit explained (Pet. App. 10a-11a), this Court's decision in *OBB Personenverkehr AG v. Sachs*, 577 U.S. 27 (2015), is instructive. At issue there was the Foreign Sovereign Immunities Act, which eliminates immunity for suits "*based upon* a commercial activity carried on in the United States by the foreign state." *Id.* at 29 (emphasis added) (quoting 28 U.S.C. § 1605(a)(2)). That language, the Court explained, requires courts to "look[] to the 'basis' or 'foundation' of a claim"—meaning that which, "'if proven, would entitle a plaintiff to relief.'" *Id.* at 33-34.

Because "underlying" means to be the "basis" or "foundation" of, that language in FOSTA's exception likewise requires courts to ask what the plaintiff must prove to obtain relief. And for a section 1595 claim like petitioners', the plaintiff must prove the defendant website "knowingly benefit[ed] . . . from participation in a venture which [it] knew or should have known ha[d] engaged in" sex trafficking. 18 U.S.C. § 1595(a). The separate conduct of third-party traffickers may be *relevant*, but it is not the "basis" or "foundation" of the plaintiff's section 1595 claim against the interactive computer service because if a plaintiff pleads and proves only that third-party conduct, she will not be "entitle[d] . . . to relief" from the service. *Sachs*, 577 U.S. at 33-34.

2. The narrow scope of FOSTA's exception for civil sex-trafficking claims is confirmed when the exception is viewed in light of "neighboring provision[s]," *Shular v. United States*, 140 S. Ct. 779, 785 (2020), addressing state criminal prosecutions.

FOSTA enacted three adjacent exceptions to section 230. The first, at issue here, exempts "any claim in a civil action brought under section 1595 . . . if the conduct underlying the claim constitutes a violation of section 1591." 47 U.S.C. § 230(e)(5)(A). The second and third exempt "any charge in a criminal prosecution brought under State law if the conduct underlying the charge would constitute a violation of" section 1591 or the federal law prohibiting the promotion or facilitation of prostitution. *Id.* § 230(e)(5)(B)-(C).

The only plausible way to read subsections (B) and (C) is as requiring proof that *the defendant*, and not some third party, violated criminal law. In interpreting criminal statutes, courts do not lightly assume "that Congress intended to dispense with a conventional *mens rea* element, which would require that the defendant know the facts that make his conduct illegal." *Staples v. United States*, 511 U.S. 600, 605 (1994). Properly understood, subsections (B) and (C) are consistent with that longstanding presumption because they require proof that the defendant being prosecuted in state court acted with the necessary criminal *mens rea*. Conversely, reading those subsections in the way petitioners urged the Ninth Circuit to read subsection (A) would defy the presumption because it would authorize criminal prosecutions where only *some third party*, and not the defendant, acted with criminal *mens rea*.

"[I]dentical words and phrases within the same statute should normally be given the same meaning"—a principle that is "doubly appropriate" where, as here, the language was added to the statute "at the same time." *Powerex Corp. v. Reliant Energy Servs., Inc.*, 551 U.S. 224, 232 (2007). So if "conduct underlying the charge" means the defendant's conduct in

subsections (B) and (C), "conduct underlying the claim" must mean the same thing in subsection (A).

Below, petitioners emphasized that although subsection (A) "refers to a 'claim,'" subsections (B) and (C) "refer to a 'charge.'" C.A. ECF 46 at 12-13. That distinction makes no difference. In the context of a civil action, a "claim" is "the means by which a person can obtain a privilege, possession, or enjoyment of a right or thing," making it synonymous with a "cause of action." BLACK'S LAW DICTIONARY 302 (10th ed. 2014). In the context of a criminal case, a "charge" is the "formal accusation of an offense," meaning the vehicle through which the government prosecutes the defendant for "[a] violation of the law." *Id.* at 282, 1250. Both terms refer to what the prosecuting party must prove to secure relief. The Ninth Circuit, like many courts before it, correctly rejected petitioners' argument and concluded that the surrounding exceptions "reinforc[e] [the] conclusion that section 230(e)(5)(A) removes section 230 immunity only when a website violates 18 U.S.C. § 1591." Pet. App. 12a-13a; *accord, e.g.*, *G.G.*, 603 F. Supp. 3d at 640-41; *L.H.*, 604 F. Supp. 3d at 1366; *J.B.*, 2021 WL 4079207, at *6.

3. FOSTA's enactment history further confirms what the text says. Petitioners argue that FOSTA exempts all civil sex-trafficking claims brought under section 1595. Congress considered language with precisely that scope—and rejected it in favor of an exception with a narrower scope. Compare the language Congress considered (on the left) to what it enacted (on the right):

NO EFFECT ON CIVIL LAW RELATING TO SEX TRAFFICKING.—Nothing in this section shall be construed to impair the enforcement or limit the application of section 1595 of title 18, United States Code. S. 1693, 115th Cong. § 3 (Aug. 1, 2017).	NO EFFECT ON SEX TRAFFICKING LAW Nothing in this section . . . shall be construed to impair or limit (A) any claim in a civil action brought under section 1595 of title 18, *if the conduct underlying the claim constitutes a violation of section 1591 of that title*. 47 U.S.C. § 230(e)(5)(A) (emphasis added).

By urging an interpretation under which *all* section 1595 claims would be exempt from section 230, petitioners would have the Court disregard the text Congress enacted in favor of "'language that it . . . earlier discarded.'" *INS v. Cardoza-Fonseca*, 480 U.S. 421, 442-43 (1987); *accord Russello v. United States*, 464 U.S. 16, 23 (1983).

Petitioners' only theory for why Congress added that limiting language is that it meant to distinguish between section 1595 claims predicated on sex trafficking and those based on other offenses covered in chapter 77 of title 18, such as slavery or peonage. Pet. 22-23. Nothing in the voluminous legislative record suggests Congress was concerned with that distinction. That is unsurprising: From the beginning, every bill Congress considered made clear that the civil exception would cover only sex-trafficking claims. S. 1693, 115th Cong. § 3 (Aug. 1, 2017) ("No effect on civil law relating to sex trafficking"); H.R. 1865, 115th Cong. § 3 (Apr. 3, 2017) ("No effect on civil law relating to sexual exploitation of children or sex trafficking.").

There was simply no possibility of the confusion that petitioners now say Congress was trying to avoid.

Petitioners also invoke the proverbial elephant in the mousehole, arguing that if Congress had intended FOSTA's exception to apply to "some, but not all," section 1595 claims, "it would have said so plainly." Pet. 21-22 (citing *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001)). Congress *did* say so plainly: It revised FOSTA's exception so that it reached section 1595 claims only "if the conduct underlying the claim constitutes a violation of section 1591." 47 U.S.C. § 230(e)(5)(A). That change was the product not of accident or oversight, but of substantial deliberation and debate. *Supra* pp. 6-8.

4. In sidestepping the limiting language Congress added, petitioners focus instead on the heading of the provision, contending that section 230 must be read to have "No Effect on Sex Trafficking Law." Pet. i, 3-4, 7, 13, 15, 18. But statutory headings "are 'but a shorthand reference to the general subject matter' of the provision, 'not meant to take the place of the detailed provisions of the text.'" *Lawson v. FMR LLC*, 571 U.S. 429, 446-47 (2014).

Petitioners also insist that FOSTA must be read so that "[n]othing . . . impair[s] or limit[s]" any section 1595 claim. Pet. 18. But that is only half of the text Congress enacted. Congress did limit section 230's reach for civil sex-trafficking claims—but only when "the conduct underlying the claim" violates section 1591. Petitioners' reading inappropriately elevates the "prefatory clause" at the beginning of FOSTA's exception over the more limited "operative" language that follows. *Kingdomware Techs., Inc. v. United States*, 579 U.S. 162, 173 (2016).

Finally, petitioners point (Pet. 24-25) to a provision of section 1595 allowing states to sue "any person who violates section 1591." 18 U.S.C. § 1595(d). The difference in language petitioners highlight cannot bear the weight they ascribe to it. Section 1595(d), in allowing *parens patriae* suits, had to specify whom states could sue, and it did so using the word "person." *Id.* FOSTA, conversely, involved an exception to immunity, and it described the scope of that exception through the type of "claim" it would cover. 47 U.S.C. § 230(e)(5)(A). That Congress used different words in different contexts is no basis to distort the plain text of the provision at issue here.

5. Below, petitioners argued that giving effect to FOSTA's text would contravene what they deemed the statute's "remedial purpose." C.A. ECF 11 at 31-33. They repeat that argument here, insisting the decision below disrupts Congress's "broad . . . remedial" scheme. Pet. 3; *see id.* at 7, 15-22.

This Court has repeatedly cautioned against assuming that whatever "might appear to further the statute's primary objective must be the law." *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1725 (2017) (cleaned up). Particularly because "'no legislation pursues its purposes at all costs,'" courts must be careful not to disrupt a carefully balanced statutory scheme to elevate one set of interests above others. *CTS Corp. v. Waldburger*, 573 U.S. 1, 12 (2014).

Petitioners fail to heed those warnings. Congress was concerned both with protecting "the rights of child victims" and with ensuring "a healthy and robust internet." *Latest Developments* 28. The "compromise" Congress struck, *id.*, serves both interests, allowing civil sex-trafficking suits against interactive computer

services, but only when the services violate section 1591 by "knowingly facilitating the sale of trafficking victims." 164 Cong. Rec. at H1303. The Ninth Circuit was correct to reject petitioners' invitation to rewrite the statute to strike a different balance.

Petitioners' concerns are overstated in any event. In the vast majority of section 1595 cases involving entities other than interactive computer services, plaintiffs can take advantage of section 1595's constructive-knowledge standard. And any services that knowingly facilitate sex trafficking are subject to the full scope of civil liability and criminal penalties. 47 U.S.C. § 230(e)(1), (5). Only where plaintiffs, like petitioners, try to hold an interactive computer service liable on the theory that it should have known about third-party users' illegal conduct does section 230 have a role to play.

Petitioners are also wrong that applying FOSTA's exception as written would "curtail[]" plaintiffs' existing rights under section 1595. Pet. 19. Before FOSTA was enacted, some courts had suggested that plaintiffs could not sue a website under section 1595 even if the website was knowingly facilitating sex trafficking. *Supra* pp. 4-5. FOSTA removed that barrier, clarifying that section 230 "does not provide such protection to such websites." Pub. L. No. 115-164, § 2(3), 132 Stat. at 1253. That was the full extent of the "remedial" reach of FOSTA's exception (Pet. i), and petitioners' request for an even broader amendment to section 230 can be directed only to Congress, not the courts.

IV. *GONZALEZ* WILL NOT AFFECT THIS CASE.

There is no reason to hold this petition for *Gonzalez*, where the issue is whether section 230 protects

interactive computer services that "make targeted recommendations of information." Petition for a Writ of Certiorari at i, *Gonzalez v. Google LLC*, 143 S. Ct. 80 (2022) (No. 21-1333), 2022 WL 1050223. Petitioners voluntarily abandoned the argument that section 230 does not apply in this case. And they claim injury not based on any "targeted recommendations," but rather based on Reddit's exercise of "traditional editorial functions (such as deciding whether to display or withdraw [third-party content])"—activities that the petitioners in *Gonzalez* concede are covered by section 230. *Id.*

1. Petitioners characterize section 230's application to their claim as a "predicate assumption" underlying the dispute. Pet. 4, 28. In reality, it is a holding the district court reached after extensive briefing and argument. Pet. App. 26a-34a; *see* C.A. ECF 12 at 26-27 (initial ruling on section 230). It comes to this Court settled only because petitioners made the strategic decision, in appealing to the Ninth Circuit, to abandon that issue and focus solely on FOSTA's exception. *See* C.A. ECF 22 at 21 n.1 (Reddit's brief pointing out plaintiffs' abandonment of the argument). As a result of petitioners' decision, the Ninth Circuit did not address the issue below. *See* Pet. App. 8a ("Both parties agree that section 230 immunity applies to the claims against Reddit.").

The word for how petitioners treated the section 230 argument is not *assumption*; it is *waiver*. *Microsoft Corp. v. I4I P'ship*, 564 U.S. 91, 112 (2011); *United States v. Jones*, 565 U.S. 400, 413 (2012). And "[w]here issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them." *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970); *accord, e.g.*, *Pa. Dep't of*

Corr. v. Yeskey, 524 U.S. 206, 213 (1998); *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362 (1981).

Petitioners argue they should be relieved of their waiver because the issue was "'squarely foreclosed by circuit . . . precedent'" at the time. Pet. 28-29 n.8. That is not what petitioners said in the district court, where they argued at length that under existing Ninth Circuit precedent—including the Circuit's decision in *Gonzalez*, which was issued before petitioners opposed Reddit's motion to dismiss—section 230 did not apply to their claim against Reddit. C.A. ECF 23 at 64-68. And far from displaying any "'want of clairvoyance'" about the prospects of review, Pet. 29 n.8, petitioners directly invoked the "'rising chorus'" of voices calling for clarification about section 230's scope. C.A. ECF 23 at 68 n.11.

Petitioners also knew how to include an argument "for preservation purposes." C.A. ECF 23 at 68 n.12; *cf. MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 125 (2007) (party can devote "a few pages of its appellate brief" to preserve an argument even if "precluded" under circuit precedent). Petitioners just made a choice to forgo that approach when it came to the threshold application of section 230. Other plaintiffs raising similar claims around the same time made a different strategic choice, arguing the section 230 point in briefing to the Ninth Circuit. *See* Brief of Plaintiffs-Appellees at 53-63, *Doe #1 v. Twitter, Inc.*, Nos. 22-15103 & 22-15104 (9th Cir. Aug. 5, 2022), 2022 WL 3331057. There is no good reason to excuse petitioners from their intentional decision to limit their arguments on appeal to the interpretation of FOSTA.

2. Ultimately, *Gonzalez* is unlikely to have any bearing on this case. The petitioners in *Gonzalez* take

issue only with section 230's application "to recommendations of third-party content." Brief for Petitioners at i, *Gonzalez*, No. 21-1333 (U.S. Nov. 30, 2022), 2022 WL 17418474. They do not dispute section 230's application when a service is sued based on claims depending on the website's alleged "editorial control" over what third-party users post. *Id.* at 5.

Petitioners here claim injury from the way Reddit screens and reviews the content third-party users post to the platform. *See, e.g.*, Pet. App. 55a-57a (claiming that Reddit "take[s] no real action to prevent users from uploading child pornography" and does not immediately or consistently enforce its content policy). They do not claim any injury as a result of algorithmic or targeted recommendations of information or content on Reddit's part. Even if the Court rules for the petitioners in *Gonzalez*, therefore, petitioners' claims here will remain covered by section 230's traditional, and concededly appropriate, scope.

CONCLUSION

The Court should deny the petition.

Respectfully submitted.

Kristin A. Linsley
Emily Riff
GIBSON, DUNN & CRUTCHER LLP
555 Mission Street, Suite 3000
San Francisco, CA 94105

Theane Evangelis
Counsel of Record
Bradley J. Hamburger
Matt Aidan Getz
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, CA 90071
(213) 229-7726
tevangelis@gibsondunn.com

Counsel for Respondent

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