No. 21-56293

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JANE DOES NO. 1-6, et al.,
Plaintiffs-Appellants,
v.
REDDIT, INC.,
Defendant-Appellee.

On Appeal From the United States District Court
for the Central District of California
Case No. 8:21-cv-00768 (Hon. James V. Selna)

BRIEF FOR *AMICI CURIAE* CHAMBER OF PROGRESS AND INFORMATION TECHNOLOGY AND INNOVATION FOUNDATION IN SUPPORT OF DEFENDANT-APPELLEE AND AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, each *amicus curiae* certifies that no parent corporation or publicly held corporation owns 10% or more of its stock.

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INTEREST OF *AMICI CURIAE*[1]

Chamber of Progress is a technology industry coalition that supports public policies that will produce a fair, inclusive country in which all people benefit from technological advances. Its work is supported by corporate partners many of whom are "interactive computer services" within the meaning of 47 U.S.C. § 230(f)(2).[2] It has a substantial interest in ensuring that consumers have access to a healthy online environment where they can work, play, learn, shop, connect, and communicate without harassment, disinformation, and incendiary content.

Information Technology and Innovation Foundation ("ITIF") is a nonprofit, nonpartisan research and educational institute whose mission is to formulate, evaluate, and promote policy solutions that accelerate innovation and boost productivity to spur growth, opportunity, and progress. As a leading science and technology think

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[1] No counsel for a party authored this brief in whole or in part, and no entity or person, aside from *amici curiae*, their members, and their counsel, made any monetary contribution intended to fund the preparation or submission of this brief. *See* Fed. R. App. P. 29(a)(4)(E). All parties have consented to the filing of this brief.

[2] Chamber of Progress's partner companies are listed at progresschamber.org. Partner companies do not sit on the Chamber's board of directors and have no vote on, or veto power over, its positions.

tank, ITIF's goal is to provide policymakers around the world with high-quality information, analysis, and recommendations.

The broad interpretations of 47 U.S.C. § 230(e)(5)(A) and 18 U.S.C. § 1595(a) advanced by Appellants pose a direct threat to the safe online communities that *Amici* and their partners strive to build. The success of those communities depends on the careful balance Congress struck in Section 230 between preserving "the vibrant and competitive free market that presently exists for the Internet," and deterring and punishing those who "traffic[] in obscenity." 47 U.S.C. § 230(b)(2), (5). *Amici* therefore have a substantial interest in the outcome of this case, which will impact the ability of their partners to offer and improve—and of consumers to access and contribute to—safe online platforms.

SUMMARY OF ARGUMENT

I. Sex trafficking and child sexual exploitation are serious societal issues. Enforcing laws against, and taking action to curtail, these offenses are critically important to protect children. This case presents extremely important questions about the circumstances in which an interactive computer service may be held liable based on harmful material posted on its platform by someone else.

The Communications Decency Act of 1996 generally immunizes interactive computer services from liability for online content posted by their users. 47 U.S.C. § 230. In 2018, Congress enacted a narrow immunity exception, *id.* § 230(e)(5)(A), for certain private actions arising under 18 U.S.C. § 1595(a).

Section 1595(a) creates a civil action for sex-trafficking victims against the perpetrator of the crime or whoever knowingly benefits from participation in a venture that the defendant should have known engaged in sex trafficking. Section 230(e)(5)(A) establishes an immunity exception for Section 1595(a) claims against an interactive computer service "if the conduct underlying the claim constitutes a violation of" 18 U.S.C. § 1591, which criminalizes sex trafficking of children.

The district court correctly held that the Section 230 immunity exception applies only when the interactive computer service's own conduct violates Section 1591—that the provision's exception to immunity when "the conduct underlying the claim constitutes a violation of" Section 1591 means conduct by the interactive computer service that otherwise would be immune.

The entire focus of Section 230 is the service's conduct. It would not make sense for a statute whose sole focus is the conduct of interactive computer services to use the word "conduct" to encompass third-party conduct. If Congress had meant to write a broader exception, it would have used different language. In addition, other exclusions from Section 230 immunity enacted at the same time as Section 230(e)(5)(A) plainly use "conduct underlying" to mean only a service's conduct. Appellants' reading of Section 230(e)(5)(A) would give private plaintiffs authority more expansive than that of state attorneys general, which would be nonsensical given the importance of government enforcement in this area.

The legislative history and purpose of the immunity exception also support the narrower reading. The committee report that introduced the "conduct underlying" language makes clear that Congress's intent was to target interactive computer services that themselves violate Section 1591.

Further, Appellants' expansive reading of the exception would undermine a central purpose of the Communications Decency Act: to encourage interactive computer services to moderate harmful user

content posted to their platforms. Services' failure to address particular instances of misuse of their platforms could be used against them if liability could be premised on the criminal acts of third parties, rather than only on the service's criminal conduct—which would create a significant disincentive for services to engage in content moderation activities. Congress therefore balanced the relevant policy goals by enacting a narrow exception.

Appellants' approach also would prevent the Act from accomplishing its goal of promoting, and not chilling, legitimate speech. The potential for broad tort liability based on content posted to online platforms by millions of people would force interactive computer services to adopt broad restrictions on users to avoid potential liability and litigation expense. Those restrictions would sweep in content protected by the First Amendment, not just conduct violative of Section 1591, undermining the Act's success in making interactive computer services robust forums for expression.

II. Even under Appellants' reading of the immunity exception, Appellants still fail to state a Section 1595(a) claim because they do not allege that Reddit participated in a sex-trafficking venture with the

alleged traffickers. The plain meaning of "participation in a venture" is to actively take part in a commercial enterprise. Appellants' allegations that Reddit "turned a blind eye" to illegal content are insufficient because the mere failure to stop an offense is not the active engagement necessary to establish participation in a Section 1595(a) venture.

ARGUMENT

I. The District Court Correctly Held That Section 230 Bars Appellants' Claims.

Congress enacted the Communications Decency Act of 1996 (CDA), Pub. L. No. 104-104, Tit. V, 110 Stat. 133, to advance "two parallel goals," *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1099 (9th Cir. 2009). First, promoting "the continued development of the Internet" and its "vibrant and competitive free market"; and, second, "encourag[ing] the development of" user-control technologies. 47 U.S.C. § 230(b). Congress also sought to encourage interactive computer services to take steps to moderate user-posted content by removing the risk that those actions could result in liability. *Id.*

"To avoid chilling speech, Congress made a policy choice not to deter harmful online speech through the separate route of imposing tort liability on companies that serve as intermediaries for other parties'

potentially injurious messages." *Gonzalez v. Google LLC*, 2 F.4th 871, 886 (9th Cir. 2021) (internal quotation marks and ellipsis omitted).

The operative provision of the CDA, 47 U.S.C. § 230(c)(1), 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." It broadly "protects websites from liability for material posted on the website by someone else." *Gonzalez*, 2 F.4th at 886-87.

Congress recently amended the CDA to create an exception to Section 230 immunity for sex-trafficking conduct. This case requires the Court to interpret that exception. This brief first discusses the relevant statutory background. It then explains why the immunity exception at issue subjects interactive computer services to civil liability if they engage in conduct that constitutes a federal sex-trafficking crime but continues to protect services against civil liability for sex-trafficking crimes committed by those who use their platforms.

A. The Relevant Statutory Provisions.

Federal Private Action for Sex Trafficking. Chapter 77 of Title 18 of the U.S. Code contains criminal offenses related to peonage,

slavery, and human trafficking. Section 1595(a) creates a civil cause of action for victims of violations of Chapter 77.

Section 1595(a) specifies two different categories of defendants subject to civil liability: (1) "the perpetrator" of "a violation of" Chapter 77; and (2) "whoever knowingly benefits, financially or by receiving anything of value from participation in a venture which that person knew or should have known has engaged in an act in violation of" Chapter 77. 18 U.S.C. § 1595(a).

Sex trafficking is one of the Chapter 77 offenses for which Section 1595(a) creates civil liability—based on the criminal offense established in Section 1591 of Title 18. That provision prohibits knowingly "recruit[ing], entic[ing], harbor[ing], transport[ing], provid[ing], obtain[ing], advertis[ing], maintain[ing], patroniz[ing], or solicit[ing] by any means a person" knowing, or in reckless disregard of the fact, that the person will be forced to engage in a commercial sex act. 18 U.S.C. § 1591(a)(1). It also prohibits knowingly "benefit[ing], financially or by receiving anything of value, from participation in a venture which has engaged in an act described in violation of" Section 1591(a)(1) knowing,

or acting in reckless disregard of, the fact that an individual would be forced to engage in a commercial sex act. *Id.* § 1591(a)(2).

Limitation on Section 230 Immunity. As originally enacted, Section 230 contained several exemptions to its immunity provisions—stating that the statutory immunity should not be construed to impair the enforcement of federal criminal statutes, limit intellectual property laws, or limit the application of certain communications-privacy laws. 47 U.S.C. § 230(e)(1)-(2), (4).

In 2018, Congress added an additional immunity exception relating to sex trafficking by enacting the Allow States and Victims to Fight Online Sex Trafficking Act (FOSTA), Pub. L. No. 115-164, 132 Stat. 1253. Two of the added provisions state that Section 230 does not limit state-law criminal charges "if the conduct underlying the charge would constitute a violation" of Section 1591 or, in certain circumstances, 18 U.S.C. § 2421A. 47 U.S.C. § 230(e)(5)(B)-(C). FOSTA also authorizes a state attorney general to "bring a civil action against" "any person who violates" Section 1591 if there is "reason to believe that an interest of the residents of that State has been or is threatened or adversely affected by" that person. 18 U.S.C. § 1595(d).

A third provision is the one at issue in this case. It states that Section 230 does not limit civil claims brought under Section 1595(a) "if the conduct underlying the claim constitutes a violation of Section 1591." 47 U.S.C. § 230(e)(5)(A).

B. The Sex-Trafficking Exception To Section 230 Immunity Applies Only When The Defendant's Own Conduct Violates 18 U.S.C. § 1591.

The district court correctly concluded that the exception to Section 230 immunity for a Section 1595(a) claim applies only if the interactive computer service's conduct—rather than a third party's conduct—violates Section 1591. ER-17. Because Section 1595(a) subjects two different categories of defendants to civil liability—the perpetrator of a Chapter 77 violation and whoever knowingly benefits from a violation by a venture—the district court effectively held that the immunity exception applies only to suits against perpetrators. That construction is firmly grounded in text and context, and in the legislative history and purpose of FOSTA.

1. Text

a. Section 230(e)(5)(A) states that the exception to immunity applies only "if the conduct underlying the claim constitutes a violation of section 1591." 47 U.S.C. § 230(e)(5)(A). The "conduct underlying the

claim" means the conduct of the "interactive computer service" that otherwise is protected from liability by Section 230. *Id.* § 230(f)(2). In other words, the service's own conduct must violate Section 1591.

To begin with, Section 230's entire focus is the conduct of the "interactive computer service." The immunity provision states that actions by an interactive computer service cannot be "treated as . . . publish[ing] or speak[ing]" third-party content, and that a service is not liable for "any action voluntarily taken in good faith" to restrict access to objectionable content or "any action taken" to enable customers to control the content they see. 47 U.S.C. § 230(c)(1)-(2). Section 230 obligates interactive computer services to "notify" customers about parental controls that limit access to material that is harmful to minors. *Id.* § 230(d).

Thus, the only "conduct" discussed in Section 230 is the conduct of the interactive computer service—no other party's conduct is mentioned in the subsections preceding the FOSTA exemptions. It would not make sense for a statute whose sole focus is the "conduct" of interactive computer services to use the word "conduct" to include third-party conduct.

If Congress had meant to write a broader immunity exception—and impose liability when the interactive computer service's own conduct did not violate Section 1591—it would have used different language. For example, Congress could have followed the approach of the pre-existing Section 230 exceptions, such as the exception stating that "[n]othing in this section shall be construed to limit or expand any law pertaining to intellectual property," 47 U.S.C. § 230(e)(2), by providing that nothing in Section 230 "shall be construed to limit or expand any federal law pertaining to sex trafficking." It also "could have said 'if the claim arises out of a violation of section 1591,' or 'if the plaintiff is a victim of a violation of section 1591.'" *J.B. v. G6 Hosp., LLC*, No. 19-CV-07848, 2021 WL 4079207, at *6 (N.D. Cal. Sept. 8, 2021); *see Doe v. Kik Interactive*, Inc., 482 F. Supp. 3d 1242, 1249 (S.D. Fla. 2020).

These formulations would encompass both types of Section 1595(a) actions—not just claims against the "perpetrator" of a Section 1591 crime, but also those against an interactive computer service that "knowingly benefits . . . from participation in a venture which that [service] knew or should have known has" violated Section 1591. 18

U.S.C. § 1595(a). Instead, Congress chose to focus the exception on the conduct of the interactive computer service.

b. The other provisions of FOSTA creating exemptions from Section 230 immunity, enacted at the same time as Section 230(e)(5)(A), strongly support that construction based on the plain language. It is a fundamental principle of statutory construction that "the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Gundy v. United States*, 139 S. Ct. 2116, 2126 (2019). That is because courts "construe statutes, not isolated provisions." *King v. Burwell*, 576 U.S. 473, 486 (2015).

Two FOSTA provisions state that Section 230 does not limit state-law criminal charges "if the conduct underlying the charge would constitute a violation of" two federal criminal statutes, 18 U.S.C. §§ 1591 and 2421A. 47 U.S.C. § 230(e)(5)(B)-(C). The phrase "conduct underlying the charge" in these provisions "necessarily refers to the conduct of the criminal defendant." *J.B.*, 2021 WL 4079207, at *6.

The very same "conduct underlying" phrase in Section 230(e)(5)(A) therefore must refer to the conduct of the civil defendant. Generally, "identical words used in different parts of the same statute carry the

same meaning." *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1723 (2017) (internal quotation marks omitted). The presumption of consistent usage carries even greater force here where the phrase at issue, "conduct underlying," is repeated across three neighboring provisions, two of which refer to the same criminal statute, 18 U.S.C. § 1591. That "strongly suggests" Congress "intended to give the 'conduct underlying' phrases the same meaning." *J.B.*, 2021 WL 4079207, at *6.[3]

Indeed, interpreting the "conduct underlying" phrase as Appellants suggest would create a bizarre anomaly, giving states broader criminal authority than the federal government. The federal government's criminal authority is limited to persons who violate Section 1591, but Appellants' construction would allow states to impose

[3] That Section 230(e)(5)(A) refers to the "conduct underlying the claim" and Sections 230(e)(5)(B) and (C) refer to the "conduct underlying the charge" does not undermine that conclusion. "Claim" and "charge" have the same basic meaning: the allegations that initiate a judicial proceeding. *See, e.g.*, Fed. R. Civ. P. 8 (discussing "claim for relief"); Fed. R. Crim. P. 3, 7(c)(1) (discussing the "offense charged"); *Black's Law Dictionary* 291 (11th ed. 2019) ("charge" means the "formal accusation of an offense as a preliminary step to prosecution"); *id.* at 311 ("claim" means "the part of a complaint in a civil action specifying what relief the plaintiff asks for"). The meaning of the "conduct underlying" phrase therefore cannot vary based on Congress's use of different technical terms appropriate for the civil and criminal contexts.

criminal penalties for violating a state statute with the same elements as Section 1595 in which someone other than the defendant is the alleged trafficker. While Congress sought to ensure state enforcement was not blocked by Section 230, it did not intend FOSTA to authorize broader criminal liability for interactive computer services under state law than federal law.

A third relevant FOSTA provision provides still more support for that construction. FOSTA amended Section 1595 to authorize a state attorney general to "bring a civil action" against "any person who violates" Section 1591 if there is "reason to believe that an interest of the residents of that State has been or is threatened or adversely affected by [that] person." 18 U.S.C. § 1595(d). An attorney general thus may sue an interactive computer service only if the service itself "violates section 1591."

Government officials are charged with pursuing the public interest and exercise discretion on "how to prioritize and how aggressively to pursue legal actions against defendants who violate the law." *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2207 (2021). For that reason, they typically are granted broader authority than private

plaintiffs. Given that reality, and the importance of these issues to the States, it "would be unreasonable to conclude that Congress would allow state attorneys general to sue only 'direct violators' of section 1591, while allowing private plaintiffs to sue civil defendants" based on violations of Section 1591 by others. *J.B.*, 2021 WL 4079207, at *7.[4]

c. Appellants' contrary arguments based on Section 230(e)(5)(A)'s text and context are wholly unpersuasive.

They rely principally on Section 230(e)(5)(A)'s use of the word "claim" in the relevant phrase—"conduct underlying the claim constitutes a violation of section 1591"—asserting that it "captures" the conduct of a sex trafficker because Section 1595(a) creates a private action against "a third-party who benefits from the underlying trafficking." Br. 27. But that argument ignores Section 230's singular focus on the "conduct" of interactive computer services and Congress's decision not to use broader language, such as "violation of Section

[4] Section 1595(d) uses different language than Section 230(e)(5)(A), because it creates a new cause of action and therefore has to specify the "person" against whom the action may be brought. Conversely, Section 230(e)(5)(A) is an immunity exception that authorizes a claim under an existing action so it necessarily employs a different sentence structure. What is key here is the scope of authority conferred on state attorneys general, because Congress would not have conferred greater authority on private plaintiffs than that given to state attorneys general.

1591," to describe the scope of the exception. In addition, Congress's use of "claim" in Section 230(e)(5)(A) parallels the use of "charge" in the exception for criminal liability. *See supra*, p. 14 n.3. That fatally undermines their argument based on "claim."

Appellants also are wrong in asserting that construing the immunity exception to apply only to an interactive computer service's own conduct "render[s] . . . meaningless" Section 1595(a). Br. 40; *see id.* at 37-41. Section 1595(a) creates civil liability for two differently situated defendants: (1) "the perpetrator" of the violation or (2) "whoever knowingly benefits . . . from participation in a venture which that person knew or should have known has engaged in an act in violation" of Chapter 77. 18 U.S.C. § 1595(a).

FOSTA withdrew Section 230's immunity protection, but only for the first category set forth in Section 1595—suits brought against an interactive computer service that *itself* is a "perpetrator" of a Section 1591 violation. Plaintiffs who meet that standard may assert a claim and recover damages—which they could not do prior to FOSTA's amendment of Section 230.

It should not come as a surprise that a Section 1595(a) plaintiff suing an interactive computer service must prove "a criminal *mens rea* standard." Appellants' Br. 39. The only way for a Section 1595(a) defendant to have been the "perpetrator" of a Section 1591 violation is if the defendant met the *mens rea* standard under that criminal provision.

Appellants also have no coherent explanation for Congress's consistent use of the phrase "conduct underlying" across three related provisions, two of which can refer only to the conduct of an interactive computer service. As discussed, *supra*, pp. 13-15, where Congress uses identical words in neighboring statutory provisions, there is a strong presumption of identical meaning.

2. Statutory context

Section 230(e)(5)(A) also must be interpreted with reference to the statutory context—the provision's "history and purpose." *Abramski v. United States*, 573 U.S. 169, 188 n.10 (2014). Here, the context confirms that the provision eliminates immunity only when the interactive computer service itself violates Section 1591.

a. Evolution of the statutory text

i. FOSTA resulted from House and Senate bills that were advanced on parallel tracks. *J.B.*, 2021 WL 4079207, at *8. Section

230(e)(5)(A) first appeared in the bill reported by the Senate Commerce Committee in January 2018. S. 1693, 115th Cong. § (3)(a)(2) (Jan. 10, 2018).

The committee report accompanying the Senate bill explained that the purpose of the exception is to ensure that an interactive computer service "cannot avoid liability" if it is "knowingly assisting, supporting, or facilitating sex trafficking." S. Rep. No. 115-199, at 4 (2018). That phrase—"knowingly assisting, supporting, or facilitating"—is taken directly from the text of Section 1591. 18 U.S.C. § 1591(a)(2), (e)(5).

Moreover, the Senate report makes clear that the legislation was designed to overturn court decisions that had applied Section 230 to preclude actions against a website, Backpage.com, notwithstanding allegations that it had engaged in conduct constituting a crime under Section 1591. The report stated that "[Section 230] protections have been held by courts to shield from civil liability and State criminal prosecution nefarious actors, such as the website BackPage.com, that are accused of knowingly facilitating sex trafficking. S. 1693 would eliminate section 230 as a defense for websites that knowingly facilitate sex trafficking." S. Rep. No. 115-199, at 4; *see also Kik Interactive*, 482

F. Supp. 3d at 1250 ("Congress only intended to create a narrow exception to the CDA for openly malicious actors such as Backpage where it was plausible for a plaintiff to allege actual knowledge and overt participation" in sex trafficking) (internal quotation marks omitted).

Congress thus intended Section 230(e)(5)(A) to reach only interactive computer services that themselves violate Section 1591. Nothing in the report suggests that Congress also intended for the provision to encompass claims based on others' violations of Section 1591.

The evolution of the text through the legislative process provides additional support for that conclusion. The initially-introduced Senate bill broadly provided that "[n]othing" in Section 230 "shall be construed to impair the enforcement or limit the application of section 1595"; and also broadly eliminated Section 230 immunity for state criminal and civil enforcement actions "targeting conduct that violates a federal criminal law prohibiting (i) sex trafficking of children; or (ii) sex trafficking by force, threats of force, fraud, or coercion." S. 1693, 115th Cong. § 3(a)(2)(A) (Aug. 1, 2017).

During the Commerce Committee's hearing on the bill, witnesses from the internet industry and the academy raised concerns that the bill's initial wording would permit an interactive computer service to be held liable without having engaged in any criminal wrongdoing. *See, e.g.*, *Hearing on S. 1693, The Stop Enabling Sex Traffickers Act of 2017 Before the S. Comm. on Commerce, Sci., and Transp.* (*Hearing on S. 1693*), 115th Cong. 20 (2017) (statement of Eric Goldman, professor, that the Senate bill would force a service to choose between being "fully liable for third party content" and taking "minimal steps to moderate" to "avoid any knowledge that might lead to liability"); *id.* at 31 (statement of Abigail Slater, general counsel, Internet Association, that the Senate bill, "as currently drafted," would create "overly broad concepts of . . . civil liability that create legal uncertainty and risk for legitimate actors"); *see also J.B.*, 2021 WL 4079207, at *8-9 (discussing *Hearing on S. 1693* 30-31, 35-36, 41-43).

Committee members asked questions about the adverse consequences of broad civil liability based on the language in the initial bill. *Hearing on S. 1693* 39, 42-43, 46-47, 53-54.

The bill later reported by the Commerce Committee included the language ultimately enacted, which excluded from Section 230 immunity only: (a) state criminal actions in which the "conduct underlying the charge" violated Section 1591; (b) Section 1595 private actions in which "the conduct underlying the claim" violated Section 1591; and (c) state attorney general civil enforcement actions against "any person who violates section 1591." S. 1693, 115th Cong. §§ (3)(a)(2), 5(a) (Jan. 10, 2018).

The adoption of those essentially identical limitations at the same time—in contrast to the much broader exclusions from immunity in the initially-introduced bill—provides further evidence that "Congress reached a compromise" to replace the initial exception with "a narrowed federal civil sex-trafficking carve-out," *J.B.*, 2021 WL 4079207, at *11, focused on "openly malicious actors" as to whom "it was plausible for a plaintiff to allege actual knowledge and overt participation" in sex trafficking, *Kik Interactive*, 482 F. Supp. 3d at 1250 (internal quotation marks omitted).

Indeed, the senators most involved in the drafting process observed that, after the hearing, the Commerce Committee made

"targeted changes" to provide redress for victims "without affecting the freedom of the internet" so that the bill would earn "solid support from the internet industry." 164 Cong. Rec. S1849, S1850 (Mar. 21, 2018) (statements of Sens. John Thune and Rob Portman); *see id.* at S1860 (statement of Sen. Chuck Schumer that "this legislation would not allow nuisance lawsuits against technology companies . . . based on bogus claims that they 'facilitate' sex trafficking").

The history of the House bill also shows a consistent narrowing of the exceptions from Section 230 immunity for criminal prosecutions, civil enforcement actions, and private claims. Thus, the initial House bill eliminated Section 230 immunity for broad categories of state criminal laws and federal and state private actions relating to sex trafficking. H.R. 1865, 115th Cong. § 3(A)(2)(A)(ii), (C) (Apr. 3, 2017).

The bill reported by the House Judiciary Committee, by contrast, eliminated immunity only for state criminal prosecutions where the "conduct underlying the charge" violated federal criminal law; there was no reduction in immunity for civil actions. H.R. 1865, 115th Cong. § 4 (Jan. 20, 2018). An amendment approved on the House floor added the language from the Senate bill regarding private and state attorney

general actions. H.R. Rep. No. 115-583, at 3 (2018). Again, this history shows a consistent narrowing of the exclusion from Section 230 immunity—and the application of the same "conduct underlying" standard to state criminal and federal civil actions, so that liability would be limited to actors who violated Section 1591's criminal wrongdoing standard.

ii. Appellants' arguments based on legislative history are meritless. The House committee report cited by Appellants, Br. 34-35, accompanied a version of the bill that did not include any exception from Section 230 immunity for civil actions, but rather permitted only criminal prosecutions. H.R. Rep. No. 115-572, at 2 (2018).

The statements of individual members of Congress cited by Appellants, Br. 35, relate to FOSTA's general purpose, and do not discuss the scope of Section 230(e)(5)(A). When surveying legislative history, the "authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill," not "scattered statements from individual Members of Congress." *Eldred v. Ashcroft*, 537 U.S. 186, 209 n.16 (2003). The Senate report here, and the consistent

narrowing of the liability provisions in the House and Senate bills, is wholly inconsistent with Appellants' reading of the exception.

b. Legislative purpose

i. Appellants' expansive reading of the immunity exception is wrong for the additional reason that it would undermine the CDA's goal of incentivizing interactive computer services to review, edit, and decide "whether to publish or to withdraw from publication third-party content," *Barnes*, 570 F.3d at 1102, without fear of tort liability for those parties' "potentially injurious messages," *Gonzalez*, 2 F.4th at 886. It also would thwart the CDA's central purpose "to promote rather than chill internet speech." *Bennett v. Google, LLC*, 882 F.3d 1163, 1166 (D.C. Cir. 2018). Because it is "impossible for service providers to screen each of their millions of postings for possible problems," the "specter of tort liability in an area of such prolific speech would have an obvious chilling effect." *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1124 (9th Cir. 2003).

Under Appellants' reading of the immunity exception, interactive computer services would be forced to impose broad measures to "severely restrict the number and type of messages posted" in order to

avoid potential liability and the expense of litigation. *Carafano*, 339 F.3d at 1124. Moderating content at the scale required for today's social media platforms necessitates the use of algorithms and imperfect human decisionmaking that inevitably would sweep in content protected by the First Amendment, such as discussions focused on trafficking survivors, safety issues for sex workers, and sexual education and health.[5] That result would undermine the CDA's success in making interactive computer services "robust . . . forum[s] for public speech," *Bennett*, 882 F.3d at 1166. The "security measures" that Appellants suggest are necessary to avoid liability, Br. 52, likewise would create barriers to accessing online speech forums by potentially requiring government-issued identification or credit card information, which users may not have or may not wish to provide.[6]

The Section 230(e)(5)(A) exception does not remove immunity from liability for actions "voluntarily taken in good faith to restrict access to

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[5] *See, e.g.*, Karen Gullo & David Greene, Elec. Frontier Found., *With FOSTA Already Leading to Censorship, Plaintiffs Are Seeking Reinstatement Of Their Lawsuit Challenging the Law's Constitutionality* (Mar. 1, 2019), bit.ly/382f7pV.

[6] *See, e.g.*, LaLa B. Holston-Zannell, Am. C.L. Union, *How Mastercard's New Policy Violates Sex Workers' Rights* (Oct. 15, 2021), bit.ly/3w9qIeC.

or availability of material that the provider" considers "objectionable." 47 U.S.C. § 230(c)(2)(A). But that does not mitigate the adverse consequences discussed above, which arise when interactive computer services "*publish*[]" user content, *id.* § 230(c)(1) (emphasis added)—not when they "restrict access to" content. Certainly plaintiffs will contend that, because the exception removes immunity based on publishing user content, there is no immunity when content moderation fails to remove user content.

Companies also would be exposed to the "heckler's veto," further chilling protected speech. Those who "perceive themselves as the objects of unwelcome speech . . . could threaten litigation against interactive computer service providers, who would then face a choice: remove the content or face litigation costs and potential liability." *Jones v. Dirty World Ent. Recordings LLC*, 755 F.3d 398, 407 (6th Cir. 2014). These chilling effects would make it more difficult for the public to communicate openly on the Internet, particularly for marginalized communities.[7]

[7] *See, e.g.*, Note, *Section 230 as First Amendment Rule*, 131 Harv. L. Rev. 2027, 2047 (2018).

ii. Appellants argue that "FOSTA's remedial nature requires the[ir] broader interpretation" of Section 230(e)(5)(A). Br. 32; *see id.* at 31-33. *Amicus* CHILD USA makes a similar argument. Br. 13-17. But FOSTA has two purposes—to permit "civil liability and State criminal prosecution [of] nefarious actors" that "knowingly facilitating sex trafficking" while also preserving Section 230 as an "essential underpinning of the modern internet" that has been "critical to the explosive growth of websites that facilitate user-generated content." S. Rep. No. 115-199, at 2.

Congress reconciled those dual purposes by enacting legislation that limits the immunity exception to criminal wrongdoers. Recognizing that the government could not prosecute everyone, and could leave victims without justice and compensation, Congress opened the door to civil claims as well—but only against that limited category of wrongdoers.

Furthermore, Appellants' conclusion does not follow from its premise that "FOSTA is a remedial statute." Br. 31. That a statute has "remedial goals" is an "insufficient justification for interpreting a specific provision more broadly than its language and the statutory

scheme reasonably permit." *Pinter v. Dahl*, 486 U.S. 622, 653 (1988). Moreover, the district court's interpretation of Section 230(e)(5)(A) is "consistent with [FOSTA's] remedial purpose," because it allows plaintiffs to "pursue a subset of claims that were previously barred" under Section 230. *J.B.*, 2021 WL 4079207, at *6.

FOSTA addresses a specific concern about the application of Section 230 immunity to "nefarious actors" that "knowingly facilitating sex trafficking" in violation of Section 1591. S. Rep. No. 115-199, at 2. Appellants' reading would make mere knowledge of trafficking grounds for liability. Br. 51. Yet interactive computer services like Reddit must obtain such knowledge to monitor their platforms for illegal content and develop countermeasures to reduce trafficking and remove child sexual abuse material—as the CDA and FOSTA envision, 47 U.S.C. § 230(b); S. Rep. 115-199, at 14.

Congress struck a careful "balance" between fostering "a largely unregulated free market online" and incentivizing companies to "snuff[] out certain objectionable content," *Hepp v. Facebook*, 14 F.4th 204, 209 (3d Cir. 2021). That flexibility is critical to partnerships that legitimate internet companies have forged to combat trafficking with organizations

like the National Center for Missing and Exploited Children. *See e.g.*, S. Rep. No. 115-199, at 31, 33.

Appellants also argue that interactive computer services should be held liable when community moderators do not immediately remove illegal content, or play a role in its proliferation. Br. 52-53. That unrealistic approach would undermine the important role of community moderators on Reddit and other services to "maximize user control" over the information available in specific online communities. 47 U.S.C. § 230(b)(3).

At bottom, Appellants' interpretation of Section 230(e)(5)(A) would force interactive computer services to choose between actively monitoring for illegal content, with or without the help of users, and risking liability for those efforts. That is contrary to the text and context of FOSTA; the narrowing of the statutory text during the legislative process; and the balance Congress struck between holding accountable bad-faith actors and ensuring that services "cannot be held liable on account of actions taken in good faith to restrict access to objectionable material." S. Rep. No. 115-292, at 4.

II. Appellants Do Not Plausibly Allege That Reddit Participated In A Sex-Trafficking Venture With The Alleged Traffickers.

Even if 47 U.S.C. § 230(e)(5)(A) did withdraw immunity for a suit under 15 U.S.C. § 1595(a) against an interactive computer service based on a third party's violation of 18 U.S.C. § 1591, Appellants' claim still would fall short. As the district court held, the complaint here does not allege that Reddit "participated" in a sex-trafficking "venture."

Section 1595(a) imposes liability on a person who "knowingly benefits . . . from participation in a venture which that person knew or should have known has engaged in an act in violation of" Chapter 77. 18 U.S.C. § 1595(a). To state a Section 1595(a) claim against a defendant based on another party's violation of 18 U.S.C. § 1591, a plaintiff must allege that the defendant "participat[ed] in a venture" that violated Chapter 77. *Ratha v. Phatthana Seafood Co.*, 26 F.4th 1029, 1044 (9th Cir. 2022).

Because Section 1595 does not define "participation in a venture," those words take their "ordinary, contemporary, common meaning" when Congress added them to Section 1595(a) in 2008. *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2362 (2019).

The plain meaning of "participation in a venture" is to actively "t[ake] part in a common undertaking or enterprise involving risk and potential profit." *Doe #1 v. Red Roof Inns, Inc.*, 21 F.4th 714, 725 (11th Cir. 2021).

"[P]articipation" involves active engagement to further some purpose. *Black's Law Dictionary* 1151 (8th ed. 2004) ("The act of taking part in something, such as a partnership."); *Webster's Third New International Dictionary* 1646 (2002) ("the action or state of partaking of something," "often used with *in*"); *see Reves v. Ernst & Young*, 507 U.S. 170, 179 (1993) (applying the *Webster's* definition). Thus, "participation" requires an individual to "seek by his action to make [a venture] succeed," and not merely to "associate himself with the venture." *Rosemond v. United States*, 572 U.S. 65, 76 (2014).

The ordinary meaning of a "venture" is "an undertaking or enterprise involving risk and potential profit," *Red Roof Inns*, 21 F.4th at 724—in other words, a "speculative commercial enterprise," *Black's Law Dictionary* 1591 (8th ed. 2004); *see New Oxford American Dictionary* 1866 (2d ed. 2005); *Webster's Third New International Dictionary* 2542.

The district court correctly held that Appellants failed to state a Section 1595(a) claim because the complaint does not allege that Reddit actively took part in a commercial enterprise with sex traffickers. ER-18-19. The well-pleaded facts indicate no "business relationship" or "business deal" with the alleged sex traffickers, and there are no allegations that Reddit had a "monetary relationship with those traffickers." *Id.*

Rather, Appellants allege that Reddit "turn[ed] a blind eye" to topic-specific forums "geared toward child pornography, and fail[ed] to train moderators to limit child pornography." ER-55 ¶ 75. Appellants argue that those alleged errors made Reddit a "safe haven for sex traffickers and child pornography." Br. 48-49, 52.

Courts have refused to infer a Section 1595(a) venture based on a mere failure to stop trafficking offenses, because such allegations do not support a plausible inference of the active involvement required by the statute's use of the term "participation." *See, e.g.*, *A.D. v. Wyndham Hotels & Resorts, Inc.*, No. 4:19-CV-120, 2020 WL 8674205, at *5 (E.D. Va. July 22, 2020). In fact, Appellants' allegations show that Reddit

was actively trying to reduce trafficking and remove illegal content, and working with community moderators to improve responsiveness.

Appellants' allegations also fall short because they do not support a plausible inference that Reddit and the people who posted the images in violation of Section 1591 were engaged in a "business relationship" whose goal was to profit from sex trafficking. Br. 51. Appellants' assertion that Reddit "receives advertising revenue" based on illegal content, ER-48 ¶ 53, does not show that Reddit itself took part in a commercial enterprise *with* the alleged sex traffickers. There simply are no allegations that Reddit was actively engaged in a venture with sex traffickers that involved "risk and potential profit," *Red Roof Inns*, 21 F.4th at 725, which was "directed to [the] defined end" of trafficking, *United States v. Afyare*, 632 F. App'x 272, 279 (6th Cir. 2016).

Appellants mischaracterize the district court's opinion as holding that a Section 1595(a) plaintiff must allege "a formal business deal or even a direct exchange of money." Br. 48. But the court actually held that Appellants failed to allege that Reddit took part in a sex-trafficking *venture*, ER-18-19, and its references to a "business deal" or a "monetary relationship" were simply examples of types of allegations

that could show a venture. The court did not hold that only those allegations suffice. Where, as here, a plaintiff alleges that the defendant participated in a sex-trafficking venture with the perpetrator of a Section 1591 violation, the allegations must show that the defendant took part in a commercial enterprise whose aim was trafficking. The allegations here do not plausibly support such an inference.

The three district court decisions cited by Appellants, Br. 50-51, do not support their argument that Reddit participated in a venture. The first, *Doe v. Mindgeek USA Inc.*, No. SACV 21-00338, 2021 WL 4167054 (C.D. Cal. Sept. 3, 2021), applied the wrong definition of "venture." Congress provided a specific definition of "venture" in 18 U.S.C. § 1591, but as Appellants correctly note, the definitions in Section 1591 do not apply to Section 1595. Br. 38. *Mindgeek* erroneously imported the definition from Section 1591, instead of relying on the common meaning of "venture." 2021 WL 4167054, at *5. *Mindgeek* is also distinguishable on its facts. The *Mindgeek* plaintiffs alleged a venture "with traffickers to share proceeds of advertisement revenue earned from child pornography videos posted to [the

defendants'] websites." 2021 WL 4167054, at *5. Appellants have not alleged anything like that.

M.L. v. craigslist Inc., No. C19-6153, 2020 WL 5494903 (W.D. Wash. Sept. 11, 2020), is also factually distinguishable. The alleged venture there was a commercial advertising relationship, not sex trafficking. *Id.* at *6. Here, Appellants allege that the venture with the sex traffickers was the trafficking itself—but fail to show the necessary participation. ER-18-19. In addition, *M.L.* expressly declined (on procedural grounds) to consider the defendants' argument that the court had failed to use the ordinary meanings of "participation" and "venture." 2020 WL 5494903, at *6.

The third decision, *Doe v. Twitter, Inc.*, 555 F. Supp. 3d 889 (N.D. Cal. 2021), held that the plaintiff alleged "participation in a venture" by asserting a "continuous business relationship" with the traffickers. *Id.* at 922. That conclusion was based on "general allegations" that the defendant "enable[d]" traffickers to distribute images on its platform and "specific allegations" that the defendant "failed or refused to take action" to remove images. *Id.* at 923. When the images were brought to

the defendant's attention, it allegedly sought further information and eventually removed them. *Id.* at 922-23.

Those allegations alone do not satisfy the "participation in a venture" element. At most, they show shortcomings in the defendant's procedures for removing images posted to its platform by traffickers. But where, as here, the alleged venture is trafficking, the complaint must contain facts showing that the defendant actively engaged in a commercial enterprise with a Section 1591 violator the aim of which was trafficking.

In sum, Appellants' allegations fall short of what is required to state a claim under Section 1595.

CONCLUSION

The judgment of the district court should be affirmed.

Dated: May 6, 2022

Respectfully submitted,

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