Nos. 22-15103 and 22-15104

IN THE

United States Court of Appeals
For the Ninth Circuit

JOHN DOE #1 AND JOHN DOE #2,

Plaintiffs-Appellees-Cross-Appellants,

v.

TWITTER, INC.,

Defendant-Appellant-Cross-Appellee.

Interlocutory Appeal from the United States District Court
for the Northern District of California
Case No. 21-CV-0485
Magistrate Judge Joseph C. Spero

PETITION FOR PANEL REHEARING AND REHEARING EN BANC

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INTRODUCTION AND RULE 35(B) STATEMENT

While 13–14 years old, John Does #1 and #2 ("Doe #1" and "Doe #2") were exploited online as part of a sex-trafficking sextortion scheme, with videos and images created depicting their exploitation. The traffickers threatened to publish these images and videos if the boys did not continue to send more. The traffickers made good on their promise. A compilation video of the child pornography—also called child sexual abuse material ("CSAM")—depicting these young boys was uploaded to Twitter's servers and widely disseminated. When Twitter was notified that this illegal video was on its servers, it verified Doe #1's age, reviewed the illegal content of the videos, and then ***refused*** to remove them. Twitter relented only when the Department of Homeland Security stepped in and directed that the videos be removed.

This case is a matter of first impression addressing the issue of whether an internet company has civil immunity from liability under Section 230 of the Communication Decency Act, 47 U.S.C. § 230 ("CDA 230"), if it is notified that it is in possession of CSAM, and then continues to knowingly possess and distribute that CSAM in violation of 18 U.S.C. § 2252A. District courts across the United States have been split on this issue. The panel decision granting Twitter immunity created a dangerous precedent, effectively giving a safe harbor for CSAM to websites: they can knowingly possess, distribute, and profit from CSAM, as long as

someone else posted it first. With immunity, websites—unlike their brick-and-mortar equivalents—need not alter their conduct to avoid liability, and can profit with impunity. This ruling creates absurd results and contradicts this Circuit's prior precedent holding that actions that create liability when done offline do not "magically become lawful" when they occur online. "The Communications Decency Act was not meant to create a lawless no-man's-land on the Internet." *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1164 (9th Cir. 2008).

This panel decision should be reheard *en banc* for two reasons: (1) it conflicts with binding precedent from both this Circuit and the Supreme Court; and (2) it is necessary to address a matter of national importance.

First, rehearing is necessary to maintain uniformity among this Circuit's decisions, as the panel decision conflicts with both this Circuit's jurisprudence applying Section 230 and the Supreme Court's jurisprudence concerning child pornography. The panel decision is inconsistent with this Circuit's decisions in

Roomates.com,[1] *Homeaway.com*,[2] *Internet Brands*,[3] and *Gonzalez,*[4] which all closely analyze the defendant's conduct that is the basis of the claim to determine whether a claim "treats" an internet company as the "publisher or speaker" of "information" provided by a third party. The duty Twitter violated here is established by 18 U.S.C. § 2252A. Plaintiff's complaint does "not seek to hold defendant liable as a publisher or speaker of third-party content," *Internet Brands*, 824 F.3d at 853 (internal quotations omitted). Rather, the complaint premises liability on Twitter's own actions: once they knew they were in possession of child pornography on their servers, and they elected to continue possessing and distributing it.

Second, rehearing is also necessary because the panel decision contains an overriding question of national importance: *Does CDA 230 provide civil immunity to providers and users of interactive computer services who knowingly violate 18 U.S.C. § 2252A?* This question—which the panel decision answers in the affirmative

[1] *Roommates.Com*, 521 F.3d at 1165 ("Roommate's own acts . . . are entirely its doing and thus section 230 of the CDA does not apply to them.").

[2] *HomeAway.com, Inc. v. City of Santa Monica*, 918 F.3d 676, 682 (9th Cir. 2019) ("We look . . . to what the duty at issue actually requires . . . .").

[3] *Doe v. Internet Brands*, 824 F.3d 846, 853 (9th Cir. 2016) ("The tort duty asserted here does not arise from an alleged failure to adequately regulate access to user content or to monitor internal communications.").

[4] *Gonzalez v. Google LLC,* 2 F.4th 871, 891 (9th Cir. 2021), *cert. granted*, 214 L. Ed. 2d 12, 143 S. Ct. 80 (2022) (looking to duty of defendant).

with no substantive discussion—will have a tremendous impact on the ability of survivors of child pornography to hold their abusers accountable and obtain justice.

The panel decision is at odds with Supreme Court precedent which holds that child pornography is uniquely harmful to children because it is both a record of and a perpetuation of sexual abuse and therefore subject to the strictest regulation by the government. The panel erred by treating child pornography like any other type of "information" being transferred over the internet. Child pornography is not information; it is contraband. There is no free marketplace of ideas or commerce for child pornography. Likewise, no one makes "editorial" or "publishing" decisions concerning child pornography. Section 230 provides Twitter no safe harbor to knowingly cast 18 U.S.C. § 2252A's standard aside.

Absent intervention on rehearing, the panel decision is this Circuit's standard bearer. This Circuit's interpretations of the Communications Decency Act are the most influential in the country. While the panel decision is a memorandum disposition, it is already being cited by internet companies to support their arguments for carte-blanche civil immunity. If this panel decision stands, it effectively turns civil causes of actions in the online context into a dead letter, depriving victims of the access to justice that Congress gave them.

Finally, this case raises a separate and independent matter of exceptional importance. The panel decision rested in part on a recent three-judge panel decision

that was released after the parties in this case finished briefing on Plaintiffs' beneficiary-liability sex-trafficking claim. That decision, *Jane Does 1-6 v. Reddit, Inc.*, 51 F.4th 1137 (9th Cir. 2022), interprets for the first time Congress's recent amendment to Section 230 to clarify that civil claims by survivors of online sex trafficking are not barred. The full circuit did not have the opportunity to review whether the *Reddit* panel decision should be reheard *en banc*. This petition for rehearing gives this Circuit the choice of whether it wants the *Reddit* decision to stand as the first-impression interpretation of Congress's most significant amendment to Section 230 since it was enacted in 1996.

BACKGROUND

The Plaintiffs in this case are victims of a sex-trafficking scheme to create child pornography depicting them that was ultimately distributed broadly on Twitter. Doe #1 notified Twitter that child pornography depicting him and another child, Doe #2, was being distributed on its platform. ER 149 ¶ 112. Two days after he first contacted Twitter, the child pornography had been viewed at least 167,000 times. It was also "re-tweeted" (or re-posted) on Twitter 2,223 times and "liked" 6,640 times. ER 155 ¶ 124 (screen capture of Twitter user engagement with the CSAM). Twitter possessed and allowed its distribution for another seven days resulting in further sharing of the child pornography. ER 155 ¶ 125.

After verifying Doe #1's identity and age, Twitter reviewed the video containing Plaintiffs' child pornography. ER 149-50, 152 ¶ 112-15, 120. Seven days after Doe #1's original report, Twitter wrote to him stating it reviewed the child pornography, and refused to remove it. *Id.* Doe #1 was shocked and horrified by Twitter's decision to continue possessing the child pornography and distributing the same. "What do you mean you don't see a problem?" he wrote. "We both are minors right now and were minors at the time these videos were taken. We both were 13 years of age. We were baited, harassed, and threatened to take these videos that are now being posted without our permission." ER 154-5 ¶ 123. Because of the severe anguish and embarrassment he experienced, Doe #1 became suicidal and Doe #2 stopped going to school for several weeks. ER 149 ¶ 106, 108. Twitter only removed the child pornography when it was directed to do so by the Department of Homeland Security. ER 156 ¶ 128.

Plaintiffs sued Twitter, alleging amongst other claims that (1) Twitter unlawfully benefited from participation in a sex-trafficking venture in violation of 18 U.S.C. §§ 1591(a)(2) and 1595 ("Count II"), and (2) that Twitter knowingly possessed and distributed child pornography in violation of 18 U.S.C. §§ 2252A and 2255 ("Count IV"). Twitter moved to dismiss all claims on the basis of Section 230 of the Communications Decency Act. In a published decision, the District Court dismissed all the claims except for Count II. *See Doe v. Twitter, Inc.*, 555 F. Supp.

3d 889 (N.D. Cal. 2021); ER 2-57. As to that count, the District Court found that Plaintiffs' allegations were "sufficient to allege an ongoing pattern of conduct amounting to a tacit agreement with the perpetrators in this case to allow them to post videos and photographs it knew or should have known were related to sex trafficking without blocking their accounts or the Videos." ER 45.

Twitter petitioned the District Court for permission to bring an interlocutory appeal as to Count II and Plaintiffs cross-petitioned this Court for permission to bring an interlocutory cross-appeal as to Count IV (CSAM) and their claim for direct sex-trafficking liability ("Count I"). Both petitions were granted.

The three-judge panel heard oral argument on April 20, 2023. Thirteen days later, it issued a Memorandum Decision affirming the District Court's order as to the dismissals of the child-pornography and direct sex-trafficking claims. *See* Op. 1-6. The panel also reversed the District Court's denial of dismissal of the beneficiary-liability sex-trafficking claim and remanded it for further consideration in light of *Reddit, supra*. Op. 6.

REASONS FOR GRANTING REHEARING

I. The panel decision contradicts this Circuit's CDA 230 jurisprudence and Supreme Court authority.

The panel decision is the first time this Circuit, or any federal appellate court, has ruled that Section 230 provides civil immunity for knowing violations of 18 U.S.C. § 2252A. This is in error; Section 230 does not preclude the CSAM claim

because (1) the claim does not treat Twitter as the publisher or speaker of the CSAM, and (2) CSAM is not "information" within the mean of 47 U.S.C. § 230(c)(1).

A.Under this Circuit's cases, Plaintiff's CSAM claim does not treat Twitter as the publisher or speaker of information provided by a third-party.

First, under this Court's precedent, Plaintiffs' CSAM claim does not treat Twitter as the "publisher or speaker" of information provided by a third party. The panel decision cites a line from this Circuit's decision in *Roomates.com*, stating that Plaintiffs' "complaint targets 'activity that can be boiled down to deciding whether to exclude material that third parties seek to post online.'" Op. 5. But Plaintiffs' Count IV seeks to hold Twitter accountable for its choice to engage in criminal conduct once it knew illegal contraband was uploaded to its servers. It is illegal to knowingly possess, reproduce, promote, present, transport, distribute, sell, or advertise CSAM. 18 U.S.C. § 2252A. At a minimum, possessing and receiving CSAM is distinct from any activity that is that of a "publisher" or "speaker."

The panel decision ignores this Circuit's jurisprudence. A cause of action only "inherently requires the court to treat the defendant as the publisher or speaker of content provided by another" if "the duty that the plaintiff alleges the defendant violated derives from the defendant's status as the publisher or speaker." *Gonzalez*, 2 F.4th at 891 (quoting *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1102 (9th Cir. 2009)). It is not Twitter's status as a provider of an interactive computer service that publishes third-party content which drives the analysis—it is Twitter's duty under

Section 2252A. Once it knew that it was in possession of child pornography it stood in violation of that law. The fact that the child pornography was still being broadly circulated on the Twitter platform only served to publicly demonstrate its violation.

Section 230(c)(1) prohibits *treating* a "provider or user of an interactive computer service" as the "publisher or speaker" of third-party information. It does not prohibit holding internet companies accountable for generally applicable legal duties. The analysis must include the defendant's conduct—not merely who the defendant is. Crucially, Plaintiffs' CSAM claim does ***not*** turn on whether Twitter has done a good job policing the posts of its users, as Twitter has no duty to "monitor third-party content." *Homeaway.com*, 918 F.3d at 682. But, neither does CDA 230 provide general immunity every time something originates from third-party content. *Id.* To provide broad immunity "every time a website uses data initially obtained from third parties would eviscerate [the CDA]." *Id.* (citing *Barnes*, 570 F.3d at 1100; *Roommates.com*, 521 F.3d at 1171).

Devoid of any meaningful discussion of this Circuit's CDA 230 precedent, the panel decision rests the entire disposition of Count IV on the "boiling down" language from *Roomates.com*. Yet, those words are not the end of the analysis—they are an introduction to the analysis. The *Roomates.com* decision goes on to caution courts "to be *careful not to exceed the scope of the immunity provided by Congress* and thus give online businesses an unfair advantage over their real-world

counterparts, which must comply with laws of general applicability." *Id*. at 1165 n.15 (emphasis added). This Circuit reiterated this principle in *Homeaway.com*:

> We have consistently eschewed an expansive reading of the statute that would render unlawful conduct "magically … lawful when [conducted] online," and therefore "giv[e] online businesses an unfair advantage over their real-world counterparts." For the same reasons, while we acknowledge the Platforms' concerns about the difficulties of complying with numerous state and local regulations, the CDA does not provide internet companies with a one-size-fits-all body of law. Like their brick-and-mortar counterparts, internet companies must also comply with any number of local regulations concerning, for example, employment, tax, or zoning.

HomeAway.com, 918 F.3d at 683 (quoting *Roommates.com*, 521 F.3d at 1164–65 & n.15). Internet companies must also comply with Congress's laws concerning child pornography. The panel decision is at odds with this Circuit's precedent because it reads Section 230(c)(1) so expansively that it would give internet companies a safe harbor for all violations of the law.

B. CSAM is not "information" within the meaning of CDA 230 and is therefore not subject to any immunity provision.

Child pornography is not "information" within the meaning of Section 230(c)(1)—it is contraband. The panel decision treats child pornography like any other form of content on the internet. It is illegal in the same manner that illegal guns or illegal drugs would be contraband. It is a felony to knowingly create, receive, possess, or distribute child pornography. Here the panel decision neglects binding Supreme Court precedent. Child pornography is its own category because it is

"intrinsically related to the sexual abuse of children." *New York v. Ferber*, 458 U.S. 747, 759 (1982). Congress and all 50 states prohibit the knowing possession of child pornography because they have an interest in "protecting the victims of child pornography" and "encourag[ing] the possessors of these materials to destroy them." *Osborne v. Ohio*, 495 U.S. 103, 110-11 (1990). The panel decision does not acknowledge the Supreme Court's careful and distinctive treatment of child pornography. As a result, it eviscerates the civil remedies Congress has specifically established for victims of child pornography. *See* 18 U.S.C. §§ 2252A and 2255.[5]

II. The panel decision presents matters of exceptional importance.

A. The panel decision will result in a broad safe harbor for harmful conduct that was never intended by Congress.

The significance of the panel's holding regarding child pornography is unavoidable. The panel decision is the first federal appellate decision to hold that Section 230 provides civil immunity for knowing violations of the child-pornography laws. Prior to the panel decision, no federal appellate court had addressed the issue. This Circuit's guidance on this issue is crucial because it sets the standard for many of the largest technology companies in the world.

[5] The panel decision notes that this Circuit has found that the exception to immunity in § 230(e)(1) does not apply to civil causes of action based on criminal statutes. That is beside the point. Plaintiffs' CSAM claim should move forward because it doesn't treat Twitter as a publisher or speaker of information.

The District Court dismissed the Plaintiffs' CSAM claim while acknowledging that their argument concerning the claim "[had] some force." *Twitter,* 555 F. Supp. 3d at 928. Other district courts have addressed the issue, with diverging results.[6] Other than its cursory citation to *Roomates.com*, the panel decision makes no attempt to ground its holding as to the CSAM claim in this Court's jurisprudence, Supreme Court precedent, or the statutory texts. Op. 5.

In dismissing Plaintiffs' CSAM claim, the District Court said that the decisions from the two district courts that have interpreted Section 230(c)(1) to provide immunity for CSAM were "in line with Ninth Circuit authority." *Twitter,* 555 F. Supp. 3d at 928 (citing *Gonzalez,* 2 F.4th at 886 and *Carafano v. Metrosplash.com, Inc*., 339 F.3d 1119, 1123 (9th Cir. 2003)). But neither *Gonzalez* nor *Carafano* dealt with a child-pornography claim. And the district-court decision that both the district court and Twitter lean upon most heavily[7] rests entirely on out-of-circuit cases that are not about child pornography. *See Bates*, 2006 WL 3813758 at *19-20 (citing *Zeran v. Am. Online, Inc.*, 129 F.3d 327 (4th Cir. 1997) (applying

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[6] *Compare Doe v. Bates*, 2006 WL 3813758 at *4 (E.D. Tex. 2006) (internet company immune from CSAM claim under 230(c)(1)); *and M.A. ex rel. P.K. v. Vill. Voice Media Holdings, LLC*, 809 F. Supp. 2d 1041, 1051 (E.D. Mo. 2011) (same); *with Doe #1 v. MG Freesites, LTD*, 2022 WL 407147, at *22 (N.D. Ala. Feb. 9, 2022) ("Receipt and possession of child pornography, alone, are criminal acts, and are not shielded by Section 230 immunity.").

[7] *See* Dkt. 61, Twitter's Reply Br. on App. and Cross App. Resp. Br. at 40-1.

§ 230(c)(1) to defamation claim); *and Noah v. AOL Time Warner, Inc.,* 261 F. Supp. 2d 532, 534 (E.D. Va. 2003) (applying § 230(c)(1) to Title II religious-discrimination claim)).

The panel decision fails to engage in the requisite legal analysis. It makes no attempt to apply the text of Section 230(c)(1), nor does it attempt to compare the facts in this case to the facts of other CDA 230 cases. Neither the panel decision, nor the decision of the District Court, is grounded in this Circuit's jurisprudence; both fail to employ this Circuit's practice of carefully applying the Communication Decency Act to claims before it. Unless there is intervention on rehearing, the panel decision's cursory and shallow analysis will become the authoritative interpretation of the Communications Decency Act regarding child pornography in this Circuit and beyond.

The exceptional importance of the consequences of the panel decision's error is not mitigated by the fact that it is a memorandum disposition. As the regional epicenter of some of the nation's largest technology companies, this Circuit's guidance on Section 230 looms large.[8] The panel decision caries this Circuit's imprimatur; its status as a memorandum decision does not change that. Indeed, the

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[8] *See generally, Validity, Construction, and Application of Immunity Provisions of Communications Decency Act*, 47 U.S.C. § 230, 52 A.L.R. Fed. 2d 37 (2011) (table indicating the Ninth Circuit has decided far more Section 230 cases (88) than any other circuit—over three times as many as the next most active circuit (the Second Circuit with 25)).

same day the panel decision was released, the online platform Omegle cited it to the Eleventh Circuit in an appeal concerning child pornography. *See* Supp. Auth. Let., *M.H. v. Omegle.com LLC*, 22-10338 (11th Cir. May 3, 2023) (28(j) letter), ECF No. 62 (05/03/23) ("To Omegle's knowledge, the Ninth Circuit is the first federal circuit court of appeals to address the question whether Section 230(c)(1)'s exception to immunity extends to civil claims like Plaintiffs' for alleged violation of 18 U.S.C. §§ 2252A and 2255."). Twelve days later, it was again cited by Google and YouTube to support their proposition that "section 230 precluded Plaintiffs from stating a viable claim for possession and distribution of child pornography." *Alonso v. Google, et. al.,* 5:23-cv-00091-JA-PRL, *18 (M.D. Fla. 2023), ECF No. 40 (05/15/23).

The panel decision's error will do more than clothe internet companies with broad, *de facto* immunity for knowing violations of the child-pornography laws—it is likely to shield individual consumers and distributors of child pornography as well. Section 230(c)(1) applies to both "providers" and "users" of "interactive computer services." 47 U.S.C. § 230(c)(1). By the logic of the panel decision, even the knowing possession of CSAM through online platforms can be boiled down to the publishing function. Thus, as long as they were not the original creators of child pornography, Twitter users that access and redistribute child pornography through Twitter, or other online platforms will claim immunity, just as Twitter has. This

absurd result is not what Congress intended when it enacted the Communications Decency Act, which was aimed at protecting children.[9] But it is the tragic consequence of the interpretation Twitter has pressed in this litigation and which the panel decision has now endorsed on behalf of this Circuit.

B. The full Ninth Circuit has not had the opportunity to address Congress's recent amendment to CDA 230, which clarified that immunity does not apply in the context of civil, online sex-trafficking claims.

The panel decision also raises a separate, and independent, issue of exceptional importance. The panel decision remands the Plaintiffs' claim under 18 U.S.C. §§ 1591(a)(2) and 1595 that Twitter knowingly benefited from their sex trafficking on the Twitter platform for reconsideration in light of the panel decision in *Reddit, supra*, Op. 4-5.[10] In their discretion, a majority of judges in this Circuit may well decide that a remand based on *Reddit* in this case is not the best approach. Indeed, there are compelling reasons for the whole circuit to review the significance and consequence of the *Reddit* panel's decision.

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[9] *Cf.* 47 U.S.C. § 230(b)(4) ("It is the policy of the United States to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material."); *U.S. v. City of Redwood City*, 640 F.2d 963, 969 (9th Cir. 1981) (rejecting interpretation as absurd because it would function to shield negligent party from liability in contradiction of statute's purpose).

[10] As the panel decision recognizes, a petition for *certiorari* is pending in *Reddit*. Op. 6 n. 2.

First, the *Reddit* decision is the first decision by a federal appellate court to apply Congress's recent FOSTA amendment to Section 230(c)(1), which specifically focused on online sex trafficking.[11] The appellants in *Reddit* petitioned for *certiorari* but did not petition for rehearing or rehearing *en banc*. As a result, most of the circuit judges will not have the opportunity to address an important issue of first impression: Congress's substantive amendment to Section 230 that was designed to permit online sex-trafficking claims.

Second, the panel decision in *Reddit* is flawed in several respects meriting this Circuit's *en banc* review. These flaws include: (1) reliance on Sixth Circuit authority that is inapposite, has been superseded by statute, and exempts from liability those who "turn a blind eye"—a phrase that does not appear in 18 U.S.C. § 1591;[12] (2) reliance on legislative history to the detriment of the plain language of the statute;[13] and (3) the adoption of a narrow reading of FOSTA that results in survivors of online trafficking having *fewer* civil remedies than victims trafficked in the physical (or

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[11] *See generally*, Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. Law. No. 115-164 (Apr. 11, 2018).

[12] *Reddit,* 51 F.4th at 1145 (quoting *U.S. v. Afyare*, 632 F. App'x 272, 286 (6th Cir. 2016)).

[13] *See id.* at 1143–45; *see also id.* at 1146 (R. Nelson, J. concurring in part) (disagreeing with majority's use of legislative history).

non-online) context—the precise opposite of what Congress sought to accomplish when it enacted a remedial statute[14] titled to "fight online sex trafficking."

The three-judge panel in this *Twitter* appeal and cross-appeal were bound by the *Reddit* decision and unable to consider or address its flaws. Sitting *en banc*, however, this Circuit may address those problems.[15] This appeal presents another opportunity for this Circuit to provide guidance on legislation designed to make sure survivors of online sex trafficking are not summarily blocked from proving their claims through a broad reading of § 230(c)(1).

CONCLUSION

For all these reasons the panel decision should be reheard by this Circuit sitting *en banc*. At a minimum, the Circuit should vacate the memorandum-disposition decision and rehear as to Plaintiffs' Count IV (CSAM), applying the Circuit's CDA 230 cases to the Plaintiffs' claim under 18 U.S.C. § 2252A.

As a secondary matter, the Circuit should vacate its memorandum-disposition decision and rehear as to Plaintiffs' Count II (knowingly benefiting from sex-

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[14] Remedial statutes should be construed liberally. *Peyton v. Rowe*, 391 U.S. 54, 65 (1968).

[15] *Cf. Sterling Sav. Ass'n v. Ryan*, 959 F.2d 241 (9th Cir. 1992) ("A prior published decision of this circuit may be overruled only in an *en banc* proceeding.").

trafficking), with a reconsideration of the interpretation of FOSTA in the *Reddit* decision.

Dated: May 17, 2023

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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9th Cir. Case Number(s) 22-15103 and 22-15104

I am the attorney or self-represented party.

I certify that pursuant to Circuit Rule 35-4 or 40-1, the attached petition for panel rehearing/petition for rehearing en banc/response to petition is (*select one*):

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OR

○ In compliance with Fed. R. App. P. 32(a)(4)-(6) and does not exceed 15 pages.

Signature s/ Paul A. Matiasic **Date** May 17, 2023
(use "s/[typed name]" to sign electronically-filed documents)

Appendix

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Selected docket entries for cases 22–15103, 22–15104

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Filed	Document Description	Page	Docket Text
05/03/2023	78		FILED MEMORANDUM DISPOSITION (LAWRENCE VANDYKE, GABRIEL P. SANCHEZ and STEPHEN JOSEPH MURPHY, III) Accordingly, the district court's order is AFFIRMED as to Counts 1 and 4, but because the holding of the district court regarding Count 2 is contrary to our court's Reddit decision, the order is REVERSED with respect to Count 2 and REMANDED for further proceedings to be conducted in a manner consistent with this court's Reddit decision. FILED AND ENTERED JUDGMENT. [12707684] [22–15103, 22–15104] (AKM)
	78 Memorandum	2	
	78 Post Judgment Form **DOCUMENT COULD NOT BE RETRIEVED!**		

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

MAY 3 2023

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

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

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

Argued and Submitted April 20, 2023
San Francisco, California

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

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

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

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

cross-appeals.

"We review de novo both a district court order dismissing a plaintiff's claims pursuant to Federal Rule of Civil Procedure 12(b)(6) and questions of statutory interpretation." *Dyroff v. Ultimate Software Grp., Inc.*, 934 F.3d 1093, 1096 (9th Cir. 2019). Only a complaint that states a plausible claim for relief may survive a motion to dismiss. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Section 230 of the Communications Decency Act states that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1). Our court has held that section 230 "provides broad immunity" for claims against interactive computer service providers "for publishing content provided primarily by third parties." *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1123 (9th Cir. 2003). And "any activity that can be boiled down to deciding whether to exclude material that third parties seek to post online is perforce immune under section 230." *Fair Housing Council of San Fernando Valley v. Roommates.Com, LLC*, 521 F.3d 1157, 1170–71 (9th Cir. 2008).

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

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

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

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

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

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

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

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

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

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

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