No. 23-961

IN THE

Supreme Court of the United States

JOHN DOE, THROUGH NEXT FRIEND JANE ROE,

Petitioner,

v.

SNAP, INC., DBA SNAPCHAT, L.L.C.,
DBA SNAP, L.L.C.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF *AMICI CURIAE* CHILD USA, NATIONAL CENTER ON SEXUAL EXPLOITATION ("NCOSE") AND THE KEMPE FOUNDATION IN SUPPORT OF PETITIONER

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INTERESTS OF AMICI CURIAE[1]

Amici are organizations dedicated to the prevention of child sexual abuse and exploitation.

CHILD USA is a non-profit, interdisciplinary think tank fighting for the civil rights of children. CHILD USA pairs in-depth legal analysis and cutting-edge social science research to determine the most effective public policies to protect children from sexual abuse and online exploitation and to ensure access to justice for victims. Distinct from an organization engaged in the direct delivery of services, CHILD USA produces evidence-based solutions and information needed by policymakers, organizations, courts, media, and society as a whole to increase child protection and the common good.

The National Center on Sexual Exploitation ("NCOSE") is a nonprofit organization, founded in 1962, that combats sexual exploitation and abuse by advocating in state and federal courts for survivors, engaging in corporate advocacy to encourage companies to adopt responsible and safe practices, and advocating for legislative change that protects survivors and promotes human dignity.

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1. All parties have received notice of amici's intent to file an amicus brief in the above-captioned matter. No counsel for a party has authored this brief in whole or in part, and no party, party's counsel, or any other person – other than amici or their counsel – has made a monetary contribution to the preparation or submission of this brief. There is no relationship between CHILD USA, The National Center on Sexual Exploitation, and The Kempe Foundation, or its attorneys and petitioners or petitioners' counsel.

The Kempe Foundation is a 501(c)(3) founded in 1976 to support the work of the Kempe Center for the Prevention and Treatment of Child Abuse and Neglect at the University of Colorado. The Kempe Center was the first academic center in the United States dedicated to the research and treatment of child abuse and neglect. Founded in 1972, the Kempe Center is home to approximately 80 experts in a variety of disciplines, including medicine, behavioral health, law, and social work, all of whom focus their research, teaching, and advocacy on the prevention and treatment of child abuse and neglect. The Kempe Foundation also independently works to advance policies that improve the lives of children and families by building teams of experts, legislators, and advocates at the state, national, and international levels.

Amici write to emphasize the harmful impact that broad interpretation of Section 230 has had on victims of child sexual abuse and exploitation and to underscore the urgency with which this Court's review is needed to ensure the protection of children online. Section 230's failure to incentivize tech companies to develop child-protective processes has made child sexual exploitation and abuse a feature of digital communication platforms and left victims without recourse, which is inconsistent with Congress's intent. This case presents an opportunity for this Court to change the incentive calculus by restoring interpretation of Section 230 to its text and congressionally intended purpose in favor of child-protection.

SUMMARY OF THE ARGUMENT

When Congress passed Section 230 as part of the Communications Decency Act ("CDA") twenty-eight years

ago, lawmakers promised some degree of protection for children online – both from exposure to sexually explicit material and from the harm attendant to exploitation and abuse. In this respect it has failed, in large part because of the expansive immunity read into Section 230 by federal courts. Today, tech companies enjoy unprecedented immunity from civil suit, even from knowing violations of laws prohibiting child pornography[2] and trafficking. Tragically, Section 230's failure to incentivize tech companies to adopt child protection-driven processes has made sexual exploitation a feature of digital communication platforms and has left victims like Doe and their families without legal recourse. This was not Congress's intent when they set out on a broad campaign to "clean up the internet."

Congress passed Section 230 as a limited defense from civil liability for internet service providers' ("ISPs") good faith efforts to restrict or enable restriction to sexually explicit or otherwise harmful content on their platforms. Section 230 bars claims that impose liability on an ISP based solely on the improper character of a third-party's post. 47 U.S.C. § 230(c)(1). That is a very circumscribed set of claims.

The interconnected, dynamic online environment that Section 230 presides over today is profoundly different from that of the early static, content-repository days of Prodigy, making Section 230's limits on immunity more important than ever for child protection. Predators

2. While the term child pornography is used in federal statutes, this brief will use the term child sexual abuse material ("CSAM") instead, as it more accurately reflects the abuse depicted in these images and videos and the resulting trauma to the child.

increasingly leverage social media platforms for easy and direct access to potential victims. An ever-increasing number of children are being groomed, exploited, and abused online, and the images and videos of their abuse are being viewed, collected, and redistributed at an unprecedented rate. Social media companies, including Snapchat, have the tools to address the dangers that lurk on their platforms but have repeatedly chosen financial profit over the protection of children. The question bears asking, why are these companies granted immunity when, as in this case, they have taken affirmative steps that contributed to the plaintiff 's injuries? Indeed, it is absurd that a law originally intended to protect children from explicit content online may be applied in such a way that it instead protects the companies who facilitate their abuse.

As a "rising chorus" of jurists have recognized, the prevailing interpretation of Section 230 improperly immunizes the misconduct of online companies—especially social media platforms. *See Gonzalez v. Google LLC*, 2 F.4th 871, 913 (9th Cir. 2021) (Christian, J.) ("We share the dissent's concerns about the breadth of § 230. As the dissent observes, 'there is a rising chorus of judicial voices cautioning against an overbroad reading of the scope of Section 230 immunity'. . . ."); *Malwarebytes, Inc. v. Enigma Software Grp. USA, LLC*, 141 S. Ct. 13, 14–15 (2020) (Thomas, J., statement respecting the denial of certiorari) (positing that the "modest understanding" of what Section 230 is meant to do based on its text "is a far cry from what has prevailed in court"); *Force v. Facebook*, Inc., 934 F.3d 53, 84 (2d Cir. 2019) (Katzmann, J., concurring in part) (opining that Section 230 as applied creates "extensive immunity . . . for activities that were undreamt of in 1996" and "[i]t therefore may be time for

Congress to reconsider the scope of § 230"). The seven dissenters to the Fifth Circuit's underlying decision in this case are merely the latest to express their skepticism and call upon this Court to definitively determine the proper scope of Section 230. *Doe v. Snap, Inc.*, 88 F.4th 1069, 1073 (5th Cir. 2023) (Elrond, J. dissenting).

As this brief will explain, this case is an ideal vehicle for this Court to clarify what the text of Section 230 already makes clear: when a plaintiff's claim is based not on the content of the information shown but rather on the affirmative conduct of the defendant, the Section 230 defense cannot be invoked as a shield from ordinary tort liability.

REASONS TO GRANT THE PETITION

I. This Court Should Grant Certiorari to Address the Proper Scope of Section 230 Immunity

The blanket immunity that courts have read into Section 230 is antithetical to the statute's plain language and congressional intent. Rather than incentivizing "Good Samaritan" behavior by internet companies, the prevailing misinterpretation of Section 230 shields them from accountability for the harm their own conduct causes, even when they knowingly facilitate heinous crimes against children. The Court should take this opportunity to restore the narrow scope of Section 230 consistent with its text and Congressional objectives, including child protection.

A. The Prevailing Interpretation of Section 230 Improperly Immunizes Misconduct of Social Media Platforms

Overly broad construction of Section 230 can be traced back to the Fourth Circuit's decision in *Zeran v. America Online, Inc.* 129 F.3d 327 (4th Cir. 1997). Relying exclusively on Section 230's purpose to protect online providers in limited circumstances, without reference to the statutory text or the law's other purpose to protect children, the court erroneously held that Section 230(c)(1) creates immunity for "any cause of action that would make service providers liable for information originating with a third-party user of the service." *Id.* at 330, 333. Justice Clarence Thomas criticized the decision explaining that, "[a]lthough the text of §230(c)(1) grants immunity only from 'publisher' or 'speaker' liability, the first appellate court to consider the statute held that it eliminates distributor liability too." *Malwarebytes*, 141 S. Ct. at 15 (Thomas, J., statement respecting the denial of certiorari) (citing *Zeran*, 129 F.3d at 331–34). "Extending §230 immunity beyond the natural reading of the text," Justice Thomas lamented, could have "serious consequences." *Id.* at 18.

Illustrating that point is *Doe v. Am. Online*, one of the earliest CSAM cases to adopt the *Zeran* approach. 783 So. 2d 1010 (Fla. 2001). In that case, a mother brought a negligence claim on behalf of her eleven-year-old son, John Doe, who had been victimized by a sexual predator using the online platform America Online ("AOL"). *Id.* at 1012. Relying on *Zeran*'s broad interpretation of Section 230 immunity, the Florida Supreme Court rejected Doe's claims alleging that AOL had knowingly distributed and permitted advertisements for CSAM on its platform, that

it had received complaints about CSAM depicting Doe on its platform, and that it had failed to terminate the account of the user it knew to be posting such material in violation of the company's terms of service. *Id* at 1017. In his incisive dissent, Justice Lewis argued that the majority's reliance on *Zeran* was erroneous and that the decision

> frustrate[d] the core concepts explicitly furthered by the [Communications Decency] Act and contravene[d] its express purpose . . . [T]he so-called Decency Act has, contrary to well established legal principles been transformed from an appropriate shield into a sword of harm and extreme danger which places technology buzz words and economic considerations above the safety and general welfare of our people.

Id. at 1019 (Lewis, J., dissenting). He warned that the majority's approach to liability under Section 230 would create "carte blanche immunity for wrongful conduct plainly not intended by Congress." *Id*.

As predicted, courts following *Zeran* have "read extra immunity" into the statute "where it does not belong," in a manner far beyond what the text supports. *Malwarebytes*, 141 S. Ct. at 15 (Thomas, J., statement respecting the denial of certiorari) (citation omitted). The effect has been an alarming cascade of increasingly flawed decisions providing online platforms with immunity for a vast array of criminal and tortious activities that have very little to do with publishing, such as: terrorism, *Force*, 934 F.3d at 53; illegal firearm sales, *Daniel v. Armslist, LLC*, 926 N.W.2d 710, 715, 726 (Wis. 2019), cert. denied. 140 S. Ct. 562 (2019); and sex trafficking, *Doe v. Backpage.com, LLC*, 817 F.3d 12, 21 (1st Cir. 2016), to name a few.

Even after Congress enacted the Fight Online Sex Trafficking Act ("FOSTA") – which clarified that Section 230 does not provide legal protection to online service providers that promote, facilitate, or materially benefit from trafficking activities on their platforms – courts *still* granted immunity to companies that knowingly or recklessly facilitated these heinous crimes against children despite the actual language of the Act. Pub. L. No. 115–164, 132 Stat. 1253. *See also* 164 Cong. Rec. H1290-02 (daily ed. Feb. 27, 2018) (statement of Rep. Lee); *Does 1-6 v. Reddit, Inc.*, 51 F.4th 1137, 1142 (9th Cir. 2022); *A.M. v. Omegle.com, LLC, 2022* WL 2713721, at *1 (D. Or. July 13, 2022); *M. L. v. Craigslist, Inc.*, 2020 WL 6434845, at *10 (W.D. Wash. Apr. 17, 2020); *Doe v. Kik Interactive, Inc.*, 482 F. Supp. 3d 1242 (S. D. Fla. 2020).

This extreme approach that would immunize online platforms for their own misconduct is impossible to reconcile with the statute's plain language, which clearly indicates that the operative reasons for immunity are restricting access to objectional content and "Good Samaritan" screening. 47 U.S.C. § 230(c); *see also* Alina Selyukh, *Section 230 A Key Legal Shield For Facebook, Google Is About To Change*, NPR (Mar. 21, 2018) (statement of Rep. Cox), https://www.npr.org/sections/alltechconsidered/2018/03/21/591622450/section-230-a-key-legal-shield-for-facebook-google-is-about-to-change.

Furthermore, broad construction of Section 230 has created a perverse incentive for online platforms to behave recklessly in pursuit of profit. As Justice Lewis questioned,

> [w]hat conceivable good could a statute purporting to promote ISP self-policing efforts

> do if, by virtue of the courts' interpretation of that statute, an ISP which is specifically made aware of child pornography being distributed by an identified customer through solicitation occurring on its service, may, with impunity, do absolutely nothing, and reap the economic benefits flowing from the activity?

AOL, 783 So. 2d at 1024–25. Without an obligation for online companies to address harmful activities on their platforms – no matter how easily they could do so – and no requisite standard of care by which to conform their conduct, consumers, and especially children and victims of abuse, have been left to bear the consequences.

There is an urgent need for this Court to "take up the proper interpretation of Section 230 and bring its wisdom and learning to bear on this complex and difficult topic." *Gonzalez*, 2 F.4th at 926 (Gould, J., dissenting). This case places these questions squarely before this Court because each of Doe's claims, which are grounded in Snapchat's own misconduct, were dismissed based on the Fifth Circuit's overbroad interpretation of Section 230 immunity. Given the speed with which technology is advancing and the ever-expanding use of social media among our Nation's youth, it is imperative that this Court intervene now to resolve this issue of exceptional importance.

B. This Court Should Resolve Questions About When and Under What Conditions Section 230 Protects Social Media Platforms from Liability for Their Own Misconduct

The internet has changed in unimaginable ways since Congress passed Section 230 as part of the CDA. Modern

tech companies like Snapchat are vastly larger, wealthier, and more powerful than were the online service providers of two decades ago, and the activities in which they engage are less obviously about speech. *See* Shira Ovide, *Big Tech Has Outgrown This Planet*, The New York Times (Oct. 12, 2021), https://www.nytimes.com/2021/07/29/technology/big-tech-profits.html. Today's virtual world offers a multitude of products and services that would have been unimaginable to Congress back in 1996, and poorly designed digital products can cause significant harm to their users. Whereas in the physical world, consumers may seek redress for their harm by filing a tort claim against the manufacturer of the product, such claims originating in the virtual world are often preempted by Section 230.

Section 230's content-publisher model has proven especially problematic in cases where a plaintiff 's injury is causally connected to third-party content, but the defendant's alleged wrongdoing is not based on a failure to moderate that content. For example, the Fifth Circuit's decision in *Doe v. Myspace*, one of the first appellate court cases to address liability in the context of a defective virtual product, demonstrates the paradigmatic error courts have and continue to make in assessing these claims under Section 230. 528 F.3d 413 (5th Cir. 2008). In that case, the Court considered allegations that the social media platform MySpace had been negligent in its failure to implement basic safety features that could have prevented Doe, then thirteen-years-old, from creating a profile on the platform through which she was able to connect with a sexual predator. *Id.* The Court rejected Doe's claim, characterizing it as a "disingenuous" attempt to circumvent Section 230 and institute liability based on her individual disapproval of the platform's "monitoring,

screening and deletion" choices, which are activities generally protected by Section 230. *Id*. at 420. In so holding, the Court ignored that the alleged harm stemmed from Doe's ability to access the social media platform – which occurred well before she interacted with any users – and not from the contents of any correspondence posted to the website by this predator or any other third party. By disregarding MySpace's affirmative conduct – namely, its failure to design and implement features that would have prevented such foreseeable harms to minors accessing their platform – and assuming that Doe sought redress for some content-derived harm, the Fifth Circuit improperly foreclosed claimants' ability to hold online platforms liable for their role as manufacturers of products.

Many courts have followed suit, dismissing claims against online platforms for their affirmative design and system choices reasoning that, regardless of any negligence or defects or preventable harm to others, online entities are immune from liability so long as the duty breached does not involve the creation of content. *See*, *e.g.*, *Force*, 934 F.3d at 53; *Marshall's Locksmith Serv. Inc. v. Google, LLC*, 925 F.3d 1263 (D.C. Cir. 2019); *Stokinger v. Armslist, LLC*, No. 1884CV03236F, 2020 WL 2617168, at *5 (Mass. Super. Apr. 28, 2020); *Herrick v. Grindr, LLC*, 306 F. Supp. 3d 579, 590 (S.D.N.Y. 2018), *aff'd*, 765 F. App'x 586 (2d Cir. 2019), *cert. denied*, 140 S. Ct. 221 (2019); *Dyroff v. Ultimate Software Grp., Inc.*, 934 F.3d 1093, 1097–101 (9th Cir. 2019); *Backpage.com*, 817 F.3d at 21.

In a departure, the Ninth Circuit in *Doe v. Internet Brands, Inc.*, held that Section 230 did not bar a negligence claim against the owners of a social networking site for individuals in the modeling industry for the website's

alleged negligent failure to warn about two individuals who used the website to lure Doe to a fake audition, where she was raped. 824 F.3d 846 (9th Cir. 2016). The owners had obtained information from an offline source about the third parties' scheme to target and lure victims through its platform. *Id.* In permitting plaintiff 's claim, the Court distinguished a remedial measure that may require an interactive computer service provider to warn its users of a known risk from the paradigmatic case of Section 230 immunity—a defamation claim based on content published by a third-party user. *Id.* at 853. The Court explained that Doe's failure to warn claim "ha[d] nothing to do with [Defendant's] efforts, or lack thereof, to edit, monitor, or remove user-generated content." *Id.* at 852. While the Court conceded that Defendant had acted as the "publisher or speaker" of user content (Doe's profile), a "but-for" cause of her injuries, it nonetheless rejected the but-for causation requirement as applied to Section 230 preemption, reasoning that "[p]ublishing activity is a but-for cause of just about everything [Defendant] is involved in." The court noted further that "the CDA does not provide a general immunity against all claims derived from third-party content. . . . Congress has not provided an all-purpose get-out-of-jail-free card for businesses that publish user content on the internet, though any claims might have a marginal chilling effect on internet publishing businesses." *Id.* at 852–53.

The Ninth Circuit refined the publisher liability analysis in *Lemmon v. Snap, Inc.*, asserting that whether a defendant is treated as a publisher or speaker depends on "the duty the plaintiff alleges." 995 F.3d 1085, 1091 (9th Cir. 2021). To that point, the Court added that the duty alleged in a products liability claim

> differs markedly from the duties of publishers as defined in the CDA. Manufacturers have a specific duty to refrain from designing a product that poses an unreasonable risk of injury or harm to consumers. Meanwhile, entities acting solely as publishers – *i.e.*, those that review material submitted for publication, perhaps edit it for style or technical fluency, and then decide whether to publish it – generally have no similar duty.

Id. at 1092 (internal citations and quotations omitted).

These Ninth Circuit decisions are instructive as to the proper analysis of publisher liability under Section 230 in light of its text and history. The key lies in the careful evaluation of the claimant's cause of action to determine if the defendant's conduct – the alleged source of harm – goes beyond the entity's editorial functions. *See Bauer v. Armslist, LLC*, 572 F. Supp. 3d 641, 664 (E.D. Wis. 2021) (describing Section 230 as a "definitional provision" requiring a "fact-based inquiry."). While an online platform may be primarily designed for posting and exchanging content, that fact alone does not sweep all decisions made by the platform within the scope of its publishing function. Indeed, "Section 230(c)(1) limits liability *based on the function the defendant performs, not its identity*." *Force*, 934 F.3d at 81 (emphasis added). Simply put, "[w]hen a plaintiff brings a claim that is based not on the content of the information shown" but rather on the defendant's own conduct, "the CDA does not and should not bar relief." *Id.* at 82. *See also FTC v. Accusearch Inc.*, 570 F.3d 1187, 1204 (Tymkovich, J.) (10th Cir. 2009); *Bauer*, 572 F. Supp. 3d at 663–64.

This case presents an opportunity for the Court to clarify that Section 230 does not apply to an online company's affirmative conduct and that they are not entitled to immunity when their actions cause harm to others, even if third-party content set the plaintiff 's injury in motion.

II .The Question Presented is Exceptionally Important Because It Implicates Child Protection

For decades, courts have read Section 230 to shield the Nation's largest and most powerful tech companies from virtually all legal claims. Far from making the internet safer for children, the prevailing interpretation of Section 230 allows social media platforms to eschew their responsibilities to consumers and then to sidestep accountability when their products cause serious harm. The near universal use of social media by today's youth underscores the urgency with which this Court's intervention is needed. Returning Section 230 to its statutory text is critical to safeguarding children online and to ensuring that past victims have access to justice.

A. The Prevailing Interpretation of Section 230 Undermines Its Predominant Purpose to Provide Minors with a Safe Online Experience

Twenty-eight years ago, the argument that internet service providers operate exclusively as passive conduits for third-party content and thus should not be liable for harm caused by the activities on their platforms may have been reasonable. Today, companies such as Snapchat operate some of the most technologically advanced websites in the world. Social media companies are not only

able to manipulate content and exploit user behaviors to drive up profits, but they affirmatively exercise that ability. *See*, *e.g.*, Devi Sridhar, *Social media could be as harmful to children as smoking or gambling – why is this allowed?* The Guardian (Jul. 4, 2023), https://www.theguardian.com/commentisfree/2023/jul/04/smoking-gambling-children-social-media-apps-snapchat-health-regulation (revealing that ninety-nine percent of Snapchat's revenue is generated through ad-driven user engagement). Indeed, "[m]any . . . successful internet companies . . . design their applications to collect, analyze, sort, reconfigure, and repurpose user data for their own commercial reasons, unrelated to the original interest in publishing material or connecting users. These developments belie any suggestion that online intermediaries are merely conduits of user information anymore." Olivier Sylvain, *Intermediary Design Duties*, 50 Conn. L. Rev. 203, 218 (2018). *See also* 164 Cong. Rec. S1849-09 (daily ed. Mar. 21, 2018) (statement of Sen. Wyden). Social media companies like Snapchat have propelled much of the harmful content on their platforms to optimize user engagement, often with little regard to the collateral consequences. *Protecting Youth Mental Health*, U.S. Surgeon General's Advisory (2021), https://www.hhs.gov/sites/default/files/surgeon-general-youth-mental-health-advisory.pdf.

For example, in 2017, a British teenager named Molly Russel took her own life after months of viewing pro-suicide and self-harm content recommended to her through social media. Adam Satariano, *British Ruling Pins Blame on Social Media for Teenager's Suicide*, The New York Times (Oct. 1, 2022), https://www.nytimes.com/2022/10/01/business/instagram-suicide-ruling-britain.html. Following an intensive investigation, the

Senior Coroner for the Northern District of Greater London issued a landmark ruling, that the teen "died from an act of self-harm while suffering from depression and the negative effects of on-line content." *Regulation 28 Report to Prevent Future Deaths*, North London Coroner's Service (Oct. 13, 2022), https://www.judiciary.uk/wp-content/uploads/2022/10/Molly-Russell-Prevention-of-future-deaths-report-2022-0315_Published.pdf. Specifically, the Coroner found that the platforms algorithmic tool fueled binge periods during which the teen was fed a stream of increasingly harmful content which ultimately "contributed to her death in a more than minimal way." *Id.*; Dan Milmo, *Molly Russell inquest must lead to action on internet dangers, says coroner*, The Guardian (Sept. 29, 2022) https://www.theguardian.com/technology/2022/sep/29/molly-russell-inquest-must-lead-to-action-on-internet-dangers-says-coroner. As news of the teen's death spread, thirty additional families came forward alleging that social media played a role in their children's suicides as well. *See* Faith Ridler, *THIRTY Families Blame Social Media Firms for Their Roles in Children's Suicides as it Emerges Pinterest Sent a Personalised Email to Molly Russell's Account with Self-Harm Images AFTER She Took Her Own Life,* Daily Mail (Jan. 27, 2019), https://www.dailymail.co.uk/news/article-6636807/Now-30-families-blame-social-media-firms-roles-childrens-suicides.html.

Similarly, in 2019, the public learned that YouTube had been recommending compromising videos of young children, thus enabling a "pedophilia ring" to proliferate on its site. Ryan Broderick, *YouTube's Latest Child Exploitation Controversy Has Kick-Started A War Over How to Fix The Platform,* Buzzfeed News (Feb. 22, 2019),

https://www.buzzfeednews.com/article/ryanhatesthis/youtube-child-sexual-exploitation-creators-watson; K.G Orphanides, *The Paedophile Scandal Shows YouTube is Broken. Only Radical Change Can Fix It*, WIRED (Feb. 23, 2019), https://www.wired.co.uk/article/youtube-paedophiles-boycott-algorithm-change.

Overwhelming scientific research has also evidenced the significant, negative effects that social media has on youth mental health. *Social Media and Youth Mental Health: the U.S. Surgeon General's Advisory*, U.S. DEP'T HEALTH & HUM. SERVS. (May 23, 2023). For example, greater social media consumption among adolescents is associated with a range of adverse outcomes including poor sleep habits, body dissatisfaction, low self-esteem, disordered eating behaviors, online harassment, and depressive symptoms, to name a few. *Id*. *See also* G. Wells, J. Horwitz, and D. Seetharaman, *Facebook Knows Instagram is Toxic for Teen Girls, Documents Show*, THE WALL STREET JOURNAL (Sep. 14, 2021), https://www.wsj.com/articles/facebook-knows-instagram-is-toxic-for-teen-girls-company-documents-show-11631620739.

These stories illustrate that social media companies are aware of their products' capabilities to manipulate human behavior both on and offline, and of the harms that have befallen their users as a result. Yet, these companies still refuse to take responsibility by, for example, marshaling the tools already at their disposal to prevent illicit contact between children and adults on their platforms.

With ninety-five percent of today's children aged thirteen to seventeen using social media, the potential

harm posed by these platforms is limitless absent meaningful, legal accountability. *Social Media and Youth Mental Health: the U.S. Surgeon General's Advisory*, U.S. Dep't Health & Hum. Servs. (May 23, 2023).

B. The Sweeping Immunity Afforded to Social Media Companies Under Section 230 Has Facilitated an Explosion of Online Exploitation and Abuse

The incentive Congress sought to provide by enacting Section 230 has been twisted such that social media companies stand to gain significant profits from hosting and distributing illicit content on their platforms. The tragic result has been an explosion of growth in the online marketplace for CSAM. At any given time, there are at least one million child sex offenders searching for CSAM online. Eur. Parliamentary Rsch. Serv., Curbing the surge in online child abuse: The dual role of digital technology in fighting and facilitating its proliferation 2 (Nov. 2020), https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/659360/EPRS_BRI(2020)659360_EN.pdf. In the last fifteen years alone, online exploitation and abuse of children has increased by 422 percent. U.S. Sent'g Comm'n, Federal Sentencing of Child Pornography: Production Offenses 3 (2021), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2021/20211013_Production-CP.pdf. Millions of individual users consume more than fifteen million child sexual abuse images in a market currently valued between three and twenty billion dollars annually. Michael H. Keller & Gabriel J.X. Dance, *The Internet Is Overrun With Images of Child Sexual Abuse. What Went Wrong?*, NYTimes.com (Sep. 2019), available at https://

www.nytimes.com/interactive/2019/09/28/us/child-sex-abuse.html?msclkid=531b2a24a55511ec9733999ed45d40bd.

These materials not only exist on the dark roads of the internet, but also on mainstream platforms as well. For example, Google returns 920 million videos on a search for 'young porn,' and Pornhub has facilitated and profited from the distribution of thousands of videos with violent titles such as "Screaming Teen" and "Degraded Teen." Nicolas Kristof, *The Children of Pornhub*, NY Times (Dec. 4, 2020), https://www.nytimes.com/2020/12/04/opinion/sunday/pornhub-rape-trafficking.html.

Relatedly, perpetrators increasingly rely on popular social media platforms to target and groom minors to engage in sexually explicit conduct online. In fact, Snapchat is one of the most – if not *the* most – frequently used platforms in grooming crimes committed against children online. Charles Hymas, *Snapchat accounts for nearly half of recorded online grooming crimes against children*, The Telegraph (Aug. 15, 2023), https://www.telegraph.co.uk/news/2023/08/15/snapchat-half-online-grooming-crimes-against-children/#:~:text=Snapchat%20accounted%20for%20nearly%20half,data%20obtained%20by%20the%20NSPCC; *Responding to Online Threats: Minors' Perspectives on Disclosing, Reporting, and Blocking in 2021*, Thorn (Feb. 2023), https://info.thorn.org/hubfs/Research/Thorn_ROT_Monitoring_2021.pdf. A simple Google search returns countless news stories exposing incidents of grooming and sexual abuse on Snapchat, with some tragically resulting in the minor's death. *See, e.g.*, Mike Martindale, *Ex-hockey coach sentenced for sending player nude pics*, The Detroit News (Oct.

15, 2015), https://www.detroitnews.com/story/news/local/oakland-county/2015/10/01/ex-hockey-coach-novi-sentenced-sending-nude-photos-player/73168960/; Julie Jargon, *Teen Boys are Falling for a Snapchat Nude-Photo Scam, Here's How to Avoid It*, The Wall Street Journal (Nov. 18, 2023), https://www.wsj.com/tech/personal-tech/teen-boys-are-falling-for-a-snapchat-nude-photo-scam-heres-how-to-avoid-it-97a830c8.

For forty years, this Court has recognized the grave "physiological, emotional, and mental" injuries suffered by victims of child sexual abuse. *New York v. Ferber*, 458 U.S. 747, 758 (1982). The trauma stemming from child sexual abuse takes a significant toll on victims' overall health, increasing the risk not only for depression, anxiety, substance abuse, post-traumatic stress disorder, and suicidal ideation, but also physical ailments such as high blood pressure and chronic illness. *See* Centers for Disease Control and Prevention, National Center for Injury Prevention and Control, Division of Violence Prevention, Preventing Sexual Violence (last reviewed by the CDC on Jan. 17, 2022), available at https://www.cdc.gov/violenceprevention/sexualviolence/fastfact.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fviolenceprevention%2Fsexualviolence%2Fconsequences.html. The paradigm shift from tangible to digital CSAM has only exacerbated these effects. Von Weiler, J., Haardt-Becker, A., & Schulte, S. *Care and treatment of child victims of child pornographic exploitation (CPE) in Germany*, 16 J. of Sexual Aggression 211, 216 (2010); National Center for Missing & Exploited Children, Child Pornography Possessors Arrested in Internet-Related Crimes: Findings from the National Juvenile Online Victimization Study, available at http://

us.missingkids.com/en_US/publications/NC144.pdf; U.S. Dep't of Justice, The National Strategy For Child Exploitation And Prevention And Interdiction, 11 at D-12 (2010), available at http://www.justice.gov/psc/docs/natstrategyreport.pdf; Leonard, M.M., *'I did what I was directed to do but he didn't touch me': The impact of being a victim of internet offending*, 16 J. of Sexual Aggression 249, 254 (2010). While perpetrators of online abuse are responsible for resulting harm to children, so too are online platforms that remain complicit in fostering the spread of abuse. As this Court has recognized, "everyone who reproduces, distributes, or possesses the images of the victim's abuse . . . plays a part in sustaining and aggravating this tragedy." *Paroline v. United States*, 572 U.S. 434, 457 (2014). Congress, legislating against the backdrop of *Ferber* and its progeny, never intended to immunize defendants like Snapchat for their role in the modern CSAM marketplace.

C. The Prevailing Interpretation of Section 230 Has Left Victims of Online Abuse with No Leverage to Hold Online Platforms Accountable and Seek Redress for their Harm

In the physical world, when a plaintiff is harmed as a result of a company's tortious conduct, they may seek redress by filing a lawsuit against the wrongdoer. Whereas courts generally consider elements like negligence, foreseeability, and intent where the allegations involve real-world harm, they have largely failed to do the same when that harm occurs online. As a result, when victims of online harm seek redress, they may find their claims dismissed without the benefit of any fact-intensive inquiry into the company's functional role in the harm. Dismissal

of such cases at the pre-discovery stage all but foreclose on victims' ability to prove that the defendants operated with a culpable mens rea. Indeed, courts have acknowledged the dangers of granting a motion to dismiss based on the CDA's limited immunity defense. *See*, *e.g.*, *CYBERsitter, LLC v. Google, Inc.,* 905 F. Supp. 2d 1080, 1086 (C.D. Cal. 2012). In fact, Congress has specifically acknowledged the importance of discovery in cases of online exploitation, trafficking, and abuse, observing that internet companies believed they "would be able to win again in court and deny us our opportunity to look at the documents and to look at the underlying evidence that one should always look at in an investigation." 164 Cong. Rec. S 1827, 1830 (Sen. McCaskill).

Without the ability to engage in discovery, there will be no serious consideration of what companies like Snapchat knew about the likelihood of harm to children who access their platforms. This is especially important given the sophisticated algorithms implemented by online platforms that prioritize user engagement and profitability, often at the expense of children's safety. *See*, *e.g.*, Wells, G., Horwitz, J., & Seetharaman, D., *Facebook Knows Instagram is Toxic for Teen Girls, Company Documents Show*, The Wall Street Journal (Sep. 14, 2021), https://www.wsj.com/articles/facebook-knows-instagram-is-toxic-for-teen-girls-company-documents-show-11631620739?mod=hp_lead_pos7; Craig Timberg, *YouTube Says It Bans Preteens But It's Still Delivering Troubling Content to Young Children*, The Washington Post (Mar. 14, 2019), https://www.washingtonpost.com/technology/2019/03/14/youtube-says-it-bans-preteens-its-site-its-still-delivering-troubling-content-young-children/. The decision to forgo discovery not only prevents

victims from seeking any meaningful redress, but it also prevents online companies from learning about potentially dangerous features on their platforms, and thus hinders discovery of new technologies that could increase user safety and promote growth.

By cutting off victims' opportunity to gather evidence regarding tech company practices, courts have thwarted the CDA's child protection purpose and denied countless victims the access to justice Congress so plainly promised. Now the opportunity to correct this injustice is before this Court. As Justice Thomas explains, "[p]aring back the sweeping immunity courts have read into §230 would not necessarily render defendants liable for online misconduct. It simply would give plaintiffs a chance to raise their claims in the first place. Plaintiffs still must prove the merits of their cases, and some claims will undoubtedly fail." *Malwarebytes*, 141 S. Ct. at 18 (Thomas, J., statement respecting the denial of certiorari). Restoring the scope of Section 230 to its statutory text will advance Congress's goal of ensuring accountability for companies that recklessly gamble with users' lives. *See, e.g.*, *United States v. Williams*, 444 F.3d 1286, 1290 (11th Cir. 2006) ("Our concern is not confined to the immediate abuse of the children depicted in these images but is also to enlargement of the market and the universe of this deviant conduct that, in turn, results in more exploitation and abuse of children.").

CONCLUSION

Social media companies must be held accountable for the harm they are exacting on children through their own misconduct. For the reasons stated above, this Court should grant the Petition for Writ of Certiorari so that it may properly define the scope of Section 230 consistent with its text and underlying child protection goal.

Respectfully Submitted,

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