No. 23-961

IN THE

Supreme Court of the United States

JOHN DOE,

Petitioner,

v.

SNAP, INC., doing business as SNAPCHAT, L.L.C., doing business as SNAP, L.L.C.,

Respondent.

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

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SUMMARY OF ARGUMENT

Snap's BIO makes many assertions that are a far cry from its statements to California's Second District Court of Appeal a few months ago that there is "a significant, recurring legal question about the reach and efficacy of Section 230: whether plaintiffs who were allegedly harmed by third-party content online can circumvent Section 230's broad protections through creative pleading." Petition for Writ of Mandate ("Snap Cal. Pet.") at 14, *Snap, Inc.* v. *Superior Court*, No. B335533 (Cal. Ct. App., 2 Dist. March 1, 2024). Snap has not retracted that statement in California—it still is pursuing its petition for a writ of mandamus to challenge a California Superior Court's conclusion that Section 230 did not bar claims similar to the claims here. There, families of individuals who overdosed as a result of Snap attracting drug dealers and drug users to its platform sued Snap for creating a dangerous environment and refusing to mitigate the danger it created. *Id.* at 15.

However this same question is phrased, the parties apparently agree that there is a "significant" and "recurring" question on the scope of Section 230 and whether Section 230 protects Snap from liability for its role in designing, creating, and promoting a product that injures its users simply because third-parties *also* are culpable as criminals that took advantage of the environment Snap negligently designed and failed to monitor. Unlike the California Court of Appeal, though, this Court can resolve that question once and for all. It can resolve the conflict among the courts that Snap pretends in its BIO does not exist, and it can eliminate the uncertainty Snap

decries to the California Court of Appeal. This Court can provide the proper interpretation of Section 230(c)(1)'s plain text, which only requires that Snap not be treated as a publisher—not that it be completely immune to any claim involving third-party content that comes through Snapchat.

This case is the proper vehicle to explore and resolve the scope of Section 230. Doe's claims do not seek to impose liability on Snap by treating it as a publisher. And Snap's myriad vehicle arguments rely on its base misrepresentation of the claims. It falsely asserts that "Snap's only alleged connection to petitioner's injuries was to publish the content of another." BIO at 12. From that, it erects numerous strawman arguments, like falsely comparing itself to text messaging services, BIO at 2, 17, 23, and falsely asserting that Doe faults Snap for its efforts to protect children, BIO at 15. Doe faults Snap for *endangering* children and then blithely hiding behind some courts' misinterpretation of Section 230 to eschew any duty to mitigate that danger.

ARGUMENT

I. As Snap acknowledges, the question presented requires immediate resolution.

The same day Doe filed its petition here, Snap filed a petition in the California Court of Appeal stating that "the reach and efficacy of Section 230" as it applies to plaintiffs harmed by third-parties using internet services "presents a significant, recurring legal question." Snap Cal. Pet. 14.

The facts and grounds for liability there are similar to this case. The plaintiffs are parents of children who were targeted for drug sales through Snapchat. Order Sustaining in Part and Overruling in

Part Defendant's Demurrer at 5, *Neville* v. *Snap, Inc.*, No. 22STCV33500 (Sup. Ct. Cal., Los Angeles, Jan 2, 2024). According to the plaintiffs, "Snapchat's many data-deletion features and functions made it foreseeable, if not intended, that Snapchat would become a haven for drug trafficking." *Id.* at 3. On top of that, Snapchat includes design features that make it "an inherently dangerous product for young users." *Id.* The plaintiffs there assert Snap should thus be liable for its own conduct, which was independently tortious, in providing a defective product and failing to moderate it. *Id.* at 5.

Snap's assertion that it matters that this case does not raise the "targeted recommendation" fact pattern also rings hollow. BIO 16. Snap noted in its California petition—which also does not involve targeted recommendations—that "[t]he importance of this issue is underscored by *Gonzalez* v. *Google LLC* (2023) 598 U.S. 617, in which the U.S. Supreme Court granted certiorari *to address this same question*." Snap Cal. Pet. 26 (emphasis added).

As Snap also acknowledges, it is important to clear up conflicts on this issue. Snap. Cal. Pet. 24. According to Snap, without resolution, there will be forum shopping and some courts will leave internet service providers "uncertain about their exposure to liability." *Id.* at 25. Putting aside that without Section 230's existence at all, this uncertainty would be just the application of the same set of rules applicable to other businesses, the uncertainty as to Section 230 will exist regardless of the California Court of Appeal's ruling because it is not the nation's final authority on Section 230—it is not even California's.

In the end, according to Snap, the question presented here "presents a 'significant issue of law' that has far reaching implications for countless social networking companies and Internet platforms nationwide." Snap Cal. Pet. 26 (citation omitted). In Snap's own words: "[w]hether Section 230 protects [its features] is a question that will continually be raised in courts across the country, as plaintiffs look for creative ways around Section 230's protections." *Id.* Petitioner agrees. Seven of fifteen voting Fifth Circuit judges agree. Pet. App. 41a. And 22 states plus the District of Columbia agree. Br. for Amici Curiae State of Mississippi, et al., in Support of Petitioner. Snap may prefer, for whatever reason, the California Court of Appeal for the Second District over this Court as a forum for addressing Section 230's scope, but it cannot now claim the question is not significant or recurring, having said just the opposite to another court just a few months ago.

2. Even if Snap's California petition could resolve a conflict there, other conflicts would remain. Snap misrepresents the Seventh Circuit's approach as merely a "semantic" difference to claim the circuits are not divided here. BIO at 10–13. Not so. The Seventh Circuit has explicitly rejected the "view . . . in other circuits" that Section 230(c)(1) grants sweeping immunity to internet service providers. *Chicago Lawyers' Comm. for C.R. Under L., Inc.* v. *Craigslist, Inc.*, 519 F.3d 666, 669 (7th Cir. 2008). In the Seventh Circuit, Section 230(c)(1) plays a "limited role." *Id.* at 670.

Under the Seventh Circuit standard, Section 230(c)(1) only applies when a cause of action requires a plaintiff to establish that the defendant is a publisher (like when a plaintiff asserts a defamation

claim). *Id.* Applying this standard, the Seventh Circuit in *Chicago Lawyers' Committee* held that Section 230(c)(1) protected Craigslist from a suit in which the Fair Housing Act claim treated Craigslist as a publisher of discriminatory housing advertisements. *Id.* (citing 42 U.S.C. § 3604(c)). But where (as here) claims do not treat the defendant as a publisher—the breached duty not being publication of harmful material—Section 230(c)(1) does not apply.

The other circuits also do not treat Section 230 uniformly. The Fifth Circuit wields Section 230 like a sledgehammer, knocking down any claim against any internet service provider involving third-party content. *See, e.g.*, *Doe* v. *MySpace, Inc.*, 528 F.3d 413, 419 (5th Cir. 2008). The Ninth Circuit, on the other hand, takes a more nuanced approach. It considers each separately asserted cause of action and determines "whether [it] inherently requires the court to treat the defendant as the 'publisher or speaker' of content provided by another," *Barnes* v. *Yahoo!, Inc.*, 570 F.3d 1096, 1102 (9th Cir. 2009), and whether the defendant "contribute[d] materially to the alleged illegality of the conduct," *Fair Hous. Council of San Fernando Valley* v. *Roommates.Com, LLC*, 521 F.3d 1157, 1168 (9th Cir. 2008). This case likely would have survived under the Ninth Circuit's nuanced approach. After all, in *Roommates.Com* the Ninth Circuit concluded Section 230 did not protect a defendant who designed and operated its website in a way that facilitated illegal, discriminatory activity, even though that illegal activity depended on third-party content. *Id.* at 1167–70. The courts below certainly are divided on how they interpret Section 230 in ways that are outcome determinative here, and this Court's review is needed.

3. Just as Petitioner expected, Pet. at 30–31, Snap argues that the disparate judicial interpretations of Section 230 is a problem for Congress (and, apparently, the California Court of Appeal for the Second District), rather than this Court, to fix, BIO at 25–27. Snap does not raise a single novel point or even respond to the petition's analysis. Instead, as social media companies for years have urged, Snap contends that Congress is working it, and urges this Court not to step in to "'update' the law" on its own. BIO at 26. This Court would not be "updat[ing] the law" here. Instead, it would be interpreting Section 230 in the first instance.

Notably absent from the BIO is any response to the many calls for *this Court*—not Congress—to review *lower courts' misinterpretations* of Section 230. *Malwarebytes, Inc.* v. *Enigma Software Grp. USA, LLC*, 141 S. Ct. 13, 14 (2020) (Thomas, J.); *Doe* v. *Facebook, Inc.*, 142 S. Ct. 1087, 1088 (2022) (Thomas, J.); Pet. App. 48a ("[I]t is once again up to our nation's highest court to properly interpret the statutory language enacted by Congress in [Section 230]."); Br. for Amici Curiae State of Mississippi, et al., in Support of Petitioner 20–22. That decades have passed since enactment, or that the "appropriate case" has not yet readily presented itself, are arguments in favor of, not against, granting review now. This is the appropriate case, and, as this case illustrates, "[e]xtending § 230 immunity beyond the natural reading of the text [is] hav[ing] serious consequences." *Malwarebytes*, 141 S. Ct. at 18. It is imperative that this Court step in now to decide "what the law demands." *Id.*

II. This case presents the ideal vehicle for resolving the question presented.

Snap asserts various "vehicle" arguments, most of which are irrelevant, given they apply to *every* case—particularly every case involving Section 230. For example, Snap claims the Court should forego this opportunity to address Section 230's scope because Snap asserted additional defenses on the merits of Doe's claims. BIO at 22–25. Snap fails to explain how this differentiates the petition here from just about every other petition this Court reviews. Of course the defendant claiming immunity also had arguments it is not liable on the merits. Those arguments are unsupported, though, and unlike the issue that resolved *Gonzalez*, they are unresolved questions of state common law, not federal statutory law that this Court resolved in a parallel case. *See Gonzalez* v. *Google LLC*, 598 U.S. 617, 622 (2023) ("Since we hold that the complaint in that case fails to state a claim for aiding and abetting under § 2333(d)(2), it appears to follow that the complaint here likewise fails to state such a claim.").

Snap's merits defenses will not be effective in any event. What Snap likes to call "creative pleading" is basic pleading of Snap's liability for creating an environment that is a haven for child predators and then failing to include safeguards to prevent the harm it facilitated, proclaiming that it is protecting young and vulnerable users from dangerous content while profiting from its content curation.

Snap asserts over and over again that Doe claims Snap should be held liable for the content of Ms. Mazock's messages, *e.g.* BIO at 5, but as noted in the Petition, Doe wishes the extent of Snap's conduct and

his harm was receiving offensive materials published by Snap. Pet. at 15. A simple review of the complaint here, or the summary of the claims stated in the petition and left unaddressed in the BIO, Pet. at 14–15, or the district court's description of the claims, Pet. App. 32a–33a, proves Doe alleges far more than that.

Snapchat is not just a conduit in a vacuum whereby Mazock reached out to and groomed Doe. It is a haven for pedophiles by Snap's design. Pet. at 11 There is no doubt that Mazock's illicit messages through Snapchat are a but-for cause of Doe's injuries. And under Section 230, Doe could not assert liability against Snap for publishing those messages, if they fit the definition of being "published." But Doe's complaint does not assert liability for "publishing" the messages. Snap's design choices *also* are but-for and proximate causes of Doe's injuries. Pet. App. 33a. Snap's choice to market *its product* to minors, knowing pedophiles have flooded the system unchecked is a but-for and proximate cause of Doe's injuries. *Id.* And Snap's failure to exercise reasonable care in its efforts to mine users' messages for commercial gain is a third but-for and proximate cause of Doe's injuries. Pet. App. 32a–33a.

Assuming Snap is right that "[a]s a matter of 'common sense,' and the 'common definition of what a publisher does,' publication involves 'reviewing, editing, and deciding whether to publish or to withdraw from publication third-party content,'" BIO at 14, Snap's conduct here does not meet the definition of publication and Doe's allegations do not treat it as a publisher. Nowhere does Doe claim that Snap made a decision whether to publish or withdraw from publication any of Mazock's messages. Nowhere does Doe claim that Snap reviewed or edited Mazock's

messages. Such an exercise of discretion is exactly what Section 230, both by plain text and purpose, is clearly designed to protect *and promote*. Snap steadfastly clings to an expansive interpretation of Section 230 to protect both (1) refusal to exercise such discretion and (2) creating a dangerous condition that makes the exercise of that discretion absolutely necessary.

The question here is whether Section 230, by virtue of Snapchat providing the messages, immunizes *all* of Snapchat's culpable conduct, or just the conduct of sending the messages from Mazock to Doe, to the extent that is "publishing." The answer, based on Section 230(c)(1)'s plain text is "no," but the Fifth Circuit answered with a clear "yes," Pet. App. 2a–3a, though seven of the fifteen voting judges in the Circuit recognized the error and implored this Court to take this Case to correct that atextual, dangerous, and improper interpretation, Pet. App. 48a.

Snap's assertions that the complaint is inadequate to state claims are silly. Snap asserts that there is no allegation that Snap should have known about Mazock's messages to support distributor liability, BIO at 17, but that is the obvious implication of the first cause of action stating that Snap negligently failed to monitor messages and determine Doe's age in conjunction with Mazock's age, *see* Pet. App. 32a–33a. Comparisons to phone companies, BIO at 17, also are far afield. Phone companies do not monitor message content; and as the complaint expressly alleges, Snap does, but only for commercial purposes (ignoring its promise to protect vulnerable users), Pet. App. 32a. The complaint alleges that Snap thus should have used these tools to protect children and should have known about Mazock's activities. Pet. App. 32a–33a.

Snap also mischaracterizes Doe's design defect claim as the "failure to adequately censor third-party content." BIO at 18. It is unclear where Snap got that impression, and it does not cite the complaint or anything else for that falsehood. As the district court recognized, Doe identified several defects, including the use of ephemeral messaging without retaining messages on the back end, features that allow users to provide false birthdates and change them repeatedly, and otherwise fostering an environment that attracts and protects sexual predators. Pet. App. 33a.

Doe's allegations establish that Snap's conduct was a proximate cause of Doe's injuries by creating an environment rife with pedophiles and then drawing children in, and Snap had a duty not to create such an environment, or at the very least, when creating such an environment, not to invite children in and leave them completely unprotected. Snap does not—and cannot—provide any cases or statutes stating that people and entities have no duty under Texas common law to refrain from bringing pedophiles together with children.

Snap even resorts to faulting Doe for not wasting the Fifth Circuit's time by (1) arguing the merits of his claims when the district court did not address the merits and dismissed the claims under Section 230, and (2) failing to ask the panel to unlawfully overturn a prior panel's decision by providing a "narrowing construction" of Section 230. BIO at 6. The panel and the judges writing in support of en banc review all agreed that Fifth Circuit precedent foreclosed the claims here under Section 230. Pet. App. 3a & 41a.

Snap's approach can be summed up in it's assertion that Doe provides a "perverse implication" in his theory of the case that Snap should not take efforts to protect children. BIO at 15. Again, Snap misrepresents Doe's position. Doe cannot understate how much he wishes Snap actually protected children. Snap *says* it protects children—lying to parents—and then utterly fails to do so, *both* by designing a system that specifically endangers children (the design defect claim) and then by failing to use the tools it already has for commercial purposes to actually undertake the duty it purports to fulfill (the negligence claims). Section 230's text and purpose do not support Snap's assertion of immunity for creating a haven for child predators and doing nothing to mitigate the harm they cause. The Fifth Circuit's decision below is both erroneous and at least in conflict with the Seventh Circuit. And this Court should grant the writ to clarify Section 230's scope so that Snap does not continue to casually endanger children, using a misapplied federal statute as a shield against liability.

CONCLUSION

For the foregoing reasons, the petition should be granted, the judgment below should be reversed, and the case should be remanded for further proceedings.

Respectfully submitted,

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