No. 16-276

In the Supreme Court of the United States

JANE DOE, ET AL., PETITIONERS

v.

BACKPAGE.COM LLC, ET AL.

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

REPLY BRIEF OF PETITIONERS

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Respondents do not contest that, under the court of appeals' ruling, Section 230 of the Communications Decency Act (CDA) immunizes internet service providers (ISPs) from civil liability for intentional participation in the sex trafficking of children. Respondents chillingly answer, "that is *precisely* what the statute does." Br. in Opp. 18. There is nothing in the language or circumstances surrounding adoption of Section 230, however, that remotely suggests Congress took the radical step of immunizing ISPs from civil liability for conduct that violates federal criminal statutes, and from *all* liability (civil or criminal) for conduct violating state criminal law. The court of appeals' stunning grant of this sweeping immunity, in direct conflict with other courts, warrants this Court's review.

The court of appeals accepted, as required on a motion to dismiss, petitioners' plausible, concrete allegations that respondents deliberately structured their business to profit from their own participation in child sex trafficking ventures—precisely what the Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA) prohibits. Indeed, petitioners' complaint specifically alleges that respondents actively coach sex traffickers on how to advertise victims and make it harder for law enforcement to identify and apprehend traffickers, including by scrubbing location-identifying metadata from photographs of victims, obfuscating potential "red flags" to law enforcement, and even removing police sting advertisements, all to protect and make the site more attractive to traffickers. Additional facts have recently emerged through the U.S. Senate Permanent Subcommittee on Investigations and the State of California's criminal investigation of Backpage.com's executives, see p. 6, *infra*, providing further detail about respondents' conduct, including evidence of direct communications between respondents and at least some traffickers. This record amply supports the plausibility of petitioners' allegations that respondents are engaged in conduct that constitutes participation in child sex trafficking, in violation of state and federal criminal prohibitions.

Other courts, including the Ninth Circuit, have rejected the court of appeals' extension of Section 230 beyond its text to bar all claims in which content provided by a third party forms part of the chain of causation leading to injury—*i.e.*, where there would be no harm to plaintiffs "but for the content of the postings," Pet. App. 12a. Those courts recognize that ISPs can still be

held liable for their own affirmative wrongful conduct. The pernicious effects of the court of appeals' ruling are evident in the recent decision of a California state trial court dismissing criminal indictments against Backpage.com's executives based on the First Circuit's "but-for" construction of Section 230. Congress has not granted ISPs immunity for their own criminal acts, and it was wrong for the court of appeals to do so. This Court should review and correct that error.

I. THE COURT OF APPEALS' "BUT-FOR" TEST EXPANDS SECTION 230 BEYOND ITS TEXT, IN CONFLICT WITH OTHER COURTS' INTERPRETATIONS

A. Despite respondents' assertions to the contrary, (Br. 2, 7-11), the court of appeals' adoption of a but-for causation test to determine whether a claim "treats" a defendant "as a publisher" could not be clearer. Indeed, it is the lynchpin of that court's statutory analysis of Section 230. The court of appeals correctly framed the "ultimate question" as "whether the cause of action necessarily requires that the defendant be treated as the publisher or speaker of content provided by another." Pet. App. 11a-12a. Rather than analyze the meaning of those statutory terms, however, the court simply observed that "the relevant advertisements were provided either by their traffickers or by the [petitioners] themselves (under orders from their traffickers)." *Id.* at 12a. Despite extensive allegations regarding respondents' role in shaping that content, the panel treated as determinative the fact that "there would be no harm to [petitioners] *but for* the content of the postings" by third parties. *Ibid.* (emphasis added). In other words, the First Circuit equated the statutory question whether petitioners' claims "treat" respondents "as a

publisher" of others' content, *id.* at 15a-16a, with whether third-party content was a but-for link in the causal chain of petitioners' injury. That test deems irrelevant whether, as petitioners allege, respondents' own conduct constituted participation in a sex trafficking venture. *Id.* at 12a, 16a-17a.

B. The Ninth Circuit and Washington Supreme Court have squarely rejected the First Circuit's but-for causation test. In *Doe* v. *Internet Brands, Inc.*, the Ninth Circuit acknowledged that the defendant had "acted as the 'publisher or speaker' of user content," and even that "that action could be described as a 'but-for' cause of [plaintiff's] injuries," which would have required dismissal under the First Circuit's test. 824 F.3d 846, 853 (2016) (decision on rehearing). But the Ninth Circuit recognized "that does not mean the failure to warn claim *seeks to hold [defendant] liable as the 'publisher or speaker' of user content*," which is all that Section 230 forbids. *Ibid.* (emphasis added). *Internet Brands* reaffirmed the Ninth Circuit's earlier decision in *Barnes* v. *Yahoo!, Inc.*, 570 F.3d 1096, 1100 (2009), and expressly stated that "the CDA does not provide a general immunity against all claims derived from third-party content." 824 F.3d at 853. The First Circuit declared precisely such a "general immunity" here. Indeed, one court has already recognized that the First Circuit "take[s] a more expansive view of Section 230(c) preemption than the Ninth Circuit." *Airbnb Inc.* v. *City & Cnty. of San Francisco*, No. 3:16-cv-03615-JD, 2016 WL 6599821, at *4 (N.D. Cal. Nov. 8, 2016). As further detailed in the petition (at 17-18), other courts of appeals also agree with the Ninth Circuit that Section 230 does not provide protection to an ISP that in-

jures a plaintiff through its own actions in violation of generally applicable laws. See, *e.g.*, *Chi. Lawyers' Comm. for Civil Rights Under Law, Inc.* v. *Craigslist, Inc.*, 519 F.3d 666, 669 (7th Cir. 2008) (Section 230(c) "as a whole cannot be understood as a general prohibition of civil liability for" ISPs); *FTC* v. *Accusearch, Inc.*, 570 F.3d 1187, 1201 (10th Cir. 2009) (ISP not protected by Section 230 where its actions contributed to the unlawful conduct of its users in violation of the Telecommunications Act of 1996).

Likewise, the Washington Supreme Court's decision in *J.S.* v. *Village Voice Media Holdings, LLC*—which, tellingly, respondents mention only in a footnote—recognized that Backpage could be subject to liability for its own conduct in designing posting rules, even though a third party provided the content of the underlying advertisements. See 359 P.3d 714, 717-718 (2015) (en banc). As the court explained, plaintiffs alleged "that Backpage did more than simply maintain neutral policies prohibiting or limiting certain content," *id.* at 717, and were entitled to discovery to "ascertain whether in fact Backpage designed its posting rules to induce sex trafficking." *Id.* at 717-718. That holding cannot be squared with the First Circuit's declaration that "claims that a website facilitates illegal conduct through its posting rules necessarily treat the website as a publisher or speaker of content provided by third parties and, thus, are precluded by section 230(c)(1)." Pet. App. 17a.

Had petitioners' exact allegations been asserted in a district court in the Ninth Circuit, or in Washington state court, their claims would not have been dismissed. This Court should grant review to resolve that conflict.

C. While respondents dispute (because they cannot defend) that the First Circuit adopted a causation test, they concede that the First Circuit has created a hard-line rule that anything a website does in connection with third-party content is immunized from liability by Section 230. The effect of the First Circuit's rule is to prevent courts from considering the nature of an ISP's own conduct whenever third-party content played a role in the chain of causation leading to injury.

As described above, petitioners allege in detail that respondents have developed a business model based on supporting sex traffickers. See, *e.g.*, C.A. App. 24-26, 28-29, 34-49. The plausibility of these allegations is confirmed by a Senate Permanent Subcommittee on Investigations report, which found that respondents have a practice of altering advertisements for the express purpose of removing "red flags" that would call attention to illegal activity. See Staff of S. Permanent Subcomm. on Investigations, 114th Cong., *Recommendation to Enforce a Subpoena Issued to the CEO of Backpage.com, LLC* 2, 11-12, 17-22 (Nov. 19, 2015), https://www.hsgac.senate.gov/subcommittees/investigations/reports. The Subcommittee also found that respondents had direct contact with traffickers, at times offering "freebies" upon receiving complaints that advertisements had been "unnecessarily" edited. *Id.* at 21-22, App.110. And Backpage.com's CEO and two founders were recently indicted in California on charges of pimping and conspiracy to pimp. See *People* v. *Ferrer*, No. 16FE019224 (Sup. Ct. Cal. Sept. 26, 2016). Yet under the First Circuit's and respondents' reading of Section 230, Backpage.com is immune from liability, so long as the actual advertisements for sex services are posted

by traffickers. The First Circuit categorized all conduct by respondents as "traditional editorial functions," and assumed defendants could not be held liable for those acts. See, *e.g.*, Pet. App. 13a, 16a. It is not a "traditional editorial function[]" to create and tailor a business to profit from the sexual exploitation of children or, as part of that business, to affirmatively assist sex traffickers to avoid detection, and Section 230 does not immunize such conduct.

Quoting the court of appeals' decision, respondents strive mightily to make their alleged acts sound innocuous. Stripping the allegations of their details, respondents say that the complaint merely concerns "the structure and operation of the Backpage website," including "decisions about how to treat postings," such as "rules about whether a person may post after attempting to enter a forbidden term, and the procedure for uploading photographs." Br. in Opp. 8 (quoting Pet. App. 14a). While, at a high level of abstraction, each of these can be characterized as "editorial choices," *ibid.* (quoting Pet. App. 15a), Section 230 does not provide that an ISP's own wrongful acts cannot form the basis of liability just because they are acts a publisher might perform. Rather, Section 230 provides only that no ISP "*shall be treated as the publisher or speaker of any information provided by another information content provider*." 47 U.S.C. 230(c)(1) (emphasis added).

Petitioners' complaint includes numerous allegations that respondents engaged in coaching and signaling regarding the content of advertisements. See, *e.g.*, C.A. App. 24-26, 28-29, 35-49. Respondents help guide traffickers to frame their advertisements to avoid detection, *id.* at 41; they strip from posts information that

would enable law enforcement to locate victims, *id.* at 37; and they feign cooperation with law enforcement while refusing to adopt technology that could assist with victim recovery, *id.* at 24-28. Significantly, the court of appeals expressly assumed, for purposes of resolving the appeal, "that [respondents'] conduct amounts to 'participation in a [sex trafficking] venture,'" Pet. App. 16a (second alteration in original), that would violate the TVPRA. And the court acknowledged that petitioners had made "a persuasive case" to support their "core argument * * * that Backpage has tailored its website to make sex trafficking easier." *Id.* at 32a. Where, as here, a complaint adequately alleges that the defendants' own conduct constitutes participation in a sex trafficking enterprise, that conduct is not immunized from liability merely because those acts might, at some level of generality, be characterized as "publishing," or because a third party's content contributes to the plaintiff's harm. Only where the "claim seeks to hold [defendant] liable *as the 'publisher or speaker' of user content*" is Section 230 implicated. *Internet Brands*, 824 F.3d at 853 (emphasis added).

Because petitioners seek to hold respondents liable for their own criminal conduct, this Court need not resolve whether respondents' involvement in shaping the content of traffickers' advertisements renders those advertisements respondents' own content, as petitioners have alleged, C.A. App. 38-42. Respondents' argument (Br. 12) that petitioners have "waive[d]" the content creation issue is thus beside the point. Even if the advertisements at issue were purely third-party content, the complaint's allegations establish that petitioners' claims seek to hold respondents liable for their own

wrongful conduct, not to hold them liable "as a publisher" of third party content.

D. The court of appeals' dismissal under Section 230, despite accepting, for these purposes, that petitioners had alleged a TVPRA violation, refutes respondents' blithe assertion that "there is nothing to reconcile" regarding the two statutes. Br. in Opp. 17. As the Ninth Circuit recognized, nothing in the language of Section 230 suggests that it frees ISPs from the need to comply with "laws of general applicability." *Fair Housing Council* v. *Roommates.com, LLC*, 521 F.3d 1157, 1164 n.15 (2008); see *Barnes*, 570 F.3d at 1100; *Internet Brands*, 824 F.3d at 853. Section 230 was designed to guard against broad liability for ISPs for third party content that would interfere with the development of the internet, see Pet. 4-5—not to free websites to engage in conduct that would independently constitute criminal activity.[1] This is precisely the context where this Court has admonished lower courts of the obligation to harmonize potentially applicable statutes, rather than assume that Congress "intended one federal statute to preclude the operation of the other." *POM Wonderful LLC* v. *Coca-Cola Co.*, 134 S. Ct. 2228, 2238 (2014); see Pet. 23-26.

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[1] As set forth in the petition (at 3-5) and by amicus Legal Momentum (Br. 12-13), the "treat as a publisher" language was drawn from defamation law, which undermines the sweeping construction the court of appeals gave the provision. Respondents' attempt to bolster their argument (Br. 5) by reference to an amendment extending Section 230 to "foreign judgments," is perplexing. That amendment is expressly limited to "foreign *defamation* judgments," 28 U.S.C. 4102(c) (emphasis added), and thus, if anything, highlights the limited meaning Congress intended for Section 230.

II. THE FIRST CIRCUIT'S ERRONEOUS INTERPRETATION OF SECTION 230 HAS FAR-REACHING IMPLICATIONS THAT THIS COURT SHOULD ADDRESS

A. The expansion of Section 230 to immunize affirmative criminal conduct threatens to obstruct not only private civil enforcement, but also state and local governments' abilities to prosecute criminal conduct on the internet. Indeed, it has already done so.

In *People* v. *Ferrer*, the California Superior Court invoked the First Circuit's decision in this case as grounds to dismiss criminal charges against Backpage's CEO and its two founders for facilitation of prostitution in violation of state criminal statutes. No. 16FE019224 (Sup. Ct. Cal. Dec. 9, 2016), slip op., https://assets.documentcloud.org/documents/3235130/16FE019224-Ferrer.txt. The court held that the defendants were immune from prosecution under Section 230, even while acknowledging that the allegations against them would otherwise establish criminal offenses. *Id.* at 3, 15. Relying on the First Circuit's opinion, the judge adopted the but-for causation test, and concluded that Section 230 forecloses prosecution for websites where the injury "took place as a result of an advertisement placed by a third party." *Id.* at 14 (finding the "victimization resulted from the third party's placement of the ad"). The court further concluded that Backpage's executives could not be held liable for "decisions regarding posting rules, search engines and information on how a user can increase ad visibility are all traditional publishing decisions." *Ibid.* That ruling demonstrates that, under the First Circuit's construction, Section 230 does precisely what the Ninth Circuit has rejected—"create a lawless

no-man's-land on the Internet." *Fair Housing Council* v. *Roommates.com, LLC*, 521 F.3d 1157, 1164 (2008).

And respondents appear to recognize that the First Circuit's flawed analysis also impacts federal civil private rights of action beyond the TVPRA. See Br. in Opp. 17 (asserting that absence of any "conflict" between Section 230 and the TVPRA would likewise justify immunity from liability under "any other federal statute establishing a civil cause of action"). As amicus National Center for Missing and Exploited Children explains (Br. 21-25), private civil remedies in statutory enforcement schemes are valuable remedies that empower victims of crimes, well beyond sex trafficking. The First Circuit's reasoning will effectively foreclose any such actions against ISPs where third-party content appears as part of the chain of causation.

B. Respondents' plea (Br. 3-4) that their criminal conduct must be shielded from liability in order to preserve a vibrant internet rings hollow. The Court should be no more persuaded by that argument here than it was in *MGM Studios Inc.* v. *Grokster, Ltd.*, 545 U.S. 913 (2005). Like respondents here, Grokster and its amici argued that imposing liability on a company that had built its business to profit from others' piracy would "limit further development of beneficial technologies." *Id.* at 929. But the Court rejected those contentions, observing that liability for contributory infringement premised on "purposeful, culpable expression and conduct * * * does nothing to compromise legitimate commerce." *Id.* at 937. Similarly here, establishing clear boundaries between claims that would hold ISPs liable merely for hosting others' content and claims that hold ISPs liable for their own criminal actions would protect,

rather than inhibit, lawful commerce and innovation on the internet.

Respondents' suggestion (Br. 19-20) that petitioners must seek relief from Congress to remedy their injuries gets things exactly backwards. Congress has already adopted, in the TVPRA, a remedy for child sex trafficking victims against those that profit from participation in the trafficking venture. And the court of appeals accepted that petitioners' complaint alleged a cause of action under that statute. Congress has never adopted an exception from liability under the TVPRA based on a digital company's own conduct. Indeed, Amicus Legal Momentum explains the genesis of Section 230 (Br. 8-9) and the intention to provide limited protection to websites from being held liable solely based on a third party's posting while retaining ISPs' liability for their own knowing violations of law. *Id.* at 10-15.

Broad immunity from liability for criminal conduct is a rarity in our law, especially for private entities. It was error for the court of appeals to confer such immunity on ISPs, where Congress has given no indication that it intended to create such a gaping hole in the TVPRA's remedial protections. This Court should review and reverse that ruling.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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