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IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL DISTRICT
UNITED STATES COURT OF APPEALS

MH,

Appellant,

Docket No. 22-10338

v.

OMEGLE.COM LLC,

Appellee,

Proceedings in the Above-Titled Matter:

Location: Montgomery, Alabama

Date: November 17, 2022

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A P P E A R A N C E S

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1 MH v. OMEGLE.COM LLC

2 THURSDAY, NOVEMBER 17, 2022;

3 * * *

4 JUDGE LAGOA: Let everyone settle --
5 settle in.

6 MR. MARSH: Thank you, Your Honor.

7 JUDGE LAGOA: Good morning. We're here on
8 the third case on the calendar, MH, JH versus
9 Omeglecom.LLC.

10 You ready to proceed, Counsel?

11 MR. MARSH: Yes, I am, your Honor.

12 JUDGE LAGOA: Thank you.

13 MR. MARSH: Good morning, Your Honor. May
14 it please the Court. Before beginning today I'd like
15 to acknowledge the contributions of my co-counsel in
16 this case, Margaret Mabie and Hillary Napi who are at
17 counsel table.

18 The limited immunity provided by section
19 230 should not be construed as absolute immunity. The
20 defendant in this case, Omegle, is a virtual boom boom
21 room, an online den of degradation. That's from a
22 case that was written by Judge Carnes, United States
23 versus Mosey. And that case involved an apt analogy
24 to what we're seeing in this case, where Mr. Mosey was
25 a businessman. But in reality he was a pimp who

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2 created the boom boom room where he would invite young
3 teenage girls in to meet with men to have sex. That
4 case Mr. Mosey was prosecuted. It was not the girls.
5 It was not the purchasers. It was the person that
6 facilitated the sexual abuse of these girls.

7 You're going to hear a lot today about
8 third-party content; right? What is third-party
9 content? In the analogy of the boom boom room, the
10 third-party content would be the content created by my
11 client, an 11-year-old girl in her bedroom invited to
12 meet new friends by talking to strangers on the Omegle
13 website. She was extorted with information that was
14 provided by Omegle concerning her geolocation. She
15 was coerced to produce child pornography on a website
16 that knows cappers capture that sexual abuse that's
17 being committed.

18 And Omegle itself has known for a long
19 time that its site is being used to produce child
20 pornography. This is about production. This is a
21 narrow case about production. It is not about
22 third-party content. It is categorically outside the
23 scope of section 230 immunity because no third-party
24 content is involved. You cannot engage in criminal
25 activity and cloak it in a website. The abuse our

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2 11-year-old client suffered, it was preventable,
3 predictable, and only occurred because Omegle created
4 a venue which enabled, encouraged, and enticed
5 children to meet strangers online.

6 The laws prohibiting child pornography,
7 which is commonly now referred to as CSAM, child sex
8 abuse materials, although the law still reflects --
9 yes, Judge Carnes.

10 JUDGE CARNES: Let me ask you something.
11 I'm not (inaudible) argumentatively. I usually don't
12 let just -- here's the problem I have. I hope you'll
13 help me with it. The fact that the manufacturers of
14 automobiles (inaudible) can be misused in criminal
15 enterprises and that the manufacturers of automobiles
16 know that a certain percentage of them are being
17 misused in criminal enterprises, you wouldn't suggest
18 that they are liable for anything on the misuse of
19 their product or their services. So how do you
20 distinguish that category -- and an automobile
21 manufacturer is not the best example -- but that
22 category of instruments that can be misused can be
23 used for valuable purposes and beneficial purposes and
24 certainly legitimate purposes. How is that different?

25 MR. MARSH: That's a very good question,

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2 Judge Carnes. And I would analogize that to a
3 situation of perhaps a bus company, right, producing a
4 party bus that said, "Come on the bus and meet
5 strangers. Come on the bus and meet men" like in the
6 boom boom room. You know, it wasn't a bar. It wasn't
7 a -- you know, a movie theatre. It was a venue that
8 was designed to link people together that should not
9 be put together. So it is -- we hear a lot about
10 neutral tools; right? Wasn't this a neutral tool?

11 JUDGE CARNES: Let me stop -- stop you
12 there. It was designed to link people together who
13 shouldn't have been linked together.

14 Was it -- you can't say it was designed
15 only -- to link only people who shouldn't have been
16 linked.

17 MR. MARSH: That's correct.

18 JUDGE CARNES: In other words, it links
19 people who -- without making moral judgments that
20 aren't enforced in the law -- it puts people together
21 who we can't say aren't -- shouldn't be put together.
22 That's for them to decide.

23 MR. MARSH: Well, yes your Honor. But
24 with all due respect, the "them" in this case are
25 children. And there is no age verification on this

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2 site --

3 JUDGE CARNES: Counsel, some of the "them"
4 are children. You've never alleged that the only
5 people who were put together with other people in this
6 enterprise, let's call it, are children.

7 MR. MARSH: That's correct, your Honor,
8 and that --

9 JUDGE CARNES: There are some adults and
10 to the extent that their behavior can't be
11 constitutionally prohibited, adult-on-adult behavior,
12 then you can't say that this is an enterprise that was
13 only designed to violate the law and exploit children.

14 MR. MARSH: Well, your Honor, that gets to
15 the knowing component of the FOSTA exception. And we
16 are -- to be clear, we are pre-discovery in this case.
17 We do not know why this site was created. We do not
18 know the knowledge of the corporation that created
19 this site.

20 JUDGE LAGOA: Because the issue here is
21 whether or not immunity applies.

22 MR. MARSH: That is --

23 JUDGE LAGOA: This was stopped at the
24 immunity stage.

25 MR. MARSH: That is correct, your Honor.

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2 JUDGE LAGOA: So the true question here
3 is, is there immunity.

4 JUDGE CARNES: Based on the allegations in
5 the complaint.

6 MR. MARSH: Well, their immunity is
7 statutory, but there are statutory exceptions to that
8 immunity. The Court could find that this -- this
9 website -- this behavior that was occurring on this
10 website is outside section 230. What I hear you
11 saying, Judge Carnes, is that you -- you are --
12 believe that that is a dubious distinction. But there
13 is an exception to section 230.

14 JUDGE CARNES: I'm not saying that at all.
15 I'm asking questions that go to your case.

16 MR. MARSH: Well, then we need to look at
17 -- go ahead, Judge.

18 JUDGE CARNES: No. You go.

19 MR. MARSH: We are -- then turn to section
20 18 USC 1591 which is a FOSTA carve out. This is
21 passed by Congress with the intention of addressing
22 some of this behavior that is occurring on this
23 website and it is --

24 JUDGE LAGOA: Counsel, was it 18591?

25 MR. MARSH: Sorry, your Honor. 18 USC,

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1-5-9-1, 1591 --

JUDGE LAGOA: Okay. Thank you.

MR. MARSH: -- which is commonly known as the FOSTA -- I don't even remember what it stands for anymore -- but the FOSTA, F-O-S-T-A, carve out.

JUDGE BRASHER: So this is what that language says in the carve out. It says "Nothing in this section shall be construed to impair or limit any claim in a civil action brought under section 1595, which is the civil action, if the conduct underlying the claim constitutes a violation of section 1591 of that statute." 1591 is the criminal liability section.

MR. MARSH: Correct. That's the criminal predicate, your Honor.

JUDGE BRASHER: So why don't your allegations have to establish criminal conduct on the part of Omegle -- first question. And then if they do have to establish that, have you actually established that in your allegations in your complaint?

MR. MARSH: Okay. That's a very good question. So these statutes are cumbersome at best. It's taken me quite a while to appreciate all the nuances of these statutes. So 1591 is the criminal

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2 predicate as you -- as you recognize, and 1595 is the
3 civil remedy as you recognize. With 1595 has been
4 interpreted one of the challenges of looking at these
5 two statutes together is how you interpret 1595's knew
6 or should have known civil standard onto 1591, which
7 is why I'm sort of starting with 1591 to show that we
8 don't need to have a lesser standard in this case
9 because we have the actual knowing of 1591. So we
10 don't need the -- we don't need the beneficiary
11 liability.

12 JUDGE BRASHER: So you think your
13 allegations are sufficient to establish actual
14 knowledge under 1591?

15 MR. MARSH: That's correct, your Honor.
16 That's exactly what I'm arguing in terms of the
17 statutory construction of 1591. Now, unfortunately,
18 we don't have many hours to go over all the nuances
19 here, but there is an A1, an A2 of 1591 which
20 establishes the knowing conduct of the website. A1
21 talks about recruiting, enticing, obtaining, or
22 soliciting; right?

23 And Judge Carnes, with all due respect,
24 that's what differentiates this case from the
25 automobile case because we do have proof of

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2 recruiting, enticing, you know, talk to strangers,
3 meet strangers online -- that is enticing --
4 obtaining, and soliciting. So that's -- you can
5 find --

6 JUDGE CARNES: It doesn't say "If you're a
7 child, talk to strangers online" --

8 MR. MARSH: That's correct.

9 JUDGE CARNES: -- or "Talk to strange
10 children online" --

11 MR. MARSH: And that's why you have
12 these --

13 JUDGE CARNES: -- anymore than it says "If
14 you're planning a robbery, buy an automobile. You can
15 get away faster" (inaudible).

16 MR. MARSH: Well, then let's -- then your
17 Honor, let's talk about A2, which discusses reckless
18 disregard. Now, this Court's precedence on reckless
19 disregards with regard to sex crimes is very solid.
20 That is the -- not only the Mosey case, your Honor,
21 which you -- which you wrote, but also the Daniels and
22 the Pruitt case. And those cases were criminal cases.
23 And in those criminal cases this Court found that the
24 protection of the very young calls for a contextual
25 approach to statutory interpretation; right? That's

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2 the United States versus Daniels. Given the
3 congressional intent to protect the most vulnerable
4 among us, that's why these statutes were passed. That
5 principle has been applied repeatedly. In the Daniels
6 case, to federal statutory rape laws, which provide an
7 apt comparison here, child sex trafficking prohibited
8 by 1591, in particular, child sex trafficking, your
9 Honor, expressed congressional recognition that young
10 children need special protection against sexual
11 exploitation. That is this Court's decision in the
12 United States versus Daniel. And then in the Ruggiero
13 case talks about age verification as a component of
14 the federal regulatory scheme in the criminal context
15 when it comes to the production of child pornography.
16 So with 1591, that is aimed specifically at this
17 conduct of child trafficking. That's why it was
18 written and that's why it should apply in this case.
19 And the -- and again, to parse all of these various
20 components would take longer than I have, 42 seconds.
21 But suffice it to say that there is a specific carve
22 out, A2, for persons who have not obtained the age of
23 18 years and will be cause to engage in a commercial
24 sex act, which the production of child pornography
25 clearly is.

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2 JUDGE LAGOA: Can I ask you a question?

3 MR. MARSH: Yes, your Honor.

4 JUDGE LAGOA: Because I guess on the
5 record it -- or the implication is that they don't ask
6 for the age. But my understanding is the website
7 itself, I guess, I don't know if it's an algorithm,
8 but it matches users randomly, but sometimes it also
9 pairs people based on similarities.

10 MR. MARSH: Correct. You can enter key
11 words, if you will, your Honor, of the kinds of people
12 and content you want to access.

13 JUDGE LAGOA: So it's not necessarily the
14 -- Omegle -- is that how you pronounce it?

15 MR. MARSH: That is how we pronounce it.

16 JUDGE LAGOA: Omegle is actively involved
17 in sometimes linking the users together?

18 MR. MARSH: Correct. And they are also
19 actively involved in revealing the geolocation of the
20 individuals on the other side of the screen. We don't
21 know if this is a feature, if this is a data leak.
22 But we do know that Omegle is aware of this because it
23 is frequently talked about by pedophiles and child
24 molesters as a way that they can identify the users,
25 the children on the other side. And in this case

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2 basically extort them with that information to provide
3 this kind of content to them, this kind of illegal
4 content that's prohibited by the First Amendment.

5 JUDGE BRASHER: Can I ask -- can I ask a
6 follow-up question? So what -- so I see some
7 allegations in your complaint where you've alleged
8 sort of generally that Omegle knew. So like paragraph
9 84, for example, "Defendant knowingly benefited from a
10 participation venture in which defendant knew CH would
11 be forced to engage in commercial sex."

12 What are the factual allegations that you
13 make in the complaint that back up that sort of
14 blanket allegation?

15 MR. MARSH: Yes, your Honor. That's a
16 good question. Omegle itself has been involved in
17 criminal investigations for this exact kind of
18 content. They have been subpoenaed. They appear in
19 the case records. They appear in the reported
20 decisions as an entity because this content is illegal
21 and beyond First Amendment protection. And Omegle has
22 been contacted in those cases with similar behavior.
23 So we have to assume that because of this information
24 that they are aware that this activity is occurring on
25 their website.

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2 JUDGE LAGOA: So you're assuming in the
3 complaint knowledge based on criminal actions that
4 involve their website?

5 MR. MARSH: That's correct. Not as them
6 as defendants to be clear, your Honor but --

7 JUDGE LAGOA: I understand that. But
8 they've been contacted or subpoenaed or...

9 MR. MARSH: Yes.

10 JUDGE BRASHER: Yeah. That seems like a
11 -- I mean, that seems -- I want you to tell me why
12 it's not problematic, but it seems problematic because
13 when I wrote this decision in Red Roof Inns that talks
14 about should have known versus known, and in that
15 decision we say, look, this is about hotels. You
16 know, the fact that your hotels are used by sex
17 traffickers, the fact that you might have -- you know,
18 you might reasonably expect that people are going to
19 sex-traffic in your hotel; that's not the same as
20 saying that you knowingly participate in a venture
21 involving sex trafficking. So how is that -- how is
22 your reading of your complaint consistent with Red
23 Roof Inns?

24 MR. MARSH: That's another good question,
25 your Honor. So --

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2 JUDGE BRASHER: I only ask good questions.
3 From here on out, just assume all the questions are
4 good.

5 MR. MARSH: Especially when I'm over time
6 and I want to sit down. So...

7 JUDGE LAGOA: It's fine. This is an
8 important issue, so we'll go over time. But don't
9 tell him any more "Good question." It's going to go
10 to his head.

11 MR. MARSH: I'll do my best, your Honor.
12 Thank you.

13 There has been a lot of analogies between
14 the virtual world and the physical world, the Red Roof
15 Inn world. And I think that the distinguishing factor
16 in that case, in those cases, is it's -- what we don't
17 know about this site, your Honor, is why it was
18 created, what their actual knowledge is as we do in
19 the Red Roof cases; right? Those are pretty clear.
20 The role of the hotels, the franchisers -- and some
21 cases have found liability for hotels in those cases.
22 In this case we have not even gotten to that level of
23 discovery to know, you know, precisely what this --
24 this site knows.

25 We do know that they screen capture, that

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2 they monitor some of these chats. We do know that any
3 textual chats are -- are -- are maintained by the
4 company and you can retrieve the text part of it. But
5 we don't know, in fact, why this site was created. It
6 does -- you know, the boom boom room could have been
7 a -- could have been a bar and grill for all I know.
8 But we do know what was going on there.

9 And so it isn't analogous, but again, at
10 this stage when we haven't even had discovery to -- to
11 -- to divine all of the knowledge and the intent and
12 the participation and how the algorithm works in this
13 product to link, you know, children with adult sex
14 offenders -- we don't know beyond that veil. And that
15 is the challenge we have with section 230. And that's
16 why these carve outs are so important, that we can
17 make a good faith argument that they had knowledge.
18 They are revealing this information that's being used
19 to sextort children, that this itself is in violation
20 of COPPA. Although it doesn't have a cause of action,
21 it does set a standard of care for children under 13.
22 Our client was clearly under 13 years of age. And so
23 whether or not it's more like a hotel or more like an
24 auto industry or more like the boom boom room is
25 something that we would need further discovery to

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2 determine.

3 We do know recently that even the United
4 Nations has called this site into question for the --
5 for the activities that are going on there. It's
6 widely known that almost every image that you click
7 through is someone masturbating or a penis or some
8 sexual content. So it's not as neutral as it seems
9 when you actually look at how the site functions and
10 what is occurring there. I know that probably doesn't
11 answer your entire question but...

12 JUDGE BRASHER: Thank you.

13 MR. MARSH: I'm happy to answer any
14 further questions. And I have time reserved so...

15 JUDGE LAGOA: Yes. You will. You'll get
16 your full time. Thank you very much.

17 MR. MARSH: Great. Thank you, your Honor.

18 MS. GUNNING: Good morning.

19 JUDGE LAGOA: Good morning.

20 MS. GUNNING: May it please the Court.
21 Kimberlee Gunning for the appellee Omegle.com LLC.
22 Language sets limits. And in this case there are
23 three categories of limits that the Court must
24 consider.

25 First of all, the Court is confined -- the

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2 Court is limited by the actual allegations and claims
3 in the Plaintiff's second amended complaint. Second,
4 the Court's consideration is limited by the actual
5 issues that the appellant raised on appeal, which are
6 one, is the section 2252A claim exempt from section
7 230? And two, whether an actual knowledge or
8 constructive knowledge standard applies to the section
9 1591 claim. Those are the only issues raised on
10 appeal. I want to -- and the third limit is, the
11 limits in section 230's plain language, which
12 considering all of the exemptions the appellants have
13 raised, it's clear based on the language that none of
14 those exemptions apply.

15 I want to talk first about the exemption
16 in section 230 C1. And this is the exemption, "No
17 provider or user of an interactive computer service
18 shall be treated as the publisher or speaker of any
19 information provided by another information content
20 provider." And what that means is, it applies to --
21 that type of immunity applies to any cause of action
22 that makes a service provider like Omegle liable for
23 content originating with a third-party user.

24 Now, an exception to that is situations
25 where the platform or the ICS materially contributes

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2 to the content. And that's not the case here. This
3 is about the content created by the John Doe who
4 criminally misappropriated the site. It's about his
5 words to CH --

6 JUDGE LAGOA: But how -- but for example,
7 it has -- there is no -- there's an exception to
8 sexual exploitation of children. Let's just talk
9 about that. So if you -- if in discovery you could
10 prove that your client or someone who is involved in
11 the company knew or knows or willingly participated or
12 received money as a result of sexual exploitation of
13 children, would you agree that that would be part of
14 the exception and that would be -- that you would not
15 have immunity for that?

16 MS. GUNNING: Well, with respect to the
17 1591 claim, your Honor, it's an actual knowledge
18 standard, and so the -- the appellant would -- the
19 plaintiff would have to show that there was -- that
20 Omegle had actual knowledge as to the plaintiff.

21 JUDGE LAGOA: All right. But the district
22 court judge here treated it as a -- basically a full
23 immunity when the statute has exceptions. And in
24 order to show knowledge, you're going to have to have
25 some level of discovery. I mean, you're not making

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2 the suggestion that a complaint that is a notice
3 pleading has to have any and all facts in order to
4 survive.

5 MS. GUNNING: Well, your Honor, there's
6 nothing in the statute, section 230, or the statutes
7 that underlie the two claims on appeal here that
8 indicates that these type of cases are exempt from the
9 requirements of Iqbal Twombly. In this case this is
10 the second amended complaint. The plaintiffs had
11 multiple opportunities to amend their complaint.

12 JUDGE LAGOA: Were they allowed to do
13 discovery?

14 MS. GUNNING: No, your Honor. They were
15 not allowed to do discovery, but they are situations,
16 hypothetical facts, and some of which have arisen in
17 other cases where it was possible.

18 JUDGE LAGOA: Well, I guess, going
19 forward, if someone now brought a lawsuit, they can
20 claim now that you have knowledge; correct?

21 MS. GUNNING: I'm sorry, your Honor?

22 JUDGE LAGOA: That the company now has
23 knowledge that it's being used as a child pornography
24 website?

25 MS. GUNNING: The issue, your Honor, with

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2 respect to the claims here is whether Omegle had
3 particular knowledge as to the plaintiffs, and that's
4 in Judge Brasher's decision in Red Roof, which he
5 mentioned in questioning of the appellant. So even if
6 you're outside of section 230, and even if the FOSTA
7 exception doesn't apply, and even if platforms were
8 subject to the same standards as the hotels, there
9 still has to be that violation, knowing -- knowing or
10 should have known that there was a violation as to the
11 plaintiff.

12 JUDGE BRASHER: Right. It's not -- the
13 knowledge required by the statute is not knowledge
14 that someone else is using your stuff to do something;
15 right? It's knowing participation in a venture that
16 involves sex trafficking; right?

17 MS. GUNNING: That's correct.

18 JUDGE BRASHER: So the mere fact that you
19 know that someone else is doing something -- I mean, I
20 don't know if this is -- that's not the kind of
21 knowledge that the statute talks about.

22 MS. GUNNING: That's correct, your Honor.
23 It's not -- it's not --

24 JUDGE BRASHER: Now, maybe you should have
25 known that someone -- you know, like I know that there

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2 are people who tend to use my hotel for whatever --
3 maybe I should know that -- that they're doing that.
4 That's a should-have standard, but that doesn't meet
5 the do know, actual -- actual knowledge.

6 MS. GUNNING: That's correct. I mean,
7 again, if this were outside section 230, the Red Roof
8 standard, applying that, clearly there hasn't been
9 shown the type of particularized knowledge. However,
10 FOSTA does --

11 JUDGE CARNES: Let me ask you this
12 question, Counsel.

13 MS. GUNNING: Yes.

14 JUDGE CARNES: So your position is that if
15 your clients give 1,000 children for being sexually
16 abused or trafficked (inaudible) you're using the
17 site, but they didn't know the identity, had no idea
18 which children it was, where they were located, so
19 forth, so on, they'd be absolutely immune and could
20 continue at the rate of a thousand a year with perfect
21 immunity.

22 Is that (inaudible)?

23 MS. GUNNING: Based on the claims in this
24 case and based on the allegations, yes. There would
25 be immunity because knowledge of other incidents that

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2 allegedly occur, other bad actors who criminally
3 misappropriate a platform is simply not enough to --

4 JUDGE CARNES: (Inaudible) they did a
5 study, internal study, top secret, confidential, don't
6 share, but it got shared. And it showed that 95
7 percent of the children who went on the website were
8 abused in one form or another, and that X number of
9 children are abused every year. And that wouldn't
10 matter? Your clients would be absolutely immune so
11 long as they said, "No, no. Don't tell me. I don't
12 want to know their names. I don't want to know their
13 geolocation. Let's take that (inaudible)."

14 MS. GUNNING: Your Honor, under -- again,
15 under the claims at issue here, that generalized
16 knowledge standard or non-particularized knowledge,
17 yes. The immunity would apply and --

18 JUDGE CARNES: What claims -- what claims
19 would the immunity not apply to? I'm trying to see if
20 your clients that have the most malevolent of hearts
21 could continue doing this with full immunity knowing
22 that they were causing or participating in causing a
23 thousand children a year to be sexually abused and
24 trafficked so long as they didn't know the names and
25 addresses or geolocation of the child.

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2 MS. GUNNING: Well, your Honor, if there
3 were not -- if there was not a claim that implicated
4 FOSTA or not a claim that implicated section 22 --
5 excuse me -- 2252A, then we would go to that general
6 exemption under C1, which is, here is unlawful content
7 that is created by bad actors who are misappropriating
8 the site. It's not content that Omegle is materially
9 contributing to.

10 JUDGE CARNES: So your answer is, yes,
11 they would be immune.

12 MS. GUNNING: They would --

13 JUDGE CARNES: (Inaudible) as long they
14 wanted to a thousand children (inaudible) a year.
15 That's your position?

16 MS. GUNNING: Under the current law and
17 under these claims, yes, they would be immune.

18 JUDGE LAGOA: So what is the basis -- or
19 what is the reason then for having section E1, "No
20 effect on criminal law, nothing in this section shall
21 be construed to impair the enforcement of section 223
22 or 231 of this title chapter 71 or title 18 or any
23 other federal criminal statute"?

24 MS. GUNNING: Well, section E1 is an
25 exemption for criminal prosecution. It's not an

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2 exemption for civil claims, your Honor.

3 JUDGE CARNES: Let me follow up with my
4 question.

5 You understand, of course, that there is
6 an exemption (inaudible) statutory interpretation to
7 statutory interpretation (inaudible).

8 MS. GUNNING: I'm sorry, your Honor. I
9 missed the last part of that question.

10 JUDGE CARNES: You know there's an
11 absurdity exception or doctrine or principle in
12 statutory interpretation that says even if we would
13 ordinarily read a statute to mean something, even as
14 plain words mean something, if it is absurd, and so
15 absurd it couldn't possibly have been intended, we
16 won't read it that way (inaudible).

17 MS. GUNNING: There is an absurdity
18 exception to the plain language rule.

19 JUDGE CARNES: You don't think it would be
20 absurd to interpret this statute to permit the kind of
21 wholesale existential exploitation of children
22 (inaudible)?

23 MS. GUNNING: Your Honor, I would actually
24 point to some recent decisions of the US Supreme
25 Court, different kinds of cases, and one in particular

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2 which is the Henson case, Henson versus Santander,
3 which is considered a remedial statute. In that case
4 the FDCPA, a statute that was enacted to protect a
5 particular group of folks, consumers with household
6 debt, and prohibited certain types of unlawful
7 practices. And in that case Justice Gorsuch still
8 said we have to apply the law faithfully as written.
9 It's also similar to the Supreme Court's decision in
10 Rodriguez where the Court said it frustrates rather
11 than effectuates legislative intent simplistically to
12 assume that whatever furthers the statute's primary
13 objective must be the law.

14 JUDGE BRASHER: So you -- but I mean, just
15 to get us back to the -- I mean, the allegations here
16 are not that the site is used 95 percent of the time
17 to traffic children; right? That's not the allegation
18 here?

19 MS. GUNNING: That's not the allegations
20 in this case.

21 JUDGE BRASHER: Okay. So -- and you agree
22 -- I mean, I think you agree with this. There is an
23 exception to 230 for liability under section 18 USC
24 1591; right?

25 MS. GUNNING: Correct.

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2 JUDGE BRASHER: So if there's criminal
3 conduct that violates 18 US C 1591, that is not
4 covered by section 230.

5 MS. GUNNING: Yes. If the conduct
6 underlying the claim -- if the defendant's conduct
7 constitutes a violation of section 1591, yes, that
8 exception --

9 JUDGE BRASHER: Right.

10 MS. GUNNING: -- exemption does not apply,
11 but you could still go to -- to other exemptions.

12 JUDGE CARNES: What it means is if the
13 defendant, your client, engaged in a crime under
14 1591 -- if your client -- I'm sorry -- under the
15 underlying criminal statute, your client can also face
16 civil liability unless you come up with some other
17 defense. But it doesn't mean if there was being shown
18 on the website criminal behavior by someone else who
19 posted it on the website that there's an exception to
20 civil liability for your client; right?

21 MS. GUNNING: If I'm understanding your
22 Honor's question correctly, yes, I mean, the exemption
23 in -- FOSTA's exemption in E5A, it is the defendant's
24 own conduct that has to violate the criminal statute.
25 And actually recently -- very recently -- we submitted

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2 this as supplemental authority to the Court. The 9th
3 Circuit became the first circuit court of appeals to
4 rule on these questions and found that, yes, indeed,
5 the actual knowledge standard, in other words,
6 applying the standard applicable to a criminal -- a
7 violation of the statute -- a criminal violation of
8 the statute applied in that instance.

9 JUDGE BRASHER: Right. So let's -- so
10 let's talk about then -- I think we're all kind of on
11 the same page.

12 So do the allegations in the complaint --
13 so this is the text of 1591. Do the allegations in
14 the complaint establish or sufficiently allege for
15 purposes of plausibility under Twombly Iqbal that
16 Omegle, quote, "Knowingly benefits financially or by
17 receiving anything of value from participation in a
18 venture which has engaged in an act of sex
19 trafficking."

20 MS. GUNNING: No.

21 JUDGE BRASHER: Okay. Explain why that
22 would be.

23 MS. GUNNING: Well, there's --

24 JUDGE LAGOA: I'm sorry. Answer the
25 question, and then I'll ask my question.

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2 MS. GUNNING: Well, there's no -- there's
3 no allegations of a knowing benefit. There's no
4 allegations to support a common undertaking. And most
5 importantly --

6 JUDGE LAGOA: Don't they allege that the
7 individuals who are cappers or pedophiles pay for the
8 service and that you receive -- your client receives
9 money in order for them to use the service?

10 MS. GUNNING: Not exactly, your Honor.
11 There's no payment for using Omegle's service. It's a
12 free site. I do understand that they alleged in the
13 complaint that there was a financial benefit, but not
14 related to any payment to use the site. Now, with
15 respect to knowledge that is not alleged --

16 JUDGE LAGOA: Am I not supposed to accept
17 that allegation as true?

18 MS. GUNNING: You can accept the
19 allegation as true. It just -- it's not -- it's not
20 payment from users of the site. I believe they allege
21 that there's advertising on the site, but not a pay
22 for use.

23 JUDGE LAGOA: Correct. So advertisers pay
24 in order -- because you have a certain amount of users
25 that use the site.

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2 MS. GUNNING: That's the allegation, yes.

3 JUDGE LAGOA: And they use the site for
4 pornography of children? That's the allegations in --

5 MS. GUNNING: I don't believe advertisers
6 are using the site, your Honor.

7 JUDGE LAGOA: The users. But the
8 advertisers pay for the amount of users that you have
9 trafficking and using the website. That's how you get
10 revenue.

11 MS. GUNNING: That's the allegation in the
12 complaint, your Honor. But I want to go back to this
13 -- the earlier question, which is -- goes to the level
14 of knowledge that the appellant has to show to show
15 Omegle violated the statute. And again, the most
16 important thing I would go back to Red Roof, Judge
17 Brasher, where you explained that there had to be this
18 knowledge by -- by the defendant that the TVPRA was
19 violated as to the plaintiff. Omegle had no
20 contemporaneous knowledge of the plaintiff, no
21 contemporaneous knowledge of the John Doe. This
22 isn't --

23 JUDGE BRASHER: Well, you're saying that.
24 But I mean, so -- I mean, we're stuck with the
25 allegations of the complaint and I mean, the 84 --

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2 paragraphs 84 through 87 of the complaint are things
3 that I'm having trouble with because they say things
4 like, quote, "Defendant knowingly benefited from
5 and/or received value from participation in the
6 venture in which Defendant knew CH would be forced to
7 engage in commercial sexual acts while under the age
8 of 18 years old." That's paragraph 84. Paragraph 87
9 says "Defendant knowingly benefited financially from
10 the sex trafficking venture and the exploitation of
11 CH."

12 So what do we do with allegations in the
13 complaint that just literally say we meet the
14 standards of 1591?

15 MS. GUNNING: Well, respectfully, your
16 Honor -- and I do not have the complaint in front of
17 me -- I believe that those are the allegations in the
18 cause of action themselves, not the underlying
19 allegations that explain how those elements of the
20 claim are met. And there are some -- there are some
21 allegations that -- and this was added after the
22 district court judge dismissed the First Amendment
23 complaint for shotgun pleading, adding those specific
24 allegations. But looking at those they don't map on
25 to the allegations in the cause of action. They don't

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2 flesh that out. I do see that I've gone over my time.
3 I'm happy to answer additional questions if the Court
4 has any.

5 JUDGE LAGOA: Thank you very much.

6 MS. GUNNING: Thank you.

7 JUDGE BRASHER: All right. So let me --
8 I'll just -- the question I'm having in this case is,
9 I think -- you make a lot of arguments in your brief
10 about the way section 230 should be interpreted and
11 the way 1595 and 1591 work together. But I think if
12 we get to the point where you have to allege that
13 Omegle committed a crime under 1591, the question I
14 have is, have you alleged in your complaint that
15 Omegle committed a crime under 1591?

16 MR. MARSH: Well it's a good question,
17 your Honor. And I think if we -- in relation to the
18 Rule 8 issue and the knowledge issue, this Court's
19 precedents in United States versus Pruitt is
20 instructive. And that is, again, another criminal
21 case. It's not a civil case. These are all criminal
22 cases with a much higher standard. It says "According
23 to the circuit's well-established precedent, courts
24 will address knowing receipt" -- and again, this is a
25 child pornography case -- "mainly as issues of fact,

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2 not as law," which goes to your issue, Judge Lagoa,
3 about gaining access to this information, which will
4 allow us to prove all of these knowing elements. We
5 are at the pleading stage.

6 And again, this is not a case about
7 household debt. I know the defendant would like it to
8 be. This is about the sexual exploitation of
9 children. That is beyond First Amendment protection.
10 There was a very good district court decision in this
11 district recently which -- which talks about that, the
12 Freesites case, and this is a higher -- a heightened
13 standard of protection that we want to give to
14 children that don't apply to consumers of household
15 debt.

16 And the Daniels case is also instructive
17 as to this knowing issue. And it says "Although
18 there's a general presumption that knowing mens rea
19 applies to every element in a statute," -- again, a
20 criminal case -- "cases concerned with the protection
21 of minors are within a special context" -- that's
22 black letter law in this district -- "where that
23 presumption is rebutted." A very, very strong
24 preference for the protection of children.

25 This -- and if we want to get into

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2 statutory interpretation, which we haven't here today,
3 this CDA was passed, the Communications Decency Act --
4 well, there's nothing decent about what happened
5 here -- as a child protection statute. That was the
6 intent of Congress in passing this law, originally.
7 This is before FOSTA.

8 JUDGE BRASHER: Yeah. Because, I mean,
9 originally 230 was read to apply to Backpage and stuff
10 like that where there was knowing participation in the
11 sex trafficking venture; right? So, you know,
12 Backpage.com knew --

13 MR. MARSH: Correct.

14 JUDGE BRASHER: -- that sex traffickers
15 were advertising, encouraged sex traffickers to
16 advertise, participated in the venture. I guess my
17 point, once again, is where are the allegations in
18 this complaint that suggests Omegle has done something
19 like Backpage did and effectively committed a federal
20 crime?

21 MR. MARSH: Well, this is what we have
22 alleged in our complaint, which I do have a copy of,
23 and I do have sites too. So we allege in paragraph 4
24 that Omegle knowingly received value. All right.
25 That is a conclusory statement. But it also talks

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2 about the presence of these individuals called
3 "cappers," these people that in effect screen capture
4 the abuse. They brand it with Omegle, which is
5 ubiquitous on TikTok. You can Google Omegle on
6 TikTok, search for Omegle on TikTok, and find all
7 these child sex abuse videos that are branded "Omegle"
8 by these cappers. That is paragraph 4.

9 In paragraph 31, we do allege that the
10 defendants benefit financially, received something of
11 value, including increased web traffic. I assume they
12 aren't running this site for free. I assume this is
13 not a public good that they've created. Increased web
14 traffic from participation in one or more sex
15 trafficking ventures allowing Omegle.com to become a
16 safe haven and refuge for child predators, sex
17 abusers, human traffickers, and child pornographers.
18 Paragraph 32, again, as to their knowledge, Omegle is
19 a focus topic of discussion by child predators and
20 child pornographers who trade and disseminate child
21 sex abuse material, capping how-tos, how to exploit
22 children on the site. Again, that goes to my criminal
23 cases, Judge Lagoa, that I referenced in terms of
24 their knowledge, the UN report, which is not included
25 in our complaint, but we subsequently learned about

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2 it, and we'll include it as supplemental authority,
3 tips for how to create and produce child sex abuse
4 videos on Omegle, advice on how to share and
5 distribute child sex abuse materials with impunity,
6 and other perverse pursuits.

7 Paragraph 34 talks about how the Omegle
8 site works and the involvement with -- with different
9 key words that you can utilize to target children or
10 to match these two individuals together.

11 Paragraph 39, paragraph 40 -- it's all in
12 the record, your Honor. I'm not going to belabor
13 this. Paragraph 41, Judge Lagoa, talks about the
14 criminal cases that Omegle has been implicated in.
15 And again, we are -- to the -- to the Rule 8 issue, we
16 should not be subjected to a heightened standard of
17 pleading here. We're not alleging fraud or any of the
18 things that would require a heightened pleading
19 standard.

20 And so again, if we -- if we go back to
21 the purpose, the congressional purpose, the way that
22 this law has been misinterpreted -- the genesis of
23 where we are today goes back to cases that were
24 decided during dial up, you know, AOL. And like I
25 experienced in my case before the Supreme Court on

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2 restitution, you know, once the district courts start
3 in this direction, we unfortunately get a lot of bad
4 precedents that really twisted the congressional
5 intent of the Communications Decency Act as a child
6 protection statute into something that we are now
7 arguing, as Judge Carnes recognizes, that we could
8 have thousands and thousands of children and which
9 Defendant posits that they still have absolute
10 immunity.

11 JUDGE BRASHER: But I think they're wrong
12 about that because that seems like Backpage.com, which
13 clearly -- maybe not dot com, Back page in paper.

14 MR. MARSH: And then it became dot com.
15 So...

16 JUDGE BRASHER: Yeah. Clearly, clearly,
17 the thing that Congress was trying to get at by
18 creating this exception -- I just go back to the
19 question of, have you alleged -- do you think you've
20 alleged sufficiently in this complaint that I could
21 take this complaint and go and indict Omegle with it?

22 MR. MARSH: Go and --

23 JUDGE BRASHER: Indict them for a federal
24 crime?

25 MR. MARSH: Well --

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2 JUDGE BRASHER: I mean, because that's the
3 standard, right, of 1591?

4 MR. MARSH: I'd like to indict them for a
5 federal crime.

6 JUDGE BRASHER: Yeah.

7 MR. MARSH: I mean, you know, the federal
8 government has powers that we do not have.

9 JUDGE LAGOA: But the difference is in an
10 indictment you're actually going to have testimony
11 before a grand jury and you're going to have
12 witnesses; correct?

13 MR. MARSH: And subpoenas and subpoena
14 power.

15 JUDGE LAGOA: And there's going to be
16 subpoenas and you're going to have an investigation.
17 I mean, this is not -- you know, when you're in AUSA,
18 you have reactive cases. This would not be a reactive
19 case. It would be an investigative case, which means
20 that you'd have agents going out and interviewing
21 witnesses, and then you go before a grand jury --

22 MR. MARSH: You'd have --

23 JUDGE LAGOA: -- when you have your case
24 ready.

25 MR. MARSH: -- discovery, your Honor.

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2 JUDGE LAGOA: Well --

3 MR. MARSH: In effect.

4 JUDGE LAGOA: In effect.

5 MR. MARSH: In a criminal effect.

6 JUDGE BRASHER: Yeah. But the standard --
7 but the standard for liability Congress has made, I
8 think, the standard for liability, a violation of a
9 federal -- you know, it's the same as the criminal
10 activity. So --

11 MR. MARSH: It's the criminal activities,
12 but you'd only need to prove it in this context by a
13 preponderance of evidence --

14 JUDGE BRASHER: Right.

15 MR. MARSH: -- not by the criminal
16 standard.

17 JUDGE BRASHER: Sure.

18 MR. MARSH: And so, you know, not to say
19 we're mixing metaphors here, but to hold us to a
20 criminal standard in terms of our papers, I think, you
21 know, not only makes our, you know, Rule 8
22 requirements beyond what the -- the civil, you know,
23 rules require, but also sort of undercuts, you know,
24 the congressional intent and this Court -- this
25 circuit's intent to -- to have a different standard

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when it comes to the protection of children.

JUDGE LAGOA: Thank you very much. Very interesting case.

MR. MARSH: Thank you very much, your Honor.

JUDGE LAGOA: We're going to be in a short recess, and then we'll be back for the last case of the calendar. Thank you.

MR. MARSH: Thank you. Thank you, Judge Carnes.

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