No. 23-55134

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THE ESTATE OF CARSON BRIDE, by and through his appointed administrator KRISTIN BRIDE; A. K., by and through her legal guardian Jane Doe 1; A. C., by and through her legal guardian Jane Doe 2; A. O., by and through her legal guardian Jane Does 3; TYLER CLEMENTI FOUNDATION, on behalf of themselves and all others similarly situated,

Plaintiffs-Appellants,

v.

YOLO TECHNOLOGIES, INC.; LIGHTSPACE, INC.,

Defendants-Appellees.

On Appeal from the United States District Court for the Central District of California
No. 2:21-cv-6680
The Honorable Fred W. Slaughter, District Court Judge

BRIEF OF THE ELECTRONIC PRIVACY INFORMATION CENTER AND FAIRPLAY AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANT AND REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, *amici curiae* the Electronic Privacy Information Center and Fairplay state that they have no parent corporation and that no publicly held corporation owns 10% or more of its stock.

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INTEREST OF THE *AMICI CURIAE*

The Electronic Privacy Information Center ("EPIC") is a public interest research center in Washington, D.C., established in 1994 to focus public attention on emerging privacy and civil liberties issues. EPIC regularly participates as *amicus* in this Court and other courts in cases concerning privacy rights and harmful data practices. EPIC also regularly advocates for meaningful government oversight of abusive, exploitative, invasive, and discriminatory data collection systems, algorithms, and platform design decisions. EPIC is interested in this case because of EPIC's concern that overly broad interpretations of the scope of 47 U.S.C. § 230 can hamper society's ability to address some of the most egregious forms of online harm. EPIC previously filed *amicus* briefs on the scope of Section 230 immunity in *Gonzalez et al. v. Google*, 598 U.S. ___ (2023) and *Herrick v. Grindr, LLC*, 765 F. App'x 586 (2d Cir. 2019).

Fairplay, a fiscally-sponsored organization of Third Sector New England, Inc., a 501(c)(3) non-profit, is the leading independent watchdog of the children's media and marketing industries. Fairplay's advocacy is grounded in the overwhelming evidence that child-targeted

online marketing—and the excessive screen time it encourages—undermines healthy child development. The organization is deeply interested in this case because the scope of publisher immunity under 47 U.S.C. § 230 has a significant impact on platform accountability for algorithmic recommendation systems and design features that encourage excessive social media use and direct young users to addictive and dangerous online experiences and content. Fairplay has filed numerous complaints and comments before the FTC regarding harmful design features and algorithmic recommendation systems, and it previously filed an *amicus* brief on publisher immunity under Section 230 in *Gonzalez et al. v. Google*, 598 U.S. ___ (2023). Appellant Kristin Bride is a member of the Screen Time Action Network at Fairplay. Ms. Bride did not participate in or contribute money to the preparation of this brief. [1]

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[1] The plaintiffs consented to the filing of this brief, but the defendants did not consent. In accordance with Rule 29, the undersigned states that no party or party's counsel authored this brief in whole or in part nor contributed money intended to fund the preparation of this brief. No outside person contributed money intended to fund the preparation of this brief.

SUMMARY OF THE ARGUMENT

Over the past several years, Ninth Circuit caselaw has converged on an important limiting principle for Section 230: Section 230 only applies to claims that allege interactive computer service providers ("ICSs") have the legal duty of a publisher to monitor, edit, and remove improper third-party content. To apply this rule, courts must determine, for each claim, what duty underlies the claim; whether it is absolutely necessary for a company to monitor, edit, or remove third-party information to comply with the duty; and whether the duty stems from the company's publishing conduct or from another action that the company took, such as promising to monitor, edit, or remove third-party information. The district court did none of this analysis and instead applied the repudiated but-for test, which far from a limiting principle is instead a dangerously overbroad grant of immunity to internet companies. Because the legal claims in this case do not allege the defendants had a duty to monitor, edit, or remove third-party content, the decision below should be reversed.

The Ninth Circuit's limiting principle has roots in Section 230's origins. The case that led Congress to pass Section 230, *Stratton*

Oakmont v. Prodigy, would have imposed a publisher's legal duty to monitor, edit, and remove tortious third-party information on internet companies because they performed some publishing-like activities such as removing posts with obscene language. This duty would carry serious liability risk because ICSs disseminate thousands to millions of messages per day. Congress feared this decision would disincentivize content moderation because companies that engaged in content moderation would be labeled as publishers with the associated duty and liability risk, while companies that eschewed content moderation would not be labeled publishers and thus spared this duty and liability. By prohibiting any claims that allege an ICS violated its duty to review, edit, or remove harmful third-party content, Congress created a safe harbor in which companies could engage in content moderation without automatically adopting a publisher's duties. What Congress did not do is give internet companies immunity whenever they engage in publishing activities or whenever improper content on an online platform is a but-for cause of a claim.

The Ninth Circuit has used this rule to decide several important recent cases. Under this Court's analysis, Section 230 only prohibits

claims that allege ICSs have a duty that necessarily requires them to review, edit, or remove third-party content. The Ninth Circuit has recognized that many claims are not barred by Section 230 because companies can avoid liability without monitoring, editing, or removing third-party information. Section 230 also does not prevent claims that merely *incentivize* companies to engage in publishing activities without requiring them to do so, claims that result from ICSs voluntarily adopting publishing duties, and claims for which publishing activities are merely a but-for cause. Additionally, claims that allege ICSs have a duty to review, edit, remove, or publish their *own* content are not prohibited by Section 230.

In addition to respecting statutory text and Congressional intent, recognizing Section 230's proper scope ensures a balance of incentives for internet companies that will result in a healthier internet ecosystem. The limiting principle that has emerged from Ninth Circuit caselaw carefully ensures that Section 230 provides the full measure of protection intended by Congress without creating a lawless no-man's-land online through overly broad protections for internet companies that cause harm.

ARGUMENT

I. SECTION 230 ONLY PROHIBITS CLAIMS THAT "TREAT" INTERACTIVE COMPUTER SERVICES AS THE "PUBLISHERS OR SPEAKERS" BY IMPOSING THE LEGAL DUTIES OF PUBLISHERS OR SPEAKERS ON THEM.

Under Section 230 of the Communications Decency Act, "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1) (1994). The Ninth Circuit has broken down this sentence into a three-prong test: Section 230 applies to "(1) a provider or user of an interactive computer service (2) whom a plaintiff seeks to treat . . . as a publisher or speaker (3) of information provided by another information content provider." *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1100–01 (9th Cir. 2009). In evaluating the second prong—whether a claim seeks to treat an ICS as the publisher of third-party content—the key is whether the claim imposes the legal duties of a publisher on the defendant, which is a duty to review, edit, and remove harmful content, solely because the defendant engages in some publishing conduct such as hosting third-party content or engaging in content moderation. Section 230 only applies to claims

that *necessarily* impose this duty. Section 230 does not apply simply because the defendant's publishing activities are a but-for cause of the claim, nor does it matter that the defendant might *choose* to engage in publishing activities to comply with a legal duty. These are important distinctions that ensure that Section 230's scope does not exceed its text and purpose.

A. Congress passed Section 230 with the limited purpose of stopping courts from imposing publisher duties on interactive computer service providers.

The history and purpose of Section 230 show that a claim "treat[s]" an ICS "as the publisher" of third-party content only when it imposes a duty to monitor, remove, or edit third-party information.

In *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, the *en banc* court explained that the "principle or only purpose" of Section 230 was "to overrule *Stratton-Oakmont* [sic] *v. Prodigy*." 521 F.3d 1157, 1163, 1163 n.12 (9th Cir. 2008). In *Stratton Oakmont*, the court imposed strict defamation liability on the ICS Prodigy by labeling it a "publisher." *Id.* at 1163. In New York, and many other states, publishers of a defamatory statement, such as book or

newspaper companies, are strictly liable for defamatory content that they communicate to third parties. *Stratton Oakmont, Inc. v. Prodigy Services Co.,* 31063/94, 1995 WL 323710, at *3 (N.Y. Sup. Ct. May 24, 1995); Restatement (Second) of Torts § 581 (Am. L. Inst. 1965). Publishers have a duty to ensure no tortious content is published because they exercise "editorial control and judgment" over the contents of their publications, selecting, reviewing, and editing each piece for publication. *Stratton Oakmont*, 1995 WL 323710 at *3. But for cases against "distributors" or "conduits" that transmit a large volume of materials without selecting or editing them, a plaintiff must prove the defendant's knowledge of the content's defamatory character. *Id.*; Restatement (Second) of Torts § 581 (Am. L. Inst. 1965); *see also Smith v. California*, 361 U.S. 147, 152–53 (1959) (explaining that the First Amendment requires establishing knowledge to find fault for distributors in obscenity cases); *Cubby, Inc. v. CompuServe, Inc.*, 776 F. Supp. 135, 139 (S.D.N.Y. 1991) (applying *Smith v. California* to the defamation context). The publisher's duty carries with it a large liability risk, which is why the Supreme Court has recognized that the First Amendment requires heightened scienter showings for publishers

discussing public figures, *see New York Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964), and for distributors more generally, *see Smith*, 361 U.S. at 152–53.

The question in *Stratton Oakmont* was whether Prodigy was more like a publisher or a distributor. Prodigy argued that it was more like a distributor because it had little to no editorial control over the 60,000 messages posted to its website every day. *Stratton Oakmont*, 1995 WL 323710 at *3. But the court held that Prodigy was a publisher because it had adopted content guidelines and implemented technology to screen for obscenity and nudity on its message boards. *Id.* at *4. In the court's opinion, these modest content moderation activities were sufficiently similar to a newspaper's editorial process to justify labeling Prodigy as a publisher, which imposed on Prodigy "the same responsibilities," or duties, "as a newspaper" to monitor *all* information flowing through its website and to remove or edit out any tortious material. *Id.* In other words, the court did two things: it imposed a publisher's duty to monitor, edit, and remove all tortious material from its website, and it did so because it classified Prodigy's conduct as editorial conduct associated with traditional publishers. As Congress recognized, this was

a dubious line of reasoning because Prodigy was unlikely to have sufficient editorial control over 60,000 message board posts per day to ensure that none contained defamation. *See* 141 Cong. Rec 22046 (Rep. Goodlatte remarking that "[t]here is no way that any of these entities, like Prodigy, can take the responsibility to edit out information that is going to be coming in to them from all manner of sources onto their bulletin boards."). Meanwhile, other message boards that declined to moderate content were labeled as mere distributors. *Roommates.com*, 521 F.3d at 1163 (citing *Cubby, Inc. v. CompuServe, Inc.*, 776 F.Supp. 135, 140 (S.D.N.Y.1991)).

The result of these rulings was what the Ninth Circuit called a "grim choice" for ISPs: voluntarily engage in content moderation and thus adopt an onerous duty to review, edit, and remove any tortious materials, or bury one's head in the sand and ignore problematic posts altogether to escape liability. *Id.*; *see also* 141 Cong. Rec. 22045 (Rep. Cox explaining that *Stratton Oakmont* would create "a massive disincentive" for ICSs to engage in content moderation).

To spare ICSs from this grim choice, Congress intervened with Section 230. If the problem was that by engaging in content

moderation—a practice Congress wanted to incentivize—ICSs were adopting the legal duties of publishers and facing extreme liability risks for the failure of those duties, then the solution was to prohibit any claims alleging that ICSs had violated their duties as publishers. By not having to face these types of claims, ICSs can be assured that engaging in voluntary content moderation will not subject them to higher levels of liability risk. Thus, Section 230 instructs courts not to permit claims that allege an ICS has a publisher's duty to review, edit, and remove harmful materials solely because it engages in some publishing activities. *See Roommates.com,* 521 F.3d at 1163. That is what it means to "treat" an ICS "as the publisher." 47 U.S.C. § 230(c)(1) (1994). This is distinct from saying that ICSs cannot face liability any time that improper content is a but-for cause of a claim. *See* Part I.D, *infra.* If an ICS can comply with the legal duty underlying a claim without monitoring, editing, or removing improper third-party information, or if the duty is not being imposed because the ICS is engaging in editorial conduct, then Section 230 does not apply.

B. The Ninth Circuit has recognized that Section 230 only prohibits claims that seek to impose publisher duties on interactive computer service providers.

As recent Ninth Circuit caselaw shows, Section 230 does not bar a claim unless the claim "treats" an ICS "as the publisher or speaker" by alleging that an ICS's publishing activities gave it a publisher's duty to monitor third-party content and remove or edit it to avoid liability. In the Ninth Circuit, courts look at the actions the claim "necessarily requires" the defendant to take to avoid liability and whether those actions are to "review[], edit[], and decid[e] whether to publish or to withdraw from publication third-party content." *Homeaway, Inc. v. City of Santa Monica*, 918 F.3d 676, 681 (9th Cir. 2019) (internal quotation marks and citations omitted).

In *Barnes v. Yahoo!, Inc.*, for example, Section 230 prohibited a negligent undertaking claim that left the defendant no choice but to remove harmful third-party materials from its website in order to avoid liability. *See Barnes*, 570 F.3d at 1103. The plaintiff alleged that Yahoo had committed the tort of "negligent undertaking" by failing to remove pieces of harmful content from its social networking site. *Id.* at 1099. The plaintiff argued that Section 230 did not prohibit her claim because

the claim did not seek to treat Yahoo as a publisher, but instead as an entity that performed a service in a negligent fashion. *Id.* at 1102. In other words, Yahoo did not have a publisher's duty to review, edit, or remove information, but a general duty to perform a service in a non-negligent fashion. *Id.* But the Ninth Circuit rejected this argument because the "service" that Yahoo undertook was publishing third-party content, so its alleged duty could only be met by removing harmful content—something indistinguishable from a publisher's duty. *Id.* at 1103. For that reason, the court recognized that the claim sought to treat Yahoo as the publisher or speaker of third-party content and found that Section 230 applied. *Id.*

Similarly, in *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, the plaintiffs alleged that the defendant violated the Fair Housing Act by allowing website users to write essays about qualities they sought in a housemate, some of which expressed discriminatory preferences. *Roommates.com*, 521 F.3d at 1173. The Ninth Circuit held that Section 230 prohibited this claim because it would require the defendant to "review[] every essay" and edit or remove the discriminatory ones. *Id.* at 1173–74. Because the only option

to comply with the underlying duty was reviewing, editing, and removing harmful content, the claim imposed a publisher duty on the defendant. *See id.*

No matter the name of the cause of action, Section 230 only prohibits claims that would force an ICS to monitor the third-party materials it publishes and remove or edit what makes them tortious to avoid liability.

C. Section 230 does not prohibit claims premised on non-publisher duties.

Section 230 does not apply to claims that allege that defendants violated non-publisher duties. These claims fall into two major categories relevant to this case: claims that do not necessarily require an ICS to engage in publishing activities to avoid liability and claims that arise when an ICS adopts a publisher's duties through means other than engaging in publishing activity, such as by making a promise.

Section 230 allows claims that would not require the defendant to monitor, edit, or remove third-party content to avoid liability. In *Lemmon v. Snap*, for example, the plaintiffs brought a products liability claim against app developer Snap alleging that it had designed an

unreasonably unsafe app. *Lemmon v. Snap*, 995 F.3d 1086, 1089 (9th Cir. 2021). The plaintiffs alleged that Snapchat's "Speed Filter" and rewards feature combined to incentivize users to take photos while driving at dangerously high speeds. *Id.* at 1089–90. The court ruled that Section 230 did not bar the claim and noted that "Snap could have satisfied its alleged obligation—to take reasonable measures to design a product more useful than it was foreseeably dangerous—without altering the content that Snapchat's users generate." *Id.* at 1092 (internal quotation marks omitted). Similarly, in *Doe v. Internet Brands*, the plaintiff alleged that the defendant website had failed its duty to warn her that sexual assaulters used its website to lure unsuspecting victims. 824 F.3d 846, 848 (9th Cir. 2016). The court ruled that Section 230 did not apply because "[a]ny alleged obligation to warn could have been satisfied without changes to the content posted by the website's users." *Id.* at 851.

Many non-publisher duties could conceivably be met by engaging in publishing activities, but that does not mean that Section 230 bars claims based on violations of such duties. Instead, the court must determine whether engaging in publishing activities is the *only* way to

fulfill the alleged duty. In *Homeaway, Inc. v. City of Santa Monica*, for example, the plaintiff Homeaway challenged a city ordinance that, among other things, prohibited Homeaway from facilitating vacation home rentals on its website that were not on Santa Monica's registry of pre-approved properties. *Homeaway, Inc.*, 918 F.3d at 680. Homeaway argued that the ordinance imposed a publisher duty because Homeaway's "best option from a business standpoint" would be to remove non-conforming third-party listings from its website so it would not be "chock-full of un-bookable listings." *Id.* at 681. Because removing improper content is what publishers do, Homeaway argued that this claim was prohibited by Section 230. *Id.* But the court explained Section 230 did not prohibit the claim because the underlying duty could have been satisfied without removing listings. *Id.* Homeaway could, for example, simply refuse to process any transactions that attempted to register non-approved properties. *Id.* A key indication that the claim did not involve a publisher's duty, then, was the fact that there were ways to comply with the duty that did not involve publishing activities. This is true for any claim evaluated under this Court's Section 230 analysis.

The plaintiffs' product liability claims in the instant case should not be prohibited because the defendants could comply with their alleged duties to design a reasonably safe product without monitoring, altering, or removing any third-party content. The plaintiffs' complaint alleges that the defendants designed an unreasonably dangerous product by enabling anonymous users to target and send abusive messages to recipients. *See* ER-22-23 (Pl's First Amend. Compl. ¶ 18). The underlying duty alleged is that the defendants must design a product that is reasonably safe by designing a messaging service that does not allow one-sided anonymous messaging. The defendants could comply with their alleged legal duty by removing anonymity as a feature, which is different than monitoring, altering, or removing any user's content. Much like the Speed Filter in *Lemmon*, anonymity in this context is properly categorized as a product design decision, not a decision about the content of any given message, so Section 230 should not prohibit the claim. *See Lemmon*, 995 F.3d at 1092.

Section 230 also does not prohibit claims when ICSs voluntarily adopt a duty to monitor, edit, or remove harmful materials. When an ICS promises to edit or remove a piece of third-party content, the

resulting duty does not derive from the company's publishing activities but from the company's promise. *Barnes*, 570 F.3d at 1107. In *Barnes*, for example, Yahoo had promised the plaintiff it would remove the fake profiles being used to harass her, but it ultimately took no action. *Id.* at 1099. Barnes brought a breach of contract claim. *Id.* While the negligent undertaking claim discussed earlier was prohibited by Section 230, *see id.* at 1102–03, the contract claim was not, *see id.* at 1107.[2] The court explained "[p]romising . . . is not synonymous with the performance of the action promised," so holding Yahoo liable for its breach stems from the breach of the *promising* duty, not the breach of a publisher's general duty to remove harmful materials. *Id.*

Holding Yahoo responsible for its breach of contract would not force it into the "grim choice" that holding it responsible for the negligence claim would. Much like the defamation claim in *Stratton Oakmont*, the negligence claim in *Barnes* alleged that Yahoo had a

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[2] *Barnes* illustrates the importance of analyzing each claim separately under Section 230, not bundling them together based on the underlying content that caused them to arise, since two claims arising from the same activity came out differently under the court's Section 230 analysis. *See Barnes*, 570 F.3d at 1102–03, 1107.

publisher's duty to remove harmful content merely because it hosted third-party information. *See Barnes*, 570 F.3d at 1103 (explaining that the undertaking that Barnes alleged Yahoo failed to perform with due care was the removal of indecent profiles). This claim, if allowed, could be brought by any plaintiff for any harmful content that Yahoo failed to remove unless Yahoo avoided "undertaking" the service of removing any third-party content whatsoever. This is the grim choice that Congress wanted to prevent ICSs from having to make. But in *Barnes*, the contract claim stemmed from an easily avoidable promise that Yahoo had decided to make. The court noted that it was "easy for Yahoo to avoid liability: it need only disclaim any intention to be bound." *Id.* Section 230 does not immunize promisors from abiding by their promises, even if those promises are to act like a publisher.

The plaintiffs' misrepresentation claims in the instant case resemble the contract claims in the *Barnes* case and should not be prohibited by Section 230. The defendants asserted in their terms of service that they would not tolerate abuse and that they would engage in certain actions to prevent or punish that abuse, *see* ER-52-54 (AC ¶¶ 111, 131), thereby adopting the duties any business has not to mislead

prospective customers. It would have been easy for the defendants to avoid liability by not saying they would ban or identify abusive users. Holding as much would not impose a general publisher's duty on the defendants to ensure no abusive content existed on their platform, but instead would simply recognize a duty the defendants voluntarily adopted to ban abusive users' access to the app and reveal their identities when they acted abusively.

D. Section 230 does not apply solely because publisher activities are but-for causes of the claim.

This Court and others have consistently refused to prohibit claims on Section 230 grounds simply because an ICS's publishing activity was a "but-for" cause of the claim. Such a but-for test inappropriately evaluates whether a defendant's publishing activities in some way led to the claim at hand instead of properly evaluating whether the defendant's publishing activities triggered a duty to monitor, edit, or remove third-party information. Congress wisely did not craft Section 230 to prohibit any claims for which an ICS's publishing was a but-for cause because, as this Court has noted, the but-for test would create a "lawless no-man's-land on the Internet." *Roommates.com*, 521 F.3d at

1164; *see also Henderson v. Source of Public Data, L.P.*, 53 F.4th 110, 122 (4th Cir. 2022) (Fourth Circuit explaining the same). The but-for test is overbroad because "[p]ublishing activity is a but-for cause of just about everything [an ICS] is involved in. It is an internet publishing business. Without publishing user content, it would not exist." *Internet Brands*, 924 F.3d at 853; *see also Lemmon*, 995 F.3d at 1092–93 ("[T]hough publishing content is a but-for cause of just about everything Snap is involved in, that does not mean that the Parents' claim, specifically, seeks to hold Snap responsible in its capacity as a publisher or speaker.") (internal quotations and citations omitted); *A.M. v. Omegle.com, LLC*, 614 F. Supp. 3d 814, 817–20 (D. Oregon 2022). This outcome would be the opposite of Section 230's "core policy" to incentivize Good-Samaritan moderation of third-party content. *Internet Brands*, 924 F.3d at 852–53; *see Roommates.com, LLC*, 521 F.3d at 1164.

The district court in the instant case applied the but-for test by lumping almost all of the plaintiffs' claims together and ruling they were prohibited by Section 230 because the plaintiffs "fundamentally seek to hold Defendants liable based on content published by

anonymous third parties." ER-9. Focusing on whether content published by anonymous third parties was the but-for cause of the claims is not the correct Section 230 analysis. Instead, the district court should have identified three aspects of each claim: the duty whose alleged violation led to the claim; whether the duty alleged could only have been complied with by monitoring, editing, or removing third-party content; and whether the duty is being imposed because the defendants engaged in publishing activity or instead because they took some other action such as making a promise. Congress did not pass Section 230 to provide ICSs with the wide scope of immunity implied by the but-for test, and this Court should re-affirm its rejection of such an analysis.

E. Section 230 does not prohibit claims that are not premised on third-party content.

Under the third prong of this court's analysis, Section 230 will not apply to any claim that is based on content that an ICS created itself or to which it made a "material contribution." *See Roommates.com*, 521 F.3d at 1164–65. Section 230 only immunizes ICSs for claims resulting from "information provided by *another* information content provider," 47 U.S.C. § 230(c)(1) (emphasis added), and an ICS can turn into an

information content provider when it "is responsible, in whole or in part, for the creation or development of information," 47 U.S.C. § 230(f)(3) (1994).

Section 230 does not prohibit claims that condition liability on an ICS's own statements or omissions because the claims are not treating the ICS as the publisher of third-party information. In *Internet Brands*, for example, the court explained that the defendant's duty to warn users of a website's dangers was not prohibited by Section 230 because it was a duty for the defendant to create and communicate *its own information*, not a duty to review, edit, or remove any third-party content. *See Internet Brands*, 824 F.3d at 851. Because Section 230 only prohibits liability based on third-party information published on a platform, a claim based on a company's own communication—or tortious lack thereof—is not prohibited.

Similarly, claims that base liability on an ICS's failure to monitor its own internal reports are not premised on monitoring third-party information, so Section 230 does not prohibit them. For example, the ICS in *Homeaway.com* challenged the city ordinance that directed the ICS to cross-reference user-requested properties with a list of city-

approved properties. *Homeaway.com*, 918 F.3d at 680. The ICS claimed that Section 230 should have blocked this ordinance because the ordinance required the ICS to monitor the user-submitted rental property listings on its website, and monitoring all third-party content is a publishing activity. *Id.* at 682. But the Court noted that the law imposed a duty to monitor the "distinct, internal, and nonpublic" *requests* to book a property, not the third-party listings themselves. *Id.* Therefore, the statute was not holding online platforms liable for failing to monitor third-party information published on the platform, so Section 230 would not prohibit enforcement of the ordinance. *Id.*

This is relevant to the instant case because the plaintiffs do not allege the defendants had a duty to monitor all third-party content for abusive language, but instead argue that defendants adopted a duty to respond to specific reports of cyberbullying. *See* ER-52-54 (Pl's First Amend. Compl. ¶¶105–13). The plaintiffs submitted reports of abuse through multiple non-public channels such as the defendants' corporate email addresses and the defendants' law enforcement email address. *Id.* ¶¶ 111-116. Like the reports generated when users endeavored to rent a home in *Homeaway.com*, these emails are "distinct, internal, and

nonpublic." Any failure to monitor or respond to them, then, was not a failure to monitor third-party content published on its platform—a publisher's duty—but a failure to monitor the company's own internal records, a duty from which Section 230 does not excuse the defendants. Also, the plaintiffs seek to hold defendants liable because of the defendants' own allegedly misleading statements about how they would operate, not because the defendant published any specific third-party material. Like the defendant in *Barnes*, the defendants could have avoided liability simply by changing their own statements in their terms of service.

II. REJECTING THE DISTRICT COURT'S "BUT-FOR" TEST WILL NOT BREAK THE INTERNET.

Applying the Ninth Circuit's limiting principle for Section 230 will not "break the internet" as commenters often suggest when courts deliberate Section 230's scope. Such warnings fail to comprehend how Section 230 operates and ignore the variety of protections that ICSs enjoy, such as heightened pleading standards and First Amendment defenses. An overly expansive reading of Section 230 is dangerous

because it wrongfully prohibits claims that would incentivize ICSs to provide better, safer, more speech-protective online platforms.

ICSs have plenty of defenses for claims that lack merit or are against public policy. Plaintiffs must still state a valid claim, establish standing, overcome First Amendment defenses, and win on the merits of their claims. *See Internet Brands*, 824 F.3d at 853 ("[T]he argument that our holding will have a chilling effect presupposes that Jane Doe has alleged a viable failure to warn claim under California law. That question is not before us and remains to be answered."). When courts overextend Section 230's coverage, whether through misinterpretation or in response to seemingly weak claims, they do collateral damage to worthy plaintiffs. *Cf. Gonzalez v. Google LLC*, 598 U.S. 617 (2023) ("We therefore decline to address the application of § 230 to a complaint that appears to state little, if any, plausible claim for relief."). Plaintiffs who have suffered real harms should not be barred from the courtroom through overly expansive interpretations of the scope of Section 230.

Section 230 does not prohibit non-publisher claims for good reason: they do not force ICSs into the "grim choice" of either facing serious liability risk for moderating content or, instead, foregoing

moderating content altogether. *See Roommates.com*, 521 F.3d at 1163. Instead, they incentivize internet companies to act in pro-social ways. In *Barnes*, for example, Yahoo could have fulfilled its duty without foregoing content moderation or being a perfect content moderator: Yahoo could simply abide by its promise to remove specifically identified harmful content or avoid making such promises in the first place. *Barnes*, 570 F.3d at 1108. Either of these outcomes would be preferable to immunizing Yahoo's behavior. If Yahoo chose to avoid making promises, users could more clearly understand whether they would receive help from the company and seek other aid if not. And if Yahoo had abided by its promises, it would stop the harmful situation in which Ms. Barnes and others had been placed. Similarly, in the instant case, holding the defendants responsible for misrepresenting that they would ban and reveal the identities of abusive users would incentivize a healthier online ecosystem in which users can accurately identify which applications are more likely to allow bullying. The alternative—allowing companies to make promises with no way to hold them accountable when they fail to follow through—would greatly diminish consumer trust in online platforms and make it much harder

for consumers to make informed choices about what internet services to use.

Similarly, prohibiting products liability claims would remove an important incentive for internet companies to implement common-sense features that make their products safer. For example, consider the out-of-circuit case *Herrick v. Grindr, LLC*, 765 F. App'x 586 (2d Cir. 2019). The plaintiff, Herrick, sued Grindr, the company behind an eponymous dating platform, for claims including defective design. *Id.* at 588, 590. A man was using the Grindr platform and other dating applications to abuse Herrick by impersonating him and sending more than a thousand men to his home and workplace expecting sex and drugs. Pl's First Amend. Compl. at 2, *Herrick*, 765 Fed. App'x 586 (2d Cir. 2019). Notably, other dating apps addressed Herrick's concerns, employing industry-standard safety features such as IP address blocking to stop the abuse. *Id.* Herrick alleged that Grindr was liable, among other things, for defectively designing its app because it failed to implement features that are commonly used by similar apps to protect users from harassment, abuse, impersonation, and stalking. *Herrick*, 765 F. App'x at 588. The court dismissed the claim on Section 230 grounds using a

but-for analysis. *Id.* at 590. This represented a lost opportunity whether or not Herrick ultimately prevailed. If Herrick's claim had succeeded on the merits, then Grindr would have been incentivized to adopt the industry-standard safety features that similar apps were using. If it turned out that such features were in reality not industry-standard, meaning there was not really a reasonable alternative design for Grindr's app, then Grindr would have rightfully won on the merits. By prohibiting merits determinations on claims such as these, but-for applications of Section 230 prevent the development of important caselaw and stymy the development of appropriate incentives for internet companies who control many aspects of how people interact online.

In the instant case, the misrepresentation and products liability claims would not force defendants into the grim choice of foregoing all moderation or facing unlimited liability. By simply abiding by their promise to reveal abusive users' identities, refusing to make such promises in the first place, or removing anonymity as a feature altogether, the defendants could continue to run their businesses. And these outcomes would not occur unless the defendants actually lose on

the merits; if they do, then the outcome would be incentive for a safer internet ecosystem run by more trustworthy operators.

CONCLUSION

For the foregoing reasons, *amici* respectfully urge the Court to reverse the district court's order granting Defendants' motion to dismiss.

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CERTIFICATE OF COMPLIANCE

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