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.,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

REPLY BRIEF FOR PLAINTIFFS-APPELLANTS

JUYOUN HAN
ERIC M. BAUM
ANDREW CLARK
JONATHAN AXEL
EISENBERG & BAUM, LLP
24 Union Square East, Penthouse
New York, New York 10003
(212) 353-8700

Attorneys for Plaintiffs-Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE(S)

Cases

PAGE(S)

Statutes

INTRODUCTION

This lawsuit was brought by Plaintiffs-Appellants (hereinafter, the "Children") who were harmed, some fatally, by dangerous mobile applications marketed to children with false promises of safety. In the current market, digital technology products often incentivize danger to maximize profit: Danger brings audience, audience brings data, and data brings profit. From posts and broadcasts daring teenagers to race to find a pop-up celebrity, to speed filters on Snapchat App encouraging teenagers to drive at fatally dangerous speeds, product developers have knowingly exploited the vulnerable psychology of naïve teenagers to seek thrills, dopamine, and adrenaline by incorporating and romanticizing danger and risk in their products. This Court in *Lemmon* held that product developers who monetize such dangers would face accountability under the law, and that they could not seek cover under the CDA.

YOLO made design choices in its anonymous messaging app that would heighten the danger and amplify users' engagement. Essentially every anonymous messaging app had been known to be dangerous, risky, daring, and thus, to attract an instant pool of audience among young users, guaranteeing a short term success to companies that develop them. For more than a decade, anonymous apps have also come to be associated with teen suicide for the same reasons. An exhaustive list of previous anonymous messaging apps that hit the top of the app markets are

provided in the Children's Complaint, along with names of children who took their lives due to the harms engendered by those apps.

YOLO's advertised features were uniquely dangerous: it allowed for one-way anonymous messaging, which meant that *only the sender* of the message would be anonymous. Meanwhile, if the non-anonymous recipient of the message wished to reply to the anonymous message sender, it needed to do so in a semi-public forum, where it had to disclose the anonymously-received message to all of their connected audience because the recipient would not know the specific person to reply to. YOLO's design choice engages not only the receiver and sender but involves connected audiences in the conversation. It is by no coincidence that such design would boost user engagement, increasing profit for the platforms. In the meantime, it became the breeding ground for anonymous cyber-bullies to intentionally target their victims, who were not anonymous, and publicly humiliate them before a large audience. YOLO also designed two "reveal" functions: first the anonymous sender can unilaterally elect to "swipe to reveal" their own identity; and second, YOLO voluntarily represented that it would "reveal" the identities of users who harass or bully other users or "ban" such users. Problematically, this latter "reveal" function did not work – all of the Children remembered seeing this purported "reveal" function by YOLO but were ignored when they attempted to use the function to reveal the identities of their vicious harassers. YOLO's false

promise of the "reveal" and "ban" function was different from other types of community policy guidelines because it was conspicuously advertised as part of its platform's feature. The Children were misled by this promise and the Plaintiff-Appellant Carson Bride spent the last frantic minutes of his life desperately trying to find out how to reveal the identities of bullies on YOLO.

Ignoring all of these specific details about YOLO's design, the District Court erred by analogizing YOLO to the pseudonymous community board in *Dyroff* where all users' identities are associated with a pseudonym, and cursorily concluded that YOLO's reveal and ban feature is merely a content moderation decision which should be protected under CDA. But YOLO did not have to advertise and misrepresent the reveal and ban, nor did it have to make its designs so conducive to bullying without any recourse for the bullying victim. YOLO intentionally designed its product to maximize recklessness, danger, engagement, and ultimately profit, and now seeks to hide under an irrational interpretation of the CDA.

Since 1996, in the near three decades that the Communication Decency Act has been in effect, digital technology tools have become smart, sophisticated, and covertly invasive. Hence, Courts are now more skeptical about digital communication platforms who play down their roles to passive publishers. "As the internet has exploded, internet service providers have moved from 'passive

facilitators to active operators.' They monitor and monetize content, while simultaneously promising to protect young and vulnerable users." *Doe v. Snap, Inc*., No. 22-20543, at *7 (5th Cir. Jun. 26, 2023) (Elrod, J., dissenting from denial of rehearing en banc).

Technology may appear simple through an interface, but the devil is in the details of its designs: product teams use various features and tools, often hidden or behind-the-scenes, to increase engagement, promote content, and raise revenue. For example, different ride-sharing apps employ designs that boost the collection of tips or to gain more customers. Video and music streaming platforms compete with algorithms and designs to recommend contents that continue to keep users engaged. Similarly, social media and messaging apps utilize features such as daily streaks, push notifications, and other tools meticulously designed to boost user engagement. The point of these features is not about brokering rides or publishing content – it is about boosting business operations by increasing user engagement, which means more data, and more profit.

In recent decisions such as the *Social Media Cases* in the California Supreme Court, the court sharply pointed out that platforms are not immune from liability under the CDA simply because a particular claim involves content. Rather, the court held that the CDA does not cut off liability for business conduct related to how their platforms were designed, independent of the content published on those

platforms. *See In re Coordinated Proceeding Special Title Rule 3.550 Soc. Media Cases*, 2023 Cal. Super. LEXIS 76992 (Los Angeles Cty. Sup. Ct. Oct. 13, 2023). Similarly, the Seventh Circuit court recently decided that platforms cannot benefit from CDA protection if the claims arise from publication of illegal content, but can held accountable as product developers for designing, supporting, marketing, operating, and facilitating a product. *G.G. v. Salesforce.com, Inc.,* No. 22-2621 (7th Cir. Aug. 3, 2023).

ARGUMENTS

This Court in *Barnes v. Yahoo!, Inc.* established its seminal three-pronged test for determining whether an internet company may be exempt from liability under Section 230. 570 F.3d 1096, 1100 (9th Cir. 2009). Under this test, immunity from liability exists for "(1) a provider or user of an interactive computer service (2) whom a plaintiff seeks to treat, under a state law cause of action, as a publisher or speaker (3) of information provided by another information content provider." *Id*. at 1100-01. On appeal, the Children assert that the District Court erroneously applied the second and third prong of the Barnes test, and that this Court should reverse the lower court's decision to dismiss the action.

A. Section 230 Does Not Offer Protection to YOLO Because Children Seek to Hold YOLO Accountable for Its Own Conduct, Not Its Content.

With respect to both the second and third prongs of the *Barnes* test, the disputed issue here is whether the Appellants claimed that YOLO is liable for its own content or for third-party users' content. *See* 570 F.3d 1096, 1100 (9th Cir. 2009). The District Court's decision contained erroneous rulings in two distinct aspects: duty and causation. In this appeal, this Court must determine whether the claims alleged by Children derive from YOLO's duty as a publisher or duty as a developer, operator, creator and advertiser of its own product. As stated in the Opening Brief, Children have sufficiently alleged that its claims against YOLO were not about its publication of third party users' content but about YOLO's own conduct and content.

As to causation, this Court must review whether the Children have plausibly alleged that YOLO's non-publishing conduct caused the stated harms. This requires a fact-specific inquiry regarding the alleged conduct (i.e., the development of the application) and the harms upon the Children (i.e., the inability to face the harassers, constant targeting in a one-way anonymity, impossibility of guardians to be involved, hopelessness and fear about unknown harassers, abandoned trust and harm from misrepresentation that harassers would be revealed or banned, generating motivation to target more harassment, etc).

B. The Children's Claims Focus on YOLO's Failure of Duty as Developers of Its Own Product and Content, And CDA Does Not Bar Such Claims.

The CDA bars claims only when it holds a platform liable as a publisher of third party content. This concept of CDA protection has metastasized beyond its intent mainly because courts had difficulty interpreting the concept of publisher treatment. To properly understand whether liability hinges on a publisher duty, the Court must first examine the duty underlying the claims. YOLO superficially argues that the "option to anonymize email addresses" and setting forth an anonymous posting board are by nature related to publishing content and thus entitled to CDA protection. YOLO Br. at 24 (*citing Fields v. Twitter, Inc*., 217 F. Supp. 3d 1116, 1124 (N.D. Cal. 2016); *Dyroff v. Ultimate Software Grp., Inc.,* 934 F.3d 1093, 1098 (9th Cir. 2019)). However, this Court and others have held that performing a publishing function does not necessarily mean that the platform is acting out of a publisher duty. The publisher *duty* analysis must reach beyond actions and ask where that duty comes from. Assuming arguendo that anonymizing user information is a publisher function, if that function was performed to fulfill a contractual promise or a commercial representation, the duty to anonymize user information derives from the contract or the representation, not by virtue of being a traditional publisher.

This Court has already recognized the importance of analyzing a platform's duty to remove content when it did so for each claim in *Barnes*, differentiating

between a publisher's duty and a non-publisher's duty with respect to Section 230. In *Barnes*, while this Court found that Section 230 immunized Yahoo from the plaintiff's negligence claims because the duty arose from Yahoo's role as a publisher, it held Yahoo liable on the plaintiff's promissory estoppel claim because that duty arose from Yahoo's contractual obligation to remove particular injurious content. *Barnes*, 570 F.3d at 1107 ("Barnes does not seek to hold Yahoo liable as a publisher or speaker of third-party content, but rather as the counter-party to a contract, as a promisor who has breached."). This Court explained that "[c]ontract liability here would come not from Yahoo's publishing conduct, but from Yahoo's manifest intention to be legally obligated to do something, which happens to be removal of material from publication." *Id.* at 1107.

YOLO seeks to distinguish *Barnes* from this case by stating that *Barnes* involved a promissory estoppel/breach-of-promise claim for which this Court found no CDA immunity, and that the instant case does not bring contractual claims. YOLO Br. at 27. YOLO misses the mark of *Barnes*, because the significance of this Court's *Barnes* decision is that a different duty analysis can attach to the platform's removal of conduct – a publisher duty and a non-publisher duty (i.e., a contract or promissory estoppel claim). *Barnes*, 570 F.3d at 1107. And applied here, *Barnes* would support that the CDA would not bar the Children's negligence, misrepresentation, and duty to warn claims.

Following the wisdom of this Court in *Barnes*, courts around the country are now more informed and aware that a traditional publisher role does not cover the actions and decisions involved in designing, developing, operating, and distributing social media products.[1] These courts have been able to parse out the duties of social media product developers that correspond with non-publisher roles as to their products.

For example, in a recent decision by the Seventh Circuit in *G.G. v. Salesforce.com, Inc.*, the Court reiterated the distinction between a platform's conduct and publication through a well-articulated duty analysis. 76 F.4th 544 (7th Cir. 2023). It rejected the defendant's invocation of Section 230 to dismiss the case because the plaintiffs sought to hold Salesforce accountable for its *actions*, not for what it published. In *Salesforce.com*, a minor-plaintiff and her mother brought suit under the Trafficking Victims Protection Reauthorization Act of 2003 (Section 1595). *Id.* at 548. A sex trafficker used the now defunct Backpage.com to advertise G.G. while Salesforce helped Backpage reach more customers. This Court found that Salesforce was not entitled to dismissal under Section 230 because the plaintiffs sought to hold Salesforce "liable under Section 1595 for its own . . . acts

[1] Large, modern-day internet platforms are more than willing to remove, suppress, flag, amplify, promote and otherwise curate the content on their sites in order to cultivate specific messages." *See Missouri v. Biden*, 83 F.4th 350, 392 (5th Cir. 2023), cert. granted, No. 23-411, 2023 WL 6935337 (S. Ct. Oct. 20, 2023) (finding numerous platforms likely restricted protected speech on their sites as a result of government pressure).

or practices, rather than for publishing content created by another."

Salesforce.com, 76 F.4th at 567 (emphasis added):

> [P]laintiffs seek to hold Salesforce accountable for *supporting* Backpage, for *expanding* Backpage's business, for *providing* Backpage with technology, for *designing* custom software for Backpage, for *facilitating* the trafficking of G.G., for *helping* Backpage with *managing* its customer relationships, *streamlining* its business practices, and *improving* its profitability, and for *enabling* Backpage to scale its operations and increase the trafficking conducted on Backpage.

Id. (internl quotations omitted). The plaintiffs alleged that Salesforce had a duty not to benefit knowingly from participating in Backpage's venture while knowing or having reason to know that the venture was engaged in sex trafficking. *Id.* The Seventh Circuit Court found "[t]hat duty does not depend in any way on Salesforce's supposed status or conduct as a publisher or speaker." *Id.* (internal quotations omitted); *see also Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1101–02 (9th Cir. 2009). If the duty originates from the platform's own conduct or business practices—such as developing, designing, and operating a commercial product or making representations upon which consumers rely upon—rather than for publishing content created by another, then the second prong is not met and Section 230 does not apply. *Salesforce.com*, 76 F.4th at 567.

In another recent decision in the *Social Media Cases* in the California Supreme Court, the plaintiffs alleged various social media companies design

platforms with manipulative and addictive features. *See In re Coordinated Proceeding Special Title Rule 3.550 Soc. Media Cases* ("Social Media Cases"), 2023 Cal. Super. LEXIS 76992. In denying the defendants' motion to dismiss, Judge Kuhl in the *Social Media Cases* correctly conducted a duty analysis, poignantly reasoning that "not all legal duties owed by Internet intermediaries necessarily treat them as the publishers of third party content, even when these obligations are in some way associated with their publication of this material." *Social Media Cases*, 2023 Cal. Super. LEXIS 76992, at *30. The Judge continued, "[i]t may very well be that a jury would find that Plaintiffs were addicted to Defendants' platforms because of the third-party content posted thereon. But the Master Complaint nonetheless can be read to state the contrary—that is, that it was the design of Defendants' platforms themselves that caused minor users to become addicted." *Id*. at *29-30.

Judge Kuhl drew a critical distinction that Section 230 does not apply when plaintiffs attempt to hold platforms, namely social media companies, liable for the ways in which they "designed and operated their platforms," not the content on the platforms. *Id.* at *2. As the Ninth Circuit found in *Lemmon v. Snap, Inc.*:

> Snap is an internet publishing business. Without publishing user content, it would not exist. But though publishing content is a but-for cause of just about everything Snap is involved in, that does not mean that the [plaintiffs'] claim, specifically, seeks to hold Snap responsible in its capacity as a publisher or speaker. The

> duty to design a reasonably safe product is fully independent of Snap's role in monitoring or publishing third-party content.

955 F.3d 1085, 1092–93 (9th Cir. 2021) (internal quotations omitted). Judge Kuhl warns that courts should be cautious "not to stretch the immunity provision of Section 230 beyond its plain meaning in a manner that diminishes users' control over content they receive." *Social Media Cases*, 2023 Cal. Super. LEXIS 76992, at *100. "So long as providers are not punished for publishing third-party content, it is consistent with the purposes of Section 230 to recognize a common law duty that providers refrain from actions that injure minor users." *Id.* at 100-01.

Just like the Seventh Circuit Court in *Salesforce* determined that the CDA does not shield claims against business conduct and product design (e.g., supporting, expanding, designing, facilitating, and improving profitability of a website where it knew or had reason to know sex trafficking was occurring), and Judge Kuhl in the *Social Media Cases* found it plausible that the design of a platform can be addictive, independent of the contents published therein, the District Court here should have found that YOLO may be sued for its own conduct or business practices—such as developing, designing, and operating a commercial product or making representations upon which consumers rely upon.

The Amended Complaint plausibly alleged that the claims were predicated upon product developer duties, not a publisher duty:

> One of the duties that Yolo [] violated springs from the duty to take reasonable measures to design a product that is more useful than it was foreseeably dangerous. By simply removing the element of anonymity, Yolo []could have complied with this duty to design a reasonably safe product. It could have provided the same messaging tools—such as the ability of users to send polling requests to each other—without monitoring or changing the content of the messages. Likewise, Yolo [] could have complied with their duty to warn users (and users' parents and guardians) of the danger of anonymous messaging without monitoring or changing the content of users' messages. And Yolo [] could have complied with their duties under the common law and state statutory law not to make false, deceptive, or misleading statements simply by accurately describing their own products, services, and business practices, or by not making such statements at all. ER-23-24 (AC ¶ 18).

Further, the Amended Complaint pointed out that it was not the content, but YOLO's enabling of one-way anonymous messages as well as the false promise to ban or reveal harassing users, that produced harms independent of the content itself:

> Carson's continued and painstaking efforts to investigate his harassers' identity until moments before his death demonstrates the tormenting anxiety and pressure that YOLO's anonymity feature imposed on him. See ER-52 (AC ¶ 97).
>
> Anonymity hinders victims from appropriately handling the content of messages because it deprives them of any means of confronting the perpetrators or assessing the possible reasons for those messages, and this leaves a sense of unresolved anger and harm especially in developing teenagers that makes it impossible for

> guardians, schools, or law enforcement to intervene. See ER-39 (AC ¶ 56).
>
> Moreover, YOLO's false statement creates a new type of harm that is separate from the third-party messages. This includes the level of stress and frustration that was experienced by Carson as he was searching online for means to reveal his YOLO bullies on the night prior to his death. See ER-51 (AC ¶ 94). Similarly, A.K., A.O., and A.C. were harmed when they all relied upon YOLO's statement that harassing users will be unmasked, and later their requests to reveal the identities of harassers were ignored. See ER-57-60 (AC ¶¶ 122-48).

The development of anonymous apps like YOLO's was not just about publishing content. YOLO made a calculated decision to design an anonymous messaging app that allow for one-way targeting of messages under a false promise to reveal or ban bad actors. Here, the Children's Complaint centers on YOLO's duty as product developers, not as publishers.

C. A Simple "But-For" Test, Used By The District Court, Is Inadequate for Determining Whether the CDA Shield Applies.

The District Court's decision collapsed the analysis of duty and causation question by relying on a "but-for" test, reasoning in its decision, "had those third-party users refrained from posting harmful content, Plaintiffs' claims that Defendants falsely advertised and misrepresented their applications' safety would not be cognizable." ER-12. YOLO implicitly concedes that the "but-for" test would be an inadequate analysis by arguing that "the Putative Class Members'

attempt to recast the District Court's sound analysis as using a 'but-for' third party content publication test is without merit." YOLO Br. at 28.

In the *Social Media Cases*, Judge Kuhl ruled that "courts have repeatedly 'rejected use of a but-for test that would provide immunity under [Section 230] solely because of a cause of action would not otherwise have accrued but for the third-party content." *Social Media Cases*, 2023 Cal. Super. LEXIS 76992, at *103 (citing *Lee v. Amazon.com, Inc.*, 76 Cal. App. 5th 200, 256 (2022)) (internal citations and quotations omitted). In *Doe v. Internet Brands, Inc.*, this Court ruled that a "but-for" test would "stretch the CDA beyond its narrow language and its purpose." 824 F.3d 846, 853 (9th Cir. 2016). *See, e.g., HomeAway.com, Inc. v. City of Santa Monica*, 918 F.3d 676, 682 (9th Cir. 2019) ("*Internet Brands* rejected use of a but-for test that would provide immunity under the CDA solely because a cause of action would not otherwise have accrued but for the third-party content.").

YOLO contends that it was a publisher for purposes of this lawsuit. However, the fact that publishing was involved somewhere in the harassment and bullying that young Carson Bride was subjected to does not mean that YOLO can successfully use Section 230(c) to shield itself from liability. *Salesforce.com*, 76 F.4th at 567. Publishing activity was "a but-for cause of just about everything" YOLO was involved in. *See Doe v. Internet Brands, Inc.*, 824 F.3d 846, 853 (9th

Cir. 2016). The obtuseness of the "but-for" test should be replaced with a concrete duty analysis as outline in the previous section.

D. CDA Does Not Apply Per *Barnes* Third Prong Because YOLO's Own Content Caused the Harm and Its Designs Materially Contributed to Dangerous and Harmful Content.

Two important points are reiterated regarding *Barnes* third prong: The Children's claims are focused on YOLO's own content, not that of any other user; and the Complaint alleged that YOLO's own designs materially contributed to the danger and harm alleged in the claims. The disputed issue here is whether the Children claimed that YOLO should be liable for its own content or for content provided by another information content provider. *See* Barnes, 570 F.3d at 1100. Here, the District Court first erred by not distinguishing the failure to warn and misrepresentation claims which solely focus on YOLO's *own* statements and conduct: a conspicuous and misleading notification that it would reveal and ban bad actors on the platform. Secondly, the District Court failed to engage with the facts specific to this case, which are distinguishable from *Dyroff*. YOLO leads this Court to assume without basis that "YOLO app's anonymity feature [] is a neutral tool that the user exploits in creating harmful content." YOLO Br. at 32 (citing *Dyroff*, 934 F.3d at 1098).

First, as sufficiently explained in the Children's Opening Brief (Appellants' Opening Br. at 32-40), the CDA does not bar claims that are based on the

platform's own internet content, or where the claims are predicated on the platform's own acts. *See Lemmon*, 995 F. 2d at 1093. Children's Failure to Warn Claims and Misrepresentation and False Advertising claims are solely predicated on YOLO's own content and conduct of misstating and misrepresenting its product. And the Children's Complaint cogently alleges that YOLO's own statements resolving to reveal and ban harassing users created an expectation and reliance in the Children's mind which then turned into disappointment and stress when the platform failed to carry out its promise. Children Opening Br. at 12 (citing ER-51 & 57-60). The Complaint alleged that Carson's last search online was to reveal users on YOLO, and it is plausible that the frustration of not being able to reach YOLO to do so may have very well been the last straw that led to his death. *Id*. The Children should have had the opportunity to discover and present these facts to a jury.

Second, the Complaint sufficiently stated that YOLO's own conduct—its deliberate product design choices—materially encouraged the dangers on its platform and should not have been barred. Children's Opening Br. at 38 (citing ER-18-19; ER-44-45; ER-52. "Immunity from design defect claims is neither textually supported nor logical because such claims fundamentally revolve around the platforms' conduct, not third-party conduct. Nowhere in its text does Section 230 provide immunity for the platforms' own conduct." *Snap*, No. 22-20543, at *5

(Elrod, dissenting). "Product liability claims do not treat platforms as speakers or publishers of content." *Id.*

Under the material contribution test, a platform materially contributes content if the features are conducive to a particular type of content that is harmful. In that case, the platform cannot claim Section 230 protection. The Ninth Circuit has held that a website that "creat[es] or develop[s]" content "by making a material contribution to [its] creation or development" loses Section 230 immunity. *Gonzalez v. Google LLC*, 2. F.4th 871, 892 (9th Cir. 2021) (citing *Kimzey v. Yelp! Inc.*, 836 F.3d 1263, 1269 (9th Cir. 2016)). A "material contribution" does not refer to "merely . . . augmenting the content generally, but to materially contributing to its alleged unlawfulness." *Fair Hous. Council of San Fernando Valley v. Roommates.com*, 521 F.3d 1157, 1167–68 (9th Cir. 2008). This test "draw[s] the line at the crucial distinction between, on the one hand, taking actions" to display "actionable content and, on the other hand, responsibility for what makes the displayed content [itself] illegal or actionable." *Kimzey*, 836 F.3d at 1269 n.4 (internal quotations omitted) (quoting *Jones v. Dirty World Ent. Recordings LLC*, 755 F.3d 398, 413–14 (6th Cir. 2014)).

The District Court and YOLO seek to analogize the facts of this case to *Dyroff*, but the superficial similarities do not account for the differences in the designs of the pseudonymous posting board in *Dyroff* where everyone's

registration credentials were attached to their messages and afforded multilateral pseudonymous communication to all users.

In contrast, YOLO's advertised features were anonymous, one-way messaging and a purported function to reveal and ban bad actors. While YOLO succeeded in delivering its one-way, anonymous messaging feature, its reveal-and-ban function was either a failure or a lie. This perfect storm resulted in a product that is harmful no matter what the content might be. Appellee-Defendant claims its anonymity feature is content-neutral; however, this is a disingenuous claim that does not account for the complete picture of YOLO as a product. YOLO's anonymity feature *and* one-way communication *and* failure to reveal and ban bad actors breeds harm regardless of the content or the platform. These three features must be taken together as part of a material contribution analysis. As described in Plaintiffs-Appellants' Opening Brief, it is the combination of these features that make YOLO an inherently dangerous product. *See* ER-24 ("YOLO created a virtual invisibility cloak with a falsely advertised safety switch that did not work, and reaped millions of downloads of its app—countless of those downloads were by vulnerable young users who suffered harm."; "YOLO's false statement creates a new type of harm that is separate from the third-party messages.").

While YOLO's anonymous, one-way messaging feature allowed other users to incessantly terrorize Carson and other Plaintiffs-Appellants, it is YOLO's

defective reveal-and-ban feature that hindered users' control over their product experience, enabled bullies to avoid consequences, and ultimately keep both harassers and victims engaged with the platform as victims desperately try to uncover the identity of their bullies. Failing to deliver on its advertised reveal-and-ban feature meant YOLO not only facilitated the severity and frequency of bullying online but ensured victims could not report the bully to their parents, school officials, or trusted adults offline.

Here, the Complaint sufficiently alleged that the specific harm—the targeted bullying and harassment—is attributable to YOLO's anonymity feature. It is true Section 230 prevents platforms like YOLO from being held accountable for the content third-party users send to users, even if that content is hateful and harmful. However, the harmful content, frequency of transmission, and the inability of victims to seek recourse are all the result of YOLO's design, not its content or moderation policies. Anonymity emboldens users to harass without fear of consequence, which not only enables the initial harassment but incentivizes repeated and often increasingly hostile instances of harassment. The anonymity design baked into YOLO's platform also inhibits users from having more agency over their experience on the platform because they cannot respond to the harmful or harassing communications unless they publicly reveal the messages in a humiliating fashion.

Section 230(c) may be relevant to liability for claims that depend on who "publishes" information or is a "speaker"—for example, in cases involving defamation, obscenity, or copyright infringement—but where the claim does not depend on publishing or speaking, Section 230(c) is irrelevant. *Salesforce.com*, 76 F.4th at 565 (internal citations omitted). There are instances where Section 230 is a valuable and even essential mechanism for facilitating freedom of expression on online platforms. When comments are made on an Instagram post or YouTube video or when replies are added to a Reddit thread or Facebook post, Section 230 protects those platforms. In those instances, users are *publicly* expressing themselves *to* other users in *two*-way digital spaces, meaning other users can react, share, agree, disagree, and everything else in between. Here, YOLO's core anonymity feature allows users to *privately* speak *at* other users in a *one*-way digital space. In other words, bullies can seek out and target victims, relentlessly terrorizing them with hateful and harmful messages. Meanwhile, the victim is left desperately trying to learn the identity of their bully. If the same bully contacted a victim on Instagram, Facebook, or many other platforms, and sent the same content, the victim can identify the bully, respond to them, and block their communications. As such, the content of these communications are not the primary issue at hand, rather it is the design decision to allow bullies to use a shield of anonymity to harass others without recourse.

Appellee-Defendant argues that all the harms are caused by the messages and not the designs. But this is an issue of causation, not duty, and deserves to be explored in discovery. Just as Judge Kuhl recognized that a jury may attribute harms to the third-party content on platforms *or* the design of the platforms themselves, *Social Media Cases*, No. JCCP 5255 at *100, a jury in this case may do the same. Accordingly, a fact-specific inquiry is necessary when applying the material contribution test. To that end, Plaintiffs-Appellants request this Court to allow this case to go into discovery so that a jury might judge the cause of these harms for themselves.

CONCLUSION

For the reasons argued above, this Court should find that the District Court erroneously applied the second and third prong of the *Barnes* test, and reverse the lower court's decision to dismiss the action.

Dated: January 12, 2024

Respectfully submitted,

By: /s/ Juyoun Han

Juyoun Han
Eric M. Baum
Eisenberg & Baum LLP
24 Union Square East,
Penthouse
New York, NY 10003
(212) 353-8700
Attorneys for Plaintiffs-Appellants

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Circuit Rule 32-1 and Fed. R. App. P. 32(a)(7)(B)(i) because it contains 5167 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared using a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman 14-point font.

Dated: January 12, 2024

By: _/s/ Juyoun Han

CERTIFICATE OF SERVICE

I, Juyoun Han, a member of the Bar of this Court, hereby certify that on January 12, 2024, I caused to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system the following document.