

No. 18-396

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MATTHEW HERRICK,

Plaintiff-Appellant,

v.

GRINDR, LLC, GRINDR HOLDINGS, INC.,
AND GRINDR HOLDING COMPANY,

Defendants-Appellees

Appeal from a Judgment of the United States District Court
for the Southern District of New York

**BRIEF OF PAUL ALAN LEVY
AS AMICUS CURIAE URGING AFFIRMANCE**

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STATEMENT PURSUANT TO RULE 29(A)(A)(4)(E)

No counsel for a party authored this brief, in whole or in part. No counsel for a party, nor a party itself, nor indeed any person other than amicus, made any monetary contribution intended to fund the preparation or submission of this brief.

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INTEREST OF AMICUS CURIAE

Paul Alan Levy is a lawyer who has handled numerous cases involving the First Amendment rights of citizens who participate in public debates. In particular, over the past 19 years, he has represented consumers who criticize companies and politicians on interactive platforms, and given informal advice to consumers who have been threatened with suit unless they remove their criticisms. That experience has persuaded him that the broad discretion afforded companies that provide platforms for the posting of material by third parties, and more specifically to companies that give consumers access to interactive web sites, best preserves consumers' right to criticize and prevents their criticisms from being subjected to a hecklers' veto. Spurred by that experience, he has also represented the operators of several small consumer-oriented web sites in opposing litigation that seeks to circumvent their section 230 immunity. He also writes personal blogs that allow user comments; he has his own Facebook page and administers several Facebook groups on which viewers can make comments; and he places posts on other Facebook pages and groups, to which viewers can post responses. In that capacity, he himself offers interactive computer services with respect to which he enjoys section 230 immunity, and has an interest in the case on that basis as well. The parties consent to this filing.

I. The Broad Construction of Section 230 Immunity Adopted in *Zeran v. America Online* Best Protects Consumers' Ability to Express Their Views and to Obtain the Views of Others.

When consumers are trying to choose which businesses to use in their own local communities, especially in metropolitan areas where word of mouth from their neighbors may be less useful, they can benefit from the wisdom and experience of other consumers by checking reviews on such generalized business review sites as Yelp or Google, or specialized sites such as RateMDs or Avvo. When consumers are traveling and need to use businesses in communities with which they are unfamiliar, and especially in communities where they have no friends or family from whom to seek advice, consumer reviews on sites such as Yelp and Trip Advisor, as well as AirBnB and VRBO, can provide invaluable information. Consumers who are thinking about what products to buy from which individual sellers can look to the ratings of retailers as well as products on Amazon and eBay. Would-be investors can use such financial review sites as Yahoo! Finance and Raging Bull to evaluate the prospects of companies in which they might want to invest. Prospective employees can get useful information about their employers from all of the above sites, as well as comments from other current and former employees on Glassdoor. General social media operations such as Facebook and Twitter can provide other sources of information about

businesses. And each of these sites, in addition to providing consumers with a wealth of information about businesses, provides the opportunity for consumers to explain, for the benefit of others, their own experiences with companies, whether positive, negative, or mixed.

Moreover, several companies offer blogging and other Internet-hosting platforms that allow members of the public to set up their own web sites, on topics big and small. Blogging platforms such as Wordpress, Typepad, Tumblr, and Blogspot host blogs where companies, political figures, and public policy issues may be discussed at length, with equal measures of praise and criticism; the microblogging platform Twitter allows for much briefer discussions but ones that often provoke extended debate. Facebook allows individuals to create their own personal pages, where they may write about their own personal experiences or express views about what they see in their daily lives as well as in the press; it also allows the creation of “groups” and “pages” addressed to specific topics of interest. GoDaddy and other companies host web sites that address similar issues. In each of these contexts, members of the public who have access to these pages often have the ability to comment on what others have posted. Most major media companies allow members of the public to post comments on their articles.

Section 230 of the Communications Decency Act (“CDA”), as construed by the Court of Appeals for the Fourth Circuit in *Zeran v. America Online*, 129 F.3d 327 (4th Cir. 1997), has made possible this flowering of the Internet as a broad public forum. Section 230 protects companies that provide platforms for individual expression from being held liable for the expression that they are hosting, while preventing the groups and individuals that take advantage of these platforms from being held liable for the comments that others post.

Specifically, Section 230(c)(1) states, “No 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.” Section 230(e)(3) further provides, “No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.”

These provisions protect against suit for **allowing** speech claimed to be actionable. The Act also includes a provision that protects platforms from being sued for removing or restricting information that they find objectionable, regardless of whether that information is constitutionally protected:

(c)(2) No provider or user of an interactive computer service shall be held liable on account of—

(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers

to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; . . .

Congress recently reaffirmed its general commitment to section 230's principles by incorporating a requirement of compliance with the section into the 2010 SPEECH Act, which establishes the conditions that must be met before a foreign libel judgment can be enforced in the United States. *See* 28 U.S.C. § 4102(c).

The Fourth Circuit's 1997 decision in *Zeran* and its progeny hold that hosts that offer interactive platforms ("ICS operators") on which third parties may place their content cannot be sued for (1) allowing allegedly wrongful speech to be expressed, (2) refusing to remove allegedly wrongful speech when someone who objects to that speech calls attention to a claim that the speech is actionable, or (3) making editorial decisions that rest between removing the speech or leaving the speech online. In effect, the message of *Zeran* to the would-be plaintiff is to pursue the speaker, not the host. If the speaker is found liable, then the court can assess damages or, if the jurisdiction allows injunctions against speech held to be tortious, order the speaker to use her best efforts to remove the statement.

Although appellant Herrick ignores *Zeran*, and his supporting amici openly contest *Zeran*'s holding, its approach has been followed by every federal circuit,¹ including this Court,² that has addressed the issue, as well as by many state appellate courts.³ In contrast to *Zeran*, appellant's contention is the protections in subsections 230(c)(1) and 230(e)(3) against being held liable or subject to suit for hosting or refusing to remove third-party content claimed to be actionable are limited by the protection provided by section 230(c)(2) against being held liable for removing third party content.⁴

Zeran's construction of section 230 is vital to the system of online free speech because it is expensive not only to litigate claims that the content of online

¹ *E.g.*, *Chicago Lawyers' Comm. for Civil Rights Under Law v. Craigslist, Inc.*, 519 F.3d 666, 670-671 (7th Cir. 2008); *Universal Comm'ns Sys. v. Lycos*, 478 F.3d 413, 418-422 (1st Cir. 2007); *Batzel v. Smith*, 333 F.3d 1018, 1028-1030 (9th Cir. 2003); *Green v. America Online*, 318 F.3d 465, 468 (3d Cir. 2003); *Carafano v. Metrosplash.com. Inc.*, 339 F.3d 1119, 1125 (9th Cir. 2003); *Ben Ezra, Weinstein & Co. v. America Online*, 206 F.3d 980, 983 (10th Cir. 2000).

² *FTC v. LeadClick Media*, 838 F.3d 158 (2d Cir. 2016); *Ricci v. Teamsters Local 456*, 781 F.3d 25 (2d Cir. 2015)

³ *E.g.*, *Shiamili v. Real Estate Group of New York*, 17 N.Y.3d 281, 952 N.E.2d 1011 (N.Y. 2011); *Barrett v. Rosenthal*, 40 Cal. 4th 33 (2006); *Austin v. CrystalTech Web Hosting*, 125 P.3d 389, 394 (Ariz. App. 2003); *Donato v. Moldow*, 865 A.2d 711 (N.J. Super. App. 2005); *Doe v. AOL*, 783 So.2d 1010 (Fla. 2001); *Schneider v. Amazon.com*, 31 P.3d 37 (Wash. App. 2001).

⁴ The brief of amicus EFF addresses the statutory construction flaws in this appellant's contention. Amicus does not repeat those points here.

free speech is wrongful, but even to evaluate whether a plaintiff or someone threatening suit has a tenable claim that could result in a finding of liability against the ICS operator or prolonged litigation before dismissal. The costs of litigation and of assessing the risk of having to litigate are so great that, without immunity from suit, the path of least resistance for the online host is to respond to litigation or the threat of litigation by removing the speech, regardless of whether the claim has merit.

After all, when a threat of litigation is received, the recipient of the threat must decide whether the threatened litigation is likely to succeed, and how much it is going to cost to defend against the litigation. That assessment likely requires legal training, and requires consideration of both the facts alleged by the person threatening to sue, as well as the facts that the speaker can marshal in opposition to the litigation. The speaker whose speech is alleged to be wrongful will, at least, have access to information about why the challenged speech was justified, but the web host may well have no such information. To decide whether the action will likely be won or lost, the host for allegedly wrongful speech would need access to the information that might to justify what the speaker said. The host may or may not have contact information for the speaker, either because speakers are allowed to comment without providing any identifying information or any contact

information, or because the identifying and contact information was sketchy, incomplete, or outdated. It may take some time before a request for supporting information is received, and then addressed, by the speaker.

Assuming that the host is able to reach the speaker and receives a response, the host must then make several decisions if, as frequently happens, there is a dispute between the two sides about the propriety of the speech. If, as is often true in cases involving section 230 immunity, the speech is claimed to be defamatory (or is claimed to be tortious in some way that is subject to the First Amendment restrictions on defamation claims, *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988)), the host has to decide whether the speaker has made a false statement of fact. If the speaker claims that the statements are true, then the host is put in the position of deciding which of two alternate versions of the facts is correct. The host might also have to assess whether the speaker was negligent about making false statements (if the person threatening litigation is not a public figure), or whether the speaker made false statements with actual malice (if the person is a public figure). In the alternative, the host may have to determine whether challenged speech reflects a statement of opinion, rather than fact, and hence is nonactionable; a variety of other possible privilege defenses may also have to be assessed. And all of these assessments have to be made with the recognition that,

if the host makes the wrong call about how judges or juries may resolve these issues, the result may be substantial liability.

And the assessment discussed so far takes account only of the risk of losing the case. Equally significant is the cost of litigating the case: the host has to consider whether a lawsuit is likely to be resolved by a motion to dismiss, or a motion for a summary judgment (or similar procedures provided by state courts, some of which are far less receptive than the federal courts are to procedures for adjudication short of a jury trial).

Moreover, generally speaking, commercial ICS operators are paid very small sums for hosting services, or they hope to profit from their hosting services by, for example, selling advertising on the site for pennies per page-view or per click. Other ICS operators function on a wholly eleemosynary basis, without any expectation of revenue. Not only can ICS operators not police the content in advance, but even when particular comments are challenged, it is unrealistic to expect the operators to devote sufficient lawyer time to evaluate challenged statements and decide whether to remove or leave them posted, not to speak of hiring lawyers to litigate such cases. The cost of making intelligent assessments of the risks of litigation, not to speak of the cost of participating in the litigation, far

outstrips the money that can be earned from hosting challenged comments. *Chicago Lawyers' Committee*, 519 F.3d at 668-669.

These concerns are compounded by the fact that many operators of interactive computer systems host millions, or hundreds of millions, of statements by users that would be potential sources of liability absent section 230. As of this year, consumers had written more than 163 million reviews on Yelp about local businesses, Yelp, *About Us*, <https://www.yelp.com/about>; Tumblr has been estimated to be hosting some 350 millions blogs, and WordPress has been said to host 75 million blogs. *How Many Websites and Blogs are on the Internet?* <https://blogging.org/blog/how-many-websites-and-blogs-are-on-the-internet/>. Section 230 was enacted in 1996 because Congress recognized that ICS operators may host thousands or millions of statements. *Carafano*, 339 F.3d at 1123-1124. The extent of speech hosted on interactive computer systems has increased many times since 1996. When hosted speech has to be addressed at these levels of magnitude, the cost of assessing the dangers of being sued, and the dangers of losing such suits, is sufficient to make even the most well-funded host tremble.

Moreover, the impact of the potential hecklers' veto on the marketplace of online ideas flows in one direction only—it tends to suppress criticism. It is rare for a company or individual who is the subject of online comment to sue or

threaten to sue over unjustified praise. And when justifiable criticism of businesses, or of political figures or celebrities, or of other potential plaintiffs that can afford to hire lawyers to oppress their critics, is suppressed by the hecklers' veto, it is not just the speaker whose rights and interests are harmed; it is also other consumers and members of the public, who are deprived of information that they might find useful in deciding how to spend their own consumer dollars, or what political candidates or causes to support or oppose.

II. Several Examples of the Practical Operation of Section 230 Immunity in a Litigation Context Show the Need for the *Zeran* Interpretation of Section 230 to Protect the Free Speech of Consumers.

The interplay between consumers' right of free speech and section 230 is well illustrated by several recent cases.

A. Facebook Group About the Misdeeds of Country Rap Musician Mikel Knight.

An anonymous individual hosts a Facebook page directed to criticizing a "country rap" musician based in Nashville named Jason Cross, a/k/a Mikel Knight, who markets his work by the unorthodox method of sending out teams of young men (the "Maverick Dirt Road Street Team") living out of panel vans for weeks at a time, who sell CDs and Tshirts on commission. According to accounts published in the press and on the Facebook page *Public Awareness of Mikel Knight and The Maverick Dirt Road Street Team*, <https://www.facebook.com/>

Public-Awareness-of-Mikel-Knight-and-The-Maverick-Dirt-Road-Street-Team-1533971343525187/. Knight's CD sellers had to work eighteen-hour days, six days a week,⁵ using drugs to stay awake so that they could drive from town to town, living in filthy conditions and often being subjected to severe beatings and expulsion from the sales team, without receiving their promised commissions, for speaking out of turn or complaining about their treatment. These working conditions eventually led to motor vehicle accidents in which members of the sales team were killed. See Cush, *Driving and Dying in the Service of the Country Rap King* (Jan. 28, 2016), <http://gawker.com/driving-and-dying-in-the-service-of-the-country-rap-kin-1751698239>. The Facebook page carried first-person accounts from former members of the sales team and their relatives, and urged members of the public to avoid supporting Knight's mistreatment by boycotting his products and by urging the local police to intervene. Claiming that mob violence had resulted, Knight demanded that Facebook identify the anonymous author of this page and remove the page entirely, warning that if it did not provide such information so that Knight could proceed against the author directly, Knight was going to sue to hold Facebook responsible. *Cross v. Facebook, Inc.*, No.

⁵ The Fair Labor Standards Act contain an exemption, Section 13(a)(1), excluding outside sales people from maximum hour and overtime provisions.

15C2403, Proposed Amended Complaint ¶ 26 (Davidson County Tennessee Second Cir. Ct, Aug. 13, 2015), accessible at <https://www.citizen.org/sites/default/files/knightproposedtennesseeamendedcomplaint.pdf>. When Facebook refused to accede to these demands, Knight sued it in a Tennessee state court alleging defamation, and asked a Tennessee state court to issue a subpoena compelling Facebook to provide the identifying information. Facebook provided notice to its user (identified here as anonymous “Doe”), pursuant to its normal practices, so that she could assert her First Amendment right to keep her speech anonymous, *see Signature Mgt. Team v. Doe*, 876 F.3d 831, 836 (6th Cir. 2017), but also moved to dismiss the defamation claim based on section 230 immunity.

While this motion was pending, the Facebook user sought to protect her anonymity, because she was concerned that, in light of Knight’s criminal record and his reputation for violence against wayward sellers, she and her family faced the danger of extrajudicial consequences if her identity were revealed. Although the Doe would have been section 230 immune with respect to statements by others that appeared on her Facebook page, as a precaution her counsel sought to show the accuracy of those statements, and to that end collected affidavits from several of Knight’s former sales workers; a showing that the statements about Knight on

the Facebook page were true could have helped oppose the subpoena under a line of cases beginning with *Dendrite Int'l v. Doe No. 3*, 775 A.2d 756, 760 (N.J. Super. App. Div. 2001). Levy, “*Country Rap*” *Singer Mikel Knight’s Effort to Suppress Criticism of His Employment Practices on Right of Publicity Grounds* (Dec. 20, 2016), available at <http://pubcit.typepad.com/clpblog/2016/12/country-rap-singer-mikel-knights-effort-to-suppress-criticism-of-his-employment-practices-on-right-o.html>.

After the Tennessee court dismissed Facebook on section 230 grounds, Knight sought leave to amend his complaint to allege claims against Doe defendants who had criticized him using the Facebook page. Counsel warned Knight’s counsel that, if he pursued his motion to amend and his requested subpoena, Doe would use these affidavits in the state court proceeding. *Id*,

Knight then filed a second lawsuit against Facebook in a California state court, following through on his threat to pursue liability claims against Facebook unless it identified his anonymous detractors. *Cross v. Facebook, Inc.*, 222 Cal. Rptr. 3d 250, 254 (Cal. App. 1st Dist. 2017). His new lawsuit alleged that Facebook was violating his right of publicity, violating California law against unfair business conduct, and breaching various duties enforceable in tort, by allowing the Doe (and the authors of certain other hostile Facebook pages) to

maintain pages about Knight that included pictures of him, while serving advertisements on those same pages. Knight further alleged that Facebook had breached its contract with Knight, himself a Facebook user, by allowing allegedly defamatory matter written by other Facebook users to remain posted on the Facebook site. The California trial court dismissed Knight's contract and related claims, holding that they treated Facebook as a publisher of the critical third party material, but it also denied Facebook's anti-SLAPP motion to dismiss the right of publicity claims, and other related claims, on the ground that right of publicity is a form of intellectual property and hence outside the scope of section 230's immunity. *Id.* at 256-257. On the parties' cross-appeal, Facebook prevailed in having the entire case dismissed. *Id.* at 269. Only then was the Doe Facebook user protected against potential identification and its possible consequences.

B. Citizen Criticism of Local Officials on the “Eye on Emerson” Electronic Bulletin Board.

In another illustrative case, *Donato v. Moldow*, 865 A.2d 711 (N.J. Super. App. Div. 2005), Steven Moldow, the operator of an ICS and a resident of the Emerson, New Jersey, operated a web site called “Eye on Emerson.” The site featured a number of articles that Moldow himself authored, as well as an electronic bulletin board on which members of the local community could participate. The board featured very robust debate including harsh criticisms of

several officials. Four of the individuals criticized on the forum—two elected officials, a candidate for elected office, and the chairman of the dominant local political party—filed suit claiming that 117 separate postings defamed them, and seeking relief against both the individual posters and Moldow as the operator of the site. After plaintiffs issued a subpoena to identify the authors of the 117 posts, Moldow moved to quash the subpoena.

Moldow and his supporting amici argued that section 230 protected Moldow from liability for posts by others on the bulletin board, and that the principles of *Dendrite v. Doe*, *supra*, required the plaintiffs meet the standard for discovery enunciated in that case **before** obtaining discovery. *Donato v. Moldow*, Brief of Amicus Curiae, No. BER-L-6214-01 (N.J. Super. Bergen County, Oct. 10, 2001), https://www.citizen.org/system/files/case_documents/donatoamicus.pdf. Specifically, they contended that, under *Dendrite*'s test for subpoenas to identify anonymous defendants, plaintiffs had to both ensure that notice was provided to the Does that their anonymity was at risk, and make a minimal showing that their claim on each message whose author they sought to identify met a minimal standard of viability. Under *Dendrite*, plaintiffs had to show that each allegedly defamatory message included a false statement of fact that tended to harm the plaintiffs' reputation. The complaint included a listing of the 117 statements, but

never specifically alleged why each was false and actionable, and no evidence of falsity had been adduced, as the *Dendrite* line of cases requires.

The trial judge agreed both that the plaintiffs had not made the proper showing to justify discovery and that, in any event, that Moldow was protected by section 230. *Donato v. Moldow*, No. BER-L-6214-01 (N.J. Super. Bergen County, Dec. 21, 2001), available at https://www.citizen.org/system/files/case_documents/donato_moldow_superior_court_decision.pdf.

The plaintiffs appealed, but they made no effort to pursue their defamation claims against individual citizens of their town who had allegedly defamed them. Even though the *Dendrite* test requires only a minimal showing of merit with respect to a given message, plaintiffs appealed only the dismissal of the complaint against Moldow, the operator of the message board. Had the officials succeeded in this strategy, they could have made it too expensive for Moldow to operate an interactive computer system that hosted content critical of the town's political leadership. The New Jersey Appellate Division held, however, the section 230 immunized Moldow from being sued for content posted by others to his message board, 865 A.2d at 487-490, and that the defense of section 230 immunity could

be raised on a motion to dismiss when the facts central to the immunity were alleged in the complaint. *Id.* at 482-483.⁶

C. Consumer Criticism of Telemarketers on 800Notes.com

In another series of cases, two interactive web sites had allowed users to post about the contents of telephone calls that they received. The sites, 800Notes.com and Whocallsme.com, were designed to allow members of the public to create a reverse directory of telephone numbers, with a particular emphasis on numbers used by telemarketers for cold-calling consumers. Consumers who actually took the telemarketing calls could report their experiences, while consumers who noticed such numbers in their Caller ID could consult the sites to discover the nature of the telemarketers behind the phone calls, before taking the call. Over the period of several years when she was involved with the company that owned these sites, Julia Forte received many threats of litigation, warning her of the expensive litigation that she would face if she failed to remove criticisms that a lawyer's client did not like, or failed to provide prompt

⁶The affirmative defense of Section 230 immunity may also be raised on a Rule 12(b)(6) motion to dismiss if the complaint's allegations show that the defendant is an ICS. *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 256 (4th Cir. 2009); *Barnes v. Yahoo*, 570 F.3d 1096, 1098 n.1 (9th Cir. 2009) (as amended on rehearing).

identifying information about the online detractors (who were allowed to post on this site without revealing their real names).

On two occasions, Forte was sued personally by plaintiffs seeking to hold her liable for the damages caused by critical content posted on her company's web site, and for her own failure to remove that content on demand. *Houlihan Smith & Co, v. Forte*, No. 1:10-cv-02412 (N.D. Ill.); *Vision Media TV Group v., Forte*, No. 09-80396- CIV-MARRA (S.D. Fla.). The content in both cases tended to suggest that the telemarketing calls were deceptive in a variety of ways; the companies also objected to having their sales techniques denominated as telemarketing. In addition to claiming defamation, both suits sought to evade section 230 immunity on the ground that using the plaintiff companies' names on her site infringed or diluted their trademarks (and hence was outside section 230 immunity under that statute's intellectual property exception).

First, in the Illinois case, an investment firm named Houlihan Smith that cold-called prospective investors obtained a state-court temporary restraining order. After the case was removed to federal court, the TRO was dissolved in light of section 230, the First Amendment prior restraint doctrine, and a finding that using Houlihan's name did not infringe its trademark. *See Houlihan Smith & Co, v. Forte*, Transcript of Oral Opinion, No. 1:10-cv-02412 (N.D. Ill. May 10, 2010),

https://www.citizen.org/system/files/case_documents/houlihan_smith_oral_opinion.pdf. Eventually, the plaintiff company settled by paying \$35,000 to resolve Forte's claim for sanctions for their having filed frivolous litigation. *See* Settlement Agreement, August 30, 2018, https://www.citizen.org/system/files/case_documents/fullysignedsettlementagreement.pdf.

Second, Forte was sued by a maker of promotional videos called Vision Media that cold-called nonprofit groups claiming the ability to obtain free publicity for them on "public television" in the event the nonprofits hired the company to make five-minute spots. The case was dismissed for lack of personal jurisdiction, making it unnecessary for the court to address the section 230 and other issues raised. *Vision Media TV Group v. Forte*, No. 09-80396-CIV-MARRA (S.D. Fla. July 19, 2010), https://www.citizen.org/system/files/case_documents/vision_media_forte_order_grant_motion_dismiss.pdf.

A fair amount of evidence was adduced during the course of the *Vision Media* litigation tending to show that there was a substantial factual basis for the various criticisms that third parties had posted on 800Notes,⁷ but none of this evidence was available to Forte at the time she had to decide whether to accede to

⁷ *E.g.*, Affidavit of Jeffrey Cronin in *Vision Media TV Group v. Forte*, No. 09-80396-CIV-MARRA (S.D. Fla. Feb. 17, 2010), https://www.citizen.org/system/files/case_documents/fortecroninaffidavit.pdf.

the demand for removal of the challenged content and identification of the reviewers. It was section 230 immunity that allowed Forte to take a principled stand to shield online critics of the plaintiffs from being identified without any proof that their speech was in any way actionable, and to refuse to remove the challenged content. Forte was able to withstand the expense of federal court litigation only because she had the benefit of pro bono representation, and that was only possible because section 230 gave her a likely way out of the litigation on summary judgment.

In the Mikel Knight case, Facebook used private counsel, no doubt at significant expense, to defend its business model of making a platform available for uncensored third-party communications (within the discretionary application of terms of service barring violent, prurient, and otherwise objectionable content). It is doubtful that Facebook would have defended the case if its liability turned on whether Facebook could show that the statements about Mikel Knight that Doe allowed to be posted on her Facebook page were true. Facebook itself had no knowledge about the underlying facts, and it would have been cumbersome to obtain them. Indeed, without section 230, companies like Facebook would not likely allow pages critical of **any** plaintiffs wealthy enough to sue over speech they do not like, without the protection of section 230.

III. Herrick's Theories Risk Driving a Gaping Hole in Section 230 Immunity That Would Be Equally Available to Plaintiff Companies, Celebrities, and Political Figures Dissatisfied by Critical Citizen Commentary.

Taking the allegations of the complaint as true, as the Court must do on an appeal from the grant of a motion to dismiss, the plaintiff has suffered a grievous wrong at the hands of the third-party user who directed malevolent content at Matthew Herrick, and it is hard to sympathize with Grindr for its alleged refusal to take sufficient action to protect Herrick against those harms.⁸ The trade-off for Section 230's broad immunity was an expectation that ICS operators would behave in a responsible manner when they learned that their services had been abused. Taking the allegations of the complaint on their face, Grindr did not do so in this case.

But sympathy for Herrick and outrage at Grindr, however justified, should not persuade the Court to distort the law of section 230, which stands as a bulwark against the suppression of consumer and citizen speech based on the heckler's

⁸ Arguments by Grindr's counsel at the TRO extension hearing, JA 150-153, call into question the veracity of the allegation in the complaint, ¶ 23, that Grindr did **nothing** to try to protect Herrick. Herrick's counsel appeared to acknowledge the existence of those efforts, and took the position that those efforts were at least somewhat helpful. JA 134. Nothing in the record, however, suggests that Grindr did anything to meet Herrick's complaints on the many occasions when he alleges that he contacted the company before suit was filed.

veto, as discussed in the first section of this brief. Each of the arguments advanced by Herrick and his amici would be equally available to less sympathetic plaintiffs, including the plaintiffs in the cases discussed in the second section above, and they would prevent the operation of interactive web sites that provide a key way for members of the public to express their views about such plaintiffs.

First, plaintiffs attempt to cast their claims against Grindr as ones for negligent or defective design, manufacture and/or warnings in connection with its dating app, defects that, according to the complaint, are said to have made it too easy for Herrick's tormentor to create a false profile and too hard for Grindr to identify and remove all of the false postings. The district court properly rejected this claim, in that the "defective" character about which Herrick seeks to sue implicates Grindr's failure to conform to the model that Herrick advocates for the monitoring and removal of inappropriate third-party content. Those are precisely the sort of editorial judgments about how to arrange third-party content that Congress chose to put beyond the reach of civil liability, and state-law criminal liability, through the principles of section 230 immunity.

At oral argument below, plaintiff was unable to articulate a theory of product liability that did not rest on the fact that Grindr had allowed one of its users to post false speech about plaintiff that had caused the plaintiff serious harm.

JA 156-159. Had plaintiff brought a claim that did not rest on third-party posting of false speech, the proper outcome of this appeal would be different

Moreover, the same sort of “defective product design” argument that Herrick asks the Court to allow him to pursue against Grindr could be cast as a basis for defamation claims that are at the heart of section 230 immunity. For example, in *Donato v. Moldow*, the plaintiff public officials argued that speakers on the message board might be more responsible if participation were not anonymous, or if all participants had to register and thus make themselves more readily subject to quick identification. That may well be true, although prohibitions against anonymity may make some members of the public less willing to post fair and accurate criticisms of public officials or local economic pillars in the community if their postings expose them to retaliation by the powerful or their supporters. Similarly, companies that file lawsuits over criticisms posted on Yelp commonly allege that the criticisms were not made by real customers. *E.g. Yelp, Inc. v. Hadeed Carpet Cleaning*, 770 S.E.2d 440, 441 (Va. 2015). Merchants argue that Yelp could better protect against the posting of reviews by non-customers (which would violate Yelp’s Terms of Service) by requiring reviewers to prove in advance of posting that they are real customers by providing Yelp with receipts or invoices. And indeed this is a potential solution to one kind of problem

about potentially false reviews. At the same time, the solution could make it harder for genuine customers to post review if they don't happen to save a receipt, or if the receipt includes identifying information.

All of these considerations implicate choices about web site design that ICS operators make; those who prefer to read and put their trust in comments posted on interactive computer systems that follow different rules are free to vote with their feet. These differences, indeed, present ways in which different web masters might promote their sites. But section 230 leaves it to the free market of ideas to determine which site is most worthwhile, by protecting the creators of any such web sites from liability for the content placed by others on their web sites.

Herrick and some of his amici also argue that because his main tort claim in this case is based on harassment and invasion of privacy, section 230 should not apply because the two New York cases that most clearly prompted the adoption of section 230 immunity involved claims for defamation. However, nothing in the text of section 230 limits the sorts of claims to which immunity applies to defamation—the original statute contained an exemption for intellectual property claims, and a recent amendment to section 230 added an exception relating for civil claims relating to sex trafficking in children. 47 U.S.C. § 230(e)(5). The amicus brief filed by the Electronic Privacy Information Center marshals

impressive citations about the importance of privacy and the need for protection against online harassment as a public value, but similar arguments could be made about the importance of protecting individuals' reputation. *See generally* Smolla, *Law of Defamation 2d* (2018). However, the proper venue for making arguments about the need for (and possible scope of) a privacy or harassment exception to section 230 is Congress, not the courts.

To be sure, in a case such as this one, the operator of an ICS does not have to investigate a possible other side of the story (as it would if only defamation is alleged) when it receives a complaint asserting, "I am being impersonated in a very offensive way and it is subjecting me to serious harm." But unless very carefully crafted, a "harassment" exception runs the risk of creating a backdoor through which countless defamation claims could be re-pleaded. Plaintiffs whose complaint is about false statements that harm them commonly add counts to their complaints that recast their defamation claims in the form of a privacy or harassment tort. For example, Knight's original Tennessee complaint included a claim for false light invasion of privacy, and his proposed amended Tennessee complaint alleged that the Facebook page that he wanted removed was in violation of Facebook's Terms of Service forbidding harassment. The right of publicity claim on which Knight sued Facebook in California in his effort to force the

critical Facebook group offline might equally have been recast as a privacy claim, in light of the recent work contending that the right of publicity is best understood as being a branch of the law of privacy. Rothman, *The Right of Publicity: Privacy Reimagined for a Public World* 3-7, 181-185 (2018). Similarly, the *Donato* plaintiffs pleaded harassment as well as defamation claims, and when it was clear that they could not proceed as pleaded, plaintiffs shifted ground sought leave to claim invasion, *Donato v. Moldow*, No. BER-L-6214-01 (N.J. Super. Bergen County, Dec. 21, 2001), at 8-9, which under Herrick's approach could then be a basis for holding Moldow liable even assuming the statements were true.

Finally, Herrick casts his tort claims against Grindr as being founded in the contractual obligations that he thinks Grindr undertook by including in its Terms of Service and Privacy Policies prohibitions against various forms of objectionable conduct such as harassment, and reserving the right to remove contents determined to be objectionable. But such clauses typically warn as well that defamatory content is unacceptable, and so the same sorts of arguments that Herrick advances here could be made by victims of claimed defamatory content.

Moreover, courts have warned against construing the general language in such boilerplate terms of service as being a specific promise to remove content that a given site user does not like. *E.g., Barnes v. Yahoo*, 570 F.3d at 1108. The

irony of Herrick's argument is that online hosts generally include such clauses in their terms of service to give fair warning to their users that the operator of the site is not promising to keep matter online, no matter how objectionable. The inclusion of these clauses in the Terms of Service helps ICS operators avoid the claim that the removal of objectionable materials, in the exercise of the Good Samaritan function that Congress intended to encourage by enacting the CDA, should itself subject the ICS operators to liability. Adopting Herrick's estoppel and misrepresentation arguments would make it harder, not easier, for ICS operators to police their sites for inappropriate content and to remove material when they find that step proper.

CONCLUSION

The Court should affirm the district court's judgment.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the word-length limitation of Federal Rule 32(g)(1) and Circuit Rule 29.1(c), in that the attached brief as amici curiae contains 6419 words.

2. This brief complies with the typeface requirements of Rule 32(a)(5) of the Federal Rules of Appellate Procedure and with the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface using Word Perfect 8's Times New Roman font in size 14.

/s/ Paul Alan Levy
Paul Alan Levy

August 30, 2018

CERTIFICATE OF SERVICE

I hereby certify that I am electronically filing the foregoing with the Clerk of the Court for the United States Courts of Appeals for the Second Circuit by using the appellate CM/ECF system on this date.

/s/ Paul Alan Levy
Paul Alan Levy

August 30, 2018