18-0396-cv

United States Court of Appeals

for the

Second Circuit

MATTHEW HERRICK,

Plaintiff-Appellant,

– v. –

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

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF ELECTRONIC FRONTIER FOUNDATION AND CENTER FOR DEMOCRACY AND TECHNOLOGY AS *AMICI CURIAE* IN SUPPORT OF DEFENDANTS-APPELLEES

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DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER ENTITIES WITH A DIRECT FINANCIAL INTEREST IN LITIGATION

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Amici Curiae Electronic Frontier Foundation and Center for Democracy and Technology state that they do not have a parent corporation and that no publicly held corporation owns 10 percent or more of their stock.

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STATEMENT OF INTEREST[1]

As organizations focused on users' rights, Amici Curiae the Electronic Frontier Foundation (EFF) and the Center for Democracy and Technology (CDT) understand the vital role third-party Internet platforms play in maintaining the Internet as a forum available to practically anyone around the world, regardless of financial resources or technical expertise, and the vital role that Section 230 thus plays in preserving the Internet as a uniquely democratic communications medium. The vast majority of current Internet users publish by way of third-party platforms; as a result, platforms are firmly embedded in the current architecture of the Internet. Given the scale, operators of third-party platforms, except perhaps the very largest ones, are unable to monitor the content being posted through them; as a result, many platforms would not be able to exist without the immunity from publisher-liability Section 230 provides. EFF and CDT thus believe that Section 230 is essential to promote the Internet as a democratic medium available to the widest range of users around the world.

EFF is a member-supported, non-profit organization that works to protect free speech and privacy in the digital world. Founded in 1990, EFF has over

[1] Pursuant to Federal Rule of Appellate Procedure Rule 29(a)(4(E) and LR 29.1, EFF and CDT certify that no person or entity, other than Amici, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief or authored this brief in whole or in part. All parties consent to the filing of this brief.

40,000 members. EFF represents the interests of technology users in both court cases and broader policy debates surrounding the application of law to technology.

CDT is a non-profit public interest organization that advocates for individual rights in Internet law and policy. CDT represents the public's interest in an open, innovative, and decentralized Internet that promotes constitutional and democratic values of free expression, privacy, and individual liberty.

EFF and CDT have represented parties and filed amicus briefs in courts around the country addressing the breadth of Section 230 immunity and are acknowledged as two of the organizational experts on the topic.

INTRODUCTION

Attempts like Plaintiff-Appellant Matthew Herrick's—to plead around 47 U.S.C. § 230's ("Section 230")[2] protections and hold Internet platforms liable for what their users post online—threaten the ability of all online platforms to offer Internet users robust and open forums for speech. Such efforts to hold online platforms liable for third-party speech are contrary to Section 230's purpose and, if allowed, will severely curtail free expression online.

Section 230 is not meant to benefit platforms for the platforms' sake; it is meant to benefit users, that vast majority of whom post non-actionable content, by encouraging platforms to host a diverse range of content. As Congress recognized when passing Section 230, granting Internet intermediaries immunity from liability for the speech of users is critical for maintaining platforms for users' vibrant, robust, and diverse online speech. Online intermediaries are an essential element of the modern Internet. They provide the very "vast democratic forums of the Internet" that, in the words of the Supreme Court, make the Internet one of the "most important places . . . for the exchange of views." *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017). Users rely on intermediaries to express themselves, reach a global audience, engage with others, and build relationships

[2] The statute was passed as Section 509 of the Communications Decency Act, part of the Telecommunications Act of 1996, Pub. L. 104–104. It is sometimes colloquially referred to as "CDA 230" or "Section 230 of the Communications Decency Act." Amici refers to it as Section 230.

and communities with people from around the world—all without having to learn how to code or expend significant financial resources. Intermediaries allow Internet users to connect easily with family and friends, follow the news, share opinions and personal experiences, create and share art, and debate politics. Appellant's efforts to circumvent Section 230's protections undermine Congress's goal of encouraging open platforms and robust online speech.

Placing liability on Grindr in this case would not only conflict with the plain text and purpose of Section 230, but it would also severely undercut the essential role online platforms play in fostering our modern political and social discourse. Internet intermediaries would take the very steps to restrict the openness of their platforms that Congress sought to discourage: they would limit who can use their service, screen all content created by those users, and cautiously censor and remove more speech than ever before. And smaller platforms that cannot afford to take these steps to avoid liability would simply cease to exist, resulting in fewer platforms for user speech across the Web.

This Court should affirm the lower court's dismissal pursuant to Section 230.

ARGUMENT

I. SECTION 230 IS ESSENTIAL TO INTERNET USERS' FREEDOM OF EXPRESSION ONLINE.

Placing liability on Grindr in this case would severely undercut the essential role all online platforms play in fostering our modern political and social discourse. It would require fundamentally altering the relationship between platforms and their users by incentivizing platforms to dramatically curtail what people can discuss on online.

Instead of making open forums for participation by users around the world—a quintessential feature of Internet intermediaries—online platforms, saddled with potential or explicit liability based on the content their users post, would likely screen user-generated content to avoid the risk that their users might post offensive content that will create liability for the companies. And companies would take down any and all content that drew any complaint—especially by those complainants with resources to fund litigation—just as Congress feared, which was what prompted it to pass Section 230. These overreactions could include reviewing all content users intend to post and preventing any potentially controversial comments or criticism from being published in the first place, and removing accounts whose content drew objections—potentially far beyond the harassing content at issue here.

The ability—both logistically and financially—for modern platforms to conduct such review is dubious given the incredible volume of content generated by platform users. When Congress passed Section 230 in 1996, about 40 million people used the Internet worldwide, and commercial online services in the United States had almost 12 million individual subscribers. *See Reno v. ACLU*, 521 U.S. 844, 850–851 (1997). Today's Internet hosts third-party contributions from a broad array of voices, facilitating the speech of billions of people. As of January 2018, roughly 4 billion people were online—53 percent of the global population.[3] And the Web continues to grow at an accelerating pace. At the end of 2016, there were 1.046 billion websites on the Web; only a year later, at the end of 2017, that number had reached 1.767 billion, and in 2018 we are nearing 2 billion.[4] Users of the video platform YouTube today upload roughly 400 hours of video to the website *every minute*.[5] WordPress—a free and open-source content management system available in over 50 languages that allows users around to globe to create

[3] *See* Nathan McDonald, *Digital in 2018: World's Internet Users Pass the 4 Billion Mark*, We Are Social (Jan. 2018), https://wearesocial.com/us/blog/2018/01/global-digital-report-2018.

[4] Internet live stats, Total number of Websites http://www.internetlivestats.com/total-number-of-websites/.

[5] Bree Brouwer, *YouTube Now Gets Over 400 Hours of Content Uploaded Every Minute*, Tubefilter (July 26, 2015), http://www.tubefilter.com/2015/07/26/youtube-400-hours-content-every-minute/.

free websites or blogs— as of 2017 had been used to create 75,000,000 websites.[6] Medium—an online publishing platform that allows amateur and professional people alike to publish their work—had 60 million unique monthly visitors in 2016, only four years after the company launched.[7] Meanwhile, the Grindr dating app is today approaching 4 million daily active users.[8]

Small businesses also have an increasing online presence. In 2017, over 70 percent of small businesses in the United States had a website, and 79 percent of those small businesses had a mobile-friendly website.[9] And with platforms like Shopify—an e-commerce platform that helps customers create websites for their online stores and currently powers over 600,000 online merchants[10]—it is easier than ever for small businesses to get online.

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[6] WhoIsHostingThis.com, Shocking WordPress Stats 2017, https://www.whoishostingthis.com/compare/wordpress/stats/.

[7] Ken Yeung, *Medium grows 140% to 60 million monthly visitors*, VentureBeat *(Dec. 14, 2016),* https://venturebeat.com/2016/12/14/medium-grows-140-to-60-million-monthly-visitors/.

[8] *See* Diana Bradley, *How the Grindr ecosystem evolved into more for its 4 million users*, PR Week (Feb. 26, 2018), https://www.prweek.com/article/1457079/grindr-ecosystem-evolved-its-4-million-users.

[9] SmallBusiness.com, What Percentage of Small Businesses Have Websites? (2017), https://smallbusiness.com/digital-marketing/how-many-small-businesses-have-websites/.

[10] Shopify Partners, Platform Features, https://www.shopify.com/partners/platform-features.

With such a staggering number of Internet users, the new content-screening regime that a ruling in favour of Plaintiff-Appellant would lead to would be costly. To keep the cost of human reviewers down, larger, more sophisticated platforms would likely turn to algorithms or artificial intelligence to flag and block controversial comments or criticism. Social media giants like Facebook, which now has 2.23 billion users,[11] are already using algorithms or artificial intelligence to moderate content on their platforms.[12] This is despite the fact that such systems are notoriously terrible at understanding context and cultural differences, are capable of being gamed by those looking to censor speech, and therefore are more likely to result in censorship of journalists, human rights activists, artists, or any other creators of lawful content.[13] Use of these automated systems would only increase, and censorship would along with it.

Meanwhile, smaller platforms without the substantial resources required to manage potential liability in this way—or to weather the significant litigation costs

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[11] Statista, *Number of monthly active Facebook users worldwide as of 2nd quarter 2018 (in millions)*, https://www.statista.com/statistics/264810/number-of-monthly-active-facebook-users-worldwide/.

[12] *See, e.g.*, Hayley Tsukayama, *Facebook Turns to Artificial Intelligence to fight hate and misinformation in Myanmar*, Washington Post (Aug. 15, 2018), https://www.washingtonpost.com/technology/2018/08/16/facebook-turns-artificial-intelligence-fight-hate-misinformation-myanmar/?.

[13] Sydney Li and Jamie Williams, *Despite What Zuckerberg's Testimony May Imply, AI Cannot Save Us*, Deeplinks (Apr. 11, 2018), https://www.eff.org/deeplinks/2018/04/despite-what-zuckerbergs-testimony-may-imply-ai-cannot-save-us.

they would face if they choose not to—would be forced to shut down. And new companies would be deterred from even trying to offer open platforms for speech. Indeed, even those platforms that would prevail on the merits of a lawsuit will incur significant legal fees. *Cf. Wicks v. Miss. State Emp't Servs.*, 41 F.3d 991, 995 n.16 (5th Cir. 1995) ("[I]mmunity means more than just immunity from liability; it means immunity from the burdens of defending a suit[.]").

If platforms are required to take some or all of the measures described above, it would lead to sanitized, milk-toast online platforms. Platforms would be incentivized to engage in self-censorship and host only non-controversial conversations, while actively discouraging any discussions that may draw objection, out of concern that the content may one day form the basis of a lawsuit against the company. The end result: the less controversial the content, the more likely it will remain on the platform.

Increased platform censorship would end the essential role intermediaries play in fostering social and political discourse on the Internet. Indeed, many individuals around the world use U.S.-based services to access and distribute all manner of content, from organizing in opposition to oppressive regimes[14] to sharing pictures of children with grandparents. Such robust, global online

[14] *See, e.g.*, Philip N. Howard, et al., *Opening Closed Regimes: What Was the Role of Social Media During the Arab Spring?* (Sep. 1, 2011), http://philhoward.org/opening-closed-regimes-what-was-the-role-of-social-media-during-the-arab-spring/.

participation would never have been achieved without the immunity provided by Section 230. Granting would-be plaintiffs a clear avenue to circumvent Section 230's protections would undermine this global phenomenon. Because platforms would be unwilling to take a chance on provocative or unpopular speech, the online marketplace of ideas would be artificially stunted. This is precisely what Congress sought to avoid in passing Section 230.

II. TO PROTECT USER SPEECH, SECTION 230 SHIELDS ONLINE PLATFORMS FROM LIABILITY BASED ON THIRD-PARTY CONTENT.

A. Congress Immunized Intermediaries From Liability Based on Third-Party Speech to Encourage the Development of Open Platforms and to Enable Robust Online Speech.

Plaintiff-Appellant's claims threaten not just Grindr, but all Internet intermediaries and their ability to host platforms for diverse online speech. Congress recognized in passing Section 230 that the Internet depends upon intermediaries, which serve "as a vehicle for the speech of others." Anupam Chander & Uyên P. Lê, *Free Speech*, 100 Iowa L. Rev. 501, 514 (2015). Intermediaries create democratic forums in which anyone can become "a pamphleteer" or "a town crier with a voice that resonates farther than it could from any soapbox." *Reno v. ACLU*, 521 U.S. 844, 870 (1997). They give a single person, with minimal resources and technical expertise anywhere in the world, the ability to communicate with others across the globe. Online platforms host a wide

range of diverse speech on behalf of their users, ensuring that all views—especially controversial ones—can be presented and received by platform users.

Intermediary platforms—such as social media websites and "apps" like Grindr, blogging platforms, video-sharing services, and web-hosting companies—are the essential architecture of today's Internet. Indeed, they are often the primary way in which the majority of people engage with one another online.

Thus, Section 230 benefits the Internet as a whole, a fact Congress understood in passing the law. Congress recognized the Internet's power to sustain and promote robust individual speech, a value rooted in the First Amendment. Congress not only sought to encourage the already robust free speech occurring online in the mid-1990s, but also to speed the development of online platforms by providing broad immunity to service providers that host user-generated content. *See* 47 U.S.C. § 230(b)(1), (3) ("It is the policy of the United States . . . to promote the continued development of the Internet and other interactive computer services and other interactive media" and "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation.").[15]

[15] Congress thus clearly sought to promote innovation online in many forms. Amicus EPIC is wrong to argue that Section 230 was only intended "to protect providers of bulletin board systems" that enable users to "express their opinions," that "many modern platforms do not substantially promote free expression of internet users," and those that have "clear commercial purposes" should not benefit

B. Congress Recognized that the Internet Would be a Far More Limited Medium if Intermediaries Faced Liability for Any and All Content Published on Their Platforms.

Congress recognized that if our legal system failed to robustly protect intermediaries, it would fail to protect free speech online. *Zeran v. AOL*, 129 F.3d 327, 330 (4th Cir. 1997). Given the volume of information being published online, it would be impossible for most intermediaries to review every single bit of information published through their platforms prior to publication. "Faced with potential liability for each message republished by their services, interactive computer service providers might choose to severely restrict the number and type of messages posted." *Id.* at 331. The resulting Internet, Congress recognized, would include a far more limited number of forums if intermediaries were forced to second-guess decisions about managing and presenting content authored by third parties.

Congress also recognized that if intermediaries could be held liable for the speech of others, even if premised on knowledge of offending content, they would be susceptible to the "heckler's veto." *Jones v. Dirty World Entm't Recordings LLC*, 755 F.3d 398, 407 (6th Cir. 2014). Without immunity, those who disliked certain content could pressure online platforms into removing content they found objectionable simply by threatening litigation; platforms would find it easier to

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from Section 230 immunity. *See* Electronic Privacy Information Center (EPIC) Amicus Brief at 20-21 (ECF No. 72).

simply take down content rather than investigate whether it was tortious or illegal. *See id*.; *see also Zeran*, 129 F.3d at 331 ("The specter of tort liability in an area of such prolific speech would have an obvious chilling effect.").

By creating Section 230's platform immunity for third-party speech, Congress made the intentional policy choice that individuals harmed by speech online must seek relief from the speakers themselves, rather than the platforms those speakers used. *Id.* at 330–31. By limiting liability in this way, Congress decided that creating a forum for unrestrained and robust communication was of utmost importance, even if it resulted in the presence of harmful content online. Congress made the express decision that promoting robust online dialogue was more important than ridding the Internet of all harmful speech.[16]

C. Section 230 Protects Intermediaries From Liability Based on Their Exercise of Traditional Editorial Functions, Including Decisions to Remove or Not Remove Content.

In line with Congress's intention of promoting the continued development of open platforms and vibrant online dialogue, Section 230 provides interactive

[16] Contrary to amicus EPIC's assertion that Section 230 provides "blanket immunity to service providers," *see* EPIC Amicus Brief at 16 (ECF No. 72), Section 230 actually reflects a delicate policy balance. Congress left online platforms open to liability based on their own speech (and own actions unrelated to publishing others' content) and based on third-party content in certain limited situations: Section 230 does not provide immunity from federal criminal law claims, intellectual property claims, Electronic Communications Privacy Act or similar state law claims, and most recently, certain sex work claims. *See* 47 U.S.C. § 230(e).

computer service providers "broad immunity" from liability for content originally posted by third parties. *Doe v. MySpace, Inc.*, 528 F.3d 413, 418 (5th Cir. 2008); *see also Ben Ezra, Weinstein, & Co., Inc. v. Am. Online Inc.*, 206 F.3d 980, 985 n.3 (10th Cir. 2000). This intermediary immunity provision, codified at subsection (c)(1) of Section 230, 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." 47 U.S.C. § 230(c)(1). This section protects an online service provider that a plaintiff seeks to treat as the publisher or speaker of content created by a third party. *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1100–01 (9th Cir. 2009).[17]

Section 230(c)(1) immunity against liability for user speech is not conditioned on how an interactive computer service displays, selects, or channels that speech. Instead, Section 230 immunizes "any activity that can be boiled down to deciding whether to exclude material that third parties seek to post online[.]"

[17] Section 230(c) also includes a second—and separate—immunity provision, subsection (c)(2), which is not at issue in this case. Section 230(c)(2) "provides an *additional shield* from liability"—"not merely [for] those whom subsection (c)(1) already protects, but [for] any provider of an interactive computer service"—"but only for 'any action voluntarily taken in good faith to restrict access to or availability of material that the provider . . . considers to be obscene . . . or otherwise objectionable.'" *Barnes*, 570 F.3d at 1105 (citing 47 U.S.C § 230(c)(2)) (emphasis added). Section 230 (c)(2) would protect a platform from a lawsuit brought, for example, by a user who was upset that the platform decided to take down one of their photos or posts for violating the platform's community standards.

Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC, 521 F.3d 1157, 1170–71 (9th Cir. 2008) (en banc). The statute "shields from liability all publication decisions, whether to edit, to remove, or to post, with respect to content generated entirely by third parties." *Barnes*, 570 F.3d at 1105. It shields decisions relating to the monitoring and screening content. *MySpace*, 528 F.3d at 420 (internal quotations and citation omitted). Indeed, any "lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content—are barred." *Zeran*, 129 F.3d at 330; *see also Green v. Am. Online (AOL)*, 318 F.3d 465, 471 (3d Cir. 2003) (same).

Accordingly, "courts have rejected claims that attempt to hold website operators liable for failing to provide sufficient protections to users from harmful content created by others." *Jane Doe No. 1 v. Backpage.com*, LLC, 817 F.3d 12, 21 (1st Cir. 2016), cert. denied, 137 S. Ct. 622 (2017). Courts have also consistently found that the creation of "neutral tools" that facilitate the creation of content by third parties does not transform a service provider into a content provider for purposes of piercing Section 230 immunity. *See, e.g., Carafano*, 339 F.3d at 1124 (provider's questionnaire, which facilitated expression of information by individual users, did not make a service provider an "information content provider"); *Roommates.com*, 521 F.3d at 1174 (allowing users to input information

into a blank text box did not make service provider an "information content provider"). Nor do any similar actions short of actually creating the actionable content void Section 230 immunity.[18] *See Carafano v. Metrosplash.com*, 339 F.3d 1119, 1124 (9th Cir. 2003) ("[S]o long as a third party willingly provides the essential published content, the interactive service provider receives full immunity regardless of the specific editing or selection process.").

Section 230(c)(1) immunity is also not limited to protecting *only* those "Good Samaritan" intermediaries who block or screen offensive content, as EPIC asks this Court to rule. *See* EPIC Amicus Brief at 14 (ECF No. 72). It is true that Congress also intended the statute as a whole to *encourage* platform self-regulation by reducing the risk involved in good-faith content moderation efforts. *See Jones*, 755 F.3d at 408. (Prior to the passage of Section 230, given traditional publisher-liability law, service providers had strong incentives to avoid engaging with third-party content on their platforms for fear of increased liability if any moderation

[18] Intermediaries also do not lose Section 230 immunity by (a) displaying or allowing access to content created by another (even if it encouraged users to provide the content), *see, e.g.*, *Jones*, 755 F.3d at 409–10; (b) categorizing third-party content, *see, e.g.*, *Dart v. Craigslist, Inc.*, 665 F. Supp. 2d 961, 962 (N.D. Ill. 2009) ("Craigslist created the categories, but its users create the content of the ads and select which categories their ads will appear in."); *Gentry v. eBay, Inc.*, 99 Cal. App. 4th 816, 832 (2002); or (c) creating neutral tools, such as generic search engines, that guide users in finding third-party content, *see, e.g.*, *Roommates.com*, 521 F.3d at 1167; *Ascentive, LLC v. Opinion Corp.*, 842 F. Supp. 2d 450, 476 (E.D.N.Y. 2011) ("[Search engine optimization] tactics and its use of plaintiffs' marks to make [defendant's] pages appear higher in search engine results list . . . do not render [defendant] an information content provider").

efforts failed.[19]) But consistent with Congress's goal of promoting robust expression across the Internet, it did not *mandate* such self-regulation as a condition of receiving Section 230 immunity. *See Blumenthal v. Drudge*, 992 F. Supp. 44, 52 (D.D.C. 1998) ("Congress has conferred immunity from tort liability as an incentive to Internet service providers to self-police the Internet for obscenity and other offensive material, even where the self-policing is unsuccessful or *not even attempted*.") (emphasis added).[20]

Indeed, Section 230(c)(1) contains no requirement that platforms engage in good faith efforts to restrict offensive content or any type of intent-based exception to the immunity that it affords intermediaries. As this Court has recognized,

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[19] In one pre-Section 230 case, *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, 1995 WL 323710 (N.Y. Sup. Ct. 1995), the court held that an Internet intermediary could be held responsible for the defamatory words of one of its users where the provider had attempted—and failed—to filter objectionable content from its site. *Id*. at *4. According to the court's reasoning, the service provider could be held liable precisely because it had voluntarily attempted to police third-party content. As the Sixth Circuit later explained in *Jones*, "Section 230 set out to abrogate [the] precedent" set by *Stratton Oakmont* and thereby ensure that service providers were encouraged—not discouraged—from self-regulating content disseminated via their services. 755 F.3d at 408.

[20] The heading for Section 230(c), "Protection for 'Good Samaritan' blocking and screening of offensive material," reflects Congress's intention that the immunity provided under subsection (c)(1) for liability based on third-party content and the immunity provided under subsection (c)(2) for liability based on good faith efforts to monitor objectionable content, *see supra* note 17, would remove two distinct legal risks of self-policing and thus incentivize intermediaries to monitor their platforms. The phrase "Good Samaritan" is not otherwise mentioned and does not appear in the plain language of the statutory text.

Section 230(c)(1) has only three elements: a defendant must show that "(1) [it] is a provider or user of an interactive computer service, (2) the claim is based on information provided by another information content provider and (3) the claim would treat [the defendant] as the publisher or speaker of that information." *FTC v. LeadClick Media, LLC*, 838 F.3d 158, 173 (2d Cir. 2016) (internal quotation marks and citation omitted). Consistent with the plain language of the statute, courts have found that defendants are immune under subsection 230(c)(1) regardless of whether they engage in good faith monitoring of their platforms, and in fact even if they act in *bad faith*. *See, e.g., Zeran*, 129 F.3d at 331–33 (holding that AOL was immune from defamation liability under Section 230(c)(1) even though it had actual knowledge of a statement's falsity); *Asia Econ. Inst. v. Xcentric Ventures LLC*, No. CV 10–01360 SVW PJWx, 2011 WL 2469822, at *6 (C.D. Cal. May 4, 2011) (holding that the defendant's deliberate manipulation of HTML (Hypertext Markup Language) computer code for paying customers to make certain reviews more visible in online search results was immune under Section 230(c)(1) and that "[a]bsent a changing of the disputed reports' substantive content that is visible to consumers, liability cannot be found").

The district court in this case therefore correctly held that Herrick's claims are barred by Section 230 because they "bear on Grindr's ability to search for and remove content posted to the app—exactly the sort of 'editorial choices' that are a

function of being a publisher." *See Herrick v. Grindr, LLC*, 306 F. Supp. 3d 579, 591 (S.D.N.Y. 2018) (*citing Backpage.com*, 817 F.3d 12). It also correctly held that Section 230 applied regardless of whether or how Grindr screened content on its app—and that Grindr "was under no obligation to search for and remove the impersonating profiles." *Id.* at 594.

III. SECTION 230 BARS PLAINTIFF-APPELANT'S CLAIMS BECAUSE THEY ARE BASED ON HARM CAUSED BY THIRD-PARTY SPEECH.

Section 230 plainly bars Plaintiff-Appellant's claims against Grindr for product liability, failure to warn, negligence, and intentional and negligent infliction of emotional distress, each of which is predicated on impersonating profiles created and posted online by one of its users. Each claim would require finding Grindr liable for third-party speech.

Plaintiff-Appellant's claims begin and end with user-generated content: each incident of harassment he faced was a direct result of his ex-boyfriend creating and posting impersonating profiles online. There "would be no harm to [Plaintiff-Appellant] but for the content of the postings" in this case. *See Backpage.com*, LLC, 817 F.3d at 19–20. Indeed, the unfortunate facts of this case are analogous to those of *Zeran*, one the very first cases to interpret Section 230 over 20 years ago. Like Plaintiff-Appellant here, the plaintiff in *Zeran* sued the provider of an online bulletin board for negligence after facing significant harassment as a result of

content posted by a third-party Internet user. 129 F.3d at 328–29. And like the district court below, the Fourth Circuit in *Zeran* held that Section 230 barred the claims against AOL. *Id.* at 332. The district court in this case correctly recognized that Plaintiff-Appellant's claims against Grindr for product liability, failure to warn, negligence, and intentional and negligent infliction of emotional distress are all predicated on content posted by a third-party Internet user, Herrick's ex-boyfriend—and are the precise type of claims that Congress sought to protect against in passing Section 230. *See Herrick*, 306 F. Supp. 3d at 589, 594 (finding that the "content [was] provided by another user—Herrick's former boyfriend," and "Grindr did not create the [fake] profiles").

Because Plaintiff-Appellant's claims attempt to hold Grindr labile under tort law as a direct result of harm caused by user-generated content, Section 230's immunity must apply. The form of the claim does not matter: if "the duty that the plaintiff alleges the defendant violated derives from the defendant's status or conduct as a 'publisher or speaker'" then "section 230(c)(1) precludes liability." *Barnes*, 570 F.3d at 1102. "[W]hat matters is not the name of the cause of action . . . what matters is whether the cause of action inherently requires the court to treat the defendant as the 'publisher or speaker' of content provided by another." *Id.* at 1101–02; *see also MySpace*, 528 F.3d at 420 (rejecting an attempt to circumvent Section 230's protection by styling the claims as a failure to implement

basic safety measures to protect minors); *Jones*, 755 F.3d at 402 ("Jones's tort claims are grounded on the statements of another content provider yet seek to impose liability on Dirty World and Richie as if they were the publishers or speakers of those statements.").[21]

The Court should reject Plaintiff-Appellant's request and affirm the district court's dismissal.

CONCLUSION

This Court should affirm the district court's dismissal with prejudice.

Dated: August 30, 2018

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[21] Amicus EPIC wrongly states that Section 230 only "targets defamation claims." *See* EPIC Amicus Brief at 4 (ECF No. 72). Nowhere in the statute is there any such limitation.

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS AND TYPE STYLE REQUIREMENTS PURSUANT TO FED. R. APP. P. 32(A)(7)(C)

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify as follows:

1. This Brief of Amici Curiae Electronic Frontier Foundation and Center for Democracy and Technology in Support of Defendants-Appellees complies with the type-volume limitation, because this brief contains 4,918 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii); and

2. 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 this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2011, the word processing system used to prepare the brief, in 14 point font in Times New Roman font.

Dated: August 30, 2018

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Brief of Amicus Curiae Electronic Frontier Foundation with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system on August 30, 2018.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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