In the United States Court of Appeals

For the Second Circuit

No. 18-396

Matthew Herrick,

Appellant

v.

Grindr, LLC; Grinder Holdings, Inc.; and Grindr Holding Company,

Appellees

Appeal from the United States District Court
For the Southern District of New York

AMICUS CURIAE BRIEF OF CONSUMER WATCHDOG AND MEAGHAN BARAKETT IN SUPPORT OF APPELLANT HERRICK AND REVERSAL

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STATEMENT PURSUANT TO FED. R. APP. P. 29(a)(4)(E)

No counsel for a party authored the Brief, in whole or in part. No counsel for a party or a party itself made a monetary contribution intended to fund the preparation or submission of this Brief. No person other than *Amici* or their Counsel made a monetary contribution to its preparation or submission.

STATEMENT PURSUANT TO FED. R. APP. P. 29(a), (c)(5)

All parties have consented to the filing of this Amicus Brief. No counsel for a party authored the Brief, in whole or in part. No counsel for a party or a party itself made a monetary contribution intended to fund the preparation or submission of this Brief. No person other than *Amici* or their Counsel made a monetary contribution to its preparation or submission.

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INTEREST OF AMICUS

Amicus Consumer Watchdog files this Amicus Brief to urge this Court to restore the balance of interests originally intended by Congress in enacting the Communications Decency Act and the Good Samaritan Provision in § 230 of the Act. Consumer Watchdog is a nonprofit organization dedicated to providing an effective voice for taxpayers and consumers in an era when special interests dominate public discourse, government and politics. It deploys an in-house team of public interest lawyers, policy experts, strategists, and grassroots activists to expose, confront, and change corporate and political injustice every day, saving Americans billions of dollars and improving countless lives. For decades Consumer Watchdog has been the nation's most aggressive consumer advocate, taking on politicians of both parties and the special interests that fund them**.** In 1985, consumer advocate Harvey Rosenfield founded Consumer Watchdog (originally the Foundation for Taxpayer and Consumer Rights) as a California-based organization to conduct research and public education around issues of consumer protection and political reform. Over the years, Consumer Watchdog has fought to save consumers more than $100 billion on their auto insurance, exposed and changed the inhumane practices of health insurance companies, prevented oil companies from ripping off motorists, won privacy protections for consumers and blocked taxpayer bailouts of utility companies.

Meaghan Barakett files as an amicus curia in this matter as she was a horrific victim of impersonation on the dating site, Match.com. ("Match"), one of the largest dating websites. Ms. Barakett was impersonated on that site by a jealous, vindictive ex-girlfriend of Brett Barakett, now her husband, who discovered the "e-personation" and brought it to the attention of Ms. Barakett, as it essentially and falsely stated she was a gold-digger who was uninterested in children. Mr. and Ms. Barakett (who have since married) sought the help of Match to find out who had created the impersonation. Match refused to do so because Meaghan was not an account holder. The Baraketts were forced to file a Jane Doe complaint in New York Supreme Court and then issue a subpoena to obtain the identity of the impersonator, which they ultimately did. But because there was no effective state law, the wrongdoer was never prosecuted criminally, and New York civil remedies were weak. Nor could Match be sued given the immunity under Section 230 of the Communications Decency Act. Thus, Ms. Barakett remains yet another victim and has good reason to support Mr. Herrick. The *New York Times* reported her story, which can be accessed at:

https://www.nytimes.com/2016/03/20/fashion/weddings/brett-barakett-meaghan-jarensky-marriage.html.

SUMMARY OF ARGUMENT

Amicus Consumer Watchdog and Ms. Barakett urge this Court to reject the argument that Matthew Herrick's claim is barred by § 230 of the Communications Decency Act, 47 U.S.C. § 230. This Amicus Brief is a frontal assault on the § 230 defense interposed by Grindr in this case, and more profoundly, on the sweeping interpretation of § 230 that has gained unfounded traction across the country.

This Circuit is in a unique position. Most federal circuits have developed relatively deep bodies of precedent regarding the meaning of § 230. This Court, through serendipity, has not. In the few recent opinions of this Court applying §230, this Court has noted that in comparison to sister Circuits, the Second Circuit's jurisprudence on § 230 is scant and thin. While this Court has correctly characterized the broad interpretations other Circuits have given to § 230, the Second Circuit has not been independently pressed to delve deeply into the meaning of § 230. No prior panel decision of this Court has squarely faced or ruled on the sweep of § 230 in any case in which the compass of the statue was meaningfully in play.

This Court thus has the freedom to take its own fresh look at § 230. Amicus Consumer Watchdog and Ms. Barakett urge the Court to take such an independent fresh look, and to reject as entirely unsound the sweeping interpretation the statute has been given in several other federal circuits.

Fortunately, some groundwork has already been undertaken, within this Circuit and across the nation. This Circuit has previously recognized a limitation on the immunity granted by § 230. When a defendant acts independently to contribute to the tortious conduct giving rise a plaintiff's complaint, § 230 immunity does not apply. The more liberally this exception is construed, the narrower the reach of § 230 immunity. This Appeal presents the ideal vehicle for generously construing and applying this principle. Such an application will go a long way toward confining § 230 within its proper bounds, bringing interpretation of the statute into alignment with the intent of Congress in enacting it.

Similarly, § 230 may reasonably be construed as *not* creating immunity against a defendant acting as a "distributor" of tortious material once the nature of that tortious material is plainly revealed to the distributor. When, as in the egregious facts here, an entity such as Grindr is unequivocally aware of the abuses its platform is aiding and abetting, whatever immunity § 230 may otherwise have provided is forfeited.

Section 230, as it is widely applied by courts today, is a creature of judicial invention, untenably divorced from its actual intended function. The sweeping immunity that courts have bestowed on Internet Service Providers cannot be squared with the plain meaning of the statutory text, with the antecedent common law doctrines and judicial decisions that informed the enactment of the statute, with the

statute's legislative history, or within any plausible common-sense understanding of the public policy objectives Congress sought to achieve.

To grant immunity to Grindr on the facts of this case is grossly out of kilter with any sensible balance of the competing societal interests at stake, and beyond any credible explanation of what the Congress of the United States undertook to accomplish when it passed § 230.

The Supreme Court of the United States has never yet interpreted § 230. Until the Supreme Court does finally and authoritatively rule, it remains within the right and duty of state and federal courts to continue the ongoing debate over what Congress truly intended when it passed the statute. Until it has been decided right, it has not been decided.

ARGUMENT

I. THIS COURT HAS THE FREEDOM DUTY TO UNDERTAKE AN INDEPENDENT ASSESSMENT OF THE INTENT OF CONGRESS IN ENACTING § 203, AND TO CONSTRUE THE STATUTE IN A MANNER CONSISTENT WITH THAT CONGRESSIONAL INTENT

In *Ricci v. Teamsters Union Local 456*, 781 F.3d 25 (2nd Cir. 2015), this Court recognized the anomaly that in contrast to other federal circuits, "[w]e have never construed the immunity provisions of the Communications Decency Act." *Id*. at 27. After noting that other circuits had applied the Act to a broad list of internet service providers, this Court in *Ricci* applied the Act to the online service "GoDaddy." *Ricci*

does not dictate the outcome of this Appeal, however, because *Ricci* stands only for the nondescript threshold proposition that it does not take much to be classified as an "internet service provider" under the statute. Even if Grindr, like GoDaddy, makes it through that first hoop, it does not follow that § 230 should protect it. *Ricci* did not require any deeper inquiry into the *breadth* of the immunity that internet service providers are granted under § 230, or the extent to which a defendant's own conduct may defeat that immunity. *Ricci* thus does not control the outcome of this Appeal.

One year later, in *Federal Trade Commission v. LeadClick Media, LLC*, 838 F.3d 158 (2nd Cir. 2016), this Court again noted the paucity of Second Circuit precedent construing § 230, observing that "[w]e have had limited opportunity to interpret Section 230." Yet again, this Court acknowledged that "[o]ther circuits, however, have recognized that Section 230 immunity is broad." *Id.*

Notwithstanding the recognition that other circuits have interpreted § 230 immunity as "broad," this Court in *LeadClick* courageously and correctly *rejected* the § 230 immunity claim interposed in *LeadClick*. The Court had doubts that the defendant LeadClick met the definition of an "Internet Service Provider," but held that even if it did, LeadClick was not being held accountable as a "publisher or speaker," a threshold requirement for § 230 immunity, but rather for its own independent actions. *Id.* at 176 ("LeadClick cannot establish the third element

necessary for immunity because it is not being held liable as a publisher or speaker of another's content. Rather, as discussed above, LeadClick is being held accountable for its own deceptive acts or practices—for directly participating in the deceptive scheme by providing edits to affiliate webpages, for purchasing media space on real news sites with the intent to resell that space to its affiliates using fake news sites, and because it had the authority to control those affiliates and allowed them to publish deceptive statements.").

The principle applied in *LeadClick* was the one principle that has proven useful to some plaintiff's nationwide in defeating § 230 immunity. When a defendant acts independently to contribute to the tortious conduct giving rise a plaintiff's complaint, § 230 immunity does not apply. Section 230, in short, does not apply to independent conduct of a defendant aiding and abetting tortious activity of others. The more broadly this exception is construed, the narrower the scope of § 230 immunity. This Appeal presents the ideal vehicle for this Court to construe this exception liberally. In so doing, this Court will return § 230 to its proper limits, bringing interpretation of the statute into alignment with the intent of Congress in enacting it.

Ricci and *LeadClick* demonstrate that for purposes of this Appeal, the Court has a free hand. While it has *observed* the broad interpretation that other circuits have given § 230, it has had no need itself to evaluate, endorse, or reject that

interpretation. In *Ricci*, the scope of immunity was not implicated. In *LeadClick* the Court actually *rejected* the claim of immunity but had no occasion to determine the extent to which other rejections of immunity might be warranted.

In short, the door here is open. Amicus Consumer Watchdog urges the Court to walk through it.

II. THE STATUTORY TEXT DOES NOT SUPPORT IMMUNITY FOR GRINDR

"'We begin our interpretation of a federal statute with the statutory text.'" *United States v. Maynard*, 743 F.3d 374, 379 (2nd Cir. 2014), *quoting City of New York v. Permanent Mission of India to the United Nations,* 618 F.3d 172, 182 (2nd Cir.2010). The plain meaning of the words chosen by Congress is additionally illuminated by the animating purpose of the statute being construed, and the placement of the words within the structure and headings of the statutory scheme. "Our reading of a statutory text 'necessarily begins with the plain meaning of a law's text and, absent ambiguity, will generally end there.'" *Id.* at 381, *quoting Dobrova v. Holder*, 607 F.3d 297, 301 (2nd Cir.2010), *quoting in turn, Bustamante v. Napolitano*, 582 F.3d 403, 406 (2nd Cir.2009) (additional internal quotation mark omitted). "In conducting such an analysis, we 'review the statutory text, considering the ordinary or natural meaning of the words chosen by Congress, as well as the placement and purpose of those words in the statutory scheme.'" *Maynard* at 391,

quoting Dobrova at 301, *quoting United States v. Aguilar*, 585 F.3d 652, 657 (2nd Cir.2009).

The title of the § 230 signals its animating purpose: "Protection for private blocking and screening of offensive material." Subsections (a) and (b) contain a list of findings and policy objectives, which in combination reflect a congressional intent to balance "the vibrant and competitive free market that presently exists for the Internet," § 230(b)(2), against the congressional purpose "to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material" § 230(b)(4).

The operative provision of the statute, subsection (c), contains a subtitle that further illuminates the congressional purpose: "Protection for "Good Samaritan" blocking and screening of offensive material." § 230(c). Subsection (c) provides in its entirety:

> **(c) Protection for "Good Samaritan" blocking and screening of offensive material**
>
> **(1) Treatment of publisher or speaker**
>
> 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.
>
> **(2) Civil liability**

> 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; or
>
> **(B)** any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).

47 U.S.C.A. § 230(c). Aside from subsection (c), the only other salient language in the statute resides in two statutory definitions. The statute defines the term "interactive computer service" as "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions. § 230(f)(3). The statute defines "information content provider" as "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service." § 230(f)(4).

On its face, the meaning of § 230, considering its captions, its operative language, and its definitions, appears to provide a defense from liability for internet service providers who take affirmative steps to screen and block access provided by third parties because of its "obscene, lewd, lascivious, filthy, excessively violent,

harassing, or otherwise objectionable" content. Section 230 does not, on its face, self-evidently create any universal immunity from liability for the content of third parties. The more modest reading of the statutory text is surely a *permissible* reading that harmonizes the captions, operative language, and definitions of the statute, considered in its entirety. This point was well made by Judge Frank Easterbrook in an opinion for the United States Court of Appeals for the Seventh Circuit:

> Section 230(c)(2) tackles this problem not with a sword but with a safety net. A web host that does filter out offensive material is not liable to the censored customer. Removing the risk of civil liability may induce web hosts and other informational intermediaries to take more care to protect the privacy and sensibilities of third parties. The district court held that subsection (c)(1), though phrased as a definition rather than as an immunity, also blocks civil liability when web hosts and other Internet service providers (ISPs) refrain from filtering or censoring the information on their sites. . ..
>
> If this reading is sound, then § 230(c) as a whole makes ISPs indifferent to the content of information they host or transmit: whether they do (subsection (c)(2)) or do not (subsection (c)(1)) take precautions, there is no liability under either state or federal law. As precautions are costly, not only in direct outlay but also in lost revenue from the filtered customers, ISPs may be expected to take the do-nothing option and enjoy immunity under § 230(c)(1). Yet § 230(c)—which is, recall, part of the "Communications Decency Act"—bears the title "Protection for 'Good Samaritan' blocking and screening of offensive material", hardly an apt description if its principal effect is to induce ISPs to do nothing about the distribution of indecent and offensive materials via their services. Why should a law designed to eliminate ISPs' liability to the creators of offensive material end up defeating claims by the victims of tortious or criminal conduct?
>
> True, a statute's caption must yield to its text when the two conflict, . . . but whether there is a conflict is the question on the table. Why not read § 230(c)(1) as a definitional clause rather than as an

> immunity from liability, and thus harmonize the text with the caption? . . .On this reading, an entity would remain a "provider or user"—and thus be eligible for the immunity under § 230(c)(2)—as long as the information came from someone else; but it would become a "publisher or speaker" and lose the benefit of § 230(c)(2) if it created the objectionable information. The difference between this reading and the district court's is that § 230(c)(2) never requires ISPs to filter offensive content, and thus § 230(e)(3) would not preempt state laws or common-law doctrines that induce or require ISPs to protect the interests of third parties, such as the spied-on plaintiffs, for such laws would not be "inconsistent with" this understanding of § 230(c)(1).

Doe v. GTE Corp., 347 F.3d 655, 659-60 (7th Cir. 2003). *See also*, *City of Chicago, Ill. v. StubHub!, Inc.*, 624 F.3d 363, 366 (7th Cir. 2010) ("Subsection (c)'s caption, 'Protection for "Good Samaritan" blocking and screening of offensive material' bodes even less well for StubHub! . . . As earlier decisions in this circuit establish, subsection (c)(1) does not create an 'immunity' of any kind.") *citing Doe v. GTE Corp.*, 347 F.3d at 660; *Chicago Lawyer's Committee for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666, 669-71 (7th Cir.2008).

The Seventh Circuit does not stand alone. The Ninth Circuit has expressed a similar willingness to more narrowly construe § 230. *See Doe v. Internet Brands, Inc.*, 824 F.3d 846, 851-52 (9th Cir. 2016) ("As the heading to section 230(c) indicates, the purpose of that section is to provide "'[p]rotection for "Good Samaritan" blocking and screening of offensive material." That means a website should be able to act as a 'Good Samaritan' to self-regulate offensive third party content without fear of liability.").

III. THE LEGISLATIVE HISTORY OF § 230 DOES NOT SUPPORT IMMUNITY FOR GRINDR

A. The Common Law Backdrop to § 230

If the plain meaning of § 230 is susceptible to the more limited construction suggested by the Seventh and Ninth Circuits, how does that limited construction comport with what is known of the context surrounding the statute's enactment? "The meaning of particular groups of words varies with the verbal context and surrounding circumstances.... A word has no meaning apart from these factors; much less does it have an objective meaning, one true meaning." *Pacific Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co.*, 69 Cal.2d 33, 38 (1968) (Traynor, J.) "[M]eaning is not determined in the abstract, and the Court must look to whether these definitions are consistent with the context of the Communications Decency Act." *Song fi Inc. v. Google, Inc.*, 108 F. Supp. 3d 876, 882 (N.D. Cal. 2015).

The context surrounding the enactment of § 230 could not be more straightforward. Congress passed the statute in reaction to the evolution of common law doctrines defining when a person or entity is deemed "a publisher or speaker," as those doctrines were beginning to be applied in the early days of the Internet. Congress saw that the common law might evolve to create disincentives that would discourage internet service providers from doing the right thing, affirmatively seeking to screen and block offensive content posted on Internet sites by third parties.

A decision from the Southern District of New York, *Cubby, Inc. v. CompuServe, Inc.*, 776 F. Supp. 135, 141 (S.D.N.Y. 1991), held that in the absence of knowledge of the defamatory content of a third-party's statement on the service "CompuServe," the defendant CompuServe could not be held liable for that content. In contrast, the decision that most immediately precipitated the enactment of § 230 was *Stratton Oakmont, Inc. v. Prodigy Services Co.*, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995) (unpublished). In *Stratton Oakmont*, a New York court ruled that an Internet service provider became a "publisher" of offensive content on its message boards because it deleted some offensive posts but not others. *Id.* at *4. "Under *Stratton Oakmont*'s reasoning, a website had to choose between voluntarily removing some offensive third party content, which would expose the site to liability for the content it did not remove, or filtering nothing, which would prevent liability for all third party content." *Doe v. Internet Brands, Inc.*, 824 F.3d at 851. "In passing section 230, Congress sought to spare interactive computer services this grim choice by allowing them to perform some editing on user-generated content without thereby becoming liable for all defamatory or otherwise unlawful messages that they didn't edit or delete." *Fair Housing Council v. Roommates.Com, LLC*, 521 F.3d 1157, 1163 (9th Cir. 2008) (en banc).

In *LeadClick* this Court recognized that § 230 grew out of reaction to *Cubby* and *Stratton*, stating that "[t]he amendment assuaged Congressional concern

regarding the outcome of two inconsistent judicial decisions applying traditional defamation law to internet providers." *LeadClick*, 838 F.3d at 173, *citing* Cong. Rec.

B. The Specific Legislative History of § 230

The legislative history of §230 soundly buttresses this interpretation. The key legislative committee report on the bill explained:

> This section provides 'Good Samaritan' protections from civil liability for providers or users of an interactive computer service for actions to restrict or to enable restriction of access to objectionable online material. One of the specific purposes of this section is to overrule *Stratton Oakmont v. Prodigy* and any other similar decisions which have treated such providers and users as publishers or speakers of content that is not their own because they have restricted access to objectionable material. The conferees believe that such decisions create serious obstacles to the important federal policy of empowering parents to determine the content of communications their children receive through interactive computer services.

Conference Committee Report on the Telecommunications Act of 1996, Pub.L. No. 104–104, §§ 1, 501 (Feb. 8, 1996) 110 Stat. 56, 133), H.R.Rep. No. 104-458, 2d Sess., p. 10, 194 (1996) U.S.Code Cong. & Admin.News 1996, pp. 124, 199-200. Senator Coats, one of the two main authors of the CDA, made clear while discussing § 230 that its intention was to prevent ISPs that try to keep offensive material off the Internet "from being held liable as a publisher for defamatory statements for which they would not otherwise have been liable." 141 Cong. Rec. S8345 (daily ed. June 14, 1995) (statement of Sen. Coats). *See also Batzel v. Smith*, 333 F.3d 1018, 1026–30 (9th Cir.2003) (restating Congress's concerns that "[i[f efforts to review and omit

third-party defamation, obscene or inappropriate material make a computer service provider or user liable for posted speech, then website operators and Internet service providers are likely to abandon efforts to eliminate such material from their site.").

Section 230, understood against this backdrop, was indeed nothing more nor less than the caption "Good Samaritan" implies. Internet service providers who function as "Good Samaritans," acting laudably to delete offensive material harmful to others from their websites, are not to be treated as responsible for offensive material merely because they take make such laudable efforts. Section 230 must thus be read as a modest congressional elaboration on the common law, most particularly, the common law of defamation:

> The common law of libel distinguishes between liability as a primary publisher and liability as a distributor. A primary publisher, such as an author or a publishing company, is presumed to know the content of the published material, has the ability to control the content of the publication, and therefore generally is held liable for a defamatory statement, provided that constitutional requirements imposed by the First Amendment are satisfied. (Rest.2d Torts, § 581, subd. (1), com. c, p. 232; Prosser & Keeton, Torts (5th ed.1984) § 113, p. 810; Smolla, The Law of Defamation (2d ed.1999) § 4:87, pp. 4–136.3 to 4–136.4, § 4:92, pp. 4–140 to 4–140.1.) A distributor, such as a book seller, news vendor, or library, may or may not know the content of the published matter and therefore can be held liable only if the distributor knew or had reason to know that the material was defamatory. (Rest.2d Torts, § 581, subd. (1), coms. b, c, d & e, pp. 232–234; Prosser & Keeton, Torts, supra, § 113, pp. 810–811; 2 Harper et al., The Law of Torts (2d ed. 1986) Defamation, § 5.18, pp. 144–145; Smolla, The Law of Defamation, supra, § 4:92, pp. 4–140 to 4–140.1.)

Grace v. eBay Inc., 120 Cal. App. 4th 984, 16 Cal. Rptr. 3d 192, 199, review *granted and opinion superseded*, *Grace v. eBay*, 99 P.3d 2 (Cal. 2004), *review dismissed*, *Grace v. eBay*, 101 P.3d 509 (Cal. 2004). As the court in *Grace* originally and correctly held, § 230 speaks only to "publisher or speaker" liability, but leaves untouched liability predicated on an internet service provider's status as a distributor or transmitter, with its concomitant higher standard of notice and culpability.

"Section 230(c)(1) does not state that a provider or user of an interactive computer service may not be treated as a 'distributor' or 'transmitter' of information provided by another person, but only that a provider or user may not 'be treated as the publisher or speaker.'" *Id*. at 199. *Grace* sensibly held that in light of these common law doctrines, "section 230(c)(1) does not clearly and directly address distributor liability and therefore does not preclude distributor liability." *Id.*

IV. THE EXPANSIVE *ZERAN* IMMUNITY SHOULD BE REPUDIATED

Numerous state and federal courts, led by the early decision of the United States Court of Appeals for the Fourth Circuit in *Zeran v. America Online, Inc.* 129 F.3d 327 (4th Cir.1997), have not interpreted § 230 in the constrained manner urged by Amicus Consumer Watchdog and Ms. Barakett here, but have instead treated the statute as creating a broad and virtually impenetrable bulwark immunizing internet service providers from virtually all offensive and damaging content posted by third parties. While *Zeran* has spawned many offspring, they are no more legitimate than

Zeran itself. *Zeran* wrenched § 230 from its common-law antecedents and legislative history. *Zeran* focused exclusively on one sentence of § 230, the naked statement in § 230(c)(1) that internet service providers are not to be "be treated as the publisher or speaker of any information provided by another information content provider," as if this stood alone as the *sole* load-bearing declaration giving meaning to the statute. *Zeran* improperly failed to read this language in the context of the captions and other operative provisions of § 230. That context would have harmonized the passage with the entirety of the statute, rendering it merely "definitional," thereby connecting the overall meaning of § 230 to the modest adjustment of the common-law that Congress manifestly intended.

The time has come to unequivocally reject *Zeran*. The analysis in *Zeran* proves too much, leading inexorably to results that stretch far beyond anything Congress could have remotely intended.

In *Jones v. Dirty World Entm't Recordings LLC*, 755 F.3d 398 (6th Cir. 2014), for example, the court applied the expansive approach to § 230 to immunize an Internet site from liability that brazenly specializes in soliciting salacious dirt on public figures. Is it really likely that in passing what Congress deemed its "Good Samaritan" law it set out to immunize the likes of Dirty World? In what conceivable sense is Dirty World a Good Samaritan? Dirty World operated a site that openly and brazenly invites users to post dirt on private figures—its very success is built on its

identity as a defamation machine. Richie engaged in highly selective editorial decisions as to which posts are to be included, and then adds his own commentary, often piling on by repeating or re-emphasizing the defamation. Surely this was not what Congress sought to immunize. When an anonymous poster submits a post flatly accusing a school teacher and NFL cheerleader of having sex with NFL players to a site that openly invites and encourages such dirt, and the site operator adds his own touch about teachers being freaks in bed, it is no stretch of ordinary principles of law to treat the operator and the poster as jointly contributing to the defamation. Congress surely never intended to rule § 230 immunize such joint activity. *See* Rodney Smolla, *Law of Defamation* (2nd ed.) § 4:86.

Similarly, in *Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12 (1st Cir. 2016), *cert. denied*, 137 S. Ct. 622 (2017), the court held that § 230 immunized Backpage.com. from liability for hosting a site promoting prostitution and escort services. The action was brought by three young women, all minors, who claimed to have been victims of sex trafficking. The women alleged that Backpage, "with an eye to maximizing its profits, engaged in a course of conduct designed to facilitate sex traffickers' efforts to advertise their victims on the website," leading to their victimization. *Id.* at 17. This is what *Zeran* has wrought, a regime of virtually absolute immunity for Internet Service Providers leading to perverse outcomes in which the very evils Congress sought to prevent now flourish.

V. THE EXCEPTIONS TO § 230 APPLICABLE WHEN A DEFENDANT INDEPENDENTLY CONTRIBUTES TO THE TORTIOUS CONDUCT OR AS A DISTRIBUTOR IS MADE AWARE OF THE ABUSES IT IS AIDING AND ABETTING, SHOULD BE LIBERALLY CONSTRUED AND APPLIED IN THIS CASE

This Court has the opportunity in this case to roll back this tide and return § 230 to its original moorings. This result may be accomplished most simply by applying the principal exceptions to § 230 that have already been developed in the caselaw in a manner that is generous to plaintiffs.

When the purported Internet Service Provider contributes to the tortious activity through its own actions, § 230 provides no shelter. Concomitantly, when the purported Internet Service Provider is made aware of the tortious or criminal conduct it is aiding and abetting, yet takes no action, § 230 provides no shelter.

The more broadly these exceptions are applied, the narrower the § 230 immunity. This case provides the perfect vehicle for adopting a broad interpretation of the exceptions, thereby narrowing the scope of § 230 immunity. If ever there were a Defendant that may plausibly be deemed to have independently contributed to the tortious activity that caused a plaintiff damage, or blithely looked the other way when confronted with evidence of its complicity, it is Grindr.

Significantly, this Court has *already* recognized the first exception to § 230 immunity. The Court applied the exception in *LeadClick*. *LeadClick*, 838 F.3d at 177-78. ("Accordingly, because LeadClick's Section 5 liability is not derived from

its status as a publisher or speaker, imposing liability under Section 5 does not "'inherently require the court to treat the [LeadClick] as the 'publisher or speaker'" of its affiliates' deceptive content, and Section 230 immunity should not apply.") *See also Doe v. Internet Brands, Inc.*, 824 F.3d at 852-53 ("A post or email warning that Internet Brands generated would involve only content that Internet Brands itself produced. Therefore, an alleged tort based on a duty that would require such a self-produced warning falls outside of section 230(c)(1)."); *Airbnb, Inc. v. City & Cty. of San Francisco*, 217 F. Supp. 3d 1066, 1072 (N.D. Cal. 2016) ("The Ordinance holds plaintiffs liable only for their own conduct, namely for providing, and collecting a fee for, Booking Services in connection with an unregistered unit. . . This regulation of plaintiffs' own conduct 'does not depend on who "publishes" any information or who is a "speaker."'") *quoting City of Chicago, Ill. v. StubHub!, Inc.*, 624 F.3d at 366 (rejecting Section 230(c) challenge to municipal tax on Internet auction sites). *Sherman v. Yahoo! Inc.*, 997 F. Supp. 2d 1129, 1138 (S.D. Cal. 2014) ("Accordingly, the Court concludes that the 'good samaritan' immunity is inapplicable where Yahoo! did not engage in any form of content analysis of the subject text to identify material that was offensive or harmful prior to the automatic sending of a notification message.").

The allegations of Mr. Herrick's Amended Complaint easily lend themselves to application of these exceptions. Herrick has properly alleged that Grindr was

notified more than 50 times between November 2016 and January 2017 of the abusive behavior Herrick was being cruelly subjected to, and that in addition was notified over 50 times between January 2017 and March 2017 of the impersonating profiles that were directly causing Herrick damage. Amended Complaint, ¶¶ 68, 69.

Grindr's brazen refusal to take action in the face of this notice is utterly unconscionable. In conjunction with the design and purpose of Grindr's platform, Grindr's conduct is enough to render it complicit in any common-sense understanding of that term, aiding and abetting tortious and criminal conduct. *See Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 930 (2005) (finding the music file-sharing service Grokster liable for contributory copyright infringement, stating, that "[o]ne infringes contributorily by intentionally inducing or encouraging direct infringement, … and infringes vicariously by profiting from direct infringement while declining to exercise a right to stop or limit it. . . Although '[t]he Copyright Act does not expressly render anyone liable for infringement committed by another,' these doctrines of secondary liability emerged from common law principles and are well established in the law.").

Grindr was not behaving as a Good Samaritan. Grindr was behaving as a bad actor, encouraging the very sort of abuse Congress sought to deter when it passed the Communications Decency Act.

In *LeadClick*, this Court recognized that congressional purpose, observing that "[w]hen it was introduced, the primary purpose of the CDA was to protect children from sexually explicit internet content." *LeadClick*, 838 F.3d at 173. This Court in *LeadClick* also recognized that in grafting § 230 on to the Communications Decency Act, Congress sought to reconcile the two antecedent conflicting judicial decisions previously discussed in this Brief, *Cubby v. CompuServe* and *Stratton Oakmont v. Prodigy*, choosing to adopt *Cubby* and reject *Stratton*. "The amendment was intended to overrule *Stratton* and provide immunity for 'interactive computer service[s]' that make 'good faith' efforts to block and screen offensive content." *LeadClick*, 838 F.3d at 173, *quoting* 47 U.S.C. § 230(c).

Fair enough, and good enough. But this was *all* that § 230 was ever intended to accomplish. The true Good Samaritan was not to be penalized for trying. To construe § 230 to immunize Grindr, which did *nothing* to act as a Good Samaritan, but rather actively aided and abetted stalking and sexual abuse, is to allow the statute's exception to defeat the statute's overriding purpose. "Surely, this is to burn the house to roast the pig." *Butler v. State of Michigan*, 352 U.S. 380, 383 (1957). It could not have been what Congress intended.

VI. BROAD IMMUNITY IS NOT CONSISTENT WITH THE PUBLIC POLICIES ENDORSED BY CONGRESS

It was never the intent of Congress to make the law of the land the law of the jungle. "[T]he Communications Decency Act was not meant to create a lawless no-

man's-land on the Internet." *Roommates.Com*, 521 F.3d at 1164. "Congress has not provided an all purpose get-out-of-jail-free card for businesses that publish user content on the internet, though any claims might have a marginal chilling effect on internet publishing businesses." *Doe v. Internet Brands, Inc.*, 824 F.3d at 852–53.

Zeran went overboard in interpreting § 230, on the fear that the Internet was some sort of fragile new baby of precarious health in need of extraordinary paternalistic support from government to keep it alive. That fear, exaggerated even in its time, has long since proven unfounded. The Internet in general, and social media platforms in particular, have assumed dominating influence and power in society. What is needed *today* is a sensible construction of § 230 that does not empower Internet platforms carte blanche to operate in derogation of other societal entities, who are bound by the rule of law, or competing societal values, such as protection of individual privacy, reputation, and dignity. As the Ninth Circuit observed:

> The Internet is no longer a fragile new means of communication that could easily be smothered in the cradle by overzealous enforcement of laws and regulations applicable to brick-and-mortar businesses. Rather, it has become a dominant—perhaps the preeminent—means through which commerce is conducted. And its vast reach into the lives of millions is exactly why we must be careful not to exceed the scope of the immunity provided by Congress and thus give online businesses an unfair advantage over their real-world counterparts, which must comply with laws of general applicability.

Roommates.Com, 521 F.3d at 1189, n. 15.

The court in *Grace* got it right in declaring its disagreement "with the *Zeran* court's conclusion that for providers and users of interactive computer services to be subject to distributor liability would defeat the purposes of the statute and therefore could not be what Congress intended." *Grace*, 16 Cal. Rptr. at 201. In fact, *Zeran* calibrated the incentives all backwards, when weighed against what Congress clearly sought to accomplish. "The broad immunity provided under *Zeran* . . . would eliminate potential liability for providers and users even if they made no effort to control objectionable content, and therefore would neither promote the development of technologies to accomplish that task nor remove disincentives to that development as Congress intended." *Id.* *Zeran* instead operates to "eliminate a potential incentive to the development of those technologies, that incentive being the threat of distributor liability." *Id., citing* Note, *Immunizing Internet Service Providers from Third–Party Internet Defamation Claims: How Far Should Courts Go?*, 55 Vand. L.Rev. 647, 683–685 (2002); Freiwald, *Comparative Institutional Analysis in Cyberspace: the Case of Intermediary Liability for Defamation* 14 Harv. J.L. & Tech. 569, 616–623 (2001).

This Court now has the opportunity to also get it right. The conduct of Grindr here was surely not the conduct Congress sought to protect in its statutory scheme. This Court should make that clear and reject Grindr's defense.

CONCLUSION

Zeran and its progeny have created a monster. For the Second Circuit to reject the § 230 defense on the egregious facts of this case will begin to tame that monster. If this Circuit's rejection of the unfounded and virtually impregnable immunity that *Zeran* has spawned creates a split with sister Circuits, so be it. The actual intent of Congress is what must ultimately control. Nothing in the law of this Circuit prevents this Court from interpreting § 230 in a manner faithful to that intent. It is the right thing to do.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief contains 6,409 words, as indicated by Microsoft Word, in accordance with Federal Rules of Appellate Procedure 32(a)(7)(B)(i).

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CERTIFICATE OF SERVICE

I, Rodney A. Smolla, hereby certify that on May 31, 2018,

I electronically filed the foregoing **CONSUMER WATCHDOG'S MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF APPELLANT HERRICK** with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system.

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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