No. _____

In The
Supreme Court of the United States

MARY KAY BECKMAN,

Petitioner,

vs.

MATCH.COM, LLC,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Section 230 of the Communications Decency Act (CDA), 47 U.S.C. § 230, established immunity from liability for providers and users of an interactive computer service who publish information provided by others. An immunity clause in the Act states that 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. Since the CDA's inception in 1996, internet companies have continually shielded themselves from liability, not for the published material or as speaker of the content, but for situations where their own actions or omissions contributed to the harm caused.

The questions presented are:

> Does Section 230 of the CDA immunize website operators for their own negligent or tortious conduct from all civil lawsuits any time a third party has contributed to the injury caused?
>
> AND
>
> Does the inconsistent application of Section 230 of the CDA among the Circuit Courts of Appeal regarding the extent of immunity provided to website operators warrant action by the Supreme Court of the United States to clarify what conduct is protected by the statute?

LIST OF PARTIES

Petitioner Mary Kay Beckman was the plaintiff in the District Court and the appellant in the Court of Appeals.

Respondent Match.com, LLC, was the defendant in the District Court and the appellee in the Court of Appeals.

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(Second Appeal)

The opinion of the United States Court of Appeals for the Ninth Circuit (App. A, *infra*, App. 1-App. 3) was issued as a Memorandum of Opinion and was not reported. The opinion of the United States District Court, District of Nevada, granting respondent's motion to dismiss (App. B, *infra*, App. 4-App. 14) was not reported.

(First Appeal)

The opinion of the United States Court of Appeals for the Ninth Circuit (App. C, *infra*, App. 15-App. 18) was issued as a Memorandum of Opinion and was not reported. The opinion of the United States District Court, District of Nevada, granting respondent's motion to dismiss (App. D, *infra*, App. 19-App. 41) was not reported.

STATEMENT OF JURISDICTION

The Ninth Circuit's final opinion was rendered on November 21, 2018. The jurisdiction of this Court to review the Judgment of the Ninth Circuit is invoked under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Section 230 of the Communications Decency Act, 47 U.S.C. § 230.

> **(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.
>
> **(e) Effect on Other Laws**
>
> > **(3) State Law**
> >
> > Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section. 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.

STATEMENT OF THE CASE

A. United States District Court, District of Nevada, Proceedings

On January 18, 2013, Petitioner filed suit in the United States District Court, District of Nevada, alleging

state law claims of Negligent Misrepresentation, Negligent Failure To Warn, Negligence, Negligent Infliction of Emotional Distress, and Negligence Per Se. Respondent Match.com, LLC, filed their first Motion to Dismiss on March 4, 2013, claiming immunity from suit on the basis that Appellant's complaint failed to state a claim upon which relief can be granted under Federal Rule of Civil Procedure (FRCP) 12(b)(6) and that Petitioner lacked standing to pursue a claim under 15 U.S.C. § 45(a)(1). On May 29, 2013, the United States District Court, District of Nevada, granted Respondent's first Motion to Dismiss.

B. United States Court of Appeals for the Ninth Circuit Proceedings (First Appeal to the Ninth Circuit)

On June 28, 2013, a timely appeal was filed pursuant to FRAP 4(a)(1). On September 1, 2016, The United States Court of Appeals for the Ninth Circuit affirmed the District Court's dismissal of Petitioner's Negligent Misrepresentation, Negligence Per Se, and Negligent Infliction of Emotional Distress claims. The court reversed the dismissal of Petitioner's Failure To Warn claim, and directed the District Court to provide her a reasonable opportunity to amend her complaint.

C. United States District Court, District of Nevada Proceedings (After Reversal)

On October 21, 2016, Petitioner filed her Amended Complaint consistent with the Ninth Circuit's September

1, 2016 order. Respondent again filed a Motion to Dismiss Amended Complaint or, in the Alternative, for Summary Judgment on November 7, 2016, on the same previously briefed and argued issue. The District Court dismissed the case against Match.com again on March 10, 2017.

D. United States Court of Appeals for the Ninth Circuit Proceedings (Second Appeal to the Ninth Circuit)

On May 18, 2017, a second appeal to the Ninth Circuit was filed pursuant to FRAP 4(a)(1). On December 13, 2018, The United States Court of Appeals for the Ninth Circuit affirmed the dismissal of Petitioner's Failure To Warn Claim.

REASONS FOR GRANTING THE PETITION

I. Review Is Warranted Because Intermediaries Are Exploiting The Legal Protection Provided Under Section 230 Of The Communications Decency Act (CDA) By Extending It To Include Their Own Negligent Or Tortious Actions Or Omissions

The Senate and House passed the Communications Decency Act (CDA), otherwise known as Title V of the Telecommunications Act of 1996, with the purpose of regulating obscene content online. At the time, online pornography was becoming increasingly prevalent, and lawmakers wanted to adopt legislation that would make the Internet a safer place for

subordinated groups, particularly children. Section 230 of the Communications Decency Act (hereinafter "Section 230") was enacted "to promote the continued development of the Internet and other interactive computer services and other interactive media." 47 U.S.C. § 230(b)(1). The relevant provision of Section 230 is titled "Protection for 'Good Samaritan' Blocking and Screening of Offensive Material." *Id.* § 230(c). That provision established that "no provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information provider." *Id.* § 230(c)(1). Section 230 was meant to provide civil immunity for "intermediaries" that facilitated the posting of third-party content. *Id.* An intermediary is in essence a website operator, such as Match.com (hereinafter "Match"), that provides the platform for third-parties to participate in online activities that allow individuals to author and publish content. Courts have defined intermediaries as "conduits" for speech and commerce." *Zeran v. America Online, Inc.*, 129 F.3d 327, 332 (4th Cir. 1997).

Section 230 was enacted with the goal of assisting the Internet to flourish. In 1996, there were approximately 36,000,000 (thirty-six million) Internet users worldwide. *Internet Growth Statistics*, Internet World Stats (Dec. 18, 2018), https://www.internetworld stats.com/emarketing.htm. Section 230 was drafted to ensure that intermediaries could exist in a "vibrant and competitive free market" that was "unfettered by federal or state regulation." § 230(b)(2). The drafters of

Section 230 felt that the principles of tort law were not enforceable on the Internet due to the sheer amount of content that it contains. They also felt that regulation of intermediaries would prevent the intermediaries from growing and expanding, which would significantly hinder the progression of the Internet. As of June 2018, there were approximately 4,208,571,287 Internet users. *Internet Growth Statistics*, *supra*. The original goal behind the policy rationale has been achieved, and there no longer exists a compelling reason to provide intermediaries blanket immunity to foster Internet growth.

Section 230 established that no intermediaries would be treated as publishers of third-party content, and thus could not be civilly liable for any harm resulting from the publishing of such third-party content. § 230(c). After the conflicting New York court decisions of *Cubby, Inc. v. Compuserve, Inc.*, 776 F. Supp. 135 (1991), and *Stratton Oakmont, Inc. v. Prodigy Services Company*, 1995 WL 323710 (N.Y. Sup. Ct. 1995), regarding the moderating of third-party content by intermediaries, Section 230 was enacted in part, to resolve the discrepancy.

In *Cubby, Inc. v. Compuserve, Inc.*, CompuServe, a general information service which provided subscribers access to websites and forums, was sued for libel after a third party posted defamatory contents on one of its forums. CompuServe did not review any third-party content before it was posted, and claimed no liability. The United States District Court for the Southern District of New York held that CompuServe

could not be held liable as a distributer of the third-party content because CompuServe did not review any third-party content before it was posted. Therefore, there was no evidence that it had knowledge or reason to know of the allegedly defamatory statements. *Cubby*, 776 F. Supp. at 141.

Conversely, in *Stratton Oakmont, Inc.*, Prodigy, a web services company that hosted online bulletin boards, was sued for libel after an unidentified bulletin board user posted defamatory content about the securities investment banking firm Stratton Oakmont, Inc. The New York Supreme Court, Nassau County, held that because Prodigy sometimes deleted offensive postings on its boards, it had in essence become a publisher, and was liable for defamatory postings that were published on the site.

The *Stratton Oakmont* decision influenced Congress into taking action. Legislators feared that prospective liability for website operators would have a chilling effect, and lead to severe restrictions regarding online content. In retrospect, this fear of liability may have had a positive effect on how intermediaries currently manage their sites. Instead of imposing liability on companies like Prodigy that attempted to moderate content on their sites, legislators wanted to draft legislation that would allow internet companies the freedom to develop new and unhindered services, to ensure that the Internet would develop and grow, unencumbered. As a result, Section 230 was drafted with this intention.

The Internet has woven its way into the lives of all Americans to a degree that could not have been foreseen at the time that Section 230 was signed into law. However, the immunity provided to protect Internet Service Providers that were actually taking action to edit and remove content, has now been the reason that Internet Service Providers often take no action, because under Section 230, they do not have to. Originally, Section 230 was designed to protect those who took action and removed posts that they thought were obscene or offensive. Now, it is protecting the exact opposite behavior. Section 230 is now encouraging the "take no action" approach because Internet Service Providers are protected against suit no matter what they do or don't do. In Petitioner's case of Beckman v. Match.com, Match admits this resulting consequence of Section 230, at oral argument before the Ninth Circuit Court of Appeals on October 20, 2015:

> Judge Mary Marguia: Even if they allege that you knew . . . Do you think the CDA protects you?
>
> Counsel for Match: It does your honor.
>
> Judge Mary Marguia: Tell me why.
>
> Counsel for Match: Because knowledge is irrelevant to the application of the Communications Decency Act.
>
> Judge Mary Marguia: You could have known that he was a serial killer . . . and you matched them up . . . and you think the CDA protects you?

> Counsel for Match: Yes. I understand that is an uncomfortable conclusion, but that is the logical conclusion.

(Video of Oral Arguments from October 20, 2015 – *Mary Beckman v. Match.com*, https://www.ca9.uscourts.gov/media/view_video.php?pk_vid=0000008337)

Match likely knew one of its members was using its service to find and kill women, yet they did nothing to protect their other users. Match even took the additional step of pairing the dangerous individual with another unsuspecting user of their website, free from any liability.

A. In Contrast To The Legislative Intent Behind Section 230 To Protect Intermediaries That Reasonably Moderate The Content On Their Websites, Interpretation Of The Statute Has Led To Blanket Immunity For Intermediaries That Take No Action To Moderate Content

Section 230 of the Communications Decency Act, 47 U.S.C. § 230, broadly grants immunity to intermediaries from state-law claims arising from their publication of information furnished by their users. As referenced above, the statute provides that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." § 230(c)(1). The statute further specifies that "[n]o cause of action may be brought and no liability

may be imposed under State or local law that is inconsistent with this section." § 230(e)(3). Immunity hinges on whether or not defendant is considered an "information content provider." An information content provider is "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)(3). If a defendant is not deemed an information content provider, it cannot "avail itself of the immunity set forth in Section 230(c)(1). *Small Justice LLC v. Xcentric Ventures LLC*, 873 F.3d 313, 318 (1st Cir. 2017).

While Section 230 may have been enacted to rid the Internet of unnecessary federal or state regulation, it has led to a Wild West environment where intermediaries are shielded from civil liability when their own action or inaction leads to serious bodily injury and/or death. As stated above, the aim of Section 230 was to provide immunity to intermediaries that were actually taking action to edit and/or remove third-party content. However, it is the unintended consequences of "inaction" which have become particularly problematic. Instead of encouraging intermediaries to police content on their own websites by eliminating state and federal regulation, the statute has had the opposite effect. Now, intermediaries routinely take no action in regard to illicit or harmful third-party content, as they know Section 230 will protect them from the prospect of any civil liability relating to such content. As a result, Internet users are routinely victims of crime in instances which are entirely avoidable, if only

intermediaries would act in situations where the harm is clear, obvious, and undeniable. Yet, most intermediaries do nothing. Accordingly, victims of online crimes are being unjustly prevented from civilly recovering from the responsible intermediaries. Users can report incidents to intermediaries and request that content or profiles be taken down, but Section 230 insulates intermediaries from having to monitor third-party content, and therefore, as is the case with Match, they take no action. In 2013, when the underlying lawsuit was first filed, Match's response to complaints regarding the criminal activities of other users was not to remove or delete the profile, but to state that without a court order, Match would simply not remove the profile. Intermediaries have repeatedly, consistently, and successfully defended themselves in lawsuits based on their own conduct or inaction by hiding under the blanket of immunity provided by Section 230.

B. Intermediaries Have Been Able To Use The Blanket Immunity Provided By Section 230 To Protect Themselves Against Lawsuits Stemming From Their Own Conduct Or Inaction

Does Section 230 of the CDA immunize website operators from all civil lawsuits based on their own negligent or tortious conduct any time a third party has contributed to the injury caused? In numerous instances following Section 230's introduction into law, intermediaries have been able to use Section 230's immunity to wrongly dismiss cases against them that

were directly premised on their own negligent or tortious acts.

An excellent example of this is the underlying case for the instant Petition. Mary Kay Beckman (hereinafter "Ms. Beckman") is a woman who decided to join Match.com, with the intention of finding a suitable partner. Ms. Beckman had been lured by what she alleged was false advertising by Match that gave her a sense of security like "more relationships and more marriages than any other site," and the generally misleading corporate statement of Eva Ross, a spokeswoman for Match.com, that "The many millions of people who have found love on Match.com and other online dating sites know how fulfilling it is . . . [Match.com is] an entire community of men and women looking to meet each other."

After following Match's instructions and completing the required questionnaire, Ms. Beckman created her profile. Match, utilizing its proprietary algorithm, then sent Ms. Beckman the profile of a man, Wade Ridley (hereinafter "Ridley"), whose profile they had failed to remove from their site after receiving multiple complaints about his dangerous and violent propensities. Ms. Beckman felt safer paying her membership fee and delving into the "entire community of men and women looking to meet each other," believing Ridley was on Match for the same reason Match advertised that all individuals were.

Not only did Match fail to remove the profile of the dangerous individual, but it also took the extra step of

sending Ms. Beckman an e-mail which contained her "Matches of the Day," including Ridley, and further advised her to send a "wink" to the matches from the e-mail and begin a conversation. Ms. Beckman took Match's advice and sent Ridley a "wink." On or about September 26, 2010, Ms. Beckman had her first date with Ridley in Las Vegas, Nevada, but she was unaware that Match had received complaints and warnings about her "match." On January 21, 2011, at approximately 10:00 p.m., as Ms. Beckman arrived at her residence, she was ambushed by Ridley, who was hiding inside of her garage. Ridley brutally stabbed Ms. Beckman ten (10) times about her head, face, and upper body, until the blade broke and he continued to strike her with the handle of the knife. He then repeatedly stomped on her throat until she stopped breathing, and left her for dead. Except, Ms. Beckman did not die. She was transported to University Medical Center (UMC) in Las Vegas, NV, and immediately underwent surgery for brain trauma. She also underwent two additional surgeries at UMC to remove parts of her skull and replace them with synthetic components.

Beckman's "match," Ridley, was eventually picked up by the police and confessed to the attempted murder of Ms. Beckman. Ridley also confessed to the actual murder of another woman in Arizona whom he had also met on Match, committed prior to the attempted murder of Ms. Beckman.

Ms. Beckman brought suit against Match in United States District Court, District of Nevada, for Match's own conduct, not the conduct of a third party.

Ms. Beckman sought to hold Match liable for their own extreme and outrageous conduct, which included materially misrepresenting the safety of online dating, failing to warn Ms. Beckman about Ridley's dangerous propensities, and ultimately recommending that she "wink" to a dangerous sociopath who tried to murder her. Respondent filed a Motion to Dismiss on March 4, 2013. On April 9, 2013, Respondent filed a Motion to Stay Discovery Pending Resolution of Motion to Dismiss, to prevent Ms. Beckman from conducting discovery.

Ms. Beckman's claims for Negligent Misrepresentation, Negligence (Failure To Warn), Negligent Infliction of Emotional Distress (NIED), and Negligence were all dismissed by the District Court because "Match.com is immune from such claims under the CDA." *See* Appendix D, United States District Court, District of Nevada, Order (May 29, 2013). This ruling was inconsistent with Section 230, which provides civil immunity to intermediaries for third-party conduct, whereas stated above, *all* of Ms. Beckman's causes of action were first-party claims against Match based on Match's own conduct.

The case was appealed to the Ninth Circuit, and once again the causes of action for Negligence and Negligent Misrepresentation were dismissed because the Court deemed Match to be immune from liability under Section 230. The claim for Negligent Infliction of Emotional Distress was dismissed because the Ninth Circuit erroneously held that in Nevada, "only a 'bystander' may bring a claim for negligent infliction of

emotional distress." (App. C, *infra*, App. 16). The Supreme Court of Nevada has held that "If a bystander can recover for the negligent infliction of emotional distress, it is only logical that the direct victim be permitted the same recovery." *Shoen v. Amerco, Inc.*, 896 P.2d 469, 477 (Nev. 1995). However, even if the Ninth Circuit did not affirm the dismissal on the erroneous basis, they seemed poised to dismiss the claim as barred by the CDA, consistent with the District Court's original decision.

Dismissal of Ms. Beckman's claim for Negligence (Failure To Warn) was reversed by the Ninth Circuit which held that "at the pleading stage, the CDA did not preclude a plaintiff from alleging a state law Failure To Warn claim against a website owner who had obtained information 'from an outside source about how third parties targeted and lured victims' through that website platform." (App. C, *infra*, App. 17). The case was remanded to the District Court so that Ms. Beckman could amend her Complaint to allege that Match had knowledge of Ridley's dangerous propensities prior to her being attacked on January 21, 2011. Match again immediately filed a Motion to Stay Discovery Pending Resolution of Motion to Dismiss Amended Complaint, prohibiting Beckman from conducting discovery. The District Court dismissed the Failure To Warn cause of action for the second time, and Ms. Beckman again appealed to the Ninth Circuit. The second time the Ninth Circuit dismissed the claim on the grounds that a special relationship did not exist between Ms. Beckman and Match, giving rise to a duty to warn.

As shocking as the actual crime committed is the fact that Match claims to have no liability to Ms. Beckman, regardless of whether or not they had actual knowledge of Ridley's dangerousness prior to him attacking Ms. Beckman. During oral arguments in front of the Ninth Circuit on October 20, 2015, counsel for Match stated frankly that even if Match did receive complaints of acts of violence from other users, and had actual knowledge of the violent propensities of Ridley, Match still would not have done anything with that information, because it did not have to under Section 230. (Video of Oral Arguments from October 20, 2015 – *Mary Beckman v. Match.com,*https://www.ca9.uscourts.gov/media/view_video.php?pk_vid=0000008337 (last visited Feb. 10, 2019)). This admission regarding the actual practice of Match, which results from the immunity provided by Section 230, is a legitimate basis for this Honorable Court to alter and limit the immunity. As Section 230 is broadly applied now, Match could have (1) acquired firsthand knowledge that one of its members was a serial killer using the website to identify and target other users, (2) failed to remove the profile or notify other users of the potential danger, (3) recommended that violent person to another member of its site, (4) sat idly by as one of its members took Match's advice and initiated contact with that violent member, (5) allowed the unsuspecting member to be viciously attacked, and Match would *still* have no civil liability to the victim of the violent attack under Section 230. Intermediaries have no incentive to take even minimal precautions in preventing harm to individuals using

their website platforms, and people are being victimized as a result.

In the twenty-three years that Section 230 has been in effect, it has come to shield intermediaries from civil liability for conduct that was not foreseeable in 1996. Even though the current extent of the immunity provided is far reaching, Section 230 was originally and commonly used as a defense against claims of defamation. In *Carafano v. Metrosplash.com*, 339 F.3d 1119 (9th Cir. 2003), an actress brought suit against Matchmaker.com after another individual created a fake account on Metrosplash.com in her name. The individual posted content which contained the home address and phone number of the actress, and indicated that she was seeking sexual contact. Ms. Carafano argued that Matchmaker should be deemed an information content provider because it required a detailed questionnaire to be completed before users could post a profile. The Ninth Circuit concluded that Ms. Carafano's claims were barred by the CDA, and that "even assuming Matchmaker could be considered an information content provider, the statute precludes treatment as a publisher or speaker for *any* information provided by *another* information content provider." *Id.* at 1125.

Aside from defamation, Section 230 provides immunity to intermediaries for nearly all types of tortious conduct. The immunity has unnecessarily made the Internet a much more dangerous place for individuals. There are numerous instances in which intermediaries have avoided culpability for their own otherwise

manageable failure to take simple precautions to verify age. In *Doe v. Sexsearch.com*, 502 F. Supp. 2d 719 (N.D. Ohio 2007), plaintiff met an underage female on Sexsearch.com and had sexual intercourse with her. The girl's profile stated that she was at least eighteen (18) years old. Plaintiff brought suit against Sexsearch.com after he was arrested for unlawful sexual contact with a minor, claiming that but for the website he would not have had sex with the underage female. The Court held that the claims against Sexsearch.com were barred by the CDA because the claims were based on the publication of third-party content. *Id.* at 727.

Similarly in *Doe v. MySpace, Inc.*, 528 F.3d 413 (5th Cir. 2008), an underage female represented on a MySpace profile that she was eighteen (18) years old and was sexually assaulted by a person she met as a result of that online profile. The underage female and her mother brought suit against MySpace for failing to implement proper safety measures to protect minors from child predators. *Id.* at 416. The Fifth Circuit held that the CDA barred the claims against MySpace. *Id.* at 418.

These lawsuits may have been based on the conduct of third parties, but they all share the common theme that the harm caused by the third parties could have prevented with very minimal effort from the defendant intermediaries. There is no "chilling effect" to require age verifications for minor or adult users. In the instant case involving Match, because intermediaries have no fear of civil liability, they do nothing to take precautions to prevent harm to their users. Certainly,

the blanket immunity provided to intermediaries by Section 230 for all lawsuits, even if based remotely on third-party conduct, thoroughly disincentivizes intermediaries from taking any action whatsoever to prevent unlawful activity occurring on their websites.

In *Metrosplash*, 339 F.3d 1119, the website operator could have prevented the creation of the fake account in question by requiring more than a simple questionnaire to be completed. They could have required an identity verification or implemented a screening process that would have identified the fake account, removed it, and notified the victim. Metrosplash didn't take these additional safety precautions because they did not have to, under Section 230. The courts are bound by the overreaching nature of Section 230. They are being prevented from deciding cases on their merits to determine if there was actual tortious conduct on behalf of an intermediary defendant, failure to take safety precautions, or the failure to act, because these cases are being dismissed at the pleading stage.

In *Sexsearch.com*, 502 F. Supp. 2d 719, and *MySpace, Inc.*, 528 F.3d 413, the website providers failed to implement security measures that could have prevented underage females from posting profiles suggesting they were 18 years old. In this instance, even if Sexsearch knew the girls were underage, they could still allow the content to stay on its website under Section 230. Just as in *Metrosplash*, the website providers could have implemented a secure process for creating and posting profiles. They also could have implemented screening procedures, possibly through an

algorithm or by employing individuals specifically to monitor content, that could have identified and deleted these profiles before any harm was caused. Self-policing is not working, as intermediaries are not taking action because they don't have to. However, courts and plaintiffs are not able to analyze and consider the conduct or the failure to act of the intermediary because Section 230 deems the website operators immune before discovery is conducted and any of these issues could even be considered.

II. The Different Circuit Court Interpretations Of Section 230 Have Prevented The Circuit Courts From Coming To A Consensus Regarding The Scope Of Section 230 Protection

Does the split among the circuits regarding the extent of immunity provided to website operators provided in Section 230 of the CDA warrant action by the Supreme Court of the United States to clarify what conduct is protected by the statute? In the twenty-plus years that Section 230 has been law, Circuit Courts have struggled to establish a uniform set of standards for which to interpret it.

Disharmony exists among the Circuit Courts, particularly between the First and Ninth Circuits, regarding what conduct leads to civil liability for intermediaries. While the Sixth, Seventh, and Tenth Circuits have aligned themselves with the Ninth Circuit Court's rationale regarding Section 230 immunity,

holdings in the Third and Fourth Circuits have mirrored that of the First Circuit Court.

The Ninth Circuit Court decisions have demonstrated that the civil immunity provided under Section 230 is not without limitation. There have been instances where intermediaries were considered potentially liable for their own conduct relating to the posting of third-party content. The Ninth Circuit has shown the most narrow interpretation of the immunity provided by Section 230.

Courts have interpreted Section 230 to provide immunity to intermediaries as long as they have not "contributed materially" to third-party content. *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157 (9th Cir. 2008) (en banc). In *Roommates.com*, the Ninth Circuit declined to dismiss the case against Roommate.com regarding a specific design element on its website. To search for or list available housing on the site, users were required to answer a set of questions which compelled them to disclose their sex, sexual orientation, and whether or not they plan to live with children. If a subscriber was listing available housing, that subscriber was required to disclose whether there were currently any "Straight Male(s)," "Gay Male(s)," "Straight Female(s)," or "Lesbians" living in the dwelling. Subscribers that were seeking housing were required to disclose, through another drop-down menu, which one of these four categories of people they would be willing to live with. *Id.* at 1165. Users were also required to describe, with

respect to those three categories, what they were looking for in a roommate.

The Ninth Circuit found that the drop down menu constituted Roommate's "own acts," which were "entirely its doing." *Id.* at 1165. By requiring users to answer the questions on the menu, Roommate induced third parties to express illegal preferences. Thus, Roommate was not entitled to immunity because it acted as more than just a passive intermediary, which is akin to what we have here in the instant case against Match. Match collects personal information from users through a questionnaire, and then "curates" that personal information through an algorithm. Match additionally e-mails its members a list of recommended "matches," and suggests that a "wink" be sent to these "matches" to start communication. The court in *Roommates.com, LLC*, reasoned that "a website operator can be both a service provider and a content provider. If it passively displays content that is created entirely by third parties, then it is only a service provider with respect to that content. As to content that it creates itself, or is 'responsible, in whole or in part' for the creating or developing, the website is also a content provider." *Id.* at 1162. The court further explained that the type of conduct that would make an intermediary responsible for third-party content was conduct that makes it "more than a passive transmitter of information provided by others." *Id.* at 1166. Match is more than a passive transmitter of information because it curates information through an algorithm that gives

recommendations to users regarding other "suitable" users to reach out to and "wink" at.

What the Ninth Circuit holding in *Roommates.com, LLC*, meant was that intermediaries could be held liable for their own actions. The Ninth Circuit continued the narrower interpretation of Section 230 immunity a year later in *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096 (9th Cir. 2009). In *Barnes*, Yahoo promised the plaintiff that it would remove certain third-party content from its website and then neglected to do so. The court held that Yahoo could not use Section 230 to defend against a claim for promissory estoppel because the claim sought to hold Yahoo liable for its own conduct, and not "as a publisher or speaker of third-party content." *Id.* at 1107. Though the plaintiff would not have been injured "but for" the acts of the third party, the claim was not barred by Section 230 because it was based on Yahoo's own acts of promising to take down third-party content and then failing to do so.

The Ninth Circuit's most recent decision denying Section 230 immunity was in *Doe No. 24 v. Internet Brands, Inc.*, 824 F.3d 846 (9th Cir. 2016). In that case, the plaintiff alleged that the defendant intermediary had knowledge that two of its users were using its website to target rape victims. The Ninth Circuit held that at the pleading stage, Section 230 does not preclude a plaintiff from alleging a state law Failure To Warn claim against a website owner who had obtained information from an outside source about how third parties targeted and lured victims through that website platform. *Internet Brands*, 824 F.3d at 851. The

court went on to explain that liability for the intermediary was warranted because "the CDA does not provide a general immunity against all claims derived from third-party content." *Id.* at 853.

Although these cases are reflective of the Ninth Circuit's willingness to narrow the scope of immunity provided by Section 230, they have not been consistent in their application of this rationale. The conduct of Match was also a "but for" cause of Ms. Beckman's injuries. However, the court still dismissed Ms. Beckman's claims for Negligent Misrepresentation, Negligence, and Negligent Infliction of Emotional Distress. The Ninth Circuit ultimately dismissed Ms. Beckman's Negligent Failure To Warn claim because it found that a "special relationship" did not exist between Ms. Beckman and Match that would give rise to a duty to warn her of known and foreseeable dangers. (App. A, *infra*, App. 1-App. 3). None of the tortious acts alleged in these causes of actions would have occurred if it were not for Match's own affirmative, actual conduct. Action by this court is warranted to ensure that lower courts will have a clear framework to apply which will prevent these inconsistencies from depriving deserving plaintiffs from civil recovery.

Other circuits have echoed the Ninth Circuits's narrowing of Section 230's immunity. The Tenth Circuit found civil liability for a website operator after deeming it to not be a "neutral" intermediary. *FTC v. Accusearch, Inc.*, 570 F.3d 1187 (10th Cir. 2009). The Sixth Circuit held in a case challenging the immunity

of Section 230 that, "We do not adopt the district court's discussion of the Act, which would read § 230 more broadly than any previous Court of Appeals decision has read it, potentially abrogating all state or common-law causes of action brought against interactive Internet services." *Doe v. Sexsearch.com*, 551 F.3d 412, 415 (6th Cir. 2008). The Seventh Circuit ruled that Section 230 "as a whole cannot be understood as a general prohibition of civil liability for web-site operators and other online content hosts." *Chicago Lawyers' Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666, 669 (7th Cir. 2008).

The rationale behind the holdings of the Ninth, Sixth, Seventh, and Tenth Circuit Courts is that Section 230 should not provide immunity to intermediaries for their own negligent or tortious conduct, regardless of whether or not a third party bears partial liability for the harm caused. Intermediaries should be held accountable when their actions cause harm to plaintiffs. Businesses outside the realm of the Internet are held to such a standard, and no unfair advantage should be granted to any business solely because its services are provided online.

However, in stark contrast to the aforementioned holdings, the First Circuit has held that intermediaries can be provided immunity under Section 230 for their own negligent acts. *Universal Communications Systems v. Lycos, Inc.*, 478 F.3d 413 (1st Cir. 2007). They have applied the rationale that "but for" the conduct of third parties, there would be no harm to the plaintiffs.

Doe v. Backpage.com, LLC, 817 F.3d 12, 20 (1st Cir. 2016).

In *Lycos*, an intermediary had actual knowledge of defamatory postings on its website and neglected to take them down. *Lycos*, 478 F.3d at 419. The First Circuit's ruling denying liability to the intermediary was based on the principle that the third party was the ultimate publisher of the content. "But for" the third party's actions, the plaintiff would not have suffered harm. The court opined, "It is, by now, well established that notice of the unlawful nature of the information provided is not enough to make it the service provider's own speech. *Zeran*, 129 F.3d at 332-33; *Barrett v. Rosenthal*, 40 Cal. 4th 33, 51 Cal. Rptr. 3d 55, 146 P.3d 510, 514, 525 (2006). We confirm that view and join other courts that have held that Section 230 immunity applies even after notice of the potentially unlawful nature of the third-party content." *Lycos*, 478 F.3d at 420.

Much like *Lycos*, decisions from the Third and Fourth Circuit Courts have also held that Section 230 immunizes intermediaries from liability for their own negligent conduct. The Fourth Circuit ruled in *Zeran* that negligence claims against America Online (AOL) based on its own failure to promptly remove defamatory content, after it was made aware of such content, were barred by Section 230. *Zeran*, 129 F.3d at 328. Similar to *Zeran*, the Third Circuit upheld Section 230 immunity for AOL in a negligence case based on AOL's failure to act after receiving knowledge of harmful, illicit content. *Green v. America Online (AOL)*, 318 F.3d

465 (3d Cir. 2003). The holdings in these cases was premised on the notion that, despite any negligent action on behalf of intermediaries, the third parties posting the content were ultimately responsible for the harm caused.

However, Section 230 was drafted to protect intermediaries that actually took action, not those who fail to act, especially in the face of imminent danger to its own users. The First, Third, and Fourth Circuits' inconsistent and unjust application of Section 230 does away with all potential civil liability for intermediaries regarding their own conduct, as long as third-party content is somehow causally tied to a plaintiff's injury. Even the Ninth Circuit's narrowed interpretation of Section 230 immunity has not been consistently applied, as demonstrated when the court dismissed Ms. Beckman's causes of action related to Match's own conduct. *Lycos* (First Circuit) and *Internet Brands* (Ninth Circuit) are reflective of a serious disconnect between the Circuit Courts concerning what conduct is unlawful for intermediaries to engage in with respect to third-party users of their websites. The Internet's exponential rate of growth since Section 230's inception is evidence that the problems created by this ambiguity will only continue to increase.

We respectfully request that this Honorable Court render a decision that solidifies the notion that intermediaries are not immune from liability for their own conduct simply because third-party content is involved. Without judicial intervention and clarification, the Circuit Courts will continue to apply Section 230

differently, causing disparate treatment of litigants. The current split between the decisions of the Sixth, Seventh, Ninth, and Tenth Circuit Courts versus the decisions of the First, Third, and Fourth Circuit Courts requires the intervention of the Supreme Court of the United States to establish a bright line rule for intermediary liability. We request that this Honorable Court limit the scope of the immunity afforded to intermediaries through Section 230 to its original purpose of protecting against defamation claims and insulating "Good Samaritan" intermediaries that take action 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." § 230(c)(2)(A).

CONCLUSION

For all the foregoing reasons, Petitioner respectfully requests that the Supreme Court grant review of this matter.

Respectfully submitted,

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