NO. _____

In the Supreme Court of the United States

THE ESTATE OF CARSON BRIDE,
BY AND THROUGH HIS APPOINTED ADMINISTRATOR
KRISTIN BRIDE, ET AL.,

Petitioners,

v.

YOLO TECHNOLOGIES, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 230 of the Communications Decency Act states that no service provider "shall be treated as the publisher or speaker of any information provided by another information content provider," or, more colloquially, by a third-party user of the service. *Id.* §230(c)(1). The second part protects actions taken by a service provider to moderate and restrict material it "considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable." *Id.* §230(c)(2). Section 230 expressly preempts any state laws with which it may conflict. *Id.* §230(e)(3).

The Question Presented Is:

Whether Section 230(c)(1) of the CDA immunizes an online anonymous messaging app from products liability claims, where the app was alleged to be dangerously designed because it facilitated one-sided anonymous messaging and its stated safety feature of revealing and banning harassers did not work?

PARTIES TO THE PROCEEDINGS

Petitioners and Plaintiffs-Appellants below

- The Estate of Carson Bride, by and through his appointed administrator Kristin Bride
- A.K.,
  by and through her legal guardian Jane Doe 1
- A.C.,
  by and through her legal guardian Jane Doe 2
- A.O.,
  by and through her legal guardian Jane Doe 3
- Tyler Clementi Foundation, on behalf of themselves and all others similarly situated,

Respondent and Defendant-Appellee below

- Yolo Technologies Inc.

LIST OF PROCEEDINGS

U.S. Court of Appeals, Ninth Circuit

No. 23-55134

Bride et al, Plaintiffs-Appellants *v.*
Yolo Technologies et al., Defendant-Appellee

Opinion: August 22, 2024

Rehearing Denial: September 6, 2024

U.S. District Court, Central District of California

No. 21-cv-6680

Bride et al, Plaintiffs *v.*
Yolo Technologies et al., Defendant

Opinion: January 10, 2023

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PETITION FOR A WRIT OF CERTIORARI

Petitioner the Estate of Carson Bride respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The published opinion of the United States Court of Appeals for the Ninth Circuit (App.1a) is available at *Est. of Bride by & through Bride v. Yolo Techs., Inc.*, 112 F.4th 1168 (9th Cir. 2024). The District Court's memorandum opinion and order (App.24a) is unpublished but is available at *Bride v. Snap Inc.*, No. 2:21-CV-06680-FWS-MRW, 2023 WL 2016927 (C.D. Cal. Jan. 10, 2023), *aff'd in part, rev'd in part and remanded sub nom. Est. of Bride by & through Bride v. Yolo Techs., Inc.*, 112 F.4th 1168 (9th Cir. 2024).

JURISDICTION

The court of appeals entered its judgment on August 22, 2024. App.1a. The court denied a timely petition for rehearing en banc on September 6, 2024. *Id.* (App.44a). This Court has jurisdiction under 28 U.S.C. §1254(1). Justice Kagan extended the time to file until February 3, 2025. (24A500)

STATUTORY PROVISIONS INVOLVED

The appendix to this petition reproduces the relevant provisions of the Communications Decency Act, 47 U.S.C. §230 ("Section 230"). (App.46a)

INTRODUCTION

This petition presents the Court with an opportunity to review Communication Decency Act §230's scope upon products liability claims.

Section 230 of the Communication Decency Act states 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 present controversy related to the interpretation and application of the "treatment as a publisher" prong and the "third party content" prong of Section 230(c)(1) which is often disputed in litigation.

Despite the statute's narrow focus, lower courts have interpreted §230 to "confer sweeping immunity" and "extended §230 to protect companies from a broad array of traditional product-defect claims." *Malwarebytes, Inc. v. Enigma Software Group USA, LLC*, 141 S. Ct. 13, 17, 208 L. Ed. 2d 197 (2020) (statement of THOMAS, J., respecting denial of certiorari); *see also id.*, 141 S. Ct. at 17-18 (collecting examples). Section 230 has shielded platforms from suit even where they allegedly engaged in egregious, intentional acts—such

as "deliberately structur[ing]" a website "to facilitate illegal human trafficking." *Id.* at 17; *see Doe v. Facebook*, 142 S.Ct. 1087 (Mem), 1088, 212 L.Ed.2d 244 (2022) (statement of THOMAS, J., respecting denial of certiorari).

The question presented is whether Section 230 immunizes internet platforms for designing their platforms in a way that facilitates danger and harm. Does such design still fall under traditional publisher treatment prong of Section 230(c)(1)? Does such design and facilitation of content constitute first party conduct of the platforms or does it fall under the third party content prong of Section 230(c)(1)?

The Court had been previously presented similar questions regarding the reach of Section 230 in the below cases but has not yet addressed the issues.

In *Doe v. Facebook*, this Court denied certiorari due to jurisdictional constraints but anticipated that the Court would review an appropriate case. 142 S.Ct. at 1088 (statement of THOMAS, J., respecting denial of certiorari).

In *Gonzalez v. Google LLC*, (per curiam) the Court granted certiorari to consider whether and how §230 applied to claims that Google had violated the Antiterrorism Act by recommending ISIS videos to YouTube users but did not reach the scope of Section 230 because the claims would have failed on the merits. 598 U.S. 617, 621 (2023) (*citing Twitter, Inc. v. Taamneh*, 598 U. S. 471 (2023)).

In *Doe v. Snap Inc.*, 603 U.S. ___ (2024) this Court denied review over whether Snapchat's platform's own conduct and design is immunized under Section 230.

Absent a unifying standard set by this Court, the Circuits have developed inconsistent standards for interpreting Section 230(c)(1)'s publisher treatment prong and third party content prong.

1. Ninth Circuit Correctly Established a Duty Analysis Framework for Potentially Distinguishing Publisher Duty and Product Developer Duties

The Ninth Circuit, in *Fair Hous. Council of San Fernando Valley v. Roommates.com*, 521 F.3d 1157 (9th Cir. 2008), recognized that websites are not entitled to Section 230 immunity when their design choices contribute to the illegality of third-party content. In *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096 (9th Cir. 2009), the Ninth Circuit further rejected the idea that Section 230 provides blanket immunity for all conduct related to the distribution of third party content. Instead, the Ninth Circuit court recognized that Yahoo had a duty as a promisor — not a duty as a publisher — to remove specific content that was harmful to the plaintiff, and therefore, failure to remove said content was a liability that was not covered under the CDA.

Similarly, in *HomeAway.com v. City of Santa Monica*, 918 F.3d 676 (9th Cir. 2018), the Ninth Circuit held that the CDA immunity does not attach "any time a legal duty might lead a company to respond with monitoring or other publication activities . . . Holding that the CDA does not bar claims against platforms for violations of a Santa Monica ordinance that required all short-term home rental listings listed are licensed and listed on the City's registry before they can be booked online, the Ninth Circuit Court reasoned: [e]ven assuming that removing certain [violative] listings may be the Platforms' most practical

compliance option, allowing internet companies to claim CDA immunity under these circumstances would risk exempting them from most local regulations and would, as this court feared in *Roommates.com*, 521 F.3d at 1164, 'create a lawless no-man's-land on the Internet.'" *HomeAway.com*, 918 F.3d at 683.

In *Lemmon v. Snap, Inc.*, 995 F.3d 1085, 1091–94 (9th Cir. 2021), the Ninth Circuit determined that the claims based on Snapchat's speed filter did not treat the platform as a "publisher or speaker," because the claims "treat[ed] Snap as a products manufacturer, accusing it of negligently designing a product (Snapchat) with a defect."

These decisions formed the analytical basis for the Ninth Circuit's test of Section 230 (c)(1)'s application reemphasized in *Calise v. Meta Platforms*, 103 F.4th 732, 742 (9th Cir. 2024). The proper analysis requires an examination into the duty that forms the basis of the claims.

> First, we examine the right from which the duty springs. Does it stem from the platform's status as a publisher (in which case it is barred by §230)? Or does it spring from some other obligation, such as a promise or contract (which, under *Barnes*, is distinct from publication and not barred by §230)? Second, we ask what this duty requir[es] the defendant to do. If it *requires* that YOLO moderate content to fulfill its duty, then §230 immunity attaches.

Bride v. Yolo Technologies, Inc., 112 F.4th 1168, 1177 (9th Cir. 2024) (citations omitted).

2. Seventh Circuit Analyzed the Defective Product Features by Focusing on the Platforms' Own Conduct in the Third Party Content Prong

The Seventh Circuit denied Section 230 coverage to a platform selling firearms because the claims were based on a platform's duty not to encourage and assist individuals to engage in illegal gun sales. *Webber v. Armslist LLC*, 70 F.4th 945, 957 (7th Cir. 2023). The Seventh Circuit affirmed decision of the district court where it focused on the platform's "own conduct in creating the high-risk gun market and its dangerous features" including "failing to prohibit criminals from accessing or buying firearms through Armslist.com; actively encouraging, assisting, and facilitating illegal firearms transactions through their various design decisions." *Webber v. Armslist LLC*, 572 F. Supp. 3d 603, 616 (E.D. Wis. 2021), *aff'd in part, rev'd in par*t, 70 F.4th 945 (7th Cir. 2023). It concluded that this type of claim, does not seek to treat Defendants as the "publisher or speaker" of the post that led to Schmidt's killer obtaining a firearm; rather, it seeks to hold Defendants liable for their own misconduct in negligently and recklessly creating a service that facilitates the illegal sale of firearms. 47 U.S.C. §230(c)(1). *Id.*

3. Third Circuit Analyzed the Platform's Editing Functions by Focusing on the Platform's Own Conduct Under Third Party Content Prong

The Third Circuit in *Anderson v. TikTok, Inc.*, 116 F.4th 180, 184 (3d Cir. 2024) decided that a platforms' editing functions, such as making decisions on "third-party speech that will be included in or excluded from a compilation" and "organiz[ing] and present[ing] the included items," can become the platform's own conduct

and first-party speech, which fails to meet the third prong of the *Barnes* Test. *Anderson*, 116 F.4th at 183–84 (3d Cir. 2024). It reasoned:

> Given the Supreme Court's observations that platforms engage in protected first-party speech under the First Amendment when they curate compilations of others' content via their expressive algorithms, *id.* at 2409, it follows that doing so amounts to first-party speech under §230, too.

Id. at 184 (citing *Doe ex rel. Roe v. Snap, Inc.*, 144 S. Ct. 2493, 2494, 219 L.Ed.2d 1335 (2024) (THOMAS, J., dissenting from denial of certiorari)).

4. Fourth Circuit Limited the Publisher Treatment Prong to Only Include Claims That Depend on Improper Content

The Fourth Circuit in *Henderson v. Source for Pub. Data, L.P.*, 53 F.4th 110 (4th Cir. 2022) set forth an "improper content" requirement to determine whether a claim is based upon publisher liability so as to provide Section 230 coverage. "In other words, to hold someone liable as a publisher at common law was to hold them responsible for the content's improper character. We have interpreted "publisher" in §230(c)(1) in line with this common-law understanding. Thus for §230(c)(1) protection to apply, we require that liability attach to the defendant on account of some improper content within their publication." *Henderson*, 53 F.4th at 122. While recognizing that "at a high level, liability under the FCRA depends on the content of the information published" the Court reasoned that the Defendant owed a duty to provide the information which was required under the Fair Credit Reporting Act to consumers and

was required to obtain requisite certifications from, and provide a summary of FCRA rights to employers. *Id.* at 123-24.

5. Fifth Circuit rejected the "but-for" and "only-link" standards in determining the publisher treatment prong

The Fifth Circuit also attempted to define the contours of publisher duty in its decision in *A.B. v. Salesforce, Inc.*, 123 F.4th 788 (5th Cir. 2024). The plaintiffs there asserted claims against Salesforce, Inc. under 18 U.S.C. §1595 and Texas Civil Practice and Remedies Code §98.002.9 for facilitating sex trafficking. Rejecting the defendant's argument that the claims could not survive "but-for" the publishing of sex trafficking listings by Backpage and that the publication was the "only link" between Salesforce and the Plaintiff's harm, the Fifth Circuit held that plaintiffs' claims treat Salesforce as a beneficiary of sex trafficking and not as a publisher or speaker of third-party content. *Salesforce, Inc.*, 123 F.4th at 796. It added that if the claim instead sought to hold the defendant liable for "deciding whether to publish, withdraw, postpone or alter content[,]" the claim treats the defendant as a publisher or speaker and is barred by section 230. *Id.* (citation omitted).

6. Second Circuit Adopted an Overexpansive Interpretation of Publisher Treatment

The Second Circuit in *Force v. Facebook, Inc.*, 934 F.3d 53, 66–69 (2d Cir. 2019) opined that the victims of terrorist attacks allegedly coordinated and encouraged on Facebook by users were barred by Section 230. The Second Circuit Court decided that how and where to display content is a quintessential editorial decision

protected under Section 230, and therefore the claims treat defendant as a publisher. The Second Circuit likewise held that Facebook had not developed user content when its algorithms "take the information provided by Facebook users and 'match' it to other users—again, materially unaltered—based on objective factors applicable to any content." *Force*, 934 F.3d at 70.

While other Circuits have not squarely addressed the issue raised in this case, the circuits and district courts are generally scattered in its analysis of the Section 230 prongs. *See e.g.*, *Ben Ezra, Weinstein, & Co., Inc. v. Am. Online, Inc.*, 206 F.3d 980, 986 (10th Cir. 2000) ("Imposing liability on Defendant for the allegedly inaccurate stock information provided by ComStock would 'treat' Defendant as the 'publisher or speaker,' a result §230 specifically proscribes."); *Jones v. Dirty World Ent. Recordings LLC*, 755 F.3d 398, 416 (6th Cir. 2014) (adopting the Ninth Circuit's 'material contributions' test per *Roommates*, but factually distinguishing that "[u]nlike in *Roommates*, the website that Richie operated did not require users to post illegal or actionable content as a condition of use").

STATEMENT OF THE CASE

I. Legal Background

Congress enacted what became known as Section 230 of the Communications Decency Act as a response to a New York state-court decision that had held an internet service provider legally responsible for a defamatory statement posted to one of its message boards. *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, No. 31063/94, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995).

The sponsors of the bill that became Section 230 called out the ruling of *Stratton Oakmont* as "backward," arguing that Congress should be encouraging internet service providers to do everything to help consumers control what appears on their screens. Section 230 was thus enacted to protect "computer Good Samaritans," from facing liability for protecting users from harmful contents by making editorial decisions. 141 Cong. Rec. H8470 (daily ed. Aug. 4, 1995) (statement of Rep. Christopher Cox).

Section 230(c)(1) provides: "No provider or user of an interactive computer service shall be treated as the publisher of or speaker of information provided by another information content provider." 47 U.S.C. §230(c)(1). Since its enactment, courts have grappled with the meaning of section 230(c)(1), particularly in discerning whether a defendant is "treated as [a] publisher," and whether the content that the defendant published was "provided by another information content provider."

Today, the internet has transformed drastically. Pertinently, social media use by youth is nearly universal. Up to 95% of youth ages 13–17 report using a social media platform, with more than a third saying they use social media "almost constantly."[1] Although age 13 is commonly the required minimum age used by social media platforms in the U.S., nearly 40% of children ages 8–12 use social media.[2] Social media platforms have also transformed in scale and complexity of their design and functions that are optimized to seize the attention of its users. Former technologists at the big technology firms explained social media: "[T]hink of a slot machine, a contraption that employs dozens of psychological tricks to maximize its addictive power. Next, imagine . . . if they could create a new slot machine for each person, tailored in its visuals, soundtrack, and payout matrices to that person's interests and weaknesses. That's essentially what social media already does, using algorithms and AI[.]"[3] Today, social media platforms no longer function as mere publishing spaces. The platform itself is a sophisticated system that is meticulously designed and embedded with data-driven artificial intelligence to draw in the attention of users by learning from users' interactions with content.

II. The Present Controversy

The present controversy raises the question of whether Section 230 shields platform developers from

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[1] *Social Media and Youth Mental Health*, U.S. Dept. of Health and Human Services, Office of the Surgeon General (2023), available at, https://www.hhs.gov/surgeongeneral/reports-and-publications/youth-mental-health/social-media/index.html

[2] *Id.*

products liability claims when their products were designed with defective safety features that failed to protect children against obvious harms that were contributed by the product design. The Ninth Circuit has failed to conduct a proper duty analysis with regard to the products liability claims and presumed facts beyond the record to come to the erroneous conclusion that Section 230 bars these claims. Had the Ninth Circuit engaged in a proper duty analysis with the record of alleged facts, it would have concluded that the products liability claims did not meet the publisher treatment prong nor the third party content prong.

The Respondent's mobile application You Only Live Once ("YOLO app") was specifically marketed and distributed to mainly teen audience as an anonymous messaging app. YOLO app's designs were uniquely dangerous for children: it allowed for one-way anonymous messaging, which meant that *only the sender* of the message would be anonymous. App.108a. Meanwhile, if the non-anonymous recipient of the message wished to reply to the anonymous message sender, it needed to do so in a semipublic forum, where it had to disclose the anonymously received message to all of their connected audience because the recipient would not know the specific person to reply to. YOLO's design choice engages not only the receiver and sender but involves connected audiences in the conversation. App.108a. In the meantime, it became the breeding ground for anonymous cyber-bullies to

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[3] Jonathan Haidt & Eric Schmidt, *AI Is About to Make Social Media (Much) More Toxic*, THE ATLANTIC (May 5, 2023), https://www.theatlantic.com/technology/archive/2023/05/generative-ai-social-mediaintegration-dangers-disinformation-addiction/673940/ [https://perma.cc/7WCA-RWHR].

intentionally target their victims, who were not anonymous, and publicly humiliate them before a large audience.

To assuage users (or their guardians) about the foreseeable dangers of the anonymous app design, YOLO purported to have a safety feature: it would "reveal" the identities of users who harass or bully other users or "ban" such users. App.109a.

The Petitioners' Complaint alleged that this safety feature was defective because YOLO was either unable and/or unwilling to activate this safety feature — all of the minor plaintiffs were ignored when they attempted to reveal the identities of their vicious harassers. YOLO's safety reporting function likewise rendered no responses despite multiple reports by Carson's parents. App.4a, 59a.

The one-sided anonymity feature designed by YOLO as well as its failure to activate the safety mechanism that purportedly served as a basis product defect claim alleged against YOLO. App.54a-55a. The Complaint specified that YOLO's anonymity product and its failure to activate the safety function of revealing or banning the harasser compelled young Carson to make continued and fruitless efforts to investigate his harassers' identity until moments before his death. *See* App.55a. It also specified that the repeated disregard and helplessness that his parents felt when they tried to contact and report the harm to YOLO and received no response. App.59a.

As a result of YOLO's alleged defective product, Petitioners, the Estate of Carson Bride, and three living minor children A.K., A.O., and A.C., all suffered extreme harassment and bullying through YOLO result-

ing in acute emotional distress, and in the case of Carson Bride, death by suicide. Along with the organizational plaintiff, the Tyler Clementi Foundation, these individuals brought a nation-wide class action alleging that YOLO violated multiple state tort and product liability laws by developing an anonymous messaging app and falsely representing that it would unmask the identity of harassers and ban bullying and abusive users. YOLO never actually did so.

A. The District Court's Decision to Dismiss the Complaint

In a decision dated January 10, 2023, the District Court held that "Section 230 immunizes Defendant[-Appellee] from Plaintiffs' claims in their entirety" and dismissed the Complaint with prejudice. App.43a. The District Court reasoned that while Petitioners' claims "frame user anonymity as a defective design feature of Defendants' applications, Plaintiffs fundamentally seek to hold Defendants liable based on content published by anonymous third parties on their applications. Accordingly, the court finds Plaintiff's theories of liability treat Defendants as a publisher within the meaning of Section 230." App.33a. (internal quotation marks omitted)

The District Court further held that YOLO's decision to allow or prevent users from using anonymity tools are "decisions about the structure and operation of a website are content-based decisions" under Section 230." App.34a.

Distinguishing this case from the Ninth Circuit precedent in *Lemmon*, the District Court held:

> Though Plaintiffs seek to characterize anonymity as a feature or design independent of the content posted on Defendants' applications, the theories underlying Plaintiffs' claims essentially reduce to holding Defendants liable for publishing content created by third parties that is allegedly harmful because the speakers are anonymous. Imposing such a duty would "necessarily require [Defendants] to monitor third-party content," cf. *HomeAway.com, Inc. v. City of Santa Monica*, 918 F.3d 676, 682 (9th Cir. 2019), e.g., in the form of requiring Defendants to ensure that each user's post on their applications is traceable to a specifically identifiable person.

App.36a. Also dismissing the Misrepresentation and False Advertising Claims, the District Court held that "those claims are still predicated on content developed by those third parties. Had those third-party users refrained from posting harmful content, Plaintiffs' claims that Defendants falsely advertised and misrepresented their applications' safety would not be cognizable." App.37a.

Dismissing the Failure to Warn Claims, the District Court found them barred by the CDA because "Plaintiffs' theory would require the editing of third-party content, thus treating Defendants as a publisher of content. Accordingly, *Internet Brands* is inapposite on this issue." App.40a.

B. The Ninth Circuit Decision Revived the Misrepresentation Claims but Incoherently Analyzed the Products Liability Claim

In reviewing the appeal brought by the Petitioners, Ninth Circuit reemphasized the duty analysis that originated in *Barnes v. Yahoo* and in *Calise*, 103 F.4th at 742 ("Our cases instead require us to look to the legal 'duty.' 'Duty' is 'that which one is bound to do, and for which somebody else has a corresponding right.'") (cleaned up)

The Ninth Circuit went through a two-step duty analysis of first examining "the right from which the duty springs" which asks whether the duty "stem[s] from the platform's status as a publisher or from some other obligation, such as a promise or contract. *Bride v. Yolo Technologies, Inc.*, 112 F.4th at 1177. Second, it examined whether the duty requires the platform to moderate content to fulfill its duty. App.11a.

The Ninth Circuit also correctly set forth a flexible standard for the publisher treatment prong:

> The question of whether §230 immunity applies is not simply a matter of examining the record to see if "a claim, including its underlying facts, stems from third-party content." *Calise*, 103 F.4th at 742. Nor is there a bright-line rule allowing contract claims and prohibiting tort claims that do not require moderating content, for that would be inconsistent with those cases where we have allowed tort claims to proceed, *see Internet Brands*, 824 F.3d 846 (negligent failure to warn claim survived §230 immunity);

> *Lemmon v. Snap, Inc.*, 995 F.3d 1085 (9th Cir. 2021) (authorizing a products liability claim based in negligent design), and contradict our prior position that the name of a cause of action is irrelevant to immunity, *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."). Instead, we must engage in a careful inquiry into the fundamental duty invoked by the plaintiff and determine if it "derives from the defendant's status or conduct as a 'publisher or speaker.'"

App.14a (citation omitted).

Applying this duty framework, the Ninth Circuit correctly held that the misrepresentation claims are not immunized under Section 230 for the following reasons:

> YOLO repeatedly informed users that it would unmask and ban users who violated the terms of service. Yet it never did so, and may have never intended to. Plaintiffs seek to enforce that promise—made multiple times to them and upon which they relied—to unmask their tormentors. While yes, online content is involved in these facts, and content moderation is one possible solution for YOLO to fulfill its promise, the underlying duty being invoked by the Plaintiffs, according to *Calise*, is the promise itself. *See Barnes*, 570 F.3d at 1106–09. Therefore, the misrepresentation claims survive.

App.16a.

However, when the Ninth Circuit Court turned to the products liability claims, it set forth an analytically incoherent decision. It failed to conduct a duty analysis and instead concluded that, because the harm was caused by third party content, the product liability claims were equivalent to publisher liability:

> At root, all Plaintiffs' product liability theories attempt to hold YOLO responsible for users' speech or YOLO's decision to publish it. For example, the negligent design claim faults YOLO for creating an app with an "unreasonable risk of harm." What is that harm but the harassing and bullying posts of others? Similarly, the failure to warn claim faults YOLO for not mitigating, in some way, the harmful effects of the harassing and bullying content. This is essentially faulting YOLO for not moderating content in some way, whether through deletion, change, or suppression.

App.17a.

The Ninth Circuit then went on to make factual presumptions that departed from the pleadings and the appellants' briefings. The Ninth Circuit ignored that Plaintiffs' products liability claims had always alleged and contemplated the entire design of YOLO's app, which includes a one-sided anonymity (only the message sender is anonymous), public non-anonymous response (the responder needs to respond to a semi-public audience), and the defective safety feature that was supposed to reveal or ban harassers. Instead, the Ninth Circuit reduced Plaintiffs' allegations to "anonymity per se" and presumed it to be a "neutral" tool

without factual basis. Based on these erroneous presumptions, the Ninth Circuit held that the products liability claims were doomed by Section 230. *See generally, id.*

REASONS FOR GRANTING THE PETITION

This case satisfies all of this Court's traditional certiorari criteria. Inconsistencies remain among circuit courts regarding how to interpret the publisher treatment prong and third party content prong of Section 230(c)(1) when it applies to product liability claims. The question is also squarely and cleanly presented here, where the Ninth Circuit erred in applying its own standard for conducting a duty analysis, and a clarifying standard from this Court would resolve the issue. Lastly, resolving this issue would provide valuable clarity applicable to a wide array of social media cases that are currently grappling with the same question. There is urgency in resolving this issue as it relates to the safety of minor users. As such, this Court's review is warranted.

I. Inconsistencies Remain Among Circuit Courts' Decisions

The decision in the instant case highlights this continuing inconsistency among the Circuit Courts that have dealt substantively with the issue have interpreted the second and third prong of Section 230(c)(1).

The Ninth Circuit set forth a duty analysis framework for determining publisher treatment prong. The Ninth Circuit's opinion in *Barnes* is instructive in that it held that Yahoo had a duty as a promisor — not a

duty as a publisher — to remove specific content that was harmful to the plaintiff, and the same court's opinion in *Homeaway* that the CDA does not bar claims against platforms for violations of a Santa Monica ordinance [e]ven assuming that removing certain [violative] listings may be the Platforms' most practical compliance option, *HomeAway.com*, 918 F.3d at 683. In *Calise*, the Ninth Circuit noted that the proper analysis requires an examination into the duty that forms the basis of the claims, including whether the duty stems from the platform's status as publisher or from some other obligation, such as a promise or contract. 103 F.4th at 742. And in *Lemmon*, the Ninth Circuit clarified that claims based on Snapchat's speed filter did not treat the platform as a "publisher or speaker," because the claims "treat[ed] Snap as a products manufacturer, accusing it of negligently designing a product (Snapchat) with a defect." 995 F.3d at 1091–94.

The Seventh Circuit leans on the third prong of Section 230(c)(1) and focuses on the platform's "own conduct" in the third prong of Section 230(c)(1) rather than publisher treatment and held that CDA did not apply. In *Webber*, the claims regarding an underlying duty not to encourage and assist individuals to engage in illegal gun sales were deemed to be relevant to the platform's own conduct of creating and assisting transactions for illegal gun transactions. *Webber*, 70 F.4th at 957. Where, as here, the claims allege that YOLO app's own design and conduct breached YOLO's duty to not develop or create a dangerous project that encourage individuals to engage in harassing conduct, the Seventh Circuit would have held that CDA does

not apply because the claims are based on YOLO's own conduct and not as publishers of third party content.

Similar to the Seventh Circuit, the Third Circuit, per its decision in *Anderson v. TikTok, Inc*., held that a platforms' editing functions that makes substantive decisions about "third-party speech that will be included in or excluded from a compilation" and "organiz[ing] and present[ing] the included items," can become the platform's own conduct and first party speech. 116 F.4th at 184 (citation omitted). In this case, the factual allegations were about the inherent dangers of Yolo's app, including its design decision about whether or not harassers' identity can be presented to the users. Such design decisions would have been considered the platform's won conduct and relevant to the third prong of Section 230(c)(1), and CDA would not apply.

The Fourth Circuit in *Henderson* set forth an "improper content" requirement to determine whether a claim is based upon publisher liability: For §230(c)(1) protection to apply, we require that liability attach to the defendant on account of some improper content within their publication." 53 F.4th at 122. Where, as here, the platform's design itself and not the content within is alleged to be the basis of dangerousness, the Fourth Circuit would have held that CDA did not apply.

The Fifth Circuit in *A.B. v. Salesforce, Inc.*, would have examined whether the claim would have sought to hold the defendant liable for "deciding whether to publish, withdraw, postpone or alter content[,]" so as to apply Section 230. 123 F.4th at 796 (citation omitted) If applied to this case, the Fifth Circuit's analysis would conclude that the CDA did not apply because YOLO could have designed its app so that the safety function

was functional, and it could have simply responded to harassment reports effectively without altering or editing the contents of third parties.

In contrast, the Second Circuit in *Force v. Facebook, Inc.* would have opined that editorial decisions about how and where to display content is covered under Section 230, and thus, in this case, the Petitioners' claims would be barred by the CDA. *Force*, 934 F.3d at 70.

II. The Ninth Circuit Decision Is Erroneous Because It Failed to Conduct a Duty Analysis and Presumed Facts Contrary to the Allegations in the Record

The Ninth Circuit went through a two-step duty analysis of first examining "the right from which the duty springs" which asks whether the duty "stem[s] from the platform's status as a publisher or from some other obligation, such as a promise or contract. *Bride v. Yolo Technologies, Inc.*, 112 F.4th at 1177. Second, it examined whether the duty requires the platform to moderate content to fulfill its duty. *Id.*

However, the Ninth Circuit failed to apply its own duty analysis when reviewing the Products Liability Claims. The Ninth Circuit court instead concluded that, because the harm was caused by third party content, the product liability claims were equivalent to publisher liability. *See* App.18a ("[T]he negligent design claim faults YOLO for creating an app with an 'unreasonable risk of harm.' What is that harm but the harassing and bullying posts of others? This is essentially faulting YOLO for not moderating content in some way, whether through deletion, change, or suppression.").

In reaching this conclusion without conducting a proper duty analysis, the Ninth Circuit Court errone-

ously arrived at factual presumptions that contradict the allegations in the records.

First, the Ninth Circuit ignored the Plaintiffs' allegations regarding YOLO's app design, which facilitated one-sided targeted anonymous messaging with defective safeguards. Instead, the Ninth circuit replaced it with and oversimplified description: "Here, Plaintiffs allege that anonymity itself creates an unreasonable risk of harm. But we refuse to endorse a theory that would classify anonymity as a *per se* inherently unreasonable risk to sustain a theory of product liability." *Id.*

Then, the Ninth Circuit Court went on to assume — contradicting the allegations made — that YOLO's features were content neutral and that there were no use of algorithms:

> [H]ere, the communications between users were direct, rather than suggested by an algorithm, and YOLO similarly provided users with a blank text box. These facts fall within *Dyroff*'s ambit. As we have recognized, "No website could function if a duty of care was created when a website facilitates communication, in a content-neutral fashion, of its users' content."

App.21a. (quoting *Dyroff v. Ultimate Software Group, Inc.*, 934 F.3d 1093, 1101 (9th Cir. 2019))

Defendants' assumptions run counter to the allegations in the record. Petitioners' Opposition to the Motion to Strike in the Ninth Circuit[4] (App.97a)

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[4] *See Bride et al. v. Yolo Technologies et al.*, No. 23-55134 (9th Cir.), Dkt. No. 50 (Mar. 8, 2024).

elucidates that the products liability claim alleged in the pleadings in the district court level, and in both the opening and reply brief in the appellate court level described YOLO app's design as inherently dangerous not only because of its anonymity but in combination with the defective safety feature (reveal and ban) and deceptive marketing to young children:

> The Original Complaint and the FAC explicitly alleged that the YOLO app's "reveal and ban" feature contribute both to the misrepresentation and the product's inherently dangerous quality, because Appellee's inability to activate its safeguard ("reveal and ban") is connected to the danger and harm it caused. App.98a.
>
> . . .
>
> In the Original Complaint, under the section "FIRST CAUSE OF ACTION: STRICT LIABILITLY," the Appellants conspicuously alleged: Defendants' apps promoted cyberbullying and are designed to be inherently dangerous. LMK and YOLO are unable or unwilling to detect and identify abusive users who send bullying and harassing messages. These apps are also unable or unwilling to enforce their policies where they state they would ban, reveal, and report abusive users. App.99a.
>
> . . .
>
> "As a direct result of the defective and unreasonably dangerous design of the Defendants' apps, Plaintiff Carson Bride suffered from bullying and harassment by unknown users

> on Defendants' apps and suffered while being unsuccessful at getting Defendants' apps to reveal the identities of those sending harassing messages." App.100a.

Moreover, as further set forth in Petitioners' Opposition to the Motion to Strike in the Ninth Circuit, the Complaint made blatantly clear that the design of YOLO's app was different from anonymous community boards like *Dyroff* where it was a one-sided anonymity:

> [T]he descriptions of this one-way anonymity feature were emphasized throughout both the Original Complaint and the FAC. Specifically, the descriptions of how YOLO works contain numerous mentions of how anonymity attaches to the "senders" of the YOLO messages, while recipients have no control over how to reveal the senders. The non-exhaustive list below includes examples from excerpts of the Original Complaint and FAC:
>
> 1. "[T]he apps allow teens to chat, exchange questions and answers, and sending polling requests to one another on a completely anonymous basis—that is, the receiver of a message will not know the sender's account names, nicknames, online IDs, phone numbers, nor any other identifying information unless the sender "reveals" himself or herself by "swiping up" in the app." Compl. at 14; FAC at 12 (emphasis added).
>
> 2. "In responding to numerous abusive messages, Carson asked the anonymous users sending him abusive messages to voluntarily "S/U" (Swipe Up) to reveal their identities. None of

> the users chose to reveal themselves." Compl. at 21; FAC at 35 (emphasis added). App.103a.

The opening brief of the Petitioner-Appellants also made clear the difference between Dyroff and this case by explaining the one-sided anonymity and its inherently dangerous designs:

> Unlike the website Experience Project in *Dyroff*, where every user had a registered name attached to their posts, and every user remained pseudonymous (*id*. at 1100), YOLO was designed to give a one- sided privilege to keep the message sender anonymous, while the message receiver was identifiable. *See* ER-25, 39, 51 (AC ¶¶ 26, 56 & 96). This made targeted bullying inevitable, especially when unassuming teens would rely on YOLO's self stated promise to reveal harassers' identities while using the app.

Bride et al. v. Yolo Technologies et al., No. 23-55134 (9th Cir.), Dkt. No. 24 at 38-39 (Aug. 11, 2023). App.89a.

Despite these pleadings and briefings, the Ninth Circuit struck out these factual allegations in a mere footnote: "In their reply brief, Plaintiffs advance a new theory that several of YOLO's features taken together created liability. YOLO moved to strike this argument because it was raised for the first time in the reply brief. We agree and will grant the motion." *Bride v. Yolo Technologies, Inc.*, 112 F.4th at 1174 n.1.

III. This Case Is an Excellent Vehicle for Resolving the Circuit Split and the Timing Is Ripe

Rule 10(c) provides that certiorari is appropriate if "a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court. . . . " S.Ct. Rule 10(c).

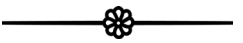
In *Gonzalez v. Google LLC*, 598 U.S. 617, 621 (2023) (per curiam), the Court granted certiorari to consider whether and how §230 applied to claims that Google had violated the Antiterrorism Act by recommending ISIS videos to YouTube users but did not reach the scope of Section 230 because the claims would have failed on the merits. *See id.* (citing *Twitter, Inc. v. Taamneh*, 598 U. S. 471 (2023)). In *Doe v. Facebook*, the Court denied certiorari due to jurisdictional constraints but anticipated that the Court would review an appropriate case. 142 S.Ct. 1087 (Mem), 1088, 212 L.Ed.2d 244 (2022) (statement of THOMAS, J., respecting denial of certiorari). In *Doe v. Snap Inc.*, 603 U.S. __ (2024), this Court denied review over whether Snapchat's platform's own conduct and design is immunized under Section 230. However, as rightfully stated in Justice Thomas' dissent, "[a]lthough the Court denies certiorari today, there will be other opportunities in the future. But, make no mistake about it—there is danger in delay." *Doe v. Snap Inc.*, 603 U.S. __ (2024) (statement of THOMAS, J., dissenting).

This case comes to the Court on review of a motion to dismiss the complaint for failure to state a claim and presents a clean issue of whether the claim set out in the complaint, where the design of Defendant YOLO's one-sided anonymous app contains a

defective safety feature, is barred by section 230(c)(1)'s publisher treatment prong and/or third party content prong.

Justice Thomas correctly warned that "[e]xtending immunity [under section 230] beyond the natural reading of the text can have serious consequences." *Malwarebytes*, 141 S.Ct. at 18. Before giving companies immunity from civil claims involving serious charges, he urged, the Court "should be certain that is what the law demands." *Id*. The complaint in this case depicts consequences and makes a charge of the utmost gravity.

Online platforms of the 1990s are unrecognizable from those we see today, and these changes require the law to apply in a manner that understands the role and obligations of online platforms. The technology that was behind the older online community boards that defined the early internet is nothing like the artificial intelligence-based product that we pour our personal data and communications into today. Being cognizant of this evolution, we will need to continue to revisit the concepts of duties, content moderation, product liability, and publisher duties of internet platforms. Rectifying the sweeping immunity courts have read into Section 230 would not render these platforms incapable of operating their online forums for fear of liability. It simply would give plaintiffs an opportunity to gather evidence to prove the merits of their claims.



CONCLUSION

For the above reasons, a writ of certiorari should be issued to review the judgment and opinion of the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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