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STATE OF NEW MEXICO
COUNTY OF SANTA FE
FIRST JUDICIAL DISTRICT COURT

STATE OF NEW MEXICO, EX REL., RAÚL TORREZ, ATTORNEY GENERAL Plaintiff, v. SNAP INC., Defendant.	NO. D-101-CV-2024-02131

SNAP INC.'S MOTION TO DISMISS AMENDED COMPLAINT

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Sexual exploitation and violence are not just illegal; they are unconscionable. Those who perpetrate these criminal acts, wherever they hide, must be apprehended and brought to justice. Snap is committed to assisting in this fight and protecting the safety and security of its hundreds of millions of users. That is why Snap prioritizes not only its independent safety work but also its longstanding partnerships with local, state and federal law enforcement, including in New Mexico.

Snapchat was intentionally designed to be a safe and healthy community where people can engage with real friends and family, and that is precisely how the vast majority of Snapchat's hundreds of millions of users use the platform. While no platform can claim 100% success in preventing misuse, Snap has devoted considerable time and resources into making Snapchat inhospitable to bad actors, and it has seen concrete results. Snap has doubled the size of its Trust and Safety team and tripled the size of its Law Enforcement Operations team since 2020. These investments have improved Snap's ability to act quickly when Snapchat users report harassment or improper sexual content on the platform, usually taking action within 15 minutes of receiving a report. Snap has also adopted proactive techniques for detecting child sexual abuse material ("CSAM") and reporting it to the National Center for Missing and Exploited Children, efforts that led to more than 1,000 arrests in 2023 alone. And Snap collaborates with industry experts and coalitions across the globe to support law enforcement and to raise awareness about risks of unwanted contact to teens and all members of the Snapchat community. This work has had a positive impact on the wellbeing of Snapchat's users, with over 90% of Snapchatters saying they feel comfortable, happy and connected with friends and family when using Snapchat.

Of course, Snap cannot prevent every bad actor from abusing the platform to engage in

illegal conduct, any more than law enforcement can eradicate all crimes. But Snap works hard to do its part, hand-in-hand with law enforcement, who routinely praise Snap's efforts.

Instead of working ***with*** Snap and New Mexico's law enforcement officials on these efforts to combat bad actors, the Attorney General ("the State" or "Plaintiff") has chosen to work ***against*** them, partnering with private contingency-fee counsel to sue Snap. The result is a highly charged, headline-grabbing lawsuit founded upon gross misrepresentations of the State's "investigation," dubious "evidence" mined from the dark web, screenshots from platforms other than Snapchat, and cherry-picked references to old features that no longer exist.

Most notably, there are serious concerns regarding the veracity of the State's allegations about the "Department of Justice's investigation" of Snapchat using a "decoy account." At the core of the State's Complaint is the pernicious accusation that Snapchat, upon the creation of a new account by a minor, immediately connected that minor account to inappropriate or illicit accounts without any affirmative steps by the user. Specifically, the Complaint alleges that the Department of Justice established a "decoy account" of a fictitious 14-year-old girl named "Heather" and that "Heather did not add any users, but, within a day, she was added by Enzo (Nud15Ans)." (Am. Compl. ¶¶ 73, 75.) The Complaint goes on to allege that, from that single friend connection—purportedly initiated by a bad actor on the platform or suggested by Snapchat—Snapchat then "suggested over 91 users" to the minor account, including adults seeking sexually explicit content. (Am. Compl. ¶ 76.) **These allegations are patently false.** Contrary to the State's representations: (1) Plaintiff's operatives ***did*** affirmatively send out many friend requests from "Heather's" account, including to obviously targeted usernames like "nudedude_22," "teenxxxxxxx06,"

"ineedasugardadx," and "xxx_tradehot"; and (2) it was ***Plaintiff's operatives*** posing as "Heather" who searched for and added "Enzo" as a friend, not the other way around.[1]

The State also repeatedly mischaracterizes Snap's internal documents. For example, citing an internal Snap document, the State faults Snap for "consciously decid[ing] not to store child sex abuse images" and suggests that Snap does not provide such images to law enforcement. (Am. Compl. ¶ 105.) But federal law prohibits platforms like Snap from storing CSAM on its servers and requires them to turn such material over to the National Center for Missing and Exploited Children—which Snap of course does. The State also claims, for instance, that Snap lacks "urgency and commitment to addressing CSAM" because employees discussed that a "proposed solution" to CSAM "would have to be evaluated by 'legal and privacy.'" (*Id.* ¶ 117.) However, the State omits that in the same communication, employees expressed confidence such review would be "simple and swift" because combatting CSAM is a "#1" priority for Snap. Contrary to the State's insinuations, Snap's employees act exactly as a responsible corporation should when faced with these issues—i.e., they work together to prioritize the safety and wellbeing of the Snapchat community and address potential criminal activity.

The sexual exploitation of minors and violence must never be tolerated. But a sensationalist lawsuit, drafted to grab headlines rather than help New Mexicans, is not the way to combat these problems. And the State's ill-conceived Complaint also suffers from numerous legal infirmities that require its dismissal.

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[1] Snap has reached out to the State to address these false allegations.

As an initial matter, the Complaint is procedurally defective. Snap, a Delaware corporation based in California, is not subject to general jurisdiction in New Mexico, and the State cannot show that Snap aimed its conduct at New Mexico, much less that any such conduct gave rise to the State's claims, as required for specific jurisdiction. Courts have routinely rejected the notion that providing internet services nationwide subjects a company to jurisdiction in every state its service is available. And even if the forum were proper, the claims are also substantively meritless.

First, the State's attempt to mandate specific "age verification" and "parental control" features, as well as warnings about potential speech-based harms, contravenes the First Amendment, as several courts have made clear, including three in the past year.

Second, the State's claims are barred by Section 230 of the Communications Decency Act, which exempts internet platforms like Snap from liability over the publication of third-party content—e.g., illegal attempts to sextort a user or sell guns or drugs.

Third, the State fails to plead the public right and causation elements of its public nuisance claim. As courts have recognized in declining to extend public nuisance law to the marketing and sale of lawful products or services, the doctrine was created to fill a narrow void left open by tort law—i.e., to protect ***public*** rights, such as the right to clean air and water. It was never intended to be a freewheeling cause of action for redressing a series of ***individual*** harms associated with complicated, multi-faceted societal problems. Moreover, the relationship between Snap's alleged misconduct and the purported harms to users is far too attenuated to satisfy the requirements of proximate causation. The bulk of those alleged injuries (e.g., from sextortion, guns and drugs) are based on criminal activity over which Snap has no control. Likewise, the purported harms to New

Mexican users' mental health implicate their interactions with third parties that create or send communications on the platform, as well as with peers, teachers and relatives.

Fourth, the State's claims under the Unfair Practices Act ("UPA") fail as a matter of law and are inadequately pled. The UPA—which regulates the "sale" or "lease" of goods and services—does not apply to a free internet platform like Snapchat. It also expressly exempts publishers from its reach. In any event, the Complaint fails to identify any actionable misrepresentations. Instead, it identifies puffery-based "catchphrases" (e.g., that Snapchat is a "worry-free" platform) and aspirational statements regarding Snap's commitment to safety, neither of which remotely guarantees that Snap would (much less could) extinguish all potential risks posed by third parties. And the State's failure-to-warn theory is belied by its repeated recognition that Snap disclosed the purported safety risks underlying this lawsuit.

BACKGROUND

Snap owns and operates the online communication service, Snapchat. (*See* Am. Compl. ¶¶ 2, 18.)[2] People come to Snapchat to communicate and share experiences with real-life friends and family through texts, photos and video messages, so that they can feel closer even when they are physically far apart. (*See, e.g*., *id.* ¶ 50.) Conversations are not posted publicly and delete by default after a brief period, allowing users to "show a more authentic, unpolished, and spontaneous side of themselves." (*See id.* ¶ 51.) By design, content feeds are not presented to people who open the application; instead, users must make a conscious choice to navigate them.

[2] On September 30, the State filed an Amended Complaint that corrected certain allegations (after Snap identified them as false) but asserts the same legal theories as the Original Complaint.

Snap takes numerous steps to safeguard and protect minors using its platform, including: restricting the age of Snapchat users, restricting minors' communications to their existing friends and contacts, using "age-gating tools" to prevent minors from viewing age-regulated content, making it difficult for strangers to find minors on Snapchat, identifying and removing illicit content, and giving parents the ability to see who their teenagers are communicating with and to set even stricter content limits. (*See, e.g.*, Am. Compl. ¶¶ 59, 148, 188, 191, 236, 341.)[3] In addition, Snap monitors and vets content submitted via Snapchat's Spotlight and Stories features, which disseminate posts created by users across the platform, to ensure they are consistent with Snapchat's Community Guidelines and Terms of Service before they appear on the platform.[4]

The State bases its claim on certain allegedly "defective" Snapchat features, including: (i) the so-called "ephemeral" "content delivery system" (Am. Compl. ¶¶ 118-138); (ii) the "Quick Add" and search term tools (*see id.* ¶¶ 139-155); (iii) Snap Map, which allows users to share geolocation data (*see id.* ¶¶ 156-167); (iv) "content recommendation system[s]" (*see id.* ¶¶ 170-184); (v) purportedly ineffective "age verification features" and parental controls (*see id.* ¶¶ 60,

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[3] *See also* https://parents.snapchat.com/safeguards-for-teens. Snapchat's website (including the Privacy Policy and Terms of Service) is discussed in the Complaint (*see, e.g.*, Am. Compl. ¶¶ 39 n.12, 59 n.29) and thus, its contents are subject to judicial notice. *See New Mexico ex rel. Balderas v. Google, LLC*, 489 F. Supp. 3d 1254, 1257 (D.N.M. 2020) ("factual information found on the world wide web" was subject to judicial notice where "the complete address for each document on its website" was provided, "these pages are still found at those addresses" and "the State's complaint incorporates by reference several of [defendant]'s other webpages") (citation omitted). Because New Mexico's rule governing judicial notice is virtually identical to its federal analog, *compare* N.M. Rule 11-201(B)(2), *with* Fed. R. Evid. 201(b)(1)-(2), federal caselaw is "instructive." *State v. Martinez*, 2006-NMCA-148, ¶ 12, 140 N.M. 792 (applying principle to another rule of evidence).

[4] *See* https://help.snapchat.com/hc/en-us/articles/7012309738516-Are-Snap-submissions-moderated-before-being-posted-to-Spotlight; https://help.snapchat.com/hc/en-us/articles/7012263915412-Is-Stories-content-on-Snapchat-moderated.

185-193); (vi) the "My AI" "chatbot that uses [AI] technology to answer questions, offer advice, and make recommendations" (*see id.* ¶¶ 194-201); (vii) alerts or notifications that allegedly "encourage addictive engagement and increase use" (*see id.* ¶¶ 256-264); and (viii) filters and other effects that "allow users to edit and overlay augmented-reality special effects and sounds" (*see id.* ¶¶ 265-269). The State also alleges that several of these features do not adequately prevent the dissemination of CSAM and "the trafficking of children, drugs, and guns" by criminals. (*Id.* ¶ 2; *see, e.g.*, *id.* ¶¶ 4-6, 8, 52, 70.) The State asserts claims under the UPA (counts I, II and III) and for public nuisance (count IV) and seeks penalties, disgorgement and injunctive relief.

ARGUMENT

Under Rule 1-012(B)(2) NMRA, "[p]laintiffs have the burden of making a prima facie showing of personal jurisdiction." *Zavala v. El Paso Cnty. Hosp. Dist.*, 2007-NMCA-149, ¶ 13, 143 N.M. 36. Under Rule 1-012(B)(6) NMRA, a complaint must allege facts capable of "stat[ing] a claim on which relief could be granted." *Healthsource, Inc. v. X-Ray Assocs. of N.M., P.C.*, 2005-NMCA-097, ¶ 31, 138 N.M. 70. A court should not credit "conclusory statements," *Saylor v. Valles*, 2003-NMCA-037, ¶¶ 24-25, 133 N.M. 432, "conclusions of law or unwarranted deductions of fact," *Saenz v. Morris*, 1987-NMCA-134, ¶ 6, 106 N.M. 530. Moreover, fraud-based allegations "shall be stated with particularity." *Bronstein v. Biava*, 1992-NMSC-053, ¶ 7, 114 N.M. 351 (quoting Rule 1-009(B)).

I. SNAP IS NOT SUBJECT TO PERSONAL JURISDICTION IN NEW MEXICO.

To proceed with this lawsuit, the State must establish that Snap is subject to either general or specific jurisdiction in New Mexico. *Bristol-Myers Squibb Co. v. Superior Court*, 582 U.S. 255,

262 (2017). General jurisdiction typically exists only in a corporation's "place of incorporation and principal place of business." *Chavez v. Bridgestone Ams. Tire Operations, LLC*, 2022-NMSC-006, ¶ 24 (quoting *Daimler AG v. Bauman*, 571 U.S. 117, 137 (2014)). Because the State acknowledges that Snap is a Delaware corporation with its principal place of business in California (Am. Compl. ¶ 18), Snap is not subject to general jurisdiction in this state.

The State also has not sufficiently pled either requirement of specific jurisdiction: (1) that Snap purposefully availed itself of New Mexico; and (2) that such forum-based contacts gave rise to the State's claims. *See Chavez*, 2022-NMSC-006, ¶ 46.

First, the State fails to adequately plead that Snap "purposefully avail[ed] itself of the privilege of conducting activities within the forum State." *F.D.I.C. v. Hiatt*, 1994-NMSC-044, ¶ 8, 117 N.M. 461. As courts have repeatedly held, including in multiple cases involving Snap, merely operating an internet platform that is available in all 50 states does not constitute purposeful availment. *See, e.g.*, *Carril v. Black*, No. 29,612, 2009 WL 6669337, at *2 (N.M. Ct. App. Dec. 9, 2009) (holding that "a passive website" that "provide[s] information to interested visitors" is "not a basis for jurisdiction"); *Ziencik v. Snap, Inc.*, No. 21-49, 2021 WL 4076997, at *4 (W.D. Pa. Sept. 8, 2021) ("Plaintiffs provide no evidence that [Snap] does more than exist as an application that people can download while located in Pennsylvania."); *Jaime-Crisostomo v. Hernandez*, No. 2022-006462, 2022 WL 20527084, at *2 (Ariz. Super. Ct. Dec. 22, 2022) (trial order) (no personal jurisdiction over Snap simply because it "conducted business through a nationally accessible website"); *Palmer v. Savoy*, No. 20-94, 2021 WL 3559047, at *4 (N.C. Super. Ct. July 28, 2021) (trial order) (Snap's "internet contacts" not a basis for exercising jurisdiction over Snap). Rather,

a defendant must do something to "expressly aim its tortious conduct at the forum state" in a manner that is different from what it does in the rest of the country. *Ziencik*, 2021 WL 4076997, at *4 (no specific jurisdiction over Snap in case involving alleged "design defect" because the "alleged tortious conduct . . . could have occurred in any state"); *accord Hernandez*, 2022 WL 20527084, at *2 ("Snap did not expressly aim its conduct at Arizona because it was available all over the country."); *see also Helferich Pat. Licensing, LLC v. Suns Legacy Partners, LLC*, No. 11-2304 et al., 2013 WL 442296, at *2 (D. Ariz. Feb. 5, 2013) ("defendant must do more than simply operate a website that is accessible from the forum state: 'a defendant must in some way target the forum state's market'") (citation omitted).

The State seeks to overcome this caselaw by alleging that "Snap advertises its products extensively in New Mexico, through television and Internet advertisements, as well as other mediums directed to or available to New Mexico residents." (Am. Compl. ¶ 25.) These alleged advertisements, however, are *nationwide* in scope and "no more likely to solicit customers in [New Mexico] than anywhere else"; accordingly, they do not constitute purposeful availment. *See Rich v. Meta Platforms, Inc.*, No. 21-11956, 2023 WL 8355932, at *8 (D. Mass. Dec. 1, 2023) (no purposeful availment because "the services of Meta, including facebook.com, are available to anyone with Internet access, [and] do not target residents of Massachusetts"), *appeal filed*. As courts have repeatedly held in dismissing claims against online communication services, any other rule would "enable[e] a plaintiff to sue in any state to which he chooses to roam," "'eviscerat[ing]' the limits on personal jurisdiction over out-of-state defendants." *Id.* ("It cannot be sufficient that

wherever plaintiff accesses Meta services, there is jurisdiction.").[5]

The State also alleges that Snap "contracts with New Mexico advertisers and advertisers targeting New Mexico residents" (Am. Compl. ¶ 33); that it "contracts with New Mexico users" via its Terms and Conditions and "monetizes consumers' private data" (*id.* ¶¶ 32, 34); and that "Snap has received money from [a subset of] users in New Mexico for the 'Snapchat+' service" (*id.* ¶ 25). But to the extent any advertisements "target" New Mexico residents, it is the ***third-party*** advertisers who engage in such conduct. *See Bristol-Myers*, 582 U.S. at 268 (defendant's relationship with a third party "is an insufficient basis for jurisdiction"; rather, the plaintiff must "allege[] that [defendant] engaged in relevant acts together with [the third party] in" relevant forum) (citation omitted). The other allegations do not plausibly reflect purposeful targeting of New Mexico residents. *See, e.g.*, *Zavala*, 2007-NMCA-149, ¶¶ 28-29 (contract with New Mexico hospital was insufficient to establish specific jurisdiction where agreement at issue "did not show an intent to attract New Mexico patients"); *S & D Trading Acad., LLC v. AAFIS, Inc.*, 494 F. Supp. 2d 558, 565 (S.D. Tex. 2007) ("merely contracting with a Texas resident is not enough to establish

[5] *See also, e.g.*, *Georgalis v. Facebook, Inc.*, 324 F. Supp. 3d 955, 960 (N.D. Ohio 2018) (rejecting argument that "advertising directed to Ohio Facebook users is analogous to mailing advertisements to Ohio users, and is a sufficient minimum contact to satisfy . . . due process and support personal jurisdiction"); *Harrison v. Facebook, Inc.*, No. 18-0147, 2019 WL 1090779, at *4 (S.D. Ala. Jan. 17, 2019) ("[P]ersonal jurisdiction over Facebook may not exist simply because a user avails [her]self of Facebook's services in a state . . . .") (citation omitted), *report & recommendation adopted*, 2019 WL 1102210 (S.D. Ala. Mar. 8, 2019); *Ralls v. Facebook*, 221 F. Supp. 3d 1237, 1244 (W.D. Wash. 2016) (same); *Doshier v. Twitter, Inc.*, 417 F. Supp. 3d 1171, 1178 (E.D. Ark. 2019) (Twitter not subject to specific jurisdiction in Arkansas because website and advertising platform are accessible nationwide); *Gullen v. Facebook.com, Inc.*, No. 15-7681, 2016 WL 245910, at *2-3 (N.D. Ill. Jan. 21, 2016) (no personal jurisdiction where "Facebook uses the tag suggestions and facial recognition software on all uploaded photos, not just those uploaded in . . . Illinois"); *Johnson v. Gawker Media, LLC*, No. 15-1137, 2016 WL 193390, at *9 (E.D. Mo. Jan. 15, 2016) (no specific jurisdiction where there was no showing that the defendant "targeted its website . . . toward the State of Missouri as opposed to the United States or the world as a whole").

specific personal jurisdiction . . . even if the contract was partially performed in Texas").

Second, even if the State could establish purposeful availment, it fails to plead that its "claims against [Snap] arose from [Snap]'s activities in connection with New Mexico." *Carril*, 2009 WL 6669337, at *2. The State challenges Snapchat's "design[]" (Am. Compl. ¶ 2), as well as alleged misstatements "to the public regarding the safety and design of its platform[]" (*id.* ¶ 3) and "the frequency of harms . . . encountered by young users on its platform" (*id.* ¶ 366). As the *Palmer* court explained in dismissing similar allegations against Snap for lack of personal jurisdiction, any harm caused by such alleged conduct "does not arise from Snap's sale of advertising or user data" (i.e., the purported contacts with the forum). *See, e.g.*, *Palmer*, 2021 WL 3559047, at *4 ("[E]vidence that Snap has gathered North Carolina specific user data and sold advertising based on that data" does not support exercise of specific jurisdiction because "[p]laintiff's injury does not directly relate to Snap's conduct in that regard."); *Georgalis*, 324 F. Supp. 3d at 961 (no specific jurisdiction because claim that Facebook deleted content from plaintiff's account did not "arise from [d]efendant's claimed sale of targeted marketing to Ohio residents").[6] Rather, the complained-of conduct would have occurred at Snap's headquarters in California. For this reason, too, Snap is not subject to specific jurisdiction in this Court.

II. THE STATE'S CLAIMS FAIL AS A MATTER OF FEDERAL AND STATE LAW

A. The State's Claims Contravene The First Amendment.

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[6] Judge Biedscheid's recent decision to exercise personal jurisdiction over Meta Platforms, Inc. in a different lawsuit does not compel a different result. *State ex rel. Torrez v. Meta Platforms, Inc.*, No. D-101-CV-2023-02838 (June 21, 2024). That ruling did not address Snap's argument here that there is an insufficient "connection" between the purported forum-based contacts and the acts giving rise to the alleged case. *See Bristol-Myers*, 582 U.S. at 264. In addition, the Court's ruling dealt with different allegations based on a different company's advertising practices.

1. <u>The State's Proposed Age Verification And Parental Control Mandates Would Interfere With And Deny Access To Protected Speech.</u>

In a long line of rulings, courts have made clear that requiring platforms like Snapchat to use a State government's preferred age verification and parental control measures (*e.g.*, Am. Compl. ¶¶ 339, 354, 386), is barred by the First Amendment. *See NetChoice, LLC v. Griffin*, No. 23-05105, 2023 WL 5660155 (W.D. Ark. Aug. 31, 2023); *NetChoice, LLC v. Yost*, 716 F. Supp. 3d 539 (S.D. Ohio 2024); *NetChoice, LLC v. Reyes*, Nos. 23-00911 & 24-00031, 2024 WL 4135626 (D. Utah Sept. 10, 2024). This is so because age verification mandates require invasive data collection from all users (including adults)—processes that inevitably deter and "deny access" to protected speech. *Reno v. ACLU*, 521 U.S. 844, 876 (1997). As multiple courts have recognized, because internet platforms do not know *ex ante* the ages of people signing up for accounts, mandatory age verification would require *all* potential users to upload proof of age and identity to the internet service provider. Mandatory parental consent would require all that *plus* proof of a parental relationship between two users. These requirements "deny access" to protected speech, even for adults, and are inconsistent with the First Amendment. *Id.* at 876; *see, e.g.*, *Griffin*, 2023 WL 5660155, at *17 ("It is likely that many adults who otherwise would be interested in becoming account holders on regulated social media platforms will be deterred—and their speech chilled—as a result of the age-verification requirements . . . ."). Moreover, even if there were a way to impact only the speech rights of users under 18—which there is not—courts and governments lack the power to prevent teenagers "from hearing or saying anything without their parents' prior consent." *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 795 n.3 (2011). Such laws would

functionally "impose governmental authority, subject only to a parental veto." *Id.*; *Hodgkins ex rel. Hodgkins v. Peterson*, 355 F.3d 1048, 1064 (7th Cir. 2004) ("To condition the exercise of First Amendment rights on the willingness of an adult to chaperone is to curtail them.").

2. <u>The State's Failure-To-Warn Claims Seek To Compel Speech.</u>

The State's failure-to-warn claims are also barred by the First Amendment because they seek to compel Snap to "creat[e] and disclos[e] . . . highly subjective opinions about content-related harms to children." *NetChoice, LLC v. Bonta*, 113 F.4th 1101, 1122 (9th Cir. 2024). In *NetChoice*, the Ninth Circuit held that California's Age-Appropriate Design Code Act likely violated the First Amendment by requiring online businesses and platforms to "opine on and mitigate the risk that" their "design"—including their "algorithms"—could expose children "to harmful or potentially harmful content, contact, or conduct online." *Id.* at 1116, 1120. Even though the statutory requirement was framed as one about "data management practices," the court recognized that those "practices" were specifically defined to "require consideration of content or proxies for content." *Id.* at 1118. Despite its labels, the law would effectively "deputize private [online platforms] into determining whether material is suitable for kids." *Id.*

The same principles preclude the warnings the State seeks to compel from Snap here. (*See, e.g.*, Am. Compl. ¶ 354 (alleging that Snap "failed to warn users, parents, and the public of the risks and harms of Snapchat"); *id.* ¶ 4 ("failing to warn" about "sex trafficking, sexual exploitation content, and drug and gun sales on the platform").) It makes no difference whether the State seeks to impose these requirements via litigation or statute—if anything, the State's effort to impose a duty to speak by *ad hoc* litigation is even more problematic. Not only would Snap be required to

make subjective judgments about potential risks of harm and disclose them, but it would have to do so with virtually no guidance about how to avoid liability in the future. *See, e.g.*, *James v. Meow Media, Inc.*, 300 F.3d 683, 697 (6th Cir. 2002) ("We cannot adequately exercise our responsibilities to evaluate regulations of protected speech, even those designed for the protection of children, that are imposed pursuant to a trial for tort liability."); *Bonta*, 113 F.4th at 1122 ("[A] disclosure regime that requires the forced creation and disclosure of highly subjective opinions about content-related harms to children is unnecessary for fostering a proactive environment in which companies, the State, and the general public work to protect children's safety online."). This, too, would contravene the First Amendment.

B. Section 230 Of The Communications Decency Act Bars The State's Claims.

Section 230 codifies the common-sense rule that online platforms like Snapchat, which facilitate communication between hundreds of millions of people, cannot be held liable for the acts of their users. Recognizing that "[t]he specter of . . . liability in an area of such prolific speech would have an obvious chilling effect" on internet providers, *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997), Congress passed Section 230 to provide "broad immunity" to communications platforms for claims based on content posted by their users. *Woodhull v. Meinel*, 2009-NMCA-015, ¶ 19, 145 N.M. 533; *see also Force v. Facebook, Inc.*, 934 F.3d 53, 64 (2d Cir. 2019) ("[T]he Circuits are in general agreement that the text of Section 230(c)(1) should be construed broadly in favor of immunity."). A platform may not be held liable where the content at issue was created by third parties, and the platform merely engaged in the typical actions expected of a publisher. "None of this means, of course, that the original culpable party who posts [the

harmful] messages would escape accountability"—just that the internet provider does not become liable simply for furnishing neutral tools used by the wrongdoer. *Zeran*, 129 F.3d at 330; *see also Doe v. MySpace, Inc.*, 528 F.3d 413, 419 (5th Cir. 2008) ("Parties complaining that they were harmed by a Web site's publication of user-generated content have recourse; they may sue the third-party user who generated the content").

Section 230 immunity applies to tort and consumer protection claims, including those asserted by state attorneys general. *See In re Soc. Media Adolescent Addiction/Pers. Inj. Prods. Liab. Litig.*, MDL No. 3047, 2024 WL 4532937, at *13-14 (N.D. Cal. Oct. 15, 2024) (applying Section 230 to multistate attorneys generals' claims); *In re Facebook, Inc.*, 625 S.W.3d 80, 94 (Tex. 2021) (Section 230 bars product liability "claims alleging that defectively designed internet products allowed for transmission of harmful third-party communications"); *Zango, Inc. v. Kaspersky Lab, Inc.*, 568 F.3d 1169, 1177 (9th Cir. 2009) (Section 230 "provide[s] immunity from state unfair competition and false advertising actions").[7] Moreover, because Section 230 "protect[s] websites not merely from ultimate liability, but [also] from having to fight costly and protracted legal battles," *Fair Hous. Council of San Fernando Valley v. Roommates.Com, LLC*, 521 F.3d 1157, 1175 (9th Cir. 2008) (en banc), immunity must be applied "at the earliest possible stage in litigation," including on motions to dismiss. *Gen. Steel Domestic Sales, L.L.C. v. Chumley*, 840 F.3d 1178, 1181 (10th Cir. 2016) (citation omitted); *see, e.g.*, *Dyroff v. Ultimate Software*

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[7] *See also, e.g.*, *Bride v. Snap Inc.*, No. 21-06680, 2023 WL 2016927, at *6 (C.D. Cal. Jan. 10, 2023) ("[T]he nature of [p]laintiffs' legal claim does not alter the court's conclusion, whether based on negligence or false advertising."), *aff'd in relevant part sub nom. Est. of Bride v. Yolo Techs., Inc.*, 112 F.4th 1168 (9th Cir. 2024).

Grp., Inc., 934 F.3d 1093, 1101 (9th Cir. 2019) (affirming grant of motion to dismiss).

The State attempts to circumvent Section 230 by framing its claims as challenges to specific design features of Snapchat, but the vast majority of the State's allegations explicitly challenge the publication of allegedly harmful content and communications from third-party users, such as child sex predators, drug dealers, and gun sellers, who have abused the Snapchat platform to harm others. (*See generally* Am. Compl. at 16-103.) The gravamen of these claims is that Snap is liable because its platform allegedly allowed users to connect and communicate with others, including bad actors who shared prohibited content or messages with users. Such allegations lie within the heartland of Section 230 immunity, as appellate courts have repeatedly held.[8]

Section 230 immunity applies if: (1) a defendant is a "provider . . . of an interactive computer service," and (2) the claims seek to hold the defendant liable by treating it as a "publisher or speaker" of (3) content provided by someone else. 47 U.S.C. § 230(c)(1); *see Dyroff*, 934 F.3d at 1097. Each of these prongs is satisfied as to the State's core claims challenging Snap's role as a publisher of third-party content and its related omission and failure-to-warn claims.[9]

1. Snap Provides An Interactive Computer Service.

The first prong is satisfied because Snap is indisputably an interactive computer service provider, as multiple courts have recognized. *E.g.*, *L.W. v. Snap Inc.*, 675 F. Supp. 3d 1087 (S.D.

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[8] *See, e.g.*, *Doe v. Snap, Inc.*, No. 22-20543, 2023 WL 4174061 (5th Cir. June 26, 2023) (per curiam) (CSAM, child sexploitation), *cert. denied*, 144 S. Ct. 2493 (2024); *Doe #1 v. Twitter, Inc.*, Nos. 22-15103 & 22-15104, 2023 WL 3220912 (9th Cir. May 3, 2023) (CSAM); *Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12 (1st Cir. 2016) (CSAM, sexploitation); *Dyroff*, 934 F.3d 1093 (drugs); *Daniel v. Armslist, LLC*, 926 N.W.2d 710 (Wis. 2019) (guns).

[9] While Snap does not seek dismissal under Section 230 of the State's claims premised on alleged affirmative misrepresentations by Snap (*see, e.g.*, Am. Compl. ¶¶ 345-353), they fail for the reasons set forth in Part V.B, *infra*.

Cal. 2023); *In re Soc. Media Adolescent Addiction/Pers. Inj. Prods. Liab. Litig.*, 702 F. Supp. 3d 809, 825 (N.D. Cal. 2023).

2. <u>The State's Claims Treat Snap As A Publisher Of Third-Party Content.</u>

The second prong is satisfied because the State's allegations fundamentally seek to hold Snap liable for "publish[ing]" harmful content from third-party users. In applying Section 230, "courts must ask whether the duty that the plaintiff alleges the defendant violated derives from the defendant's status or conduct as a 'publisher or speaker.' If it does, Section 230(c)(1) precludes liability." *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1102 (9th Cir. 2009) (citing 47 U.S.C. § 230(c)(1)). Claims targeting a defendant's "reviewing, editing, and deciding whether to publish or to withdraw [content] from publication" treat it as a publisher. *Id.*

The State's Complaint does just that by alleging that Snap "facilitated the collection and distribution of sexually explicit, exploitative and child sex abuse materials" (Am. Compl. at 16), and "the trafficking of drugs" and guns (*id.* at 85, 97), and that Snap "knew, or should have known" that its features "promot[ed] and encourag[ed]" this "illicit content" (*id.* ¶ 420). Such illicit content shared between users (which Snap prohibits) are "prototypical" user-provided content within the scope of Section 230. *Kimzey v. Yelp! Inc.*, 836 F.3d 1263, 1266 (9th Cir. 2016). Courts have repeatedly held that Section 230 bars such claims, including claims involving alleged CSAM and sexploitation, *see, e.g.*, *Doe v. Snap, Inc.*, 2023 WL 4174061, at *1; *L.W.*, 675 F. Supp. 3d at 1095-98; *V.V. v. Meta Platforms, Inc.*, No. X06-UWY-CV-23-5032685-S, 2024 WL 678248, at *8-11 (Conn. Super. Ct. Feb. 16, 2024); *Doe #1 v. Twitter, Inc.*, 2023 WL 3220912; *Backpage.com, LLC*, 817 F.3d 12; *Doe v. MySpace*, 528 F.3d 413; Order re Mot. to Strike at 9-11, *Social Media Cases*,

JCCP No. 5255 (Cal. Super. Ct. July 19, 2024) ("7/19/24 JCCP Order") (Ex. 1), drug sales, *see, e.g.*, *Dyroff*, 934 F.3d at 1096-99, and illegal gun sales, *Armslist, LLC*, 926 N.W.2d 710; *Gibson v. Craigslist, Inc.*, No. 08-7735, 2009 WL 1704355, at *1-4 (S.D.N.Y. June 15, 2009).[10]

To avoid the application of Section 230, the State frames its claims as targeting various "design" features that allegedly facilitate the dissemination of harmful content or cause users to become "addicted" to Snapchat. (*See, e.g.*, Am. Compl. ¶ 30.) But courts have repeatedly rejected such attempts to creatively plead around Section 230 where, "[a]t root," the claims "attempt to hold [defendant] responsible for users' speech" and turn internet platforms into all-purpose policemen of bad actors who abuse the internet. *Est. of Bride v. Yolo Techs., Inc.*, 112 F.4th 1168, 1179-80 (9th Cir. 2024) (claims challenging "inherently dangerous" design of app's "anonymity" feature that allegedly facilitated harassment by third-party users were barred by section 230).

Publication of ephemeral or private content. To protect user privacy and offer a digital communications experience that mirrors real life conversations, Snapchat messages are designed to delete by default after a certain period of time. Snap's decision regarding the length of time to make content available is a quintessential publishing activity that every court to squarely consider the issue has held to be protected by Section 230. *See, e.g.*, *In re Soc. Media*, 702 F. Supp. 3d at 831 (claims based on Snap's decision to "[l]imit[] content to short-form and ephemeral content" are barred by Section 230); 7/19/24 JCCP Order at 25-26 (same); *L.W.*, 675 F. Supp. 3d at 1097-

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[10] Section 230 immunity "applies even after notice of the potentially unlawful nature of the third-party content." *Universal Commc'n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 420 (1st Cir. 2007); *see Zeran*, 129 F.3d at 332-33. In any event, although the Complaint generally alleges that Snap knew or should have been aware that its platform was being abused by third parties (Am. Compl. ¶¶ 10, 54, 120, 419), it does not allege that Snap knew about any specific, illicit third-party content and failed to take action.

98 (Section 230 barred claims focused on Snapchat's "ephemeral design features" that allegedly made users vulnerable to sextortion scheme); *Doe v. Snap, Inc.*, No. 22-00590, 2022 WL 2528615, at *14 (S.D. Tex. July 7, 2022), *aff'd*, 2023 WL 4174061 (5th Cir. June 26, 2023), *cert. denied*, 144 S. Ct. 2493 (2024) (same); *V.V.*, 2024 WL 678248, at *1, *11 (same). The conclusion of this long line of cases makes sense. Deciding whether to offer an experience where messages persist indefinitely, or in the case of Snapchat, to replicate live conversations, which are not saved, are "choices about what content can appear on the website and in what form," all of which "fall within the purview of traditional publisher functions." *Fields v. Twitter, Inc.*, 217 F. Supp. 3d 1116, 1124 (N.D. Cal. 2016) (citation omitted). Likewise, Section 230 protects features that allow users to keep certain content private. *See, e.g.*, *In re Soc. Media*, 702 F. Supp. 3d at 833 (finding "no authority indicating that posting third-party content is not publishing where it is posted only to one other person"); 7/19/24 JCCP Order at 27 (same); *Fields*, 217 F. Supp. 3d at 1128-29 (same, citing additional cases). Providing a digital way to do what people have been doing in person, and over the phone, for generations does not rob Snap of Section 230 immunity.

Allowing users to share geolocation data. The State also challenges "Snap Map," a feature that "allows users to share their location with their" friends and family. (Am. Compl. ¶¶ 6, 156.) As the federal MDL court reasoned in rejecting virtually identical allegations under Section 230, "limiting publication of geolocation data provided by users . . . inherently targets the publishing of third-party content and would require defendants to refrain from publishing such content." *In re Soc. Media*, 702 F. Supp. 3d at 831; *see also Herrick v. Grindr LLC*, 765 F. App'x 586, 590 (2d Cir. 2019) ("location information" provided by third parties is content falling within Section 230);

V.V., 2024 WL 678248, at *1, *10-11 (same); *Doe v. Grindr Inc.*, 709 F. Supp. 3d 1047, 1053 (C.D. Cal. 2023) (same), *appeal filed*.

Recommendations of Content and Other Users' Profiles. The Complaint challenges Snap's use of algorithms that "determine what content and users to recommend to each user" because they allegedly "proliferate[] content that is sensational or sought out" and "make it easy for predators to find, connect with, and harm young victims." (Am. Compl. ¶¶ 118, 170-171; *see also, e.g.*, *id.* ¶¶ 72, 77, 90, 139, 155, 173, 212.) But "features and functions, including algorithms," used to recommend content to users are publishing "tools" immune from liability under section 230. *Dyroff*, 934 F.3d at 1098; *see also, e.g.*, *Force*, 934 F.3d at 66 (interactive computer service acts as "'publisher' of third-party information when it uses tools such as algorithms that are designed to match that information with a consumer's interests"); *In re Soc. Media*, 702 F. Supp. 3d at 833 ("use of algorithms to determine whether, when, and to whom to publish third-party content" is a "traditional editorial function" "essential to publishing"); *Wozniak v. YouTube, LLC*, 100 Cal. App. 5th 893, 917 (2024) ("website's use of content-neutral algorithms, without more, does not expose it to liability for content posted by a third-party") (citation omitted).[11]

The same logic applies to tools that recommend or facilitate connections with other user profiles based on, e.g., shared connections. (*See, e.g.*, Am. Compl. ¶ 140 ("Quick Add is a Snapchat feature that suggests potential friends to a user."); *id.* ¶ 209 ("Mentions feature" "allows

[11] To the extent the State also challenges the "continuous feed of advertisements" by third parties on Snapchat's Discover feature (Am. Compl. ¶ 173), that feature, too, "facilitate[s] the communication and content of others" and is protected by Section 230. *Dyroff*, 934 F.3d at 1098; *see also Force*, 934 F.3d at 70 ("[M]aking information more available is, again, an essential part of traditional publishing[.]").

users to tag their Snapchat friends in group chats, Stories, and Snaps"); *id.* ¶ 155 ("Snap's search term tool allows unknown adults to identify minor accounts.").) As the federal court overseeing the social media MDL proceeding explained in holding that identical allegations were barred by Section 230, "recommending one user's profile to another is publishing" activity because "user accounts or profiles are third-party 'content.'" *In re Soc. Media*, 702 F. Supp. 3d at 831.[12]

The State also conflates its proactive and results-oriented "decoy account" search for other users with Snap's purported recommendations of bad actors' accounts to minors. Such allegations are facially false and should be disregarded. For example, the State alleges that, in connection with its investigation, Snap recommended a user named "sugar baby 4 pay" to the State's decoy account. (Am. Compl. ¶ 74.) But the screenshot included in the Complaint as supposed support for this allegation shows that the bad actor account was surfaced as a result of the investigator affirmatively searching for a portion of the account name—not because of Snap's algorithmic recommendations. (*Id.*)

Age verification and parental controls. The State also challenges Snapchat's allegedly "ineffective age . . . verification" and "parental controls." (*Id.* ¶¶ 218, 339; *see also id.* ¶¶ 175, 339-344, 221, 388, 407.) Section 230 bars these claims because they are premised on harms allegedly caused by third-party content published by Snap—e.g., "sending sexually graphic

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[12] *See also, e.g.*, *L.W.*, 675 F. Supp. 3d at 1093, 1097-98 (claim that "Quick Add" feature allegedly facilitated child predators' communication with minor plaintiff was barred by Section 230 because "the harm animating [p]laintiffs' claims 'is directly related to the posting of third-party content'") (citation omitted); *V.V.*, 2024 WL 678248, at *2, *10 (claim that Quick Add connected minor plaintiff with child predators was barred by Section 230); *Doe (K.B.) v. Backpage.com, LLC*, No. 23-cv-02387-RFL, 2024 WL 2853969, at *2 (N.D. Cal. Mar. 20, 2024) (Section 230 barred plaintiff's "claims that Meta's algorithms facilitated her sex trafficking").

content to minors." (*Id.* ¶ 175.) Courts have rejected attempts to reframe claims about harms from third-party content as claims about age verification or parental control. *See, e.g.*, 7/19/24 JCCP Order at 27 (Section 230 bars allegations that the "absence of effective age verification measures . . . allows predators to lie about their ages and masquerade as children") (citation omitted); *Doe v. MySpace*, 528 F.3d at 420-21 (allegations that MySpace failed "to implement measures that would have prevented" predators from communicating with minors "are merely another way of claiming that MySpace was liable for publishing the communications").[13]

Notifications. The State challenges Snapchat's "push notifications and emails" as allegedly "encourag[ing] addictive engagement." (Am. Compl. ¶ 256.) But "notifications" about third-party content are "tools meant to facilitate the communication and content of others"; thus, a provider "act[s] as a publisher of others' content" when supplying them. *Dyroff*, 934 F.3d at 1098; *see also Fed. Agency of News LLC v. Facebook, Inc.*, 432 F. Supp. 3d 1107, 1118 (N.D. Cal. 2020) (same). Indeed, the State's allegations expressly challenge notifications about ***other users'*** content. (*See* Am. Compl. ¶ 257 (notifications sent to users "when another user follows them, or likes or comments on their post," or "if the user is 'tagged' or mentioned in a post or if a message is sent").) Section 230 bars claims challenging notifications "made to alert users to third-party content." *In re Soc. Media*, 702 F. Supp. 3d at 833.

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[13] *See also, e.g.*, *Herrick*, 765 F. App'x at 590 (Section 230 barred claims because "Grindr's alleged lack of safety features 'is only relevant to [plaintiff's] injury to the extent that such features would make it more difficult for his former boyfriend to post impersonating profiles or make it easier for Grindr to remove them'") (citation omitted); *Doe v. Snap, Inc.*, 2022 WL 2528615, at *12, *14 (Section 230 barred claim that Snapchat "is negligently designed because the application fails to prevent underage users from creating accounts using false birthdays," allegedly "creating an environment where adults can interact with underage users").

Filters/Other Effects. The State challenges features that "allow users to edit and overlay augmented-reality special effects and sounds on their Snaps." (Am. Compl. ¶ 265.) These claims are based on the publication of content created with those features (*id.* ¶ 268), and are thus "directly related to the posting of third-party content." *Doe v. Twitter, Inc.*, 555 F. Supp. 3d 889, 930 (N.D. Cal. Aug. 19, 2021), *aff'd in part & rev'd in part*, Nos. 22-15103 & 22-15104, 2023 WL 3220912 (9th Cir. May 3, 2023).[14]

Rewards. The State challenges various alleged "rewards" features that acknowledge "milestones" or "metrics" in users' communications history. (*See* Am. Compl. ¶¶ 270-286 (discussing Streaks, Trophies and Charms).) Many online services and games offer "awards" for user engagement, but that does not eliminate Section 230 immunity, as these awards are inherently premised on the content of others. *V.V.*, 2024 WL 678248, at *1, *10 (acknowledging plaintiffs' allegations regarding "Snap Streaks" and "rewards" and holding that Section 230 barred all of plaintiffs' claims); *Doe v. Reddit, Inc.*, No. 21-00768, 2021 WL 5860904, at *5 (C.D. Cal. Oct. 7, 2021) (provision of "Karma awards" did not strip service of immunity), *aff'd*, 51 F.4th 1137 (9th Cir. 2022), *cert. denied*, 143 S. Ct. 2560 (2023).[15]

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[14] *Lemmon v. Snap, Inc.*, 995 F.3d 1085 (9th Cir. 2021) is inapposite. There, the plaintiffs claimed that a "speed filter" encouraged users to drive too fast, creating an independent danger unrelated to publication of any content. 995 F.3d at 1093 (plaintiffs "d[id] not fault Snap in the least for publishing" content). *Lemmon* made clear that plaintiffs "would not be permitted under § 230(c)(1) to fault Snap" for harms caused by users' reactions to content created using the filter, which "would treat Snap as a publisher of third-party content." *Id.* at 1093 n.4.

[15] Section 230 also bars the State's allegations regarding a short-lived "Snapcash" feature (discontinued in 2018) that allowed users to send each other money through the platform. (Am. Compl. ¶¶ 202-206.) The crux of these allegations is that "predators . . . extort[ed] cash from adolescent users" through threats. (*Id.* ¶ 202.) *See La Park La Brea A LLC v. Airbnb, Inc.*, 285 F. Supp. 3d 1097, 1106 (C.D. Cal. 2017) (Section 230 "protect[s] websites that process payments and transactions" for third-party content); *United States v. eBay Inc.*, No. 23-7173, 2024 WL 4350523, at *10 (E.D.N.Y. Sept. 30, 2024) (Section 230 barred claims that eBay facilitated the sale of illegal products by third-party merchants; eBay's provision of "payment processing software does not materially contribute to the

Failure to Warn and Omission Claims. Finally, claims barred by Section 230 cannot be revived by alleging that Snap "failed to warn" or omitted statements about certain alleged harms. (*See, e.g.*, Am. Compl. ¶¶ 184, 354, 366, 404-405.) Otherwise, Section 230 would be rendered meaningless, since "essentially every state cause of action otherwise immunized by section 230 [could] be pleaded as a failure to warn." *Wozniak*, 100 Cal. App. 5th at 914-15. A claim based on a harmful message sent by a third party, for instance, could be recast as a claim based on the service provider's "failure to warn" plaintiffs that they might receive this message. Courts have repeatedly rejected such an end run around Section 230 immunity. *See Bride*, 112 F.4th at 1179-80 (Section 230 barred "failure to warn" claim regarding anonymous messaging feature); *Herrick*, 765 F. App'x at 591 (affirming dismissal of failure-to-warn claims because they are "inextricably linked" to "alleged failure to edit, monitor, or remove the offensive [third-party] content").

3. <u>The State's Claims Depend On Content Provided By Third Parties.</u>

The third prong of Section 230 immunity is met because the State's allegations are predicated on the publication of user-generated content that Snap did not create. (*See, e.g.*, Am. Compl. at 16-103 (describing communications from predatory third-party users).) *See also* 47 U.S.C. § 230(f)(3) (the "information content provider" is the "person or entity that is responsible, in whole or in part, for the creation or development of information"). The "proliferation and dissemination of content does not equal creation or development of content," *Kimzey*, 836 F.3d at 1270-71, and "features and functions" provided by interactive computer services, such as

illegal products' 'alleged unlawfulness'").

"algorithms," "recommendations[,] and notifications," are "tools . . . to facilitate" third-party communications; they do not constitute "content in and of themselves," *Dyroff*, 934 F.3d at 1098. Simply put, the State's claims seek to hold Snap liable by treating it as a publisher of content provided by someone else. That is exactly what Section 230 prohibits.

C. The State's Public Nuisance Claim Is Not Legally Viable.

Public nuisance law is a narrow doctrine intended to protect the public's right to air, water and other indivisible property-based resources shared by the community at large. The State seeks to dramatically expand this doctrine to encompass a theory that Snap should have been more effective than the State's law enforcement officers at preventing bad actors from committing crimes. If accepted, such a theory would "create a broad web of indeterminate liability that the common law has heretofore refused to impose." *Coordinated Proceeding Special Title (Rule 3.400) Social Media Cases*, No. JCCP 5255 et al., 2024 WL 2980618, at *1 (Cal. Super. Ct. June 7, 2024) (trial order) (dismissing nuisance claims against Snap and other defendants under California, Florida, Rhode Island and Washington law).[16] Indeed, taken to its logical conclusion, the State's theory would allow for the imposition of nuisance liability on any operator of a widely disseminated, lawful service that could be abused or misused by a third party.

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[16] The federal court overseeing the social media MDL proceeding recently dismissed public nuisance claims brought by school districts under a handful of states' laws that have expressly "imposed land- or product-related limitations" (Illinois, New Jersey, Rhode Island and South Carolina) but declined to dismiss nuisance claims governed by state laws that have not "formally adopted such limitations." *See* Order Grant. In Part & Den. In Part Defs.' Mot. to Dismiss, *In re Social Media*, MDL No. 3047, at 1 (N.D. Cal. Oct. 15, 2024). While the court reasoned that "public nuisance . . . provides a flexible mechanism to redress evolving means for causing harm," *id.*, that logic misapprehends the purpose of nuisance law and the limited role of a federal court sitting in diversity. *See City of Phila. v. Beretta U.S.A. Corp.*, 277 F.3d 415, 421 (3d Cir. 2002) ("public nuisance is a matter of state law, and it is not the role of a federal court to expand state law in ways not foreshadowed by state precedent").

The State's nuisance claim should be dismissed because: (1) the State has not alleged that Snap violated a public right; and (2) the State has failed to adequately plead causation.

1. <u>The State Fails To Plead That Snap Violated A Public Right.</u>

Under New Mexico law, both common law and statutory public nuisance are defined as "an 'unreasonable interference with a right common to the general public.'" *State ex rel. Vill. of Los Ranchos de Albuquerque v. City of Albuquerque*, 1994-NMSC-126, ¶ 52, 119 N.M. 150 ("*Los Ranchos*") (citation omitted) ("The common law public nuisance is similar to the New Mexico public nuisance statute, Section 30-8-1") (citing Restatement (Second) of Torts § 821B(1) (1979) and NMSA 1978, § 30-8-1); *see also City of Albuquerque v. State ex rel. Vill. of Los Ranchos de Albuquerque*, 1991-NMCA-015, ¶ 15, 111 N.M. 608 (deeming it unnecessary "to distinguish between" the common law and section 30-8-1) (citation omitted). It is not enough that individual injuries are suffered by "a large number of persons." *State ex rel. Smith v. Riley*, 1997-NMCA-063, ¶ 8, 123 N.M. 453 (citation omitted). Rather, a public nuisance can only arise where an act interferes with a right shared by all members of the public. *Los Ranchos*, 1994-NMSC-126, ¶ 52.

The nuisance doctrine was created to prevent offensive uses of property and has been consistently applied in that context. *See, e.g.*, *id.* (bridge alleged to cause pollution and wildlife destruction); *Citizens for Alternatives to Radioactive Dumping v. CAST Transp., Inc.*, No. 99-321, 2004 WL 7338006, at *20-37 (D.N.M. Sept. 30, 2004) (radioactive waste storage), *aff'd*, 485 F.3d 1091 (10th Cir. 2007); *Scott v. Jordan*, 1983-NMCA-022, ¶¶ 1-18, 99 N.M. 567 (cattle feed lot). The Restatement, which New Mexico courts have embraced, *see, e.g.*, *Los Ranchos*, *supra*, recognizes the centrality of physical space to a public nuisance claim. *See* Restatement (Second)

Torts § 821B cmt. b (1979) (highlighting "the case of keeping diseased animals or . . . a pond of breeding malarial mosquitoes . . . the storage of explosives in the midst of a city or the shooting of fireworks in the public streets . . . [and] . . . houses of prostitution or indecent exhibitions").

Consistent with this property-based approach to public nuisance law, courts have refused to extend the nuisance doctrine to the misuse of lawful products or services, including prescription drugs and guns. *See, e.g.*, *State ex rel. Hunter v. Johnson & Johnson*, 499 P.3d 719, 726, 730-31 (Okla. 2021) (opioids; public nuisance law is designed "to address discrete, localized problems," generally linked to "land or property use," not policy problems such as those caused by an arguably dangerous product, which do not involve "violation of a public right"); *City of Chicago v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099, 1116 (Ill. 2004) (guns; describing product-based public nuisance theories as "so broad and undefined that the presence of any potentially dangerous instrumentality in the community could be deemed to threaten it"); *In re Lead Paint Litig.*, 924 A.2d 484, 495-97 (N.J. 2007) (lead paint; "public nuisance has historically been tied to conduct on one's own land or property").[17] As these courts have recognized, applying public nuisance law to multi-faceted social problems related to the misuse of lawful products "would create unlimited and unprincipled liability for product manufacturers." *Hunter*, 499 P.3d at 725; *see also Beretta*, 821 N.E.2d at 380 (warning against a potential "flood of limitless, similar theories of public nuisance, not only against these defendants, but also against a wide and varied array of other commercial and manufacturing

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[17] *See also, e.g.*, *District of Columbia v. Beretta, U.S.A., Corp.*, 872 A.2d 633, 651 (D.C. 2005) (warning against "a proliferation of lawsuits not merely against these [gun manufacturer] defendants but against other types of commercial enterprises in order to address a myriad of societal problems") (cleaned up); *Detroit Bd. of Educ. v. Celotex Corp.*, 493 N.W.2d 513, 521 (Mich. Ct. App. 1992) (asbestos products; "manufacturers, sellers, or installers of defective products may not be held liable on a nuisance theory for injuries caused by the defect").

enterprises and activities") (citation omitted).

As noted above, the state court overseeing the California social media litigation recently applied these principles to dismiss public nuisance claims on the ground that "the right not to be injured by the Defendants' social media platforms is a right ***personal*** to the minors who used Defendants' platforms." *Coordinated Proceeding*, 2024 WL 2980618, at *16 (emphasis added). As that court explained, the doctrine "should not be extended from the defined limits of its reach by the expedient of calling the secondary, collective effects of tortious conduct toward" those minors "a 'nuisance,'" which would create a "broad web of indeterminate liability." *Id.* at *1, *18.

The State does not allege that Snap has violated a traditional public right such as clean air, clean water, or a public right of way. Instead, the State alleges discrete harms (such as exploitation or mental health injuries) to a minority of individuals who use the Snapchat platform. (*See, e.g.*, Am. Compl. ¶¶ 63, 218, 222-224, 319, 320.) If a nuisance claim could be asserted against Snap under these circumstances, the doctrine would be limitless. Similar suits could be brought against any company that provides a product or service that can be abused for illicit purposes (e.g., a telecom company or postal service).[18] Other courts have rightly rejected such an expansive application of the nuisance doctrine, and this Court should do the same.

2. Plaintiff's Public Nuisance Claim Fails For Lack Of Proximate Causation.

The State has also failed to plead causation, which "is an essential element of" nuisance

[18] Although Judge Biedscheid declined to dismiss the State's claim against Meta in a different lawsuit, the court did not address the traditional limits on public nuisance law, the extensive authority discussed in text, or the policy and legal implications of expanding the doctrine in the manner being urged by the State. *See Torrez*, at *3. The court also did not consider the causation argument presented here.

claims. *Firstenberg v. Monribot*, 2015-NMCA-062, ¶ 14; *see also Power v. Geo Grp.*, No. 20-0782, 2023 U.S. Dist. LEXIS 155116, at *17-18 (D.N.M. Sept. 1, 2023), *proposed findings & recommended disposition adopted by* 2023 U.S. Dist. LEXIS 169589 (D.N.M. Sept. 21, 2023) (granting summary judgment on common law public nuisance claims, for failure to prove causation). Under New Mexico law, proximate cause entails not just factual causation, but also "a natural and continuous sequence unbroken by an independent and intervening cause that produces the injury." *Baer v. Regents of Univ. of Cal.*, 1999-NMCA-005, ¶¶ 14-15, 126 N.M. 508 (cleaned up); *Cal. First Bank v. State*, 1990-NMSC-106, ¶ 25 n.4, 111 N.M. 64 ("causal connection" may be "too tenuous a basis upon which to fix liability" even if it constitutes cause in fact).

As courts have recognized in rejecting other claims against online communication services for lack of proximate causation, online platforms are not responsible for "ripples" that "flow far beyond" their alleged conduct. *Crosby v. Twitter, Inc.*, 921 F.3d 617, 625 (6th Cir. 2019) (citation omitted); *see also Twitter, Inc. v. Taamneh*, 598 U.S. 471, 501 (2023) ("Given the lack of any concrete nexus between defendants' services and the Reina attack, plaintiffs' claims would necessarily hold defendants liable as having aided and abetted each and every ISIS terrorist act committed anywhere in the world."). For example, in *Crosby*, the victims of a tragic mass shooting and their relatives sued multiple social media companies, seeking to hold them responsible under both federal and state law on the theory that propaganda made available on their platforms caused the shooter's actions. The Sixth Circuit affirmed the dismissal of the plaintiffs' claims, holding that proximate cause "demand[s] . . . some direct relation between the injury asserted and the injurious conduct alleged." 921 F.3d at 624 (citations omitted). That direct relationship was absent

because "[t]he content [on the online platforms] did not compel [the shooter's] actions"; rather, it was the assailant himself who carried out the mass shooting. *Id.* at 619, 625. Other courts have applied similar principles in contexts ranging from gun sales, *see, e.g.*, *People v. Sturm, Ruger & Co.*, 761 N.Y.S.2d 192, 202 (App. Div. 2003), to the sale of cold medication used in methamphetamine, *see Ashley County v. Pfizer, Inc.*, 552 F.3d 659, 666-73 (8th Cir. 2009).

As discussed above, although the State seeks to frame its allegations as claims related to Snapchat's "design," they primarily concern the actions of "criminals" and "bad actors," who intentionally "traffic[] [in] drugs . . . . sexual exploitation" and "the illegal trade and sale of guns." (Am. Compl. at 85, 97; *see also id.* ¶ 69 ("sextortion criminals are able to easily bypass" Snap's "safety measure[s]"); *id.* ¶ 152 (alleging that "Bad actors" "groom" users on other platforms to identify new targets through Snapchat's algorithm).) Such third-party wrongdoing, including conduct committed off the platform over which Snap has no control, is far removed from the alleged conduct underlying the State's public nuisance claim. While the State suggests that Snap should have taken the place of New Mexico's law enforcement authorities, the alleged misconduct is far removed from the "design" features of Snapchat underlying this lawsuit. Taken to its logical conclusion, the State's expansive view of causation could impose liability on any social media platform or messaging application; even "those who merely deliver mail or transmit emails could be liable for the tortious messages contained therein." *Taamneh*, 598 U.S. at 489, 500.

Although the State also claims that Snap's "design" "caused mental health harm" to New Mexico residents, including "stress, anxiety, depression, suicidal thoughts, and eating disorders" (Am. Compl at 122; *see also id.* ¶¶ 309-316, 326-338), Snap's alleged conduct is many steps

removed from these alleged injuries. For example, the State alleges that certain Snapchat features, including "ephemeral content" and "chat notifications," have harmed young users by "encourag[ing] compulsive use" of (and addiction to) Snapchat, which is allegedly "detrimental to youth well-being and mental health." (Am. Compl. ¶¶ 354, 368, 408.) But this theory of injury involves many active steps on the part of Snapchat users, whom Snap does not control and who must choose to create ephemeral content or send the communications that result in chat notifications. Similarly, the purported relationship between addiction and various mental health issues implicates an individual's personal circumstances and experiences beyond Snapchat, including their relationships and interactions both on other communication platforms and at school or home with peers, teachers, family members and others. In short, the State's own allegations demonstrate that the purported harms were proximately caused by third parties, not Snap.[19]

D. The State's Unfair Practices Act Claims Fail.

The State's claims for unfair/deceptive/unconscionable practices (counts 1-3) are based on its contention that Snap made alleged falsehoods "to the public regarding the safety and design of its platforms" and "failed to warn users, parents, and the public of the risks and harms of Snapchat."

[19] The federal MDL court recently ruled that school district plaintiffs had sufficiently alleged proximate causation as to their negligence theory that defendants "fostered compulsive use of their platforms," holding that such an alleged injury was foreseeable to the defendants. *See In re Soc. Media Adolescent Addiction/Pers. Inj. Prods. Liab. Litig.*, MDL No. 3047, 2024 WL 4673710, at *14, *16 (N.D. Cal. Oct. 24, 2024). In so holding, the court downplayed the other proximate cause inquiry: remoteness. *See Ashley County*, 552 F.3d at 667 ("action can be too remote or indirect to be considered the legal cause of a subsequent injury" even if it is allegedly foreseeable). Moreover, the MDL court ruled that "any alleged injuries to the school districts stemming from dangerous challenges, threats, and crimes disseminated or perpetrated on defendants' platforms" that did not involve defendants' alleged promotion or development ***did*** "fail proximate causation," which supports dismissing most of the State's lawsuit here. 2024 WL 4673710, at *16; *see also id.* at *28 ("[P]laintiffs fail to allege that defendants proximately caused third-party harms flowing from physical property damages, crimes, or threats transmitted on defendants' social media platforms.").

(Am. Compl. ¶¶ 3, 345-412.) These claims cannot proceed because: (1) the UPA does not cover the provision of free services like Snapchat and exempts the dissemination of information; and (2) many of the State's allegations are vague and conclusory; (3) the only alleged specific misstatements are either subjective statements of opinion or in fact truthful statements regarding Snap's commitment to public safety; and (4) the State's failure-to-warn theory is belied by its citation to numerous examples of Snap publicly disclosing the very risks at issue in this litigation.

1. The Alleged Conduct Is Outside The Scope Of The UPA.

a) The UPA Does Not Apply To Free Services, Like Snapchat.

A threshold requirement under the UPA is that the purportedly unfair, deceptive or unconscionable practice was "knowingly made in connection with the sale, lease, rental or loan of goods or services or in the extension of credit or in the collection of debts." NMSA 1978, § 57-12-2(D) (defining "unfair or deceptive trade practice"); *see also, e.g.*, *id.* § 57-12-2(E) (same for "unconscionable trade practice"). Although this element "does not require a transaction between a claimant and a defendant," "somewhere along the purchasing chain, the claimant" must have "*purchase[d]*" a good or service "that was at some point *sold* by the defendant." *Hicks v. Eller*, 2012-NMCA-061, ¶ 20 (emphasis added).

As the State repeatedly concedes, "Snap does not require a monetary exchange from New Mexican consumers in order for them to use [the] Snap platform and features." (Am. Compl. ¶ 360.) Although the State suggests that this element can nonetheless be satisfied because Snap allegedly "monetizes consumers' private data" (*id.* ¶ 34), the terms "sale" or "lease" require a "tangible form of payment" (i.e., money); they do not encompass intangible benefits like those

alleged by the State. *Claridge v. RockYou, Inc.*, 785 F. Supp. 2d 855, 864 (N.D. Cal. 2011) (consumer's transfer of personal data in exchange for using application did not satisfy similarly "strict requirement" of "purchase" or "sale" under California's consumer-protection statute at pleading stage). Nor can the State circumvent this element by alleging that "Snap made representations about its platform in connection with the sale of . . . advertising to ***New Mexico companies***" (Am. Compl. ¶ 360 (emphasis added)), because the premise of the State's UPA claims is that Snap misled "teens and their parents" (*id.* ¶ 346), not advertisers.[20]

b) The UPA Exempts Snap From Liability.

The UPA also exempts from liability "publishers, broadcasters, printers or other persons engaged in the dissemination of information . . . who publish, broadcast or reproduce material without knowledge of its deceptive or unconscionable character." NMSA 1978, § 57-12-16. As alleged in the Amended Complaint, Snap is an online communications platform that enables third-party "users to send and receive ephemeral, or 'disappearing,' audiovisual messages." (Am. Compl. ¶ 50; *see also id.* ¶¶ 2, 9 (describing Snapchat as "Snap's social media service" and "an internet forum").) Because Snap's business is to provide a platform for users to publish and disseminate information, Snap is exempt from UPA liability.

2. <u>The State Has Not Adequately Pled A Violation Of The UPA.</u>

a) The State Fails To Allege Any "Unfair" Trade Practices.

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[20] Although the State alleges in passing that "a subset of users" subscribe to Snapchat+, where they are charged "a monthly fee" "in exchange for which users receive access to additional features on Snapchat" (Am. Compl. ¶¶ 25, 35, 361), the Complaint does not plead what those features are, much less specify what (if anything) is unfair, unconscionable or deceptive in Snap's alleged sale of that subscription.

"The gravamen of an unfair trade practice is a misleading, false, or deceptive statement made knowingly in connection with the sale of goods or services." *Farmer v. Walmart, Inc.*, No. 23-00397, 2024 WL 1539789, at *13 (D.N.M. Apr. 9, 2024) (citation omitted);[21] *see also Hicks*, 2012-NMCA-061, ¶ 18 ("essential element[]" of UPA claim is that "the defendant made an oral or written statement" "that was either false or misleading") (citation omitted). Even if the UPA applies, the State's claims for deceptive practices (counts 1 and 3) fail for multiple reasons.

First, many of the statements the State identifies as purported "misrepresentations" are inadequately pled under any standard, much less the heightened "particularity" standard of Rule 1-009(B) that governs fraud-based claims. *See Barranca Builders, LLC v. LB/L-Los Santeros Phase I, LLC*, No. 03-293, 2003 WL 27384974, at *4 (D.N.M. Aug. 13, 2003) (plaintiff "must satisfy the who, what, when, where, and how pleading requirements" when claiming that "false misrepresentations" "violated the New Mexico Unfair Trade Practices Act"); *Choq, LLC v. Holistic Healing, LLC*, No. 20-00404, 2020 U.S. Dist. LEXIS 247692, at *18 (D.N.M. July 28, 2020) (dismissing UPA claim under analogous Rule 9(b)).

For example, while the State alleges that Snap "affirmatively mislead[s] parents and children about the presence of young children and about sex trafficking, sexual exploitation content, and drug and gun sales on the platform" (Am. Compl. ¶ 4), it does not identify the specific statements that are supposedly false, much less plead the particulars of when those statements were

[21] Federal authority on the UPA is instructive. *See* NMSA 1978, § 57-12-4 ("It is the intent of the legislature that in construing Section 3 of the Unfair Practices Act the courts to the extent possible will be guided by the interpretations given by the federal trade commission and the federal courts.").

made, who made them and why they are false. Similarly, the State references purportedly "false" "claims" to the effect that "Snapchat is unlike other social media" (*id.* ¶ 9), but does not set forth any details about those supposed representations. And the State does not identify either the purported "public statement regarding [Snap's] commitment to privacy" that is allegedly "misleading" (*id.* ¶ 183) or any particular statement in "Snap's Parent's Guide" that it claims "deceived parents about the existence or efficacy of various safety features" (*id.* ¶ 351). Accordingly, its allegations are far too vague and conclusory to satisfy any pleading standard.

Second, to the extent the State identifies any specific statements and attempts to provide any details about them, they are not actionable. "[W]hile specific representations of fact can form the basis of a deceptive trade practice claim," "general statements of opinion typically constitute protected puffery" that is not actionable under the UPA. *See Farmer*, 2024 WL 1539789, at *14 (citation omitted); *see also Dollens v. Wells Fargo Bank, N.A.*, 2015-NMCA-096, ¶ 16 ("non-actionable puffery" cannot form the basis of a claim under the UPA). The State's laundry-list of alleged misrepresentations fall into this latter category.

Puffery. The State repeatedly references what it describes as "pithy and misleading catchphrases," such as "Snap's Super Bowl promotion of Snapchat as a worry-free platform that is '[m]ore private,' '[l]ess permanent, [m]ore free,' or '[l]ess trolls.'" (*See, e.g.*, Am. Compl. ¶ 103; *see also id.* ¶ 348 ("Snap has repeatedly sought to portray itself as the 'antidote to social media'").) The State likewise highlights "slogans" that promote the experience on Snap as "More Playful . . . More free . . . More love.'" (*Id.* ¶ 349.) These statements are quintessential statements of opinion because they are not "specific and measurable claim[s], capable of being proved false or of being

reasonably interpreted as a statement of objective fact." *Farmer*, 2024 WL 1539789, at *14 (citations omitted); *see also Renfro v. Champion Petfoods USA, Inc.*, 25 F.4th 1293, 1303 (10th Cir. 2022) ("statements 'Trusted Everywhere' and 'Ingredients We Love [From] People We Trust' are unactionable puffery"); *Catalano v. N.W.A. Inc.*, No. 98-7768, 1998 WL 35483144, at *9 (Minn. Dist. Ct. Sept. 15, 1998) ("[T]he 'worry-free' slogan is an example of the 'mere puffings' often associated with descriptions of travel services, and is not a guarantee of no harm."). In short, under the State's own allegations, these claims are nothing more than subjective "catchphrases," which are not actionable under New Mexico law.

Aspirational Statements About Snap's Commitment To Safety. The State also claims that Snap misrepresented "that its platform was safe or that it was addressing problematic content" (Am. Compl. at 134), pointing, for example, to a statement by Snap's Vice President of Global Public Policy that Snap "takes 'into account the unique sensitivities and considerations of minors when we design products'" (*id.* ¶¶ 347(a), 139, 367(f)). But the federal MDL court rejected this exact allegation on the ground that the statement was "a nonactionable statement of opinion." *In re Social Media*, 2024 WL 4532937, at *56 (dismissing "consumer-protection claims [against Snap] based on these defendants' affirmative statements").[22] The same logic applies to the State's challenges to Snap's ***policies***—e.g., that it "prohibit[s] any activity that involves sexual exploitation or abuse of a minor" (Am. Compl. ¶¶ 352(b), 353); and "abide[s] by certain guidelines

[22] The MDL court found that certain other alleged misrepresentations made by Meta were actionable, such as Meta's specific statements that its platform's impact on teens is "quite small." *See In re Soc. Media*, 2024 WL 4532937, at *24-25. The State does not have comparable allegations here.

so the information it provides minimizes harm" (*id.* ¶¶ 195, 347(c), 352(a)). Like the example singled out by the MDL court, the highlighted statements never "guaranteed safety, but instead emphasized [Snap's] belief in the importance of trust and safety and its commitment to both." *In re Lyft Inc. Sec. Litig.*, 484 F. Supp. 3d 758, 770-71 (N.D. Cal. 2020) ("generalized assertions about Lyft's commitment to safety, its safety measures, and the role safety plays in the rideshare market" are "aspirational" and "not actionable"); *accord Eisner v. Meta Platforms, Inc.*, No. 24-2175, 2024 WL 3228089, at *3 (N.D. Cal. June 28, 2024) ("Meta's statement that its 'policies prohibit harmful content'" were "broad policy affirmations or aspirational statements").

Even if such "aspirational" statements could qualify as affirmations of fact, the State's allegations confirm that they are true—i.e., that Snap ***did*** undertake significant efforts to promote user safety. For example, the State acknowledges "safety measure[s]" that "notify users after a screenshot has been taken of their Snaps or when a prerecorded video or image is used," as well as Snap's efforts to block "CSAM keywords." (Am. Compl. ¶¶ 69, 77.) While the State challenges the adequacy of those efforts based on "decoy" accounts that evaded Snap's measures (*see, e.g.*, *id.* ¶¶ 73, 77, 82), the State's allegations merely reflect that bad actors will stop at nothing to perpetrate their crimes. That does not call into question Snap's commitment to safety, much less render its aspirational statements about that commitment false or misleading.

The State also acknowledges that "users must 'confirm' that they are 13 or older to create an account." (Am. Compl. ¶ 59.) While the State attacks this effort as "largely meaningless" (*id.* ¶ 347(b)) due to "minor users being [un]truthful" (*id.* ¶ 60), Snapchat warns of this risk (*id.* (disclosing risk that users may "provide us with incorrect or incomplete information regarding

their age or other attributes,") (citation omitted)). Similarly, the State acknowledges that Snap "ha[s] safeguards against trying to circumvent our protections for minors" (*id.* ¶ 188), including one that makes it more difficult for predators to find and "friend" underage users by limiting their appearance in the Quick Add feature (*id.* ¶ 148).

Third, the State also alleges that Snap violated the UPA by "fail[ing] to warn users, parents, and the public of the risks and harms of Snapchat." (Am. Compl. ¶ 354; *see also id.* ¶ 368 (similar).) But the UPA only "imposes a duty to disclose material facts reasonably necessary to prevent any statements from being misleading." *Vilar v. Equifax Info. Servs., LLC*, No. 14-0226, 2014 WL 7474082, at *29 (D.N.M. Dec. 17, 2014) (citation omitted); *id.* at *30. "New Mexico court[s] have held that information is material where" "the plaintiff has no reasonable opportunity to ascertain it." *Id.* at *27; *see also WXI/Z Sw. Malls v. Mueller*, 2005-NMCA-046 ¶ 29, 137 N.M. 343 (defendant had "no affirmative duty" to disclose information that plaintiffs could have discovered by "reasonable diligence").

The State essentially concedes that New Mexicans had every "reasonable opportunity" to discover the purported safety risks that underlie this lawsuit. In fact, as the State acknowledges, Snap expressly warned of these risks, including that "Snapchatters who view your Snaps, Chats, and any other content, can always screenshot that content, save it, or copy it outside the Snapchat app" (Am. Compl. ¶ 137) and that Snap "cannot – and do[es] not – guarantee that other users or the content they provide . . . will comply with our Terms, Community Guidelines or our other

terms, policies or guidelines."[23] The State also repeatedly cites publicly available sources that disclose how Snap operates and the potential for "bad acts" on the platform. (*See, e.g.*, Am. Compl. ¶ 107 (describing an article that noted the risk of child sexual abuse on online platforms, including Snapchat).) In short, users of Snap and their parents had every "reasonable opportunity to ascertain" the purported safety risks the State alleges Snap failed to disclose, foreclosing the State's omission-based theory under the UPA. *Vilar*, 2014 WL 7474082, at *27.

b) The State Fails To Allege "Unconscionable" Trade Practices.

To state a claim for unconscionable trade practices, a complaint must allege "an act or practice in connection with the sale . . . of any goods or services" "that to a person's detriment" "takes advantage of the lack of knowledge, ability, experience or capacity of a person to a grossly unfair degree" or "results in a gross disparity between the value received by a person and the price paid." NMSA 1978, § 57-12-2(E). The State cannot proceed under either theory.

First, the State has not pled that Snap's alleged conduct resulted in a "gross disparity between the value received by a person and the price paid." NMSA 1978, § 57-12-2(E). Because "[t]he UPA is a law that prohibits the ***economic*** exploitation of others," "those seeking relief for an unconscionability claim must establish that the defendant ***economically*** exploited the plaintiff." *Robey v. Parnell*, 2017-NMCA-038, ¶¶ 53, 56 (emphasis added) (citation omitted). Here, there could not have been any "economic exploitation" of the vast majority of New Mexican users of Snapchat, who did not pay a "price" for its services. (Am. Compl. ¶ 360.) And as to the "subset of

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[23] https://snap.com/en-US/terms. As previously noted, Snap's Terms of Service are publicly available and subject to judicial notice. *See supra*.

users" who allegedly subscribed to Snapchat+ for "a monthly fee," the State does not allege how Snap "economically exploited" them. (*Id.* ¶¶ 25, 35, 361.)

Second, the Complaint fails to articulate a cognizable legal theory in support of the claim that Snap "[t]akes advantage of . . . a person to a grossly unfair degree." NMSA 1978, § 57-12-2(E). As courts have recognized in interpreting similar laws, the "grossly unfair degree" standard requires that the defendant take "advantage of [a plaintiff's] lack of knowledge and 'the resulting unfairness'" must be "glaringly noticeable, flagrant, complete and unmitigated." *Craig v. Ameriquest Mortg. Co.*, No. 04-3929, 2005 WL 2921947, at *4 (S.D. Tex. Nov. 4, 2005) (citation omitted); *see also Fikri v. Best Buy, Inc.*, 2013-Ohio-4869, ¶ 22, 1 N.E.3d 484, 490 (describing unconscionable as "unreasonable or excessive").

As already discussed, the State repeatedly alleges both that Snap disclosed the potential for misuse of the platform by "bad actors" and "criminals" and that the purported safety risks were publicized throughout the public domain. (*See, e.g.*, Am. Compl. ¶¶ 107, 121, 160-161, 199, 200, 225, 226, 238.) Moreover, the State repeatedly concedes that Snap takes affirmative efforts to thwart bad actors, such as limiting the age of users and content-monitoring efforts. (*See, e.g.*, *id.* ¶¶ 59, 188, 235.) This further precludes any theory that Snap took advantage of New Mexico users to a "grossly unfair degree." *Craig*, 2005 WL 2921947, at *4.

CONCLUSION

For the foregoing reasons, Snap respectfully requests that the State's Complaint be dismissed in its entirety.

Dated: November 18, 2024

Respectfully submitted,

HOLLAND & HART LLP

By: /s/ *Larry J. Montaño*
Larry J. Montaño
110 North Guadalupe, Suite 1
Santa Fe, New Mexico 87501
Telephone: (505) 954-7291
Facsimile: (505) 983-6043
Email: lmontano@hollandhart.com

**SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP**

Amy L. Van Gelder (*pro hac vice forthcoming*)
320 South Canal Street
Chicago, Illinois 60606-5707
Telephone: (312) 407-0903
Facsimile: (312) 407-0411
Email: amy.vangelder@skadden.com

Jessica Davidson (*pro hac vice forthcoming*)
Christopher D. Cox (*pro hac vice forthcoming*)
One Manhattan West
New York, New York 10001
Telephone: (212) 735-2603
Facsimile: (212) 735-2000
Email: jessica.davidson@skadden.com
Email: christopher.cox@skadden.com

MUNGER, TOLLES & OLSON LLP

Jonathan H. Blavin (*pro hac vice forthcoming*)
560 Mission Street, 27th Floor
San Francisco, California 94105-3089
Telephone: (415) 512-4000
Facsimile: (415) 512-4077
Email: Jonathan.Blavin@mto.com

Attorneys for Defendant Snap, Inc.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on November 18, 2024, the foregoing document was filed and served via Odyssey File & Serve on all counsel of record.

By: *_/s/ Larry J. Montaño_*
Larry J. Montaño

EXHIBIT 1

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E-Served: Jul 23 2024 4:03PM PDT Via Case Anywhere

FILED
Superior Court of California
County of Los Angeles

JUL 19 2024

David W. Slayton, Executive Officer/Clerk of Court
By: A. M'Greene, Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

Social Media Cases
JCCP5255
(Lead Case: 22STCV21355)

Dept. 12 SSC
Hon. Carolyn B. Kuhl

Defendants' Motion to Strike Third-Party Misconduct and Online Challenge Allegations from Identified Short-Form Complaints

Court's Ruling: The court grants the Motion to Strike in part, denies it in part, and denies it without prejudice in part as discussed in the opinion below.

I. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs in these coordinated proceedings are minor users of social media platforms (or parents of those users) who allege they have suffered various types of harm resulting from use of the platforms. Plaintiffs bring their claims against multiple Defendants that designed and operated the following social media platforms: Facebook, Instagram, Snapchat, TikTok, and YouTube.[1] The Master Complaint in this case, filed May 16, 2023, consists of 300 pages. Each Plaintiff or family in this coordinated proceeding also filed a short-form complaint that adopts some or all of the allegations of the Master Complaint, specifies each Plaintiff's injuries, and adds individual allegations concerning the social media platforms used by each Plaintiff and how those platforms injured him or her.

[1] Facebook and Instagram are owned, designed, and operated by a group of Defendants who are referred to collectively herein as "Meta." Snapchat is owned, designed, and operated by Defendant Snap Inc. (Snap). TikTok is owned, designed, and operated by multiple Defendants who are referred to collectively herein as "ByteDance." YouTube is owned, designed, and operated by multiple Defendants referred to collectively herein as "Google."

Defendants previously demurred to the Master Complaint and to three typical short-form complaints. In a ruling issued on October 13, 2023 (October 2023 Ruling), this court sustained the demurrer as to a number of causes of action, including Plaintiffs' product liability causes of action, but overruled the demurrer as to the negligence cause of action pleaded against all Defendants and the fraudulent concealment claim pleaded against Meta. The October 2023 Ruling includes an extended summary of the allegations of the Master Complaint. (October 2023 Ruling, at pp. 2-11.)

One of Defendants' principal arguments in the briefing on the demurrer to the Master Complaint was that Section 230 of the Communications Decency Act, 47 U.S.C. § 230 (Section 230) bars liability for the claims alleged by Plaintiffs. As discussed further below, Section 230 provides immunity for a provider of an interactive computer service (such as Defendants) against liability for speaking or publishing third-party content. The court overruled the demurrer to the negligence claim because the Master Complaint set forth "several theories of breach of duty ... that are not barred by Section 230" (October 2023 Ruling, at p. 57), although the court recognized that some allegations of the Master Complaint "can be read to seek to hold Defendants liable for publishing third-party content" (*id.* at p. 66).

Defendants now move to strike numerous allegations of the Master Complaint that Defendants contend are barred by Section 230 immunity or by the First Amendment. In part, the Motion to Strike addresses a gap in the briefing of the Demurrer to the Master Complaint. None of the short-form complaints included in the coordinated briefing on that Demurrer included injuries allegedly caused by child predators, by child sexual abuse material or by dangerous "challenges" found on social media. (See October 2023 Ruling, at p. 11, fn. 1.)

The factual allegations that Defendants seek to strike from the Master Complaint may be grouped into the following categories:

(1) Failure to warn.
(2) Failure to remove Child Sexual Abuse Material (CSAM) and failure to create processes to report CSAM.
(3) Recommendation of inappropriate content to minors.
(4) Creating a geolocation feature that allows strangers access to data by which minors can be located.
(5) Affirmatively recommending that minors contact strangers.
(6) Creating systems to allow strangers to send cash to minors and reward minors with "virtual gifts."

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(7) Encrypting direct messages between minors and strangers.
(8) Creating a means by which users can make images they create or see disappear.
(9) Inadequate mechanisms for age verification.
(10) Setting minors' accounts to "public" as a default.

The court and the parties also agreed that seven short-form complaints would be addressed by the current motion, and Defendants have moved to strike portions of each of these individual complaints. The seven short-form complaints that are relevant to this proceeding are:

(1) First Amended Short Form Complaint For Damages And Demand For Jury Trial, *A.S. ex rel. E.S. v. Meta Platforms, Inc., et al.*, Case No. 22STCV28202 (L.A. Super. Ct. filed Jan. 5, 2024) (referred to herein as "A.S. SFC").
(2) First Amended Short Form Complaint For Damages And Demand For Jury Trial, *GlennMills v. Meta Platforms, Inc., et al.*, Case No. 23SMCV03371 (L.A. Super. Ct. filed Jan. 5, 2024) (referred to herein as "Glenn-Mills SFC").
(3) First Amended Short Form Complaint For Damages And Demand For Jury Trial, *K.L. ex rel. S.S. v. Meta Platforms, Inc., et al.*, Case No. CIV SB 2218921 (L.A. Super. Ct. filed Jan. 5, 2024) (referred to herein as "K.L. SFC").
(4) First Amended Short Form Complaint For Damages And Demand For Jury Trial, *N.S. ex rel. Z.H. v. Snap Inc.*, Case No. 22CV019089 (L.A. Super. Ct. filed Jan. 5, 2024) (referred to herein as "N.S. SFC").
(5) First Amended Short Form Complaint For Damages And Demand For Jury Trial, *P.F. ex rel. A.F. v. Meta Platforms, Inc., et al.*, Case No. 23SMCV03371 (L.A. Super. Ct. filed Jan. 5, 2024) (referred to herein as "P.F. SFC").
(6) Second Amended Short Form Complaint For Damages And Demand For Jury Trial, *J.S. and D.S. ex rel. L.H.S. v. Meta Platforms, Inc., et al.*, Case No. CV2022-1472 (L.A. Super. Ct. filed Jan. 9, 2024) (referred to herein as "J.S. SFC").
(7) Second Amended Short Form Complaint For Damages And Demand For Jury Trial, *K.K. ex rel. S.K. v. Meta Platforms, Inc., et al.*, Case No. 23SMCV03371 (L.A. Super. Ct. filed Jan. 17, 2024) (referred to herein as "K.K. SFC").

Six of these short-form complaints allege that, in addition to harms such as "addiction/compulsive use," "depression," and "anxiety," Plaintiffs also suffered "[e]xploitation and/or sexual abuse related harms." (See, e.g.,

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A.S. SFC, at pp. 4-5.) The J.S. SFC alleges the following additional harms: "[h]arms resulting from being the victim of viral challenges engaged in by other minors." (J.S. SFC, at p. 5.) Defendants move to strike the allegations of harm from exploitation or sexual abuse and from viral challenge videos.

II. DISCUSSION

A. <u>Plaintiffs' Procedural Objections</u>

1. The Motion to Strike is Timely

A motion to strike a complaint must be filed within the time allowed for filing an answer; and a motion to strike a complaint should be heard at the same time as a demurrer to that complaint. (See Code Civ. Proc., § 435, subd. (b)(1); Cal. Rules of Court, rule 3.1322, subd. (b).) Plaintiffs argue that this Motion to Strike should have been filed and heard in connection with Defendant's demurrer to the Master Complaint.

Plaintiffs' position is not well taken. Here, Defendants have moved to strike the allegations of seven short-form complaints, filed in January, which incorporate the factual allegations of the Master Complaint. Defendants' motion to strike allegations in the seven short-form complaints is timely. Plaintiffs' incorporation of the factual allegations of the Master Complaint into the short-form complaints also makes the allegations in the Master Complaint properly subject to Defendants' Motion to Strike.

a. The Motion to Strike is Procedurally Proper

Plaintiffs argue it is procedurally improper for this court to strike portions of the operative pleadings that Defendants claim seek to hold them liable qua publishers in contravention of the immunity provided by Section 230. This argument is not supported by California procedure and practice.

This court may "[s]trike out any irrelevant, false, or improper matter inserted in any pleading." (Code Civ. Proc., § 436, subd. (a).) The First District Court of Appeal has instructed that trial courts may, in the interests of judicial efficiency and fairness to the defendant, strike portions of a cause of action that are "substantively defective." (*PH II, Inc. v. Superior Court* (1995) 33 Cal.App.4th 1680, 1682.) Furthermore, in these coordinated proceedings involving the claims of hundreds of Plaintiffs, this court "has broad discretion ... to fashion suitable methods of practice in order to manage complex litigation." (*Fire Ins. Exchange v. Superior Court* (2004) 116 Cal.App.4th 446, 452.) An order striking any allegations that are clearly

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barred by Section 230 is a proper and appropriate manner of managing this litigation and providing needed clarity regarding the substantive viability of Plaintiffs' claims. Striking the improper matter in the operative pleadings is also consistent with Section 230's policy goal of preventing the threat of litigation from chilling speech posted by service providers on the internet. (See, e.g., *Barrett v. Rosenthal* (2006) 40 Cal.4th 33, 44 (*Barrett*).)

Nevertheless, "[w]here the defect raised by a motion to strike or by demurrer is reasonably capable of cure, leave to amend is routinely and liberally granted to give the plaintiff a chance to cure the defect in question." (*CLD Construction, Inc. v. City of San Ramon* (2004) 120 Cal.App.4th 1141, 1146, internal citations and quotation marks omitted.) In this litigation, this court sustained a demurrer with respect to a negligent failure to warn claim Plaintiffs attempted to plead in seven short-form complaints that were selected as sample pleadings. (Ruling, Mar. 27, 2024.) The court granted leave to amend to allow Plaintiffs to plead additional facts in support of their asserted cause of action for negligent failure to warn, and the deadline for the amendment had not yet passed when this Motion to Strike was briefed. Insofar as the current Motion to Strike seeks to eliminate factual allegations concerning failure to warn, the court declines to strike those allegations and will consider Defendants' objection to them in the context of any pleading challenge that may be brought to any amended claim for negligent failure to warn. To do otherwise would be to effectively deny Plaintiffs a right to amend. Therefore, the Motion to Strike paragraphs 137-138, 369-370, 518, 626, 662, 774, 781-782, and 809 is denied without prejudice.

B. Section 230 and General Principles Governing Its Application

Defendants' principal argument in support of the Motion to Strike is that Section 230 provides immunity to Defendants that bars Plaintiffs from holding Defendants liable based on the allegations challenged by this Motion. As this court did in its October 2023 Ruling, the court again sets forth the specific statutory language on which Defendants base their immunity claim, and the guiding legal authorities that frame the scope of Section 230 immunity.

Section 230, titled "Protection for private blocking and screening of offensive material," was passed by Congress in 1996. In part, the statute was meant to overrule a decision of a New York state court that had held an internet service provider liable as a publisher of offensive content because it deleted some offensive message board posts and not others. (See *Doe v. Internet Brands, Inc.* (9th Cir. 2016) 824 F.3d 846, 851-852 (*Internet Brands*); *Hassell v. Bird* (2018) 5 Cal.5th 522, 534 (*Hassell*).) Congress sought to spare internet service providers the "grim choice" between doing

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nothing to remove offensive content and removing some but not all offensive content. (*Internet Brands*, at p. 852.)

In a subdivision of Section 230 titled "Protection for 'Good Samaritan' blocking and screening of offensive material,"[2] Section 230 states that no provider of an interactive computer service may be held liable for either (a) a voluntary good faith action to restrict access to materials that the provider considers "obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable," or (b) any action to enable information content providers or others the technical means to restrict access to such materials. (47 U.S.C. § 230, subd. (c)(2)(A)-(B).) Under that same heading, Congress provided additional protection for information service providers, which has proven more difficult to interpret:

> 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.

(*Id.* § 230, subd. (c)(1).)

Defendants seek protection from the claims asserted in this case based on this language of Section 230. It is conceded by all parties that Defendants are "provider[s] ... of an interactive computer service" within the meaning of subdivision (c)(1) of Section 230.[3]

Congress expressly stated its policy goals in enacting Section 230. Subdivision (b) of Section 230 states "[i]t is the policy of the United States" to promote continued development of the internet and interactive computer services and "to preserve the vibrant and competitive free market" of these services "unfettered by Federal or State regulation." (*Id.* § 230, subd. (b)(1)-(2).) Congress equally desired "to encourage the development of technologies which maximize user control over what information is received

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[2] The court in *Internet Brands*, *supra*, 824 F.3d at p. 851, looked to the heading of subdivision (c) of Section 230 to guide its consideration of the purposes of Section 230.

[3] "The term 'interactive computer service' means 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." (*Id.* § 230, subd. (f)(2).)

"The term 'access software provider' means a provider of software (including client or server software), or enabling tools that do any one or more of the following: (A) filter, screen, allow, or disallow content; (B) pick, choose, analyze, or digest content; or (C) transmit, receive, display, forward, cache, search, subset, organize, reorganize, or translate content." (*Id.* § 230, subd. (f)(4).)

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by individuals, families and schools" using interactive computer services and to "remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict children's access to objectionable or inappropriate online material." (*Id.* § 230, subd. (b)(3)-(4).) Congress also expressed a policy "to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer." (*Id.* § 230, subd. (b)(5).)

The California Supreme Court has quoted with approval Ninth Circuit precedent recognizing that "there is an apparent tension between Congress's goals of promoting free speech while at the same time giving parents the tools to limit the material their children can access over the Internet ... . The need to balance competing values is a primary impetus for enacting legislation. Tension within statutes is often not a defect but an indication that the legislature was doing its job." (*Barrett*, *supra*, 40 Cal.4th at p. 56, internal citations, quotation marks, and brackets omitted, quoting *Batzel v. Smith* (9th Cir. 2002) 333 F.3d 1018, 1028 (*Batzel*), reversed on other grounds by subsequent statutory amendment as stated in *Breazeale v. Victim Services, Inc.* (9th Cir. 2017) 878 F.3d 759, 766-767).

As to the preemptive effect of Section 230, the statute states:

> (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.

(47 U.S.C. § 230, subd. (e)(3).)

Several general principles can be derived from caselaw that has evolved since the enactment of subdivision (c)(1) of Section 230:

- A provider of interactive computer services (hereinafter sometimes referred to as "a provider") cannot be held liable as a publisher or speaker of content provided by a third party. (*Barrett*, *supra*, 40 Cal.4th at p. 57 ["Congress intended to create a blanket immunity from tort liability for online republication of third party content"]; *Zeran v. America Online, Inc.* (4th Cir. 1997) 129 F.3d 327, 330 ["By its plain language, § 230 creates a federal immunity to any cause of action that would make service providers liable for information

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originating with a third-party user of the service. Specifically, § 230 precludes courts from entertaining claims that would place a computer service provider in a publisher's role"].)

- A provider also cannot be liable for incidental editorial functions because it is still acting as a publisher of third-party content. (*Batzel*, *supra*, 333 F.3d at 1031 [provider who does no more than select and make minor edits to third-party content cannot be considered a content provider].)

- A provider can be liable for its own speech, subject to First Amendment restrictions. (*Fair Housing Council v. Roommates.com, LLC* (9th Cir. 2008) 521 F.3d 1157, 1169 (en banc) (*Roommates*) [Section 230 did not bar liability where a provider "designed its search and email systems to limit the listings available to subscribers based on sex, sexual orientation and presence of children" and thereby allegedly engaged in unlawful discriminatory conduct]; *Liapes v. Facebook, Inc.* (2023) 95 Cal.App.5th 910 (*Liapes*) [Facebook acted as a "content developer" and therefore Section 230 did not bar a claim against Facebook for unlawful discrimination under California law. Facebook allegedly required users to disclose age and gender and then relied on those "unlawful criteria" to develop an advertising targeting and delivery system making it difficult for individuals with protected characteristics (women and older people) to find or access insurance ads on Facebook].)

- It is important to consider the gravamen of the cause of action brought against the provider. Section 230 bars liability only if the cause of action seeks to impose liability for the provider's *publication* decisions regarding third party content—for example, whether or not to publish and whether or not to depublish. (See, e.g., *Barnes v. Yahoo!, Inc.* (9th Cir. 2009) 570 F.3d 1096 [Although taking down third-party content from its website "is quintessential publisher conduct" by a provider, Section 230 did not bar an action for promissory estoppel based on the provider's failure to remove a posting after it had agreed to do so. "Contract liability here would come not from Yahoo's publishing conduct, but from Yahoo's manifest intention to be legally obligated to do something, which happens to be removal of material from publication"]; *Hassell*, *supra*, 5 Cal.5th at pp. 542-543 ["we recognize that not all legal duties owed by Internet intermediaries necessarily treat them as publishers of third party content, even when these obligations are in some way associated with their publication of this material"]; *Bolger v. Amazon.com, LLC* (2020) 53 Cal.App.5th 431, 464-465 [Provider was liable in strict product

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liability as a seller in the chain of distribution for a defective product. That cause of action targeted the provider's role in the distribution of consumer goods, not the third-party content in the product listing published by the provider].)

- Even if third-party content is a "but-for" cause of the harm suffered by a plaintiff, the action is not barred by Section 230 if the cause of action does not seek to hold the provider liable as a publisher. (*Internet Brands*, *supra*, 824 F.3d at p. 853 [Provider acted as a publisher of third-party content by hosting Jane Doe's user profile on a website, but the provider could be held liable for failure to warn Jane Doe based on its independent knowledge that the website was used to identify rape victims. Section 230 "does not provide a general immunity against all claims derived from third-party content" even if the third-party content was a but-for cause of plaintiff's injuries]; *HomeAway.com v. City of Santa Monica* (9th Cir. 2018) 918 F.3d 676, 682 (*HomeAway*) [Provider that hosted postings by persons offering Airbnb rentals was required to comply with an ordinance prohibiting short-term home rentals unless licensed as "home-sharing." The court rejected "use of a 'but-for' test that would provide immunity under [Section 230] solely because a cause of action would not otherwise have accrued but for the third-party content," rather looking to "whether the duty would necessarily require an internet company to monitor third-party content"]; *Lee v. Amazon.com, Inc.* (2022) 76 Cal.App.5th 200, 256 (*Lee*) [Quoting *HomeAway* and holding that a provider was required to post a warning under California's Proposition 65 where the product offered for sale by a third party on defendant's website exposed consumers to mercury].)

As discussed above, whether there is immunity for an internet service provider depends critically on the elements of the cause of action sought to be prosecuted against it. A claim is barred if it seeks to hold the provider liable as a publisher or as a speaker of third-party content.

C. Section 230 Immunity Bars Plaintiffs from Premising a Negligence Claim on Defendants' Failure to Remove CSAM and on Defendants' Failure to Create Processes to Report CSAM

Plaintiffs' allegations regarding Defendants' insufficient efforts to remove CSAM from social media sites, if true, are exceptionally concerning. For example, Plaintiffs allege that "Meta knowingly possessed the capabilities and technologies to incorporate other automatic actions into its product designs to protect children (including, but not limited to, immediately disabling or deleting harmful content to minors), but Meta deliberately and

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willfully failed to do so," and that Meta "knowingly failed to invest in adequate CSAM prevention measures, including, but not limited to, client-side scanning and perceptual hashing." (Mast. Compl., ¶¶ 397-398.) As to Snap, Plaintiffs allege that it failed to use effective technologies to stop the spread of CSAM prior to Fall of 2020, that CSAM in Snap's disappearing messages cannot be reported, and that users "cannot specifically report CSAM that is sent to a user via direct messaging, including from another user's camera roll." (Mast. Compl., ¶¶ 503-507.) Plaintiffs allege that TikTok "does not have any feature to allow users to specifically report CSAM" and that "[u]sers have reported 'Post-in-Private' CSAM videos to TikTok, and ByteDance responded that no violations of its policy were found." (Mast. Compl., ¶¶ 679, 680.) As to Google, Plaintiffs allege that it "routinely fails to flag CSAM and regularly fails to adequately report known content to NCMEC and law enforcement, including CSAM depicting Plaintiffs, and fails to takedown, remove, and demonetize CSAM." (Mast. Compl., ¶ 793.) In addition, Plaintiffs allege that "there is effectively no way for users to report CSAM on Google's YouTube product." (Mast. Compl., ¶ 801.)

Nevertheless, as discussed above, a core purpose of Section 230 was to protect internet providers from liability when they deleted some offensive content from their platforms but did not delete all offensive content. (*Internet Brands*, *supra*, 824 F.3d at pp. 851-852.) Although it may seem, in retrospect, unwise to "remove disincentives for the development and utilization of blocking and filtering technologies" (47 U.S.C. § 230, subd. (b)(4)) for inappropriate and even criminally sanctionable online material, Congress chose to immunize internet service providers from liability for the "mere act of publication—including a refusal to depublish upon demand ... ." (*Hassell*, *supra*, 5 Cal.5th at p. 541.) "Congress contemplated self-regulation, rather than regulation compelled at the sword point of tort liability." (*Barrett*, *supra*, 40 Cal.4th at p. 53.) "Thus, the immunity conferred by section 230 applies even when self-regulation is unsuccessful, or completely unattempted." (*Id.*)

Liability for failure to remove CSAM posted by third parties on providers' platforms is at the core of what the immunity provided by Section 230 was designed to preclude. In 2018, Congress added subsection (e)(5) to Section 230 to make clear that the statute does not bar claims of violation of the federal sex trafficking law (18 U.S.C. §1591) or bar certain defined criminal prosecutions for sex trafficking under state law. (See generally *In re Facebook, Inc.* (Tex. 2021) 625 S.W.3d 80, 99 (*In re Facebook*).) However, Congress did not lessen internet service providers' immunity from civil liability for failure to remove abusive sexual content, even sexual content qualifying as CSAM.

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Section 230 immunity from liability based on display and failure to remove third party content logically extends to Plaintiffs' allegations that Defendants failed to create adequate processes for reporting suspected CSAM. Whether the CSAM posted by a third party remains on the provider's platform because the provider had inadequate screening mechanisms, or because the provider had inadequate reporting mechanisms for CSAM makes no difference for purposes of Section 230 immunity. Both types of allegedly negligent conduct (failure to provide a mechanism to identify and remove CSAM and failure to provide a reporting mechanism for CSAM) base liability on inadequate mechanisms for removing third party content.[4]

The court grants Defendants' Motion to Strike the following paragraphs of the Master Complaint, which seek to hold the Defendants liable for failure to identify and remove CSAM and for failure to establish mechanisms for reporting CSAM: 382-384, 387-392, 394-400, 503-510, 512-513, 666-667, 679-681, 790-799, 801-802.

D. Under Current Binding Precedent, Section 230 Immunity Bars Plaintiffs from Premising a Negligence Claim on Defendants' Recommendations of Content

Defendants seek to strike portions of the Master Complaint in which Plaintiffs allege that Defendants have recommended or promoted certain content. Plaintiffs allege that TikTok recommends and promotes "challenge" videos, including those that demonstrate dangerous conduct (for example, the "Blackout Challenge" that encourages viewers to choke themselves until passing out, and the "Benadryl challenge" that encourages viewers to take large quantities of Benadryl to cause hallucinations or induce an altered mental state). (Mast. Compl., ¶¶ 608-625.) As to Google, Plaintiffs allege

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[4] This court recognizes that the federal district court in the related MDL proceeding allowed a product liability claim to proceed based on "[n]ot implementing reporting protocols to allow users or visitors of defendants' platforms to report CSAM and adult predator accounts specifically without the need to create or log in to the products prior to reporting." (*In re Social Media Adolescent Addiction/Personal Injury Products Liability Litigation* (N.D. Cal., Nov. 14, 2023, No. 4:22-MD-03047-YGR) 2023 WL 7524912, at *12 (*Social Media MDL*).) The court in that decision faulted defendants for "not address[ing] how altering the ways in which they allow users and visitors to their platforms to report CSAM is barred by Section 230." (*Id.* at *13.) The court therefore allowed a product defect claim to go forward based on the allegation of inadequate reporting protocols, noting that receiving reports of suspected CSAM does not require internet service providers to remove content. (*Id.*) This court agrees with the MDL court that having an effective mechanism for reporting CSAM does not, in and of itself, require removal of CSAM. Nevertheless, in this court's view, premising liability on failure to provide an adequate reporting mechanism for CSAM targets the Defendants' actions that are part of its decision-making processes as to what content to target for removal and what content to allow to remain on their platforms, thus running afoul of Section 230's immunity for publication of third-party content.

that it also "promotes the creation of and pushes children toward extremely dangerous prank or 'challenge' videos." (Mast. Compl., ¶ 767.) Google also allegedly recommends videos of children in underwear or bathing suits, teen models, and children doing gymnastics to adults who are child predators. (Mast. Compl., ¶¶ 784-789.)

The challenge videos and videos of children are content created by the users of Defendants' platforms. As discussed above, Section 230 precludes liability premised on the existence of these videos on Defendants' platforms. Plaintiffs allege that they seek to hold Defendants liable not as publishers of the videos but rather as active promoters of the third-party content appearing on their platforms. This proposed liability conflicts with binding California authority on the interpretation of Section 230. In *Wozniak v. YouTube, LLC* (2024) 100 Cal.App.5th 893 (*Wozniak*), the California Court of Appeal held that recommendations by social media platforms are "tools meant to facilitate the communication and content of others," and thus the recommendation of third-party content is immune under Section 230. (*Id.* at pp. 916-918 [holding that YouTube's recommendations of certain harmful "scam videos" were subject to Section 230 immunity].) *Wozniak* is supported by substantial authority. (See, e.g., *Dyroff v. Ultimate Software Group, Inc.* (9th Cir. 2019) 934 F.3d 1093; *Force v. Facebook, Inc.* (2d Cir. 2019) 934 F.3d 53 (*Force*); *In re Facebook, supra*, 625 S.W.3d 80.)

It is worth pointing out that there have been very thoughtful opinions penned by well-respected judges that criticize the conclusion that an internet service provider is treated as a "publisher" of third-party content when it affirmatively recommends third-party content to a social media user. (See separate opinions by Judge Berzon and Judge Gould in *Gonzalez v. Google LLC* (9th Cir. 2021) 2 F.4th 871 (*Gonzalez*), vacated and remanded (2023) 598 U.S. 617, and rev'd sub nom. *Twitter, Inc. v. Taamneh* (2023) 598 U.S. 471; and separate opinion of Chief Judge Katzman in *Force, supra*, 934 F3d at pp. 76-89.) The United States Supreme Court granted certiorari in *Gonzalez* to address this question, but ultimately did not reach the issue, essentially resolving the case on other grounds. (*Twitter, Inc. v. Taamneh* (2023) 598 U.S. 471.) Despite the persuasive reasoning of these concurring and dissenting views, this court is bound by *Wozniak.* Thus, under existing authority, Section 230's immunity bars the Plaintiffs' theory of a duty arising out of TikTok's promotion of challenge videos.

The allegations concerning Defendants' promotion of challenge videos and videos of children are not analogous to the facts in *Lemmon v. Snap, Inc.* (9th Cir. 2021) 995 F.3d 1085 (*Lemmon*). In *Lemmon,* the plaintiffs were parents of two deceased boys who sued Snap, "alleging that it encouraged their sons to drive at dangerous speeds and thus caused the

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boys' deaths through its negligent design of its smartphone application Snapchat." (*Id.* at p. 1087.) At issue was Snap's app called the "Speed Filter." "The app ... permits its users to superimpose a filter over the photos or videos that they capture through Snapchat at the moment they take that photo or video. [One of the deceased boys] used one of these filters—the Speed Filter—minutes before the fatal accident on May 28, 2017. The Speed Filter enables Snapchat users to record their real-life speed." (*Id.* at p. 1088, internal quotation marks omitted.) "Many of Snapchat's users suspect, if not actually believe, that Snapchat will reward them for recording a 100-MPH or faster snap using the Speed Filter. According to plaintiffs, this is a game for Snap and many of its users with the goal being to reach 100 MPH, take a photo or video with the Speed Filter, and then share the 100-MPH-Snap on Snapchat." (*Id.* at p. 1089, internal quotation marks and brackets omitted.)

The Ninth Circuit reversed the district court's dismissal of the plaintiffs' action under Section 230, concluding "that, because the [plaintiffs'] claim neither treats Snap as a publisher or speaker nor relies on information provided by another information content provider, Snap does not enjoy immunity from this suit under § 230(c)(1)." (*Id.* at p. 1087, internal quotation marks omitted.) The court noted that the plaintiffs in *Lemmon* alleged a cause of action that "rest[ed] on the premise that manufacturers have a duty to exercise due care in supplying products that do not present an unreasonable risk of injury or harm to the public." (*Id.* at p. 1092.) The court then concluded that the claims were not barred by Section 230:

> The duty underlying such a claim differs markedly from the duties of publishers as defined in [Section 230]. Manufacturers have a specific duty to refrain from designing a product that poses an unreasonable risk of injury or harm to consumers. [Citation.] Meanwhile, entities acting solely as publishers—*i.e.*, those that "review material submitted for publication, perhaps edit it for style or technical fluency, and then decide whether to publish it," [citation]—generally have no similar duty. [Citation.]
>
> It is thus apparent that the [plaintiffs'] amended complaint does not seek to hold Snap liable for its conduct as a publisher or speaker ... . [T]he duty that Snap allegedly violated "springs from" its distinct capacity as a product designer. [Citation.] This is further evidenced by the fact that Snap could have satisfied its "alleged obligation"—to take reasonable measures to design a product more useful than it was foreseeably dangerous—without altering the content that Snapchat's users generate. [Citation.] Snap's

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> alleged duty in this case thus "has nothing to do with" its editing, monitoring, or removing of the content that its users generate through Snapchat. [Citation.]

(*Id.*, internal citations and brackets omitted; italics in original.)

Unlike the allegations here, the facts in *Lemmon* were that the Speed Filter *itself* encouraged users to engage in dangerous driving; here, by contrast, it is the specific third-party content presented in the challenge videos and videos of children and the recommendation of the content that give rise to the injuries alleged. The court in *Wozniak* rejected reliance on *Lemmon* for the same reasons. (*Wozniak*, *supra*, 100 Cal.App.5th at p. 913.) As stated above, under current California law interpreting Section 230, liability based on promotion of challenge videos is barred.[5]

The court therefore grants Defendants' Motion to Strike the following paragraphs of the Master Complaint, which seek to hold Defendants liable for recommending dangerous content to minors: 365-368, 372 (allegations as to Instagram), 608-625, 767, 784-789. The court also strikes the language Defendants challenge in the J.S. SFC.

E. <u>Plaintiffs' Claims Premised on Affirmative Acts that Increase Risk of Harm to Minors from Sexual Exploitation by Third Parties</u>

Plaintiffs allege that a number of affirmative actions of Defendants regarding design of their social media platforms and communication with the minor Plaintiffs foreseeably increased the risk that Plaintiffs would be sexually exploited by other users of the platforms. Plaintiffs' allegations, which the court must accept as true at this point, describe an ecosystem created by Defendants that increase the likelihood that a sexual predator can find, contact, groom, and solicit sexually explicit material from minors. Plaintiffs seek to hold Defendants liable for the following conduct:

- Creating a geolocation feature that allows strangers access to data by which minors can be located.
- Affirmatively recommending that minors contact strangers.
- Creating systems to allow strangers to send cash to minors and to reward them with "virtual gifts."
- Encrypting direct messages between minors and strangers.
- Creating a means by which users can make images they create or see disappear.

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[5] Because the court finds that Plaintiffs' claims based on online challenge videos are barred by Section 230, the court does not reach Defendants' argument that allegations of injury from online challenges are independently barred by the First Amendment.

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- Inadequate mechanisms for age verification.
- Setting minors' accounts to "public" as a default.

1. Plaintiffs Have Adequately Alleged a Claim for Negligence Based on Defendants' Affirmative Conduct that Allegedly Increases the Risk of Injury to the Minor Plaintiffs

Before determining whether Section 230 applies, this court must first determine whether these allegations can properly underlie a claim for negligence under the common law. Defendants argue that, in order to state a negligence claim based on Defendants' conduct that allegedly connected minor users of Defendants' social media sites with adults who sexually abused the minors, Plaintiffs must allege that Defendants have a "special relationship" with minor users of Defendants' platforms. However, under California law, a defendant is liable for its affirmative conduct that increases the risk of injury to another from the foreseeable conduct of a third party. As discussed below, Plaintiffs' allegations of affirmative conduct by Defendants that increased the risk the minor plaintiffs would be sexually abused by an adult adequately state a claim for relief under California law.

"[T]he law imposes a general duty of care on a defendant only when it is the defendant who has created a risk of harm to the plaintiff, including when the defendant is responsible for making the plaintiff's position worse." (*Brown v. USA Taekwondo* (2021) 11 Cal.5th 204, 214, internal citations and quotation marks omitted.) "This general rule ... derives from the common law's distinction between misfeasance and nonfeasance, and its reluctance to impose liability for the latter." (*Id.*, internal citations and quotation marks omitted.) Stated more precisely, "[t]he proper question is not whether an actor's failure to exercise reasonable care entails the commission or omission of a specific act. [Citation.] Rather, it is whether the actor's entire conduct created a risk of harm." (*Id.,* at p. 215, fn. 6, internal citations and quotation marks omitted, citing Rest.3d Torts, Liab. for Phys. & Emot. Harm (2012) § 37, com. c, p. 3.)

As stated in Section 19 of the Restatement Third of Torts, Liability for Physical and Emotional Harm: "The conduct of a defendant can lack reasonable care insofar as it foreseeably combines with or permits the improper conduct of the plaintiff or a third party." Regarding the scope of an actor's liability for actions that increase the risk of third-party misconduct, the Restatement notes that "[i]f the third party's misconduct is among the risks making the defendant's conduct negligent, then ordinarily plaintiff's harm will be within the defendant's scope of liability." (Rest.3d Torts, Liab. for Phys. & Emot. Harm, § 19, com. c.) Thus, when the actor has sufficient knowledge of the circumstances to foresee criminal misconduct by a third

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party, negligence liability may be imposed for the actor's conduct that increases the risk of harm to another by a third party. (*Id.* com. f.)

In *Weirun v. RKO General, Inc.* (1975) 15 Cal.3d 40, the California Supreme Court, in a decision written by Justice Stanley Mosk, held that a radio broadcast had created an unreasonable risk of harm to its listeners by encouraging their participation in a contest involving a race on city streets to obtain cash prizes. (*Id.* at p. 47.) The Supreme Court found the radio station liable to a listener who was killed in a car crash while pursuing the contest prize money. The Supreme Court stated that it was "of no consequence that the harm to decedent was inflicted by third parties acting negligently" because of "the likelihood that a third person may react in a particular manner is a hazard which makes the actor negligent ... ." (*Id.* at p. 47.) "Liability is imposed only if the risk of harm resulting from the [defendant's] act is deemed unreasonable—i.e., if the gravity and likelihood of the danger outweigh the utility of the conduct involved." (*Id.*, citing Prosser, Law of Torts (4th ed. 1971) at pp. 146-149.)

In *Lugtu v. California Highway Patrol* (2001) 26 Cal.4th 703, the California Supreme Court held that a law enforcement officer could be held liable in negligence for having pulled over the plaintiff's automobile into the center median strip of a highway where it was struck by another vehicle, injuring plaintiff. The court stated: "It is well established ... that one's general duty to exercise due care includes the duty not to place another person in a situation in which the other person is exposed to an unreasonable risk of harm through the reasonably foreseeable conduct ... of a third person." (*Id.* at p. 716.)

The standard of duty is heightened because the affirmative conduct allegedly engaged in by Defendants was conduct involving a minor. For example, the foreseeable consequences of Defendants' creation of a geolocation feature may be different for a minor user—who may be unable to appreciate the danger that others may try to locate the minor for harmful purposes—than it would be for an adult user. The legal standard of duty when interacting with minors is that "[a]n adult must anticipate the ordinary behavior of children. An adult must be more careful when dealing with children than with other adults." (CACI No. 412.)

In *McDaniel v. Sunset Manor Co.* (1990) 220 Cal.App.3d 1, the court of appeal held that "[a] greater degree of care is generally owed to children because of their lack of capacity to appreciate risks and to avoid danger. ... The determination of the scope of foreseeable perils to children must take into consideration the known propensity of children to intermeddle." (*Id.* at p. 7.) In that case, the court held that, because the defendant landowner

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had built a fence around its property but had allowed the fence to become dilapidated (to develop holes), there was an issue of fact as to whether the landowner was liable for injury to a child who entered through a hole in the fence and then fell into a creek on adjacent property from a vertical drop of at least seven feet. (*Id.* at pp. 4, 8-10.)

Plaintiffs have adequately pleaded that Defendants affirmatively developed and implemented features on their social media platforms that created dangerous conditions for minors by increasing the risk that vulnerable minors would be identified and sexually preyed upon by adult strangers. For purposes of California pleading standards, Plaintiffs have adequately alleged that the identified features materially contributed to the danger that minors would encounter and be injured by adult strangers on Defendants' social media platforms. (See CACI No. 430 ["A substantial factor in causing harm is a factor that a reasonable person would consider to have contributed to the harm. It must be more than a remote or trivial factor. It does not have to be the only cause of the harm"].)

2. *Whether Liability for Affirmative Acts of Defendant Alleged to Have Increased the Risk of Injury to Minors Is Barred by Section 230*

a. Geolocation of Minors

Defendants assert that binding California precedent bars a claim for liability based on any choice an interactive computer service provider makes in designing a social media platform. (See Defs' Mot., at pp. 16-17.) In support of this assertion, Defendants principally rely on *Doe II v. MySpace, Inc.* (2009) 175 Cal.App.4th 561 (*MySpace*). Although *MySpace* recognizes and applies Section 230's broad grant of immunity, the case does not sweep as broadly as Defendants contend. As the panel in that case recognized, Section 230 does not bar liability for an interactive computer service provider's own decisions as a content developer.

In *MySpace*, the complaint sought recovery for injuries suffered by minor users of a social media platform, MySpace, who were sexually assaulted by men they met through interactions on the platform. (*Id.* at p. 564.) The plaintiffs "characterized their complaint as one for failure to adopt reasonable safety measures" and the court viewed the claims of plaintiffs, at their core, as seeking to regulate what appears on the social media platform. (*Id.* at p. 573.)

The *MySpace* court distinguished the facts before it from the circumstances considered in *Roommates.* In *Roommates*, the Ninth Circuit Court of Appeals held that Section 230 did not bar liability where the

provider "designed its search and email systems to limit the listings available to subscribers based on sex, sexual orientation and the presence of children" and thereby allegedly engaged in unlawful discriminatory conduct. (*Roommates, supra,* 521 F.3d at p. 1169.) In *MySpace*, the court construed *Roommates* as involving "two ends of the spectrum with respect to how much discretion a third party user has in the content he or she posts on the site." (*MySpace*, at p. 575.) In *Roommates*, a subscriber was required to select one answer from a limited number of choices in the profile section but was given unfettered discretion as to content in the "additional comments" section; the provider could be held responsible for the former but not for the latter. (*Id.*) The *MySpace* court characterized the MySpace website at issue as providing "neutral tools" from which users could create their profile. The court found it dispositive that MySpace did not "require[ ] its members to answer the profile questions as a condition of using the site." (*Id.*) Based on that characterization, the *MySpace* court held that the plaintiffs' claims for liability were based on third-party content published by the plaintiffs themselves, not on the actions of the website provider.

One of the choices some Defendants have made in designing their platforms is to provide a location feature that tracks individual platform users and allows them to "geotag the location where a photo was taken or from where a post is being made." (Mast. Compl., ¶ 380 as to Meta; see Mast. Compl., ¶ 669 as to ByteDance.) This feature does not ask the user to identify the place where the user was located when the user made a post or took a photograph and then publish the information provided by the user. If the user voluntarily placed such information on the social media site and a third party was thereby enabled to find that user, Section 230 would protect the provider from liability derived from content provided by the user. The geolocation feature, however, provides location content both created and published by the internet service provider. The geolocation tag is derived not from information furnished by the user but rather from the Defendants' decision to track the location of the user's cell phone and then to publish this provider-created content.

Under Section 230, the provider is not "treated as the publisher or speaker of any information provided by another information content provider" if a Defendant is found to have increased the risk of sexual abuse of a plaintiff by having developed and published the geotag information. Rather, Plaintiffs seek to hold Defendants liable for tracking a user to develop and publish location information identifying where a Plaintiff is when he or she posts a message or a photo. Plaintiffs' theory of liability based on the increased risk for minors due to Defendants' geolocation features is not barred by Section 230.

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Defendants argue that cases from other jurisdictions have held that Section 230 bars liability for harm caused by information provided by an internet service provider's geolocation device. But neither case cited by Defendants actually concerns liability based on a geolocation device provided by a social media company. In *Herrick v. Grindr LLC* (2d Cir. 2019) 765 F.App'x 586 (*Herrick*), the plaintiff sought to hold the defendant social media provider liable because of harm caused by her boyfriend's posts that impersonated her and directed other users to her home and workplace. (*Id.* at p. 588.) The plaintiff in that case contended that the geolocation device provided by the social media website was used to direct other users to her home and workplace. The court of appeal held that Section 230 barred liability because the defendant's geolocation device *was not in fact used* to direct users to plaintiff's location. It was "uncontested that [plaintiff] was no longer a user of the app at the time the harassment began; accordingly, any location information was necessarily *provided by [plaintiff's] ex-boyfriend*." (*Id.* at p. 590, emphasis added.) Thus, the defendant website could not be held liable based on content provided by the ex-boyfriend.

Neither are the facts of *Marshall's Locksmith Service Inc. v. Google, LLC* (D.C. Cir. 2019) 925 F.3d 1263 (*Marshall's*) analogous to the facts alleged here. In that case, the plaintiffs were locksmith companies that alleged the defendant social media providers flooded the market with online search results about "scam" locksmiths. The plaintiffs based their contentions in part on defendants' publication of maps with pinpoints on where the scam locksmiths could be found. The court of appeal held that Section 230 barred the plaintiffs' claims based on the maps because the maps were created using street addresses and locations that were copied by the defendants from the scam locksmiths' own representations in their webpages. The court of appeal held that Section 230 protection applied when the pinpoints on the maps only translated address information provided by the third-party scam locksmiths into map form. (*Id.* at p. 1270.) When the pinpoints on the maps were created by a "neutral algorithm" that translated approximate location information provided by the scam locksmith into a map format, the same result obtained because, again, the location information expressed in the map was content provided by a third party.

Here, the geolocation information was created by Defendants by tracking the minors' cell phones. Unlike the circumstances in *Herrick* and *Marshall's*, the minors here did not provide the location information—it was based on the Defendants' tracking function. Liability therefore is not premised on publication of third-party content, and Section 230 does not bar Plaintiffs' claims that Defendants' provision of a geolocation device to track

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minors and publish their locations is negligent because it increases the risk that Plaintiffs will be victims of predatory conduct.

As in *Lemmon*, the geolocation feature for which Plaintiffs seek to hold Defendants liable "has nothing to do with [Defendants'] editing, monitoring, or removing the content that its users generate using" the social media site." (*Lemmon*, *supra*, 995 F.3d at p. 1092, internal quotation marks omitted.) In *Lemmon*, the social media defendant applied a notation to a photograph taken by the user; the notation was created by a "Speed Filter" the provider created by tracking the speed at which the user was traveling at the time the photo was taken. Here, Defendants apply a notation to a photograph taken by the user or content posted by the user; the notation is created by a geolocation device the Defendants' created to track the location of the user at the time the photo was taken or the posting was made. By analogy to *Lemmon*, Section 230 does not bar liability based on Plaintiffs' claim that Defendants' decision to create a location-tracking capability and to apply a location notation to minors users' content increased the risk of harm to the minors from third-party conduct.

The court therefore denies Defendants' Motion to Strike the following paragraphs of the Master Complaint alleging liability flowing from Defendants' use of geolocation features: 380-381, 669.

b. Recommending "Friends" for Minors

Plaintiffs allege that Facebook uses algorithms "to suggest users for 'friending' to each other" and "Facebook does not provide the option to disable this feature." (Mast. Compl., ¶ 172.) According to the Master Complaint, "Facebook's 'People You May Know' feature helps predators connect with underage users and puts them at risk of sexual exploitation, sextortion, and production and distribution of CSAM; 80% of 'violating adult/minor connections' on Facebook were the result of this friends recommendation system." (Mast. Compl., ¶ 372.) As to Snap, Plaintiffs allege:

> Through a feature known as "Quick Add," Snap recommends new, sometimes random friends, similar to Facebook's "People You Might Know" feature. Suggestions are formulated using an algorithm that considers users' friends, interests, and location. Quick Add encourages users to expand their friend base to increase their Snapscore by interacting with an ever-expanding group of friends, which ... can result in exposure to dangerous strangers ... . Quick Add

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> could, and in fact did, recommend that a minor and adult user connect.

(Mast. Compl., ¶481.) As to TikTok, Plaintiffs allege that the platform "intentionally and actively promoted" connections between children and strangers 'by suggesting accounts to follow through the 'Find Friends' or 'People You May Know' features." (Mast. Compl., ¶ 555.)

Under the reasoning of *MySpace*, Section 230 does not bar liability for Defendants' decisions to employ a feature that recommends a personal contact to a minor. As explained above, *MySpace* interpreted the plaintiffs' claims in that case as seeking to regulate what third parties post on a social media platform. (*MySpace*, *supra*, 175 Cal.App.4th at p. 573.) Under the facts alleged in that case, users created profiles on topics suggested by the social media provider and "[o]ther MySpace users are then able to search and view profiles that fulfill specific criteria ... ." (*Id.* at p. 564.) As described by the court of appeals, "MySpace channels information based on members' answers to various questions, allows members to search only the profiles of members with comparable preferences, and sends e-mail notifications to its members." (*Id.*) The contacts for which the plaintiffs in *MySpace* sought to hold the social media provider liable were contacts that were (1) based on information provided by the user (third-party content), and (2) based on searches performed by the user.

Here, by contrast, Plaintiffs do not seek to hold Defendants liable for information posted by third-party users or for the results of searches made possible by Defendants but performed by users. Instead, Plaintiffs allege that Defendants' own affirmative acts increased the risk of harm to the minors because of Defendants' own speech, unprompted by a request from the user, that recommended that the minor pursue a contact with an identified person. The court of appeals in *MySpace* had no reason to consider, and did not analyze, the scope of Section 230 protection of an internet service provider when the provider's own speech was the asserted basis for liability. Moreover, the *MySpace* court's discussion of *Roommates* acknowledged that a social media provider may be chargeable with liability based on the provider's own speech or creation of content, and that Section 230 does not bar liability in those circumstances.

Defendants' recommendations of "friends" for minor users also cannot be characterized as the publication of third-party content. In *Wozniak*, the court of appeal held that the defendants' recommendation of scam videos "does not make them information content providers because those recommendations did not materially contribute to the illegality of the content underlying the scam." (*Wozniak*, *supra*, 100 Cal.App.5th at p. 921.)

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However, the court left open the possibility that liability would not be barred by Section 230 if based on the social media providers' actions in "continu[ing] to maintain the verification of channels that have been hijacked to broadcast ... scam videos ... ." (*Id.* at p. 924, internal quotation marks omitted.) The court of appeals concluded that the complaint "adequately alleges that under section 230 [defendant] is responsible for creating the information in the verification badges." (*Id.* at p. 924.) The court held that, so long as the plaintiffs amended to allege "that the information for which defendants are responsible gives rise to their asserted liability or materially contributed to the illegality of the conduct at issue," Section 230 would not bar such claim. (*Id.*) Thus, despite *Wozniak*'s determination that providers cannot be held liable for recommending content, the court recognized that Section 230 does not immunize a provider's speech or conduct that characterizes third party content as authentic.

As stated in *Liapes*, "providing neutral tools to users to make illegal or unlawful searches does not constitute development for immunity purposes. But the system must do absolutely nothing to enhance the unlawful message at issue beyond the words offered by the user." (*Liapes*, *supra*, 95 Cal.App.5th at p. 930.) Here, Plaintiffs' allegations are not merely that Defendants recommended third-party content to a minor, but that Defendants referred to the person posting the content as a "friend" or someone the minor "might know." This label and recommendation allegedly enhanced the danger posed to a minor user beyond the danger posed by the mere existence of a fraudulent user profile somewhere on the social media site. Liability is alleged to be based not on the third-party content of a fraudulent profile (e.g., a profile of a 40-year-old man pretending to be 15 years old), and not for recommending content contained in the fraudulent profile, but for affirmatively recommending the creator of the profile as a "friend" with whom a minor (who has not searched for any content or contact) should establish an online relationship. Because Defendants enhanced the fraudulent message, they may be held liable for increasing the risk to Plaintiffs' use of Defendants' social media platforms. Again, as in *Lemmon*, the allegations here target the conduct of Defendants in creating a feature that increases the danger to Plaintiffs, not because of content posted on the website, but because the feature seeks to engage the minor Plaintiffs in dangerous activity (contact with strangers, especially adult strangers).

In *A.M. v. Omegle.com, LLC* (D.Or. 2022) 614 F.Supp.3d 814, the federal district court reached similar conclusions.. In that case, the plaintiff brought a products liability claim against an internet service provider for randomly pairing a minor Plaintiff with an adult man for one-on-one chats. Ultimately, the plaintiff was sexually abused online through the defendant's

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social media platform. (Id. at p. 817.) The district court held that Section 230 did not bar this claim for two reasons. First, the plaintiff's theory of liability did not require that the defendant "review, edit or withdraw any third-party content," but rather was premised on an allegedly dangerous product design feature created by the defendant (randomly matching people for one-on-one chats). (*Id.* at p. 819.) Second, liability was not imposed based on holding the defendant responsible for the adult abuser's communications to the plaintiff, but rather was imposed based on the product that was designed "in a way that connects individuals who should not be connected (minor children and adult men) and that it does so before any content is exchanged between them." (*Id.* at pp. 820-821.)

The court therefore denies Defendants' Motion to Strike as to the following paragraphs of the Master Complaint alleging liability based on Defendants' recommendation of contacts to minors: 172, 372, 481-483, and 555. Because Defendants have failed to demonstrate that there is no actionable conduct by Defendants on which Plaintiffs' claims for exploitation and/or sexual abuse related harms may be based, the court also denies the Motion to Strike as to the A.S. SFC, Glen-Mills SFC, K.L. SFC, N.S. SFC, P.F. SFC and K.K. SFC.

c. Money and Virtual Gifts

Plaintiffs allege that Defendants increased the risk of harm to minor Plaintiffs from online sexual predators by creating features that allow the predators to send money or gifts to minors through the social media site, and to communicate privately by voice or video call through the website. From 2014 to 2018, Snapchat included a feature known as "Snapcash," which was a "peer-to-peer mobile payment service." Snapcash allegedly "provided a way for users to pay for private content with little to no oversight" and "enabled predators to extort cash from adolescent users by threatening to disseminate CSAM to other users." (Mast. Compl., ¶ 499.) A feature of Snapchat "allows users to voice or video call one another in the app." (Mast. Compl., ¶ 501.) This feature allegedly "allows predators to call and video chat with minors in private, with virtually no evidence of what was exchanged." (Mast. Compl., ¶ 501.) "ByteDance's design of the 'LIVE Gifts' and 'Diamonds' rewards allegedly greatly increases the risk of adult predators targeting adolescent users for sexual exploitation, sextortion, and CSAM." (Mast. Compl., ¶ 677.)

None of these features involves publication of third-party content. Rather they are modalities for payment of money or provision of virtual rewards that allegedly are significant to minors, or they are instruments for verbal communication. These features are designed by Defendants and

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cannot be analogized to functions of publishers or distributors of third-party content. They are not rewards for publishing content; they are means for users to pay or favor one another or to have verbal contact.

Defendants assert that the "gravamen" of these allegations is injury caused by content on the social media services. (Defs' Supp. Br., at p. 12.) This is an incorrect reading of the allegations. The gravamen of Plaintiffs' claims based on these features is that Defendants' affirmative acts increased the risk of harmful third-party conduct toward the minor Plaintiffs. Plaintiffs contend that these payments and verbal communication modalities increase minors' risk of harm from sexual predators. In some instances, the rewards or verbal communications are alleged to lead to in-person contact between the minor and the sexual predator. In other instances, the rewards or verbal communications are alleged to be part of a sextortion scheme that occurs partly online. In the latter instance, even if third-party content is a "but-for" cause of the harm suffered by a plaintiff, the action is not barred by Section 230 because the cause of action does not seek to hold the provider liable as a publisher. (See *Internet Brands*, *supra*, 824 F.3d at p. 853 [Section 230 "does not provide a general immunity against all claims derived from third-party content" even if the third-party content was a but-for cause of plaintiff's injuries]; *HomeAway*, *supra*, 918 F.3d at p. 682; *Lee*, *supra*, 76 Cal.App.5th at p. 256.)

Defendants also cite *Wozniak* for the proposition that a claim against a provider may not be based on "sale of advertisements" when liability is "ultimately predicated on the third party content." (Defs' Supp. Br., at p. 12, citing *Wozniak*, *supra*, 100 Cal.App.5th at p. 915.) *Wozniak* is inapposite. In that case, there was no allegation that the defendants themselves created the advertisements, and the injury was alleged to flow not from selling advertisements to third parties but from publishing the third parties' advertising of their scam videos. There, the plaintiffs "object[ed] to the content of the advertisements themselves, which promote[d] the scam." (*Wozniak*, at p. 915.) In contrast, here, the features created by Defendants that allegedly increased the risk of harm were not based on content provided by third parties; rather, they served as a modality separate from published content that allowed adult predators to influence minors while eluding detection.[6]

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[6] Defendants also cite *La Park La Brea A LLC v. Airbnb, Inc.* (C.D. Cal. 2017) 285 F.Supp.3d 1097, 1106, for the proposition that the processing or receipt of payments associated with posts does not strip a provider of immunity under section 230. But nothing in that case changes the correct analysis under Section 230: determining whether liability is premised on a provider's publication decision regarding third-party content. Here, the rewards and money payments are alleged to independently create a risk for minors regardless of Defendants' publication decisions concerning third-party content.

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The court denies Defendants' Motion to Strike the following paragraphs of the Master Complaint alleging liability based on Defendants' social media site features that allow minors to receive money or gifts through the site: 499 and 677.

d. Private Direct Messaging and Private Posting or Communication of Images

Defendants seek to strike portions of the Master Complaint in which Plaintiffs allege they are injured by Defendants' decisions to allow users to exchange private messages or videos (Mast. Compl., ¶¶ 377, 385 as to Meta; ¶¶ 673-674, 678 as to ByteDance), to limit display time for images (Mast. Compl., ¶¶ 472-473 as to Snap) and to allow content to be hidden in a tab that requires a passcode and will self-destruct if a user attempts access with the wrong code (Mast. Compl., ¶¶ 476-477).

While these features are allegedly dangerous for minors, they in fact are Defendants' decisions about how to publish and disseminate content; therefore, liability may not be premised on Defendants' decisions to allow users to publish content that is ephemeral or hidden from others. Unlike the features discussed above, these features embody decisions about how to publish content. (See *Batzel*, *supra*, 333 F.3d at p. 1031 ["the exclusion of 'publisher' liability necessarily precludes liability for exercising the usual prerogative of publishers to choose among proffered material and to edit the material published while retaining its basic form and message"].) Defendants have chosen to publish material that the information content providers wanted to remain private to various extents; this is a decision that is protected by Section 230 immunity.

This court agrees with the conclusions reached in *LW through Doe v. Snap Inc.* (S.D. Cal. 2023) 675 F.Supp.3d 1087. In that case, several plaintiffs alleged that when they were minors they were contacted on social media (not on the platform of the defendant in that case) by a sexual predator and then began communicating with the predator on Snapchat, facilitated by Snapchat's ephemeral design features, specifically the disappearing messages. The federal district court found that the "harm animating Plaintiffs' claims is directly related to the posting of third-party content on [Snapchat]." (*Id.* at p. 1097, internal citations and quotation marks omitted.) "Plaintiffs' arguments more closely implicate a publication function than a design or development function." (*Id.*)

Although this court finds that liability may not be premised on Defendants' practices of publishing ephemeral or private content, the court

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will not strike from the Master Complaint all reference to the existence of, and user access to, ephemeral or private content. These allegations serve as background facts that support Plaintiffs' allegations that other actionable conduct of Defendants is negligent. For example, the fact that a minor may communicate using ephemeral content and may have secret messaging with a third party reflects on the reasonableness of Defendants' conduct in introducing minors to "friends" who are adults the minors do not know. (See Mast. Compl., ¶ 377 [explaining how exchange of private direct messaging makes predatory conduct more likely after a minor has received a message from a stranger].) Plaintiffs also have alleged that Defendants have designed their platforms with inadequate parental controls, and Defendants have not sought to strike these allegations. (See, e.g., Mast. Compl., ¶¶ 259, 261, 401 as to Meta; ¶¶ 491-493 as to Snap; ¶¶ 540, 659 as to ByteDance.)[7] The factual contentions concerning Snapchat's "My Eyes Only" feature (Mast. Compl., ¶¶ 476-477), which Defendants seeks to strike, may serve as background for understanding why Snap's "Family Center" feature for parental control (Mast Compl., ¶ 493), which Defendants do not seek to strike, is allegedly inadequate.

A motion to strike is proper to remove irrelevant matter from a complaint. (Code Civ. Proc., § 436, subd. (a).) Irrelevant matter includes allegations "neither pertinent to nor supported by an otherwise sufficient claim or defense." (Cal. Prac. Guide Civ. Pro. Before Trial (The Rutter Group) Ch. 7(I), ¶ 7:178-B, quoting Code Civ. Proc., § 431.10, subd. (b)(2).) Because the Master Complaint's allegations concerning private direct messaging and private videos, even though not actionable in themselves, are relevant to Plaintiffs' actionable claims regarding the potential dangers from the "friends" features, and are relevant to evaluation of Defendants' allegedly negligent conduct in crafting parental controls, the allegations concerning private direct messaging and private videos are not irrelevant matter.[8]

The court therefore denies Defendants' Motion to Strike the following paragraphs of the Master Complaint which describe Defendants' publication features that allow private communication and/or private posting of information: 377-378, 385, 472-473, 476-477, 497-498, 501-502, 670, 673-674 and 678.

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[7] This court notes that the MDL court allowed the plaintiffs there to assert negligence claims based on Defendants' allegedly ineffective parental controls. (*Social Media MDL*, *supra*, 2023 WL 7524912, at *12.)

[8] It is premature for the court to address whether a limiting instruction would be appropriate if evidence concerning, for example, private direct messaging is introduced at trial.

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e. Lack of Age Verification and Default Public Setting for Minors' Profiles

Plaintiffs allege that the "absence of effective age verification measures ... allows predators to lie about their ages and masquerade as children, with obvious dangers to the actual children on Meta's products." (Mast. Compl., ¶ 373.) Plaintiffs also allege that minors' user profiles are allowed to be publicly viewable by any user as a default setting, allowing strangers to contact minor users. (Mast. Compl., ¶¶ 374, 555.) Defendants seek to strike these allegations, arguing that claims of liability based on them are barred by Section 230 immunity.

Claims based on Defendants' failure to implement effective age verification software and on implementing a default public setting for user profiles are barred by *MySpace.* (*MySpace*, *supra*, 175 Cal.App.4th at p. 565 [barring plaintiffs' claims based on allegations "that MySpace should have implemented readily available and practicable age-verification software or set the default security setting on the [plaintiffs'] accounts to private"], internal quotation marks omitted.) However, as is the case with Plaintiffs' allegations concerning direct messaging and private videos, the facts pleaded concerning a lack of age verification and the default public setting are not irrelevant matter because they may be admissible to explain the potential dangers from the "friends" features and why parental controls are allegedly inadequate to protect minors from other dangers, including addiction to Defendants' platforms. Although Section 230 precludes liability for the absence of age verification and the decision to make minors' profiles public, the fact that these features exist is not irrelevant matter because it allegedly explains in part why other actions by Defendants were negligent.

For the foregoing reasons, the court denies Defendants' Motion to Strike the following paragraphs of the Master Complaint which describe Defendants' age verification and default public setting for minor profiles: 373-374, 494-495, 550, and 556.

III. CONCLUSION

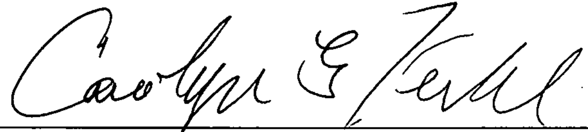
Defendants' Motion to Strike is granted in part, denied in part, and denied without prejudice in part as specified in the foregoing decision.

Defendants also seek to strike certain words, sentence fragments and sentences from other paragraphs of the Master Complaint as set forth in items 9 through 39 of the Motion to Strike. Because this court has addressed all substantive issues raised by the Motion to Strike, the court orders the parties to meet and confer to reach agreement as to how this

court's opinion should be applied to items 9 through 39. As to any item on which there is disagreement, the parties shall file a brief joint report setting forth their respective positions. Insofar as the parties agree how this court's rulings affect the sentences and fragments listed in items 9 through 39, the parties shall file a stipulated proposed order granting or denying the Motion to Strike those items (but preserving the parties' respective positions as stated in the briefing of the Motion to Strike).

IT IS SO ORDERED

July 19, 2024



Hon. Carolyn B. Kuhl
Judge of the Superior Court

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