**No. _____**

# IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA SECOND APPELLATE DISTRICT

**SNAP INC.,**
*Petitioner*,
v.

**SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF LOS ANGELES,**
*Respondent,*

**AMY NEVILLE; AARON NEVILLE; JAIME PUERTA MARIAM HERNANDEZ; CINDY CRUZ SARANTOS; BRIDGETTE NORRING; JAMES MCCARTHY; KATHLEEN MCCARTHY; SAMANTHA MCCARTHY; MATTHEW CAPELOUTO; CHRISTINE CAPELOUTO; PERLA MENDOZA; SAMUEL CHAPMAN; DR. LAURA ANN CHAPMAN BERMAN; JESSICA DIACONT; E.B.; AND P.B.,**
*Plaintiffs—Real Parties in Interest.*

From an Order of the Los Angeles County Superior Court, Case No. 22STCV33500, Hon. Lawrence P. Riff, Presiding, Department 007, Telephone (213) 310-7007

## PETITION FOR WRIT OF MANDATE; MEMORANDUM OF POINTS AND AUTHORITIES; STAY REQUESTED BY MARCH 29, 2024 OF TRIAL COURT PROCEEDINGS [EXHIBITS FILED SEPARATELY]


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## CERTIFICATE OF INTERESTED PARTIES

In accordance with rule 8.208 of the California Rules of Court, the undersigned certifies that Snap Inc. ("Snap") is a publicly traded corporation and has no parent corporation. In November 2017, Tencent Holdings Limited informed Snap that it had purchased 10% or more of Snap's capital stock. In October 2022, FMR LLC filed a Schedule 13G with the Securities and Exchange Commission stating that it owns over 10% of Snap Class A common stock (and reconfirmed that it owns more than 10% of Snap Class A common stock in February 2023 and February 2024 Schedule 13G/A filings). FMR LLC made such filings as a parent holding company on behalf of the following subsidiaries: (1) FIAM LLC, (2) Fidelity Institutional Asset Management Trust Company, (3) Fidelity Management & Research (Hong Kong) Limited, (4) Fidelity Management & Research Company, LLC, (5) Fidelity Management Trust Company, and (6) Strategic Advisers LLC.

Date: March 1, 2024

/s/ James R. Sigel
James R. Sigel

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## PETITION

### A. Issue Presented

1. Whether plaintiffs who were allegedly injured by third-party content on an online communication platform may evade Section 230 of the Communications Decency Act's broad immunity for such platforms simply by recasting their allegations as claims that they were harmed by the platform's purportedly defective features, which facilitated the display of the harmful third-party content.

### B. Introduction

2. Social networking platforms are "integral to the fabric of modern society and culture" and among "the most important places . . . for the exchange of views" on "topics 'as diverse as human thought.'" (*Packingham v. North Carolina* (2017) 582 U.S. 98, 104-105, 109.) Millions of people use services like Snapchat, Facebook, and LinkedIn to debate issues, search for jobs, connect with friends, and much more.

3. The growth of these platforms is thanks, in no small part, to Section 230 of the Communications Decency Act. That statute provides: "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." (47 U.S.C. § 230(c)(1).) Congress intended this language to ensure that online services would not be liable for harms caused by third-party content posted on or transmitted through their platforms. Congress recognized this immunity was essential "to promote the continued development of the Internet" and "preserve the vibrant and competitive free market that presently exists for the Internet." (*Id.* § 230(b)(1), (2).) These platforms cannot exist if held legally responsible for any harmful content users write online. Although leading platforms

have made significant efforts at content moderation, no platform can screen all posts and messages to remove all harmful content.

4. This petition presents a significant, recurring legal question about the reach and efficacy of Section 230: whether plaintiffs who were allegedly harmed by third-party content online can circumvent Section 230's broad protections through creative pleading. That is, rather than attribute their injuries to harmful third-party communication, can plaintiffs evade Section 230 by claiming they were harmed by the online platform's features that facilitated that communication? The trial court, perceiving a conflict in the governing precedents, viewed that question as an open one.

5. The correct answer is no. California and federal courts alike have held that Section 230's protection is broad and cannot be circumvented through creative pleading. (E.g., *Hassell v. Bird* (2018) 5 Cal.5th 522, 542, 544.) Service providers are immune from suit not only for displaying third-party content, but also for quintessential editorial decisions like *how* to format and organize content and *who* can create and receive it. California courts have thus barred claims targeting platforms' features, including algorithms that decide which videos can include advertising (*Prager University v. Google LLC* (2022) 85 Cal.App.5th 1022, 1033-1134); stars endorsing users based on ratings (*Gentry v. eBay, Inc.* (2002) 99 Cal.App.4th 816, 833-834); and failure to verify users' ages (*Doe II v. MySpace Inc.* (2009) 175 Cal.App.4th 561, 572-573). Where the gravamen of a complaint is that third-party content harmed the plaintiffs, they cannot circumvent Section 230 merely by naming a platform's features that allowed them to view the content and attributing their harm to those features. Otherwise, Section 230 would be read out of existence: every online platform makes choices about how content will be shared or

communications exchanged, and plaintiffs can always identify some way in which those features interacted with third-party content.

6. This case "falls within the heartland" of Section 230's broad protection. (*Force v. Facebook, Inc.* (2d Cir. 2019) 934 F.3d 53, 65; see *Barrett v. Rosenthal* (2006) 40 Cal.4th 33, 39 [recognizing Section 230 should be read broadly].) Plaintiffs allege that drug dealers used Snapchat, a messaging platform, to create and exchange drug-related content with other users, including Plaintiffs' relatives. Plaintiffs' relatives then (outside of Snapchat) purchased and took drugs surreptitiously laced with fentanyl, and they overdosed. No one disputes that the drug dealers' conduct was illegal and that the consequences were tragic. But Plaintiffs did not sue the drug dealers—they sued Snap.

7. Section 230 bars Plaintiffs from seeking to hold Snap liable for the content created and exchanged between the drug dealers and Plaintiffs' relatives (even assuming Snap could somehow be deemed the proximate cause of Plaintiffs' relatives' overdoses). Plaintiffs' attempt to frame their complaint around Snapchat's features does not change that. Snap did not create any drug-related content. Nor did Snapchat's features contribute to the illegality of the content the drug dealers created. And Snap certainly did not sell Plaintiffs' relatives drugs, lace those drugs with fentanyl, or encourage them to ingest those drugs. Plaintiffs' recourse is against the dealers who sold the drugs that caused their relatives' overdoses, not the platform on which those dealers communicated with their relatives. Whatever attenuated role Snap may have played by providing a platform for communication, that role is not one the law recognizes as creating liability.

8. The trial court ruled otherwise by exempting from Section 230's reach claims based on allegedly defective features. Relying primarily on *dissents* from individual federal judges, the court adopted a narrow interpretation of Section 230 incompatible with the governing California decisions. It made no attempt to distinguish between the many Snapchat features plaintiffs identified or specify which ones brought this case outside Section 230's scope. Instead, it created a sweeping features-based exception to Section 230, concluding that Plaintiffs' claims about Snapchat's design target Snap's own independent conduct, not third-party content. That misses the point: Plaintiffs contend that Snapchat's features are defective *because* they enabled third-party drug dealers to exchange content with the decedents. If plaintiffs could circumvent Section 230 just by identifying some feature of the platform that facilitated harmful communications, Section 230's immunity would provide no protection at all.

9. Writ review is necessary not only because the trial court erred in creating an end-run around Section 230, but also because the way it erred will have significant consequences. The trial court disregarded binding California precedent—declaring itself free to do so because, it (erroneously) claimed, those precedents are in conflict. The trial court also disregarded persuasive authority from multiple federal appellate courts, including the Ninth Circuit, which have considered the same question and held Section 230 bars such claims. (E.g., *Dyroff v. Ultimate Software Group, Inc.* (9th Cir. 2019) 934 F.3d 1093, 1096-1099 [Section 230 barred claims alleging website's features facilitated drug-related communications that led to fentanyl overdose]; *Force*, *supra*, 934 F.3d at p. 65.)

10. This Court should intervene to address the trial court's confusion—and forestall the further confusion its decision will create—

about the proper interpretation of Section 230. This Court should make clear that there is no conflict in California Court of Appeal precedents, which remain binding on trial courts. It should also reinforce that California courts interpret Section 230 consistently with the Ninth Circuit and other federal Courts of Appeals—contrary to the trial court's disregard for this consistent federal precedent on an issue of federal law. Without this Court's immediate intervention, the trial court's decision will leave online service providers uncertain about what they must do to avoid losing Section 230's protection. That may cause them to "severely restrict the number and types of messages posted"—exactly what Congress enacted Section 230 to prevent. (*Barrett*, *supra*, 40 Cal.4th at p. 44.)

11. This Court should issue a writ directing the trial court to vacate its order overruling the demurrer and enter a new order sustaining it.

### C. The Parties

12. Defendant Snap Inc. is a Delaware corporation with its principal place of business in California. Snap owns and operates Snapchat, an online messaging platform.

13. Plaintiffs Amy Neville, Aaron Neville, Jaime Puerta, Mariam Hernandez, Cindy Cruz-Sarantos, Bridgette Norring, James McCarthy, Kathleen McCarthy, Samantha McCarthy, Matthew Capelouto, Christine Capelouto, Perla Mendoza, Samuel Chapman, Dr. Laura Ann Chapman Berman, Jessica Diacont, E.B., and P.B. are relatives of eleven individuals who overdosed on drugs laced with fentanyl after they allegedly communicated with dealers on Snapchat.

### D. Authenticity of Exhibits

14. All attached exhibits are true and correct copies of the original documents filed in trial court, except Exhibits EE, FF (Vol. VI, Exs. EE, FF, pp. 1239-1397), which are true and correct copies of the reporter's transcripts of the October 18, 2023 hearing on Snap's demurrer.

### E. Factual Background[1]

#### *1. Snapchat*

15. Snap owns and operates Snapchat, a messaging service that enables users to communicate through text messages and in-app photo and short video messages called "snaps." (Vol. III, Ex. I, p. 384.) By default, snaps disappear after recipients view them. (*Id.* at p. 402].) This ephemerality allows users to "show a more authentic, unpolished, and spontaneous side of themselves," emulating in-person and telephone conversations. (*Id.* at p. 384.) Snapchat is one of the most popular social networking platforms, with over 390 million daily users worldwide at the time of the demurrer. (Vol. VIII, Ex. NN, p. 1797.)

16. Plaintiffs identify several other features in addition to ephemerality that Snapchat uses to display content and facilitate communications. For example, Snapchat "stories" are snaps users can share with their entire friend group, a subset of their friends, or publicly for 24 hours. (Vol. III, Ex. I, at p. 415.) Snapchat also offers a "Quick Add" feature that makes it easier for users to add "friends," such as by

[1] The facts are drawn from Plaintiffs' Second Amended Complaint (Vol. III, Ex. I) and Snap's Request for Judicial Notice (Vol. IV, Ex. L). Although Snap moved for sanctions because the complaint includes demonstrably false allegations, the complaint's allegations are accepted as true for purposes of the demurrer. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

recommending people in the user's telephone contacts or with whom the user shares mutual friends. (*Id.* at pp. 407-408.) Quick Add's recommendations are not added to a user's "friends" list unless the user sends a friend request and the recipient accepts. (*Id.* at pp. 413-415.) Plaintiffs allege that Snapchat uses algorithms to determine which stories to display in a user's "feed" and which accounts to show on a user's Quick Add. (*Id.* at pp. 408, 416.) Another feature, "Snap Map," allows users to share their locations. (*Id.* at p. 420.) Snapchat by default does not share users' locations with anyone; it shares that information only if users affirmatively change the default setting and opt to share their locations. (*Ibid.*)

17. Snapchat employs a variety of safeguards, including ones aimed specifically at minors. For example, Snap prohibits minors from creating public profiles or displaying their usernames on Snap Map. (Vol. III, Ex. I, at pp. 420, 440.) Unlike other social networking platforms, Snapchat does not allow browsable public profiles. (*Id.* at p. 440.)[2]

***2. Use by Drug Dealers***

18. Snap forbids the use of Snapchat for any illegal activity, including "promoting, facilitating, or participating in . . . buying, selling, exchanging, or facilitating sales of illegal or regulated drugs." (Vol. IV, Ex. L, at p. 714.) Snap uses machine-learning software and other technology to identify and remove drug-related content. (*Id.* at p. 720.) Of the drug-related content Snap removes, this software proactively detects 90% of it before users even report it. (*Ibid.*) After that process, only 0.04%

[2] As detailed in Snap's motion for sanctions, Snap also employs many other safety measures omitted from Plaintiffs' complaint. (See Vol. V, Ex. W, pp. 938-939, 944.)

of snaps and stories made available to users between January 1 and June 30, 2022 contained content that was determined to violate any of Snap's policies, and only 4.8% of that violative content was drug-related. (*Id.* at p. 725.)

19. Snap also provides a mechanism for users and parents to report violative content. (Vol. III, Ex. I, p. 423.) Snap reviews these reports and, when it determines content is illegal or violates its policies, takes corrective action. That action can include removing the content, banning the account, taking steps to block the offender from creating new accounts, and/or preserving content for law enforcement. (*Id.* at p. 444.)

20. Of course, it is impossible for any online platform—especially one with over 390 million daily users—to detect and remove all unlawful content. The opioid epidemic has caused tragedies worldwide. Plaintiffs allege that drug dealers promoted drug sales on Snapchat, such as by posting drug-related stories and using Snap Map and Quick Add to connect with new customers. (Vol. III, Ex. I, at pp. 407-433.) Plaintiffs claim their relatives exchanged messages with drug dealers, then met the dealers to purchase and take drugs that (unbeknownst to them) were laced with fentanyl, which caused them to overdose.[3] (*Id.* at pp. 455-536.) Ten of Plaintiffs' relatives died, and one survived. (*Ibid.*)

## F. Procedural Background

### *1. Plaintiffs' Complaint*

21. Rather than sue the dealers who sold the fentanyl-laced drugs, Plaintiffs sued Snap for providing an allegedly defective platform on which

[3] The drug purchases that led to these overdoses did not take place on Snapchat, as there was no marketplace feature and users could not exchange money via Snapchat. (Vol. III, Ex. I, p. 403.)

their relatives communicated with the dealers. Plaintiffs alleged 16 counts: three counts of strict products liability; five counts of negligence; two counts of fraudulent misrepresentation; tortious interference with parental rights; public nuisance; aiding and abetting; survival action; wrongful death; and loss of consortium. (*Id.* at pp. 536-585.)

22. In an effort to plead around Section 230, Plaintiffs' 215-page complaint sets out an attenuated causal chain purportedly linking their relatives' injuries to various Snapchat features that enabled their relatives' communications with drug dealers, rather than to those communications themselves. (Vol. III, Ex. I, at pp. 561-563.) For example, Plaintiffs claimed features like stories, Quick Add, and Snap Map "unreasonably expose[d] youth users to drug-encouraging content," and that Quick Add recommended connections with strangers who turned out to be drug dealers. (*Id.* at p. 561) Plaintiffs also claimed ephemerality made Snapchat an attractive platform for drug dealers. (*Ibid*.) Plaintiffs alleged Snapchat's safeguards were insufficient because Snap did not adequately verify users' ages, remove drug-related content, or suspend accounts. (*Id.* at pp. 562-563.) Although Plaintiffs attempted to disclaim liability based on the content of the drug dealers' communications, their allegations and injuries all depended on that harmful content.

23. This case was one of seven filed against Snap and assigned to the same trial judge. Collectively, the seven cases asserted similar claims on behalf of 65 individuals who overdosed on fentanyl-laced drugs. (Vol. VIII, Ex. OO, p. 1830.) The trial court stayed the six other cases pending resolution of the demurrer. (*Id*. at p. 1832.) Snap entered a tolling agreement with Plaintiffs' counsel, permitting them to identify other individuals who plan to assert similar claims. (*Ibid.*) To date, Plaintiffs'

counsel have identified 34 individuals, and the tolling agreement extends to May 30, 2024. (Vol. VIII, Ex. QQ, pp. 1858-1859.)

### *2. Snap's Demurrer*

24. Snap demurred, contending, among other things, that Section 230 barred all Plaintiffs' claims.[4] (Vol. III, Ex. J, pp. 622-632.) As Snap explained, the gravamen of Plaintiffs' complaint is clear: they were harmed by third-party content encouraging and enabling their relatives to buy drugs. Indeed, the reason Plaintiffs claimed Snapchat's features were defective was because they enabled drug dealers to create and exchange drug-related messages with these relatives. Snap explained this was precisely the kind of liability for third-party content that Section 230 prohibits, as numerous courts had held. (E.g., *Dyroff*, *supra*, 934 F.3d at pp. 1096-1099.) Snap argued that permitting Plaintiffs to evade immunity through artful pleading would nullify Section 230's protections.

### *3. Trial Court's Order*

25. The trial court overruled Snap's demurrer on Section 230 grounds for all but one claim. (Vol. VIII, Ex. NN, pp. 1803-1816.) Although the court recognized it was bound by decisions of the California Supreme Court and Courts of Appeal, it stated that "when appellate decisions of the California Court of Appeal are in conflict, 'the court exercising inferior jurisdiction can and must make a choice between the conflicting decisions.'" (*Id.* at p. 1804.) Erroneously concluding there was such a conflict—and relying in significant part on *dissenting* opinions in

[4] Snap also argued that Plaintiffs failed to state a claim because they did not allege Snap proximately caused their harm. (Vol. III, Ex. J, pp. 633-634.) After all, Snap's provision of communication tools did not cause drug dealers to sell illegal drugs or lace them with fentanyl, nor did Snap cause Plaintiffs' relatives to purchase or ingest those drugs. (*Ibid.*)

*federal* cases—the trial court chose a narrow interpretation of what it means to "treat Snap as a publisher." (*Id.* at pp. 1806-1815.) It made no attempt to reconcile that approach with our Supreme Court's holding that Section 230's "broad" terms require "an inclusive interpretation" (*Barrett*, *supra*, 40 Cal.4th at pp. 48-49), or with California and federal decisions holding Section 230 bars similar claims. Instead, it sweepingly exempted from Section 230's protection any claims targeting a platform's design. (Vol. VIII, Ex. NN, pp. 1815-1816].)

26. In doing so, the trial court stated that Plaintiffs' claims did not treat Snap as a publisher because Snap's design of Snapchat's features was "independent tortious conduct—independent, that is, of the drug sellers' posted content." (Vol. VIII, Ex. NN, pp. 1815-1816.) The court also ruled that Snapchat's features were themselves "content" that made Snap a "content provider" rather than a publisher of third-party content. (*Id.* at p. 1816.) The court did not explain how Snapchat's features were independent from the content they facilitated or why the features were themselves content.

27. By contrast, the trial court ruled that Plaintiffs' aiding and abetting claim was barred by Section 230 because it was "too intimately tied to Snap's publication of the drug sellers' third-party content." (Vol. VIII, Ex. NN, p. 1816.) It did not explain why the same was not true of the other claims, apparently presuming this conclusion followed directly from its narrow interpretation of Section 230. (*Ibid.*) The court also sustained the demurrer as to tortious interference, public nuisance, and loss of consortium on other grounds. (*Id.* at p. 1827.)

28. On February 28, 2024, the trial court stayed discovery in this case and the six other pending cases "until 3/29/2024 or further order of the

Court, [whichever] is earlier." (Vol. VIII, Ex. RR., p. 1913.) After that date, without an additional stay, the parties will begin discovery for the 27 bellwether candidate claims. (*Id.* at p. 1912.)

### G. Jurisdiction and Timeliness

29. On January 2, 2024, the trial court issued its order overruling Snap's demurrer in part. This petition was filed within 60 days. (See *Laboratories & Workforce Development Agency v. Superior Court* (2018) 19 Cal.App.5th 12, 24.)

### H. The Need for Writ Relief

30. Immediate appellate intervention is needed for several reasons.

31. *First*, this Court's intervention is necessary to resolve any confusion over what the trial court erroneously called a "conflict" in the California Court of Appeal decisions interpreting Section 230. Because the trial court mistakenly concluded the California precedents were inconsistent, it declared itself free to choose whatever it thought was the best interpretation of Section 230. In doing so, the court ignored binding precedent about the breadth of Section 230's immunity. (See, e.g., *Hassell*, *supra*, 5 Cal.5th at pp. 542, 544; *Barrett*, *supra*, 40 Cal.4th at p. 39). Its decision will sow confusion, potentially leading other trial courts to conclude they have similar license to disregard precedent.

32. This Court's intervention is needed to clear up this confusion. This Court should confirm that there is no conflict in the binding precedents, and that Section 230 bars lawsuits challenging the means by which online platforms arrange and display the third-party content that caused the plaintiffs' harm. Left uncorrected, the trial court's decision may

leave other California trial courts at sea, creating unpredictability in an area where litigation is frequent and predictability is crucial.

33. *Second*, the trial court's ruling splits not only with the governing California precedents, but also with federal appellate decisions that are on all fours with this case. In particular, the Second and Ninth Circuits have both considered claims attempting to hold online platforms liable for "features" that allegedly facilitated harmful content by terrorists and drug dealers, including by recommending connections between users. (*Force*, *supra*, 934 F.3d at p. 65; *Dyroff*, *supra*, 934 F.3d at pp. 1096-1099.) Both courts held those features were part of the platforms' role as publishers and thus within Section 230's protection, rejecting arguments nearly identical to those the trial court accepted here. (*Force*, *supra*, 934 F.3d at p. 65; *Dyroff*, *supra*, 934 F.3d at p. 1099.)

34. The trial court's contrary decision therefore invites forum-shopping and leaves California-based companies uncertain about their exposure to liability. That uncertainty will chill speech and innovation, undermining Section 230's purpose. This Court's intervention is needed to ensure California courts remain aligned with federal courts on the proper interpretation of Section 230, as they have been until now. (See, e.g., *Barrett*, *supra*, 40 Cal.4th at p. 58.)

35. *Third*, writ review is needed to prevent irreparable harm that cannot be addressed after any final judgment. Section 230 grants "immunity from suit," protecting service providers not just from ultimate liability, but also from "the burdens associated with defending against state-law claims." (*Hassell*, *supra*, 5 Cal.5th at p. 544.) The benefits of that immunity will be lost if Snap must proceed with costly discovery and trial in multiple bellwether cases before obtaining appellate review. (See *City of*

*Stockton v. Superior Court* (2007) 42 Cal.4th 730, 747, fn. 14.) For that reason, California courts have repeatedly granted writs of mandate where trial courts erroneously overrule demurrers on immunity grounds. (E.g., *Big Valley Band of Pomo Indians v. Superior Court* (2005) 133 Cal.App.4th 1185.)

36. Moreover, correcting the trial court's error will "result in a final disposition" not only of this case, but also of six other pending cases against Snap and the potential claims of 34 other individuals covered by the tolling agreement. (*Boy Scouts of America National Foundation v. Superior Court* (2012) 206 Cal.App.4th 428, 438.) Without this Court's intervention, Snap will be forced to defend against at least seven cases—involving over 90 individuals—from which it should be immune.

37. *Finally*, this case presents a "significant issue of law" that has far-reaching implications for countless social networking companies and Internet platforms nationwide. (*Boy Scouts*, *supra*, 206 Cal.App.4th at p. 438.) Many platforms, including LinkedIn, Twitter (now X), Facebook, Instagram, and YouTube, offer features that organize and display content like the ones Plaintiffs target here. Whether Section 230 protects those features is a question that will continually be raised in courts across the country, as plaintiffs look for creative ways around Section 230's protections.

38. The importance of this issue is underscored by *Gonzalez v. Google LLC* (2023) 598 U.S. 617, in which the U.S. Supreme Court granted certiorari to address this same question. Ultimately, the Court did not resolve the issue, as its decision in a parallel case led it to dispose of the claims in defendants' favor on other grounds. (*Id.* at p. 622.)

39. This Court's clarification of the law thus remains critical. Left uncorrected, the trial court's decision will create a blueprint for improperly circumventing Section 230. Through clever pleading, plaintiffs can easily turn claims based on third-party content into claims that target some feature of the platform that hosted that content (especially if they can rely on alleged causal chains as attenuated as the one here). If that is all it takes to deprive service providers of immunity, Section 230 will be a dead letter. Rather than risk exposure to enormous liability from their hundreds of millions of daily users, online services may choose instead to offer fewer features and limit their platforms' capabilities. That will deprive users of valuable tools that the vast majority of people use responsibly and for positive ends. The end result will be a "chilling effect on the Internet by opening the floodgates of litigation"—precisely what Section 230 was enacted to prevent. (*Dyroff v. Ultimate Software Group, Inc.* (N.D.Cal., Nov. 26, 2017, No. 17-cv-05359-LB) 2017 WL 5665670, at p. 14, affd. (9th Cir. 2019) 934 F.3d 1093.)

## I. The Need for Immediate Stay

40. The trial court has stayed discovery only until March 29, 2024. (Vol. VIII, Ex. RR, p. 1913.) After that date, absent a stay from this Court, the parties are expected to begin discovery for the 27 bellwether candidate claims. (*Id.* at p. 1912.) For the reasons explained above, proceeding with costly discovery and litigation of bellwether cases to trial would violate Snap's immunity from suit under Section 230. An immediate stay of trial court proceedings is necessary to prevent that irreparable harm.

## PRAYER FOR RELIEF

WHEREFORE, Petitioner prays that this Court:

1. Issue an order directing the Superior Court and respondents to show cause before this Court why a peremptory writ should not issue directing the Superior Court to vacate its order overruling Petitioner's demurrer.

2. Issue a stay of proceedings in the trial court while this Court resolves this petition.

3. Thereafter issue a writ of mandate directing the Superior Court to vacate its order overruling Petitioner's demurrer and enter a new order sustaining the demurrer without leave to amend.

3. Award Petitioner its costs for this proceeding; and

4. Grant such other relief as may be just and proper.

Date: March 1, 2024

Respectfully submitted,

MORRISON & FOERSTER LLP

s/ James R. Sigel
James R. Sigel

*Counsel for Petitioner Snap Inc.*

## VERIFICATION

I, Jessica L. Grant, declare:

I am an attorney duly licensed to practice law in the State of California. I am a partner at Shook Hardy & Bacon LLP, counsel for Petitioner Snap Inc.

I have read the foregoing petition for writ of mandate and know its contents. I am informed and believe the facts stated in the petition are true, and that the exhibits referred to and filed herewith are true and correct copies of the documents filed in the trial court. Because of my familiarity with the relevant facts pertaining to the proceedings in the trial court, I, rather than Petitioner, verify this petition.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on March 1, 2024, in San Francisco.

/s/ Jessica L. Grant
Jessica L. Grant

## MEMORANDUM OF POINTS AND AUTHORITIES

## I. STANDARD OF REVIEW

Where a petition for a writ of mandate arises from a trial court order "improperly overrul[ing] a demurrer" on "a pure question of law," this Court "reviews the issue de novo." (*Fair Employment & Housing Com. v. Superior Court* (2004) 115 Cal.App.4th 629, 633.)

## II. ARGUMENT

### A. Section 230 Bars Plaintiffs' Claims

#### *1. Plaintiffs' claims fall within the heartland of Section 230*

Section 230 states that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." (47 U.S.C. § 230(c)(1).) It further contains an express preemption provision: "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." (*Id.* § 230(e)(3).)

Our Supreme Court has held, and the Courts of Appeal have consistently reinforced, that the immunity this statute confers should be interpreted broadly. (See, e.g., *Barrett*, *supra*, 40 Cal.4th at p. 48 ["The terms of section 230(c)(1) are broad and direct[.]"]; *Hassell*, *supra*, 5 Cal.5th at p. 544 ["Section 230(e)(3) underscores . . . the broad scope of Section 230 immunity[.]"]; *Doe II*, *supra*, 175 Cal.App.4th at p. 572 [following the "general consensus to interpret section 230 immunity broadly"]; *Murphy v. Twitter, Inc.* (2021) 60 Cal.App.5th 12, 25 [same]; *Prager*, *supra*, 85 Cal.App.5th at p. 1032 [same].) To determine whether claims fall within that broad immunity, California courts apply a three-prong test, asking whether "(1) the defendant [is] a provider or user of an

interactive computer service; (2) the cause of action treat[s] the defendant as the publisher or speaker of information; and (3) the information at issue [is] provided by another information content provider." (*Gentry*, *supra*, 99 Cal.App.4th at p. 830.)

All three prongs are satisfied here. The trial court correctly recognized that Snap is an interactive computer service. (Vol. VIII, Ex. NN, p. 1815.) But it erred in concluding Snap did not satisfy the other two prongs. There is no dispute that Section 230 would bar Plaintiffs from suing Snap for displaying the drug dealers' content and communications to Plaintiffs' relatives. But the trial court permitted Plaintiffs to do just that by simply reframing their claims around Snapchat's "features" and purporting to disclaim reliance on the third-party content at the center of those claims. Clever pleading, however, cannot change the "gravamen" of Plaintiffs' claims, which should remain barred by Section 230. (*Murphy*, *supra*, 60 Cal.App.5th at p. 30, fn. 6; *Hassell*, *supra*, 5 Cal.5th at p. 542 [rebuffing "attempts to avoid section 230 through the 'creative pleading' of barred claims"]; *Prager*, *supra*, 85 Cal.App.5th at p. 1033 [similar].)

### *a. Plaintiffs' claims seek to treat Snap as the publisher of third-party content*

#### i. Under California precedent, the design of Snapchat's features falls within Snap's role as a publisher

In addressing the second prong, California courts have interpreted the term "publisher" broadly. (*Barrett*, *supra*, 40 Cal.4th at pp. 47-50.) As the trial court recounted, early debates over the meaning of "publisher" centered on whether Congress intended to invoke the term's ordinary meaning or a legal term of art from the common law of defamation, which distinguished between "publishers" and "distributors." (Vol. VIII, Ex. NN, pp. 1807-1808.) Plaintiffs seeking to narrow Section 230 argued it

protected only "publishers" (liable at common law for defamation "on the same basis as authors"), not "distributors" (book sellers or news vendors liable only upon notice of the defamation). (*Barrett*, *supra*, 40 Cal.4th at pp. 44-45.) In what our Supreme Court called the "leading case on section 230 immunity," the Fourth Circuit rejected this narrow reading. (*Id.* at pp. 41-42 [citing *Zeran v. America Online, Inc.* (4th Cir. 1997) 129 F.3d 327, 331-333].) The Fourth Circuit stated that a "distributor" exception would place an "impossible burden" on online services, undermining Section 230's purposes. (*Zeran*, *supra*, 129 F.3d at p. 333.)

Along with most federal and state courts, our Supreme Court agreed. (*Barrett*, *supra*, 40 Cal.4th at pp. 41-42.) It noted that Section 230's terms were "broad," warranting "an inclusive interpretation." (*Id.* at pp. 48-49.) It held that "the plain language of section 230 'creates a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service.'" (*Id.* at p. 43 [quoting *Zeran*, *supra*, 129 F.3d at p. 330].) Put differently, Section 230 bars any claims "that would place a computer service provider in a publisher's role," an immunity extending to all "traditional editorial functions." (*Ibid.*)

As courts have repeatedly recognized, publishers' traditional editorial functions are not limited to deciding what content to publish. They also encompass deciding how that content should be displayed and to whom, and what content should be removed and when. That includes, for example, decisions about "where on their sites (or other digital property) particular third-party content should reside and to whom it should be shown"—e.g., on the homepage or targeted to certain users based on "geolocation, language of choice, and registration information." (*Force*, *supra*, 934 F.3d at pp. 66-67.) It also includes "decid[ing] what type and

format of third-party content they will display, whether that be a chat forum for classic car lovers, a platform for blogging, a feed of recent articles from news sources frequently visited by the user, a map or directory of local businesses, or a dating service to find romantic partners." (*Id.* at p. 67.)

California courts have thus barred a wide range of claims targeting online services' "features." For example, courts have held that plaintiffs were treating defendants as publishers when they challenged YouTube's use of algorithms to determine which videos could include advertising and which should be restricted from certain audiences (*Prager*, *supra*, 85 Cal.App.5th at p. 1033); MySpace's failure to verify users' ages and adopt "reasonable safety measures" (*Doe II*, *supra*, 175 Cal.App.4th at p. 573); eBay's category labels for products, endorsement of users with stars or awards based on ratings, and failure to restrict who can rate sellers in its "Feedback Forum" (*Gentry*, *supra*, 99 Cal.App.4th at pp. 833-834); and Twitter's decision whether to remove certain content or suspend certain accounts (*Murphy*, *supra*, 60 Cal.App.5th at pp. 25-26). (See also *Hassell*, *supra*, 5 Cal.5th at p. 543, fn. 14 [describing Yelp's decision to feature defamatory review as "Recommended Review" and failure to factor some reviews into business's ranking as "clearly publication decisions"].) These courts rejected arguments that the claims were based on some duty independent of the defendants' status as publishers. (E.g., *Doe II*, *supra*, 175 Cal.App.4th at pp. 572-573; *Gentry*, *supra*, 99 Cal.App.4th at p. 831.)

All the features Plaintiffs target here are likewise traditional editorial functions that implicate Snap's role as a publisher. Each challenged feature reflects Snap's determinations about how and to whom content on Snapchat will be prioritized and displayed. For example, snaps, stories, and Snap Map are ways of displaying third-party content, whether it be the photos and videos users post or the locations they choose to share. (See Vol. III,

Ex. I, pp. 415-420 [alleging harmful content displayed on stories]; *id.* at pp. 420-422 [alleging Snap Map "allows users to share their location with their followers (and the public) on an activity-level-based, color-coded heatmap"].) The content's ephemerality is an editorial decision about how long content is displayed and when it should be removed. (See *id.* at pp. 402-404.) And Snap uses Quick Add to recommend friends for users to connect with, which determines whose content users see. (See *id.* at pp. 407-415.) Finally, Snap's reporting mechanisms, response to reports, and other safety measures are all part of its editorial decisions about what content to remove. (See, e.g., *id.* at pp. 445, 452 [complaining Snap declined to remove reported content it deemed did not violate its policies].)

Plaintiffs find fault with these features *because* they allegedly enabled drug dealers to exchange drug-related content with Plaintiffs' relatives. This is apparent throughout Plaintiffs' complaint. (E.g., Vol. III, Ex. I, p. 416 [objecting to stories because "drug dealers use the Stories product to advertise and openly publish their drug menus"]; *id.* at pp. 417-419 [displaying examples of harmful content]; *id.* at pp. 416-419 [objecting to Snap Map and Quick Add because they allegedly provide "predatory adult users with means to advertise and distribute illicit and illegal products"]; *id.* at 443 [complaining Snap failed "to keep dealers off its platform"]; *id.* at 452 [complaining Snap declined to remove reported content].) Plaintiffs thus do not, as the trial court erroneously believed, identify any duty or conduct "independent" of the drug dealers' content. (Vol. VIII, Ex. NN, pp. 1815-1816.) As in *Doe II*, it is "undeniable" that Plaintiffs seek to hold Snap "responsible for the communications between" drug dealers and Plaintiffs' relatives. (175 Cal.App.4th at p. 573.)

Just as the plaintiffs in *Doe II* "want[ed] MySpace to ensure that sexual predators do not gain access to (i.e., communicate with) minors on

its Web site," Plaintiffs want Snap to ensure drug dealers do not gain access to and communicate with users on Snapchat. (175 Cal.App.4th at p. 573.) But that is the "heartland of what it means to be the 'publisher' of information under Section 230(c)(1)." (*Force*, *supra*, 934 F.3d at p. 65; accord *Doe II*, *supra*, 174 Cal.App.4th at p. 573 [same].)

**ii. Numerous federal courts have likewise held that Section 230 bars claims targeting an online platform's design or features**

In addition to following directly from governing California precedents, the conclusion that Section 230 bars Plaintiffs' claims is consistent with the decisions of numerous federal courts, which have held that Section 230 bars claims targeting online platforms' design or features that facilitate user-generated content. In fact, the Ninth, Second, and Fifth Circuits have considered claims on all fours with Plaintiffs' claims here and held them barred by Section 230.

The circumstances the Ninth Circuit confronted in *Dyroff*, *supra*, were almost identical to those here. The defendant was "a social networking website made up of various online communities or groups" where users could post anonymously. (934 F.3d at p. 1095.) The website used algorithms to "recommend[] groups for users to join," and the plaintiff alleged that "[s]ome of the site's functions, including user anonymity and grouping, facilitated illegal drug sales." (*Ibid.*) The plaintiff's son had posted in a heroin-related group looking to find heroin, received an email notification from the defendant about a response to his post, purchased heroin from the responding user, and overdosed and died because the heroin contained fentanyl. (*Ibid.*) The Ninth Circuit rejected the plaintiff's attempt to "plead around Section 230 immunity" by framing her complaint around the websites' "features and functions," including algorithms for

recommending user groups. (*Id.* at p. 1098.) The Court stated: "By recommending user groups and sending email notifications, [the defendant] was acting as a publisher of others' content. These functions—recommendations and notifications—are tools meant to facilitate the communication and content of others." (*Ibid.*) Here, Snapchat's challenged features are likewise "meant to facilitate the communication and content of others." (*Ibid.*; see *Prager*, *supra*, 85 Cal.App.5th at p. 1034 [citing and applying *Dyroff*].)

Similarly, in *Force*, *supra*, the Second Circuit refused to recognize a features-based exception to Section 230. The *Force* plaintiffs sued Facebook for using algorithms to make "friend suggestions," determine what content to display on newsfeeds, and target ads. (934 F.3d at p. 58.) They claimed these algorithms connected Hamas accounts and content with users vulnerable to radicalization, who then executed terrorist attacks that killed or injured five Americans. (*Id.* at p. 59.) The Second Circuit rejected the plaintiffs' argument that their claims did not treat Facebook as the publisher of Hamas's content, but instead sought to hold it liable for its own "matchmaking," i.e., suggesting "connections" between users. (*Id.* at p. 65.) As the court warned, "[a]ccepting plaintiffs' arguments would eviscerate Section 230(c)(1)." (*Id.* at p. 66.) The court found "no basis in the ordinary meaning of 'publisher,' the other text of Section 230, or decisions interpreting Section 230, for concluding that an interactive computer service is not the 'publisher' of third-party information when it uses tools such as algorithms that are designed to match that information with a consumer's interests." (*Id.* at p. 66.) It reasoned that forming "connections" was "an essential result of publishing." (*Id.* at pp. 66-67.) It compared this "matchmaking" to editorial decisions about how to prioritize

and display content, like choosing what to place on a website's homepage. (*Ibid.*)

Likewise, in *Doe v. MySpace, Inc.* (5th Cir. 2008) 528 F.3d 413, the Fifth Circuit held Section 230 barred negligence claims targeting MySpace's failure to take adequate safety measures to protect minors. MySpace, a social networking website, prohibited users under 16 from creating public profiles. (*Id.* at p. 416.) The plaintiff, a minor, lied about her age to create a public profile and connected with a 19-year-old user who sexually assaulted her. (*Ibid.*) The plaintiff sued MySpace for failing to implement adequate safety measures, such as age verification software. (*Id.* at pp. 416, 421.) The Fifth Circuit rejected the plaintiff's argument that she did not seek to hold MySpace liable for third-party content. (*Id.* at pp. 419-420.) It held that her allegations about MySpace's failure to take measures "that would have prevented [her] from communicating" with her attacker were "merely another way of claiming that MySpace was liable for publishing the communications." (*Id.* at p. 420.)

*Dyroff*, *Force*, and *MySpace* are by no means outliers. Numerous other federal courts have applied Section 230 to bar claims based on platforms' features, including the very features challenged here. (E.g., *Herrick v. Grindr LLC* (2d Cir. 2019) 765 Fed.Appx. 586, 590 [rejecting argument that claims targeting Grindr's "geolocation function" were "premised on Grindr's design and operation of the app rather than on its role as a publisher of third-party content"]; *Doe v. Snap, Inc.* (S.D.Tex. July 7, 2022, No. H-22-00590) 2022 WL 2528615, at *14, affd. (5th Cir. June 26, 2023, No. 22-20543) 2023 WL 4174061 [rejecting argument that negligent design claim targeted "Snapchat's design and operation rather than its role as a publisher of third-party content" because "Snapchat's alleged lack of safety features is only relevant to Doe's injuries to the extent

that such features would have averted wrongful communication via Snap's platforms by third parties"] [alterations, and quotation marks omitted]); *L.W. v. Snap, Inc.* (S.D.Cal., June 5, 2023, No. 22cv619-LAB-MDD) ___ F.Supp.3d ___, 2023 WL 3830365, at *4-6 [same for Snapchat's ephemerality and Quick Add]; *Doe v. Grindr* (*Grindr*) (C.D.Cal., Dec. 28, 2023, 2:23-cv-02093-ODW (PDx) 2023) ___ F.Supp.3d ___, 2023 WL 9066310, at *3-4 ["match function"]; *Bride v. Snap Inc.* (C.D.Cal., Jan. 10, 2023, No. 2:21-cv-06680-FWS-MRW) 2023 WL 2016927, at *5-7 [anonymity]; *Anderson v. TikTok, Inc.* (E.D.Pa. 2022) 637 F.Supp.3d 276, 280-281 [algorithm for curating content]; *Jackson v. Airbnb, Inc.* (C.D.Cal., Nov. 4, 2022, No. 22-CV-3084 DSF (JCx)) 2022 WL 16753197, at *1-2 [negligent design].)

Plaintiffs' claims are no different. They seek to treat Snap as the publisher of third-party drug dealers' content. They are thus barred by Section 230.

***b. Snap is not an "information content provider"***

The third prong is likewise satisfied because "the information at issue [is] provided by another information content provider." (*Gentry*, *supra*, 99 Cal.App.4th at p. 830.) Section 230 defines "information content provider" as "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service." (47 U.S.C. § 230(f)(3).) Here, the "information at issue" is the drug-related content exchanged between drug dealers and Plaintiffs' relatives. Those messages—*not* the Snapchat platform itself or any content Snap created—allegedly encouraged Plaintiffs' relatives to buy drugs that led to their overdoses. And the "information content provider" of those drug-related

communications was clearly the dealers, not Snap. Plaintiffs' attempt to attribute blame to Snapchat's features does not change that core fact.

*First*, contrary to the trial court's conclusion (Vol. VIII, Ex. NN, p. 1816), Snapchat's features are not themselves content that could deprive Snap of Section 230's protection. The Court of Appeal rejected that argument in *Prager*, where the plaintiffs claimed that Google's creation of algorithms used to restrict advertising or display of certain videos turned Google into a "content provider." (85 Cal.App.5th at p. 1034.) Following *Dyroff* and *Force*, *Prager* held the plaintiffs "'cannot plead around section 230 immunity by framing these website features as content.'" (*Ibid.* [quoting *Dyroff*, *supra*, 934 F.3d at p. 1098].) As it emphasized: "Merely arranging and displaying others' content to users through such algorithms is not enough to hold a service provider responsible as the 'developer' or 'creator' of that content." (*Ibid.* [quoting *Force*, *supra*, 934 F.3d at p. 70] [alterations omitted].)

The same is true here. All of Snapchat's challenged features—whether Quick Add's friend recommendations or Snap Map's location display—are "tools meant to facilitate the communication and content of others," "not content in and of themselves." (*Dyroff*, *supra*, 934 F.3d at p. 1098.) It does not matter that Snap created those features because it was the content facilitated, not the features themselves, that allegedly led to Plaintiffs' relatives' overdoses. (*Prager*, *supra*, 85 Cal.App.5th at p. 1035 ["Prager's claims turn not on the creation of algorithms, but on the defendants' curation of Prager's information content irrespective of the means employed"]; *Anderson*, *supra*, 637 F.Supp.3d at p. 280 ["algorithms are 'not content in and of themselves'"].)

*Second*, and similarly, offering these features does not transform Snap into a developer of the drug dealers' content merely because the dealers used those features. California courts have adopted the Ninth Circuit's "material contribution" test for determining when a service provider becomes a content "developer." (*Doe II*, *supra*, 175 Cal.App.4th at pp. 574-575.) Under that test, a website is a content developer, and thus unprotected by Section 230, "if it contributes materially to the alleged illegality of the conduct." (*Fair Housing Council of San Fernando Valley v. Roommates.com LLC* (9th Cir. 2008) 521 F.3d 1157, 1168.) That is, "development of information" under Section 230(f)(3) requires not merely "augmenting the content generally," but "materially contributing to its alleged *unlawfulness*." (*Id.* at pp. 1167-1168 [italics added].) The Ninth Circuit explained that broader readings of "development" that encompass "any function performed by a website . . . would defeat the purposes of section 230 by swallowing up every bit of the immunity that the section otherwise provides." (*Id.* at p. 1167.)

As Division 8 of the Second District Court of Appeal recounted, the facts of *Roommates.com* illustrate "two ends of the spectrum." (*Doe II*, *supra*, 175 Cal.App.4th at p. 575.) The website Roommates.com matched people renting out rooms with potential roommates. (*Roommates.com*, *supra*, 521 F.3d at p. 1161.) The plaintiffs alleged it violated fair housing laws by discriminating based on protected characteristics. (*Id*. at p. 1162.) The Ninth Circuit held Roommates.com was not immune under Section 230 for asking subscribers discriminatory questions, "forc[ing] subscribers to answer these questions as a condition of using its services," and designing matches based on the responses. (*Doe II*, *supra*, 175 Cal.App.4th at pp. 574-575.) These actions made Roommates.com "responsible" as a

developer because they actively contributed to what made the content illegal. (*Roommates.com*, *supra*, 521 F.3d at p. 1166.)

Roommates.com retained immunity, however, for providing an "Additional Comments" box in which users wrote discriminatory preferences. (*Id.* at p. 1175.) The Ninth Circuit emphasized that providing "neutral tools" that others use for unlawful activity does not expose platforms to liability as long as they do not "encourage illegal content" or "require users to input illegal content." (*Id.* at pp. 1169, 1175.) That is so even if the website's features "enhance by implication or develop[] by inference" the unlawful content. (*Id.* at pp. 1174-1175; see *id.* at p. 1169 ["A website operator who edits user-created content—such as by correcting spelling, removing obscenity or trimming for length—retains his immunity for any illegality in the user-created content, provided that the edits are unrelated to the illegality."]; *Carafano v. Metrosplash.com, Inc.* (9th Cir. 2003) 339 F.3d 1119, 1124-1125 [dating website was not content provider for creating questionnaire used to create false profile because it did not contribute to the "underlying misinformation"].)

California courts have applied that test to features analogous to Snapchat's and consistently held the platforms retain Section 230 immunity. In *Doe II*, *supra*, the Court held MySpace was not a content developer merely because it created prompts for users to provide personal information on their profiles. (175 Cal.App.4th at p. 575.) The Court dismissed claims alleging that attackers used the information to locate, contact, and sexually assault the victims. (*Ibid.*) It reasoned that MySpace's prompts were not themselves illegal and that MySpace did not "require[] its members to answer the profile questions as a condition of using the site." (*Ibid.*) Similarly, in *Gentry*, *supra*, the Court held eBay did not become a content developer by providing stars and endorsements based

on (false) user reviews because it did not materially contribute to the "underlying misinformation." (99 Cal.App.4th at p. 834.)

*Dyroff* and *Force* further reinforce this conclusion. In *Dyroff*, *supra*, the Ninth Circuit held the defendant website was not a content provider because, like Snapchat, it did not require users to post about illegal drugs, even if its "recommendation and notification functions" allegedly facilitated drug-related conversations. (934 F.3d at p. 1099.) Likewise, in *Force*, *supra*, the Second Circuit held Facebook was not a content developer for using algorithms to recommend friends or content because those features were "content 'neutral'": "the algorithms [took] the information provided by Facebook users and 'match[ed]' it to other users—again, materially unaltered—based on objective factors applicable to any content, whether it concerns soccer, Picasso, or plumbers." (934 F.3d at p. 70.; see also, e.g., *Herrick*, *supra*, 765 Fed.Appx. at p. 590 [Grindr's "geolocation function" did not make it a content provider]; *Marshall's Locksmith Service, Inc. v. Google, LLC* (D.C.Cir. 2019) 925 F.3d 1263, 1269-1270 [Google not a content provider for translating users' locations into map pinpoints]; *Pennie v. Twitter, Inc.* (N.D.Cal. 2017) 281 F.Supp.3d 874, 890 [selecting ads to pair with content did not materially contribute to illegality].)

This case is indistinguishable: Snapchat's features fall at the latter end of the *Roommates.com* spectrum. None specially facilitates drug transactions. Snap did not solicit drug-related content, much less *require* it as a condition of using the platform. Instead, Snapchat's features provided "neutral tools" to facilitate the display of users' content, all of which originated solely from third-party users. (*Roommates.com*, *supra*, 521 F.3d at p. 1169.) For example, while drug dealers allegedly used the stories feature to post drug menus, others used the same feature to share vacation

photos. Snap's neutral features treated all content and users the same; it did not preference drug-related messages. Indeed, as in *Carafano*, such unlawful content "was contrary to its express policies." (*Doe II*, *supra*, 175 Cal.App.4th at p. 575.) Snap thus did not materially contribute to any illegality of that content, and it cannot be treated as a content provider.

### *2. The trial court's contrary decision is inconsistent with Section 230's text and purpose, binding California precedent, and federal appellate decisions*

In holding that Section 230 nevertheless permitted Plaintiffs' claims, the trial court created a sweeping exception to Section 230 immunity for claims that purport to challenge some aspect of a platform's design or features. (Vol. VIII, Ex. NN, pp. 1815-1816.) This decision provides a blueprint for plaintiffs to evade Section 230: simply identify some feature of the online platform that allegedly facilitated the harmful third-party content at the heart of their claims and purport to disclaim reliance on the content itself. Because every online platform makes choices about how to display content, plaintiffs can always point to some way in which a platform's features interacted with the third-party content that harmed them.

To justify its narrow understanding of Section 230, the trial court read the statute's text to "invoke words of art drawn from common law defamation-liability distinctions between 'publishers' and 'speakers,' on the one hand, and, apparently 'distributors' on the other." (Vol. VIII, Ex. NN, at p. 1807.) Although conceding that numerous courts—including the California Supreme Court, as the trial court seemed to recognize—had rejected that narrow interpretation, the trial court believed the governing California precedents were in conflict with each other, giving it leeway to choose among the conflicting interpretations. (*Id.* at pp. 1807-1812.)

Applying its narrow interpretation to this case, the trial court concluded that Plaintiffs were not seeking to treat Snap as the publisher of drug dealers' content, but instead to hold Snap liable for its own "independent tortious conduct—independent, that is, of the drug sellers' posted content." (*Id.* at pp. 1815-1816.) The court also concluded Snapchat's features "crossed the line into 'content," without specifying which features crossed that line or how they did so. (*Id*. at p. 1816.)

The trial court's ruling is premised on multiple errors. Each warrants this Court's immediate attention.

### *a. The trial court's decision contravenes the text and purpose of Section 230*

#### i. Our Supreme Court has held Section 230 should be interpreted broadly

The trial court's ruling is based on a fundamental misreading of Section 230's text. The court narrowly interpreted the term "publisher" to mean publishers as defined under the common law of defamation, in contrast to "distributors." (Vol. VIII, Ex. NN, p. 1807.) As explained above, our Supreme Court has already held that Section 230(c)(1) should be interpreted "broad[ly]"—rejecting "narrow, grudging" interpretations like the trial court's. (*Barrett*, *supra*, 40 Cal.4th at p. 48; *Hassell*, *supra*, 5 Cal.5th at p. 546.) Indeed, *Barrett* specifically rejected the publisher-distributor distinction the trial court invoked here. (*Barrett*, *supra*, 40 Cal.4th at pp. 41-42.) That binding precedent should have foreclosed the trial court's interpretation.

#### ii. Congress ratified courts' broad interpretation of Section 230's text

If that were not enough, the trial court's interpretation is also foreclosed by Congress's ratification of the broad reading of "publisher"

adopted by *Barrett* and other courts. Since Section 230 was enacted in 1996, countless courts have applied the provision to a wide range of claims, reaching the consensus that it bars claims challenging editorial decisions. (E.g., *Barrett*, *supra*, 40 Cal.4th at p. 46 [describing this view as "broadly accepted, in both federal and state courts"]; *Klayman v. Zuckerberg* (D.C. Cir. 2014) 753 F.3d 1354, 1359 [collecting cases].)[5] During that time, Congress has amended and incorporated Section 230 repeatedly. (E.g., SPEECH Act, Pub.L. No. 111-223 (Aug. 10, 2010) 124 Stat. 2380 [prohibiting courts from enforcing foreign judgments not "consistent with section 230"] [codified at 28 U.S.C. § 4102(c)(1)]; Pub.L. No. 110-425 (Oct. 15, 2008) 122 Stat. 4820 [exempting deletion of third-party content "in a manner consistent with section 230(c)" from the Controlled Substances Act] [codified at 21 U.S.C. § 841(h)(3)(A)(iii)(II)].) These repeated incorporations and amendments ratify that consensus interpretation, indicating "that the construction adopted by the lower federal courts has been acceptable to the legislative arm of the government." (*Texas Dept. Housing & Community Affairs v. Inclusive Communities Project, Inc.* (2015) 576 U.S. 519, 537 [citation and alterations omitted].)

One amendment is particularly telling. In 2016, the First Circuit held Section 230 barred claims sex-trafficking victims brought against Backpage.com, a classified ad website whose "Adult Entertainment" section facilitated advertising by sex traffickers. (*Jane Doe No. 1 v. Backpage.com, LLC* (1st Cir. 2016) 817 F.3d 12, 16.) Noting that the plaintiffs made a "persuasive case" that Backpage intentionally "tailored its

[5] The trial court cited a purported disagreement among "federal appellate and trial courts" over whether to accept *Zeran*'s broad interpretation of "publisher." (Vol. VIII, Ex. NN, p. 1810.) There is no disagreement, and the trial court cited no contrary case.

website to make sex trafficking easier,"[6] the Court lamented that the law required "deny[ing] relief to plaintiffs whose circumstances evoke outrage," but it adhered to the text of Section 230. (*Id.* at pp. 15, 29.) It stated: "If the evils that the appellants have identified are deemed to outweigh the First Amendment values that drive the CDA, the remedy is through legislation, not through litigation." (*Id.* at p. 29.)

Congress responded by amending Section 230 to create an exception for sex-trafficking laws. (See Allow States and Victims to Fight Online Sex Trafficking Act, Pub.L. No. 115-164 (Apr. 11, 2018) 132 Stat. 1253.) Significantly, Congress did *not* alter the definition of "publisher" or otherwise amend the broad immunity provided in Section 230(c)(1). If the First Circuit had misinterpreted that provision, Congress could easily have clarified that Section 230 does not bar claims based on website features or design. It did not. Instead, Congress carved out a narrow exception for certain sex-trafficking claims. (47 U.S.C. § 230(e)(5) [exempting from immunity certain claims brought under 18 U.S.C. §§ 1595 and 2421A].) Congress's rationale was also limited to sex trafficking: it stated that Section 230 "was never intended to provide legal protection to websites that unlawfully promote and facilitate prostitution and websites that facilitate traffickers in advertising the sale of unlawful sex acts with sex trafficking victims." (132 Stat. 1253, § 2(1).)

[6] After the case was decided, Senate investigation unearthed new evidence that sets Backpage even further apart from the facts of this case, *Force*, *MySpace*, or *Dyroff*. (H.R. Rep. No. 115-572, 2nd Sess., p. 5 (Feb. 20, 2018).) Backpage did not provide a neutral platform that was used by sex traffickers. It deliberately aided sex trafficking by, e.g., editing ads to delete incriminating words like "amber alert" and "coach[ing] its users on how to 'clean' ads to cover illegal transactions." (*Ibid*.)

This amendment confirms that Congress accepted courts' broad interpretation of "publisher." Indeed, a sex-trafficking exception would have been unnecessary if Section 230(c)(1) afforded only the narrow immunity that the trial court below understood it to provide. (See *Duncan v. Walker* (2001) 533 U.S. 167, 174 ["It is our duty 'to give effect, if possible, to every clause and word of a statute.'"].)

### iii. The trial court's decision undermines Section 230's purposes

The trial court's interpretation is also incompatible with Congress's express findings and policy statements. Congress made clear it had two purposes in providing immunity to computer services: (1) "to promote the free exchange of ideas over the Internet" and (2) "to encourage voluntary monitoring for offensive or obscene material." (*Hassell*, *supra*, 5 Cal.5th at p. 534.) Exposing Snap to liability for its neutral features, which facilitate the exchange of third-party content, undermines both purposes.

In enacting Section 230, Congress recognized that "[t]he Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation." (47 U.S.C. § 230(a)(4).) Congress highlighted the "extraordinary advance in the availability of educational and informational resources to our citizens," and the availability of a "forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity." (*Id.* § 230(a)(1), (3).) Congress intended Section 230 immunity "to promote the continued development of the Internet and other interactive computer services and other interactive media" and "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation." (*Id.* at § 230(b)(1), (2).) This protection was necessary because "if service

providers faced tort liability for republished messages on the Internet, they 'might choose to severely restrict the number and type of messages posted.'" (*Barrett*, *supra*, 40 Cal.4th at p. 44.)

Allowing claims for designing content-neutral features that facilitate communication would gut this protection, chilling speech and the development of the Internet. (*Doe II*, *supra*, 175 Cal.App.4th at p. 569-570.) Each of the features Plaintiffs target is used—like Snapchat generally—overwhelmingly for beneficial purposes. Threatening massive liability because Snapchat happens to be the means by which a few people choose to communicate about an unlawful transaction would inevitably create enormous economic pressure not to provide the feature or the service at all, depriving the rest of the public of their benefits. For example, if Quick Add and Snap Map expose Snap to liability for users' abuses, Snap may need to disable those features, making it harder for all users to connect and communicate with friends and family. Many use these features for beneficial purposes, such as using Snap Map to ensure friends get home safely. Likewise, eliminating ephemerality will result in more long-term collection of personal information, undermining privacy. That threatens the "continued development" of a "vibrant" Internet that Congress sought to promote. (47 U.S.C. § 230(b)(1), (2).)

Congress also sought "'to encourage service providers to self-regulate the dissemination of offensive material over their services.'" (*Barrett*, *supra*, 40 Cal.4th at p. 44.) Section 230 was enacted in part to abrogate a New York trial court decision holding a service provider liable for defamatory content because it had actively screened only some content. (*Ibid.* [citing *Stratton Oakmont, Inc. v. Prodigy Services Co.* (N.Y.Sup.Ct., May 24, 1995) 1995 WL 323710].) Congress feared that providers would react by avoiding any screening of content. (*Ibid.*) Congress eliminated

this disincentive against self-regulation by granting immunity for services' decisions about what content to remove. (*Ibid.*)

Plaintiffs' allegations about the supposed inadequacy of Snap's reporting mechanism, age verification, and other safety measures are exactly the kind of claims Congress intended to prohibit. Of the drug-related content Snap removes, Snap's advanced technology proactively detects 90% of it, and Snap further expends significant resources to review and address reports from users and inquiries from law enforcement about other content allegedly violating Snap's policies. (Vol. IV, Ex. L, p. 720-721.) While Plaintiffs may want even more invasive monitoring and censorship or may disagree with some of Snap's determinations about whether specific content violates its policies, imposing liability on that basis would revive the disincentives to self-regulation that Congress eliminated. Given the "sheer number" of users on Snapchat, Plaintiffs' claims would impose an "impossible burden" on Snap. (*Barrett*, *supra*, 40 Cal.4th at p. 45.) No company with hundreds of millions of daily users can remove 100% of the offensive content on its platform. That is precisely why Congress refused to permit costly tort liability of this sort for online services.

***b. The trial court disregarded binding appellate precedent by claiming to find a non-existent conflict***

The trial court's decision further warrants this Court's intervention because it contravenes basic principles governing our hierarchical judicial system. The court acknowledged the foundational rule that trial courts are bound by decisions of the California Supreme Court and Courts of Appeal. (Vol. VIII, Ex. NN, p. 1804.) But it seized upon an inapposite exception: "when appellate decisions of the California Court of Appeal are in conflict,

'the court exercising inferior jurisdiction can and must make a choice between the conflicting decisions.'" (*Ibid.* [quoting *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 456].) The trial court erroneously believed there was such a conflict here, justifying its departure from otherwise binding precedent.

The so-called conflict it asserted does not exist. The trial court invoked two California Court of Appeal cases to justify its features-based exception to Section 230—*Liapes v. Facebook, Inc.* (2023) 95 Cal.App.5th 910, and *Lee v. Amazon.com, Inc.* (2022) 76 Cal.App.5th 200. (Vol. VIII, Ex. NN, pp. 1813-1815.) But neither of those decisions is applicable here. Nor do they conflict with the many California cases cited above—e.g., *Barrett*, *Prager*, *Doe II*, *Murphy*, *Gentry*—which compel the conclusion that Section 230 bars Plaintiffs' claims. (*Supra* pp. 31-35.)

In *Liapes*, the Court held Section 230 did not bar claims alleging that Facebook discriminated against women and older people by targeting insurance ads to users based on gender and age. (95 Cal.App.5th at p. 915.) As the Court recognized, these claims were materially identical to those challenging the discriminatory questionnaire in *Roommates.com*. (*Id.* at p. 929.) Facebook was a content provider, not merely a publisher of third-party content, because it compelled users to disclose their age and gender, required advertisers to select age and gender parameters, and targeted ads based on that discriminatory information. (*Ibid.*)

*Liapes* is inapposite here for the same reason that *Roommates.com*'s holding on the discriminatory questionnaire is. As explained above, Snap did not require users to provide unlawful information or to create drug-related content. Rather, Snap's policies prohibited such content, and Snap took steps to remove it. (See *supra* Section II.A.1.b.) Although Snapchat

has neutral features that allegedly facilitated the *dissemination* of that content—in the same manner as they disseminated all content—Snap did not contribute to what made the content illegal.

*Lee*, in turn, involved claims that were not based on third-party content at all. Rather, *Lee* held Amazon was not immune from liability as a product seller for violating Proposition 65, which requires "*every business* that 'exposes' an individual to a listed chemical" to provide a warning. (76 Cal.App.5th at pp. 254, 256-260 [italics in original].) Amazon was subject to this duty to warn because, like a retail seller, it played a "'pivotal role' in 'bringing the product here to the consumer.'" (*Id*. at p. 254.) Critically, neither Amazon's duty nor the plaintiffs' injuries were based on any third-party content posted on its website, but rather on Amazon's independent conduct "exposing consumers to mercury-consuming products." (*Ibid*.) Snap, by contrast, is not a retail seller, and Plaintiffs' claims do not target any conduct independent of Snap's operation of a platform for exchanging third-party content. Snap did not sell drugs on Snapchat, nor did it process payment for or ship the drugs, like Amazon did in the sale of its products.

These distinctions render *Liapes* and *Lee* fully consistent with other California precedents. Indeed, neither *Liapes* nor *Lee* viewed itself as creating a conflict. (*Lee*, *supra*, 76 Cal.App.5th at p. 253; *Liapes*, *supra*, 95 Cal.App.5th at 928.) The trial court's contrary decision, and its apparent confusion about the scope of *Liapes* and *Lee*, will sow further confusion if left uncorrected. This Court's intervention is needed to clear up the confusion and clarify that the California precedents are consistent and binding on all trial courts.

### *c. The trial court's ruling departs from federal decisions*

As explained above, the Second, Fifth, and Ninth Circuits' decisions in *Force*, *MySpace*, and *Dyroff* reached the opposite result in materially indistinguishable circumstances. The trial court did not disagree, making no attempt to distinguish these on-point decisions. (Vol. VIII, Ex. NN, pp. 1809-1810.) Instead, it simply brushed them aside, noting that "the decisions of federal district and circuit courts, although entitled to great weight, are not binding on state courts even as to issues of federal law." (*Id.* at pp. 1803-1804, quotation marks omitted; see also *V.V. v. Meta Platforms, Inc.* (D.Conn., Feb. 16, 2024, No. X06-UWY-CV-23-5032685-S) 2024 WL 678248, at *10, fn. 13 [finding the trial court's decision here "of little persuasive value" because it "chose not to follow" *Force* and relied on the dissent instead].)

That flippant dismissal is inconsistent with California courts' longstanding approach to Section 230. While lower federal decisions are not binding, "they are persuasive and entitled to great weight." (*Barrett*, *supra*, 40 Cal.4th at p. 58; *id.* at p. 47 [criticizing lower court for "[s]wimming against the jurisprudential tide"].) For example, when adopting *Zeran*'s broad definition of "publisher," the California Supreme Court in *Barrett* gave "great weight" to *Zeran* itself and other federal decisions following it. (*Ibid.* ["[W]here the decisions of the lower federal courts on a federal question are 'both numerous and consistent,' we should hesitate to reject their authority."].) The Court warned that "[a]dopting a rule of liability under section 230 that diverges from the rule announced in *Zeran* and followed in all other jurisdictions would be an open invitation to forum shopping." (*Ibid.*) California Courts of Appeal have heeded that warning and repeatedly interpreted Section 230 consistently with federal

appellate decisions, particularly those of the Ninth Circuit. (E.g., *Prager*, *supra*, 85 Cal.App.5th at p. 1034 [citing and applying *Dyroff* and *Force*]; *Doe II*, *supra*, 175 Cal.App.4th at pp. 574-575 [applying *Roommates.com*'s "material contribution" test and finding the case more similar to *Carafano*]; *Liapes*, *supra*, 95 Cal.App.5th at p. 929 [following *Roommates.com*].)

The trial court's disregard for the governing federal precedents is made particularly clear by its extensive reliance on individual judges' *dissenting* and *concurring* opinions. (Vol. VIII, Ex. NN, pp. 1810-1812 [citing *Force*, *supra*, 934 F.3d at pp. 76-77 [Katzmann, C.J., dissenting]; *Gonzalez v. Google, Inc.* (9th Cir. 2021) 2 F.4th 871, 913 [Berzon, J., concurring]; *id.* at p. 919 [Gould, J., dissenting]; *Malwarebytes, Inc. v. Enigma Software Group USA, LLC* (2020) 141 S.Ct. 13, 14 [Thomas, J., statement respecting denial of certiorari]].) To state the obvious, none of these decisions represent the law in their respective jurisdictions, and they should not be afforded the "great weight" given to precedents like *Dyroff* and *Force*.

The two Ninth Circuit decisions the trial court purported to rely on—*Doe v. Internet Brands, Inc.* (9th Cir. 2016) 824 F.3d 846 and *Lemmon v. Snap* (9th Cir. 2021) 995 F.3d 1085—provide no support for its interpretation, either. Much as in *Lee* (*supra* p. 51), the claims in these cases had nothing to do with third-party content.

In *Doe*, the defendant operated a networking website for models. (824 F.3d at p. 848.) Two individuals found models' contact information from their website profiles, lured them to fake auditions, and raped them. (*Ibid.*) The Ninth Circuit held Section 230 did not bar a victim from suing the defendant for knowing about the specific scheme of these particular bad actors and failing to warn her. (*Id.* at pp. 850-853.) Importantly, the Ninth

Circuit relied on the fact that the defendant learned about the rape scheme "from an outside source of information," *not* from "monitoring postings on" its website. (*Id.* at pp. 849, 853.) Additionally, the plaintiff did not allege that the website "transmitted any potentially harmful messages between" her and the rapists, that she was "lured by any posting that [the defendant] failed to remove," or that the rapists "posted anything to the website." (*Id.* at p. 851.) Thus, the claims did not treat the defendant as a publisher: no publication was at issue, only the defendant's independent duty to warn based on outside knowledge. (*Id.* at pp. 851-852; see also *Herrick*, *supra*, 765 Fed.Appx. at p. 591 [distinguishing *Internet Brands* because "there was no allegation that the defendant's website transmitted potentially harmful content"].)

Likewise, in *Lemmon*, the plaintiffs' claims "simply d[id] not rest on third-party content." (995 F.3d at p. 1093.) There, the plaintiffs alleged that Snapchat's "Speed Filter," which enabled users to "record their real-life speed" and superimpose it on their snaps, encouraged dangerous driving because users suspected they would be rewarded for recording a speed over 100 mph. (*Id.* at p. 1089.) The plaintiffs sued Snap after their sons died in a car crash trying to record their speed. (*Id.* at pp. 1089-1090.) The Ninth Circuit held Section 230 inapplicable because the plaintiffs did "not fault Snap in the least for publishing [the driver's] snap." (*Id.* at p. 1093.) Instead, they alleged the existence of the Speed Filter itself was what enticed him to speed. (*Id.* at pp. 1092-1094.) As the Court emphasized, the plaintiffs could have asserted that claim even if Snap had not posted the driver's content at all. (See, e.g., *Jackson*, *supra*, 2022 WL 16753197, at p. *2 [distinguishing *Lemmon* because "[t]he harm could occur even if the photo or video was not shared because the allegation was that individuals were incentivized by the filter to drive at unsafe speeds"];

*Grindr*, *supra*, 2023 WL 9066310, at p. *4 ["the harm from reckless fast driving could occur independently of any publishing or editing"].)

Here, in stark contrast, Plaintiffs' claims are not independent of the drug dealers' content, but entirely reliant on it. Plaintiffs do not allege that features like Snap Map or Quick Add independently led to their relatives' overdoses. Rather, they allege that drug dealers used these features to exchange content and messages with Plaintiffs' relatives, enticing them to buy drugs that led to their overdoses. The Ninth Circuit has expressly distinguished cases like this, noting that the parents in *Lemmon* could not have asserted claims "fault[ing] Snap for publishing other Snapchat-user content (e.g., snaps of friends speeding dangerously) that may have incentivized the boys to engage in dangerous behavior." (995 F.3d at p. 1093, fn. 4; see *Internet Brands*, *supra*, 824 F.3d at p. 853 [distinguishing claims for "failure to adequately regulate access to user content"].) Numerous courts have correctly recognized this distinction. (See *L.W.*, *supra*, 2023 WL 3830365, at pp. *4-5, 7-8 [distinguishing Snapchat's "ephemeral design features" and "Quick Add function" from *Lemmon* and *Internet Brands*]; *Bride*, *supra*, 2023 WL 2016927, at pp. *5, 7 [same for anonymity].)[7]

The trial court's departure from federal precedent invites the very forum-shopping our Supreme Court warned against. (*Barrett*, *supra*, 40 Cal.4th at p. 58.) Like Plaintiffs here, other plaintiffs whose claims would

[7] The trial court also cited one Oregon federal district court case. (Vol. VIII, Ex. NN, p. 1814 [citing *A.M. v. Omegle.com, LLC* (D.Or. 2022) 614 F.Supp.3d 814].) *Omegle.com*, however, is an outlier decision about a roulette-style website that randomly pairs strangers for one-on-one chats. (*Omegle.com*, *supra*, 614 F.Supp.3d at p. 817.) That decision has been expressly rejected by a California federal district court. (*Grindr*, *supra*, 2023 WL 9066310, at p. *7, fn. 4 ["respectfully disagree[ing]"].)

be barred in federal court could attempt to evade those decisions by filing non-removable claims in California court. That possibility creates significant risks for the many online service companies headquartered in California, which now face uncertainty about when they will be exposed to liability and how to structure their operations accordingly. That uncertainty will have a chilling effect on speech and the innovation of Internet services. This Court's intervention is needed to ensure consistency between California trial courts, the Ninth Circuit, and other jurisdictions.

#### *d. The trial court misconstrued Snap's argument as advocating a but-for test*

Rather than engage with Snap's arguments about text, purpose, or precedent, the trial court refuted a straw man. It construed Snap's argument as advocating a "but-for" test and rejected that test: "if the plaintiffs would have no claim but for the presence of the drug sellers' third-party content on Snap's platform, then section 230 immunizes Snap." (Vol. VIII, Ex. NN, pp. 1806-1807, 1816.) But Snap never argued for a simple "but for" test. To the contrary, it expressly stated it was *not* arguing for such a test. (Vol. VI, Ex. FF, p. 1351 ["We're not doing a but-for analysis. They like to characterize that, but it's simply incorrect."].)

What Snap argued for instead was the same standard applied by the California Supreme Court in *Barrett*, the California Courts of Appeal in *Doe II*, *Gentry, Murphy*, and *Prager*, and the federal Courts of Appeals in *Dyroff*, *Force*, and *MySpace*. (See, e.g., *Barrett*, *supra*, 40 Cal.4th at p. 43 [Section 230 provides immunity from "any cause of action that would make service providers liable for information originating with a third-party user of the service."].) Those decisions elaborated upon the definitions of "publisher" and "content provider." Their consistent interpretations of those terms cannot be boiled down into a single pithy sentence, like the trial

court's "but-for" formula. For example, a broad but-for test would bar even claims that a defendant materially contributed to the content's illegality. But Snap did not argue for abandoning *Roommates.com*'s "material contribution" test; rather, it argued it passed that test because it did not contribute to the illegality of drug dealers' content. By focusing on a but-for test that was not at issue, the trial court avoided addressing Snap's actual arguments.

#### *e. The trial court's decision will lead to significant adverse consequences*

The trial court's erroneous decision cannot be cabined to the facts of this case. Notably, the court did not specifically analyze any of Plaintiffs' 15 claims apart from the aiding-and-abetting claim, or any of Snapchat's particular challenged features. (See Vol. VIII, Ex. NN, pp. 1815-1816.) That is because its decision is grounded in its outlier reading of Section 230—one that creates a sweeping exception for *any* claims purportedly based on a platform's features.

The trial court "fail[ed] to fully grasp how plaintiffs' maneuver, if accepted, could subvert" Section 230's entire statutory scheme. (*Hassell*, *supra*, 5 Cal.5th at p. 546.) Plaintiffs' attempt to disclaim liability based on third-party content and reframe the same harm around a feature that facilitated that content "was creative, but it was not difficult." (*Ibid.*) If such creative pleading were permissible, "in the future other plaintiffs could be expected to file lawsuits" doing the same. (*Ibid.*)

That loophole would effectively swallow Section 230, as nearly every barred claim can be reframed this way. All social networking platforms that publish user content employ features of some kind, including algorithms that arrange content and technological innovations that enhance

its display. Indeed, many platforms use the very same features challenged here. (See, e.g., Vol. IV, Ex. L, p. 656 [Telegram, Signal, Instagram, Zoom, Google Meet, Skype, and Microsoft Teams offer ephemeral messaging]; Vol. III, Ex. I, p. 416 ["Snap's 'feed' based Stories product operates similarly to Meta's News Feed, Explore, and Reels products, [and] TikTok's For You Page"]; Vol. V, Exs. W, p. 941, and X, p. 1134, 1137 [Facebook and LinkedIn make friend suggestions similar to Quick Add]; *Marshall's Locksmith*, *supra*, 925 F.3d at p. 1265 [Google translates locations into map display].) If plaintiffs harmed by third-party content can evade Section 230 simply by claiming the platform's features that delivered that content were defective, Section 230's protection will be meaningless.

### B. Writ Review Is Needed

This Court should grant the petition to resolve any confusion about the so-called "conflict" in the Court of Appeal precedents and keep California trial courts in line with the Ninth Circuit and other federal courts. A writ of mandate is permissible "[w]here there is no direct appeal from a trial court's adverse ruling, and the aggrieved party would be compelled to go through a trial and appeal from a final judgment" absent writ relief. (*Fair Employment & Housing Com.*, *supra*, 115 Cal.App.4th at p. 633.) That is the case "where the trial court has improperly overruled a demurrer." (*Ibid.*) Writ relief is particularly appropriate where "the petitioner will suffer harm or prejudice in a manner that cannot be corrected on appeal" (*Omaha Indemnity Co. v. Superior Court* (1989) 209 Cal.App.3d 1266, 1273-1274); where "resolution of the issue would result in a final disposition as to the petitioner" (*Boy Scouts*, *supra*, 206 Cal.App.4th at p. 438); and where the writ raises a "significant issue of law" or of "widespread interest" (*ibid.*; *Omaha Indemnity*, *supra*, 209 Cal.App.3d at p. 1273). All those circumstances are present here.

### *1. Appeal after final judgment will not vindicate Snap's Section 230 right to immunity from suit*

Even if Snap prevails on appeal after final judgment, that belated relief cannot undo the harm that Snap will already have suffered by going through discovery and trial in bellwether cases involving multiple plaintiffs' claims. The California Supreme Court has held that Section 230 "confers immunity from suit," not merely immunity from liability. (*Hassell*, *supra*, 5 Cal.5th at p. 544; see *Cross v. Facebook, Inc.* (2017) 14 Cal.App.5th 190, 206 [Section 230 "protect[s] websites not merely from ultimate liability, but from having to fight costly and protracted legal battles."].) This is evident from Section 230's text, which provides that "*[n]o cause of action may be brought* and no liability may be imposed under any State or local law that is inconsistent with" this statute. (47 U.S.C. § 230(e)(3), italics added.) With this language, Congress "inten[ded] to shield Internet intermediaries from the burdens associated with defending against" barred claims. (*Hassell*, *supra*, 5 Cal.5th at p. 544; see *id.* at p. 545 [sparing defendants "ongoing entanglement with the courts"].) Accordingly, Section 230 immunity is most appropriately addressed on demurrer, before defendants are forced to suffer through intrusive discovery, costly summary judgment litigation, and potentially even trial—all on claims that should be barred.

Writ review is "clearly appropriate" when the benefits of a defense "would be effectively lost if defendants were forced to go to trial." (*City of Stockton*, *supra*, 42 Cal.4th at p. 747, fn. 14.) Applying this principle, California courts have repeatedly granted writ relief when trial courts erroneously overruled demurrers raising meritorious immunity defenses. (See, e.g., *Big Valley Band*, *supra*, 133 Cal.App.4th at pp. 1189-1190 ["An immunity defense is effectively lost if an immune party is forced to stand

trial or face other burdens of litigation[.] Thus, interlocutory writ review is appropriate here."]; *County of Sacramento v. Superior Court* (1972) 8 Cal.3d 479, 481; *Casterson v. Superior Court* (2002) 101 Cal.App.4th 177, 182; *State of California v. Superior Court* (2001) 87 Cal.App.4th 1409, 1412; *Gates v. Superior Court* (1995) 32 Cal.App.4th 481, 509.) That alone justifies this Court's immediate intervention.

### *2. Writ review will finally resolve this litigation, six other pending cases against Snap, and additional cases Plaintiffs' counsel intend to file*

The need for writ review is further warranted where "resolution of the issue would result in a final disposition as to the petitioner," such as when a trial court has erroneously overruled demurrer that should have been sustained in its entirety. (*Audio Visual Services. Group, Inc. v. Superior Court* (2015) 233 Cal.App.4th 481, 488.) "[T]he unreasonableness of the delay and expense is apparent" when a defendant is unnecessarily "compelled to go through a trial" on a claim for which demurrer should have been sustained. (*Fogarty v. Superior Court* (1981) 117 Cal.App.3d 316, 320.)

Here, resolving the Section 230 issue will finally dispose of the underlying litigation because Section 230 bars all of Plaintiffs' claims. Although the trial court sustained the demurrer on Plaintiffs' aiding and abetting claim, it made no distinctions between the other 15 claims. (Vol. VIII, Ex. NN, p. 1816.) As explained above, all of those claims fall within Section 230's heartland because they seek to hold Snap liable for the drug dealers' communications. (*Supra* pp. 30-43.) That this lawsuit should be over is itself grounds for granting this petition. (See *Fogarty*, *supra*, 117 Cal.App.3d at p. 320.)

The harm to Snap is particularly acute because the trial court's error affects not just this case, but also six other pending cases and potentially more that Plaintiffs' counsel intend to file. Absent a stay, the parties are expected to begin discovery for 27 bellwether candidate claims on March 29, 2024. (Vol. VIII, Ex. RR, pp. 1912-1913.) Snap and Plaintiffs' counsel also have a tolling agreement covering the claims of 34 additional individuals, which extends until May 30, 2024. (Vol. VIII, Ex. QQ, pp. 1858-1859.) This Court's intervention will promote judicial efficiency and spare the parties needless expense over numerous lawsuits that should be barred.

#### *3. Section 230's application to the features of an online platform is a recurring question of widespread interest*

Finally, this Court's intervention is warranted given the significance of the question presented. (*Boy Scouts*, *supra*, 206 Cal.App.4th at p. 438.) The trial court's decision creates confusion about California courts' Section 230 precedents, and it may prompt other courts to choose their own interpretations of Section 230, generating unpredictability. (See *supra* Section II.A.2.b.) Additionally, the trial court's departure from federal precedent will invite forum shopping, with plaintiffs filing in California state court to avoid *Dyroff*'s binding effect in the Ninth Circuit. (See *supra* Section II.A.2.c.) The combined effect will be to create significant uncertainty for online companies, chilling speech and innovation. All the above consequences will affect not just Snap, but also countless other online platforms and their hundreds of millions of users. (See *supra* Section II.A.2.e).

This case is thus of "widespread interest" to online services and users alike. (*Omaha Indemnity*, *supra*, 209 Cal.App.3d at p. 1273.)

Because plaintiffs often try to circumvent Section 230 through creative pleading, the same questions presented here recur frequently, making this Court's guidance particularly useful. (See, e.g., *In re Coordinated Proceeding Special Title Rule 3.550 Social Media Cases* (Los Angeles Cty. Sup.Ct., Oct. 13, 2023, No. JCCP 5255) 2023 Cal.Super. LEXIS 76992 [pending petition for writ of mandate to address parallel issue, see *Meta Platforms, Inc. v. Superior Court* (Cal.App.2d Dist.) No. B333842]; *Twitter, Inc. v. Superior Court* (Cal.App.Ct., Aug. 17, 2018, No. A154973) 2018 Cal.App.LEXIS 1248 [issuing alternative writ on petition presenting similar issue].)[8]

The significance of this issue is further reinforced by the outpouring of commentary the trial court's decision has generated from leading Internet law scholars, stakeholders, and journalists. (See, e.g., Goldman, *Judge Goes Rogue and Rejects Snap's Section 230 Defense for [Reasons]—Neville v. Snap*, Technology & Marketing Law Blog (Jan. 9, 2024)[9]; Masnick, *California Judge Says Because Snapchat Has Disappearing*

[8] Petitioner does not rely on these unpublished decisions as authority, but cites them to highlight that the question presented is recurring and there is confusion in the trial courts. (See Eisenberg and Hepler, Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2023) Ch. 11-F, § 11:186.11 [recognizing courts have cited depublished opinions to illustrate "that the issue presented in those cases and the present case was recurring and remained unresolved"]; California Criminal Appellate Practice Manual (Jan. 2013 ed.) § 7.11 [notwithstanding California Rule of Court, rule 8.1115(a), petition for review "may point to unpublished cases to show conflicts among the courts on a particular issue"]; *Mangini v. J.G. Durand International* (1994) 31 Cal.App.4th 214, 219 [citing depublished opinions "simply to illustrate an important fact," i.e., that "this recurring issue remains unresolved"].)

[9] https://blog.ericgoldman.org/archives/2024/01/judge-goes-rogue-and-rejects-snaps-section-230-defense-for-reasons-neville-v-snap.html.

*Messages, Section 230 Doesn't Apply To Lawsuits Over Snapchat Content*, Techdirt (Jan. 4, 2024)[10]; Nyce, *Should Teens Have Access to Disappearing Messages?* The Atlantic (Jan. 30, 2024).[11])

The U.S. Supreme Court also recognized the significance of this question when it recently granted certiorari to decide whether Section 230 immunizes computer services "when they make targeted recommendations of information provided by another information content provider." (Petition for Certiorari, *Gonzalez v. Google LLC*, No. 21-1333; *Gonzalez v. Google LLC* (2022) 143 S.Ct. 80 [granting certiorari].) The Court ultimately did not resolve the issue because its decision in a parallel case already disposed of the claims on other grounds. (*Gonzalez*, *supra*, 598 U.S. at p. 622.) But the Court's grant of certiorari reflects its assessment that the question was one of nationwide importance meriting its attention. Because it is uncertain when the Supreme Court may again weigh in, this Court should take this opportunity to provide valuable guidance to California courts, making clear that the law in this jurisdiction is not—or at least should not be—in a state of confusion.

[10] https://www.techdirt.com/2024/01/04/california-judge-says-because-snapchat-has-disappearing-messages-section-230-doesnt-apply-to-lawsuits-over-snapchat-content.

[11] https://www.theatlantic.com/technology/archive/2024/01/snapchat-fentanyl-lawsuit/677296.

## CONCLUSION

For the reasons discussed above and in the accompanying petition, Petitioner respectfully requests that the Court grant the relief prayed for in the petition.

Date: March 1, 2024

Respectfully submitted,

MORRISON & FOERSTER LLP

s/ James R. Sigel
James R. Sigel

*Counsel for Petitioner Snap Inc.*

## CERTIFICATE OF COMPLIANCE

Pursuant to rule 8.204(c) of the California Rules of Court and in reliance on the word count of the computer program used to prepare this brief, counsel certifies that this Petition was produced using at least 13 point font and contains 13,963 words.

Dated: March 1, 2024

/s/ James R. Sigel
James R. Sigel

# PROOF OF SERVICE

I declare that I am employed with the law firm of Morrison & Foerster LLP, whose address is 2100 L Street, NW, Suite 900, Washington, DC 20037. I am not a party to the within cause, and I am over the age of eighteen years.

I further declare that on March 1, 2024 I served a copy of the following document(s):

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# PROOF OF SERVICE

I declare that I am employed with the law firm of Morrison & Foerster LLP, whose address is 707 Wilshire Boulevard, Los Angeles, California 90017. I am not a party to the within cause, and I am over the age of eighteen years.

I further declare that on March 1, 2024 I served a copy of the following document(s):

**PETITION FOR WRIT OF MANDATE**
**[EXHIBITS FILED SEPARATELY]**

☒ **BY OVERNIGHT DELIVERY,** by placing a true copy thereof enclosed in a sealed envelope with delivery fees provided for, addressed as follows, for collection by UPS, in accordance with Morrison & Foerster LLP's ordinary business practices.

**See Attached Service List**

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed at Los Angeles, California, on March 1, 2024.

| Marco Perez | /s/ Marco Perez<br>(signature) |
|---|---|

# SERVICE LIST

**VIA OVERNIGHT DELIVERY:**

Clerk of the Superior Court
Los Angeles Superior Court
Stanley Mosk Courthouse
111 North Hill Street
Los Angeles, California 90012
Attn: The Hon. Lawrence P. Riff