February 21, 2023

Re: Briefing in Response to *February 14, 2023 United States Senate Committee on the Judiciary Hearing on Protecting our Children Online*

Dear Senators,

We represent Kristin Bride, the parent of 16-year-old Carson Bride, who was viciously bullied on anonymous apps before taking his own life. Kristin Bride brought a national class action against Snap Inc. and two anonymous apps YOLO and LMK for their defective product designs and false product misrepresentation. The lawsuit was dismissed in the Central District Court of California on January 10, 2023, citing Section 230 immunity.

We also represent individuals and entities such as:

- Tyler Clementi Foundation and other individual families advocating against cyberbullying
- three young children and their families and a nationwide class who were victims of physically rape, sexually grooming, and sextorted for CSAM production,
- Children and/or families who lost their lives due to illicit drug sale in a nationwide class action
- Children and/or families who lost the lives due to the choking challenge in a nationwide class action

At the senate judiciary committee's hearing, Kristin Bride explained that the lawsuit was not about content of third parties but focused on the designs of apps which make anonymity the integral feature. Anonymous messaging apps – predecessors of YOLO and LMK – distributed among teens had historically led to numerous reports of suicide. Many senators at the hearing responded to Ms. Bride's testimony, reiterating the compelling need for reforms to Section 230. The Committee also requested that Ms. Bride submit proposals or requests for how Section 230 should be reformed.

Section 230 of the Communications Decency Act is in critical need of reform. In its present form, Section 230 enables powerful tech companies to escape any and all liability for their involvement in discrimination, harassment, and human rights abuses. To address the failures of Section 230 in allowing rampant harms to be inflicted upon users–many of whom are children–we propose the following reforms to this Committee: (1) Section 230 immunity should only be applicable in cases where defendants can demonstrate effective mechanisms for combatting illegal and harmful content on their platform; (2) Section 230 immunity should be treated as an affirmative defense, necessitating defendants to bear the burden of proof and permitting plaintiffs to obtain an appropriate scope of discovery; (3) Section 230 immunity should ***not*** be applicable to a defendant's own representations, recommendation algorithms, and other flawed product

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designs; and, (4) Section 230 should expressly permit litigants to calculate damages through defendant companies' data revenue.

1. **Section 230 should apply only where companies can demonstrate that they have established protocols to safeguard users expeditiously and meaningfully from illegal and harmful content on their platforms.**

Section 230, as currently written, is used as a get-out-of-litigation-free card by tech platforms to hide from liability. In reforming Section 230, we ask this Committee to gain insight from examples of other safe harbor laws applicable to technology companies that are harmonized to protect both tech platforms and users.

For example, Congress created the DMCA Safe Harbor provisions under 17 U.S.C. §512 which require that Online Service Providers (OSPs) demonstrate eligibility for a safe-harbor in order to limit exposure to liability for copyright violations on contents hosted on their platforms. Pursuant to the DMCA, OSPs seeking protection under 17 U.S.C. §512 must expeditiously remove or take down the alleged copyright-infringing material of which it is notified. This process allows for a counter-notification process so that both users are able to make use of the OSP's process. It must designate agents to receive such copyright-infringing notices from users and must take action upon actual or constructive knowledge. OSPs are also required to establish a process of identifying and sanctioning repeat offenders that infringe copyrights.

Like the above, that Section 230 immunity should also be revised so that immunity is not freely provided as a blanket protection. Instead, social media platforms must be able to demonstrate that they have protocols and the capacity to remove and block access to harmful and illegal content that it is notified of, expeditiously and meaningfully.

2. **Section 230 should be used as an affirmative defense: defendants raising the affirmative defense must bear the burden of proof, and plaintiffs should be entitled to an appropriate scope of discovery.**

We propose that the Committee refashion Section 230 as an affirmative defense, not as a blanket immunity. Under this framework, tech companies would bear the burden of proof to show that they implemented effective, available technology to screen out harmful content relevant to the demographics of their users that the tech platforms knew or should have known about. Since defendant tech companies would bear the burden of proof in asserting the affirmative defense, plaintiffs should be entitled to an appropriate scope of discovery in the early stages of litigation surrounding the affirmative defense raised.

Currently, plaintiffs, courts, consumers, and other members of the public face a Blackbox when it comes to the operations and safety protocols that tech companies purport to employ. As drafted, Section 230 immunity has been interpreted by courts to dismiss claims at the earliest stage of litigation, plaintiffs' claims – even where they allege the most atrocious harms occurring on a routine basis to the most vulnerable population in America.

Whistleblowers like Frances Haugen have brought to light that technology products are designed to maximize profit to companies at the cost of known harms to children. However, without an appropriate scope of discovery, the public is provided with no information about the safety of the tech products, and courts can only "take the defendants' words for it." Because all of the relevant information about the designs of the products and safety concerns are under exclusive control of the tech platforms, the platforms must bear the burden to produce the evidence in order to use Section 230 as a defense, and plaintiffs must be able to probe into evidence to counter it.

3. Section 230 Should Not Apply to Tech Companies' Own Representations, Recommendation Algorithms, and Other Dangerously Designed Products.

We recognize that the elephant in the room in these discussions surround Section 230's potential implications upon free speech. However, creating a law that upholds consumers' right to be redressed for harms caused by tech companies' own representations and product designs is an issue that is analytically distinct from free speech and censorship issues. As cogently written by Hon. Judge Hawkins and attorney M. Stanford in the University of Chicago Law Review[1]:

> " . . . Sure, threatening the immunity of purportedly biased platforms offers a potent political cudgel. But in a strictly legal sense, they are two different issues. One is whether (and if so, to what degree) absolute immunity under Section 230 has outlived its usefulness, which we assess by weighing the political, economic, and social costs of various approaches to platform liability for unlawful user behavior. The other concerns platforms' considerable power over speech in what people might consider today's public square. While one might ultimately prove useful in coaxing platforms to address the other, the censorship debate's preoccupation with platforms' removal of allegedly harmful but otherwise lawful content asks a separate question—namely, has the time come to require platforms to provide users the same free speech protections that Congress must afford the protestors on its front steps? Modernizing Section 230 doesn't require us to answer to that politically fraught question, so we won't."

We believe that this Committee is more than capable of reforming Section 230 in ways that fulfill the dual aims of preventing the overexpansion of tech companies' power used to extort profit at the cost of harm to children while fostering a healthy online environment for communications to happen without limited free speech. To do so, we can start by holding tech companies liable for their own representations, recommendations of certain contents, and development of other dangerous product designs.

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[1] Michael Daly Hawkins & Matthew J. Stanford, *Uproot or Upgrade? Revisiting Section 230 Immunity in the Digital Age*, University if Chicago Law Review Online, https://lawreviewblog.uchicago.edu/2020/06/23/section-230-hawkins-stanford/.

For example, Kristin Bride's lawsuit alleged that the anonymous app YOLO overtly stated to users that it will unmask cyberbullies, but when requested by Kristin Bride, it failed to comply with its own representations or even respond to her pleas, four times. Reforming Section 230 so that tech platforms are held accountable based on their own representations, policies, and statements regarding their products would be a starting point that empowers consumers without restricted free speech. Also, recommendation of contents or connection between certain users (i.e., stranger adults and minor children) are algorithms and features that are designed and developed by the tech companies. Holding companies accountable for their direct involvement in developing algorithms designed to perform these specific functions have little to do with third-party content. Lastly, holding companies accountable for dangerously designed products (i.e., anonymous messaging for teens) should be possible under a reformed Section 230. The Committee can develop measures that allow appropriate discovery in early stages of litigation, and through opinions of experts and researchers to establish whether certain designs are dangerous enough to impose liability. This relates back to the proposal articulated in Section 2 that tech companies should bear the burden of proof to provide evidence of effective safety protocols that correspond to the objective dangers and risks of tis product.

4. **Section 230 Should Include Language Allowing Litigants to Calculate Damages Through Data Revenue.**

The modernized Section 230 should recognize that we live in a data economy, and that when users are on tech platforms, each minute of usership equates to dollars for Companies. Hence, litigants should be allowed to ask for damages calculations based on the value of their personal data, or conversely, the data revenue that companies profit from users' data.

Carson's family supports the Kids Online Safety Act bill and urges that Section 230 reform is harmonized with its protections.

We thank the Committee's strenuous efforts to make laws that will protect our younger generation and eagerly await your actions.

Sincerely,

Kristin Bride

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