Nos. 25-2411, 25-2418

In the United States Court of Appeals for the Fourth Circuit

JANE DOES 1-10,
Plaintiffs-Appellants,

v.

MG FREESITES LTD., D/B/A/ PORNHUB.COM; HAMMY MEDIA LTD., D/B/A/ XHAMSTER.COM; MINDGEEK S.A.R.L.; TRAFFICSTARS LTD.; WISEBITS IP LTD.,
Defendants-Appellees,

and

LIMESTONE UNIVERSITY, F/K/A/ LIMESTONE COLLEGE; SHARON HAMMONDS; BRENDA F. WATKINS; MG FREESITES II LTD.; MINDGEEK USA, INC.; MG BILLING LTD.; WISEBITS LTD.; XHAMSTER IP HOLDINGS LTD.; COLLINS MURPHY,
Defendants.

On Appeal from the United States District Court
for the District of South Carolina at Spartanburg
Case Nos. 7:20-cv-00947-DCC, 7:21-cv-03193-DCC
(The Honorable Donald C. Coggins Jr.)

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DISCLOSURE STATEMENT

Plaintiffs-Appellants Jane Does 1–10 are individuals that have no corporate parent and do not issue stock.

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INTRODUCTION

While at Limestone College in South Carolina for a competition, two visiting girls' field hockey teams used the college's locker room to shower and change. Unbeknownst to them, an employee had set up a hidden camera in the locker room, pointed at the open showers. The girls were secretly filmed undressing, showering, and changing clothes. They had no idea what happened until six years later—when the videos were widely disseminated on Pornhub and xHamster, two of the largest pornographic websites in the world, where they amassed tens of thousands of views.

Pornhub and xHamster knew exactly what they were doing when they reviewed these nonconsensual video recordings and decided to disseminate them. They knew how popular "hidden camera" videos are with some viewers, and thus how profitable they can be. Even when a video has all the trappings of having been illegally recorded—as these videos do—Pornhub and xHamster will distribute them on their websites without taking any steps to ensure that the participants consented. And, as the record in this case shows, they will keep disseminating the videos—taking steps to expand their reach and present them as consensual amateur pornography products—in the face of repeated efforts to flag the videos as nonconsensual.

While these companies had much to gain by distributing nonconsensual recordings, the girls themselves had everything to lose. The girls in these videos were tracked down, with a stranger even posting still images from the videos to the one of girls' social-media accounts. To this day, they suffer severe emotional distress, [redacted], knowing that thousands of strangers have sexually satisfied themselves to footage of them undressing and showering. [redacted]

To seek a measure of legal accountability for this harm, the girls brought two kinds of privacy claims. *First*, they claimed that the porn companies painted them in a false light by conveying the impression that the girls had willingly appeared on a pornographic website. At summary judgment, the district court found that these claims were barred by section 230(c)(1) of the Communications Decency Act, which protects internet companies from liability in certain instances. But section 230 protects internet companies only when they serve as mere conduits for the speech of their users, where liability is "based on the content of the speech published." *Henderson v. Source for*

Pub. Data, L.P., 53 F.4th 110, 122 (4th Cir. 2022). It does not insulate companies from liability for their *own* wrongful conduct.

Here, the plaintiffs' false-light claims are based on the companies' own conduct. Before they were disseminated, the videos themselves did not suggest that the plaintiffs had consented to being filmed, let alone that they consented to appear on a porn website. It's the context that the companies created—the websites that they touted as hubs of consensual porn—that gives that false impression.

In granting summary judgment on these claims, the district court recognized that section 230 provides no defense to a company that "materially contributes" to the illegality underlying a cause of action. The court just misunderstood what that illegality was here. The illegality that the plaintiffs challenge is not the unlawful *filming* of the videos, as the court thought. Rather, it is the way in which the videos were *presented*, which falsely suggested to some that the girls were amateur porn actors. Because the defendants materially contributed to that false impression, section 230 does not bar the claims.

Second, the plaintiffs alleged that the companies invaded their privacy by disclosing without their consent private details about their lives—videos of

them showering and changing. It's hard to imagine a clearer wrongful-disclosure-of-private-facts claim than that. Yet the district court didn't even let these claims get off the ground. It dismissed them because it concluded that the plaintiffs had not alleged that the companies exercised control over the person who filmed the videos in the first place. But that is not an element of a wrongful-disclosure claim. Because the district court required the plaintiffs to allege facts unnecessary to their claims, this Court should reverse that dismissal. And because the district court did not reach the question of whether section 230 would bar these claims, this Court should not do so either.

Were the Court nevertheless to reach that question, however, it should hold that the porn companies are not entitled to prevail on their section 230 defense as a matter of law. Congress explicitly instructed courts that section 230(c)(1) "shall [not] be construed" to cover the willful dissemination of unlawfully intercepted content. 47 U.S.C. § 230(e)(4). This provision controls here. It makes clear that section 230(c)(1) does not protect defendants when they "wilfully disseminate the contents of unlawfully intercepted information." *Doe v. GTE Corp.*, 347 F.3d 655, 659 (7th Cir. 2003). As one circuit has already recognized, that includes the willful dissemination of surreptitious recordings "showing undressed players" in "locker rooms" and "showers" "without the[ir]

knowledge or consent." *Id.* at 656. The defendants are therefore not entitled to prevail on their section 230 defense as a matter of law.

JURISDICTIONAL STATEMENT

The district court had subject matter jurisdiction under 28 U.S.C. § 1331 because the plaintiffs asserted a claim under the Trafficking Victims Protection Reauthorization Act, ECF.193.at.21, and it had supplemental jurisdiction over the plaintiffs' state-law claims under 28 U.S.C. § 1367. The district court granted the appellees' motions for summary judgment on September 3, 2025, ECF.635, leaving only the plaintiffs' claims against Collins Murphy, the person who filmed the videos.

Subsequently, MindGeek, Hammy Media, and the plaintiffs all requested certification under Rule 54(b) of an entry of final judgment over the claims against MindGeek and Hammy Media. ECF.641, ECF.649, ECF.650. The district court agreed, expressly concluding that there was "no just reason for delay," and granted the motions for entry of final judgment as to MindGeek and Hammy Media on October 22, 2025. ECF.651.at.8. The plaintiffs timely filed a notice of appeal on November 17, 2025. ECF.652. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. **False light.** Does Section 230 bar the plaintiffs' claims that two porn companies gave the misimpression that the plaintiffs willingly appeared on their porn websites?

2. **Wrongful disclosure.** Did the plaintiffs plausibly allege an invasion of privacy tort based on the wrongful disclosure of private facts where a porn company disseminated a video of them showering and changing in a locker room without their consent?

STATEMENT OF THE CASE

I. Statutory background

Section 230 precludes "provider[s]" of "interactive computer service[s]" from being "treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1). Congress clarified that subsection (c)(1) "shall [not] be construed" to cover the knowing dissemination of unlawfully intercepted communications. § 230(e)(4).

A. Congress enacted section 230 to incentivize internet companies to remove offensive, pornographic content.

Section 230 was passed in the mid-1990s, when to most people, the internet was "an absolutely brand-new technology." 141 Cong. Rec. 22,044 (Aug. 4, 1995). It was also rudimentary: It had no Facebook, no Google, no

Amazon; webpages took a long time to load; people logged on using dial-up service with AOL and shared information using message boards. *See, e.g.*, Farhad Manjoo, *Jurassic Web*, Slate (Feb. 24, 2009), https://perma.cc/XF68-ZVBP. Yet public access to the internet was growing. *See* Susannah Fox & Lee Rainie, *The Web at 25 in the U.S.: Part 1: How the internet has woven itself into American life*, Pew Rsch. Ctr. (Feb. 27, 2014), https://perma.cc/9Q5L-DCMU. And so too was concern about its use.[1]

To Congress, one concern loomed above all: "smut," and particularly the extent to which the internet made pornographic material widely available. 141 Cong. Rec. 22,045. Congress wanted internet companies—websites and internet service providers—to filter out offensive content. *See* 141 Cong. Rec. 22,044-046. But it worried that legal barriers prevented companies from doing so: Under the existing legal regime, internet companies could not remove pornographic content without risking being held liable for everything that anyone had ever posted on their site. *See id.*

[1] Unless otherwise specified, all internal quotation marks, citations, emphases, and alterations are omitted throughout the brief. And unless otherwise noted, all ECF citations are to the docket in Case No. 20-cv-947.

In assigning liability for disseminating unlawful content, the common law had long distinguished between publishers and distributors. *See Malwarebytes, Inc. v. Enigma Software Grp. USA, LLC*, 141 S. Ct. 13, 14 (2020) (statement of Thomas, J.); *M.P. ex rel. Pinckney v. Meta Platforms Inc.*, 127 F.4th 516, 523 (4th Cir. 2025). Publishers, like newspapers and magazines, chose what they published and maintained editorial control over their publications. *See, e.g.*, *Malwarebytes*, 141 S. Ct. at 14; *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, 1995 WL 323710, at *3 (N.Y. Sup. Ct. 1995). With this control came liability: Publishers were "subject to strict liability" for the content they published. *M.P.*, 127 F.4th at 523. On the other hand, distributors—like newsstands or bookstores—were passive conduits that passed on publications to readers "without exercising editorial control," often "transmitt[ing] far more content than they could be expected to review." *Malwarebytes*, 141 S. Ct. at 14. Distributors, therefore, could not be held liable unless "they knew or had reason to know" that they were distributing unlawful content. *Stratton Oakmont*, 1995 WL 323710, at *3; *M.P.*, 127 F.4th at 523.

Congress was concerned about how courts might apply these longstanding common-law rules to the internet. A New York Supreme Court decision had recently held an online message board liable for defamatory

content on its site because the website—in an effort to be "family oriented"—endeavored to remove offensive content. *Stratton Oakmont*, 1995 WL 323710, at *2, *5. That effort, the court held, constituted "editorial control" and meant that the website must be treated as a publisher—that is, as liable for its users' posts as the users themselves. *Id.* at *4.

Congress passed section 230 "to overrule *Stratton-Oakmont v. Prodigy* and any other similar decisions" treating internet companies "as publishers … because they have restricted access to objectionable material." S. Rep. No. 104-230, at 194 (1996) (Conf. Rep.); *see Zeran v. Am. Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997); *M.P.*, 127 F.4th at 523. In enacting the statute, Congress thus sought to "remove the disincentives" preventing internet companies from "regulat[ing] the dissemination of offensive material" on their sites. *Zeran*, 129 F.3d at 331.

B. Section 230 provides internet companies with an affirmative defense to claims seeking to hold them liable as a mere publisher of someone else's content.

Congress's goal—ensuring that internet companies aren't dissuaded from removing offensive content—is evident throughout section 230's text, starting with the title: "Protection for private blocking and screening of offensive material." 47 U.S.C. § 230. And the heading of the statute's operative

provision, section 230(c), is "Protection for 'Good Samaritan' blocking and screening of offensive material."

Section 230(c) implements Congress's goal to "alter[] the *Stratton Oakmont* rule in two respects." *Malwarebytes*, 141 S. Ct. at 14 (statement of Thomas, J.). First, subsection (c)(1) states: "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." And second, subsection (c)(2) holds: "No provider or user of an interactive computer service shall be held liable on account of any action voluntarily taken in good faith to restrict access to … objectionable" material.

These provisions serve complementary ends. Subsection (c)(1) "indicates that an Internet provider does not become the publisher of a piece of third-party content—and thus subjected to strict liability—simply by hosting or distributing that content," while subsection (c)(2) provides further protection for removing content in good faith. *Malwarebytes*, 141 S. Ct. at 14. So "if a company unknowingly leaves up illegal third-party content, it is protected from publisher liability by § 230(c)(1)." *Id.* And "if it takes down certain third-party content in good faith, it is protected by § 230(c)(2)(A)." *Id.*

C. Congress clarified that section 230's defense does not extend to the knowing dissemination of unlawfully intercepted communications.

This case concerns the first of these provisions, subsection (c)(1). Congress cabined the reach of this provision in three ways that matter here.

First, to come within its protections, subsection (c)(1) requires that an internet company be "treated as the publisher" of information. 47 U.S.C. § 230(c)(1). In imposing this requirement, Congress sought to protect companies from liability for claims "based on the *content of the speech published*," but not for claims based on their own wrongful conduct. *Henderson v. Source for Pub. Data, L.P.*, 53 F.4th 110, 122 (4th Cir. 2022); *see M.P.*, 127 F.4th at 525.

Second, subsection (c)(1) supplies a defense only for claims based on information "provided by another information content provider." In imposing this requirement, Congress sought to protect companies from liability if they had no hand in the unlawful content, but not if they "creat[ed]" or "materially contribute[d]" to it. *Henderson*, 53 F.4th at 127-28. When a company is "'responsible, in whole or in part, for the creation or development' of the information at issue" in a claim, it "receives no protection" from subsection (c)(1). *Id.* at 126 & n.22 (quoting 47 U.S.C. § 230(f)(3)).

Third, the text of a neighboring provision, subsection (e), further illuminates subsection (c)(1)'s meaning. Subsection (e) sets forth several rules of construction (each beginning: "Nothing in this section shall be construed…"), which together serve as a "clarification of the meaning of [subsection (c)(1)] rather than an exception to its coverage." *Id.* at 123 n.17.

Subsection (e)(1), for example, clarifies when subsection (c)(1) is available. It may be invoked as a defense to a civil suit, but not as a defense to an "enforcement" action by the federal government for violation of a "Federal criminal statute." 47 U.S.C. § 230(e)(1); *see also* § 230(e)(3) (same for state enforcement of consistent state laws). Other parts of subsection (e) then clarify the scope of subsection (c)(1). One clarifies that subsection (c)(1) does not "limit" a "claim in a civil action brought under" the federal sex-trafficking laws. § 230(e)(5). Another says that it does not "limit or expand any law pertaining to intellectual property." § 230(e)(2).

And another—subsection (e)(4)—is of particular relevance here. It clarifies that subsection (c)(1) has "[n]o effect on communications privacy law" at all. § 230(e)(4). It explains that subsection (c)(1) "shall [not] be construed" to "limit the application of" the federal Electronic Communications Privacy Act or "any similar State law." § 230(e)(4). The ECPA, in turn, prohibits the

"intercept[ion]" of any "oral … communication," including videos that contain audio, and imposes liability on anyone who "intentionally discloses" such communication, "knowing or having reason to know" that it was unlawfully intercepted. 18 U.S.C. § 2511(1)(a), (c). As one circuit has recognized, that prohibition applies to the willful dissemination of surreptitious recordings "showing undressed players" in "locker rooms" and "showers" "without the[ir] knowledge or consent." *Doe v. GTE Corp.*, 347 F.3d 655, 656 (7th Cir. 2003). When a company knowingly discloses illegal recordings of that sort, it thus not only may be subject to civil liability under the ECPA or "any similar State law," 47 U.S.C. § 230(e)(4); it also engages in conduct as to which section (c)(1) furnishes no defense to liability.

II. Factual background

A. MindGeek had a policy of disseminating illegal, nonconsensual content on Pornhub, directing traffic to it, and profiting as a result.

1. MindGeek, which operates Pornhub.com, is one of the biggest pornography companies in the world.[2] *See* [redacted]

[2] MindGeek, as used throughout this brief, refers to both MG Freesites Ltd. and MindGeek S.A.R.L. MG Freesites Ltd. operates Pornhub.com. ECF.475-3.at.2. MindGeek S.A.R.L. is the corporate parent of MG Freesites Ltd. ECF.475-3.at.3.

[redacted] In 2019, Pornhub attracted more than 100 million visits a day, totaling over 40 billion visits in the year. ECF.488-4.at.2.

[redacted] So it enlists the help of its users. Pornhub users can upload their *own* pornographic photos and videos to the site. [redacted] And MindGeek incentivizes them to do so by sharing revenue with them. ECF.475-4.at.4-5.

MindGeek also works behind the scenes to make sure that as many people view Pornhub videos as possible. It creates still images from each video—called "thumbnails"—to make the "video[] more appealing for users to

click on." ECF.488-6.at.17; [redacted]

MindGeek also creates categories and tags—keywords assigned to videos such as "Teen," "Big-Tits," or "MILF"—to help users searching for specific content find what they are looking for. ECF.488-6.at.10, 13-14; [redacted] As the company explains to its uploaders, using the right "tags and categories … increase[s] views by allowing users to find your videos" when they search for those terms on Pornhub or on a search engine like Google. ECF.488-6.at.10; [redacted]

Finally, MindGeek tells some users how they can "generat[e] more views" on their videos—and thereby generate more revenue for themselves and MindGeek—with detailed advice about everything from how long videos should be to suggested titles, categories, and tags. ECF.488-6.at.4-5, 7-8, 13-17. [redacted]

2. MindGeek's more-is-more approach to content and traffic on its sites extends to illegal, nonconsensual content. The company has long known that Pornhub is "infested" with nonconsensual videos, including "spy cam videos." Nicholas Kristof, *The Children of Pornhub*, N.Y. Times (Dec. 4, 2020), https://perma.cc/JRJ4-HH3L (cited at ECF.488.at.3); *Fleites v. Mindgeek S.A.R.L.*, 801 F. Supp. 3d 1045, 1061 (C.D. Cal. 2025) ("[V]ictims, employees, advocacy groups, law enforcement, press reports, and government agencies have all made MindGeek" "aware" that "nonconsensual materials appear on their platforms."). [redacted] *see* Complaint at 4, *FTC v. Aylo Grp. Ltd.*, No. 2:25-cv-00752 (D. Utah Sept. 3, 2025), available at

https://perma.cc/RME8-GQ7B (alleging that MindGeek has "distributed tens of thousands of videos and photos" of nonconsensual material, including "spy camera videos").

Despite this knowledge, MindGeek for years refused to take any steps to prevent or slow the flow of nonconsensual videos onto its site. Instead, MindGeek incentivized it. [redacted] In its end-of-year report, the company boasted that its users were turning to its site for "realistic" videos featuring "'[r]eal' people," not "actors." ECF.488-4.at.5. [redacted], which "dr[ove] the demand for new [spy-cam] images and videos." [redacted] ECF.488-26.at.8. To satisfy the increasing demand, MindGeek wanted as much of that content as possible. [redacted]

MindGeek thus made it as easy as possible for users searching for nonconsensual content to find it. [redacted]

[redacted] And some viewers likely thought so too: MindGeek held itself out to the public as a home for consensual "adult-oriented content" made by "models who desire to share … sexually explicit images." ECF.475-4.at.17. But MindGeek made no effort to distinguish staged videos featuring consenting actors from true hidden-camera videos depicting people who did not know they were being filmed. In 2019, MindGeek did not require its uploaders to verify that the people in their videos had consented to being recorded—let alone to having that recording published on a porn website—by providing, for example, identification and a signed release form for each person appearing in the

videos. ECF.475-4.at.4-5; [redacted] Nor did MindGeek do anything else to ensure it had consent before disseminating such videos.

That wasn't because it lacked the opportunity to do so. Unlike pictures uploaded to Instagram or videos uploaded to YouTube, videos uploaded to Pornhub do not go live on the website immediately when they are uploaded. *See* ECF.475-4.at.7. Instead, Pornhub is more like Netflix: For each video uploaded to the site, MindGeek has full control over whether it will appear in its library of videos. ECF.475-4.at.7; [redacted]

3. In late 2020, the New York Times published a bombshell article exposing that Pornhub was "infested" with child sexual assault videos and other nonconsensual material. Kristof, *The Children of Pornhub*, *supra* at 16. Facing widespread public backlash, Pornhub removed 9 million of the 13.5 million videos on its site.[3] [redacted] the company enacted several policies demonstrating what it could have been doing all along to make its platform safer. [redacted]

[3] Kari Paul, *Pornhub Removes Millions of Videos After Investigation Finds Child Abuse Content*, The Guardian (Dec. 14, 2020), https://perma.cc/7F2X-JAE6.

B. Hammy Media also had a practice of disseminating nonconsensual content, promoting that content, and profiting.

xHamster.com is another of the "largest" pornography websites in the world, boasting "over 30 million unique users per day." *About*, xHamster, https://perma.cc/MF4X-GTGQ. xHamster—operated by Hammy Media—functions similarly to Pornhub in nearly every respect. [redacted] Like Pornhub, xHamster provides free pornographic videos to anyone on the internet, [redacted] ECF.479-14.at.38. [redacted]

[redacted]

But xHamster goes even further than Pornhub to encourage nonconsensual content on its platform. xHamster creates categories—a set of "pre-populated, specifically curated, popular words"—to allow users to easily find the content they are looking for. ECF.635.at.7; [redacted]

By the end of 2020, xHamster had posted more than 35,000 videos in the "voyeur" and "hidden" categories. ECF.479-14.at.54-56.

xHamster has made strikingly few improvements over the years. Even today, xHamster has categories it created titled "voyeur" and "voyeur yoga," and maintains sections of its website filled with those videos.[4] [redacted]

C. This case

Two girls' field hockey teams are secretly filmed while changing in a locker room. In 2012, a college girls' field hockey team travelled to Limestone College in South Carolina for a game. [redacted] While there, they used the college's locker room to shower and change. [redacted] Unbeknownst to them, an employee of the college had set up a hidden camera in the locker room, pointed directly towards the open shower. [redacted] ECF.635.at.2; ECF.475-2.at.24-25. That camera filmed the girls undressing, showering, and changing clothes. [redacted] Because the camera filmed

[4] *Porn Video Categories Starting with "V,"* xHamster, https://perma.cc/UC5Z-EWXT.

directly into the shower, the girls were fully or partially naked in the videos. [redacted][5]

The next year, a different college girls' field hockey team travelled to Limestone College for a competition. [redacted] They too were secretly filmed while using the locker room to undress, shower, and change clothes. [redacted] And they too were fully or partially naked in the videos. [redacted] None of the girls on either team had any idea they had been surreptitiously recorded. *See* [redacted] That all changed in the fall of 2019, when the videos were uploaded to Pornhub and xHamster. [redacted]

MindGeek disseminates and profits from the videos. In August 2019, a Pornhub user uploaded six videos of the plaintiffs from the locker room. [redacted] One month later, a different Pornhub user uploaded two more videos of the plaintiffs. [redacted]

[5] The secretly recorded videos of the plaintiffs are included in the record on appeal. [redacted] But the contents of the videos are not disputed, and the plaintiffs do not believe it is necessary for the Court to view the videos to resolve this appeal.

[redacted]

Once the videos went live, MindGeek took steps to ensure as many users as possible would see them. [redacted]

[redacted]

MindGeek even specifically stepped in to change the categories assigned to two of the videos, removing categories that the uploader had selected and replacing them with "Amateur," "Fetish," and "Lesbian." ECF.635.at.5; [redacted] It made this change to drive more traffic to the videos: In 2019, "Lesbian" and "Amateur" were two of the three most viewed categories on Pornhub. ECF.488-4.at.16; [redacted]

[redacted]

[redacted] Still, MindGeek continued to disseminate the videos.

[redacted]

[redacted]

MindGeek was even specifically asked to take down the videos. Pornhub's website allows users to submit "content removal requests" if they believe content on the website is illegal. *See Content Removal Request*, Pornhub, https://perma.cc/B5MT-YLHQ. [redacted]

Eventually, the police got involved. [redacted]

xHamster also disseminates and profits from the videos. In August 2019, a user uploaded eight videos of the plaintiffs to xHamster. [redacted]

And xHamster made sure the videos would generate advertising revenue. The videos were assigned categories that xHamster itself had

created—"voyeur" and "hiding"—making it easy for users seeking nonconsensual content to find these videos. *See* ECF.492.at.7 [redacted]

xHamster, however, did not ban the uploader from its site. The account remains online today and continues to upload videos. *See cwdistribution*, xHamster, https://perma.cc/QSU2-82MP.

The videos are reposted across the internet. By the time the videos were removed from Pornhub and xHamster, it was too late. The videos—which had been online for months—received tens of thousands of views. [redacted] ECF.488-26.at.9. [redacted]

[redacted]

see also Fleites, 801 F. Supp. 3d at 1062 (accusing MindGeek of "systematically and surreptitiously reupload[ing] removed content").

The plaintiffs suffer extreme distress. This extreme violation of privacy has had a devastating impact on the plaintiffs. [redacted]

[redacted]

[redacted]

III. Procedural history

Jane Does 1–9, members of the first field hockey team, sued MindGeek, Hammy Media, and several other defendants in early 2020. ECF.1. The next year, Jane Doe 10, a member of the second field hockey team, filed a similar lawsuit. *Doe v. Limestone Univ.*, No. 7:21-cv-03193 (D.S.C. Sept. 30, 2021). The district court then consolidated the cases. ECF.267, ECF.559.

As relevant here, the plaintiffs alleged that the porn companies had intruded on their privacy in two independent ways: (1) by painting them in a false light, which the companies did by contextualizing the videos in a way that suggested to some viewers that the plaintiffs willingly appeared on a porn website; and (2) by wrongfully disclosing their private affairs. ECF.99.at.10, 15; Complaint at 9-10, 14-15, *Doe v. Limestone Univ.*, No. 7:21-cv-03193 (D.S.C. Sept. 30, 2021). MindGeek moved to dismiss, arguing that the plaintiffs

had not stated any claims against it for its role in publishing nonconsensual videos of the plaintiffs on its pornography site. *See* ECF.104.at.1-2.

The district court granted the motion in part. It recognized that the plaintiffs had "pled sufficient facts" to state a claim that MindGeek presented them in a false light. ECF.133.at.7-8. But the district court dismissed the plaintiffs' invasion of privacy claim for wrongful disclosure of private affairs. ECF.133.at.6-7. Although the plaintiffs had alleged that the porn companies had wrongfully disclosed their private affairs by "disseminat[ing]" videos that the companies "knew or should have known" were "filmed surreptitiously and without consent," ECF.99.at.6-7, the district court concluded they had not stated a claim because they failed to allege that the company exercised "control" over the person who filmed the videos. ECF.133.at.7.

The case proceeded to discovery. The plaintiffs learned that [redacted] MindGeek had altered the categories on

some of the videos, categorizing them as "Amateur" and "Fetish" porn to expand their reach. [redacted] *see* ECF.635.at.5. [redacted]

[redacted]

The porn companies then moved for summary judgment, arguing that section 230 barred the plaintiffs' false-light claim. ECF.475-1; ECF.479-1. The plaintiffs responded that section 230 provided no defense because their false-light theory of liability—that it was the porn websites themselves that gave the false impression that the plaintiffs were "amateur porn performers"—was based on the companies' own conduct. ECF.488.at.18, 27; ECF.492.at.25, 39.

The district court granted summary judgment to the porn companies. The court recognized that a company may not assert a section 230 defense where it "materially contributed" to the underlying illegality. ECF.635.at.36 (quoting *Henderson*, 53 F.4th at 127). But it determined that the illegality underpinning the plaintiffs' false-light claims was that the videos had been surreptitiously recorded. ECF.635.at.39. So it concluded that, to defeat a section 230 defense, the plaintiffs were required to show that the porn companies contributed "to the recording of [the videos] without Plaintiffs' consent." ECF.635.at.46. In the court's view, the plaintiffs had not made that

showing. ECF.635.at.46 None of the websites' features, the court thought, contributed to the fact that the videos were "recorded without … consent." ECF.635.at.46.[7]

STANDARD OF REVIEW

This Court reviews a district court's grant of summary judgment "de novo," *Ray Commc'ns, Inc. v. Clear Channel Commc'ns, Inc.*, 673 F.3d 294, 299 (4th Cir. 2012), "constru[ing] all facts and reasonable inferences therefrom in the light most favorable to the nonmoving party," *Tekmen v. Reliance Standard Life Ins. Co.*, 55 F.4th 951, 958 (4th Cir. 2022). A defendant is entitled to summary judgment on an affirmative defense only if it "conclusively establish[es] all essential elements of that defense." *Ray Commc'ns*, 673 F.3d at 299. Summary judgment is improper if a jury could find facts on which a defendant would not prevail on its affirmative defense. *Id.*

This Court also reviews a district court's grant of a Rule 12(b)(6) motion to dismiss "de novo," "assum[ing] the facts alleged in the complaint are true

[7] The district court granted summary judgment to two other entities associated with Hammy Media: Wisebits and TrafficStars. ECF.635.at.31, 72-76. It also granted summary judgment to MindGeek and Hammy Media on the plaintiffs' claims for negligent monitoring, civil conspiracy, and trafficking under the Trafficking Victims Protection Reauthorization Act. ECF.635.at.53-68. The plaintiffs are not appealing those decisions.

and draw[ing] all reasonable factual inferences in [the plaintiffs'] favor." *Burbach Broad. Co. v. Elkins Radio Corp.*, 278 F.3d 401, 406 (4th Cir. 2002).

SUMMARY OF ARGUMENT

I. The district court's grant of summary judgment to the porn companies as to the plaintiffs' false-light claims was improper because section 230 does not bar those claims.

A. A company may not assert a section 230 defense where it "materially contributed to what made the content unlawful." *Henderson*, 53 F.4th at 128. Here, the porn companies materially contributed to the illegality underpinning the plaintiffs' false-light claims. The plaintiffs claim that the porn companies painted them in a false light by falsely suggesting that they voluntarily associated with a porn website. That misimpression was created entirely by the companies. After all, the videos on their own do not give the false impression that the plaintiffs consented to being filmed—let alone that they willingly appeared on a porn website. It is only the companies that suggested otherwise. They held themselves out as websites publishing consensual porn and surrounded the videos with consensual porn and explicit advertisements. MindGeek even changed the tags on some of the videos in ways that further suggested the videos featured amateur actors performing in a staged hidden-

camera video. Because the companies materially contributed to that misimpression, section 230 provides no defense to these claims.

B. The district court held to the contrary because it misunderstood the illegality underpinning the false-light claims. In the court's view, to defeat a section 230 defense, the plaintiffs were required to show that the porn companies contributed in some way to the videos' "nonconsensual nature." ECF.635.at.39. But that is not the illegality underpinning the false-light claims. The illegality underpinning those claims is the misimpression created about the plaintiffs. And the porn companies materially contributed to that misimpression.

Finally, the district court erroneously concluded that a website's "publishing functions" cannot, as a matter of law, contribute to the illegality. That misstates the law. As this Court held in *Henderson*, an internet company can be held liable where its "own actions" created the illegality.

II. The district court improperly dismissed the plaintiffs' privacy tort claim based on wrongful disclosure of private facts.

A. A defendant who publicizes the private life of another is subject to liability if the matter publicized would be highly offensive to a reasonable person and is not of legitimate concern to the public. *See* Restatement (Second)

of Torts § 652D (1977). That's what the porn companies did here. The district court nonetheless dismissed the plaintiffs' public-disclosure claim against MindGeek because it thought the plaintiffs were required to allege that MindGeek was "liable for the acts and misdeeds" of the person who filmed the videos. ECF.133.at.7. But that isn't an element of the tort. The plaintiffs' allegations—that MindGeek disseminated videos of them showering even though it knew or should have known that the videos were surreptitiously filmed without consent—were sufficient to state a claim, so the claim should be reinstated.

B. Because the district court concluded that the plaintiffs had not even stated a claim, the court never considered the applicability of section 230 with respect to the wrongful-disclosure claim. This Court should not do so either, and should instead remand for the district court to consider the applicability of section 230 in the first instance.

But lest there be any doubt: Section 230 does not bar this claim. The statute expressly provides that section 230(c)(1) "shall [not] be construed" to "limit the application of" the federal Electronic Communications Privacy Act or "any similar State law." And the ECPA prohibits the intentional disclosure of wrongfully intercepted communications. *See* 18 U.S.C. § 2511(1)(a), (c);

GTE Corp., 347 F.3d at 658-59 (making the same point about the same type of illicit videos). So when, as here, a company knowingly discloses illegal recordings, it engages in conduct as to which section 230 furnishes no defense to liability.

ARGUMENT

I. The district court improperly granted summary judgment to the porn companies on the plaintiffs' false-light claims.

The thrust of the plaintiffs' false-light claims is that MindGeek and Hammy Media presented the plaintiffs as amateur actors starring in a staged hidden-camera video when that impression was false. These claims seek to hold the companies accountable for their own conduct: The videos alone do not suggest that the plaintiffs consented to being filmed or to appearing on a porn site. Only the websites themselves—depicting the videos surrounded by other, consensual porn—could have given that impression. Because the plaintiffs' false-light claims are based on the companies' own conduct, section 230 provides no defense. The district court's grant of summary judgment to the companies on the false-light claims should therefore be reversed.[8]

[8] Section 230 provides no defense to the plaintiffs' false-light claims for another reason too. As we explain below, the willful dissemination of surreptitiously recorded videos falls outside the scope of the section 230 defense altogether. *See infra* Part II.B.2.

A. The plaintiffs' false-light claims seek to hold the porn companies liable for their own conduct, so section 230 provides no defense.

Section 230 bars claims that seek to hold internet companies vicariously liable for the content posted by their users. It supplies a defense, in other words, only where an internet company's users are *solely* responsible for the alleged illegality. It does not prohibit holding companies liable for their *own* conduct. *See Henderson*, 53 F.4th at 126 n.22; *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1165, 1169 n.24 (9th Cir. 2008); *Lemmon v. Snap, Inc.*, 995 F.3d 1085, 1092 (9th Cir. 2021); *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 254 (4th Cir. 2009) (noting that internet companies may be held liable for "speech that is properly attributable to them").

To help police this line, this Court has adopted the material-contribution test. Under that test, a company may not assert a section 230 defense where it "materially contributed to what made the content unlawful." *Henderson*, 53 F.4th at 128.

The application of that test here is straightforward. The first step is to ask what makes the content unlawful. What makes content unlawful for purposes of a false-light claim is the misimpression that it creates for others.

The tort recognizes that a party may not publicly paint another in a "false light" that would be "highly offensive to a reasonable person." *Wood v. Hustler Mag., Inc.*, 736 F.2d 1084, 1086 (5th Cir. 1984); *see also* Restatement (Second) of Torts § 652E. Determining whether this standard has been met will generally require examination of more than just the content of a particular piece of information in a vacuum; it will typically also require examination of the "context" in which that information was portrayed to others. *Braun v. Flynt*, 726 F.2d 245, 254 (5th Cir. 1984).

A classic example of a false-light claim is when a company falsely suggests that a woman "*voluntarily* associated" herself with "provocative" pornographic content. *Douglass v. Hustler Mag., Inc.*, 769 F.2d 1128, 1133-36 (7th Cir. 1985). Well before the internet, courts recognized the existence of such claims where "sex-centered magazine[s]"—like Hustler or Playboy—published nude photos without the subject's consent. *Wood*, 736 F.2d at 1089, 1093. Courts held that the magazines led readers to assume that the women had "consented" to appear nude within their pages, *id.*, giving a "false impression" as to their "reputation, integrity or virtue," *Braun*, 726 F.2d at 247, 249; *see also Pinder v. 4716 Inc.*, 494 F. Supp. 3d 618, 628-29 (D. Ariz.

2020) (recognizing claim against a strip club for "falsely suggest[ing]" that the plaintiffs were affiliated with the club by posting their photos in its ads).

The claims in this case are closely analogous to these textbook examples. Just as Hustler suggested to readers that its centerfold women wanted to be featured there, MindGeek and Hammy Media "insinuate[d]" to at least some users that the plaintiffs were "the kind of [people] willing to be shown naked" on a porn website. *Douglass*, 769 F.2d at 1135. The videos appeared on the website alongside consensual videos featuring actors, suggesting that the girls in these videos were actors too. The companies surrounded the videos with advertisements featuring masturbating and topless women, implying that the plaintiffs "approv[ed]" of that content. *Braun*, 726 F.2d at 254 n.11; *see* [redacted]. And "[n]othing" on the websites told viewers that the videos "appear[ed] without [the plaintiffs'] permission and against [their] will." *Douglass*, 769 F.2d at 1135. In fact, the companies explicitly told its users the opposite, explaining that their websites featured only "models who desire to share … sexually explicit images." ECF.475-4.at.17; *see also Terms & Conditions*, xHamster, https://perma.cc/28GC-V5DY ("All Content depicts consenting models … that have provided rights to the Site to publish the content.").

MindGeek went even further. It specifically categorized some of the videos as "amateur" to give the mistaken impression that they featured amateur porn actors, rather than girls who were illegally filmed without their knowledge or consent. *See Amateur*, The Merriam-Webster.com Dictionary, https://perma.cc/K59Y-E58A ("one who engages in a pursuit … as a pastime rather than as a profession"); [redacted] ECF.635.at.5. MindGeek added other categories to the videos too—tagging them as "lesbian" and "fetish"—to further present the videos as consensual pornographic content. [redacted] ECF.635.at.5. [redacted]

In taking all these steps, the porn companies materially contributed to the illegality underlying the false-light claims. After all, "the content provided to" the companies—the videos themselves—do not give the impression that the plaintiffs are amateur porn actors. *Henderson*, 53 F.4th at 129. On their own, the videos look to be genuine spy-cam videos. [redacted]

[redacted]

But the "context" of a video can dramatically change its "effect" on viewers. *Braun*, 726 F.2d at 254 & n.11. And here, that context—created by the companies—"transform[ed]" videos that did not paint the plaintiffs in a false light into videos that did. *Roommates.com*, 521 F.3d at 1168. By any measure, that is a material contribution. *See Henderson*, 53 F.4th at 129. Hence, section 230 does not provide a defense to the plaintiffs' false-light claims.

None of this is to suggest that the videos themselves are somehow irrelevant here. The plaintiffs, of course, wouldn't have a false-light claim if it weren't for the videos. But section 230 is not a "but-for test." *Henderson*, 53 F.4th at 122-23. An internet company whose conduct materially contributes to the illegality underlying the plaintiff's claim is an information content provider with respect to that content—even if user content was causally necessary for the claim to exist at all. *See id.*; *Doe v. Internet Brands*, 824 F.3d 846, 853 (9th Cir. 2016); *HomeAway.com, Inc. v. City of Santa Monica*, 918 F.3d 676, 682

(9th Cir. 2019); *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1106, 1109 (9th Cir. 2009). Because that is the case here, the porn companies are not entitled to summary judgment as to the false-light claims.[9]

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[9] Below, the porn companies insisted that South Carolina law applies to the plaintiffs' false-light claims, and that South Carolina does not recognize a false-light tort. *See* ECF.578.at.19; ECF.580.at.32. The district court didn't address this argument, and this Court need not either. *See* ECF.635.at.25.n.14. But should it choose to do so, the companies are doubly wrong.

First, South Carolina's choice-of-law rules apply, *see ITCO Corp. v. Michelin Tire Corp.*, 722 F.2d 42, 49 n.11 (4th Cir. 1983), and they provide that the "substantive law" governing a tort action is determined by the law of the state "in which the injury occurred," *Boone v. Boone*, 546 S.E.2d 191, 193 (S.C. 2001). Here, the injury is the "mental anguish" that each plaintiff suffered, *Wood*, 736 F.2d at 1088, which occurred when the videos were posted and was felt in the states where the plaintiffs resided. Unquestionably, Kentucky, Nevada, and Indiana have each expressly recognized this claim. *See McCall v. Courier-Journal & Louisville Times Co.*, 623 S.W.2d 882, 888 (Ky. 1981); *Abrams v. Sanson*, 458 P.3d 1062, 1070 n.5 (Nev. 2020); *Carson v. Palombo*, 18 N.E.3d 1036, 1047 (Ind. Ct. App. 2014).

Second, if the plaintiffs had to be able to assert a claim under South Carolina law, they could do that too. The South Carolina Supreme Court has not "directly addressed" whether South Carolina law recognizes a false-light claim, so this Court must "anticipate how it would rule." *Stahle v. CTS Corp.*, 817 F.3d 96, 100 (4th Cir. 2016); *see Sign-N-Ryde, LLC v. Preferred Auto. Grp., LLC*, 2011 WL 11736317, at *1 (S.C. Ct. App. 2011) (calling this an "important question[] of novel impression" in South Carolina). All signs suggest that, if faced with the question, the South Carolina Supreme Court would follow the majority of states and adopt the Restatement's view, as it has done for other privacy torts. *See, e.g.*, *Swinton Creek Nursery v. Edisto Farm Credit, ACA*, 514 S.E.2d 126, 131, 134 (S.C. 1999); *Priv. Mortg. Inv. Servs., Inc. v. Hotel & Club Assocs., Inc.*, 296 F.3d 308, 314 (4th Cir. 2002) (anticipating that the South Carolina Supreme Court would adopt the Restatement view in one context based on its adoption of the Restatement view in a related context).

B. The district court mistakenly granted summary judgment to the defendants because it misapplied the material-contribution test.

The district court's conclusion to the contrary rests on two independent legal errors. First, the court mistakenly asked whether the companies contributed to the *filming* of the videos—not whether they contributed to the false light in which the plaintiffs were placed. Second, the district court erroneously concluded that so-called "publishing functions"—functions created by MindGeek and Hammy Media that could be applied to any videos—can *never* materially contribute to the illegality underpinning a plaintiff's claim. We take up each error in turn.

1. The district court misunderstood the illegality underpinning the plaintiffs' false-light claim. In its view, the videos were unlawful because they were "recorded without … consent." ECF.635.at.46. And so, it thought, to defeat a section 230 defense with respect to these claims, the plaintiffs had to show that the porn companies contributed in some way to the videos' "nonconsensual nature." ECF.635.at.39. That's incorrect. The material-contribution test asks whether an internet company materially contributed to what the plaintiff alleged "made the content … improper." *Henderson*, 53 F.4th at 128. That inquiry turns on the plaintiff's cause of action. *See id.* If a

plaintiff brings a defamation claim, the question is whether the company "materially contributed to the defamatory aspect" of the content. *Id.* If a plaintiff instead alleges that some information is unlawfully inaccurate, the question is whether the internet company contributed to that inaccuracy. *Id.* And if a plaintiff brings a false-light claim, the question is whether the company materially contributed to the false impression conveyed about the plaintiff.

The district court did not ask this question. As to each website feature, it asked only whether that feature contributed to the nonconsensual filming of the videos—not whether it contributed to the false light in which the plaintiffs were presented. *See* ECF.635.at.39 (asking whether the companies' thumbnail creation "contributed to [the videos'] … nonconsensual nature"); ECF.635.at.42-45 (whether categories and tags contributed "to what made these Videos illegal in the first place"); ECF.635.at.46 (whether the webpage dedicated to voyeuristic content contributed "to the recording of these Videos without Plaintiffs' consent"); ECF.635.at.48-49 (similar with respect to advertisements); ECF.635.at.49-51 (similar with respect to algorithms).

But again, the fact that these videos were filmed without the plaintiffs' consent is not the basis of the false-light claims. In fact, the plaintiffs could

bring a false-light claim even if the videos had been *consensually* filmed, because the plaintiffs did not consent to being presented as amateur porn actors on porn websites. *See, e.g.*, *Wood*, 736 F.2d at 1085, 1093 (recognizing false-light claim where plaintiff had consented to being photographed nude but not to publication of photograph); *Douglass*, 769 F.2d at 1131, 1136-37; *Pinder*, 494 F. Supp. 3d at 628-29.

Had the district court asked the right question, it would have arrived at the right answer. To take one particularly stark example, the court acknowledged that MindGeek "change[d] the categories" on some of the videos, removing categories that the uploader had selected and replacing them with categories of its own making: "amateur," "fetish," and "lesbian." ECF.635.at.42. Those categories, the court understood, "were not indicative of illegal or nonconsensual content." ECF.635.at.44. MindGeek conceded as much. ECF.578.at.13. If the district court had properly identified the illegality, it would have realized that this fact cuts sharply in the plaintiffs' favor. A reasonable jury could conclude that the way MindGeek recategorized the videos telegraphed, at least to some users, that the plaintiffs were amateur porn actors. That's the context that the plaintiffs claim painted them in a false light. And a jury could conclude that the rest of the context in which the

companies placed the videos gave the same false idea. *See supra* Part I.A. By failing to properly identify the illegality underpinning the plaintiffs' false-light claim, the district court committed reversible error.

2. The district court's analysis was wrong for another, independent reason. The court erroneously thought that features on the websites that can be applied to all user content—what the court called a website's "publishing functions"—cannot materially contribute to the illegality as a matter of law. *See* ECF.635.at.39, 43, 46. That position is foreclosed by this Court's decision in *Henderson*, 53 F.4th 110.

In *Henderson*, a consumer sued a credit-reporting agency that had produced a report that inaccurately summarized her criminal history. 53 F.4th at 118, 128. The company responded by asserting a section 230 defense. *Id.* at 119. Its reports, it argued, were simply the result of "edit[ing]" content supplied by third parties and placing it into an "original, proprietary format." Br. of Defendants-Appellees, 2022 WL 103151, at *37 (4th Cir. 2022). And the "traditional editorial function" of repackaging third-party data, the company said, could not make it liable for harm flowing from user-submitted information—even if its edits resulted in some inaccurate reports. *Id.*

This Court rejected that argument. The inaccuracies in the plaintiff's report "resulted from" the company's publishing technique of "stripping" out the disposition of criminal charges and replacing that information with its own summaries. *Henderson*, 53 F.4th at 128. So it was the company's "own actions" that caused the report to be inaccurate—and thus unlawful. *Id.* And it was those actions that barred a section 230 defense. It made no difference that the company applied the same editorial techniques across the board. As applied to the information about the plaintiff, those techniques resulted in an inaccurate report. *Id.* That was enough.

The same is true here. It makes no difference whether the porn companies took certain actions with respect to "all videos" on the site. The companies "alter[ed]" the videos "in ways that ma[d]e [them] unlawful." *Id.* at 129. They are therefore information content providers as to the plaintiffs' false-light claims and may not assert a section 230 defense.

In any event, MindGeek, at least, did *not* take the same actions with respect to "all videos." It singled out the videos of the plaintiffs, replacing the user-supplied categories with categories of its own. So even if the district court were right on this point, it would still have been wrong to grant summary judgment on these claims.

II. This Court should reinstate the plaintiffs' privacy claim for wrongful disclosure of private facts.

The district court erred in disposing of another of the plaintiffs' claims: that the companies wrongfully disseminated a video showing them naked and changing clothes without their permission. The district court dismissed that invasion-of-privacy claim not because of section 230, but because it believed that the plaintiffs were required to demonstrate that the companies had been involved in the videos' filming. But that is not an element of a wrongful-disclosure claim, and the court erred in making it one. Further, although this Court need not (and in our view, should not) reach the issue, this claim is not barred by section 230 either.[10]

[10] Though the plaintiffs initially brought this claim against both MindGeek and Hammy Media, *see* ECF.99.at.10, the district court dismissed it only with respect to MindGeek, *see* ECF.133.at.7. The plaintiffs were not required to replead that dismissed claim when they amended their complaint. *See Young v. City of Mount Ranier*, 238 F.3d 567, 572 (4th Cir. 2001) (concluding that it would be "needlessly formalistic to require a plaintiff to replead claims already dismissed … in order to preserve the right to appeal the dismissal"). And because the claims against the two companies were so similar, the plaintiffs did not replead this claim against Hammy Media either. *See* ECF.193. If this Court reinstates the plaintiffs' public-disclosure claim as to MindGeek, the plaintiffs should be given leave to amend their complaint to replead the same claim against Hammy Media.

A. The district court improperly granted MindGeek's motion to dismiss the plaintiffs' wrongful-disclosure claim.

1. Because modern technology has made it "easier than ever for unwanted third parties to obtain—and share—sensitive information," "nearly every … state" has recognized "an invasion-of-privacy tort claim based on the public disclosure of private facts." *Cmty. Health Network, Inc. v. McKenzie*, 185 N.E.3d 368, 381 (Ind. 2022). A defendant "who gives publicity to a matter concerning the private life of another" is subject to liability if "the matter publicized" would "be highly offensive to a reasonable person" and "is not of legitimate concern to the public." Restatement (Second) of Torts § 652D.

That is what MindGeek and Hammy Media did here. The companies were given secretly recorded videos of the plaintiffs showering and changing clothes in a private space, videos that they knew or should have known were illegally recorded. And they made the videos publicly available to anyone on the internet, without ever verifying that the plaintiffs consented. *See id.* § 652D, cmt. b (explaining that a newspaper that publishes a photo "taken without the plaintiff's consent in a private place" commits the tort); *Does 1-22 v. Bd. of Educ. of Prince George's Cnty.*, 644 F. Supp. 3d 149, 159 (D. Md. 2022) ("students … dressing in a school locker room" reasonably expect "that they will not be subjected to video recording because they retain a significant

privacy interest in their unclothed bodies"). That conduct gives rise to an invasion-of-privacy claim.

Criminal law "fortifie[s]" this conclusion. *Nappier v. Jefferson Standard Life Ins. Co.*, 322 F.2d 502, 505 (4th Cir. 1963) (looking to criminal law to determine if the defendant's conduct constituted wrongful publication of private affairs). The distribution of surreptitiously recorded content is such an egregious violation of privacy that it is a crime under a host of federal and state statutes, including the Electronic Communications Privacy Act. *See, e.g.*, 18 U.S.C. § 2511(c) (making it a crime to "disclose[]" an "electronic communication, knowing or having reason to know that the information was obtained" illegally); S.C. Code Ann. § 16-17-470(B)-(C) (making it a felony to "knowingly … distribute" a photo or video that was recorded "for the purpose of arousing or gratifying sexual desire," "while the person [being filmed] is in a place where he or she would have a reasonable expectation of privacy" and without their "knowledge and consent"); Ky. Rev. Stat. Ann. § 531.100(1)(c) (similar); Nev. Rev. St. § 200.604(2) (similar); Tex. Penal Code Ann. § 21.15(b)(3) (similar); *State v. Katz*, 179 N.E.3d 431, 450 (Ind. 2022) (observing

that 48 states have enacted laws "criminalizing the nonconsensual dissemination of private sexual images").[11]

2. Neither company seriously contests any of this. *See* ECF.104-1.at.7-8; ECF.174-1.at.17.n.4. Yet the district court dismissed the public-disclosure claim anyway. In the court's view, the plaintiffs were required to allege that MindGeek was "liable for the acts and misdeeds" of the person who filmed the videos. ECF.133.at.7. The court dismissed the claim solely because it concluded that the plaintiffs had not plausibly alleged an "agency relationship" between MindGeek and the filmer. ECF.133.at.7.

But no state's law requires the plaintiffs to allege such a relationship to make out a wrongful-disclosure claim. A newspaper that publishes a photo taken without the subject's consent can be held liable for wrongful disclosure of private facts even if it didn't take the photo itself. *See Gallon v. Hustler*

[11] This Court need not decide which state's law governs these claims. Each of the relevant possible states—Kentucky, Indiana, Nevada, Texas, and South Carolina—recognize an invasion-of-privacy claim based on wrongful disclosure of private facts. *See Cmty. Health Network, Inc.*, 185 N.E.3d at 380-81; *Indus. Found. of the South v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 682-83 (Tex. 1976); *McCall*, 623 S.W.2d at 887; *Franchise Tax Bd. of State of Cal. v. Hyatt*, 407 P.3d 717, 733 (Nev. 2017), *rev'd on other grounds*, 587 U.S. 230 (2019); *Swinton Creek Nursery v. Edisto Farm Credit, ACA*, 514 S.E.2d 126, 130-31 (S.C. 1999).

Mag., Inc., 732 F. Supp. 322, 325 (N.D.N.Y. 1990); Restatement (Second) of Torts § 652D, cmt. b. The same is true for a website that publishes videos of women changing in a locker room without their consent.

Under the proper legal standard, the plaintiffs' allegations were sufficient to overcome a motion to dismiss on that claim. The plaintiffs alleged that MindGeek *itself* had wrongfully disclosed their private affairs, independent of any relationship it may have had with the person who filmed the videos. In particular, the plaintiffs alleged that MindGeek "knew or should have known" that the videos on its site "w[ere] filmed surreptitiously and without consent." ECF.99.at.7. They also alleged that MindGeek's "use of Plaintiff's identities … without permission" constituted "publication of their private affairs," which caused the plaintiffs "serious mental and emotional injuries and distress." ECF.99.at.10-11. And, in responding to MindGeek's motion to dismiss, the plaintiffs argued that they had stated a privacy claim based on MindGeek's "dissemination of a nonconsensual illicit video of the Plaintiffs." ECF.114.at.9-10. "[A]ccept[ing]" those allegations "as true" and "view[ing] the complaint in a light most favorable to the plaintiff[s]," the plaintiffs stated a claim for wrongful disclosure of private affairs. *Mylan*

Lab'ys, Inc. v. Matkari, 7 F.3d 1130, 1134 (4th Cir. 1993). This Court should reverse the district court's dismissal.

B. Although there is no need for this Court to reach the issue, section 230 would not bar the wrongful-disclosure claim.

1. Because the district court (improperly) dismissed the plaintiffs' wrongful-disclosure-of-private-facts claim under Rule 12(b)(6), it did not reach the question whether section 230 supplies a defense to that claim as a matter of law. *See* ECF.133.at.2.n.1. The court instead recognized that it would be improper to consider the companies' section 230 defense at the motion-to-dismiss stage. ECF.133.at.2.n.1. Nor did the district court consider the applicability of section 230 as to that claim at summary judgment. *See* ECF.635.at.8 (listing claims addressed at that point).

This Court should therefore reverse the district court's dismissal and remand so that the district court may consider the parties' section 230 arguments in the first instance. *See White v. BFI Waste Servs., LLC*, 375 F.3d 288, 292, 294, 301 (4th Cir. 2004); *Gonzalez v. Google LLC*, 2 F.4th 871, 880, 886 n.6 (9th Cir. 2021) (declining to reach applicability of section 230 defense after reinstating improperly dismissed claim), *reversed on other grounds by Twitter, Inc. v. Taamneh*, 598 U.S. 471 (2023); *NAACP v. Bureau of the*

Census, 945 F.3d 183, 193 (4th Cir. 2019) (declining to consider "alternative grounds" for dismissal of claims that the district court had not considered).[12]

2. A remand would be anything but futile. Section 230 does not bar the plaintiffs' wrongful-disclosure claim because the statute expressly provides that companies may be held liable for willfully disseminating unlawfully intercepted information, and there is evidence showing that this is what happened here.

Section 230 must be read as an "integrated whole." *Hepp v. Facebook*, 14 F.4th 204, 210 (3d Cir. 2021). That means reading not only the text of subsection (c)(1), but also the text of the five rules of construction that Congress added in subsection (e), each of which begins with the phrase: "Nothing in this section shall be construed." In using this language, as this Court has already recognized, Congress made clear that "§ 230(e) does not establish an exception to a prohibition that would otherwise reach the conduct excepted." *Henderson*, 53 F.4th at 123 n.17. Instead, this language "suggests

[12] Even if it were appropriate to consider the companies' section 230 defense at the motion-to-dismiss stage, dismissal would be appropriate only if "the statute's barrier to suit is evident from the face of the complaint." *Marshall's Locksmith Serv. Inc. v. Google, LLC*, 925 F.3d 1263, 1267 (D.C. Cir. 2019); *see also Hammock v. Watts*, 146 F.4th 349, 367 (4th Cir. 2025). As we explain, the face of the complaint—as well as the summary judgment record—demonstrate that section 230 does *not* apply.

a clarification of the meaning of § 230[(c)(1)] rather than an exception to its coverage." *Id.* Or as another circuit has made the same point: The clarifications in subsection (e) "cabin[] the reach of the Act's liability provisions," *Hepp*, 14 F.4th at 209, by identifying conduct that is not covered by subsection (c)(1)'s defense.

The key provision here is subsection (e)(4), the Communications Privacy clarification. It explains that "nothing in" section 230 "limit[s] the application of" the Electronic Communications Privacy Act "or any similar State law." Whereas other provisions clarify that section 230 may not be raised as a defense against specific causes of action, *see, e.g.*, 47 U.S.C. § 230(e)(1) (clarifying that section 230 may not be raised as a defense to an "enforcement" action based on a violation of a "Federal criminal statute"); § 230(e)(5) (clarifying that section 230 may not be raised as a defense to a "claim in a civil action brought under section 1595 of title 18, if the conduct underlying the claim" violates the federal sex-trafficking laws), the Communications Privacy clarification explains that section 230 does not affect the "application" of the ECPA and similar state laws at all. The conduct that those laws target thus "fall[s] outside" the defense's scope altogether. *Hepp*, 14 F.4th at 209.

And sensibly so. The ECPA "creates liability for those who wilfully disseminate the contents of unlawfully intercepted information." *Doe v. GTE Corp.*, 347 F.3d 655, 658-59 (7th Cir. 2003); *see also* 18 U.S.C. § 2511(1)(c) (prohibiting the intentional disclosure of unlawfully intercepted communication if such person "know[s] or ha[s] reason to know that the information was obtained" illegally). In clarifying that this conduct falls outside section 230's scope, Congress recognized that the ECPA does not treat violators as "the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1). That's because liability for conduct that violates the ECPA isn't based on the "content of the speech published." *Henderson*, 53 F.4th at 122 (emphasis removed). It is based on the unlawful provenance of the recording and specifically what the violator knew or had reason to know about that unlawful provenance.

The section 230 analysis of the plaintiffs' disclosure-of-private-facts claims is thus straightforward. To prevail on their section 230 defense as a matter of law, the porn companies must show that there is no set of facts that would defeat this defense. *See Ray Commc'ns, Inc. v. Clear Channel Commc'ns, Inc.*, 673 F.3d 294, 299 (4th Cir. 2012). They cannot do so. The plaintiffs alleged that the companies engaged in conduct that violated the

ECPA (and similar state laws). *See* ECF.99.at.6-7 (alleging that the companies "disseminate[d]" videos that they "knew or should have known" were "filmed surreptitiously and without consent"). And on the summary-judgment record, a jury could easily find the same. After all, the intentional dissemination of a surreptitiously filmed video of "undressed players" in "locker rooms" has already been recognized to violate the ECPA. *GTE*, 347 F.3d at 656; *see also Doe v. Smith*, 429 F.3d 706, 707, 709 (7th Cir. 2005) (allegations that ex-boyfriend electronically distributed hidden-camera sex tape of plaintiff stated claim under ECPA).[13] So the only question is whether a reasonable jury could conclude that the companies knew or had reason to know that the videos had been unlawfully intercepted. *See* 18 U.S.C. § 2511(1)(c). It plainly could: [redacted]

[13] It also violates similar state laws. *See, e.g.*, S.C. Code Ann. § 17-30-20(3); S.C. Code Ann. § 16-17-470(C); Ky. Rev. Stat. Ann. § 526.060; Nev. Rev. St. § 200.650; Tex. Penal Code Ann. § 16.02(b)(2).

Because a reasonable jury could find that the conduct giving rise to liability on the plaintiffs' wrongful-disclosure claim violates the ECPA, the jury could find that the companies engaged in conduct that is outside section 230(c)(1)'s scope. They are therefore not entitled to prevail on their section 230 defense as a matter of law.

CONCLUSION

This Court should reverse the district court's judgment.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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