

18-396

In the United States Court of Appeals
for the Second Circuit

MATTHEW HERRICK,
Plaintiff-Appellant,

v.

**GRINDR LLC, KL GRINDR HOLDINGS INC.,
GRINDR HOLDING COMPANY,**
Defendants-Appellees

On Appeal from the U.S. District Court, S.D. of New York
Case No. 1:17-cv-00932-VEC, Honorable Valerie E. Caproni

**BRIEF OF *AMICI CURIAE* BREAK THE CYCLE, NATIONAL ASSOCIATION
OF WOMEN LAWYERS, NATIONAL NETWORK TO END DOMESTIC
VIOLENCE, LAURA'S HOUSE, LEGAL AID SOCIETY OF ORANGE COUNTY,
AND PUBLIC LAW CENTER IN SUPPORT OF PLAINTIFF MATTHEW
HERRICK, URGING REVERSAL OF THE ORDER DISMISSING WITHOUT
LEAVE TO AMEND**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the undersigned counsel for *Amici Curiae* Break the Cycle, National Association of Women Lawyers, National Network to End Domestic Violence, Laura's House, Legal Aid Society of Orange County, and Public Law Center certifies the following: there are no parent companies of any of these entities, and no publicly held company owns ten percent (10%) or more of any of these entities.

Dated: May 31, 2018

Respectfully submitted,

/s/ Mary-Christine Sungaila

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INTERESTS OF *AMICI CURIAE*¹

Amici Curiae are local and national domestic violence organizations, pro bono legal services organizations, and a bar association that have each identified this case as one that may impact the various groups or individuals they serve or represent, and therefore each of these entities is interested in the outcome of this case. *Amici Curiae* and their interests are further described in the Brief's Addendum.

SUMMARY OF ARGUMENT

Amici Curiae, local and national domestic violence organizations, pro bono legal services organizations, and the National Association of Women Lawyers, file this brief to (1) describe the use of technology, including the Internet, by abusers as tools for dating and domestic violence, (2) explain the need for effective strategies to combat that abuse, (3) highlight the importance of this case to victims of online abuse, and (4) provide an analysis of why, given the circumstances alleged here—including 100 reports of impersonation and fake accounts over a three-month period, further correspondence from plaintiff's lawyer, and a restraining order from a New York state court, with no action by Grindr—leave to amend was improperly denied in this case.

¹ No counsel for a party authored this brief in whole or in part, and no party, party's counsel, or any person other than *Amici Curiae* or their counsel contributed money intended to fund preparation or submission of this brief. This brief is filed with consent of the parties.

FACTUAL BACKGROUND²

Grindr App & Its Functionality. Grindr is a dating and “hook-up” app that uses a “geolocation code” to match gay and bisexual men present in a given geographic area. Am. Compl. ¶¶ 1, 3, 21–22. Grindr’s geolocation technology retrieves the latitude and longitude of a user’s mobile device without prompting from the user, and selects potential matches based on users’ distance from each other. *Id.* ¶ 23. After Grindr matches two users, Grindr facilitates a meeting by allowing a matched user, via the app’s “direct messag[ing]” feature, to generate and send a map showing the geographical relation of the matched users. *Id.* ¶¶ 24, 52. Grindr represents in its “advertising and community values page” that “it protects users from ‘behaviors that endanger them.’” *Id.* ¶ 40. Grindr’s website also states that Grindr has a “system of digital and human screening tools to protect [its] users from actions and behaviors that endanger them.” *Id.* ¶ 41.

To create a Grindr account, users must accept the terms of service and provide an e-mail address, date of birth, and self-selected password. *Id.* ¶ 32. Thereafter, users personalize their Grindr profile, creating a display name, profile photo, and an “about me” section. *Id.* ¶ 32. The remainder of a user’s profile is created by the user selecting Grindr-created criteria from drop-down menus, such

² This account is based on the allegations in the First Amended Complaint, which must be taken as true at this stage. *See Litwin v. Blackstone Grp., L.P.*, 634 F.3d 706, 715 (2d Cir. 2011).

as a user's physical characteristics and sexual preferences. *Id.* ¶ 32. Once a user has created a Grindr profile, Grindr's primary user interface displays multiple clickable icons, which show pictures and names of other users, arranged from nearest to farthest away. *Id.* ¶ 31. These clickable icons lead to further information about a particular user (such as the user's physical attributes) and to direct-messaging features that allow users to chat with each other. *Id.* ¶¶ 31, 51.

Prior Notice of Grindr's Safety & Privacy Issues. In 2014, Grindr received negative publicity because of "privacy vulnerabilities" that allowed for "precise geographical pinpointing of individual users." *Id.* ¶ 37. Despite "notice" of these issues, Grindr did not "fix the problems"; reportedly, pinpointing is still possible "even when users disable the 'show distance' option to hide their location." *Id.* ¶ 37. Various crimes have been linked to the app as well. *Id.* ¶ 39. A minor who used Grindr in 2012 was sexually assaulted by two adult males he met through the app; a serial killer used Grindr to "carry out his sick fantasies, drugging, raping, filming," and murdering men that he met through the app; and the top 25 violent crimes committed through Grindr are ranked on a website devoted to chronicling Grindr-related crimes. *Id.* ¶ 39.

Herrick Joins Grindr. Plaintiff Matthew Herrick ("Herrick") joined Grindr in 2011 and met a man on Grindr in June 2015. *Id.* ¶¶ 46, 48. The two began

dating, their relationship became exclusive, and Herrick removed his Grindr profile in November 2015. *Id.* ¶ 48. The relationship ended around October 2016. *Id.* ¶ 49.

Herrick's Ex-Boyfriend Impersonates Him on Grindr, Opening Fake Accounts That Drive Scores of Men to Herrick's Home and Work. Soon after the relationship ended, Herrick's "then-recent ex-boyfriend" (the "Ex") began using Grindr to impersonate Herrick. *Id.* ¶ 49. Various impersonating profiles included salacious profile names, photos of Herrick, and accurate descriptions of Herrick's physical characteristics, and stated that Herrick was "hosting"—i.e., inviting matches to meet at Herrick's location. *Id.* ¶¶ 50–51, 147, 150. Some of these fake profiles even presented Herrick as "HIV positive"—which he is not—and claimed that he was interested in "hardcore and unprotected sex"; "many fantasy scenes," including a "rape fantasy"; and "kink[y]" sexual activities, including "fisting" ("sex acts involving hand insertion") and "watersports" ("sex acts involving urine") *Id.* ¶¶ 50, 51, 62, 67 & 50 nn. 6, 7.

From October 2016 to March 2017, Grindr's geolocation function directed "approximately 1100 strangers to [Herrick's] home and work," and "direct messages were used to transmit maps" of Herrick's locations. *Id.* ¶¶ 49, 52–74. As many as 16 individuals have visited Herrick in a day, with around four to eight persons showing up daily at Herrick's home, and around the same number of individuals showing up daily at Herrick's work. *Id.* ¶¶ 5, 54.

Herrick posted a sign outside of his residence, telling visitors about the fake Grindr accounts and asking them not to enter his apartment building. *Id.* ¶ 65. The sign has been ignored, and a Grindr user once even “ripped the sign off.” *Id.* ¶ 65. Further, many of these individuals refused to leave even after being told that Herrick was being impersonated on Grindr, some turned violent after being told about the fake Grindr profiles, and some showed up expecting that Herrick would provide them with illegal drugs. *Id.* ¶¶ 55, 59, 61, 64. The Ex used the “direct messag[ing] feature . . . to precondition these visitors to expect” Herrick’s “resistance as part of an agreed upon rape fantasy or role play,” and to expect illegal drugs “based on representations made on Grindr”—which itself “developed new icons that signify various drugs offered through the App.” *Id.* ¶¶ 62, 63.

Grindr Takes No Action & Herrick Remains Exposed to Danger. Herrick reported the abusive accounts to Grindr approximately 50 times from November 2016 to January 2017. *Id.* ¶ 69. Grindr also received “numerous” reports from third parties, including Herrick’s sister and roommates, who have been harassed by men seeking Herrick. *Id.* ¶ 70. All told, Grindr received reports approximately “100 times.” *Id.* ¶¶ 8, 81. Grindr acknowledged receipt of the reports through an auto-generated reply, but has taken no further action. *Id.* ¶ 71. In late January 2017, Herrick’s counsel sent Grindr a cease and desist and preservation letter. *Id.* ¶ 74.

Herrick filed around 14 police reports and petitioned the New York State Supreme Court for a temporary restraining order requiring Grindr to disable the impersonating profiles. *Id.* ¶¶ 73, 75. The petition was granted, but Grindr failed to comply with the temporary restraining order after it was issued, and the temporary restraining order expired when Grindr removed this action to the Southern District of New York in February 2017. *Id.* ¶¶ 77, 78.

Herrick has provided the “Grindr Defendants with the [physical] addresses from where the offending account is most likely controlled as well as [Herrick’s] home and work addresses where the unwanted visitors are sent.” *Id.* ¶ 85. Grindr’s “geolocation technology” allows it to “flag” instances when “the offending account is used at the specific address.” *Id.* ¶ 85. Accordingly, Grindr could take a number of “basic measures,” such as “notify[ing] users in [Herrick’s] region” about the impersonating accounts. *Id.* ¶ 86. Instead, Grindr has done nothing. *Id.* ¶¶ 71, 86.

Herrick previously carried on a “quiet and low-key life.” *Id.* ¶ 93. Now, he suffers from “serious pain and mental distress as a result of Grindr’s role in facilitating this incessant nightmare.” *Id.* ¶¶ 12, 92. Herrick has also lost job opportunities and income, including a “sponsorship with a South African touring company.” *Id.* ¶ 94. Herrick remains in “danger of immediate and severe harm”—with over 1000 “men, some on drugs, some aggressive and violent,” continuing “to track” Herrick “at his home and work demanding sex.” *Id.* ¶ 96.

LEGAL DISCUSSION

I. The Expanding Role of Technology in Dating and Domestic Violence.

A. As technology becomes more ubiquitous, it has become the perfect tool for abusers.

While this case does not involve allegations of violence during an ongoing dating relationship,³ technology plays a significant role in domestic violence, and it is important for the Court to understand this greater context in deciding this case.

One in four women and one in seven men “have been victims of severe physical violence by an intimate partner in their lifetime.” National Coalition Against Domestic Violence, *National Statistics*, <https://ncadv.org/statistics> (last visited May 25, 2018). Domestic violence is a public health epidemic that claims 7 million new victims every year, across all age, race, gender, sexual orientation, and socioeconomic groups. *See* Location Privacy Protection Act of 2014 Hearing: Hearing on S. 2171 Before the Subcomm. on Privacy, Technology, and the Law of the S. Comm. on the Judiciary, 113th Cong. (June 4, 2014) (testimony of Cindy Southworth, Vice President of Development and Innovation, National Network to

³ Nonetheless, as with the Ex’s post-separation conduct here, domestic abuse frequently becomes particularly severe after separation; indeed, the time period after separation is widely acknowledged to be the most dangerous and potentially lethal for domestic violence victims. *See* Dutton, M. A., & Goodman, *Coercion in Intimate Partner Violence: Toward a New Conceptualization*, 52 *Sex Roles* 743, 743 (2005); Peter G. Jaffe, et al., *Common Misconceptions in Addressing Domestic Violence in Child Custody Disputes*, *Juvenile & Family Court Journal* 57 (Fall 2003) (observing that “separation may be a signal to the perpetrator to escalate his behavior in an attempt to continue to control or punish his partner for leaving”).

End Domestic Violence). In fact, intimate-partner-related violence is the chief cause of homicides of women in the United States. *See* Centers for Disease Control and Prevention, *Racial and Ethnic Differences in Homicides of Adult Women and the Role of Intimate Partner Violence—United States, 2003–2014*, https://www.cdc.gov/mmwr/volumes/66/wr/mm6628a1.htm?s_cid=mm6628a1_w (last visited May 25, 2018).

Domestic violence, at its core, is about gaining control over another person through an ongoing strategy of intimidation and isolation, including verbal threats, stalking behavior, excessive monitoring of a partner’s movements and activity, repeated accusations of infidelity, and physical violence. *See* Evan Stark, *Coercive Control: How Men Entrap Women in Personal Life* 5 (2007); Power and Control Wheel: On Technology and Abuse, nnedv.org/safetynet (last visited May 22, 2018).

“New technologies—social networking sites, texts, cell phones, and e-mails—have given abusers another way to control, degrade, and frighten their partners. These tools . . . have allowed abusers to harass their victims anywhere and at any time, even when they’re apart.” Janine Zweig & Meredith Dank, *Teen Dating Abuse and Harassment in the Digital World* (Urban Institute Feb. 2013); *id.* (“Abusers use technology to stalk their partners, send them degrading messages, embarrass them publicly, and pressure them for sex or sexually explicit photos.”);

Research Findings: Tech Abuse in Teen Relationships Study 7 (Fifth & Pacific Companies, Inc. Jan. 2007), <https://www.breakthecycle.org/sites/default/files/pdf/survey-lina-tech-2007.pdf> (last visited May 21, 2018) (“This research provides the first clear evidence that technology has made teen dating abuse more pervasive and hidden. Teens believe that dating abuse via technology is a serious problem across a broad array of everyday tech activities- emailing, texting, IMing, phoning, and community networking.”); K.E. Stonard, et al., *The Relevance of Technology to the Nature, Prevalence and Impact of Adolescent Dating Violence and Abuse: A research synthesis*, 19 *Aggression & Violent Behavior* 390, 410 (2014) (observing that electronic communication technology “can be used for abusive or controlling behaviors within adolescent dating relationships,” most commonly through phone calls or text messaging); Michelle Miller-Day & Sam Dorros, *Intimate Partner Violence: An Overview* (forthcoming 2018) (manuscript at 10) (on file with author) (finding that “7 out of 10 students who attend high school in Orange County report having experienced some type of hurtful behavior in their dating relationships in high school”; this hurtful behavior tends to “begin at 15.5 years old, but can start as young as 11 years old”).⁴

⁴ Because teens and young adults are digital natives, most of the studies of the prevalence and impact of online abusive behavior have focused on this age bracket. Indeed, young women ages 18 to 24 are experiencing electronic stalking through e-mail, text messaging, and social media at levels well beyond any other demographic group. See Location Privacy Protection Act of 2014 Hearing: Hearing

Online, abusers may impersonate their victims, post false and hurtful information on blogs or websites, make threats via email, monitor a victim's location or internet activity with spyware or other tracking technology, or use websites to encourage strangers to harass the victim. *See* Power and Control Wheel: On Technology and Abuse, nnedv.org/safetynet (last visited May 22, 2018); *see also* Kaofeng Lee & Jane Anderson, *The Internet and Intimate Partner Violence: Technology Changes, Abuse Doesn't*, *Criminal Justice* 28, 29 (Summer 2016) ("In intimate partner violence, as with other tactics of abuse, the goal of the abuser in misusing technology and online spaces is to exert power and control over

on S. 2171 Before the Subcomm. on Privacy, Technology, and the Law of the S. Comm. on the Judiciary, 113th Cong. (June 4, 2014) (testimony of Bea Hanson, Principal Deputy Director, Office on Violence Against Women, Department of Justice). But "any teen can be a victim of dating abuse and harassment through technology. Victims include girls and boys, middle school and high school students, and teens of all races and sexual orientations." Janine Zweig & Meredith Dank, *Teen Dating Abuse and Harassment in the Digital World* (Urban Institute Feb. 2013). Data from a 2007 survey showed that nearly one in five teens in a relationship say that their partner has used a cellphone or the Internet to spread rumors about them, or used a networking site to harass or put them down, and more than one in ten reported that a partner has shared private or embarrassing pictures of them. *Research Findings: Tech Abuse in Teen Relationships Study* 12 (Fifth & Pacific Companies, Inc. Jan. 2007). According to one survey, "[o]ne in four dating teens is abused or harassed online or through texts by their partners." Janine Zweig & Meredith Dank, *Teen Dating Abuse and Harassment in the Digital World* 11 (Urban Institute Feb. 2013); *see also* Joris Van Ouytsel, et al., *Cyber Dating Abuse Victimization Among Secondary School Students from a Lifestyle-Routine Activities Theory*, *Journal of Interpersonal Violence* 2 (Feb. 2016) ("Cyber dating abuse is defined as 'the control, harassment, stalking, and abuse of one's dating partner via technology and social media.' One of the scarce studies on its prevalence found that 26% of teenagers in a dating relationship reported being a victim.").

the victim Because so many people live their lives on the Internet, it is a treasure trove of information, keeping the abuser informed and in control of the victim.”).

Abusers will create fake social media accounts or e-mail addresses to threaten and harass their victims; they also may “send negative messages about the victim or share intimate photos without consent to family, friends, coworkers, or employers with the goal of ruining the victim’s reputation, getting the person fired, or humiliating the victim.”⁵ Kaofeng Lee & Jane Anderson, *The Internet and Intimate Partner Violence: Technology Changes, Abuse Doesn’t*, *Criminal Justice* 29 (Summer 2016). As in Herrick’s case, “[a]busers have created fake accounts pretending to be the victim on dating sites, porn sites, or even mainstream social media sites and encouraged others to harass the victim. In addition to posting sexually explicit images, they will post personally identifying information, such as phone numbers or home addresses, encouraging others to contact the survivor,

⁵ Among college students, “[s]ome of the most common [digital dating abuse] behaviors reported included monitoring a dating partner’s whereabouts, monitoring with whom a dating partner is friends and/or talks to, and snooping into a dating partner’s private information using digital media.” Lauren A. Reed, et al., *Snooping and Sexting: Digital Media as a Context for Dating Aggression and Abuse Among College Students* 13 (Sage 2016). According to one study of thousands of middle- and high-school students, “the most frequent form of harassment or abuse was tampering with a partner’s social networking account without permission”; nearly “1 in 10 teens in relationships report[ed] having this happen to them in the past year.” Janine Zweig & Meredith Dank, *Teen Dating Abuse and Harassment in the Digital World* (Urban Institute Feb. 2013).

implying that the victim is offering sexual favors, including desiring ‘rape fantasies.’ Survivors have been inundated with phone calls, e-mails, and even strangers showing up at their house.” Kaofeng Lee & Jane Anderson, *The Internet and Intimate Partner Violence: Technology Changes, Abuse Doesn’t*, Criminal Justice 29 (Summer 2016).

Advances in technology provide even more avenues for abuse. “Deepfake” technology, for example, can be used to map a victim’s face onto the body of a performer in a porn video, thereby humiliating the victim through wholly manufactured involuntary pornography (without the need for access to any nude or intimate images of the victim). See Adam Dodge & Erica Johnstone, *Using Fake Technology to Perpetrate Intimate Partner Abuse*, Domestic Violence Advisory, http://withoutmyconsent.org/sites/default/files/blog_post/2018-04-25_deepfake_domestic_violence_advisory.pdf (last visited May 22, 2018) (“Deep fake technology leverages machine learning techniques to manufacture facts about the world. It manipulates video and audio so individuals appear doing and saying things they never did or said”; this technique can be used to perpetrate intimate partner abuse, “by making it appear as though one’s partner was in, for example, a pornographic video that they were not in fact in”).

Abusers may also cyberstalk, (1) using location-tracking features on victims’ phones, tablets, computers, or even their cars, or (2) loading spyware onto a

partner's computer or smartphone, which will give abusers access to the victim's location, photos, e-mails, phone calls, and voicemails.⁶ See generally Michael L. Pittaro, *Cyber stalking: An Analysis of Online Harassment and Intimidation*, Int'l J. Cyber Criminology 180 (2007); Joseph Cox, *I Tracked Myself With \$170 Smartphone Spyware that Anyone Can Buy*, Motherboard (Feb. 22, 2017), https://motherboard.vice.com/en_us/article/aeyea8/i-tracked-myself-with-dollar170-smartphone-spyware-that-anyone-can-buy (last visited May 22, 2018); see also Jennifer Valentino-DeVries, *Hundreds of Apps Can Empower Stalkers to Track Their Victims*, The New York Times (May 19, 2018) (observing that over “200 apps and services offer would-be stalkers a variety of electronic capabilities, including basic location tracking, harvesting texts and secretly recording video”), <https://www.nytimes.com/2018/05/19/technology/phone-apps-stalking.html> (last visited May 25, 2018).

“Digital technologies offer perpetrators of offline dating violence additional ways to humiliate [a] partner publicly”; some forms of online abuse (such as posting an intimate picture or insult) provide the perpetrator the opportunity to inflict a different type or level of harm, “because online communication is more

⁶ According to one survey of over 70 domestic violence shelters, including some in New York, 85 percent of the surveyed shelters are working directly with victims whose abusers tracked them using GPS. *Smartphones Are Used To Stalk, Control Domestic Abuse Victims*, NPR, <https://www.npr.org/sections/alltechconsidered/2014/09/15/346149979/smartphones-are-used-to-stalk-control-domestic-abuse-victims> (last visited May 25, 2018).

permanent, easily accessible and shareable” and “the perpetrator can target the victim 24/7 without having to be physically present.” Joris Van Ouytsel, et al., *Cyber Dating Abuse Victimization Among Secondary School Students from a Lifestyle-Routine Activities Theory*, *Journal of Interpersonal Violence* 2 (Feb. 2016). Indeed, “because electronic communications can occur at any time, regardless of physical proximity, and with rapid-fire intensity, electronic victimization may be particularly pernicious”; “electronic media also create unique opportunities for highly public forms of humiliation through unwanted postings, pictures, and video recordings on social networking sites, and for serious deception if . . . dating partners assume one’s own identity, or use a false identity when interacting electronically.” Diana C. Bennett, et al., *College Students’ Electronic Victimization in Friendships and Dating Relationships: Anticipated Distress and Associations with Risky Behaviors*, in *Violence and Victims* 411 (Springer Publishing 2011).

B. The perpetration of abuse online often corresponds with abuse in the physical world.

“[W]hile technology has given abusers a new way to control and intimidate their partners, it’s rarely the only way they inflict harm”; according to one study by the Urban Institute, for example, “[a]bout 84 percent of [teen] victims are psychologically abused by their partners, half are physically abused, and one-third experience sexual coercion.” Janine Zweig & Meredith Dank, *Teen Dating Abuse*

and Harassment in the Digital World (Urban Institute Feb. 2013). A study of college students' dating experiences has similarly revealed a strong correlation between online and real world abuse: "intimate partner cyber aggression victimization was [found to be] significantly related to in-person experiences of intimate partner psychological, physical, and sexual aggression;" in fact, nearly all respondents who reported experiencing in-person violence also reported experiencing cyber aggression from their intimate partner. Alison Marganski, PhD & Lisa Melander, PhD, *Intimate Partner Violence Victimization in the Cyber and Real World: Examining the Extent of Cyber Aggression Experiences and Its Association with In-Person Dating Violence*, *Journal of Interpersonal Violence* 1087 (Sage 2015).

In short, "[h]arassment and abuse in the digital world" is often "a red flag that something even more troubling may be happening. Beyond a cruel Facebook insult or harassing texts, a deeper pattern of abuse may be unfolding offline and in person." Janine Zweig & Meredith Dank, *Teen Dating Abuse and Harassment in the Digital World* (Urban Institute Feb. 2013). "Victims of digital abuse and harassment are 2 times as likely to be physically abused, 2.5 times as likely to be psychologically abused, and 5 times as likely to be sexually coerced." *Id.*; see also Joris Van Ouysel, et al., *Cyber Dating Abuse Victimization Among Secondary School Students from a Lifestyle-Routine Activities Theory*, *Journal of*

Interpersonal Violence 2 (Feb. 2016) (“Studies indicate that cyber dating abuse victimization among adolescents is linked with experiences of offline dating violence. Online types of abuse might be an extension of offline forms of violence”); Janine M. Zweig, et al., *The Rate of Cyber Dating Abuse Among Teens and How it Relates to Other Forms of Dating Violence*, Journal of Youth and Adolescence 21 (2010) (“Victims of sexual cyber dating abuse are significantly more likely than non-victims of sexual cyber abuse to report non-sexual cyber dating abuse, physical violence, other psychological abuse, and sexual coercion against the same partner during the same time period.”).

In particular, there is a correlation between online abuse and other forms of psychological abuse being inflicted offline. See Lauren A. Reed, et al., *Snooping and Sexting: Digital Media as a Context for Dating Aggression and Abuse Among College Students* 17 (Sage 2016) (digital dating abuse “seems to have the strongest association with psychological abuse, indicating that these may be similar behaviors in different contexts”); Diana C. Bennett, et al., *College Students’ Electronic Victimization in Friendships and Dating Relationships: Anticipated Distress and Associations with Risky Behaviors, in Violence and Victims* 411 (Springer Publishing 2011) (“Electronic aggression includes similar elements as relational and psychological aggression- namely, revealing private information,

insulting and derogatory language, humiliation, obsessive monitoring, and threats.”).

Thus, “use of technologies such as the Internet enable[] control by partners to extend into every aspect of adolescents’ [and others’] social lives and . . . offline environment.” K.E. Stonard, et al, *The Relevance of Technology to the Nature, Prevalence and Impact of Adolescent Dating Violence and Abuse: A research synthesis*, 19 *Aggression & Violent Behavior* 390, 410 (2014).

C. Many online providers have responded to the potential for their platforms to be used as a tool for abusers by providing avenues for recipients of abuse to lodge complaints.

“While technology may open up avenues for dating abuse and harassment, it can also provide the most effective solutions to prevent it.” Janine Zweig & Meredith Dank, *Teen Dating Abuse and Harassment in the Digital World* (Urban Institute Feb. 2013). Among other things, “[t]hese same digital platforms can be tools to educate teens [and other victims], spread the word about where to go for help, and give victims and witnesses a safe way to report abuse.” *Id.*

Online providers like Twitter and Google have developed policies designed to prevent abuse on their platforms and to help victims of such abuse. Twitter recently unveiled an update making it easier for users to report threats to law enforcement. *See Sarah Perez, Twitter’s Latest Addition Makes It Easier To Report Threats On Its Service To The Police*, TechCrunch (Mar. 17, 2015),

<https://techcrunch.com/2015/03/17/twitters-latest-addition-makes-it-easier-to-report-threats-on-its-service-to-the-police/> (last visited May 25, 2018). For its part, Google has created a function on its platform to remove abusive content. Google, Legal Removal Requests, <https://support.google.com/legal/answer/3110420?hl=en> (last visited May 25, 2018).

Dating apps have also developed similar policies. A popular dating app, Tinder, permits its users to report impersonating profiles so that Tinder can “investigate the profile or user in question.” Tinder, *I want to report an impersonation or fake profile*, <https://www.help.tinder.com/hc/en-us/articles/115004950423-I-want-to-report-an-impersonation-or-fake-profile-> (last visited May 24, 2018). Additionally, “Scruff” and “Jack’d”—“hook-up” apps similar to Grindr—“employ staff who are responsive to user complaints,” “confirm the identity of the person making the complaint, navigate the complainant through their system to help them identify the offending user, and . . . locate and remove the offending profiles” within 24 hours. Am. Compl. ¶ 45.

D. Existing civil and criminal remedies do not sufficiently protect those subject to dating or domestic violence that is perpetrated through a third party.

Victims of domestic or dating violence, particularly teenage victims, often face high hurdles to obtain legal protection from their abusers. Teenagers in many states, for example, “cannot obtain restraining or protective orders.” *See* Ione

Curva, *Exposing the Invisibility of Teen Dating Violence in New Jersey*, 33 Women's Rts. L. Rep. 471, 474 (2012) (citing Roger J. R. Levesque, *Dating Violence, Adolescents, and the Law*, 4 Va. J. Soc. Pol'y & L. 339, 362–64 (1997)). Indeed, in the most recent iteration of a national survey detailing laws aimed at teen-dating violence, New York, Connecticut, and Vermont fell behind other States in the effort to combat teen-dating violence. *See Break the Cycle, 2010 State Law Report Cards* 10, 25–26, 77–78, 103–04 (2010). For instance, as recently as 2010, New York law did not specify whether protective orders could be granted against abusive minors, or the procedure for obtaining protective orders shielding minors from further abuse. *See id.* at 77.

Moreover, even when protection is potentially available under state law, there are additional obstacles unique to proving and preventing abuse occurring online. A “proponent of electronic evidence often has to swim against the tide of a judiciary that is highly skeptical of such evidence.” *See* Jonathan D. Frieden & Leigh M. Murray, *The Admissibility of Electronic Evidence Under the Federal Rules of Evidence*, 17 Richmond J. Law & Tech. 1, 8 (2011) (citing *Clair v. Johnny's Oyster & Shrimp, Inc.*, 76 F. Supp. 2d 773, 774–75 (S.D. Tex. 1999) (citing authenticity issues to exclude documents pulled from the Internet)). Additionally, retrieving forensic evidence from a digital device “can be expensive,” thereby precluding many low-income *pro se* litigants who cannot

afford to hire a forensic examiner from seeking a protective order in the first place. See Kaofeng Lee & Jane Anderson, *The Internet and Intimate Partner Violence: Technology Changes, Abuse Doesn't, Criminal Justice* 31 (Summer 2016).

Further, when online abuse is perpetrated anonymously, there can be a further roadblock: it can be quite difficult to obtain judicial relief, such as a temporary restraining order, against unidentifiable third parties. See, e.g., *Winterland Concessions Co. v. Geisel*, 511 F. Supp. 310, 311 (N.D. Ill. 1981) (observing that the court had previously “denied plaintiffs’ ex parte request for temporary injunctive relief” for failure to designate “any specific defendants”).

* * *

This Court should account for the realities of widespread use of technology to perpetrate dating abuse as well as gaps in available domestic violence legal protections when deciding whether Herrick could state a claim, and in fashioning this Circuit’s approach to the rights and responsibilities of online providers under the Communications Decency Act.

II. This Court Should Reverse the Dismissal Order—at the Very Least, Because Herrick Should Have Been Allowed to Amend His Complaint.

A. The district court dismissed the complaint without leave to amend based on a ground that this Court ordinarily deems inadequate.

When, as here, a party requests leave to amend its complaint, permission generally should be freely granted. See *Anderson News, L.L.C. v. Am. Media, Inc.*,

680 F.3d 162, 185 (2d Cir. 2012) (citing *Foman v. Davis*, 371 U.S. 178, 182 (1962); Fed. R. Civ. P. 15(a)(2)). This “permissive standard” mirrors this Court’s “strong preference for resolving disputes on the merits.” *Williams v. Citigroup Inc.*, 659 F.3d 208, 212–13 (2d Cir. 2011); accord *Foman*, 371 U.S. at 182 (observing that if “the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits”).

Consistent with Rule 15’s permissive standard, this Court has repeatedly held that it ordinarily “will not deem a request for leave to amend insufficient on the basis of form alone.” *Loreley Fin. (Jersey) No. 3 Ltd. v. Wells Fargo Sec., LLC*, 797 F.3d 160, 190 (2d Cir. 2015) (remanding for leave to amend even where, as here, the request was raised at the end of plaintiff’s brief opposing the motion to dismiss); see also *Ronzani v. Sanofi S.A.*, 899 F.2d 195, 198–99 (2d Cir. 1990) (holding that the district court erred by failing to grant leave to amend where, as here, the plaintiff did not formally move to replead—but did state in his opposition brief that he desired to replead if the motion to dismiss were to be granted).

The district court dismissed Herrick’s complaint without leave to amend because he “did not attach[] a proposed second amended complaint.” See *Herrick v. Grindr, LLC*, No. 17-CV-932 (VEC), 2018 WL 566457, at *14 (S.D.N.Y. Jan. 25, 2018). But there is no such requirement in this Circuit; all that was required

was for plaintiff to ask for leave to amend, which Herrick did in his opposition to the motion to dismiss. *See id.*, Docket No. 54 at 50; *see also Loreley Fin. (Jersey) No. 3 Ltd.*, 797 F.3d at 190. Herrick had only once tried his hand at amending the complaint; ordinarily, particularly in complex cases such as this, one more opportunity to amend is freely given. *See Loreley Fin. (Jersey) No. 3 Ltd.*, 797 F.3d at 191 (observing that, in complex cases, “pleading defects may not only be latent, and easily missed or misperceived without full briefing and judicial resolution; they may also be borderline, and hence subject to reasonable dispute”).

The district court’s order also fails to set forth the basis for the denial of leave to amend, such as “undue delay, bad faith, dilatory motive, [or] futility”; this too warrants a remand. *See id.* at 190; *see also Ronzani*, 899 F.2d at 198–99 (observing that where this Court cannot “make a determination that [plaintiff] could not correct deficiencies in his complaint,” the case should be remanded for further proceedings). At any rate, a “court of appeals exercises considerable discretion in addressing the question” of whether a request for leave to amend was soundly denied. *See Porat v. Lincoln Towers Cmty. Ass’n*, 464 F.3d 274, 276 (2d Cir. 2006). Indeed, even “where [a party’s] request [for leave to amend] gives no clue as to ‘how the complaint’s defects would be cured,’” this Court will still consider “other underlying issues like notice and futility.” *Loreley Fin. (Jersey)*

No. 3 Ltd., 797 F.3d at 190–91. As we now explain, permitting Herrick to replead would not necessarily be futile.

B. Amending the complaint would not be futile because Herrick could potentially state a claim that is not cloaked by the immunity provisions of the Communications Decency Act (“CDA”).

1. An exception to CDA immunity recognized by this Court is implicated by the allegations in the complaint.

The CDA shields a defendant “from publisher liability (with respect to web content provided by others) in its capacity as a provider of an interactive computer service.” *Ricci v. Teamsters Union Local 456*, 781 F.3d 25, 28 (2d Cir. 2015). Specifically, per Section 230 of the CDA, “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). Section 230 “shields conduct if the defendant (1) is a provider or user of an interactive computer service, (2) the claim is based on information provided by another information content provider and (3) the claim would treat [the defendant] as the publisher or speaker of that information.” *FTC v. LeadClick Media, LLC*, 838 F.3d 158, 173 (2d Cir. 2016) (internal quotations omitted).

This Court and others have recognized a category of claims that falls outside the scope of the CDA’s immunity provisions. An interactive computer service⁷

⁷ *Amici Curiae* assume for the sake of argument that Grindr is an “interactive computer service.” See 47 U.S.C. § 230(f)(2) (providing the statutory definition).

may be held liable where the plaintiff's claim is premised on the defendant's *own conduct*, not on its status as a publisher or speaker. See *LeadClick Media*, 838 F.3d at 176 (holding that CDA immunity is inapplicable where the defendant "is being held accountable for its *own*" *conduct* rather than "as a publisher or speaker of another's content"); *Doe v. Internet Brands, Inc.*, 824 F.3d 846, 851 (9th Cir. 2016) (concluding that "Jane Doe's negligent failure to warn claim" was not barred by the CDA because it did "not seek to hold [Defendant] Internet Brands liable as the 'publisher or speaker of any information provided by another information content provider'"); see also *FTC v. Accusearch Inc.*, 570 F.3d 1187, 1204 (10th Cir. 2009) (Tymkovitch, J., concurring) (arguing that the defendant was not entitled to CDA immunity because "the FTC sought and ultimately held [defendant] liable for its *conduct* rather than for the *content* of the information it was offering on [its] website").

2. Herrick could plausibly allege claims seeking to hold Grindr liable for conduct materially detached from any publishing or speaking activities immunized by the CDA.

To assess "whether the claim at issue [seeks] to hold the defendant liable" for CDA-immunized liability, this Court has observed that "what matters is whether the cause of action inherently requires the court to treat the defendant as the 'publisher or speaker' of content provided by another." *LeadClick Media*, 838 F.3d at 175. If the claim at issue is "premiered not on content but on [defendant's]

conduct,” the defendant is not shielded from liability by the CDA’s immunity provisions. *See id.*

In *Doe v. Internet Brands*, for example, the Ninth Circuit held that the CDA did not preclude a plaintiff from alleging a state law failure-to-warn claim against a website owner that obtained information “from an outside source about how third parties targeted and lured victims” through the website’s platform, reasoning that the gravamen of this claim did not seek to impose liability for defendant’s role as a “publisher or speaker” of third-party content, for its failure to remove that content, or for its failure to monitor third-party content. *See Internet Brands, Inc.*, 824 F.3d at 851; *see also Beckman v. Match.com, LLC*, 668 F. App’x 759, 760 (9th Cir. 2016) (granting plaintiff leave to amend where she intended to plead a failure-to-warn claim alleging that a dating website “had actual knowledge that [an individual] had identified and attacked other women using Match’s service prior to his attack on” plaintiff).

Here, the factual allegations in Herrick’s operative complaint (viewed in the light most favorable to the plaintiff, as is required at this early stage) indicate that some of Herrick’s claims rest in part on Grindr’s own tortious conduct rather than its status as a publisher or speaker—particularly Grindr’s conduct *after* Herrick, third parties, and Herrick’s attorney notified Grindr about the fake accounts. *See Am. Compl.* ¶¶ 8, 13, 32, 37, 42, 49, 71, 85, 86, 139, 171, 186, 207, 213.

For example, as in *Internet Brands* and *Match.com*, Herrick could plausibly plead a state law failure-to-warn claim. Herrick alleges that (1) he and Grindr had a special relationship imposing a duty on Grindr; (2) Grindr had notice of prior complaints concerning dangerous individuals using the app, both from Herrick himself and from numerous others; (3) he provided Grindr with adequate information to “flag” further impersonating accounts created by the Ex, through the use of Grindr’s own geolocation features; (4) Grindr had the ability to issue some type of warning notification; and (5) Grindr took no action on any of Herrick’s reports. *See Internet Brands, Inc.*, 824 F.3d at 851; *Match.com*, 668 F. App’x at 760; *Davis v. S. Nassau Communities Hosp.*, 26 N.Y.3d 563, 577 (2015) (finding a cognizable duty-to-warn claim arising from a special relationship); *Crosland v. New York City Transit Auth.*, 68 N.Y.2d 165, 170 (1986) (concluding defendant with special relationship to plaintiff could be held liable where negligence liability was grounded on failure to follow “common standards of behavior”); *see also* 14 Kreindler, et al., *New York Law of Torts* § 6:30 (Rev. Aug. 2017) (observing that *Crosland* found actionable negligence “because under the circumstances the failure to act violated ‘common standards of behavior.’”).⁸

⁸ As the district court observed, California law may potentially apply here due to the choice-of-law provision in Grindr’s Terms of Use. *See Herrick*, 2018 WL 566457, at *9 n.11. Under California law, which may be invoked on remand given Grindr’s Terms of Use, Herrick’s duty-to-warn claim could also be potentially actionable. *See, e.g., Johnson v. State*, 69 Cal. 2d 782, 786 (1968) (observing that

Moreover, under New York law, a “plaintiff has a cause of action for negligent infliction of emotional distress if she suffers an emotional injury from defendant’s breach of a duty which unreasonably endangered her own physical safety.” *Mortise v. United States*, 102 F.3d 693, 696 (2d Cir. 1996). Here, Herrick alleged all of the requisite elements: that Grindr had a cognizable duty to warn, that Grindr breached that duty by taking no action on Herrick’s multiple reports over several months, and that he suffered “serious pain and mental distress as a result of Grindr’s role in facilitating” dangerous and violent individuals to seek him at his home and work. *See id.* Herrick could therefore potentially state a claim for negligent infliction of emotional distress.

This Court should at the very least reverse and remand to permit Herrick to refine and replead the complaint in light of this exception to CDA immunity. *See Loreley Fin. (Jersey) No. 3 Ltd.*, 797 F.3d at 191 (where plaintiff’s position was at the very least “partially vindicate[d]” on appeal, this Court held that “remanding the case with instructions to grant the requested leave” was warranted).

Permitting Herrick to proceed on claims like these “would not discourage the core policy of section 230(c)”—i.e., “‘Good Samaritan’ filtering of third party content”—because these claims have “nothing to do with [Grindr’s] efforts, or lack thereof, to edit, monitor, or remove user generated content.” *See Internet Brands*,

California law “impose[s] a duty upon those who create a foreseeable peril, not readily discoverable by endangered persons, to warn them of such potential peril”).

Inc., 824 F.3d at 852. Nor would such claims impose a burdensome duty on Grindr to “conduct[] a detailed investigation” into the third-party content maintained on its app, as Herrick alleged that he provided Grindr with all the information necessary to pinpoint the impersonating accounts. *See id.*

CONCLUSION

For the foregoing reasons, *Amici Curiae* respectfully request that this Court reverse the district court’s dismissal order and remand with instructions allowing Plaintiff Herrick an opportunity to amend the complaint.

Respectfully submitted,

Dated: May 31, 2018

HAYNES AND BOONE, LLP

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Mary-Christine Sungaila
Counsel for *Amici Curiae*

CERTIFICATE OF COMPLIANCE

This motion complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(a)(5) and Second Circuit Rule 29.1(c) because, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f), it contains 6,757 words typed in 14 point Times New Roman font, as determined by the word-count function of Microsoft Word 2010.

Dated: May 31, 2018

HAYNES AND BOONE, LLP

By: /s/ Mary-Christine Sungaila
Mary-Christine Sungaila
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CERTIFICATE OF SERVICE

I hereby certify that on May 31, 2018, an electronic copy of the foregoing was filed with the Clerk of Court for the United States Court of Appeals for the Second Circuit using the appellate CM/ECF system.

I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished on them via the appellate CM/ECF system.

Dated: May 31, 2018

HAYNES AND BOONE, LLP

By: /s/ Mary-Christine Sungaila
Mary-Christine Sungaila
Counsel for *Amici Curiae*

ADDENDUM

Break the Cycle is an innovative national nonprofit organization whose mission is to engage, educate, and empower youth to build lives and communities free from domestic and dating violence. Founded in 1996, Break the Cycle is the nation's first organization to provide domestic-violence- and dating-abuse legal services exclusively to young people, ages 12 to 24. Our domestic violence prevention and early intervention services include education, outreach, peer leadership opportunities, and comprehensive, free legal services for young victims of abuse. Break the Cycle works on both a national and local level to provide youth with resources they need to end dating abuse and to educate teachers, parents, social service providers, healthcare professionals, and other caring adults about dating abuse, domestic violence, healthy relationships, and the legal options of young victims. Break the Cycle also provides technical assistance and training to criminal justice professionals on the use and misuse of technology in dating violence cases and to domestic violence service providers around dating abuse generally. Break the Cycle is an active participant in the national and D.C. communities of advocates working to shape public policies around dating abuse, domestic violence, sexual assault, and stalking.

The mission of the National Association of Women Lawyers (“NAWL”) is to provide leadership, a collective voice, and essential resources to advance women

in the legal profession and advocate for the equality of women under the law. Since 1899, NAWL has been empowering women in the legal profession, cultivating a diverse membership dedicated to equality, mutual support, and collective success. As part of its mission, NAWL promotes the interests of women and families by participation as *amicus curiae* in cases impacting their rights.

The National Network to End Domestic Violence (“NNEDV”) is a not-for-profit organization incorporated in the District of Columbia in 1994 to end domestic violence. (www.nnedv.org.) As a network of the 56 state and territorial domestic violence and dual domestic violence and sexual assault coalitions and their over 2,000 member programs, NNEDV serves as the national voice of millions of women, children, and men victimized by domestic violence. NNEDV was instrumental in promoting congressional enactment and eventual implementation of the Violence Against Women Acts of 1994, 2000, 2005, and 2013. Working with federal, state and local policy makers and domestic violence advocates throughout the nation, NNEDV also helps identify and promote policies and best practices to advance victim safety. WomensLaw, one of NNEDV’s signature projects, provides legal information about custody for 54 states and territories through WomensLaw.org, a website that is visited by more than 1.5 million individuals annually. NNEDV also corresponds with thousands of victims of domestic violence each year through the WomensLaw Email Hotline, a large

percentage of which are domestic violence survivors who have experienced online abuse facilitated by technology.

As technology becomes increasingly pervasive in our everyday lives, so does the opportunity for that technology to be misused in dangerous, frightening, and malicious ways. NNEDV encounters survivors of domestic violence who regularly face abuse facilitated by technology. Victims often lack legal options to stop the abuse or to obtain compensation for the harm that it causes. Abusers utilize this legal void to continue the abuse with near impunity. On behalf of victims of domestic violence, NNEDV has an interest in seeing that companies take reasonable steps to protect against the misuse of their products.

Laura's House provides unduplicated domestic violence-related services to the 3,190,400 residents of Orange County, California, the sixth largest county in the United States. Over the past 24 years, Laura's House has provided shelter and supportive services to more than 4,000 abused women and children, and counseling, life-skills education, and legal assistance to over 50,000 persons. Today, Laura's House continues to be the only state-approved comprehensive domestic violence agency in South Orange County, California. Annually, Laura's House provides residential shelter services, counseling and legal services to thousands of women, men, and children. Laura's House has identified this case as one that may impact the women, men, and children it serves.

Legal Aid Society of Orange County (“LASOC”) has provided free legal services to low-income residents in Orange County and Southeast Los Angeles since 1958. With limited resources, LASOC focuses its legal programs and services on the community’s most vulnerable population and tries to end clients’ cycle of poverty. Within those priority areas, LASOC prioritizes two areas of legal services: representation of domestic violence victims and tenants facing unlawful detainer proceedings. LASOC has at least one client who endured domestic violence and sought a protective order. LASOC’s client had been married nine years to her husband, who sponsored her immigration from India. The marriage quickly turned, and her husband began controlling and abusing her. Her husband has been arrested multiple times and has at least two criminal protective orders.

The Public Law Center (“PLC”) is a non-profit legal services organization in Santa Ana, California that provides free civil legal services to low-income residents of Orange County, California. The substantive work performed by PLC staff and volunteers is varied, including family law, immigration, health, housing, veterans, microbusiness and consumer. In PLC’s Family Law Unit, attorneys and staff regularly assist low-income clients who are seeking domestic violence restraining orders. Through that work, PLC has observed that the perceived anonymity of the Internet has emboldened abusers and provided them with the tools to stalk, harass, threaten, and disturb the peace of their victims. Even after the

family law court has issued a restraining order, survivors often must seek protection from criminal and civil courts, depending on the actions taken by the abuser.

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