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10 **IN THE UNITED STATES DISTRICT COURT**  
11 **NORTHERN DISTRICT OF CALIFORNIA**  
12 **OAKLAND DIVISION**

13 CHRISTOPHER CALISE and ANASTASIA  
14 GROSCHEM, Individually and On Behalf of  
15 All Others Similarly Situated,

16 Plaintiffs,

17 v.

18 META PLATFORMS, INC.,

19 Defendant.

CASE NO. 4:21-CV-06186-JSW

**BRIEF OF PROPOSED AMICUS CURIAE  
IN SUPPORT OF DEFENDANT'S  
MOTION TO CERTIFY ORDER FOR  
INTERLOCUTORY APPEAL UNDER 28  
U.S.C. § 1292(B)**

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    I. The Court’s determination that Plaintiffs sufficiently allege a breach of contract involves a “controlling question of law as to which there is substantial ground for difference of opinion,” the resolution of which will “materially advance” the resolution of this litigation.... 2

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1 **INTRODUCTION**

2 This Court should certify for interlocutory appeal its September 22, 2025 Order Granting in  
3 Part and Denying in Part Defendant Meta’s Motion to Dismiss Plaintiffs’ Amended Complaint,  
4 Dkt. 62. The Order presents a controlling question of law with profound implications for websites:  
5 whether terms of service and community standards create affirmative obligations on websites to  
6 combat alleged “scam” advertisements. Inconsistent results in these cases create confusion—while  
7 some courts may recognize that platform policies reserve discretion rather than impose affirmative  
8 duties, others, like this Court, treat aspirational commitments as binding promises. This places  
9 websites in the unenviable position of choosing between maintaining vague policies or inviting  
10 endless breach of contract claims that undermine Section 230’s core purpose of encouraging  
11 voluntary content moderation. Immediate appellate review would resolve this critical issue and  
12 materially advance the litigation’s resolution.

13 **STATEMENT OF INTEREST OF AMICUS CURIAE**

14 NetChoice is a national trade association of online businesses that share the goal of promoting  
15 free enterprise and free expression on the Internet. For over two decades, NetChoice has worked  
16 to ensure the Internet remains innovative and free. NetChoice advocates on behalf of its  
17 membership by, among other things, participating in litigation involving issues of vital concern to  
18 the online community and by filing amicus curiae briefs. A list of NetChoice’s members is  
19 available at: <https://tinyurl.com/yuwv2eat>.

20 Through this brief, NetChoice advocates for prompt interlocutory review of this Court’s  
21 September 22, 2025 Order, which will provide necessary guidance on a critically important legal  
22 issue. This Court should grant Meta’s Motion to Certify Order for Interlocutory Appeal Under 28  
23 U.S.C. §1292(b), Dkt. 71.

24 **ARGUMENT**

25 Courts may certify orders for interlocutory appeal where “[such order involves a controlling  
26 question of law as to which there is substantial ground for difference of opinion and . . . an  
27

1 immediate appeal from the order may materially advance the ultimate termination of the  
2 litigation.” 28 U.S.C. § 1292(b).

3 **I. The Court’s determination that Plaintiffs sufficiently allege a breach of contract**  
4 **involves a “controlling question of law as to which there is substantial ground**  
5 **for difference of opinion,” the resolution of which will “materially advance” the**  
6 **resolution of this litigation.**

7 Meta meets the three statutory factors for a court to certify an issue for interlocutory review.

8 First, whether a website’s terms of service and community standards create affirmative  
9 obligations presents a controlling question of law that merits interlocutory appeal under Section  
10 1292(b). An issue is a “controlling question of law” when its “resolution . . . on appeal could  
11 materially affect the outcome of litigation in the district court.” *In re Cement Antitrust Litig. (MDL*  
12 *No. 296)*, 673 F.2d 1020, 1026 (9th Cir. 1981). For example, “[a]n issue which could immediately  
13 end the case is a controlling question of law.” *Elia v. Roberts*, No. 1:16-CV-0557 AWI EPG, 2019  
14 WL 7048762, at \*2 (E.D. Cal. Dec. 23, 2019). And here, Plaintiffs’ two remaining claims—the  
15 breach of contract claim and the derivative breach of the covenant of good faith and fair dealing  
16 claim—depend on the interpretation of Meta’s affirmative obligations under its Terms of Service  
17 and Community Standards. This is precisely the type of determinative legal issue that courts have  
18 recognized as warranting interlocutory review. The district court’s resolution of this question  
19 determines whether Plaintiffs’ remaining claims can proceed or whether Defendant must continue  
20 to engage in costly litigation—a threshold issue that could potentially dispose of much of this  
21 litigation.

22 Second, there is substantial ground for difference of opinion as to whether its Terms of Service  
23 and Community Standards impose an enforceable legal duty on Meta. In fact, other cases in this  
24 very district have reached a different outcome on this issue. *See* Dkt. 71 at 6-7. “[W]hen novel  
25 legal issues are presented, on which fair-minded jurists might reach contradictory conclusions, a  
26 novel issue may be certified for interlocutory appeal without first awaiting development of  
27 contradictory precedent.” *Reese v. BP Expl. (Alaska) Inc.*, 643 F.3d 681, 688 (9th Cir. 2011). For  
28 example in *Caraccioli v. Facebook, Inc.*, 167 F. Supp. 3d 1056 (N.D. Cal. 2016), *aff’d*, 700 F.  
App’x 588 (9th Cir. 2017) the court noted that “while Facebook’s Terms of Service ‘place

1 restrictions on users’ behavior,’ they ‘do not create affirmative obligations.’” 167 F. Supp. 3d at  
2 1064 (citing *Young v. Facebook, Inc.*, No. 5:10-CV-03579-JF/PVT, 2010 WL 4269304, at \*3  
3 (N.D. Cal. Oct. 25, 2010)). And similarly in *Goddard v. Google, Inc.*, 640 F. Supp. 2d 1193, 1201  
4 (N.D. Cal. 2009), the court declined to find that Google’s Content Policy and Advertising Terms  
5 included “any promise *by Google* to enforce its terms of use or otherwise to remove noncompliant  
6 advertisements.” 640 F. Supp. 2d at 1201 (emphasis in original).

7 The divergence of judicial opinion on this issue reflects fundamental disagreements about the  
8 nature of terms of service as contractual instruments and warrants interlocutory review. This  
9 Court’s order treats Meta’s policies as creating enforceable bilateral obligations, requiring it to  
10 police content according to their stated standards. But other courts have recognized that terms of  
11 service are generally structured as unilateral agreements that reserve broad discretion to platforms,  
12 particularly regarding content moderation decisions.

13 Third, interlocutory review is appropriate where, as here, an immediate appeal “may materially  
14 advance the ultimate termination of the litigation.” 28 U.S.C. § 1292(b). In this case, because  
15 Plaintiffs’ claims turn on whether Meta’s Terms of Service and Community Standards create  
16 binding obligations on Meta, interlocutory review on the threshold issue of whether Plaintiffs  
17 sufficiently alleged a breach of contract claim may help bring prompt resolution to this case.

18 **II. The Court’s order significantly affects websites, like NetChoice members, and**  
19 **introduces confusion in a litigious space.**

20 Nearly every website on the Internet requires users to agree to some kind of terms of service  
21 and community standards to become a registered user of the website. The reason these contracts  
22 are ubiquitous is that they are important for websites to function. For example, to publish user-  
23 generated speech (which is the intellectual property of the users), websites must secure a license  
24 to disseminate that user generated speech. Moreover, if websites abandon their terms of service, it  
25 may make websites less secure. For example, terms of service require users to agree to “content-  
26 moderation” policies that provide a contractual right for websites to remove inappropriate and  
27 harmful content.

1 But recent judicial developments have opened a troubling pathway for plaintiffs to circumvent  
2 Section 230’s broad immunity protections by recasting content moderation disputes as breach of  
3 contract claims based on these terms of service and community standards. Beginning with *Barnes*  
4 *v. Yahoo!, Inc.*, 570 F.3d 1096 (9th Cir. 2009), which created a narrow exception allowing  
5 promissory estoppel claims based on specific, individualized promises to remove content, courts  
6 have steadily expanded this exception beyond its original bounds. 570 F.3d at 1106-09. For  
7 example, the Ninth Circuit’s recent decision in *Estate of Bride v. YOLO Technologies, Inc.*, 112  
8 F.4th 1168 (9th Cir. 2024) risks dramatically broadening this exposure by holding that general  
9 promises in terms of service—such as commitments to “unmask and ban” users that “sen[d]  
10 harassing messages to others”—can trigger liability separate from a platform’s publisher status,  
11 thereby evading Section 230 immunity. 112 F. F.4th at 1173, 1178 (cleaned up). This trend  
12 threatens to transform boilerplate terms of service into a litigation minefield, as plaintiffs may  
13 plead around Section 230 by alleging that platforms breached their own content moderation  
14 policies. This would effectively impose liability for the very editorial decisions Congress intended  
15 to protect by enacting Section 230. *See Calise v. Meta Platforms, Inc.*, 103 F.4th 732, 739 (9th Cir.  
16 2024) (explaining the history of Section 230 and how it was meant to “encourage internet  
17 companies to monitor and remove offensive content without fear” of liability (citation omitted)).  
18 Rather than allowing platforms broad discretion to moderate content on their platforms,  
19 weaponizing terms of service and community standards permits plaintiffs to avoid Section 230  
20 immunity simply by pointing to aspirational language in platform policies.

21 Allowing plaintiffs to circumvent Section 230 immunity through breach of contract claims  
22 based on a platform’s terms of service and community standards directly undermines Section 230’s  
23 core purpose of encouraging voluntary content moderation by internet platforms. As the Ninth  
24 Circuit acknowledged in this case, Congress enacted Section 230 specifically to resolve the  
25 “perverse incentive” created by *Stratton Oakmont, Inc. v. Prodigy Services Co.*, 1995 WL 323710  
26 (N.Y. Sup. Ct. 1995), which held that platforms engaging in good-faith content moderation could  
27 face greater liability than those that took a hands-off approach. *Calise*, 103 F.4th 739. Section  
28

1 230(c)(2) was designed to ensure that platforms could establish and enforce community standards  
2 without fear that doing so would expose them to liability as publishers. But the emerging trend of  
3 treating terms of service provisions as binding contractual promises resurrects this exact  
4 disincentive structure. If every aspirational statement about maintaining a “safe environment” or  
5 taking “appropriate action” against harmful content can be construed as an enforceable promise,  
6 platforms face an impossible choice: either create vague, meaningless policies that provide no  
7 guidance to users, or face endless breach of contract litigation whenever their content moderation  
8 decisions fall short of perfection. Platforms will thus be discouraged from making stronger  
9 commitments to their users at the risk of increasing potential liability. This outcome contradicts  
10 Congress’s intent to encourage, not punish, platforms for taking affirmative steps to make their  
11 services safer and more welcoming for users.

12 In addition to complicating content moderation for websites, vague standards also hurt the user  
13 experience. Without clear guidelines, users may not have proper expectations about their  
14 participation on different websites. Or websites may try to preemptively remove potentially  
15 problematic speech to avoid legal risks. *See* Eric Goldman, *Why Section 230 Is Better Than the*  
16 *First Amendment*, 95 Notre Dame L. Rev. Reflection 33, 41 (2019) (explaining the “collateral  
17 censorship” effect wherein websites “proactive[ly] remov[e] legitimate content as a prophylactic  
18 way of reducing potential legal risk and the associated potential defense costs”). Ultimately,  
19 allowing users to weaponize terms of service and community standards may leave users worse off  
20 in terms of their ability to meaningfully participate online.

21 Furthermore, inconsistent outcomes on this issue engender even more confusion and  
22 uncertainty for platforms. While this Court’s order allows a threshold breach of contract claim  
23 against platforms, others, like the *Caraccioli* and *Young* courts would dismiss such claims at the  
24 pleading stage. Defendants like Meta are left without guidance as to whether to alter their terms of  
25 service and community standards, or even more fundamentally, their content moderation policies.  
26 This issue thus merits further guidance via interlocutory review.

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**CONCLUSION**

The Court should certify this case for interlocutory appeal.

Respectfully submitted,

DATED: November 18, 2025

NETCHOICE

/s/ Gabriela G. Bethencourt  
Gabriela G. Bethencourt

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