

Nos. A175211, A175220, A175379

**COURT OF APPEAL FOR THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT, DIVISION FOUR**

John Doe, *a minor, represented by his court-appointed
guardian ad litem*; Charles Jonas,

Plaintiff-Respondent,

v.

Roblox Corporation; Discord Inc.;
and Does 1-50, *inclusive,*

Defendants-Appellants.

Consolidated Appeals from Orders
Denying Motions to Compel Arbitration
San Mateo County Superior Court No. 25-CIV-01193
(Shapirshteyn, J.)

**BRIEF OF NETCHOICE, TECHNET, AND
CHAMBER OF PROGRESS AS AMICI CURIAE
IN SUPPORT OF DEFENDANTS-APPELLANTS**

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**BRIEF OF NETCHOICE, TECHNET, AND
CHAMBER OF PROGRESS AS AMICI CURIAE
IN SUPPORT OF DEFENDANTS-APPELLANTS**

INTEREST OF AMICI CURIAE

NetChoice is a national trade association of online businesses that works to protect free expression and free enterprise on the internet. Its members operate many of the services through which Americans speak to one another in the digital age. NetChoice litigates extensively in defense of that speech, most notably in *Moody v. NetChoice* (2024) 603 U.S. 707, which confirms that a website’s decisions about which third-party speech to carry, and how to present it, are editorial judgments protected by the First Amendment.

NetChoice has a direct interest in the proper application of the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act (EFAA). The ruling below puts online intermediaries to a choice between keeping their arbitration agreements and carrying speech freely. NetChoice submits this brief to explain how the EFAA can be read to bar arbitration in the disputes Congress meant to reach, while still leaving room for online speech and debate that is “uninhibited, robust, and wide-open.” (*New York Times Co. v. Sullivan* (1964) 376 U.S. 254, 270.)

TechNet is the national, bipartisan network of technology chief executive officers and senior executives that promotes the growth of the innovation economy by advocating a targeted policy agenda at the federal and 50-state level. TechNet's diverse membership includes dynamic American businesses ranging from startups to the most iconic companies in the world and represents over five million employees and countless customers in the fields of information technology, artificial intelligence, e-commerce, the sharing and gig economies, advanced energy, transportation, cybersecurity, venture capital, and finance.

TechNet's member companies have firsthand experience with the importance of predispute arbitration agreements to enhancing compliance, promoting even-handed enforcement, and enabling companies to innovate. TechNet joins this brief to emphasize that enforcing arbitration agreements between businesses and consumers allows both to obtain faster and more cost-effective resolution to disputes.

Chamber of Progress is a tech-industry coalition devoted to a progressive society, economy, workforce, and consumer climate. Chamber of Progress seeks to protect internet freedom and free speech, promote innovation and economic growth, and empower

technology customers and users. In keeping with that mission, Chamber of Progress believes that allowing online speech to flourish will benefit everyone. Chamber of Progress's work is supported by its corporate partners, but its partners do not sit on its board of directors and do not have a vote on, or veto over, its positions. Chamber of Progress does not speak for individual partner companies and remains true to its principles even when partners disagree.

SUMMARY OF ARGUMENT

The EFAA gives a person alleging sexual assault the option to set aside a predispute arbitration agreement in a case that “relates to the sexual assault dispute.” (9 U.S.C. § 402(a).) Any sexual assault dispute in this case lies between the plaintiff and his alleged abuser. The defendants, Roblox and Discord, are strangers to it. Neither is alleged to have assaulted anyone, or to have employed or been responsible for anyone who did. The plaintiff's claims against the defendants are tort claims about how the defendants moderated content on their services and described those services to the public—claims covered by arbitration agreements accepted at sign-up. The trial court declared those agreements unenforceable anyway, reasoning that

a case relates to an assault whenever the assault would not have occurred but for a defendant's service.

The defendants explain why the statute's text and history will not bear that reading. We write to add two points.

I. A but-for test, or any similarly capacious one, would chill speech up and down the technology stack. An assailant can reach a victim over a carrier's network, on a smartphone, through an app store, and by direct message or email. Under the trial court's reading of the EFAA, every one of those services stands to lose its arbitration agreements in every case of this kind. A communications service that wants to keep its agreements has only one option: suppress speech. Monitor conversations. Screen users, including by demanding identification, in order to exclude minors. Drop tools for communication. Close entire forums. Those measures will be paid for with the speech rights of users who did nothing wrong, as an unintended consequence of stretching the EFAA to disputes it was not enacted to cover.

II. A limiting principle is readily available. It is, in fact, a venerable one, deeply rooted in the common law: Those who furnish general-purpose goods and services to the public do not answer for the few customers who misuse them. Twice in three

years, and without dissent, the Supreme Court has applied that rule to digital intermediaries that carry other people's speech. The EFAA does not adopt those decisions directly, but they reflect a settled judgment about when furnishing a means of communication makes a company responsible for the conduct of the people who use it. A case relates to a sexual assault dispute when the defendant is the perpetrator or an employer or enterprise answerable for him. But a case does not relate to a sexual assault dispute when the assailant merely used the defendant's communications service along with the rest of the public. On that reading of the EFAA, every plaintiff Congress had in mind gets the courtroom Congress meant to provide, and everyone else's speech is left alone.

ARGUMENT

I. THE TRIAL COURT'S READING OF THE EFAA LEAVES A COMMUNICATIONS SERVICE NO WAY TO PRESERVE AN ARBITRATION AGREEMENT EXCEPT TO SUPPRESS SPEECH.

The trial court was willing to treat as "related to" an assault the conduct of any entity bearing a but-for causal relationship to it. (Appellants' Opening Br. [AOB] 26-27, 37-38.)

Causal chains have no natural stopping point. “In a philosophical sense, the consequences of an act go forward to eternity, and the causes of an event go back to the dawn of human events, and beyond.” (*Holmes v. Sec. Investor Protection Corp.* (1992) 503 U.S. 258, 266, fn. 10 [quoting Prosser and Keeton on Torts § 41, p. 264 (5th ed. 1984)].) Responsibility assigned on that basis “would result in infinite liability for all wrongful acts.” (*Ibid.*) So it is here. The “sweeping” but-for standard (*Bostock v. Clayton Cnty.* (2020) 590 U.S. 644, 656) would cancel arbitration agreements up and down the technology stack. Consider the ordinary course of a single perpetrator’s conduct:

- He locates the victim on social media (arbitration clause in the terms of service—void).
- They both use ISPs, smartphones, and mobile operating systems (clauses in the victim’s subscriber agreement, device terms, and app-store terms—void, void, void).
- They interact through email and messaging services (void, void).

Tort law, for its part, is about more than causation. A defendant sued for negligence may answer that it owed no duty, or that it breached none, and it can protect itself in advance by

taking reasonable care. Here, by contrast, only causation is at play, and the trial court's test thus contains no limit whatsoever. However careful the service, any assault causally connected to it renders its arbitration agreement unenforceable. Negligence asks whether a service behaved reasonably. The EFAA, as read by the trial court, asks only whether it was used.

Under a but-for standard, a service that wants to maintain an arbitration agreement has only one option: make it harder to communicate. It can monitor and restrict speech and disable features until an assault becomes impossible. That is its only rational course of action.

This dynamic is well known to the law. *Smith v. California* (1959) 361 U.S. 147 involved a city ordinance that made a bookseller liable for any obscene book on his shelves. The Supreme Court held the ordinance unconstitutional because it would drive him to stock only what he had read, restricting "the public's access to reading matter." (*Id.* at p. 153.) The resulting "self-censorship, compelled by the State, would be a censorship affecting the whole public, hardly less virulent for being privately administered." (*Id.* at p. 154.) Make an intermediary answerable

for the speech it carries, and it will protect itself by restricting speech in every case of doubt.

Courts have drawn the same lesson for the internet. Broad intermediary liability gives an online service a “natural incentive to simply remove messages,” as it is presented with “ceaseless choices of suppressing controversial speech or sustaining prohibitive liability.” (*Barrett v. Rosenthal* (2006) 40 Cal.4th 33, 54-55 [quoting *Zeran v. Am. Online, Inc.* (4th Cir. 1997) 129 F.3d 327, 333].) “The specter of tort liability in an area of such prolific speech would have an obvious chilling effect.” (*Zeran*, *supra*, 129 F.3d at p. 331.) And here, to repeat, no amount of care buys the service relief. It has no real choice but to do exactly what the First Amendment forbids the government to do: “suppress lawful speech as the means to suppress unlawful speech.” (*Ashcroft v. Free Speech Coalition* (2002) 535 U.S. 234, 255; cf. *NRA v. Vullo* (2024) 602 U.S. 175, 190 [a government official “cannot do indirectly what she is barred from doing directly”].)

Such censorship can take several forms. Services could suppress speech case by case, but they could also monitor their users, degrade their services, and—failing all else—simply bow out.

Start with surveillance. One way for a communications service to combat sexual assault—as well as many other crimes—is to monitor every private conversation it carries. More precisely, it can stop carrying *private* conversations at all. Stopping crime is important, but few Americans would choose to do so by posting a chaperone—likely an AI one—in every direct message thread and every group chat. When the government does the monitoring, the objections are familiar. Broad government surveillance of private communications offends the Fourth Amendment (see, e.g., *Katz v. United States* (1967) 389 U.S. 347, 353) and the freedom of association (see, e.g., *First Choice Women’s Resource Ctrs., Inc. v. Davenport* (2026) 608 U.S. ____ [slip op. at pp. 6-8]; *NAACP v. Ala. ex rel. Patterson* (1958) 357 U.S. 449, 462 [recognizing the “vital relationship” between the “freedom to associate” and “privacy in one’s associations”]). The danger here is subtler, but no less real. The trial court did not order anyone to monitor anything, but it made monitoring the price of an enforceable agreement. We end up in the same place. “[T]he fear of public disclosure of private conversations might well have a chilling effect on private speech.” (*Bartnicki v. Vopper* (2001) 532 U.S. 514, 533.) “Strip away the ability of individuals to work together free from governmental”—

or corporate—“oversight and intrusion, and the freedom to associate may become no freedom at all—individuals deterred, groups diminished, and their protected advocacy suppressed.” (*First Choice*, supra, 608 U.S. ____ [slip op. at p. 8].)

Another option is to stop hosting minors. A partial fix, to be sure—adults can be assaulted online too—but one a service might well think worth the price. That price would be steep. A service cannot exclude one age group without verifying the age—and effectively the identity—of everyone. (See Hancock, *Age Assurance Methods Explained*, Electronic Frontier Foundation (Dec. 9, 2025) <<https://tinyurl.com/55txy6md>> [all sites as of Aug. 25, 2026].) In a world where online services card at the digital door, adults would have to give up the right to “remain anonymous”—“an aspect of the freedom of speech protected by the First Amendment” (*McIntyre v. Ohio Elections Comm’n* (1995) 514 U.S. 334, 342)—or stay off the services altogether. Minors would lose as well. They “are entitled to a significant measure of First Amendment protection.” (*Brown v. Entm’t Merchants Assoc.* (2011) 564 U.S. 786, 794.) Shutting them out of lawful online spaces—under a rule adopted, ironically enough, in their name—would burden their rights to speak, to listen, and to associate.

A service might conclude that its exposure comes from a particular communicative tool, and that the safest course is to amputate that tool from its service. Out might go direct messages, image sharing, voice chat, or search. But those features are what make communications services so valuable to millions of users. (Cf. *Riley v. California* (2014) 573 U.S. 373, 396 [describing the proliferation of useful apps on smartphones].) They are what allow a user to speak with “a voice that resonates farther than it could from any soapbox.” (*Reno v. ACLU* (1997) 521 U.S. 844, 870.) The First Amendment bars the government from disabling these features. The trial court’s rule invites services to disable them on their own.

Finally, and most alarming of all, a service might decide that entire topics or forums—vast swaths of the marketplace of ideas—are best treated as off limits. This is not speculation. Consider what happened the last time Congress took aim at intermediaries in the name of combating sexual exploitation. Two days after Congress passed the Allow States and Victims to Fight Online Sex Trafficking Act (FOSTA), Craigslist shuttered entire lawful sections of its website. (*Woodhull Freedom Found. v. United States* (D.C. Cir. 2020) 948 F.3d 363, 368-369.) The law

reached the online promotion and facilitation of prostitution and sex trafficking (18 U.S.C. § 2421A), yet Craigslist took down its personals section in full—including dating posts and strictly platonic listings. “Any tool or service can be misused,” Craigslist explained, and it could not run that risk “without jeopardizing all [its] other services.” (Kennedy, *Craigslist Shuts Down Personals Section After Congress Passes Bill On Trafficking*, NPR (Mar. 23, 2018) <<https://tinyurl.com/3vv4vp56>>). A well-intentioned rule led promptly and predictably to the suppression of lawful speech. (To contain the damage, the D.C. Circuit later limited FOSTA’s “promote or facilitate” language to reach only traditional aiding and abetting (*Woodhull Freedom Found. v. United States* (D.C. Cir. 2023) 72 F.4th 1286, 1302)—similar to the approach we urge for the EFAA below.)

These consequences, moreover, could be cumulative. One intermediary scans messages. Another strips attachments. A third checks identification at the entrance. Each measure may seem tolerable standing alone. Together they turn an open network into a series of guarded checkpoints.

True enough, legislatures across the country are entertaining some of these measures, age verification in

particular. Those debates at least proceed with the right questions in view. Legislators can weigh the tradeoffs between child safety and speech and privacy. They can hear from the people affected, calibrate the rules, and revisit what does not work. Here, by contrast, the threats to privacy, expression, association, and the open web are not the product of anyone's considered judgment. They are the collateral result of making a statute about the forum for sexual assault disputes turn on a wrongdoer's incidental use of general-purpose communications infrastructure. Congress sought to change where sexual assault disputes are heard, not to redesign the internet.

Rejecting a but-for (or other broad) test forfeits nothing the EFAA is meant to protect. A survivor may still choose a court over an arbitrator, both for claims against the perpetrator and for claims against anyone who must answer for him—the employer for its supervisor, the enterprise for its staff. (See H.R. Rep. No. 117-234, 2d Sess., pp. 3, 8 (2022).) But the EFAA does not target services that assaulted no one, nor employed anyone who did, nor selected or supervised anyone who did, nor did anything to assist anyone who did beyond carrying his words along with everyone else's. Such services should not be pressured into a sweeping (but

silent) program of censorship. This Court should not read the EFAA to impose such a chilling effect.

II. SETTLED PRINCIPLES GOVERNING INTERMEDIARIES SUPPLY THE LIMIT ON THE EFAA’S REACH THAT THE TRIAL COURT COULD NOT FIND.

The trial court searched for “practical limits” on the EFAA’s “relates to” clause. (AOB 26-27.) It landed on but-for causation, but that is no limit at all. Under that test, everything still relates to everything. Yet the limit the trial court needed is available. The common law has long had to decide when one party must answer for another’s wrong, and part of its answer has been to treat intermediaries *as intermediaries*. Those who furnish general-purpose goods and services to the public do not ordinarily become responsible for the few customers who misuse them. That is doubly true of intermediaries that carry speech, such as social media platforms and internet service providers. To be sure, the EFAA does not incorporate these legal principles directly. But they supply the settled way of thinking about an intermediary’s relationship—or, more often, its lack of one—to third-party wrongdoing.

“[O]ur legal system generally does not impose liability for mere omissions, inactions, or nonfeasance.” (*Twitter, Inc. v.*

Taamneh (2023) 598 U.S. 471, 489.) Liability instead requires that the defendant “consciously and culpably ‘participate[]’ in a wrongful act so as to help ‘make it succeed.’” (*Taamneh*, supra, 598 U.S. at p. 493 [quoting *Nye & Nissen v. United States* (1949) 336 U.S. 613, 619].) That standard “reflects a centuries-old view of culpability.” (*Smith & Wesson Brands, Inc. v. Estados Unidos Mexicanos* (2025) 605 U.S. 280, 291 [quoting *Rosemond v. United States* (2014) 572 U.S. 65, 70].)

This rule governs businesses that serve the public. Their “routine and general activity” rarely triggers liability merely because it “happens on occasion to assist in a crime.” (*Smith & Wesson*, supra, 605 U.S. at p. 292.) “[A] company is not liable,” in other words, merely for “providing a service to the general public with knowledge that it will be used by some” to do wrong. (*Cox Commc’ns, Inc. v. Sony Music Entm’t* (2026) 607 U.S. 583, 587.) A contrary rule would be untenable: “ordinary merchants could become liable for any misuse of their goods and services, no matter how attenuated their relationship with the wrongdoer.” (*Taamneh*, supra, 598 U.S. at p. 489.)

Twice in three years, the Supreme Court has applied these principles—without dissent—to communications services in

particular. *Twitter v. Taamneh* rejected allegations that social-media platforms had aided and abetted an ISIS attack, though the platforms allegedly knew that ISIS supporters were using their services and did not remove their accounts. The services' relationship with ISIS and its supporters was "the same as their relationship with their billion-plus other users: arm's length, passive, and largely indifferent." (*Taamneh*, *supra*, 598 U.S. at p. 500.) Social media was no more culpable for ISIS's conduct than "cell phones, email, or the internet generally." (*Id.* at p. 498.)

Cox v. Sony rejected a theory of liability—one that had produced a billion-dollar verdict—premised on an internet service provider's continuing to serve subscribers accused of repeated copyright infringement. Cox "simply provided Internet access, which is used for many purposes other than copyright infringement." (*Cox*, *supra*, 607 U.S. at p. 595.) Even the two justices who declined to join the majority's reasoning—because they wanted a *broader* rule of secondary liability—agreed that "[n]othing about that conduct is inherently culpable," and that "[m]ere indifference . . . is not enough for aiding and abetting liability to attach." (*Id.* at pp. 606, 608 [conc. opn. of Sotomayor, J.].)

In short, “communication-providing services” generally have “no duty” to “terminate customers after discovering that the customers [a]re using the service for illicit ends.” (*Taamneh*, supra, 598 U.S. at p. 501.) That may sound counterintuitive, but it is in fact essential. Communications services are useful for wrongdoing because they are useful for everything. Make a social network, an email provider, or a telephone company answerable for every wrong committed on or by use of its service, and each becomes an insurer of the conduct of millions of strangers. Each would have to resort to the surveillance, gatekeeping, and suppression described above. Hence the need to limit culpability to those who actively join in a wrong, rather than merely furnish the ordinary means of communication.

The same principles should govern here. The sanction in question differs—loss of a contractual forum rather than an award of damages—but the underlying demand is the same: a plaintiff asks that a defendant answer for the wrong of someone with whom it had no relationship beyond the one it has with everyone. The common law’s response to that demand has been consistent, and—especially where speech is involved—for good reason. Treating communications services as culpable for their

users' misconduct would push them toward "a censorship affecting the whole public." (*Smith*, supra, 361 U.S. at p. 154.) Read against these principles, the EFAA does not reach the defendants in this case. Nothing ties them to the assault that does not equally tie them to every conversation they carry.

Taamneh and *Cox* also answer claims that a service had "design features" or "functionalities" that "enabled" an assault. Every communications service is designed to connect users, carry their conversations, and let them store and share information. Such services make misconduct easier in the trivial sense that they make *communication* easier. A rule that seized on general-purpose features would not identify culpable design; it would penalize services for *being* communications services. (See *Taamneh*, supra, 598 U.S. at p. 499 [algorithms that were "agnostic as to the nature of the content" did not convert "passive assistance into active abetting"]; *Cox*, supra, 607 U.S. at pp. 595-596 [Cox "simply provided Internet access, which is used for many purposes other than copyright infringement"].)

"Relates to" should be read in line with centuries of common law, the Supreme Court's recent intermediary decisions, the EFAA's own history, and the First Amendment's abiding

hostility to compelled self-censorship. A dispute relates to a sexual assault when the defendant assaulted the plaintiff, or must answer for the person who did. It does not relate to a sexual assault when the assailant simply used the defendant's communications service. That reading gives a survivor everything the EFAA promises her—a courtroom for the claims that arise from the assault—without chilling everyone else's speech. The trial court's reading offers no such limit.

CONCLUSION

The Court should reverse.

August 28, 2026

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CERTIFICATE OF COMPLIANCE

In accord with rule 8.204(c)(1), California Rules of Court, I certify that, according to the word-count feature in Microsoft Word, the foregoing Brief of NetChoice, TechNet, and Chamber of Progress as Amici Curiae in Support of Defendants-Appellants contains 3,626 words, including footnotes, but excluding any content excepted by Rule 8.204(c)(3).

August 28, 2026

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PROOF OF SERVICE

I, Corbin K. Barthold, certify as follows:

I am an active member of the State Bar of California, and I am not a party to this action. My business address is NetChoice, 1401 K Street NW, Suite 502, Washington, D.C. 20005. My electronic service address is cbarthold@netchoice.org.

On August 28, 2026, I served the **Brief of NetChoice, TechNet, and Chamber of Progress as Amici Curiae in Support of Defendants-Appellants** on the persons identified in the attached service list, as follows.

Electronic Service. I served the document electronically, through the Court's electronic filing service provider, TrueFiling, on each person listed on the attached service list under the heading "Served Electronically," at the electronic service address shown for that person on the list.

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