

1 online business, and because they are large.

2 Your Honor, case after case has said, online businesses,  
3 in fact owe duties to their customers. We see that in the two  
4 *Facebook* decisions from this -- from this district, again, as  
5 well as cases like *Maynard*, *Lemmon*, *Brooks*, online businesses  
6 owe duties of care.

7 And in fact, the fact --

8 **THE COURT:** Well, let me ask this.

9 **MS. SCULLION:** Go ahead.

10 **THE COURT:** -- to Mr. --

11 **MS. SCULLION:** Drake.

12 **THE COURT:** So is that the position that you're  
13 attempting to take, that you owe no duty?

14 **MR. DRAKE:** No. That's not the --

15 **THE COURT:** All right. So what --

16 (Simultaneous colloquy.)

17 **MR. DRAKE:** -- wouldn't articulate it that way, Your  
18 Honor.

19 **THE COURT:** So what duty do you owe? What duty do  
20 you owe to these children?

21 **MR. DRAKE:** Well, I think that's a -- an amorphous  
22 question that's hard to answer --

23 (Simultaneous colloquy.)

24 **THE COURT:** -- best you can.

25 **MR. DRAKE:** Well --

1           **THE COURT:** Do the best you can. You're a --

2           **MR. DRAKE:** I think --

3           **THE COURT:** -- collectively represent billion-dollar  
4 companies.

5           What duty do owe to these adolescents?

6           **MR. DRAKE:** Well, I'm not sure that I know what duty  
7 the companies would owe based on any case that I been able to  
8 find to be able to articulate a duty for Your Honor today and  
9 I think that's part of the problem that we're struggling  
10 with --

11           **THE COURT:** That is part of the problem. That is  
12 part of the problem, that you seem to suggest you have no  
13 duty.

14           **MR. DRAKE:** Well, we're suggesting that we have no  
15 cognizable, recognized duty under the laws of the 49 states  
16 that -- that are mostly at issue here -- I guess could we  
17 could say all 50 states if -- if we want -- that has looked at  
18 this exact set of allegations. The plaintiffs had the burden  
19 to plead that duty under Rule 88 --

20           **THE COURT:** And you had a duty bringing a motion to  
21 dismiss to say that nothing is there and -- and you get to be  
22 scot-free.

23           **MR. DRAKE:** Well, we -- what we've articulated in our  
24 motion, Your Honor, is that a general duty to design a  
25 platform in a safe way is no --

1           **THE COURT:** So you don't -- you don't have a duty  
2 to --

3           **MR. DRAKE:** Not as articulated.

4           **THE COURT:** -- to design a platform in a safe way.  
5 That's what you want -- that's what you want to argue.

6           **MR. DRAKE:** Well, what I'm arguing --

7           **THE COURT:** Yes or no? Yes or no?

8           **MR. DRAKE:** Well, yes, I do want to argue that, Your  
9 Honor.

10           **THE COURT:** That you have -- let me write it down.  
11 No duty to design a platform in a safe way. That's what you  
12 said.

13           **MR. DRAKE:** That duty does not exist under the law.  
14 It has not been articulated by any of the cases that we've  
15 looked at, that we've cited at length in our brief. The  
16 courts have repeatedly looked at this issue in a whole host of  
17 different contexts, whether traditional media or modern media  
18 or social media.

19           And the courts have found that pleading a one-sentence  
20 duty that says you have a duty to design your platform in a  
21 safe way is not a cognizable duty. It does not satisfy the  
22 burden to plead a duty under Rule 8.

23           And it has been repeatedly rejected by numerous courts in  
24 the context specifically of online platforms and for reasons,  
25 many of which Mr. Willen articulated earlier, which is that to

1 recognize such a duty as articulated would stifle free  
2 expression. And that is a significant policy objective that  
3 courts have repeatedly recognized. And that allegations like  
4 those in the complaint here do not satisfy the foreseeability  
5 standard that courts have also articulated --

6 **THE COURT:** Any response?

7 (Simultaneous colloquy.)

8 **MR. DRAKE:** -- recognizes it underpinning --

9 **MS. SCULLION:** Yes, Your Honor. As Your Honor's  
10 picked up on, they -- they do, in fact, allege -- and this is  
11 motion to dismiss at page 28. They say, "no state has  
12 recognized any duty of an online service to its customers."  
13 It's flat. It's extreme. It's not supported by the law.

14 And -- and I've already talked about the various cases,  
15 including in this district, that have found duties of care  
16 owed to the customers of online service -- online --

17 (Simultaneous colloquy.)

18 **THE COURT:** Could I have my state AG reps --

19 Well, actually, I will get to you.

20 I'm curious to know whether the 40 state attorney generals  
21 are going to agree with you, that your clients have no duty to  
22 design a platform in a safe way.

23 **MR. DRAKE:** Well, if I could just -- just to add one  
24 more point to that, Your Honor. I was speaking in the context  
25 of tort and negligence liability and duty.

1           **THE COURT:** Okay.

2           **MR. DRAKE:** Not in the context of perhaps federal  
3 statutes whether COPPA or Protect or other statutes that might  
4 exist, but in the context of common law --

5           **THE COURT:** In the context of the law that we  
6 generally deal with in these kinds of things.

7           All right. We're moving on. Causation.

8           **MS. SCULLION:** Thank you, Your Honor.

9           **THE COURT:** Okay. So my notes with respect to  
10 causation, I have Ms. Hazam back and Mr. Blavin.

11           **MR. BLAVIN:** Correct. Mr. Blavin.

12           **THE COURT:** Blavin?

13           **MR. BLAVIN:** Yes. Thank you, Your Honor.

14           **THE COURT:** Well, at least I didn't call you  
15 "Mr. Jonathan."

16           **MR. BLAVIN:** That would have been fine, too.

17           **THE COURT:** I had a classmate in college, and we  
18 called him "the guy with two last names." Sorry about that.

19           Okay. Causation. Everybody has agreed -- I think we've  
20 heard repeatedly today that we aren't dealing with but-for  
21 causation, right?

22           **MS. HAZAM:** Correct, Your Honor.

23           **THE COURT:** Correct?

24           **MR. BLAVIN:** Correct, Your Honor.

25           **THE COURT:** Okay.