No. _____

In the Supreme Court of the United States

JASON FYK,

Petitioner,

v.

FACEBOOK, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

Jeffrey L. Greyber
POLI, MOON & ZANE, PLLC
7016 Charleston Shores Blvd., #8
Lake Worth, FL 33467
(602) 857-8180
jgreyber@pmzlaw.com

Constance J. Yu
Counsel of Record
PUTTERMAN | YU | WANG LLP
345 California Street, Ste. 1160
San Francisco, CA 94104
(415) 839-8779
cyu@plylaw.com

FEBRUARY 7, 2023 *COUNSEL FOR PETITIONER*

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QUESTIONS PRESENTED

This writ of certiorari centers around the proper scope of immunity conferred by subsection (c) of the Communications Decency Act of 1996 ("CDA"), Title 47, United States Code, Section 230 (entitled "Protection for private blocking and screening of offensive material") to interactive computer service ("ICS") providers ("ICSP").

1. CONDUCT/ACTIONS–Does Section 230(c)(1) immunize any/all conduct/actions of an ICSP from civil liability arising out of its actions and decisions to de-publish/re-publish/alter content, regardless of its motivation, including commercial benefit, anti-competition, bad faith, and/or other non-Good Samaritan reasons, which such conduct would otherwise be actionable outside the Internet ether?

2. MOTIVATION–Does the Section 230(c) "Good Samaritan" general provision apply *generally* to all of Section 230(c) (at the threshold of the immunity analysis) as the statute is written, or is the Section 230(c) "Good Samaritan" "intelligible principle" only applicable to Section 230(c)(2) as the District Court held here (which such issue the Ninth Circuit declined to address or remand)?

3. CONSTITUTIONALITY–Whether Section 230(c)'s protection of ICSPs can supersede constitutionally-protected individual rights; *i.e.,* does Section 230(c) immunize an ICSP (Respondent, Facebook, Inc., "Facebook") from taking the property and/or liberty (speech) of an ICS user ("ICSU") (Petitioner, Jason Fyk, "Fyk") without due process (and, separately, free speech) rights?

LIST OF PROCEEDINGS

DIRECT PROCEEDINGS BELOW[1, 2]

U.S. District Court, N.D. Cal

No. 18-cv-05159-JSW

Jason Fyk, Plaintiff v. *Facebook, Inc.*, Defendant

Dismissal order: June 18, 2019. (App.7a-12a)

Order denying Motion for Relief Pursuant to Fed. R. Civ. P. 60(b) to Vacate and Set Aside Entry of Judgment: November 1, 2021. (App.4a-6a)

U.S. Court of Appeals, Ninth Circuit

No. 19-16232

Jason Fyk, Appellant v. *Facebook, Inc.*, Appellee

First Appeal, Final Opinion: June 12, 2020. (App.538a-542a)

Second Appeal, Final Opinion: October 19, 2022. (App.1a-3a)

Reconsideration denial: November 9, 2022. (App.13a)

Mandate: November 17, 2022. (App.14a)

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[1] Fyk's first SCOTUS petition/booklet (sans exhibits) is attached and incorporated as App.641a-681a.

[2] All germane District Court filings (through [D.E. 51]) associated with Fyk's second appeal leading to this Petition are excerpts of record ("ER") associated with Fyk's opening brief filed in the Ninth Circuit on March 2, 2022. All germane Ninth Circuit filings (through [D.E.40]) associated with Fyk's second appeal leading to this Petition are attached in the Appendix.

Supreme Court of the United States

No. 20-632

Jason Fyk, Petitioner v. *Facebook, Inc*., Respondent

Petition for writ of certiorari denial (after First Appeal): January 11, 2021. (App.641a-681a)

RELATED PROCEEDINGS

U.S. District Court, District of Columbia

No. 1:22-cv-01144

Jason Fyk v. *United States of America*, (D.D.C.).

This action commenced on April 26, 2022, and is a constitutional challenge of the CDA. *See id*. at [D.E 1]. As of November 21, 2022, dismissal motion practice has been fully briefed.

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Following SCOTUS' denials of the petitions for writs of certiorari in *Enigma* and in *Fyk I* (Fyk, No. 20-632, App.641a-681a),[3] Fyk returned to the District Court by way of Rule 60(b) reconsideration motion practice based on the controlling *Enigma* Ninth Circuit authority. (App.505a-525a). Fyk's Rule 60(b) motion was denied by the District Court on November 1, 2021 (App.4a-6a), and Fyk appealed to the Ninth Circuit. The October 19, 2022, memorandum opinion of the Ninth Circuit affirmed the District Court *result*. (App.1a-3a). "The District Court result," not the District Court denial opinion, because the Ninth Circuit's October 19, 2020, memorandum opinion was predicated on "discretionary"/*sua sponte* timeliness grounds, whereas the District Court's November 1, 2021, denial opinion (and the parties' District Court briefing) had been focused on the scope of §230 immunity vis-à-vis *Enigma* (and, for that matter, other court decisions being rendered during the pendency of Fyk's appeal). *See id.* Fyk timely moved for reconsideration. (App.287a-305a). On November 9, 2022, the Ninth Circuit entered a paperless order that "denied" Fyk's reconsideration efforts. (App.13a). On November 17, 2022, the Ninth Circuit entered its mandate rendering November 17, 2022, the effective date of the October 19, 2022, memorandum opinion. (App.14a).

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[3] *See Malwarebytes, Inc. v. Enigma Software Group USA, LLC*, 141 S.Ct. 13 (Oct. 2020) and *Fyk v. Facebook, Inc.*, 141 S.Ct. 1067 (Jan. 2021).

JURISDICTION

The Ninth Circuit issued its Memorandum denying Petitioner's appeal from a denial for a Rule 60(b) motion for relief based on a substantial change in controlling law (*Enigma*) relating to the CDA on October 19, 2022. (App.1a-3a). On November 2, 2022, Fyk sought the Ninth Circuit's reconsideration. (App.287a-305a). On November 9, 2022, the Ninth Circuit denied Fyk's reconsideration motion (App.13a), and the Ninth Circuit entered its Mandate on November 17, 2022. (App.14a, advising, in part, that "the judgment of this Court, entered October 19, 2022, takes effect this date").

The basis for District Court jurisdiction was 28 U.S.C. §1332. The basis for Circuit Court jurisdiction was 28 U.S.C. §1291. The basis(es) for SCOTUS jurisdiction is/are 28 U.S.C. §1251(a) and/or 1254(1), and this Petition is timely per SCOTUS Rule 13.

STATUTORY PROVISIONS INVOLVED

Per SCOTUS Rule 14.1(f), the text of the CDA is attached as App.16a-21a. The following discrete summarized portions of the CDA are the subject of this Petition:

(A) §230(c) (*motivation*): the "Good Samaritan" general provision, must be considered (1) in the interest of the public, (2) at the onset of litigation, and (3) applied in the interest of

others (*i.e.,* not for the benefit or interest of the ICS provider or user).

(B) §230(c)(1) (*inactive distributor protection*) (Treatment): prevents (1) the ICS provider or user from being treated as "another" publisher (*i.e.,* as anyone other than the provider or user), (2) must be predicated upon some improper content, and (3) does not confer any immunity for any conduct (*i.e.,* §230(c)(1) does not protect the ICS provider's or user's own publisher actions).

(C) §230(c)(2)(A) (*active publisher protection*) (Civil Liability): protects "any action" taken by the ICS provider or user, so long as such action is taken (1) entirely "voluntarily" (*i.e.,* without coercion), (2) in "good faith" (as a "Good Samaritan"), and (3) the content at issue, is "otherwise objectionable" (*i.e.,* considered objectively) as it relates to "obscene, lewd, lascivious, filthy, excessively violent, harassing."

(D) §230(c)(2)(B) (*conveyance of publishing responsibility*) (Civil Liability): protects "any action" taken by an ICS provider or user to enable or make available to others the technical means to restrict "obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable" information.

(E) §230(f)(3) (*unprotected publishing*) (Content Provision): any action taken (*i.e.,* "in whole or in part") by the provider or user to bring any information into existence (*i.e.,* creation) or manipulate any informa-

tion after it exists (*i.e.,* "development") is unprotected conduct (*i.e.,* the "responsibility" of the "person or entity" who acted).

INTRODUCTION

Ron Wyden, one of the original authors of §230, said that he wanted to provide platforms with a "*sword* and a *shield*." Over the past two and a half decades, and through a process of proof-texting, the §230(c)(1) defensive "shield" (*i.e.,* protection from the conduct of another), became a secondary offensive weapon (*i.e.,* active publishing authority), rendering the actual §230(c)(2) "sword," superfluous/surplusage.

Since 2018, Fyk attempted to (re)articulate to the lower courts, WHO "the publisher" is (Fyk), WHAT Facebook did (engaged in anti-competitive conduct), HOW Facebook did it (de-published Fyk's materials, solicited a new "owner," made a quid-pro-quo agreement to restore Fyk's material for Fyk's competitor, then re-published Fyk's identical materials for Fyk's competitor), and WHY (for Facebook's own monetary gain; *i.e.,* antithetical to Congress' express CDA "Good Samaritan" and "good faith" language). Unfortunately, the courts' (mis)categorization conflated Fyk's publishing conduct with Facebook's illegal conduct. As a result, §230's proper application has become a veritable Abbott and Costello "*Who's On First?*" routine.

The gravamen of Fyk's dismissal(s) rests on the erroneous notion that Facebook cannot be treated as "a publisher" (in the general sense) of any third-party materials, even when Facebook itself acts as a

secondary publisher (*i.e.,* interpreting §230(c)(1) as precluding Facebook from being treated as itself and being held accountable for its own conduct).

Competing with the Ninth Circuit's conclusion(s), the Fourth Circuit (*Henderson*) more recently determined that "§230(c)(1) provides protection to [ICSs]. … *But it does not insulate a company from liability for all conduct that happens to be transmitted through the Internet.*" *Henderson*, 53 F.4th at 129. (App.194a, emphasis added). Rather, *"§230(c)(1) applies only when the claim depends on the content's impropriety." Id.* at 125 (App.185a, emphasis added). Indeed, as Senator Cruz's *Gonzalez* Amicus Curiae brief noted, *"§230(c)(1) does not immunize any conduct at all."* Cruz, Senator Ted, et al., No. 21-1333, 2022 WL 17669645 at *13 (Dec. 7, 2022) (emphasis added).[4]

Fyk's case (as distinguished from *Gonzalez, et al. v. Google, LLC*, No. 21-1333 set for SCOTUS oral argument on February 21, 2023) is the "appropriate [CDA interpretation] case," as Justice Clarence Thomas put it in his October 13, 2020, Statement in *Malwarebytes, Inc. v. Enigma Software Group USA, LLC*, No. 19-1284.[5] "The appropriate case" by which

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[4] Of all the Amicus Curiae submitted in *Gonzalez*, we feel the following three (cited throughout this Petition) are most fitting for use here: Cruz, Senator Ted, et al., No. 21-1333, 2022 WL 17669645 (Dec. 7, 2022); *State of Texas, Paxton, Kennth, et al.*, No. 21-1333, 2022 WL 17640417 (Dec. 7, 2022); *United States of America, Fletcher, Brian H., et al.* No. 21-1333, 2022 WL 17650509 (Dec. 7, 2022).

[5] Per Justice Thomas, "in the 2[7] years since [CDA enactment], [SCOTUS has] never interpreted this provision." *Malwarebytes*, 141 S.Ct. at 13; *see also id.* at 18 ("we need not decide today the

it would "behoove" SCOTUS to weigh-in on the proper interpretation/application of CDA "immunity" (in relation to all of §230(c), not just in relation to §230(c)(1) or §230(c)(2)) because the *Fyk* case queues up all of §230(c) and its "subtle but significant distinctions," *Gonzalez*, State of Texas, et al. *Amicus Curiae*, 2022 WL 17640417 at *20 (Dec. 7, 2022), as the *Fyk* case has traveled through years of parallel proceedings (including two trips to the Ninth Circuit and one trip to SCOTUS) on the pleadings alone–pleadings which must be presumed true in favor of the Plaintiff/Petitioner. Moreover, that which is at issue in Fyk's case is enmeshed in circuit court split (*e.g.*, *Fyk I* and/or *Fyk II* as compared to *Henderson*).

This Petition may be the only means by which Fyk's constitutional rights may be cognizable and heard in a neutral juridical body that does not prescribe to sweeping CDA "super-immunity. That being the case, the relatively recent dissenting opinion of Justice Gorsuch in *Buffington* rings particularly loudly:

> Rather than provide individuals with the best understanding of their rights and duties under law a neutral magistrate can muster, we outsource our interpretative responsibilities. Rather than say what the law is, we tell those who come before us to go ask a bureaucrat. In the process, we introduce into judicial proceedings a systematic bias toward one of the parties…. We place a finger on the scales of justice in favor of the most powerful of litigants, the federal government

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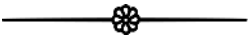
correct interpretation of §230. But in an appropriate case, it behooves us to do so").

> [and/or its delegated state actors; *e.g.*, Facebook], and against everyone else.

Buffington v. McDonough, 143 S.Ct. 14, 18-19 (2022).



STATEMENT OF THE CASE

Fyk is *"the publisher"* of Where's The Fun ("WTF") Magazine. *See, e.g.*, Ver. Compl. at ¶22, n.8. (App.692a-693a). Fyk used Facebook's purportedly "free" "platform for all ideas" (Mark Zuckerberg) to publish humorous content. *Id.* at ¶2 (App.683a). Fyk's business pages, at one time, had more than 25,000,000 documented followers. *Id.* at ¶1. (App.682a-683a). According to some ratings, Fyk's (WTF Magazine) Facebook page was ranked the fifth most popular page on Facebook. *Id.* at ¶15 (App.686a). Fyk's large online presence resulted in his pages becoming income generating advertising and marketing business tools, generating hundreds of thousands of dollars a month. *Id.* (App.686a).

Facebook began selling the same reach and distribution space, which it had previously offered for free, and, in doing so, became an advertising *competitor* of all ICSUs, like Fyk. This business model, "create[d] a misalignment of interests between [Facebook] and people who use [Facebook's] services." This pecuniary "misalignment" incentivizes(d) Facebook to tortiously restrict low value ICSUs, in favor of developing[6] Facebook's higher valued advertising "partners."

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[6] An "'information content provider' means any person or entity that is responsible, in whole or in part, for the creation or

After reducing Fyk's competitive reach to almost nothing, in October 2016, Facebook deactivated several of Fyk's pages/businesses, totaling over 14,000,000 fans cumulatively, under the fraudulent aegis of "otherwise objectionable"–improper content restriction (per (c)(2)(A)). Ver. Compl. ¶¶19-24 (App.689a-695a).

In February/March 2017, Fyk contacted a prior business colleague (and now competitor) who was more favored by Facebook, having paid Facebook over $22,000,000.00 in advertised content development. *Id.* at ¶¶24, 42-44 (App.693a-695a,704a-705a). Fyk's competitor was offered exclusive service(s) and community standards (*i.e.,* "rules") exemptions unavailable to Fyk. Fyk asked his competitor to see if their Facebook representative would restore Fyk's unpublished and/or deleted pages for Fyk. *Id.* Facebook's response was to decline Fyk's request unless Fyk's competitor was to take ownership (*i.e.,* solicited a new owner) of *Fyk's information. Id.*

Facing no equitable solution, Fyk sold his (*previously published*) property to his competitor at an extremely reduced amount. *Id.* Thereafter, Facebook "*re-published*" Fyk's information (*i.e.,* Facebook *substantively contributed*[7] to the *development* (*i.e.,*

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development of information provided through the Internet or any other interactive computer service." §230(f)(3).

[7] Per *Henderson*:

> An extreme example helps illustrate this point. Take a writer of a ransom note, for example, who cuts letters out of a magazine [re-publish] to list his demands [for Facebook's financial gain]. That writer might be said to be 'altering' content [invisible vs. visible–worthless vs. valuable]. Yet, the note's writer [Facebook] is hardly acting as an 'editor' of [Fyk's]

divisible manipulation) of Fyk's information, *at least in part*. *See id.* at ¶45 (App.705a-706a).

Fyk is "the publisher" of his information, and Facebook *substantively contributed* (*i.e.,* Facebook's conduct) to the harms caused to Fyk. Here, Facebook's anti-competitive actions to de-publish and republish the exact same content (*i.e., in form, not function*) is *prima facie* evidence there was never any *improper content* legitimately at issue.[8]

REASONS FOR GRANTING THE PETITION

This is the "appropriate case," *see, e.g.*, *Malwarebytes*, 141 S.Ct. 13 (2020), for SCOTUS to interpret CDA immunity as a whole (starting with the "Good Samaritan" general provision overarching all of §230(c)) for the first time in the approximate twenty-seven-years since its enactment to provide guidance on the interpretation of the intended immunity to be conferred upon private "state" actors (*e.g.*, Facebook, Google, Twitter, *etc.*).

> magazine [information]. Instead, [Facebook] has *substantively changed* [Fyk's] magazine's content and transformed it from benign [less valued] information into [financially beneficial] information…

Henderson, 53 F.4th at n.5. (App.193a, emphasis added).

[8] A claim treats the defendant "'as the publisher or speaker of any information' when it (1) makes the defendant liable for publishing certain information *to* third-parties [not *for* third-parties], and (2) seeks to impose liability based on that information's improper content." *Henderson* at 120-121. (App.176a, emphasis added); *see also id.* at 122-124 (regarding "but for" causation). (App.179a-180a).

I. THE QUESTIONS PRESENTED (CONCERNING PROPER INTERPRETATION/APPLICATION OF CDA IMMUNITY) ARE OF EXCEPTIONAL IMPORTANCE, NATIONAL EMERGENCY.

"Courts have extended the immunity in §230 far beyond anything that plausibly could have been intended by Congress," *Malwarebytes*, 141 S.Ct. at 15 (internal citation omitted), the issue is of exceptional national importance and this Petition is appropriate for this Court's consideration for such an analysis. Is anti-competitive/monopolistic misconduct, (*id.* at 18) entitled to CDA immunity?

Abuse of CDA immunity has resulted in unlawful behavior for commercial profit without remedy, inconsistent with legislative intent and the plain language of the statute. Because Internet platforms being principally located within the Ninth Circuit's jurisdiction, with corresponding forum selection clauses in the ICSU agreements, Ninth Circuit law predominates regardless of where the ICSU resides across (or outside of) the country. Hence, it "behooves" the country *id.* at 18, for SCOTUS to grant writ of certiorari and interpret CDA immunity (spanning all §230(c) consideration; again, offered only by the *Fyk* case, not other cases like *Gonzalez*).

II. FEDERAL COURTS ARE INCONSISTENT ON THE INTERPRETATION/APPLICATION OF CDA IMMUNITY –CONFLICT/SPLIT AMONGST CIRCUIT COURTS.

Justice Thomas' *Malwarebytes* Statement made clear that federal courts across this country have been inconsistent on the issue of CDA immunity. A few courts identified in Justice Thomas' *Malwarebytes* Statement have interpreted CDA immunity substan-

tively within certain contexts. *See, e.g.*, *Fair Housing Council of San Fernando Valley v. Roommates.Com, LLC*, 521 F.3d 1157 (9th Cir. 2008), *Enigma Software Group USA, LLC v. Malwarebytes, Inc.* 946 F.3d 1040 (9th Cir. 2019), and *e-ventures Worldwide, LLC v. Google, Inc.*, 214CV646FTMPAMCM, 2017 WL 2210029 (M.D. Fla. Feb. 8, 2017). But many other courts (including lower courts in this case) have inconsistently developed the jurisprudence of CDA immunity; *e.g.*, *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096 (9th Cir. 2009), *Sikhs for Justice, Inc. v. Facebook, Inc.*, 697 Fed. Appx. 526 (9th Cir. 2017), *aff'g* 144 F.Supp.3d 1088 (N.D. Cal. 2015), and *Zeran v. America Online, Inc.*, 129 F.3d 327 (4th Cir. 1997).

When inconsistencies in federal court decisions (district and circuit) result in incoherent jurisprudence on an issue, it "behooves" this Court to provide guidance to all courts. The exceptional nature of this issue compels the granting of this writ to address the scope of CDA immunity (as a whole), particularly in light of circuit court conflict that has developed on the issues at the heart of the *Fyk* case since the time of Justice Thomas' *Malwarebytes* Statement. *See, e.g., Henderson, et al. v. The Source for Public Data, L.P., et al.*, 53 F.4th 110 (4th Cir. Nov. 3, 2022) (departing from the Fourth Circuit's *Zeran* decision from 1997, potentially undermining California courts' CDA-related decisions from over the past two-plus decades, including the decisions in *Fyk*, with *Zeran* at the root of most, if not all, such cases) (App.167a-195a); *Jarkesy v. SEC*, No. 20-61007 (5th Cir. May 18, 2022) (making clear how an "intelligible principle"/general provision is to apply); *see also, e.g.,* supplemental authority filings during Fyk's California appeals process (2021-present),

Doe (App.53a-55a), *Jarkesy* (App.82a-84a), *Rumble* (App.149a-151a), *Henderson* (App.167a-195a).

III. THE NINTH CIRCUIT'S DECISION IN THIS CASE CREATES AN IRRECONCILABLE CONFLICT WITHIN ITS CIRCUIT AND OTHER FEDERAL CIRCUIT COURTS WHICH CANNOT WITHSTAND CONSTITUTIONAL SCRUTINY.

A. §230(c) Does Not Confer Immunity for Anti-Competitive Conduct and the Ninth Circuit's Ruling Cannot Withstand Constitutional Scrutiny

Fyk's Verified Complaint challenged Facebook's anti-competitive actions when Facebook took down Fyk's business pages on the ostensible authority of the CDA while permitting the same exact content for another ICSU, who paid Facebook $22,000,000.00 in advertising. Ver. Compl. at ¶45 (App.705a-706a). At its core, this Petition challenges the discrepancies in the federal circuit courts' application of the CDA's conferred immunity among citizens of different states depending on an ICSP's ICSU agreements–which, again, are all contracts of adhesion–having nothing to do with the situs or locale of where ICSUs actually use and access the ICSP's services or platform. At the time of Fyk's case filing, an earlier-filed but similar SCOTUS challenge to the scope of CDA §230(c) immunity (*Malwarebytes*) was concurrently winding its way through the California's district court system, and ultimately through appeals to the Ninth Circuit and SCOTUS.

The *Fyk* case faced a similar trajectory but a different result despite both cases deriving from the Ninth Circuit and both involving an ICSU's allegations

that an ICSP's conduct was underlain by anti-competitive animus, antithetical to the "Good Samaritan" general provision and thereby depriving the ICSP of any CDA "immunity." The dissonant treatment of §230(c) within the same circuit is itself a problem, but not one that ordinarily would warrant SCOTUS review. The difference here is that the discrepancies in how federal circuit courts apply §230(c) immunity for "Good Samaritan" ICSP actions (done in "good faith") versus commercially-motivated ICSP actions (done for pecuniary interests) underscores the urgency of the need for SCOTUS' review and grant of certiorari. The application of the CDA "immunity" to Fyk (a Pennsylvania citizen) should not differ from application to a citizen of the Fourth Circuit (*see, e.g.*, *Henderson*), simply by operation of an ICSP's ICSU agreement that contains a boilerplate forum selection clause subjecting Fyk to the exclusive jurisdiction of California courts. As described below, Fyk was treated differently even from that of the *Enigma* parties in the Ninth Circuit.

Notwithstanding its own precedent under *Enigma*, the Ninth Circuit's most recent decision affirming the District Court's dismissal of Fyk's case at the pleading stage on a pleading that specifically alleged bad faith and anti-competitive misconduct of the ICSP giant Facebook, without leave to amend, was again not on the substantive merits but instead on an erroneous conclusory assertion that Fyk's reliance on the *Enigma* decision was "untimely." The Ninth Circuit's discretionary finding of "untimeliness" is unsupported by the actual sequence of events (*i.e.,* chronological parallel tracks between Fyk's case and the *Enigma* case supporting Fyk's 60(b) motion in

District Court), as shown in a comparative timeline attached hereto at App.599a-601a (*see also* App.297a-300a) and incorporated fully herein by reference.[9, 10]

The accurate *Enigma /Fyk* chronology (App.599a-601a) reflects the parallel procedural tracks between the *Enigma* case and the *Fyk* case, demonstrating that Fyk timely moved for 60(b) reconsideration here. Fyk has never been given the opportunity to amend his pleadings or be heard in oral argument, despite being in the right since Day 1 approximately four-and-a-half-years ago, which such "being in the right" reality is starting to be squarely realized by courts of late (*e.g.*, *Malwarebytes* Oct. 13, 2020, J. Thomas Statement, *Henderson* Nov. 3, 2022, Opinion, *etc.*). Fyk was entitled to apply the controlling authority (*Enigma*) to his case, once it became settled Ninth Circuit law in October 2020 following SCOTUS' denial of Malwarebytes' cert petition. *See Malwarebytes, Inc. v. Enigma Software Group USA, LLC*, 141 S.Ct. 13 (2020). Contrary to the Ninth Circuit's Memorandum stated "untimely" conclusion, Fyk *promptly* put *Enigma* before the District Court in a reconsider-

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[9] Although Fyk did not cite "*Enigma*" in his first California go-round (2018-2020), because *Enigma* did not exist at the time, Fyk's briefing in that Ninth Circuit appeal (19-16232) advanced the same "Good Samaritan" related general provision arguments that were advanced in *Enigma*. Yet, the Ninth Circuit came down differently for Enigma than it did for Fyk, deeming Malwarebytes' alleged anti-competitive conduct not eligible for CDA immunity per the "Good Samaritan" general provision and permitting Facebook's anti-competitive conduct to be shielded by CDA immunity entirely ignoring the "Good Samaritan" general provision and Fyk's arguments regarding same.

[10] This same *Enigma*/*Fyk* timeline is also part of the appellate record underlying this Petition.

ation motion following SCOTUS' January 2021 denial of his first Petition. Importantly, while Fyk's first SCOTUS Petition was pending, the District Court and Ninth Circuit were divested of jurisdiction.

For unarticulated reasons, the Ninth Circuit declined to apply the "Good Samaritan" general provision to Fyk's case (*i.e.,* its own precedent of *Enigma* to Fyk's first or second appeal) and similarly declined to substantively consider the application of the intervening cases of *Doe* (App.53a-55a), *Jarkesy* (App.82a-84a), *Rumble, Inc.* (App.149a-151a), and *Henderson* (App.167a-195a), to Fyk's appeal. Amounting to *prima facie* deprivation of Fyk's due process rights at minimum.

B. §230(c)(1) Does Not Confer Any Immunity for any Conduct at all

Fyk's case is not about improper content or treating Facebook as someone else. Fyk's case is entirely about treating Facebook as Facebook for Facebook's own misconduct. On page one of his Verified Complaint, Fyk made clear: "This case asks whether Facebook can, without consequence, engage in brazen tortious, unfair and anti-competitive, extortionate, and/or fraudulent practices (*i.e., Facebook's conduct*)." Ver. Compl. at ¶1 (App.682a-683a).

The gravamen of Fyk's §230(c)(1) dismissal rested on the District Court's determination, "if the duty that the plaintiff alleges was violated by defendant derives from the defendant's status or conduct as a 'published or speaker,' … §230(c)(1) precludes liability." *Fyk v. Facebook, Inc.* No. 18-cv-05159-JSW, 2019 WL 11288576 at *2 (N.D. Cal. June 18, 2019), (citing *Barnes*, 570 F.3d at 1102) (App.11a, emphasis added). Publication "involves the reviewing, editing,

and deciding whether to publish or to withdraw from publication third-party content." *Id.* at *1 (App.72a). Thus, "any activity that can be boiled down to deciding whether to exclude material that third parties seek to post online is perforce immune under §230." *Fyk v. Facebook, Inc.*, No. 19-cv-16232, 808 Fed.Appx. 597, n.2 (9th Cir. 2020) (citing *Roommates*, 521 F.3d at 1170-71) (App.72a). And the Ninth Circuit promulgated same: "In any event, it is clear that Fyk seeks to hold Facebook liable as a publisher for its decisions to de-publish and re-publish the pages." *Id.* (App.54a, emphasis added).

Both the District Court and Ninth Circuit relied heavily on *Barnes* which such *Barnes* decision largely derives from *Zeran*. Both courts concluded that an ICS cannot be treated as *"a publisher"* (in the general sense), for any of its own publishing conduct, simply because the content originated from a third-party– here, Fyk. Under such reasoning, the courts came to the erroneous conclusion that §230(c)(1) precludes Fyk from "treating" Facebook as Facebook, for Facebook's own conduct (conduct that occurred both online and off-line). Furthermore, Facebook's "decisions to de-publish and re-publish" Fyk's information (for Fyk's competitor and not Fyk), and/or Facebook's decisions to solicit a new owner for Fyk's property/information predicated on Facebook's pecuniary interests (*i.e.,* anti-competitive animus), did not rise to the arbitrary level of *"material contribution"* (*i.e.,* Facebook's actions did not contribute to, *i.e.,* manipulate, Fyk's information *enough,* to be considered development of his information, even in part).

"Some courts have taken a different approach, holding that [§]230 bars '*lawsuits seeking to hold a*

[ICSP] liable for its exercise of a publisher's traditional editorial functions–such as deciding whether to publish, withdraw, postpone or alter content.' [*Zeran*, 129 F.3d at 330 (4th Cir. 1997)]. That language has been quoted extensively.[] Candeub, Prof. Adam, *Reading Section §230 As Written* at 148 (Mich. St. U. 2021) (emphasis added) (footnote omitted).[11]

> The language comes from the influential *Zeran* case, but many courts [drop] the *immediately preceding* language [from their analyses entirely]. [Per *Zeran*], section 230:
>
> > creates a federal immunity to any cause of action that would make [ICSPs] *liable for information originating with a third-party user of the service*. Specifically, §230 precludes courts from entertaining claims that would place a[n] [ICSP] in a publisher's role. Thus, lawsuits seeking to hold a[n] [ICSP] liable for its exercise of a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content—are barred. [FN: *Barrett v. Rosenthal*, 146 P.3d 510, 516 (Cal. 2006) (quoting *Zeran*, 129 F.3d at 330) (emphasis added)]
>
> The 'traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content,' *id.*, are examples of *third-party content decisions* (*i.e.,* third-party conduct) that §230 protects. It does not protect platform as to

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11 The Professor Candeub article/treatise cited herein is cited extensively throughout *Henderson*.

> their *own* editorial decisions or judgments (*i.e.,* their own conduct).
>
> When quoted out of context, the 'its' would seem to suggest that [§]230 immunizes the platform's publisher role. But this is an example of sloppy drafting and an imprecise pronoun antecedent, as the sentence prior speaks of 'information originating with a third-party user of the service.'

Id. at 148-149.

> Numerous courts mischaracterize the *Zeran* language and interpret §230 as immunizing platforms' own editorial decisions. To take a typical example, in *Levitt* the plaintiff alleged that Yelp! "manipulate[d] … review pages—by removing certain reviews and publishing others or changing their order of appearance." [*Levitt v. Yelp! Inc.*, Nos. C-10-1321 EMC, C-10-2351 EMC, 2011 WL 5079526 at *6 (N.D. Cal. Oct. 26, 2011)]. The *Levitt* plaintiffs argued that Yelp!'s behavior constituted *unfair or fraudulent business* under Cal. Bus. & Prof. Code §17200. But *the elements of the unfair or fraudulent business practices law have nothing to do with speaking or publishing third party content*. Rather, they ask whether Yelp! engaged in an "unlawful, unfair or fraudulent business act or practice" or an "unfair, deceptive, untrue or misleading advertising and any act."
>
> Ignoring this straightforward analysis, the court ruled that §230(c)(1) immunized Yelp!'s conduct, supporting its conclusion by quoting the "traditional editorial functions" language of *Zeran*. But notice the court's confusion here: *Yelp! allegedly made changes and conscious re-arrangements to*

> *reviews in violation of its representations to users and customers–plaintiffs sought to make Yelp! accountable for its own editorial decisions and false representations.*

Id. at 149 (emphasis added).

During litigation, defendants (*e.g.,* Yelp!, Facebook, *etc.*) typically cite "questionable precedent" out-of-context to set up defendants' proof-texting of isolated snippets from the CDA to distort the statutory language and intent of §230.

To understand the original intent of the author (Congress), we look to the legislature for guidance. Senator Cruz and sixteen other members of Congress[12] posit: *"§230(c)(1) does not immunize any conduct at all."* Cruz, Senator Ted, et al., No. 21-1333, 2022 WL 17669645 at *13 (Dec. 7, 2022) (emphasis added).

> [§]***230(c)(1) does not provide any immunity***. Rather, it states a definition: no [ICSP] 'shall be treated as the publisher or speaker of any information provided by another [ICP].' 47 U.S.C §230(c)(1). Although this requirement can *indirectly* affect liability, it (1) *does not directly confer immunity,* and (2) applies only in limited circumstances where the elements of a claim turn on treating an Internet platform as *the speaker or publisher* of others' words. Outside of this limited realm, §230(c)(1) plays no role

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[12] While we recognize the opinions of Senator Cruz and other Congressional co-signers in an Amicus Curiae may not be controlling upon SCOTUS, it should not go without saying that seventeen representatives of Congress are equally (if not more) qualified to articulate the "policy and purpose" of Congress than the courts.

> whatsoever, and the lower courts–including the Ninth Circuit []–have erred by *turning §230(c)(1) into a* ***super-immunity provision***.

Id. at *7 (emphasis added in bold italics, emphasis in original in regular italics).

§230(c)(1) does not describe what "a publisher" does (*i.e.,* what conduct is "immune"–because (c)(1) does not "immunize" anything); rather, it specifically identifies *who* "the publisher" is (*i.e.,* another ICP). Changing "the" (of "the publisher") into "a" (of "a publisher") changes *who* "the (particular) publisher" is, that the ICSP or ICSU cannot be treated as. This subtle change is a critical mistake with significant impact on the proper application of §230(c)(1).

James Madison once argued that the most important word in "The Right To Free Speech" is the word "the" because it denotes "the right" preexisted any potential abridgement. In the English language, a definite article such as the word "the," in "the publisher," is used to "denote [a] particular, [or] specified persons or things."[13] "The publisher," in the context of §230(c)(1), specifies "the (*particular* or *specified*) publisher" who created and/or developed the information–*"another"* ICP. In other words, "the publisher" is not just *any unspecified publisher* (which could include the ICSP or ICSU), "the publisher" is specifically the *known publisher* in the story. "The" *known* publisher is "another [ICP]" *(i.e.,* anyone *other than* the ICSP or ICSU). Facebook cannot possibly be "the publisher" in Fyk's case, as Fyk is "the *(known)*

13 https://www.wordnik.com/words/the

publisher," and Fyk's publishing preexisted Facebook's involvement in the story.

This subtle, yet critical mistake-using "a" and "the" interchangeably in "the publisher or speaker," we submit, is the genesis of the mistaken interpretation of §230(c)(1), and the origin of the confusion surrounding §230's proper application (i.e., as a whole). Once "the publisher" is identified for the purposes of §230(c)(1), the rest of the statute's intended purpose is clear.

§230(c)(1) *specifically* reads: "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." *Id.* (emphasis added). Courts often use the *Barnes* three-part test to determine (so-called) §230(c)(1) immunity.[14]

"Pursuant to §230(c)(1) of the CDA, 47 U.S.C. §230(c)(1), "[i]mmunity from liability exists for: … (1) a[n] [ICSP] or [ICSU] of an [ICS] (2) whom a plaintiff seeks to treat, under a state law cause of action, as ***a publisher*** or speaker (3) of information provided by another [ICP]."' *Fyk v. Facebook, Inc.*, 808 Fed.Appx. 597 (9th Cir. 2020) (citing *Dyroff v. Ultimate Software Grp., Inc.*, 934 F.3d 1093, 1097 (9th Cir. 2019) (quoting *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1100–01 (9th Cir. 2009)). (App.539a).

§230(c)(1) explicitly reads: "the publisher," not "a publisher." The *Barnes* three-part "immunity" test (employing "a publisher") is inconsistent with the text of the statute. Compare that to the three-part

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[14] §230(c)(1) does not confer any "immunity" for any conduct; rather, it is definitional by nature.

test used in *Henderson*, which accurately quotes and applies §230(c)(1): "The defendant is a '[ICSP] or [ICSU] of an [ICS]'; (2) the plaintiff's claim holds the defendant 'responsible 'as ***the publisher*** or speaker of any information'; and (3) the relevant information was 'provided by another [ICP].'" *Henderson*, 53 F.4th at 119 (citing *Nemet Chevrolet, Ltd. v. Consumeraffairs. com, Inc.*, 591 F.3d 250, 254 (4th Cir. 2009) (quoting §230(c)(1)).

As a result of conflating "the" and "a," some courts, in some circumstances, get it right (*i.e.,* they read (c)(1) to *not protect* any publishing conduct), while other courts, in other circumstances, get it wrong (*i.e.,* they read (c)(1) to *protect all* publishing conduct–as absurd "super-immunity").

Under the Absurdity Canon "a provision may be either disregarded or *judicially corrected* as an error ***(when the correction is textually simple)*** (*e.g.,* "the") if failing to do so would result in a disposition that no reasonable person could approve." (*e.g.,* "super-immunity") (emphasis added).[15] §230(c)(1) could conceptually be judicially corrected by, for example, giving the word "the" proper effect, thereby restoring the meaningful difference between §230(c)(1) and §230 (c)(2), and reconciling the inconsistency between §502 and §230. §230 would no longer be absurd "super-immunity"

> §230(c)(1) provides protection to ICSs. *See Zeran*, 129 F.3d at 331. *But it does not insulate [super-immunize] a company from liability for all conduct that happens to be*

[15] There is no real textual "correction" required; rather, it is as simple as SCOTUS giving the current text the correct effect.

> *transmitted through the internet [i.e., it is not absurd "super-immunity"].* Instead, protection under §230(c)(1) extends only to bar certain claims, in specific circumstances, against particular types of parties.

Henderson, 53 F.4th at 129. "§230(c)(1) prevents suits that 'cast [the defendant] in the same position as the party who originally posted the offensive messages.'" *Id.* at n.26. "… §230(c)(1) applies only when the claim depends on the content's impropriety." *Id.* at 125. "In other words, for protection to apply, the claim must turn on some 'information,' and must treat the defendant as the 'publisher or speaker' of that information." *Id.* at 120. Fyk posted his original messages. Fyk is not casting Facebook in the same position as Fyk. Fyk has made clear, on more than one occasion throughout the lifespan of this case, that "*this case is not about objectionable content.*… This case is about Facebook's fraud, extortion, unfair competition, and tortious interference with Fyk's business." *Fyk v. Facebook, Inc.*, No. 19-16232, 2020 WL 709442 at * (9th Cir.); *see also* Ver. Compl. at ¶1 (App.682a-683a).

The Ninth Circuit, relying on *Zeran* (now eviscerated by *Henderson*) and not the law itself, dismissed all of Fyk's claims concerning Facebook's illegal *conduc*t under §230(c)(1) "immunity," because Fyk was precluded from treating Facebook "a publisher" (*i.e.,* treating Facebook as Facebook for Facebook's own conduct). That conclusion was not only wrong, it ran afoul of the Absurdity Doctrine.

C. The CDA Requires the Defendant's Conduct Be That of a "Good Samaritan" Motivation at the §230(C) Threshold to Be Entitled to Any Immunity Consideration

There exists a subtle difference between deliberately omitting action and failing to act. Likewise, there is a subtle difference between *knowingly* and *unknowingly* disseminating content. The difference turns on *consideration* (*i.e.,* editorial decisions), therefore, any editorial decision inherently relies on motive. If a "Good Samaritan" (*i.e.,* the [ICSP] or [ICSU]) *fails to act* to prevent harm, that is it omits all content consideration (*i.e.,* all editorial conduct), then the "Good Samaritan" should not be held accountable for the harms caused by others (because it played no active role in that harm). If, however, a "Good Samaritan" deliberately does not act to prevent harm (*i.e.,* chooses to *knowingly* allow harm), then the "Good Samaritan" could not be considered a "*Good* Samaritan" because the "Bad Samaritan" *acted* to not act (*i.e.,* acted in *bad* faith–contributed to the harm).

Does §230(c)'s "Good Samaritan" general provision (*i.e.,* the statute's general motivation) apply "general[ly]" to the entire statute as Congress intended, and as an "intelligible principle" is supposed to function (*see, e.g., Jarkesy*), or is it what the District Court/Ninth Circuit said here, that "[u]nlike 47 U.S.C. §230(c)(2)(A), nothing in §230(c)(1) turns on the alleged motives underlying the editorial decisions [conduct] of the [ICSP or ICSU] of an [ICS]?" (App.66a). It is either the *Fyk* courts are correct that §230(c)(1) protects *all conduct* regardless of motive (*i.e.,* commercial "super-immunity" from any/all unlawful conduct); or, as we have argued for years, and as *Henderson* confirms

across the board, §230(c)(1) does not protect *any conduct at all* (confirmed by *Henderson*) and motive does, in fact, matter (*i.e.,* the "Good Samaritan" general provision has meaning and effect, confirmed by *Enigma* and *Jarkesy*). There is only one sensible view/approach, and that is the latter.

The question of whether any defendant acted as a "Good Samaritan" *must be considered* at the §230(c) threshold (*i.e.,* at the onset of litigation). In other words, the threshold "Good Samaritan" immunity analysis stops at §230(c) and does not progress to §230(c)(1) or §230(c)(2). §230(c) does not protect *bad faith* conduct, or "*Bad Samaritans*," it only protects "Good Samaritans" when "blocking and screening [] offensive materials" in "good faith" (*i.e.,* the purpose of §230(c)(2)(A)), and it protects "Good Samaritans" when they fail (*i.e.,* do not act at all) to act (*i.e.,* they cannot be treated as the person or entity who acted-§230(c)(1)).

Here is one of many examples of Facebook's *'Bad Samaritan'* actions:

> Facebook's theft and re-publishing of the [Fyk's] identical content Fyk had published ["the publisher"], was ***motivated*** by Facebook's desire to enrich Fyk's competition, which thereby *enriched Facebook [in bad faith]* as Facebook enjoyed a far more lucrative relationship with that competitor than with Fyk as that competitor has paid Facebook, upon information and belief, over $20,000,000.00 as compared to the approximate $43,000.00 paid to Facebook.

See Ver. Compl. at ¶¶19, 46, 52 (App.689a-690a, 707a, 709a-710a).

The Ninth Circuit nevertheless dismissed Fyk's appeal and claims, stating: "That Facebook allegedly took its actions for monetary purposes does not somehow transform Facebook into a content developer. . . ." *Fyk*, 808 Fed.Appx. at 598. The Ninth Circuit recognized the real issue–Facebook's conduct/actions motivated by pecuniary gain. While a "monetary" motivation (*i.e.,* anti-competitive animus repugnant to the "Good Samaritan" general provision) may not have transformed Facebook into a "content developer" in and of itself, Facebook's actions taken to manipulate Fyk's content (*i.e.,* Facebook's responsibility for developing Fyk's information in part) did, and the anti-competitive animus should have disqualified Facebook from any §230(c) immunity to begin with. Facebook's reasoning for restricting Fyk's materials was not because Fyk's materials were somehow improper (as evidenced by their restoration in identical form for Fyk's competitor), but rather for its own enrichment. Such reasoning cannot be the actions of a "Good Samaritan," because self-enrichment is the antithesis of "Good Samaritan[ism]."

In stark contrast, the Ninth Circuit, in *Enigma*, also concluded that immunity is unavailable when a plaintiff alleges anti-competitive (*i.e.,* illegal self-enrichment) conduct. The *Enigma* panel, "recognize[d] that interpreting the statute to give [ICSPs] unbridled discretion (*i.e.,* not confined to being a "Good Samaritan") to block online content would … enable and potentially motivate [ICSPs] *to act for their own*, and not the public, benefit." *Enigma*, 946 F.3d at 1051. The *Enigma* decision established clear new precedent confirming that immunity is unavailable when a plaintiff alleges *anti-competitive motivated conduct–*

a decision that directly contradicts the *Fyk* decisions wherein Fyk's courts did not engage in any anti-competition/self-enrichment analysis at the pleading stage.

Under a §230(c) "Good Samaritan" threshold analysis, any of the provider or user's conduct (whether considered under §230(c), §230(c)(1), §230(c)(2), or otherwise) *must* "turn[] on the[ir] alleged motives." Any "editorial decision" (*i.e.,* consideration–to block or *knowingly* not block content) must be the conduct of a "Good Samaritan" motivation, or protection under the CDA is unavailing.

On Fyk's 60(b)-oriented second appeal seeking to reconcile *Fyk* and *Enigma*, the District Court (and the Ninth Circuit, effectively ratifying same by entirely refusing to address the merits of Fyk's appeal)[16] held, in pertinent part: "The Order that Fyk seeks to vacate based its conclusion on 47 U.S.C. §230(c)(1). By contrast, the Ninth Circuit's *Enigma* opinion did not involve the application of §230(c)(1); instead, the court examined §230(c)(2)." *Fyk,* 18-cv-05159-JSW, 2021 WL 5764249 at *1 (N.D. Cal. Nov. 1, 2021) (App.5a, internal citations omitted). Rather than harmonize or even rationalize *Fyk* with *Enigma* (*i.e.,* consider §230 as a whole), the District Court adopted

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16 In fact, the Ninth Circuit's Memorandum was no affirmation of any district court ruling or analysis at all; instead, it dismissed the merits of the subject appeal without due process. *See, e.g., Dept. of Defense v. FLRA*, 114 S.Ct. 1006, 1014 (1994) ("We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there," internal quotation omitted); 6 Sir Edward Coke's English King's Bench Reports 65 ("A general rule is to be understood generally").

an absurd interpretation that the "Good Samaritan" general provision does not apply "*generally*" to the statute and is exclusive to a §230(c)(2) analysis.

Like *Enigma*, the Northern District of California's more recent *Rumble* decision also does not square with the decision(s) rendered in *Fyk*. The *Rumble* decision addresses whether a complaint involving anti-competition/unfair competition/antitrust/monopolistic allegations (*i.e.,* motivation) (Sherman Act in the *Rumble* case, California Business & Professions Code §17200-17210 (Unfair Competition) in this case) is subject to dismissal.

The *Rumble* court held, in pertinent part, as follows: (a) "the Supreme Court's direction [is] that Sherman Act plaintiffs 'should be given the full benefit of their proof without compartmentalizing the various factual components and wiping the slate clean after scrutiny of each,'" *Rumble, Inc.*, No. 21-cv-00229-HSG at 6 (internal citations omitted); (b) "This is especially true given the Ninth Circuit's holding that 'even though [a] restraint effected may be reasonable under section 1, it may constitute an attempt to monopolize forbidden by section 2 if a specific intent to monopolize may be shown.'" *Id.* (internal citations omitted). By analogy, these holdings square with the *Enigma* decisions cited throughout Fyk's appellate briefs (and underlying briefs), namely that causes of action rooted in allegations of anti-competitive conduct are not subject to dismissal at the CDA "Good Samaritan" immunity threshold.

Prior to the Fifth Circuit decision in *Jarkesy*, Fyk's case has only been contradicted by other Ninth Circuit panel decisions (*e.g., Enigma/Rumble*). The *Jarkesy* case deals specifically with the mandate that

Congress supply an "intelligible principle" (denoted/ articulated in quotes) where (as here) §230 delegates administrative "Good Samaritan" enforcement authority to an ICS.[17]

SCOTUS has recognized that Congress could not delegate powers that were 'strictly and exclusively legislative.' *See* n.29, *supra.* Chief Justice John Marshall laid the groundwork for the "intelligible principle" standard that governs non-delegation cases today. Marshall stated that if Congress delegates quasi-legislative powers to another body (*e.g.,* §230), it must provide an "intelligible principle" [*i.e.,* a general motivation] by which "those who act" [*i.e.,* those who

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17 The Non-Delegation Doctrine provides:

> …a principle in administrative law that Congress cannot delegate its legislative powers to other entities [*e.g.*, Section §230's 'voluntary' option to engage in a government mandate]. This prohibition typically involves Congress delegating its powers to administrative agencies or to private organizations [ICSs].
>
> In *J.W. Hampton v. United States*, 276 U.S. 394 (1928), the Supreme Court clarified that when Congress does give an agency the ability to regulate, Congress must give the agencies an 'intelligible principle' on which to base their regulations.
>
> The Court has contrasted the delegation of authority to a public agency, which typically is required to follow established procedures in building a public record to explain its decisions and to enable a reviewing court to determine whether the agency has stayed within its ambit and complied with the legislative mandate, with delegations to private entities, which typically are not required to adhere to such procedural safeguards.

US Legal, *Intelligible Principle Law and Legal Definition*, https://definitions.uslegal.com/i/intellligible-principle/

regulate] can "fill up the details." Therefore, Congress cannot give an outside agency [*e.g.*, Facebook] free reign to make law, but it can authorize the agency to flesh out the details of a law Congress has already put in place under the "intelligible principle" to which the agency (here, Facebook as the government's (quasi) state actor) is instructed to conform.

As the *Jarkesy* case concludes, if Congress does not supply an "intelligible principle" (*i.e.,* the general provision) under such a delegation setting, then the law is unconstitutional. So, it is either all §230(c) is governed *generally* by the overarching "Good Samaritan" "intelligible principle"/general provision (as Fyk's briefings have argued) or §230 is unconstitutional. Either way, Facebook cannot enjoy *carte blanche* §230(c)(1) "super-immunity" *sans* a "Good Samaritan" threshold requirement.

"Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested." *Jarkesy*, No. 20-61007 at 21 (citing *A.L.A. Schechter Poultry Corp*); *see also* n.24, *supra.* The two questions we must address, then, are (1) whether Congress has delegated power to the agency that would be legislative power but for an "intelligible principle" to guide its use and, if it has, (2) whether it has provided an "intelligible principle" such that the agency exercises only executive power."[18]

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18 *"[T]here is [no] delegation of legislative power at all so long as the legislature has supplied an 'intelligible principle' to guide the exercise of delegated discretion. Where there is such a principle, the delegatee is exercising executive power, not legislative power." Vermeule, Adrian, No, 93 TEX. L. REV. 1547, 1558 (2015) (emphasis added, footnote omitted).

This Petition asks this Court (1) did Congress delegate power to Facebook that would be unconstitutional *legislative* power "but-for an intelligible principle to guide its use," or (2) is "Good Samaritan" the "intelligible Principle' by which the "agency" (*i.e.,* the private ICS) must base their regulations (*i.e.,* "Good Samaritan" must apply *generally* to the statute), such that Facebook is only exercising *executive* power?

D. The (CDA) Does Not Supplant Constitutionally Guaranteed Rights (*e.g.*, Due Process, Free Speech).

Standing alone, §230 grants nearly unlimited regulatory discretion to private self-interested corporations, without providing any oversight or procedural safeguards. Compounding the statute's unqualified regulatory discretion, courts have also relied on *"non-textual arguments"* when interpreting §230. Consequently, some courts erroneously determined §230(c)(1) *"shields from liability [for] all publication decisions, whether to edit, to remove, or to post" (i.e., without any measure of motive),* decisions that include taking the property and denying the liberties of all citizens, including Fyk.

A "taking" may be a physical seizure or constructive (*i.e.,* a regulatory taking in which the government restricts the owner's rights to the extent (*e.g.,* "super-immunity") "that the governmental action becomes the functional equivalent of physical seizure."[19]

> In *U.S. v. Dickinson*, 331 U.S. 745 (1947), [SCOTUS] held that *even if the government does not physically seize private property*,

19 https://www.law.cornell.edu/wex/takings

> the action is still a taking 'when inroads are made upon an owner's use of it to an extent that, as between private parties, a servitude has been acquired either by agreement or in course of time.' [*Id.* at 748].... Many regulatory takings disputes arise in the context of land use regulation [*e.g.,* Fyk's Internet property]. [In] *Agins v. City of Tiburon*, 447 U.S. 255 (1980), [SCOTUS] held that i[f] there is not a requirement for government compensation where such regulations 'substantially advance the legitimate state interests' [*e.g.,* blocking and screening offensive materials to protect the public interests], and as long as the regulations do not prevent a property owner from making 'economically viable use of his land,' [*id.* at 260], [which is precisely what happened to Fyk in relation to Facebook's taking of his Internet 'property.'][20]

(emphasis added).

> [SCOTUS] has developed a 4-part test to determine whether a regulation is considered to be a taking[:] [1] Is the regulation a taking under *Loretto*? A government regulation is a taking when the government authorizes a permanent physical occupation of real/personal property; [2] Is the regulation a taking under *Lucas*? The regulation is a taking when the regulation causes the loss of all economically beneficial/productive uses of the land, unless the regulation is justified

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[20] *Id.* (emphasis added).

> by background principles of property law/ nuisance law; [3] Is the regulation a taking under *Nollan-Dolan*? The regulation is a taking if the government demands an exaction that lacks a nexus with a legitimate state interest or lacks proportionality to project's impacts. Exaction–a requirement that the developer[21] provides specified land, improvements, payments, or other benefits to the public [in the public's interest] to help offset the project's impacts; [4] Is the regulation a taking under the *Penn Central* balancing test? Here a court will look at [other] factors: [a] The character of the governmental action involved in the regulation; [b] If the government's action is a physical action, rather than a 'regulatory invasion,' then the action is almost certainly a taking; (c) The extent to which the regulation has interfered with the owner's reasonable investment-backed expectations for the parcel as a whole; (d) The regulation's economic impact on the affected prop[erty] owner.[22, 23]

In 1996, Congress sought to protect an ICSP or ICSU who voluntarily chose (*i.e.,* the private prerogative) to *block and screen obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable*

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21 Fyk alleged that Facebook "developed" Fyk's materials/property.

22 §230 caused the loss of all economically beneficial/productive use of Fyk's online property and §230(c)(1) by itself allowed for the regulatory taking (illegal invasion) of Fyk's property, failing to compel the government interest.

23 https://www.law.cornell.edu/wex/takings

material (*i.e.,* the state prescribed act), so long as the private actor acted as a "Good Samaritan" in "good faith" (*i.e.,* the state prescribed manner), "whether or not such material is constitutionally protected" (*i.e.,* lawful speech). In other words, Congress sought to protect the private actor when it voluntarily chose to engage in the voluntary state directive to block lawful speech. Whether the private actor claims to have acted privately or not, if it seeks "protection" it must prove it voluntarily followed the state directive.

Typically, public (*disinterested*) commissions must follow their own set of rules (*i.e.,* qualifications and procedural guidelines). For example, the Administrative Procedure Act ("APA"). When a commission takes an "*agency action*" that denies a U.S. citizen of life, liberty, or property, and that action is arbitrary, capricious, or it does not follow the APA guidelines, that action or regulatory code can be challenged in a court of law (*i.e.,* remedied).

Unlike public commissions who must act (*i.e.,* involuntarily), and are subject to strict qualifications, oversight, and procedural safeguards (*e.g.,* APA), a private (*self-interested*) commission can "voluntarily" choose whether to act (*i.e.,* §230(c)(1) applies when it fails to act, and §230(c)(2) applies when it voluntarily chooses to takes "any action"), has no qualifications, no legislative oversight, no procedural safeguards and is unchecked by the binding federal jurisprudence. §230 specifically authorizes a private company to act arbitrarily, capriciously, without any procedural oversight, in their own interest, and in contravention to the constitutional rights of the unwilling participant (*e.g., Gonzalez*, *Fyk*).

In essence, §230 grants any unqualified, *privately owned ICSPs absolute, unlimited, uncontrollable, sovereign-like, government-like (i.e., "state") "super-immunity"* to *unconstitutionally restrict* the "life, liberty, and/or property" of others, without procedural safeguards, without due process and without respecting free speech rights.

Fyk submits that the CDA is unconstitutional (again, *see Fyk v. USA*, 1:22-cv-01144 (D.D.C. May 2022)), because it deprives individual American citizens of their (a) liberties and property without due process, in violation of the Fifth Amendment; and (b) free speech rights, in violation of the First Amendment.

§230, facially and as applied, violates the Non-Delegation/Major Questions doctrine, the Void-for-Vagueness doctrine, the Substantial Overbreadth doctrine, and tenets of construction. This Court has the ability here, to strike down laws on the grounds that they are unconstitutional, a power reserved to the courts through judicial review. *See Marbury v. Madison*, 5 U.S. 137, 177 (1803) ("[i]t is emphatically the province and duty of the judicial department to say what the law is"). Whether based on the unconstitutionality of the CDA or the misapplication of CDA "immunity" among circuit courts, Fyk has been deprived of any recourse, and SCOTUS should, through this Petition, rein in §230 by narrowly conforming the application of §230 consistent with legislative intent and constitutional mandates, addressing the inconsistent judicial limits of [ICSPs'] untenable "super-

immunity;"[24] and clarify the proper scope of §230(c) protection.

IV. THIS PETITION ADDRESSING ALL OF THE ISSUES PRESENTED IN GONZALEZ AND AMICI.

This Court should realign the CDA with its original intent, the text of the statute, the interests of the public, and the Constitution. "[I]n an *appropriate case*, [SCOTUS] should consider whether *the text* of this increasingly important statute aligns with the current state of immunity enjoyed by Internet platforms. … it behooves us to do so." *Malwarebytes*, 141 S.Ct. at 14. While *Gonzalez* may be an "*appropriate case*" to resolve **some** aspects of §230, it lacks the full "benefit of [Fyk's] briefings" as to be *"certain"* of "what the law demands," Amicus Curiae in *Gonzalez* (such as the three appended to this Petition) contend that §230 issues would be best addressed afresh by the lower courts after this Court has scraped away the layers of erroneous §230(c) precedent on which the decisions in *Fyk* relied.

Fyk's case is the superior case by which this Court should provide *certainty* as to "what the [§230] demands" in determining the *full context-extent* of §230 immunity because all of the issues presented by *Gonzalez* and by Amicus Curiae are represented in Fyk's underlying case and appeal.

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[24] At present, there is absolutely no limit to CDA immunization; and worse, the judicial construction of the limits of the immunity varies tremendously from one jurisdiction to another (having now evolved into circuit court conflict/split), making its application and effect extremely inconsistent and arbitrary despite the Internet not recognizing geographic bounds.

WHEREFORE, Petitioner, Jason Fyk, respectfully requests that this Court **(a)** grant a writ of certiorari to review the judgment/mandate of the Ninth Circuit filed and entered on November 17, 2022; **(b)** alternatively, remand and direct the Ninth Circuit to hear Fyk's appeal consistent with this Court's prospective opinion in pending petition, *Gonzalez,* No. 21-1333, cert. granted, scheduled for oral argument on February 21, 2023; and/or **(c)** afford Fyk any other relief the Court deems equitable, just, and/or proper.

Respectfully submitted,

Constance J. Yu
Counsel of Record
PUTTERMAN | YU | WANG LLP
345 California Street, Ste. 1160
San Francisco, CA 94104
(415) 839-8779
cyu@plylaw.com

Jeffrey L. Greyber
POLI, MOON & ZANE, PLLC
7016 Charleston Shores Blvd., #8
Lake Worth, FL 33467
(602) 857-8180
jgreyber@pmzlaw.com

Counsel for Petitioner

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